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

Proceeding	85677459
Applicant	Nomi Network, Inc.
Applied for Mark	NOMI MADE FOR A BETTER LIFE
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Date	07/27/2015

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

In re: Nomi Network, Inc.
App. Ser. No.: 85677459, for NOMI MADE FOR A BETTER LIFE, Class 35
App. Filed: July 15, 2012

APPLICANT’S BRIEF IN SUPPORT OF APPEAL OF REFUSAL TO REGISTER

INTRODUCTION

Applicant Nomi Network, Inc. (“Applicant” or “Nomi Network”) hereby appeals the Final Office Action, issued by the Examining Attorney on November 20, 2014, refusing to register its trademark NOMI MADE FOR A BETTER LIFE, Ser. No. 85677459. On May 20, 2015, Applicant requested reconsideration of the Examining Attorney’s refusal to register its mark and, on May 27, 2015, the Examining Attorney denied Applicant’s request. Applicant now submits this brief in support of its appeal of the refusal to register.¹

QUESTION ON APPEAL

The sole question on appeal is whether a likelihood of confusion exists between Applicant’s mark NOMI MADE FOR A BETTER LIFE as used in connection with “on-line retail store services featuring clothing items, excluding footwear, that are specifically identified

¹ On July 23, 2015, Applicant submitted a Request for Remand to the Board, seeking to submit additional, newly available evidence showing how Applicant’s mark is actually used in commerce. Because the Board has not yet ruled on the Request, Applicant is submitting this brief in support of its appeal and requesting that if the Board grants the Request for Remand, Applicant be given an opportunity to submit a supplemental brief relying on that evidence.

as made by survivors of sex slavery and human trafficking and sold to consumers who wish to support victims of sex slavery and human trafficking” in Class 35 and the mark that is the subject of Registration No. 3918897, namely NOMI as used in connection with “footwear” in Class 25.

FACTS

Applicant Nomi Network is a non-profit, charitable organization that creates economic opportunities for survivors, and women at risk, of human trafficking by equipping them with leadership, entrepreneurship and production skills to become financially independent. Specifically, Nomi Network teaches women to design and produce clothing items which it then sells on-line through its websites at www.nominetwork.org and www.buyherbagnotherbody.org, which bear Applicant’s NOMI MADE FOR A BETTER LIFE mark in a prominent location. See, e.g., Jul. 23, 2015, Amendment to Allege Use, App. No. 85677459, TSDR, pp. 10-58,² downloaded from www.buyherbagnotherbody.org and www.nominetwork.org on Jul. 23, 2015. All products sold on Nomi Network’s website are marketed and clearly distinguished as products made by women who survived, or are at risk of, sex slavery and human trafficking. Indeed, the main purpose of Nomi Network’s products is to support the women who make them through Nomi Network. Nomi Network’s mission is an integral part of the circumstance under which its products are marketed and purchased.

When consumers first enter the electronic store on Nomi Network’s website, they encounter the statement “Nomi Network is in business to create economic opportunities for

² All citations to page numbers in the record refer to page numbers of the documents when downloaded as PDFs from the TSDR.

survivors and women at risk of human trafficking. Every item you buy provides jobs for survivors and helps end modern-day slavery.” See Jul. 23, 2015, Amendment to Allege Use, App. No. 85677459, TSDR, pp. 10, downloaded from www.buyherbagnotherbody.org on Jul. 23, 2015. Consumers that leave the store home page and view specific products, which must be done in order to purchase those products, view the products directly beside additional information about how each purchase supports survivors and women at risk of human trafficking. For example, a consumer seeking to purchase a Children’s Elephant Tee in White sees a Description Tab, which states “allow your little one to rock our elephant tee and help prevent other children from being trafficked”, and an Impact Tab, which talks about the area in which the t-shirt was made: “Sonagacchi, the largest, most infamous sex district in Kolkata, India. Within a few square miles more than 10,000 women stand in line selling their bodies to thousands of men who visit daily. Many are trafficked from Bangladesh, Nepal and rural India. For others poverty has left them without options. The cries of their hungry children drive them to sell their bodies.” Id. at pp. 18-20. A customer interested in the Women’s Stitching India tee sees a Descriptions Tab that says “Inspired by our India sewing program, this shirt represents our women’s new beginnings and their journeys to freedom” and an Impact Tab that contains information about the area in which the t-shirt was made. Id. at pp. 21-23. Each of the products offered by Nomi Network contains this type of information and the NOMI MADE FOR A BETTER LIFE mark is clearly displayed on each page where the products are offered. Id. at pp 10-44.

