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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91223228
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BROOKS SPORTS, INC.

Opposer,

v.

ANTA (CHINA) CO., LTD.,

Applicant.

Opposition No.: 91223228

App. No.: 86/268,523

BROOKS SPORTS, INC.'S REPLY TRIAL BRIEF

Respectfully submitted,

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DATED: August 10, 2017

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I. INTRODUCTION

Anta concedes that the design marks pictured immediately below—the Anta Single-Flare Chevron Design and the Brooks Single-Flare Chevron Marks—are used on identical goods, in overlapping channels, and with the same customer base.¹

Brooks Single-Flare Chevron Marks	Anta Single-Flare Chevron Design
	

Notwithstanding these evidentiary and legal admissions concerning six important *DuPont* factors, Anta claims that confusion is not likely because the marks are dissimilar and the Brooks Single-Flare Chevron Marks are weak. Anta’s arguments are unpersuasive. They misstate and apply incorrect legal standards, ignore the complete evidentiary record, and, in some cases, do not respond at all to Brooks’s well-supported claims for relief.

Rather, as Brooks already demonstrated, the balance of the *DuPont* factors establish a likelihood of confusion between the Anta Single-Flare Chevron Design and the Brooks Single-Flare Chevron Marks. Brooks has also already shown a likelihood of dilution by blurring, and Anta’s arguments do not change that conclusion either. Brooks therefore respectfully requests that the Opposition be sustained and the Application be refused.

¹ This reply brief is supported by the record in this proceeding, including the Notice of Reliance (filed at entry 26), the testimonial affidavit of Dan Sheridan (filed at entry 27), the confidential exhibits to Mr. Sheridan’s affidavit filed under seal (filed at entry 28), and the rebuttal affidavit of Mr. Sheridan (filed at entry 19). All numbered TTABVue citations refer to entries in the record in this proceeding. In quotations, all internal quotations and citations are omitted and all emphasis is added unless otherwise noted. All capitalized terms are consistent with Brooks’s Opening Trial Brief (filed at entry 22).

II. ANTA CONCEDES THAT *DUPONT* FACTORS 2, 3, 4, 9, 10, AND 12 FAVOR FINDING A LIKELIHOOD OF CONFUSION

Anta makes important evidentiary and legal admissions. It expressly concedes that the goods sold under the marks are identical in part (*DuPont* factor 2), that the likely channels of trade overlap (*DuPont* factor 3), and that the likely classes of consumers are the same and they will exercise nothing more than ordinary care in purchasing the goods at issue (*DuPont* factor 4). *See* 23 TTABVUE at 2. Likelihood of consumer confusion is greater if these factors favor a registrant. *See Fort James Operating Co. v. Royal Paper Converting, Inc.*, 83 U.S.P.Q.2d 1624, 2007 WL 1676779, at *4 (T.T.A.B. 2007). Further, if these factors favor a registrant, the degree of similarity between the marks at issue need not be substantial to support a finding of likelihood of confusion. *See id.*

Brooks also argued that the variety of goods on which the Brooks Single-Flare Chevron Marks are used (*DuPont* factor 9), the market interface between Brooks and Anta (*DuPont* factor 10), and the extent of potential confusion (*DuPont* factor 12) support finding a likelihood of consumer confusion. *See* 22 TTABVUE at 13-14, 17-18. Anta did not rebut any of these arguments. *See* 23 TTABVUE at 1-17. Anta thus effectively concedes that these factors also favor finding a likelihood of confusion between the Anta Single-Flare Chevron Design and the Brooks Single-Flare Chevron Marks.

