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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kimsaprincess Inc., Khlomoney Inc., and 2Die4Kourt

Serial Nos. 85250061 and 85250063

Jennifer Ko Craft of Gordon & Silver Ltd. for Kimsaprincess Inc., Khlomoney Inc., and 2Die4Kourt.

Seth A. Rappaport, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Seeherman, Cataldo and Hightower,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Kimsaprincess Inc., Khlomoney Inc., and 2Die4Kourt (“Applicants”) seek registration on the Principal Register of the marks DASH (in standard characters) and **DASHI** (in stylized form) for the following services, as amended:

retail store services featuring apparel, footwear, and fashion accessories, but excluding, eyewear, namely, eyeglasses, eyeglass frames, sunglasses and eyeglass cases

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in International Class 35.¹

The Trademark Examining Attorney has refused registration of Applicants' marks on the ground of a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of two registrations, issued to different entities, for the mark DASH, (in typed form), one for

pants, shirts, sweatshirts, sweatpants, hosiery, jackets, shoes, waistcoats, T-shirts, shorts, hats, headbands, wristbands, leggings, shoulder belts, belts, sweaters, blouses, underwear, vest tops, blazers, and coats

in International Class 25;² and one for

eyewear, namely eyeglasses, eyeglass frames, sunglasses and eyeglass cases

in International Class 9.³

Applicants filed requests for reconsideration and appealed the final refusals. The Examining Attorney denied the requests for reconsideration. The refusals have been fully briefed by Applicants and the Examining Attorney.⁴

¹ Application Serial Nos. 85250061 and 85250063 were filed on February 23, 2011, both based upon Applicants' assertion of August 1, 2006 as a date of first use and first use of the mark in commerce.

² Registration No. 1807678 issued on the Principal Register on November 30, 1993. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Second renewal.

³ Registration No. 2670119 issued on the Principal Register on December 31, 2002. Section 8 affidavit accepted; Section 15 affidavit acknowledged. First renewal.

⁴ Trademark Rule 2.142(b)(2) provides that briefs be submitted in double spaced form, and that, without prior leave of the Board, a main brief shall not exceed 25 pages in its entirety, including the table of contents, index of cases, description of the record, statement of the issues, recitation of facts, argument and summary. Applicants' brief for application Serial No. 85250061 contains 17 pages of text and 3 pages of table of contents/index of cases, and Applicant's brief for application Serial No. 85250063 contains two additional pages of text. The briefs thus are therefore technically within the page limitations set forth in the rule. However, we note that

Proceedings Consolidated

Applicants' request for consolidation of these appeals was granted by Board order on November 6, 2014, after Applicants' and the Examining Attorney's main briefs had been filed. References to the record cite to Application Serial No. 85250061 unless otherwise indicated.⁵

Likelihood of Confusion

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).

Strength of Registrants' Marks

We first consider Applicants' argument that Registrants' DASH marks are weak as a result of third-party use and registration of similar marks for related goods or services. In support of their argument, Applicants introduced

Applicants' briefs contain 4 pages of footnotes, which are single- rather than double-spaced. Although the Board has not yet had the need to adopt the Federal Circuit's rule that footnotes, too, must be double-spaced, we caution that single-spaced footnotes are not to be used as a subterfuge to avoid the page limitations set forth in Trademark Rule 2.142.

Applicants further submitted some 18 pages of exhibits with their briefs, stating that they were made of record during prosecution of the involved applications. We will not undertake a separate review of the exhibits. To the extent that they were previously made of record, their attachment to Applicants' briefs is duplicative and unnecessary. To the extent that any papers were not previously made of record, they will not be considered.

