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

Proceeding	76678969
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD ON APPEAL

APPLICANT'S APPEAL BRIEF

SERIAL NO:	76/678,969
MARK:	ML
APPLICANT:	Mighty Leaf Tea
FILING DATE:	July 2, 2007
EXAMINING ATTORNEY:	Priscilla Milton
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DESCRIPTION OF THE RECORD

Applicant filed a trademark application on July 2, 2007, for the mark “ML” in International Class 003 for “personal care products and skin care preparations, namely, skin soap, body wash, foam bath, body lotion, body scrub, bath salts and massage oil; potpourri; incense”. Applicant first used the “ML” mark anywhere and in commerce on November 1, 2004. An Office Action was issued on October 3, 2007. Applicant responded to the Office Action on November 28, 2007. On January 1, 2008, a Final Office Action was issued. Applicant responded to the Final Office Action on July 2, 2008 requesting reconsideration and additionally filed a Notice of Appeal. The Applicant’s request for reconsideration was denied on July 24, 2008.

STATEMENT OF THE ISSUES

Whether the mark “ML”, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 2,132,830 that confusion is likely under §2(d) of the Trademark Act, 15 U.S.C. §1052(d).

RECITATION OF THE FACTS

Applicant filed a trademark application on July 2, 2007, for the mark “ML” in International Class 003 for “personal care products and skin care preparations, namely, skin soap, body wash, foam bath, body lotion, body scrub, bath salts and massage oil; potpourri; incense” (“Applicant’s mark”).

In the Office Action dated October 3, 2007, the Examining Attorney refused registration of the Applicant’s mark because of a likelihood of confusion with U.S. Registration No. 2,132,830 directed to the mark “ML MARK LEES” for “skin care products, namely, skin cleanser, skin toner, skin cream, skin lotion, skin mask gel, make-up foundation, powder and blush” (“the cited mark”). The Examining Attorney argued that

Applicant's mark and the cited mark create a substantially similar overall commercial impression because both marks share the letters ML. The Examining Attorney further argued that the respective goods are "related personal care and skin care products".

The Applicant provided a Response to the Office Action on November 28, 2007 in which the Applicant made the assertion, among others, that the Examining Attorney failed to conduct a complete analysis of all the duPont factors relevant to a determination of likelihood of confusion because the Examining Attorney failed to determine whether and to what extent other similar marks are in use on similar goods. Applicant's Response provided additional discussion directed to printouts from the TESS database of additional marks in use on the same or similar goods.

In the Final Office Action dated January 2, 2008, the Examining Attorney maintained the refusal to register the Applicant's mark under §2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Examining Attorney argued that Applicant's evidence from the TESS database "does not show that there is a crowded field of ML marks in the personal care and skincare industry." The Examining Attorney further argued that the goods and services of Applicant's mark and the cited mark are closely related and the dominant feature of the cited mark is the stylized "ML" component, which is the only feature in Applicant's mark.

The Applicant responded to the Final Office Action on July 2, 2008, requesting that the Examining Attorney again failed to conduct a complete analysis of all the duPont factors relevant to a determination of likelihood of confusion because the Examining Attorney failed to determine whether and to what extent other similar marks are in use on similar goods. Applicant's Response included additional printouts from the TESS database of additional registered marks in use on the same or similar goods. The Applicant further included the details of pending applications directed to marks in the personal care and skincare industry.

The Applicant further requested reconsideration of the application and filed a Notice of Appeal on July 2, 2008.

On July 24, 2008, the Examining Attorney denied the Applicant's request for reconsideration. The Examining Attorney maintained the arguments in the previous Office Action and Final Office Action. In addition, the Examining Attorney stated that no consideration was given to the TESS database records directed to pending applications. The Examining Attorney also stated that the goods of Applicant's mark and the cited mark are "nearly identical" such that "the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods and/or services."

ARGUMENT

Applicant's mark "ML" when used on or in connection with the identified goods is not likely to be confused with the cited mark "ML MARK LEES" under §2(d) of the Trademark Act, 15 U.S.C. §1052(d).

