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Sent: 12/4/2015 1:05:49 PM

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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 77921983

MARK: ECLIPSE



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

**APPLICANT:** Summit Entertainment, LLC

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

11186-033

**CORRESPONDENT E-MAIL ADDRESS:**

**EXAMINING ATTORNEY'S APPEAL BRIEF**

Summit Entertainment, LLC, limited liability Company (hereinafter referred to as "applicant") has appealed the trademark examining attorney's final refusal to register the mark ECLIPSE based upon Section 2(d) of the Trademark Act.

## **FACTS**

Applicant has applied for registration on the Principal Register for the mark ECLIPSE, for "backpacks adapted for holding computers, camera cases, decorative magnets sold in sheets, decorative wind socks for indicating wind direction and intensity, eyeglasses and eyeglass cases, laptop carrying cases, magnets, mousepads, slot machines, sunglasses and sunglass cases, computer storage devices, namely, flash drives; covers for cell phones, portable and handheld electronic digital devices for playing music, namely, MP3 and MP4 players, laptop computers, personal digital assistants, namely, PDAs, and gaming devices, namely, gaming machines, all relating to motion pictures and entertainment." Registration was refused under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), based on a likelihood of confusion with Registration Nos. 0799454, ECLIPSE for "magnets;" 3986292, ECLIPSE for "computer keyboards, computer mice; mouse pads; wireless presenter in the nature of a wireless remote pointer;" 3986293, ECLIPSE and Design for "computer keyboards, computer mice, mouse pads, wireless presenter in the nature of a wireless remote pointer;" 1526584, ECLIPSE for "mobile sound equipment and accessories, namely, am-fm tuners, cassette, CD and [DAT players,] speakers, amplifiers and equalizers;" 1581195, ECLIPSE [Stylized] for "mobile sound equipment and accessories, namely, am-fm tuners, cassette, CD and DAT players, speakers, amplifiers and equalizers;" 3503154, ECLIPSE and Design for "audio and visual equipment, namely, radios, CD players, DVD players, hard disc players, and audio equipment for vehicles, namely, equalizers, amplifiers, speakers, and combination CD/DVD players; navigation

apparatus for automobiles in the nature of on-board computers;" 2109357, SOLAR ECLIPSE for "sunglasses;" 4150483, MIDNIGHT ECLIPSE for "gaming machines, namely, devices which accept a wager;" and 4202676, CASH ECLIPSE for "gaming devices, namely, slot machines, with or without video output."

On March 3, 2015, the examining attorney issued a final refusal to register under Section 2(d) of the Trademark Act. In response to the final refusal, applicant filed a notice of appeal and a request for reconsideration. Applicant's request for reconsideration included a voluntary amendment to add the specific language "all relating to motion pictures and entertainment" to the end of the identification of goods. In response to the request for reconsideration, the examining attorney advised applicant that the Office reassigned this application to the undersigned trademark examining attorney; and among other things, accepted the amendment to the identification of goods.

Please note that the following cited registration has been cancelled and is no longer a bar to the registration of applicant's mark: U.S. Registration No. 3544541 for the mark ECLIPSE DOGGY.

This appeal follows the examining attorney's final refusal under Section 2(d) and denial of applicant's request for reconsideration.

## **ARGUMENTS**

**APPLICANT'S MARK IS CONFUSINGLY SIMILAR TO REGISTRANTS' MARKS AND THE RESPECTIVE GOODS ARE IDENTICAL AND/OR RELATED**

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods and/or services. In re Aquamar, Inc., 115 USPQ2d 1122, 1126 (TTAB 2015) (citing Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)). That is, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. In re Viterra Inc., 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)). Additionally, the goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. See Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012).

**A. The applied-for mark is identical to three of the registered marks.**

In a likelihood of confusion determination, the marks in their entireties are compared for similarities in appearance, sound, 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).

In the present case, applicant's mark is ECLIPSE and the registrants' marks in U.S. Registration Nos. 0799454, 3986292 and 1581195 are ECLIPSE. Thus, the marks are identical in terms of appearance and sound. In addition, the connotation and commercial impression of the marks do not differ when considered in connection with applicant's and registrants' legally identical and otherwise related goods.

