

ESTTA Tracking number: **ESTTA1050249**

Filing date: **04/20/2020**

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

| | |
|------------------------|--|
| Proceeding | 91244503 |
| Party | Defendant Will Cody Whipple |
| Correspondence Address | JERRY M SNYDER LAW OFFICE OF JERRY SNYDER LAW 429 PLUMB LN RENO, NV 89509 UNITED STATES Jerry@jerrysnyderlaw.com, Nevadajerrysnyder@gmail.com 775-499-5647 |
| Submission | Brief on Merits for Defendant |
| Filer's Name | Jerry Snyder |
| Filer's email | nevadajerrysnyder@gmail.com |
| Signature | /Jerry Snyder/ |
| Date | 04/20/2020 |
| Attachments | APPLICANT RESPONDING BRIEF.pdf(353410 bytes) |

TABLE OF CONTENTS

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

| | |
|--|----|
| Table of Contents | 2 |
| Table of Authorities | 4 |
| I. INTRODUCTION..... | 5 |
| II. STATEMENT FACTS | 5 |
| III. ARGUMENT..... | 7 |
| A. Will Cody Whipple’s Declaration Testimony Is Admissible..... | 7 |
| B. Miguel Torres Has Not Shown Any Likelihood of Confusion Between Its “Torres 10” Mark and Whipple’s “10 Torr Distilling & Brewing Company” Mark..... | 8 |
| i. The “10 Torr Distilling and Brewing Company” Mark Is Distinct in Appearance, Sound, Connotation, and Commercial Impression From the “Torres 10” Mark..... | 10 |
| 1. “10 Torr Distilling and Brewing Company” Has a Significantly Different Meaning and Connotation than “Torres 10”..... | 11 |
| 2. The “10 Torr Distilling and Brewing Company” Mark is Visually Distinct from the “Torres 10” Mark..... | 14 |
| 3. The 10 Torr Mark is Sonically Distinct from the Torres 10 Mark..... | 17 |
| 4. The “10 Torr Distilling and Brewing Company” Mark Differs from the “Torres 10 Mark” Substantially in Its Commercial Presentation..... | 18 |
| ii. Miguel Torres Has Not Shown that the “Torres 10” Mark Is a Strong Mark. | 19 |
| iii. The Two Marks Are Used In Connection With Different, Albeit Related Products..... | 22 |
| iv. Miguel Torres Has Not Provided any Evidence of Actual Confusion..... | 23 |
| v. Opposer Has Not Shown Any Potential For Confusion..... | 23 |

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

| | |
|---|----|
| vi. The <i>DuPont</i> Factors Do Not Support the Opposer’s Claim..... | 24 |
| IV. CONCLUSION..... | 25 |

TABLE OF AUTHORITIES

Cases

| | | |
|----|---|----------|
| 1 | | |
| 2 | | |
| 3 | <i>A&H Sportswear v. Victoria’s Secret Stores, Inc.</i> , 237 F.3d 198 (3rd | |
| 4 | Cir. 2000)..... | 10, 19 |
| 5 | <i>Abercrombie & Fitch Co. v. Hunting World, Inc.</i> , 537 F.2d 4 (2d | |
| 6 | Cir.1976)..... | 19 |
| 7 | <i>Affiliated Hosp. Prod., Inc. v. Merdel Game Mfg. Co.</i> , 513 F.2d | |
| 8 | 1183, 1188 (2d Cir. 1975)..... | 23 |
| 9 | <i>Brennan’s Inc. v. Brennan’s Restaurant, LLC</i> , 360 F.3d 125, 131 (2d | |
| 10 | Cir. 2004)..... | 20 |
| 11 | <i>Flushing Bank v. Green Dot Corp.</i> , 138 F.Supp. 3d 561, 587 | |
| 12 | (S.D.N.Y. 2015)..... | 10 |
| 13 | <i>Henri’s Food Products Co. v. Kraft, Inc.</i> , 717 F.2d 352, 355-56 (7 th | |
| 14 | Cir. 1983)..... | 18 |
| 15 | <i>In re Bay State Brewing Co.</i> , 117 USPQ2d 1958, 1960 (TTAB | |
| 16 | 2016)..... | 11 |
| 17 | <i>In Re Detroit Athletic Co.</i> , 903 F.3d 1297, 1305 (Fed. Cir. 2018)..... | 14 |
| 18 | <i>In re E.I. DuPont Nemours & Co.</i> 476 F.3d 1357 (CCPA 1973)..... | 6, 9, 10 |
| 19 | <i>In re Gen Tire & Rubber Co.</i> , 213 USPQ 870, 871 (TTAB 1982)..... | 16 |
| 20 | <i>In re Nationwide Industries Inc.</i> , 6 USPQ 2d 1882, 1884 (TTAB | |
| 21 | 1884)..... | 16 |
| 22 | <i>In re Wine Society of America, Inc.</i> 12 USPQ2d 1139, 1142 (TTAB | |
| 23 | 1989)..... | 16 |
| 24 | <i>KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.</i> , 543 U.S. | |
| 25 | 111, 117 (2004)..... | 8 |
| 26 | <i>Palm Bay Imps., Inc. v. Veuve Clicquot Ponsard in Maison Fondée</i> | |
| 27 | <i>en 1772</i> , 396 F.3d 1369, 1372 (Fed. Cir. 2005)..... | 15 |
| 28 | <i>Perini Corp. v. Perini Const., Inc.</i> 915 F.2d 121 (4 th Cir 1990)..... | 19 |

