

This Opinion is not a  
Precedent of the TTAB

Oral Hearing: September 22, 2020

Mailed: November 23, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re PIF Group LLC*  
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Serial No. 88084519  
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Meghan Michaels and Gina Durham of DLA Piper LLP (US),  
for PIF Group LLC.

Jeanine Gagliardi, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

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Before Cataldo, Goodman and Coggins,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

PIF Group LLC (“Applicant”) seeks registration on the Principal Register of SHE

KNEW SHE COULD as a mark (in standard characters) for

Jewelry, jewelry cases, costume jewelry, imitation jewelry,  
gemstones, pet jewelry, watches being jewelry, bracelets,  
rings, jewelry brooches, necklaces, anklets in the name of  
jewelry in International Class 14;

Blank Journals in International Class 16;

Beach bag; tote bag in International Class 18;

Drinking glasses, namely, tumblers, Ceramic figurines;  
Ceramic sculptures, vases, vessels, bowls, plates and pots;

Coffee mugs; Decorative ceramic tiles not for use as building materials; Decorative plates; Commemorative plates in International Class 21;

Aprons; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Baby bibs not of paper; Baby bodysuits; Bandanas; Baseball caps; Bathing suits; Bathrobes; Beach cover-ups; Beachwear; Briefs; Children's and infant's apparel, namely, jumpers, overall sleepwear, pajamas, rompers and one-piece garments; Children's and infants' cloth bibs; Children's cloth eating bibs; Ear muffs; Fleece pullovers; Flip flops; Footwear for women; Gloves; Hats; Hats for infants, babies, toddlers and children; Hooded pullovers; Hooded sweat shirts; Infant and toddler one piece clothing; Jackets; Jogging outfits; Jogging pants; Jogging suits; Knit shirts; Knitted caps; Knitted gloves; Ladies' underwear; Leg warmers; Lingerie; Lounge pants; Loungewear; Mittens; Muscle tops; Neckties; Nightgowns; One piece garment for infants and toddlers; One-piece play suits; Outdoor gloves; Outdoor mittens; Over shirts; Overalls; Pajamas; Panties, shorts and briefs; Play suits; Polo shirts; Robes; Rugby shirts; Scarfs; Shirts; Shirts and short-sleeved shirts; Shirts for infants, babies, toddlers and children; Shorts; Sleepwear; Socks; Sun visors being headwear; Sundresses; Surf wear; Sweat pants; Swim wear; Swimwear; T-shirts; Tank-tops; Tee shirts; Thermal underwear; Thong footwear and thong underwear; Underclothes; Undergarments; Undershirts; Underwear; Visors being headwear; Walking shorts; Women's hats and hoods; Wristbands as clothing; Anklets in the nature of socks in International Class 25;

Playing cards in International Class 28.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88084519 was filed on August 20, 2018, based upon Applicant's assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Page references to the application record refer to the online database pages of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§1051-1052, 1127 for failure to function as a mark because the applied-for mark "merely conveys an ordinary, familiar, well-recognized sentiment."<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. An oral hearing was held. We affirm the refusal to register.

#### I. Failure to Function as a Mark

"The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration." *In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). A "trademark" is defined as "any word, name, symbol, or device or any combination thereof ... to identify and distinguish [a person's] goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." Trademark Act Section 45, 15 U.S.C. § 1127.