**B. The applied-for mark creates a substantially similar overall commercial impression to three registered marks that are either stylized and/or include a design element.**

Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterro Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. See *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

The word portion generally may be the dominant and most significant feature of a mark because consumers will request the goods and/or services using the wording. See *In re Viterro Inc.*, 671 F.3d 1358, 1362, 1366, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014). For this reason, greater weight is often given to the word portion of marks when determining whether marks are confusingly similar. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)); TMEP §1207.01(c)(ii).

In the present case, the applicant's mark is ECLIPSE and the cited registrations are 3986293, ECLIPSE and Design and 3503154, and ECLIPSE and Design. The design in 3986293 consists of a stylized crescent moon and the design in 350315 consists of the underlining of the word ECLIPSE and a stylized crescent.

While the designs in both marks are easy to see or notice, the designs are hardly the dominant feature of the registered marks. The designs are minimally stylized and positioned next to the wording ECLIPSE. Such positioning of the crescent and the crescent moon appears to visually reinforce the wording ECLIPSE. Moreover, it is very difficult to view the designs without also viewing the words comprising the marks. Thus, the wording ECLIPSE is the most visually prominent portion of the registrants' marks and will be used in calling for the goods.

As to U.S. Registration No. 1581195, the wording ECLIPSE is stylized. However, the stylization of the registered mark does not avoid a likelihood of confusion with applicant's mark ECLIPSE in standard characters. A mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. See *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a). Thus, a mark presented in stylized characters and/or with a design element generally will not avoid likelihood of confusion with a mark in typed or standard characters because the marks could be presented in the same manner of display. See, e.g., *In re Viterra Inc.*, 671 F.3d at 1363, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular display").

**C. The applied-for mark creates a substantially similar overall commercial impression to three registered marks containing the wording ECLIPSE with additional wording.**

The applicant's mark is ECLIPSE and the cited registrations are 2109357, SOLAR ECLIPSE; 4150483, MIDNIGHT ECLIPSE; and 4202676, CASH ECLIPSE. Deleting a term from a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). See *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (finding TITAN and VANTAGE TITAN confusingly similar). In the present case, the marks are identical in part.

The applicant's mark creates a substantially similar overall commercial impression with the marks SOLAR ECLIPSE and MIDNIGHT ECLIPSE. The marks are similar in sound, appearance and connotation. Here, the registered marks are SOLAR ECLIPSE and MIDNIGHT ECLIPSE and the applicant's mark is ECLIPSE. Thus, the marks are the same because they consist of the same word ECLIPSE and they differ because applicant has deleted the wording SOLAR, a term in U.S. Registration No. 2109357, and the wording MIDNIGHT, a term in U.S. Registration No. 4150483.

The wording ECLIPSE is a strong distinctive term, when applied to the respective goods. The term eclipse is defined in relevant part as follows: "the total or partial obscuring of one celestial body by another." See <http://www.merriam-webster.com/>. (See attachment to the Denial of Request for Reconsideration, p. 63). To this end, the wording ECLIPSE is not descriptive of or suggestive of the respective goods at issue, specifically, sunglasses, sunglass cases, eyeglasses, eyeglass cases and gaming

machines. The additional wording SOLAR to ECLIPSE does not change the meaning of the word ECLIPSE. The term “solar” is an adjective that merely describes a type of eclipse, specifically, “eclipse of the sun by the moon.” See <http://www.merriam-webster.com/>. (See attachment to the Denial of Request for Reconsideration, p. 60). Similarly, the additional wording MIDNIGHT to ECLIPSE does not change the meaning of the word ECLIPSE in that midnight describes the time of day the eclipse appears. Thus, the applicant’s deletion of wording from the cited registered marks to form the mark ECLIPSE does not avoid a likelihood of confusion with the marks SOLAR ECLIPSE and MIDNIGHT ECLIPSE.

Moreover, the applicant’s mark ECLIPSE and the cited marks SOLAR ECLIPSE and MIDNIGHT ECLIPSE are in standard characters. Therefore, the registrants, when using the mark in commerce, could choose to make the word ECLIPSE much larger or bolder than the additional wording in the mark used to describe the type of eclipse. Such display would be more likely to increase the likelihood of confusion between applicant’s mark and the marks in the above-mentioned cited registrations

The applicant’s mark also creates a substantially similar overall commercial impression with the mark CASH ECLIPSE. The applicant’s deletion of a suggestive or descriptive term CASH to form the mark ECLIPSE is not sufficient to avoid a likelihood of confusion with the mark CASH for identical or related goods. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. See *In re Nat’l Data Corp.*, 753 F.2d at 1058,

224 USPQ at 751. Matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant in relation to other wording in a mark. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)).

