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

Proceeding	86425269
Applicant	Prosser, Inc.
Applied for Mark	TRUE VELOCITY
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Date	02/08/2016

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

<b>In re Trademark Application of :</b>	}	<b>Trademark Law Office 115</b>
	}	
<b>Applicant: Prosser, Inc.</b>	}	<b>Jeffrey S. Deford</b>
<b>Serial No.: 86425269</b>	}	<b>Examining Attorney</b>
<b>Filed: October 6, 2014</b>	}	
<b>Mark: TRUE VELOCITY</b>	}	

**APPLICANT’S APPEAL BRIEF**

**INTRODUCTION**

Prosser, Inc. (“Applicant”) hereby appeals the Examining Attorney’s final refusal to register the mark TRUE VELOCITY “for polymer-based center fire rifle cartridges meeting military specifications and provided solely in connection with the Department of Defense, governmental and military use in automatic machine guns and semi-automatic machine guns, excluding all other ammunition, shotgun shells and shotgun shell shot” in International Class 13 (“Applicant’s Mark”), and respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney’s decision. The Examining Attorney has refused registration of Applicant’s Mark on the grounds that it is likely to be confused with the mark in U.S. Registration No. 2386219 for the mark VELOCITY for “ammunition; shotgun shells; shotgun shell shot” in International Class 13 (the “Cited Mark”).

**APPLICATION HISTORY**

On October 16, 2014, Applicant filed an intent-to-use application (Serial No. 86425269) to register its TRUE VELOCITY mark for “ammunition” in International Class 13. The Examining Attorney issued an Office Action on January 26, 2015, refusing registration of the mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on likelihood of confusion with the Cited Mark. Applicant responded to the first Office Action on March 24, 2015, revising the description of goods and submitting arguments and evidence in opposition to the Examining Attorney’s position on likelihood of confusion.

On April 28, 2015, the Examining Attorney issued a second Office Action making final the refusal based upon the Cited Mark on the grounds of likelihood of confusion.

On October 19, 2015, Applicant filed an Amendment to Allege Use claiming a date of first use of January 5, 2015, which Amendment was accepted on October 22, 2015.

On October 27, 2015, Applicant filed a Notice of Appeal and Request for Reconsideration. The Trademark Trial and Appeal Board issued an order instituting the appeal, and remanded the Request for Reconsideration to the Examining Attorney on October 28, 2015. The Examining Attorney issued an action denying the Request for Reconsideration on December 3, 2015. The Board issued an order resuming the Appeal on December 11, 2015.

#### **SUMMARY OF EXAMINING ATTORNEY'S ARGUMENT**

The Examining Attorney has argued that Applicant's Mark is confusingly similar to the Cited Mark because of: (1) the similarity of the marks; (2) the similarity and nature of the goods and/or services; and (3) the similarity of the trade channels of the goods and/or services. Regarding the similarity of the marks, the Examining Attorney has argued that the Applicant's Mark incorporates the entire literal portion of the Cited Mark, that the common matter between the marks is not weak or diluted, and that Applicant has merely added the word element TRUE to the Cited Mark. Regarding the similarity and nature of the goods and/or services, the Examining Attorney has argued that the goods are identical and highly related and that Registrant's identification of goods has no restrictions as to nature, type, channels of trade, or classes of purchasers. Regarding the similarity of the trade channels of the goods and/or services, the Examining Attorney has argued that the Registrant is presumed to operate in all normal channels of trade and reaches all classes of purchasers of the identified goods, including Applicant's intended purchasers.

#### **SUMMARY OF APPLICANT'S ARGUMENT**

Applicant has argued that pertinent case law establishes the marks differ in appearance, sound and connotation and convey different commercial impressions, that the common matter between the marks is weak and therefore subject to weak protection, that the goods identified by Applicant's Mark and the Cited Mark are distinguishable, and even if the goods are identical or highly related, the marks are sufficiently different to make confusion unlikely, especially given the number of similar marks in use on

similar goods. Applicant's Mark begins with an additional term "TRUE," which distinguishes the marks, as customers focus on the first word in a mark. In addition, the common matter between the marks, the term VELOCITY, is common in third-party trademark registrations and common law marks for similar goods as well as in marketing for ammunition, showing that Registrant's VELOCITY mark is deserving of weak protection. Applicant's goods travel in different channels of trade, and Applicant's customers, such as governments and the military, are extremely sophisticated consumers. Both Applicant's specialized consumers and Registrant's general consumers have specific technical needs with respect to ammunition such that they are unlikely to be confused by similarities between the marks.

### **APPLICANT'S ARGUMENT**

To prevail in this appeal, the Examining Attorney must meet its burden of proving that Applicant's Mark, when used in connection with Applicant's goods, so resembles the Cited Mark when used with Registrant's goods, as to be likely to cause confusion, to cause mistake, or to deceive the relevant purchasing public. *See In re Giovanni Food Co.*, 97 USPQ2d 1990 (TTAB 2011) ("[W]e determine that the Office has not met its burden of proving likelihood of confusion."). In the record below, the Examining Attorney did not meet this burden. While Applicant's goods and Registrant's goods may be characterized generally as ammunition, the Examining Attorney has neglected to account for the significant differences between Applicant's Mark and the Cited Mark as well as the use of numerous third-party "VELOCITY" marks for ammunition. Applicant respectfully submits that, given the realities of the ammunition marketplace, Applicant's Mark is sufficiently distinct from the Cited Mark, the goods at issue are not related, that both Applicant's and Registrant's goods are purchased by different types of consumers with specific technical needs, and that the use of numerous third-party "VELOCITY" marks for ammunition which render the Cited Mark extremely weak favor registration of Applicant's Mark.

