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U.S. Application Serial No. 88434221

Mark: GEL-LYS

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant appeals the refusal to register the applied-for mark, "GEL-LYS", based on a likelihood of confusion with U.S. Reg. No. 4,728,364 "GEL'ISS", under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

FACTS

On May 16, 2019, applicant applied to register the mark “GEL-LYS” for “Artificial eyelash tweezers; Tweezers” in International Class 008, and for “Battery-powered applicators for applying cosmetics to eyelashes; Motorized applicators for applying cosmetics to eyelashes” in International Class 021. The trademark examining attorney refused registration on August 2, 2019 based on a likelihood of confusion with the mark in U.S. Reg. No. 4,728,364. Additionally, applicant was advised of a potential likelihood of confusion with respect to a prior-filed pending U.S. Trademark Application Serial No. 86/263573. Applicant’s arguments against the Section 2(d) likelihood of confusion with respect to U.S. Reg. No. 4,728,364 were not persuasive. Therefore, the Section 2(d) refusal with respect to U.S. Reg. No. 4,728,364 was made final on February 20, 2020. Additionally, in the February 20, 2020 final Office action, applicant was notified that U.S. Trademark Application Serial No. 86/263573 had abandoned and was no longer a potential bar to registration of applicant’s applied-for mark. This appeal follows the trademark examining attorney’s denial of reconsideration dated August 28, 2020. The sole issue to be decided on appeal is whether the applicant’s mark is likely to cause confusion with U.S. Registration No. 4,728,364.

ARGUMENTS

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 goods 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). Any evidence of record related to those factors need be considered; however, “not all of the *DuPont* factors are relevant or of similar weight in every case.” *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)).

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 goods. 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 and differences in the marks.”); TMEP §1207.01.

A. The Applicant’s Mark and Registrant’s Mark are Similar in Appearance, Sound and Overall Commercial Impression

In a likelihood of confusion determination, 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 Fondée 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)), *aff’d per curiam*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019); TMEP §1207.01(b).

In the present case the respective marks, “GEL-LYS” and “GEL’ISS”, are similar in appearance, sound, connotation, and commercial impression. Specifically, the marks are essentially phonetic equivalents and thus sound similar. That is, the marks include the combination of the identical, in sound, terms “GEL” or “GEL-L” with identical, in sound, terms ending in “YS” or “ISS”. Similarity in sound alone may be sufficient to support a finding that the compared marks are confusingly similar. *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (citing *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732, 156 USPQ 523, 526 (C.C.P.A. 1968)); TMEP §1207.01(b)(iv).

Applicant argues that the respective marks are different because the apostrophe in registrant's mark gives the impression that the mark is comprised of one word and may be pronounced as the term "jealous," while applicant's applied-for mark gives the commercial impression of two terms, "GEL" and "LYS". Additionally, applicant states that the term "LYS" means "light" in Danish, Hebrew, Norwegian, Western Frisian, and Yiddish. See October 27, 2020 Applicant's Appeal Brief, TSDR p. 10.

Applicant's arguments are not persuasive because the apostrophe in registrant's mark and the hyphen in applicant's mark both serve a similar purpose in portraying the marks as being a composite mark. Additionally, the fact that the term "LYS" in applicant's mark has a meaning in foreign languages does not avoid a likelihood of confusion here because consumers encountering applicant's mark are not likely to stop and translate "LYS" apart from the mark. In particular, the hyphen in applicant's mark is combining the two terms into a single composite mark, in which consumers would not dissect the mark apart into two separate words and interpret a potential translation with the second term in the mark.

Moreover, there is no correct pronunciation of a mark; thus, consumers may pronounce a mark differently than intended by the mark owner. See *In re Viterra, Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (citing *Interlego AG v. Abrams/Gentile Entm't, Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002)); TMEP §1207.01(b)(iv). In the present case, the compared marks could clearly be pronounced the same. Such similarity in sound alone may be sufficient to support a finding that the compared marks are confusingly similar. *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (citing *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732, 156 USPQ 523, 526 (C.C.P.A. 1968)); TMEP §1207.01(b)(iv).