The word, cash, is descriptive or suggestive of the cash required to play the machines and/or the cash involved when one play the machines for real money. Regardless of whether CASH is merely descriptive or suggestive when applied to registrant's slot machines, it is clearly not the dominate feature of the cited mark. ECLIPSE is the dominant feature of the registrant's mark CASH ECLIPSE and ECLIPSE is the only feature in applicant's mark. Thus, the marks are substantially similar.

#### **THE GOODS ARE RELATED AND IN THE SAME CHANNELS OF TRADE**

The respective goods are identical or closely related. The goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.").

The respective goods and/or services need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

As to U.S. Registration No. 0799454, ECLIPSE, the registrant's goods are "magnets." The applicant's goods also include "decorative magnets sold in sheets... and magnets..., all relating to motion pictures and entertainment." The goods are identical in part and registrant's goods are broad enough to include the applicant's "decorative magnets sold in sheets... all relating to motion pictures and entertainment."

As to U.S. Registration Nos. 3986292, ECLIPSE and 3986293, ECLIPSE and Design, the registrant's goods include among other things "computer keyboards, computer mice and mouse pads." The applicant's goods include "backpacks adapted for holding computers, laptop carrying cases, mousepads, computer storage devices, namely, flash drives; and ... laptop computers, all relating to motion pictures and entertainment." The goods are identical in part and/or closely related computer goods and accessories.

As to U.S. Registration Nos. 1526584, ECLIPSE, 1581195, and ECLIPSE [Stylized], the registrant provides among other things "mobile sound equipment ... namely, CD and DAT players." The applicant's goods include "portable and handheld electronic digital devices for playing music, namely, MP3 and MP4 players... all relating to motion pictures and entertainment." Here, the respective goods are closely related audio and visual sound equipment.

As to U.S. Registration No. 3503154, ECLIPSE and Design, the registrant's goods are "audio and visual equipment, namely, radios, CD players, DVD players, hard disc players, and audio equipment for vehicles, namely, equalizers, amplifiers, speakers, and combination CD/DVD players..." The applicant's goods include portable and handheld electronic digital devices for playing music, namely, MP3 and MP4 players, all relating to motion pictures and entertainment." These goods are also closely related audio and visual sound equipment.

As to U.S. Registration No. 2109357, SOLAR ECLIPSE, the registrant's goods are "sunglasses." The applicant's goods also include "sunglasses and sunglass cases" as well as "eyeglasses and eyeglass cases ... all relating to motion pictures and entertainment." The goods are identical in part and or closely related.

As to U.S. Registration No. 4150483, MIDNIGHT ECLIPSE the registrant's goods are "gaming machines, namely, devices which accept a wager." The applicant's goods are "slot machines... all relating to motion pictures and entertainment" Both parties provide gaming devices and the applicant provides related slot machines.

As to U.S. Registration No. 4202676, CASH ECLIPSE, the registrant's goods are "gaming devices, namely, slot machines, with or without video output." The applicant's goods are "slot machines... all relating to

motion pictures and entertainment." Both parties provide gaming devices and the applicant provides related slot machines.

In instances where the goods are not identical but closely related, the trademark examining attorney made of record evidence from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods and/or services as those of both applicant and registrant in this case. This evidence shows that the goods and/or services listed therein, namely, laptop computers and accessories for computers including computer keyboards and computer mice are of a kind that may emanate from a single source under a single mark; eye glasses eyeglass cases and sunglasses are of a kind that may emanate from a single source under a single mark; and mp3 players, mp4 players, CD players, speakers, amplifiers and audio equipment for vehicles are of a kind that may emanate from a single source under a single mark. See *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii). (See attachments to the Denial of Request for Reconsideration). See excerpts below.

U.S. Registration No. 4399333, PARETO MILL and Design for "briefcases specially adapted for holding laptop computers; **carrying cases for electronic equipment, namely, laptop computers; carrying cases for mobile computers**; computer bags; **computer carrying cases**; computer cursor control devices, namely, **computer mouse**; computer cursor control devices, namely, touch pads; **computer keyboards**; computer keypads; **computer mouse**; computer peripheral devices; computer peripherals; computer peripherals and parts thereof; computer stands specially designed for holding a computer, printer and accessories; input devices for computers; **laptop carrying cases**; messenger bags especially adapted for holding laptops; stands for personal digital electronic devices."

