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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85108213
Applicant	Mother Earth Brewing, LLC
Applied for Mark	MOTHER EARTH BREWING
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: Mother Earth Brewing, LLC  
Serial No. 85108213  
For the Mark: MOTHER EARTH BREWING

Applicant: Mother Earth Brewing, LLC  
Application Serial No.: 85108213  
Filed: August 16, 2010

Classes/ Services: IC 035: Distributorships in the field of beverages, namely beer,  
brewed malt-based alcoholic beverages, distilled spirits and  
liquor, but not organic beer and not including beer comprised  
solely of organic components

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United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
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## II. Description of the Record

Applicant, Mother Earth Brewing, LLC (“Applicant”), hereby submits its brief in support of its appeal from the final refusal to register the mark MOTHER EARTH BREWING (“Mark”) in connection with “distributorships in the field of beverages, namely beer, brewed malt-based alcoholic beverages, distilled spirits and liquor, but not organic beer and not including beer comprised solely of organic components,” in International Class 35. The application for MOTHER EARTH BREWING, United States Trademark Application Serial Number 85/108,213 (the “Application”), was filed with the United States Patent and Trademark Office on August 16, 2010.

Upon reviewing the Application, in an Office Action dated December 1, 2010, the Examining Attorney initially refused registration of Applicant’s MOTHER EARTH BREWING under Trademark Act, Section 2(d), 15 U.S.C. § 1052(d), citing United States Trademark Registration No. 3,850,662 for the following composite mark covering “beer comprised solely of organic components,” in International Class 32:



(the “ME Tree and Waterfall Mark”).<sup>1</sup>

As Cancellation No. 92053044 was pending against the cited registration for the ME Tree and Waterfall Mark, the Application was suspended on January 22, 2011. Upon the conclusion of Cancellation No. 92053044, in a non-final office action dated September 2, 2012, the Examining Attorney maintained the refusal due to the registration for the ME Tree and Waterfall Mark. The Applicant timely responded on Monday, March 4, 2013 (the “2013 Response”), addressing the refusal due to the ME Tree and Waterfall Mark as well as other issues now resolved and not on appeal (see footnote 1). Also in the 2013 Response, the

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<sup>1</sup> In the first Office Action, the Examining Attorney also raised issues not on appeal, including the need for a disclaimer and a potential Section 2(d) issue with application serial No. 85042845 for MOTHER’S BREWING CO. In the 2013 Response, the disclaimer was agreed to, and the Section 2(d) issue with MOTHER’S BREWING CO. was traversed. With the 2013 Response, a Trademark Co-Existence Agreement between Applicant and the owner of the MOTHER’S BREWING CO. application

identification of goods was amended and clarified to the wording set forth above. A final refusal issued on March 26, 2013. Notice of Appeal was timely filed on September 26, 2013, and this brief is timely filed.

### **III. Statement of the Issues**

At issue is whether there is a likelihood of confusion between Applicant's MOTHER EARTH BREWING mark for "distributorships in the field of beverages, namely beer, brewed malt-based alcoholic beverages, distilled spirits and liquor, but not organic beer and not including beer comprised solely of organic components," and the composite mark in U.S. Registration 3850662, when the registered mark is dominated by and primarily a visual logo which is very different from applicant's mark, when the shared words are themselves weak and commonly seen in relevant third party registrations and commercial uses, when the registered mark is for a narrow, niche product distinct from the goods in the applicant's identification, and when the evidence shows that the relevant consumers are sophisticated.

### **IV. Recitation of Facts**

#### **A. The Applicant**

Applicant owns and operates a craft brewery and distributorship located in Kinston, North Carolina. *See* 2013 Response, Exs. 2-6. It bottles, kegs and cans beer for sale and distribution in hundreds of outlets such as grocery stores, restaurants and bars. *Id.* Exs. 3 & 4. Applicant is growing and its beers are currently available throughout North Carolina, in Georgia and in Washington, DC. *Id.* Exs. 4-6. Applicant has won several medals for its beers, including a gold medal and two silver medals at the 2011 United States Open Beer Championships, and gold, silver and bronze medals at the 2012 United States Open Beer Championships. *Id.* Exs. 2 & 7. Since the filing of the 2013 Response, and although not of record in the appeal, Applicant was also recognized in July 2013 as one of the top 10 craft breweries and won a gold, two silvers and a bronze medal at the 2013 United States Open Beer Championship.

Applicant sells and distributes over ten varieties of craft beer. *Id.* Ex. 3. Each particular variety of Applicant's alcoholic beverage has its own brand name, such as Weeping Willow Wit, Sisters of the Moon and

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was filed.

Second Wind, and each also bears the Mark. *Id.* Applicant’s Mark is an umbrella mark for its beers, operations and distributorship services.

