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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86135128
Applicant	Coyotes Ice, LLC
Applied for Mark	COYOTES ICE SPORTS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD ON APPEAL**

Mark: COYOTES ICE SPORTS
Serial No: 86/135,128 and 86/135,177
Appellant: Coyotes Ice, LLC
Examining Attorney: Donald Johnson

EX PARTE APPEAL

APPELLANT'S REPLY BRIEF

for

Consolidated Applications Nos. 86/135,128 and 86/135,177

CASES CITED

Carefirst of Maryland, Inc. v. First Care, P.C., 434 F.3d 263 (4th Cir. 2006)

Citigroup Inc. v. Capital City Bank Group, Inc., 94 U.S.P.Q.2d 1645, 2010 WL 595586 (T.T.A.B. 2010), *aff'd*, 637 F.3d 1344 (Fed. Cir. 2011)

Communications Satellite Corp. v. Comcet, Inc., 429 F.2d 1253 (4th Cir. 1970)

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992)

In re BankAtlantic Bancorp, Inc., 2008 WL 4674561 (T.T.A.B. Sept. 23, 2008) (non-precedential)

In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973)

In re Electrolyte Labs. Inc., 929 F.2d 645, 16 USPQ2d 1239 (Fed. Cir. 1990)

In re Nat'l Data Corp., 753 F.2d 1056 (Fed.Cir.1985)

In re Dietrich, 91 USPQ2d 1622 (TTAB 2009)

In re General Motors Corp., 23 USPQ2d 1465 (TTAB 1992)

In re HSB Solomon Assocs. LLC, 102 USPQ2d 1269 (TTAB 2012)

In re Osmotica Holdings Corp., 95 USPQ2d 1666 (TTAB 2010)

In re Powermat Inc., 105 USPQ2d 1789 (TTAB 2013)

In re Princeton Tectonics, Inc., 95 USPQ2d 1509 (TTAB 2010)

In re St. Helena Hospital, 113 U.S.P.Q.2d 1082 (Fed. Cir. 2014)

In re Thor Tech, Inc., Serial No. 85667188 (January 26, 2015)

Juice Generation, Inc. v. GS Enterprises LLC, 794 F.3d 1334 (Fed. Cir. 2015)

King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974)

Packard Press, Inc. v. Hewlett–Packard Co., 227 F.3d 1352 (Fed.Cir.2000)

Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005)

COMES NOW, Appellant Coyotes Ice, LLC, by Counsel, and hereby respectfully appeals the Examining Attorney's refusal to register Appellant's applied-for mark.

SUMMARY

The Examining Attorney's response fails to give appropriate consideration to the substantial differences between the dominant, undiluted portions of Appellant's and Registrant's marks and fails to consider the marks as a whole, including disclaimed material. The Examining Attorney further ignores precedent and provides evidence with little to no probative value to assert that the Appellant's identified goods and services are similar to Registrant's. Lastly, the Examining Attorney does not consider evidence of concurrent use without any actual confusion, which is relevant to a likelihood of confusion analysis.

ARGUMENTS

A. THE REGISTERED MARKS ARE NOT STRONG MARKS

Examining Attorney is incorrect that "COYOTES" is not diluted or that the registered marks are strong marks. (Examining Attorney's Appeal Brief, September 16, 2015, p. 12). The Examining Attorney's sole evidence for this assertion is that the three cited marks were the only registered marks in Class 35 that contained "COYOTE." (Examining Attorney's Appeal Brief, September 16, 2015, p. 12). This argument is not persuasive.

First, the Examining Attorney's evidence of third party registrations combined with the evidence of third party uses, which were provided by Appellant, demonstrates that COYOTE is diluted with respect to sports teams and sports equipment, both often featured in sports retail stores. Therefore, consumers would look to other portions of the marks "COYOTES ICE

SPORTS” “W COYOTE,” “W COYOTE OUTDOORS,” and “RED COYOTE” to distinguish source. (See Request for Reconsideration, April 16, 2015, p. 5-6). The registration of multiple marks under two different owners with the same common portion indicates that the marks are not strong marks and that “COYOTE” is weak with respect to sports retailers.

