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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86129533

MARK: 24K RUSHCARD



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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: Unirush, LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

54081-4

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EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

This is an appeal from the Trademark Examining Attorney's final refusal to register applicant's mark, **24K RUSHCARD**, for magnetically encoded debit cards and magnetically encoded prepaid debit

cards. The application was refused registration on the Principal Register pursuant to Trademark Act Section 2(d), 15 U.S.C. Section 1052(d) on the ground that the applicant's mark was likely to be confused with the registered mark, **24 KARAT CARD** for credit card services.

FACTS

On November 26, 2013, applicant, UNIRUSH, LLC (hereinafter "applicant"), filed an application to register the mark **24K RUSHCARD** for magnetically encoded debit cards and prepaid debit cards on the Principal Register.

On March 17, 2014, the examining attorney refused registration of the proposed mark, **24K RUSHCARD**, pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), because the mark was likely to be confused with the mark **24 KARAT CARD** in U.S. Registration No. 3277453. Additionally, registration was refused because the identification of goods was unacceptable.

Applicant, in its response filed September 17, 2014, argued against the refusal stating: (1) the marks in their entireties were dissimilar; (2) applicant owns several marks for financial services and credit cards; (3) the marks should be examined as a whole and not dissected into their individual components; (4) the use of variations of words in common does not mean that two marks are confusingly similar; and (5) the wording 24 karat in the cited registration is weak and subject to a narrow scope of protection such that confusion with applicant's mark is unlikely. Also, applicant satisfactorily responded to the procedural informality.

On October 9, 2014, the examining attorney issued a Final refusal under Section 2(d). The examining attorney maintained that a likelihood of confusion existed as to the source of the goods and

services because (1) the literal portions of the parties' marks encompassed similar wording; (2) applicant's reference to family-of-mark was unpersuasive; and (3) the parties' goods and services were closely related based on third-party registrations and evidence obtained from the Internet featuring goods and services of other parties.

On April 9, 2015, the applicant filed a Request for Reconsideration and Notice of Appeal. The Request for Reconsideration was denied on June 1, 2015. The case was forwarded to examining attorney for briefing on August 3, 2015.

For the reasons to follow, the examining attorney requests that the Board AFFIRM the refusal under Section 2(d) of the Trademark Act.

ISSUE ON APPEAL

Whether applicant's mark 24K RUSHCARD for magnetically encoded debit cards and encoded prepaid debit cards, is likely to cause confusion with the registered mark 24 KARAT CARD for credit card services.

APPLICABLE LEGAL PRINCIPLES

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). See TMEP §1207.01.

Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361-62, 177 USPQ 563, 567 (C.C.P.A. 1973); *In re 1st USA Realty Prof'ls Inc.*, 84 USPQ2d 1581, 1584 (TTAB 2007); see also *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). The marks are compared for similarities in their appearance, sound, connotation and commercial impression. TMEP §§1207.01, 1207.01(b). The goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. See *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); TMEP §§1207.01, 1207.01(a)(vi).

However, not all the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1355, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont*, 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 of the goods and/or services, and similarity of trade channels of the goods and/or services. See *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); TMEP §§1207.01 *et seq.*

ARGUMENT

THE PARTIES' MARKS ARE CONFUSINGLY SIMILAR IN SIGHT, SOUND, CONNOTATION, AND COMMERCIAL IMPRESSION, AND THE GOODS AND SERVICES ARE CLOSELY RELATED SUCH THAT A LIKELIHOOD OF CONFUSION EXISTS AS TO THE SOURCE OF THE GOODS UNDER TRADEMARK ACT SECTION 2(d), 15 U.S.C. SECTION 1052(d).

- A. The applicant's mark 24k RUSHCARD is confusingly similar in appearance, sound, connotation and commercial impression.**

In analyzing whether a likelihood of confusion exists between marks the examining attorney must compare the marks 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). Similarity in any one of these elements may be sufficient to find the marks confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Also, 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 their entireties that confusion as to the source of the goods and/or services offered under applicant's and registrant's 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); *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012); TMEP §1207.01(b). The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b).

Marks may be confusingly similar in appearance where 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).

Incorporating the entirety of one mark within another 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 Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 1022, 194 USPQ 419, 422 (C.C.P.A. 1977) (finding CALIFORNIA CONCEPT and surfer design and CONCEPT confusingly similar); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (finding BENGAL and BENGAL LANCER and design confusingly similar); *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2D 1651, 1660-61 (TTAB 2014) (finding PRECISION and PRECISION DISTRIBUTION CONTROL confusingly similar); TMEP §1207.01(b)(iii).

