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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/525441

MARK: LAGUNA SURF SPORT



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GENERAL TRADEMARK INFORMATION:

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

TTAB INFORMATION:

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

APPLICANT: LS&S RETAIL, INC.

CORRESPONDENT'S REFERENCE/DOCKET NO:

V9184-0004

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EXAMINING ATTORNEY'S APPEAL BRIEF

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	LS&S Retail, Inc	:	BEFORE THE
Serial Nos. and Trademarks:	77524535 LAGUNA SURF & SPORT; 77525441 LAGUNA SURF SPORT and design 77525450 LAGUNA SURF AND SPORT and design	:	TRADEMARK TRIAL
Attorney:	Farah P. Bhatti, Esq	:	AND APPEAL BOARD
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FACTS

On July 17, 2008, the Applicant filed three applications on the Principal Register. These three applications included variations of the mark LAGUNA SURF & SPORT and were for use on a broad range of clothing items and retail store services related thereto.

In particular, these applications are Serial No. 77524535 for the mark LAGUNA SURF & SPORT, in standard character form, for “men’s and women’s clothing, namely, tee shirts, tank tops, hats, tops, and headwear;” Application Serial No. 77525441 for the mark LAGUNA SURF SPORT and design for “men’s, women’s and children’s clothing, namely, tee shirts, tank tops, hats, tops, bottoms and headwear,” and “online and retail store services featuring clothing, headwear, swimwear and related accessories, bags, backpacks, and sunglasses” and Application Serial No. 77525450 for the mark LAGUNA SURF AND SPORT and design for “clothing, namely, t-shirts, sweatshirts, tank tops, and tops.”

These applications were refused registration under Section 2(d), 15 U.S.C. Section 1052(d), of the Trademark Act based on U.S. Registration No. 0606116 for the mark LAGUNA stylized for “swim suits, swim suit ensembles, and men's and boys' sport shirts;” U.S. Registration No. 1050106 for the mark LAGUNA and design for “swimwear and t-shirts;” U.S. Registration No. 1214052 for the mark LAGUNA stylized for “men's, boys' and juvenile clothing-namely, swim suits, swim suit ensembles, sport shirts, warm-up suits and t-shirts;” U.S. Registration No. 1278096 for the mark LAGUNA and design

for “clothing-namely, swim suits, swim suit ensembles, sport shirts, warm-up clothing, shirts, and shorts” and U.S. Registration No. 1541125 for the mark LAGUNA, in typed form, for “men's, and boys', [juvenile boys'] clothing, namely, swim suits, swim wear, sport shirts, [warm-up suits,] t-shirts, [jackets, suits, sportcoats,] underwear, [belts, hats,] shoes, [ties, and pajamas;] women's, and girls', [juvenile girls'] clothing, namely, [blouses, skirts, jackets, jogging suits,] shorts, pants, jeans, [socks, belts, swim suits, swim wear, hats, underwear, sleepwear, and pajamas].” All of the cited registrations appear to be owned by R. Josephs Licensing Inc.

This appeal now follows the Trademark Examining Attorney’s final refusal under Section 2(d) and subsequent denial of the Applicant’s Request for Reconsideration based on the above noted registrations.

Finally, the undersigned notes that Application Serial No. 77525450, contains an additional ground for refusal, specifically an Ornamental Refusal pursuant to Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127.

On February 8, 2010, the Applicant filed an Appeal Brief in each case and all three briefs were forwarded to the undersigned. On March 15, 2010, the Examining Attorney filed a Motion to Consolidate and on March 29, 2010 the Examining Attorney filed a Motion Requesting an Extension of Time. The Board granted both motions on March 29, 2010.

With regard to Application Serial No. 77524535, the Examining Attorney withdraws the requirement that Applicant delete the claim of Section 2(f) acquired distinctiveness.

