

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

July 13, 2017

Ellen F. Burns  
Trademark Examining Attorney  
Law Office 116  
United States Patent and Trademark Office

RE: Serial No: 87428770  
Mark: **ALLOY**  
Applicant: 22 Hundred Cellars, Inc.  
Office Action: June 24, 2017

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**APPLICANT'S RESPONSE TO OFFICE ACTION**

The following is the response of Applicant, 22 Hundred Cellars, Inc., by Counsel, to the Office Action sent via email on June 24, 2017 by Examining Attorney Ellen F. Burns.

Examining Attorney has refused registration of the proposed mark ALLOY (“Applicant’s Mark”) pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d) on the grounds that the Applicant’s Mark is likely to be confused with the marks in U.S. Registration Nos. 4,675,458 for STEEL RESERVE ALLOY SERIES (“Registrant Mark #1”) and 4,893,110 for SBC THE STEEL BREWING COMPANY STEEL RESERVE ALLOY SERIES (“Registrant Mark #2”), both owned by the same registrant (collectively, the “Registrant’s Marks”). For the following reasons, the Applicant respectfully disagrees with the findings and requests that Examining Attorney reconsiders the statutory refusal and allows registration of Applicant’s Mark.

Likelihood of confusion between two marks is determined by the USPTO by a review of all of the relevant factors under the *DuPont* test. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling*

*Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567. Here, the fact that the Registrant's Marks contain numerous additional elements is the dominant factor weighing heavily in favor of no likelihood of confusion, particularly in light of the difference between Applicant's and Registrant's goods.

In the Office Action, Examining Attorney engaged in a two-part analysis to determine whether there is a likelihood of confusion between Applicant's Mark and Registrant's Marks using the factors identified in *In re E. I. du Pont de Nemours & Co.* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Applicant agrees that the relevant two-part *du Pont* analysis was used, but that several facts were not considered that should change the result here. Applicant responds that its applied-for mark ALLOY does not so resemble Registrant's Marks that a potential consumer would be confused, mistaken or deceived as to the source of the goods. The marks are measurably different in appearance, sound, connotation and overall commercial impression, particularly in light of the additional terms contained in Registrant's Marks. In addition, the goods used in connection with the marks are unrelated.

### **The Marks are Not Highly Similar**

When viewed in their entirety, Applicant's Mark is not similar to either of Registrant's Marks. Under the *du Pont* test, the USPTO will compare marks for similarity and dissimilarity in their entirety as to appearance, sound, connotation and commercial impression. Marks containing common elements are not likely to be confused if: "the marks in their entirety convey significantly different commercial impressions . . ." *See In re Farm Fresh Catfish Co.*, 231 USPQ 495 (TTAB 1986) (CATFISH BOBBERS ("CATFISH" disclaimed) for fish held not likely to be confused with BOBBER for restaurant services); *In re Shawnee Milling Co.*, 225 USPQ 747 (TTAB 1985) (GOLDEN CRUST for flour held not likely to be confused with ADOLPH'S GOLD'N CRUST and design (with "GOLD'N CRUST" disclaimed) for coating and seasoning for food items). Further, it is well established that "likelihood of confusion cannot

be predicated on dissection of a mark . . . the ultimate conclusion rests on consideration of the marks in their entireties.” *In re National Data Corp.*, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(iv).

Examining Attorney’s only evidence of likelihood of confusion is that marks both contain the term ALLOY and thus concludes that the additional wording and design in the Registrant’s Marks is not sufficient to overcome a likelihood of confusion. Respectfully, Applicant’s Mark is easily distinguishable from Registrant’s Marks because, given the additional elements of Registrant’s Marks, Applicant’s Mark has a very different connotation and creates a substantially different commercial impression; therefore, it is unlikely that ordinary consumers will believe there is any connection between the identified goods or the Applicant and Registrant.

#### **Aural and Visual Impressions**

Despite Examining Attorney’s evidence that the marks both use the term ALLOY, when spoken aloud STEEL RESERVE ALLOY SERIES and SBC THE STEEL BREWING COMPANY STEEL RESERVE ALLOY SERIES sound completely different than ALLOY. In Applicant’s Mark, the only term is ALLOY which means that relevant consumers will perceive and pronounce Applicant’s Mark as “Alloy.” In contrast, both STEEL RESERVE ALLOY SERIES and SBC THE STEEL BREWING COMPANY STEEL RESERVE ALLOY SERIES contain substantial additional matter that relevant consumers will perceive and pronounce. No consumer would confuse the pronunciation of the respective marks as they share no common letter sequences or visual similarities except the ALLOY term. As such, comparison of these marks does not lead to a finding that the marks sound similar.