| | | |
|----|--|----|
| 1 | <i>Sealed Air Corp v. v. Scott Paper Co.</i> , 190 USPQ 106, 108 (TTAB 1975)..... | 17 |
| 2 | | |
| 3 | <i>Streetwise Maps, Inc. v. VanDam, Inc.</i> , 159 F.3f 739 (2d Cir 1998)... | 18 |
| 4 | <i>Surgicenters of Am., Inc. v. Med. Dental Surgeries, Co.</i> , 601 F.2d 1011, 1015 n. 11 (9th Cir.1979) | 8 |
| 5 | | |
| 6 | <i>Universal Money Centers v. American Tele. & Telegraph CO.</i> 22 F.3d 1527, 1530 n2. (10 th Cir 1994)..... | 11 |
| 7 | | |
| 8 | | |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |
| 26 | | |
| 27 | | |
| 28 | | |

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

I. INTRODUCTION

Through the present Opposition, Miguel Torres, S.A. (“Miguel Torres”) argues that Applicant Will Cody Whipple’s (“Whipple”) “10 Torr Distilling and Brewing Company” mark is “virtually indistinguishable” from the Opposer’s “Torres 10” mark. Opposers argument is meritless.

A thorough analysis of the factors set forth in *In Re E.I. DuPont Nemours & Co.* demonstrates that Miguel Torres is unable to demonstrate that any likelihood of confusion exists. Most importantly, the Opposition fails because Whipple’s “10 Torr Distilling & Brewing Company” mark makes a significantly different overall commercial impression than does the “Torres 10” mark. As described at length in correspondence with the examiner, the “10 Torr” mark refers to the fact that the Applicant’s spirits are distilled using a vacuum process; a “torr” is a measure of vacuum pressure. As such, the phrase “10 Torr Distilling and Brewing Company” is evocative of a scientific measurement. In contrast, “Torres” is recognizable as a common surname and as such makes a very different impression. Because the two marks use words with radically different meanings, the linguistic happenstance of shared letters does not create a risk of confusion.

II. STATEMENT FACTS

Miguel Torres sells brandy internationally under the “Torres 10” mark. *See* September 30, 2019 Declaration of Michael La Terriere, submitted in support of the Opposer’s Opening Brief (“OOB”) (“La Terriere Decl.”). Miguel Torres’

1 registration for the “Torres 10” mark indicates that it is to be used exclusively in
2 connection with brandy.

3 Whipple Brewing and Distilling, LLC (“Whipple”) has been manufacturing
4 and selling beer and distilled spirits sold under the “10 Torr Distilling and
5 Brewing Company” mark since 2017. Whipple manufactures vodka, flavored
6 vodka, gin, a coffee liquor, and various canned cocktails based on its vodka.
7 Whipple does not make brandy and has no plans to do so. Whipple has only sold
8 products in Nevada and Northern California. December 5, 2019 Declaration of
9 Will Cody Whipple (“Whipple Decl.”).
10
11

12 Whipple chose to use the “10 Torr Distilling and Brewing Company” mark
13 because its spirits are distilled using a state of the art vacuum distillation
14 process that has significant advantages and produces a premium product. The
15 word “torr” is defined in English as a unit of pressure used to measure vacuum
16 pressure. Whipple Decl. ¶ 2-3; Applicant’s May 31, 2018 Response to Office
17 Action; August 9, 2018 Response to Office Action.¹
18

