

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 17, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Brian Aquart*

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Serial No. 88245504

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Stephon Johnson of Law Offices of Stephon Johnson, PLLC,  
for Brian Aquart.

Luke Cash Browning, Trademark Examining Attorney, Law Office 127,  
Mark Pilaro, Managing Attorney.

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Before Wolfson, Heasley, and Lynch,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

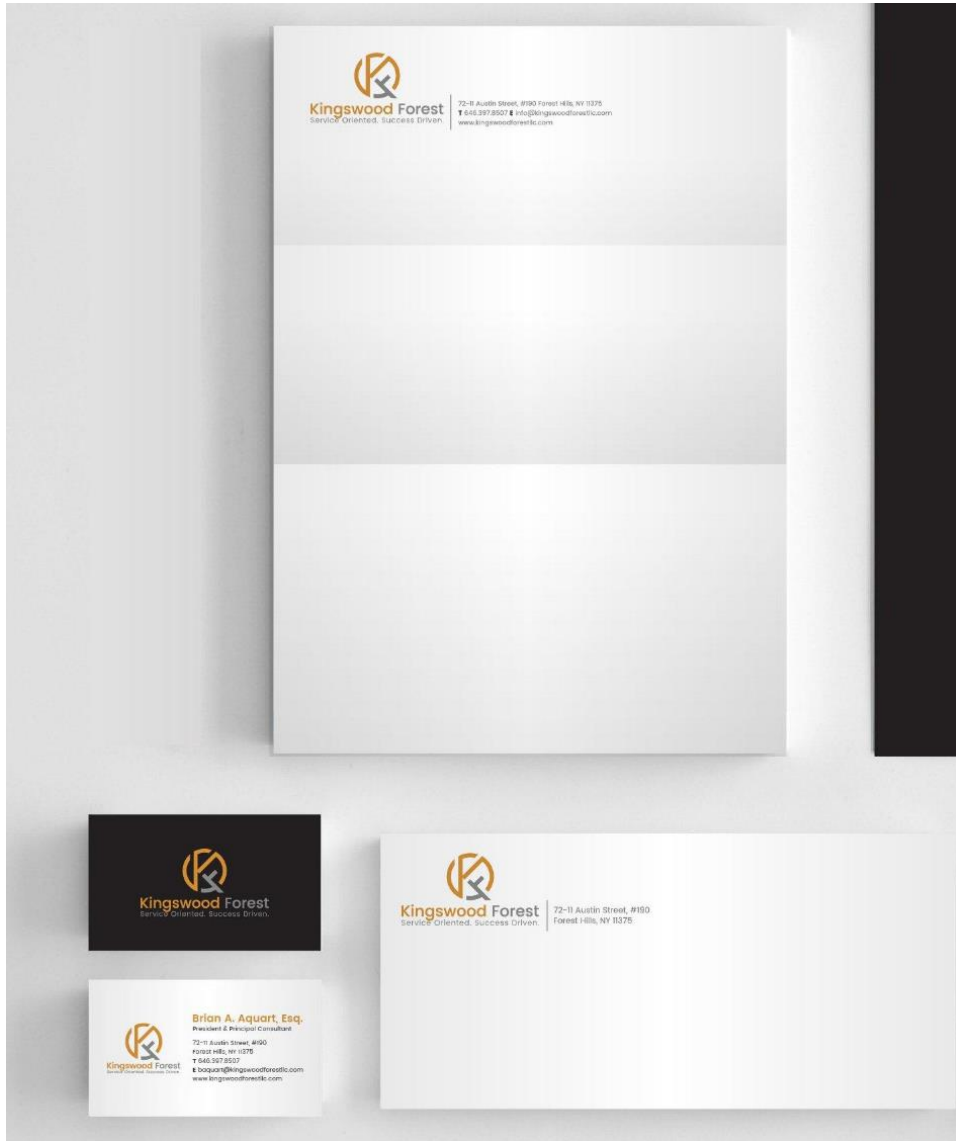
**I. Background**

Brian Aquart (“Applicant”) seeks registration on the Principal Register of the

mark  for “teaching and training in business, industry and information

Serial No. 88245504

technology” in International Class 41.<sup>1</sup> The colors orange and grey are claimed as a feature of the mark. Applicant included in the application the following specimen described as “stationery”:



<sup>1</sup> Application Serial No. 88245504 was filed December 30, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s alleged use of the mark in commerce since at least as early as May 6, 2018. The application includes the following description: “The mark consists of a circular design in orange and grey formed by a stylized letter ‘K’ and letter ‘F’, with the top arm of the letter ‘F’ forming the top arm of the letter ‘K’ and the stem of the letter ‘F’ forming the leg of the letter ‘K’. The color black in the drawing represents background and/or transparent areas and is not part of the mark.”

