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**United States Patent and Trademark Office (USPTO)**

**U.S. Application Serial Nos.** 88834639 and 88834641

**Mark:** LMC

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**Reference/Docket No.** N/A

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**EXAMINING ATTORNEY'S APPEAL BRIEF**

These proceedings concern the appeals in U.S. Application Serial Nos. 88834639 and 88834641 for which consolidation was granted on September 1, 2021.<sup>1</sup>

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<sup>1</sup> The references to pages in TIGRS below refer to both applications as the attachments are identical.

The applicant has appealed the examining attorney's<sup>2</sup> final refusal to register the marks in U.S. Application Nos. 88834639 LMC (in stylized form) and 88834641 LMC (design plus words) both for "Marina services" in Class 39 on the grounds that applicant's marks are likely to cause confusion, mistake, or deception under Trademark Act Section 2(d), 15 U.S.C. §1052(d), with the marks in U.S. Registration Nos. 5176104 LMC and 5185288 LMC S.S. BADGER A HISTORIC LANDMARK (design plus words) both for "Ferry-boat transport" in Class 39. The cited registrations are owned by the same registrant.

#### FACTS

On March 14, 2020, applicant applied to register the marks LMC (in stylized characters) and LMC (design plus words) for the services "Marina services" in Class 39.

On June 9, 2020, the examining attorney issued Office Actions in both applications in which the examining attorney issued a refusal under Trademark Act Section 2(d) 15 U.S.C. §1052(d), based upon a likelihood of confusion with the marks in U.S. Registration Nos. 5176104 LMC and 5185288 LMC S.S. BADGER A HISTORIC LANDMARK (design plus words) both for "Ferry-boat transport" in Class 39.

On November 25, 2020, applicant filed Responses in both applications in which applicant provided arguments and evidence against the Section 2(d) Refusal. On January 4, 2020, the examining attorney issued a Final Refusal in both applications based on the Section 2(d) likelihood of confusion refusal with respect to U.S. Registration Nos. 5176104 and 5185288.

On June 25, 2021, applicant filed a Notice of Appeal for both applications and on August 22, 2021, applicant filed its Appeal Brief in both applications, which were forwarded to the examining

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<sup>2</sup> The applications were originally assigned to examining attorney Dana Dickson. The applications were reassigned to the undersigned examining attorney on July 30, 2020.

attorney on August 23, 2021. On September 1, 2021, the examining attorney filed a Motion to Consolidate the appeals, which was granted on the same day.

### ISSUE

The sole issue presented on appeal is whether the applicant's marks, when used on or in connection with the applicant's services, so resemble the marks in U.S. Registration Nos. 5176104 and 5185288 to be likely to cause confusion, to cause mistake, or to deceive under Section 2(d) of the Trademark Act.

### ARGUMENT

#### **APPLICANT'S AND REGISTRANT'S MARKS ARE CONFUSINGLY SIMILAR AND APPLICANT'S AND REGISTRANT'S SERVICES ARE CLOSELY RELATED SUCH THAT CONSUMERS ARE LIKELY TO BE CONFUSED, MISTAKEN, OR DECEIVED AS TO THE SOURCE OF THE SERVICES**

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). 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 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.

#### **A. Applicant’s Marks and Registrant’s Marks are Confusingly Similar**

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 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)), *aff’d per curiam*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019); TMEP §1207.01(b).

In the present case, applicant’s mark in U.S. Application Serial No. 88834639 is LMC (in stylized form) and the mark in U.S. Application Serial No. 88834641 is LMC (design plus words). The registered marks are LMC in standard characters in U.S. Registration No. 5176104 and LMC S.S. BADGER A HISTORICLANDMARK (design plus words) in U.S. Registration No. 5185288. These marks are confusingly similar.

Specifically, the literal element of applicant’s mark, LMC, is incorporated entirely within each of the registered marks. Nothing in the marks points to a particular significance for the marks, and this

does not appear to have any particular significance in relation to the services.<sup>3</sup> Thus, the marks share a literal element that is identical in sound and appearance and does not differ in meaning.

Moreover, as this is the only wording in both applications and U.S. Registration No. 5176104, the marks are highly similar in sound and appearance and do not immediately differ in meaning.

The mark in U.S. Registration No. 5185288 contains the additional wording S.S. BADGER A HISTORICLANDMARK. However, this wording provides additional information about the services. First, S.S. BADGER appears to be the name of the ship. S.S. means “Steam Ship” and so indicates the type of boat that is providing the services.<sup>4</sup> Based on the placement of the wording BADGER, this appears to be the name of the ship.<sup>5</sup> The wording A HISTORICLANDMARK refers to a thing or site that has been recognized as having historic significance.<sup>6</sup> Thus consumers encountering the applicant’s LMC marks and the registrant’s mark with additional wording would likely perceive this as providing additional information about the services.