With information about the purpose of the clothing, where it was made, and how it supports victims of human trafficking surrounding each sale of clothing, consumers using Applicant’s online retail services cannot separate those services from the support of Applicant’s

charitable purpose and every purchaser of goods through Applicant's on-line retail services, which are offered in connection with Applicant's mark, knows that he or she does so to support victims of sex slavery and human trafficking and is making the decision to purchase the product in order to support Nomi Network. Indeed, Nomi Network's clothing is always offered in this context, as Nomi Network's goal is to generate support for its charitable purpose. Given the constant messaging of the Nomi Network mission throughout its electronic storefront, the decision to support Nomi Network is made together with the decision to purchase its products.

Consumers visiting any page of the Nomi Network website also encounter a wealth of information about Nomi Network's charitable services. They learn about Nomi Network's mission, about the specific activities it undertakes to support survivors and women at risk of human trafficking, and about the process by which the clothing items are made by these women. The home page contains a short statement about Applicant's mission, statistics about human trafficking, and links to other pages within the site that seek a visitor's involvement, talk about recent successes, and more. *Id.* at pp. 45-58. Visitors to the Nomi Network website also learn that they may support Nomi Network and help Nomi Network achieve its goals by purchasing clothing through the website. *Id.* Because information about Nomi Network's charitable purpose is displayed predominately, consumers purchasing clothing through the website in connection with Applicant's mark cannot ignore that they are purchasing them from an organization that supports, and in their own support of, survivors and women at risk of sex slavery and human trafficking.

Despite these facts, the Examining Attorney refused registration of the NOMI MADE FOR A BETTER LIFE mark on the grounds that there is a likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with Reg. No. 3918897 for NOMI for use in

connection with “footwear” in Class 25. The Examining Attorney maintained her refusal after Applicant pointed out the Registrant is a corporation that sells its shoes for profit in regular retail stores. Further, Registrant affirmatively represented that it sells only footwear, and not clothing, when it filed an amendment removing “clothing, namely tops, bottoms, headwear, skirts and dresses” from its registration and stating that “Registrant . . . discovered the existing identification of goods is inaccurate and hereby amends the goods to be narrower than what is listed in the certificate of registration”. See June 7, 2011, Section 7 Request, Reg. No. 3918897, TSDR, pp 1-2; see also Oct. 23, 2012, Office Action, App. No. 85677459, TSDR, p. 12 (showing that “clothing, namely tops, bottoms, headwear, skirts and dresses” has been removed from Registrant’s registration and only footwear remains).

ARGUMENT

In a likelihood of confusion analysis, the Board looks to the factors set forth in *In re E.I. DuPont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973), paying particular attention to the factors most relevant to the case at hand. See *In re Allegiance Staffing*, 115 U.S.P.Q.2d 1319, 1323 (T.T.A.B. 2015), citing *In re E.I. DuPont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973) (“[O]ur determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the [*du Pont* factors]. Each factor may, from case to case, play a dominant role.”). Applicant submits that of the thirteen *DuPont* factors, the following four factors, each of which is discussed below, are most relevant to the *ex parte* determination of whether a likelihood of confusion exists between Registrant’s and Applicant’s marks: (1) the similarity or dissimilarity of established, likely to continue channels of trade; (2) the conditions under which and buyers to whom sales are made, *i.e.* impulse vs. careful, sophisticated purchasing; (3) the similarity or dissimilarity of the marks in their entireties as to

appearance, sound, connotation and commercial impression; and (4) the similarity or dissimilarity of the nature of the goods. *See id.* Applicant notes that “each case must be decided on its own particular facts and circumstances”, *In re British Bulldog, Ltd.* 224 U.S.P.Q. 854, 856 (T.T.A.B. 1984), and submits that when considering the relevant *du Pont* factors, the facts and circumstances here dictate a finding of no likelihood of confusion and a reversal of the refusal to register.

