PTO Form 1930 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78697231
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (no change)	
ARGUMENT(S)	

PETITION FOR RECONSIDERATION

In response to the communication from the Examining Attorney dated April 10, 2009 (the "Final Office Action"), regarding the referenced matter, Applicant submits this Petition for Reconsideration, and respectfully requests withdrawal of the refusal to register.

INFORMALITIES

Notice of Appeal

In addition to this communication, Applicant has filed a Notice of Appeal with the Trademark Trial and Appeal Board, dated today, October 13, 2009.

Recitation of Services

Although the Examining Attorney has not requested amendment, in order to further prosecution of the application, Applicant requests that the application be amended to adopt the following recitation of services:

Entertainment services, namely, providing an online computer game, in Class 41.

Applicant had suggested this amendment in its Response to Office Action dated April 3, 2009 (the "First Response"), but it does not appear that the Examining Attorney has considered or entered the proposed amendment. In any case, Applicant is now requesting such amendment. Applicant submits that such amendment does not impermissibly broaden the description or add

new matter.

REMARKS

Likelihood of Confusion – 2(d) Refusal

The Examining Attorney has refused registration of Applicant's SHOOTING STARS mark (the "Mark"), under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), on the asserted ground that Applicant's Mark is likely to be confused with the marks in U.S. Registration Nos. 3,492,632, 3,492,633, 3,492,634, 3,492,635, 3,492,636, 3,492,637, all owned by the White Earth Chippewa Reservation (each a "Cited Mark" and collectively "Cited Marks").

As an initial matter, Applicant notes for the Examining Attorney's ease of reference that Applicant has amended its recitation of services to delete "electronic casino gaming services." Such services were identified by the Examining Attorney in the Office Action dated October 3, 2008 as the source of the likelihood of confusion with the Cited Marks. Because such services have been removed from the application, and for the reasons further discussed below, there is no likelihood of confusion between Applicant's Mark and the Cited Marks. Applicant, therefore, respectfully requests reconsideration of the Examining Attorney's refusal, and that the instant application be approved for publication and registration.

A. The Standard.

Registration of a mark may be refused under Section 2(d) of the Lanham Act, 15 U.S.C. §1052 (d), only if "confusion is likely because of concurrent use of the marks of an applicant and a prior user on their respective goods." In re E.I. du Pont de Nemours & Co., 177 U.S.P.Q. 563 (CCPA 1973) (hereinafter "du Pont"). Confusion occurs if purchasers of the goods or services believe they emanate from the same source. See, e.g., In re Quadram Corp., 228 U.S.P.Q. 863, 866 (TTAB 1985). In the instant case, as shown below, such confusion is highly unlikely to occur.

In making a determination of likelihood of confusion, the Examining Attorney must consider the known circumstances surrounding use of the mark, and "each case must be decided on its own facts. There is no litmus rule which can provide a ready guide to all cases." du Pont, 177 U.S.P.Q. at 566-67. The following du Pont factors are relevant herein:

(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound,

connotation and commercial impression.

(2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.

* * *

(6) The number and nature of similar marks in use on similar goods.

* * *

(8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

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(12) The extent of potential confusion, i.e., whether de minimis or substantial.

(13) Any other established fact probative of the effect of use.

Id. The factors listed by the du Pont court were not enumerated in an order of relative merit; according to du Pont, any factor may, "from case to case, play a dominant role." Id.; see also, Kellogg Co. v. Pack'em Enters., Inc., 951 F.2d 330, 333 (Fed. Cir. 1991) ("We know of no reason why in a particular case, a single du Pont factor may not be dispositive.").

As shown below, due to the narrow protection to be afforded the Cited Marks, the differences in appearance, sound, connotation and commercial impression of each mark, the differences in the services offered by Applicant and the owner of the Cited Marks, and the significant length of time during which there has been concurrent use without actual confusion, the likelihood of confusion between Applicant's Mark and the Cited Marks is, at best, *de minimis*.

Because the arguments relating to each Cited Mark are very similar, Applicant will address the likelihood of confusion refusal for all of the Cited Marks together, below.

B. The Cited Marks Are Highly Suggestive And Are Therefore Entitled to Narrow Protection. *(Du Pont Factors 6 and 13)*

The Cited Marks are very suggestive marks entitled to narrow protection. See Richard L. Kirkpatrick, Likelihood of Confusion in Trademark Law, § 3:3 (November 2005) (citing cases) ("The scope of protection accorded a weak mark, therefore, will be limited to more similar marks and more similar goods."). While the shared portion of the Cited Marks and Applicant's Mark, SHOOTING STAR(S), is not descriptive in that neither owner is actually selling shooting stars, it is suggestive of a common theme in the gaming industry – the theme that the owner of the Cited Marks is attempting to evoke: good luck. Therefore, the existence of the Cited Marks should not prevent the Applicant from evoking a similar feeling in order to market its distinct services. See, e.g., Taj Mahal Enters., Ltd. v. Trump, 745 F. Supp. 240, 248 (D.N.J. 1990) ("Trademark protection is not intended to allow a person

to procure a certain impression or association for his own exclusive use, and others must be permitted to communicate the same impression or association if they desire.")