Further, the wording “S.S.” and “A HISTORICLANDMARK” has been disclaimed. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). Disclaimed matter that is descriptive of or generic for a party’s services is typically less significant or less dominant when comparing marks. *In re Detroit Athletic Co.*, 903 F.3d

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<sup>3</sup> See evidence attached to January 4, 2021 Office Action from AcronymFinder.com (pages 28-29 in TIGRS).

<sup>4</sup> See *id.*, evidence from Nadaguides.com (pages 30-31 in TIGRS) and MarineInsight.com (pages 32-33 in TIGRS).

<sup>5</sup> See *id.*, evidence from Nadaguides.com (pages 47-50 in TIGRS), Wikipedia.org (pages 51-52 in TIGRS), and GCaptain.com (pages 53-58 in TIGRS).

<sup>6</sup> See *id.*, evidence from TheOldHouselife.com (pages 34-36 in TIGRS), Savingplaces.org (pages 37-41 in TIGRS) and VillagePreservation.org (pages 42-46 in TIGRS).

1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TMEP §1207.01(b)(viii), (c)(ii).

Applicant's mark in U.S. Application Serial No. 88834641 and U.S. Registration No. 5185288 have design elements. However, 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)).

In this case, applicant's additional design element is the design of a front of a ship appearing inside the letter "C". The registrant's design element is of a steam ship. These designs reference the boat-related services and do not create a differing commercial impression for the shared wording. Moreover, the designs both feature boats and so are visually similar. Thus, this additional design does not overcome the similarity created by the shared lettering.

Further, the mark in U.S. Registration No. 5176104 is in standard characters. 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”).

Therefore, the standard character registered mark could be presented in any manner of display, including one similar to applicant’s marks. Thus, the stylization and design in applicant’s marks do not overcome the similarity based on the shared lettering, particularly when compared to U.S. Registration No. 5176104.

Thus, as the marks share the identical characters “LMC” and the additional matter in the respective marks does not create a differing impression or overcome the similarity created by this identical element, these marks are confusingly similar.

#### **Applicant’s Arguments Regarding the Similarity of the Marks**

First, applicant argues that LMC in the applicant’s and registrant’s marks have differing meanings and impressions because LMC stands for “Lauderdale Marine Center” in applicant’s marks and “Lake Michigan Carferry” in the registrant’s marks. However, this interpretation relies on information not contained in the marks themselves. 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)).

Thus, as the marks here provide no interpretation or meaning for LMC, the comparison of the marks cannot be limited based on extrinsic evidence of usage. Consumers encountering both marks, as

they appear in the application and registration, would not be made aware of this differing significance. Therefore, this argument is unpersuasive.

Second, applicant argues that the marks differ. However, 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).

As discussed above, consumers are likely to view applicant’s mark as a variation of the registered marks, particularly U.S. Registration No. 5176104, which is a standard character mark that shares an identical literal element with both of applicant’s marks. Thus, the fact that the marks differ is not the test and does not overcome the similarity based on this shared lettering.

Therefore, applicant’s arguments regarding the similarity of the marks are unpersuasive.

#### **B. Applicant’s Services and Registrant’s Services are Closely Related**

In a Likelihood of Confusion determination, 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 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).

Here, the applicant’s services (in both applications) are “Marina services” in Class 39. The registrant’s services (in both registrations) are “Ferry-boat transport” in Class 39. These services are related.

First, the following evidence demonstrates that these services commonly originate from the same sources under the same marks:

- Evidence from [Crystalcoastnc.org](http://Crystalcoastnc.org) (discussing a marina and ferry service), attached to January 4, 2021 Office Action, pages 60-61 in TICRS.
- Evidence from [Barboursmarina.com](http://Barboursmarina.com) (discussing a marina and ferry under the same mark), attached to January 4, 2021 Office Action, pages 62-64 in TICRS.
- Evidence from [Bullrivermarina.com](http://Bullrivermarina.com) (discussing a boat service as part of a marina), attached to January 4, 2021 Office Action, pages 65-71 in TICRS.
- Evidence from [Harborpointmarinas.com](http://Harborpointmarinas.com) (listing a water taxi as part of the amenities of a marina service), attached to January 4, 2021 Office Action, pages 72-73 in TICRS.

- Evidence from Sailfishmarina.com (listing a water taxi as part of a marina service), attached to January 4, 2021 Office Action, pages 74-78 in TIGRS.