A. Applicant’s and Registrant’s Products are Sold to Different Consumers through Different Channels of Trade

Where there are differences in the nature and purpose of the goods and services at issue, in the manner in which the goods and/or services are promoted and in the consumers who purchase those goods and/or services, the Board frequently finds there is no likelihood of confusion. In *Edwards Lifesciences Corporation v. VigiLanz Corporation*, the Board held that VIGILANCE for heart monitors and VIGILANZ for systems that monitor adverse reactions to drugs were not confusingly similar even though the marks were virtually identical and both products were marketed to, sold to, and used by hospital personnel. 94 U.S.P.Q.2d 1399 (T.T.A.B. 2010). The Board rested its finding on the fact that different personnel within the hospital used each of the products and so “opposer's heart monitors and applicant's computer systems are separate and distinct products that are not marketed to the same consumers . . . the initial marketing and outreach efforts by the parties are to different prospective end users of the respective products.” *Id.* at 1411. Similarly, in *Quartz Radiation Corporation v. Comm/Scope Co.*, the Board determined there was no likelihood of confusion between QR for coaxial cable and QR for apparatus used in connection with photocopying, drafting and blueprint machines because the products at issue “are different in nature; they are used for different purposes; they are promoted differently and are purchased by different discriminating purchasers.” 1 U.S.P.Q.2d

1668, 1669 (T.T.A.B. 1986). In *In re Javelin Capital Markets*, the Board held that JAVELIN VENTURE PARTNERS for use in connection with venture capital services was not confusingly similar to applicant's JAVELIN for use in connection with financial exchange services relating to derivatives, excluding venture capital services, even though both are financial services. The Board focused on how the services were actually offered and used in the marketplace and found no confusion because they "are distinctly different activities that move in different channels of trade and to different classes of consumers." Ser. No. 85438946, 2015 WL 4380981, at *4 (T.T.A.B. Jun. 30, 2015) (not precedential).³ The Board continued, stating "[i]n other words, the conditions and activities surrounding marketing of these services are such that they would not be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer." *Id.* See also *In re Palm Beach Inc.*, 225 U.S.P.Q. 785, 787-88 (T.T.A.B. 1985) (holding that the mark ADLER (stylized) as used on men's pants is not likely to be confused with ADLER as used on socks because "pants and knitted socks are specifically different items of clothing which are normally displayed in different sections of the stores in which they are sold").

As is amply demonstrated by the above opinions, the relevant concern is not "with the mere theoretical possibilities of confusion, deception or mistake or with *de minimis* situations but with the practicalities of the commercial world, with which the trademark laws deal." *Edwards Lifesciences Corporation v. VigiLanz Corporation*, 94 U.S.P.Q.2d 1399, 1414 (T.T.A.B. 2010),

³ Non-precedential decisions by the Board are citable authority. Trademark Board Manual of Procedure, § 1203.02(f).

citing Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 U.S.P.Q.2d 1388, 1391 (Fed. Cir. 1992). Here, the practicalities of the commercial world and the manner in which the marks are actually used in the marketplace instruct a finding of no likelihood of confusion. Registrant's goods are footwear, sold for profit and marketed and sold to consumers simply seeking to buy shoes. Registrant's consumers are those purchasing shoes for themselves and basing their purchasing decisions on utility, aesthetics and price.