Likelihood of confusion is assessed by focusing on the question whether the marks, as applied to the respective goods, so resemble each other that the purchasing public would mistakenly assume that the applicant's goods originate from the same source as the goods in the cited registration. *See Paula Payne*

*Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (C.C.P.A. 1973). The determination is made on a case-by-case basis, guided by the application of the familiar factors from *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Those factors include the similarity or dissimilarity and nature of the goods described, the conditions under which and the buyers to whom sales are made, and the number and nature of similar marks in use on similar goods. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201 (Fed. Cir. 2003).

Not all of the *du Pont* factors may be relevant or of equal weight in a given case and “any one of the factors may control a particular case.” *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). The fundamental inquiry in the likelihood of confusion analysis is the cumulative effect of all the differences. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 928, 198 USPQ 151 (C.C.P.A. 1978). Applicant has set forth in the record that these factors strongly support the conclusion that no confusion is likely to result between Applicant’s TRUE VELOCITY mark and Registrant’s VELOCITY mark. Applicant submits that the Examining Attorney has provided no evidence for the conclusions he draws in the Office Actions and the denial of the Request for Reconsideration and has failed to give adequate consideration to the differences between Applicant’s Mark and the Cited Mark as well as the evidence of numerous third-party VELOCITY marks used in connection with ammunition that Applicant has provided.

It is clear that the Examiner has improperly only considered three of the *du Pont* factors (namely, similarity of the marks, similarity of the goods, and similarity of trade channels of the goods) which resulted in his conclusion that there is a likelihood of confusion between Applicant’s Mark and the Cited Mark. Regarding the issue of likelihood of confusion, *all* circumstances surrounding the sale of the goods and/or services are considered. See *In re du Pont*, 476 F.2d at 1361 (emphasis added). These circumstances include the marketing channels, the identity of the prospective purchasers, and the degree of similarity between the marks and between the goods and/or services. See *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386 (C.C.P.A. 1973); TMEP §1207.01. By focusing on only three of the *du Pont* factors, the Examiner has not considered all circumstances surrounding the sale of the goods,

which *du Pont* dictates *must* be considered in order to determine whether a likelihood of confusion exists. Therefore, Applicant respectfully submits that, by determining that the most relevant *du Pont* factors in this case are similarity of the marks, similarity of the goods, and similarity of trade channels of the goods, the Examiner has improperly dismissed and unduly diminished the weight given to other substantive factors that provide evidence of what happens in the market place – namely, the number and nature of similar marks in use on similar goods, “impulse” vs. careful, sophisticated purchasing, market interface between Applicant and the owner of a prior mark, and extent of potential confusion, i.e., whether de minimis or substantial. “[E]ven close similarity between two marks is not dispositive of the issue of likelihood of confusion. Rather, the similarity must be assessed in terms of its effect upon prospective purchasers.” *Lever Bros. Co. v. American Bakeries Co.*, 693 F. 2d 251, 257 (2d Cir. 1982). Consequently, the Examiner has failed to appropriately apply the *du Pont* analysis in the instant case, and Applicant submits that the proper application of the *du Pont* factors results in a very different outcome.

#### **COMPARISON OF THE MARKS**

The Examining Attorney has arbitrarily determined that VELOCITY is the dominant feature of the marks, apparently because this is the common matter between Applicant’s Mark and the Cited Mark, as the Examining Attorney has provided no evidence to support this conclusion. However, according to TMEP §1207.01(b), the marks are compared in their entirety under a Trademark Act Section 2(d) analysis. Indeed, it is well established that an analysis of likelihood of confusion must consider the mark as a whole, and undue weight must not be given to only a part of the mark in deciding likelihood of confusion. *In re Hearst*, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992) (emphasis added). The Examining Attorney concluded that, “Here the applicant has merely added the word element TRUE to the registered mark. Adding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion.” [April 28, 2015 Office Action, TSDR, p. 3.] Although this may be the general rule, the rule is subject to two exceptions: (1) where the common portion is weak or descriptive; or (2) where the marks in their entirety convey quite different meanings. *See, e.g., Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458,

1478 (TTAB 2014) (junior user's PERKSPOT was not confusingly similar to PERKS. Adding SPOT to senior user's PERKS for a discount buying program for employees was sufficient to avoid a likelihood of confusion because PERKS was a weak, descriptive mark with a narrow scope of protection). Applicant submits that the common portion of Applicant's Mark and the Cited Mark is weak and highly descriptive as applied to ammunition, and that the marks in their entireties convey quite different commercial impressions.

Whether a mark is classified as "strong" or "weak" is a very important element in deciding likelihood of confusion. If the common element of conflicting marks is a word that is "weak" then this reduces the likelihood of confusion. A portion of a mark may be "weak" in the sense that it is descriptive, highly suggestive, or is in common use by many other sellers in the market. *See Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400, 167 USPQ 529 (C.C.P.A. 1970) (PEAK for dentifrice not confusingly similar to PEAK PERIOD for personal deodorants; "even though both products come within the category of cosmetics, they are applied to the skin for entirely different purposes"); *Knapp-Monarch Co. v. Poloron Products, Inc.*, 132 USPQ 412 (TTAB 1962) (THERMEX—THERM-A-JUG: no likelihood of confusion, as common "THERM" is suggestive of heat-insulating). If the common element in the conflicting marks is suggestive or descriptive of the goods, this lessens the likelihood of confusion.