Second, the following evidence demonstrates that ferry boat services commonly operate from marinas, and so these services would be encountered in the same locations:

- Evidence from Marinawaterbus.com, (showing a boat service from a marina), attached to January 4, 2021 Office Action, pages 79-81 in TIGRS.
- Evidence from Hubbardsmarina.com, (showing a ferry as departing from a marina), attached to January 4, 2021 Office Action, pages 82-84 in TIGRS.
- Evidence from VisitNC.com, (listing a marina as a homeport for ferries), attached to January 4, 2021 Office Action, pages 85-86 in TIGRS.
- Evidence from Clearwaterferry.com, (listing a ferry that departs from a marina), attached to January 4, 2021 Office Action, pages 87-88 in TIGRS.
- Evidence from StHazards.com, (discussing a ferry from a marina), attached to January 4, 2021 Office Action, pages 89-91 in TIGRS.

The above-referenced Internet evidence establishes that the services originate from the same sources under the same marks and are offered together in the same locations in a complementary manner. Thus, applicant's and registrant's services 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 trademark examining attorney has previously provided evidence 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 services as those of both applicant and registrant in this case. This evidence shows that the services listed therein, namely, marina services and ferry or boat transport services 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).

In particular, please see the highlighted registrations below:

<u>U.S. Registration No.</u>	<u>Mark</u>	<u>Services</u>
1807973 <sup>7</sup>	BULLFROG	Class 39: arranging and conducting travel tours; houseboat, powerboat and R.V. rental services; boat rental services; transportation services; namely, ferry services, marina services
3255807 <sup>8</sup>	SAVILLE FERRY SERVICE	Class 39: boat chartering, car parking, delivery of goods by ferry, document delivery by ferry, ferryboat operating, ferry-boat transport, freight transportation by ferry, marina services, marine transport, organization of travel and boat trips, parking lot services, passenger ship transport, rental of boats, rental of car parking spaces, rental of parking spaces, rental of vehicle parking spaces, rental of vessels, river transport by boat, ship piloting, ship unloading, transport by ferry, boat and ship, transportation of passengers and/or goods by ferry boat and ship, vehicle parking and vessel transport
4391351 <sup>9</sup>	BRIDGE MARINA	Class 39: Boat chartering; Boat cruises; Boat rental; Boat towing services; Boat transport; Conducting boat charters; Leasing of boat slips; Marina services; Marine towing; Marine transport; Pleasure boat cruises; Rental of boats
4608961 <sup>10</sup>	HIGH SIERRA MARINE	Class 39: Barge transport; Boat salvage; Boat storage; Boat towing services; Boat transport; Boathouse services; Diving and underwater

<sup>7</sup> Attached to January 4, 2021 Office Action, pages 2-3 in TICRS.

<sup>8</sup> Attached to June 9, 2020 Office Action, pages 7-9 in TICRS.

<sup>9</sup> Attached to June 9, 2020 Office Action, pages 10-11 in TICRS.

<sup>10</sup> Attached to June 9, 2020 Office Action, pages 12-13 in TICRS.

		salvage; Marina services; Marine towing; Marine transport; Refloating of boats; Sailboat transportation services; Storage of goods; Underwater salvage; Vehicle and boat moving services; Vessel salvage; Vessel transport
4831784 <sup>11</sup>	(Oval Design)	Class 39: Marina services; rental of berths for marina crafts; boat storage; rental of marine crafts, namely, boats; arranging of travel tours; arranging of cruises; boat rental; arranging and conducting sightseeing tours for others; providing information about travel tours; travel agency services, namely, making reservations and bookings for transportation; transport reservation; pleasure boat transport; car transport; rental of deep water diving suits.
5072720 <sup>12</sup>	ANTELOPE POINT MARINA	Class 39: marina services; boat rental services; houseboat rental services; rental of personal watercraft, namely, kayaks and water scooters; boat cruises; boat transport services; boat storage services; leasing of boat slips
5243859 <sup>13</sup>	SUNTEX MARINAS	Class 39: Marina services; rental of berths for marina crafts; the provision, rental, and leasing of wet and dry boat slips; boat storage; rental of marine crafts, namely, boats, water scooters, personal jet boats, kayaks, paddle boats, and personal watercraft; boat chartering services; boat cruises; boat transport and towing services; marine towing services; boat launch services; rental of boat lifts; boat hauling services; boat transportation services
5612661 <sup>14</sup>	#YOUR PLACE IN THE SUN	Class 39: Marina services; rental of berths for marina crafts; the provision, rental, and leasing of wet and dry boat slips; boat storage; rental of marine crafts, namely, boats, water scooters, personal jet boats, kayaks, paddle boats, and personal watercraft; boat chartering services; boat

<sup>11</sup> Attached to January 4, 2020 Office Action, pages 12-14 in TICRS.