19 **III. ARGUMENT**

20 **A. Will Cody Whipple’s Declaration Testimony Is Admissible.**

21 Miguel Torres first objects to the admission of statements in the Whipple
22 Declaration that set forth the English definition and etymology of the word “torr,”
23 on hearsay grounds, apparently because Whipple did not identify the source of
24 these definitions in a Notice of Reliance. This objection is spurious. It is well
25
26
27

28 ¹ See also <https://www.dictionary.com/browse/torr?s=t>

1 settled that “while not determinative, dictionary definitions are often persuasive
2 in determining how a term is understood by the consuming public.” *Surgicenters*
3 *of Am., Inc. v. Med. Dental Surgeries, Co.*, 601 F.2d 1011, 1015 n. 11 (9th
4 Cir.1979).

5
6 Moreover, Miguel Torres cannot claim to suffer any prejudice as a result of
7 Whipple’s reliance on this dictionary definition. Whipple has referred to this
8 definition and etymology since it responded to Office Actions in 2018. Miguel
9 Torres has had access to the File Wrapper as well as to the Whipple Declaration
10 for several months; if it believes that the definition Whipple provides for the word
11 “torr” is not accurate, it had every opportunity to point out contrary evidence.
12

13 Miguel Torres’ objection to Whipple’s use of dictionary definition of the
14 word “torr” is particularly hollow in light of the fact that Miguel Torres cites to a
15 dictionary definition of the phrase “alcoholic beverage” which was not disclosed in
16 Miguel Torres’ own Notice of Reliance. OOB at 7:13-16.
17

18 For these reasons, Miguel Torres’ evidentiary objections should be
19 overruled.
20

21 **B. Miguel Torres Has Not Shown Any Likelihood of Confusion**
22 **Between Its “Torres 10” Mark and Whipple’s “10 Torr**
23 **Distilling & Brewing” Mark.**

24 In order to sustain the present Opposition, Miguel Torres bears the burden
25 of proving that Whipple’s use of the “10 Torr Brewing and Distilling Company
26 mark “is likely to cause confusion, or cause mistake, or to deceive.” *KP Permanent*
27 *Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004). As such,
28

1 Miguel Torres must show that Whipple’s “actual practice is likely to produce
2 confusion in the minds of consumers about the origin of the goods or services in
3 question.”

4 Miguel Torres correctly points out that the test for determining whether a
5 likelihood of confusion exists is set forth in *In re E.I. DuPont Nemours & Co.* 476
6 F.3d 1357 (CCPA 1973). The DuPont court set forth thirteen factors to be
7 considered:
8

9 (1) The similarity or dissimilarity of the marks in their
10 entireties as to appearance, sound, connotation and commercial
11 impression

12 (2) The similarity or dissimilarity and nature of the goods
13 or services as described in an application or registration or in
14 connection with which a prior mark is in use

15 (3) The similarity or dissimilarity of established, likely-to-
16 continue trade channels

17 (4) The conditions under which and buyers to whom sales
18 are made, i.e. "impulse" vs. careful, sophisticated purchasing

19 (5) The fame of the prior mark (sales, advertising, length
20 of use)

21 (6) The number and nature of similar marks in use on
22 similar goods

23 (7) The nature and extent of any actual confusion

24 (8) The length of time during and conditions under which
25 there has been concurrent use without evidence of actual
26 confusion

27 (9) The variety of goods on which a mark is or is not used
28 (house mark, "family" mark, product mark)

(10) The market interface between applicant and the
owner of a prior mark. . . .

1 (11) The extent to which applicant has a right to exclude
2 others from use of its mark on its goods

3 (12) The extent of potential confusion, i.e., whether *de*
4 *minimis* or substantial.

5 (13) Any other established fact probative of the effect of
6 use.

7 *Id.* The *DuPont* court went on to note that these factors “are not listed in order of
8 merit” and that each factor “may from case to case play a dominant role.” *Id.*

9 A thorough examination of each of these factors (to the extent that they
10 are applicable to the present case) demonstrates that Miguel Torres is unable to
11 sustain its burden of showing that Whipple’s use of the “10 Torr Distilling &
12 Brewing” mark creates likelihood of confusion with the “Torres 10” mark.