The marks are also visually completely distinct given the additional terms in Registrant’s Marks that surround the term ALLOY, the only common term between Registrant’s Marks and Applicant’s Mark. The mark ALLOY looks completely different than the marks STEEL RESERVE ALLOY SERIES and SBC THE STEEL BREWING COMPANY STEEL RESERVE ALLOY SERIES both by the difference

in the number of terms contained in Registrant's Marks and the fact that in Registrant's Marks, STEEL RESERVE and SBC THE STEEL BREWING COMPANY are the terms purchasers will first encounter when perceiving Registrant's Marks. As such, these terms are the dominant element in Registrant's Marks. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372-73, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (affirming TTAB's holding that contemporaneous use of appellant's mark, VEUVE ROYALE, for sparkling wine, and appellee's marks, VEUVE CLICQUOT and VEUVE CLICQUOT PONSARDIN, for champagne, is likely to cause confusion, noting that the presence of the "strong distinctive term [VEUVE] as the first word in both parties' marks.)

Further, although it is not proper to dissect a mark, if one feature of a mark is more significant than another feature, greater weight may be given to the dominant feature for purposes of determining likelihood of confusion. See, e.g., *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ 390, 395 (Fed. Cir. 1983); see also TMEP §1207.01(b)(iii). Here, in Registrant's Mark #2, the term STEEL is clearly the dominant feature given the text is much larger than the surrounding text. As such, greater weight should be given to the term STEEL for the purposes of determining likelihood of confusion with the term ALLOY. Due to the lack of both the aural and visual similarities between Registrant's Mark and Applicant's Mark, there is no likelihood of confusion among consumers who hear Registrant's Mark and Applicant's Mark.

### **Connotation of Marks**

Additions and deletions to marks are sufficient to avoid a likelihood of confusion if: (1) the marks in their entireties convey significantly different commercial impressions; or (2) the matter common to the marks is not likely to be perceived by purchasers as a distinguishing source because it is merely descriptive or diluted. See *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253,

1261 (Fed. Cir. 2011) (affirming TTAB's holding that contemporaneous use of applicant's CAPITAL CITY BANK marks for banking and financial services and opposer's CITIBANK marks for banking and financial services is not likely to cause confusion, based, in part, on findings that the phrase "City Bank" is frequently used in the banking industry and that "CAPITAL" is the dominant element of applicant's marks, which gives the marks a geographic connotation as well as a look and sound distinct from opposer's marks); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245, 73 USPQ2d 1350, 1356-57 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of THE RITZ KIDS for clothing items (including gloves) and RITZ for various kitchen textiles (including barbeque mitts) is likely to cause confusion, because *inter alia*, THE RITZ KIDS creates a different commercial impression); *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1044-45 (TTAB 2010) (holding DEER-B-GON for animal repellent used to repel deer, other ruminant animals and rabbits, and DEER AWAY and DEER AWAY PROFESSIONAL for repellent for repelling deer, other big game and rabbits, not likely to cause confusion, noting that "DEER" is descriptive as applied to the relevant goods and thus has no source-indicating significance).

Examining Attorney's only evidence of the possibility of confusion between the marks is that Registrant's Marks and Applicant's Mark each contains the word ALLOY which is the dominant feature of the marks, and thus consumers are likely to believe that Applicant's Mark represents a product in the Registrant's product line or vice versa. However, in each of Registrant's Marks, the word ALLOY is preceded and followed by several additional words which are instead the dominant portions of Registrant's Marks. Not only do these additional words change the meaning of ALLOY in each context, but they also mitigate the significance of the word ALLOY in Registrant's Marks. In Registrant Mark #1, two words precede ALLOY, and in Registrant Mark #2 seven words precede it. Examining Attorney also states that the term ALLOY is given a prominent placement in the Registrant Mark #2. In each instance, however,

STEEL RESERVE is the dominant portion of the mark, so consumers' attention is immediately drawn to these words because they are the *first* part of the mark and the *largest* part of the mark in Registrant Mark #2. In each of Registrant's Marks, the word ALLOY is used merely as a descriptive adjective to qualify the word SERIES, *not* as the central part of the mark.

