

ESTTA Tracking number: **ESTTA404457**

Filing date: **04/19/2011**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Miller International, Inc.		
Entity	Corporation	Citizenship	Colorado
Address	8500 Zuni Street Denver, CO 80260 UNITED STATES		

Attorney information	John P. Schmitz Mills Schmitz & Zaloudek, LLC 1019 8th Street Golden, CO 80401 UNITED STATES jschmitz@mszlawfirm.com Phone:303-384-3922		
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Applicant Information

Application No	85158824	Publication date	03/22/2011
Opposition Filing Date	04/19/2011	Opposition Period Ends	04/21/2011
Applicant	Cinch 2 Win LLC 3 Nottingham Road Livingston, NJ 07039 UNITED STATES		

Goods/Services Affected by Opposition

Class 018. All goods and services in the class are opposed, namely: Sack packs, namely, drawstring bags used as backpacks
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Grounds for Opposition

Deceptiveness	Trademark Act section 2(a)
False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is deceptively misdescriptive	Trademark Act section 2(e)(1)

Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2103956	Application Date	08/29/1995
Registration Date	10/07/1997	Foreign Priority Date	NONE
Word Mark	CINCH		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 025. First use: First Use: 1996/06/18 First Use In Commerce: 1996/06/18 clothing, namely, men's jeans, shirts, T-shirts, jackets, coats, HATS AND CAPS

U.S. Registration No.	3331971	Application Date	01/30/2006
Registration Date	11/06/2007	Foreign Priority Date	NONE

Word Mark	CINCH
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 003. First use: First Use: 2006/07/25 First Use In Commerce: 2006/07/25 Fragrances for personal use
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U.S. Registration No.	3279259	Application Date	01/24/2007
Registration Date	08/14/2007	Foreign Priority Date	NONE

Word Mark	CINCH
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Design Mark	
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Description of Mark	The mark consists of a design of a cowboy on a horse with the mark CINCH printed underneath.
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Goods/Services	Class 025. First use: First Use: 2006/06/22 First Use In Commerce: 2006/06/22 Caps; Coats; Hats; Jackets; Jeans; Pants; Shirts; Shorts; T-shirts
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U.S. Registration No.	2691182	Application Date	06/04/2002
Registration Date	02/25/2003	Foreign Priority	NONE

		Date	
Word Mark	CINCH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 025. First use: First Use: 1996/06/18 First Use In Commerce: 1996/06/18 Clothing, namely, jeans, pants, shorts, t-shirts, shirts, jackets and caps		

U.S. Registration No.	3923400	Application Date	04/12/2007
Registration Date	02/22/2011	Foreign Priority Date	NONE
Word Mark	CINCH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 018. First use: First Use: 2010/10/26 First Use In Commerce: 2010/10/26 Wallets		

U.S. Application No.	77325565	Application Date	11/09/2007
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	CINCH		

Design Mark			
Description of Mark	The mark consists of a design of a cowboy on a horse with the mark "CINCH" printed underneath.		
Goods/Services	Class 025. First use: Western belts		

U.S. Registration No.	3254325	Application Date	06/06/2006
Registration Date	06/19/2007	Foreign Priority Date	NONE
Word Mark	CINCH CLASSIC		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: First Use: 2006/07/25 First Use In Commerce: 2006/07/25 Fragrances for personal use		

U.S. Registration No.	3431885	Application Date	10/18/2006
Registration Date	05/20/2008	Foreign Priority Date	NONE
Word Mark	CINCH TOWN		

Design Mark	<h1>CINCH TOWN</h1>		
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2001/07/00 First Use In Commerce: 2001/07/00 Retail stores and retail outlet booths featuring clothing, belts, headwear, footwear, outerwear, fragrances and knives		