13
14
15 **i. The “10 Torr Distilling and Brewing Company” Mark Is**
16 **Distinct in Appearance, Sound, Connotation, and**
17 **Commercial Impression From the “Torres 10” Mark.**

18 While any one of the *duPont* factors may be important in any particular
19 case, it is well settled that “the single most important factor in determining
20 likelihood of confusion is mark similarity.” *A&H Sportswear v. Victoria’s Secret*
21 *Stores, Inc.*, 237 F.3d 198 (3rd. Cir. 2000). In addition, “When evaluating the
22 similarity of marks, courts consider the overall impression created by a mark.”
23 *Flushing Bank v. Green Dot Corp.*, 138 F.Supp. 3d 561, 587 (S.D.N.Y. 2015). In
24 assessing similarity, courts should consider “modes of presentation, typeface,
25 inclusion of additional words, dress colors, and associated tie-ins, such as a
26 mascot,” among other factors. *Id.* The degree of similarity between trademarks
27
28

1 “is tested on three levels as encountered in the marketplace: sight, sound, and
2 meaning.” *Universal Money Centers v. American Tele. & Telegraph CO.* 22 F.3d
3 1527, 1530 n2. (10th Cir 1994).

4
5 1. “10 Torr Distilling and Brewing Company” Has a
6 Significantly Different Meaning and Connotation than
7 “Torres 10.”

8 The meaning of the two marks is significantly different on its face. The
9 phrase “10 Torr Distilling & Brewing Company” refers to a unit of vacuum
10 pressure and was selected to highlight the fact that Whipple’s spirits are made
11 employing a state of the art vacuum distilling process. Whipple Decl. ¶3. Torres
12 10, on the other hand, apparently refers to the surname of Miguel Torres; Exhibit
13 1 to the la Terriere Decl. refers to the “Familia Torres” foundation in connection
14 with an advertisement for Torres 10 Brandy.

15 In spite of the fact that the English meaning of these two marks is very
16 different, Miguel Torres argues that the “10 Torr Distilling & Brewing Company”
17 mark is “similar in perceived meaning” to the “Torres 10” mark. Miguel Torres
18 argues that (1) “Torres” is the Spanish word for tower, (2) when used as a name,
19 “Torr” also means tower. For this reason, Miguel Torres apparently argues, an
20 “average purchaser” would believe that both the marks “10 Torr” and “Torres 10”
21 refer to ten towers. OOB, 16:3-24. This argument is meritless.

22
23
24 In analyzing whether two marks are similar in meaning or connotation,
25 the focus is on a general purchaser who normally retains a general, rather than a
26 specific impression of the subject trademarks. *In re Bay State Brewing Co.*, 117
27 USPQ2d 1958, 1960 (TTAB 2016). Miguel Torres’ argument, in contrast, depends
28

1 upon the notion that a purchaser of brandy, distilled spirits, and beer will have a
2 very specific knowledge of the meaning of baby names, and will apply that
3 knowledge of baby names in the context of purchasing alcohol. Miguel Torres'
4 own evidence demonstrates how attenuated this argument is.

5
6 Miguel Torres relies on the declaration of Joy Durand to support the
7 assertion that the name "Torr" means tower. OOB at 16:2-16. Exhibit 2 to the
8 Durand Declaration is a printout from the babynamesyay.com website which
9 indicates that the name "Torr" is the 11,677th most popular boys name in the
10 United States. This same documents identifies a total of 13 babies born with the
11 name "Torr" based on social security records – 6 in 1965 and 7 in 1971. As such,
12 it is apparent that Torr is hardly in widespread use as a name – and therefore, it
13 is unlikely that an average consumer of beer or distilled spirits would even
14 associate the word "Torr" with a first name, much less know that the name Torr
15 is derived from the word "Tower."
16
17

18 If Ms. Durand had referred to a standard English dictionary, rather than a
19 baby name dictionary, she would have discovered that in English, a torr is "a unit
20 of pressure, being the pressure necessary to support a column of mercury one
21 millimeter high at 0°C and standard gravity, equal to 1333.2 microbars."
22 <https://www.dictionary.com/browse/torr?s=t>. In light of the fact that there is a
23 standard English definition of the word "torr," Miguel Torres' assertion that an
24 average purchaser would associate the "10 Torr" trademark with a rare baby
25 name that means tower – and in turn connect that definition to the "Torres 10"
26 mark – is simply not credible.
27
28

1 The application history for this Trademark demonstrates that Whipple
2 intended that the 10 Torr mark was to selected to refer to the English meaning of
3 the word, which refers to a unit of vacuum pressure. In a May 31, 2018 Response
4 to Office Action, Whipple stated that the word “torr” is “a unit of pressure that is
5 used worldwide. it was derived from the name of an Italian physicist from the
6 1600's.” Whipple further explained that “torr appearing in the mark means or
7 signifies or is a term of art for a unit of pressure measurement. The distillation
8 process used by the company is unique (vacuum distillation) and torr is the
9 pressure measurement chosen for use.”
10