The word VELOCITY is very common in third-party marks and in the marketing and description of ammunition. Velocity (expressed in feet per second) is a measure applied to all ammunition standards throughout the industry. [See, e.g., exhibits *Velocity – Wikipedia*, *Gun Velocity Categories*, and *Median Velocity Chart* from October 27, 2015 Request for Reconsideration, TSDR, pp. 39-46, 47, 48-49.] For example, ammunition is commonly described and marketed as "high velocity" and "extreme velocity." [See exhibits *Third Party Velocity Marketing*, *Third Party Velocity Ammunition*, and *SAAMI ITEM 226-A Technical Overview of Ammunition Types* from October 27, 2015 Request for Reconsideration, TSDR, pp. 50-64, 65-79, 80-87.] High or extreme velocity ammunition is useful for certain types of game, especially at long distance when the shooter needs a bullet to reach a target as soon as possible. Because of the overwhelmingly common use of the term VELOCITY in the trademarks, labeling, marketing and

description of ammunition, the word VELOCITY by itself is extremely weak when used in connection with ammunition and does not stand out. The Board and the courts have recognized that merely suggestive and weak designations are entitled to a narrow scope of protection. *See In re Central Soya Company, Inc.*, 220 USPQ 914 (TTAB 1984).

In its original Response, Applicant noted that the USPTO has approved similar marks for registration that include the term VELOCITY for ammunition and related goods, including:

<b>TM/SN/RN/Disclaimer</b>	<b>Status/Key Dates</b>	<b>Brief Goods/Services</b>	<b>Owner</b>
VELOCITOR  VELOCITOR  RN: 3165303 SN: 78785725	Registered 8 & 15 October 31, 2012  First Use: December 20, 2001 Filed: January 5, 2006 Published: August 15, 2006 Registered: October 31, 2006	(Int'l Class: 13) ammunition	Alliant Techsystems Inc. (Delaware Corp.) 7480 Flying Cloud Drive Eden Prairie, Minnesota 55344
VELOCITY TACTICS  VELOCITY TACTICS  RN: 4598103 SN: 85867061	Registered September 2, 2014  First Use: February 14, 2014 Filed: March 5, 2013 Published: February 11, 2014	(Int'l Class: 13) ballistic weapons	Velocity Manufacturing Company (Kansas Limited Liability Company) 523 E. Wall Street Fort Scott, Kansas 66701
HIGH VELOCITY  RN: 2116940 SN: 75079557	Renewed November 25, 2007  First Use: May 15, 1997 Filed: March 27, 1996 Published: December 3, 1996 Registered: November 25, 1997	(Int'l Class: 09) protective clothing, namely, body armor	U. S. Armor Corporation (California Corp.) 16433 Valley View Ave. Cerritos, California 90703
TERMINAL VELOCITY	Renewed November 3, 2011	(Int'l Class: 9) Protective clothing, namely, body	U. S. Armor Corporation



<b>TM/SN/RN/Disclaimer</b>	<b>Status/Key Dates</b>	<b>Brief Goods/Services</b>	<b>Owner</b>
RN: 2496524 SN: 75377358		armor.	(California Corp.) 16433 Valley View Ave. Cerritos, California 90703
VELOCITY AIRSOFT  VELOCITY AIRSOFT  RN: 4585277 SN: 85810660	Registered August 12, 2014	(Int'l Class: 28) toys, namely, airsoft guns for recreational purposes, and accessories therefor, namely, bb pellets	Edo Trading, Inc. (California Corp.) 10316 Norris Avenue, Unit A Pacoima, California 91331
VLOCITY  VLOCITY  RN: 3482184 SN: 78721659	Registered 8 & 15 February 20, 2015  First Use: June 1, 2005 Filed: September 27, 2005 Published: August 1, 2006 Registered: August 5, 2008	(Int'l Class: 28) paintball game equipment, namely, loaders	Kee Action Sports LLC (Delaware Limited Liability Company) 570 Mantua Boulevard Sewell, New Jersey 08080

[See, e.g., exhibit *TSDR Printouts* from March 24, 2015 Response to Office Action, TSDR, pp. 27-59.]

In the second Office Action, the Examining Attorney stated that only VELOCITOR (Reg. No. 3165303) for “ammunition” and VELOCITY TACTICS (Reg. No. 4598103) for “ballistic weapons” were “related to the ammunition goods identified here.” The Examining Attorney proceeded to state that “VELOCITOR for ammunition...can be distinguished as a made-up inherently distinctive word which has no meaning and merely shares part of the word VELOCITY and creates an entirely different commercial impression and VELOCITY TACTICS for ballistic weapons which shares the term VELOCITY with the registered marks but adds the non-descriptive word TACTICS and identifies goods that could potentially use the registrant’s ammunition if the calibers of the ammunition and the weapons are the same.” This analysis leads the Examining Attorney to conclude that, “[a]s only one registration even uses the word VELOCITY for related goods, the registered marks listed do not show that the relevant wording is commonly used in connection with the ammunition goods at issue. Therefore the cited mark is in fact strong and as such is entitled to every protection for like or similar marks.” [April