Furthermore, applicant argues that the term "GEL" is weak in registrant's mark because it merely describes a feature of registrant's goods, and should be entitled to only a narrower scope of protection under Section 2(d) of the Trademark Act. See October 27, 2020 Applicant's Appeal Brief,

TSDR pp. 10-14. Applicant's argument is not persuasive because applicant is improperly dissecting registrant's mark in reaching this conclusion. Specifically, the apostrophe in the registration creates a unitary mark that is a coined term, and in which the mark as a whole is not merely descriptive of registrant's goods. As such, it is improper to focus on just a portion of registrant's mark when applicant's and registrant's marks in their entireties can be pronounced the same and essentially be identical in sound.

Additionally, even were elements of the registrant's mark or the mark itself determined to be "weak", 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 goods. 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).

Applicant goes on further to argue that the term "GEL" is weak and dilute for similar cosmetic goods in International Class 003 by referencing third-party registrations submitted in applicant's request for reconsideration dated August 13, 2020. *See* October 27, 2020 Applicant's Appeal Brief, TSDR pp. 12-14. Additionally, applicant argues that consumers have been exposed to numerous third party use of the term "GEL" for cosmetic goods and are not likely to be confused as to the source of the goods. *See* October 27, 2020 Applicant's Appeal Brief, TSDR p. 13.

Although applicant's submission of third-party registrations shows other "GEL" formative marks for use with cosmetic goods are coexisting on the Trademark Register, a closer look at these third-party registrations shows that the marks all convey different commercial impressions and are distinguishable from each other. Such as in the following few examples,

- in U.S. Reg. No. 5422795, “DON’T BE GELLY”, the term “GELLY” is an alternative, unique spelling or play-on of the term “JELLY”;
- in U.S. Reg. No. 0984243, “GEL-GLOSS”, conveys the impression of goods that are made from a “GEL” substance and have a “glossy” effect;
- in U.S. Reg. 4668474, “GELENVY”, conveys the impression of someone that is envious of gel cosmetic products; and
- in U.S. Reg. No. 4096115, “GELISH”, this coined term appears as a play-on term that the products contain a gel-like substance.

Therefore, each of these registrations are coexisting on the Trademark Register because they each convey a different overall commercial impression. Moreover, applicant’s mark and the mark in the cited registration are the only two marks on the Trademark Register for related goods that are phonetic equivalents and convey similar overall commercial impressions. Therefore, applicant’s argument is not persuasive.

Furthermore, third-party registrations are entitled to little weight on the issue of confusing similarity because the registrations are “not evidence that the registered marks are actually in use or that the public is familiar with them.” *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); see TMEP §1207.01(d)(iii). Moreover, the existence on the register of other seemingly similar marks does not provide a basis for registrability for the applied-for mark. *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Total Quality Grp., Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999).

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., 901 F.3d 1367, 1373, 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 (C.C.P.A. 1971)), *aff’d per curiam*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019); TMEP §1207.01(b). In the present case, the marks are identical in sound and convey similar overall commercial impressions. Therefore, the marks are similar.

B. The Applicant’s Goods and the Registrant’s Goods are Related

The applicant’s goods are “Artificial eyelash tweezers; Tweezers” in International Class 008, and for “Battery-powered applicators for applying cosmetics to eyelashes; Motorized applicators for applying cosmetics to eyelashes” in International Class 021.

Registrant’s goods are “Cosmetics and cosmetic preparations” in International Class 003.

The compared goods 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] 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).

In the present case, applicant's and registrant's goods are related because the goods are types of cosmetic or beauty related products. Moreover, the evidence of record establishes that the goods are of a kind that may emanate from a single source. For instance,

- at "Revlon", the company offers a variety of beauty tools, such as tweezers as well as offering a variety of cosmetic products and preparations, all under the same mark. (See August 2, 2019 Office action, TSDR pp. 7-8);
- at "KISS", the company offers tweezers for applying false eye-lashes as well as cosmetic products and preparations, such as false eye-lashes, all under the same mark. (See August 2, 2019 Office action, TSDR pp. 9-10);
- at "MAC", the company offers lash applicators as well as cosmetic products and preparations, all under the same mark. (See August 2, 2019 Office action, TSDR pp. 11-12);
- at "AZEREDO cosmetics", the company offers tweezers for applying false eye-lashes as well as cosmetic products and preparations, such as false eye-lashes, all under the same mark. (See August 2, 2019 Office action, TSDR p. 13);
- at "Sephora Collection", the brand offers eye-lash applicators as well as cosmetics, such as lipsticks, all under the same mark. (See August 2, 2019 Office action, TSDR pp. 14-15);
- at "House of Lashes", the brand offers tweezers and cosmetic products and preparations, such as false eye-lashes and false eye-lash adhesives, all under the same mark. (See February 20, 2020 final Office action, TSDR p. 2);
- at "Lilly Lashes", the brand offers tweezers for applying false eye-lashes as well as cosmetic products and preparations, such as false eye-lashes and false eye-lash