Indeed, Anta only contests *DuPont* factors 1, 5 and 6. *See id.* at 16 (summarizing Anta's arguments in opposition). But these factors are not dispositive, *see In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003) (affirming a finding of confusion where only the marks, goods, channels of trade, and customers were similar), and actually support a finding of





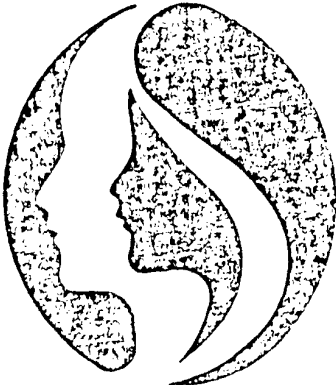
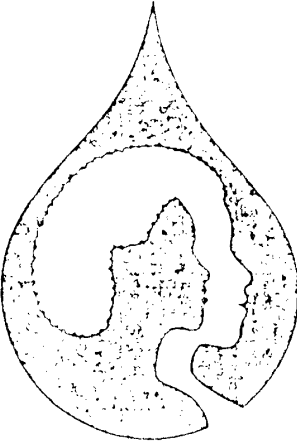
likelihood of confusion, if the correct legal standards are applied and all the evidence considered. *See infra* Parts III & IV.

III. THE MARKS ARE SIMILAR

Design marks are evaluated on their overall appearance and commercial impression. *See Longshore v. Retail Royalty Co.*, 589 F. App'x 963, 965-66 (Fed. Cir. 2014). When the marks share a common commercial context (e.g., as evidenced in *DuPont* factors 2, 3, and 4, which Anta concedes), the Board finds a likelihood of consumer confusion even when the degree of visual similarity is not great. *See Fort James Operating Co.*, 83 U.S.P.Q.2d 1624, 2007 WL 1676779, at *4 (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992)).

The marks at issue here are highly visually similar. Indeed, the chart below demonstrates that the Anta Single-Flare Chevron Design—like other design-only applications that share a common commercial context—is sufficiently similar to the Brooks Single-Flare Chevron Marks to support a finding of a likelihood of consumer confusion. Brooks presented this same evidence and argument in its opening brief. Anta never explicitly responded. *See* 23 TTABVUE at 3-7 (citing no cases concerning the likelihood of confusion between design-only marks).

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Registrant's Mark	Applicant's Proposed Mark	Citation, Goods Covered by Marks, and Decision
		<p>Marks at issue here.</p> <ul style="list-style-type: none"> • Anta concedes <i>DuPont</i> factors 2, 3, and 4
		<p><i>Longshore v. Retail Royalty Co.</i>, 589 F. App'x 963 (Fed. Cir. 2014)</p> <ul style="list-style-type: none"> • Both marks for clothing in Class 25 • Found similar and likely to cause consumer confusion
		<p><i>In re United Serv. Distributions, Inc.</i>, 229 U.S.P.Q. 237, 1986 WL 83661 (T.T.A.B. 1986)</p> <ul style="list-style-type: none"> • Applicant's mark used for health and beauty aids; registrant's used for moisturizing skin cream • Found similar and likely to cause consumer confusion



Instead, Anta argues strenuously that the Anta Single-Flare Chevron Design and the Brooks Single-Flare Chevron Marks are simply dissimilar. *See* 23 TTABVue at 3-7. But Anta applies the incorrect standard for evaluating the likelihood of confusion between two design marks. *See id.*

A. Anta Improperly Focuses on Slight Visual Differences.

Anta first asserts that the marks are dissimilar because the Brooks Single-Flare Chevron Marks “consist[] of an unfilled outline” and are “comprised of broad angles and rounded edges,”

while the Anta Single-Flare Chevron Design uses “sharp angles, a narrow shape, and broad, bold bands.” *Id.* at 4. This is not how the Board compares two design marks. *See Longshore*, 589 F. App’x at 965-66 (“It is well-established that in cases involving two design marks which are not word marks and are not capable of being spoken, the question of the similarity of the marks must be decided primarily on the basis of visual similarity of the marks.”); *Fort James Operating*, 83 U.S.P.Q.2d 1624, 2007 WL 1676779, at *4 (“The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of goods offered under the respective marks is likely to result.”).

Here, Anta admits, as it must, that the goods are the same, the channels of trade are the same, and the likely consumers are the same. *Supra* Part II. The Board should then compare these marks—the Anta Single-Flare Chevron Design and the Brooks Single-Flare Chevron Marks—through this commercial lens. *See Longshore*, 589 F. App’x at 965-66.