28, 2015 Office Action, TSDR, p. 4.] These statements clearly indicate that the Examining Attorney improperly dismissed the evidence Applicant provided to show how the term “VELOCITY” is used by third parties in connection with ammunition, weapons (including toy guns) and protective clothing used to stop ammunition because he arbitrarily concluded that only two of the registrations were related. However, third-party registrations are also useful as evidence of the suggestiveness of particular elements of marks under consideration and can serve as a dictionary to show how language is used in a particular trade or industry. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 4 USPQ2d 1793 (Fed. Cir. 1987); *see also In Re Hamilton Bank*, 222 USPQ 174, 177 (TTAB 1984) (finding that third-party registrations demonstrate “. . . that the term or feature common to the marks has a normally understood meaning or suggestiveness in the trade and that marks containing the term or feature have been registered for the same or closely related goods or services because the remaining portions of the marks are sufficient to distinguish the marks as a whole from one another.”). Although these registrations are not all for goods in Class 13, it is clear that all of these goods are utilized in the same trade or industry (or toys emulating the trade or industry) and show that the term “VELOCITY” and derivatives thereof are commonly used to refer to these types of identical or related goods.

Even if the Examining Attorney was not persuaded by the above-referenced registrations, Applicant provided evidence that contained numerous examples of third-party common law marks utilizing the term “VELOCITY” in connection with ammunition. [See exhibits *Third Party Velocity Marketing* and *Third Party Velocity Ammunition* from October 27, 2015 Request for Reconsideration, TSDR, pp. 50-64, 65-79.]. However, in the denied Request for Reconsideration, the Examiner states “Further arguing dilution, the applicant states that the term “velocity” is often used in the ammunition field to describe a feature of the goods. Applicant concludes that because of this use the word is weak, diluted, or so widely used that it should not be afforded a broad scope of protection in a trademark context. **Again, the weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar trademarks in use in the marketplace in connection with similar goods and/or services....Applicant provides no VELOCITY trademarks to support this**

**argument or to confirm.** The fact that the word is used in the marketplace in another context has no bearing on the strength of the mark cited against applicant here.” [December 3, 2015 Request for Consideration Denied, TSDR, p. 4 (emphasis added).] Therefore, although the Examining Attorney admits that “*the weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar trademarks in use in the marketplace in connection with similar goods,*” it is clear that the Examining Attorney did not consider the substantial evidence provided by Applicant that unmistakably shows “*the number and nature of similar trademarks in use in the marketplace in connection with similar goods.*” Indeed, many of these examples clearly show third parties using the term VELOCITY as a mark and not just merely as a product or marketing description. For example, in the *Third Party Velocity Marketing* exhibit, the mark HIGH VELOCITY is used in addition to and appears more prominently than the RWS house mark, the mark HIGH VELOCITY is used in addition to and appears more prominently than the SK house mark, and the mark EXTREME VELOCITY is used in addition to and appears more prominently than the McMillan house mark. [See exhibit *Third Party Velocity Marketing* from October 27, 2015 Request for Reconsideration, TSDR, pp. 50, 57, and 63, respectively.] Additionally, in the *Third Party Velocity Ammunition* exhibit, the mark HIGH VELOCITY MAGNUM STEEL is used in addition to the ESTATE house mark, the mark HIGH VELOCITY is used in addition to and appears more prominently than the PETERS house mark, the mark HIGH VELOCITY is used in addition to and appears more prominently than the EXPRESS house mark, and the mark HIGH VELOCITY HP is used in addition to and appears more prominently than the RWS mark. [See exhibit *Third Party Velocity Ammunition* from October 27, 2015 Request for Reconsideration, TSDR, pp. 67, 71, 72, and 78, respectively.] Therefore, the Examiner improperly dismissed the evidence of widespread third party use of the term VELOCITY in connection with ammunition and weapons.

Evidence of third-party use and/or registration generally is submitted in an effort to show that the cited mark is widely used by unrelated companies such that the mark is “weak” and “entitled to limited protection.” In these situations, confusion is unlikely because the marks in question are so common or so widely used by others that consumers have been conditioned to distinguish among them based on slight

differences in the marks as well as in the goods or services in connection with which the marks are used. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A.) 1974). Thus, a finding that a mark is weak on the basis of third-party uses and registrations can have a direct bearing on the likelihood-of-confusion analysis, in that other companies generally will be permitted to come closer to a weak mark than a strong one. As the CCPA explained:

Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

*Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 160, 117 USPQ 295, 296 (C.C.P.A. 1958).

The practice of giving less weight to descriptive components in determining likelihood of confusion reflects marketplace realities. In situations where consumers are exposed to various usage of descriptive words in connection with a given product or service, they tend to distinguish between these usages and to rely on other, more distinctive features of marks in identifying source. *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 1060 (Fed. Cir. 1985); *see also Old Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 204, 22 USPQ2d 1542, 1545 (Fed. Cir 1992) (noting that, in determining the strength of the asserted mark, evidence of third-party registrations should not be given any weight, but evidence of actual use of similar marks for similar goods could reasonably support an inference that the asserted mark is weak); *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1345, 196 USPQ 289, 292 n. 11 (C.C.P.A. (1977) (in finding that opposer's mark was not unique in the field, the court gave weight to applicant's evidence of similar third-party marks shown to be in actual use, but noted that the "other third-party registrations appear to have little evidentiary value in determining the scope of protection to be given opposer's mark since they are not shown to have been in actual use.")). When the substantial evidence of record provided by Applicant is properly considered, it is clear that the term "VELOCITY" is widely used as a mark in connection with ammunition.