ARGUMENT

THE MARKS OF THE APPLICANT AND THE REGISTRANT ARE CONFUSINGLY SIMILAR AND THE GOODS AND SERVICES ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

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

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001).

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26

USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002).

COMPARISON OF THE MARKS:

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

The Applicant contends that the marks look and sound different. The Examining Attorney respectfully disagrees. Here, the Applicant's proposed marks and the cited registered marks use the same dominant term, LAGUNA, to identify clothing and/or retail store services featuring clothing. As such, the usage of the same dominant term, LAGUNA, to identify related goods and/or services, serves to convey a similar commercial impression, connotation and/or meaning.

Marks are compared in their entireties under a Trademark Act Section 2(d) analysis. *See* TMEP §1207.01(b). Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant

feature in determining whether there is a likelihood of confusion. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In addition, the Trademark Trial and Appeal Board has found that consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

In this instance, the Applicant's marks *do not* create a different commercial meaning from the Registrant's marks. The addition of the descriptive terms SURF and SPORT does nothing to alter the commercial impression, because descriptive terms have little significance and would not be perceived as a source indicating feature of the mark.

In all three cases, the Applicant disclaimed the wording SURF and SPORT. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. Disclaimed matter is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). As such, the term LAGUNA constitutes the dominant portion of the Applicant's marks and the Registrant's marks, thus creating a similar overall commercial impression.

Here, the marks are highly similar, they convey a very similar commercial impression and they identify clothing and/or retail store services featuring clothing. Accordingly, consumers who are familiar with the Registrant's marks for clothing, upon encountering the Applicant's marks for clothing and retail clothing store services are likely to mistakenly believe that the goods and/or services emanate from a common source or are somehow associated with the same producer.

In all three applications, the Applicant submitted Google search summaries as evidence.¹ The Examining Attorney contends that those Google summary listings have little probative value and request that the Trademark Trial and Appeal Board not consider the Applicant's noted submissions.

A search result summary from an Internet search engine, such as Yahoo!® or Google®, that shows use of a term or phrase as the search query used by the search engine is of limited evidentiary value. These summaries generally do not provide sufficient surrounding text from which to determine the nature and relevance of the term or phrase. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007); TBMP §1208.03; TMEP §710.01(b). Thus, such evidence is considerably less probative than showing actual use of the term or phrase within the context of a website or webpage.

¹ On April 27, 2009, the Applicant submitted Google search summaries as evidence along with their response for Application Serial No. 77524535. On April 16, 2009, the Applicant submitted Google search summaries as evidence along with their response for Application Serial No. 77525441. On April 24, 2009, the Applicant submitted Google search summaries as evidence along with their response for Application Serial No. 77525450.

Also, in all three cases, the Applicant submitted abandoned and cancelled third party applications and registrations as evidence. Specifically, Serial Nos. 78833488, 78833243, 78923960, 78964431, 78486761, 78469346, 77134788, and Registration Nos. 1568461 and 1423975, were provided as evidence with the Request for Reconsideration filed on November 16, 2009 for all three applications. The Examining Attorney contends that abandoned and cancelled third party applications and registrations have little probative value and request that the Trademark Trial and Appeal Board not consider the Applicant's noted submissions.

The Applicant's contention that the marks of both parties are not confusingly similar is rejected. The Examining Attorney relies upon the search results, for all three cases, from the United States Patent and Trademark Office's X-Search Database to disprove the Applicant's argument. The search strategies are incorporated via reference. At that time, the search results from the United States Patent and Trademark Office's X-Search Database², for all three applications, revealed a total of nineteen (19) live marks that share the term "LAGUNA" to identify goods common to the Applicant and the Registrant. Printouts of these 19 marks are incorporated via reference. In each case, the results included the Applicant's three marks and the Registrant's five marks. The remaining eleven marks are not confusingly similar because those marks are different and

² Search results from the United States Patent and Trademark Office's X-Search Database are included in the Final Office Action, mail date May 19, 2009, for Application Serial No. 77524535; included in the Final Office Action, mail date May 11, 2009, for Application Serial No. 77525441, and included in the Final Office Action, mail date May 19, 2009, for Application Serial No. 77525450.

convey a different commercial impression. The results show that the Applicant's marks and the Registrant's marks are confusingly similar.

