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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86367112

MARK: SO FETCH!



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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: V Sky, LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

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EXAMINING ATTORNEY'S APPEAL BRIEF

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Applicant has appealed the examining attorney's FINAL refusal to register the proposed mark SO FETCH!
in standard character form, for "[d]resses; Jeans; Pants; Shorts; Sweaters; Tops" in International Class
25.

Registration was refused on the Principle Register pursuant to Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), on the grounds that applicant's mark, SO FETCH! in standard character form, is likely to be confused with the marks FETCH in standard character form and FETCH plus design, in U.S. Registration Nos. 4051134 and 4054327, respectively, both of which are owned by Fetchsport LLC. It is respectfully requested that these refusals be affirmed.

I. FACTS

On August 14, 2014, applicant sought registration on the Principal Register for the mark SO FETCH! in standard character form, for "[d]resses; Jeans; Pants; Shorts; Sweaters; Tops" in International Class 25.

In an Office action dated October 20, 2014, the examining attorney refused registration under Section 2(d), 15 U.S.C. Section 1052(d), citing Reg. No. 4051134, FETCH, in standard character form. The examining attorney also cited Reg. No. 4054327, FETCH and design, consisting of two tennis rackets with the handles crossed and an emblem in the center containing a dog holding a tennis ball in its mouth with the word FETCH in outlined letters below with an olive branch on either side of the word. Both registrations are for "[c]lothing not for pet or animal use, namely, T-shirts, baseball caps, gym shorts, headgear, namely, hats, shorts, tracksuits, dresses, knit shirts, pique shirts, shirts, shortsleeved or long-sleeved t-shirts, skirts and dresses, and polo shirts" in International Class 25.

In correspondence dated February 4, 2015, applicant responded to the Office action by submitting arguments against the Likelihood of Confusion Refusal.

The examining attorney issued a Final Office action on February 24, 2015, maintaining the refusal under Section 2(d) of the Trademark Act. On August 28, 2015, applicant submitted a Notice of Appeal with the Trademark Trial and Appeal Board. On December 20, 2015, applicant submitted an Appeal Brief, which was forwarded to the Examining Attorney on January 19, 2016.

II. ISSUE

The sole issue before the Board on appeal is the refusal under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), between applicant's mark, SO FETCH! in standard character form, for "[d]resses; Jeans; Pants; Shorts; Sweaters; Tops" in International Class 25 and registrant's marks, FETCH, in standard character form, and FETCH and design, both for "[c]lothing not for pet or animal use, namely, T-shirts, baseball caps, gym shorts, headgear, namely, hats, shorts, tracksuits, dresses, knit shirts, pique shirts, shirts, shortsleeved or long-sleeved t-shirts, skirts and dresses, and polo shirts" in International Class 25.

III. ARGUMENT

THE MARKS OF THE PARTIES ARE CONFUSINGLY SIMILAR AND THE GOODS OF THE PARTIES ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

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, 1361, 177 USPQ 563, 567 (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.*

The overriding concern is not only to prevent buyer confusion as to the source of the goods, but to protect 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 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).

A. THE MARKS ARE CONFUSINGLY SIMILAR

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 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

The respective marks, SO FETCH!, FETCH and FETCH plus design are similar in that the dominant feature of all of the marks is the term FETCH. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*,

671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. See *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

Furthermore, the addition of the word SO and an ! to applicant's mark does not obviate this refusal. Adding a term to a registered mark generally 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 *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); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1269 (TTAB 2009) (finding TITAN and VANTAGE TITAN confusingly similar); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO and MACHO COMBOS confusingly similar); TMEP §1207.01(b)(iii). In the present case, the marks are identical in part, and the additional elements in applicant's mark only enhance the notion that the mark is "very" fetch.

Finally, the addition of the design elements in registrant's FETCH plus design mark, Reg. No. 4054327, does not obviate this refusal, as the dominant portion of the mark remains the phrase FETCH. For a composite mark containing both words and a design, the word portion may be more likely to be impressed upon a purchaser's memory and to be used when requesting the goods and/or services. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013) (citing *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)); TMEP §1207.01(c)(ii); see *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F.2d

1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)). Thus, although such marks must be compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 671 F.3d at 1366, 101 USPQ2d at 1911 (Fed. Cir. 2012) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)).