**B. The Cited Registration and its Owner**

The owner of the cited ME Tree and Waterfall Mark is Mr. Daniel Love, who, according to the only evidence of record—his websites, his registration and news stories—sells a niche product in very limited channels and distribution. The cited registration is for a very particular image—perhaps in recognition of the abundance of other MOTHER EARTH registrations. The cited registration is for a very niche product: “beer comprised solely of organic components.” According to the registrant’s website, he sells his product during very limited hours on only certain days of the week at his Vista, California (near San Diego) tap room. *Id.* Exs. 8-10.<sup>2</sup>

**C. Other Active Registrations for MOTHER EARTH**

The term MOTHER EARTH is commonly used as a brand, and very often used for beverages and foods. In addition to the ME Tree and Waterfall Mark, there are many active registrations on the Principal Register for trademarks incorporating (or translating to) “MOTHER EARTH” and covering beverages and foods. At the time of the 2013 Response, there were six (6) such active registrations on the Principal Register for beverages, three (3) of which are for alcoholic beverages. In addition, there are another nine (9) active registrations for trademarks incorporating “MOTHER EARTH” for foods, plus over thirteen (13) more active registrations for trademarks incorporating “MOTHER EARTH” for other products. Those twenty-eight (28) registrations were attached as Exhibit 11 of the 2013 Response, and they are summarized by the following tables:

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<sup>2</sup> As background, Applicant incorporated under its MOTHER EARTH BREWING corporate name on October 21, 2008 and began using it as a mark with its products at least by October 31, 2009—over four (4) years ago. Although those dates are after the filing of Mr. Love’s application, they are long before Mr. Love’s claimed first date of use of the ME Waterfall and Tree Logo with his beer comprised solely of organic components.

In addition, Mr. Love’s original application was for a logo which had the words “100% organic,” had a banner at the top, and various other agricultural products and differences. Mr. Love was permitted to amend his mark to his current version (without the banner and 100% organic wording) long after the Applicant had adopted its mark.

<b>Reg. No.</b>	<b>Trademark</b>	<b>Goods</b>	<b>Owner</b>
<b><i>Beverages</i></b>			
2954808	MOTHER EARTH MINERALS	mineral water (class 32)	A. True Ott
4203078	BOTTLED WITH MOTHER EARTH IN MIND	bottled water (class 32)	Waiakea Investments, LLC
3593000	GAIA (registration says it translates to Mother Earth)	alcoholic beverages, namely, sotol	Rey David Destileria Sa De CV
3342899	MADRE TIERRA (registration says it translates to Mother Earth)	wine, namely red wine and white wine	Southern Most Estancias, S.A.
2958978	MATER TERRAMATER (registration says it translates to "MOTHER MOTHER EARTH")	wines	Terramater S.A.
4149259	TIERRA MADRE (registration says it translates to Mother Earth)	herb teas for medicinal purposes; herbal supplements; natural herbal supplements	Guillermo Alexander Salazar

<b>Reg. No.</b>	<b>Trademark</b>	<b>Goods</b>	<b>Owner</b>
<b><i>Food Products</i></b>			
2956409	MOTHER EARTH'S BAKED GOODS (circular design)	multiple types of baked goods	Staci Gallardo
3157701	MOTHER EARTH	ice cream	Carvel Corporation
3296267	MOTHER EARTH COFFEE	roasted coffee beans	Paris Brothers, Inc.
3997949	MOTHER EARTH	fresh produce, namely mushrooms	C.P. Yeatman & Sons, Inc.
3997548	MOTHER EARTH	processed produce, namely processed mushrooms	C.P. Yeatman & Sons, Inc.
0708474	MOTHER EARTH	canned mushrooms	C.P. Yeatman & Sons, Inc.
3023585	DAICHI (registration says it translates to MOTHER EARTH)	rice	The Sun Valley Rice Company, LLC
3676512	GAIA (registration says it translates to MOTHER EARTH)	chocolate	Bridge Brands
3500494	TERRAMATER (registration says it translates to Mother Earth)	olive oil	Terramater S.A.
<b><i>Other Products</i></b>			
3272691	MOTHEREARTH (stylized)	computer software and related services	Fugro N.V.
3252545	MOTHER EARTH (circular design)	organic potting soil	IP Holdings, LLC
3254164	MOTHER EARTH	organic potting soil	IP Holdings, LLC
3438236	MOTHEREARTHGEAR	various clothing	Woo Hoo, Inc.

3908550	MOTHER EARTH NEWS	various on-line journals	Ogden Publications, Inc.
3793559	LOVE MOTHER EARTH	various paper products	Marian Health Greeting Cards, LLC
3673385	MOTHER EARTH	insecticides	Whitmire Micro-Gen Research Laboratories, Inc.
3094803	MOTHER EARTH PILLOWS	pillows	Mother Earth Designs, Inc.
2407595	MOTHER EARTH	jewelry	Joseph L. Principato and Avion L. Moolchan-Principato
2632015	MOTHER EARTH DOLL	dolls	Jeanne M. Follett
4031276	MOTHER EARTH PADDLE SURF (logo)	paddle surfboards	Charles C. Petti
4200642	FOTO DE CHAVA (registration says it translates to Photo of Mother Earth)	photography	David Scott Larsen
4248654	SEDONA MAGO RETREAT (registration says Mago translates to Mother Earth)	education and religious services	Tao Fellowship

*Id.* Ex. 11. Evidence of the actual use in the marketplace of many of the registered marks was provided in Exhibit 12 to the 2013 Response.