In contrast, Applicant's Mark contains *only* the word ALLOY, and thus it is the essential part of the mark and consumers' attention cannot be drawn elsewhere. In Applicant's Mark, ALLOY is a proper noun that is used in an arbitrary context, and is not a characterization of additional words that precede or follow. To say that Applicant's Mark is similar to Registrant's Marks is to deem similarity based on unreasonable "dissection of the mark" instead of considering "the marks in their entirety." Examining Attorney states that because Applicant's Mark contains ALLOY, "there is no other wording to distinguish it from the registered mark." Respectfully, this logic is unsound – the *lack* of additional wording in Applicant's Mark is sufficient to distinguish it from Registrant's Marks in which there are several additional and essential words surrounding the common term ALLOY. The "matter common to the marks" (ALLOY) is therefore not likely to be perceived by consumers as a "distinguishing source." Instead, when the marks are analyzed in their entirety, they are easily distinguishable in meaning and in overall commercial impression.

Further, such differences in connotation and meaning are key factors in determining the likelihood of confusion. Differing connotations themselves can be determinative, even where identical words with identical meanings are used. *Revlon, Inc. v. Jerrell, Inc.*, 713 F. Supp. 93, 11 USPQ 2d 1612, 1616 (S.D.N.Y. 1989) (No likelihood of confusion because the meaning and connotation of the marks THE NINES and INTO THE NINETIES are not related. THE NINES suggests the number nine, or nine of something in a group. INTO THE NINETIES is a reference to the decade of the 1990's, and more generally the future; Plaintiff's motion for preliminary injunction is denied.); citing *Clarks of England, Inc. v. Glen*

*Shoe Company*, 465 F. Supp. 375, 379, 209 USPQ 852, 854-55, (S.D.N.Y. 1960) (TREK and STAR TREK for shoes; TREK connotes hiking across the Himalayas; STAR TREK connotes space travel.) It is unlikely that consumers would view Applicant's Mark as a variation on or extension of Registrant's Marks given the significantly differing connotations of ALLOY for wine and ALLOY SERIES as used with the terms STEEL RESERVE and SBC THE STEEL BREWING COMPANY for malt liquor.

#### **Use of Standard Characters**

The foregoing reasoning likewise applies to Examining Attorney's assertion that because Registrant Mark #1 and Applicant's Mark are both in standard characters, the shared term could result in consumer confusion. But because Registrant Mark #1 contains additional words that both precede and follow the single shared term, there is no stylized text that could make these marks similar "*in their entireties*." It is therefore irrelevant that Applicant's Mark is in applied for in standard characters.

#### **Actual Use of the Marks**

Registrant and Applicant use their respective marks differently. Registrant uses each of its marks to describe a "series" of malt liquor produced by Registrant; this use is consistent throughout the Registrant's website and entire product line. Applicant uses its mark in the singular form to describe a wine product. Further, in Registrant's Mark, ALLOY SERIES is a minor subscript of the dominant title STEEL RESERVE, as opposed to Registrant's Mark where ALLOY is the focal point and dominant feature of the mark. The fact that Registrant's and Applicant's Marks both contain ALLOY should not be given special weight in comparing the marks because they are drastically different when viewed in their entireties. Examining Attorney states that "the proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks." Given that ALLOY is secondary in size and significance in each of Registrant's Marks, it is extremely improbable that the average purchaser would focus on that word when viewing the mark as a whole. When ALLOY is not given special weight

in the analysis, the marks do not share any common elements and, therefore, confusion between the products is highly unlikely.

Further, the federally required approvals of labels for Registrant's Marks show use of ALLOY as a secondary mark used only in connection with the word SERIES with the house name of STEEL RESERVE. The application data supports this as Registrant listed the brand name as STEEL RESERVE and there is no mention of the term ALLOY as either the brand or secondary mark. (See Exhibit A). Registrant is mandated by the Alcohol and Tobacco Tax and Trade Bureau (TTB) to use the marks in this manner when affixed to its goods.

