

SESSION 602

Cases of Beer: Trademark Developments in the Craft Brewing Business

Timothy C. Matson
Jeffrey C. O'Brien
Lommen Abdo, P.A.
Minneapolis

Minnesota CLE's Copyright Policy

Minnesota Continuing Legal Education wants practitioners to make the best use of these written materials but must also protect its copyright. If you wish to copy and use our CLE materials, you must first obtain permission from Minnesota CLE. Call us at 800-759-8840 or 651-227-8266 for more information. If you have any questions about our policy or want permission to make copies, do not hesitate to contact Minnesota CLE.

All authorized copies must reflect Minnesota CLE's notice of copyright.

MINNESOTA CLE is Self-Supporting

A not for profit 501(c)3 corporation, Minnesota CLE is entirely self-supporting. It receives no subsidy from State Bar dues or from any other source. The only source of support is revenue from enrollment fees that registrants pay to attend Minnesota CLE programs and from amounts paid for Minnesota CLE books, supplements and digital products.

© Copyright 2016

MINNESOTA CONTINUING LEGAL EDUCATION, INC.

ALL RIGHTS RESERVED

Minnesota Continuing Legal Education's publications and programs are intended to provide current and accurate information about the subject matter covered and are designed to help attorneys maintain their professional competence. Publications are distributed and oral programs presented with the understanding that Minnesota CLE does not render any legal, accounting or other professional advice. Attorneys using Minnesota CLE publications or orally conveyed information in dealing with a specific client's or other legal matter should also research original and fully quoted sources of authority.

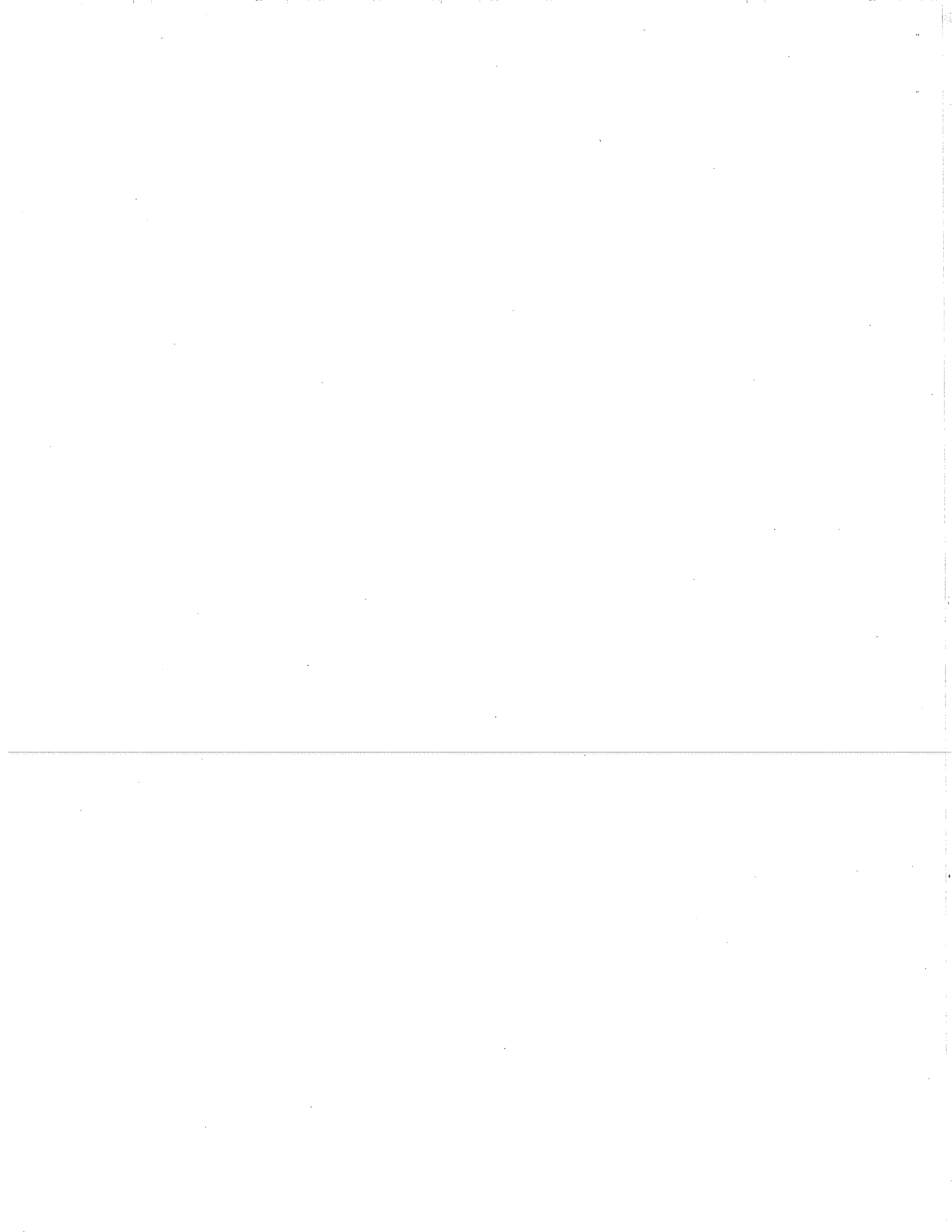
Cases of Beer:
Trademark Developments in the Craft Brewing Business