Since the 2013 Response was filed on March 4, 2013, even more MOTHER EARTH marks have been registered, including another one for a beverage. Some of those additional registrations<sup>3</sup> are:

4334063	MOTHER EARTH	Herbal teas for medicinal purposes	Guillermo Alexander Salazar
4308661	MOTHER EARTH PRODUCE FROM LOCAL FARMS TO YOUR FRONT DOOR	Delivery of goods; distribution services, namely delivery of groceries	Mother Earth Produce, LLC
4368014	MAGO (registration says Mago translates to Mother Earth)	Dietary and nutritional supplements containing acai; herbal teas for medicinal purposes	BR Consulting, Inc.
4388193	Composite logo of MOTHER EARTH, where the T is a white plant sprout (mark listed on TESS as MOTHER EARH, and the mark description clarifies it is MOTHER EARTH)	Expanded-clay for hydroponic plant growing; growing media for plants; potting soil	IP Holdings, LLC

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<sup>3</sup> The Applicant cites these more recent registrations as confirmation and illustration of the point which should be deemed sufficiently made by the evidence previously submitted.

Therefore, including the Registrant, there is evidence in the record of at least twenty-six (26) (two of which are ‘recent’ and not in the official record for the appeal) different owners of MOTHER EARTH registrations.

**D. Organic Beer Contrasted With Non-Organic Beer**

The product identified in the cited registration owned by Mr. Love is a narrow, niche product: “beer comprised solely of organic components.” This product is commonly known as organic beer. (Indeed, when Mr. Love originally applied for the ME Tree and Waterfall Mark, his then-current variant of his image included a banner stating “100% organic” and his mark was called “ME MOTHER EARTH BREW CO. 100% ORGANIC.” *See* Cancellation No. 92053044 Order dated August 22, 2011 at 1-2; *see also* file history for Reg. 3,850,662.)

Organic beer is distinct from ‘ordinary’ beer, much as sour cream is distinct from cream and pizza pies are distinct from pies. Organic beer is made of different ingredients. Organic beer is made using different production methods. Organic beer is labeled differently. Organic beer is regulated by different government entities and regulatory systems. And, organic beer is seen as being different by consumers and is bought by a different group of consumers.

According to federal law, organic beer must be comprised of different ingredients and made through different methods than traditional beer. The Organic Foods Production Act, enacted under Title 21 of the 1990 Farm Bill, served to establish uniform standards for the production and handling of foods labeled as “organic.” It authorized the establishment by the United States Department of Agriculture (“USDA”) of a National Organic Program (“NOP”) to set national standards for the production, handling and processing of organic products as well as the labeling of “organic” products.

Section 6504 of Title 7 of the United States Code specifically provides that certain requirements must be met before products are “sold or labeled as an organically produced agricultural product.” 7 U.S.C. §

6504.<sup>4</sup> In order to use the phrase “organic” on a beverage, the drinks must be produced and processed in accordance with NOP standards. 7 C.F.R. § 205.102. Consequently, at least since 1993, “no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this title.” 7 U.S.C. § 6505(a)(1)(B). In other words, an “organic beer” must genuinely be made of organic products, produced in accordance with the NOP standards and handled in accordance with NOP requirements. In contrast, traditional beer is not subject to these regulations.

Not only are the ingredients, manufacture and labeling of the products different, but even the government bodies which regulate the two types of products are different. The labeling of traditional malt beverages such as beers, as well as distilled spirits, and wines is regulated by the Alcohol and Tobacco Tax and Trade Bureau (“TTB”), pursuant to the Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.*, the Internal Revenue Code of 1986, the Alcohol Beverage Labeling Act of 1988, 27 U.S.C. § 213 *et seq.* See 2013 Response Ex. 13 at 2-4. However, according to a Memorandum of Understanding between the Food and Drug Administration (“FDA”) and TTB, when the beer is “organic,” then FDA and NOP regulations apply and the American Marketing Service (“AMS”) of the USDA also has authority to regulate and enforce the regulations. *Id.* Ex. 13 at 5. Namely, when a product is labeled as “organic,” it is mandatory that the product have gone through a certification process, there must be proof of ACA (USDA Accredited Certifying Agent) preview, and a certification statement must be presented. *Id.* Ex. 14 at 6 (TTB’s ALFD Guidance for Organic Labeling Applicants). Similarly, if the producer asserts that the beer is “made with organic ingredients” then it must contain at least 70% organic ingredients, have gone through a certification process, there must be proof of ACA preview, and the beer must have both a certification statement and a sulfite statement. *Id.* Ex. 14 at 7.

These government required statements and other regulations assist the consumer to recognize the difference between organic and non-organic beers, although consumers would likely differentiate the two already. Indeed, the practice in the marketplace is to reinforce for consumers the distinction between

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<sup>4</sup> Agricultural products include food intended for human consumption, such as Mr. Love’s organic

traditional and organic beers. Organic beers prominently display their organic claim and/or the distinctive USDA seal recognizing that the beer is organic. *Id.* Exs. 15-20 (images of organic beer labels and website).