### **The Goods are Not Related**

Examining Attorney states that there is evidence that Applicant's and Registrant's goods emanate from the same source under the same mark. The Trademark Trial and Appeal Board has noted "(t)here is no per se rule that holds that all alcoholic beverages are related." *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009). See also *G. H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635 (Fed. Cir. 1990), where the Federal Circuit held RED STRIPE and design for beer not to be confusingly similar to a design of a red stripe for wines and sparkling wines; *National Distillers and Chemical Corp. v. William Grant & Sons, Inc.*, 505 F.2d 719, 184 USPQ 34 (CCPA 1974), where DUET for prepared alcoholic cocktails, some of which contained brandy, and DUVET for French brandy and liqueurs were deemed not confusingly similar; 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.").

Further, the following pending or currently registered marks demonstrate that the relevant public recognizes malt liquor or beer and wine to be goods that emanate from different sources despite the same or similar marks:



1. SUMMIT wines, Reg. 3,628,871, The Wine Group, LLC, and SUMMIT BREWING CO. (design) beer, Reg. 4,517,565, Summit Brewing Company (disclaimer as to BREWING CO.);
2. THE BIG PICTURE wines, Reg. 4,481,183, ICT Investment Properties, Inc., and BIG PICTURE BREW WORKS beer, Reg. 4,877,955, Theodore Kerpovich;
3. RISING TIDES wines, Reg. 4,418,606, Linne Calodo Cellars, and RISING TIDE BREWING COMPANY beer, Reg. 3,974,115, Rising Tide Brewing Company LLC (disclaimer as to BREWING COMPANY);
4. INSPIRED wine, Reg. 4,489,030, M.S. Walker, Inc., and INSPIRED BREWING beer, Reg. 3,122,464, Bell's Brewery, Inc. (disclaimer as to BREWING);
5. HERETIC wines, Reg. 3,961,531, Q4X, Inc., and HERETIC BREWING COMPANY beer, Reg. 4,071,703, Heretic Brewing Company (disclaimer as to BREWING COMPANY);
6. EXCELSIOR ESTATE (design) wine, Reg. 2,634,229, De Wet Excelsior Farms, Ltd., (disclaimer as to ESTATE) and EXCELSIOR BREWING COMPANY, beer, Reg. 4,440,725, Excelsior Brewing Company, LLC (disclaimer as to BREWING COMPANY);
7. UNION WINE CO. wines, Reg. 4,486,053, Union Wine Company (disclaimer as to WINE CO.), and UNION CRAFT BREWING beers, Reg. 4,410,239, Union Craft Brewing Company, LLC (disclaimer as to CRAFT BREWING);
8. THE GERMAN wines, Reg. 4,495,410, Nora Schweihs, and OLD GERMAN (design) beer, Reg. 2,094,751 (disclaimer as to OLD GERMAN);
9. MISTLETOE wine, Reg. 4,523,371, Mesa Vineyards, LP, Mesa GP, LLC, and LIQUID MISTLETOE beer, Reg. 4,350,342, Grain to Green (disclaimer as to LIQUID);
10. EGOS wines (design), Reg. 3,020,231 (Spanish for "echoes"), FRIDRAF S.A., and ECHO BREWING COMPANY beer, Reg. 4,475,506, Echo Brewing Company LLC (disclaimer as to

- BREWING COMPANY);
11. MORNING MORNING UP wine, Reg. 4,299,227, Zhongshan Guiyan Liquor Trading Co., and MORNING BEER beer, Reg. 4,505,682, Aaron John Wierenga (disclaimer as to BEER);
  12. GRAND CHAMPION wine, Reg. 4,456,701, Merrill and Paul Bonarrigo, and CHAMPION BREWING COMPANY beer, Reg. 4,367,262, Champion Brewing Company, LLC (disclaimer as to BREWING COMPANY);
  13. SONG red wine, Reg. 4,106,908, Lyric Opera of Chicago, and HEY SONG beer, Reg. 2,122,081, Hey-Song Corporation;
  14. GINJA NINJA fruit wine, Reg. 4,519,334, Forbidden Fruit Ciderhouse, LLC, and NINJA beer, Reg. 3,753,805, Asheville Pizza & Brewing Company;
  15. ROSE'S SWEET WHITE wine, Reg. 4,239,041, Opici I.P Holdings, LLC (disclaimer as to SWEET WINE), and ROSE HOUSE (design) beer, Reg. 2,934,368, Teng-Hui Huang;
  16. SNOWS LAKE wines, Reg. 3,345,562, E. & J. Gallo Winery, Modesto, California, and SNOW (design) beer, Reg. 4,513,988, China Resources Snow Brewery (Liao Ning) Company;
  17. WILD PELICAN wines, Reg. 3,790,317, Vinovation International B.V., and PELICAN BREWING COMPANY PACIFIC CITY-OREGON COAST-USA beer, Reg. 4,384,065, Pelican Brewing Company (disclaimer as to BREWING COMPANY, PACIFIC CITY, OREGON COAST and USA);
  18. JACK HAMMER wines, Reg. 4,298,925, Jeremy Meyer, and HAMMER BEER, THE BREWERY 1858, G, PREMIUM (design) beer, Reg. 4,504,575, Gary M. Jels;
  19. PEY-MARIN VINEYARDS wine, Reg. 2,896,981, Scenic Root Winegrowers, LLC (disclaimer as to VINEYARDS), and MARIN BREWING CO. beer, Reg. Nos. 4,447,233 and 4,477,407, Marin Brewing Company, Inc. (disclaimer as to BREWING CO.).