⁵ Record citations are to TTABVue, the Trademark Trial and Appeal Board's publicly available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

into the record with their October 30, 2014 request for remand the results of a LexisNexis search of company profiles for the term “Dash” in connection with retailers, clothing, accessories, jewelry or eyewear.⁶ Applicants noted the following references in their brief as the most relevant:

- **Dash Inc.**, 423 Skyline Dr., Charleston, West Virginia 25302-4232
- **Dash Inc.**, 104 Liam Ln, Centerville, Massachusetts 02632-3326
- **Dashing Boutique**, 3573 Cerrillos Rd, Santa Fe, New Mexico 87507-2906
- **Dash Apparel**, 175 Main St, Los Altos, California 94022-2912
- **Dash Apparel**, 3219 Climbing Ivy Trl, Jacksonville, Florida 32216-1172
- **Dash Clothing Inc.**, 1375 Broadway Rm 600, New York, New York 10018-7060
- **Dash Clothing**, 2258 S Rural St, Indianapolis, Indiana 46203-3003
- **Dash Fashions**, 170 Sisson Ave. Ste 6-1, Hartford, Connecticut 06105-4058
- **Dash Fashion**, 5577 Alameda Ave, El Paso, Texas 79905-2915
- **Dash Fashion**, 12815 SW 42nd St, Miami, Florida 33175-3424
- **Dash Fashions**, 170 Sisson Ave Ste. 6-1, Hartford, Connecticut 06105-4058
- **Dash Sales, Inc**, 1423 Leestown Rd Ste B, Lexington, Kentucky 40511-2094
- **Dash & Dash Enterprises, Inc.**, 16027 17th Ave, Whitestone, New York 11357-3212
- **Dashing Elegance Lingerie, L.L.C**, 17435 Davenway Dr., Houston, Texas 77084-1197
- **Diaper Dash Inc.**, 4390 Lexi Cir, Broomfield, Colorado 80023-9590
- **Dot Dot Dash**, 6454 Cecil Ave, Saint Louis, Missouri 63105-2225
- **Dash of Chic Boutique**, 4411 Ramsey St, Fayetteville, North Carolina 28311-2234

⁶ 19 TTABVue 17-73. The search includes “Results list for: company (dash) and retail! or clothing or accessories or jewelry or eyewear” for companies located in the United States.

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- **Styles Dashing Boutique**, 19123 Mission Manor Ln, Richmond, Texas 77407-3638
- **Dash Hemp**, 303 Potrero Street Unit 47-101, Santa Cruz, California 95060
- **A Dash of Pizazz Boutique**, 640 South St, Philadelphia, Pennsylvania 19147-2102
- **Dash Technical Wear**, 1886 Prairie Way, Superior, Colorado 80027-9600
- **Dash Technical Wear**, 620 Compton St., Broomfield, Colorado 80020-1635
- **Samy Dash**, 1350 E Flamingo Rd 15b, Las Vegas, Nevada 89119-5263
- **Styles Dashing Boutique**, 19123 Mission Manor Ln, Richmond, Texas 77407-3638
- **Dashing Deals**, 801 E Broad Ave. Ste. 17, Rockingham, North Carolina 28379-4382

However, it is not clear from Applicants' LexisNexis evidence whether the listed company names are also their trade names or trademarks for their goods or services. As a result, we cannot determine the extent to which these company names are trade names or trademarks that the public would see and associate these company names with the companies' goods or services. In addition, the term DASH appears to have different meanings in at least some of the business names, *e.g.*, Samy Dash appears to be an individual's name, and Styles Dashing Boutique and Dashing Deals have a different connotation from DASH per se.

Applicants further introduced into the record screenshots from Internet webpages to show that third parties utilize the term "Dash" to identify clothing items and websites that offer clothing for sale. The following examples are illustrative:⁷

⁷ 19 TTABVue 74-103.