adhesives, all under the same mark. (See February 20, 2020 final Office action, TSDR pp. 3-6);

- at “MoxieLash”, the brand offers tweezers for applying false eye-lashes as well as cosmetic products and preparations, such as false eye-lashes and magnetic liquid eyeliner, all under the same mark. (See February 20, 2020 final Office action, TSDR p. 7);
- at “ANASTASIA”, the brand offers tweezers as well as cosmetics, all under the same mark. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR pp. 2-11);
- at “Benefit”, the brand offers cosmetics as well as tweezers, all under the same mark. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR pp. 12-19);
- at “KBLCOSMETICS”, the brand offers mascaras featuring a battery-powered applicators as well as cosmetics, all under the same mark. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR pp. 20-27);
- at “LANCOME”, the brand offers mascaras that are power operated featuring a vibrating brush as well as offering other cosmetic products and preparations, such as makeup and tweezers, all under the same mark. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR pp. 28-46);
- at “Sally Hansen”, the company offers cosmetics, such as nail polish as well as tweezers, all under the same mark. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR pp. 47-60);
- at “Twinkle Apothecary”, the web site shows cosmetic products, such as makeup as well as tweezers being sold in the same channels of trade. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR pp. 61-68);

- at “Ulta Beauty”, the company offers cosmetic products, such as makeup as well as false eye-lash tweezers and tweezers, all under the same mark. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR pp. 69-82).

This evidence shows entities that manufacture tweezers and/or mascaras featuring a battery-powered applicators are also manufacturing cosmetic products, all under the same mark and/or sold in the same channels of trade. Thus, applicant’s and registrant’s goods are considered related for likelihood of confusion purposes. See, e.g., *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Furthermore, the evidence of record establishes that applicant’s battery-powered applicators for applying cosmetics to eyelashes and motorized applicators for applying cosmetics to eyelashes are goods that can be used with registrant’s cosmetic goods. For example,

- at “M Made-in-China”, the web site shows motorized cosmetic applicators for use with applying mascara to eyelashes. (See February 20, 2020 final Office action, TSDR p. 8);
- at “ebay”, the web page shows that in the marketplace battery-operated cosmetic applicators are used to apply mascara to one’s eye-lashes. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR p. 9);
- at “Alibaba.com”, the web site features electric cosmetic applicators for use with applying mascara to eyelashes. (See February 20, 2020 final Office action, TSDR p. 10);
- the brand “Estee Lauder” offers a mascara line featuring battery-operated mascara applicators for use with applying mascara to eyelashes. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR p. 83);

- the brand “Dior” offers a mascara line featuring battery-powered mascara wand or applicator for use with applying mascara to eyelashes. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR p. 84);
- the brand “Maybelline” offers a mascara line featuring battery-powered mascara applicator for use with applying mascara to eyelashes. (See August 28, 2020 letter denying applicant’s request for reconsideration, TSDR p. 85).

Therefore, the evidence establishes that applicant’s power-operated cosmetic applicators can be used with registrant’s cosmetic products for the purpose of applying mascara, a cosmetic product, to one’s eyelashes. Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. See *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that “[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion”); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease). Therefore, applicant’s motorized or battery-operated applicators for applying cosmetics to eyelashes are related to registrant’s cosmetic goods.

