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1511TPG0923 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85964505

MARK: ENGINEERED TO PERFORM. BUILT TO



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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: Littelfuse, Inc.

CORRESPONDENT'S REFERENCE/DOCKET NO:

1511TPG0923

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EXAMINING ATTORNEY'S APPEAL BRIEF

FACTS

The applicant appeals from the examining attorney's final requirement for clarification of its identification of goods in International Class 9, and the refusal to register the mark ENGINEERED TO PERFORM. BUILT TO LAST., in standard characters, for "Prefabricated modular buildings and e-houses sold as a housing component of custom-designed, medium- and low-voltage electrical equipment for use in the mining industry, oil and gas industry, and other industrial applications for electrical distribution, protection, and control; portable low-to-medium voltage electric power centers for power distribution, monitoring and controlling for use in the mining industry, oil and gas industry, and other industrial applications; skid mounted and aboveground and underground electric substations, namely, skid mounted aboveground and underground portable low-to-medium voltage electric power centers for monitoring and controlling mining operations consisting of medium voltage switch or breaker, low-to-medium voltage transformer, electronic motor control centers, namely, control consoles and programmable logic controllers, power take-off and automation panels for monitoring, diagnosing problems and controlling the distribution and flow of electrical power, featuring motor protection relays, ground fault relays, arc flash relays, feeder protection relays, custom key pads, variable frequency drives; portable power cable couplers for use in underground and aboveground mining; electronic controls for motors and custom-built switchgear for use in the mining industry, oil and gas industry, and other industrial applications; electric generator controls and electrical equipment consisting of neutral grounding resistor and electric monitoring relays for use in the mining industry, oil and gas industry, and other industrial applications; electric relays, namely, motor protection relays, ground fault relays, arc flash relays, feeder protection relays, pump protection relays, timers, flashers, power and voltage monitors, pump controllers, liquid level and load sensors, and current transformers, all for use in the mining industry, oil and gas industry, and other industrial applications."

Registration was refused under Trademark Act Section 2(d), 15 U.S.C. §1052(d), because the applicant's mark is confusingly similar to the mark in U.S. Registration No. 4433118, ENGINEERED TO ORDER. BUILT TO LAST., in standard characters, for "Power cable terminations and joints, namely, pre-molded terminations and joints for use on dielectric cable systems; cable splice boxes; splicing kits primarily comprised of lead sleeve, Novoid compound, dry cotton tape, saturated flax twine, solder, stearine candle, varnished cambric tapes, paper pasters, tinned shielding braid, split tinned solder copper connectors, saturated webbing and compression connectors; SF6 electric circuit switches; solid dielectric switches; vacuum switches, namely, switches and switch gears used in transmission and distribution of electrical power; automatic transfer switches for use in connection with electrical distribution and transmission systems; current limiting protectors; single and three phase reclosers, namely, electric circuit closers to reclose interrupted high voltage electrical circuits; and microprocessor-based power management systems comprised of power distribution switchgear with protective electric relays for controlling automatic switching operations in overhead and underground loop distribution circuits."

After consultation with other Office personnel, the requirement for clarification of the applicant's identification of goods is withdrawn, and the identification is hereby accepted. Thus, only the Section 2(d) refusal remains. It should be noted that the refusal applies only to the applicant's goods in International Class 9, and not to the additional goods in the application in International Class 7.

ARGUMENT

Introduction

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, 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). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods and/or services. *Syndicat Des Proprietaires Viticulteurs De Chateauf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1938 (TTAB 2013) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); see TMEP §1207.01. 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)); TMEP §1207.01(b)-(b)(v). 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); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

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); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Similarity of the Marks

The applicant's mark, ENGINEERED TO PERFORM. BUILT TO LAST., is strikingly similar to the registered mark, ENGINEERED TO ORDER. BUILT TO LAST. Notably, the applicant has not disputed the similarity of its mark to the registered mark in any of its responses to the Office actions, nor in its appeal brief.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); TMEP §1207.01(b). The applicant’s mark is similar to the registered mark in all three of these elements.

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049, (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); TMEP §1207.01(b).

In this case, five of the six words in the marks are identical, namely “ENGINEERED TO” and “BUILT TO LAST.” The structure of the marks is also identical: each contains two sentences; each sentence contains three words; each sentence ends in a period. These similarities far outweigh the slight

difference in the marks between the words “PERFORM” and “ORDER.” The overall connotation and commercial impression of the respective marks is highly similar and likely to be confused by consumers.

The law is clear that marks may be confusingly similar where, as in this case, similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. See *Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff’d sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1495, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMCASH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar); TMEP §1207.01(b)(ii)-(iii).

Generally, the greater degree of similarity between the applied-for mark and the registered mark, the lesser the degree of similarity between the goods and/or services of the respective parties that is required to support a finding of likelihood of confusion. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009). Applied to this case, that rule would indicate that, because the parties’ marks are so similar, a lesser degree of similarity between their goods is required to support the refusal.

