

ESTTA Tracking number: **ESTTA1043422**

Filing date: **03/19/2020**

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

Proceeding	91244503
Party	Plaintiff Miguel Torres, S.A.
Correspondence Address	J SCOTT GERIEN DICKENSON PEATMAN & FOGARTY 1455 FIRST ST, STE 301 NAPA, CA 94559 UNITED STATES tmltg@dpf-law.com, jdurand@dpf-law.com, jkilgore@dpf-law.com 707-252-7122
Submission	Other Motions/Papers
Filer's Name	Barbara Barrera
Filer's email	bbarrera@dpf-law.com
Signature	/ Barbara Barrera /
Date	03/19/2020
Attachments	Opposer Opening Brief.PDF(259667 bytes )

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

Miguel Torres, S.A.,  
Opposer,  
vs.  
Will Cody Whipple,  
Applicant.

OPPOSITION NO. 91244503

**OPENING BRIEF OF  
OPPOSER MIGUEL TORRES, S.A.**

**TABLE OF CONTENTS**

1

2 **INTRODUCTION**..... 1

3 **DESCRIPTION OF THE RECORD**..... 1

4     **I. OPPOSER’S EVIDENCE** ..... 1

5         **a. Declaration of Joy L. Durand** ..... 1

6         **b. Declaration of Michael La Terrière** ..... 1

7         **c. Opposer’s Notice of Reliance** ..... 2

8     **II. APPLICANT’S EVIDENCE**..... 3

9 **FACTUAL BACKGROUND** ..... 3

10 **STATEMENT OF THE ISSUE** ..... 4

11 **ARGUMENT** ..... 4

12     **I. A PORTION OF PARAGRAPH 3 AND ALL OF PARAGRAPH 8 OF**

13     **THE DECLARATION OF CODY WILL WHIPPLE ARE HEARSAY**

14     **AND SHOULD BE DISREGARDED** ..... 4

15     **II. OPPOSER HAS STANDING AND PRIORITY**..... 4

16     **III. THERE IS A LIKELIHOOD OF CONFUSION BETWEEN “TORRES**

17     **10” AND “10 TORR DISTILLING AND BREWING COMPANY”** ..... 5

18         **a. The Marks Appear on Identical Goods in Class 33 and Closely Related**

19         **Goods in Class 32** ..... 6

20             **i. The Marks Appear on Identical Goods in Class 33** ..... 7

21             **ii. The Marks Appear on Closely Related Goods in Class 32**..... 7

22         **b. The Goods at Issue Travel Through Identical Channels of Trade**..... 10

23         **c. The Goods at Issue are Marketed to the Same Class of Purchasers** ..... 11

24         **d. The Overall Commercial Impressions Created by TORRES 10 and**

25         **the 10 TORR Mark are Virtually Identical**..... 12

26             **i. TORRES 10 and the 10 TORR Mark are Virtually Identical in**

27             **Appearance** ..... 13

28             **ii. TORRES 10 and the 10 TORR Mark are Virtually Identical in**

**Sound**..... 15

**iii. TORRES 10 and the 10 TORR Mark Are Similar in Perceived**

**Meaning**..... 16

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**e. Opposer’s TORRES 10 Mark is Strong Within the Alcoholic Beverage Industry**.....16

**f. The Potential for Confusion is Substantial** .....18

**g. Consideration of all of the Relevant *DuPont* Factors Demonstrates a Clear Likelihood of Confusion**.....19

**CONCLUSION**.....19

**TABLE OF AUTHORITIES**

**Cases**

*Ava Enterprises Inc. v. Audio Boss USA Inc.*, 77 USPQ2d 1783 (TTAB 2006) ..... 19

*Bank of America Nat'l Trust and Savings Assoc'n v. The American Nat'l Bank of St. Joseph*, 201 USPQ 842 (TTAB 1978) ..... 15

*Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992) ..... 19

*Champions Golf Club v. Champions Golf Club*, 78 F.2d 1111, 38 USPQ2d 1161 (6th Cir. 1996)..... 17

*Chicago Bears Football Club, Inc. v. 12th Man*, 2007 WL 683778, 83 USPQ2d 1073 (TTAB 2007) ..... 11

*Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012) ..... 13

*Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000)..... 5,14

*E. & J. Gallo Winery v. Consorzio del Gallo Nero*, 782 F.Supp. 457, 20 USPQ2d 1579 (N.D.Cal. 1991) ..... 12

*E. & J. Gallo Winery v. Wade*, 2017 TTAB LEXIS 186, \*16 (TTAB June 7, 2017)..... 15,16,17

*Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014) ..... 4,5

*Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 108 USPQ 161 (D.C. Cir.) ..... 13

*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 136 USPQ 508 (9th Cir. 1963)..... 7

*Flow Technology, Inc. v. Picciano*, 18 USPQ2d 1970 (TTAB 1991) ..... 5

*Genesco Inc. v. Martz*, 66 USPQ2d 1260 (TTAB 2003) ..... 11

*Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983)..... 15

*Guinness United Distillers & Vintners B.V. v. Anheuser-Bush, Inc.*, 64 USPQ2d 1039 (S.D.N.Y. 2002) ..... 15

*Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557 (Fed. Cir. 2001)..... 6

*Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) ..... 6,19

*In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326 (TTAB 1976)..... 10

1 *In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993)..... 8

2 *In re Appetito Provisions, Co.*, 3 USPQ2d 1553 (TTAB 1987) ..... 13

3 *In re Bercut-Vandervoort & Co.*, 229 USPQ at 765-766..... 17

4 *In re Buffalo Bayou Distilleries, LLC*, 2019 WL 4034458 (July 30, 2019)..... 9

5 *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004)..... 7,10,14

6 *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) ..... 12

7 *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997) ..... 6,14

8 *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 USPQ 563

9 (CCPA 1973)..... 5, 6, 12,17,18,19

10 *In re Gen. Tire & Rubber Co.*, 213 USPQ 870, 871 (TTAB 1982)..... 15

11 *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987) ..... 16,17

12 *In re Majestic Distilling Company, Inc.*, 2001 WL 1547938, at \*5 (TTAB Nov. 29, 2001). 7,10,11

13 *In re Marshall Brewing Company, LLC*, 2018 WL 2018257, at \*8 (TTAB Apr. 9, 2018)..... 8

14 *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988) ..... 8

15 *In re Mystic Apparel LLC*, 2017 WL 512757, at \*4 (January 17, 2017) ..... 14

16 *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985)..... 13,14

17 *In re Nationwide Industries Inc.*, 6 USPQ2d 1882 (TTAB 1988) ..... 14

18 *In re Pollio Dairy Prods., Corp.*, 8 USPQ2d 2012 (TTAB 1988)..... 6

19 *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993) ..... 6

20 *In re Vina Lo Miranda Limitada*, 2002 WL 732146, at \*3 (TTAB April 24, 2002) ..... 12

21 *In re Viterra Inc.*, 671 F.3d 1358 ..... 13

22 *In re Wine Society of America Inc.*, 12 USPQ2d 1139 (TTAB 1989) ..... 14

23 *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889

24 (Fed. Cir. 1991) ..... 6

25 *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323 (Fed. Cir. 2017)..... 17

26 *Karma Fine Beverages, Inc.*, 2015 WL 984130, at \*7 (TTAB Feb. 19, 2015) ..... 13

27 *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ22 1453 (Fed. Cir.