Not every word, phrase, or slogan identifies and distinguishes one brand from another. *See D.C. Wholesaler v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016) (*citing In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)) ("not every designation adopted with the intention that it perform a trademark function necessarily

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<sup>2</sup> Examining Attorney's brief, 11 TTABVUE 2.

accomplishes that purpose.”). Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or commonly expressed concepts or sentiments that would ordinarily be used in business or in the particular trade or industry, are not registrable. *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at \*3 (TTAB 2020) (affirming refusal to register TEXAS LOVE for hats and shirts because “it would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment”); *In re Eagle Crest, Inc.*, 96 USPQ2d at 1229 (affirming refusal to register “Once a Marine, Always a Marine” for clothing because it would be perceived as an informational slogan “to express support, admiration or affiliation with the Marines”). Derivatives or variations of widely used messages also fail to function as marks if they convey the same or similar type of information or sentiment as the original wording. *In re Melville Corp.*, 228 USPQ 970, 971 (TTAB 1986) (finding BRAND NAMES FOR LESS failed to function as a mark based on evidence of widespread use of similar marketing phrases, noting that “[t]he fact that applicant may convey similar information in a slightly different way than others is not determinative.”).

We must assess whether Applicant’s proposed mark, SHE KNEW SHE COULD, functions as a mark based on whether the relevant public, i.e., purchasers or potential purchasers of Applicant’s goods, would perceive SHE KNEW SHE COULD as identifying Applicant’s goods and their source or origin. *See e.g. In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at \*1-2 (TTAB 2019) (“The key question is

whether the asserted mark would be perceived as a source indicator for Applicant's [goods or] services."); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) (same).

"A critical element in determining whether a term or phrase is a trademark is the impression the term or phrase makes on the relevant public." *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). "[E]vidence of the public's perception may be obtained from 'any competent source, such as consumer surveys, dictionaries, newspapers and other publications.'" *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 1559 (Fed. Cir. 1985)). Internet evidence is relevant to show consumer perception. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007). Because there are no limitations to the channels of trade or classes of purchasers of the goods identified in the application, the relevant consuming public comprises all potential purchasers of the identified Class 14, 16, 18, 21, 25 and 28 goods. *See CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983).

Applicant filed the application under Section 1(b) as intent-to-use, but we consider the evidence of record showing how the designation is actually used by Applicant and others in the marketplace. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d at 1716 (failure to function found where "the marketplace is awash in products that display the term"); *In re Eagle Crest Inc.*, 96 USPQ2d at 1229 (considering specimens and evidence in the record showing how the designation is actually used in the

marketplace). “The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.” *In re Eagle Crest*, 96 USPQ2d at 1229. Even when an applicant has filed an application under Section 1(b), we may consider evidence introduced by the Examining Attorney from an applicant’s advertising literature and website. *In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006) (examining attorney may introduce evidence that applicant’s own literature supports refusal despite application being based on Section 1(b)).

#### A. The Examining Attorney’s Evidence

The Examining Attorney’s evidence includes dictionary definitions of the words “she,” “can,” “could,” “know,” and “knew”<sup>3</sup>;

The Examining Attorney also submitted copies of third-party web pages showing use of the phrase “she knew she could” and derivatives on necklaces bracelets, keychains, tote bags, coffee mugs, and clothing.

Examples include “she knew she could so she did” bracelet;<sup>4</sup> “she knew she could and then she did” bracelet;<sup>5</sup> “she knew she could do great things” necklace;<sup>6</sup> “she knew she could choose action over fear” mug<sup>7</sup>; “she knew she could do it” necklace<sup>8</sup>; “she

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<sup>3</sup> April 17, 2019 Office Action at TSDR 8, 15, 19, 27 and 32.

<sup>4</sup> squareup.com, September 28, 2018 Office Action at TSDR 20.

<sup>5</sup> etsy.com, September 28, 2018 Office Action at TSDR at 6.

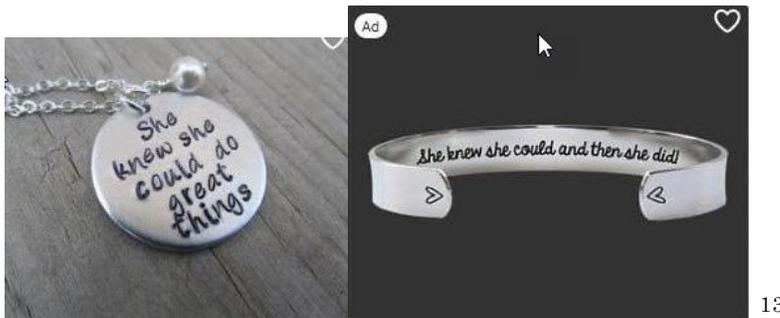
<sup>6</sup> *Id.*

<sup>7</sup> surprisegiftco.com, September 28, 2018 Office Action at TSDR 4.

