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

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| Proceeding | 86321433 |
| Applicant | PS Court Associates, LP |
| Applied for Mark | THE PAVILION AT KING OF PRUSSIA |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of: PS Court Associates, LP

Serial No.: 86/321,433

Filed: June 26, 2014 Ex Parte Appeal from Section 2(d) Refusal

For: **THE PAVILION AT KING OF PRUSSIA**

Examiner: Seth A. Rappaport

Law Office: 103

APPLICANT'S APPEAL BRIEF

In response to the final Office Action dated April 24, 2015, refusing registration based on a finding of likelihood of confusion of Applicant's THE PAVILION AT KING OF PRUSSIA mark ("Applicant's Mark") with U.S. Trademark Registration Nos. 2,909,667; 2,892,753; 2,894,594; 2,892,752; and 2,894,595, Applicant filed a request for reconsideration on October 22, 2015. The Applicant also filed a Notice of Appeal on this date to preserve its rights to appeal and requested that the appeal be suspended pending consideration of Applicant's request for reconsideration. On October 29, 2015, the Examining Attorney denied the request for reconsideration with respect to three of the five cited registrations (as the remaining two registrations had been cancelled) and, on October 30, 2015, the Trademark Trial and Appeal Board ("TTAB" or "Board") resumed the appeal and set December 29, 2015 as the deadline for Applicant's Brief.

Applicant hereby submits this Appeal Brief to support the finding that there is no likelihood of confusion as between Applicant's Mark and the marks in the remaining cited registrations.

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ARGUMENT

The Examining Attorney has maintained a Section 2(d) refusal to register Applicant's Mark in light of the following registrations, all of which are owned by King of Prussia Associates (collectively, the "Cited Registrations"):

- U.S. Trademark Reg. No. 2,892,753 for THE COURT KING OF PRUSSIA for "shopping center services, namely, leasing and management of retail space" in International Class 36 (the "753 Registration");
- U.S. Trademark Reg. No. 2,892,752 for THE PLAZA KING OF PRUSSIA for "shopping center services, namely, leasing and management of retail space" in International Class 36 (the "752 Registration"); and
- U.S. Trademark Reg. No. 2,894,595 for KING OF PRUSSIA for "shopping center services, namely, leasing and management of retail space" in International Class 36 (the "595 Registration").¹

However, as explained in detail to the Examining Attorney and as set forth in more detail below, there is no likelihood of confusion between Applicant's Mark and the marks in the Cited Registrations as, among other things, (1) Applicant's Mark and the cited marks are sufficiently different in sound, meaning, appearance and commercial impression so as to alleviate any likelihood of confusion, particularly given the geographic descriptiveness of KING OF PRUSSIA; (2) the cited marks are diluted and weak, as KING OF PRUSSIA is merely descriptive of the services associated with each registration and has been diluted via numerous third party uses of similar marks in connection with related goods and services and widespread third party use; (3) consumers of Applicant's and Registrant's services are of a sort that would exercise great care before making a purchasing decision such that a likelihood of confusion is

¹ The Examining Attorney initially refused registration of Applicant's Mark in light of two additional registrations owned by King of Prussia Associates as well, namely, U.S. Trademark Reg. No. 2,909,667 for THE PLAZA KING OF PRUSSIA (stylized) for "shopping center services, namely, leasing and management of retail space" in International Class 36, and U.S. Trademark Reg. No. 2,894,594 for THE COURT KING OF PRUSSIA (stylized) for "shopping center services, namely, leasing and management of retail space" in International Class 36, but withdrew the refusal with respect to these registrations as they had been cancelled. See Examining Attorney's October 29, 2015 Request for Reconsideration Letter.

unlikely; and (4) Applicant's Mark has peacefully coexisted alongside the Cited Registrations without incident for many years. Accordingly, Applicant respectfully requests that the Board reverse the Examining Attorney and allow Applicant's application to proceed to publication on the Principal Register.

I. There is no Likelihood of Confusion in View of the Differences between Applicant's Mark and the Marks in the Cited Registrations.