Table of Contents

1. INTRODUCTION	1
2. SUMMARIES OF RECENT DECISIONS.....	1
<u>New Belgium Brewing Co. v. Travis Cnty. Brewing Co., LLC, 2015 U.S. Dist. LEXIS 58085 (D. Colo. 2015)</u>	<u>2</u>
<u>Bell’s Brewery, Inc. v. Innovation Brewing, Opposition No. 91215896 (Trademark Trial & App. Bd.).....</u>	<u>2</u>
<u>The Lagunitas Brewing Company v. Sierra Nevada Brewing Co., Case No. 4:15-cv-00153 (N.D. Cal.)</u>	<u>2</u>
<u>Atlas Brewing Company v. Atlas Brew Works, 2015 TTAB LEXIS 381 (Trademark Trial & App. Bd., Sept. 22, 2015).....</u>	<u>3</u>
<u>VIP Products LLC v. Jack Daniel’s Properties, 2015 U.S. Dist. LEXIS 64736 (D. Ariz. 2015)</u>	<u>3</u>
<u>Allagash Brewing Company v. Pelletier, 2015 TTAB LEXIS 383 (Trademark Trial & App. Bd). Sept. 22, 2015).....</u>	<u>3</u>
<hr/>	
<u>Cervesia Gratis, Inc. v. Sierra Nevada Brewing Co., Opposition No. 91221178 (Trademark Trial & App. Bd.).....</u>	<u>4</u>
<u>Alamo Beer Company, LLC v. Old 300 Brewing LLC, Case No. 5:14-cv-285 (W.D. Tex)</u>	<u>4</u>
<u>Nebraska Brewing Co. v. Emerald City Beer Company, LLC, 2015 TTAB LEXIS 359 (Trademark Trial & App. Bd. Aug 26, 2015).....</u>	<u>5</u>
<u>Sazerac Company, Inc. v. Intercontinental Packaging Company, Case No. 3:14-cv-00205 (W.D. Ky.)</u>	<u>6</u>
<u>Sazerac Company, Inc. v. Fetzer Vineyards, Case No. 3:15-cv-04618 (N.D. Cal)</u>	<u>6</u>
<u>Mor-Dall Enters. v. Dark Horse Distillery LLC, 2015 U.S. Dist. LEXIS 22243 (W.D. Mich. 2015).....</u>	<u>6</u>

<u>Dogfish Head Marketing, LLC v. Steitieh, 2015 NAFDD LEXIS 559 (NAF May 27, 2015)</u>	6
<u>Twentieth Century Fox Film Corporation v. Allied Domecq Spirits & Wine Limited, Opposition No. 91224005 (Trademark Trial & App. Bd.)</u>	7
<u>Great Divide Brewing Co. v. Gold Key/PHR Food Servs., LLC, 2014 U.S. Dist. LEXIS 115493 (D. Colo. 2015)</u>	7
<u>Aviator Brewing Co. v. Table Bluff Brewing, Inc. 2015 U.S. Dist. LEXIS 99232 (E.D.N.C. 2015)</u>	8
<u>Harlem Brew House LLC v. Harlem Brewing Company, LLC, Cancellation No. 92060813 (Trademark Trial & App. Bd.); Harlem Brewing Company, LLC v. Riley, Case No. 1:15-cv-03081 (SDNY)</u>	8
<u>In re Three Spirits Brewery, LLC, 2015 TTAB LEXIS 224 (Trademark Trial & App. Bd. July 15, 2015)</u>	9
<u>In re House Beer LLC, 2015 TTAB LEXIS 66 (Trademark Trial & App. Bd. March 27, 2015)</u>	9
<u>In re Twin Rest. IP, LLC, 2015 TTAB LEXIS 200 (Trademark Trial & App. Bd. June 24, 2015)</u>	10
<u>In re Left Nut Brewing Company, Inc., Serial No. 85935569 (Trademark Trial & App. Bd. November 13, 2015)</u>	10
<u>In re Engine 15 Brewing Co., LLC, 2015 TTAB LEXIS 454 (Trademark Trial & App. Bd. Oct. 29, 2015)</u>	11
<u>Flying Dog Brewery, LLP v. Michigan Liquor Control Commission, 597 Fed. Appx. 342 (6th Cir. 2015)</u>	11
<u>Moosehead Breweries Limited v. Adirondack Pub & Brewery, Inc., Case No. 1:15-cv-00260 (NDNY 2015)</u>	12
<u>Anheuser-Busch, LLC v. Natty Greene’s Brewing Company, LLC, Opposition No. 91216945 (Trademark Trial & App. Bd.)</u>	12
<u>North Coast Brewing Co., Inc. v. North Coast Distilling, Case No. 3:15-cv-03918 (N.D. Cal.)</u>	12
<u>Ste. Michelle Wine Estates Ltd. v. Timberline Brewing Co., Case No. 2:15-cv-00678 (W.D. Wash.)</u>	12