Evidence of third-party use and registrations falls under the sixth *du Pont* factor – the “number and nature of similar marks in use on similar goods.” *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). If the evidence establishes that the consuming public is exposed to third-party use of similar marks on similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).

The combination of the Examining Attorney and Appellant’s evidence of third party registrations and use demonstrates that “COYOTE” is diluted with respect to sports, and is thus entitled to only a narrow scope of protection. Examining Attorney errs by considering only three registered marks and not the numerous third party uses provided by Appellant, nationwide, that show that COYOTE is diluted with respect to sports.

Because COYOTE is diluted and weak, consumers would focus on other portions of the cited marks and the relevant goods and services to distinguish the marks.

Moreover, Appellant disputes the contention that its dilution argument is not relevant in the instant case and further questions the Examining Attorney's reasoning behind the following statement:

Applicant overlooks the fact that **entertainment services in the nature of sports exhibitions** are complementary services, not competitive services. Therefore, Applicant's sports team dilution argument is not relevant in the instant case.

(Examining Attorney's Appeal Brief, September 16, 2015, p. 12) (emphasis added).

The Examining Attorney's point is a distinction without a difference. Proximity of goods is not distinguished by whether services are complementary or competitive. *Communications Satellite Corp. v. Comcet, Inc.*, 429 F.2d at 1253 ("Complementary products, or services, are particularly vulnerable to confusion."). For related goods, the danger presented is that the public will mistakenly assume there is an association between the producers of the related goods, though no such association exists.

Because the third party uses and the registered marks are complementary, they are extremely close in the minds of consumers. Thus, "COYOTE" is diluted with respect to sports team paraphernalia and sports equipment, which is often sold by sports retailers. (See Appellant's Appeal Brief, July 20, 2015, p. 10-11).

B. THE EXAMINING ATTORNEY'S COMPARISON OF THE MARKS

The Examining attorney errs in asserting that "COYOTE" is the dominant portion of the marks and by refusing to consider the marks as a whole.

1. "Coyote" is Not the Dominant Element of the Marks and is Diluted With Respect to Sports Teams, Sports Retailers, and Sports Equipment

Appellant disputes the contention that the diluted “COYOTE” element of the marks is the dominant element. (Examining Attorney’s Appeal Brief, September 16, 2015, p. 13). Appellant’s appeal brief contains evidence that the common element “COYOTE” is diluted with respect to sports. (Appellant’s Appeal Brief, July 20, 2015, p. 10-11). Consumers would instead focus on the undiluted elements.

The Federal Circuit has held that “[t]here is no general rule as to whether letters or designs will dominate in a composite mark; nor is the dominance of letters or design dispositive of the issue.” *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 647, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990). Further, disclaimed matter may be dominant or significant in some cases. TMEP § 1213.10.

It is clear from a comparison of Appellant’s mark and Registrants’ marks as a whole that the large design elements “W,” “OUTDOORS,” and the “RED” with the picture of the running fox are the dominant elements of the marks.¹

Appellant’s mark is the standard “**COYOTES ICE SPORTS.**”

The cited marks are:

¹ The Examining Attorney’s moved to consolidate his brief in this ex parte proceeding with Proceeding No. 86135177 on August 5, 2015. However, in the consolidated brief, the Examining Attorney neglected to consider the differences between Appellant’s standard “COYOTES ICE SPORTS” mark and stylized “COYOTES ICE SPORTS” marks when comparing the visual differences between the marks.

Registration No. 3,688,377:



Registration No. 3,655,451:



Registration No. 4,379,914:



red coyote

Even a cursory visual comparison makes clear that the marks are so visually dissimilar as to obviate any likelihood of confusion.

The dominant element of “RED COYOTE” is the largest portion, which is the stylized fox logo that is five times larger than any literal element of the mark. Further, the dominant portion of a literal mark is most often the first portion of the mark, “RED,” because it is more likely to stick in a consumer’s mind. The largest portion of “W COYOTE OUTDOORS” and “W COYOTE” is the giant cursive “W.” Moreover, Appellant has submitted evidence and arguments as to why the “COYOTE” element is diluted as to sports teams, sports retailers, and sports equipment. (See Appellant’s Appeal Brief, July 20, 2015, p. 7-8). Therefore, consumers will look to these large stylized elements as the dominant portion of the mark and will use them to distinguish source.

