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

Proceeding	91240378
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

RLP Ventures, LLC Opposer, v. Windgate Consulting, Inc. Applicant.	Opposition No. 91240378 Mark: MOSAIC Serial No. 87/611,099 Filed: September 16, 2017

TRIAL BRIEF FOR OPPOSER RLP VENTURES, LLC

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INTRODUCTION

Opposer, RLP Ventures, LLC, submits this trial brief in support of its notice of opposition to Appl. Serial No. 87/611,099 (the “Application”) for the trademark MOSAIC (the "Applicant's Mark"), owned by Windgate Consulting, Inc. (“Applicant”) on the grounds of (a) non-use in interstate commerce of the Applicant's Mark on each of the recited services in the Application on or before the filing date of Applicant’s use-based app1ication (“Application Date”). Accordingly, Opposer is entitled to judgment as a matter of law on this claim.

Separately, Opposer submits this trial brief in support of its notice of opposition to the Applicant’s Application on the ground that Applicant’s Mark is likely to cause confusion between, mistake related to, and/or falsely suggest to the public that there is an association between, Opposer and Applicant. Such likely misconception arises because the Applicant's Mark is substantially similar to the Opposer's registered trademark for MOSAEC (the "Opposer's Mark") and is used in connection with identical or closely related services.

Opposer will establish herein below that: (i) Opposer has standing; (ii) Opposer has superior rights to its mark; (iii) Applicant’s non-use of Applicant’s Mark on each of the services recited in Applicant’s Application (“Applicant’s Applied-for-Services”) in interstate commerce on or before the Application Date; (iv) Applicant's Mark is confusingly similar to Opposer's Mark; (v) Applicant’s Applied-for-Services are identical or closely related to Opposer’s services; and (vi) Opposer will be damaged by the registration of Applicant’s Mark. Accordingly, registration of Applicant’s Mark should be denied as a matter of law.

STATEMENT OF THE ISSUES

Whether Opposer has standing.

Whether Opposer has priority.

Whether the Application is void ab initio because Applicant did not have bona fide use of Applicant's Mark on each of the services recited in Applicant's Application in interstate commerce on or before the Application Date.

Whether there is a likelihood of consumer confusion between Opposer's Mark and Applicant's Mark.

STATEMENT OF THE RECORD

Opposer has submitted trial testimony and exhibits from the following individuals: (1) Ramona Prioleau, dated February 12, 2020 ("Prioleau Decl. 1"); (2) Declaration of Samantha Miller, dated February 12, 2020 ("Miller Decl."); (3) Declaration of Pamela Perry, dated February 12, 2020 ("Perry Decl."); and (3) Declaration of Kescia Prioleau, dated February 12, 2020. ("K. Prioleau Decl.") Additionally, Opposer has submitted Opposer's First Notice of Reliance and exhibits, dated February 12, 2020 ("Opposer's First NOR").

Opposer has submitted rebuttal testimony and exhibits from Ramona Prioleau, dated May 27, 2020 ("Prioleau Decl. 2"). Additionally, Opposer has submitted Opposer's Second Notice of Reliance and exhibits, dated May 27, 2020 ("Opposer's Second NOR").

RECITATION OF FACTS

The Opposer

The Opposer is the owner and operator of an entity using the registered trademark "MOSAEC". The MOSAEC platform has also been used to advance personal, educational, and career goals and in schools for philanthropic purposes. See Prioleau Decl. 1 ¶ 11 and 20; Prioleau Decl. 2 ¶ 8; First NOR, Exhibits A, E (RLP 43 - 46) and F (RLP 47 – 64); Second NOR, Exhibits R – W (RLP 200 – 231); Miller Decl. ¶¶ 4-8; and K. Prioleau Decl. ¶ 7-10. In addition, via the MOSAEC platform, the Opposer sells consumer goods, buys and sells advertising, and seeks funding from individuals, corporations and governments. See Id. The MOSAEC platform is targeted to users interested in notably, jobs and careers. See Id; First NOR, Exhibit C (RLP 28 – 36); Exhibit L (RLP 107 – 121); Exhibit M (RLP 122 – 124); Exhibit N (RLP 125 – 126) and Second NOR, Exhibit R (RLP 200 – 215); Exhibit S (RLP 216 – 218); Exhibit T (RLP 219 – 221); Exhibit U (RLP 222 – 225); Exhibit V (RLP 226 – 228); and Exhibit W (RLP 229 – 231).

