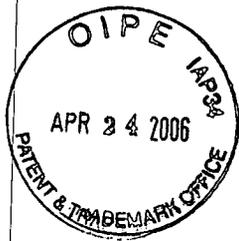


**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**



CONCORDE APPAREL, LLC )

Petitioner, )

v. )

INTERNATIONAL MARK MANAGEMENT )

S.A. )

Registrant. )

Cancellation No.: 92044693

Attorney Ref.: 4014-111

**REGISTRANT'S BRIEF IN OPPOSITION TO PETITIONER'S  
MOTION FOR SUMMARY JUDGMENT**



04-24-2006

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

CONCORDE APPAREL, LLC	)	
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Petitioner,	)	
	)	Cancellation No.: 92044693
v.	)	
	)	Attorney Ref.: 4014-111
INTERNATIONAL MARK MANAGEMENT	)	
S.A.	)	
Registrant.	)	

**REGISTRANT'S BRIEF IN OPPOSITION TO PETITIONER'S  
MOTION FOR SUMMARY JUDGMENT**

Registrant, International Mark Management S.A. ("IMM") hereby opposes Petitioner Concorde Apparel, LLC's ("Concorde's") Motion for Summary Judgment on the issue of likelihood of confusion. Concorde has failed to provide sufficient evidence to entitle it to judgment as a matter of law, and genuine disputes of material fact exist with regard to certain of the relevant *du Pont* factors.

**I. SUMMARY JUDGMENT STANDARD**

Indisputably, Concorde bears the burden of proving the existence of a likelihood of confusion by a preponderance of the evidence. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 951 (Fed. Cir. 2000); *Teledyne Technologies Inc. v. Western Skyways Inc.*, 78 USPQ2d 1203, 1206 (TTAB 2006). Therefore, to succeed on its motion for summary judgment, Concorde must provide sufficient evidence that there is no genuine issue of material fact and that Concorde is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56.

To defeat a motion for summary judgment, IMM need only present evidence of a genuine issue of material fact sufficient to allow a reasonable trier of fact to decide the issue of likelihood of confusion in IMM's favor. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Opryland USA Inc. v. The Great Am Music Show*, 970 F.2d 847, 850 (Fed. Cir. 1992). The evidence must be viewed in a light favorable to the non-movant, IMM, and all justifiable inferences are to be drawn in IMM's favor. See *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 767 (Fed. Cir. 1993); and *Opryland USA*, *supra*.

There are genuine issues of material fact with respect to several relevant *du Pont* factors. Consequently, Concorde's summary judgment motion should be denied. See *Cognis Corp. v. DBC LLC*, 73 USPQ2d 1766 (TTAB 2004) (summary judgment denied where genuine issues of material fact existed with regard to the goods on which opposer had used the mark and with respect to the similarity or dissimilarity between the parties' marks); *The Sports Authority, Inc. v. Prime Hospitality Corp.*, 89 F.3d 955 (2<sup>nd</sup> Cir. 1996) (reversing the district court's grant of summary judgment where genuine issues of material fact existed with respect to certain of the applicable *du Pont* factors).

## II. CONCORDE IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO THE EXISTENCE OF A LIKELIHOOD OF CONFUSION

The Petitioner correctly cites the *du Pont* case as the appropriate test applied by the Federal Circuit and this Board in the determination of likelihood of confusion cases. In the present situation, there are probably only a few probative *du Pont* factors which will be significant in determining likelihood of confusion, including at least the following evidentiary factors:

- 1) Similarity (or dissimilarity) of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- 2) Similarity of the goods and services;
- 3) Similarity of trade channels;
- 4) The circumstances of sale and identity of buyers
- 5) Evidence of actual confusion
- 6) Extent of potential confusion, i.e., whether *de minimis* or substantial.
- 7) The nature of similar marks

*In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). No single factor is controlling and each case is unique. *In re E.I. Dupont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567. Even a single factor may even be dispositive in a likelihood of confusion analysis. See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.2d 1373, 1375 (Fed. Cir. 1988) (affirming the Board's decision of no likelihood of confusion based on differences in the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enters.*, 951 F.2d 330, 332-33 (Fed. Cir. 1991) (holding that "substantial and undisputed differences" between two competing marks (FROOT LOOPS and FROOTIE ICE) justified a conclusion of no likelihood of confusion on summary judgment).