The Trademark Manual of Examining Procedure ("TMEP") defines the guidelines and procedures that are to be followed by Examining Attorneys at the USPTO. TMEP, Forward. The TMEP mandates that "the initial examination of an application by the Examining Attorney must be a *complete* examination [emphasis in original]". TMEP §704.01. With respect to the issue of likelihood of confusion analysis, TMEP §1207.01 instructs that all of the relevant factors identified in In re E.I. duPont de Nemours Co., 177 USPQ 563 (C.C.P.A. 1973) must be considered in order to determine whether a refusal under Section 2(d) is warranted or not. Regarding which of the duPont factors are relevant or not, the TMEP instructs that while "the issue of likelihood of confusion typically revolves around the similarity or dissimilarity of the marks and the relatedness of the goods or

services,” another one of the duPont factors that is also usually “most relevant” is “[t]he number and nature of similar marks in use on similar goods.” TMEP §1207.01.

It is clear that, contrary to the mandate provided under the TMEP, the Examining Attorney’s initial examination was not complete. Accordingly, the conclusions for the Examining Attorney’s first Office Action and subsequent Actions remain non-supported. From a review of all relevant evidence made of record, and based on the Examining Attorney’s opinion of similarity of marks and the similarity of goods and services, it is clear that there are many “ML” marks registered for similar goods and services. Accordingly, there is no likelihood of confusion between Applicant’s mark and the cited mark.

A. THE SIMILARITY OR DISSIMILARITY OF THE MARKS IN THEIR ENTIRETIES AS TO APPEARANCE, SOUND, CONNOTATION AND COMMERCIAL IMPRESSION

As the Examining Attorney recognizes, the cited mark and the Applicant’s mark are not identical, but merely similar. The similarity, however, is very limited, in that the cited mark and the Applicant’s mark share only the letters “ML”. In contrast to the Applicant’s mark, the cited mark is a highly stylized mark with the letters ML presented in a cursive, abstract fashion. The cited mark also includes entire words not found in the Applicant’s mark – the words “MARK LEES”. These words – “MARK LEES” – are presented in all capital letters in a more angular, non-cursive font thereby contrasting with the cursive font used for the other components of the cited mark. The many components of the cited mark are presented in a particular arrangement: the stylized letters ML are arranged on a line above the differently stylized words “MARK LEES”. Given the many visual differences between the cited mark and the Applicant’s mark, a consumer could easily distinguish - even at a distance - the two marks and not likely believe that products bearing the marks somehow emanate from the same source.

Clearly given the differences in the Applicant's mark and the cited mark, the marks are not only visually different, but also have different sounds when pronounced. Each mark also has a connotation that is different from the other mark.

Despite the marked differences between the cited mark and the Applicant's mark, the Examining Attorney erroneously rejects the possibility that consumers would be able to distinguish the source of the products being identified by the Applicant's mark and the cited mark. The Examining Attorney apparently gave no weight to the fact that the source of the products bearing the cited mark is clearly identified in bold capital letters in the cited mark - "MARK LEES". Such use of the company name in the mark provides a commercial impression of the cited mark that is very different from the commercial impression of the Applicant's mark and clearly lessens the likelihood of confusion.¹

Regarding the first duPont factor - the similarity of the cited mark and the Applicant's mark - the cited mark is different from the Applicant's mark.

B. THE SIMILARITY OR DISSIMILARITY AND NATURE OF THE GOODS OR SERVICES AS DESCRIBED IN AN APPLICATION OR REGISTRATION OR IN CONNECTION WITH WHICH A PRIOR MARK IS IN USE

Regarding the second duPont factor – the relatedness of the goods or services – the Examining Attorney opined that the “respective goods” are “related personal care and skin care products”.

C. THE NUMBER AND NATURE OF SIMILAR MARKS IN USE ON SIMILAR GOODS

As stated above, a complete examination of all the duPont factors relevant to this matter would have included an analysis of the sixth duPont factor – the “number and nature of similar marks in use on similar goods”. TMEP §1207.01. When conducted, this analysis

¹ W.W.W. Pharmaceutical Co. Inc. v. The Gillette Co., 25 USPQ2d 1593 (2d Cir. 1992) (Second Circuit upheld the lower court's determination that “SPORTSTICK” for lip balm (one type of personal care product) and “RIGHT GUARD SPORTS STICK” for deodorant (another personal care product)

reveals that many registrations have issued and many applications have been filed for marks that include the “ML” component for use on the same goods that the Examining Attorney has opined are related.