The use of the Opposer's Mark commenced as early as September 1998. See First NOR, Exhibit A (RLP 1 – 20) and Exhibit E (RLP 43 – 46) as well as Second NOR, Exhibit P (RLP 136 - 186). The concept for the MOSAEC platform was developed during calendar years 1996 – 1998. The MOSAEC-branded services were initially conceptualized in paper form and later transitioned to a digital format. Aspects of the business plan and source code for the MOSAEC platform were developed by the Opposer during calendar years 1996 – 1999 during courses the Opposer's owner took at New York University and other schools.

The MOSAEC platform was released first in a "beta" form during the fall of 1998. The beta version of the website was used, in part, to recruit talent, seek funding, and sell ads. The "gamma" version of the platform was launched in the spring of 1999. Since its 1999 launch, the MOSAEC platform has been accessible throughout the United States and internationally, with

users engaging with the platform's content and purchasing its consumer goods. First NOR, Exhibit G (RLP 65 – 66). Contributors to the MOSAEC platform have resided throughout the United States. See Perry Decl. ¶¶ 3, 5, and 7; Miller Decl. ¶¶ 3 and 5; K. Prioleau Decl. ¶¶ 3, 5, and 10; Prioleau Decl. ¶ 17 and First NOR, Exhibit C (RLP 28 – 36) . Through the use of the MOSAEC platform, consumer goods have been distributed to its users and contractors throughout the United States. See Miller Decl. ¶ 8. [1]

In 1998, the Opposer sent direct mail in connection with raising funds for the MOSAEC ecosystem designed to incorporate mentoring, career planning and strategy.[2]

Since 1999, the MOSAEC platform has been used to advance personal, educational, and career goals and in schools for philanthropic purposes. See Miller Decl. ¶ 8; K. Prioleau Decl. ¶ 10; Prioleau Decl. 1 ¶ 20 and First NOR, Exhibit F (RLP 59). In particular, the MOSAEC platform has featured job information, including software for a jobs board. See First NOR, Exhibit F, (RLP 48 – 58, 60 and 62) and Exhibit L, (RLP 107 – 121) as well as Second NOR, Exhibit R, (RLP 200 – 215); Exhibit S (RLP 216 – 218); Exhibit T, (RLP 219 - 221); Exhibit U (RLP 222 – 225); Exhibit V (RLP 226 – 228); and Exhibit W (RLP 229 – 231) .

Opposer is the owner of numerous registrations and applications on the Principal Register of the United States Patent and Trademark Office for Opposer's Mark, including:

Opposer's Mark	Registration No.	Good/Services (collectively, the "Opposer's Services")	Registration or Application Date
MOSAEC	5,778,338	*"Computer application software for desktop*	June 18, 2019

1 See also Cancellation No. 92066114, D.I. 19, page 126-179. https://ttabvue.uspto.gov/ttabvue/v?pno=92066114&pty=CAN&eno=19

2 See Cancellation No. 92066114, D.I. 19, page 124-125. https://ttabvue.uspto.gov/ttabvue/v?pno=92066114&pty=CAN&eno=19

		computers and mobile devices, namely, software for compilations, rankings, ratings, reviews, referrals and recommendations relating to entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, restaurants, recreation and leisure activities; Computer application software for desktop computers and mobile devices, namely, software for entering, accessing and tracking data related to entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, restaurants, recreation, leisure activities and social networking; Computer application software for desktop computers and mobile devices, namely, software for uploading, posting, showing, displaying, tagging, blogging, sharing or otherwise providing electronic media or information over the Internet or other communications network; Computer application software for desktop computers and mobile devices, namely, software for displaying and sharing a user's location and finding, locating, and interacting with other users and places; Computer software to enhance the audio-visual capabilities of multimedia applications, namely, for the integration of text, audio, graphics, still images and moving pictures; Downloadable electronic newsletters in the field of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, restaurants, recreation and leisure activities; Downloadable mobile applications for entering, accessing and tracking data related to entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, restaurants, recreation, leisure activities and social networking; Computer e-commerce software to allow users to perform electronic business	