With these principals in mind, even assuming, *arguendo*, that the Examining Attorney is correct in stating that “ICE SPORTS,” “RED,” “W,” and “OUTDOORS” are less dominant

portions of the marks, the Examining Attorney has only performed half the analysis by ignoring disclaimed elements of the marks and not viewing them as a whole.

2. The Marks Must Be Considered As a Whole

Appellant's marks "COYOTES ICE SPORTS" should be considered as a whole in a likelihood of confusion analysis, including disclaimed material, when compared to the cited marks "W COYOTE OUTDOORS," "W COYOTE," and "RED COYOTE." The Examining Attorney errs in according the word "COYOTE" too much significance and too broad a scope of protection and refuses to consider Appellant's mark "COYOTES ICE SPORTS" as a whole.

Although the court may place more weight on a dominant portion of a mark, for example if another feature of the mark is descriptive or generic standing alone, the ultimate conclusion nonetheless must rest on consideration of the marks **in total**. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1357 (Fed.Cir.2000); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed.Cir.1985) (emphasis added).

Notably, disclaimed material **must be considered** when comparing the marks in a likelihood of confusion analysis. Likelihood of confusion is determined by the likely reaction of the purchasing public, **who are not aware that certain words or phrases have been disclaimed**. *Juice Generation, Inc. v. GS Enterprises LLC*, 794 F.3d 1334, 1341 (Fed. Cir. 2015) (Emphasis added.).

The Federal Circuit has recently instructed the Board to consider the mark as a whole, including disclaimed words, and to not zero in on one portion of the mark without considering such disclaimed material. *See Juice Generation, Inc.* 794 F.3d at 1337 (Fed. Cir. 2015) ("While

the Board may properly afford more or less weight to particular components of a mark for appropriate reasons, it must still view the mark as a whole.”). In this case, the Board compared the mark “PEACE LOVE AND JUICE” (with “JUICE” disclaimed) with the mark “PEACE & LOVE,” and concluded that “PEACE LOVE” was the dominant portion of the mark “PEACE LOVE AND JUICE” and the entirety of “PEACE & LOVE” when comparing the two marks. *Id.* at 1337-38. The Federal Circuit found this analysis inadequate, partly because a full consideration of the mark “PEACE LOVE AND JUICE” may show that the entire three word mark has a different connotation in consumer’s minds. *Id.* at 1341. The Federal Circuit reasoned that it is impermissible not to give any significance to a term even if the term was generic and disclaimed. *Id.*

Similarly, a proper analysis of the current case **must consider** the disclaimed portions of Appellant’s mark “COYOTES ICE SPORTS,” because the purchasing public is not aware that certain words or phrases have been disclaimed. Examining Attorney cannot reasonably dispute that Appellant’s mark COYOTES ICE SPORTS, whether in standard character or the stylized

form, , has a different appearance, sound, and connotation in the minds of

consumers than , , and .

Similar to how a previous Board decision erroneously ignored the disclaimed matter “JUICE” from “PEACE LOVE AND JUICE” with the mark “PEACE & LOVE,” the Examining Attorney’s analysis of the marks erroneously fails to consider the marks as a whole, including disclaimed material.

Instead, the Examining Attorney bases his arguments in comparing the appearance and sound of the respective marks on only one portion of the Appellant's which the Examining Attorney deems to be dominant (i.e. "COYOTE") while ignoring the disclaimed words "ICE SPORTS." (See, Examining Attorney's Appeal Brief, September 16, 2015, p. 6, 8, 10). When considered as a whole, the marks are visually distinct: Appellant's mark "COYOTES ICE SPORTS" has a different first portion and final portion from any of the cited marks; "W COYOTES OUTDOORS" and "W COYOTE" have stylized cursive lettering and a large cursive "W" in "W COYOTE" and "W COYOTE OUTDOORS"; and "RED COYOTE" has a large running fox logo with "RED" as its first word. (See Appellant's Appeal Brief, July 20, 2015, p. 14; Request for Reconsideration, April 16, 2015, p. 3-4).