As to the similar registered marks in use on similar goods, the Applicant submitted evidence in the record of registered marks all bearing the letters “ML” in the same prefatory position as the cited mark. The cited mark and the additional marks identified here all are used on the same or similar goods. Specifically, these previously submitted marks are as follows:

Mark	Registration No.	Owner	Goods/Services
MLE	3320567	NEOPHARM CO. LTD.	Bleaching preparations and fabric softeners, soap powders, and rinse for laundry use; general purpose cleaning, polishing, and abrasive liquids and powders, soaps, perfumery, essential oils, cosmetics, hair lotions; dentifrices
MLUXE	3190546	Mudlark Papers, Inc.	Personal care products, namely, shampoo and conditioner, shower gel, milk bath, body wash, scented body spray, body lotion, hand and body cream, hand and body soaps, bath salts, bath oil beads, talcum powder, dentifrices; gift baskets and boxed gift sets consisting of personal care products, namely, shampoo and conditioner, shower gel, milk bath, body wash, scented body spray, body lotion, hand and body cream, hand and body soaps, bath salts, bath oil beads, talcum powder, dentifrices.
M'LIS	2763224	M'LIS Company, Inc.	Facial cream; facial cleansing cream; facial cleansing lotion; facial cleanser; facial scrubs; facial emollients; facial scrubs, namely, facial exfoliants; facial lotion; facial moisturizer; facial emollients, namely facial softeners; facial toner; facial soap; essential oils for personal use, namely, facial oil; facial nourishing cream; facial cream, namely, face lift glycolic acid treatment; facial lotion, namely, face lift glycolic acid treatment; facial masks; face lift masks; facial mask activators; skin cream; skin cleansing cream; skin cleansing lotion; skin cleanser; skin emollients; skin scrubs, namely, skin exfoliants; skin lotion; skin moisturizer; skin emollients, namely, skin softeners; skin toner; skin soap; essential oils for personal use, namely, skin oil; skin nourishing cream; skin cellulite cream; body masks; body mask activators; body wrap cream; essential oils for personal use, namely, body oil; bath oil; and massage oil.

The Applicant also submitted evidence in the record of other registered marks that include the letters “ML” for use on the same goods that the Examining Attorney has opined are related. They are:

are not confusingly similar because, in part, the brand name “Right Guard” distinguished the

Mark	Registration No.	Owner	Goods/Services
JML & Design	2335027	Jo Malone Limited	Almond milk for cosmetic purposes; essential oils for personal use and for use as ingredients in the manufacture of cosmetic preparations, namely, almond oil, bergamot oil, citron oil, jasmine oil, lavender oil, lemon oil, mint oil, and rose oil; almond soap; perfumes containing amber; anti-perspirant soap; anti-perspirants; aromatherapy oils; non-medicated bath salts; beauty masks; hair bleaching preparations; skin cleansing milk for toilet purposes; cosmetics, namely, non-medicated skin creams and lotions, face and body powder, eye make-up, blusher, foundation make-up, eyebrow pencils, lipstick, lip gloss, make-up and make-up removers; deodorant soap; deodorants for personal use; cosmetic dyes, namely, hair dyes; eau-de-cologne; stencils for applying eye make-up; eyebrow cosmetics, namely, eyebrow pencils; adhesives for affixing false eyelashes; false eyelashes; false nails; perfumes consisting primarily of flower extracts; hair care preparations, namely, shampoos and conditioners, hair colorants and dyes and hair waving lotions; incense; ionone perfumes; petroleum jelly for cosmetic purposes; lavender water; sachets for perfuming linen; premoistened cosmetic tissues; medicated soap; skin cleansing milk for toilet purposes; oils for toilet purposes, namely, body oil and bath oil; perfumery, namely, perfumes and eau de cologne; pumice stones for personal use; scented water; scented wood; shaving soap; antiseptic shaving stones; soap; cakes of soap; disinfectant soap; soap for foot perspiration; talcum powder; toilet water.
AMLAVI	3193532	The Double Edge, Inc.	Bath crystals; Bath gels; Bath salts; Bath soaps in liquid, solid or gel form; Beauty masks; Body cream soap; Body masks; Body scrub; Cream soaps; Facial beauty masks; Facial masks; Facial scrubs; Granulated soaps; Hand soaps; Liquid bath soaps; Liquid soap used in foot bath; Liquid soaps; Liquid soaps for hands, face and body; Perfumed soaps; Shower and bath gel; Skin masks; Skin soap; Soaps for body care; Soaps for personal use

