

This Opinion is not a
Precedent of the TTAB

Mailed: February 26, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Swan Song, Inc.
v.
Swan Song Audio LLC

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Opposition No. 91240005
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Gary D. Krugman and Kevin G. Smith of Sughrue Mion PLLC for Swan Song, Inc.

Anthony J. Crocker, pro se for Swan Song Audio LLC

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Before Kuczma, Goodman and Heasley,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Swan Song Audio LLC (“Applicant”) applied to register the mark SWAN SONG AUDIO (in standard characters, with AUDIO disclaimed) for the following International Class 9 goods:¹ “Consumer electronic products, namely, audio

¹ Application Serial No. 87576829 was filed on August 21, 2017 under Section 1(a) alleging a date of first use and first use in commerce of October 2, 2015.

References to the briefs and the record are to the Board’s TTABVUE docket system.

amplifiers, audio speakers, audio receivers, electrical audio and speaker cables and connectors, audio decoders, video decoders, speakers, power conversion devices, power converters, and power inverters.”

Swan Song, Inc. (“Opposer”) opposes registration of Applicant’s mark on the grounds of likelihood of confusion and fraud. Opposer pleads adoption and use of SWAN SONG in connection with phonograph records and ownership of Registration



No. 1014054 for the mark for phonograph records in International Class 9.²

Applicant filed an answer generally denying the salient allegations in the notice of opposition.³

Opposer and Applicant filed briefs and Opposer filed a reply brief.⁴

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the files of the involved application. Opposer made its registration of record by attaching to its notice of opposition a copy of its registration

² Issued June 24, 1975; renewed.

³ 4 TTABVUE. Although presented in an informal format, the Answer constitutes a formal written response to the Notice of Opposition where Applicant has responded to the allegations in the Notice of Opposition.

⁴ Opposer did not address the fraud claim in its brief. We consider the fraud claim waived. *See Corporacion Habanos S.A. v. Guantanamera Cigars Co.*, 86 USPQ2d 1473, 1474 n.2 (TTAB 2008).

from the USPTO's Trademark Status and Document Retrieval (TSDR) electronic database showing status and title. Opposer also filed the pleaded registration under a notice of reliance. Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2), 5 TTABVUE. Opposer filed additional notices of reliance on Internet materials, 6 TTABVUE, on official records of the USPTO (a copy of Applicant's earlier filed abandoned application), 7 TTABVUE, and on third-party registrations, 8 TTABVUE. Applicant did not submit any evidence during its testimony period.

II. Objections

Applicant attached exhibits to its brief in the form of website print-outs, provided hyperlinks in its brief, and provided excerpts from websites in its brief. In its reply brief, Opposer has moved to strike the exhibits and excerpts, or asked that the Board give them no consideration.

The website print-outs, and the excerpted Internet materials embedded into the brief, were not submitted during Applicant's trial period and are untimely. *See Norris v. PAVE: Promoting Awareness, Victim Empowerment*, 2019 USPQ2d 370880, at *2 (TTAB 2019). We have not considered this evidence nor Applicant's discussion of them. The hyperlinks and the discussion of their contents in the brief also have not been considered. This evidence is untimely as it was not submitted during the trial period and is in improper form. *Id. See also In re Future Ads LLC*, 103 USPQ2d 1571, 1572 n.3 (TTAB 2012) (The Board "will not utilize a link or reference to a website's internet address to access the site to consider whatever content may appear therein.").

Opposer also has objected to statements in Applicant's brief that could be considered trial testimony. As Applicant did not introduce any testimony during its trial period, we will consider these statements as arguments, not testimony.

Applicant has argued that Opposer's mark should be declared "dead" and that Opposer has misled the USPTO as to the nature of its goods. 11 TTABVUE 10. Opposer asserts that these arguments are a collateral attack on its registration. To the extent that Applicant's allegations constitute a collateral attack on Opposer's registration, they are impermissible, as Applicant's compulsory counterclaim was dismissed as untimely.⁵ Accordingly, no consideration has been given to Applicant's arguments in this regard.

III. Standing

Opposer has established its standing through its submission of a TSDR printout for its pleaded registration, which demonstrates that the registration is valid and subsisting, and owned by Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (party's ownership of pleaded registration establishes standing). Applicant "does not dispute that Swan Song Inc. has a registered mark with the Trademark and Patent office." 11 TTABVUE 7.

⁵ On September 10, 2019, Applicant filed notice of the filing of a petition to cancel Opposer's pleaded registration, and on September 19, 2019, a copy of the electronic filing receipt. The petition for cancellation was assigned proceeding No. 92072220 and was dismissed with prejudice on October 9, 2019. In this opposition proceeding, the Board ruled that Applicant's petition to cancel would be given no consideration. 15 TTABVUE.