Brooks Single-Flare Chevron Marks	Anta Single-Flare Chevron Design
	

These marks “engender strikingly similar impressions,” and any differences are immaterial in the context of the commercial and visual similarities. *See In re United Serv. Distribs., Inc.*, 229 U.S.P.Q. 237, 1986 WL 83661, at *2.

B. Anta Improperly Emphasizes the Written Characterizations of the Marks.

Anta’s next argument similarly falls short. It claims the marks are dissimilar because the Brooks Single-Flare Chevron Mark “immediately evokes a chevron,” while the Anta Single-

Flare Chevron Design is a “stylized arrow.” 23 TTABVUE at 4-5. But Anta owns a related mark—Registration No. 2,750,817²—where the design search code classifies the identically-shaped mark as a chevron. See 19 TTABVUE at 3 & Ex. 1. Further, the written characterization of design marks “is irrelevant.” See *Longshore*, 589 F. App’x at 965. Thus, Anta’s focus on the characterization of the Anta Single-Flare Chevron Design is thus misplaced.

C. Anta Improperly Accentuates the Combination Word and Design Mark.

Anta’s last dissimilarity argument also fails. It asserts that there is no likelihood of consumer confusion because one Brooks mark, Registration No. 1,683,840 (the “Classic Brooks Mark”), is a combination word and design mark. See 23 TTABVUE at 5-7. This argument ignores that the other Brooks mark cited in this Opposition, Registration No. 2,750,754 (the “Modern Brooks Mark”), *is* similar to the Anta Single-Flare Chevron Design and that the Classic Brooks Mark primarily demonstrates Brooks’s long-standing use of a single-flare chevron design. See 27 TTABVUE at ¶ 5 (describing the history of Brooks’s iconic mark). Anta’s emphasis on the Classic Brooks Mark (word and design) while ignoring the Modern Brooks Mark (design only) misses the target.

* * * * *

For these reasons, Anta’s arguments against a finding of similarity between the design marks are incorrect and unavailing. The design marks at issue here are strikingly similar, especially in light of their common commercial context. The first *DuPont* factor thus favors finding a likelihood of consumer confusion. See *Longshore*, 589 F. App’x at 965-66.

² This registration and other Anta registrations are subject to a related proceeding consolidated at Cancellation No. 92059488 but are not at issue here.

IV. THE BROOKS SINGLE-FLARE CHEVRON MARKS ARE STRONG

Anta next argues that the Brooks Single-Flare Chevron Marks are weak and entitled to only a narrow scope of protection. *See* 23 TTABVUE at 7-15. But Anta again relies on an incorrect legal standard, misrepresents the record evidence, distorts Brooks's claim of likelihood of confusion, and presumes, without support, that certain third-party marks were similar.

A. The Relevant Legal Test and Evidence Demonstrate That the Brooks Single-Flare Chevron Marks Are Strong and Enjoy a Broad Scope of Protection.

For likelihood of confusion purposes, the strength and fame of a mark are not binary. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1367 (Fed. Cir. 2012) (“Fame for purposes of likelihood of confusion is a matter of degree that varies along a spectrum from very strong to very weak.”). Because fame is an intangible concept, the Federal Circuit provides guidance for categories of facts that can demonstrate fame (the *Coach* Factors). *See id.*

Anta does not dispute this well-settled standard. Instead, it challenges Brooks's evidence in support of the strength and fame of the Brooks Single-Flare Chevron Marks and argues that Brooks's failure to present survey evidence or otherwise show consumer awareness of its marks precludes a finding of fame. *See* 23 TTABVUE at 14-15. These arguments are unfounded.

First, direct survey evidence of fame is not needed and “rarely appears in contests over likelihood of confusion.” *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002). Second, Brooks included independent evidence of consumer recognition through Mr. Sheridan's testimonial evidence. *See* 28 TTABVUE at 1-3 (Ex. 5, filed under seal).