The Examining Attorney refused registration on two grounds. First, he refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the previously registered mark KF in standard characters for goods and services that include “educational services, namely, conducting classes, workshops, and conferences in the field of human resources and distributing course materials in connection therewith; executive coaching” in International Class 41. Second, he refused registration under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, on the ground that the specimen does not show use of the mark in connection with the services because it does not contain any reference to the services. After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration and appealed.

In addition to arguments against the Section 2(d) refusal, Applicant’s Request for Reconsideration also included a substitute specimen, entirely in black-and white.<sup>2</sup> A representative excerpt appears below:

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<sup>2</sup> August 5, 2020 Request for Reconsideration at 6-9.

8/5/2020

the grove – kingswoodforestllc

 Kingswood Forest(<https://www.kingswoodforestllc.com/>)

**(<https://www.kingswoodforestllc.com/welcome/>)**

JANUARY 25, 2019, BRIAN AQUART

([HTTPS://WWW.KINGSWOODFORESTLLC.COM/AUTHOR/BAQUART/](https://www.kingswoodforestllc.com/author/baquart/))

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The Examining Attorney denied the request for reconsideration, maintaining both grounds for refusal. He found Applicant’s arguments unpersuasive, and addressed the substitute specimen, stating, “the submitted specimen still fails to show the applied-for mark in use, as the specimen provided is a black and white image and applicant has claimed color in the mark, including the color orange, which is not shown in the specimen provided.”<sup>3</sup>

The appeal then proceeded, and has been briefed.<sup>4</sup> For the reasons set forth below, we affirm the refusal to register on both grounds.

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<sup>3</sup> August 24, 2020 Denial of Reconsideration at 1.

<sup>4</sup> Applicant’s Brief is single-spaced. “Text in an electronic submission [filed through ESTTA] must be filed in at least 11-point type and double-spaced.” Trademark Rule 2.126(a)(1), 37 C.F.R. § 2.126(a)(1); *see also In re Cordua Restaurants LP*, 110 USPQ2d 1227, 1229 n.2 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016). Here, although Applicant’s Brief does not comply, we exercise our discretion to accept it because it would fall within the applicable page limits had it been double-spaced. *See In re University of Miami*, 123 USPQ2d 1075, 1077 n.2 (TTAB 2017).

## II. Evidentiary Matter

We note that Applicant's Appeal Brief includes exhibits that Applicant characterizes as new "substitute specimens,"<sup>5</sup> to which the Examining Attorney objects.<sup>6</sup> *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008) (evidence attached to briefs will almost always be either untimely or duplicative, and in either event should not be filed). Trademark Rule 2.142(d) provides that "[t]he record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal." 37 C.F.R. § 2.142(d).<sup>7</sup> The Examining Attorney's objection to the exhibits is sustained because Applicant did not previously submit them during prosecution (including in the request for reconsideration). *See id.* While we therefore do not consider the newly proffered substitute specimens, we note that even had we considered them, they would be rejected because they are unverified.<sup>8</sup>

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<sup>5</sup> 6 TTABVUE 5-7 (Applicant's Brief). References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

<sup>6</sup> 8 TTABVUE 4 (Examining Attorney's Brief).

<sup>7</sup> The appropriate mechanism by which to seek to introduce additional materials into the record after an appeal is filed is a request to the Board to suspend the appeal and to remand the application for further examination. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.02 (2020).

<sup>8</sup> *See* Trademark Rule 2.59(a), 37 C.F.R. § 2.59(a) ("The applicant must submit a verified statement that the substitute specimen was in use in commerce at least as early as the filing date of the application."). Applicant's Brief erroneously states that the substitute specimens are "verified":

Applicant has submitted verified substitute specimens that were in actual use in commerce at least as early as the filing date of the application or prior to the filing of an amendment to allege use and that show the mark in actual use in commerce for the services identified in the application or amendment to allege, attached, along with the following declaration: "The originally submitted specimen was in use in commerce

### III. Specimens

Under Section 45, a service mark is used in commerce “when it is used or displayed in the sale or advertising of services.” 15 U.S.C. § 1127. *See also* Trademark Rule 2.56(b)(2), 37 C.F.R. § 2.56(b)(2) (“A service mark specimen must show the mark as used in the sale of the services, including use in the performance or rendering of the services, or in the advertising of the services. The specimen must show a direct association between the mark and the services.”). Thus, service mark “use may be established by: (1) showing the mark used or displayed as a service mark in the sale of the services, which includes use in the course of rendering or performing the services, or (2) showing the mark used or displayed as a service mark in advertising the services, which encompasses marketing and promotional materials.” *In re WAY Media, Inc.*, 118 USPQ2d 1697, 1698 (TTAB 2016).