<u>Red Bull GmbH v. Old Ox Brewery, LLC, Opposition No. 91220413 (Trademark Trial & App. Bd.)</u>	13
<u>In re Puzzle Brewing Co., 2015 TTAB LEXIS 255 (Trademark Trial & App. Bd. July 27, 2015)</u>	13
<u>In re Red Whale, LLC, 2015 TTAB LEXIS 339 (Trademark Trial & App. Bd. August 24, 2015)</u>	13
<u>In re Reubens Brews LLC, Serial No. 86066711 (Trademark Trial & App. Bd. Oct. 27, 2015)</u>	14
<u>Teal Bay Alliances v. Southbound One, Inc., 2015 U.S. Dist. LEXIS 10940 (D. Md. 2015)</u>	14
<u>Summit Brewing Company v. The Grand Lake Brewing Company, LLC, 1:15-cv-440 (D. Colo)</u>	15
3. HONORABLE MENTION – OTHER MINNESOTA CASES	15
<u>UNRATED Beer – 612Brew</u>	15
<u>Long Trail Brewing Company v. Bent Paddle Brewing Company, 1-14-cv-186 (D. Vt.)</u>	15



1. INTRODUCTION

Craft brewing is a booming industry in the United States with over 5,000 breweries now existing and operating (and more to come). One of the most significant legal issues resulting from this boom has been the proliferation of names for breweries and beers and the resolution of the inevitable conflicts.

Enforcement of a valid trademark for a brewery beer name, however, is not without its challenges. A holder of a trademark who proceeds with cease and desist demands and infringement suits can face a backlash in the court of public opinion, and thus care must be taken to seek an appropriate resolution to any issue(s) of confusion that does not simultaneously impair the reputation of the brand amongst consumers.

Beer trademark disputes arise from two sources: (1) in the context of a trademark application where either the examining attorney at the U.S. Patent and Trademark Office (“USPTO”) and/or a competitor raise objections as to the similarity of the proposed mark to an existing mark, with the decision ultimately determined by the Trademark Trial and Appeals Board (“TTAB”); and (2) an infringement suit brought by one party against another in Federal district court. In general, the number of disputes resolved by the TTAB outnumber the infringement cases.

A final challenge lies in the USPTO’s policy of considering beer, wine and spirits marks to be of the same class. Especially with the recent proliferation of manufacturers in all of these industries, this policy further complicates the process of selecting and protecting a name for a brewery or beer.

2. SUMMARIES OF RECENT DECISIONS

Following are summaries of several recent matters involving breweries/beer and trademark issues. Note that the majority of these disputes are being adjudicated through the TTAB as part of the trademark application process rather than via an infringement suit filed in Federal district court¹:

¹ These summaries are taken from “A Trademark Year in Wine and Beer 2015: Our Holiday Buyer’s Guide to Disputed Beverages”, David Kluft, Trademark and Copyright Law Blog (<http://www.trademarkandcopyrightlawblog.com/2015/12/a-trademark-year-in-wine-and-beer-2015-our-holiday-buyers-guide-to-disputed-beverages/>); they are included in these materials with permission from the author.

New Belgium Brewing Co. v. Travis Cnty. Brewing Co., LLC, 2015 U.S. Dist. LEXIS 58085 (D. Colo. 2015):

New Belgium Brewing of Colorado brought suit against the Oasis Texas Brewing Company in the District of Colorado, seeking a declaration that it was the sole owner of the SLOW RIDE mark for beer. New Belgium argued that the Court had personal jurisdiction over the matter because Oasis had once participated in a beer festival in Colorado. However, SLOW RIDE beer was not on offer at that festival, and Oasis' motion to dismiss for lack of personal jurisdiction was granted. New Belgium has refiled the matter in Texas.

Bell's Brewery, Inc. v. Innovation Brewing, Opposition No. 91215896 (Trademark Trial & App. Bd.):

The owners of INNOVATION BREWING, a hipster mom and pop microbrewery in North Carolina, applied to trademark its name, but the application was opposed by Bell's Brewery of Michigan, which uses INSPIRED BREWING as its slogan. The dispute went semi-viral this year when, in true millennial fashion, Innovation took to Facebook and posted what was later dubbed "6 things Innovation Brewing wants you to know about Bell's Brewery trademark dispute," including "2. We do not believe that any human on earth would confuse Innovation Brewing with Bell's Brewery, despite their slogans." Innovation arguably has already come away the winner in the court of public opinion with its "David v. Goliath" theme, but the TTAB matter is still pending.

The Lagunitas Brewing Company v. Sierra Nevada Brewing Co., Case No. 4:15-cv-00153 (N.D. Cal.):

In January, the California-based Lagunitas Brewing Company raised a whole lot of eyebrows when it brought suit against Sierra Nevada Brewing. Lagunitas sought a temporary restraining order and alleged that its LAGUNITAS IPA mark was infringed by Sierra's IPA HOP HUNTER beer. In essence, the complaint asserted that the similar use of "IPA" on both labels was likely to cause confusion. The social media backlash against Lagunitas was so immediate and harsh that Lagunitas withdrew the suit within forty-eight hours after filing, and the Lagunitas CEO issued an apology to his customers via Twitter: "Today I was seriously schooled and I heard you well..."

Atlas Brewing Company v. Atlas Brew Works, 2015 TTAB LEXIS 381 (Trademark Trial & App. Bd., Sept. 22, 2015):

The Atlas Brewing Company of Chicago opposed Atlas Brew Works' application to register ATLAS for beer. The Opposer alleged that "Atlas" was primarily descriptive of a geographic area within Washington D.C., which is where the Applicant is located ("Atlas" is apparently an unofficial nickname of the H Street District). The TTAB rejected this argument, finding that consumers were unlikely to make the connection. The TTAB agreed with the Opposer that there was a likelihood of confusion between the marks, but it found that the Applicant was the senior user (the TTAB did not accept the launch dates of the Opposer's Twitter and Facebook accounts as establishing priority). The petition was dismissed.