By contrast, Applicant's services are provided under starkly different marketplace conditions and in a markedly different channel of trade. Applicant is a non-profit organization offering on-line retail store services featuring products made by victims of sex slavery and human trafficking that are sold to consumers who purchase the Applicant's clothing in order to support victims of sex slavery and human trafficking. The purpose of Applicant's services is not to earn a profit, but is to raise awareness of sex slavery and human trafficking, to provide survivors of human trafficking with marketable skills and to generate financial support for Applicant's charitable mission. Applicant's target customers are not those purchasing items for themselves on the basis of utility, aesthetics and price. These are secondary concerns, at best. Instead, Applicant's customers' primary concern is to support Applicant's charitable activities and to do so by visiting Applicant's on-line store to purchase clothing made by survivors of sex slavery and human trafficking. The services offered in connection with Applicant's mark—namely, Applicant's electronic store where it sells clothing made by victims, and women at risk of, sex slavery and human trafficking—are promoted to and attract a particular, narrow target audience in a very limited way, *i.e.*, by offering goods to be purchased primarily in pursuit of Applicant's charitable purpose. This is evident from the nature and content of Applicant's

website, which discusses its charitable mission extensively and clearly identifies the clothing offered as made by and sold to support victims of human trafficking and sex slavery.

The Examining Attorney argues that there is no difference in the channels of trade for Registrant's goods and Applicant's goods because Registrant's goods are "footwear" without any additional limitation and so "must be considered to encompass all types of footwear goods available to all types of consumers, including [A]pplicant's consumers." May 27, 2015, Reconsideration Letter, App. No. 85677459, TSDR, p 4. This is an over-statement of the law. The Board has recognized that "[t]he mere fact that [two parties] are presumed to market to general consumers, including businesses and individuals, does not dictate a conclusion that confusion is likely to arise." *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 U.S.P.Q.2d 1782, 1794 (T.T.A.B. 2002) ("There is nothing in the record, however, to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship."). Further, it is not proper to assume Registrant's footwear encompasses all footwear that has ever existed or been sold to anyone; rather, "it is settled that the issue of likelihood of confusion must be determined in light of the services and goods as respectively set forth in the involved application and cited registration and, in the absence of any specific limitations therein, *on the basis of all normal and usual channels of trade and methods of distribution for such services and goods.*" *In re Nobody's Perfect, Inc.*, 44 U.S.P.Q.2d 1054, 1055 (T.T.A.B. 1997) (emphasis added). The *normal and usual* channels of trade and methods of distribution for footwear are not a website run by a non-profit, charitable organization devoted to supporting victims of sex slavery and human trafficking that sells clothing and bags made by victims of sex slavery and human trafficking to consumers who wish to support victims of sex slavery and human trafficking. They are retail

stores, mass merchandisers, department stores, and footwear specialty stores, and their respective retail websites, that sell shoes for profit to consumers who purchase those shoes primarily based on their utility, aesthetics and price.

Additionally, the Examining Attorney erroneously reasons that because Registrant's channels of trade are not limited, it is insufficient for Applicant to limit its channels of trade to on-line retail stores that feature clothing items, excluding footwear, that are specifically identified as made by survivors of sex slavery and human trafficking and sold to consumers who wish to support victims of sex slavery and human trafficking. In *In re the Shoe Works, Inc.*, the Board held to the contrary, finding no likelihood of confusion where registrant's PALM BAY mark for men's, women's and children's shorts and pants was not restricted as to the channels of trade but applicant's PALM BAY (and design) mark for women's shoes was restricted to applicant's retail shoe stores. 6 U.S.P.Q.2d 1890, 1891 (T.T.A.B. 1988). In doing so, the Board noted that applicant's retail shoe stores are not the normal channels of trade for shorts and pants. *Id.*; see also *Embarcadero Technologies Inc. v. RStudio Inc.*, 105 U.S.P.Q.2d 1825, 1837 (T.T.A.B. 2013) (finding RSTUDIO for computer software and related services and ER/STUDIO computer software and related services not confusingly similar in part because applicant amended its description of goods to clarify that it was not providing the same specific type of software provided by registrant). This same logic applies here: Applicant's website where it sells clothing—and *not footwear*—made by and sold in support of victims of sex slavery and human trafficking is not a normal channel of trade for footwear.