This testimonial and documentary evidence strongly supports Brooks's assertion that the Brooks Single-Flare Chevron Marks are famous. Mr. Sheridan testified that “Brooks is recognized as an industry leader” and leads the “entire retail specialty channel.” 27 TTABVUE

at 3 (citing Ex. 5 to his testimonial affidavit). Exhibit 5 confirms that Brooks is the leader of the retail specialty channel [REDACTED]

[REDACTED]. *Id.*, Ex. 5. Mr. Sheridan also testified that Brooks sells products in all fifty states through hundreds of “big box” and specialty retailers. *Id.* at 4 & Ex. 6. Finally, Mr. Sheridan testified that in 2015 Brooks spent more than \$30 million on marketing in the United States. *Id.* at 5. This record evidence is clearly sufficient to support a finding of fame. *See also Bose Corp.*, 293 F.3d at 1371 (“[W]e have consistently accepted statistics of sales and advertising as indicia of fame: when the numbers are large, we have tended to accept them without any further supporting proof.”); *Specialty Brands Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 674-75 (Fed. Cir. 1984) (finding fame for \$25 million in annual sales and “several million” in advertising).

In addition to this evidence of high-volume sales and significant advertising expenditures (which *Bose* held to be sufficient indicia of fame), Brooks introduced evidence in support of the other *Coach* factors. *See* 22 TTABVUE at 7-8. Accordingly, Brooks met its burden of proving that the Brooks Single-Flare Chevron Marks are famous for evaluating likelihood of confusion. *See Coach Servs., Inc.*, 668 F.3d at 1367.

B. A “Chevron” Is a General Design Category, and the Anta Single-Flare Chevron Design Is a Specific Design Within This Category That Is Likely To Cause Consumer Confusion With the Brooks Single-Flare Chevron Marks.

Anta next argues that the Brooks Single-Flare Chevron Marks are weak by comparing them to any marks in the general design category for “chevron.” *See* 23 TTABVUE at 7-8. This argument is more specious than solid. Brooks does not assert that any design mark with a chevron used on athletic footwear or apparel is likely to cause confusion with the Brooks Single-

Flare Chevron Marks. *See* 22 TTABVUE at 1-24. Instead, Brooks claims only that the particular chevron marks at issue in this proceeding are likely to cause confusion. *See id.* Anta’s distortion would vitiate all claims of likelihood of confusion, and should be roundly rejected. *See, e.g., In re United Serv. Distribs., Inc.*, 229 U.S.P.Q. 237, 1986 WL 83661, at *2 (noting that likelihood of confusion between design marks is not elevated to a broad level of abstraction but based on commercial impressions of the marks at issue).

C. Dictionary Definitions and Third-Party Registrations Do Not Undermine the Strength of the Brooks Single-Flare Chevron Marks.

Anta next asserts that dictionary definitions of the word “chevron” and third-party registrations of other design marks within the general chevron design category demonstrate that the Brooks Single-Flare Chevron Marks have “no marketplace strength.” *See* 23 TTABVUE at 8-14. Like the others, these arguments are unpersuasive.

First, while dictionary usage might have some bearing on *word* marks, such definitions are not probative concerning *design* marks. *See* TBMP § 704.03(b)(1)(B) (noting that dictionary definitions may be entitled to “some weight to show the *meaning* of a mark” and citing cases where dictionary definitions were used to weigh whether a term was descriptive or suggestive). Anta’s dictionary definitions are therefore not probative concerning whether a particularized design is strong.

Second, Anta’s referenced third-party registrations and applications do not indicate that there is a “crowded field” that could weaken the strength of the Brooks Single-Flare Chevron Marks for the following reasons: (a) these are dissimilar marks; (b) these ignore marketplace realities; and (c) these are not proper record evidence.

a. Dissimilar Marks Do Not Weaken Brooks's Strong Marks.