11
12 The fact that the use of the word “torr” in the “10 Torr Distilling &
13 Brewing Company” mark refers to a measurement of vacuum pressure is further
14 clarified by labels for distilled spirit products bearing the “10 Torr Distilling and
15 Brewing Company” trademark. These labels boldly proclaim that the distilled
16 spirits are “vacuum distilled.” Whipple Decl., Ex. 1.
17

18 Thus, the two marks, either when viewed in isolation or in the context of
19 the product labels on which they are used, communicate very different meanings.
20 The “10 Torr Distilling and Brewing” mark refers to a measure of vacuum
21 pressure, while the “Torres 10” mark refers to a family name. Because of this
22 difference in meaning, it is unlikely that the “10 Torr Distilling and Brewing
23 Company” mark is likely to be confused with the “Torres 10” mark.
24

25 ///

26 ///

27 ///

28

1 identity of the initial word in a mark is particularly significant. *Palm Bay Imps.,*
2 *Inc. v. Veuve Clicquot Ponsard in Maison Fondee en 1772*, 396 F.3d 1369, 1372
3 (Fed. Cir. 2005). Applicant submits that this rule has particular force when the
4 first word in a mark is a number. In English usage, a variation on the order of a
5 phrase that includes a number and a word changes the meaning and connotation
6 of a phrase significantly. The following examples show this difference:
7

- 8 • “10 degrees” as opposed to “degree 10.” The first phrase is
9 instantly recognizable as a measurement of temperature,
10 angle, or bearing. The second phrase might refer to the extent
11 of one’s accomplishment in a Masonic Lodge.
12
- 13 • “10 Dollars” as opposed to “dollar 10.” The first phrase is a
14 measure of wealth, the second identifies a specific piece of
15 currency in a series.
16
- 17 • “60 percent” versus “percent 60.” The first phrase communicate
18 a percentage, the second is nonsensical.
19
- 20 • “50 mile” as opposed to “mile 50.” The first indicates distance,
21 the second a location on a route.

22 In the present case, the order of the numbers and letters is essential to the
23 commercial impression made by the sight of the mark. In the phrase “Torres 10,”
24 the word “Torres” modifies the number 10. This implies a family group, or
25 perhaps the gang in a spaghetti western, or a sports team. In contrast, the
26 phrase “10 Torres” sounds more like a component of a street address or an old-
27 fashioned telephone number. Thus, even if the word “Torr” and “Torres” were
28

1 mistaken for each other at first glance, the order in which those components of
2 the mark appear results in a very different impression.

3 Miguel Torres cites to a number of cases in which courts have held that a
4 mark can be confusingly similar to another even though the words appear in a
5 different order. In all the cases Miguel Torres cites to, the fundamental meaning
6 conveyed by the two marks at issue is the same. In *In re Wine Society of America, Inc.*
7 *Inc.* 12 USPQ2d 1139, 1142 (TTAB 1989), the court held that the mark
8 “American Wine Society” was confusingly similar to “The Wine Society of
9 America.” Likewise, in *In re Nationwide Industries Inc.*, 6 USPQ 2d 1882, 1884
10 (TTAB 1884) the court held that the mark “Rust Buster” was likely to be
11 confused with “Rust Bust.” In *In re Gen Tire & Rubber Co.*, 213 USPQ 870, 871
12 (TTAB 1982), the court found that the marks “Sprint Steel Radials” and “Radial
13 Sprint” were confusingly similar. The Trademark Manual of Examination
14 Procedures acknowledges, at §1207.01(b)(vii) that these cases stand for
15 proposition that “Where the primary difference between marks is the
16 transposition of the elements that compose the marks, and where this
17 transposition does not change the overall commercial impression, there may be a
18 likelihood of confusion.” (Emphasis added.) As set forth above, the initial
19 placement of the number “10” in the “10 Torr Distilling and Brewing Company”
20 mark fundamentally changes the commercial impression made by the mark.

21 Because of (1) the fundamental difference in meaning and connotation that
22 arises from the order in which numbers and words are placed, (2) the presense of
23 the disclaimed “distilling and brewing company” portion of the Applicant’s mark,
24

1 the appearance of the marks at issue here leads to a significantly different
2 commercial impression.

3 3. The 10 Torr Mark is Sonically Distinct from the Torres
4 10 Mark.