U.S. Registration No.	3327338	Application Date	02/16/2006
Registration Date	10/30/2007	Foreign Priority Date	NONE
Word Mark	ULTIMATE CINCH EXPERIENCE		
Design Mark	<h1>ULTIMATE CINCH EXPERIENCE</h1>		
Description of Mark	NONE		
Goods/Services	Class 041. First use: First Use: 2006/03/00 First Use In Commerce: 2006/03/00 Arranging of contests		

U.S. Application No.	77940102	Application Date	02/19/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	IT'S A CINCH		

Design Mark	<h1>It's A Cinch</h1>
Description of Mark	NONE
Goods/Services	Class 025. First use: shirts; hats; jackets; t-shirts; sweatshirts, caos, jeans Class 035. First use: Advertising services

U.S. Registration No.	3601176	Application Date	02/13/2008
Registration Date	04/07/2009	Foreign Priority Date	NONE

Word Mark	CINCH BRONZE LABEL / SLIM FIT HIGH QUALITY DENIM JEANS CINCH CINCHJEANS.COM FITTED HIP, THIGH & KNEE ORIGINAL RISE WITH A FITTED WAIST SLIGHTLY TAPERED LEG
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Design Mark	
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Description of Mark	The mark consists of a rectangular design with a bronze border containing the wording CINCH, written in black and white, BRONZE LABEL / SLIM FIT, written in bronze, FITTED HIP, THIGH & KNEE; ORIGINAL RISE WITH A FITTED WAIST; SLIGHTLY TAPERED LEG; HIGH QUALITY DENIM JEANS and CINCHJEANS.COM written in black, and a design of a cowboy on a horse within a red circle with leaves on either side and the wording "CINCH" printed below in a white ribbon.
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Goods/Services	Class 025. First use: First Use: 2004/12/30 First Use In Commerce: 2004/12/30 Western jeans
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U.S. Registration No.	3601178	Application Date	02/13/2008
Registration Date	04/07/2009	Foreign Priority Date	NONE

Word Mark	CINCH GREEN LABEL / ORIGINAL FIT HIGH QUALITY DENIM JEANS CINCH CINCHJEANS.COM FITTED WAIST & HIP, ORIGINAL RISE RELAXED THIGH
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	AND KNEE SLIGHTLY TAPERED LEG		
Design Mark			
Description of Mark	The mark consists of a rectangular design with a green border containing the wording CINCH, written in black and white, GREEN LABEL / ORIGINAL FIT, written in green, FITTED WAIST & HIP, ORIGINAL RISE; RELAXED THIGH AND KNEE; SLIGHTLY TAPERED LEG; HIGH QUALITY DENIM JEANS and CINCHJEANS.COM written in black, and a design of a cowboy on a horse within a red circle with leaves on either side and the wording "CINCH" printed below in a white ribbon.		
Goods/Services	Class 025. First use: First Use: 2004/12/30 First Use In Commerce: 2004/12/30 Western jeans		

U.S. Registration No.	3601177	Application Date	02/13/2008
Registration Date	04/07/2009	Foreign Priority Date	NONE
Word Mark	CINCH WHITE LABEL / RELAXED FIT HIGH QUALITY DENIM JEANS CINCH CINCHJEANS.COM RELAXED HIP, THIGH & KNEE MID RISE WITH A RELAXED WAIST STRAIGHT LEG		
Design Mark			
Description of Mark	The mark consists of a rectangular design with a white border containing the wording CINCH, written in black and white, WHITE LABEL / RELAXED FIT, written in white, RELAXED HIP, THIGH & KNEE; MID RISE WITH A RELAXED WAIST; STRAIGHT LEG; HIGH QUALITY DENIM JEANS and CINCHJEANS.COM written in black, and a design of a cowboy on a horse within a red circle with leaves on either side and the wording "CINCH" printed below in a white ribbon.		
Goods/Services	Class 025. First use: First Use: 2004/12/30 First Use In Commerce: 2004/12/30 Western jeans		

U.S. Registration No.	3883278	Application Date	02/13/2008
Registration Date	11/30/2010	Foreign Priority	NONE