To decide the present summary judgment motion, however, the Board need not even weigh the factors because there are genuine issues of material fact as to several of the factors that would allow a reasonable trier of fact to find that no likelihood of confusion exists. Therefore, for the following reasons, the Board should deny Concorde's summary judgment motion.

**A. The Parties' Marks Differ in Appearance, Sound and Commercial Impression**

The first factor in the analysis of likelihood of confusion is the similarity or dissimilarity of the marks in their entireties as to appearance, sound, and meaning. *In re Bed & Breakfast Registry*, 791 F.2d 157, 159 (Fed. Cir. 1986). This is the primary issue on which the Board will base its decision. In this regard, Registrant disagrees with Petitioner's arguments in its summary judgment brief.

Petitioner's arguments focus only on one word element of the marks. However, when comparing two marks, the marks must be considered in their entireties rather than focusing on the individual features of the marks. *Estate of P.D. Beckworth, Inc. v. Commissioner of Patents*, 252 U.S. 538, 545-46 (1920); *In re National Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985) ("[L]ikelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark."); *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion"). Further, under the overall impression analysis, confusion is not automatically likely if a junior user has a mark that contains in part the whole of another's mark. See e.g., *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400 (CCPA 1070) (PEAK PERIOD not confusingly similar to PEAK). As such, marks may be deemed dissimilar for purposes of assessing likelihood of confusion, even though portions of the marks are identical or nearly identical. See, e.g., *Champagne Louis Roederer, S.A. v. Delicato Vineyards, supra*; *Lever Bros. Co. v. Barcolene Co.*, 463 F.2d 1107 (CCPA 1972) (ALL CLEAR not confusingly similar to

ALL); *In re Merchandising Motivation, Inc.*, 184 USPQ 364 (TTAB 1974) (indicating that there is no absolute rule that no one has the right to incorporate the total mark of another as a part of one's own mark: MMI MENSWEAR not confusingly similar to MEN'S WEAR); *Mejia and Assoc., Inc. v. IBM*, 920 F. Supp. 540, 547 (S.D.N.Y. 1996) (no likelihood of confusion found despite use of term "EduQuest" in both parties' marks).

Based on the dissimilarities between the parties' marks as a whole in the present case, as well as the different commercial impression exerted by each mark, this factor weighs in IMM's favor.

**(1) The parties' marks are visually and phonetically dissimilar.**

On their face, the mark ZAGATO (stylized) of Concorde



and IMM's mark "ZAGATO Z & Design"



are visually and phonetically dissimilar. When viewed as a whole, Petitioner's ZAGATO (stylized) mark and Registrant's ZAGATO Z & Design mark will be perceived by consumers as consisting of the term ZAGATO, but also consisting of distinctive lettering styles. See e.g., *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089 (10th Cir. 1999) (the distinctive Gothic lettering style of plaintiff's mark contributed to the lack of a likelihood of confusion caused by the defendant's mark). Moreover,

Registrant's mark includes the very prominent element Z in a stylized form in much larger proportion to the term Zagato in the center of the mark. Registrant's mark also includes a rectangular border design element. In contrast, Petitioner's stylized mark does not include the separate prominent "Z" element and the rectangular border design element.

Further, purchasers would be likely to pronounce Registrant's mark as a two term mark, "ZAGATO Z" (or "Z ZAGATO"), but Petitioner's mark as only a one term mark, "ZAGATO."

As such, this factor weighs in IMM's favor.

**(2) The Parties' Marks also have Different Commercial Impressions**

In addition to the visual and phonetic differences of the marks, the marks have distinctly different connotations and overall commercial impressions. The connotation of a mark must be determined "in the context of the marks as a whole as they are encountered by consumers in the marketplace." *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 925 (10<sup>th</sup> Cir. 1986). In some situations, even marks that are identical or closely similar in sound and/or appearance may create sufficiently different commercial impressions so that there is no likelihood of confusion. See e.g., *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200 (Fed. Cir. 1992) (finding that Board erred by entering summary judgment that confusion is likely between cancellation petitioner's "Old Time" and respondent's "Ye Olde Tyme" marks); *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) (CROSS-OVER for bras held not likely to be confused with CROSSOVER for ladies' sportswear); *In re British Bulldog, Ltd.*, 224

USPQ 854 (TTAB 1984) (PLAYERS for men's underwear held not likely to be confused with PLAYERS for shoes).