		transactions via a global computer network;" in Class 009.	
MOSAEC	5,409,856	*"Entertainment services, namely, providing information by means of a global computer network in the fields of celebrities, entertainment, and popular culture; Entertainment services, namely, providing on-line reviews of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, and dance; Providing a website featuring entertainment information in the field(s) of entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, and news; Providing information, news and commentary in the field of entertainment; Providing information, news and commentary in the field of recreation and leisure activities; Provision of information relating to children's entertainment;"* in Class 041.	February 27, 2018
MOSAEC	5,284,032	*"Providing temporary use of a non-downloadable web application for posting, searching, accessing, sharing, and tracking reviews, ratings, referrals, recommendations, and other information as well as advertising, uploading photos, adding videos, finding, locating, and interacting with other users, related to entertainment, film, fine arts, museums, literature, culture, music, sports, fashion, theater, dance, restaurants, recreation and leisure activities;"* in Class 042.	September12, 2017
MOSAEC	5,166,424	*"Online social networking services;"* in Class 045.	March 21, 2017

The dates of first use given are as early as September 1998. (Printouts showing the above and their title status are at the Opposer's First NOR, Exhibit A, RLP 1-20 and Opposer's Second NOR, Exhibit P, RLP 133-186).

The Applicant

Pursuant to Section 1(a) of the Lanham Act, on September 16, 2017, Applicant filed Applicant's Application with the United States Patent and Trademark Office to register the Applicant's Mark on the Principal Register, which was published for opposition on January 30, 2018, claiming a bona fide use of Applicant's Mark in interstate commerce for the following services ("Applicant's Applied-for-Services"):

> "Software as a service (SAAS) services featuring software for a job board to help people find work and businesses to find job seekers" in Class 42.

The date of first use given is August 1, 2017. See First NOR, See Exhibit B (RLP 21 – 27) and Second NOR, Exhibit Q (RLP 187 – 199).

The Application was made on the basis of an alleged use in interstate commerce since August 1, 2017. Applicant claims no date earlier than August 1, 2017 for the purpose of priority with respect to the services in International Class 42. In connection with the preparation and filing of the Application, Applicant signed an oath that all statements made therein were true.

On August 8, 2018, the Opposer served Applicant with Opposer's First Set of Interrogatories ("Interrogatories") (Exhibit H (RLP 67 – 79)) and Opposer's First Set of Document Requests ("Document Requests") (Exhibit I (RLP 80 – 91)). On October 23, 2018, Applicant submitted responses to Opposer's Interrogatories and Document Requests.

On November 6, 2018, the Opposer served Applicant with Opposer's First Set of Requests for Admission ("RFAs", see Prioleau Decl. ¶ 14 and First NOR, Exhibit J (RLP 92 -

103)). The responses to Opposer's RFAs were served on May 3, 2019 see Prioleau Decl. ¶ 18 and First NOR, Exhibit D (RLP 37 – 42)).

Applicant's response to Opposer's first set of requests for admission included, inter alia:

> **REQUEST FOR ADMISSION NO. 21:** Admit that Applicant's Application to the USPTO was made on these bases – first use and use in interstate commerce since Aug. 1, 2017.
>
> **RESPONSE NO. 21:** I, Ed Windgate, believe the first use of our mark we October 26, 2017.

First NOR, Exhibit D (RLP 40).

ARGUMENT

I. Opposer Has Standing to Oppose the Subject Application

In an action to oppose issuance of a registration, a plaintiff must also establish that it has standing to pursue its claim. Standing is a threshold issue that must be proven by the plaintiff in every inter partes case. See Empresa Cubana Del Tabaco v. Gen. Cigar Co., 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014).

To establish standing in an opposition proceeding, a plaintiff must prove that it has a "real interest," i.e., a "reasonable" basis for its belief of damage. See Empresa Cubana, 111 USPQ2d at 1062; Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Here, Opposer submitted copies of its pleaded registrations for the Opposer's Mark Opposer which were obtained from the USPTO's Trademark Electronic Search System (TESS) database showing then-current status and title of those registrations, See First NOR, Exhibit A (RLP 1 – 20) and Second NOR, Exhibit P (RLP 136 – 186); See Trademark Rule 2.122(d)(1). Opposer's

standing to oppose registration of Applicant's mark is established by its pleaded registrations, which the record shows to be 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); N.Y. Yankees P'ship v. IET Prods. & Servs., Inc., 114 USPQ2d 1497, 1501 (TTAB 2015).

