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# UNITED STATES PATENT AND TRADEMARK OFFICE

**SERIAL NO:** 77/695481

**MARK:** EARTHQUAKE HIGH GRAVITY LAGER



**CORRESPONDENT ADDRESS:**

GERALD E. HELGET  
BRIGGS AND MORGAN, P.A.  
2200 IDS CENTER 80 SOUTH EIGHTH STREET  
MINNEAPOLIS, MN 55402-2157

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** Phusion Projects, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

39046.4

**CORRESPONDENT E-MAIL ADDRESS:**

ip@briggs.com

## EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark EARTHQUAKE HIGH GRAVITY LAGER in stylized form for "high gravity lager beer" because of a likelihood of confusion with the marks EARTHQUAKE ZIN and design for "wine" in U.S. Registration No. 2870160 and EARTHQUAKE in standard characters for "wine" in Registration No. 3626974. Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 *et seq.* It is respectfully requested that the refusal be affirmed.

### FACTS

On March 20, 2009, applicant filed an application to register the mark EARTHQUAKE HIGH GRAVITY LAGER in stylized form for beer. On June 16, 2009, the Examining Attorney refused registration of the applied for mark because of a likelihood of confusion

with the marks in U.S. Registration Nos. 2870160 and 3626974. Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 *et seq.* The examining attorney also requested a disclaimer of the generic wording “HIGH GRAVITY LAGER” and requested an accurate and complete description of the mark. On December 14, 2009, applicant filed a response to the Office action arguing against the Section 2(d) refusal to register, disclaiming the wording “HIGH GRAVITY LAGER,” and providing an accurate description of the mark. The Office action contained additional requirements and refusals which were resolved by applicant in its subsequent responses.

On January 15, 2010, the examining attorney issued a final refusal to register applicant’s mark based on the cited registered marks. Applicant filed its appeal brief on June 30, 2010.

### ISSUE

The issue on appeal is whether applicant’s mark EARTHQUAKE HIGH GRAVITY LAGER in stylized form (HIGH GRAVITY LAGER disclaimed), when used on or in connection with “high gravity lager beer” so resembles the registered marks, EARTHQUAKE ZIN and design and EARTHQUAKE in standard characters both for “wine,” that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods of the applicant and registrant.

### ARGUMENTS

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.*

#### Similarity of the Marks

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *see* TMEP §1207.01(b).

Applicant has argued that Registrant's marks are one word and two words and feature a design and applicant's mark is four words with a logo so that the marks are clearly dissimilar as to appearance and sound different. However, the marks are highly similar in appearance and sound with the shared use of EARTHQUAKE as the first and most dominant portion of each mark. Consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions). The mere addition of a term to a registered mark generally does not obviate the similarity between the marks nor does it overcome a likelihood of confusion under Trademark Act Section 2(d). *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (GASPAR'S ALE and JOSE GASPAR GOLD); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (C.C.P.A. 1975) (BENGAL and BENGAL LANCER); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (C.C.P.A. 1967) (THE LILLY and LILLI ANN); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266 (TTAB 2009) (TITAN and VANTAGE TITAN); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002 (TTAB 1988) (MACHO and MACHO COMBOS); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER

IMAGE and CREST CAREER IMAGES); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (ACCUTUNE and RICHARD PETTY'S ACCU TUNE); TMEP §1207.01(b)(iii).

Applicant's addition of the terms HIGH GRAVITY LAGER is not sufficient to overcome the likelihood of confusion. First of all, as specified in the identification of goods, such wording is generic in relation to the goods which are listed as high gravity lager.

Secondly, the wording HIGH GRAVITY LAGER appears in a smaller font than the arbitrary wording EARTHQUAKE and is also placed on a separate line than the arbitrary wording EARTHQUAKE. Therefore, the term EARTHQUAKE clearly dominates over the other wording in the mark. Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii). Here, the marks are confusingly similar in appearance because of the identical term EARTHQUAKE appearing as the dominant portion of both marks.

Applicant has argued that registrant's first mark offers no connotation of wine and registrant's second mark offers the connotation of zinfandel by the "ZIN" portion of its mark, while applicant's mark connotes HIGH GRAVITY LAGER beer. The examining attorney agrees that wording "zin" and "high gravity lager" are relevant portions of the marks in the instant case; however, such wording is not sufficient to overcome the likelihood of confusion because it is the less dominant wording in the marks which leaves the wording EARTHQUAKE as the dominant portion of the marks and the portion that truly gives each mark its connotation. The wording "zin" identifies that the type of wine is a zinfandel and the wording "high gravity lager" is generic, and therefore such wording has been disclaimed. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. Disclaimed matter is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). The terms "zin" and "high gravity lager" are less significant elements of the mark because they are highly descriptive or generic designations and they appear in a less dominant manner in each mark. Each mark begins with the wording EARTHQUAKE, which is either the whole of the mark, or placed on a different line and in a larger font than the additional wording. The term EARTHQUAKE is an arbitrary term in relation to wine and beer and is the only arbitrary term used in the marks. While one of registrant's mark appears to feature a design element in the nature of a wine label and applicant's mark is in a stylized form, when a mark consists of a word

portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods and/or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729, 735 (TTAB 1976); TMEP §1207.01(c)(ii). In this case, the wording EARTHQUAKE is the dominant portion of each mark and such term makes the marks highly similar in sound and appearance. Moreover, one of registrant's marks appears in standard characters. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element itself and not in any particular display. TMEP §1207.01(c)(iii); *see* 37 C.F.R. §2.52(a). Thus, a mark presented in stylized characters or otherwise in special form generally will not avoid likelihood of confusion with a mark in typed or standard characters because the marks could be presented in the same manner of display. *See, e.g., In re Melville Corp.*, 18 USPQ2d 1386, 1387-88 (TTAB 1991); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988).

Applicant has argued that registrant's marks' commercial impression is that its wines come from an old Lodi vineyard planted around the time of San Francisco's great earthquake in 1906 and has referenced registrant's website as attachment 3. However, there is nothing in the actual mark itself that references or suggests any specific earthquake. Therefore, when encountering registrant's marks, consumers merely encounter the arbitrary term EARTHQUAKE as the source indicator for its wines. Likewise, when encountering applicant's mark, consumers would merely encounter the

dominant and arbitrary term EARTHQUAKE as the intended source indicator for its high gravity lager. EARTHQUAKE has the exact same connotation and commercial impression in both of registrant's marks and in applicant's mark.

The question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods and/or services they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b).

#### Relatedness of the Goods

If the marks of the respective parties are identical, the relationship between the goods and/or services of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *Amtcor, Inc. v. Amtcor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981); TMEP §1207.01(a). While the marks are not identical

as a whole, the dominant element of the marks is the identical and highly arbitrary term EARTHQUAKE.

Applicant has argued that the examining attorney does not compare and evaluate the goods as actually described by the applicant and the registrant and the Office action only states that the goods are related. However, the final Office action clearly states Applicant has applied to register EARTHQUAKE HIGH GRAVITY LAGER (HIGH GRAVITY LAGER disclaimed) for “high gravity lager beer.” The cited registered marks are EARTHQUAKE and EARTHQUAKE ZIN and design for “wine.” See Page 1 of final Office action dated January 15, 2010.

Applicant has argued that the goods are dissimilar goods with a different nature and are only related by the alcohol ingredient, and that wine is made from grapes for a discerning taste and high gravity lager is known as budget beer – cheap, made from malt, high alcoholic content beer – typically consumed by lower class and young people. However, the article attached in the first Office action which provides an explanation of “high gravity beer” from [www.associatedcontent.com](http://www.associatedcontent.com), (see June 16, 2009 outgoing Office action, page 8) states:

“High Gravity simply means specialty craft beers with an increased weight of sugar and gravity “pull” in the fermentation process. They are higher in alcohol because they contain more sugar and other ingredients at the start of the brewing process. High gravity beers are not crafted with the sole intent of a higher alcohol content. The higher percentage of alcohol is due to the different ingredients used because brewers are trying to create

complex, flavorful and unique beers. High gravity beers are *meant to be sipped and appreciated, even paired with foods like wine.*”

Moreover, various alcoholic beverages have been shown to be related goods for purposes of a Trademark Act Section 2(d) analysis. *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (holding GASPAR’S ALE for beer and ale likely to be confused with JOSE GASPAR GOLD for tequila); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (holding RED BULL for tequila likely to be confused with RED BULL for malt liquor); *In re Salierbrau Franz Sailer*, 23 USPQ2d 1719 (TTAB 1992) (holding CHRISTOPHER COLUMBUS for beer likely to be confused with CRISTOBAL COLON & design for sweet wine); *Somerset Distilling, Inc. v. Speymalt Whiskey Distribs. Ltd.*, 14 USPQ2d 1539 (TTAB 1989) (holding JAS. GORDON and design for scotch whiskey likely to be confused with GORDON’S for distilled gin and vodka); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069 (TTAB 1989) (holding BRAS D’OR for brandy likely to be confused with BRADOR for beer); *Bureau Nat’l Interprofessionnel Du Cognac v. Int’l Better Drinks Corp.*, 6 USPQ2d 1610 (TTAB 1988) (holding trademark COLAGNAC for cola flavored liqueur likely to be confused with certification mark COGNAC for brandy).