U.S. Registration No. **4640039**, SUNEN for “audio amplifiers; audio recorders; batteries and battery chargers; cases for mobile phones; cases for telephones; computer hardware and computer peripherals; **computer keyboards**; data processing equipment, namely, couplers; digital photo frames; electronic LED signs; GPS navigation device; **laptop carrying cases**; **laptop computers**; light emitting diodes (LEDs); loudspeakers with built in amplifiers; Portable listening devices, namely, **MP3 players**; telephones; vehicle radios.”

U.S. Registration No. **4621038**, FIVEBOX for “batteries and battery chargers; carrying cases for radio pagers; cases for pocket calculators; cell phone cases; cell phone covers; cell phone straps; **computer keyboards**; **computer mouse**; computer peripheral equipment; Electric cables and wires; GPS navigation device; LAN (local area network) hardware; laptop carrying cases; **mouse pads**; notebook and **laptop computers**; optical communications systems comprised of optical and electronic hardware and computer software for the transmission of data between two points; radios; radios for vehicles; solar batteries; telephones; video telephones; VPN (virtual private network) hardware; WAN (wide area network) hardware.

U.S. Registration No. **3737492**, EUROVOX for “audio amplifiers; audio equipment for vehicles, namely, subwoofers; **Audio equipment for vehicles**, namely, stereos, speakers, amplifiers, equalizers, crossovers and speaker housings; audio speaker enclosures; audio speakers; Car televisions; Car video recorders; Digital audio players; Digital audio tape recorders; Electrical and electronic burglar alarms; **CD players**; **MP4 players**; **DVD players**; **MP3 players**; Graphic equalizers.

U.S. Registration No. **3884003**, MEGASSUS for “audio amplifiers; **audio cassette and CD players**; audio electronic components, namely, surround sound systems; **audio equipment for vehicles**, namely, stereos, speakers, amplifiers, equalizers, crossovers and speaker housings; audio headphones; a mixers; audio processing equipment, namely, limiters and compressors; audio speaker enclosures; audio speakers; **CD players**; **compact disc players**; digital audio players; media players; **MP3 players**; **MP4 players**; Personal stereos; record players; stereo receivers; stereo tuners; sub-woofers; woofers.”

U.S. Registration No. **3399795R** ROCKFORD ACOUSTIC DESIGN for “audio equipment, namely stereos, **CD players, MP3 players**, radios, audio speakers, woofers, subwoofers, speaker enclosures, speaker housings, amplifiers, power amplifiers, preamplifiers, **equalizers**, crossovers, signal processors, accessories for audio equipment.”

U.S. Registration No. **4721840**, DJ TECH PRO USA for “amplifiers; apparatus for recording, transmission or reproduction of sound and images; Audio recorders; audio speakers; **compact disc** players; loudspeakers; **MP3 players**; remote controls for stereos; **sound equalizers** and crossovers; sound mixers.”

U.S. Registration No. **4742429**, EJE OPTICO SISTEMA for “contact lenses; containers for contact lenses; **eyeglass cases**; eyeglass chains; eyeglass cords; eyeglass frames; **eyeglasses**; Pince-nez chains; spectacle cases; spectacle frames; spectacle lenses; spectacles; **sunglasses**.”

U.S. Registration No. 3254583, HABER {stylized}for “**eyewear, namely sunglasses**, sunglass lenses, sunglass frames, **eyeglass cases** and eyeglass accessories, namely, head straps and retainers which restrain eyewear from movement on a wearer, safety and tactical eyeglasses for use by the military and police, sport goggles for use in snow skiing, water skiing, jet boating, snow boarding, bicycling, golfing, kayaking, tennis, swimming, motorcycling, boating, windsurfing, surfing, fishing, hiking, climbing, sky diving, baseball and safety goggles.”

U.S. Registration No. **3678362**, S and Design for “**sunglasses; eyeglass cases; eyeglasses**; optical frames.