See, also, the beer and wine registrations cited by TTAB at *In re Reubens Brews, LLC*, Ser. No. 86/066,771 (October 27, 2015).

Applicant respectfully disagrees with Examining Attorney's implication that there is sufficient number of wineries and breweries producing both wine and beer, or wine and malt liquor under the same mark to find the two goods emanate from the same source. Breweries in the United States do not make wine, and with few exceptions, wineries in the United States do not brew beer. This is particularly true with regard to malt liquor, which is almost always produced as a secondary product line of an existing brewery making beer and not by a winery. As of 2015, there are approximately 4,269 breweries operating in the United States. <https://www.brewersassociation.org/statistics/number-of-breweries/>. As of February 2016, 8,702 wineries were operating in the United States.

<https://www.winebusiness.com/wbm/?go=getArticleSignIn&dataId=163894>. As of July 13, 2017, there are only 9 active 1(a) trademark applications and registrations for both malt liquor and wine and 114 active 1(a) trademark applications and registrations for both beer and wine. Conservatively, we will assume these respective 9 and 114 registrants and applicants are included in the foregoing beer and wine totals and are currently using the marks in commerce. Of the 12,875 wineries and breweries in the United States, only 9 are marketing both malt liquor and wine under the same trademark, and only 114 marketing both beer and wine. Since only 0.0007% of the wineries and breweries in the United States produce both malt liquor and wine under the same trademark, and only 0.009% produce both beer and wine under the same trademark, it is highly unlikely that a consumer would confuse the source of Registrant's malt liquor or beer with Applicant's wine and vice versa.

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*, supra, 952 F.Supp. at 1095 ("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, 1996 WL 280477 (2d Cir.1996), for example, the court found that plaintiff’s 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, viz., 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. See also *Harlem Wizards Entertainment Basketball*, supra, 952 F.Supp. at 1095 (“The show basketball performed by plaintiff is markedly distinct from NBA competitive basketball in myriad ways. As a show basketball team, plaintiff simply does not play NBA level competitive basketball . . . Therefore, the court finds that when every aspect of the two teams is compared, there is glaring dissimilarity.”).

Beer and malt liquor consumers, as well as specialty wine consumers, are fairly sophisticated. They are both consumers who are willing to spend more money to get something more unique than the mainstream offerings. As such, these consumers are well aware that, as discussed above, wineries rarely brew beer or malt liquor, and their favorite breweries are not making wine. Even if the beer or malt liquor consumer, or wine consumer were to choose to purchase the other product, they would easily know by looking at the products that the source was clearly different.

If the goods in question are not related in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. See *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board’s dismissal of opposer’s likelihood-of confusion claim, noting “there is nothing in the record to suggest that a purchaser

of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source,” though both were offered under the COACH mark); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB’s holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1551 (TTAB 2015) (finding use of identical marks for towable trailers and trucks not likely to cause confusion given the difference in the nature of the goods and their channels of trade and the high degree of consumer care likely to be exercised by the relevant consumers); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting and blueprint machines not likely to cause confusion because of the differences between the parties’ respective goods in terms of their nature and purpose, how they are promoted and who they are purchased by).