Because pending applications are relevant to duPont sixth factor analysis,² the TESS database was examined also for marks that are the subject of pending applications for use on personal care products. Many additional marks that include the “ML” component

marks); See also McGregor-Doninger Inc. v. Drizzle Inc., 202 U.S.P.Q 81 (2d Cir. 1979).

² In General Mills, Inc. v. Health Valley Foods, 24 USPQ2d 1270, 1277 - 78. (TTAB 1992), the TTAB considered the many third-party registrations and applications directed to marks that comprise, in part, the term "FIBER" to be an important factor in its decision. The TTAB stated that the number of such registrations and applications shows that "Fiber" is employed in the marketplace in a way “similar to a dictionary definition” sense of the word and held that “we do not believe there is any doubt but that the field of "FIBER" marks for foods (including cereals) is a crowded field.” Id. The TTAB found that evidence of the crowded "FIBER" market suggests that consumers are “accustomed to distinguishing between different “FIBER” marks on the basis of small differences.” Id. at 1278. Accordingly, the TTAB held that the duPont factors favored the Applicant and found that confusion was not likely between the two marks. Id.

were identified. Evidence of these additional marks was submitted previously and previously made of record. These additional marks are:

Mark	Application Serial No.	Goods
TMLA	77/414,962	Fragrances, colognes, hair care products, skin care products, personal grooming products, personal care products
MLAB	78/622,092	Non-medicated herbal preparations, namely, cosmetic products, namely, skin creams, skin cleansers, skin exfoliants, skin lotions, sunscreens, anti-aging and anti-wrinkle creams, anti-aging and anti-wrinkle serums, skin toners, creams for age spots and for skin lightening; deodorants, antiperspirants, perfumes, colognes, essential oils for personal use, anti-cellulite gel, body oils, beauty gels, hand and body lotions and creams, heel balms, lip balms, nail and cuticle moisturizers, bath oils, foam baths, body scrubs, shower gels, baby oils and non-medicated face and body balms, moisturizing and cleansing creams and face and body lotions, hand soaps, face soaps, body soaps, cosmetics, make-up removers, shampoos, hair lotions and conditioners, shaving foams, after-shave creams and lotions, sun care lotions and gels, facial masks, gels for softening and firming the skin in international class 3; Non-medicated acne control creams featuring salicylic acid in international class 5
FEMLOGIC & design	77/420,581	After shave lotions; After sun creams; Anti-aging creams; Anti-perspirants; Anti-wrinkle creams; Aromatherapy body care products, namely, body lotion, shower gel, cuticle cream, shampoo, conditioner, non-medicated lip balm, soap, body polish, body and foot scrub and non-medicated foot cream; Aromatherapy inhaler sold filled with aromatherapy essential oils; Aromatherapy lotions; Aromatherapy oils; Bath oils for cosmetic purposes; Bath soaps in liquid, solid or gel form; Beauty creams for body care; Beauty lotions; Beauty serums; Body and beauty care cosmetics; Body creams; Body emulsions; Body lotions; Body oils; Body sprays; Body washes; Cleansing creams; Concealers for skin blemishes; Cosmetic oils; Cosmetic preparations for body care; Cosmetics; Cosmetics and cosmetic preparations; Cosmetics and make-up; Cuticle cream; Essential oils; Essential oils for personal use; Essential oils for use in manufacturing of natural cosmetics; Exfoliant creams; Face and body creams; Face and body lotions; Facial cleansers; Facial creams; Facial emulsions; Facial lotion; Facial washes; Hand creams; Hand lotions; Lip balm; Lip balm; Lip cream; Lotions for cosmetic purposes; Lotions for face and body care; Non-medicated bath preparations; Non-medicated foot cream; Non-medicated foot lotions; Non-medicated lip care preparations; Non-medicated ointments for the prevention and treatment of sunburn; Non-medicated preparations all for the care of skin, hair and scalp; Non-medicated skin care preparations; Non-medicated skin care preparations, namely, creams, lotions, gels, toners, cleaners and peels; Nutritional oils for cosmetic purposes; Oils for cosmetic purposes; Perfume oils for the manufacture of cosmetic preparations; Scented body lotions and creams; Shower and bath gel. Skin and body topical lotions, creams and oils for cosmetic use; Skin care preparations, namely, body balm; Skin cleansing cream; Skin cleansing lotion; Skin conditioners; Skin creams; Skin lotions; Skin moisturizer; Tanning and after-sun milks, gels and oils; Wrinkle resistant cream
SIMLINE	77/017,727	Personal care products, namely, non-medicated ointments in the nature of diaper rash ointment and ointments for the prevention and treatment of sunburn, shampoos, hair conditioners, soaps, body lotions, deodorants, and shaving preparations in international class 3; Non-prescription medicines, namely, aspirin; and non medicated ointments, namely, anti-itch ointment in international class 5