In addition, Opposer has provided testimony and documentary evidence as to prior use of Opposer's Mark for jobs information, including software for a jobs board. See Miller Decl. ¶ ¶ 4-8; Perry Decl. ¶¶ 4 and 8-10; K. Prioleau Decl. ¶¶ 4 and 8-10; Prioleau Decl. 1 ¶¶ 13-14; Prioleau Decl. 2 ¶ 10-11; First NOR, Exhibit F, RLP 59, 48 – 58, 60 and 62, Exhibit K (RLP 104 – 106), Exhibit L (RLP 107 – 121); and Second NOR, Exhibit R, (RLP 200 – 215), Exhibit S (RLP 216 – 218), Exhibit T (RLP 219 – 221), Exhibit U (RLP 222 – 225), Exhibit V (RLP 226 – 228), and Exhibit W (RLP 229 – 231). Grand Canyon West Ranch LLC v. Hualapai Tribe, 88 USPQ2d 1501, 1502 (TTAB 2008) (standing established by testimony as to prior use); Wet Seal Inc. v. FD Management Inc., 82 USPQ2d 1629, 1634 (TTAB 2007) (standing based on common law use of mark); L. & J.G. Stickley Inc. v. Cosser, 81 USPQ2d 1956, 1964 (TTAB 2007) (cancellation petitioner's standing based on prior common law use of elements contained in defendant's registered marks); Giersch v. Scripps Networks Inc., 90 USPQ2d 1020, 1022 (TTAB 2009) (standing established by showing of common law rights).

II. Opposer Has an Undisputed Prior Use of its Mark

Opposer's ownership of pleaded Registration Nos. 5,778,338; 5,409,856; 5,284,032; and 5,166,424, respectively, removes priority as an issue with respect to the services related thereto. See Top Tobacco LP v. North Atlantic Operating Co., 101USPQ2d 1163, 1169 (TTAB 2011)

(citing King Candy, Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 82 USPQ 108 (CCPA 1974)).

In addition, Opposer has submitted herewith evidence that not only indicate Opposer's priority as it relates to Opposer's recited services in its registrations; but also the Opposer has submitted testimony and documentary evidence as to prior use of Opposer's Mark for jobs information, including software for a jobs board. See Prioleau Decl. 1 ¶¶ 13-14; Prioleau Decl. 2 ¶ 10-11 ; Miller Decl. ¶ ¶ 4-8; First NOR, Exhibit F, RLP 59, 48 – 58, 60 and 62, Exhibit K (RLP 104 – 106), Exhibit L (RLP 107 – 121); and Second NOR, Exhibit R, (RLP 200 – 215), Exhibit S (RLP 216 – 218), Exhibit T (RLP 219 – 221), Exhibit U (RLP 222 – 225), Exhibit V (RLP 226 – 228), Exhibit W (RLP 229 – 231).

Opposer has used Opposer's Mark in commerce in conjunction with the services listed in Opposer's registrations since as early as September 1998 and Opposer has used Opposer's Mark for jobs information since 1999. Id. Opposer's use of Opposer's Mark has been continuous since the date of first use through present day. Applicant's discovery responses do not indicate a use in commerce date prior to 1999. See First NOR, Exhibit D (RLP 40).

Therefore, Opposer has established prior and continuous use of Opposer's Mark in connection with Opposer's recited services in Opposer's registrations as well as prior use of Opposer's Mark for jobs information, including software for a jobs board. See Prioleau Decl. 1 ¶¶ 13-14; Prioleau Decl. 2 ¶ 10-11 ; Miller Decl. ¶ ¶ 4-8; First NOR, Exhibit F, RLP 59, 48 – 58, 60 and 62, Exhibit K (RLP 104 – 106), Exhibit L (RLP 107 – 121); and Second NOR, Exhibit R, (RLP 200 – 215), Exhibit S (RLP 216 – 218), Exhibit T (RLP 219 – 221), Exhibit U (RLP 222 – 225), Exhibit V (RLP 226 – 228), Exhibit W (RLP 229 – 231). Opposer's continuous

commercial use of Opposer Mark since at least five years prior to any date the Applicant could assert regarding first use of Applicant's Mark unequivocally establishes Opposer's priority over the Applicant's Mark as a prior user in commerce. Indeed, Applicant has not proffered, and cannot proffer, any evidence to refute this assertion.