The only evidence in the record is that the public recognizes that organic beers are a niche product with specialized buyers who pay extra for the fact that the product is an organic beer. As put by an Anheuser-Busch vice-president quoted in an article, “while the organic category is certainly an emerging market, it is still very niche.” *Id.* Ex. 21 at 3. The article continues, stating “[p]eople who are making that choice [for organic beer] are definitely not your average consumer. [They are] picky, well-informed, deliberately different, curious, and willing to pay more for perceived quality.” *Id.* Ex. 21 at 3. Another article from 2009 echoes that sentiment: “organic beer still maintains a niche market of select drinkers willing to pay a little extra for unique taste, quality, and sustainable manufacturing.” *Id.* Ex. 22. Other articles and persons in the industry routinely call the organic beer segment a niche. *See id.* Ex. 23. This niche is also quite small in comparison to the beverage market or even traditional beer. *Id.* Ex. 24 (“organic beer still makes up only a fraction of the craft beer market”).

## **V. Argument**

Applicant’s and the registrant’s marks are very different in appearance and connotation. The shared term “MOTHER EARTH” is weak and diluted in the beverage and food industries, affording only a narrow scope of protection to existing registrations that incorporate “MOTHER EARTH.” *BAF Industries v. Pro-Specialties, Inc.*, 206 U.S.P.Q. 166, 175 (TTAB 1980). The goods for the cited registration are a narrow, niche product different from the applied-for mark’s services. Moreover, Applicant’s and Registrant’s customers are discriminating purchasers that carefully select the products and services that are provided by Applicant and Registrant so as to prevent any likelihood of confusion between the respective marks. *See Woodfin Suite Hotels, LLC v. The Marcus Corp.*, 2002 WL 925898 (TTAB 2002). For these reasons, confusion is unlikely and Applicant is entitled to registration.

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beer.

#### **A. The Likelihood of Confusion Standard**

On March 28, 2012, the TTAB again ratified the use of the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), when considering whether there is a likelihood of confusion under Section 2(d). See *In re Strategic Partners, Inc.*, 102 U.S.P.Q.2d 1397 (TTAB 2012) (precedential, reversing a 2(d) refusal concerning logo of ANYWEAR and registration of a logo for ANYWEAR, both for types of clothing). When conducting its likelihood of confusion analysis, the TTAB must consider all *du Pont* factors for which there is evidence in the record. *Han Beauty Inc. v. Alberto-Culver Co.*, 57 U.S.P.Q.2d 1557 (Fed. Cir. 2001). As discussed in greater detail below, in this case, the *du Pont* factors to be considered are: (1) the dissimilarities of the marks in their entirety; (2) the number and nature of similar marks in use with similar goods and services, *i.e.* the commercial “strength” of a mark; (3) the dissimilarities of the goods and services, (4) the sophistication of consumers, and (5) the conditions under which sales are made. See *du Pont*, 476 F.2d at 1361. Each case must be decided on its own facts and any one *du Pont* factor may be dispositive in a confusion inquiry. *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 47 U.S.P.Q.2d 1459 (Fed. Cir. 1998).

#### **B. Dissimilarities of the Marks in their Entireties**

It is well settled that marks should be viewed in their entirety and that it is improper to dissect a mark. *In re Shell Oil Co.*, 26 U.S.P.Q.2d 1687, 1688 (Fed. Cir. 1993). The marks at issue must be, under *du Pont*, compared in their entirety as to appearance, sound, connotation and commercial impression. See *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005); *du Pont*, 177 U.S.P.Q. at 567. The Board has noted that no element of a mark is ignored simply because it is less dominant or would not have trademark significance if used alone. *Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 U.S.P.Q.2d 1390 (TTAB 1991). As re-stated by the TTAB in a March 14, 2012 non-precedential decision reversing a Section 2(d) refusal, “[w]hile ‘the similarity of the marks in regard to one of [the] factors can be critical to a finding of similarity . . . the law does not counsel that similarity in one factor alone automatically results in a finding that the marks are similar.’ *Coach Services Inc. v.*

*Triumph Learning LLC*, 96 U.S.P.Q.2d 1600, 1609 (TTAB 2010), *aff'd in part, vacated in part and remanded on other grounds*, 668 F.3d 1356, 101 U.S.P.Q.2d (BNA) 1713 (Fed. Cir. 2012).” *In re Dayton Power & Light Co.*, Serial Nos. 77445394 & 77445395, 2012 TTAB LEXIS 110, at \*10-11 (TTAB Mar. 14, 2012).



The registrant chose to register this composite mark , rather than mere words. His mark is dominated by the letters M and E as well as Irish, Celtic or natural/earthy references. It features a “Tree of Life,” waterfalls, Irish crosses, a Celtic band and a Celtic font. Collectively, the ME Tree and Waterfall Logo evokes the natural earth with a Celtic twist. As the registrant chose what mark to register and since he chose NOT to apply for the mere words, the design elements should not be ignored.