		Date	
Word Mark	CINCH RED LABEL/SPECIAL EDITION LOOSE HIP, THIGH & KNEE ORIGINAL RISE WITH A FITTED WAIST SLIGHTLY TAPERED LEG HIGH QUALITY DENIM JEANS CINCH CINCHJEANS.COM		
Design Mark			
Description of Mark	<p>The mark consists of a red rectangle containing the words "CINCH RED LABEL / SPECIAL EDITION Â· LOOSE HIP, THIGH & KNEE Â· ORIGINAL RISE WITH A FITTED WAIST Â· SLIGHTLY TAPERED LEG HIGH QUALITY DENIM JEANS CINCHJEANS.COM" and a design of bucking horse and rider enclosed by an oval and two laurel leaves bearing a label with the word "CINCH" thereon. The words "RED LABEL / SPECIAL EDITION" appear in red. The word "CINCH" is blue. All other wording in the mark appears in black. The laurel leaves are gold with black outline. The label is black. White appears in the background of all elements. AMENDED COLOR CLAIM REQUIRED: The color(s) red, black, gold, blue, and white are claimed as a feature of the mark.</p>		
Goods/Services	Class 025. First use: First Use: 2008/09/29 First Use In Commerce: 2008/09/29 Western jeans		

U.S. Registration No.	3729109	Application Date	02/12/2008
Registration Date	12/22/2009	Foreign Priority Date	NONE
Word Mark	CINCH BRONZE LABEL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 025. First use: First Use: 2009/01/09 First Use In Commerce: 2009/01/09 Western jeans		

U.S. Registration No.	3729107	Application Date	02/12/2008
Registration Date	12/22/2009	Foreign Priority Date	NONE

Word Mark	CINCH GREEN LABEL
Design Mark	CINCH GREEN LABEL
Description of Mark	NONE
Goods/Services	Class 025. First use: First Use: 2009/01/09 First Use In Commerce: 2009/01/09 Western jeans

U.S. Registration No.	3729110	Application Date	02/12/2008
Registration Date	12/22/2009	Foreign Priority Date	NONE
Word Mark	CINCH RED LABEL		
Design Mark	CINCH RED LABEL		
Description of Mark	NONE		
Goods/Services	Class 025. First use: First Use: 2008/09/29 First Use In Commerce: 2008/09/29 Western jeans		

U.S. Registration No.	3729108	Application Date	02/12/2008
Registration Date	12/22/2009	Foreign Priority Date	NONE
Word Mark	CINCH WHITE LABEL		
Design Mark	CINCH WHITE LABEL		
Description of Mark	NONE		
Goods/Services	Class 025. First use: First Use: 2009/01/09 First Use In Commerce: 2009/01/09 Western jeans		

Attachments	78802138#TMSN.jpeg (1 page)(bytes) 77090449#TMSN.jpeg (1 page)(bytes) 78133026#TMSN.gif (1 page)(bytes) 77155565#TMSN.jpeg (1 page)(bytes) 77325565#TMSN.jpeg (1 page)(bytes) 78901476#TMSN.jpeg (1 page)(bytes) 77023955#TMSN.jpeg (1 page)(bytes) 78816181#TMSN.jpeg (1 page)(bytes) 77940102#TMSN.jpeg (1 page)(bytes) 77396207#TMSN.jpeg (1 page)(bytes) 77396214#TMSN.jpeg (1 page)(bytes) 77396212#TMSN.jpeg (1 page)(bytes) 77396208#TMSN.jpeg (1 page)(bytes) 77395253#TMSN.jpeg (1 page)(bytes) 77395247#TMSN.jpeg (1 page)(bytes) 77395255#TMSN.gif (1 page)(bytes) 77395251#TMSN.jpeg (1 page)(bytes) Opposition 85158824.pdf (11 pages)(57518 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/John P. Schmitz/
Name	John P. Schmitz
Date	04/19/2011

Notice of Opposition

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

Miller International, Inc.

vs.