<sup>8</sup> amazon.com, September 28, 2018 Office Action at TSDR at 42.

knew she could be brave because she was his” bracelet and tote bag<sup>9</sup>; “she knew if she could imagine it she could create it” tank top<sup>10</sup>; and “she knew she could do anything because her strength came from him” key chain.<sup>11</sup>

Images from the Examining Attorney’s web page evidence of third-party use of derivatives of “she knew she could” include the following:<sup>12</sup>



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<sup>9</sup> etsy.com and theadopteshoppe.com, September 28, 2018 Office Action at TSDR at 3, 7.

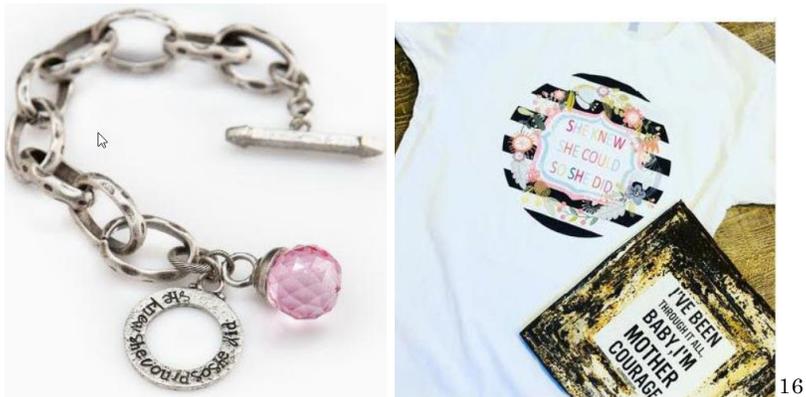
<sup>10</sup> etsy.com, September 28, 2018 Office Action at TSDR 7.

<sup>11</sup> *Id.*

<sup>12</sup> We do not consider these examples as trademark use.

<sup>13</sup> etsy.com, September 28, 2018 Office Action at TSDR 7.

<sup>14</sup> *Id.*



The Examining Attorney also submitted web pages showing use of the variant phrase “she believed she could so she did” on necklaces, bracelets, tote bags, mugs, t-shirts, journals and notebooks.<sup>17</sup> Examples of third-party use on these goods include

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<sup>15</sup> etsy.com and surprisegiftco.com, September 28, 2018 Office Action at TSDR 4, 7.

<sup>16</sup> squareup.com and ranchandfamous.com, September 28, 2018 Office Action at TSDR 20, 40.

<sup>17</sup> September 28, 2018 Office Action at TSDR 7; April 17, 2019 Office Action at TSDR 47, 46, 51, 55, 57, 61, 62, 64, 68, 70, 71, 75, 79, 82, 87, 93, 101, 108, 114, 118, 121, 123, 128; November 5, 2019 Denial of Reconsideration at TSDR 26.

the following:<sup>18</sup>



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<sup>18</sup> We do not consider these examples as trademark use.

<sup>19</sup> [thepaperstore.com](http://thepaperstore.com) April 17, 2019 Office Action at TSDR 71.

<sup>20</sup> *Id.* at 70.

<sup>21</sup> [amazon.com](http://amazon.com), April 17, 2019 Office Action at TSDR 46.

<sup>22</sup> [etsy.com](http://etsy.com), April 17, 2019 Office Action at TSDR 93.