VIP Products LLC v. Jack Daniel's Properties, 2015 U.S. Dist. LEXIS 64736 (D. Ariz. 2015):

In 2014, VIP Products introduced a dog toy called "Bad Spaniels," a "durable rubber squeaky novelty dog toy" with the look of a Jack Daniel's whiskey bottle. Presumably in order to make sure the dogs were not confused, the toys came with the disclaimer that "this product is not affiliated with Jack Daniel's." The whiskey company, which has a reputation as a polite trademark enforcer, threatened to take action against VIP, and VIP reacted by filing a complaint in the District of Arizona, seeking a declaration of non-infringement, and asserting that the trade dress of the Jack Daniel's bottle was functional and non-distinctive. As of this writing, VIP's motion for summary judgment is pending. Other alcohol-themed VIP dog toys include Jose the Perro (shaped like Jose Cuervo tequila), Blue Cats Trippin (Pabst Blue Ribbon) and Heini Sniffn (Heineken).

Allagash Brewing Company v. Pelletier, 2015 TTAB LEXIS 383 (Trademark Trial & App. Bd. Sept. 22, 2015):

A Maine resident, who lives on Allagash Road in the town of Allagash, filed an application to register ALLAGASH WILD for jellies and jams. The Allagash Brewing Company of Portland, Maine opposed the registration on account of its own prior registrations for beer

marks, including ALLAGASH WHITE, ALLAGASH BLACK, ALLAGASH TRIPEL and ALLAGASH CURIEUX. The TTAB sustained the opposition, finding that the marks were similar and that Allagash Brewing's marks were strong (there was no evidence that any other food or beverage companies were using the name). The TTAB also found that the goods were related, citing evidence of other marks covering beer and also jellies or jams, and observing that "craft beer is commonly associated with food."

Cervesia Gratis, Inc. v. Sierra Nevada Brewing Co., Opposition No. 91221178 (Trademark Trial & App. Bd.):

Sierra Nevada began marketing its 4-WAY IPA in 2014, but by that time Oregon's Fort George Brewery had already been selling 3-WAY IPA for about a year. Fort George opposed registration of Sierra Nevada's mark, and in October Sierra Nevada withdrew its application.

Alamo Beer Company, LLC v. Old 300 Brewing LLC, Case No. 5:14-cv-285 (W.D. Tex):

San Antonio-based Alamo Beer Company has been selling beer under the ALAMO mark since 1997. In conjunction with its word mark, Alamo Beer has always used a logo and trade dress based on the distinctive roof outline of the Alamo mission building. In 2011, Old 300 Brewing, d/b/a Texian Brewing Co., launched its TEXIAN beer brand, and in 2012 it began using a logo that likewise incorporated the Alamo roofline. After cease and desist correspondence from Alamo Beer, Texian removed the image from its beer packaging but continued to use it on advertising and bar tap heads.

In March 2014, Alamo Beer sued Texian for infringement of its logo and trade dress. The suit caught the attention of the State of Texas, which (through its General Land Office) owns the physical building of the Alamo, a popular tourist attraction in San Antonio. The state moved to intervene in Alamo Beer's lawsuit, claiming that it owned the image of the building and the right to commercialize it to whatever extent it chose. Texas does, in fact, commercialize the image of the Alamo, primarily on what plaintiff Alamo Brewing refers to as "souvenirs and trinkets" sold in the Alamo gift shop. The state owns a number of federal registrations for the word mark THE ALAMO and for a design mark featuring the wording "The ALAMO" under an outline of the Alamo roofline. The registrations cover a variety of goods and services, including clothing,

blankets, tote bags, jewelry, and documentaries on DVD. Just before filing its motion to intervene, Texas filed new applications to register its ALAMO marks in connection with bottled water and a variety of foods, such as barbecue sauce, candy, and soup mix – goods that the state apparently believes are more closely related to beer.

Alamo Beer opposed the state's motion, arguing that the state's use and registrations in connection with souvenirs did not give it rights in the market for beer, and that the fame of the Alamo building itself did not constitute fame as a trademark sufficient to give rise to a right to prevent dilution. Alamo Beer also pointed out that ownership of a building does not necessarily imply trademark rights in images of the building, citing a 1998 Sixth Circuit case involving Cleveland's Rock and Roll Hall of Fame. Finally, Alamo Beer noted that it had been using its marks predominantly in San Antonio for seventeen years, hinting at a possible laches defense to an attempt by the State to put an end to its use.

Texas, however, argued that its extensive use of the ALAMO word and design marks on diverse products has created significant goodwill, and that the public would expect that products bearing ALAMO marks are produced or authorized by the state of Texas. The Court ultimately granted the state's motion to intervene. In April 2015, the matter was finally settled and a consent order issued prohibiting both companies from further use of Alamo-related marks. Alamo Beer subsequently negotiated a license with the state, while Texian has changed its logo.