Cinch 2 Win, LLC

United States Department of Commerce Patent and Trademark Office in the matter of
trademark serial number 85158824 published in the Official Gazette (Trademarks) on
March 22, 2011.

Miller International, Inc

vs.

Cinch 2 Win, LLC

Commissioner of Trademarks

P.O. Box 1451,

Alexandria, VA 22313-1451

Notice of Opposition

Miller International, Inc. (“Miller”) is the registered owner of the Mark, CINCH®,
Registration Numbers # 2103956, 3331971, 3279259, 2691182, 3923400 and Serial
Number 77325565; all are registered under the following respective International Classes
IC 25: “Clothing, namely, men’s jeans, shirts, T-shirts, jackets, coats, hats and caps”,
FIRST USE IN COMMERCE: 19960618; IC 3: ”Fragrances for personal use”, FIRST

USE IN COMMERCE: 20060725. IC 8: “Knives for hobby use: pocket knives, sport knives, whittling knives”, FIRST USE IN COMMERCE: 20060622. IC 25: “caps, coats, hats, jackets, jeans, pants, shirts, shorts, T-shirts”, FIRST USE IN COMMERCE: 20060622. IC 25: “clothing, namely, jeans, pants, shorts, t-shirts, shirts, jackets, caps”, FIRST USE IN COMMERCE: 19960618. IC 18: “wallets”, FIRST USE IN COMMERCE: 20101026. IC 25: “western belts”, FIRST USE IN COMMERCE: Pending.

Miller International, Inc. is the registered owner of the Word Marks, CINCH CLASSIC®, CINCH TOWN®, ULTIMATE CINCH EXPERIENCE® and IT’S A CINCH, Registration Numbers 3254325, 3431885 and 3327338 and Serial Number 77940102 all are registered under the following respective International Classes IC 3: “fragrances for personal use”, FIRST USE IN COMMERCE: 20060725; IC 35: “retail stores, retail outlet booths featuring clothing, belts, headwear, footwear, outerwear, fragrances, knives”, FIRST USE IN COMMERCE: 20010700; IC 41: “arranging of contests”, FIRST USE IN COMMERCE: 20060300 and IC 25 and 35: “clothing and advertising services.”

Miller International, Inc. is the registered owner of the Word Marks, CINCH BRONZE LABEL/SLIM FIT®, CINCH GREEN LABEL/ORIGINAL FIT®, CINCH WHITE LABEL/RELAXED FIT® and CINCH RED LABEL/ SPECIAL EDITION®, Registration Numbers 3601176, 3601178, 3601177, and 3883278 and all are registered under the following respective International Class IC 25: “western jeans”, all FIRST USE IN COMMERCE: 20041230 and 2008929 for CINCH RED LABEL/SPECIAL EDITION®.

Miller International, Inc. is the registered owner of the Word Marks, CINCH BRONZE LABEL®, CINCH GREEN LABEL®, CINCH RED LABEL®, and CINCH WHITE LABEL®, Registration Numbers # 3729109, 3729107, 3729110 and 3729108 and all are registered under International Class IC 25: “western jeans”, all FIRST USE IN COMMERCE: 20090109 and 20080929 for CINCH RED LABEL®.

The above identified Opposer believes that it will be damaged by registration of the mark shown in the above referenced application, and hereby opposes the same. The grounds for opposition are as follows:

1) Likelihood of Confusion §2(d) of the Act:

All CINCH marks (hereinafter referred to as (the “Marks”) have been registered under the International Class (“IC”) 25 (clothing), IC 8 ((knives), IC 18 (leather goods, etc.), IC 3 (fragrances), IC 35 (retail stores and booths), and IC 41 (arranging of contests) all amongst the same similar classes. Miller International Inc. (hereinafter referred to as “Miller”) has indeed produced clothing using the Marks prior to Cinch to Win, LLC (hereinafter referred to as “Applicant”) in use application. “It is well established that rights in and to a trademark are created by use of the mark in either intrastate or interstate commerce.” *Corporate Document Services Inc. v. I.C.E.D. Management Inc.*, 48 USPQ2d 1477 (TTAB 1998). Miller produced, promotional bags, clothing, and accessories with the Marks since June 18, 1996 – clearly providing superior rights to that of the Applicant as required by *Corporate Document Services Inc.* Miller has used the Marks bearing the CINCH mark on bags as promotional items since approximately 1996.