Applicant's Mark, THE PAVILION AT KING OF PRUSSIA, which uses "AT KING OF PRUSSIA" in its ordinary, geographically descriptive sense,² is sufficiently different from the cited marks, namely, THE COURT KING OF PRUSSIA, KING OF PRUSSIA and THE PLAZA KING OF PRUSSIA, so as to avoid any likelihood of confusion, particularly given the weak and descriptive nature of "KING OF PRUSSIA" as used in connection with the cited marks. Under the Trademark Act, a refusal to register a mark grounded in likelihood of confusion requires that such confusion as to the source of the goods be not merely possible, but likely. A mere possibility of confusion is an insufficient basis for rejection under Section 2(d). *In re Massey-Ferguson Inc.*, 222 U.S.P.Q. 367, 368 (TTAB 1983) (quoting *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 164 U.S.P.Q. 43, 44 (C.C.P.A. 1969)).

With regard to the appearance, sound and connotation of trademarks, mere similarity or even identity between marks can never alone be decisive of likelihood of confusion. *McGregor-Doniger, Inc. v. Drizzle Inc.*, 202 U.S.P.Q. 81, 89 (2d Cir. 1979). *See also In re Norfolk Wallpaper, Inc.*, 216 U.S.P.Q. 903 (TTAB 1983) ("THE NORFOLK PLAN" for installation of wallpaper and retail wallpaper store services does not so resemble "NORFOLK" for interior and exterior ready-made paint and varnishes, and thinners for paint and varnishes that confusion is

² The Examining Attorney has conceded that KING OF PRUSSIA is a geographically descriptive term for a location in Upper Merion Township, Montgomery County, Pennsylvania. *See* Office Action dated October 9, 2014. Applicant and Registrant both offer their respective services in this area. *See* Office Action Response dated April 9, 2015 and Exhibit A attached thereto.

likely). Rather, marks must be considered in their entireties. *Mr. Hero Sandwich Systems, Inc. v. Roman Meal Co.*, 228 U.S.P.Q. 364, 366 (Fed. Cir. 1986).

Moreover, where a mark (or a portion thereof) is diluted or weak, such as where a portion of a mark is geographically descriptive, “the addition of . . . other material to one of the marks has been held sufficient to render the marks as a whole distinguishable.” *In re Shawnee Milling Co.*, 225 U.S.P.Q. 747, 748-49 (TTAB 1985); *see also In re Hartz Hotel Services, Inc.*, 2012 WL 1267900, at *6 (quoting *Standard Brands Inc. v. Peters*, 191 U.S.P.Q. 168, 172 (TTAB 1976) for the proposition that “the scope of protection afforded [weak] marks [is] so limited as to permit the use and/or registration of the same mark for different goods or of a composite mark comprising this term plus other matter, whether such matter be equally suggestive or even descriptive, for the same or similar goods”). This is so regardless of whether the geographical descriptive portion of the cited mark has acquired secondary meaning as a source indicator.

Numerous examples abound where this Board or the courts have refused to find a likelihood of confusion where the common element between two marks is a geographic descriptor (even if such descriptor had acquired secondary meaning). *See generally Vail Associates, Inc. & Vail Trademarks, Inc. v. Vend-Tel-Co., Ltd.*, 516 F.3d 853, 866 (10th Cir. 2008) (upholding district court decision that plaintiff failed to prove likelihood of confusion between VAIL for downhill skiing facilities; resort hotel services and 1-800-SKI-VAIL for providing automated phone switching system to offer services in or near Vail, Colorado and nearby resort locations where, *inter alia*, VAIL, although having secondary meaning, was not particularly strong in light of geographically descriptive nature and extensive use by third parties); *HBP, Inc. v. Am. Marine Holdings, Inc.*, 290 F. Supp. 2d 1320 (M.D. Fla. 2003) (no likelihood of confusion between DONZI DAYTONA for powerboats and various DAYTONA

marks for motorsport racing and related goods and services even though certain DAYTONA marks were incontestable because, *inter alia*, geographic origin of DAYTONA and widespread third-party use thereof); *Pebble Beach Co. v. Laub Am. Corp.*, No. C-84-20125, 1985 U.S. Dist. LEXIS 23876 (N.D. Cal. Dec. 27, 1985) (no infringement between PEBBLE BEACH for providing golfing facilities and PEBBLE BEACH for softgoods and souvenirs in light of geographic nature of mark and many third party uses of Pebble Beach, among other things); *In re Rock Creek Cattle Co.*, 2009 TTAB LEXIS 419 (Trademark Trial & App. Bd. June 5, 2009) (finding no likelihood of confusion between ROCK CREEK CATTLE COMPANY and Design and ROCK CREEK PROPERTY GROUP, LLC where, *inter alia*, evidence submitted showed numerous uses of ROCK CREEK for businesses); *see also In re Michael D. Mathes*, 2014 TTAB LEXIS 387 (Trademark Trial & App. Bd. Dec. 12, 2014) (no likelihood of confusion between SOUTH BEACH SWIMWEAR for swimsuits and swimwear and Section 2(f) registration for SOUTH BEACH WINE & FOOD FESTIVAL for t-shirts, polo shirts, tank tops, hats, visors and aprons given different commercial impressions of the marks and geographic descriptiveness of SOUTH BEACH).