Accordingly, the marks create the same commercial impression. 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 In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (holding CITY WOMAN for ladies' blouses likely to be confused with CITY GIRL for a variety of female clothing); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 260-61 (TTAB 1979) (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (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, 109 (TTAB 1973) (holding UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services); TMEP §1207.01(b).

Applicant sets forth three arguments with respect to the similarity of the marks: 1) the word FETCH is part of a crowded field, and is thus entitled to a narrower scope of protection, 2) a third-party registration, filed prior to registrant's marks, entitles applicant to registration in this case for the

purposes of consistency, and 3) applicant's mark gives a different commercial impression than do registrant's.

Applicant's first argument, that the word FETCH is part of a crowded field, and is thus entitled to a narrower scope of protection, is unpersuasive. First, applicant has submitted printed or electronic copies of four third-party registrations for marks containing the wording FETCH 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. These registrations appear to be for goods similar to those identified in applicant's application; however, each registration consists of additional defining elements and the term FETCH is part of a broader phrase, all of which differentiate them from the marks in the present case.

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. *See Nat'l Cable Tel. 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). Evidence of widespread third-party use of similar marks with similar goods "is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection" in that industry or field. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); *see In re Coors Brewing Co.*, 343 F.3d 1340, 1345, 68 USPQ2d 1059, 1062-63 (Fed. Cir. 2003).

However, evidence comprising only a small number of third-party registrations for similar marks with similar goods, as in the present case, is generally entitled to little weight in determining the strength of a mark. See *AMF Inc. v. Am. Leisure Products, Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982). These few registrations are “not evidence of what happens in the market place or that customers are familiar with them.” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d at 1406, 177 USPQ at 269; see *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ at 992. Thus, the few similar third-party registrations submitted by applicant are insufficient to establish that the wording FETCH is weak or diluted, especially where, as here, the third-party registrations contain unique elements that differentiate them from registrant’s marks such that they do not share the commonality of the dominant phrase FETCH, as do applicant’s and registrant’s marks in this case.

Applicant’s second argument, that consistency by the Office requires registration of applicant’s mark in the current case, is also unpersuasive. First, the referenced application has not been made part of the official record. In order to make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO’s automated systems, prior to appeal. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006); *In re Ruffin Gaming*, 66 USPQ2d, 1924, 1925 n.3 (TTAB 2002); TBMP §1208.02; TMEP §710.03. Even assuming arguendo that applicant had properly included the referenced prior registration, its inclusion would not affect the persuasiveness of applicant’s second argument, as prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. TMEP §1207.01(d)(vi); see *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). Each case is decided on its own facts, and each mark stands on

its own merits. See *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009). In this case, the examining attorney maintains that the similarity between applicant's and registrant's marks and goods necessitate a finding of a likelihood of confusion.

Finally, applicant's contention that its mark "as a whole gives an unusual commercial impression", is unpersuasive. As discussed above, the marks convey the same overall commercial impression, which is dominated by the term FETCH. As this term is the same in both applicant's and registrant's marks, the overall commercial impression of the marks remain the same, regardless of the presence of additional elements in applicant's and registrant's mark. 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 such that confusion as to the source of the goods 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). Thus, when the marks are compared in their entireties, applicant's mark and registrant's mark are not, as applicant contends, "sufficiently distinct" such that a likelihood of confusion is obviated.

As a result, the marks are sufficiently similar to warrant a refusal.

In addition to the similarity of the marks themselves, the goods of applicant and registrant are also similar.

B. THE GOODS ARE RELATED

Applicant's "[d]resses; shorts" in International Class 25 are identical to registrant's "dresses, shorts" International Class 25. In addition, registrant's "tracksuits, shirts" International Class 25 are worded broadly enough to include applicant's "pants; tops" International Class 25. Finally, where not identical or inclusive, applicant's goods, namely, "jeans; sweaters" International Class 25, are closely related to registrant's clothing items, as clothing items are often produced by the same manufacturer and marketed under the same trademark.

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 respective goods 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)); *Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1597 (TTAB 2011); TMEP §1207.01(a)(i).

Furthermore, neither the application nor the registration(s) contains any limitations regarding trade channels for the goods and therefore it is assumed that registrant’s and applicant’s goods are sold everywhere that is normal for such items, i.e., clothing and department stores. Thus, it can also be assumed that the same classes of purchasers shop for these items and that consumers are accustomed to seeing them sold under the same or similar marks. See *Kangol Ltd. v. KangaROOS U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); *In re Smith & Mehaffey*, 31 USPQ2d 1531 (TTAB 1994); TMEP §1207.01(a)(iii).