28 1992) ..... 17,18

*Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523 (CCPA 1968)..... 12

*Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464 (TTAB 2016) ..... 5

*Monarch Wine Co. v. Hood River Dist., Inc.*, 196 USPQ 855 (TTAB 1977)..... 10

*Octocom Sys., Inc., v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir.

1990) ..... 6,12

1	<i>Packard Press, Inc. v. Hewlett-Packard Co.</i> , 227 F.3d 1352, 56 USPQ2d 1351	
2	(Fed. Cir. 2000) .....	12
3	<i>Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772</i> , 396 F.3d 1369	
4	(Fed. Cir. 2005) .....	12,17
5	<i>Patron Spirits Int’l AG</i> , 2017 WL 227721, at *3 (TTAB Jan. 4, 2017) .....	7
6	<i>Ritchie v. Simpson</i> , 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999).....	4
7	<i>Schieffelin &amp; Co. v. The Molson Companies Limited</i> , 9 USPQ2d 2069, 2073 (TTAB 1989)....	7,10
8	<i>Sealed Air Corp. v. Scott Paper Co.</i> , 190 USPQ 106 (TTAB 1975) .....	13
9	<i>Shen Mfg. Co. v. Ritz Hotel Ltd.</i> , 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) .....	16,17
10	<i>Surly Brewing Company v. Christopher Olshan</i> , 2019 WL 2240648, at *7	
11	(TTAB Apr. 26, 2019) .....	7,9
12	<i>Weiss Assocs. Inc. v. HRL Assocs. Inc.</i> , 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).....	13
13	<i>Winnebago Industries, Inc. v. Oliver &amp; Winston, Inc.</i> , 207 USPQ 335 (TTAB 1980).....	16
14	<b>Statutes</b>	
15	15 U.S.C. §1052(d) .....	1
16	27 CFR 5.22 .....	7
17	Fed. R. Evid. 801 .....	4

## INTRODUCTION

1  
2 This opposition proceeding is brought by Miguel Torres, S.A. (“Opposer”), owner of  
3 incontestable U.S. Trademark Registration No. 2,267,401 for the mark TORRES 10 in standard  
4 characters for “brandy” in class 33, against Will Cody Whipple (“Applicant”), owner of U.S.  
5 Trademark Application Serial No. 87/780,256 for the mark 10 TORR DISTILLING AND  
6 BREWING COMPANY (“10 TORR Mark”) in standard characters for “beer” in class 32 and  
7 “distilled spirits” in class 33 (“10 TORR Application”).

8 As demonstrated below, there is a clear likelihood of confusion between the mark  
9 TORRES 10 and the 10 TORR Mark. This confusing similarity necessarily requires that this  
10 opposition be sustained under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d) and  
11 registration of 10 TORR Mark be refused.

## DESCRIPTION OF THE RECORD

### I. OPPOSER’S EVIDENCE

12  
13  
14 a. Declaration of Joy L. Durand, counsel for Opposer, filed on October 7, 2019  
15 (“Durand Decl.”), 5 TTABVUE 2-3. Ms. Durand provided testimony concerning an internet  
16 search using the Google translate search engine to translate the Spanish term “torres” and  
17 authenticated an internet printout of the search results. 5 TTABVUE 2, Durand Decl. ¶¶2, Exh. 1.  
18 Ms. Durand also provided testimony regarding internet searches for the meaning of the name  
19 Torr and authenticated internet printouts of the search results. 5 TTABVUE 3, Durand Decl. ¶¶3-  
20 5, Exhs. 2-4.

21 b. Declaration of Michael La Terrière, Spirits Global Director for Opposer, files  
22 on October 7, 2019 (“La Terrière Decl.”). 5 TTABVUE 28-29. Mr. La Terrière provided  
23 testimony concerning Opposer’s production and sale of brandy labeled with the TORRES 10  
24 mark in the U.S. 5 TTABVUE 28-29, La Terrière Decl. ¶¶2-8, Exh. A. Mr. La Terrière also  
25 provided testimony concerning marketing and advertising, and dollar and volume sales, of  
26 brandy labeled with the TORRES 10 mark in the U.S. 5 TTABVUE 28-29, La Terrière Decl.  
27 ¶¶3-7, Exh. A. Mr. La Terrière also provided testimony concerning the distribution channels for  
28 brandy labeled with the TORRES 10 mark in the U.S. 5 TTABVUE 29, La Terrière Decl. ¶6.



1 Mr. La Terrière also provided testimony regarding recognition of Opposer’s TORRES 10 brand  
2 within the alcoholic beverage industry as a top-quality brandy and awards earned by Opposer’s  
3 brandy at spirits competitions. 5 TTABVUE 29, La Terrière Decl. ¶8.

4 c. **Opposer’s Notice of Reliance**, filed on October 7, 2020 (“Opposer’s NOR”), 6  
5 TTABVUE 2-17, which includes: (¶1) TSDR printout for Opposer’s TORRES 10 mark  
6 (Opposer’s NOR, Exh. A); (¶2) TSDR printouts for third-party registered trademarks for both  
7 beer and distilled spirits on the basis of use in commerce (Opposer’s First NOR, Exh. B); (¶3) a  
8 copy an internet printout showing the offering for sale of beer and the offering for sale of  
9 distilled spirits under the same trademark registered by a third party for both beer and distilled  
10 spirits (Opposer’s NOR, Exh. C); (¶¶4-5) internet printouts showing Applicant’s 10 TORR Mark  
11 used to identify beer and distilled spirits (Opposer’s NOR, Exhs. D-E); (¶¶6-18) internet  
12 printouts showing third party use of the same mark used to identify beer and distilled spirits  
13 (Opposer’s NOR, Exhs. F-R); (¶¶19-21) internet printouts showing third parties identifying  
14 themselves as a “brewstillery” and offering for sale of beer and distilled spirits (Opposer’s NOR,  
15 Exhs. S-U); (¶¶22-26) internet printouts of articles discussing third parties “brewstilleries” and  
16 the practice of breweries also distilling spirits (Opposer’s NOR, Exhs. V-Z); (¶27) an internet  
17 printout of an article discussing the popularity of brandy in the U.S. and the practice of distilled  
18 spirits producers expanding into brandy (Opposer’s NOR, Exh. AA); (¶28) an internet printout of  
19 an article discussing beer and brandy trends in 2019 (Opposer’s NOR, Exh. BB); (¶29) and  
20 internet printout discussing a brewery’s practice of aging beer in barrels previously used to age  
21 brandy (Opposer’s NOR, Exh. CC); (¶¶30-34) internet printouts showing third parties  
22 advertising for sale beer aged in barrels previously used to age brandy (Opposer’s NOR, Exhs.  
23 DD-HH); (¶¶35-36) internet printouts of articles discussing the practice of beer producers aging  
24 beer in barrels previously used to age brandy (Opposer’s NOR, Exhs. II-JJ); (¶37) an internet  
25 printout of an article discussing the practice of a brandy producer aging brandy in oak barrels  
26 previously used to age beer (Opposer’s NOR, Exh. KK); (¶38) an internet printout of an article  
27 discussing the practice of distilling beer in the same was as brandy (Opposer’s NOR, Exh. LL);  
28 (¶¶39-40) internet printouts from retail outlets advertising for sale of beer brandy (Opposer’s

