

ESTTA Tracking number: **ESTTA314476**

Filing date: **10/30/2009**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Demetrio Papagni		
Entity	Individual	Citizenship	UNITED STATES
Address	7093 N. Teilman Ave., No. 102 Fresno, CA 93711 UNITED STATES		

Attorney information	Mark D. Miller Kimble, MacMichael & Upton 5260 N. Palm Ave., Ste. 221 Fresno, CA 93704 UNITED STATES ipmail@kmulaw.com Phone:(559) 435-5500		
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Registration Subject to Cancellation

Registration No	3679176	Registration date	09/08/2009
Registrant	Empire Grape Company, LLC 2540 W. Paul Avenue Fresno, CA 93711 UNITED STATES		

Goods/Services Subject to Cancellation

Class 033. First Use: 1976/04/15 First Use In Commerce: 1976/04/15 All goods and services in the class are cancelled, namely: Wine

Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Other	mark not in use in commerce on the goods

Attachments	Petition.for.Cancellation.FU.JIN.pdf (6 pages)(274097 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	/Mark D. Miller/
Name	Mark D. Miller

Date	10/30/2009
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1 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
2 **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

3
4 MARK D. MILLER (USPTO Reg. No. #32277)
5 JEREMY D. CLAR (USPTO Reg. No. #52751)
6 KIMBLE, MacMICHAEL & UPTON
7 A Professional Corporation
8 5260 North Palm Avenue, Suite 221
9 Post Office Box 9489
10 Fresno, California 93792-9489
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13 Attorneys for Petitioner, DEMETRIO PAPAGNI, an Individual.

14 * * *

15 DEMETRIO PAPAGNI)

16 Petitioner,)

17 v.)

18 EMPIRE GRAPE COMPANY, LLC,)

19 Registrant.)

Cancellation No. _____

20 **PETITION FOR CANCELLATION**

21 Demetrio Papagni (“Petitioner”), an individual residing at 7093 N. Teilman Ave., No.
22 102, Fresno, California 93711, believes that he will be damaged by the registered mark “FU
23 JIN”, Registration No. 3,679,176, and hereby petitions the Trademark Trial and Appeal Board
24 for cancellation of the same.

25 The grounds for the petition are as follows:

- 26 1. Petitioner is a producer, grower, packer, and shipper of grapes and wine.
27 2. Upon information and belief, Registrant Empire Grape Company, LLC
28 (“Registrant”), a California limited liability corporation with its principal place of business at

1 2540 West Paul Avenue, Fresno, California 93711, has registered the mark "FU JIN" as a
2 trademark used in connection with "wine" in International Class 33 as evidenced by the
3 registration of said mark by the United States Patent and Trademark Office ("USPTO").

4 3. On February 10, 2009, Registrant filed an application, Serial No. 77/666,862 ("the
5 '862 Application") for registration of the mark "FU JIN" (standard character mark) for use on
6 wine under section 1(a) of the Lanham Act, 15 U.S.C. § 1051(a), based on actual use. As a result
7 of the '862 application, Registrant obtained U.S. Registration No. 3,679,176 (the "Registration"),
8 which issued on September 8, 2009, for the mark "FU JIN" on "wine" in International Class 33,
9 a copy of which is attached hereto as exhibit A and incorporated herein by this reference.

10 4. Upon information and belief, the '862 application which matured into the
11 Registration did not meet the requirements for registration because the "FU JIN" mark was not in
12 use in commerce on the identified goods at the time the '862 application was filed as is required,
13 and thus the Registration is invalid.

14 5. Upon information and belief, the Registration is also invalid because Registrant
15 made false, material representations to the USPTO regarding dates of use of the "FU JIN" mark
16 on the listed goods (wine) that Registrant knew to be false.

17 6. Upon information and belief, on February 10, 2009, Registrant filed the '862
18 application with the USPTO as a TEAS Plus Trademark Application including a verified
19 declaration by Peterangelo Vallis, listed as a Member of Registrant.

20 7. Upon information and belief, the verified declaration of Mr. Vallis stated that the
21 FU JIN mark was in use in commerce on or in connection with the identified goods (wine), and
22 that "the mark was first used at least as early as 04/15/1976, and first used in commerce at least as
23 early as 04/15/1976, and is now in use in such commerce." Upon information and belief, the mark
24 FU JIN was not in use on wine as of the filing date of the '862 Application, and accordingly, the
25 Registrant knowingly filed a material false or inaccurate statement with the USPTO in
26 connection with the '862 Application upon which the Registration is based.

27 8. Upon information and belief, in response to a trademark office action on the '862
28 Application, on May 10, 2009, Registrant submitted substitute specimens together with a second

1 declaration verified by Mr. Vallis stating that “[t]he substitute specimen(s) was in use in
2 commerce as of the filing date of the application” and that “[t]he mark was first used at least as
3 early as 04/15/1976, and first used in commerce at least as early as 04/15/1976, and now is in use
4 in such commerce.” Upon information and belief, the mark FU JIN was not in use on wine as of
5 the filing date of the ‘862 Application, nor on May 10, 2009, and accordingly, the Registrant
6 knowingly filed a material false or inaccurate statement with the USPTO in connection with the
7 ‘862 Application upon which the Registration is based.

8 9. In view of the foregoing, Registrant is not entitled to maintain federal registration
9 of its claimed mark because the Registration is invalid and was obtained through a fraud on the
10 USPTO.

11 10. On March 20, 2009, Petitioner filed an application to register the mark FU JIN (as
12 a standard character mark) for use on wine under section 1(b) of the Lanham Act, 15 U.S.C. §
13 1051(b), application serial number 77/696,075. On June 9, 2009, Petitioner received an office
14 action identifying the ‘862 Application, and indicating that Petitioner’s application may be
15 suspended pending the disposition of the ‘862 Application.

16 11. Continued registration of Registrant’s mark will result in damage to Petitioner and
17 to the public.

18 **WHEREFORE**, Petitioner prays that this petition be granted and that United States
19 Trademark Registration No. 3,679,176 be cancelled because (i) the FU JIN mark was not in use
20 in commerce on wine as of the filing date of Registrant’s ‘862 Application, and (ii) the
21 Registration was granted based upon fraudulent representations made to the USPTO.

22
23 Dated: October 30, 2009.

KIMBLE, MacMICHAEL & UPTON
A Professional Corporation

24
25 By: 
26 Mark D. Miller, Esq.
27 Attorneys for Petitioner,
28 DEMETRIO PAPAGNI

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, a true and correct copy of the foregoing **Petition for Cancellation** was served on Registrant via first class U.S. mail, postage prepaid, in an envelope addressed as follows:

Empire Grape Company, LLC
2540 W. Paul Avenue
Fresno, CA 93611

Dated: October 30, 2009.



Mark D. Miller

10744.01.DOC.00098612.000

Exhibit A

Int. Cl.: 33

Prior U.S. Cls.: 47 and 49

United States Patent and Trademark Office

Reg. No. 3,679,176

Registered Sep. 8, 2009

**TRADEMARK
PRINCIPAL REGISTER**

Fu Jin

EMPIRE GRAPE COMPANY, LLC (CALIFORNIA
LIMITED LIABILITY COMPANY)

2540 W. PAUL AVENUE

FRESNO, CA 93711

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

FIRST USE 4-15-1976; IN COMMERCE 4-15-1976.

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

THE ENGLISH TRANSLATION OF "FU JIN" IN
THE MARK IS "ETERNAL HAPPINESS".

SER. NO. 77-666,862, FILED 2-10-2009.

JESSICA FATHY, EXAMINING ATTORNEY