The accessories and clothing market industry is wide sweeping. For example, it is common to “seed” products, such as packs, and backpacks, and duffle bags to create brand recognition. The Opposer has spent millions of dollars in creating brand recognition through “seeding” the product thorough out the accessories and apparel markets using several different models of “sacks.” This “seeding” has made, and continues to make, the Marks extremely valuable and therefore the need to protect such Marks from confusingly similar Marks is paramount.

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

determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and confusion of source. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.*

Taking into account the relevant *du Pont* factors, a likelihood of confusion determination in this case involves a two-part analysis. The marks are compared for similarities in their appearance, sound, connotation and commercial impression. TMEP §§1207.01, 1207.01(b). The goods and/or services are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); TMEP §§1207.01, 1207.01(a)(vi).

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *see* TMEP §1207.01(b).

Taking into account the first factor in a likelihood of confusion analysis, the proposed mark CINCH 2 WIN for use in connection with “Sack packs, namely, drawstring bags used as backpacks” is identical to the registered mark CINCH for use in connection with all of the goods listed above and in connection with “sacks.”

The marks are compared in their entireties under a Trademark Act Section 2(d) analysis. *See* TMEP §1207.01(b). Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); *see* TMEP §1207.01(b)(viii), (c)(ii).

CINCH is the dominant feature as WIN must be disclaimed. Thus, the marks are identical in sound, appearance, meaning and commercial impression. As such, the marks convey the same overall commercial impression. If the marks of the respective parties are identical, the relationship between the goods of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *Amtcor, Inc. v. Amtcor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981); TMEP §1207.01(a). Therefore, the registration of CINCH 2 WIN should be denied.

In this case, the facts support a finding in favor of meeting the second factor in a likelihood of confusion analysis. The goods of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

In this case, the goods identified by the parties' marks are backpacks and sacks. Likelihood of confusion is determined on the basis of the goods and/or services as they

are identified in the application and registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267-68, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 1207 n.4, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); TMEP §1207.01(a)(iii). In this case, applicant's goods are identified broadly as sacks, namely backpacks. Therefore, it is presumed that the application encompasses all goods of the type described, including those in the registrant's more specific identification, that they move in all normal channels of trade, and that they are available to all potential customers. See TMEP §1207.01(a)(iii); see, e.g., *In re Americor Health Servs.*, 1 USPQ2d 1670, 1670-71 (TTAB 1986); *In re Equitable Bancorporation*, 229 USPQ 709, 710 (TTAB 1986).

In addition, even though Applicant's identification states "Sack packs, namely, drawstring bags used as backpacks," the decisions in the accessories and apparel field have held many different types of apparel to be related under Section 2(d). *Cambridge Rubber Co. v. Cluett, Peabody & Co., Inc.*, 286 F.2d 623, 128 USPQ 549 (C.C.P.A. 1961) ("WINTER CARNIVAL" for women's boots v. men's and boys' underwear); *Jockey Int'l, Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992) ("ELANCE" for underwear v. "ELAAN" for neckties); *In re Melville Corp.* 18 USPQ2d 1386 (TTAB 1991) ("ESSENTIALS" for women's pants, blouses, shorts and jackets v. women's shoes); *In re Pix of America, Inc.*, 225 USPQ 691 (TTAB 1985) ("NEWPORTS" for women's shoes v. "NEWPORT" for outer shirts); *In re Mercedes Slacks, Ltd.*, 213 USPQ 397 (TTAB 1982) ("OMEGA" for hosiery v. trousers); *In re Cook United, Inc.*, 185 USPQ 444 (TTAB 1975) ("GRANADA" for men's suits, coats, and trousers v. ladies' pantyhose and hosiery); *Esquire Sportswear Mfg. Co. v. Genesco Inc.*, 141 USPQ 400 (TTAB 1964) ("SLEEX" for brassieres and girdles v. slacks for men and young men).