1 NOR, Exhs. MM-NN); (¶¶41) an internet printout demonstrating advertising for the sale of  
2 Opposer's TORRES 10 brandy through a retail outlet that also offers Applicant's 10 TORR beer  
3 (Opposer's NOR, Exh. OO); (¶¶42-46) internet printouts demonstrating advertising for the sale  
4 of Opposer's TORRES 10 brandy through a retail outlet that also offers beer (Opposer's NOR,  
5 Exhs. PP-TT); (¶¶47-48) internet printouts demonstrating advertising for the sale of Applicant's  
6 10 TORR beer through retail outlets that also offer brandy (Opposer's NOR, Exhs. UU-VV);  
7 (¶¶49-53) internet printouts demonstrating advertising for the sale of beer and brandy through the  
8 same retail outlet (Opposer's NOR, Exhs. WW-AAA); (¶¶54-57) internet printouts  
9 demonstrating advertising for the sale of beer and distilled spirits through the same retail outlet  
10 (Opposer's NOR, Exhs. BBB-EEE).

## 11 II. APPLICANT'S EVIDENCE

12 a. Declaration of Cody Will Whipple, Applicant and member/manager of Whipple  
13 Brewing and Distilling LLC the entity that produces beer and distilled spirits branded with the 10  
14 TORR Mark ("Whipple Decl."). 9 TTABVUE 2-4.

### 15 FACTUAL BACKGROUND

16 Opposer produces and sells brandy labeled with the brand name TORRES 10. 5  
17 TTABVUE 28-29, La Terrière Decl. ¶¶2, 4, Exh. A. Opposer is also the owner of U.S.  
18 Trademark Registration No. 2,267,401 for the mark TORRES 10 for brandy with constructive  
19 rights in the mark dating to September 11, 1998 and alleged first use in U.S. commerce of  
20 December 31, 1997. 6 TTABVUE 2, Opposer's NOR ¶1, Exh. A. Opposer has been producing  
21 its TORRES 10 brandy since 1946 and it is the most widely sold Spanish brandy in the world. 5  
22 TTABVUE 28-29, La Terrière Del. ¶¶2, 4-5, Exh. 5. Since 2014, Opposer has sold over 65,000  
23 cases of TORRES 10 brandy in the U.S. market for a total sales value of over 3.4 million Euro.  
24 5 TTABVUE 28, La Terrière Decl. ¶3. Opposer has also spent in excess of 475,000 Euro  
25 promoting and advertising the TORRES 10 brandy in the U.S. during such period. 5 TTABVUE  
26 28-29, La Terrière Decl. ¶¶3, 7. Opposer's TORRES 10 brandy is sold through all outlets where  
27 alcoholic beverages are sold in the U.S. including retail outlets such as liquor stores and  
28 supermarkets. 5 TTABVUE 29, La Terrière Decl. ¶6.

1 Opposer’s TORRES 10 brand is recognized within the alcoholic beverage industry as a  
 2 top-quality brandy and has garnered several awards. 5 TTABVUE 29, La Terrière Decl. ¶8. In  
 3 2015, Opposer’s TORRES 10 brandy received a double gold award at the San Francisco World  
 4 Spirits Competition. 5 TTABVUE 29, La Terrière Decl. ¶8. In 2016, Opposer’s TORRES 10  
 5 brandy received a silver medal at the San Francisco World Spirits Competition and an 87 point  
 6 score from the Guía Peñín wine guide. 5 TTABVUE 29, La Terrière Decl. ¶8.

### 7 STATEMENT OF THE ISSUE

8 Is Applicant’s 10 TORR Mark for “beer” in class 32 and “distilled spirits” in class 33  
 9 confusingly similar to Opposer’s registered mark TORRES 10 for “brandy” in class 33 in  
 10 violation of Section 2(d)?

### 11 ARGUMENT

#### 12 **I. A PORTION OF PARAGRAPH 3 AND ALL OF PARAGRAPH 8 OF THE** 13 **DECLARATION OF CODY WILL WHIPPLE ARE HEARSAY AND** 14 **SHOULD BE DISREGARDED.**

15 Applicant submitted testimony that the “word ‘Torr’ is defined in the English language as  
 16 ‘a unit of pressure used in measuring partial vacuums, equal to 133.32 pascals.’” 9 TTABVUE  
 17 3, Whipple Decl. ¶3. Applicant also submitted testimony that the “English word ‘Torr’ is derived  
 18 from the name Evangelista Torricelli, the Italian physicist and mathematician who in 1644 set  
 19 forth the design for the mercury barometer.” 9 TTABVUE 4, Whipple Decl. ¶8. Because such  
 20 evidence is being introduced for the truth of the matters asserted, and is unsupported by any  
 21 documents which may be relied upon in a notice of reliance, it is inadmissible hearsay and  
 22 should not be considered by the Board. *See* Fed. R. Evid. 801 (“‘Hearsay’ means a statement  
 23 that: . . . a party offers in evidence to prove the truth of the matter asserted in the statement.”).

#### 24 **II. OPPOSER HAS STANDING AND PRIORITY.**

25 A threshold issue in every *inter partes* case is the plaintiff’s standing to challenge  
 26 registration. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d  
 27 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed.  
 28 Cir. 1999). To establish standing in an opposition proceeding, a plaintiff must prove that it has

1 “both a ‘real interest’ in the proceedings as well as a ‘reasonable’ basis for its belief of damage.  
2 *See Empresa Cubana*, 111 USPQ2d at 1062. An opposer may establish its standing by properly  
3 making of record its valid and subsisting registration for its pleaded mark. *Cunningham v. Laser*  
4 *Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (party’s ownership of  
5 pleaded registration establishes standing). Opposer has established its standing by properly  
6 introducing into evidence its pleaded registration. *See* 6 TTABVUE 2, Opposer’s NOR ¶1, Exh.  
7 A.

8 Because Opposer’s pleaded registration is of record, priority is not at issue with respect to  
9 the goods identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469  
10 (TTAB 2016). Opposer’s TORRES 10 mark was first used in commerce on December 31, 1946  
11 with a constructive first use date of September 11, 1998. *See* 6 TTABVUE 2, Opposer’s NOR  
12 ¶1, Exh. A. Applicant’s earliest rights in its 10 TORR Mark based on alleged actual use or filing  
13 are no earlier than June 1, 2017. *See* Applicant’s File Wrapper. Accordingly, there is no dispute  
14 as to Opposer’s priority. *See Flow Technology, Inc. v. Picciano*, 18 USPQ2d 1970, 1972 (TTAB  
15 1991) (the issue of priority does not arise in a case where the opposer is the owner of a  
16 registration for its mark).