In Taj Mahal Enters., the owner of an Indian restaurant with the registered trademark TAJ MAHAL brought suit against the Trump Taj Mahal Casino in Atlantic City, New Jersey. Id. The district court granted summary judgment in favor of the defendant on the grounds that, *inter alia*, the plaintiff's mark, TAJ MAHAL, was suggestive, intended to evoke a common impression, and therefore weak. Id. The district court explained that "[t]he term TAJ MAHAL brings to mind grandeur and opulence, and it is evocative of an exotic, Eastern flavor" and "[w]hile there are other terms that convey a similar impression, few engender the same images with the same panache as does the term TAJ MAHAL." Id.

Here, use of the Cited Marks to market and sell casino and hotel services is intended to evoke a feeling of luck and good fortune. It is well-known superstition that seeing a shooting star is a sign of good luck, and if you wish on that star, your wish will come true. See article from http://factoidz.com/list-of-good-luck-charms/ attached hereto as an Exhibit. Themes of luck or good fortune are common in the gaming industry, and because the Cited Marks are intended to evoke this common impression, the Cited Marks are entitled to more narrow protection. Taj Mahal Enters., 745 F. Supp. at 248 ("[A] mark is relatively weak when it is suggestive, and when it is one of only a few terms which communicates a particular impression."). The narrow protection afforded the Cited Marks for casino services should not prevent the Applicant from evoking a similar impression in the sale of its own distinct services.

Moreover, when a mark contains common words with well-known meanings, even slight differences in the goods or services, and/or the sound and appearance of the marks are sufficient to avoid confusion. See Kirkpatrick, § 4:3:1; Entrepreneur Media v. Smith, 279 F.3d 1135, 1148 (9th Cir. 2002) (recognizing a sliding scale approach for relatedness of marks and goods when marks are suggestive or descriptive and stating that "[w]hile the public and the trademark owner have an interest in preventing consumer confusion, there is also a broad societal interest in preserving common, useful words for the public domain"). As demonstrated here, the owner of the Cited Marks is using words with well-understood impressions, particularly with respect to casino services. Therefore, the

differences between Applicant's services and those offered under the Cited Marks are more than sufficient to avoid confusion.

In fact, statements made by the owner of the Cited Marks during prosecution of its applications, support this conclusion. In its Response to Office Action dated April 20, 2006, the owner of the Cited Marks argued there was no likelihood of confusion with a prior filed application because, among other things, the goods and services of the two owners were distinct and not confusingly similar. See Response to Office Action for Reg. No. 3,492,632 dated April 20, 2006. At that time, the goods and services in question included casino and hotel services (at a minimum) by one owner, and restaurant and bar services, and providing temporary lodging by the other. Applicant respectfully submits that restaurant, bar, and temporary lodging services are often provided by casinos, and are in fact provided under some of the Cited Marks. Certainly such services are more similar than Applicant's services are to the services offered under the Cited Marks.

Finally, this point is further illustrated by the fact that application Serial No. 77/347,048 for SHOOTING STAR for health club and health spa services, although filed after the application for Applicant's Mark, has been approved for publication. See record from U.S. Patent and Trademark Office on-line database (TESS) attached hereto as an Exhibit. Casinos and hotels often offer health club or spa services, and consumers would readily expect such services to emanate from the same source.[1] The fact that the Cited Marks were not a bar to registration of Serial No. 77/347,048, the Examining Attorney in that case must have believed the differences in the services were sufficient to preclude a likelihood of confusion. The conclusion to be reached is that SHOOTING STAR, in the case of the Cited Marks, is therefore entitled to a narrow scope of protection.

Accordingly, because the Cited Marks are entitled to narrow protection, and, as discussed infra, there are significant differences between the services sold under the Cited Marks and the Applicant's Mark, as well as differences between the appearance and sound of the marks, the Applicant's Mark is registrable.

C. Considered In Its Entirety, Applicant's Mark Is Significantly Dissimilar To The Cited Marks In Appearance, Sound, Meaning, And Overall Commercial Impression. (*Du Pont Factor 1*)

When properly compared in their entireties, Applicant's Mark and the Cited Marks are

dissimilar in overall appearance, sound, meaning and commercial impression, thereby precluding any likelihood of confusion. In determining whether marks are confusingly similar, the marks must be compared in their entireties for overall appearance, sound, meaning and commercial impression. See In re 1776, Inc., 223 U.S.P.Q. 186, 187 (TTAB 1984). It is axiomatic that marks should not be dissected into segments when comparing them in a likelihood of confusion analysis. See id. at 187; In re Loew's Theatres, Inc., 218 U.S.P.Q. 956 (TTAB 1983). The commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole, not by its component parts. Moreover, all relevant facts pertaining to the appearance and connotation of the marks must be considered. TMEP §1207.01(b).