IV. Priority

Because Opposer's pleaded registration is of record, and Applicant's petition to cancel Opposer's pleaded registration was dismissed as untimely, priority is not an issue with respect to the goods covered by Opposer's pleaded registration. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

V. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "Not all of the *du Pont* factors are relevant to every case, and only factors of significance to the particular mark need be considered." *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). We discuss the *DuPont* factors for which there is argument and evidence below.

A. Similarity or Dissimilarity of the Marks



We compare Opposer's mark  and Applicant's mark SWAN SONG AUDIO for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *See Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

The test, under the first *DuPont* factor, 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 terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)).

The marks must be considered in their entireties, but “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

In comparing the marks, we initially find that the dominant term in Applicant's mark is SWAN SONG. Although Applicant's mark includes the term AUDIO, this term is descriptive, if not generic, of Applicant's goods and has been disclaimed. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846 (quoting *In re National Data*, 224 USPQ at 752 ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion")); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is "less significant in creating the mark's commercial impression"). The significance of the term SWAN SONG as the dominant element of Applicant's mark is reinforced by its placement as the first part of Applicant's mark. *See Palm Bay Imp. Inc.*, 73 USPQ2d at 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label.).

Opposer's mark contains both words and a design. For a composite mark containing both words and a design, the word portion is usually more likely to indicate the origin of the goods because it is more likely to be impressed upon a purchaser's memory and to be used when requesting the goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (citations omitted).

Opposer's mark contains design elements that are not separate from the literal portion of the mark, but are incorporated into the letter "S" used in both SWAN and SONG. Each design appears to suggest a swan with some other elements, and we have no doubt that consumers will recognize each design as a highly-stylized letter

“S.” Additionally, the letter “S” swan design would be seen and understood by customers as reinforcing the words SWAN SONG. For the reasons discussed, we find the dominant portion of Opposer’s mark is the literal portion, SWAN SONG, with the design elements subordinate.

In sum, the dominant portion of Opposer’s mark, SWAN SONG, is identical to the dominant portion of Applicant’s mark. Although we have pointed to the dominant portions of the parties’ marks, we acknowledge the fundamental rule in this situation that the marks must be considered in their entirety. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015).

Given the commonality of SWAN SONG in the marks, even when we factor in the design portion in Opposer’s mark and the additional disclaimed wording AUDIO in Applicant’s mark, we find that the marks are similar in sound and appearance. Further, the marks convey similar meanings (i.e., the final performance or act) and have similar commercial impressions, even with the additional matter added to each party’s mark.⁶ When the marks are compared in their entirety, including the additional disclaimed word in Applicant’s mark and the design features of Opposer’s

⁶ We take judicial notice of the dictionary definition for swan song:

- 1: a song of great sweetness said to be sung by a dying swan
- 2: a farewell appearance or final act or pronouncement

Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/swan%20song> (accessed February 21, 2020). The Board may take judicial notice of dictionary definitions in printed or online format. *See In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

mark, we find the marks engender similar overall impressions so that consumers, upon encountering the marks, are likely to be confused. This first *DuPont* factor weighs in favor of a finding of a likelihood of confusion.

B. Similarity of the Goods

The second *DuPont* factor assesses the similarity or dissimilarity of the parties' goods. The parties' respective goods need not be similar or even competitive to find that they are related for purposes of our likelihood of confusion analysis, but 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 they emanate from the same source." See *Coach Servs. v. Triumph Learning LLC*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

In comparing the goods, the issue is not whether purchasers would confuse Applicant's and Opposer's goods, but rather whether there is a likelihood of confusion as to the source of those goods. *In re Cook Medical Tech. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012). If goods are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion. See, e.g., *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

While acknowledging that the parties' goods are "obviously not identical," Opposer submits that the goods are "clearly closely related products." Opposer asserts that

“[p]honograph records, to be played and heard, must be played on a device (turntable) which requires a receiver, speakers and/or an amplifier.”⁷ 9 TTABVUE 12.

Opposer submitted Internet website evidence showing on-line and retail outlets that offer phonograph records and audio equipment. Opposer’s notice of reliance, 6 TTABVUE. Opposer’s notice of reliance states that this evidence is relevant to show “that the respective goods of the parties are closely related products which may and do emanate from a single source.” *Id.* at 3.

We have not relied on this Internet evidence for the truth of the matters asserted therein, but only for what it shows on its face. Specifically, we have considered what these sources state, rather than the truth of what they state. None of these websites show on their face that phonograph records and audio speakers, audio receivers, and audio amplifiers are sold under the same mark. However, the website evidence does show that consumers may have been exposed to the same retail stores offering these goods.