17 **III. THERE IS A LIKELIHOOD OF CONFUSION BETWEEN “TORRES 10”**  
18 **AND “10 TORR DISTILLING AND BREWING COMPANY.”**

19 The well-recognized standard for determining the likelihood of confusion was set out by  
20 the U.S. Court of Customs and Patent Appeals in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d  
21 1357, 177 USPQ 563 (CCPA 1973). In testing for likelihood of confusion under Section 2(d), the  
22 following factors must be considered: (1) similarity or dissimilarity and nature of the goods; (2)  
23 similarity or dissimilarity of trade channels; (3) sophistication of purchasers; (4) similarity or  
24 dissimilarity of the marks; (5) fame or strength of the prior mark; (6) number and nature of  
25 similar marks on similar goods; (7) nature and extent of actual confusion; (8) length of concurrent  
26 use without actual confusion; (9) variety of goods on which the mark is used; (10) market  
27 interface between applicant and owner of prior mark; (11) right of applicant to exclude others  
28 from use of its mark; (12) whether potential confusion is *de minimis* or substantial; and (13) any

1 other established fact probative of confusion. *Id.* at 1361.

2           However, as the Board has noted on numerous previous occasions, "[W]hile it must  
3 consider each factor for which it has evidence, the Board may focus its analysis on dispositive  
4 factors, such as similarity of the marks and relatedness of goods [and/or services]." *Han Beauty*  
5 *Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); *see also In*  
6 *re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) ("...not all of  
7 the [*DuPont*] factors are relevant or of similar weight in every case. Indeed, any one of the factors  
8 may control a particular case") (internal citations and quotation marks omitted). In this case,  
9 relatedness of the goods and similarity of the marks are dispositive to a finding of likelihood of  
10 confusion.

11           **a. The Marks Appear on Identical Goods in Class 33 and Closely Related**  
12           **Goods in Class 32.**

13           It is well-settled that a comparison of goods in a likelihood of confusion analysis must be  
14 determined on the basis of the goods as they are identified in the parties' respective registrations.  
15 *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001 (Fed.  
16 Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J*  
17 *Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889 (Fed. Cir.  
18 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783  
19 (Fed. Cir. 1990). Additionally, when analyzing the similarity of the goods, "it is not necessary  
20 that the goods or services involved be similar or competitive in character. It is enough if they are  
21 related in some manner such that if they were both to be encountered by the same persons, such  
22 persons would, because of the marks used thereon, mistakenly assume that they originate from or  
23 that they are in some way associated with the same source." *In re Pollio Dairy Prods., Corp.*, 8  
24 USPQ2d 2012, 2015 (TTAB 1988).

25           Applicant is seeking to register its 10 TORR Mark for "beer" in class 32 and "distilled  
26 spirits" in class 33. Applicant's File Wrapper. Opposer is the owner of the TORRES 10 mark for  
27 "brandy" in class 33. 6 TTABVUE 2, Opposer's NOR ¶1, Exh. A.

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

**i. The Marks Appear on Identical Goods in Class 33.**

The goods identified in Opposer’s TORRES 10 registration, i.e. “brandy,” are legally identical to the goods identified in class 33 of Applicant’s 10 TORR Application, i.e. “distilled spirits,” because Applicant’s broadly worded “distilled spirits” in its identification of goods encompasses the more limiting nature of the goods identified in Opposer’s TORRES 10 registration, namely “brandy.” *See* 27 CFR 5.22 (identifying brandy as a distilled spirit); *Patron Spirits Int’l AG*, 2017 WL 227721, at \*3 (TTAB Jan. 4, 2017) (finding “brandy” legally identical to “distilled spirits” as it is encompassed by “distilled spirits”); *see* “distilled spirit” Britannica.com 2020 <https://www.britannica.com/topic/distilled-spirit> (March 16, 2020) (“Distilled Spirit, also called distilled liquor, alcoholic beverage (such as brandy, whisky, rum, or arrack) that is obtained by distillation from wine or other fermented fruit or plant juice or from a starchy material”); *see* “alcoholic beverage” Britannica.com 2020 <https://www.britannica.com/topic/alcoholic-beverage> (March 16, 2020) (an “Alcoholic beverage” is “any fermented liquor, such as wine, beer, or distilled spirit, that contains ethyl alcohol, or ethanol . . . as an intoxicating agent” and a “distilled beverage, includes such liquors as whiskey, gin, vodka, rum brandy and liquers”).

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ii. The Marks Appear on Closely Related Goods in Class 32.**

While one needs to look no further than Applicant’s own application for the same mark for both beer and distilled spirits to find the goods to be related, the case law and other evidence also demonstrate such relatedness of the goods.

Although there is no *de facto* rule that brandy and beer are related for the purposes of trademark registration, on numerous occasions, the Courts and the Board have found brandy, and/or distilled spirits, to be related to beer. *See Schieffelin & Co. v. The Molson Companies Limited*, 9 USPQ2d 2069, 2073 (TTAB 1989) (finding malt liquor, beer and ale related to brandy); *In re Majestic Distilling Company, Inc.*, 2001 WL 1547938, at \*5 (TTAB Nov. 29, 2001) (finding malt liquor and tequila “sufficiently related alcoholic products”); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (beer and tequila closely related); *Surly Brewing Company v. Christopher Olshan*, 2019 WL 2240648, at \*17 (TTAB Apr. 26,

1 2019) (“beer and alcoholic beverages except beer are related products”); *Fleischmann Distilling*  
2 *Corp. v. Maier Brewing Co.*, 314 F.2d 149, 136 USPQ 508, 514 (9th Cir. 1963) (finding that beer  
3 and whisky, being both in the alcoholic beverage industry, are related); *In re Marshall Brewing*  
4 *Company, LLC*, 2018 WL 2018257, at \*8 (TTAB Apr. 9, 2018) (finding beer and vodka related).

5 Here, as evidence that the goods are related, Opposer submitted the records for twenty-  
6 seven third-party use-based registrations that include beer and distilled spirits under a single mark  
7 to show that those goods are commonly registered by a single entity under the same mark: Reg.  
8 No. 3975642 (EWING YOUNG); Reg. No. 4133934 (O’HARA’S); Reg. No. 4243654  
9 (CILICIA); Reg. No. 4299398 (RED STATE); Reg. No. 4397040 (DEDICATED TO THE  
10 CRAFT); Reg. No. 4464912 (LAND RUN); Reg. No. 4492539 (EPIDAURO); Reg. No. 4511897  
11 (MEITOU); Reg. No. 4646106 (MARGARTIAS WITH A MISSION); Reg. No. 4667715  
12 (BALLAST POINT DEDICATED TO THE CRAFT); Reg. No. 4675259 (SWING LUBE); Reg.  
13 No. 4686749 (GARAGE PROJECT); Reg. No. 4721168 (MCGARGLES IRISH FAMILY  
14 BREWERS NEVER ESTABLISHED); Reg. No. 4727645 (STOP & TASTE and Design); Reg.  
15 No. 4806652 (CASELLA FAMILY BRANDS); Reg. No. 4867279 (ALWAYS DRINK  
16 UPSTREAM FROM THE HERD); Reg. No. 4887801 (REVER); Reg. No. 4900517  
17 (SHARKEY’S); Reg. No. 4942481 (LIQUID RIOT BOTTLING COMPANY); Reg. No.  
18 4951746 (16 HOBBS TAVERN); Reg. No. 4978543 (BREWVO); Reg. No. 4978590 (FEASTY);  
19 Reg. No. 5044231 (HARRY’S); Reg. No. 5116260 (TULASI); Reg. No. 5235485 (MR. JOFF);  
20 Reg. No. 5243716 (RIOT BREWING CO.); Reg. No. 5603137 (LAKE LIFE). 6 TTABVUE 2,  
21 Opposer’s NOR ¶2, Exh. B.

