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Subject: U.S. TRADEMARK APPLICATION NO. 87728983 - KP QUIK STOP - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 87728983

MARK: KP QUIK STOP



CORRESPONDENT ADDRESS:

ERIK M PELTON

ERIK M PELTON & ASSOCIATES PLLC

PO BOX 100637

ARLINGTON, VA 22210

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: PCS Petroleum LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

uspto@tm4smallbiz.com

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's¹ final refusal to register the trademark **KP QUIK STOP** (with design) in International Class 35 for services ultimately identified as "Retail convenience stores" on the ground that the applied-for mark is likely to be confused with the mark in U.S. Registration No. 2597731 pursuant to Trademark Act Section 2(d) 15 U.S.C. Section 1052(d).

¹ The application was originally assigned to examining attorney Jennifer Richardson. On April 16, 2019, the application was reassigned to the undersigned examining attorney, Dana Dickson.

FACTS

On December 20, 2017, applicant PCS Petroleum LLC filed U.S. Application Serial No. 87728983 to register the mark **KP QUIK STOP** (with design) for “convenience stores services” in International Class 35, alleging a bona fide intention to use the mark in commerce. In an Office action dated April 6, 2018, the examining attorney refused registration on the ground that the applied-for mark was likely to be confused with the mark in U.S. Registration No. 2597731 pursuant to Trademark Act Section 2(d). The examining attorney also noted a potential likelihood of confusion with the mark in U.S. Application No. 87322488. The examining attorney also issued requirements to amend the color claim, mark description and identification of services.

In response to the initial Office action, applicant amended the color claim and mark description. Additionally, applicant amended the identification of services to the current identification of services: “Retail convenience stores” in International Class 35. Applicant also noted that the prior pending mark in U.S. Application No. 87322488 had abandoned. Finally, applicant objected to the Section 2(d) refusal. On July 12, 2018, the examining attorney maintained and made final the Section 2(d) refusal.

Applicant requested reconsideration of the Section 2(d) refusal. On February 1, 2019, the examining attorney reviewed applicant’s request to reconsider, but maintained the refusal to register because of a likelihood of confusion with the mark shown in U.S. Registration No. 2597731. This appeal now follows.

The registered mark in U.S. Registration No. 2597731 is the typed drawing mark **KWIK STOP** for “Retail convenience store services featuring gasoline, other petroleum products and alcoholic beverages” in International Class 35.

ISSUE ON APPEAL

Whether the applied-for mark with the literal element **KP QUIK STOP** is similar to the registered mark with the literal element **KWIK STOP** and the registrant's retail convenience store services featuring gasoline, other petroleum products and alcoholic beverages are closely related to applicant's retail convenience stores such that there is a likelihood of confusion by purchasers.

ARGUMENT

THE MARKS ARE CONFUSINGLY SIMILAR AS THE LITERAL ELEMENTS OF THE MARKS ARE VERY SIMILAR IN SOUND, APPEARANCE, AND COMMERCIAL IMPRESSION AND THE SERVICES ARE CLOSELY RELATED SUCH THAT CONSUMERS ARE LIKELY TO BE CONFUSED OR MISTAKEN OR DECEIVED AS TO THE SOURCE OF THE SERVICES UNDER SECTION 2(d) OF THE TRADEMARK ACT.

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the services of the parties. See 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) (called the "du Pont factors"). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Only those factors that are "relevant and of record" need be considered. *M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 1382, 78 USPQ2d

1944, 1947 (Fed. Cir. 2006) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1241, 73 USPQ2d 1350, 1353 (Fed. Cir. 2004)); see *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018).

The overriding concern is not only to prevent buyer confusion as to the source of the services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, **any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant.** TMEP §1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared services. See *In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”); TMEP §1207.01.

In this case, the following factors are the most relevant: similarity of the marks and similarity and nature of the services including the similarity of the trade channels of the services. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

I. THE MARKS ARE CONFUSINGLY SIMILAR

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); TMEP §1207.01(b).