The prevalent use of marks containing the term "VELOCITY" in connection with ammunition shows the term is not an arbitrary or unique designation. The Trademark Trial and Appeal Board and the

courts have recognized that descriptive, merely suggestive and weak designations are entitled to a narrow scope of protection. See *In re Central Soya Company, Inc.*, 220 USPQ 914 (TTAB 1984). In *Standard Brands, Inc. vs. Peters*, 1991 USPQ 168 (TTAB 1975), the Board observed that:

It is subtle that, unlike in the case of arbitrary or unique designations, suggestive or highly suggestive terms, because of their obvious connotation and possible frequent employment in a particular trade..., have been considered to fall within the category of weak marks, and the scope of protection afforded these marks has been so limited as to permit the use of and/or registration of a composite mark comprising this term plus another... for the same or similar goods.

*Id.* at 172. The Cited Mark for VELOCITY clearly meets the definition of such a weak mark.

When faced with conflicting marks wherein the shared term is weak, courts and the Board have often found the senior mark deserving of weak protection. A case that is particular analogous is *Redken Labs., Inc. v. Clairol, Inc.*, 501 F.2d 1403, 183 USPQ 84 (9th Cir. 1974). In finding no likelihood of confusion between CONDITION and CURL & CONDITION, both for hair products, the court stated:

The record discloses at least five registrations of trademarks for hair “conditioning” products embodying the word “condition,” and numerous uses of the word “condition” and its derivatives in the labeling and advertising of such products. The Clairol and Redken products involved in this case are substantially-priced cosmetics, directed toward individual and discriminating taste. Consumers who purchase these products learn of necessity to distinguish between many products designed for application to human hair. Many use the word “condition” somewhere on the label, but few customers are likely to part with their money under a misapprehension caused by the common use of the word “condition.” Given the numerous products on the market whose trademarks or labels contain the word “condition,”...the average, prudent beautician or consumer would not be likely to believe that Redken's CURL & CONDITION came from the same source as Clairol's CONDITION. Having selected a common, useful, and descriptive term as a trademark, Clairol cannot expect for the word “condition” the same broad scope of protection that may be accorded to more distinctive and arbitrary marks.

*Id.* The same analysis of the term “CONDITION” as applied to hair care products can be made with respect to the term “VELOCITY” as applied to ammunition. The only matter common to these marks (VELOCITY) is not likely to be perceived by purchasers as the distinguishing source, as the term VELOCITY is diluted in the market. Therefore, the public will ultimately rely more heavily on the distinguishing aspects of each mark (such as TRUE at the beginning of Applicant’s Mark).

As the term “VELOCITY” is highly descriptive when applied to ammunition, Applicant respectfully submits that the Examining Attorney did not give sufficient consideration to the additional

matter in Applicant's Mark, and further submits that "TRUE" is the dominant word in Applicant's Mark. Applicant's Mark is as distinct, if not more so than the references cited above. Especially in a case such as this, the marks must be compared in their entireties. *See, e.g., Keebler Co. v. Murray Bakery Products*, 9 USPQ2d 1736 (Fed. Cir. 1989) (holding no likelihood of confusion between PECAN SANDIES and PECAN SHORTIES both for cookies).

In the second Office Action, the Examining Attorney states that "Here the word TRUE used as an adjective merely modifies the noun and dominant word element VELOCITY. As such the proposed mark is very similar in appearance, sound, meaning and connotation as the registered mark. More importantly it conveys the same overall commercial impression as the mark of the registrant." [April 28, 2015 Office Action, TSDR, pp. 3-4.] The Examining Attorney concludes that "the word VELOCITY is dominant because the first word TRUE is used as an adjective and merely modifies the noun VELOCITY." [December 3, 2015 Request for Reconsideration Denied, TSDR, p. 4.] However, the Examining Attorney offers no evidence or case law to corroborate this conclusion, and, as previously shown, the Examining Attorney failed to take notice of the numerous third-party marks containing the term "VELOCITY" for ammunition and arbitrarily determines that the mark VELOCITY is strong and the term is the dominant portion of the marks. Additionally, the Examining Attorney erred in his analytical approach and did not give proper consideration to the significant contribution the component "TRUE" adds to the appearance, sound, sight and commercial impression of TRUE VELOCITY. *See In re Hearst*, 25 USPQ2d 1238, 1239 (Fed. Cir. 1992) (finding that undue weight must not be given to only a part of the mark in deciding likelihood of confusion).

If the common portion is weak, conflict is often avoided even though the non-common matter is highly suggestive or even descriptive. *See, e.g., Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (affirming TTAB's holding that contemporaneous use of applicant's CAPITAL CITY BANK marks for banking and financial services, and opposer's CITIBANK marks for banking and financial services, is not likely to cause confusion, based, in part, on findings that the phrase "City Bank" is frequently used in the banking industry and that "CAPITAL" is

the dominant element of applicant's marks, which gives the mark a look and sound distinct from opposer's marks); TMEP § 1207.01(b)(iii). Such is the case with respect to Applicant's Mark and the Cited Mark.