As such, in this case, the parties' goods and services are closely related, and are identical. The parties' goods likely travel and are sold through the same channels of trade. The Opposer is actively involved in equestrian, collegiate football, and other sports. There are many teams that the Opposer sponsors. The winner of these sporting events are commonly call "CINCH WINNERS." The Opposer spends millions of dollars each year

in marketing and sponsoring of different teams across the United States. Even if Cinch 2 Win, LLC is producing product as promotional material for other companies, the name Cinch 2 Win will inevitably be seen by the consumer and will cause a likelihood of confusion.

In addition, the mark Cinch 2 Win will invariably destroy or at the minimum extremely diminish the value of and good will of the registered mark CINCH, as Cinch 2 Win may produce promotional products with the name Cinch 2 Win that are direct competitors or may for companies that CINCH is not and does not want to be affiliated with.

Therefore, a likelihood of confusion exists between the parties' marks because, when encountered in commerce, consumers are likely to mistakenly believe that the parties' goods come from a common source, or that applicant is somehow affiliated or associated to registrant.

In the eyes of the purchasing public, the trademarks will be confusingly similar since it can appear that the proposed mark identifies a new line of promotional items in registrant's already existing line of such products, already identified by the term CINCH. Neither the application nor the registration contain 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. 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 and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

A vast financial commitment and other resources have been expended developing the Marks as a valuable asset of the company. Another registration as described above would seriously erode such value as the Opposer's trademark valuation experts will testify.

To create propriety rights in the trademark one must create open and public use of the mark to create, in the mind of a relevant purchaser, an association with the source for the goods. *Fluid Energy Processing & Equip. Co. v. PacTel Teletrac*, 212 USPQ 28 (TTAB 1981). As shown above, Miller is the leading producer using the Marks in the accessories and apparel industry and therefore has superior rights to that of the Applicant.

All that is required of the opposing party is to show that the goods are likely to be confused. *Wallpaper Mfrs., LTD v. Crown Wallcovering Corp.*, 680 F .2d 755, 214 USPQ 327 (CCPA 1982). *In Calvin Klein v. Calvin's Pharmaceuticals*, 8 USPQ2d 1269 (TTAB 1988). The Board took note of the fact that the public and trade abbreviate the opposer's full mark Calvin Klein to simply Calvins, even though the opposer made no trademark use of the contraction, and sustained the opposition. In the situation at hand, we have even more of an issue that follows this case on point – the names are identical and used for same purposes with Miller having superior rights because of prior use.

Thus the Board should deny the registration for likelihood of confusion.

2) Opposition Based Upon Misdescriptive and Deceptiveness

The opposer must provide prima facie evidence that the Mark in the relevant field is to designate source rather than to convey a characteristic of the goods or services. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F .2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988); *M. Polaner Inc. v. J.M Smucker Co.*, 24 USPQ2d 1059 (TTAB 1992).

Argunedo, even if the Applicant claims the mark relates to the company CINCH 2 WIN, LLC Miller has already established rights in the Marks by using the Marks in commerce and using the Marks in conjunction with clothing and advertising.

It appears that that Applicant is trying to “piggyback” off the commercial success of the Mark by using it in the same the name. Miller is one of the leading suppliers of accessories and clothing labeled CINCH amongst other variations of the Marks as described above and recognized in the chain of commerce as such with the Marks on the

products and therefore prima facie evidence as required by *Polaner Inc.* has been established that Applicant would be simply trying to capitalize on the Marks' source which is clearly not allowed by *Yamaha*.