A recent case from the Board illustrates why this due diligence is so important to a trademark owner. In Daniel P. Matthews v. Black Clouds. Cancellation No. 92058978 (TTAB July 31, 2015), petitioner based upon his common law rights in the mark THE BLACK CLOUDS for audio and video recordings via hard media and for streaming and downloading digital music, petitioned the TTAB to cancel a registration for the mark BLACK CLOUDS. The registrant in that case was unable to provide competent evidence of alleged prior use and was forced to rely upon the filing date of its application in accordance with 15 U.S.C. §1057(c). The petitioner in that case was able to demonstrate priority by providing evidence of album sales and commercial activity that pre-dated the registrant's application filing date by several years. Id. The petitioner prevailed against the registrant. Here, not only has Opposer, like the petitioner mentioned above, offered evidence supporting its claim of priority of rights and likelihood of confusion (discussed below), the Applicant has produced no evidence showing use of Applicant's Mark prior to 1999 and no evidence of use on the Application Date for each of the recited services in the Applicant's Application.

This, coupled with Opposer's promotion of Opposer's Goods under Opposer's Mark throughout the United States and abroad, demonstrates Opposer's steadfast and extensive efforts which have resulted in the accumulation of substantial goodwill in Opposer's Mark and have

created the strong association in the minds of the public between the MOSAEC mark and the services offered by Opposer since at least 1999 for jobs information.

It is irrefutable that Opposer's continuous and unabandoned use demonstrates priority of right over Applicant which allegedly did not first use the Applicant's Mark in commerce until October 26, 2017. (See First NOR, RLP 40 and 101). Therefore, Opposer's has priority.

III. Applicant's Mark Had Not Been Used in Commerce When Applicant's Application Was Filed.

If an applicant was not using a mark in commerce at the time it filed a use-based application, the application is considered void ab initio, and no registration can issue. e.g., Aycock Eng'g, Inc. v. Airflite, Inc., 90 USPQ2d 1301, 1307 (Fed. Cir. 2009); see also Beech Aircraft Corporation v. Lightning Aircraft Company Inc., 1 USPQ2d 1290, 1296 (TTAB 1986); 15 U.S.C. §§ 1051(a), 1127. This result is warranted here.

Section l (a) of the United States Trademark Act permits "[t]he owner of a trademark used in commerce" to file an application to register the mark on the basis of such use. 15 U.S.C. § 1051(a) (emphasis added). It has long been the law that a § l (a) application in which the subject mark has not been used in commerce prior to the filing date is void ab initio. See, e.g., Justin Indus., Inc. v. D.B. Rosenblatt, Inc., 213 USPQ 968,974-75 (TTAB 1981) (application void where first order or sale and delivery of goods under the mark occurred after application filed).

In addition, 15 U.S.C. § 1127 provides:

> "For purposes of this Act, a mark shall be deemed to be used in commerce – (2) on services when it is used or displayed in the sale or advertising of services ***and*** the services

> are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country ***and*** the person rendering the services is engaged in commerce in connection with the services…." (emphasis added)
>
> 15 U.S.C. § 1127.

The undisputed facts establish that Applicant failed to satisfy the statutory requirement for use in commerce prior to the filing of Applicant's Application on September 16, 2017. The services identified in the Applicant's Application,

> Software as a service (SAAS) services featuring software for a job board to help people find work and businesses to find job seekers,

had not been used in commerce because Applicant admitted during discovery that the first use of Applicant's Mark was October 26, 2017.

On May 3, 2019, Applicant provided responses to Opposer's RFAs (see First NOR, RLP 37-42). Applicant's response to Opposer's first set of requests for admission included, inter alia:

> **REQUEST FOR ADMISSION NO. 21:** Admit that Applicant's Application to the USPTO was made on these bases – first use and use in interstate commerce since Aug. 1, 2017.
>
> **RESPONSE NO. 21:** I, Ed Windgate, believe the first use of our mark we October 26, 2017.

(See First NOR, RLP 40 and 101).

As such, when the Applicant's Application was filed on the Application Date, Applicant's response to RFA No. 21 indicates that the Applicant's Mark had not been used for Applicant's Applied-for-Services.

While Applicant's responses to RFA's 20, 25 and 26 purports to provide different alleged dates of use, Applicant has not substantiated that claim with evidence authenticated in accordance with Safer, Inc. v. OMS Invs., Inc., 94 USPQ2d 1031, 1039 (TTAB 2010) (holding

document from the Internet admissible if access date and source (e.g., the URL) are identified). Moreover, the references in Applicant's Responses to RFA's 20, 25 and 26 do not reflect the Applicant's Mark on Applicant's Applied-for-Services.