The applicant's mark, 24K RUSHCARD, is very similar in sound, appearance, connotation and overall commercial impression to the registered mark, 24 Karat CARD. The only differences in the marks are the mere addition of the word RUSH and the substitution of the letter K for KARAT. The letter K is an acronym for Karat. (*see* Final office action). However, these two changes to the registered mark do not change the sound, appearance, connotation and commercial impression of the marks. The marks are identical in part with respect to the terms "24 and CARD," which is the dominant feature of the marks.

Applicant contends that the examining attorney finds the marks similar because he has "dissected" its mark, giving no consideration to the other, distinctive portion of applicant's mark. (*see* applicant's Brief pg. 5) Applicant concludes that the words 24K RUSHCARD, which, together with the word RUSH forms a unitary phrase with a meaning wholly distinct from the term 24 KARAT CARD. The examining attorney, however, does consider the marks as a whole. Given that the marks share wording with the same connotation, **24 KARAT CARD**, the marks are similar for purposes of likelihood of confusion analysis, which considers the recollection of the average purchaser, who retains a general rather than specific impression of trademarks.

Under the doctrine of legal equivalents, a design mark may be found confusingly similar to a word mark consisting of the design's literal equivalent because they create a similar mental impression. TMEP §1207.01(c)(i); *see, e.g., In re Rolf Nilsson AB*, 230 USPQ 141, 142-43 (TTAB 1986) (holding a mark comprising the silhouette of a lion's head and the letter "L" confusingly similar to the word mark LION); *Puma-Sportschuhfabriken Rudolf Dassler KG v. Garan, Inc.*, 224 USPQ 1064, 1066-67 (TTAB 1984) (holding a mark comprising designs of a mountain lion confusingly similar to the word mark PUMA). Since applicant's mark contains the letter K, which is an acronym for Karat, this issue is similar to the above cases. (*see* Final office action) Therefore, applicant's mark should be refused.

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 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).

Applicant also argues that the applied-for mark, RUSHCARD, is the subject of over 13 registrations, which obviates any likelihood of confusion. (*see* applicant's Brief at pg. 8) However, the Trademark Trial and Appeal Board has found that a family-of-marks argument is "not available to an applicant seeking to overcome a likelihood-of-confusion refusal." *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645-46 (TTAB 2009). Specifically, an applicant's ownership of other similar marks has little relevance in this context because the focus of a likelihood-of-confusion analysis in an ex parte case is on the mark

applicant seeks to register, rather than other marks applicant has used or registered. *In re Cynosure, Inc.*, 90 USPQ2d at 1645-46; *In re Ald, Inc.*, 148 USPQ 520, 521 (TTAB 1965); TMEP §1207.01(d)(xi).

Furthermore, adding a house mark to an otherwise confusingly similar mark will not obviate a likelihood of confusion under Section 2(d). See *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366-67 (TTAB 2007) (finding CLUB PALMS MVP and MVP confusingly similar); *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (finding LE CACHET DE DIOR and CACHET confusingly similar); TMEP §1207.01(b)(iii). It is likely that goods and/or services sold under these marks would be attributed to the same source. See *In re Chica, Inc.*, 84 USPQ2d 1845, 1848-49 (TTAB 2007). Accordingly, in the present case, the addition of the wording RUSHCARD to a registered mark does not obviate a finding of confusion because the commercial impression of the remaining wording is confusingly similar.

The applicant also argues that the cited registered mark is weak. (see applicant's Brief at pgs. 10-11) Applicant has submitted printouts of third-party registrations for marks containing the wording 24K to support the argument that this wording is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. 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); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). In this case, applicant's and registrant's marks are the only ones for credit card and debit card related goods and services.

Moreover, 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

AMF Inc. v. Am. Leisure Prods., Inc., 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). Furthermore, the goods and/or services listed in the third-party registrations submitted by applicant are different from those at issue and thus do not show that the relevant wording is commonly used in connection with the goods and/or services at issue.

The examining attorney disagrees with the applicant that a likelihood of confusion does not exist because there are other registered marks encompassing the wording 24K and 24 Karat. (see applicant's Brief at pg. 11). Applicant should note that some of the other registered marks encompass additional wording, refer to dissimilar goods and services, and have different trade channels. Thus, a likelihood of confusion may not exist between applicant's mark, registrant's mark, or other registered marks. On the other hand, the applicant's mark encompasses similar wording and features goods closely related to the cited registered mark.