Also, when dealing with a composite mark that includes both words and a design, the mark must be considered "as a whole, [and one] must not look to the name, to the pictorial elements, or at the lettering and word arrangement alone." Gaston's White River Resort v. Rush, 8 U.S.P.Q.2d 1209, 1213 (W.D. Ark. 1988). While there is no rule as to what will prove to be the dominant feature of a composite mark, the "visual impact of the marks on the minds of the prospective purchasers who view them" must be considered. Finn v. Cooper's Inc., 130 U.S.P.Q. 269, 272 (CCPA 19661).

In the present case, comparing the marks as a whole, it is clear that Applicant's Mark differs significantly from the Cited Marks in overall appearance, sound, connotation, and commercial impression, and therefore removes any likelihood of consumer confusion.

1. The Visual And Aural Differences Between Applicant's Mark And The Cited Marks Renders Confusion Unlikely.

Even in cases where there is a smaller difference than here, the difference was enough to negate any likelihood of confusion. See Vision, Inc. v. Parks, et al., 226 U.S.P.Q. 924, 927 (S.D.N.Y. 1985) (additional letters "U.S.A.," although small, distinguished VISION U.S.A. from VISION in overall appearance; Textron Inc. v. Arctic Enterprises, Inc., 178 U.S.P.Q. 315, 318 (TTAB 1973) (arrangement of letters and use of additional letter "E" in "EXT" created a mark which "engenders a visual and oral impression readily distinguishable from 'TX'").

In this case, the distinction between the marks is significant. Contrary to the Examining Attorney's assertion, "CASINO" and "HOTEL AND EVENT CENTER" in the Cited Marks are

prominent features, which have significant visual and aural impact, and create fundamental differences between Applicant's Mark and the Cited Marks. Also, it must be noted that in the marketplace, consumers do not view marks with the knowledge that certain matter has been disclaimed and that are to be afforded less significance. Accordingly, the disclaimer is not material in assessing the reaction of the average purchaser. See In re Nat'l Data Corp., 224 U.S.P.Q. 749, 751 (Fed Cir. 1985). The terms "CASINO" and "HOTEL AND EVENT CENTER" are visually and aurally distinctive, and such words create substantial differences between Applicant's Mark and the Cited Marks.

In addition, for those Cited Marks containing design elements (Reg. Nos. 3492634, 3492635, 3492636, and 3492637), the prominent, large-scale designs cannot be discounted either. See Finn v. Cooper's Inc., 130 U.S.P.Q. at 272. Such elements add significant visual distinctions between the Cited Marks and Applicant's Mark.

2. The Differences In The Meaning And Overall Commercial Impression Between Applicant's Mark And The Cited Mark Negates Any Likelihood Of Confusion.

Most significantly, the meaning and overall commercial impressions of each of the marks are very different from each other. Although the Examining Attorney discounts the significance of the words "CASINO" and "HOTEL AND EVENT CENTER" the meanings of these terms are very important in the analysis of confusion.

The word "CASINO" indicates the types of services offered under the Cited Marks, as well as the source of such services. According to the services identified in the registration, the owner of the Cited Mark operates casinos. Therefore, the significance of the term "CASINO" cannot be ignored. It will be immediately understood by consumers when viewed in connection with the services offered under the Cited Mark.

Equally significant in the likelihood of confusion analysis in this case is the meaning of the phrase "HOTEL AND EVENT CENTER," like "CASINO," such wording indicates the types of services to be offered under the Cited Marks, as well as their source. When consumers encounter the Cited Marks in connection with the services offered, this connotation will be readily understood.

These well-known meanings described by the wording "CASINO" and "HOTEL AND

EVENT CENTER" are not present in Applicant's Mark, nor does Applicant offer such services.

In addition, as discussed above, the words "SHOOTING STAR" (or "STARS") connote a well-understood idea, and therefore the differences in sound or appearance should negate any likelihood confusion. See Kirkpatrick, § 4:3:1 ("Where the marks in dispute are common words with well-known meanings, relatively slight differences in sound or appearance suffice to avoid conflict in some cases.").

In sum, given these significant dissimilarities in appearance, sound, meaning, and commercial impressions, Applicant's Mark is not likely to be confused with the Cited Mark, and Applicant's Mark is registrable.

D. Applicant's Services Are Dissimilar To Those Offered Under The Cited Marks. *(Du Pont Factor 2)*

The significant dissimilarity between Applicant's services and those offered under the Cited Marks further renders the potential for confusion *de minimis*.

