

REMARKS

In response to the Office Action dated May 15, 2019, reconsideration and withdrawal of the refusal to register the mark is respectfully requested in view of the following remarks.

Section 2(d) Refusal – Likelihood of Confusion

The refusal to register Applicant's mark ALORA on the Principal Register for the applied-for goods of "*sparkling water*" in Class 32 on the grounds that it is confusingly similar to U.S. Reg. No. 4585164 for ALOR and Reg. No. 2312561 for ALLORA, is respectfully traversed.

Concerning U.S. Reg. No. 4585164 for ALOR, Applicant filed Cancellation No. 92072250 against this registration on September 11, 2019 and Applicant requests suspension of the present application pending resolution of the cancellation proceeding. Although Applicant has requested suspension of the present application, it has presented arguments regarding Reg. No. 2312561 for ALLORA below.

A likelihood of confusion determination under Section 2(d) is normally resolved by analysis of multiple factors set forth in *In re E.I. Du Pont De Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). It is Applicant's contention that confusion in this case is unlikely in light of the following relevant factors:

A. Dissimilarity and Nature of the Parties' Goods

When considering the issue of likelihood of confusion, "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard*

Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). See also *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Here, the goods set forth in the present application of “*sparkling water*” are different from those set forth in the cited Reg. No. 2312561 for ALLORA of “*wines, sparkling wines and distilled spirits made from grapes.*” The USPTO assesses the likelihood of confusion by focusing on whether the marks, *as applied to the respective goods*, so resemble each other that the purchasing public would mistakenly assume that the Applicant’s goods originate from the same source as the goods in the cited registration. See *Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973)(emphasis added). The determination is made on a case-by-case basis. *On-Line Careline, Inc. v. America Online, Inc.*, 229 F.3d 1080, 1084, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000).

As is evident, the beverages in the cited registration are alcoholic in nature versus the non-alcoholic beverages in the applied-for mark. There is no *per se* rule that wines and spirits and non-alcoholic beverages are either related or unrelated. *In re Jakob Demmer KG*, 219 USPQ 1199, 1201 (TTAB 1983). In fact, several cases have found alcoholic beverages to be dissimilar from non-alcoholic beverages. See *Foremost Daries, Inc. v. Foremost Sales Promotions, Inc.*, 158 USPQ 360 (TTAB 1968) (finding FOREMOST for whiskey not confusingly similar to FOREMOST for various non-alcoholic beverages); *Best Flavors, Inc. v. Mystic River Brewing Co.*, 886 F. Supp. 908, 36 U.S.P.Q.2d 1247 (D. Me. 1995); *Cielo S.p.A. v. Austin House of Prayer*, Opposition No. 91166590 (TTAB September 14, 2007 and cases cited therein). In *Best Flavors*, the court found that MYSTIC SEAPORT for alcoholic beverages such as beer were not confusingly similar to MISTIC for spring water and fruit drinks stating that “alcoholic beverage

sales are not within the natural outgrowth of the MISTIC trademark products.” *Id.* The court further emphasized in regard to the party’s respective alcoholic versus non-alcoholic goods:

True, they are chilled liquid designed to quench a thirst. But alcoholic and nonalcoholic beverages are distinct commodities in our culture. Alcoholic beverages are subject to extensive state regulation, which makes them unavailable to people under 21 and which restricts the trademark owner's control over where they can be distributed. In addition, consumers are consciously aware of whether they are choosing an alcoholic or a nonalcoholic beverage. This makes confusion less likely. *Id.*

Similarly, in *Cielo S.p.A. v. Austin House of Prayer*, Opposition No. 91166590 (TTAB September 14, 2007), the Trademark Trial and Appeal Board (the “Board”) found no likelihood of confusion between the identical marks CIELLO, one for drinking water and the other for wine, stating:

there is little evidence in the record from which the Board can draw conclusions about whether, or the extent to which, there is a relationship between the identified goods. The mere fact that both products are consumable liquids that are sold to some of the same purchasers through some of the same retail outlets is insufficient to reach the conclusion that the goods are sufficiently related such that, as identified by identical marks, confusion as to source is likely. There is no evidence that, in the marketplace, wine and drinking water ever emanate from the same source, or that they are marketed under the same marks, or that the circumstances surrounding the sales of wine and drinking water are such that consumers would believe that they come from the same source. While both wine and water may be consumed at a meal, there is no evidence that they are complementary products. Nor is there evidence that these products are sold in proximity to each other in retail outlets. *Id.*

While in *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013), the Board found confusing similarity between the party’s marks used on water and wine, the decision was based on specific evidence submitted during the proceeding and the particular factual circumstances surrounding that case. *Id.* Thus, *Joel Gott Wines* supports the finding that only in appropriate factual situations should alcohol and non-alcoholic beverages be considered

related. This is not one of such cases as the evidence concerning the relationship between the parties' respective products which would lead a consumer to believe that the goods emanate from a common source is lacking.