Appellant's mark stylized mark, , has a different first portion and final portion from any of the cited marks and, additionally, contains large block stylized letters with a red outline, which further distinguishes the mark from those of Registrants' (See Appellant's Appeal Brief, July 20, 2015, p. 14; Request for Reconsideration, April 16, 2015, p. 3-4).

The Examining Attorney then refuses to consider disclaimed material when comparing the connotation and commercial impression of the marks. First, the Examining Attorney asserts the marks all connote a wild animal related to dogs and wolves by solely comparing the word "COYOTE." (Examining Attorney's Appeal Brief, September 16, 2015, p. 6, 8, 10). This analysis ignores court precedent because the Examining Attorney refuses to consider the marks as a whole, as the purchasing public would. When considered as a whole, "COYOTES ICE

SPORTS” clearly connotes the idea of a winter or ice sport, not a wild animal related to dogs and wolves.

As a further note, when comparing “COYOTES ICE SPORTS” and “W COYOTE OUTDOORS,” the Examining Attorney errs in saying “ICE SPORTS” and “OUTDOORS” creates the same commercial impression because the cited websites allegedly show ice sports being played outdoors. (Examining Attorney’s Appeal Brief, September 16, 2015, p. 8). For the purposes of this comparison, it is irrelevant whether “ice sports” may be played indoors or outdoors (although most ice sports are, in fact, only playable indoors in the United States during most of the year). The relevant question is what “OUTDOORS” and “ICE SPORTS” mean in relation to the respective goods and services. As Appellant has demonstrated, outdoors sports are hunting, fishing, archery, and the like. Ice sports are hockey, figure skating, curling, and the like. (Request for Reconsideration, April 16, 2015, p. 19-20). Therefore, consumers not consider “outdoors” in “W COYOTE OUTDOORS” to be associated with “ice sports.”

Following the Examining Attorney’s line of logic, consumers could just as easily associate “OUTDOORS” with warm weather outdoor activities or activities related to a sample of geographic regions in a specific season. For example, basketball, baseball, volleyball, hiking, bird watching, gardening, fishing, hunting, hiking, camping, white water rafting, or zip lining are all potential “outdoor” activities or sports. Showing a few websites from Anchorage, Alaska, Maryland, Aurora, CO, Minneapolis, and Massachusetts that list cold weather related outdoor activities in a cold geographic region is not the appropriate test for establishing a similar commercial impression.

Instead, the Examining Attorney's analysis ignores evidence on record of Registrant's use of "W COYOTE OUTDOORS" and "W COYOTE" in expressly connection the outdoor activities of **hunting, hiking, and fishing**. (See Appellant's Appeal Brief, April 20, 2015, p. 6-7).

Merriam-Webster expressly recognizes "outdoor" broadly as "done, used, or located outside a building" (<http://www.merriam-webster.com/dictionary/outdoor>); "outdoors" as "outside a building: not inside a building" (<http://www.merriam-webster.com/dictionary/outdoors>) and "outdoorsy" as "fond of outdoor activities." (<http://www.merriam-webster.com/dictionary/outdoorsy>). Dictionary.com recognizes "outdoorsman" as "a person devoted to outdoor sports and recreational activities, as hiking, hunting, fishing, or camping" (<http://dictionary.reference.com/browse/outdoorsman?s=t>). None of these definitions relate to "ice sports" and in fact, identify hiking, hunting, fishing, and camping. Appellant requests judicial notice be taken of explanatory materials regarding "outdoor sports," "outdoors," and "outdoorsman."

The Board may take judicial notice of dictionary definitions, including definitions in technical dictionaries, translation dictionaries and online dictionaries which exist in printed format. TMBP § 1208.04; *In re Osmotica Holdings Corp.*, 95 USPQ2d 1666, 1668 (TTAB 2010) (judicial notice taken of definitions from *Random House Dictionary* as accessed at the website www.dictionary.com); *In re Dietrich*, 91 USPQ2d 1622, 1631 n.15 (TTAB 2009) (judicial notice taken of definition from Merriam-Webster Online Dictionary from www.merriam-webster.com).