It is well settled that goods or services that can be linked to the same broad field of commerce are not necessarily related for the purposes of trademark law. See Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100, 1109 (6th Cir. 1991) ("services are 'related' not because they exist within the same broad industry, but are 'related' if they are marketed and consumed such that buyers are likely to believe that the services, similarly marked, come from the same source"); see also Electronic Data Sys. Corp. v. EDSA Micro Corp., 23 U.S.P.Q.2d 1460, 1463 (TTAB 1992) ("the issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both"). In this case, where both operate in the broad field of games or gaming, consumers are unlikely to assume that the products emanate from the same source. Even where the goods and services are from the same general field of commerce, there should be no presumption of confusion. See In re Quadram Corp., 228 U.S.P.Q. at 865 (TTAB 1985).

The Cited Marks are registered for use in relation to, among other things, "casinos." In fact, the casino run by the owner of the Cited Marks is named the Shooting Star Casino.

By contrast, Applicant provides online games. Specifically, the SHOOTING STARS mark is

the name of one game in Applicant's suite of online games. Given the nature of Applicant's services and those offered under the Cited Marks, such are not likely to be encountered by the same purchasers or end-users in a manner likely to cause confusion.

Although the owner of the Cited Marks and Applicant both offer services related to games or the gaming industry, that similarity is not sufficient to cause confusion. Rather, given the significant differences between the precise nature of Applicant's services and the services offered by the owner of the Cited Marks, confusion is highly unlikely, and Applicant's Mark therefore is registrable.

E. No Actual Confusion Has Occurred Although There Has Been Extensive Concurrent Use. (*Du Pont Factor 8*)

"An absence of likelihood of confusion may be inferred from the absence of proof of confusion if the actor and the other have made significant use of their respective designations in the same geographic market for a substantial period of time..." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §23(2), AT 249-50 (1995). Applicant has been using the SHOOTING STARS mark on the relevant services since at least as early as April 12, 2006. In addition, as evidenced by U.S. Registration No. 3,492,632, the owner of the Cited Marks has been using the word mark SHOOTING STAR CASINO since at least as early as October 1, 1991. Since Applicant and the owner of the Cited Marks began using their respective marks, no instances of actual confusion between Applicant's Mark and the Cited Marks have been reported to Applicant. This absence of actual confusion is indicative of an absence of any likelihood of confusion.

F. The Potential Confusion Is *De Minimis*. (*Du Pont Factor 12*)

Taken singularly, any of the above-described differences between the marks, or the goods and services offered under the marks, should be adequate to demonstrate that confusion is unlikely. When these elements are considered together with the meaning and therefore narrow protection to be afforded the Cited Marks, as well as the significant length of time during which there has been concurrent use without evidence of actual confusion, however, it is evident that there is no likelihood of confusion, and Applicant's Mark is therefore registrable.

CONCLUSION

Having responded fully to the Final Office Action, and in light of the amendment and

arguments made above, Applicant respectfully submits that the application is in condition for publication and registration, and hereby requests such actions.

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[1] The owner of the Cited Mark actually has a spa at its Shooting Star Casino. See attached page from http://www.starcasino.com/Hotel/SereniiteeSpa/tabid/70/Default.aspx attached hereto as an Exhibit.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)	
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DESCRIPTION OF EVIDENCE FILE	Page from online article; page from USPTO database; page from web site of owner of Cited Marks
GOODS AND/OR SERVICES SECTION (current)	
INTERNATIONAL CLASS	041
DESCRIPTION	
entertainment services, namely, providing an online computer game; electronic casino gaming services	
FILING BASIS	Section 1(b)
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	041
DESCRIPTION	
entertainment services, namely, providing an online computer game	
FILING BASIS	Section 1(b)
SIGNATURE SECTION	
RESPONSE SIGNATURE	/Deborah J Peckham/
SIGNATORY'S NAME	Deborah J. Peckham
SIGNATORY'S POSITION	Attorney of record, Massachusetts bar member
DATE SIGNED	10/13/2009
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Oct 13 12:32:41 EDT 2009
TEAS STAMP	USPTO/RFR-24.151.134.114-20091013123241748719-7869 7231-4602118c4f224b9c1cf7 6cb7ed5f9fab80-N/A-N/A-20 091013115140137451

PTO Form 1930 (Rev 9/2007)

OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **78697231** has been amended as follows:

ARGUMENT(S)
In response to the substantive refusal(s), please note the following:

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3,492,633, 3,492,634, 3,492,635, 3,492,636, 3,492,637, all owned by the White Earth Chippewa Reservation (each a "Cited Mark" and collectively "Cited Marks").

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As shown below, due to the narrow protection to be afforded the Cited Marks, the differences in appearance, sound, connotation and commercial impression of each mark, the differences in the services offered by Applicant and the owner of the Cited Marks, and the significant length of time during which there has been concurrent use without actual confusion, the likelihood of confusion between Applicant's Mark and the Cited Marks is, at best, *de minimis*.