B. Dissimilarity of Trade Channels and Consumers

In the present case, there is no evidence that the goods travel in the same channels of trade. Wines and non-alcoholic beverages typically travel in different channels of trade, often through different distributors. While some retail outlets sell both alcoholic and non-alcoholic beverages, the products are often located in distinct sections of the store and not in proximity to one another. Furthermore, a consumer will be conscious in deciding to purchase an alcoholic beverage versus a water such that a nexus in the minds of consumers as to the relatedness of the goods is unlikely to be formed. Thus, the mere fact that the products may potentially be sold in the same retail outlets or the mere fact that some entities may have registrations for both alcoholic and nonalcoholic beverages is insufficient to reach the conclusion in this specific case that the goods are sufficiently related to render confusion likely.

Furthermore, in this case, there is no evidence that the circumstances surrounding the sale of wine/spirits and water are such that consumers would believe they emanate from the same source. To find a likelihood of confusion, the conditions and activities surrounding the marketing of the goods must be in a manner such that the products would be encountered by the same person under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The marketing of alcoholic beverages is highly regulated and typically subject to greater restrictions as to time, location, content, and quantity of advertising as compared to other non-alcoholic beverages, such as water. Thus, there is no other

evidence here as to the factual circumstances surrounding the marketing or sale of the respective products to dictate a finding that the products are related for likelihood of confusion purposes.

C. The Relevant Purchasers Exercise a High Degree of Care

Importantly, purchasers of alcoholic beverages such as wines and spirits exercise a high degree of care. A bottle of wine is typically more expensive than a bottle of water and is subject to age requirements. Furthermore, the purpose of the purchase typically differs significantly. A bottle of wine is often purchased to enjoy while relaxing or celebrating with friends while a bottle of water is often a daily purchase made simply to stay hydrated. As such, a consumer is likely to exercise much greater care and time in selecting a wine or spirit at a restaurant or retail shop, as compared to a bottle of water, rendering confusion less likely. Indeed, the consumer in search of a bottle of wine or other alcoholic beverage is trained to look at the label, the packaging (e.g. glass bottle or other high-end container), and the specific retail outlet or specific section of the store. Applicant is not required to protect the negligent and inattentive purchaser from confusion resulting from indifference (however unlikely). Rather, the care expected of purchasers against which the likelihood of confusion is measured, is determined by the actual marketplace in which the goods are ordinarily purchased. *Scudder Food Products, Inc. v. Ginsberg*, 56 U.S.P.Q. 542 (1943)(test is “ordinary purchasers buying with ordinary caution”); *Life Savers Corp. v. Curtiss Candy Co.*, 182 F.2d 4, 85 U.S.P.Q. 440 (7th Cir. 1950); *S.C. Johnson & Son, Inc. v. Johnson*, 266 F.2d 129, 121 U.S.P.Q. 63 (6th Cir. 1959), cert. denied, 361 U.S. 820, 123 U.S.P.Q. 590 (1959)(no protection afforded confusion by inattentive buyer).

Furthermore, contrary to the evidence submitted in the Office Action, many registrations co-exist on the Principal Register covering the identical mark for wines or spirits on one hand and water on the other. Each case must be decided on its facts and the facts of this case do not support

a finding of a likelihood of confusion. The dissimilarity of the products is emphasized by the fact that the goods are within different international classes, namely 32 for water and 33 for wines and spirits. As such, many identical marks are registered on the Principal Register for wine by one party and drinking water by another. Included as Exhibit A are examples of such coexisting marks owned by different entities for alcoholic and non-alcoholic beverages.

In view of the above, it is respectfully submitted that the goods in the cited application for wines and spirits are unrelated to the sparkling water in the present application, such that use of the parties' respective marks is not likely to result in confusion. Accordingly, it is respectfully requested that the refusal to register in light of Reg. No. 2312561 should be withdrawn.

Int. Cl.: 33

Prior U.S. Cls.: 47 and 49

United States Patent and Trademark Office

Reg. No. 2,570,780

Registered May 21, 2002

**TRADEMARK
PRINCIPAL REGISTER**

OASIS

OASIS VINEYARD, INC. (VIRGINIA CORPORATION)
14141 HUME ROAD
HUME, VA 22639

FIRST USE 3-7-1977; IN COMMERCE 3-7-1977.

SER. NO. 76-022,135, FILED 4-10-2000.

FOR: WINE AND CHAMPAGNE, IN CLASS 33
(U.S. CLS. 47 AND 49).

CURTIS FRENCH, EXAMINING ATTORNEY

United States of America
United States Patent and Trademark Office

OASIS

Reg. No. 4,310,950

Registered Apr. 2, 2013

Int. Cl.: 32

TRADEMARK

PRINCIPAL REGISTER

INDUSTRIES LASSONDE INC. (CANADA CORPORATION)
755 PRINCIPALE STREET
ROUGEMONT, QUEBEC, CANADA J0L1M0

FOR: FRUIT JUICES, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF CANADA REG. NO. TMA139,031, DATED 1-29-1965, RENEWED AS REG. NO. TMA139,031, DATED 1-29-2010, EXPIRES 1-29-2025.

SER. NO. 77-739,496, FILED 5-18-2009.