Anta claims that third-party registrations are similar because the marks for footwear and apparel fall within the general chevron design category. *See* 23 TTABVUE at 8-11. This argument, however, begs the question concerning similarity and ignores the reality that the third-party marks are visually dissimilar from the Brooks Single-Flare Chevron Marks. *See* 22 TTABVUE at 15-16 & Ex. A. Four of the marks cited by Anta are combination word and design marks; the AXO Mark is used on dissimilar goods (for protective gear, not athletic footwear and apparel); and no mark displays similar visual features (a diagonally positioned mark; with a singular, smooth chevron shape; a long base line; a thick and prominent base line; a short upper line (or a “Flare”); and concave curvature of both the base line and the upper line). *Compare id.* (a table of the third-party registrations compared with the Brooks Single-Flare Chevron Marks), *with* 23 TTABVUE at 10-11 (listing ten allegedly similar third-party registrations).

Additionally, the “chevron” marks used on athletic shoes cited by Anta are, at even a quick glance, not similar to the Brooks Single-Flare Chevron Marks. *Compare* 19 TTABVUE at 2-5 (describing the dissimilarities and why these marks are distinct), *with* 23 TTABVUE at 11-14 (relying on athletic shoes with “A” shape marks, marks with various “crossing lines,” and other non-chevron marks). These third-party marks are not similar to the Brooks Single-Flare Chevron Marks simply because Anta lists them; they are, on their face, visually unrelated to the Brooks Single-Flare Chevron Marks. *See* 22 TTABVUE at 15-16 & Ex. A (outlining why these marks are dissimilar).

Because these marks are dissimilar from the Brooks Single-Flare Chevron Marks, they cannot and do not “crowd” the field or weaken Brooks's marks. *See* 2 J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition § 11:88 (4th ed.).

b. The Cited Marks Do Not Weaken the Brooks Single-Flare Chevron Marks Because Anta Ignored Marketplace Realities.

To the extent that any of the marks Anta cited *could* be considered similar to the Brooks Single-Flare Chevron Marks, the marketplace realities distinguish these marks. *See Original Joe's Inc. v. Pinsonneault Holdings, LLC*, No. CV 09-05203 CRB, 2009 WL 4254434, at *1 (N.D. Cal. Nov. 24, 2009) (noting that it is necessary to evaluate a mark's use in the marketplace to determine its strength). Mr. Sheridan, an executive with nearly two decades of experience in the athletic footwear and apparel industry, noted that the market readily distinguishes the marks cited in ANTA000029-69. *See* 19 TTABVUE at 2-5. For example, Mr. Sheridan testified that the Converse mark does not weaken the Brooks Single-Flare Chevron Marks because "the Converse mark uses a Star, which is notorious with its brand and is common among other Converse marks." *Id.* at 3. Similarly, the Diadora design does not weaken the Brooks Single-Flare Chevron Marks because "the size and placement of the Diadora and Brooks marks are well-known as being different." *Id.* at 4. Accordingly, the market recognizes that the third-party uses cited by Anta do not weaken the Brooks Single-Flare Chevron Marks. *See id.* at 2-5; *Original Joe's Inc.*, 2009 WL 4254434, at *1.

c. The Cited Marks Are Not Proper Record Evidence.

Brooks objected to ANTA000070-146 as irrelevant because (1) Anta did not include any evidence of use, (2) the marks were used on dissimilar goods, and (3) the marks were dissimilar from the marks at issue in this proceeding. *See* 22 TTABVUE at 15-16 & Ex. A. Anta responds to this objection by chiding Brooks for not citing a recent Federal Circuit decision, *Jack Wolfskin Ausrüstung Fur Draussen GmbH & CO. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363 (Fed. Cir. 2015). *See* 23 TTABVUE at 9-10. But *Jack Wolfskin* addressed an inapposite

situation—the likelihood of confusion between a combination design and word mark using a paw print and a design-only application using a paw print. *See Jack Wolfskin*, 797 F.3d at 1370-74. The applicant, in asserting a crowded field for paw print marks, included many famous trademark registrations of design-only paw prints, including logos for Clemson University and Penn State University. *See id.* at 1373 n.2 (listing famous design-only paw print marks). Notably, all of the famous third-party marks included closely related designs—a paw print. So, according to *Jack Wolfskin*, an applicant can rely solely on trademark registrations without introducing evidence of use when (1) the design marks are nearly identical and (2) the list of registrations include famous registrations that are undoubtedly used in commerce. *See id.* at 1370-74.