22 Opposer’s evidence reflects a representative subset of third-party, use-based, live  
23 registrations showing the same mark registered for both beer and distilled spirits. Although such  
24 registrations are not evidence that the marks shown therein are in use or that the public is familiar  
25 with them, they nonetheless have probative value to the extent that they serve to suggest that the  
26 goods and services listed therein are of a kind which may emanate from a single source under a  
27 single mark. *See In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993); *see also In re*  
28 *Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988).



1           Additionally, Opposer’s evidence includes representative internet print-outs from  
2 producers around the country that offer both beer and distilled spirits for sale under the same  
3 mark, including: LIQUID RIOT BOTTLING COMPANY, DOGFISH HEAD, NEW HOLLAND  
4 BREWING, RANGER CREEK BREWING & DISTILLING, BENT BREWSTILLERY,  
5 GRAND RIVER, LEXINGTON BREWING & DISTLLING CO, LITTLE TOAD CREEK  
6 BREWERY & DISTILLERY, THE DEPOT CRAFT BREWERY DISTILLERY,  
7 MCMENAMINS, ROUND BARN WINERY DISTILLERY BREWERY, BRICKWAY  
8 BREWERY & DISTILLERY, SQUARE ONE BREWERY & DISTILLERY, ROGUE,  
9 HOPLAND BREWSTILLERY, CORSAIR and Applicant. 6 TTABVUE 3-7, 8 Opposer’s NOR  
10 ¶¶3-19, 23 Exhs. C-S, W. Opposer’s evidence also includes evidence of producers identifying  
11 themselves as ‘brewstilleries’ and offering beer and distilled spirits for sale under different  
12 marks. 6 TTABVUE 7-8, Opposer’s NOR ¶¶20-21, Exhs. T-U. The Board has relied upon such  
13 evidence to support a finding that beer and distilled spirits are related. *See In re Buffalo Bayou*  
14 *Distilleries, LLC*, 2019 WL 4034458 (July 30, 2019) (finding that beer and spirits are related  
15 goods); *Surly Brewing Company*, 2019 WL 2240648 (finding that beer and alcoholic beverages  
16 except beer are related goods).

17           Furthermore, consumers who encounter the same or similar mark used in connection with  
18 both brandy and beer are likely to assume that a source connection between the two exists  
19 because it is an increasingly common practice in the industry for breweries to offer for sale  
20 distilled spirits. 6 TTABVUE 8-9-, Opposer’s NOR ¶¶22-26, Exh. V (“brewing and distilling  
21 also share some rather expensive equipment in common . . . [t]his has let some craft brewers to  
22 branch out and try their hand at distilling), Exh. W (the Corsair Brewstillery features 16 taps  
23 offering Corsair beers and all Corsair spirits (vodka, whiskey, rum and gin); Exh. X (craft spirits  
24 have seen a similar boom to that of craft beer and “a number of well-known, and not so well-  
25 known, craft breweries are also distilling spirits”), Exh. X (“Everything from gin to rum and  
26 whiskey is being made by the same outfits that are also creating craft beers.”), Exh. Y  
27 (“Expanding brewing operations to include distillation also makes good business sense.”), Exh. Z  
28 (“A growing number of brewers are hybridizing their operations and adding spirits to their



1 offerings. There are already 256 American businesses that hold both brewer’s and distiller’s  
2 licenses, according to the U.S. Alcohol and Tobacco Tax and Trade Bureau.”)

3 Furthermore, brandy has become a “quiet giant of the [U.S] liquor industry” with more  
4 than 13 million cases “sold domestically in 2016, outpacing gin, Scotch and Irish whiskey,  
5 according to the Distilled Spirits Council of the United States. And most of that – eight million  
6 cases – was American brandy.” 6 TTABVUE 9, Opposer’s NOR ¶¶27-28, Exhs. AA–BB  
7 (“Brandy is making a resurgence in the United States.”). The relatedness of brandy and beer is  
8 further demonstrated by the trend among brewers to age beer in brandy barrels, distillers to age  
9 brandy in beer barrels and some producers to produce “beer brandy” which is a distilled beer  
10 spirit. 6 TTABVUE 9-13, Opposer’s NOR ¶¶29-40, Exhs. CC-NN.

11 Therefore, Opposer’s goods in class 33 are closely related to Applicant’s goods in class 32  
12 and this factor weights strongly in favor of a finding of confusing similarity.

13 **b. The Goods at Issue Travel Through Identical Channels of Trade.**

14 Because there are no restrictions or limitations on trade channels for the goods in  
15 Opposer’s TORRES 10 registration for “brandy” on the one hand, and Applicant’s application for  
16 “beer” and “distilled spirits” on the other, it must be presumed that the trade channels for the  
17 goods are those through which such goods normally travel and are therefore identical.  
18 *See Schieffelin & Co.*, 9 USPQ2d at 2073 (“[S]ince there are no restrictions with respect to  
19 channels of trade in either applicant's application or opposer's registrations, we must assume that  
20 the respective products travel in all normal channels of trade for those alcoholic beverages”  
21 including “bars, restaurants, and liquor stores”); *see also In re Chatam Int'l Inc.*, 71 USPQ2d at  
22 1947-48 (tequila and beer and ale sold in similar trade channels); *In re Majestic Distilling Co.*, 65  
23 USPQ2d at 1204 (malt liquor and tequila “similar by virtue of the fact that both are alcoholic  
24 beverages that are marketed in many of the same channels of trade to many of the same  
25 consumers”); *Monarch Wine Co. v. Hood River Dist., Inc.*, 196 USPQ 855, 857 (TTAB  
26 1977) (whisky, vodka, rum, brandy, wine and champagne travel in same channels of trade to the  
27 same classes of purchasers); *In re AGE Bodegas Unidas, S.A.*, 192 USPQ 326 (TTAB  
28 1976) (“[T]here is clearly a relationship between wine and whiskey, both of which alcoholic

1 beverages are sold through the same specialized retail outlets to the same purchasers, and are  
2 frequently bought at the same time[.]”).