<sup>23</sup> *Id.*

<sup>24</sup> [ranchjunkie.com](http://ranchjunkie.com), April 17, 2019 Office Action at TSDR 101.

<sup>25</sup> [etsy.com](http://etsy.com), April 17, 2019 Office Action at TSDR 103.

<sup>26</sup> [express.google.com](http://express.google.com), April 17, 2019 Office Action at TSDR 118.

<sup>27</sup> [southernclassgiftco.com](http://southernclassgiftco.com), April 17, 2019 Office Action at TSDR 121.

The Examining Attorney also submitted web pages from Applicant's websites sheknewshecould.com and onetoughbitch.com showing use of "she knew she could" on respectively, jewelry and socks and jewelry:<sup>28</sup>

Images from Applicant's shenewshecould.com website:



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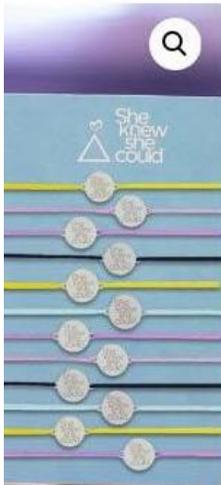
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<sup>28</sup> At the oral hearing, Applicant's counsel indicated both websites were owned by Applicant.

<sup>29</sup> November 5, 2019 Denial of Request for Reconsideration at TSDR 2.

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at 28.



## The 12 Pack She Knew She Could Bracelets

\$99.95

Whether a group of friends, a party or an entire team, connect 12 people together to harness their inner power.

Pick which color you would like for all 12! (If you would like an assortment feel free to mix and match.)

The plates are stainless steel and will not tarnish.

Bracelets are adjustable and will fit wrist sizes 4.5" - 7.5"

There is no better way to connect people together with the reminder "You've got this!"

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## She Knew She Could Bracelet-Baby Blue

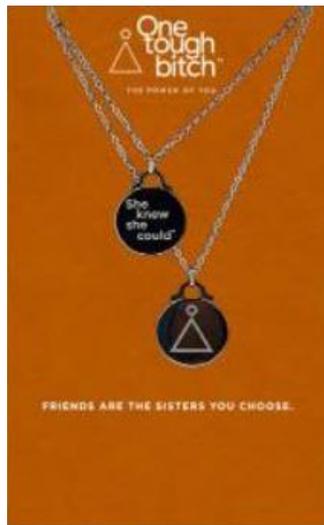
\$12.95

*Wear Your Power*

*The new protection bracelet for rough days. Reach for your bracelet and remember you can get through anything.*

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Images from Applicant's onetoughbitch.com website:



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<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.* at 5.

<sup>34</sup> April 17, 2019 Office Action at TSDR 2, 4.

B. Arguments and Analysis

The Examining Attorney asserts that the use of SHE KNEW SHE COULD in the marketplace “convey[s] the ordinary, familiar, well-recognized sentiment of female empowerment or affirmation [and] is consistent with the plain meaning of the wording that comprises the expression. ... [A] female is aware that she is able.”<sup>35</sup> The Examining Attorney argues that Applicant’s designation SHE KNEW SHE COULD “is a variation and derivative of commonplace expressions widely used by a variety of sources, including on jewelry, tote bags, coffee mugs, clothing, and journals, to convey the ordinary, familiar, well-recognized sentiment of female empowerment or affirmation.”<sup>36</sup> The Examining Attorney contends that “Applicant uses ‘SHE KNEW SHE COULD’ to convey the sentiment of female empowerment or affirmation.”<sup>37</sup>

Applicant argues that it is improper for the Examining Attorney to determine a mark’s ability to function as a mark by making assumptions on how Applicant will use its mark, without submission by Applicant of evidence of its use, or “to predict how consumers will encounter and perceive Applicant’s mark.”<sup>38</sup> Applicant points to an analogous case, *Michael S. Sachs, Inc. v. Cordon Art, B.V.*, 56 USPQ2d 1132 (TTAB 2000), as support for its position that a determination of failure to function cannot be made without evidence of use.<sup>39</sup>

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<sup>35</sup> Examining Attorney’s brief, 11 TTABVUE 7.