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Moreover, when a mark contains common words with well-known meanings, even slight differences in the goods or services, and/or the sound and appearance of the marks are sufficient to avoid confusion. See Kirkpatrick, § 4:3:1; Entrepreneur Media v. Smith, 279 F.3d 1135, 1148 (9th Cir. 2002) (recognizing a sliding scale approach for relatedness of marks and goods when marks are suggestive or descriptive and stating that "[w]hile the public and the trademark owner have an interest in preventing consumer confusion, there is also a broad societal interest in preserving common, useful words for the public domain"). As demonstrated here, the owner of the Cited Marks is using words with well-understood impressions, particularly with respect to casino services. Therefore, the differences between Applicant's services and those offered under the Cited Marks are more than sufficient to avoid confusion.

In fact, statements made by the owner of the Cited Marks during prosecution of its applications, support this conclusion. In its Response to Office Action dated April 20, 2006, the owner of the Cited Marks argued there was no likelihood of confusion with a prior filed application because, among other things, the goods and services of the two owners were distinct and not confusingly similar. See Response to Office Action for Reg. No. 3,492,632 dated April 20, 2006. At that time, the goods and

services in question included casino and hotel services (at a minimum) by one owner, and restaurant and bar services, and providing temporary lodging by the other. Applicant respectfully submits that restaurant, bar, and temporary lodging services are often provided by casinos, and are in fact provided under some of the Cited Marks. Certainly such services are more similar than Applicant's services are to the services offered under the Cited Marks.

Finally, this point is further illustrated by the fact that application Serial No. 77/347,048 for SHOOTING STAR for health club and health spa services, although filed after the application for Applicant's Mark, has been approved for publication. See record from U.S. Patent and Trademark Office on-line database (TESS) attached hereto as an Exhibit. Casinos and hotels often offer health club or spa services, and consumers would readily expect such services to emanate from the same source.[1] The fact that the Cited Marks were not a bar to registration of Serial No. 77/347,048, the Examining Attorney in that case must have believed the differences in the services were sufficient to preclude a likelihood of confusion. The conclusion to be reached is that SHOOTING STAR, in the case of the Cited Marks, is therefore entitled to a narrow scope of protection.

Accordingly, because the Cited Marks are entitled to narrow protection, and, as discussed infra, there are significant differences between the services sold under the Cited Marks and the Applicant's Mark, as well as differences between the appearance and sound of the marks, the Applicant's Mark is registrable.

C. Considered In Its Entirety, Applicant's Mark Is Significantly Dissimilar To The Cited Marks In Appearance, Sound, Meaning, And Overall Commercial Impression. (*Du Pont Factor 1*)

When properly compared in their entireties, Applicant's Mark and the Cited Marks are dissimilar in overall appearance, sound, meaning and commercial impression, thereby precluding any likelihood of confusion. In determining whether marks are confusingly similar, the marks must be compared in their entireties for overall appearance, sound, meaning and commercial impression. See In re 1776, Inc., 223 U.S.P.Q. 186, 187 (TTAB 1984). It is axiomatic that marks should not be dissected into segments when comparing them in a likelihood of confusion analysis. See id. at 187; In re Loew's Theatres, Inc., 218 U.S.P.Q. 956 (TTAB 1983). The commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole, not by its component parts. Moreover, all relevant

facts pertaining to the appearance and connotation of the marks must be considered. TMEP §1207.01(b).

Also, when dealing with a composite mark that includes both words and a design, the mark must be considered "as a whole, [and one] must not look to the name, to the pictorial elements, or at the lettering and word arrangement alone." Gaston's White River Resort v. Rush, 8 U.S.P.Q.2d 1209, 1213 (W.D. Ark. 1988). While there is no rule as to what will prove to be the dominant feature of a composite mark, the "visual impact of the marks on the minds of the prospective purchasers who view them" must be considered. Finn v. Cooper's Inc., 130 U.S.P.Q. 269, 272 (CCPA 19661).

In the present case, comparing the marks as a whole, it is clear that Applicant's Mark differs significantly from the Cited Marks in overall appearance, sound, connotation, and commercial impression, and therefore removes any likelihood of consumer confusion.

1. The Visual And Aural Differences Between Applicant's Mark And The Cited Marks Renders Confusion Unlikely.

Even in cases where there is a smaller difference than here, the difference was enough to negate any likelihood of confusion. See Vision, Inc. v. Parks, et al., 226 U.S.P.Q. 924, 927 (S.D.N.Y. 1985) (additional letters "U.S.A.," although small, distinguished VISION U.S.A. from VISION in overall appearance; Textron Inc. v. Arctic Enterprises, Inc., 178 U.S.P.Q. 315, 318 (TTAB 1973) (arrangement of letters and use of additional letter "E" in "EXT" created a mark which "engenders a visual and oral impression readily distinguishable from 'TX'").

In this case, the distinction between the marks is significant. Contrary to the Examining Attorney's assertion, "CASINO" and "HOTEL AND EVENT CENTER" in the Cited Marks are prominent features, which have significant visual and aural impact, and create fundamental differences between Applicant's Mark and the Cited Marks. Also, it must be noted that in the marketplace, consumers do not view marks with the knowledge that certain matter has been disclaimed and that are to be afforded less significance. Accordingly, the disclaimer is not material in assessing the reaction of the average purchaser. See In re Nat'l Data Corp., 224 U.S.P.Q. 749, 751 (Fed Cir. 1985). The terms "CASINO" and "HOTEL AND EVENT CENTER" are visually and aurally distinctive, and such words create substantial differences between Applicant's Mark and the Cited Marks.