3 Opposer’s TORRES 10 brandy is sold through all outlets where alcoholic beverages are  
4 sold in the U.S. including retail outlets such as liquor stores and supermarkets. 5 TTABVUE 29,  
5 La Terrière Decl. ¶6. The evidence submitted demonstrates that beer and distilled spirits are both  
6 offered for sale on numerous third-party websites and that these alcoholic beverages would all be  
7 sold in restaurants, bars, liquor stores, convenience stores and grocery stores. 6 TTABVUE 3, 4-  
8 7, 13-17 Opposer’s NOR ¶3, 6-21, 41-57 Exhs. C, F-U, OO-EEE. Indeed, beer and distilled  
9 spirits are not only sold in the same stores, but Opposer’s TORRES 10 brandy is sold in the same  
10 stores as Applicant’s 10 TORR beer. See, 6 TTABVUE 13, Opposer’s NOR ¶41, Exh. OOO.

11 Thus, the parties’ goods must be presumed to travel through all ordinary trade channels  
12 and methods of distribution for alcoholic beverages, from bars and restaurants to grocery stores.  
13 As such, the trade channels are identical. Accordingly, the channels of trade factor weighs  
14 strongly in favor of a finding of confusing similarity.

15 **c. The Goods at Issue are Marketed to the Same Class of Purchasers.**

16 When two parties’ goods are identical or related and their trade channels are identical, it  
17 must also be presumed that the goods in question will be purchased by the same potential  
18 customers. *Chicago Bears Football Club, Inc. v. 12th Man*, 83 USPQ2d 1073, 1078 (TTAB  
19 2007); see also *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part  
20 identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the  
21 identifications thereof as to trade channels and purchasers, these clothing items could be offered  
22 and sold to the same classes of purchasers through the same channels of trade.”).

23 Because the goods identified in Opposer’s TORRES 10 registration and Applicant’s 10  
24 TORR Application are both alcoholic beverages, they are presumed to travel in the same market  
25 channels. See *In re Majestic Distilling Company*, 2001 WL 1547938, at \*6. Both beer and  
26 distilled spirits are also advertised together to the same purchasers. 6 TTABVUE 3, 4-7, 13-17,  
27 Opposer’s NOR ¶3, 6-21, 41-57, Exhs. C, F-U, OO-EEE. Thus, it is presumed that the consumers  
28 of the goods at issue will encompass all normal and usual purchasers of alcoholic beverages as

1 neither party's registrations contain any limitation as to the types of purchasers.

2 Because there is no restriction in Opposer's TORRES 10 registration or in Applicant's 10  
3 TORR Application as to the price or quality of the goods offered, one cannot find that the  
4 consumers of goods will be sophisticated, discriminating, or careful in making their purchases.  
5 "The authority is legion that the question of registrability of an applicant's mark must be decided  
6 on the basis of the identification of goods set forth in the application regardless of what the record  
7 may reveal as to the particular nature of an applicant's goods, the particular channels of trade or  
8 the class of purchasers to which sales of the goods are directed." *Octocom Sys., Inc.*, 16 USPQ2d  
9 at 1787.

10 Alcoholic beverage purchasers include not only sophisticated purchasers, but also  
11 ordinary purchasers with little sophistication. *See Palm Bay Imports, Inc. v. Veuve Clicquot*  
12 *Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1376, 73 USPQ2d 1689 (Fed. Cir. 2005); *E.*  
13 *& J. Gallo Winery v. Consorzio del Gallo Nero*, 782 F.Supp. 457, 465, 20 USPQ2d 1579 (N.D.  
14 Cal. 1991) (little doubt that wine purchasers are typically unsophisticated impulse buyers); *In re*  
15 *Vina Lo Miranda Limitada*, 2002 WL 732146, at \*3 (TTAB April 24, 2002) ("Many purchasers  
16 of wine are members of the general public who would not necessarily be likely to exercise the  
17 high degree of care necessary to prevent confusion."). As a result, the classes of purchasers for  
18 the parties' goods are deemed to be identical and include the unsophisticated consumer. This  
19 factor therefore weighs strongly in favor of a finding of likelihood of confusion.

20 **d. The Overall Commercial Impressions Created by TORRES 10 and the 10**  
21 **TORR Mark are Virtually Identical.**

22 As the Board has recognized on numerous occasions, "[t]he similarity or dissimilarity of  
23 the marks in their entirety is to be considered with respect to appearance, sound and connotation."  
24 *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357, 56 USPQ2d 1351 (Fed. Cir.  
25 2000). "Similarity in any one of these elements may be sufficient to find the marks confusingly  
26 similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); accord *Krim-Ko Corp. v. Coca-*  
27 *Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the  
28 similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

1           Additionally, the test under this *DuPont* factor is not whether TORRES 10 and the 10  
2   TORR Mark can be distinguished in a side-by-side comparison, but rather whether the marks are  
3   sufficiently similar in terms of their overall commercial impression that confusion as to the source  
4   of the goods and services offered under the respective marks is likely to result. *See Coach Servs.*  
5   *Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The  
6   focus is on the recollection of the average purchaser, who normally retains a general rather than  
7   specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108  
8   (TTAB 1975). “In evaluating the similarities of marks, a particular feature or portion of a mark  
9   can thus be accorded greater weight if it would make an impression upon purchasers that would  
10   be remembered and relied upon to identify the goods or services.” *In re Appetito Provisions, Co.*,  
11   3 USPQ2d 1553, 1554 (TTAB 1987).

12                           **i. TORRES 10 and the 10 TORR Mark are Virtually Identical in**  
13                           **Appearance.**

14           It is well settled that marks may be confusingly similar in appearance despite the  
15   addition, deletion or substitution of letters or words. *See, e.g. Weiss Assocs. Inc. v. HRL Assocs.*  
16   *Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (finding TMM confusingly similar to  
17   TMS). When an applicant’s mark is compared to a registered mark, “the points of similarity are  
18   of greater importance than the points of difference.” *Esso Standard Oil Co. v. Sun Oil Co.*, 229  
19   F.2d 37, 108 USPQ 161 (D.C. Cir.); TMEP ¶1207.01(b). Although marks are compared in their  
20   entireties, one feature of a mark may be recognized as more significant in creating a commercial  
21   impression. Greater weight is given to that dominant feature in determining whether there is a  
22   likelihood of confusion. *In re National Data Corp.*, 224 USPQ 749 (Fed. Cir. 1985); TMEP  
23   ¶1207.01(b)(viii).

24           Because the terms “DISTILLING AND BREWING COMPANY” in Applicant’s mark  
25   are descriptive and have been disclaimed, the dominant portion of Applicant’s mark is “10  
26   TORR.” *See Karma Fine Beverages, Inc.*, 2015 WL 984130, at \* 7 (TTAB Feb. 19, 2015) (“It is  
27   well settled that disclaimed, descriptive matter may have less significance in likelihood of  
28   confusion determinations.”); *In re Viterra Inc.*, 671 F.3d 1358, 1362 (the court may place more

1 weight on a dominant portion of a mark, for example if another feature of the mark is descriptive  
2 or generic standing alone); *Cunningham*, 222 F.3d at 947 (“Regarding descriptive terms, this  
3 court has noted that the ‘descriptive component of a mark may be given little weight in reaching  
4 a conclusion on the likelihood of confusion.’”); *In re Chatam Int’l Inc.*, 71 USPQ2d 1944  
5 (finding that the Board properly accorded the disclaimed generic term, ALE, less weight in  
6 assessing the similarity of the marks); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d at  
7 1533-34 (“DELTA,” not the disclaimed generic term “CAFÉ,” is the dominant portion of the  
8 mark THE DELTA CAFÉ); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed.  
9 Cir. 1985) (“[T]here is nothing improper in stating, that for rational reasons, more or less weight  
10 has been given to a particular feature of a mark, provided the ultimate conclusion rests on  
11 consideration of the marks in their entirety.”)