The placement of words within marks may have a major impact on the overall similarity of the marks. *Nabisco v. Warner-Lambert*, 220 F.3d 43, 55 USPQ2d 1051 (2d Cir.2000). Consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 296 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of the mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions). Therefore, consumers will be more likely to focus on Applicant's use of the word TRUE because of its prominent placement at the beginning of Applicant's Mark. The prefix TRUE in Applicant's Mark makes an immediate impression upon the consumer. One of the main desired traits in ammunition is accuracy. Thus, when reading the word TRUE, the consumer is brought to focus on the accuracy and precision -- traits that differ considerably from speed, as in VELOCITY. TRUE has other connotations beyond accuracy, including: (1) a: steadfast, loyal; b: honest, just; c archaic: trustful; (2) being in acceptance with the actual state of affairs...; (3) properly so called <true love>...; (4) legitimate, rightful... [See exhibit *True - Definition* from March 24, 2015 Response to Office Action, TSDR, pp. 22-26.] These definitions connote a focus on trustworthiness, honesty and justice -- important factors in the military, Applicant's market. As such, the word TRUE substantially distinguishes Applicant's Mark such that consumer confusion is unlikely.

#### **MARKET INTERFACE BETWEEN APPLICANT AND REGISTRANT**

It is well-established law that when assessing the similarity of two marks, the marks must be considered not in the abstract, but in the context of the way in which they are actually presented to the public. *See Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 487 (1st Cir. 1981) ("similarity is determined on the basis of total effect of the designation, rather than a comparison of individual features"). In evaluating the likelihood of confusion, the issue is not whether the marks are

similar, but whether their similarity will confuse consumers. *Bristol Meyers Squibb Co. v. McNeill-PPC, Inc.*, 973 F.2d 1033, 1046 (2nd Cir. 1992).

In the instant case, not only is the respective packaging utilized in connection with Applicant's Mark and the Cited Mark very different, but even more importantly, the Cited Mark, VELOCITY, and Applicant's Mark, TRUE VELOCITY, do not appear at all similar when viewed in isolation. [See exhibits 75503865 - *Velocity Specimen* and 86415217 - *True Velocity Specimen* from October 27, 2015 Request for Reconsideration, TSDR, pp. 29, 30.] Registrant uses the term VELOCITY superimposed over an image featuring a shotgun and shotgun shells. Registrant's house mark KENT CARTRIDGE prominently appears on the top of the image and on the shotgun shells themselves. Registrant is obviously attempting to appeal to its recreational and sport hunting customer base with a consumer-friendly package for its shotgun shells. It is clear from the specimen that VELOCITY is one product in the KENT CARTRIDGE ammunition line and it is only used in connection with shotgun shells. It also appears that all of KENT CARTRIDGE's products are sold in distinctive packaging that has a similar look and feel. [See exhibits *Kent Cartridge - Hunting & Training Ammo Products* from October 27, 2015 Request for Reconsideration, TSDR, p. 31.] Therefore, Registrant's customers are not looking for VELOCITY brand ammunition, but are instead looking for KENT CARTRIDGE brand shotgun shells that happen to be sold under the model name VELOCITY. This is in stark contrast to the nondescript black box that features Applicant's TRUE VELOCITY mark in association with Applicant's TV mark as well as Applicant's TRUEVELOCITY TV logo. The box also clearly states that the cartridges are intended for use by the U.S. Government, and Applicant's military and governmental customers require TRUE VELOCITY brand ammunition that is compliant with applicable military regulations (specifically, IE MIL-C-63989C for 5.56 mm NATO ammunition). [See exhibits 86415217 - *True Velocity Specimen* and *MIL-C-63989C* from October 27, 2015 Request for Reconsideration, TSDR, pp. 30, 32-38.] In *In re Magic Muffler Service, Inc.*, 184 USPQ 125 (TTAB 1974), the TTAB ruled that "specimens of use presumably show how the average purchaser will encounter the mark under normal marketing conditions and, as such, the specimens are suggestive of the reaction of the average purchaser to this display of the



mark.” In the instant case, the “average purchaser” of Applicant’s goods is a military or government buyer who is seeking polymer center fire cartridges that meet military specifications for use in automatic machine guns and semi-automatic machine guns, whereas Registrant’s “average purchaser” is a recreational or sport shotgun hunter seeking shotgun shells available for purchase by the general public. Not surprisingly, the manner in which Applicant and Registrant use their respective marks convey distinct commercial impressions such that the products would appeal to completely different consumers with completely different objectives.

### COMPARISON OF GOODS

The Examiner has determined that Applicant’s and Registrant’s “goods are identical and highly related.” In response, Applicant has amended its recitation of goods in International Class 13 as follows: “polymer-based center fire rifle cartridges meeting military specifications and provided solely in connection with Department of Defense, governmental and military use in automatic machine guns and semi-automatic machine guns, excluding all other ammunition, shotgun shells and shotgun shell shot.”

While there is no dispute that Applicant’s goods and Registrant’s goods are generally classified as ammunition in Class 13, that does not mean that they are closely related for purposes of a likelihood of confusion analysis. *See, e.g., In re Cotter and Co.*, 179 USPQ 828, 828-29 (TTAB 1973) (“In determining whether two or more products are ‘closely related,’ the inquiry should be whether they appeal to the same market and not whether a term can be found that describes the various products.”). As Applicant established in the record (and summarizes below), polymer-based center fire rifle cartridges meeting military specifications for use in automatic machine guns and semi-automatic machine guns belong to a class of ammunition that is entirely distinct from shotgun shells and shotgun shell shot used for recreational shotgun hunting and sports that Registrant provides. [See October 27, 2015 Request for Reconsideration after Final Action, TSDR, pp. 6-8, 21-23.] Given the divide between these specific types of ammunition and between the consumers for the respective goods, there is no practical likelihood of confusion stemming from Applicant’s use of the mark TRUE VELOCITY and Registrant’s use of VELOCITY. After all, the Board is “not concerned with mere theoretical possibilities of confusion,

deception, or mistake or with de minimis situation but with the practicalities of the commercial world.”  
*Autac Inc. v. Walco Sys., Inc.*, 195 USPQ 11, 16 (TTAB 1977).

