Hearing: 7/12/07 Mailed: 12/28/07

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Bridger Management, LLC

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Serial No. 78516349

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Adam M. Cohen, Brendan P. McFeely and Adam E. Schwartz of Kane Kessler for Bridger Management, LLC.

Hannah Fisher, Trademark Examining Attorney, Law Office 111 (Craig D. Taylor, Managing Attorney).

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Before Quinn, Grendel and Wellington, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Bridger Management, LLC filed an application to register the mark BRIDGER CAPITAL ("CAPITAL" disclaimed) for "hedge fund services offered to high-net-worth individuals and entities" in International Class 36.[1]

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that

[1] Application Serial No. 78516349, filed November 12, 2004, alleging first use anywhere and first use in commerce in June 2000.

applicant's mark, when used in connection with applicant's services, so resembles the previously registered mark BRIDGER COMMERCIAL FUNDING ("COMMERCIAL FUNDING" disclaimed) for "commercial lending services for the commercial mortgage and financial asset management industries" in International Class 36[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs, and both appeared at an oral hearing.

Applicant advances two principal arguments against the refusal, the first being that the services are different (lending of money by commercial loan versus operating a hedge fund). Applicant contends that the examining attorney has made the mistake of equating the services of the two entities as generally falling under the huge category of "financial services" without appreciating the significant differences between the services. Applicant also contends that the services are offered to different customers, and that, in any event, the customers for the services are highly sophisticated and more than capable of distinguishing between the marks. With respect to the

[2] Registration No. 2570475, issued May 14, 2002 on the Supplemental Register.

second point, applicant emphasizes that its clients are high net worth individuals who make a minimum investment of $1 million. Applicant argues "[n]o reasonable consumer, regardless of wealth, is likely to invest millions of dollars without detailed knowledge regarding the entity managing that investment." (Brief, p. 8). Applicant also asserts that the marks are distinguishable, pointing to the differences between "CAPITAL" and "COMMERCIAL FUNDING." Applicant additionally contends that the "BRIDGER" portion of registrant's mark is merely descriptive, as is evidenced by issuance of the registration on the Supplemental Register. In support of its position, applicant submitted Wikipedia listings for "hedge funds" and "commercial lender," and excerpts of registrant's website.[3]

[3] In an attempt to narrow the scope of protection of the registered mark, applicant referenced, for the first time in its brief, three third-party registrations. The examining attorney properly objected to this evidence. Firstly, reliance on this evidence is untimely. Trademark Rule 2.142(b). Secondly, copies of the registrations were not submitted. *In re Duofold Inc.*, 184 USPQ 638, 640 (TTAB 1974). Accordingly, we have not considered this evidence in reaching our decision. We hasten to add, however, that even if considered, the evidence is of no probative value in the present case. The registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Moreover, the registrations cover goods (backpacks, clothing and beef jerky) far removed from the types of services involved herein.

The examining attorney maintains that both of the involved marks are dominated by the identical term, namely "BRIDGER." The examining attorney also states that the services are rendered to an overlapping customer base, namely high-net-worth entities in the monetary sector. The examining attorney submitted third-party registrations and portions of third-party websites to support her contention that the services are related.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also: In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first turn to compare the marks. In determining the similarity or dissimilarity of the marks, we must compare the marks in their entireties as to appearance,

sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods and/or services offered under the respective marks is likely to result.

With respect to the involved marks, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ["There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable."] For example, in the past merely descriptive matter that is disclaimed has been accorded subordinate status relative to the more distinctive portions of a mark. *In re Dixie Restaurants Inc.*, 41 USPQ2d at 1533-34. In the present case, applicant has disclaimed the term "CAPITAL," while

registrant has disclaimed the words "COMMERCIAL FUNDING." In addition, we note that registrant's mark is registered on the Supplemental Register; according to applicant, the term "BRIDGER" in registrant's mark is merely descriptive of "bridge loans" offered through commercial lending services.

Even if we assume *arguendo* that the term "BRIDGER" is descriptive of registrant's services, it is still the dominant portion of the registered mark given the generic nature of the term "COMMERCIAL FUNDING." Likewise, given the generic nature of the term "CAPITAL" in applicant's mark, applicant's mark is dominated by the term "BRIDGER." The dominant feature of each mark, "BRIDGER," is identical in sound and appearance.