In contrast, the applied for mark is MOTHER EARTH BREWING.

Here, first, the difference that the registered mark is a composite mark whereas the applied-for mark is a word-only mark is important. This is a factor favoring a finding of no likelihood of confusion. *See Omaha Nat'l Bank v. Citibank, N.A.*, 633 F. Supp. 231, 234 (D. Neb. 1986) (finding no likelihood of confusion between plaintiff’s composite mark of Bank-in-a-Billfold with a design and defendant’s word mark Bank In A Wallet, and writing “Defendant’s designations are mere words while plaintiff’s composite mark is a combination of words and design.”). Of course, even if, as some court and TTAB decisions indicate, the words in a composite mark are sometimes given greater weight than the design elements, the particular words here are sufficiently different in appearance, sound and meaning, as described above.

Second, the marks are different. This applied-for Mark is MOTHER EARTH BREWING. It connotes the act of brewing by Mother Earth as a personality or personified brewer.

In contrast, the ME Tree and Waterfall Logo is a design. It is dominated by the letters M and E as well as Irish, Celtic or natural/earthy references. As noted, it features a “Tree of Life,” waterfalls, Irish crosses, a Celtic band and a Celtic font. Collectively, the ME Tree and Waterfall Logo evokes the natural earth with a

Celtic twist. Its connotation is far different from the Mark's connotation. It has no imagery of a face, a person or a personality. Its words ME MOTHER EARTH BREW CO., which are distinct from the applied-for Mark, neither suggest the act of brewing nor a personality.

In both Mr. Love's application and the Cancellation proceeding later brought against it, Mr. Love and the Board identified specific imagery and elements of the registered mark which were important as his logo evolved from one version to another: a concentric circular design, a tree representing the tree of life, a particular font and location of the words, the words 'Mother Earth Brew Co.,' two Irish cross symbols, an inner circle containing a narrow band with a Celtic design, and waterfalls cascading over the letters 'M' and 'E.' Almost all of the noted elements are simply not present in the applied-for Mark, as the only features shared are the words Mother Earth. Consequently, when the marks are considered in their entireties, the Mark presents a very different commercial impression with a different meaning.

Third, although each mark includes the words "Mother Earth," that similarity should not be afforded significant weight because, as explained below, the term is both conceptually and commercially weak. It is descriptive, diluted and common. It appears in a host of trademarks owned by over two dozen different owners for beverages, alcoholic beverages, other beverages, foods and other products.

Thusly, the difference between the M E \_\_\_ BREW CO. and \_\_\_ BREWING takes on even more significance. These additional words suggest different meanings and different sources in the crowded field of MOTHER EARTH marks.

In addition, the marks at issue are unlikely to be spoken by someone in a taproom or other location because the marks in question are both umbrella, or company, marks. For example, if someone was in Mr. Love's Tap Room, he would not be likely to say "Bartender, pour me a ME Mother Earth Brew Co." (or even "Mother Earth"). Indeed, unlike a Budweiser or a Coors Light, the phrase "Mother Earth Brew Co." could refer to any of Mr. Love's several brands of organic beer, which are named (according to his website): 24 Carat, Auld Knucker, Rysing Tide, Barely Legal Blonde, Big Mother, Cali' Creamin', and other names. 2013 Response, Ex. 25. Similarly, Applicant's beers have names such as Sisters of the Moon, Endless River,

Weeping Willow Wit, Second Wind and more. *Id.* Ex. 3. So, as a practical matter, any perceived auditory similarity in the marks should not be considered significant as the marks at issue are much more likely to be seen rather than said. Indeed, there is no evidence in the record that the marks are more likely to be said rather than seen.

It also must be noted that the registered mark is a logo, making it even harder to be ‘said.’ Treating the registered mark as words rather than a logo would give the registration undue and different protection than what actually has been granted through the registration.

And, even if the marks “MOTHER EARTH BREWING” and “ME MOTHER EARTH BREW CO.” were spoken, they sound different. *See, e.g., Dayton Power*, 2012 TTAB LEXIS 110, at \*11 (TTAB Mar. 14, 2012) (composite marks for GREEN CONNECT and GC GREEN CONNECTED “possess key differences in sound and appearance”).

Overall, therefore, the dissimilarities between the marks at issue, when considered in their entireties, favor a determination that there is no likelihood of confusion.