The Applicant further argues, in general, that the proposed marks should be allowed to co-exist because the term LAGUNA is a weak mark. The Examining Attorney respectfully disagrees. The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed "weak" or merely descriptive are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods and/or services. *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982).

In all three cases, the marks are highly similar, they convey the same commercial impression and meaning or connotation and they identify closely related goods and/or services that travel and are marketed in the same channels of trade. As such, relevant consumers are likely to encounter these goods and/or services and are likely to mistakenly believe that these goods and/or services emanate from a single source.

In the brief for Serial No. 77524535, the Applicant argues generally that when a mark is composed of wording and a design, the design is the dominant portion of the mark. More specifically, in the Applicant's briefs for Serial Nos. 77525441 and 77525450, the Applicant argues that, "...Here the design elements are so unique and distinctive that they can be considered more dominant than any other portion of the mark..." See Applicant's briefs for Serial Nos. 77525441 and 77525450 both at page 4. Additionally, Applicant

states that, "...LAGUNA is not the dominant portion of the Applicant's mark, rather the design and stylization is the dominant portion..." See Applicant's brief for Serial No. 77525441 at pages 5 and 6; See Applicant's brief for Serial No. 77525450 at page 6. The Examining Attorney respectfully disagrees.

When consumers are referencing products and/or services, consumers will identify and/or call for the product or the service using the word portion of the mark. The Trademark Trial and Appeal Board has continuously held that when a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods and/or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999).

The Applicant contends that its mark(s) is/are "intended to be spoken as a whole and viewed in its entirety..." See Applicant's brief for Serial No. 77524535 at page 6.

Although it is the Applicant's hope that consumers will speak the word portion of the Applicant's marks in their entirety, it is unlikely that consumers will do so. That is because consumers tend to retain a general, rather than specific, impression of trademarks, and as such, are likely to recall only the dominant feature of the mark, which, in this case, is LAGUNA. The Trademark Trial and Appeal Board has found that the focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979).

The question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods and/or services they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

In addition, the Applicant states that, "...Applicant is unaware of any consumer confusion between its mark and the Cited Registrations..." [sic]. See Applicant's briefs for Serial Nos. 77524535, 77525441 and 77525450 all at page 3.

It is well settled that the relevant test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. TMEP §1207.01(d)(ii); e.g., *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990). The Trademark Trial and Appeal Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and the registrant has no chance to be

heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case).

In re Kangaroos U.S.A., 223 USPQ 1025, 1026-27 (TTAB 1984).

In all three cases, the marks are highly similar, they convey the same commercial impression and meaning or connotation and they identify closely related goods and/or services that travel and are marketed in the same channels of trade. As such, relevant consumers are likely to encounter these goods and/or services and are likely to mistakenly believe that these goods and/or emanate from a single source. Accordingly, the marks in question are confusingly similar.

COMPARISON OF THE GOODS AND SERVICES:

If the goods and/or services of the respective parties are “similar in kind and/or closely related,” 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. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987).

Such is the case here. Nonetheless, the Applicant argues generally that the goods and/or services of the parties are not related. The Examining Attorney respectfully disagrees. The Applicant failed to provide any evidence to support the claim that its clothing and/or retail clothing store services differ or are unrelated to the Registrant’s clothing. The Examining Attorney contends that consumers are likely to be confused by the use of similar marks on or in connection with clothing and/or retail clothing store services.

It has long been held that consumers are likely to be confused by the use of similar marks on or in connection with goods and with services related to those goods. See TMEP §1207.01(a)(ii). In particular, the Board has held that clothing and retail clothing store services are related. *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE (stylized) for retail women's clothing store services and clothing held likely to be confused with CREST CAREER IMAGES (stylized) for uniforms).