Applicant offered specimens of the second type – advertising. “For specimens showing the mark in advertising the services, [i]n order to create the required ‘direct association,’ the specimen must not only contain a reference to the service, but also the mark must be used on the specimen to identify the service and its source.” *Id.* (quoting *In re Osmotica Holdings Corp.*, 95 USPQ2d 1666, 1668 (TTAB 2010)).

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at least as early as the filing date of the application or prior to the filing of the amendment to allege use.” See C.F.R. §2.20 [sic].

Applicant’s Brief, 6 TTABVUE 5.

Although the applicable rule for “Declarations in lieu of oaths” is cited, Applicant failed to comply with the rule by offering either “the language of 28 U.S.C. 1746” or the declaration language set out in the rule. *See* 37 C.F.R. § 2.20. Rather, Applicant’s Brief, signed by his attorney, merely makes a bald statement about the date of use of the substitute specimen without any accompanying verification.

### **A. Original Specimen**

Applicant's first specimen, his stationery and business cards, clearly falls short. The specimen contains no wording that refers or even alludes to the nature of Applicant's services. Along with the mark, the stationery and business cards include only the wording "Kingswood Forest. Service Oriented. Success Driven.", along with some contact information. "A specimen that shows only the mark with no reference to, or association with, the services does not show service mark usage." *In re DSM Pharms., Inc.*, 87 USPQ2d 1623, 1624 (TTAB 2008). Thus, we agree with the Examining Attorney that both the stationery and business cards comprising Applicant's original specimen are unacceptable.

### **B. Substitute Specimen**

Turning to Applicant's substitute specimen shown above, although Applicant has claimed color as a feature of the mark, the substitute specimen does not show the mark in the claimed orange and grey colors. When color is claimed as a feature of the mark, the specimen and the drawing of the mark must match, and the specimen must show use of the color. 37 C.F.R. § 2.51(a) ("the drawing of the mark must be a substantially exact representation of the mark as used on or in connection with the goods and/or services"); 37 C.F.R. § 2.56(a) (specimen required "showing the mark as actually used in commerce"); *see* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 904.02(c)(ii) (Oct. 2018) ("If color is a feature of the mark ..., the specimen must show use of the color"). Accordingly, we agree with the Examining Attorney that Applicant's substitute specimen is unacceptable.

### **C. Conclusion as to Specimen Refusal**

Given the absence of an acceptable specimen showing use of Applicant's mark in connection with the applied-for services, we affirm the refusal to register under Sections 1 and 45 of the Trademark Act.

### **IV. Likelihood of Confusion**

For completeness, we also address the likelihood of confusion refusal. Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also Stratus Networks, Inc. v. UBTA-UBET Commc'ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*\*3 (Fed. Cir. 2020) (“Not all *DuPont* factors are relevant in each case . . .”). Two key considerations are the similarities between the marks and the relatedness of the services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the [services] and differences in the marks.”).



### A. The Relatedness of the Services

Applicant recites as his services “teaching and training in business, industry and information technology,” while the cited registration identifies “educational services, namely, conducting classes, workshops, and conferences in the field of human resources and distributing course materials in connection therewith; executive coaching.” In analyzing the relatedness of the services under the second *DuPont* factor, we look to the identifications in the application and cited registration. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any one of the identified services within that class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Because the subject application broadly identifies, inter alia, teaching and training in business and industry, this encompasses all services of the type identified, including Registrant’s more narrowly described “executive coaching” services. *See In re Country Oven*, 2019 USPQ2d 443903, \*4 (TTAB 2019); *Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). For example, the record includes evidence describing executive coaching as “part of the standard leadership development training for elite executives....”<sup>9</sup> Another website notes that “executive

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<sup>9</sup> April 1, 2019 Office Action at 6.

coaching training programs offered by top business schools can leverage better performance from individuals and teams....”<sup>10</sup> The Stanford Graduate School of Business describes one purpose of executive coaching as working with “[m]anagers who are valuable to the company but have key performance issues to address.”<sup>11</sup>

Similarly, the evidence shows that Registrant’s human resources classes and workshops are a type of training in business and industry, for example as indicated on the BusinessTrainingWorks.com website, offering human resources training, which is further described as targeted to business managers on subjects such as “how to Interview and Hire Well,” how to create effective employee orientation programs, and “Understanding and Avoiding Sexual Harassment in the Workplace.”<sup>12</sup>

Thus, Applicant’s teaching and training in business and industry includes classes and workshops in the field of human resources, as well as executive coaching, as set out in the cited registration. While Applicant seeks to distinguish the services based on alleged actual differences in the marketplace, “[t]he authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of [services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s [services], the particular channels of trade or the class of purchasers to which sales of the [services] are directed.” *Octocom Syst.*, 16 USPQ2d at 1787. Thus, because Applicant chose a

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<sup>10</sup> *Id.* at 17.