Based on these definitions and the use of the registered mark "W COYOTE OUTDOORS," it would be odd to assume that outdoor activities such as hunting and fishing or a

broad definition such as “outside of a building: not inside of a building” would cause consumers to think of “ice sports” simply because certain ice sports may be played outdoors some of the time.

In conclusion, Appellant asserts that the Examining Attorney does not fully consider evidence that contradicts his position, and instead focuses on only half the evidence and half the analysis. Further, the Examining Attorney has made statements concerning the similarity of the parties’ marks that are either irrelevant or incorrect. Appellant respectfully submits that the consumer is unlikely to be confused by the appearance, sound, or connotation of Appellant’s and Registrant’s mark, and requests that the applied-for mark be moved to publication.

C. COMPARISON OF THE GOODS AND SERVICES

1. The Examining Attorney’s Citation to Third Party Registrations

On appeal, the Examining Attorney has submitted several third party registrations. However, these registrations are not probative to demonstrate that Appellant’s goods and services are similar to the goods and services of the cited marks.

Third party registrations that cover a number of different goods or services may have some probative value only to the extent that they suggest the goods or services are a type that may emanate from a single source. *See, e.g.* (TMEP) § 1207.01(d)(iii). However, these registrations must be carefully considered to ensure that each registration presented is probative, the number of registrations is sufficient, and the types of goods at issue are related.

The Examining Attorney has not done so.

Instead, the Examining Attorney duplicates these eleven third party registrations in his reply. (See Examining Attorney’s Appeal Brief, September 16, 2015, p. 15-16). Appellant disagrees with the contention that these third party registrations are probative to show that “hockey” and “ice skating equipment” are in related trade channels or that “retail sporting goods stores” and “online retail store services featuring sporting goods” may emanate from a single source. (See, Examining Attorney’s Appeal Brief, September 16, 2015, p. 9, 13-14).

Instead, these third party registrations show a diversity of goods ranging from fitness equipment and horseback riding to retail shop window arrangement services. (See Appellant’s Appeal Brief, July 20, 2015, p. 22-23). This large variety of identified goods diminishes the probative value in establishing any two items identified in the registrations are related. (Request for Reconsideration, April 16, 2015, p. 9). Here, the third party registrations show a diversity of goods including fitness equipment and nutritional products, as well as horseback riding.

Second, the Examining Attorney counters Appellant’s arguments against the probative value of the cited third party registrations by stating “the evidence of record is to the contrary,” and simply re-citing to the eleven third party registrations submitted with the office action on October 16, 2014. (Examining Attorney’s Appeal Brief, September 16, 2015, p. 14). Yet, the reproduced list of third party registrations in the appeal brief also only reproduce the identified goods and services in Class 35 for each mark, which does not accurately reflect the variety of goods identified for each registration. (See, e.g., “EUROPEAN SPORTS” in Classes 35 and 40). Thus, the probative value of these third party registrations is suspect.

2. The Examining Attorney’s Citation to Internet Evidence

The Examining Attorney's Internet evidence of three webpage links is not probative to demonstrate that Appellant's goods and services are similar to the goods and services of the cited marks. Specifically, the Examining Attorney erroneously asserts that such evidence shows that the same entity commonly provides "retail sporting good store" services and "hockey equipment" or "on-line retail store services featuring sporting goods" marketed under the same mark, and thus the services are complementary. (Examining Attorney's Appeal Brief, September 16, 2015, p. 7, 9-11, 14).

Providing only a website address or hyperlink to Internet materials is insufficient to make such materials of record. *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013); *In re HSB Solomon Assocs. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012). In *In re Thor Tech, Inc.*, Serial No. 85667188 (January 26, 2015).

Moreover, evidence that is from sources that sell a broad range of varied and unrelated goods online has not been found to be probative. *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509 (TTAB 2010). The Federal Circuit has held that even printed material evidence not within the listed class of goods and services for a registration make the evidence less probative to demonstrate that similar programs bear the same mark or name as the facility offering the program. *See In re St. Helena Hospital*, 113 U.S.P.Q.2d 1082 (Fed. Cir. 2014).