5 The commercial impression created by the sound of the two marks at issue
6 here is also significantly different.

7 Miguel Torres asserts the “the two marks are also virtually identical
8 phonetically.” In order to arrive at that conclusion, Miguel Torres divides the two
9 marks into their respective component phonemes, and notes that those individual
10 sounds are similar. However, it is well settled that the trademark analysis is not
11 to be based on individual sounds taken out of context, but on the “overall
12 commercial impression” created by the marks. *Sealed Air Corp v. v. Scott Paper*
13 *Co.*, 190 USPQ 106, 108 (TTAB 1975). The overall impression created by the two
14 marks is significantly different.
15
16

17 First the, the phrase “10 Torr,” when stated, consists of two stressed
18 syllables in quick, staccato succession. In contrast, when “Torres 10” is stated,
19 the phrase of three syllables in an alternating rhythm of stressed and unstressed
20 syllables. As anyone who has read Shakespeare knows, the rhythmic effect of this
21 pattern of emphasis is not trivial; the mere sound of the phrase “10 Torr,” even
22 ignoring the meaning of that phrase, differs substantially from the phrase
23 “Torres 10.”
24
25

26 Second, as set forth above, because the phrase “10 Torr” begins with a
27 number, the listener is immediately placed in a different frame of reference that
28

1 than he or she would upon hearing “Torres.” The initial sound of the number 10
2 signals that the next word is likely to be a measurement, as in the phrase “10
3 miles,” or “10 pounds.” In contrast, the initial sound of the word “Torres”
4 immediately communicates a common family name. Hence, the commercial
5 impression created by the sound of the “10 Torr Brewing and Distilling
6 Company” mark is significantly different than the impression conveyed by the
7 sound of the “Torres 10” mark.
8

9
10 4. The “10 Torr” Mark Differs from the Torres 10 Mark
Substantially in Its Commercial Presentation.

11 Finally, in evaluating the similarity of the two marks, the Board is to
12 appraise “the overall impression created by the logos and the context in which
13 they are found and consider the totality of factors that could cause confusion
14 among prospective purchasers.” *Streetwise Maps, Inc. v. VanDam, Inc.*, 159 F.3d
15 739 (2d Cir 1998) (finding that although the marks “Streetwise” and
16 “Streetsmart” when applied to maps were similar, the overall impression of the
17 marks in context was not confusingly similar). Marks that are otherwise similar
18 are not likely to be confused where used in conjunction with a logo. *Henri’s Food
19 Products Co. v. Kraft, Inc.*, 717 F.2d 352, 355-56 (7th Cir. 1983).
20
21

22 The “10 Torr Distilling and Brewing” mark is presented in commerce in a
23 manner which is significantly different from that of the Torres 10 mark. The
24 Torres 10 mark is printed in a rather tastefully restrained font with the word
25 “Torres” appearing above the number 10. The number 10 is printed in a typeface
26 more than twice as large as the word “Torres.” *See* Opposer’s Exhibit PP. In
27
28

1 contrast, the 10 Torr mark is presented on products in a highly stylized font
2 which includes exaggerated serifs and proportions that border on the whimsical.
3 Whipple Decl., Ex. 1. In addition, the words “10 Torr” are printed on a single line
4 and are of an identical typeface size. The 10 Torr label also includes a logo (which
5 is not claimed) consisting of a vertical line bisecting a circle. In addition, the “10
6 Torr Distilling and Brewing” mark includes the disclaimed phrase “distilling and
7 brewing.” These visual differences result in an significantly different overall
8 commercial impression between the two marks. *A&H Sportswear*, 237 F.3d at
9 219 (even though the Miraclesuit mark was similar to the “Miracle Bra” mark,
10 the use of the disclaimed word “bra” rendered the two marks not confusingly
11 similar).
12

13
14 For these reasons, the “10 Torr Distilling and Brewing Company” mark
15 creates a very different overall commercial impression than does the “Torres 10”
16 mark. Miguel Torres has not shown that the two marks are confusingly similar to
17 each other.
18

19 **ii. Miguel Torres Has Not Shown that the “Torres 10”**
20 **Mark Is a Strong Mark.**

21 In evaluating the strength of a mark, Judge Friendly classified trademarks
22 into four categories: (1) generic, (2) descriptive, (3) fanciful, and (4) arbitrary.
23 *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir.1976). If a
24 mark is merely descriptive, then proof of secondary meaning is required for the
25 mark to be eligible for protection. *Perini Corp. v. Perini Const., Inc.* 915 F.2d 121
26 (4th Cir 1990). Both surnames and first names “are regarded as descriptive terms
27
28

1 and therefore on who claims federal trademark rights in a name must prove the
2 name has acquired a secondary meaning.” *Id. See also Brennan’s Inc. v.*
3 *Brennan’s Restaurant, LLC*, 360 F.3d 125, 131 (2d Cir. 2004).