Contrary to the TMEP's mandate that all relevant duPont factors must be considered to determine whether confusion is likely and a refusal to register a mark under Section 2(d) is warranted, the Examining Attorney appeared to dismiss the value of such third party registrations and applications. The Examining Attorney opined, "Further, third-party registrations are entitled to little weight on the question of likelihood of confusion because they are 'not evidence of what happens in the market place or that customers are familiar with them [citations omitted]'". The TTAB and other courts have opined otherwise.³

The Examining Attorney provides no reasoning in the record as to why consumers would somehow not look to the differences between the cited mark and the Applicant's mark to distinguish the source of goods bearing the marks - such as the easy to read and easy to pronounce words found in the cited mark, "MARK LEES" – particularly when, as clearly demonstrated in the record, the ML component is common to many marks used on many related goods and, therefore, not indicative of one source. Just some of the additional registered marks that are relevant to the duPont analysis are "MLE", "MLUXE", and "M'LIS", all of which are used on personal care and skin care products.

³ The TTAB has stated that "Third-party registrations may be relevant to show that the mark or a portion of the mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. *See, e.g., Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983)". TMEP § 1207.01(d)(iii). Furthermore, in *In re Hamilton Bank*, 222 USPQ 174, 177 (TTAB 1984), the TTAB found that third party registrations are competent to "show that others in a particular area of commerce have adopted and registered marks incorporating a particular term. We can also note from such registrations that the term or feature common to the marks has a normally understood meaning or suggestiveness in the trade and that marks containing the term or feature have been registered for the same or closely related goods or services because the remaining portions of the marks are sufficient to distinguish the marks as a whole from one another. *American Hospital Supply Corporation v. Air Products and Chemicals, Inc.*, 194 USPQ 340 (TTAB 1977). "Properly used in this limited manner, third-party registrations are similar to dictionaries showing how language is generally used. [...] Evidence of third-party use falls under the sixth du Pont factor - the 'number and nature of similar marks in use on similar goods.'" *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. If the evidence establishes that the consuming public is exposed to third-party use of similar marks on similar goods, this evidence "is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)." TMEP § 1207.01(d)(iii).

Therefore, all of the relevant evidence made of record shows at least five similar registered marks and four marks that are the subject of pending applications that exist in what the Examining Attorney has determined to be the relevant marketplace. Each of the marks is owned by a different business. In such a situation, the courts have widely recognized that, when many different sources use the same term for the same or similar goods or services, even small differences - such as those between the Applicant's mark and the cited mark in this case - are sufficient to distinguish the marks as a whole. In re Broadway Chicken, Inc., 38 USPQ2d 1559 (TTAB 1996)⁴; General Mills, Inc. v. Health Valley Foods, 24 USPQ2d 1270, 1277 (TTAB 1992)⁵; In re Hamilton Bank, 222 USPQ 174 (TTAB 1984)⁶; Melaro v. Pfizer, Inc., 214 USPQ 645, 649 (TTAB 1982)⁷; Cutter

⁴ In In re Broadway Chicken, Inc., 38 USPQ2d 1559 (TTAB 1996), evidence was submitted by the Applicant to show that many third party registrations and uses existed for marks that included the term "Broadway" for "closely related goods and services". The TTAB found that "[e]vidence of widespread third-party use, in a particular field, of marks containing a certain shared term is competent to suggest that purchasers have been conditioned to look to other elements of the marks as a means of distinguishing the source of goods or services in the field." Id. at 1565 - 66. Accordingly, the TTAB reversed the Examining Attorney's refusal to register under Section 2(d) the mark "Broadway Chicken" in light of the cited registrations for "Broadway Pizza" and "Broadway Pizza & Bar". Id.

