

## REPLY TO OFFICE ACTION

Applicant: Rhinegeist, LLC

Mark: VISION and Design

Serial Number: 90/593,129

Attorney Docket Number: 39169-0241

The Examining Attorney has refused to register the within mark, VISION and design, for beer because of a registration for VIZÓN (with an accent mark over the “Ó”), Reg. 5,723,064, for agave spirits, and also cited these two pending applications for the mark VISION for soft drinks and energy drinks, which were filed by the same applicant:

1. VISION (standard characters), Ser. 90/501,593; and
2. VISION and Design, Ser. 90/501,581<sup>1</sup>.

The applicant responds as follows:

### A. THE GOODS ARE NOT THE SAME

The Trademark Trial and Appeal Board has noted that “(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”). For example, the Board held in *Campari Mexico, S. A. de C. V. v. Toland*, Opp. 912150805 (August 31, 2021), a non-precedential decision, that when two marks are not identical, as is the case here, beer and agave spirits (in other words, tequila) are not enough related to make confusion likely, and that an opposer (and presumably an Examining Attorney) must present evidence of a likelihood of confusion.

The relatedness of alcoholic beverages comes up most often, perhaps, in connection with beer and wine. The following pending or currently registered marks that many of the Office’s examining attorneys have concluded that wine and beer are not related for purposes of likelihood of confusion:

1. BLUE MOON (design) wine, Reg. Nos. 2,068,550 and 2,224,435, Bridgeview Vineyards, Inc., and BLUE MOON beer, Reg. 3,119,888, and BLUE MOON BLUE MOON BREWING CO. (design) beer, Reg. 2,878,098, MillerCoors LLC (disclaimer as to BREWING CO.);

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<sup>1</sup> The Office will publish these two intent-to-use applications for opposition on October 5, 2021. The applicant reserves the right to address these two marks should they result in registrations and be cited against this application.

2. CABIN FEVER wine, Reg. 3,850,067, Hazlitt 1852 Vineyards, Inc., and CABIN FEVER ALE, Reg. 3,180,241, New Glarus Brewery Co.;
3. SCHNEIDER wine, Reg. 2427,705, Schneider Selections, LLC, and SCHNEIDER WEISSE beer, Reg. 3,421,671, G. Schneider & Sohn GmbH (disclaimer as to WEISSE);
4. THE BIG PICTURE wines, Reg. 4,481,183, ICT Investment Properties, Inc., and BIG PICTURE BREW WORKS beer, Reg. 4,877,955, Theodore Kerpovich;
5. BLACKEYE ZIN wine, Reg. 3,363,470 (disclaimer as to ZIN), Patenatnports, Ltd., and BLACK EYE ALE, Reg. 2,667,078, Mendocino Brewing Co., (disclaimer as to ALE);
6. 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);
7. 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);
8. 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);
9. 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);
10. EPIPHANY wine, Reg. 2,497,018, Parker Station Inc., and EPIPHANY PALE (disclaimer as to ALE), Reg. 3,873,558, Old Schoolhouse Brewery, Inc.;
11. SONG red wine, Reg. 4,106,908, Lyric Opera of Chicago, and HEY SONG beer, Reg. 2,122,081, Hey-Song Corporation;
12. GINJA NINJA alcoholic beverages (except for beer) and fruit wine, Reg. 4,519,334, Forbidden Fruit Ciderhouse, LLC, and NINJA beer, Reg. 3,753,805, Asheville Pizza & Brewing Company;
13. PEY-MARIN VINEYARDS wine, Reg. 2,896,981, Scenic Root Winegrowers, LLC (disclaimer as to VINEYARDS), and MARIN BREWING CO. beer, Reg. Nos. 4,447,787, Marin Brewing Company, Inc. (disclaimer as to BREWING CO.);
14. BLIND FAITH wine, Reg. 2,859,391, Berit and Neils Udsen, and BLIND FAITH beer, Reg. 2,011,128, Magic Hat Brewing Company & Performing Arts Center, Inc.;
15. ALAMOS wine, Reg. 2,783,556, Bodegas Esmereldas S.A., and ALAMO beer, Reg. 2,196,136, Alamo Beer Co.;

16. THE BIG KAHUNA wine, Reg. 3,463,202, Fresh & Easy, LLC, and BIG KAHUNA beer, Reg. 3,671,520, Kona Brewery, LLC;
17. STEELHEAD RUN wine, Reg. 1,400,616, McKenzie Brewing Co., and STEELHEAD beer, Reg. 2,950,860, Mad River Brewing Co.;
18. BLACK WIDOW wine, Reg. 3,965,682, Cielo Farms, Inc., and BLACK WIDOW beer, Reg. 4,368,199, McMenamins, Inc.;
19. FATHOM, wine, Reg. 3,119,923, Babcock Enterprises, Inc., and FATHOM beer, Reg. 4,071,615, Home Brew Mart, Inc.

(Copies of these certificates of registration are attached as Exhibit “A”.) These registered marks demonstrate that the relevant public recognizes beer and wine to be goods that emanate from different sources despite there being the same or similar marks. On the other hand and as the Board noted in 2015, the number of locations making wine and beer is statistically insignificant. *In re Reubens Brews LLC*, Ser. 86/066.711, at 7.

#### **B. THE MARKS ARE NOT THE SAME**

The applied-for mark is VISION with the background design of the applicant’s well-known spirit design. Copies of TESS print-outs are attached for registrations 4827070, 4831357, 5418242 and 5670597 at Exhibit “B”. By comparison, the registered mark is VIZÓN with an accent mark over the “O”. VISION and cited registered mark have obvious differences and engender different commercial impressions, particularly given the difference in the beverages identified by each.. This conclusion is buttressed by the registrations for these arguably similar marks for wine and other alcoholic beverages (Exhibit “C”):

1. HANS VON WILHELM beer, Reg. 1,557,154;
2. HANS CHRISTIAN ANDERSON for non-alcoholic beverages except beer, Reg. 4,995,531;
3. JOHN WILLIAM wine, Reg. 4,979,909<sup>2</sup>;
4. BIG JOHN CAB wine, Reg. 4,596,201, Coyote Canyon Winery, LLC, Prosser, Washington; and
5. DR. HANS VONMÜLLER wine, Reg. 5,095,164.

The Examining Attorney has concluded that VISION and the registered mark, VIZÓN, “are essentially phonetic equivalents and thus sound similar.” The applicant points out respectfully that the Examining Attorney has presented no evidence how anyone pronounces the registered mark, including English speakers. The stressed syllable of VISION is the first syllable. The accent mark over the “O” in the registered mark may mean that the second syllable of that mark is stressed. And VISION is a common English word that needs no definition. VIZÓN is not. In

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<sup>2</sup> HANS VON WILHELM, one of the cited marks, is German for John of William.

fact, nothing in the registration file for the registered mark suggests that the word has a meaning in any language.

These differences tip the scale in favor of a finding of no likelihood of confusion, similar to the non-precedential conclusion reached by the Board in *Reubens Brews LLC*, Ser. 86/066,771 for the mark REUBEN'S BREWS and Design (October 27, 2015), particularly when one considers the "catch-all" 13<sup>th</sup> *DuPont* factor (namely, any other established fact probative of the effect of use). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973).

The applicant requests that the Examining Attorney reconsider the refusal and approve VISION for publication.

Respectfully submitted,

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