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* at 7-8.

<sup>38</sup> Applicant’s brief, 8 TTABVUE 8-9.

<sup>39</sup> *Id.* at 9.

However, although the application is based on Section 1(b), as indicated, the evidentiary record includes excerpts from Applicant's websites that illustrate how SHE KNEW SHE COULD is used by Applicant. *In re Promo Ink*, 78 USPQ2d at 1303 (examining attorney may introduce evidence that applicant's own literature supports refusal despite the fact that the application was based on intent-to-use under Trademark Act Section 1(b); the fact that applicant has filed an intent-to-use application does not limit the examining attorney's evidentiary options or shield an applicant from producing evidence that it may have in its possession).

Applicant argues that the Examining Attorney's third-party evidence is not probative because

the additional terms in these references change the overall concept or meaning of these derivatives because the focus or emphasis of those phrases are on those additional terms. For instance, when consumers see the phrase "she knew she could be brave" and "she knew she could do great things"—as cited by the Examiner—the focus of those phrases is on the terms "brave" and "do great things."<sup>40</sup>

Although some of the examples provided by the Examining Attorney may not convey exactly the same sentiment because of additional wording, we find that the derivatives "she knew she could and so she did," "she knew she could and then she did," and "she knew she could do it" and the variant "she believed she could so she did" are probative as they convey similar information, that is, sentiments of female empowerment or affirmation. The variation in wording as to these uses does not convey a markedly different message from SHE KNEW SHE COULD.

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<sup>40</sup> *Id.*; Applicant's Reply brief 12 TTABVUE 4.

Applicant also criticizes some of the third-party evidence from the websites Society6 and Etsy as being difficult to authenticate as being from United States sellers.<sup>41</sup> Applicant contends that these websites are not evidence of extensive third-party use because the goods are sold to single customers, are bought “on demand,” or are “one-off creations.”<sup>42</sup>

Nonetheless, we find this evidence probative as these websites are online marketplaces offering goods of third-party sellers to United States consumers. The websites are reflective of many different sellers in the marketplace offering goods with the phrase SHE KNEW SHE COULD, its derivative, or its variant to consumers and provide relevant evidence of consumer perception.

Applicant also argues that the Examining Attorney has not addressed its argument that multiple informational or motivational slogans have been registered at the USPTO such as “The Sky’s the Limit,” “You can do it,” and “Believe in Yourself.”<sup>43</sup> However, the registration by the USPTO of different slogans using

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<sup>41</sup> Applicant’s Reply brief, 12 TTABVUE 5.

<sup>42</sup> *Id.* Applicant also criticizes two websites as originating from China, southernclassgiftco.com and paolish.com, April 17, 2019 Office Action at TSDR 98 and 121. However, these websites are directed to the United States consumer as the prices are displayed in U.S. dollars and the pages are in English. See *In re Bayer AG*, 82 USPQ2d at 1835 (“Information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.”); *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1781 n.10 (TTAB 2017) (finding foreign website evidence relevant because potential consumers would likely encounter those English language websites when searching for companies offering services similar to applicant).

<sup>43</sup> Applicant’s brief, 8 TTABVUE 10; Applicant’s Reply brief, 12 TTABVUE 5-6. Applicant submitted as “Exhibit A” to its brief a copy of its “Exhibit A” filed with its October 17, 2019 Request for Reconsideration at TSDR 15-76. The Examining Attorney points out that five of these registrations have been cancelled.

different wording than Applicant's proposed mark is not relevant to the issue of whether SHE KNEW SHE COULD is entitled to registration. The question before us is whether this particular phrase Applicant seeks to register would be perceived by potential consumers as identifying source. Thus, the registrability of other slogans identified by Applicant has no bearing on the question of whether SHE KNEW SHE COULD is registrable. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.").