Such results make good sense, as even where a geographical descriptor has acquired secondary meaning, such finding “does not provide the mark holder with an *exclusive right* to use the mark in its original descriptive sense.” *Vail Associates, Inc.*, 516 F.3d at 866. Indeed, courts have recognized that geographically descriptive marks should not be given exclusive appropriation by any one producer of goods or services, as it unfairly prohibits others from using a certain geographic location, when there are only but a few ways to identify said location. *Del. & Hudson Canal Co. v. Clark*, 80 U.S. 311, 323-324 (1871); *Columbus Mill Co. v. Alcorn*, 150 U.S. 460, 464 (1893); *see also Del. & Hudson Canal Co.*, 80 U.S. at 328 (“By advertising and

selling coal brought from the Lackawanna Valley as Lackawanna coal, [Defendant] has made no false representation If the complainants' sales are diminished, it is because they are not the only producers of Lackawanna coal, and not because of any fraud of the defendant”).

Thus, in *In re Altitude Development Corp.*, 2009 TTAB LEXIS 237 (Trademark Trial & App. Bd. March 6, 2009), the Trademark Trial and Appeal Board made plain that geographical descriptors, even when registered, are entitled to such a narrow scope of protection so as to allow for the coexistence of other marks that include the entirety of such descriptor along with additional matter, even if such matter is suggestive or descriptive. There, the Board reversed an Examining Attorney’s refusal to register the mark SUMMIT AT BRIAN HEAD for resort hotel and resort lodging services on the basis that such registration was likely to cause confusion with registrations for BRIAN HEAD for ski resort services, BRIAN HEAD for temporary lodging services, namely hotel services and restaurant services, and BRIAN HEAD RESORT for ski resort services, restaurant and hotel services, all owned by the same owner. 2009 TTAB LEXIS 237, at *7. While noting that the applicant’s services were legally identical to the registrant’s services and that the applicant’s mark was similar to the registrant’s marks because it incorporated BRIAN HEAD in its entirety, the Board found that there was no likelihood of confusion as “the manner in which the mark is structured with ‘Summit’ as the first word of the mark and ‘at Brian Head’ modifying ‘Summit’ as the geographic location of the services, highlights the word ‘Summit’ as the dominant part of applicant’s mark”. *Id.* at 3-7. Thus, the inclusion of the term “SUMMIT AT”, which itself was descriptive, was sufficient to differentiate the applicant’s mark from the cited marks where all of the marks were associated with the location Brian Head, making plain that the Board believed the geographic descriptor “BRIAN HEAD” should be entitled to only a very narrow scope of protection.

For nearly identical reasons here, Applicant's Mark and the marks in the Cited Registrations are similarly sufficiently dissimilar so as to avoid a likelihood of confusion. Applicant's Mark is for THE PAVILION AT KING OF PRUSSIA. The dominant portion of Applicant's Mark is "THE PAVILION", as it appears first in the mark, *see id.* at *6 (finding "SUMMIT" dominant portion of SUMMIT AT BRIAN HEAD where it appeared first), and because "AT KING OF PRUSSIA" is otherwise disclaimed. Moreover, the use of the term "AT" in Applicant's Mark makes plain that KING OF PRUSSIA is being used solely as a geographical indicator in its "original, descriptive sense," that is, in the manner in which the registrant lacks the "*exclusive right to use the mark*". *Vail Assocs., Inc.*, 516 F.3d at 866. Under the circumstances, consumers would place more emphasis on "THE PAVILION" portion of Applicant's Mark (which has acquired distinctiveness as a source indicator) and less emphasis on "AT KING OF PRUSSIA," particularly given the weak and diluted nature of KING OF PRUSSIA (discussed below in Section II in more detail).