12 Here, the dominant elements of the marks are the numeral “10” and the word  
13 “TORR/TORRES.” Thus, since it is well settled that “[c]onfusion is likely between two marks  
14 consisting of reverse combinations of the same elements if they convey the same meaning or  
15 create substantially similar commercial impressions,” (*In re Mystic Apparel LLC*, 2017 WL  
16 512757, at \*4 (January 17, 2017)) the dominant features of the marks, TORRES 10 and 10  
17 TORR, are likely to be confused. *See also*, *In re Wine Society of America Inc.*, 12 USPQ2d  
18 1139, 1142 (TTAB 1989) (holding THE WINE SOCIETY OF AMERICA and design for “wine  
19 club membership services inclusion the supplying of printed materials” etc., likely to be  
20 confused with AMERICAN WINE SOCIETY 1967 and design, registered for a newsletter,  
21 bulletin and journal of interest to members of the registrant); *In re Nationwide Industries Inc.*, 6  
22 USPQ2d 1882, 1884 (TTAB 1988) (finding RUST BUSTER, for a rust-penetrating spray  
23 lubricant likely to be confused with BUST RUST for a penetrating oil, holding that “the reversal  
24 in one mark of the essential elements of another mark may serve as a basis for a finding of no  
25 likelihood of confusion only if the transposed marks create distinctly different commercial  
26 impressions.”); *In re Gen. Tire & Rubber Co.*, 213 USPQ 870, 871 (TTAB 1982) (holding  
27 SPRINT STEEL RADIAL (with “STEEL” and “RADIAL” disclaimed) for pneumatic tires, and  
28 RADIAL SPRINT (with “RADIAL” disclaimed) for radial tires, likely to cause confusion); *Bank*

1 of *America Nat'l Trust and Savings Assoc'n v. The American Nat'l Bank of St. Joseph*, 201 USPQ  
2 842, 845 (TTAB 1978) (“the words ‘BANKAMERICA’ and ‘BANK OF AMERICA’, on the  
3 one hand, and ‘AMERIBANC’, on the other, convey the same meaning and create substantially  
4 similar commercial impressions”); *see also* TMEP §1207.01(b)(vii).

5 Thus, in comparing the overall visual impressions created by the TORRES 10 mark and  
6 the 10 TORR Mark, there can be very little dispute that the marks are strikingly similar.

7 **ii. TORRES 10 and the 10 TORR Mark are Virtually Identical in**  
8 **Sound.**

9 The marks are also virtually identical phonetically. A factor that weighs heavily in the  
10 analysis of the similarity of the marks is whether the dominant portion of the marks at issue  
11 sounds the same when spoken. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565,  
12 218 USPQ 390, 395 (Fed. Cir. 1983) (GIANT confusingly similar to GIANT HAMBURGERS  
13 for related food products and services because dominant portion, GIANT, sounds the same when  
14 spoken).

15 Here, the dominant portions of the marks at issue, TORRES 10 and 10 TORR,  
16 respectively, are virtually identical in sound. Such similarity is exacerbated by the fact that when  
17 spoken, both marks are alliterative. Given that the alcoholic beverages at issue must be presumed  
18 to move through all channels of trade, including bars, such alliteration increases the likelihood of  
19 confusion based on the similarity in sound of the marks where the goods are ordered by name in  
20 a bar under noisy, chaotic conditions. *See Guinness United Distillers & Vintners B.V. v.*  
21 *Anheuser-Busch, Inc.*, 64 USPQ2d 1039, 1044 (S.D.N.Y. 2002) (noting “the often chaotic  
22 conditions under which alcoholic beverages are purchased in bars.”). As the Board found in the  
23 case of *E. & J. Gallo Winery v. Wade*, 2017 TTAB LEXIS 186, at \*16 (TTAB June 7, 2017):

24 [Alcoholic beverages] are often ordered by name, in a noisy bar or  
25 restaurant. Further, if the beer is served in a glass because it is a draft beer  
26 from a keg, or the wine is served in a glass . . . , the consumer may never  
27 actually see a label displaying the mark; rather, the only representation of the  
28 mark may be in the verbal form. In sum, any minor differences in the sound  
of the marks may go undetected by consumers and, therefore, are not  
sufficient to distinguish the marks.

1 Thus, Opposer's TORRES 10 mark and Applicant's 10 TORR Mark are confusingly  
2 similar based on their sound.

3 **iii. TORRES 10 and the 10 TORR Mark Are Similar in Perceived**  
4 **Meaning.**

5 As to connotation of the TORRES 10 mark and the 10 TORR Mark, there is no  
6 significant distinction between the two based on their meanings. The term "torres" is a Spanish  
7 word that translates into "towers." 5 TTABVUE 2, Durand Decl. ¶2, Exh. 1. The term "Torr" is  
8 a name that means "tower." 5 TTABVUE 3, Durand Decl. ¶¶3-5, Exhs. 2-4. The term "torres"  
9 in Opposer's mark and the term "Torr" in Applicant's mark are both combined with the identical  
10 numeral "10." As a result, Opposer's TORRES 10 mark translates into English as "10 towers." 5  
11 TTABVUE 2, Durand Decl. ¶2, Exh. 1. Applicant's 10 TORR Mark conveys the identical  
12 meaning as Opposer's mark, i.e. "10 towers." Because the analysis of similarity of meaning  
13 between marks focuses on the average purchaser who normally retains only a general, rather than  
14 specific impression of trademarks the meanings of the marks at issue are clearly the same. *See*  
15 *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); TMEP  
16 §1207.01(b)(v).

17 Where the goods of an opposer and an applicant are similar and/or closely related, as they  
18 are in this case, the degree of similarity between the marks required to support a finding of  
19 likelihood of confusion is not as great as would be required with diverse goods. *See In re J.M.*  
20 *Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d  
21 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004). Here, the marks at issue are similar in  
22 appearance and sound, and are likely to convey the same or similar meaning. As a result, in  
23 overall commercial impression they are quite similar and, in this case, the similarities outweigh  
24 the differences and this factor weighs in favor of confusing similarity.