Applicant argues that the respective goods do not overlap because applicant has developed a proprietary and patent pending method for eyelash extensions, which is used in applicant’s beauty salon. Further, applicant argues that applicant’s products can only be used with applicant’s bonds and glues and used by professionals in the cosmetic industry. See October 27, 2020 Applicant’s Appeal Brief,

TSDR pp. 14-16. Applicant's arguments are not persuasive because applicant's goods have not been limited or restricted for use with specific products or by specific users. Similarly, the registration contains no restriction or limitations as to channels of trade or as to a specific type of purchasers. Therefore, in the absence of limitations as to channels of trade or classes of purchasers in the goods in the registration or application, the presumption is that the goods move in all trade channels normal for such goods and are available to all potential classes of ordinary consumers of such goods. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); TMEP §1207.01(a)(iii).

Additionally, applicant argues that based on the specimen submitted by registrant the mark was used on nail polish; however, applicant goes on to further state that after an extensive search for products (including with nail polish) in connection with registrant's mark did not return any results. *See* October 27, 2020 Applicant's Appeal Brief, TSDR p. 15. Applicant's argument is without merits because a trademark registration on the Principal Register is prima facie evidence of the validity of the registration and the registrant's exclusive right to use the mark in commerce in connection with the specified goods. *See* 15 U.S.C. §1057(b); TMEP §1207.01(d)(iv). The cited registration is for "cosmetic and cosmetic preparations," and as such presumably encompasses all types of cosmetics and cosmetic preparations, including false eyelashes. Therefore, applicant's goods can be used with registrant's goods. Moreover, the evidence of record shows that the respective goods are of a kind that may emanate from a single source.

Furthermore, the purported lack of fame of the cited mark, as argued by applicant, *see* October 27, 2020 Applicant's Appeal Brief, TSDR p. 15, is not significant to the issue of likelihood of confusion in ex parte examination. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (citing *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006)); TMEP §1207.01(d)(ix). Because the types of evidence bearing on the fame of a registered mark include the volume of sales, advertising

expenditures, and length of use of the mark, and such evidence normally is not publicly available, trademark examining attorneys are not expected to submit evidence regarding the fame of a cited registered mark in ex parte proceedings. TMEP §1207.01(d)(ix); see *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016) (citing *In re Thomas*, 79 USPQ2d at 1027 n.11). When no evidence of fame has been provided, this *du Pont* factor is usually treated as neutral. See *In re Mr. Recipe, LLC*, 118 USPQ2d at 1086. Thus, in this case, this factor is considered neutral for purposes of determining likelihood of confusion.

Applicant argues that there is no overlap between the distribution channels of applicant's and registrant's goods. See October 27, 2020 Applicant's Appeal Brief, TSDR p. 17. Specifically, applicant argues that the goods sold by applicant and registrant are not sold by the same dealers, used by the same purchasers nor advertised together, and the fact that applicant's and registrant's products can be categorized in the same broad field of 'cosmetology' does not, in and of itself, provide a basis for regarding their products as related. See October 27, 2020 Applicant's Appeal Brief, TSDR p. 16. The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01. The evidence of record establishes that cosmetic products such as makeup and false eye-lashes and beauty tools, such as tweezers, false eye-lash tweezers are goods of a kind that may emanate from a single source, and further, the evidence of record establishes that the respective goods are complementary and can be used together. Specifically, the evidence shows battery-operated cosmetic applicators can be used to apply mascara to one's eye-lashes. Additionally, eyelash tweezers are designed to be used to apply false eye-lashes.

Furthermore, applicant revisits its argument that its goods are marketed and sold to professionals in the cosmetic or beauty industry but further argues that applicant's consumers are highly sophisticated and knowledgeable about applicant's goods and that confusion as to the source of the goods is unlikely. See October 27, 2020 Applicant's Appeal Brief, TSDR p. 18. However, 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). Moreover, in the present case the respective goods in the application and registration have not been limited to a specific group of professional purchasers. Therefore, where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d at 1325, 110 USPQ2d at 1163), *aff'd per curiam*, 777 F. App'x 516, 2019 BL 375518 (Fed. Cir. 2019).

Furthermore, the overriding concern is not only to prevent buyer confusion as to the source of the goods, 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).

CONCLUSION

The marks are similar in appearance, sound, connotation, and commercial impression. Furthermore, applicant's and registrant's goods are related. Thus, consumers are likely to be confused as to the source of the goods. Accordingly, the examining attorney respectfully requests that the Section 2(d) likelihood of confusion refusal be affirmed.

Respectfully submitted,

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