⁵ In General Mills, Inc. v. Health Valley Foods, 24 USPQ2d 1270, 1277 (TTAB 1992), General Mills ("GM") opposed the registration of "FIBER 7 FLAKES" by Health Valley Foods in light of GM's registration of "FIBER ONE", also for cereal. The TTAB considered the third-party registrations and applications directed to marks that comprise, in part, the term "FIBER" to be an important factor in its decision. Id. The TTAB stated that such registrations and applications "show the sense in which the "Fiber" is employed in the marketplace[:] similar to a dictionary definition" and held that "we do not believe there is any doubt but that the field of "FIBER" marks for foods (including cereals) is a crowded field." Id. The TTAB found that evidence of the "FIBER" crowded market suggests that consumers are accustomed to distinguishing between different "FIBER" marks even on the basis of small differences. Id. at 1278. Accordingly, the TTAB held that the duPont factors favored the Applicant and found that confusion was not likely between the two marks. Id.

⁶ In In re Hamilton Bank, 222 USPQ 174 (TTAB 1984), the TTAB held that the refusal to register under Section 2(d) was improper after finding that the many registrations for marks containing the common term or feature "key" for the same or closely related goods or services were competent evidence to show that the remaining portions of the marks are sufficient to distinguish the marks as a whole from one another. Id. at 179.

Laboratories, Inc. v. Air Products and Chemicals, Inc., 189 USPQ 108, 110 (TTAB 1975)⁸.

On this same point, the TMEP observes that third-party registrations show that the public will look to other elements to distinguish the source of the goods or services. TMEP §1207.01(d)(iii). Consumers will clearly not view the ML component as identifying a single source in what the Examining Attorney contends is the relevant marketplace.

CONCLUSION

From a complete examination of all the duPont factors, it is clear that many “ML” marks are used by many different owners in what the Examining Attorney has opined is the relevant marketplace to identify the source of many related goods. Given the differences between the Applicant’s mark and the cited mark, confusion is not likely.

For the foregoing reasons, the refusal to register on the basis of §2(d) of the Trademark Act, 15 U.S.C. §1052(d) should be reversed and this application be permitted to be published.

⁷ In Melaro v. Pfizer Inc., 214 USPQ 645, 649 (TTAB 1982), the TTAB stated that a large number of registrations of marks that include a certain component indicates that the Trademark Office treats that component as weak, and not subject to exclusive appropriation in the given field. The TTAB recognized that the mere fact that each of the two marks that were before the TTAB contained the common term “SILK” is not a sufficient basis in and of itself upon which to predicate a holding of likelihood of confusion. Id. The TTAB held that the marks must be considered in their entirety and when this was done, the marks “POLYSILK” and “SILKSTICK” were sufficiently removed by the addition of the components (“POLY” and “STICK”) from the petitioner’s mark “SILK”, *per se*, to avoid any confusion of purchasers as to the source of the products sold thereunder. Id.

⁸ The TTAB in Cutter Labs Inc. v. Air Products and Chem., Inc., 189 USPQ 108, 110 (TTAB 1975) found that the many third party registrations of marks containing the component “FLEX” to be competent evidence to suggest that the Registrant and the Applicant adopted and used the term “FLEX” for the same purpose and that the inclusion of the “FLEX” component in each mark to be an insufficient basis to predicate a holding of a likelihood of confusion. The TTAB found that the difference between the marks to be sufficient to be distinguishable by purchasers so as to preclude a likelihood that the purchasers will mistakenly assume that the products sold thereunder emanate from a common source. Id.

REQUEST FOR ORAL HEARING

Applicant requests an oral hearing.

Dated: October 17, 2008

Respectfully submitted,

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