Also to show relatedness, Opposer submitted over sixty third-party registrations that it asserts cover “phonograph records, and also for audio amplifiers and/or audio

⁷ Opposer submitted the file wrapper of Applicant’s abandoned application Serial No. 86008474 for the mark SWAN SONG AUDIO as “relevant to show that the U.S. Patent and Trademark Office has, on at least one occasion, had the opportunity, at the examination level, to find likelihood of confusion from the use of the mark SWAN SONG AUDIO ... in view of the existence of Opposer’s registered SWAN SONG mark for phonograph records.” Opposer’s notice of reliance, 7 TTABVUE 2-3. Opposer’s brief does not address this evidence in connection with the second *DuPont* factor. But we note that prior decisions and actions of examining attorneys of the USPTO are not binding upon the Board, and have very little evidentiary value in an opposition proceeding. The Board must make its own findings of fact on the evidence before it and need not adopt the conclusions reached by an examining attorney in an earlier application. *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (each application must be considered on its own merits).

speakers and/or audio receivers.” Opposer’s notice of reliance, 8 TTABVUE. Opposer argues that “[t]he third party registrations of record ... are probative to show that these respective products are of a kind that may and do emanate from a single source under a single mark.” 9 TTABVUE 12.

Third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them. However, the registrations “may have some probative value to the extent that they serve to suggest that the listed goods and/or services are of a type that may emanate from a single source.” *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993). *See also, In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

Nineteen of the third-party registrations submitted by Opposer do not cover the relevant goods and are not probative.⁸ As to the remaining registrations, we find 14 of these have probative value as they are limited to a single class of goods and do not include a broad array of unrelated goods. In particular, while the other third-party registrations may include phonograph records and audio receivers, or audio speakers or audio amplifiers, their probative value is negated by the variety of diverse and unrelated goods and/or services covered. *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509, 1510-11 (TTAB 2010) (“The diversity of the goods identified in this registration diminishes the probative value in establishing that any two items identified in the registration are related.”).

⁸ These registrations do not cover audio amplifiers or audio speakers or audio receivers but cover cases for those goods.

For example, among the many goods identified in these registrations, four of the registrations also cover eyewear and/or eyewear accessories, three of the registrations also cover various types of batteries, seven of the registrations also cover cameras or camera equipment, five of the registrations also cover mobile or smart phones, eight of the registrations also cover various computer hardware and software, one registration also covers transistors and capacitors, and one registration also covers water treatment equipment, water meters and wind turbine controllers. Registrations such as these, which cover a wide variety of goods and services, do not suggest, or are at least much less likely to suggest, that particular goods and services within the parties' identifications are of the type that may emanate from a single source. *In re Mucky Duck*, 6 USPQ2d at 1470 n.6.

Upon consideration of the evidence, we find that the goods are related. It is common knowledge that phonograph records are used with audio equipment. *See e.g., M.C.I. Foods, Inc. v. Brady Bunte*, 96 USPQ2d 1544, 1552 (TTAB 2010) (finding Mexican food and tortilla chips complementary stating “[i]t is common knowledge that Mexican food is served with tortilla chips.”). The third-party registrations themselves also show that the goods are complementary and thus related as they are offered under the same mark. *See e.g., Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (finding that third-party registrations covering both wine and water were probative of the relatedness of those beverages). The Internet evidence shows on its face that consumers may have been exposed to these goods being sold in the same retail location. Additionally, consumers familiar with

Opposer's mark for phonograph records could well believe that Applicant's mark reflects a brand extension into audio equipment.

Accordingly, the second *DuPont* factor weighs in favor of a finding of likelihood of confusion.

C. Channels of Trade and Classes of Purchasers

The third *DuPont* factor requires us to consider the similarity or dissimilarity of the trade channels and classes of purchasers for the goods. Because there are no trade channel limitations in either Applicant's or Opposer's identification of goods in the application and in the pleaded registration, we must presume that the goods, as identified, are marketed in all normal and usual trade channels for such goods and to all normal classes of purchasers for such goods. *See Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

As indicated above, Opposer submitted Internet evidence from six websites showing on-line and retail outlets that offer phonograph records and audio equipment.

One of the websites to which Opposer refers, Htfr.com, is the website of a foreign entity that is located in the United Kingdom. The website shows on its face that the goods are offered in British pounds and appear to be directed to local consumers. Although the website states "worldwide mail order store," there is no evidence of United States consumer exposure to this website. As for the other five websites, two of the websites (Merlesrecordrack.com and Clintonstreetrecordandstereo.com) only

offer vintage, not new audio equipment, as well as vintage and new vinyl records. Opposer has not established that this is a normal channel of trade for Applicant. Of the remaining three websites, one offers new audio equipment and new and used vinyl records, while the other two websites offer new and used audio equipment as well as new and used vinyl records:

Vinylren.com offers “new and used vinyl records and CDs” and “vintage audio equipment from well known brands,” and “new and used media and audio equipment.”

