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Subject: U.S. Trademark Application Serial No. 87842087 - LIQUIDYN - 98983.020001 - Request for
Reconsideration Denied - Return to TTAB

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United States Patent and Trademark Office (USPTO)
Office Action (Official Letter) About Applicant's Trademark Application

U.S. Application Serial No. 87842087

Mark: LIQUIDYN

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Reference/Docket No. 98983.020001

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REQUEST FOR RECONSIDERATION
AFTER FINAL ACTION
DENIED

Issue date: **October 30, 2019**

Applicant's request for reconsideration is denied. *See* 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant's request and determined the request did not: (1) raise a new issue, (2) resolve all the outstanding issue(s), (3) provide any new or compelling

evidence with regard to the outstanding issue(s), or (4) present analysis and arguments that were persuasive or shed new light on the outstanding issue(s). TMEP §§715.03(a)(ii)(B), 715.04(a).

On April 10, 2019, the trademark examining issued a final Section 2(d) Refusal as to Registration No. 5206749, LIQUIDYNE. On October 9, 2019, applicant instituted an appeal to the Trademark Trial and Appeal Board, and submitted a concurrent reconsideration request, which the trademark examining attorney now addresses below.

Similarity of the Marks

In comparing the marks, applicant first argues that “the additional letter ‘E’ at the end of [registrant’s] mark” is sufficiently visually dissimilar to avoid a likelihood of confusion. However, 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—as is the case here, with the only difference between the marks’ wording being a single letter. *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).

Applicant then asserts the marks “are distinguishable in sound” based on how particular portions of the marks can be “commonly pronounced.” There is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1835 (TTAB 2013) (quoting *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012); *In re The Belgrade Shoe Co.*, 411 F.2d 1352, 1353, 162 USPQ 227, 227 (C.C.P.A. 1969)); TMEP §1207.01(b)(iv).

The marks in question could clearly be pronounced the same—as was proven by the attached pronunciation evidence from the April 10, 2019 final Office action; such similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *see In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv).

With that being said, even if consumers were to pronounce this small part of the marks slightly differently, slight differences in the sound of similar marks will not avoid a likelihood of confusion. *In re*

Energy Telecomm. & Elec. Ass'n, 222 USPQ 350, 351 (TTAB 1983); see *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012).

Applicant indicates that “neither Applicant nor Registrant uses the marks at issue as standalone marks,” in that “[b]oth use their respective house marks” in commerce with the marks at issue here, which “is enough to create different commercial impressions.” The marks are compared as they appear in the drawing of the application and in the registration; the USPTO does not consider how an applicant and registrant actually use their marks in the marketplace. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1324, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)).

Finally, while applicant correctly indicates that mark comparisons cannot be made “merely by looking at the two marks side-by-side,” applicant then proceeds to argue that, when comparing the marks directly with one another, consumers will specifically identify a difference in meaning via the respective uses of “DYN” and “DYNE” in the context of the identified goods. 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).

Relatedness of the Goods

Applicant argues that the goods are unrelated because “the respective goods are for sophisticated purchasers,” and, whereas applicant’s goods “are for the limited application of precision dispensing solutions,” registrant’s goods “are for large, industrial applications.”

First, as was asserted by the trademark examining attorney in the April 10, 2019 final Office action, 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. TMEP §1207.01(d)(vii); see, e.g., *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

Second, even with applicant’s identification amendment, the relevant identifications contain no language that limits the trade channels and classes of purchasers to the degree that applicant asserts, and determining likelihood of confusion is based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. See *In re Detroit Athletic*

Co., 903 F.3d 1297, 1307, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1325, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)).

Finally, applicant limits its identification to be “not for hydraulic pumps” in order to “emphasize the difference between Applicant’s goods and those for use in connection with the Cited Registration.” However, the relatedness of the identified goods, as shown by attached evidence from the July 9, 2018 Office action and the April 10, 2019 final Office action, is not limited to direct use with one another. Instead, the previously attached evidence proved that “the same entity commonly provides hydraulic pumps and various types of valves, including dispensing valves[,] . . . [they] are marketed under the same mark, and they are sold or provided through the same trade channels.”

In addition to the previously attached evidence, the trademark examining attorney now also attaches evidence to this denial from the USPTO’s X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods as those of both applicant and registrant in this case. This evidence shows that the goods listed therein, namely “dispensing valves” and “hydraulic pumps,” are of a kind that may emanate from a single source under a single mark. See *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); TMEP §1207.01(d)(iii).

Conclusion

Accordingly, the Section 2(d) Refusal made final in the Office action dated April 10, 2019 is ***maintained and continued***. See TMEP §§715.03(a)(ii)(B), 715.04(a).

If applicant has already filed an appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. See TMEP §715.04(a).

If applicant has not filed an appeal and time remains in the six-month response period, applicant has the remainder of that time to (1) [file another request for reconsideration](#) that complies with and/or overcomes any outstanding final requirement(s) and/or refusal(s), and/or (2) [file a notice of appeal](#) to the Board. TMEP §715.03(a)(ii)(B). Filing a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); see TMEP §715.03(c).

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