The website links cited by the Examining Attorney are not probative because they only show several different businesses offering a wide variety of noncompetitive services. (See Response to Office Action, April 16, 2015, p. 22-23). Specifically:

www.dicksportinggoods.com shows an online store that sells a variety of footwear, exercise products, and materials for fans.

www.big5sportinggoods.com shows an online venue for finding a wide variety of products such as footwear, fitness, fishing and hunting products, roller sports, games and toys, and seasonal products.

www.sportsauthority.com discloses an online venue to order a wide variety of goods, such as fitness goods, clothes, shoes, games, outdoor equipment, and accessories. Moreover, most of these varied goods are not even related to Appellant's identified goods and services.

Thus, these website links do not show that Appellant's and Registrant's identified goods and services are related for likelihood of confusion purposes.

Therefore, Appellant submits that the evidence provided by the Examining Attorney should be given little probative value. Further, the Appellant's identified goods and services are sufficiently distinct from the identified goods and services of the cited marks. Thus, Appellant respectfully requests that the marks be moved toward publication.

D. THE EXAMINING ATTORNEY'S ARGUMENTS AGAINST ABSENCE OF ACTUAL CONFUSION

The Examining Attorney errs in refusing to consider five (5) years of concurrent use without actual confusion as evidence. (Examining Attorney's Appeal Brief, September 16, 2015, p. 11-12). Both parties agree that the *du Pont* test is appropriate for determining likelihood of confusion. The *du Pont* test requires consideration of the absence of confusion and the nature of

extent of actual confusion as two factors for determining likelihood of confusion. The Board and many courts have so held:

In re General Motors Corp., 23 USPQ2d 1465, 1470-71 (TTAB 1992) (“The absence of any known incident of actual confusion in an extensive period of contemporaneous use of the marks is strong evidence that confusion is not likely to occur in the future.”)

Carefirst of Maryland, Inc. v. First Care, P.C., 434 F.3d 263, 269 (4th Cir. 2006) (“the absence of any evidence of actual confusion over a substantial period of time...creates a strong inference that there is no likelihood of confusion.” (finding that nine (9) years of no actual confusion was substantial evidence that confusion was unlikely)).

King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974) (“In the absence of evidence to the contrary, such lack of actual confusion over so many years must be considered in this case as supportive of a finding that confusion is not likely in the future”).

In re BankAtlantic Bancorp, Inc., 2008 WL 4674561 (T.T.A.B. Sept. 23, 2008) (non-precedential; evidence of absence of actual confusion over twenty years of concurrent use persuasive evidence that confusion was unlikely).

Citigroup Inc. v. Capital City Bank Group, Inc., 94 U.S.P.Q.2d 1645, 2010 WL 595586 (T.T.A.B. 2010), *aff'd*, 637 F.3d 1344 (Fed. Cir. 2011) (evidence of absence of actual confusion is evidence that confusion is unlikely).

Appellant demonstrated that the cited marks have existed concurrently for at least five years without evidence of actual confusion. (Appellant’s Appeal Brief, July 20, 2015, p. 8-9).

Two of the *du Pont* factors to determine whether or not there is a likelihood of confusion are “the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion” and “the nature of and extent of actual confusion.” Based on the extensive period of no actual confusion, these two factors weigh heavily in Appellant’s favor.

Thus, the concurrent use of Registrants’ marks with the diluted element “COYOTE” for over 5 years without any known actual confusion is a relevant factor to demonstrate that consumers are unlikely to be confused by concurrent registration of “COYOTES ICE SPORTS.”

E. CONCLUSION

The Board must keep in mind that the test is whether confusion is likely, not simply possible. *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1393 (Fed. Cir. 1992). The Examiner has not met this burden.

Appellant submits that the dominant portion of the marks is not “COYOTE,” but is the undiluted portion of the marks. Further, Appellant’s mark is unlikely to be confused with Registrants’ marks when the marks are considered as a whole, including disclaimed matter. Further, the evidence provided by the Examining Attorney alleging the identified goods and services are similar has little probative value.

In light of the above, Appellant respectfully requests that the Board allow for the registration of Appellant’s mark.

Respectfully submitted,

October 6, 2015

Date

/Steven J. Laureanti/signed

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