- **DASH BOUTIQUE** for apparel
(facebook.com/DashBoutique2014?ref=br_rs)
- **DASH APPAREL** for apparel
(facebook.com/pages/Dash/22029892799282)
- **DASH T-SHIRTS & SHIRTS** for apparel
(zazzle.com/dash+tshirts)
- **DASH PANT BY SYMPLI** for apparel
(adaresboutique.com/servlet/the-12436/Dash-Pant-by-Sympli/Detail)
- **DASH HEMP** for apparel (dashhemp.com)
- **A DASH OF SOUTH** for apparel (adashofsouth.com)
- **SEVEN DASH** for athletic apparel
(http://www.sevendash.net/)
- **HOUSTON DASH** for apparel (nwsllshop.com/houston-dash)
- **DOTDOTDASH** for children's apparel
(otdotdashboutique.com/kids)
- **CLOSETDASH** for thrift/consignment women's apparel
(facebook.com/ClosetDash)
- **DASH OF CHIC** for apparel (dashofchic.com/)
- **NIKE DASH WOMEN'S** for shorts
(nike.com/us/en_us/pd/dash-womenstrack-and-field-shorts)
- **SPECIAL BLEND DASH PANTS** for apparel
(evo.com/outlet/pants/special-blend-dash-womens.aspx)
- **BOYS' UA DASH PANTS** for apparel (underarmour.com/en-us/101-pant)
- **SPECIAL BLEND DASH SNOWBOARD PANTS** for apparel (thehouse.com/sb4das02gg12zz-special-blend-snowboard-pants.)
- **DIP N. DASH CO.** for apparel (facebook.com/DipnDashCo)
- **HAYWARD COLOR DASH** for apparel
(haywardcolordash.com/clothing)
- **UNDER ARMOUR BOYS' DASH PANTS** for apparel
(dickssportinggoods.com/product/index.jsp?productId=45707726)
- **SYMPLI DASH PANT BLACK** for apparel
(jossboutique.com/Sympli-Dash-Pant-Black)
- **ROXY GIRLS MAD DASH PANTS** for apparel
(sundancebeach.com/roxygirls-mad-dash-pants-100-17743)
- **DASH OF SOPHISTICATION BOUTIQUE** for apparel
(dashofsophisticationboutique.com)
- **LOLA & DASH** for children's apparel
(facebook.com/lolaanddash)
- **A DASH OF SPLENDOR** for apparel (facebook.com/pages/A-Dash-of-Splendor/167824576563969)

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However, many of these Internet websites utilize the term DASH in a manner evoking a different connotation from DASH alone, *e.g.*, the blog called A Dash of South; or DASH having the meaning of running, *e.g.*, Roxy Girl Mad Dash Pants; or as a name, *e.g.*, Lola & Dash; or used in a Morse Code phrase, *e.g.*, DotDotDash. In addition, we cannot ascertain to what extent the third-party Internet names have received significant public exposure, such that consumers would be aware of the various DASH usages. The above-noted A Dash of South appears to be an individual's personal blog, and many of the listings are for Facebook pages. Even some of the boutiques shown in the webpages appear to be local in nature, such that they must be considered isolated examples.

Applicants also made of record copies of approximately eighty-five third-party registrations for DASH-formative marks for a variety of goods and services, of which the following are most relevant:⁸

Registration No. 3683931 for the mark MIRROR/DASH for “handbags,” and “dresses, pants shirts, sweaters, shoes;”

Registration No. 3809136 for the mark shown below for a variety of clothing, items;



Registration No. 3832770 for the mark DASH for “cosmetics in general, including perfumes;”

Registration No. 4141664 for the mark LIVE YOUR DASH for “rings;”

⁸ 4 TTABVue 29-161.

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Registration No. 4118734 for the mark shown below for “hooded sweatshirts, sweat shirts, long-sleeved shirts, short-sleeved shirts, sport shirts, T-shirts, tank tops, hats, visors, shorts, sweat pants;”



Registration No. 4119281 for the mark DASH BOARD for a variety of clothing items;

Registration Nos. 4052567 for the mark shown below and 3955871 for the mark STASH 'N DASH, both owned by the same entity, for “scarves;”



Registration No. 4023715 for the mark FASHION DASH for “computerized on-line retail store services in the field of clothing;”

Registration No. 3319698 for the mark ZIP AND DASH for “clothing, namely, dresses;”

Registration No. 3751990 for the mark DASH & DIESEL for “children and baby clothing, namely, hats, T-shirts, infant and toddler one piece clothing, jackets;”

Registration No. 3533508 for the mark shown below for “shirts, T-shirts, polo shirts, sleep shirts, golf shirts, long sleeved shirts.”



The remainder of the third-party DASH and DASH-formative registrations made of record by Applicants recite goods or services that are unrelated to

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those identified in the subject applications and cited registrations. The following examples, all for the mark DASH, are illustrative:⁹

- Reg. No. 1795636 for various items of telephone equipment;
- Reg. No. 2037290 for disposable medical gloves;
- Reg. No. 2194172 for patient monitors for monitoring ECGs, blood pressure, pulse oximetry and temperature;
- Reg. No. 2682341 for personal computers and accessories therefor;
- Reg. No. 2548998 for surgical retractors;
- Reg. No. 3719384 for computer game and video game software;
- Reg. No. 3757468 for fruit flavored soft drinks;
- Reg. No. 3884087 for toothpaste and tooth whiteners;
- Reg. No. 3905520 for hot tubs and spas; and
- Reg. No. 3406729 for pedometers.