Here, the Applicant's goods and services include clothing, clothing accessories and retail clothing store services and the Registrant's goods are clothing. The important question under a likelihood of confusion analysis is whether consumers will confuse the source of Applicant's goods and services with the source of Registrant's goods. In this instance, neither the Applicant nor the Registrant has limited their goods and/or services by the channels of trade or classes of purchasers. Thus, consumers viewing these highly similar marks on Registrant's goods and in connection with the Applicant's goods and services, which are within Registrant's zone of expansion, are likely to be confused as to the source of these goods and services.

A determination of whether there is a likelihood of confusion is made solely on the basis of the goods and/or services identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999); *see* TMEP §1207.01(a)(iii). If the cited registration describes the goods and/or services broadly and there are no limitations as to their nature,

type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods and/or services of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

Neither the application(s) nor the registration(s) contain any limitations regarding trade channels for the goods and therefore it is assumed that Registrant's and Applicant's goods are sold everywhere that is normal for such items, i.e., clothing and department stores. Thus, it can also be assumed that the same classes of purchasers shop for these items and that consumers are accustomed to seeing them sold under the same or similar marks. *See Kangol Ltd. v. KangaROOS U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992).

As such, the goods and/or services of both parties will travel and will be marketed in the same channels of trade and thus, when encountered by consumers are capable of causing confusion when bearing the same or similar marks.

Further, the Examining Attorney must consider any goods or services in the Registrant's normal fields of expansion to determine whether the Registrant's goods are related to the Applicant's identified goods or services under §2(d). *In re General Motors Corp.*, 196 USPQ 574 (TTAB 1977). A trademark owner is entitled to protection against the registration of a similar mark on products that might reasonably be expected to be produced by him in the normal expansion of his business. The test is whether purchasers

would believe the product or service is within the Registrant's logical zone of expansion.

In re 1st USA Realty Professionals, Inc., 84 USPQ2d 1581 (TTAB 2007).

Such is the case here. In addition, the risk of likelihood of confusion is increased for inexpensive products that are purchased on impulse. Therefore, in a likelihood of confusion determination, purchasers of such products are held to a lesser standard of purchasing care. *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

Given that the marks are confusingly similar and they identify closely related goods and services, relevant purchasers will encounter these products and services under circumstances that could give rise to the mistaken belief that the goods and services come from a common source.

Finally, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002).

THE MARK AS USED BY THE APPLICANT ON THE SPECIMEN OF RECORD FOR *APPLICATION SERIAL NO. 77525450* IS MERELY A DECORATIVE OR ORNAMENTAL FEATURE OF THE GOODS; IT FAILS TO FUNCTION AS A TRADEMARK TO IDENTIFY AND DISTINGUISH APPLICANT'S GOODS FROM THOSE OF OTHERS AND TO INDICATE THE SOURCE OF APPLICANT'S GOODS UNDER SECTIONS 1, 2 AND 45 OF THE TRADEMARK ACT.

Registration was refused because the applied-for mark, as used on the specimen of record, is merely a decorative or ornamental feature of the goods; it does not function as a trademark to identify and distinguish Applicant's goods from those of others and to indicate the source of Applicant's goods. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127; *see* TMEP §§904.07(b), 1202.03 *et seq.*; *see, e.g., In re Pro-Line Corp.*, 28 USPQ2d 1141 (TTAB 1993).

The applied-for mark, as shown on the specimen, is merely ornamental because the proposed mark is prominently displayed on the front of a t-shirt. The display of the mark is very large and is not likely to be perceived as a source indicator by consumers.