That is not the case here. Anta cites registrations from the California Footwear Corporation; Jermaine Jr, Inc.; Zhejiang Kaida Imp. & Exp. Trade Co., Ltd.; Shanghai Power Source International Co., Ltd.; Shenzhen Dacheng Zhisheng E-Commerce Co., Ltd.; Fin A Go, LLC; and Abg-Tretorn, LLC. 23 TTABVUE at 10-11. These marks are dissimilar from the Brooks Single-Flare Chevron Marks, *see supra* Part IV.C.a., and none of these companies or their marks are famous. It is not clear if (because there is no evidence that) any of these companies still exist, ever sold goods in the United States, or are continuing to sell goods in the United States. These companies are unlike famous brands like Clemson University or Penn State University, and it is accordingly proper for the Board to be cautious about the amount of weight to give these registrations. *See Jack Wolfskin*, 797 F.3d at 1370-74; *Weider Publ'ns, LLC v. D & D Beauty Care Co., LLC*, 109 U.S.P.Q.2d 1347, 2014 WL 343269, at *15-16 (T.T.A.B. 2014) (discounting third-party registrations without evidence of use because the third-party “evidence”

related to a broad term, SHAPE, that was not tied to the specific goods and marketplace realities of the registrant's mark).



Furthermore, Anta did not address that many of the marks in ANTA000070-146 are used on dissimilar goods or are dissimilar from the marks at issue in this proceeding. *See* 23 TTABVUE at 9-10.

ANTA000070-146 is not relevant and should be afforded little if any weight because (1) Anta did not include any evidence of use, (2) the marks are used on dissimilar goods, and (3) the marks were dissimilar from the marks at issue in this proceeding.³

D. Even If the Board Does Not Find the Brooks Single-Flare Marks to Be Famous and Strong, the Anta Single-Flare Design Is Likely to Cause Consumer Confusion.

Although fame of a prior mark plays a “dominant role” in likelihood of confusion cases, fame of a mark is not a dispositive factor. *See In re Majestic Distilling Co., Inc.*, 315 F.3d at 1319. Marks can be likely to cause consumer confusion when, as here, the marks share a common commercial context and the marks are sufficiently similar. *See Fort James Operating Co.*, 83 U.S.P.Q.2d 1624, 2007 WL 1676779, at *4. Anta concedes that the Anta Single-Flare Chevron Design shares a common commercial context (*DuPont* factors 2, 3, and 4) with the Brooks Single-Flare Chevron Marks. *See supra* Part II. And the marks, as seen below, are sufficiently similar.

³ Brooks also objected to ANTA000029-69 as irrelevant because this evidence (1) related to dissimilar marks from the marks at issue in this proceeding, (2) related to dissimilar goods, and/or (3) ignored the marketplace realities. *See* 22 TTABVUE at 15-16 & Ex. A. In response, Anta claims only that the marks are similar. This argument not only ignores the other evidentiary deficiencies but also the rebuttal testimony of Mr. Sheridan, who explains that these marks were dissimilar and/or ignored marketplace realities, *See* 19 TTABUE at 2-5. Accordingly, Anta effectively concedes that ANTA000029-69 is not proper record evidence.

Brooks Single-Flare Chevron Marks	Anta Single-Flare Chevron Design
	

V. THERE IS LIKELY DILUTION BY BLURRING

Anta only contests this claim to the extent that it argued that Brooks could not establish fame. *See* 23 TTABVUE at 16-17. Because the record demonstrates that the Brooks Single-Flare Chevron Marks are famous, *see supra* Part IV.A, Brooks rests on the arguments submitted in its Opening Trial Brief, *see* 22 TTABVUE at 19-23.

VI. CONCLUSION

For the reasons stated above and in Brooks’s Opening Trial Brief, the Opposition should be sustained and Application should not be allowed to issue to registration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing BROOKS SPORTS, INC.’S REPLY TRIAL BRIEF has been served on Anta (China) Co., Ltd.’s counsel, Christina Licursi by forwarding said copy on August 10, 2017, via email to:
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