4 Although Miguel Torres argues that the “Torres 10” mark is arbitrary, the
5 mark is based on the Torres family name, as is made clear by Exhibit 1 to the la
6 Terriere Decl., which refers to the “Familia Torres.” Miguel Torres uses this
7 family connection in its advertising: “in 1946, despite a difficult and turbulent
8 time in history, Miguel Torres Carbo created Torres 10, Brandy Torres’ flagship
9 brand.” Exhibit QQ to Opposers Notice of Reliance. Thus, it is clear that the
10 “Torres 10” mark is based on the Torres family name. While Miguel Torres’ use of
11 the mark may have rendered its validity uncontestable under 15 U.S.C. §1065,
12 “courts generally are hesitant to afford strong protection to proper names.”
13 *Brennan’s Inc.* at 131. Thus, a mark using a common last name “implicates ... the
14 minimal level of protection traditionally granted to descriptive marks.” *Id.*

15 Miguel Torres attempt to bolster its argument regarding the strength of
16 the mark by pointing out that since 2014, it has sold over 65,000 cases of brandy
17 in the United States, worth a total of 3.4 million Euro. Miguel Torres further
18 states that it has spent in excess of 475,000 Euro promoting Torres 10 brandy.
19 However, without evidence to contextualize these numbers, they do not provide
20 any real evidence of the strength of the “Torres 10” mark. What share of the total
21 United States brandy market does this represent? What portion of these
22 advertising dollars were spent in the Northern Nevada and California Market in
23 which products bearing the 10 Torr Distilling and Brewing mark are sold?
24
25
26
27
28

1 Without a context to put these numbers in, they do not provide any meaningful
2 evidence as to the strength of the “Torres 10” mark.

3 Although Miguel Torres’ failure to contextualize these numbers is notable,
4 the evidence that it does provide demonstrates that the mark is substantially less
5 than widely known. Miguel Torres has shown that on average since 2014, it has
6 sold approximately 11,000 cases of brandy annually in the United States (65,000
7 cases divided by 6 years). This amounts to roughly one case of brandy for every
8 29,800 United States residents annually (assuming a population of 328,000,000).
9 Miguel Torres’ own evidence shows that its share of the United States brandy
10 market is miniscule. An April 17, 2017 New York Times article reports that
11 “Brandy has become a quiet giant of the liquor industry. More than 13 million
12 cases were sold domestically in 2016.” Exhibit BB to Miguel Torres October 17,
13 2019 Notice of Reliance. Thus, Miguel Torres’ own evidence shows that it
14 accounts for just .084% of the United States brandy market – less the one tenth
15 of one percent. But another way, approximately 1 in ever 1,181 cases of brandy
16 sold in the United States in 2016 bears the “Torres 10” mark. Applicant submits
17 that this does not provide evidence of the strength of the “Torres 10” mark.
18
19
20
21

22 Accordingly, Miguel Torres has not provided any cognizable evidence to
23 demonstrate that the “Torres 10” mark is anything but a descriptive mark, and
24 as such is not entitled to strong protection.

25 ///

26 ///

27 ///

28

1 **iii. The Two Marks Are Used In Connection With**
2 **Different, Albeit Related Products**

3 The “Torres 10” mark is applied exclusively to brandy, while the “10 Torr
4 Distilling and Brewing” mark applies to beer and distilled spirits. The 10 Torr
5 mark has not been applied to Brandy, and Applicant has no plans to make
6 brandy. Whipple Decl. ¶ 2.

7 Miguel Torres points out that Courts and the Board have on a number of
8 occasions held that beer and distilled spirits, including brandy, are related
9 products for purposes of a likelihood of confusion analysis. The degree to which
10 Miguel Torres emphasizes this argument is worth noting. A great deal of the
11 evidence that Miguel Torres has cited to in its Notice of Reliance is adduced to
12 establish that brandy is commercially related to beer and other distilled spirits.
13 Even though it is well established that, “the single most important factor in
14 determining likelihood of confusion is mark similarity.” Miguel Torres leads its
15 substantive argument regarding likelihood of confusion with a 4.5 page analysis
16 devoted to establishing that the Applicant’s mark is used on products related to
17 brandy. OOP p. 6-10.