Nebraska Brewing Co. v. Emerald City Beer Company, LLC, 2015 TTAB LEXIS 359 (Trademark Trial & App. Bd. Aug 26, 2015):

The Nebraska Brewing Company, makers of BLACK BETTY IMPERIAL STOUT and BLACK BETTY RUSSIAN beer, petitioned to cancel the Emerald City Beer Company's BETTY BLACK LAGER mark. Nebraska Brewing did not own any registered marks, but alleged that its common law use began in 2009, two years before Emerald City's use. On Nebraska Brewing's motion for summary judgment, the TTAB held that BLACK BETTY was distinctive as to beer, that Nebraska Brewing had priority, and that the marks were confusingly similar. However, the TTAB also found that there were genuine disputes of material fact with respect to Emerald City's laches defense (Emerald City spent time and money promoting its mark in reliance on the lack of opposition to its registration), and recommended accelerated case resolution on this issue.

Sazerac Company, Inc. v. Intercontinental Packaging Company, Case No. 3:14-cv-00205 (W.D. Ky.):

In 2014, the Sazerac Company, owner of the Buffalo Trace Distillery, filed a trademark infringement action in the Western District of Kentucky against the Crosby Lakes Spirits Company, complaining that Crosby's BISON RIDGE whiskey was packaged so as to mimic BUFFALO TRACE's trade dress. Crosby's motion to transfer the case to its home turf of Minnesota was denied, and the parties proceeded to discovery. In February 2015, the parties settled and stipulated to a dismissal of the case.

Sazerac Company, Inc. v. Fetzer Vineyards, Case No. 3:15-cv-04618 (N.D. Cal):

In October 2015, Sazerac made similar claims against Fetzer Vineyards in the Northern District of California, alleging that Fetzer's 1000 STORIES wine label infringed the BUFFALO TRACE trade dress because it contained a "confusingly similar buffalo."

Mor-Dall Enters. v. Dark Horse Distillery LLC, 2015 U.S. Dist. LEXIS 22243 (W.D. Mich. 2015):

Although the Kansas-based Dark Horse Distillery knew about Michigan's Dark Horse Brewing Company before it named itself, it barreled ahead under the assumption that nobody would be confused because beer and whiskey are different drinks. But the Brewery didn't agree and brought suit in the Western District of Michigan. After denying the Distillery's motion to dismiss for lack of personal jurisdiction, the Court found that there was a genuine issue of material fact as to the relatedness of beer and whiskey. A jury later determined that the products were related, and concluded that the Distillery had infringed the Brewery's trademark. After the verdict, the parties entered into a settlement agreement allowing the Distillery to sell off its remaining inventory before the end of 2015.

Dogfish Head Marketing, LLC v. Steitieh, 2015 NAFDD LEXIS 559 (NAF May 27, 2015):

Dogfish Head Marketing held a registered trademark for DOGFISH HEAD in connection with beer and beer-related goods and services. Dogfish maintains a website at <dogfish.com>.

but it also wanted <dogfish.net>, which was being used to provide links to hunting sites. After Dogfish filed a UDRP complaint, a National Arbitration Forum panel found that the domain was confusingly similar to Dogfish's mark. However, there was no evidence that the registrant was targeting Dogfish's customers or providing beer-related links, nor was there evidence that the registrant made a habit of buying up domain names with brand marks. Therefore, there was insufficient proof of bad faith and the transfer of the domain was denied. Dogfish appears to have purchased the domain from the registrant since then.

Twentieth Century Fox Film Corporation v. Allied Domecq Spirits & Wine Limited, Opposition No. 91224005 (Trademark Trial & App. Bd.):

In September 2015, Twentieth Century Fox opposed the application of Allied Domecq Spirits & Wine to register MILTONDUFF for alcoholic beverages except beer. The entertainment giant alleged that the mark will be confused with its Simpsons-related marks for beverages, including DUFF, DUFF BEER, DUFF LIGHT, DUFF DRY and CAN'T GET ENOUGH OF THAT WONDERFUL DUFF. Fox has promoted various beverages under these marks since 2007 (including actual beer and an energy drink), but claims priority back to 1990, when the fictional DUFF mark first appeared on the series. Milton Duff Whisky claims to have a much longer history, established as an independent distillery in 1824 and acquired by a series of companies along the way. However, it appears that one of those companies let an earlier registration for MILTON-DUFF expire in 1993. The matter is pending.

Great Divide Brewing Co. v. Gold Key/PHR Food Servs., LLC, 2014 U.S. Dist. LEXIS 115493 (D. Colo. 2015):

The Great Divide Brewing Company of Denver registered its GREAT MINDS DRINK ALIKE slogan in 2002, and last December it took exception when the "Lager Heads" pub in Virginia Beach began using the slogan "Great Minds Eat & Drink Alike." Great Divide filed suit in the District of Colorado, and Lager Heads moved to dismiss for lack of personal jurisdiction. Lager Heads had no restaurant or other business in Colorado, but Great Divide argued that it should be subject to the Court's jurisdiction because the Lager Heads website allowed Internet users across the country to view "infringing phrases," to sign up for a mailing list, and to buy gift cards (including one that had been sold to an IP address located in Colorado). The Court allowed the motion to dismiss, finding that the website was insufficient for specific personal jurisdiction

because nothing on the site manifested an intent to do business in Colorado. In so ruling, the Court doubted whether the Zippo interactivity test for personal jurisdiction applied in the Tenth Circuit, and in any held that it would not apply in this case because “something more” was lacking.