By contrast, the Cited Registrations are for THE COURT KING OF PRUSSIA, THE PLAZA KING OF PRUSSIA and KING OF PRUSSIA. With respect to KING OF PRUSSIA alone, as noted above, the addition of other matter, even descriptive or suggestive terms to this geographic descriptor, is sufficient to differentiate Applicant's Mark from such an inherently weak mark. *See, e.g., In re Altitude Development Corp.*, 2009 TTAB LEXIS 237, at *6-7 (Trademark Trial & App. Bd. Mar. 6, 2009); *In re Hartz Hotel Services, Inc.*, 2012 WL 1267900, at *6 (protection afforded weak marks is "so limited as to permit the use and/or registration of the same mark for different goods or of a composite mark comprising this term plus other matter, whether such matter be equally suggestive or even descriptive, for the same or similar goods" (emphasis added)).

Regarding THE COURT KING OF PRUSSIA and THE PLAZA KING OF PRUSSIA, Applicant notes that, similar to Applicant's own mark, "THE COURT" and "THE PLAZA" are the dominant portions of—or at least of equal weight as KING OF PRUSSIA in connection with—these respective marks, as these terms appear first in connection with these marks. Accordingly, consumers viewing these marks would place more emphasis on "THE COURT" and "THE PLAZA" portions thereof (or at least equal weight with KING OF PRUSSIA). Doing so, consumers will easily differentiate between Applicant's Mark and the cited marks, as THE PAVILION AT KING OF PRUSSIA looks and sounds quite different than THE COURT KING OF PRUSSIA and THE PLAZA KING OF PRUSSIA and plainly has a different meaning and commercial impression. Indeed, whereas "court" in connection with registrant's services means a "large building surrounded by usually enclosed grounds" and "plaza" refers to a "shopping center", *see* Exhibits E and F to the October 22, 2015 Request for Reconsideration, "pavilion" means "an annex". Consumers, aware of these definitions, would understand that THE PAVILION AT KING OF PRUSSIA, while still part of the KING OF PRUSSIA mall complex, is annexed thereto, that is, attached but separate and apart from the other buildings thereto. Thus, just like where "SUMMIT AT" in SUMMIT AT BRIAN HEAD was sufficient to differentiate the applied-for mark from various cited BRIAN HEAD marks because "Summit at Brian Head suggests the mountaintop at Brian Head", a specific location in Brian Head, *In re Altitude Development Corp.*, 2009 TTAB LEXIS 237, at *6 (Trademark Trial & App. Bd. Mar. 6, 2009), here "THE PAVILION AT KING OF PRUSSIA" should be sufficient to differentiate the applied-for mark from the various cited marks because it suggests a specific location in King of Prussia and the King of Prussia mall complex. Under such circumstances, consumers simply will not be confused into believing that Applicant or its services are associated with the registrant

or its services. “By advertising and selling [leasing services] ... from the [the King of Prussia mall complex in King of Prussia, PA] as [being AT KING OF PRUSSIA], [Applicant] has made no false representation If the [Registrant’s] sales are diminished, it is because [Registrant is] not the only [provider of leasing services at the King of Prussia mall complex in King of Prussia], and not because of any fraud of the defendant.” *Del. & Hudson Canal Co.*, 80 U.S. at 328.

Simply put, the addition of “THE PAVILION” to the inherently weak and geographically descriptive phrase “AT KING OF PRUSSIA” substantially alters the overall commercial impression created by Applicant’s Mark, rendering Applicant’s Mark readily distinguishable from the marks in the Cited Registrations. Applicant’s adoption of a mark that shares only geographically descriptive language, used in a geographically descriptive manner, with the cited marks is insufficient to support a finding of likelihood of confusion. Indeed, “[i]n other cases involving geographically descriptive marks, even when marks have become incontestable, courts have rejected claims of infringement for another’s use of the location’s name.” *HBP, Inc.*, 290 F. Supp. 2d at 1331. Thus, this first factor weighs against a finding of likelihood of confusion and for this reason alone there is no likelihood of confusion.

II. In View of the Coexistence of Multiple Marks Using KING OF PRUSSIA, Applicant’s Mark can Peacefully Coexist with Registrants’ Marks without Creating a Likelihood of Confusion.