Where the services of an applicant and registrant are identical or virtually identical, the degree of similarity between the marks required to support a finding that confusion is likely declines. See *Cai v. Diamond Hong, Inc.*, ___ F.3d ___, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); TMEP §1207.01(b).

Here, applicant’s special form mark, **KP QUIK STOP**, is confusingly similar to the registered typed drawing mark **KWIK STOP**. Specifically, both marks consist in large part or entirely of phonetic equivalents of the term “**QUICK**” (either “**QUIK**” or “**KWIK**”) immediately followed by the term “**STOP**.” Marks may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. See *Crocker Nat’l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff’d sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat’l Ass’n*, 811 F.2d 1490, 1495, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMCASH and COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar); TMEP §1207.01(b)(ii)-(iii). Here, because both marks consist in large part or entirely

of phonetic equivalents of the term “**QUICK**” (either “**QUIK**” or “**KWIK**”) immediately followed by the term “**STOP**,” they are confusingly similar in sound and appearance and create a similar overall commercial impression.

Applicant argues that “the marks are distinguishable based on appearance, sound, and commercial impression.” First, applicant argues that the letters “**KP**” are the dominant part of applicant’s mark because they are the “first word” in the applied-for mark and appear in larger size and “bolder font” than the wording “**QUIK STOP**”. Restated, applicant’s argument is that if two marks begin with a different first word, prefix or syllable (or, as here, two letters), then they cannot be found confusingly similar. Applicant has cited to no legal authority that would support this proposition. Rather, the cases cited by applicant suggest that the first word, prefix or syllable in a mark is one factor among many to be weighed in a likelihood of confusion determination. Applicant’s argument ignores the fact that marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP*, 746 F.3d at 1321, 110 USPQ2d at 1160; TMEP §1207.01(b)-(b)(v). Or, as applicant correctly observed “the mark as applied for must be considered in its entirety.” Even if **KP** is the dominant portion of the wording in the applied-for mark, the marks must be compared in their entireties (**KP QUIK STOP** and **KWIK STOP**) not, as applicant suggests, **KP** and **KWIK STOP**. Viewed in their entireties, the similarities between the marks far outweigh their differences.

Moreover, applicant’s argument ignores the fact that incorporating the entirety of one mark within another does not obviate the similarity between the compared marks, as in the present case, nor does it overcome a likelihood of confusion under Section 2(d). See *Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 1022, 194 USPQ 419, 422 (C.C.P.A. 1977) (finding CALIFORNIA CONCEPT and surfer design and CONCEPT confusingly similar); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 557, 188 USPQ 105, 106 (C.C.P.A. 1975) (finding BENGAL LANCER and design and BENGAL confusingly similar); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (finding BARR GROUP and

BARR confusingly similar); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1090 (TTAB 2016) (finding JAWS DEVOUR YOUR HUNGER and JAWS confusingly similar); TMEP §1207.01(b)(iii). Applicant does not dispute that the wording “**QUIK STOP**” in the applied-for mark and the wording “**KWIK STOP**” in the registered mark are phonetic equivalents. Therefore the applied-for mark merely adds the two letters **KP** to the phonetic equivalent of the registered mark.

Moreover, to the extent that **KP** will be viewed as a house mark, adding a house mark to an otherwise confusingly similar mark will not obviate a likelihood of confusion under Section 2(d). See *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366-67 (TTAB 2007) (finding CLUB PALMS MVP and MVP confusingly similar); *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (finding LE CACHET DE DIOR and CACHET confusingly similar); TMEP §1207.01(b)(iii). It is likely that services sold under these marks would be attributed to the same source. See *In re Chica, Inc.*, 84 USPQ2d 1845, 1848-49 (TTAB 2007).

