

ESTTA Tracking number: **ESTTA537948**

Filing date: **05/15/2013**

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

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	40401 Corporation d/b/a Erie Brewing Company		
Entity	Corporation	Citizenship	Pennsylvania
Address	1213 Veshecco Drive Erie, PA 16501 UNITED STATES		

Attorney information	Robert M. Bauer 120 West Tenth Street Erie, PA 16501 UNITED STATES trademarks@kmgslaw.com Phone:814-459-2800		
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### Applicant Information

Application No	85804771	Publication date	05/14/2013
Opposition Filing Date	05/15/2013	Opposition Period Ends	06/13/2013
Applicant	Derailed Brewing LLC 2609 W. Cortland Chicago, IL 60647 UNITED STATES		

### Goods/Services Affected by Opposition

Class 032. All goods and services in the class are opposed, namely: Beer
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### Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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### Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	85806548	Application Date	12/19/2012
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	DERAILED		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 032. First use: First Use: 2009/05/20 First Use In Commerce: 2009/05/20 Beer		

Attachments	intA639.PDF(132437 bytes )
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## Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Robert M Bauer/
Name	Robert M. Bauer
Date	05/15/2013

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

In Re Trademark Application	)	
Serial No.	)	85804771
	)	
Filed:	)	December 17, 2012
	)	
Published in the Official Gazette of May 14, 2013	)	
	)	
Mark:	)	DERAILED BREWING
	)	
Class:	)	Int. 32
	)	
40401 CORPORATION,	)	
Opposer,	)	Opposition No. _____
	)	
v.	)	
	)	
DERAILED BREWING, LLC,	)	
Applicant.	)	

**NOTICE OF OPPOSITION**

40401 Corporation d/b/a Erie Brewing Company of Erie, PA (“Erie Brewing”), believing that it has prior trademark rights as reflected in its application for the mark “DERAILED” for beer and that it will be damaged by registration of the mark “DERAILED BREWING” for beer by Derailed Brewing, LLC of Chicago, Illinois (“Derailed Brewing”), in Trademark Application Serial No. 85804771, hereby opposes the application.

The grounds for opposition against said application are as follows:

1. Derailed Brewing filed an intent-to-use trademark application under Section 1(b) of the Lanham Act with the U.S. Patent and Trademark Office for “DERAILED BREWING”, assigned Serial No. 85804771 in Class 032 for “Beer” and is the owner of the trademark application.
2. Derailed Brewing’s trademark application disclaims the exclusive right to use “brewing” apart from the mark.
3. Derailed Brewing’s trademark application was published for opposition on May 14, 2013.

4. Erie Brewing filed a trademark application under Section 1(a) of the Lanham Act with the U.S. Patent and Trademark Office for “DERAILED” based on actual use, assigned Serial No. 85806548 in Class 032 for “Beer” and is the current owner of the trademark application and the trademark rights for its DERAILED beer.

5. Erie Brewing’s application is based on actual use in interstate commerce, dating back to at least May 20, 2009, which is prior to the filing date of Derailed Brewing’s application. Thus, Erie Brewing is the senior user of the trademark. Erie Brewing’s application has not yet been published for opposition.

6. Erie Brewing heavily relies on the DERAILED mark in its sales and marketing efforts, and has built up a significant amount of goodwill and popularity for the beer, especially in the craft beer community. Erie Brewing’s DERAILED beer was awarded the Bronze Medal in the 2011 Great American Beer Festival.

7. There is a likelihood of confusion between Erie Brewing’s DERAILED beer and Derailed Brewing’s mark for “DERAILED BREWING”, given the similarities of the marks, the identical Class, the identical goods, and the strength of Erie Brewing’s pre-existing trademark rights in the DERAILED mark. If registration were permitted, consumers are likely to be confused or misled as to the source of Erie’s Brewing’s DERAILED beer or its relationship to Derailed Brewing

8. The mark proposed for registration by Derailed Brewing, with the disclaimer, is identical to Erie Brewing’s beer and trademark. The identical nature of the marks therefore creates a likelihood of confusion among consumers encountering the marks.

9. The likelihood of confusion is furthered by the identical nature of the goods.

10. The likelihood of confusion is furthered by the near identical business of the parties as current or intended makers of craft beer.

11. This likelihood of confusion harms the extensive goodwill and consumer recognition that Erie Brewing has in its DERAILED beer.

12. In view of the similarity of DERAILED BREWING and Erie Brewing’s DERAILED beer, the mark in Derailed Brewing’s application is likely to produce confusion, mistake, and/or deception among consumers as to the affiliation or sponsorship of Erie Brewing’s DERAILED beer by Derailed Brewing.

WHEREFORE, Erie Brewing requests that application serial no. 85804771 be refused, that no registration be issued thereon to Derailed Brewing, and that this Opposition be sustained in favor of Erie Brewing.

Any fee deficiency in connection with this matter should be charged to Deposit Account No. 50-5649 (79340.0008).

RESPECTFULLY SUBMITTED this 15th day of May 2013.

40401 Corporation d/b/a Erie Brewing Company

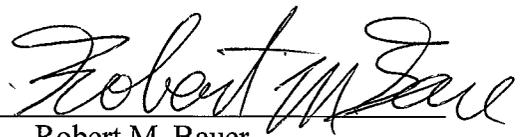
By: 

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814-459-2800  
814-453-4530 – Facsimile  
Attorneys for Erie Brewing

**CERTIFICATE OF SERVICE**

It is hereby certified that a true and complete copy of this Notice of Opposition was served via First Class mail, postage prepaid, this 15th day of May, 2013 to the following address for correspondence with Derailed Brewing's Domestic Representative as shown in the record:

Julia K. Sutherland  
Seyfarth Shaw LLP  
131 S. Dearborn St., Ste 2400  
Chicago, Illinois 60603-5863

By: 

Robert M. Bauer