In addition to the inherently weak nature of the cited marks, as discussed above, Applicant has presented substantial evidence tending to show that third party uses of marks comprising the term KING OF PRUSSIA are prevalent in Pennsylvania and the King of Prussia, PA area specifically. “Extensive third party use of the mark or a term used in the trademark weakens the strength of the mark.” *Id.* at 1329 (citing *Sun Banks of Fla., Inc. v. Sun Fed. Sav. &*

Loan Ass'n, 651 F.2d 311, 316 (5th Cir. 1981) for the proposition that “evidence of 75 third-party financial companies registered in Florida using the word ‘Sun’ in their names was impressive evidence that there would be no likelihood of confusion between Sun Banks and Sun Federal”). Accordingly, consumers will be able to readily distinguish between Applicant’s Mark and the cited marks, which share only use of the weak and diluted phrase KING OF PRUSSIA.

Here, Applicant has submitted substantial evidence showing that, like “Sun” in *Sun Banks of Florida, Inc.*, KING OF PRUSSIA is widely used by third parties in connection with business names or as trademarks or as geographical descriptors in connection with various services, including services related to those offered by the registrant, in the King of Prussia, PA area. Examples include: MACY’S KING OF PRUSSIA for a department store in King of Prussia, PA; NORDSTROM RACK THE OVERLOOK AT KING OF PRUSSIA, for a shoe department store in King of Prussia, PA; ZAGG AT KING OF PRUSSIA for a store; KING OF PRUSSIA WALMART SUPERCENTER for a Walmart retail store; JC PENNY AT KING OF PRUSSIA PLAZA for a department store and corresponding rental services; NORMAN’S HALLMARK AT KING OF PRUSSIA PLAZA for a retail store; KING OF PRUSSIA BUSINESS CENTER for office space rental in King of Prussia; KING OF PRUSSIA OFFICE SPACE for office space rental in King of Prussia; and KING OF PRUSSIA OFFICE PROPERTIES used descriptively to describe office properties in King of Prussia. *See* Exhibit I to the October 22, 2015 Request for Reconsideration. Such uses are also plainly related to the services identified in the Cited Registrations, as the registrations attached as Exhibit J to the October 22, 2015 Request for Reconsideration show that such services are of a type that originate from the same source as a provider of shopping center leasing services such as those identified in the Cited Registrations.

Moreover, Applicant submitted evidence of over 220 active businesses, many of which are located in or around King of Prussia, PA, that use trade names comprising the term KING OF PRUSSIA. *See* Exhibit L to the October 22, 2015 Request for Reconsideration. Such evidence makes plain that KING OF PRUSSIA is in widespread use such that consumers will place little emphasis on this portion of any mark incorporating this term. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373, 73 U.S.P.Q.2d 1689, 1693 (Fed. Cir. 2005) (if the evidence establishes that the consuming public is exposed to third-party use of similar marks on similar goods, this evidence “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”); *Vail Assocs, Inc.*, 516 F.3d at 867 (“[u]se by others of a similar mark will tend to dilute any consumer recognition and association of that mark with the alleged owner”) (citations and quotations omitted).

The fact that these third party marks can peacefully coexist with each other (and with the marks in the cited registration) strongly suggests that Applicant’s Mark is equally able to coexist with the marks in the Cited Registrations. *See Palm Bay Imps.*, 396 F.3d at 1374 (evidence of the coexistence of third party marks shows that customers have “become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different [] marks on the bases of minute distinctions’”) (internal citations omitted). Thus, this factor also weighs strongly against a finding of likelihood of confusion and suggests that consumers will be able to readily distinguish between Applicant’s Mark and the cited mark. *See HBP, Inc.*, 290 F. Supp. 2d at 1332 (“[t]he geographic origin and resulting widespread third-party use of ‘Daytona’ weighs against the strength of HBP’s marks, even though several are incontestable”).

III. Consumers of Applicant's and Registrant's Respective Services are Sophisticated and will Take Great Care when Making a Purchasing Decision.