EMILY CARLSEN, EXAMINING ATTORNEY



Lisa Street Lee

Acting Director of the United States Patent and Trademark Office

United States of America

United States Patent and Trademark Office

Fresh

Reg. No. 5,477,521

Registered May 22, 2018

Int. Cl.: 33

Trademark

Supplemental Register

D.J. Maragas Wine Co. (OREGON CORPORATION), DBA Maragas Winery
15523 Sw Hwy 97
Culver, OREGON 97734

CLASS 33: Wine

FIRST USE 9-7-2017; IN COMMERCE 12-22-2017

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

SER. NO. 87-732,953, FILED P.R. 12-22-2017; AM. S.R. 04-04-2018



Andrei Iancu

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FRESH

Reg. No. 5,539,882

Registered Aug. 14, 2018

Int. Cl.: 32

Trademark

Principal Register

CDF Group, Inc. (DELAWARE CORPORATION)
7380 W. Sandlake Road, Suite 500
Orlando, FLORIDA 32819

CLASS 32: Bottled water; Bottled artesian water; Bottled drinking water; Spring water; Drinking water; Drinking waters; Mineral and aerated water; Mineral and aerated waters; Mineral and carbonated waters; Mineral water; Mineral waters; Still water; Still waters; Water beverages

FIRST USE 2-1-2012; IN COMMERCE 3-1-2012

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

OWNER OF U.S. REG. NO. 4820960

SEC.2(F)

SER. NO. 87-742,452, FILED 01-03-2018



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EVE

Reg. No. 4,914,349

LONERIDER BREWING COMPANY (NORTH CAROLINA CORPORATION)
8816 GULF COURT, SUITE 100
RALEIGH, NC 27617

Registered Mar. 8, 2016

Int. Cl.: 32

FOR: BEER, ALE, LAGER, STOUT, PORTER, SHANDY, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

TRADEMARK

FIRST USE 7-3-2014; IN COMMERCE 7-3-2014.

PRINCIPAL REGISTER

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SN 86-235,733, FILED 3-28-2014.

SHARON MEIER, EXAMINING ATTORNEY



Michelle K. Lee

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EVE

Reg. No. 5,087,431

Facey Commodity Co. Ltd. (JAMAICA limited company (Ltd.))
53 Newport Boulevard, Newport West
Kingston JAMAICA

Registered Nov. 22, 2016

Int. Cl.: 30, 32

CLASS 30: MEAT AND VEGETABLE SAUCES, HOT PEPPER SAUCES, TOMATO KETCHUP

Trademark

FIRST USE 8-18-2016; IN COMMERCE 8-18-2016

Principal Register

CLASS 32: FLAVORED SYRUPS FOR MAKING SOFT DRINKS; CANNED AND BOTTLED NON-ALCOHOLIC FRUIT JUICE BEVERAGES

FIRST USE 8-18-2016; IN COMMERCE 8-18-2016

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

SER. NO. 86-593,569, FILED 04-10-2015
HOWARD SMIGA, EXAMINING ATTORNEY



Michelle K. Lee

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EVE

Reg. No. 4,881,336

Registered Jan. 5, 2016

Int. Cl.: 33

TRADEMARK

PRINCIPAL REGISTER

K VINTNERS, L.L.C. (WASHINGTON LIMITED LIABILITY COMPANY)
820 MILL CREEK ROAD
WALLA WALLA, WA 99362

FOR: WINES, IN CLASS 33 (U.S. CLS. 47 AND 49).

FIRST USE 1-1-2012; IN COMMERCE 1-1-2012.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 86-650,525, FILED 6-3-2015.

MARILYN IZZI, EXAMINING ATTORNEY



Michelle K. Lee

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United States Patent and Trademark Office

BUBBLES

Reg. No. 4,367,990

WILLIAMS, ERIC B (UNITED STATES INDIVIDUAL)
615 EAST 97TH ST.

Registered July 16, 2013

KANSAS CITY, MO 64131

Int. Cl.: 32

FOR: AERATED WATER; ICE CREAM SODA; ITALIAN SODA; POP; RAMUNE (JAPANESE SODA POPS); SODA POPS; SODA WATER; SOFT DRINKS, NAMELY, SODAS, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

TRADEMARK

FIRST USE 11-2-2012; IN COMMERCE 11-2-2012.

PRINCIPAL REGISTER

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-786,420, FILED 11-25-2012.

ANDREA BUTLER, EXAMINING ATTORNEY



Leea Street Lee

Acting Director of the United States Patent and Trademark Office

United States of America

United States Patent and Trademark Office

Bubbles

Reg. No. 5,515,937

Registered Jul. 10, 2018

Int. Cl.: 33

Trademark

Supplemental Register

A to Z Wineworks, LLC (OREGON LIMITED LIABILITY COMPANY)
30825 N Highway 99 W
Newberg, OREGON 97132

CLASS 33: Wines

FIRST USE 6-19-2017; IN COMMERCE 6-19-2017

The mark consists of the word "BUBBLES" in stylized letters.

SER. NO. 87-823,015, FILED P.R. 03-06-2018; AM. S.R. 05-15-2018



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