Setting aside the “mere theoretical possibilities of confusion, deception or mistake,” and considering, instead, the “the practicalities of the commercial world” in which Registrant's and Applicant's goods and services are offered, it is clear that, as in the cases cited above, “the

conditions and activities surrounding marketing of these [goods and] services are such that they would not be encountered by the same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer.” *In re Javelin Capital Markets*, Ser. No. 85438946, 2015 WL 4380981, at *4 (T.T.A.B. Jun. 30, 2015) (not precedential). Given the vast difference in channels of trade, Applicant submits that there is no likelihood of confusion with Registrant’s mark.

B. Consumers of Applicant’s Services are Sophisticated and Exercise Care When Deciding Whether and How to Support Applicant’s Charitable Mission

Where a consumer is likely to exercise a reasonable degree of care, despite the price of the goods at issue, this factor weighs against a finding of a likelihood of confusion. *See, e.g., In re N.A.D., Inc.*, 224 U.S.P.Q. 969, 971 (Fed. Cir. 1985) (holding that as only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED); *see also Inter IKEA Sys. B.V. v. Akea, LLC*, 110 U.S.P.Q.2d 1734, 1744 (T.T.A.B. 2014). In *Inter IKEA Sys. B.V. v. Akea, LLC*, the Board found that consumers of applicant’s dietary supplements would not make their purchases carelessly, as “a child purchasing candy or a toy”, but would be “expected, at least, to examine the front of the packages in order to determine what kind of entrée is contained therein” and, in doing so, would see applicant’s AKEA mark. *Id.* Because of this “moderate degree of consumer care”, the Board found that there was no likelihood of confusion between AKEA for use on dietary and nutritional supplements and IKEA for use on various food items and restaurant services. *Id.*

Like the consumers of the AKEA products, Applicant’s consumers are likely to exercise at least a moderate degree of consumer care. Support of a charitable organization and its cause is

very personal and not taken lightly. As a result, consumers seeking to support charitable organizations carefully review those organizations and their missions and activities before making any donations or purchasing any of their products. Applicant's constituents are no different. Generally, speaking, they examine and carefully consider the contents of Applicant's website and Applicant's mission and activities. In doing so, they, like the consumers of the AKEA products, will encounter Applicant's marks in a manner that eliminates the likelihood that they will believe Applicant's products emanate from Registrant.

C. The Marks are Different in Appearance, Sound and Commercial Impression

It is an accepted principal of trademark law that when assessing the similarity of two marks, the marks must be reviewed in their entireties. *See, e.g., Embarcadero Technologies Inc. v. RStudio Inc.*, 105 U.S.P.Q.2d 1825, 1835 (T.T.A.B. 2013). Indeed, even disclaimed, generic or other non-trademark material must be considered in determining the overall appearance, sound and commercial impression of two marks. *See In re TSI Brands Inc.*, 67 U.S.P.Q.2d 1657, 1661-62 (T.T.A.B. 2002) (considering the disclaimed, descriptive wording in application for AK AMERICAN KHAKIS (and design) for sportswear when determining no likelihood of confusion exists with AK (and design) for athletic clothing). When Applicant's and Registrant's marks are considered in their entireties, it is clear that they are different in appearance, sound and commercial impression. Registrant's mark is simply NOMI, a single word and nothing else. It conveys no information or connotation with respect to footwear. Applicant's mark is NOMI MADE FOR A BETTER LIFE, comprised of six words and eight syllables and, obviously, is different from Registrant's mark in appearance and sound.

Perhaps most importantly, Applicant's mark conveys a distinct commercial impression by suggesting qualities of Applicant's services, namely that Nomi Network's products are made by victims, and women at risk of, human trafficking who are trying to improve their lives. In

other words, the clothing sold by Applicant is actually *made* by women seeking a *better life* and, by purchasing the products, the consumer too can help victims of sex slavery and human trafficking achieve better lives.