U.S. Registration No. 4032679, EXPERIMENT WITH NATURE for “cases for spectacles and sunglasses; **eyeglass cases**; eyeglass frames; **eyeglasses**; eyewear; eyewear cases; eyewear, namely, **sunglasses**, eyeglasses and ophthalmic frames and cases therefor; frames for spectacles and sunglasses;

spectacle frames; spectacles and sunglasses; sunglasses; sunglasses and spectacles; audio headphones; carrying cases for cell phones; carrying cases specially adapted for pocket calculators and cellphones; cases for mobile phones; cases for telephones; earphones and headphones; headphones; music headphones; personal headphones for use with sound transmitting systems; stereo headphones.”

Applicant argues that the involved goods are unrelated in that applicant’s goods are all relating to motion pictures and entertainment. Applicant contends that confusion is unlikely because the respective goods are sold through different channels of trade to different classes of consumers and because of the differences in the way applicant's goods and registrants’ are marketed. Applicant has provided evidence which purportedly demonstrates that applicant’s mark always refers to the Eclipse films and feature imagery from the films. However, applicant’s arguments regarding the difference in the actual goods and channels of trade are not persuasive, inasmuch as the determination of the question of likelihood of confusion is determined based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

In this case, the identification set forth in the registrations has no restrictions as to nature, type, channels of trade, or classes of purchasers. Therefore, it is presumed that these goods and/or services “travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)).

Applicant argues that the wording ECLIPSE is weak. Applicant has submitted numerous printouts of third-party registrations for marks containing the wording ECLIPSE, as well as applicant's prior U.S. Registrations for the marks ECLIPSE, to support the conclusion that this wording is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. However, the goods/services listed in the prior registrations submitted by applicant are different and unrelated to the goods in the application and the cited registrations. The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods and/or services. See *Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991).

Evidence of weakness or dilution consisting solely of third-party registrations, such as those submitted by applicant in this case, is generally entitled to little weight in determining the strength of a mark, because such registrations do not establish that the registered marks identified therein are in actual use in the marketplace or that consumers are accustomed to seeing them. See *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). Thus, these third-party registrations submitted by applicant containing different or unrelated goods and/or services are insufficient to establish that the wording "ECLIPSE" is weak or diluted.

Moreover, even if the marks were weak, 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. TMEP §1207.01(b)(ix); see *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974) (likelihood of confusion is “to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong mark’)); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982) (“even weak marks are entitled to protection against registration of similar marks”). This protection extends to marks registered on the Supplemental Register. TMEP §1207.01(b)(ix); see, e.g., *In re Clorox Co.*, 578 F.2d 305, 307-08, 198 USPQ 337, 340 (C.C.P.A. 1978); *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975).

In addition, the applicant contends that its consumers and registrant’s consumers exercise a high degree of care. However, there is no evidence of record to support this claim. There is no evidence of record to demonstrate that the respective goods are expensive and the potential consumers are professionals or sophisticated purchasers. Generally, casual purchasers of low-cost, every-day consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods.” *In re Davia*, 110 USPQ2d 1810, 1818 (TTAB 2014) (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984)).

When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014); *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

Finally, as it relates to the cited marks, applicant contends that the examining attorney must consider the fame of the cited marks. However, because of the nature of the evidence required to establish the fame of a registered mark, the Board normally does not expect the examining attorney to submit evidence as to the fame of the cited mark in an ex parte proceeding. See *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006). Since the examining attorney is not expected to submit evidence regarding the fame of the cited mark, this factor is treated neutral in such proceedings. See TMEP §1207.01(d)(ix).

The examining attorney maintains that the marks create a substantially similar overall commercial impression. The marks are similar in sound, appearance and connotation. Moreover, the applicant's evidence of dilution of the cited marks is insufficient and there is no evidence to support applicant's claim that applicant's consumers and the consumers of the owners of the cited registrations are careful purchasers. Thus, in the case at hand, viewing the marks in their entireties, the similarities in appearance sound, connotation and overall commercial impression outweighs any dissimilarity. There is no evidence of record that would support a different conclusion.

### **CONCLUSION**

Applicant's mark ECLIPSE is confusingly similar to the marks in the cited registrations. The marks are substantially similar in sound, appearance, connotation and overall commercial impression. Further, the respective goods are closely related and in the same channels of trade. For the foregoing reasons, the refusal to register the mark under Section 2(d) of Trademark Act should be affirmed.

Respectfully submitted,

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