Musicdirect.com offers vinyl records and “high end audio equipment” which includes speakers, amplifiers and stereo receivers.

Acousticsounds.com offers vinyl records, including pre-owned, and speakers, amplifiers and receivers.

We find that this evidence, although small in number, is sufficient to establish that the parties’ goods may be offered in overlapping channels of trade. We find the third *DuPont* factor also weighs in favor of a finding of likelihood of confusion.

D. Conditions of Sale

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse vs. careful sophisticated purchasing.’” *DuPont*, 177 USPQ at 567.

Applicant argues that purchasers of the parties’ goods are sophisticated. However, there is no evidence that the consumers of phonograph records and the identified audio equipment would exercise a heightened degree of care. While purchasers of audio equipment might exercise a higher degree of care than purchasers of phonograph records, this would not overcome likelihood of confusion in the case of

similar marks. *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”). Overall, we find this *DuPont* factor to be neutral.

E. Fame of Opposer’s Mark

The fifth *DuPont* factor considers the fame of the prior mark. *DuPont*, 177 USPQ at 567.

In its brief, Opposer acknowledges that there is no evidence in the record that its mark is famous. Accordingly, we find this *DuPont* factor neutral.

F. Evidence of third-party use of Similar Marks on Similar Goods

The sixth du Pont factor “considers ‘[t]he number and nature of similar marks in use on similar goods [or services].’” *DuPont*, 177 USPQ at 567.

While acknowledging that there is no evidence in the record on this factor, Opposer submits that the evidence weighs in its favor. Applicant, on the other hand, points to the existence of another user of SWAN SONG.⁹ We find this *DuPont* factor neutral.

G. Nature and Extent of any Actual Confusion

The seventh *DuPont* factor considers the nature and extent of any actual confusion. *DuPont*, 177 USPQ at 567.

⁹ Applicant argues that there is a use of SWAN SONG in Japan. Aside from this being mere argument, the sixth factor considers use in the United States, not foreign use.

As Opposer points out, there is no evidence of actual confusion. This *DuPont* factor also is neutral.

H. Any Other Established Fact Probative of the Effect of Use

Another *DuPont* factor discussed by the parties is whether Applicant acted in bad faith in seeking registration of its involved mark. Under the thirteenth *DuPont* factor, evidence of an applicant's bad faith adoption of its mark is relevant to our likelihood of confusion analysis. *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1890 (TTAB 2008). Establishing bad faith requires a showing that the applicant intentionally sought to trade on the opposer's good will or reputation. *See Big Blue Products Inc. v. International Business Machines Corp.*, 19 USPQ2d 1072, 1076 (TTAB 1991).

As probative of bad faith, Opposer points to Applicant's "course of conduct" in filing a second application for the same mark for nearly identical goods after abandoning its earlier application due to the USPTO's refusal of registration, where Opposer's registration was cited against that application under Section 2(d). Applicant argues that the rejection of the prior application was based on phonopreamplifiers, omitted from the current application, which Applicant no longer manufactures due to a change in business focus.

Applicant's re-filing of an application after abandoning an earlier application is insufficient evidence from which to infer that Applicant intended to trade on Opposer's goodwill. A finding of bad faith must be supported by evidence of an intent to confuse, rather than mere knowledge of another's mark or even an intent to copy." *See Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 92 USPQ2d 1769,

1782 (2d Cir. 2009) (“[T]he only relevant intent is intent to confuse. There is a considerable difference between an intent to copy and an intent to deceive.”)).

The existence of only one abandoned application to register the same mark for nearly identical goods does not support an inference that Applicant has engaged in a pattern of bad faith conduct. *Cf. L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1442 (TTAB 2012) (applicant demonstrated a pattern of filing applications to register various well-known marks with the intention to trade off of opposer’s famous marks). Although the evidence indicates that Opposer’s registration was cited against Applicant’s earlier filed application as the blocking registration, it is apparent from Applicant’s answer and its arguments in its brief that it believed the parties’ goods were different and the marks were different (because Applicant had not adopted Opposer’s manner of display) such that there would be no confusion among the public.

Therefore, it is the opinion of Swan Song Audio LLC that the two marks can coexist as Swan Song Inc and Swan Song Audio LLC are not in the same business. Swan Song Inc does not make records, manage artists, manufacturer and distribute audio reproduction equipment, and is not even directly visible to the modern consumer. Swan Song Audio LLC has nothing to do with records but does manufacturer and distribute audio reproduction equipment and is visible [sic]. Applicant’s Brief at 11 TTABVUE 10.

We find the record insufficient to support a finding of bad faith. Accordingly, we find this *DuPont* factor is neutral.

VI. Conclusion

In view of the similarities of the marks, the relatedness of the goods and overlapping trade channels, we find confusion likely.

Decision: The opposition is sustained and registration to Applicant's application Serial No. 87576829 is refused.