The only connotation of Concorde's mark Zagato (stylized) is the term Zagato, which in addition to being a trademark is also a surname. In contrast, IMM's mark ZAGATO Z & Design most prominently features the letter Z, which bears a resemblance to a lightning bolt. It is possible that the "Z" element will be the distinctive feature of the mark that potential purchasers will recall and, in connection with the term Zagato, may bring to mind an association with fast high performance cars.<sup>1</sup>

The differences in the appearance and sound of the parties' marks, as well as the commercial impressions of the mark, clearly creates a genuine issue of material fact not only to this factor, but also to the overall conclusion of whether a likelihood of confusion exists. See, e.g., *Champagne*, 148 F.3d at 1375 (finding no likelihood of confusion between the mark "Crystal Creek" for wine and the mark "Cristal" for wine and "Cristal Champagne" for champagne; conclusion based solely on dissimilarity of the marks, where remaining relevant *du Pont* factors all favored a likelihood of confusion); *Kellogg Co. v. Pack'em Enterprises Inc.*, *supra*.

#### **B. The Relevant Consumers Are Sophisticated**

The sophistication factor "recognizes that the likelihood of confusion between the products at issue depends in part on the sophistication of the relevant purchasers." *Arrow Fastener Co., Inc. v. Stanley Works*, 59 F.3d 384, 399 (2<sup>nd</sup> Cir. 1995). A finding of sophistication is based on the general impression of the ordinary consumer, buying under normal market conditions, and giving the attention such purchasers usually give

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<sup>1</sup> The Board can take judicial notice that letter Z is used in the names of many high performance cars.

in purchasing the product at issue. See *W.W.W. Pharm. Co. v. Gillette Co.*, 984 F.2d 567, 572 (2<sup>nd</sup> Cir. 1993). A finding that the consumers are sophisticated usually leads to a finding of no likelihood of confusion. *Electronic Design & Sales v. Electronic Data Systems*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992)(purchaser “sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care.” ); *Pignons S.A. de MeCanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489 (1<sup>st</sup> Cir. 1981) (“[s]ophisticated consumers may be expected to exercise greater care”).

In this case, the goods of both parties' marks are apparel. Buyers of apparel have been previously held to be sophisticated purchasers. See, e.g., *A&H Sportswear Inc. v. Victoria's Secret Stores Inc.*, 237 F.3d 198 (3<sup>rd</sup> Cir. 2000) (affirming district court's finding that purchasers of women's apparel were sophisticated purchasers); *Jordache Enterprises, Inc. v. Hogg Wyld Ltd.*, 625 F.Supp. 48, 53 (D.N.M. 1985), *aff'd*, 828 F.2d 1482 (10th Cir. 1987); *Sally Gee, Inc. v. Myra Hogan, Inc.*, 699 F.2d 621, 626 (2d Cir. 1983); *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1131 (2d Cir. 1979); *Paco Sport, Ltd. v. Paco Rabanne Parfums*, 86 F.Supp.2d 305 (S.D.N.Y. 2000). Thus, this factor weighs in IMM's favor.

**C. There is no evidence of any Instance of Actual Confusion**

As to this factor, the evidence of actual confusion favors Registrant because Petitioner has provided no evidence of any actual confusion.

**D. The Extent of Any Alleged Harm to Petitioner is *de Miminis***

This factor also weighs in IMM's favor. Even assuming, for argument's sake, that confusion could exist – which IMM denies – any resulting harm from such confusion would be negligible.

Concorde's statement that it will be damaged because "the '903 Registration falsely suggest [sic] to the public that, by virtue of the registration, there is an association between Petitioner and IMM with respect to the ZAGATO MARK or that IMM's clothing goods are in some manner associated with Petitioner and its registered mark," cannot stand. There is no evidence of record to support the statement other than the conclusory testimony of a Concorde manager. If the injury is affiliation, the predecessor court to the Federal Circuit has said that it would not cause significant injury:

If the public is confused – and there is no evidence to show that it is – the presumed confusion is merely that it thinks that the same people put out or sponsor [Concorde's clothing] and [IMM's clothing]. . . I suspect the public is indifferent to the situation as it is when the owner of a product filed under a trademark sells its business to another who continues to sell the same product under the same mark. If there is any confusion in this picture, it is certainly not injuring the public.

*See In re National Distillers & Chem. Corp.*, 297 F.2d 941, 943 (CCPA 1962).