Where marks convey different commercial impressions, as Applicant's and Registrant's marks do, the Board has consistently found no likelihood of confusion exists. For example, in *In re Nobody's Perfect Inc.* the Board recognized that applicant's mark NOBODY'S PERFECT for "apparel retail store services selling goods of both first and irregular quality" was substantially similar in terms of sound and appearance and identical in terms of goods and channels of trade to a registration for NO BODY'S PERFECT for use on "feminine underwear." 44 U.S.P.Q.2d 1054 (T.T.A.B.1997). Despite these overwhelming similarities, the Board found there was no likelihood of confusion because of the difference in connotation and commercial impression presented by the two marks: NOBODY'S PERFECT for retail stores selling goods of first and irregular quality suggested that the items sold therein are less than perfect while NO BODY'S PERFECT for feminine underwear suggests that no one person's physical body is perfect. *Id.* at 1057. The Board adopted this same approach in *In re Island Oasis Frozen Cocktail Co.*, finding no likelihood of confusion on the basis that ISLANDER COFFEE HOUSE for restaurant services conveyed a different commercial impression from ISLANDER for bases and concentrates used in making frozen drinks, even though "coffee house" was generic and disclaimed in the relevant registration. 64 U.S.P.Q.2d 1158, 1160 (T.T.A.B. 2002) (not precedential). *See also Swatch AG (Swatch SA) (Swatch Ltd.) v. M. Z. Berger & Co.*, 108 U.S.P.Q.2d 1463, 1471 (T.T.A.B. 2013) (holding SWATCH and IWATCH are not confusingly similar, despite identical goods and channels of trade for marks and fame of SWATCH mark, because marks differ in sound, meaning and commercial impressions); *Embarcadero*

Technologies Inc. v. RStudio Inc., 105 U.S.P.Q.2d 1825, 1837 (T.T.A.B. 2013) (finding RSTUDIO for computer software and related services and ER/STUDIO computer software and related services not confusingly similar in part because, despite “a degree of similarity in the marks’ appearance and sound . . . each mark possesses a separate and distinctively different commercial impression and connotation”). The obvious differences in the sound, appearance and commercial impressions of Applicant’s and Registrant’s marks also weigh against a finding of a likelihood of confusion.

D. Registrant and Applicant Offer Different Goods and Services

“A finding that the goods are similar is not based on whether a general term or overarching relationship can be found to encompass them both.” *Edwards Lifesciences Corporation v. VigiLanz Corporation*, 94 U.S.P.Q.2d 1399, 1410 (T.T.A.B. 2010). There is no “per se” rule that there must be a likelihood of confusion where footwear and clothing items are offered in connection with the same or a similar mark. *In re British Bulldog, Ltd.* 224 U.S.P.Q. 854, 856 (T.T.A.B. 1984). Instead, the Board looks at a variety of factors, including the exact nature of the products, whether the relevant products are likely to be sold in close proximity to each other, and whether the marks have the different connotations when used in connection with the respective products. Here, not one, but all three of these factors indicate that Applicant’s and Registrant’s products are not similar.

First, Applicant and Registrant offer different products—Registrant sells footwear, while Applicant offers on-line retail store services featuring clothing items and not footwear. In fact, footwear is not available anywhere on Applicant’s website and Applicant has explicitly excluded footwear from its description of services. *See, e.g., In re the Shoe Works, Inc.*, 6 U.S.P.Q.2d 1890, 1891 (T.T.A.B. 1988) (similar marks for shorts/pants and shoes not confusingly similar); *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854, 856 (T.T.A.B. 1984) (the same mark for

underwear and shoes not confusingly similar); *In re ReSashay Square Dance, Inc.*, Ser. No. 86041312, (T.T.A.B. Jul. 8, 2015) (not precedential) (similar marks for square dancing petticoats and shoes not confusingly similar).