In addition, for those Cited Marks containing design elements (Reg. Nos. 3492634, 3492635,

3492636, and 3492637), the prominent, large-scale designs cannot be discounted either. See Finn v. Cooper's Inc., 130 U.S.P.Q. at 272. Such elements add significant visual distinctions between the Cited Marks and Applicant's Mark.

2. The Differences In The Meaning And Overall Commercial Impression Between Applicant's Mark And The Cited Mark Negates Any Likelihood Of Confusion.

Most significantly, the meaning and overall commercial impressions of each of the marks are very different from each other. Although the Examining Attorney discounts the significance of the words "CASINO" and "HOTEL AND EVENT CENTER" the meanings of these terms are very important in the analysis of confusion.

The word "CASINO" indicates the types of services offered under the Cited Marks, as well as the source of such services. According to the services identified in the registration, the owner of the Cited Mark operates casinos. Therefore, the significance of the term "CASINO" cannot be ignored. It will be immediately understood by consumers when viewed in connection with the services offered under the Cited Mark.

Equally significant in the likelihood of confusion analysis in this case is the meaning of the phrase "HOTEL AND EVENT CENTER," like "CASINO," such wording indicates the types of services to be offered under the Cited Marks, as well as their source. When consumers encounter the Cited Marks in connection with the services offered, this connotation will be readily understood.

These well-known meanings described by the wording "CASINO" and "HOTEL AND EVENT CENTER" are not present in Applicant's Mark, nor does Applicant offer such services.

In addition, as discussed above, the words "SHOOTING STAR" (or "STARS") connote a well-understood idea, and therefore the differences in sound or appearance should negate any likelihood confusion. See Kirkpatrick, § 4:3:1 ("Where the marks in dispute are common words with well-known meanings, relatively slight differences in sound or appearance suffice to avoid conflict in some cases.").

In sum, given these significant dissimilarities in appearance, sound, meaning, and commercial impressions, Applicant's Mark is not likely to be confused with the Cited Mark, and Applicant's Mark is registrable.

D. Applicant's Services Are Dissimilar To Those Offered Under The Cited Marks. *(Du Pont Factor 2)*

The significant dissimilarity between Applicant's services and those offered under the Cited Marks further renders the potential for confusion *de minimis*.

It is well settled that goods or services that can be linked to the same broad field of commerce are not necessarily related for the purposes of trademark law. See Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100, 1109 (6th Cir. 1991) ("services are 'related' not because they exist within the same broad industry, but are 'related' if they are marketed and consumed such that buyers are likely to believe that the services, similarly marked, come from the same source"); see also Electronic Data Sys. Corp. v. EDSA Micro Corp., 23 U.S.P.Q.2d 1460, 1463 (TTAB 1992) ("the issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both"). In this case, where both operate in the broad field of games or gaming, consumers are unlikely to assume that the products emanate from the same source. Even where the goods and services are from the same general field of commerce, there should be no presumption of confusion. See In re Quadram Corp., 228 U.S.P.Q. at 865 (TTAB 1985).

The Cited Marks are registered for use in relation to, among other things, "casinos." In fact, the casino run by the owner of the Cited Marks is named the Shooting Star Casino.

By contrast, Applicant provides online games. Specifically, the SHOOTING STARS mark is the name of one game in Applicant's suite of online games. Given the nature of Applicant's services and those offered under the Cited Marks, such are not likely to be encountered by the same purchasers or end-users in a manner likely to cause confusion.

Although the owner of the Cited Marks and Applicant both offer services related to games or the gaming industry, that similarity is not sufficient to cause confusion. Rather, given the significant differences between the precise nature of Applicant's services and the services offered by the owner of the Cited Marks, confusion is highly unlikely, and Applicant's Mark therefore is registrable.

E. No Actual Confusion Has Occurred Although There Has Been Extensive Concurrent Use. (*Du Pont Factor 8*)

"An absence of likelihood of confusion may be inferred from the absence of proof of confusion if the actor and the other have made significant use of their respective designations in the same geographic market for a substantial period of time..." RESTATEMENT (THIRD) OF UNFAIR COMPETITION §23(2), AT 249-50 (1995). Applicant has been using the SHOOTING STARS mark

on the relevant services since at least as early as April 12, 2006. In addition, as evidenced by U.S. Registration No. 3,492,632, the owner of the Cited Marks has been using the word mark SHOOTING STAR CASINO since at least as early as October 1, 1991. Since Applicant and the owner of the Cited Marks began using their respective marks, no instances of actual confusion between Applicant's Mark and the Cited Marks have been reported to Applicant. This absence of actual confusion is indicative of an absence of any likelihood of confusion.