Although applicant claims that the applied-for and registered marks “differ in meaning and commercial impression,” applicant provides no explanation as to why the addition of the two letters “**KP**” to the otherwise phonetically equivalent marks alters the meaning of the marks or their commercial impressions. Applicant obliquely references *Juice Generation* and exhorts consideration of the marks in their entireties. However, applicant provides no argument to explain how the marks at issue in the instant case are similar to those at issue in *Juice Generation* or why the holding in *Juice Generation* mandates reversal of the Section 2(d) refusal in this instance. Moreover, applicant concedes that the applied-for and registered marks share the terms **QUICK** and **STOP** (“The terms shared between the marks, ‘QUICK’ and ‘STOP’ . . .”). Applicant has even provided as attachments to the Request for Reconsideration definitions of the terms **QUICK** (“done or taking place with rapidly² [sic]” or “acting or capable of acting with speed”) and **STOP** (“to cause to give up or change a course of action,” “to cease

² Presumably, applicant intended to employ the word “rapidity” instead of “rapidly.”

activity or operation,” or “to cease to move on”). Applicant further explains that both the applied-for mark and registered mark convey that “potential customers of Registrant and Applicant will cease operation of their vehicles to rapidly grab some snacks, groceries, coffee, gas, or whatever else is available at the convenience store and then continue to their end destination.” The examining attorney does not disagree with this summary of the commercial impression conveyed by the applied-for and registered marks. However, she notes that applicant failed to show how the addition of the two letters “KP” in the applied-for mark alters this commercial impression.

Applicant argues that the inclusion of a “traffic sign design element” in the applied-for mark “creates a visual and phonetic impression that is absent from Registrant’s KWIK STOP mark.” First, it is unclear what applicant means when it argues that a design element “creates” a “phonetic impression” as it is a design element and makes it difficult for the examining attorney to respond meaningfully. However, applicant’s argument that its “traffic sign design element . . . creates a visual . . . impression that is absent from” the registered mark ignores the fact that an applicant generally cannot overcome a Section 2(d) refusal by pointing to the presence of certain design elements in the applied-for mark when the registered mark is a standard character or typed drawing mark. This is true for two primary reasons. First, when evaluating a composite mark consisting of words and a design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the services. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)); TMEP §1207.01(c)(ii). Thus, although marks must be compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 671 F.3d at 1366-67, 101 USPQ2d at 1911 (citing *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ2d 390, 395 (Fed. Cir. 1983)). Here, the

dominant portion of the applied-for mark is not the “traffic sign design element” as applicant implies but instead the word portion, **KP QUIK STOP** for purposes of comparison with the registered mark **KWIK STOP**.

Second, **a mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition.** See *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a); TMEP §1207.01(c)(iii). **Thus, a mark presented in stylized characters and/or with a design element generally will not avoid likelihood of confusion with a mark in typed or standard characters because the word portion could be presented in the same manner of display.** See, e.g., *In re Viterra Inc.*, 671 F.3d at 1363, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that “the argument concerning a difference in type style is not viable where one party asserts rights in no particular display”). Applicant’s argument ignores the fact that the registered mark is a **typed drawing mark** and can, therefore, be displayed in any lettering style and in connection with design elements. Registrant could use its mark in a font and in connection with design elements identical to the font and design elements in the applied-for mark. Thus applicant’s argument that “The addition of the traffic sign design element makes a significant contribution, lessening potential for confusion,” is vitiated.

Applicant argues that because applicant deliberately misspells “quick” as “**QUIK**” and registrant deliberately misspells it as “**KWIK**,” this “makes the marks visually distinguishable.” Applicant’s argument ignores the fact that, when comparing marks, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that [consumers] who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, ___ F.3d ___, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713,

1721 (Fed. Cir. 2012)); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re St. Helena Hosp.*, 774 F.3d 747, 750-51, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014); *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007, 169 USPQ 39, 40 (CCPA 1971)); TMEP §1207.01(b). Here, the average purchaser, who retains a general rather than specific impression of trademarks, is not expected to distinguish between marks that are in large part phonetically equivalent on the basis that one of these marks deliberately misspells the word "quick" as "**QUIK**" while the other substitutes the deliberate misspelling "**KWIK**."