Moreover, even if the registered mark were considered weak, weak marks are entitled to some protection. The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed "weak" or merely descriptive are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods and/or services. *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982); 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). 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 (TTAB 1975). Further, the applicant's assertion basically suggests that the registrant's mark should be diluted and afforded no protection of a registered mark.

Last, consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 1336, 164 USPQ 301, 304 (C.C.P.A. 1970) (holding MISTER STAIN likely to be confused with MR. CLEAN on competing cleaning products); see *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125 (TTAB 1978) (holding TUNA O' THE FARM for canned chicken likely to be confused with CHICKEN OF THE SEA for canned tuna); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105 (TTAB 1973) (holding UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services); TMEP §1207.01(b). Although the parties marks do not look alike in every aspect, they nonetheless convey the same idea, stimulate the same mental reaction, or may have the same overall meaning based on the wording: **24 KARAT CARD vs. 24K RUSHCARD.**

Thus, the proposed marks create the same overall impression, and the marks would confuse consumers into believing that the goods and services would emanate from the same source.

B. Applicant's Goods and Services and Registrant's Services Are Related, such that a Likelihood of Confusion Exists as to the Source of the Goods.

The second step in the likelihood of confusion test is a comparison of the parties' goods and services. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). 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 application and registration list complementary goods and services. Specifically, the applicant's goods are magnetically encoded debit cards and magnetically encoded prepaid debit cards. The registrant's services are credit card services. The respective goods and/or services need only be related in some manner or the conditions surrounding their marketing be such that they will be encountered by the same consumers under circumstances that would lead to the mistaken belief that the goods and/or services originate from the same source. *Gen. Mills Inc. v. Fage Dairy Processing Indus.*, 100 USPQ2d 1584, 1597 (TTAB 2012); TMEP §1207.01(a)(i); see *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d at 1086, 56 USPQ2d at 1475; *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984). The examining attorney has provided third-party registrations demonstrating that parties use the same brand on both the goods and services at issue, namely, "debit cards and credit card services."

Applicant argues that a likelihood of confusion does not exist as to the source of the parties goods and services because (1) the conditions are designed to prevent confusion; and (2) the channels of trade are dissimilar (see applicant's Brief at pgs.13-17) .

Examining attorney finds applicant's arguments unpersuasive and maintains that a likelihood of confusion does exist as to the source of the parties' goods and services. In support of the determination that the goods and services are related, the examining attorney provided third-party registrations of marks used in connection with the same or similar goods and/or services as those of applicant and registrant in this case. (see examining attorney's 10/09/14 Final office Action). Some of the third-party registrations provided in the Final office action included:

MYCROPAY (Reg. No. 3938393) Goods: magnetically encoded plastic access cards for use in banking, magnetically encoded access cards, magnetically encoded credit cards, and magnetically encoded debit cards; **Services:** issuing stored value cards, credit card services, debit card services, banking services, namely, providing automatic teller

machine (ATM) cards and services; issuing customer loyalty cards, namely, issuing stored value cards for use by customers as part of an incentive program in which points may be accumulated and translated into cash value and used by the customer to purchase goods or services at any participating location;

VISA PAYWAVE (Reg. No. 3858344) Goods: magnetic coded bank cards, credit cards, debit cards, prepaid cards, and chip cards; magnetic coded cards and cards impregnated with integrated circuit chips for use in financial applications; **Services:** financial services, namely, banking services, credit card services, debit card services, and prepaid card services, namely, processing electronic payments made through prepaid cards; payment card services offered by means of radio frequency identification devices, namely, processing electronic payments made through credit cards, debit cards, and prepaid cards; electronic funds transfer and currency exchange services; electronic payment processing services; credit card, debit card, and prepaid card transaction authorization and settlement services; credit, debit, and prepaid card payment verification services; payment identification services, namely, payment transaction, authentication, and verification services; advisory services relating to all of the aforesaid services;