Insofar as meaning is concerned, the term "BRIDGER" in applicant's mark appears to be arbitrary, while the term in registrant's mark may be descriptive of lending services featuring bridge loans. Even if the term "BRIDGER" has a different meaning in each of the marks, any difference is outweighed by the identity in sound and appearance.

Although we have focused on the dominant portions of the marks, which, as indicated above, are essentially identical, we reiterate that we have considered the marks in their entireties. And, in doing so, we find that they

engender substantially similar overall commercial impressions.

Insofar as the services are concerned, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the services recited in applicant's application vis-à-vis the services identified in the cited registration. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). In the present case, we compare applicant's "hedge fund services offered to high-net-worth individuals and entities" with registrant's "commercial lending services for the commercial mortgage and financial asset management industries."

Applicant has submitted information regarding hedge funds and commercial lenders. The information was retrieved from Wikipedia, and was submitted with applicant's request for reconsideration. The examining attorney had an opportunity to rebut the Wikipedia evidence by submitting other evidence to call into question the accuracy of the Wikipedia information pertaining to hedge funds and commercial lenders. The examining attorney did not rebut the Wikipedia evidence or otherwise call into question the accuracy of the information retrieved

therefrom. Accordingly, although we recognize the limitations inherent with Wikipedia, we have considered this evidence. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028-1032-33 (TTAB 2007).

According to Wikipedia, a hedge fund is "a lightly regulated private investment fund often characterized by unconventional investment strategies." Hedge funds have the ability to "short" sell financial instruments that they believe will fall in price. Hedge funds "are normally open to business and institutional investors only," and the "bulk of hedge fund assets [is] invested in funds that employ 'long/short' equity strategies." Other hedge funds "use alternative strategies such as selling short, arbitrage, trading options or derivatives."

"Commercial lenders" include "commercial banks, mutual companies, private lending institutions, hard money lenders and other financial groups." These lenders "specialize in hard money and bridge loans." The commercial loan industry "is most often accessed through brokers, who provide an evaluation of a borrower and then recommend the loan to a number of different commercial lenders whom they feel will be most likely to fund the borrower's request."

Although the services fall within the broad category of "financial services," hedge funds and commercial lenders

engage in fundamentally different business activities. The examining attorney's Internet and third-party registration evidence shows that some financial institutions render both investment management and commercial lending services. Hedge funds, however, are a distinct type of investment vehicle. As pointed out by applicant, the examining attorney has failed to provide even one example of a single entity providing both hedge fund and commercial lending services. Further, the fact that hedge funds and commercial lenders may be customers of each other is not probative to show that the services are related; what is probative is the absence of any showing of an overlap in customers for the two distinct types of services.

Moreover, it is immediately apparent after even a cursory reading of the respective recitation of services (not to mention the Wikipedia entries) that the services are rendered to highly sophisticated purchasers. The examining attorney essentially does not dispute this point. The recitations of services dictate the classes of purchasers: applicant's services are directed to high net worth individuals and entities while registrant's services are offered to banks and similar financial institutions. The nature of the services clearly requires that any of the involved financial transactions are made only with care and

deliberation after investigation. Even assuming *arguendo* that there is an overlap in customers, it is reasonable to expect that different branches of the common customer will handle the different transactions, that is, one branch will handle commercial lending while a different branch will handle investment management. In any event, the customers are sophisticated and certainly will know with whom they are dealing.

The sophistication of purchasers of the respective purchasers is a factor that weighs heavily in favor of finding no likelihood of confusion. *See Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992) ["sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care"]; and *In re Box Solutions Corp.*, 79 USPQ2d 1953 (TTAB 2006).

Based on the record before us, we see the likelihood of confusion refusal as amounting to only a speculative, theoretical possibility. Language by our primary reviewing court is helpful in resolving the likelihood of confusion issue in this case:

> We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the

> practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 USPQ2d at 1391 (Fed. Cir. 1992), *citing Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

Notwithstanding the similarities between the marks, the significant differences between the nature of the services and the high level of sophistication of purchasers tip the scales in favor of a finding of no likelihood of confusion.

Decision: The refusal to register is reversed.