<sup>11</sup> February 6, 2020 Office Action at 10.

<sup>12</sup> *Id.* at 3-4.

broader identification that includes “teaching and training in business, industry and information technology” of all kinds, we cannot consider Applicant’s narrower characterization of his own services. Nor, for the same reason, can we consider his narrower characterization of the Registrant’s services.

The services therefore are legally identical in part. The second *DuPont* factor weighs in favor of likely confusion.

### **B. The Trade Channels and Classes of Consumers**

Because the services in the cited registration overlap with Applicant’s, and there are no restrictions or limitations to the channels of trade in the respective identifications, we presume that the services travel through at least some of the same channels of trade to the same classes of purchasers. *See Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, “the marketing channels of trade and targeted classes of consumers and donors are the same”); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). Thus, the third *DuPont* factor weighs in favor of likely confusion.


### **C. Similarity of the Marks**

We now compare the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements

may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Where the services are legally identical, as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is lessened. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Coach Servs.*, 101 USPQ2d at 1721); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)).



We compare Applicant’s mark, , to the cited mark, KF in standard characters, bearing in mind that the standard-character mark could appear in any font style or color, and therefore could appear in the same colors used in Applicant’s mark. *See Viterra*, 101 USPQ2d at 1909; *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (registrant “entitled to depictions of the standard character mark regardless of font style, size, or color”). The circular design in Applicant’s mark merely encircles the letters, forming a relatively

insignificant background element. We find this “circular carrier for [the] mark” to be merely an “ordinary geometric shape that serves as a background for the [stylized letter] mark” that “is not sufficiently distinctive to change the commercial impression conveyed by the mark.” *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1742 (TTAB 2016) (citing *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1267 (TTAB 2011) (“And certainly the oval designs in the marks are merely background . . . and do not make a strong commercial impression.”)).

We see no reason here to deviate from the general rule that “[i]n the case of a composite mark containing both words and a design, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.” *Viterra*, 101 USPQ2d at 1908 (quoting *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *see also In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (“In the case of marks, such as Applicant’s, consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods.”). We find the marks similar in appearance and identical in sound because the only literal element of Applicant’s mark is identical to the cited mark.

We are not persuaded by Applicant’s argument that the stylization of his mark distinguishes it from the cited mark. As noted in *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983), “the argument concerning a difference in

type style is not viable where one party asserts rights in no particular display.” We do not agree with Applicant that his mark, which Applicant himself described as a “circular design in orange and grey formed by a stylized letter ‘K’ and letter ‘F,’” is barely recognizable as lettering. Rather, “[t]he stylization of the letter[s] is not so extreme or striking that when viewing the marks in their entirety, the stylization overwhelms the underlying letter[s] making [them] virtually unrecognizable or subordinate to the overall design.” *Nike, Inc. v. WNBA Ent., LLC*, 85 USPQ2d 1187, 1199 (TTAB 2007). Additionally, as shown on the specimens, and as Applicant states in his Brief, Applicant’s mark is “a stylized version of the first letters ‘K’ and ‘F’ of two words always used together, representing ‘Kingswood’ and ‘Forest’...,”<sup>13</sup> such that the letters would be even more recognizable to consumers. *See Am. Rice, Inc. v. H.I.T. Corp.*, 231 USPQ 793, 796 (TTAB 1986) (“[W]e may take into account whether the trade dress of packages or labels in the application file as specimens, or otherwise in evidence, may demonstrate that the trademark projects a confusingly similar commercial impression.”); *Northwestern Golf Co. v. Acushnet Co.*, 226 USPQ 240, 244 (TTAB 1985) (“Evidence of the context in which a particular mark is used on labels, packaging, etc., or in advertising is probative of the significance which the mark is likely to project to purchasers.”); *see also Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984).

As to the marks’ connotations and commercial impressions, we also find them similar. Consumers would attribute the same meaning to, and derive the same

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<sup>13</sup> 6 TTABVUE 4.

impression from, the shared lettering KF in Applicant's marks as they would in the cited mark.

Given their overall resemblance in appearance, sound, connotation and commercial impression, we find Applicant's mark and the cited mark similar.

**D. Conclusion as to Likelihood of Confusion Refusal**

The similarity of the marks for legally identical services that are presumed to move in the same channels of trade to the same classes of customers renders confusion likely. 15 U.S.C. § 1052(d).

**Decision:** The refusal to register Applicant's mark is affirmed on both grounds.