Similarity of the Goods

The applicant’s goods are identified as:

“Prefabricated modular buildings and e-houses sold as a housing component of custom-designed, medium- and low-voltage electrical equipment for use in the mining industry, oil and gas industry, and other industrial applications for electrical distribution, protection, and control; portable low-to-medium voltage electric power centers for power distribution, monitoring and controlling for use in the mining industry, oil and gas industry, and other industrial applications; skid mounted and aboveground and underground electric substations, namely, skid mounted aboveground and underground portable low-to-medium voltage electric power centers for monitoring and controlling mining operations consisting of medium voltage switch or breaker, low-to-medium voltage transformer, electronic motor control centers, namely, control consoles and programmable logic controllers, power take-off and automation panels for monitoring, diagnosing problems and controlling the distribution and flow of electrical power, featuring motor protection relays, ground fault relays, arc flash relays, feeder protection relays, custom key pads, variable frequency drives; portable power cable couplers for use in underground and aboveground mining; electronic controls for motors and custom-built switchgear for use in the mining industry, oil and gas industry, and other industrial applications; electric generator controls and electrical equipment consisting of neutral grounding resistor and electric monitoring relays for use in the mining industry, oil and gas industry, and other industrial applications; electric relays, namely, motor protection relays, ground fault relays, arc flash relays, feeder protection relays, pump protection relays, timers, flashers, power and voltage monitors, pump controllers, liquid level and load sensors, and current transformers, all for use in the mining industry, oil and gas industry, and other industrial applications.”

The registered goods are identified as:

“Power cable terminations and joints, namely, pre-molded terminations and joints for use on dielectric cable systems; cable splice boxes; splicing kits primarily comprised of lead sleeve, Novoid compound, dry cotton tape, saturated flax twine, solder, stearine candle, varnished cambric tapes, paper pasters, tinned shielding braid, split tinned solder copper connectors, saturated webbing and compression connectors; SF6 electric circuit switches; solid dielectric switches; vacuum switches, namely, switches and switch gears used in transmission and distribution of electrical power; automatic transfer switches for use in connection with electrical distribution and transmission systems; current limiting protectors; single and three phase reclosers, namely, electric circuit closers to reclose interrupted high voltage electrical circuits; and microprocessor-based power management systems comprised of power distribution switchgear with protective electric relays for controlling automatic switching operations in overhead and underground loop distribution circuits.”

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.”); TMEP §1207.01(a)(i).

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)); TMEP §1207.01(a)(i).

The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular *goods*, but likelihood of confusion as to the *source* of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01.

The parties' goods are related in that they are all electrical goods used in the distribution and controlling of electrical power. In particular, the applicant's goods include "power cable couplers" while the registered goods include "power cable terminations and joints." The applicant's goods include "electrical equipment for electrical protection" and five types of "protection relays" while the registered goods include "current limiting protectors" and "protective electric relays." Both the applicant's goods and the registrant's goods also include "switches" and "switchgear."

The applicant provides power centers and e-houses for use in distribution and control of electricity. See the applicant's electrical equipment datasheet, located on page 10 of its September 15, 2014 response to Office action. The datasheet indicates that the equipment delivers fully integrated electrical and automation systems. The products are self-contained units, of which "the primary switchgear and control applications include low- and/or medium-voltage switchgear and motor control centre enclosures; relay panel enclosures." These goods are highly similar to the registrant's electrical products, and in particular the registrant's "microprocessor-based power management systems comprised of power distribution switchgear with protective electric relays for controlling automatic switching operations in overhead and underground loop distribution circuits."

Both the applicant and the registrant also provide various products in connection with their power systems, including relays, switchgear, and automatic controls and switches. The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods and/or services identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods and/or services. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-65 (TTAB 1980); *see* TMEP §1207.01(a)(iii).

Because registrant's goods are not restricted to any particular trade channels, they are presumed to encompass electrical power distribution products for use in all industries, including the "mining industry, oil and gas industry, and other industrial applications" that are specified in the applicant's identification of goods. Also, the registrant's "switch gears used in transmission and distribution of electrical power" are presumed to occupy all trade channels, and to encompass the applicant's "custom-built switchgear for use in the mining industry."

Where, as in this case, the goods and/or services of an applicant and registrant 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 in the case of diverse goods and/or services. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).

As to electrical goods in particular, different goods in the electrical, electronic, and/or electromechanical fields have been found to be related where the evidence shows that the goods would be marketed through the same channels of trade and/or sold to the same classes of purchasers. *See, e.g., Alliance Mfg. Co. v. ABH Diversified Prods., Inc.*, 226 USPQ 348 (TTAB 1985) (finding cycling-type furnace controllers and various home products, including garage door openers and remote controls for operating lights and appliances, to be related, where both parties' goods were electrically powered/electronically operated, had similar energy conserving characteristics, and were sold for residential use); *In re Globe-Union Inc.*, 189 USPQ 158, 159 (TTAB 1975) (finding resistor-capacitor components and ceramic condensers to be related, where such goods "would be sold in the same trade channels to the same classes of purchasers such as original equipment manufacture[r]s for incorporation in the same piece of electronic equipment or apparatus"); *In re Dynaco, Inc.*, 189 USPQ 104, 105 (TTAB 1975) (finding two-channel stereophonic amplifiers, loudspeakers, and non-electronic devices for connecting amplifiers and speakers, on the one hand, and switching transistors, on the other, to be related because the goods would be "invariably sold to the same class of purchasers in such circumstances and conditions that if persons were to encounter them under the same or similar marks, they might well be induced to believe that they originate from a common source"); *Nat'l Steel Constr. Co. v. Matsushita Elec. Indus. Co.*, 158 USPQ 464 (TTAB 1968) (finding electric washing machines and electric water heaters to be related, where such goods were sold through the same channels of trade to the same class of purchaser, where the purchase of one of the party's goods could lead to the purchase of the other party's goods, and where the evidence of record indicated that a single manufacturer might produce both electric washing machines and electric water heaters).