18 The board should recognize that the tremendous emphasis that Miguel
19 Torres places on its “related goods” argument for what it is: a piece of rhetorical
20 legerdemain to distract the board from the simple fact that the “10 Torr Distilling
21 and Brewing” mark is substantially different in overall commercial impression
22 from the “10 Torres” mark.

23
24
25
26
27 ///

1 **iv. Miguel Torres Has Not Provided any Evidence of**
2 **Actual Confusion**

3 While Miguel Torres has provided extensive evidence to show that the
4 subject products are related, it has made no effort at all to show that any actual
5 confusion has occurred. Miguel Torres has not shown that its sales have been
6 affected in the slightest since 10 Torr Distilling and Brewing products went on
7 the market in 2017. Miguel Torres has not pointed to any evidence that a single
8 actual customer has confused products bearing the “10 Torr Distilling and
9 Brewing” mark with products produced by Miguel Torres. While a trademark
10 holder may establish a likelihood of confusion with showing that any actual
11 confusion has occurred, it is notable that Miguel Torres has implicitly
12 acknowledged that no evidence of actual confusion exists. *Affiliated Hosp. Prod.,*
13 *Inc. v. Merdel Game Mfg. Co.*, 513 F.2d 1183, 1188 (2d Cir. 1975) (“it is certainly
14 proper for the trial judge to infer from the absence of actual confusion that there
15 is no likelihood of confusion.”)
16
17
18

19 **v. Opposer Has Not Shown Any Potential For Confusion.**

20 Finally, Miguel Torres argues that even though there is no evidence
21 whatsoever to indicate actual confusion, there is a potential for confusion because
22 Whipple may use the “10 Torr Distilling and Brewing” mark in a style similar to
23 that used by the “Torres 10” mark. As set forth above the two marks are
24 significantly different in sight, sound, meaning, and overall commercial
25 impression. Miguel Torres’ unsupported assertion that “there is a considerable
26 potential for customer confusion” (OOB at 18:27-28) is not sufficient to overcome
27
28

1 the fact that the “10 Torr Distilling and Brewing” mark is simply not similar to
2 the “Torres 10” mark.

3 **vi. The *DuPont* Factors Do Not Support the Opposer’s**
4 **Claim.**

5 Miguel Torres has established that the products covered by the “10 Torr
6 Distilling and Brewing” mark and those covered by the “Torres 10” mark are
7 similar and are sold through similar channels. However, the remaining *duPont*
8 factors militates strongly against a finding that there is any likelihood of
9 confusion:
10

- 11 • Most importantly, the two marks differ substantially in their overall
12 commercial impression.
- 13 • The “Torres 10” mark is based on a family name, and is therefore
14 descriptive and not entitled to the highest level of protections.
- 15 • Miguel Torres has not demonstrated any evidence to indicate actual
16 confusion, even though products bearing the “10 Torr Distilling and
17 Brewing” mark have been sold since 2017.

18 For these reasons, Miguel Torres has not sustained its burden of showing
19 that the “10 Torr Distilling and Brewing Company” mark is likely to be confused
20 with the “Torres 10” mark.
21

22 ///
23

24 ///
25

26 ///
27

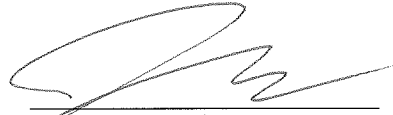
28 ///

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

IV. CONCLUSION

For the foregoing reasons, Whipple respectfully submits that Miguel Torres has not sustained its burden of showing that registration of the “10 Torr Distilling and Brewing” mark will result in any likelihood of confusion. Accordingly, Whipple respectfully requests that Miguel Torres’ Opposition be denied.

DATED: April 20, 2020



Jerry M. Snyder
Law Office of Jerry M. Snyder
Nevada State Bar No. 6830
429 Plumb Ln.
Reno, Nevada 89509
Jerry@Jerrysnyderlaw.com
Telephone: (775) 499-5647
Facsimile: (775) 499-5648
Attorney for Applicant

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Jerry M. Snyder, 429 W. Plumb Lane, Reno, Nevada 89509, and that on this date I caused the foregoing to be delivered to the parties listed below by:

Placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

Certified Mail

Return Receipt Requested

Personal Delivery

Facsimile (Fax # _____)

Federal Express, or other overnight delivery

Reno/Carson Messenger Service, Inc.

Electronic mail addressed to Joy Durand at Jdurand@dpf-law.com

Dated: April 20, 2020.