Here, as in *Sunenblick*, even though Applicant’s and Registrant’s Marks share one common word, the products are marketed to different consumers (wine drinkers versus beer drinkers). Also, similar to *Sunenblick*, wine is generally stocked by style, not alphabetically by name. Further, federal regulations require extensive and precise labeling and disclosures. This labeling and these disclosures make it unlikely that a consumer will conclude that any beer or malt liquor and any wine come from the same source. Retail stores sell beer/malt liquor and wine in separate areas, and the labels for the products distinguish them from each other. Restaurants generally provide a wine list that lists the available wines only. Restaurant patrons do not confuse beers with wines.

Examining Attorney must provide evidence showing that the goods are related to support a finding of likelihood of confusion. *See In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both Applicant's goods and the goods listed in the cited registration. *See In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). See TMEP §1207.01(d)(iii) and cases cited therein regarding the probative value of third-party registrations.

Examining Attorney presents insufficient evidence to substantiate the relatedness of Applicant's and Registrant's respective goods. The evidence presented shows there are very few companies in the United States that market both beer or malt liquor and wine under the same trademark. Based on the lack of evidence, Applicant respectfully disagrees with this conclusion. There is nothing in the record provided by Examining Attorney to suggest that a purchaser of Registrant's beer or malt liquor who also purchases ALLOY wine would consider the goods to emanate from the same source.

### **Conclusion**

In conclusion, Applicant's Mark is sufficiently distinct from Registrant's Marks such that Applicant's Mark creates a significantly different commercial impression than Registrant's Marks. The average consumer will easily and readily recognize and identify the distinct commercial impressions of

each mark. The simple fact that the marks both contain ALLOY does not obviate the fact that the marks are overwhelming different when viewed in their entireties as to appearance, sound, connotation and commercial impression. *See Lever Brothers Co. v. The Barcolene Co.*, 463 F.2d 1107, 174 USPQ 392, 393 (CCPA 1992) (“While appellant points out some similarities between the word ALL as it is used by both parties, inspection of the two marks [ALL and design and ALL CLEAR! and design] also shows some obvious differences. Considering appellee’s mark in its entirety, we are convinced that there is no likelihood of confusion.”); *Colgate-Palmolive Co. v. Carter-Wallace Inc.*, 432 F.2d 1400, 167 USPQ 529, 530 (CCPA 1970) (“The difference in appearance and sound of the marks in issue [PEAK and PEAK PERIOD] is too obvious to render detailed discussion necessary. In their entireties, they neither look nor sound alike.”); and *In Opposition No. 91154452 re General Electric Co.*, 304 F.2d 688, 134 USPQ 190 (CCPA 1962) (VULCAN and VULKENE not similar).

Further, Applicant’s goods are wholly different from Registrant’s goods. Registrant produces numerous malt liquors under the STEEL RESERVE mark. In contrast, Applicant does not produce malt liquor or have a wine branded as STEEL RESERVE. Applicant produces wines under the ALLOY house mark.

The foregoing facts weigh in favor of registration of Applicant’s Mark, as Applicant’s Mark is not likely to cause consumer confusion. Thus, Applicant requests Examining Attorney reconsider the statutory refusal and allow registration of Applicant’s Mark.

<b>FOR TTB USE ONLY</b>			<b>DEPARTMENT OF THE TREASURY</b> <b>ALCOHOL AND TOBACCO TAX AND TRADE BUREAU</b> <b>APPLICATION FOR AND</b> <b>CERTIFICATION/EXEMPTION OF LABEL/BOTTLE</b> <b>APPROVAL</b> (See Instructions and Paperwork Reduction Act Notice on Back)
<b>TTB ID</b> 14155001000325			
<b>1. REP. ID. NO. (If any)</b>	<b>CT</b>	<b>OR</b>	
	906	48	