In this instance, the mark consists of the wording LAGUNA SURF AND SPORT within an oval and the petals of a poinsettia appear to the left of the term LAGUNA. An oval is a common design element and a common carrier for encasing wording. The poinsettia is a common flower. In connection with the goods, clothing, namely, t-shirts, sweatshirts, tank tops, and tops, decorative designs and wording are often placed on the front of clothing. With this common practice, of placing decorative designs on the front of clothing, consumers are not likely to perceive ornamental matter as a source indicator.

Finally, the design is not capable of creating a commercial impression distinct from any accompanying matter (such as wording), if presented together with text or other matter.

The Trademark Trial and Appeal Board has held that when evaluating a mark that appears to be ornamental, “the size, location, dominance and significance of the alleged mark as applied to the goods” are all relevant factors in determining whether it is inherently distinctive. *E.g., In re Pro-Line Corp.*, 28 USPQ2d 1141, 1142 (TTAB 1993).

Although there is no prescribed method or place for affixation of a mark to goods, the location of a mark on the goods “is part of the environment in which the [mark] is perceived by the public and . . . may influence how the [mark] is perceived.” *In re Tilcon Warren Inc.*, 221 USPQ 86, 88 (TTAB 1984). Thus, where consumers have been conditioned to recognize trademarks in a certain location, as on the breast area of a shirt, ornamental matter placed in a different location is less likely to be perceived as an indicator of source. *See* TMEP §1202.03(a), (b).

Established practices of the trade may be relevant to the amount of evidence needed to show acquired distinctiveness with respect to a mark that is merely ornamental or decorative.

TMEP §1202.03(b). Generally, more evidence is needed if the applied-for mark is matter used so frequently as ornamentation or decoration in the relevant industry that consumers would be less apt to discern source-indicating significance based on its use. *See Anchor Hocking Glass Corp. v. Corning Glass Works*, 162 USPQ 288, 292 (TTAB 1969) (holding ornamental cornflower design registrable as used on coffee percolators and culinary vessels

and utensils based on applicant's "voluminous evidence" of purchaser recognition of the design as an indicia of origin, despite practices of the trade to use ornamental floral designs on such goods).

In this instance, the composition of the mark is capable of being used as a trademark. However, at present, the manner in which the proposed mark is used on the goods is merely ornamental and thus, causes the mark to fail to function as a trademark.

Secondly, it is a common practice in the clothing industry to place ornamental matter on the front of clothing, and as such, would not be perceived as a source indicator by consumers. Thirdly, the Applicant has not proffered any evidence to support a Section 2(f) claim of acquired distinctiveness or a claim of secondary source.

In the first Office Action, mail date October 27, 2008, the Applicant was given the option of amending this application by claiming Section 2(f) acquired distinctiveness by submitting evidence that the applied-for mark has become distinctive of Applicant's goods in commerce; or by submitting evidence that the applied-for mark is an indicator of secondary source or sponsorship for the identified goods; or by seeking registration on the Supplemental Register; or by submitting a substitute specimen that shows non-ornamental trademark use, and the required substitute specimen statement that is verified with an affidavit or signed declaration. However, the Applicant elected not to exercise any of these options for overcoming an ornamental refusal.

Accordingly, as used on the specimen of record, the proposed mark fails to function as a trademark pursuant to Sections 1, 2 and 45 of the Trademark Act.

CONCLUSION

The marks are similar and the goods and/or services are related. Consumers encountering the Applicant's marks and the cited registered marks in the marketplace are likely to mistakenly believe that the goods and/or services derive from a common source. For the foregoing reasons the refusal to register under Section 2(d) of the Trademark Act should be affirmed.

The proposed mark as used on the specimen of record, for Application Serial No. 77525450, is merely ornamental and fails to function as a trademark because it fails to identify and distinguish Applicant's goods from those of others and to indicate the source of Applicant's goods. For the foregoing reasons the refusal to register Application Serial No. 77525450 under Sections 1, 2 and 45 of the Trademark Act should be affirmed.

Respectfully submitted,

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