In this case, the evidence from Applicant's websites shows that the phrase SHE KNEW SHE COULD is prominently displayed on Applicant's bracelets, necklaces and socks. "The placement, size, and dominance of the wording are consistent with informational (or ornamental), not trademark use. Such prominence is more consistent with the conveying of an informational message than with signifying a brand or an indicator of source."<sup>44</sup> *In re Hulting*, 107 USPQ2d 1175, 1179 (TTAB 2013).

The well-recognized and commonly expressed sentiment and informational (or ornamental) nature of the proposed mark is corroborated by the widespread third-party use of the phrase SHE KNEW SHE COULD, its derivatives or variants. The record evidence shows that consumers are accustomed to seeing SHE KNEW SHE

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<sup>44</sup> We note that Applicant refers to its bracelets in a non-trademark manner as "She knew she could bracelets" on its website.

COULD, its derivatives, and variants as a prominent ornamental or informational feature on the same goods as Applicant's, e.g., jewelry, mugs, tote bags, journals, and clothing. These uses would be perceived by consumers as conveying a common sentiment or statement of female empowerment or affirmation. *See In re Texas With Love*, 2020 USPQ2d 11290, at \*4 (the examples of third-party use of TEXAS LOVE on the same goods as Applicant do not refer to the sources of products offered but reflect use of the phrase in a manner that will only be perceived by consumers as conveying "support for, or affiliation or affinity with the State of Texas," a well-recognized sentiment). As a result, consumers will not perceive SHE KNEW SHE COULD appearing on Applicant's Class 14, 16, 18, 21, 25 and 28 goods as a source indicator. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1403-04 (TTAB 2018) (consumers accustomed to seeing similar, ornamental displays of I LOVE YOU on bracelets and jewelry from different sources will not perceive I LOVE YOU appearing on bracelets as pointing uniquely to Applicant as a single source).

The fact that Applicant may also use SHE KNEW SHE COULD on packaging in a traditional, non-ornamental or non-informational manner is not dispositive of whether SHE KNEW SHE COULD actually functions as a mark because the proposed mark must be considered in the environment in which it is perceived. *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at \*3; *D.C. One Wholesaler*, 120 USPQ2d at 1716. Therefore, even when displayed on packaging, consumers will not perceive SHE KNEW SHE COULD as pointing uniquely to Applicant as a single source because of the widespread third-party informational (or ornamental) use of that

phrase on goods similar to Applicant's.<sup>45</sup> See also *In re Texas With Love*, 2020 USPQ2d 11290, at \*3 (TTAB 2020) (notwithstanding trademark use shown on specimens, and Applicant's apparent intent it function as a mark, the third-party use shows that TEXAS LOVE does not function as a mark); *Damn I'm Good Inc. v. Sakowitz, Inc.*, 514 F. Supp. 1357, 212 USPQ 684 (S.D.N.Y. 1981) (where plaintiff used DAMN I'M GOOD as a message engraved on a bracelet and commenced use of the term on a hangtag only after competitors began to produce similar products, court held that "plaintiff does not hold a valid trademark.").

## II. Conclusion

The record evidence shows that consumers are accustomed to seeing the commonly expressed concept or sentiment SHE KNEW SHE COULD, its derivatives, or variants in an informational (or ornamental) manner as an affirmation or statement of female empowerment. As a result, consumers will not perceive this wording as applied to Applicant's goods as a source indicator pointing uniquely to Applicant. Rather, consumers purchasing Applicant's goods will perceive the designation SHE KNEW SHE COULD as a commonly used concept or sentiment or informational slogan used by multiple entities rather than a sole source of goods.

**Decision:** The refusal to register Applicant's mark SHE KNEW SHE COULD is affirmed.

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<sup>45</sup> *Id.*