### **C. Weakness of the Cited Mark and of MOTHER EARTH**

The category of distinctiveness into which the marks fall is a factor in the likelihood of confusion analysis. In a 2012 precedential decision, this Board has found that even when services are largely identical, when shared words are common, descriptive or highly suggestive—as demonstrated by prior third party registrations and/or commercial uses—then the shared portion of the mark should be deemed weak and also the “addition of other matter . . . may be enough to distinguish it from another mark.” *In re Hartz Hotel Serv., Inc.*, Serial No. 76692673, 2012 TTAB LEXIS 75, at \*11-12, 102 U.S.P.Q.2d 1150 (TTAB Mar. 19, 2012). In *Hartz*, an examiner objected to an application for GRAND HOTELS NYC for hotel services due to a prior registration for GRAND HOTEL for hotel services. This Board reversed that refusal noting five (5) prior registrations by unrelated entities incorporating Grand (or Grande) Hotels for “hotel services” as well as other evidence that Grand Hotel was used in the marketplace for hotels. *Id.* at \*15-16. This Board found that the addition of NYC was “sufficient to render applicant’s mark distinguishable from the mark in the cited

registration.” *Id.* at \*15. This Board quoted a prior decision, stating:

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights.

*Id.* at \*12 (quoting *Sure-Fit Prod. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 U.S.P.Q. 295, 297 (CCPA 1958)).

Likewise, in the recent non-precedential case of *In re Wine B&B*, 2013 TTAB LEXIS 58 (TTAB Feb. 6, 2013), the Board considered an application for SECRET WINE SHOP and found that third party registrations demonstrated that the addition of various terms to SECRET was understood by the Trademark Office to sufficiently differentiate marks from each other. There, the third party registrations included not only variants with the term SECRET (such as SECRET ACRE AND SECRET OF PINK), but also foreign variants such as VALLE SECRETO VINEYARDS WINERY, TIERRA SECRETS, SECRET DE GRAND BATEAU, and SECRETO PATAGONICO.

Similarly here, the term MOTHER EARTH should be deemed weak and the scope of protection afforded to the cited registration should be deemed so narrow that the Application should be allowed. The shared words MOTHER EARTH are both conceptually and commercially weak, as seen by evidence in the record from a dictionary, prior registrations on the Trademark Registry, and evidence of commercial use.

Webster’s Third New International Dictionary lists “Mother Earth” and defines it as “1: the mother of everything animate or inanimate upon the earth 2: soil, ground.” *See* 2013 Response Ex. 26. Thus, in the context of Mr. Love’s registration for beer comprised solely of organic components, the term is descriptive and thus weak. It describes the fact that the beer is solely comprised of components which are organic, which is to say that they are from the earth as opposed to being man-made.

The mark is diluted and weak as seen by third party registrations and commercial use. The Principal Register shows that MOTHER EARTH (including translations) appears in six (6) registrations for beverages (plus a seventh more recent registration), three (3) of which are alcoholic beverages, plus nine (9) prior

registrations for foods and more for other products. These registrations belong to over two dozen different owners, demonstrating the Office’s prior determination that the differences in particular marks and products are sufficient for the marks to co-exist without likely confusion. In addition, evidence of actual use in the marketplace of many of these third-party registered marks was provided in Exhibit 12 of the 2013 Response.

As the commercial weakness or dilution of a particular mark is determined in the context of the number and nature of similar marks on the register and in actual use, MOTHER EARTH must be seen as a very weak mark. This commercial weakness is, of course, on top of the conceptual weakness described above.

Accordingly, the scope of protection afforded to the words within the registered composite mark and the composite mark itself should therefore been seen as very narrow and tied closely both to the exact composite logo depicted and the niche product identified (“beer comprised solely of organic components”). Put another way, the registrant chose to register a particular design in connection with the niche product, and in light of the abundance of other uses of the words, his registration is accordingly narrowly fitted to that design and niche product. This weakness and narrowness of the ME Tree and Waterfall Mark thus favors a determination of no likelihood of confusion, especially when the applied for mark is neither for the same niche product nor for a design which uses the isolated letters M E, the tree, the waterfall, or even “Brew Co.”

A related issue raised by the examining attorney in the office actions bears consideration. Namely, the examining attorney previously raised the issue of whether the word portion—MOTHER EARTH BREW CO.—of the registered composite mark should be accorded greater weight than the design elements when determining whether the Mark is confusingly similar to it. In light of the weak, diluted and descriptive natures of MOTHER EARTH and BREW CO., there is no reason in this situation to afford the words undue weight rather than considering the composite mark in its entirety.

Indeed, the Federal Circuit has written that “[t]here is no general rule as to whether letters or design will dominate in composite marks. . . . No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs., Inc.*, 913 F.2d 930 (Fed. Cir. 1990), corrected, 929 F.2d 645 (Fed. Cir. 1990). McCarthy on Trademarks and Unfair Competition states that

a “literary” presumption that words have more impact than designs is a “dubious generalization” and “merely a guideline.” *McCarthy on Trademarks and Unfair Competition* § 23:47, at 23-234. And, courts are required to compare the marks consisting of both words and pictorial symbols “in their entireties.” *See, e.g. Columbia Steel Tank Co. v. Union Tank & Supply Co.*, 277 F.2d 192 (C.C.P.A. 1960); *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084 (10th Cir. 1999).