In view of the lack of evidence of how affiliation between the companies would result in substantial harm, this factor also favors IMM.

**E. IMM Owns a Longstanding and Unchallenged Registration for Z ZAGATO & Design.**

As Petitioner indicates in its brief at p. 4, the USPTO online database indicates one additional active registration for a mark containing ZAGATO. That registration, Registration No. 2,089,587 for the mark Z ZAGATO & Design (which is the same design mark as in the '903 Registration), belongs to IMM. See Tab 1. The '587 Registration was for automobiles, bicycles; and motorcycles; and custom design of automobiles, bicycles and motorcycles for others; engineering services. It claims a first date of use back to 1919 and a first date of use in commerce of 1955 for these goods and services. It remains in effect for custom design of automobiles for others; engineering services. The co-existence of this mark of Registrant with Petitioner's ZAGATO mark for decades may be probative of a lack of confusion of the mark of the '903 Registration with Petitioner's mark.

Further, in light of the prior '587 Registration, whether or not IMM's Z ZAGATO & Design mark is a famous mark, and whether it impacts on the strength of the Petitioner's mark are other issues of fact that should preclude summary judgment. See *Recot, Inc. v. Becton*, 214 F.3d 1322, 1328 (Fed. Cir. 2000) ("the fame of the mark must always be accorded full weight when determining the likelihood of confusion").

**III. CONCLUSION**

The evidence of record clearly illustrates that the parties use dissimilar marks on goods that are sold to sophisticated consumers. In addition, Petitioner did not come forward with any evidence of actual confusion. Moreover, Registrant's previously used and federally registered '587 Registration for ZAGATO Z & Design may show that Registrant's mark is famous and entitled to a broad scope of protection. On the present

record, a reasonable fact finder could hold that no likelihood of confusion exists. Thus, it is respectfully requested that Concorde's motion for summary judgment be denied.

Respectfully submitted,

**INTERNATIONAL MARK MANAGEMENT  
S.A.**

Date: April 24, 2006

By: Sheryl De Luca  
Sheryl De Luca  
Frank P. Presta  
Attorneys for Opposer

**CERTIFICATE OF SERVICE**

I, Sheryl De Luca, Attorney for Registrant, hereby certify that a copy of the foregoing REGISTRANT'S BRIEF IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT was served on Attorney for Applicant, Jay A. Bondell, Elliott W. Lipins, Schweitzer Cornman Gross & Bondell LLP, 292 Madison Avenue, 19<sup>th</sup> Floor, New York, New York 10017, via U.S. Postal Service, first class mail, this 24 day of April, 2006.

  
Sheryl De Luca

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

CONCORDE APPAREL, LLC	)	
	)	
Petitioner,	)	
	)	Cancellation No.: 92044693
v.	)	
	)	Attorney Ref.: 4014-111
INTERNATIONAL MARK MANAGEMENT	)	
S.A.	)	
Registrant.	)	

**TAB 1 TO REGISTRANT'S BRIEF IN OPPOSITION TO PETITIONER'S**  
**MOTION FOR SUMMARY JUDGMENT**

**Int. Cls.: 12 and 42**

**Prior U.S. Cls.: 19, 21, 23, 31, 35, 44, 100, and 101**

**Reg. No. 2,089,587**

**United States Patent and Trademark Office**

**Registered Aug. 19, 1997**

**TRADEMARK  
SERVICE MARK  
PRINCIPAL REGISTER**



**INTERNATIONAL MARK MANAGEMENT S.A.  
(LUXEMBOURG CORPORATION)  
11 RUE ALDRIGEN  
L 2960, LUXEMBOURG**

**FOR: AUTOMOBILES, BICYCLES; AND MO-  
TORCYCLES, IN CLASS 12 (U.S. CLS. 19, 21, 23,  
31, 35 AND 44).**

**FIRST USE 0-0-1919; IN COMMERCE  
0-0-1955.**

**FOR: CUSTOM DESIGN OF AUTOMOBILES,  
BICYCLES AND MOTORCYCLES FOR  
OTHERS; ENGINEERING SERVICES, IN  
CLASS 42 (U.S. CLS. 100 AND 101).**

**FIRST USE 0-0-1919; IN COMMERCE  
0-0-1955.**

**SN 74-636,600, FILED 2-21-1995.**

**CINDI GREENBAUM, EXAMINING ATTOR-  
NEY**