**PART I - APPLICATION**


<b>2. PLANT REGISTRY/BASIC PERMIT/BREWER'S NO. (Required)</b> BR-WI-MIL-1 BR-CA-MIL-1 BR-CO-CBC-1 BR-GA-MIL-1 BR-NC-MIL-1 BR-OH-MIL-1 BR-TX-MIL-1 BR-VA-CBC-1 BR-WI-JAC-1 BR-WI-MIL-15003		<b>3. SOURCE OF PRODUCT (Required)</b> <input checked="" type="checkbox"/> Domestic <input type="checkbox"/> Imported	<b>8. NAME AND ADDRESS OF APPLICANT AS SHOWN ON PLANT REGISTRY, BASIC PERMIT OR BREWER'S NOTICE. INCLUDE APPROVED DBA OR TRADENAME IF USED ON LABEL (Required)</b>  MILLERCOORS LLC 4000 W STATE ST  MILWAUKEE WI 53208  STEEL BREWING COMPANY (USED ON LABEL) (Used on label)	
<b>4. SERIAL NUMBER (Required)</b> 140096	<b>5. TYPE OF PRODUCT (Required)</b> <input type="checkbox"/> WINE <input type="checkbox"/> DISTILLED SPIRITS <input checked="" type="checkbox"/> MALT BEVERAGE			
<b>6. BRAND NAME (Required)</b> STEEL RESERVE		<b>8a. MAILING ADDRESS, IF DIFFERENT</b>		
<b>7. FANCIFUL NAME (If any)</b> SPIKED PUNCH				
<b>9. EMAIL ADDRESS</b>	<b>10. GRAPE VARIETAL(S) (Wine Only)</b> N/A	<b>11. FORMULA</b> 1199575	<b>18. TYPE OF APPLICATION (Check applicable box(es))</b> a. <input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL  b. <input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL "For sale in _____ only" (Fill in State abbreviation.)  c. <input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL. TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (Fill in amount)  d. <input type="checkbox"/> RESUBMISSION AFTER REJECTION TTB ID. NO. _____	
<b>12. NET CONTENTS</b> 1 PT. (16 FL. OZ.)	<b>13. ALCOHOL CONTENT</b> 8.0	<b>14. WINE APPELLATION IF ON LABEL</b>		
<b>15. WINE VINTAGE DATE IF ON LABEL</b>	<b>16. PHONE NUMBER</b> (303) 277-6986	<b>17. FAX NUMBER</b> (303) 277-7373		
19. SHOW ANY INFORMATION THAT IS BLOWN, BRANDED, OR EMBOSSED ON THE CONTAINER (e.g., net contents) ONLY IF IT DOES NOT APPEAR ON THE LABELS AFFIXED BELOW. ALSO, SHOW TRANSLATIONS OF FOREIGN LANGUAGE TEXT APPEARING ON LABELS.				

**PART II - APPLICANT'S CERTIFICATION**

Under the penalties of perjury, I declare; that all statements appearing on this application are true and correct to the best of my knowledge and belief; and, that the representations on the labels attached to this form, including supplemental documents, truly and correctly represent the content of the containers to which these labels will be applied. I also certify that I have read, understood and complied with the conditions and instructions which are attached to an original TTB F 5100.31, Certificate/Exemption of Label/Bottle Approval.

<b>20. DATE OF</b>	<b>21. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT</b>	<b>22. PRINT NAME OF APPLICANT OR</b>
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<b>APPLICATION</b> 06/04/2014	(Application was e-filed)	<b>AUTHORIZED AGENT</b> KIMBERLY MAJOR
<b>PART III - TTB CERTIFICATE</b>		
This certificate is issued subject to applicable laws, regulations and conditions as set forth in the instructions portion of this form.		
<b>23. DATE ISSUED</b> 06/25/2014	<b>24. AUTHORIZED SIGNATURE, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU</b> 	

<b>FOR TTB USE ONLY</b>	
<b>QUALIFICATIONS</b> EACH CONTAINER MUST BE CODED TO INDICATE ACTUAL PLACE OF BOTTLING. TTB has not reviewed this label for type size, characters per inch or contrasting background. The responsible industry member must continue to ensure that the mandatory information on the actual labels is displayed in the correct type size, number of characters per inch, and on a contrasting background in accordance with the TTB labeling regulations, 27 CFR parts 4, 5, 7, and 16, as applicable.	<b>EXPIRATION DATE (if any)</b>
<b>STATUS</b> THE STATUS IS APPROVED.	
<b>CLASS/TYPE DESCRIPTION</b> MALT BEVERAGES SPECIALITIES - FLAVORED	

AFFIX COMPLETE SET OF LABELS BELOW

Image Type:

Brand (front)

Actual Dimensions: 8.99 inches W X 7.26 inches H

Note: The image below has been reduced to fit the page. See actual dimensions above.



TTB F 5100.31 (07/2012) PREVIOUS EDITIONS ARE OBSOLETE