<sup>12</sup> Attached to June 9, 2020 Office Action, pages 14-16 in TICRS.

<sup>13</sup> Attached to January 4, 2020 Office Action, pages 15-17 in TICRS.

<sup>14</sup> Attached to January 4, 2020 Office Action, pages 18-20 in TICRS

		cruises; boat launch services; rental of boat lifts; boat hauling services; boat transportation services
6023241 <sup>15</sup>	KNOTTY OAR	Class 39: Boat rental; Boat salvage; Boat storage; Boat towing services; Boat transport; Marina services; Leasing of boat slips; Refloating of boats; Rental of boats; Vehicle and boat moving services
6158694 <sup>16</sup>	BITTER END	Class 39: Marina services, featuring berthing, mooring, docking, and storage; boat cruises; providing transport for boat excursions by boat, namely, sailboats and yachts
6190207 <sup>17</sup>	RESORTS WORLD BIMINI	Class 39: Transportation services, namely, transport by ferry, boat, and shuttle bus; marina services; valet parking services and rental of parking spaces

Therefore, as the services originate from the same sources under the same marks and are offered together, these services are related.

**Applicant’s Arguments Regarding the Relatedness of the Services**

First, applicant argues that the services are distinct. As discussed above, the goods not need be identical or competitive to find a likelihood of confusion. *See* TMEP §1207.01(a)(i). The test is instead whether the services are of a kind that could give rise to the mistaken belief that the services originate from the same sources. *Id.* Thus, the fact that applicant’s and registrant’s services do not include each other does not mean that the services are not related. As shown by the evidence set forth above, these are the kind of services that are offered by the same sources and are offered in the same locations. Therefore, consumers are likely to presume a connection between providers of these kinds of services. Thus, this argument is not persuasive.

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<sup>15</sup> Attached to June 9, 2020 Office Action, pages 17-19 in TICRS.  
<sup>16</sup> Attached to January 4, 2020 Office Action, pages 25-27 in TICRS.  
<sup>17</sup> Attached to January 4, 2020 Office Action, pages 21-24 in TICRS.

Second, applicant argues that its activities are geographically separate from those of registrant. However, applicant seeks a geographically unrestricted registration. The owner of a registration without specified limitations enjoys a presumption of exclusive right to nationwide use of the registered mark under Trademark Act Section 7(b), 15 U.S.C. §1057(b), regardless of its actual extent of use. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1568, 218 USPQ 390, 393 (Fed. Cir. 1983). Therefore, the geographical extent of applicant's and registrant's activities is not relevant to a likelihood of confusion determination. As a result, this argument is unpersuasive.

Applicant argues that registrant's services are limited to a specific vessel and specific usage and applicant's services are limited to distinct services. However, this relies on extrinsic evidence regarding applicant's and registrant's services. Determining likelihood of confusion is based on the description of the services 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)).

Here, applicant's arguments are primarily based on extrinsic limitations and evidence regarding the actual services; however no such limitations exist in the identification in the application or registration. Therefore, this argument is unpersuasive.

Applicant argues that the channels of trade differ. As discussed above, 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 Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). Again, applicant's arguments regarding the channels of trade is based on extrinsic evidence regarding the services and not on the identifications in the applications or registrations. Therefore, this argument is unpersuasive.

Applicant argues that there is no evidence of actual confusion and it is unaware of actual confusion. “[A] showing of actual confusion is not necessary to establish a likelihood of confusion.” *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); TMEP §1207.01(d)(ii). “[T]he relevant test is *likelihood* of confusion, not *actual* confusion.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 1309, 128 USPQ2d 1047, 1053 (Fed. Cir. 2018) (emphasis in original). “Uncorroborated statements of no known instances of actual confusion . . . are of little evidentiary value,” especially in ex parte examination. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). Therefore, this argument is unpersuasive.

Applicant argues that the purchasers of the services are sophisticated. 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). Further, 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).

Thus, even assuming the purchasers are sophisticated, given the similarity between the marks and the relatedness of the services, this does not overcome the likelihood of confusion between the marks.

Applicant argues that it has no intent to infringe on registrant’s marks. A Section 2(d) Refusal does not require intent to infringe as part of the consideration. *See* TMEP §1207.01.

For the reasons set forth above, applicant's arguments against the Section 2(d) Refusal are not persuasive.

**CONCLUSION**

Therefore, because the applicant's marks and registrant's marks are confusingly similar, and because applicant's services are closely related to registrant's services, consumers are likely to be confused, mistaken, or deceived as to the source of the respective services. The examining attorney respectfully requests that the Board affirm the refusal to register the mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

Respectfully submitted,

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