Applicant argues that the applied-for and registered marks "differ in meaning and commercial impression" because the "traffic sign design element of Applicant's mark playfully conveys two different commercial impressions. First, a quick one-stop shop for convenience store services. Second, Applicant's mark lightheartedly instructs consumers to stop at its retail convenience store much like a traffic sign provides a road user with specific guidelines, such as . . . stopping." The "two" commercial impressions therefore differ only in that one is a suggestion and the other a command. If the design element of applicant's mark were intended to command consumers to stop, presumably the wording "**STOP**" would have featured more prominently, and the sign would have been octagonal in shape and red in color as is customary for U.S. stop signs. Moreover, applicant has provided zero evidence in support of its assertion that consumers would perceive the applied-for mark as a suggestion or command to stop.

At any rate, applicant's argument is a red herring. Applicant's argument hinges on what the design elements of the applied-for mark convey. Because the registrant's mark is a typed character mark, the registrant is entitled to display the wording in the registered mark in any font and in connection with any design elements it so chooses. Registrant could display the wording in the registered mark in a font and with design elements identical to those in the applied-for mark. In that instance, the only difference between the marks would be applicant's addition of the two letters "**KP**." Yet applicant has not

articulated why the addition of these letters would alter the meaning or commercial impression of the mark.

Applicant argues that “The Shared Pronunciation of the Term ‘QUICK’ is Weak and Diluted, Entitling Registrant’s Mark to a Narrower Scope of Protection.” Applicant makes several sub-arguments in support of this broader argument. First, applicant argues that “The terms shared between the marks, ‘QUICK’ and ‘STOP,’ have little or no source identifying significance because they are highly suggestive and descriptive.” Trademark Act Section 7(b), however, provides that a certificate of registration on the Principal Register is prima facie evidence of the validity of a registered mark. 15 U.S.C. §1057(b). The validity of a cited registration “cannot be challenged in an ex parte proceeding.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Thus, applicant’s argument is not being considered because to do so would fail to give the cited registered mark the validity to which it is entitled. *In re Fat Boys Water Sports LLC*, 118 USPQ2d at 1517 (citing *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007)).

Next, applicant argues that “The Term ‘QUICK’ is Commercially Weak and Diluted.” Applicant references third-party registrations attached to the Response as Exhibit A and the Request for Reconsideration as Exhibit R, specimens for third-party registrations attached to the Request for Reconsideration as Exhibit KK and certain exhibits (B-O attached to the Response and S-JJ, LL-FFF attached to applicant’s Request for Reconsideration). Applicant asserts that **all** of these exhibits show that third-parties use “either the phrase ‘QUICK STOP’ or the term ‘QUICK’ in connection with convenience and/or retail store services.” First, applicant’s argument ignores the fact that “**QUICK**” (or its phonetic equivalent) is not the only wording that the registered mark and the applied-for mark share. Both marks also include the wording “**STOP**.” Evidence that third-parties use the wording “**QUICK**” (or its phonetic equivalent) in connection with services similar to the applicant’s and registrant’s does not establish that the wording “**QUICK STOP**” (or deliberate misspellings thereof) is weak or diluted. **None** of

the third-party registrations included in Exhibits A or R and referenced in Exhibit KK include variable spellings of **both** the wording “**QUICK**” and “**STOP**”), therefore they do not establish that the wording “**QUICK STOP**” (or deliberate misspellings thereof) is weak or diluted. Exhibits B, D-J, N, LL-FFF suffer the same flaw (specifically, in these screenshots, the marks under which the services are provided do not contain variable spellings of **both** the wording “**QUICK**” and “**STOP**”), therefore they do not establish that the wording “**QUICK STOP**” (or deliberate misspellings thereof) is weak or diluted. Additionally, the services described in Exhibits Y, Z, BB, DD and FF (grocery store, deli, catering, automotive maintenance and repair, supermarket, deli, and pharmacy, respectively) do not appear to be the same as the services identified by applicant and registrant.