FIRST FEDERAL (Reg. No. 2777978) Goods: automatic teller machines; magnetically encoded credit cards; magnetically encoded debit cards; computer software for use in banking and financial industries, namely, computer communications software to allow customers to access bank account information and transact bank business via global computer networks; software enabling banking customers to transmit payment directly; software for use in connection with electronic funds transfers; **Services:** banking and related financing services; financial services, namely, providing financial analysis, consultation, planning and management, commercial and consumer lending services, mortgage lending, and loan financing; credit card services; debit card services; electronic payment services, namely, electronic processing and transmission of bill payment data; security services, namely, guaranteeing loans; cash management; mortgage banking; safety deposit box services; checking account services; savings account services; wire transfer services; automated teller machine services; investment services, namely, providing annuity services and certificate of deposit services; credit life insurance underwriting services; providing banking, financial and investment consultation and information via global computer networks; providing interactive banking, financial and investment consultation and information via global computer networks; and providing bank account information by telephone

This evidence establishes that the same entity commonly provides Classes 9 and 36 goods and services of both parties.

The Internet evidence submitted in the final office action also establishes that the same entity commonly provides the relevant goods and services and markets the goods and services under the same mark and are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use. The evidence also shows that the goods and services are similar or complementary in terms of purpose or function. Therefore, applicant's and registrant's goods and/or services are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). The following websites shows that the goods and services are related and/or used together.

Mastercard® Services "Convenient Cardholder Services that Help You Get More and Do More."
More Credit Card and Debit Card Services

BB&T "Debit and Credit Card Processing"

NetSpend "Earn cash back for using your NetSpend Prepaid Debit Card."

Citizens Bank® "Payment Processing: Accept Credit and Debit Cards"

American Express Serve® "Your Full Service Reloadable Prepaid Account"

Evidence obtained from the Internet may be used to support a determination under Section 2(d) that goods and/or services are related. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007). The Internet has become integral to daily life in the United States, with Census Bureau data showing approximately

three-quarters of American households used the Internet in 2013 to engage in personal communications, to obtain news, information, and entertainment, and to do banking and shopping. See *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015) (taking judicial notice of the following two official government publications: (1) Thom File & Camille Ryan, U.S. Census Bureau, Am. Cmty. Survey Reports ACS-28, *Computer & Internet Use in the United States: 2013* (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>, and (2) The Nat'l Telecomms. & Info. Admin. & Econ. & Statistics Admin., *Exploring the Digital Nation: America's Emerging Online Experience* (2013), available at http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf). Thus, the widespread use of the Internet in the United States suggests that Internet evidence may be probative of public perception in trademark examination.

Given the arguments and evidence discussed above, the examining attorney has demonstrated that the goods of the types identified by the applicant and services of the types identified by the registrant are similar and commonly marketed under the same service marks and generally travel in the same or similar channels of trade.

Applicant raises the argument that the channels of trade are different because registrant uses its services to finance the purchase of jewelry. (see applicant's Brief pg. 15) In analyzing the applicant's and registrant's goods and/or services for similarity and relatedness is based on the description of the goods and/or services set forth in the application and registration at issue, not on extrinsic evidence of actual use. See *Octocom Sys. Inc. v. Hous. Computers Servs. Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); see also *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp. Inc.*, 648 F.2d 1335, 1337, 209 USPQ 986, 988 (C.C.P.A. 1981). Absent restrictions in an application and/or registration, the

identified goods and/or services are presumed to travel in the same channels of trade to the same class of purchasers. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d at 1268, 62 USPQ2d at 1005. Additionally, unrestricted and broad identifications are presumed to encompass all goods and/or services of the type described. See *In re Jump Designs*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

In this case, the identifications set forth in the application and cited registration uses broad wording to describe the type of goods and services being provided, and does not contain any limitations as to nature, type, channels of trade or classes of purchasers of the goods and services. Specifically, the applicant's goods are magnetically encoded debit cards and magnetically encoded prepaid debit cards, and have been demonstrated through the use of third-party registrations and Internet evidence to emanate from the same source providing various types of credit card services. Therefore, it is presumed that the goods and/or services move in all normal channels of trade, and that they are available to each other's potential customers. See *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); TMEP §1207.01(a)(iii).

Finally, 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, 1025 (Fed. Cir. 1988).

CONCLUSION

The evidence and arguments of record strongly support the examiner's position that refusal under Trademark Act Section 2(d), 15 U.S.C. §1052(d), is proper. Applicant's mark is confusingly similar to the cited registration when used in connection with related goods and services. Therefore, it is respectfully submitted that the Section 2(d) refusal should be affirmed.

Respectfully submitted,

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