With regard to these third-party registrations, we first note that such registrations are not evidence of use of the marks shown therein and, therefore, are not proof that consumers are familiar with said marks so as to be accustomed to the existence of similar marks in the marketplace. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Second, the marks in these registrations are farther removed from the marks in either the cited registration or involved application, or identify goods and services which are not as closely related to those in the cited registrations as Applicants' recited services. As such, these third-party registrations have very limited probative value for purposes of demonstrating the asserted weakness of Registrants' DASH mark for the goods recited therein.

⁹ *Id.*

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Third-party registration evidence, although not evidence of use, can serve to show that a term common to many marks in a particular field has a significance for the goods or services in that field. In the present case, there appear to be several meanings to the word DASH, depending on the other wording in the marks. However, these marks do not show that DASH has a particular significance when it comes to fashion/apparel, aside from suggesting the act of running or being dashing in appearance. Therefore, on the record in this case, we find insufficient support for Applicants' argument that DASH in the cited registrations is weak in the fields of clothing and eyewear and that the registrations are entitled to only a narrow scope of protection. *See Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). *Cf. In re Broadway Chicken, Inc.*, 38 USPQ2d 1559, 1565 (TTAB 1996).

Similarity of the Marks

Regarding the first factor, the similarity of the marks, we note that the mark in Applicants' application Serial No. 85250061 is DASH in standard characters. The mark in Registration Nos. 1807678 and 2670119 is DASH in typed form. Trademark Rule 2.52(a) was amended in 2003 to redesignate "typed drawings" as "standard character" drawings. *See* Trademark Rule 2.52(a); 37 C.F.R. § 2.52(a). As a result, Applicants' standard character DASH mark is identical to the marks in the cited registrations. The mark in Applicants' application Serial No. 85250063 is **DASH!** in slightly

stylized form. Because the mark in the cited registrations is DASH in typed form or standard characters, it may be displayed in any form, including one identical to Applicants' stylized **DASH!** mark. It is settled that marks presented in typed or standard characters are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012). As a result, Applicants' marks are legally identical to the marks in the cited registrations.

Applicants argue that their marks evoke their owners, the Kardashian sisters Kim, Khloe and Kourtney, and introduced into the record with their November 28, 2011 response evidence in the form of Internet postings and a wikepeida.org article discussing Applicants' stores under the subject marks. Applicants argue that, as a result, their marks differ in meaning and connotation from the Registrants' marks and create a different commercial impression. Specifically, Applicants argue that

Kim, Khloe, and Kourtney Kardashian, Applicants' respective principals, are famous sisters, fashion icons, and well-known television personalities. (internal citations omitted) "DASH" is a play on the sisters' last name "KARDASHIAN" and refers to their famous KARDASHIAN brand. Applicants' Mark is used in connection with the Applicants' hugely popular chain of "DASH" retail stores, which are featured on the television shows, *Keeping Up with the Kardashians*, *Kourtney and Khloe Take Miami*, and *Kourtney and Kim Take New York*. As a result of the Kardashian sisters' fame and well-known DASH retail stores, consumers encountering the Applicants' Mark immediately connect Applicants' retail store services with Kim, Khloe and Kourtney Kardashian. Moreover, the evidence on record demonstrates that since its adoption in 2006, Applicants' Mark

has received widespread publicity. Not only has Applicants' Mark been featured on the Kardashians' popular television shows, Applicants' DASH stores have been the topic of numerous media articles. In fact, Applicants' Mark even has a dedicated Wikipedia page, further indicating its popularity and consumer perception that the term "DASH" is a play on Applicants' surname Kardashian and is associated with the Kardashian sisters. Thus, consumers immediately connect Applicants' Mark with the Kardashian sisters and are aware that Applicants' services originate from the Applicants. In contrast, there is no evidence the Cited Marks have a similar meaning or commercial impression, or a connection with a famous personality or individual.¹⁰

We note, however, that the applied-for marks are DASH in standard characters and stylized form. The marks do not consist of either the term "Kardashian," or the names or likeness of the Applicants.¹¹ As a result, we find insufficient support for Applicants' argument that consumers will view their DASH marks as having a different connotation or commercial impression from the legally identical marks in the cited registrations. Furthermore, even if we accept Applicants' arguments that DASH is a weak mark and entitled only to a narrow scope of protection, and that consumers may look to other elements to distinguish one DASH mark from another, in this case, the marks are identical, and lack any other element to distinguish them.