In addition to the foregoing, there is no likelihood of confusion between Applicant's Mark and the cited marks because the customers who purchase such services, namely, leasing of office and retail space, are sophisticated and will take great care before making a purchasing decision. This Board has previously held that "purchasers of luxury resort property development services and real estate investment, management and brokerage services are likely to be at least somewhat sophisticated purchasers who would make careful purchasing decisions because of the expense and complexity of real estate transactions," *In re Rock Creek Cattle Company, Ltd.*, 2009 TTAB LEXIS 419, at *14 (Trademark Trial & App. Bd. June 5, 2009). So, too, would lessees of retail shops and office space take great care and exercise caution before making a purchasing decision. *See also HQ Network Sys. V. Exec. Headquarters*, 755 F. Supp. 1110 at 1119 (D. Mass 1991) ("[t]he people who buy business center services are relatively sophisticated; that is, they know that they are entering into a lease of real property..." and comprise "relatively sophisticated businesspeople -- individual entrepreneurs or employees of larger entities who, either on their own behalf or because it is required of them as business managers, are most concerned about the bottom line as well as all the other prudent business judgments which one would be expected to make in leasing property and services"). Such cautious consumers would not be confused into believing that Applicant, Applicant's Mark or Applicant's services are associated with Registrant, Registrant's marks or Registrant's respective services, under the circumstances, particularly given the other reasoning discussed above. *See Sand Hill Advisors, LLC v. Sand Hill Advisors, LLC*, 680 F. Supp. 2d 1107, 1120 (N.D. Cal. 2010) ("[t]he likelihood of consumer confusion decreases where the consumer is sophisticated and exercises a high degree of care"). Under the circumstances, this factor weighs against a finding of likelihood of confusion as well.

IV. The Parties have been Coexisting without Incident of Actual Confusion for Many Years

Finally, the parties have been coexisting for over ten years without any known instances of actual confusion. *See* Office Action Response dated April 9, 2015 at 2. “[A]n absence of actual confusion, or a negligible amount of it, between two products after a long period of coexistence on the market is highly probative in showing that little likelihood of confusion exists.” *Aktiebolaget Electrolux v. Armatron Int’l, Inc.*, 999 F.2d 1, 4 (1st Cir. 1993). Tellingly, the Examining Attorney did not place in the record any evidence showing there is actual confusion amongst consumers in the marketplace arising out of Applicant’s longstanding, coexisting use of THE PAVILION AT KING OF PRUSSIA. Accordingly, this weighs against a finding of likelihood of confusion as well.

Weighing these factors together, it is plain that there is simply no likelihood of confusion between Applicant’s THE PAVILION AT KING OF PRUSSIA and any of the cited marks and, accordingly, Applicant respectfully requests that the Board reverse the Examining Attorney and withdraw the refusal under Section 2(d).

V. The Examining Attorney’s Arguments are Misplaced.

Notwithstanding the foregoing, the Examining Attorney attempts to argue that a likelihood of confusion exists between Applicant’s Mark and the marks in the Cited Registrations, raising only the following arguments to date:³

1. “Adding a term [(“THE PAVILION AT”)] to a registered mark [(KING OF PRUSSIA)] generally does not obviate the similarity between the compared marks”;
2. KING OF PRUSSIA in Applicant’s Mark and the cited marks is the dominant portion of the respective marks given that “PLAZA”, “PAVILION” and

³ The Examining Attorney did not raise any new arguments in his Request for Reconsideration Letter dated October 29, 2015.

“COURT” are not strong terms with respect to the services rendered such that they would not be given much emphasis by consumers;

3. The Examining Attorney’s evidence purportedly shows that “consumers view the term King of Prussia as having strong source identifying significance with respect to shopping malls and related services given the fame of the shopping complex in that city . . . [and] The Pavilion at King of Prussia is connect[ed] to The Plaza and The Court and was created out of a portion of The Court in the early 2000s” such that consumers will believe that Applicant’s services and Registrant’s services originate from the same source; and
4. Applicant’s and Registrant’s services are related.

Office Action dated April 24, 2015.

These arguments, however, are quickly dismissed. Regarding (1), contrary to the Examining Attorney’s position, as discussed above, *see supra* Section I, adding additional matter (i.e., “THE PAVILION AT”) to a weak and diluted term or mark (i.e., KING OF PRUSSIA) is sufficient to differentiate a junior mark from a senior mark.