Aviator Brewing Co. v. Table Bluff Brewing , Inc. 2015 U.S. Dist. LEXIS 99232 (E.D.N.C. 2015):

Lost Coast Brewery’s shark-infested infringement action in the Northern District of California against the Aviator Brewing Company was dismissed for lack of personal jurisdiction. Aviator then filed a declaratory judgment action in its home court, the Eastern District of North Carolina, seeking a declaration of non-infringement. The dispute concerned two beer labels that the Court found “looked nothing like” except that both had a picture of a shark. Nevertheless, the Court refused to grant early summary judgment for Aviator because Lost Coast represented, pursuant to Fed. R. Civ. P. 56(d), that it needed additional discovery. However, the Court warned Lost Coast that it likely would be on the hook for both parties’ attorneys’ fees if it went ahead with this discovery and did not ultimately prevail. Lost Coast likely saw its own blood in the water and worked out a stipulation of dismissal.

Harlem Brew House LLC v. Harlem Brewing Company, LLC, Cancellation No. 92060813 (Trademark Trial & App. Bd.); Harlem Brewing Company, LLC v. Riley, Case No. 1:15-cv-03081 (SDNY):

In 2013, the “Neighborhood Original” Harlem Brewing Company registered the HARLEM BREWING COMPANY mark for beer, which it claimed to have been using since 2001. In late 2014, rival Harlem Brew House registered its own HARLEM BLUE PREMIUM BEER mark and then petitioned to cancel the HARLEM BREWING COMPANY mark, arguing that it is geographically misdescriptive because the Harlem Brewing Company beer is actually bottled in Saratoga Springs. In August 2015, the cancellation proceeding was suspended pending the outcome of a civil action between the parties in the Southern District of New York. Both matters are pending.

In re Three Spirits Brewery, LLC, 2015 TTAB LEXIS 224 (Trademark Trial & App. Bd. July 15, 2015):

Three Spirits Brewery of North Carolina sought registration of HOPPER'S DELIGHT for beer, which the Trademark Examining Attorney refused in view of the already-registered HOPPERS and DELIGHT marks for beer. On appeal, Three Spirits argued that its mark created a distinct commercial impression because it was a parody of the well-known song "Rapper's Delight." The TTAB acknowledged that the "song has some popularity in the U.S.," but the association with the song was not as obvious as, say, the WRAPPER'S DELIGHT mark. The TTAB affirmed the refusal, finding that there was a likelihood of confusion with the HOPPERS mark, and also that consumers might think HOPPER'S DELIGHT is just a "hoppier" form of DELIGHT beer, made by the Hudepohl Brewing Company of Cincinnati (where it is actually known as "Hudy Delight"). A few days after the decision, another application for a mark incorporating HOPPER'S DELIGHT was filed, this one by Mad Scientists Brewing Partners of Brooklyn.

In re House Beer LLC, 2015 TTAB LEXIS 66 (Trademark Trial & App. Bd. March 27, 2015):

A Trademark Examining Attorney refused an application to register HOUSE BEER for retail beer sales because it was likely to cause confusion with the identical HOUSE BEER mark, owned by California's House Brewing company, which had been registered while the Applicant's application was pending. The Applicant argued that its application should have been allowed to proceed to publication first because the House Brewing application, although filed first, was subsequently amended to seek registration on the Supplemental Register. Therefore, the effective filing date of House Brewing's application should have been amended to whenever an allegation of first use was filed, pursuant to 37 C.F.R. § 2.75(b), which occurred much later. Are you following this? The TTAB agreed with the Applicant's analysis but nevertheless held that the Examining Attorney's refusal was appropriate despite this "procedural mishap." The TTAB stated that the appropriate remedy for the Applicant would be first to seek cancellation of the House Brewing mark in an inter partes challenge, but it also stated that the Applicant would

probably lose such a challenge because a mere error in the examination procedure would not be grounds for cancellation.

In re Twin Rest. IP, LLC, 2015 TTAB LEXIS 200 (Trademark Trial & App. Bd. June 24, 2015):

The Twin Restaurant company was refused registration of its KNOTTY BRUNETTE mark for beer because of the already-registered NUTTY BREWNETTE for beer. On appeal, Twin Restaurant argued that KNOTTY BRUNETTE would be sold in a unique channel of trade, namely in its own “Twin Peaks” restaurants by its “sexy wait staff.” The TTAB rejected this argument and presumed that the two beers traveled in the same channels of trade (in fact, NUTTY BREWNETTE is also sold in restaurants, albeit perhaps by a less skimpily-dressed wait staff). Nevertheless, the TTAB reversed the refusal to register, primarily because the marks had different connotations: NUTTY BREWNETTE indicated a nutty flavored beer, while KNOTTY BRUNETTE suggested the phrase “naughty brunette, that is to say, a dark-haired woman displaying a playful type of sexiness.” In other words, because each mark was telling a different joke, their commercial impressions were different. Get it? Excuse me one second; I just need to hit the snooze button on my misogyny alarm. Now, where were we? Oh yes. One panelist dissented on the ground that “inside a noisy bar, as the night wears on . . . any aural differences . . . will likely not be readily distinguishable – and especially to southern ears.” The dissent also criticized the majority for assuming that “the average bar patron will retain fine connotations from one tavern visit to the next . . . Let’s see, was that dark-haired female of several weeks ago an extremely difficult personality (“knotty”), strange (“nutty”), or playfully sexy (“naughty”)?” Twin Peaks’ other selections include DIRTY BLONDE, DROPDEAD REDHEAD and GOLD DIGGER.