Second, Applicant's and Registrant's products are not offered in the same sections of the same stores, or even in the same stores. In *In re British Bulldog, Ltd.*, the Board reversed a refusal to register PLAYERS for underwear that was based on an alleged likelihood of confusion with PLAYERS for shoes reasoning that the goods are "distinctly different, [even] when sold in the same stores". 224 U.S.P.Q. 854, 856 (T.T.A.B. 1984); *see also H.D. Lee Co. v. Maidenform Inc.*, 87 U.S.P.Q.2d 1715 (T.T.A.B. 2008) (finding no likelihood of confusion even though undergarments sold in same store as jeans, pants, shirts, and skirts in part because goods are sold in different parts of the store); *In re Palm Beach Inc.*, 225 U.S.P.Q 785, 787-88 (T.T.A.B. 1985) (holding ADLER (stylized) for pants not confusingly similar to ADLER for knitted socks because they are different clothing items that are normally displayed in different parts of the store). Applicant's and Registrant's products are separated even further than the goods in *In re British Bulldog, Ltd.* and the other cases cited above. They are not merely offered in different sections of a store; they are not offered in the same store at all. Applicant seeks registration for its on-line retail store services where it approves all goods offered therein and exclusively sells products made by survivors, and women at risk of, human trafficking to consumers wishing to support survivors, and women at risk of, human trafficking. Registrant's footwear is not, and will never be, offered through Applicant's on-line retail store services. Moreover, Applicant's on-line services and clothing and Registrant's footwear are not offered in the same stores or on the same websites at all.

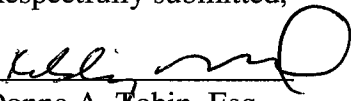
Finally, Applicant's and Registrant's marks create different connotations and commercial impressions when viewed in connection with their products. The Board has held that identical marks on different clothing items are not confusingly similar where the marks have different connotations when used on the items. In *In re Sydel Lingerie Co.*, the Board determined that BOTTOMS UP for women's and children's underwear and BOTTOMS UP for men's clothing was not likely to cause confusion in part because the marks likely carry different connotations as applied to the respective goods. 197 U.S.P.Q. 629, 630 (T.T.A.B. 1977). In doing so, the Board observed that one must consider "the nature and impact of the marks as well as the marketing environment in which a purchaser normally encounters them." *Id.* In *In re Sears, Roebuck and Co.*, the Board found that, because the marks had different connotations, CROSS-OVER for brassieres was not confusingly similar to CROSSOVER for women's sportswear even though the goods were "all clothing items that may be sold through the same outlets to the same classes of purchasers, and may well be purchased during the same shopping trip, quite possibly to be worn together". 2 U.S.P.Q.2d 1312, 1313 (T.T.A.B. 1987); *see also In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854, 856 (T.T.A.B. 1984) (determining no likelihood of confusion because PLAYERS for underwear and for shoes creates a "somewhat different" commercial impression). As in these cases, the connotations and commercial impressions of the marks at issue here are different when viewed with the products offered thereunder. NOMI MADE FOR A BETTER LIFE, when considered in connection with Applicant's charitable services, the fact that the clothes are made by survivors and women at risk of human trafficking, and manner in which they are advertised and sold carries a specific connotation, namely that the clothes literally are made and sold so those survivors and women at risk can have a better life. Registrant's mark as used in connection with its footwear carries no such connotation.

It is important to remember that, in a likelihood of confusion analysis, the relevant inquiry is “not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source.” *Paula Payne Prods. Co. v. Johnson’s Pub’g Co., Inc.*, 177 U.S.P.Q. 76, 77 (C.C.P.A. 1973); *see also Viacom International Inc. v. Komm*, 46 U.S.P.Q.2d 1233, 1239 (T.T.A.B. 1998) (holding that even though applicant’s mark might call to mind registrant’s mark there is no likelihood of confusion because consumers are not likely to be confused into believing applicant’s and registrant’s products emanate from the same source). Similarly here, consumers are not likely to be confused between supporting Nomi Network’s mission and buying shoes from Registrant.

CONCLUSION

Given the differences in Applicant’s and Registrant’s channels of trade, goods and marks, the sophistication of Applicant’s consumers, and the lack of a single instance of actual confusion, the answer to the relevant inquiry is that the marks will not confuse people into believing that the goods or services they identify emanate from the same source. Accordingly, Applicant respectfully submits the Examining Attorney’s refusal to register NOMI MADE FOR A BETTER LIFE should be reversed and Applicant’s application should be approved for publication.

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