Having established that hundreds of pages of applicant’s submitted evidence are irrelevant to the Section 2(d) analysis, even if applicant’s remaining exhibits established that the wording “**QUICK STOP**” (or deliberate misspellings thereof) is weak with respect to applicant’s and registrant’s services, the Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection under Section 2(d) against the registration by a subsequent user of a similar mark for closely related services. TMEP §1207.01(b)(ix); *see King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010). Thus, this protection under Section 2(d) even extends to marks registered on the Supplemental Register. TMEP §1207.01(b)(ix); *see, e.g., In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1743 (TTAB 2016) (citing *Towers v. Advent Software, Inc.*, 913 F.2d 942, 946, 16 USPQ2d 1039, 1042 (Fed. Cir. 1990); *In re Research & Trademark Corp.*, 793 F.2d 1276, 1278, 230 USPQ 49, 49 (Fed. Cir. 1986); *In re Clorox Co.*, 578 F.2d 305, 307-08, 198 USPQ 337, 340 (C.C.P.A. 1978)). Moreover, the trademark examining attorney notes that registrant’s mark is on the Principal not Supplemental Register. The trademark examining

attorney further notes that applicant has pointed to ***no other federal registration*** for similar services including both the wording “**QUICK**” and “**STOP**” (or their phonetic equivalents).

Ultimately, when purchasers call for the services of the applicant and the services of the registrant using marks that are very similar in sound, appearance and meaning, they are likely to believe that the marks identify a single source of services. **Thus, the marks are confusingly similar.**

II. THE SERVICES ARE CLOSELY RELATED

The services are compared to determine whether they are similar, commercially related, or travel in the same trade channels. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §§1207.01, 1207.01(a)(vi).

The compared services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); TMEP §1207.01(a)(i). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

Applicant’s services, as amended, are identified as “Retail convenience stores” in International Class 35.

Registrant's services are identified as "Retail convenience store services featuring gasoline, other petroleum products and alcoholic beverages" also in International Class 35.

Here, the application uses broad wording to describe the relevant services which presumably encompass all services of the type described, including the registrant's more narrowly defined services. *See, e.g., Sw. Mgmt., Inc. v. Ocinoled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015); *In re N.A.D., Inc.*, 57 USPQ2d 1872, 1874 (TTAB 2000). Specifically, applicant's broader wording "Retail convenience stores" in International Class 35 encompasses registrant's narrower wording "Retail convenience store services featuring gasoline, other petroleum products and alcoholic beverages" also in International Class 35. *See, e.g., Sw. Mgmt., Inc. v. Ocinoled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015); *In re N.A.D., Inc.*, 57 USPQ2d 1872, 1874 (TTAB 2000). Additionally, the services of the parties have no restrictions as to nature, type, channels of trade, or classes of purchasers and are "presumed to travel in the same channels of trade to the same class of purchasers." *In re Viterro Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)).

The applicant has made no argument against the relatedness of the services.

Ultimately, when purchasers encounter the applicant's services and the registrant's services, they are likely to be confused as to the source of services by the relationship between them. **Thus, the services are closely related.**

CONCLUSION

Therefore, because the marks are confusingly similar and the services are closely related, purchasers encountering these services are likely to be confused or mistaken or deceived as to the source of the services. For the foregoing reasons, the examining attorney respectfully requests that the refusal to register on the basis of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) be affirmed.

Respectfully submitted,

/Dana Dickson/

Examining Attorney

Law Office 113

(571) 270-7552

dana.dickson@uspto.gov

Myriah Habeeb

Managing Attorney

Law Office 113