Thus, according to *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F .2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988); *M. Polaner Inc. v. J.M Smucker Co.*, 24 USPQ2d 1059 (TTAB 1992), registration of the Mark by Applicant should be denied.

3) Distinctiveness

Distinctiveness of the Mark must be established in an opposition proceeding at the time of the proceeding, *unless* one or more of the other parties to the proceeding assert their use of the term as a mark, in which case the party (Miller) who first established the distinctiveness of the term will have acquired dominant rights. *Harrsco Corp. v. Electrical Servs.*, 9 USPQ2d 1570 (TTAB 1988). *McCormick & Co., v. Summers*, 354 F .2d 668, 148 USPQ 272 (CCPA 1996; *Kaiser Aluminum & Chem Corp. v. American Meter Co.*, 153 USPQ 419 (TTAB 1967).

The situation at hand shows Miller clearly has acquired distinctiveness in the stream of commerce. Miller has been selling/providing accessories and clothing using the Marks since 1996. Therefore, according to the long standing history of the United States Patent and Trademark Office's of standing by precedence, the Applicants mark must be denied.

4) Unfair Competitive Advantage

Irrespective of the other issues presented in this Opposition. An applicant should be denied the registration if granting the mark would give the applicant an unfair competitive advantage. *DeWalt, Inc. v. Magna Power Tool Corp.*, 289 F .2d 656, 129 USPQ 275 (CCPA 1961).

The Applicant would be given a serious competitive advantage by using the name CINCH 2 WIN because Miller has spent millions of dollars developing the Marks. Once again, the Applicant would be merely trading off that name and confusing the consumer

as to the high quality of goods produced by Miller by using the Mark. Therefore, according to *DeWalt*, the Applicant should be denied registration.

5) Trade Directories

Trade and general directories may disclose that the term is a recognized word in the relevant trade and that its use is deceptively misdescriptive. *Cummins Engine Co. v. Continental Motors Corp.*, 359 F.2d 892, 149 USPQ 559 (CCPA 1966).

Any search of the Marks, whether through the industry trade channels or through a general internet search, show that the Marks are used to brand and sell Miller's products. Obviously a search of the Marks in conjunction with clothing would cause a deceptively misdescriptive thought in the eyes of the consumer. Thus, the Applicant's registration must be denied according to *Cummins*.

6) Infringement

Although the Board does not have grounds for preventing the registration of the CINCH 2 WIN based upon a forthcoming infringement claim, Miller does have rights of federal registration to challenge CINCH 2 WIN that is inimical to an equal or superior right of Miller to use the same or a similar term in connection with similar or commercially related goods or services. *Crown Wallcovering Corp. v. Wallpaper Mfrs., Ltd.*, 188 USPQ 141 (TTAB 1975); *Continental Specialties Corp. v. Continental Connector Corp.*, 192 USPQ 449 (TTAB 1976). As described above, Miller does have superior rights to the Marks, thus, because of the above case law, registration of the CINCH 2 WIN should be prevented even though a forthcoming case of infringement is not grounds for opposing registration because the Board lacks jurisdiction over the matter. Thus, the Applicant should be denied registration.

7) Use of Marks by Miller

Miller uses the Marks worldwide and not just in the United States. The Marks are recognized worldwide as a leading supplier of active wear, clothing and accessories. The

Marks are in international commerce with registrations in China, Argentina, Australia, Mexico, Nicaragua, Canada, and Switzerland.

Even though Miller uses the Marks in the United States, the company is not precluded from protecting its rights against the Applicant in foreign countries as well. *All England Lawn Tennis Club v. Creations Aromatiques*, 220 USPQ 1069 (TTAB 1983).

To further amplify Miller's position, it should be noted that Miller owns all the trademarks bearing the name CINCH in conjunction with apparel and related accessories. Because of the reasons listed above, Miller respectfully requests denial of the Applicant's registration.

By:

/s/John P. Schmitz/

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