The fact that the marks are identical results in the first *du Pont* factor strongly supporting the Examining Attorney's position. *In re Shell Oil Co.*,

¹⁰ 16 TTABVue 13-14.

¹¹ Furthermore, to the extent Applicants' arguments are directed toward the fame of the applied-for marks, the *du Pont* factor refers to "the fame of the **prior** mark." 177 USPQ at 567 (emphasis added).

992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“Without a doubt the word portions of the two marks are identical, have the same connotation, and give the same commercial impression. The identity of the words, connotation, and commercial impression weighs heavily against the applicant.”).

The Goods and Services

We turn now to the *du Pont* factor involving the similarity or dissimilarity of Applicants’ services and the Registrants’ respective goods. It is settled that in making our determination, we must look to the goods and services as identified in the applications vis-à-vis those recited in the cited registrations. *See Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). It is not necessary that the respective goods or services be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods and services are related in some manner, or that the conditions and activities surrounding the marketing of the goods and services are such that they would or could be encountered by the same persons under circumstances that could, because of the identity of the marks, give rise to the mistaken belief that they originate from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

Moreover, “even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption

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that there is a common source.” *Id.* at 1689. *See also Amcor, Inc. v. Amcor Industries, Inc.*, 210 USPQ 70, 78 (TTAB 1981) (when both parties are using or intend to use the identical designation, “the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar”).

In this case, Applicants’ services are

retail store services featuring apparel, footwear, and fashion accessories, but excluding, eyewear, namely, eyeglasses, eyeglass frames, sunglasses and eyeglass cases;

in Registration No. 1807678, the Registrant’s goods are

pants, shirts, sweatshirts, sweatpants, hosiery, jackets, shoes, waistcoats, T-shirts, shorts, hats, headbands, wristbands, leggings, shoulder belts, belts, sweaters, blouses, underwear, vest tops, blazers, and coats;

and in Registration No. 2670119, the Registrant’s goods are

eyewear, namely eyeglasses, eyeglass frames, sunglasses and eyeglass cases.

In support of the refusal to register, the Examining Attorney introduced into the record with his December 21, 2011 Final Office Action evidence from Internet websites for retail stores to show that retail stores featuring apparel, footwear and fashion accessories carry clothing of the types recited in the cited Registration No. 1807678 under the same marks. The following are illustrative:

Macy’s offers shirts and ties (macys.com);

Ann Taylor offers shirts, pants, sweaters, belts and blouses (anntaylor.com);

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ShopStyle offers shirts, pants, sweaters, hosiery, shoes and shorts (shopstyle.com);

Calvin Klein offers jackets, pants, shorts and underwear (calvinklein.com);

Michael Kors offers jackets, pants, shoes, shirts, sweaters and shorts (michaelkors.com);

Neiman Marcus offers jackets, vests, sweaters, pants and shorts (neimanmarcus.com);

Baby Phat offers shirts, sweaters, pants and shorts (babyphat.com);

Jimmy Jazz offers pants, jackets and shoes (jimmyjazz.com);

Marc Jacobs offers pants, shirts, shoes and jackets (marcjacobs.com); and

Anne Klein offers shirts, jackets, pants, leggings and shoes (anneklein.com).

Based upon this evidence, we find that Applicants' retail store services in the field of apparel and footwear are related to the apparel and footwear items recited in Registration No. 1807678. There are numerous cases in which likelihood of confusion has been found when the same or similar mark is used for goods, on the one hand, and for services involving those goods, on the other hand. *See In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (BIGG'S (stylized) for retail grocery store services and general merchandise store services held likely to be confused with BIGGS and design for furniture); *In re United Service Distributors, Inc.*, 229 USPQ 237 (TTAB 1986) (design for distributorship services in the field of health and

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beauty aids held likely to be confused with design for skin cream); *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) (STEELCARE for refinishing of furniture, office furniture, and machinery held likely to be confused with STEELCASE for office furniture and accessories). In particular, the Board has often found a likelihood of confusion between marks that were used on apparel, on the one hand, and stores featuring apparel on the other. *See, e.g., In re U.S. Shoe Corp.*, 8 USPQ2d 1938 (TTAB 1988) (cowboy boots versus retail clothing stores featuring boots).