Concerning (2), KING OF PRUSSIA is not the dominant portion of the respective marks. As discussed above, *see supra* Sections I and II, the dominant portion of Applicant’s Mark is plainly “THE PAVILION”, given that it appears first in Applicant’s Mark and given that the geographical descriptor “AT KING OF PRUSSIA” has been disclaimed, is plainly used to identify a geographical location, and is otherwise diluted and weak. For similar reasons, “THE COURT” and “THE PLAZA” are the dominant portions of the marks comprising the Cited Registrations (or are at least as dominant as the KING OF PRUSSIA portion thereof). Thus, consumers would place more (or *at least equal*) emphasis on “THE COURT”, “THE PLAZA” and “THE PAVILION” as KING OF PRUSSIA and AT KING OF PRUSSIA, respectively.

Doing so, they would not be confused into believing that Applicant's Mark and the cited marks originate from the same source.

As to (3), the fact that Applicant's building is annexed to the King of Prussia Mall, in King of Prussia, PA, does not support that consumers will be confused as to source in light of Applicant's use of THE PAVILION AT KING OF PRUSSIA. First, the Examining Attorney's evidence does not provide any indication as to whether consumers of Applicant's and Registrant's respective services would be confused into believing that such services originate from the same source.

Second, it is plain from the Wikipedia articles submitted as evidence that the public separately identifies THE PAVILION AT KING OF PRUSSIA from THE COURT KING OF PRUSSIA and THE PLAZA KING OF PRUSSIA. Indeed, the submitted Wikipedia article provides that "The Pavilion at King of Prussia . . . might be considered the 'third mall' at King of Prussia." *See* Exhibit A to April 9, 2015 Response to Office Action. Thus, it is acknowledged as being separate and distinct from THE COURT KING OF PRUSSIA and THE PLAZA KING OF PRUSSIA.

Moreover, Applicant's building is a part of the King of Prussia Mall complex. *See id.* (noting that the mall's third anchor was "redeveloped as the shopping complex's newest section, the Pavilion at King of Prussia"). Thus, even if "consumers view the term King of Prussia as having strong source identifying significance with respect to shopping malls and related services given the fame of the shopping complex in that city," Office Action dated April 24, 2015, it does not follow that consumers view KING OF PRUSSIA as having strong source identifying significance with respect to a single source, namely, Registrant.

To the contrary, consumers and the general public are aware of the different sections of the King of Prussia Mall complex and are aware that that portion leased under the term THE

PAVILION AT KING OF PRUSSIA is owned by Applicant, whereas the remaining portion of the mall complex is leased by Registrant, as the website screenshot attached as Exhibit C to Applicant's April 9, 2015 Response to Office Action makes plain (noting "Kravco Simon manages the mall, which is owned by a private partnership called King of Prussia Associates. Another private partnership, PS Court Associates, owns the Pavilion, which houses Borders Books & Music, Urban Outfitters, and Cheesecake Factory"). The fact of the matter is, the building Applicant leases comprises part of the King of Prussia mall complex. Applicant must be able to use "AT KING OF PRUSSIA" to denote this fact. Tellingly, Registrant does not own a registration for KING OF PRUSSIA MALL or KING OF PRUSSIA MALL COMPLEX. Consumers and the general public are aware that the mall complex comprises different sections, which are owned by different entities. Thus, the Examining Attorney's evidence does not form a basis for upholding the 2(d) refusal as well.

Finally, with respect to (4), the fact that Applicant's and Registrant's services may be related is not dispositive as to whether there is a likelihood of confusion particularly where, as here, the cited marks are weak. Rather, this is but one factor in the likelihood of confusion analysis. Moreover, as noted above in Section I, *In re Hartz Hotel Services, Inc.* makes plain that weak marks such as Registrant's are limited to such a narrow scope of protection so as to permit "the use and/or registration of ... a composite mark comprising this [weak] term plus other matter, whether such matter be equally suggestive or even descriptive, for the same or similar goods." 2012 WL 1267900, at *6 (quoting *Standard Brands Inc. v. Peters*, 191 U.S.P.Q. 168, 172 (TTAB 1976)); *see also In re Altitude Development Corp.*, 2009 TTAB LEXIS 237, at *3, *6-7 (Trademark Trial & App. Bd. Mar. 6, 2009) (noting "Applicant's resort hotel services are legally identical to the registrant's hotel services" but finding no likelihood of confusion between SUMMIT AT BRIAN HEAD and BRIAN HEAD). Thus, this argument must fail too.

CONCLUSION

In view of the foregoing, Applicant respectfully requests that the Board reverse the Examining Attorney and withdraw the refusal to register.

Respectfully submitted,

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