Shotgun shell ammunition is made primarily for recreational hunting of game and waterfowl and in some applications, personal defense. Recreational shotguns typically hold no more than 5 rounds of ammunition and is somewhat effective out to an approximate maximum range of 70 yards. Shotguns are designed to throw a group or “pattern” of many small pellets called “shot,” which makes hitting a flying or moving target much more feasible than using a single projectile, as fired by a rifle or pistol. In stark contrast, polymer-based center fire rifle cartridges contain single projectiles geared toward accuracy. Rifle ammunition is contained in “clips or belts” used in military automatic and semi-automatic machine guns, and the clips hold between 20 and 30 rounds of ammunition, and ammunition belts or equivalent deployment systems can hold belts of up to 5,000 rounds of ammunition and be shot at a rate of between 12 to 50 rounds of ammunition per second from a maximum range of 600 yards. [See October 27, 2015 Request for Reconsideration, TSDR, pp. 6-8, 21-23.]

The appearance and size of rifle and shotgun shell ammunition is distinctly different, as are the appearances and sizes of weapons used to fire the respective types of ammunition; the differences are immediately and widely recognized throughout the market. [See exhibit *Shotgun shell vs. Rifle cartridge* from October 27, 2015 Request for Reconsideration, TSDR, pp. 95-96.] Applicant’s rifle cartridges must also meet military specifications and be approved by the U.S. Army Armament Research, Development and Engineering Center. [See exhibit *MIL-C-63989C* from October 27, 2015 Request for Reconsideration, TSDR, pp. 36-38.] There is no such approval requirement for Registrant’s shotgun shell ammunition.

Although Registrant’s identification of goods, namely, “ammunition; shotgun shells; shotgun shell shot,” contains the term “ammunition,” given the evidence of record, it is clear that Registrant included the term “ammunition” in its identification of goods because that is the term consumers use to generically refer to all types of bullets. However, it is also clear that Registrant felt it was necessary to include “shotgun shells; shotgun shell shot” in its identification of goods to clarify the specific types of ammunition it provides in connection with the Cited Mark. [See October 27, 2015 Request for

Reconsideration, TSDR, pp. 6-7, 21-22, and exhibits 75503865 - *Velocity Specimen, Kent Cartridge \_ Hunting & Training Ammo Products*, and *Kent Cartridge \_ About*, TSDR, pp. 29, 31, 94.] In cases where the terminology in an identification is unclear or undefined, the Board has permitted an applicant to provide extrinsic evidence to show that the registrant's identification has a specific meaning to members of the trade. *See, e.g., In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990) (noting that, "when the description of goods for a cited registration is somewhat unclear...it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade.") TMEP § 1207.01(a)(iii).

As pointed out by the Examiner, the goods and services listed in an application carry more weight than extrinsic evidence. However, even if the goods are identical or highly related, the facts in each case vary and the weight to be given each relevant *du Pont* factor may be different in light of the varying circumstances; therefore, there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009); *see also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 1383, 78 USPQ2d 1944, 1947-48 (Fed. Cir. 2006) (noting that relatedness between goods may not be presumed merely because the goods are delivered in the same format and that, instead, a subject-matter-based mode of analysis is appropriate). TMEP § 1207.01(a)(v). In *M2 Software*, although both software goods were marketed under the term M2, the goods are geared towards different industries. The mark M2 COMMUNICATIONS was used on CD-ROMS containing educational information in the pharmaceutical and medical field, while the mark M2 was used on computer software targeted exclusively to the music and entertainment industry. The mere fact that both parties' marks share a common term and that the goods were provided in the same format (software on CD-ROMS) was not enough to find the goods related, since the goods are marketed to distinct industries. In the instant case, just because both goods are delivered in the same general format known as "ammunition" and the marks share a common term, the goods are geared toward different industries for

use in different types of weapons and for different purposes. Additionally, the lack of evidence that Registrant targets the government and military market shows the existence of different channels of trade.

Here, it appears that the Examiner has arbitrarily determined that Applicant's goods and Registrant's goods are per se related, as the Examiner has not provided any evidence showing that Applicant's goods are related to Registrant's goods to support his finding of likelihood of confusion. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). TMEP §1207.01(a)(vi). In the cited *Astra Pharmaceutical* case, the court held that while the goods of both parties "were in the same broad and general area of health care products, their qualities and functions were so dissimilar and the channels of trade so diverse as to prevent a likelihood of confusion as to source." *Astra Pharmaceutical Prods. Inc. v. Bechman Instruments, Inc.*, 718 F.2d 1201, 1208 (1st Cir. 1983). The same holds true in the instant case. The mere fact that both parties' goods are generally related to ammunition does not render the goods at issue related. Consumers must be likely to believe that the goods come from the same source or are somehow connected with or sponsored by a common company. *Communications Satellite Corp. v. Comcet, Inc.*, 166 USPQ 353 (4th Cir. 1970), cert. denied, 167 USPQ 705 (1970). Because Applicant's polymer-based rifle ammunition for governmental and military use is entirely different from Registrant's shotgun shells for recreational and sport hunting, it is extremely unlikely that these goods would be provided by the same source. Therefore, the goods would not be related in the reasonable and practical mind of the consuming public as to the origin of the goods.