In re Left Nut Brewing Company, Inc., Serial No. 85935569 (Trademark Trial & App. Bd. November 13, 2015):

The Left Nut Brewing Company’s application to register LEFT NUT BREWING was refused on the ground that it was “immoral or scandalous,” because “LEFT NUT” as a unit is “clearly limited to the vulgar meaning referring to the left testicle.” On appeal, the TTAB turned

to the Urban Dictionary and determined that “left nut” had a variety of slang meanings, including as a figure of speech for “something of great value.” It also recounted some “equally suggestive “nut” marks which have registered, including:” MY HUSBAND’S NUTS, SMELL MY NUTS, and HAVE SOME GUTS . . . CHECK YOUR NUTS. The refusal was reversed.

In re Engine 15 Brewing Co., LLC, 2015 TTAB LEXIS 454 (Trademark Trial & App. Bd. Oct. 29, 2015):

The Engine 15 Brewing Company’s application to register the NUT SACK DOUBLE BROWN ALE mark was refused by a Trademark Examining Attorney on the ground that it included “immoral or scandalous” matter that was “offensive to a substantial composite of the general public.” On appeal, the TTAB was not willing to accept Engine 15’s argument that the mark was entirely innocuous, but it did find that “the word “Nut” will clearly describe a flavor or style of ale, rather than being an obvious reference to testicles.” Ultimately, the TTAB found that the record was mixed as to the offensive nature of the mark: while it might be “somewhat taboo in polite company,” it was “not so shocking or offensive as to be found scandalous within the meaning of the statute.”

Flying Dog Brewery, LLP v. Michigan Liquor Control Commission, 597 Fed. Appx. 342 (6th Cir. 2015):

In celebration of its twentieth anniversary, the Hunter S. Thompson-inspired Flying Dog Brewery created a new Belgian-style India Pale Ale called RAGING BITCH, featuring art by Thompson’s illustrator buddy Ralph Steadman, which depicted “a wild dog presenting human female genitalia as well as possessing semblances of human breasts.” However, the Michigan Liquor Control Commission refused regulatory approval of the product because “the proposed label which includes the brand name ‘Raging Bitch’ contains such language deemed detrimental to the health, safety, or welfare of the general public.” Flying Dog brought an action pursuant to 42 U.S.C. § 1983 for violation of its First Amendment rights. A Michigan Federal District Court held that the Commission enjoyed a qualified immunity, but the Sixth Circuit reversed and remanded the matter for a determination of whether Flying Dog’s First Amendment rights had been violated. The parties stipulated to dismissal of the action before that determination could be made.

Moosehead Breweries Limited v. Adirondack Pub & Brewery, Inc., Case No. 1:15-cv-00260 (NDNY 2015):

Last year, Moosehead Breweries, which has made MOOSEHEAD beer since 1931, successfully blocked a trademark application by the Adirondack Pub & Brew Company to register MOOSE WIZZ for soft drinks. After the refusal, Adirondack was still selling its MOOSE WIZZ root beer in bottles featuring a moose profile allegedly reminiscent of the Breweries' labels, so Moosehead filed suit against Adirondack in the Northern District of New York. The parties were unable to reach a resolution at a court-ordered settlement conference, and have headed into discovery.

Anheuser-Busch, LLC v. Natty Greene's Brewing Company, LLC, Opposition No. 91216945 (Trademark Trial & App. Bd.):

Anheuser-Busch opposed the Natty Greene's Brewing Company's registration of NATTY GREENE'S (presumably named after the revolutionary war general) for beer. Anheuser-Busch claimed that the name may be confused with its own previously registered beers marks: NATTY LIGHT, FATTY NATTY and NATTY DADDY (all commercial nicknames for Natural Light beer). After several months of settlement negotiations, Anheuser-Busch withdrew the opposition with prejudice.

North Coast Brewing Co., Inc. v. North Coast Distilling, Case No. 3:15-cv-03918 (N.D. Cal.):

North Coast Brewery filed a complaint in the Northern District of California against the fledgling North Coast Distillery of Oregon, alleging infringement of its NORTH COAST mark. This matter settled quickly, and the distillery is now called Pilot House Spirits.

Ste. Michelle Wine Estates Ltd. v. Timberline Brewing Co., Case No. 2:15-cv-00678 (W.D. Wash.):

In April, Ste. Michelle Wine Estates of Washington filed a trademark infringement action against the Twisted Pine Brewing Company of Colorado. Ste. Michelle owns the registered mark NORTHSTAR for wine, and took exception to Timberline's marketing of its seasonal

NORTHSTAR beer. The matter was voluntarily dismissed by the winery in June; presumably as the result of a settlement.

Red Bull GmbH v. Old Ox Brewery, LLC, Opposition No. 91220413 (Trademark Trial & App. Bd.):

In January 2015, energy drink giant Red Bull opposed the Virginia-based Old Ox Brewery's application to register its name and logo. Red Bull claimed that the ox and the bull "both fall within the same class of 'bovine' animals and are virtually indistinguishable to most customers." Old Ox responded with an answer in the TTAB, but also with a running commentary on its blog, through which it made settlement offers (it promised NEVER to produce an energy drink), announced that Red Bull was being "extremely uncool," and opined that the arguments in Red Bull's opposition were "Red Bulls**t." The matter has led to something of a critical backlash against Red Bull, but it is still pending before the TTAB.