Finally, decisions regarding likelihood of confusion in the clothing field have found many different types of apparel to be related goods. *Cambridge Rubber Co. v. Cluett, Peabody & Co.*, 286 F.2d 623, 624, 128 USPQ 549, 550 (C.C.P.A. 1961) (women’s boots related to men’s and boys’ underwear); *Jockey Int’l, Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233, 1236 (TTAB 1992) (underwear related to neckties); *In re*

Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991) (women's pants, blouses, shorts and jackets related to women's shoes); *In re Pix of Am., Inc.*, 225 USPQ 691, 691-92 (TTAB 1985) (women's shoes related to outer shirts); *In re Mercedes Slacks, Ltd.*, 213 USPQ 397, 398-99 (TTAB 1982) (hosiery related to trousers); *In re Cook United, Inc.*, 185 USPQ 444, 445 (TTAB 1975) (men's suits, coats, and trousers related to ladies' pantyhose and hosiery); *Esquire Sportswear Mfg. Co. v. Genesco Inc.*, 141 USPQ 400, 404 (TTAB 1964) (brassieres and girdles related to slacks for men and young men).

The record includes evidence from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods and/or services as those of both applicant and registrant in this case. See First Office action, pp.7-19 (October 20, 2014). This evidence shows that the goods and/or services listed therein, namely "[d]resses; Jeans; Pants; Shorts; Sweaters; Tops" and "[c]lothing not for pet or animal use, namely, T-shirts, baseball caps, gym shorts, headgear, namely, hats, shorts, tracksuits, dresses, knit shirts, pique shirts, shirts, shortsleeved or long-sleeved t-shirts, skirts and dresses, and polo shirts", are of a kind that may emanate from a single source under a single mark. See *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii). For example, U.S. Registration No. 4617233 identifies "shirts, jackets, skirts, sweaters", U.S. Registration No. 4617461 identifies "denims, hooded sweatshirts, pants, shirts, sweatshirts", and 4617558 identifies "tops, bottoms, tee shirts, shirts, shorts, pants, hats, sweaters, skirts".

In addition, the Internet evidence of record establishes that the goods are closely related to each other, as clothing items are often produced by the same manufacturer and marketed under the same

trademark. Therefore, applicant's and registrant's goods 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 evidence is as follows:

Evidence attached to the First Office action, dated October 20, 2014

- Evidence from Jcrew.com website demonstrating that "sweaters", "pants", "tops/shirts", and "dresses" are commonly sold together by the same manufacturer and marketed under the same trademark, at pages 20 - 58.
- Evidence from Nordstrom.com website demonstrating that "t-shirts", "sweaters", "pants" and "shorts" are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use, at pages 59 – 98.

Evidence attached to the Final Office action, dated February 24, 2015

- Evidence from toryburch.com demonstrating that "dresses", "skirts", "tops", "sweaters", "pants and shorts" are commonly sold together by the same manufacturer and marketed under the same trademark, at page 2.
- Evidence from Gap.com demonstrating that "tees", "tops", "sweaters", "pants", "shorts" are commonly sold together by the same manufacturer and marketed under the same trademark, at pages 24 - 26

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.

Taken together, this evidence illustrates that, upon seeing SO FETCH! in standard character form, for "[d]resses; Jeans; Pants; Shorts; Sweaters; Tops" in International Class 25, FETCH in standard character form, and FETCH and design, both for "[c]lothing not for pet or animal use, namely, T-shirts, baseball caps, gym shorts, headgear, namely, hats, shorts, tracksuits, dresses, knit shirts, pique shirts, shirts, shortsleeved or long-sleeved t-shirts, skirts and dresses, and polo shirts" in International Class 25, consumers are likely to be confused and mistakenly believe that the respective goods emanate from a common source.

Applicant sets forth no arguments with respect to the similarity of applicant's and registrant's goods. Therefore, for the reasons stated above, the examining attorney asks that the goods be found to be sufficiently similar such that a likelihood of confusion exists between applicant's mark and registrant's marks.

I. CONCLUSION

The marks are similar and the goods are, where not identical or inclusive, closely related. Consumers encountering applicant's and registrant's marks in the same marketplace are likely to mistakenly believe that the goods derive from a common source. For the foregoing reasons, the refusal to register applicant's mark under Section 2(d) of the Trademark Act should be affirmed.

Respectfully submitted,

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