This Board too has demonstrated these principles. Recent cases such as *In re Hartz* (GRAND HOTEL, reversal of Section 2(d) refusal) and *Dayton Power* (GREEN CONNECT, reversal of Section 2(d) refusal) demonstrate that when the shared words are weak, diluted (e.g. common), or descriptive, then the design elements or other words in the marks become the key factors demonstrating a lack of confusing similarity between composite marks. As another example, in *In re Broadway Chicken, Inc.*, 38 U.S.P.Q.2d 1559 (TTAB 1996), this Board reversed a Section 2(d) refusal for BROADWAY CHICKEN despite a registration for BROADWAY PIZZA (with PIZZA disclaimed) due to multiplicity of Broadway brands. *See also In re Ameristar Fence Prod., Inc.*, Serial Nos. 77955361 & 77955366, 2012 TTAB LEXIS 128 (TTAB Mar. 19, 2012) (non-precedential) (TTAB finding that “440” was the weaker portion of the mark due to its meaning in the industry and thus that “440” was dissimilar to “440-XH,” for distinct but arguably related types of metal goods); *In re Dougherty Enter., Inc.*, Serial No. 77127337, 2009 TTAB LEXIS 24 (TTAB Jan. 8, 2009) (non-precedential) (finding “Precious” common and weak and reversing a Section 2(d) refusal of PRECIOUS PORTRAITS despite a registration of PRECIOUS PRINTS, both for jewelry).

Similarly, in the *King of the Mountain* case, the plaintiff held multiple registrations for logos of King of the Mountain. Chrysler then used the phrase in its own display (shown below).



Plaintiff's first mark.



Plaintiff's second mark.



Defendants' primary logo. The court found that "even assuming the phrase 'king of the mountain' constitutes the dominant portion of the defendants' logo," the marks as a whole were not confusingly similar due to the design differences. *King of the Mountain Sports*, 185 F.3d at 1090.

Similarly, the following two designs were found to be dissimilar despite both sharing the lettering K+ and both being for a dietary potassium supplement:



and



. See *In re Electrolyte Laboratories, Inc.*, 929 F.2d 645 (Fed. Cir. 1990).

And, a similar result was reached about the following logos for CO-OP:



. See *Ass'n of Co-op Members, Inc. v. Farmland Indus., Inc.*, 684 F.2d

1134 (5th Cir. 1982), *cert. denied*, 460 U.S. 1038 (1983).

Thus, when the shared word element is a descriptive or highly suggestive term such as Co-op or K (for potassium), or simply a common and diluted phrase, such as "King of the Mountain," "Grand Hotel," "Secret," "Green" and "Connect," the presence of other words in place of the absent logo sufficiently differentiates the marks.

Here with respect to MOTHER EARTH, the dictionary, the Registry and commercial uses show that the term should be understood to be descriptive, common, diluted and weak in the context of the cited registration. MOTHER EARTH appears often in registrations for beverages, for foods and for other products.

Accordingly, the scope of protection (if any) afforded to Mr. Love's registration should be very narrow and weak, as reflected by the block quotation cited above from *Sure-Fit* and *In re Hartz*. The literary elements

of the cited registration (MOTHER EARTH and BREW) are among its weakest parts and its dominant feature is its imagery. Thus, the wording difference in the applied-for mark ensures that confusion is unlikely.

#### **D. Dissimilarities of Goods and Services**

The ME Tree and Waterfall Mark is for a niche product—beer comprised solely of organic components (*i.e.* organic beer). It has a different composition from traditional beer. It must be manufactured and handled differently. It is regulated by the National Organic Program which does not apply to traditional beer. Indeed, it is subject to regulation by a different governmental agency than traditional beer. Plus, its labeling is subject to different requirements. *See* § IV.D above.

Consistent with these different regulatory frameworks, organic beer is labeled differently and treated differently in the marketplace. 2013 Response Exs. 15-20. As seen by the public, “organic beer still maintains a niche market of select drinkers willing to pay a little extra for unique taste, quality, and sustainable manufacturing.” *Id.* Ex. 22.

In contrast, Applicant’s application identifies services and those services specifically exclude both organic beers and beers comprised solely of organic components. This avoids any likelihood of confusion.

Case law further demonstrates that confusion is less likely—even for two nearly identical marks—if each set of goods/services is regulated by different regulatory frameworks. *See MB Fin. Bank, N.A. v. MB Real Estate Serv., L.L.C.*, 2003 WL 21462501 (N.D. Ill. 2003) (finding no likelihood of confusion between two MB marks when each service was subject to its own set of regulatory requirements). As described above, the manufacture, handling and labeling of the registrant’s organic beer is regulated by a government agency with regulations which are not applicable to the traditional beer sold by Applicant. These rules impact how the consumer sees the goods and serves to avoid confusion.

### **E. Sophistication of Consumers**

The only evidence in the record is that the relevant consumers of Applicant's craft beer and Mr. Love's organic beer are careful, sophisticated purchasers. *See* 2013 Response Exs. 17-20. Today the organic beer and craft beer industries are flourishing. Consumers are well-versed in the styles of beer being offered and are knowledgeable about the sources (i.e. the brewers) of the beers they select.