F. The Potential Confusion Is *De Minimis. (Du Pont Factor 12)*

Taken singularly, any of the above-described differences between the marks, or the goods and services offered under the marks, should be adequate to demonstrate that confusion is unlikely. When these elements are considered together with the meaning and therefore narrow protection to be afforded the Cited Marks, as well as the significant length of time during which there has been concurrent use without evidence of actual confusion, however, it is evident that there is no likelihood of confusion, and Applicant's Mark is therefore registrable.

CONCLUSION

Having responded fully to the Final Office Action, and in light of the amendment and arguments made above, Applicant respectfully submits that the application is in condition for publication and registration, and hereby requests such actions.

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[1] The owner of the Cited Mark actually has a spa at its Shooting Star Casino. See attached page from http://www.starcasino.com/Hotel/SereniiteeSpa/tabid/70/Default.aspx attached hereto as an Exhibit.

EVIDENCE
Evidence in the nature of Page from online article; page from USPTO database; page from web site of owner of Cited Marks has been attached.
Original PDF file:
http://tgate/PDF/RFR/2009/10/13/20091013123241748719-78697231-003_001/evi_24151134114-115140137_._List_of_good_luck_charms.pdf
Converted PDF file(s) (5 pages)
Evidence-1
Evidence-2
Evidence-3
Evidence-4
Evidence-5
Original PDF file:
http://tgate/PDF/RFR/2009/10/13/20091013123241748719-78697231-003_002/evi_24151134114-

115140137_._SHOOTING_STAR__class_44.pdf
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Original PDF file:
http://tgate/PDF/RFR/2009/10/13/20091013123241748719-78697231-003_003/evi_24151134114-115140137_._Shooting_Star_Casino_Spa.pdf
Converted PDF file(s) (3 pages)
Evidence-1
Evidence-2
Evidence-3

CLASSIFICATION AND LISTING OF GOODS/SERVICES
Applicant proposes to amend the following class of goods/services in the application:
Current: Class 041 for entertainment services, namely, providing an online computer game; electronic casino gaming services
Original Filing Basis:
Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

Proposed: Class 041 for entertainment services, namely, providing an online computer game
Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

SIGNATURE(S)
Request for Reconsideration Signature
Signature: /Deborah J Peckham/ Date: 10/13/2009
Signatory's Name: Deborah J. Peckham
Signatory's Position: Attorney of record, Massachusetts bar member

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 78697231
Internet Transmission Date: Tue Oct 13 12:32:41 EDT 2009
TEAS Stamp: USPTO/RFR-24.151.134.114-200910131232417
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d5f9fab80-N/A-N/A-20091013115140137451

List of good luck charms

There are many good luck charms that supposedly bring good luck and good fortune because they put off positive energy. Many different cultures have their own symbols of luck. Some of the symbols are seen as being lucky and other are seen as having the ability to bring good fortune or ward off bad spirits or bad fortune. Some items are even seen as wish makers. Here are some of the most popular symbols of luck:

Ladybugs: When a ladybug lands on you it is said to be good luck. Killing a ladybug is considered bad luck.

Scarabs: Scarabs were considered good luck beetles in ancient Egypt.

Rainbow: Rainbows are lucky because at the end of the rainbow is a pot of gold. A rainbow also has seven different colors.

Tigers: Tigers are considered lucky in Chinese astrology. The tiger is also considered a protector against certain evils including theft and fire.

Rabbits Foot: Many rabbit feet are fitted to be carried on key chains for good luck and protection to the traveler.

Buddha figure: A Buddha charm or statue is thought of as being lucky, especially if you rub Buddha's belly.

Dream Catcher: Dream catchers are from Native American's and are considered good fortune because they catch negative images from dreams and have been known to ward of bad dreams.

Horseshoe: Horseshoes are thought to bring good fortune when they are hung up on the wall of a home or above a doorway. Blacksmiths that made horseshoes were considered to be lucky.

Pot of Gold: You find a pot of gold at the end of rainbow, making it really lucky.

Nautical star: The nautical star is a good luck symbol because it is seen as providing guidance for sailors.

The Number Seven: Probably the luckiest and most talked about number, the number seven is considered lucky by different cultures, including the U.S. culture. The number seven is a lucky number all over the world and is important in world religions like Buddhism, Hinduism and Christianity.

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Four Leaf Clover or Shamrock: St. Patrick's Day has made the four leaf clover a popular symbol of luck. Four leaf clovers do exist; they are just not as common as the three leaf variety. So if you find one, it is said to be good luck.

Bamboo: Bamboo is considered good luck, specifically a certain type, named Lucky Bamboo. Feng Shui experts suggest the use of bamboo in your house as good luck.

Wishbone: A wishbone is a symbol of good luck and it is also a wish maker. When you find the wishbone, two people give the wishbone a tug and each of them make a wish. After the wishbone breaks, the person with the bigger piece will have their wish granted.