Applicant's Arguments

The applicant notes the rule that simply because a term can be found to generally describe both parties' goods does not necessarily make them related. The examining attorney has no quarrel with that rule; it is simply inapplicable to this case. The examining attorney did not "find" a term to generally describe both parties' goods. He didn't need to. Instead, he simply repeated the terms which appear over and over again in the parties' identifications of goods. Specifically:

- the term "electric" or a close variation thereof appears 12 times in the applicant's identification of goods, and eight times in the registrant's;
- the term "distribution" appears three times in the applicant's identification of goods, and four times in the registrant's;
- the term "control" or a close variation thereof appears 10 times in the applicant's identification of goods, and once in the registrant's.

Noting the identical language used by the parties in their respective identifications of goods and coming to the conclusion that the goods are therefore related is nothing akin to the examining attorney "finding" a term which describes them both.

The applicant asserts that the examining attorney's statement as to the relationship between the parties' goods is "simply wrong as a matter of law" but then cites no law in support of that assertion. Instead, the applicant offers a hypothetical which fails to prove its point. The applicant's purported analogy to a case involving nuclear reactors on submarines and electric guitars bears no resemblance to the case at hand. The goods in that hypothetical are clearly limited to a specific field of use; such limitations are absent here. The registrant's identification of goods contains absolutely no limitations on

the fields in which its goods can be used, and the would-be limitations contained in the applicant's identification are rendered virtually meaningless by the language "and other industrial applications," which could be almost anything.

The applicant takes exception to the examining attorney's statement that both parties' goods include electrical equipment for electrical protection. It is true that the quoted language from the applicant's identification should have included ellipses: "electrical equipment . . . for electrical . . . protection." However, this is only one of six items listed in the application for electrical "protection." The application also includes five types of electrical "protection relays."

The applicant is also critical of the examining attorney's noting that the application includes "power cable couplers" while the registration includes "power cable terminations and joints." While the applicant notes the additional wording which surrounds these goods in their respective identifications, the applicant does not deny that the goods could be related, or even identical.

Indeed, it should be noted that throughout its brief, the applicant relies on characterizations of the examining attorney's arguments as "astonishing," "absurd," and "cherry picking." But not once does the applicant deny that many of its goods could be related, or even identical, to the registered goods. In this context, it cannot be overemphasized that the fact that the goods of the parties differ *is not controlling in determining likelihood of confusion*. The issue is not likelihood of confusion between particular *goods*, but likelihood of confusion as to the *source* of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01.

The applicant claims that “at no time did the Examining Attorney introduce any evidence to support his refusal.” On the contrary, the examining attorney provided what is always the best possible evidence in a Section 2(d) refusal: the plain language of the parties’ identifications of goods. As TMEP §1207.01(a)(vi) makes clear, “[T]he identification of goods/services in the subject application and in the cited registration(s) may in itself constitute evidence of the relatedness of the goods or services. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding the Board erred in concluding that there was insufficient evidence of relatedness, because it “did not consider the important evidence already before it, namely the ITU application and [opposer’s] registrations”).”

Finally, the applicant takes exception to the examining attorney’s treatment of its claim of expensive goods and sophisticated purchasers. As to the cost of the goods, the examining attorney is legally forbidden from considering such factors. See TMEP §1207.01(a)(iii): “An applicant may not restrict the scope of its goods and/or the scope of the goods covered in the registration by extrinsic argument or evidence, for example, as to the quality or *price of the goods*. See, e.g., *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764–65 (TTAB 1986)” (emphasis added).

Regarding sophisticated purchasers, contrary to the applicant’s contention, the examining attorney did in fact consider the applicant’s argument. The examining attorney is actually in agreement with the applicant that the purchasers of the goods at issue are probably quite knowledgeable. However, as the applicant notes, this does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); see, e.g., *Stone Lion Capital*

Partners, LP v. Lion Capital LLP, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). The examining attorney agrees with the applicant that purchaser sophistication “is a *factor* weighing against confusion.” It is just not a *persuasive* factor.

CONCLUSION

For the foregoing reasons, the applicant’s mark, when used on the identified goods, is likely to cause confusion as to the source of those goods, based on the existence of Registration No. 4433118 for a similar mark used on similar goods. Accordingly, the refusal to register the applicant’s mark under Trademark Act Section 2(d) should be affirmed.

Respectfully submitted,

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