#### **DIFFERENCE IN CONSUMERS**

The Examining Attorney stats that "The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion." [December 3, 2015 Request for Reconsideration Denied, TSDR, p. 6.] However, circumstances suggesting care in purchasing may tend to minimize the likelihood

of confusion. *See, e.g., In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because 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); TMEP § 1207.01(d)(vii).

The general rule is that even identical marks can coexist without confusion when the purchasers and relevant markets are sufficiently distinct. For example, in *Electronic Design & Sales*, the Federal Circuit reversed the Board's finding of likelihood of confusion between the Opposer's registered mark EDS for computer programming services in the medical field and applicant's mark E.D.S. for power supplies and battery chargers which are incorporated into medical instruments and sold under other manufacturer's marks, emphasizing that likelihood of confusion must exist with respect to actual customers or purchasers. *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (CAFC 1992).

In the present application, Applicant's goods are rendered to a totally different class of buyers (governments and militaries) in a different marketing context than the goods associated with the Cited Mark (recreational hunters and sportsmen). As previously discussed, Applicant's goods must meet strict military requirements and Applicant must go through a rigorous screening process in order to supply its goods to the military, which is not the case for Registrant's goods or required for Registrant to sell its goods to the general public. When there is not one buyer who would be faced with both Applicant's and Registrant's goods, no confusion exists. *See Pneutek, Inc. v. Scherr*, 211 USPQ 824 (TTAB 1981). Thus, because of the significant difference in the types of buyers, the types of goods rendered, and the very different channels of trade, confusion in the marketplace is non-existent.

Even more analogous, in *NEC Electronics, Inc. v. New England Circuit Sales*, 13 USPQ2d 1059 (D. Mass. 1989), the court found no likelihood of confusion between two marks which were identical but for the letter S. In other words, the court found no likelihood of confusion between NEC and NECS, even where both companies sold computer chips, because they were selling them to sophisticated purchasers with specific technical needs.

Here, Applicant's customers are every bit as sophisticated as those customers discussed above with specific technical needs. Consumers are highly unlikely to confuse Applicant's military-grade ammunition with Registrant's consumer goods. Registrant has not listed military or governmental use on or in connection with its goods, and Registrant does not market its products to militaries. The Cited Mark is used to market ammunition and shotgun shells for sporting endeavors such as target shooting. [See exhibit *Target Velocity Kent* from March 24, 2015 Response to Office Action, TSDR, p. 60.] Furthermore, Registrant does not appear to market to military or armed forces in any respect. The word "military" does not appear anywhere on Registrant's website. [See exhibit *Military Site Kent Gamebore* from March 24, 2015 Response to Office Action, TSDR, p. 61.]

Not only are Applicant's consumers sophisticated, but Registrant's general consumer is discerning when it comes to ammunition as well. The court in *Redken Labs* stated, "Given the numerous products on the market whose trademarks or labels contain the word "condition,"...the average, prudent beautician or consumer would not be likely to believe that Redken's CURL & CONDITION came from the same source as Clairol's CONDITION." *Redken Labs., Inc. v. Clairol, Inc.*, 501 F.2d 1403, 183 USPQ 84 (9th Cir. 1974). Given the numerous ammunition products on the market whose trademarks or labels contain the word "VELOCITY,"...the average, prudent soldier or consumer would not be likely to believe that Applicant's TRUE VELOCITY products came from the same source as Registrant's VELOCITY products.

In the instant case, the practicalities of the commercial world would dictate that consumers are not likely to confuse Applicant's Mark with the Cited Mark. Furthermore, Applicant's goods are specifically non-competitive with and unrelated to the goods provided under the Cited Mark. Applying the principles of well-established trademark law to the present case compels a determination that Applicant's Mark will not create any likelihood of confusion.

### **CONCLUSION**

Applicant submits that, for the reasons set forth above, purchasers of Applicant's goods and purchasers of Registrant's goods are not likely to be confused as to the source of each party's goods. This

is demonstrated by the case law cited herein, and the evidence of third-party registrations for and common law uses of similar marks and the evidence showing VELOCITY to be a diluted term in the market for ammunition. It is clear that while the subject marks share common elements, Applicant and the Registrant offer significantly different types of goods in connection with sufficiently different marks such that no likelihood of confusion will result from the Applicant's use and registration of its mark.

The purpose of the Register is to reflect commercial reality, and to allow third parties to be on notice as to the marks in actual commercial use. *See In re Four Seasons Hotels, Ltd.*, 26 USPQ2d 1071, 1072 (Fed. Cir. 1993) ("Denial of registration does not deny the owner the right to use the mark, and thus, will not serve to protect the public from confusion.") To warrant refusal under Section 2(d) of the Trademark Act, there must be an *actual* likelihood of confusion, *not the mere possibility thereof*. *See Electronic Design & Sales*, 21 USPQ2d 1388, 1391; *NEC Electronics, Inc. v. New England Circuit Sales*, 13 USPQ2d 1059 (D. Mass. 1989). In the case at hand, the total effect of the use of the marks clearly indicates no likelihood of confusion is present.

For the reasons set forth above, Applicant submits that the substantial evidence supporting Applicant's contention that its mark is sufficiently different than the Cited Mark such that consumer confusion is unlikely, and respectfully request that the Trademark Trial and Appeal Board reverse the Examining Attorney's decision, and return the Application to the Examining Attorney for publication.

Respectfully submitted,

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