Falling Star: A falling star or a shooting star is lucky because it is rare to see one and you should make a wish after seeing one as it will be granted.

Lucky Penny: Many people bend over and pick up a penny lying on the ground if it is laying heads up, because it is considered good luck. Some people even keep the penny for good fortune.

Sharks Tooth: A sharks tooth is said to have protective and healing powers. They are also said to bring good luck. Many people wear them on necklaces or keep them somewhere in their house.

The Cross: Well known because of Christianity, the cross serves as good luck and a symbol to ward off evil and protect the person who bears it. Legend has it that the undead cannot attack you if you hold up a cross, the symbol of God, as good deflects evil. Many people wear crosses around their neck or carry a cross as a symbol of good luck and to keep them safe.

Garlic: Garlic was seen as a vampire vanquishing tool back in the middle ages. If you were to wear a chain of garlic around your neck the garlic was the closest thing to an antibiotic in the middle ages, so it was considered good luck to wear it and keep it close by.

Salt: Throwing salt over the shoulder is considered good luck, but spilling salt is bad luck. If you throw salt over your shoulder you are said to be putting the devil behind you. Superstitions about salt date back to biblical times when salt was a highly prized commodity, one reason why it was bad luck to spill salt. You should throw salt over your shoulder to ward off the devil, because the devil could be waiting over your left shoulder. Another reason spilling salt could be considered bad luck is because it is thought that Judas spilled salt at the Last Supper. Another belief is that your guardian angel (who can be found over your right shoulder) spills salt to warn you of evil nearby, so throw salt over your left shoulder to put salt in the devils eyes. It is also said that if you put a small layer of salt outside surrounding your entire house outside it will ward off evil.

Although science has defeated superstition mostly, we can't help but pick up a penny lying on the street or smile when we come across a four leaf clover.

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#9 in ***health***
#1 in ***frugal***

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SHOOTING STAR

Word Mark SHOOTING STAR

Goods and Services IC 025. US 022 039. G & S: Clothing, namely, shirts, golf shirts, western shirts, tee-shirts, baseball caps, golf hats, fishing hats, hats, visors, wind-resistant shirts and jackets, rain-resistant shirts and jackets, sweatshirts, sweaters, vests, pants, shorts, sleepwear, robes, underwear, coats, jackets, skirts, headbands, scarves, ties, belts and swimsuits

IC 028. US 022 023 038 050. G & S: Golf clubs, golf club covers, golf strap covers, golf balls, golf bags, golf gloves, golf bag tags, golf flags, golf ball markers, tees, divot repair tools; skis, ski poles, ski bindings, ski wax, snowboards, fishing poles, fishing tackle, fishing lures, tennis rackets, tennis balls, swim floats for recreational use

IC 041. US 100 101 107. G & S: Sports entertainment services, namely, operation of golf courses, conducting golf tournaments, golf instruction services, skiing facilities, nordic skiing facilities, skijoring, sleigh rides, sleighing facilities, sport fishing facilities, tennis facilities, swimming facilities, recreational services in the nature of horseback riding and horseback riding lessons; Providing live musical, vocal and variety performances; Health club services, namely, providing instruction and equipment in the field of physical exercise

IC 044. US 100 101. G & S: Health spa services, namely, cosmetic body care services

Standard Characters Claimed

Mark

Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77347048
Filing Date	December 7, 2007
Current Filing Basis	1B
Original Filing Basis	1B
Published for Opposition	May 26, 2009
Owner	(APPLICANT) Crystal Springs **Ranch**, Inc. CORPORATION WYOMING 3490 Clubhouse Drive Wilson WYOMING 83014
Attorney of Record	Lawrence E. Abelman
Type of Mark	TRADEMARK. SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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Sereniitee Spa offers a variety of spa packages and will be happy to create a custom spa experience to meet your needs. Some of our Spa Journeys include:

$162	*Sereniitee Spa* Our three most popular services rolled into one spa package: a Relaxation Massage, Purifying Facial and a Spa Pedicure. Duration: 3 hours
$102	*Total Indulgence* No time for a full day at the spa? This package gives you head-to-toe indulgence in a time-sensitive manner. A Relaxation Massage and a Spa Manicure or a Spa Pedicure (your choice). Duration: 2 hours

$324

Away Together

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Duration: 3 hours per per person

For a full list of packages, services, and pricing, download the Sereniitee Spa menu.

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Walk-ins are welcome. However, we highly recommend that you make reservations in advance to enjoy the best spa experience.

Hours: Monday through Saturday 9am–7pm

Cancellation Notice

As a courtesy to other guests and therapists, please let us know 24 hours in advance to reschedule or cancel an appointment to avoid being charged for a scheduled appointment. Please note that if you arrive late for your appointment, it will end as scheduled as to prevent delaying the scheduled guest.

Age Requirement

The Sereniitee spa is for adults 18 years or older. Those 17 years or younger may enjoy select spa services if accompanied by a parent or legal guardian.

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