Attached in the final Office action were 20 printouts from the USPTO X-Search database, which show third-party registrations of marks used in connection with the same or similar goods and/or services as those of applicant and registrant in this case. These printouts have probative value to the extent that they serve to suggest that the goods and/or services listed therein, namely “beer” and “wine,” are of a kind that may emanate from a

single source. *In re Infinity Broad. Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii). As indicated below, “beer” would include “high gravity lager beer” since no limitations as to the type of beer have been placed in the registrations.

The trademark examining attorney also refers to the excerpted materials from the Google® search engine in the final Office action in which producers of wine *and* beer appeared in reference to the same entity in several stories. See attachments. Material obtained from the Internet is generally accepted as competent evidence in examination and ex parte proceedings. See *In re Rodale Inc.*, 80 USPQ2d 1696, 1700 (TTAB 2006) (Internet evidence accepted by the Board to show genericness); *In re White*, 80 USPQ2d 1654, 1662 (TTAB 2006) (Internet evidence accepted by the Board to show false connection); *In re Joint-Stock Co. “Baik”*, 80 USPQ2d 1305, 1308-09 (TTAB 2006) (Internet evidence accepted by the Board to show geographic significance); *Fram Trak Indus. v. WireTracks LLC*, 77 USPQ2d 2000, 2006 (TTAB 2006) (Internet evidence accepted by the Board to show relatedness of goods); *In re Consol. Specialty Rest. Inc.*, 71 USPQ2d 1921, 1927-29 (TTAB 2004) (Internet evidence accepted by the Board to show that geographic location is well-known for particular goods); *In re Gregory*, 70 USPQ2d 1792, 1793 (TTAB 2004) (Internet evidence accepted by the Board to show surname significance); *In re Fitch IBCA Inc.*, 64 USPQ2d 1058, 1060 (TTAB 2002) (Internet evidence accepted by the Board to show descriptiveness); TBMP §1208.03; TMEP §710.01(b).

Such evidence shows several entities that produce and sell both wine and beer under the same mark, such as Wagner Vineyards at [www.wagnervineyards.com](http://www.wagnervineyards.com), The Round Barn Winery Distillery & Brewery at [www.roundbarnwinery.com/](http://www.roundbarnwinery.com/), and Nashoba Valley Winery at [www.nashobawinery.com](http://www.nashobawinery.com). All of these entities are wineries that also brew and sell beer. Finally, an article from <http://findarticles.com/p/articles>, references three wineries that have entered the beer business. Therefore, consumers encountering the mark EARTHQUAKE for high gravity lager beer are likely to mistakenly believe that these goods are produced or related to the same entity that provides EARTHQUAKE wine. The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source of those goods. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); TMEP §1207.01; *see Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975).

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, it is sufficient that the goods and/or services are related in some manner and/or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir.

2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984). The above referenced evidence clearly demonstrates that beer and wine are related goods.

Applicant has argued that its channels of trade are beer vendors, including some liquor stores, selling beer generally to middle class but especially lower class and young people and that registrant's wine is sold to upper and upper middle class buyers via the internet, wine stores and some liquor stores. However, neither party has limited its identification of goods to indicate its channels of trade, consumers, or vendors. A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1637-38 (TTAB 2009); *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999); see TMEP §1207.01(a)(iii). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); TMEP §1207.01(a)(iii).

Applicant has argued that the examining attorney reaches its conclusion by only arguing the first three of the Du Pont factors. However, the examining attorney has also considered the fourth element referenced by applicant which is the conditions under which, and buyers to whom sales are made, i.e., impulse vs. careful, sophisticated purchasing. Applicant has stated that its beer is cheap. The risk of likelihood of

confusion is increased for inexpensive products that are purchased on impulse.

Therefore, in a likelihood of confusion determination, purchasers of such products are held to a lesser standard of purchasing care. *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984).

Applicant has argued that registrant's purchasers are sophisticated. The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); *see In re Cynosure, Inc.*, 90 USPQ2d 1644 (TTAB 2009); *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988).

## CONCLUSION

For the reasons set out above, the examining attorney respectfully requests that refusal to register the mark EARTHQUAKE HIGH GRAVITY LAGER in stylized form for “high gravity lager beer” because of a likelihood of confusion with the marks EARTHQUAKE ZIN and design and EARTHQUAKE in standard characters for “wine” be affirmed.

Respectfully submitted,

/Leslie L. Richards/  
Trademark Examining Attorney  
Law Office 106  
U.S. Patent and Trademark Office  
571-272-1256 phone  
571-273-9106 fax

Mary I. Sparrow  
Managing Attorney  
Law Office - 106