The Examining Attorney also introduced into the record with his December 21, 2011 Final Office Action evidence from Internet websites of to show that retail stores featuring apparel, footwear and fashion accessories also carry eyewear of the type recited in Registration No. 2670119 under the same marks. *See, e.g.,* geoffreybeane.com; anntaylor.com; calvinklein.com; macys.com; michaelkors.com; neimanmarcus.com; babyphat.com; and marcjacobs.com. However, the evidence that retail stores offer clothing, accessories and eyewear is insufficient to support a finding that eyewear on the one hand, and retail stores featuring apparel and footwear but not eyewear on the other, are related for purposes of our likelihood of confusion determination.

The evidence of record establishes that Applicants' services are related to the goods identified in cited Registration No. 1807678. As such, this *du Pont* factor favors a finding of likelihood of confusion as to that registration.

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However, we find insufficient evidence to support a finding that Applicants' services are related to the eyewear recited in Registration No. 2670119, and therefore we find, on the basis of this factor, that confusion is not likely with respect to this registration. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (a single *duPont* factor may be dispositive). Accordingly, we confine our analysis regarding the remaining *du Pont* factors to cited Registration No. 1807678.

Channels of Trade/Classes of Consumers

In making our determination regarding the similarity or dissimilarity of the channels of trade, we look as we must to the goods or services as identified in the involved applications and Registration No. 1807678. *See Octocom Systems, Inc.*, 16 USPQ2d at 1787. *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Because there are no recited trade channel restrictions in either the involved applications or Registration No. 1807678, it is presumed that the clothing goods and retail apparel and footwear store services at issue move in all channels of trade normal for such goods and services, and that they are purchased by all of the usual consumers for such services. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)). In addition, the Examining Attorney's evidence, discussed above, shows that the goods identified in

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Registration No. 1807678 are available in retail apparel and footwear stores, which are the same trade channels in which Applicants' services are offered.

As a result, we are not persuaded by Applicants' arguments that their services "are targeted to a discreet set of niche consumers – fans of the Kardashians – through marketing efforts that are primarily intended to promote the sisters' celebrity KARSASHIAN brand"¹² and also feature high-end celebrity brands. Simply put, the involved applications do not recite any trade channel limitations and we must base our determination on the clear language thereof, not on Applicants' assertions or evidence suggesting a narrower target audience for their services. *See Octocom Systems, Inc.*, 16 USPQ2d at 1787.

As such, this *du Pont* factor favors a finding of likelihood of confusion as to Registration No. 1807678.

Lack of Actual Confusion

The final *du Pont* factor discussed by Applicants and the Examining Attorney is that of the lack of instances of actual confusion. Applicants assert that the absence of actual confusion since 2006 suggests there is no likelihood of confusion. However, it is not necessary to show actual confusion in order to establish likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Particularly in an *ex parte* proceeding, Applicants' assertion of the absence of actual confusion is of little probative value in our determination on the issue of likelihood of

¹² 16 TTABVue 15.

confusion. See *In re Majestic Distilling Co.*, 65 USPQ2d at 1205 (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value.”).

Conclusion

After considering all of the evidence properly of record and arguments pertaining to the *du Pont* likelihood of confusion factors, we find that because the marks are legally identical, the goods in Registration No. 1807678 and Applicants’ services are related, and are offered in some of the same trade channels, Applicants’ marks, if used in association with the services identified in the applications, are likely to cause confusion with the registered mark in connection with the goods recited in the registration.

However, because there is insufficient evidence that the goods in Registration No. 2670119 are related to the services recited in the involved applications, we find that Applicants’ marks are not likely to cause confusion with that registration.

Decision: The likelihood of confusion refusal to register Applicants’ marks is affirmed as to Registration No. 1807678, and reversed as to Registration No. 2670119.