Beers such as those offered by Mr. Love are neither inexpensive nor likely to be purchased on impulse. The only evidence in the record shows that organic beer buyers are "select drinkers willing to pay a little extra for unique taste, quality, and sustainable manufacturing." *Id.* Ex. 22. They are "picky, well-informed, [and] deliberately different." *Id.* Ex. 21 at 3. They are "definitely not your average consumer." *Id.*

Craft beer and organic beer are premium and specialized products. Prices are at least 50% higher than non-craft beer such as Budweiser beer. *Id.* Ex. 27. Purchasers are likely to be in the market for "an upscale item for consumption and to have a reasonably focused need." *G.H. Mumm & Cie v. Desnoes & Geddes, Ltd.*, 917 F.2d 1292, 1295 (Fed. Cir. 1990) (focused need for premium champagne demonstrates that consumer exercises a higher degree of care in making purchasing decisions and weighs against a holding of likelihood of confusion). *Cf. Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.").

This factor, sophistication of the consumers, and the related point that the products are in different economic markets due to product and price differences, therefore favor a determination of no likely confusion.

### **F. Other Conditions of Sale**

As reiterated by the TTAB in the precedential decision finding stylized versions of ANYWEAR for specific types of clothing not likely to be confused, other relevant factors in the marketplace can decisively result in a finding of no likelihood of confusion. *See In re Strategic Partners, Inc.*, 102 U.S.P.Q.2d 1397 (TTAB 2012) (reversing Section 2(d) refusal). Here, there are three additional conditions of sale which favor finding no likelihood of confusion.

First, as noted above, both the registered mark and the applied-for mark are umbrella or company name marks as opposed to particular brands of organic beer or of regular beer. Thus, every buyer of the product will see both the respective mark at issue and the particular brand of beer or organic beer. This combination of marks helps to ensure that there is no confusion. Indeed, when verbally ordering the product, the consumer is more likely to say the particular product brand rather than the respective company brand in dispute.

Second, along similar lines, in order to purchase Mr. Love's specialized organic product, one must visit a specific location, which itself is emblazoned with a sign. The fact that one is intentionally venturing to a specific place and is likely to see a sign with the registrant's brand or name on it further minimizes the chances that one will confuse the registrant's logo with Applicant's logo (or vice versa).

Further, Mr. Love's websites indicate that he sells his branded product in very limited ways in the Vista/San Diego, California area. 2013 Response Exs. 8-10. He describes his operations and "services" with the words "takes reservations, walk-ins welcome, good for groups." *Id.* As a self-professed "microbrewery" selling "handcrafted beer and homebrew supplies," *id.*, the marketplace in which he operates consists of a very "local" operation in which walk-in customers order small quantities of beer directly from Mr. Love (or his business), or perhaps other tap rooms. His website says that he has "limited production" and even suggests that before "you head over to your local watering hole, give 'em a jingle"—because they may not have his product available. *Id.* Ex. 9 at 3. These conditions of sale are consistent with the nature of the product sold—namely, the niche of beer comprised solely of organic components.

Mr. Love does not appear to sell through any third party retail stores, such as grocery stores, convenience stores or ABC stores. Rather, the record shows that he operates a single site location in which a person with specialized knowledge and desires for organic beer visits the registrant's premises (or perhaps a special temporary site) and purchases the organic beer directly from the registrant, much like one might at a local, small, single-site bar. *Id.* Exs. 8-10. Consumers not only would expect to find the registrant's niche product (organic beer) in a small establishment sold in small quantities, but that is what is apparently occurring.

In contrast, Applicant produces at least 10 times as much product, and primarily distributes product through hundreds of third party retailers such as grocery stores, convenience stores, bars, restaurants, and beverage vendors. *Id. Ex. 4*. This distinction is yet another factor demonstrating that confusion is unlikely.

Third, Mr. Love has alleged use of the ME Tree and Waterfall Logo since April 28, 2010 with his identified goods. By comparison, Applicant has been using its mark with its respective goods since an earlier time, October 31, 2009. Applicant is not aware of any evidence of actual confusion during all of this time, although, candidly the parties are not in the same location. *See generally Strategic Partners*, 102 U.S.P.Q.2d 1397.

## **VI. Summary**

To summarize, in view of the facts that the marks are different, that MOTHER EARTH is so conceptually and commercially weak and diluted that the addition of other terms or imagery differentiates the marks, that other MOTHER EARTH marks for alcoholic beverages, non-alcoholic beverages and foods currently co-exist on the Principal Register and in the marketplace, that the respective goods and services are different and regulated by separate regulatory frameworks, that the record shows discriminating consumers, and other conditions of sale, there is no likelihood of confusion between the marks.

For the foregoing reasons, Applicant respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney's Trademark Act section 2(d) refusal and approve Applicant's application for publication.

Respectfully submitted, this is the 25<sup>th</sup> day of November, 2013.

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CERTIFICATE OF FILING

I hereby certify that a copy of the foregoing document is being filed with the United States Patent and Trademark Office via the Trademark Trial and Appeal Board's Electronic System for Trademark Trials and Appeals [ESTTA] on-line filing process.

This is the 25<sup>th</sup> day of November, 2013.

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