In re Puzzle Brewing Co., 2015 TTAB LEXIS 255 (Trademark Trial & App. Bd. July 27, 2015):

The Puzzle Brewing Company in California was refused registration of PUZZLE BREWING COMPANY for beer on the ground that a registered THE PUZZLE mark already existed (owned by Newton Vineyard). Based on third-party registrations and "representative internet evidence," the TTAB affirmed, holding that the marks were confusingly similar, the products were related, and the term "brewery" would not sufficiently distinguish the mark because there were many breweries selling "beer-wine hybrids."

In re Red Whale, LLC, 2015 TTAB LEXIS 339 (Trademark Trial & App. Bd. August 24, 2015):

The TTAB affirmed refusal of the RED WHALE mark for beer in light of two prior registrations. The prior WHALE mark for beer is owned by the Six Row Brewing Company in St. Louis, which sells WHALE ALE. The TTAB found that the addition of the term "RED," which often is used to describe a style of red ales, did not prevent the marks from giving the same overall commercial impression. The TTAB also found that the other prior mark, BLUE

WHALE VODKA (with Vodka disclaimed), was sufficiently similar to create a likelihood of confusion despite the use of a different color, because some manufacturers use colors to differentiate goods within a product line (e.g., Johnnie Walker Red, Black, Blue, etc.). The TTAB did not find persuasive the applicant's evidence that everyone and their mother is putting whales on beer and on everything else, because said evidence did not include registered marks with respect to similar goods.

In re Reubens Brews LLC, Serial No. 86066711 (Trademark Trial & App. Bd. Oct. 27, 2015):

Reuben's Brews of Seattle applied to register its REUBEN'S BREWS name and logo (with "BREWS" disclaimed), but the Trademark Examining Attorney refused registration on the ground that it confusingly resembled the RUBENS mark for wine, owned by a Spanish vineyard. The TTAB found that the goods were related (it remarked that it was aware of no case in which beer and wine were found not to be related), and that the two marks were identical in sound. However, the TTAB found that they had very different meanings. On the one hand, REUBEN was known as the biblical son of Jacob and also as a grilled corned beef sandwich. On the other hand, the most prominent meaning of RUBENS was the Flemish painter Peter Paul Rubens (in fact, the RUBENS mark was displayed on wine labels alongside Baroque-style paintings). Therefore, the TTAB saw the overall commercial impressions of the marks as different, and the refusal to register was reversed.

Teal Bay Alliances v. Southbound One, Inc., 2015 U.S. Dist. LEXIS 10940 (D. Md. 2015):

In 2010, Marcus Rogerson of Ocean City, Maryland made up some bumper stickers to give away that read "Shorebilly Surf'n Life." The term "shorebilly," the District of Maryland explained, is the "seashore context equivalent of hillbilly," and had already been in use by several businesses in the Ocean City area. When locals expressed a fondness for the bumper stickers, Rogerson started selling t-shirts with the same design and applied to register the SHOREBILLY mark. In 2011, Rogerson learned that the defendant was opening a "nano-brewery" on the Ocean City Boardwalk called "Shorebilly Brewery." After some letter writing, Rogerson filed suit for trademark infringement. Shorebilly Brewery voluntarily changed its name

to Backshore Brewing to avoid the hassle, but Rogerson wanted to maintain the hassle and persisted with his claims. The Court held that Rogerson's trademark registration was not enforceable because he had made "false statements" to the USPTO about his first use in commerce, and ordered Rogerson to pay Backshore Brewing over \$30K in attorneys' fees. Rogerson initially filed a notice of appeal but the matter subsequently settled.

Summit Brewing Company v. The Grand Lake Brewing Company, LLC, 1:15-cv-440 (D. Colo):

Minnesota's Summit Brewing brought suit against The Grand Lake Brewing Company of Colorado, alleging that its SUMMIT marks were infringed by Grand Lake's SUMMIT COLORADO PALE ALE product, which is brewed in part using Summit hops. The case settled rapidly, and Grand Lake now sells this product under the name "1881 Colorado Pale Ale."

3. HONORABLE MENTION – OTHER MINNESOTA CASES

UNRATED Beer – 612Brew:

The most popular beer sold by Minneapolis-based 612Brew was reportedly its "RATED R" Rye India Pale Ale, so the brewery applied to register the mark. The application was met with a cease and desist letter from the Motion Picture Association of America. 612Brew, not willing to make a federal case out of it, changed the beer's name to UNRATED.

Long Trail Brewing Company v. Bent Paddle Brewing Company, 1-14-cv-186 (D. Vt.):

On August 29, 2014, Long Trail Brewing Company (Vermont) filed suit against Bent Paddle Brewing Company (Minnesota) alleging, in part, trademark infringement and dilution of Long Trail's registered and common law rights in their "distinctive logo design depicting a silhouette of a person hiking while wearing a backpack and carrying a walking stick or hiking pole (the 'Hiker Logo')," and of their trade dress.

Bent Paddle immediately took steps to remove the "Hiker" logo from any more beer releases. As a way to punctuate the amicable ending, Bent Paddle made a donation to the Green

Mountain Club, care takers of the Long Trail hiking route, and Long Trail made a donation to the Superior Hiking Trail Association in Minnesota.