25 **e. Opposer's TORRES 10 Mark is Strong Within the Alcoholic Beverage**  
26 **Industry.**

27 The "fame of a mark is not 'an all-or-nothing' measure when considered in the context of  
28 likelihood of confusion" *E. & J. Gallo Winery*, 2017 TTAB LEXIS 186, at \*17; *see also Joseph*  
*Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323 (Fed. Cir. 2017) ("fame" is



1 determined from the viewpoint of consumers of like products). Unlike the fame necessary for  
2 supporting a claim of trademark dilution, in evaluating the fame of a mark under the fifth  
3 *DuPont* factor, the mark's renown must be demonstrated in the specific product market among  
4 the customers and potential customers of the product, and not the general public. *Palm Bay*  
5 *Imports, Inc.*, 396 F.3d at 1375 (noting that a large segment of the general public does not even  
6 consume alcoholic beverages). The "stronger" or more "well known" a "plaintiff's mark, the  
7 greater the likelihood that use or registration for even minimally related products will cause  
8 confusion." *Champions Golf Club v. Champions Golf Club*, 78 F.2d 1111, 38 USPQ2d 1161,  
9 1164 (6th Cir. 1996). "Indeed, '[a] strong mark...casts a long shadow which competitors must  
10 avoid.'" *Id.*, (quoting *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 353,  
11 22 USPQ2d 1453 (Fed. Cir. 1992)).

12 Opposer's TORRES 10 mark for "brandy" is arbitrary. Therefore, Opposer's mark is  
13 strong and entitled to a wide scope of protection. *See In re Bercut-Vandervoort & Co.*, 229  
14 USPQ at 765-766 (marks with no suggestive or descriptive connotations must be considered  
15 strong, arbitrary marks for the purposes of a Section 2(d) analysis).

16 The "commercial strength of a mark may be measured indirectly by the volume of sales  
17 of and expenditures for the goods identified by the marks, the length of time those indicia of  
18 commercial awareness have been evident, widespread critical assessments, notice by  
19 independent sources of the goods, and the general reputation of the goods." *E. & J. Gallo*, 2017  
20 TTAB LEXIS 186, at \*19. Opposer has been producing its TORRES 10 brandy since 1946 and  
21 it is the most widely sold Spanish brandy in the world. 5 TTABVUE 28-29, La Terrière Del. ¶¶2,  
22 4-5, Exh. 5. Since 2014, Opposer has sold over 65,000 cases of TORRES 10 brandy in the U.S.  
23 market for a total sales value of over 3.4 million Euro. 5 TTABVUE 28, La Terrière Decl. ¶3.  
24 Opposer has also spent in excess of 475,000 Euro promoting and advertising the TORRES 10  
25 brandy in the U.S. during such period. 5 TTABVUE 28-29, La Terrière Decl. ¶¶3, 7. Opposer's  
26 TORRES 10 brandy is sold through all outlets where alcoholic beverages are sold in the U.S.  
27 including retail outlets such as liquor stores and supermarkets. 5 TTABVUE 29, La Terrière  
28 Decl. ¶6.



1 Opposer's TORRES 10 brand is recognized within the alcoholic beverage industry as a  
2 top-quality brandy and has garnered several awards. 5 TTABVUE 29, La Terrière Decl. ¶8. In  
3 2015, Opposer's TORRES 10 brandy received a double gold award at the San Francisco World  
4 Spirits Competition. 5 TTABVUE 29, La Terrière Decl. ¶8. In 2016, Opposer's TORRES 10  
5 brandy received a silver medal at the San Francisco World Spirits Competition and an 87 point  
6 score from the Guía Peñín wine guide. 5 TTABVUE 29, La Terrière Decl. ¶8.

7 Because the consuming public has been widely exposed to Opposer's TORRES 10 mark  
8 for brandy, it is very well known and strong. When properly according Opposer's TORRES 10  
9 registration the "wide latitude of legal protection" it enjoys as a strong and famous mark for  
10 brandy, it is clear that this factor favors a finding of likelihood of confusion. *See Kenner Parker*  
11 *Toys*, 963 F.2d at 352.

12 **f. The Potential for Confusion is Substantial.**

13 The potential for confusion between Opposer's TORRES 10 mark and Applicant's 10  
14 TORR Mark is substantial. Opposer's registration and Applicant's application are both in  
15 standard character format, meaning that the 10 TORR Mark could be used by Applicant in any  
16 manner whatsoever, including in a style similar to Opposer's use of its TORRES 10 mark, or in a  
17 manner which diminishes the significance of the terms "DISTILLING AND BREWING  
18 COMPANY" in Applicant's application, e.g.,:

19  
20 **10 TORR**

21 Distilling and Brewing Company

22  
23 Additionally, there is a significant risk that consumers encountering Applicant's 10  
24 TORR Mark will incorrectly assume that it is a derivative, off-shoot or second label for the  
25 TORRES 10 brand (or vice versa). Alternatively, TORRES 10 could be perceived by consumers  
26 as merely being a shortened form of Applicant's 10 TORR DISTILLING AND BREWING  
27 COMPANY mark. Therefore, there is considerable potential for consumer confusion such that  
28 this *DuPont* factor also weighs in favor of Opposer.

**g. Consideration of all of the relevant *DuPont* Factors Demonstrates a Clear Likelihood of Confusion.**

In considering all of the evidence of record as it pertains to the *DuPont* factors, each of which tip decidedly in Opposer’s favor, the confusing similarity of Opposer’s TORRES 10 mark and Applicant’s 10 TORR Mark is readily apparent. The marks as registered present a virtually identical commercial impression. The parties’ goods are identical and/or closely related. As such, the trade channels and classes of purchasers must be viewed as identical. Opposer’s TORRES 10 mark is arbitrary and commercially strong. Therefore, consideration of the *Du Pont* factors clearly demonstrates that a likelihood of confusion exists.

To the extent that any doubts may still exist as to the confusing similarity of the marks, these doubts must be resolved in favor of the prior registrant and against the newcomer. *See Hewlett-Packard Co.*, 281 F.3d at 1265 (“This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks.”); *see also Century 21 Real Estate Corp.*, 970 F.2d 874, 878 (Fed. Cir. 1992); *Ava Enterprises Inc. v. Audio Boss USA Inc.*, 77 USPQ2d 1783, 1787 (TTAB 2006). Thus, Applicant’s mark is likely to be confused with Opposer’s mark in violation of Section 2(d).

**CONCLUSION**

For the foregoing reasons, Opposer respectfully requests that the opposition be sustained and that registration of the 10 TORR Mark be refused.

Dated: March 19, 2020

Respectfully submitted,

DICKENSON, PEATMAN & FOGARTY



By J. Scott Gerien

Joy L. Durand

1455 First Street, Suite 301  
Napa, California 94559  
Telephone: 707-252-7122  
Facsimile: 707-255-6876

Attorneys for Opposer,  
Miguel Torres, S.A.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

I declare that I am over the age of 18 years, employed in the County of Napa, and not a party to the within action; my business address is 1455 First Street, Suite 301, Napa, California 94559.

On March 19, 2020, I electronically served a copy of the following document(s) by email:

- **OPENING BRIEF OF OPPOSER MIGUEL TORRES, S.A.**

The persons served are as follows:

JERRY M. SNYDER  
LAW OFFICE OF JERRY SNYDER LAW  
Jerry@jerrysnyderlaw.com,  
Nevadajerrysnyder@gmail.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed March 19, 2020, at Napa, California.



\_\_\_\_\_  
Barbara Barrera