Since Applicant has not produced evidence of use that satisfies the first and second prongs of 15 U.S.C. § 1127 for Applicant's Applied-for-Services as of the Application Date, the reference that Applicant provides in RFAs 25 and 26 further supports a finding of non-use for the Applicant's Applied-for-Services as of the Application Date.

The standard for review for the TTAB is a comparison of Applicant's actual services with the services recited in Applicant's application. Here, Applicant recited its services as "Software as a service (SAAS) services featuring software for a job board to help people find work and businesses to find job seekers;" but Applicant has disclosed during discovery that its services were not used in commerce until October 26, 2017. See First NOR, Exhibit D (RLP 40).

Opposer has demonstrated that Applicant's discovery responses indicate that Applicant's Mark was not used in commerce for the services identified in the Applicant's application on the Application Date.

IV. Likelihood Of Confusion.

In In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1361 (C.C.P.A. 1973), the predecessor of the Federal Circuit set forth a multi-factor test for determining likelihood of confusion. These factors include (i) "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression" and (ii) "the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." Id.

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods and/or services. In re Fat Boys Water Sports LLC, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); see TMEP §1207.01. That is, the marks are compared in their entireties for similarities in appearance, sound, connotation and commercial impression. In re Viterra Inc., 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Additionally, the goods and/or services are compared to determine whether they are similar or 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, (a)(vi).

A. Applicant's Mark is Similar to Opposer's Mark

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 Davia, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing In re 1st USA Realty Prof'ls, Inc., 84 USPQ2d 1581, 1586 (TTAB 2007)); In re White Swan Ltd., 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

Applicant's Mark is confusingly similar in appearance, sound, connotation and commercial impression. The Opposer's Mark is MOSAEC. Applicant's Mark is MOSAIC which is confusingly similar in appearance, sound, connotation and commercial impression to the Opposer's Mark. Note that the only difference in the marks is the "I" in Applicant's Mark.

The visual and aural appearances and pronunciations of the dominant portions of the parties' marks are self-evident – so much so that the USPTO issued a Notice of Pseudo Mark MOSAIC for Opposer's Registration No. 5,409,856. See Second NOR, Exhibit P (RLP 139). Thus, the marks are confusingly similar because MOSAEC and MOSAIC are essentially phonetic equivalents and thus sound similar. Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. In re White Swan Ltd., 8 USPQ2d 1534, 1535 (TTAB 1988); see In re 1st USA Realty Prof'ls, Inc., 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv).

Here, the literal portions of the marks are phonetic equivalents. Slight differences in the sound of similar marks will not avoid a likelihood of confusion. In re Energy Telecomm. & Elec. Ass'n, 222 USPQ 350, 351 (TTAB 1983); see In re Viterra Inc., 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012).

In summation, the Opposer's Mark and the Applicant's Mark are similar in appearance and overall commercial impression.

B. Applicant's Applied-for-Services are Closely Related or Identical to Opposer's Services

The goods and/or services of the parties 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) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods."); TMEP §1207.01(a)(i).

The respective goods and/or services need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or 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).

The Opposer's services include jobs information, including software for a jobs board. Here the services are related because Applicant's Applied-for-Services and Opposer's services are in part identical. Both the Applicant and Opposer use software and artificial intelligence to provide a job board. Evidence of common law use has been deemed acceptable (see Daniel P. Matthews v. Black Clouds, Cancellation No. 92058978 (TTAB July 31, 2015)).

In addition, here, Applicant's Applied-for-Services recited in Applicant's Application are "Software as a service (SAAS) services featuring software for a job board to help people find work and businesses to find job seekers." The services are related to the Opposer's registered services as well as the use of Opposer's Mark for jobs information, including software for a jobs board because they are services that commonly emanate from the same source. See In re Aquamar, Inc., 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); In re Albert Trostel & Sons Co., 29 USPQ2d

1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii). *Cf*. Second NOR Exhibit X (RLP 232 – 258) and Exhibit Y (RLP 259 - 263) for the brand FACEBOOK that provides services in International Classes 42 (Computer Services) and 45 (Social Media) as well as a jobs board.

Accordingly, there is no dispute that the second du Pont factor weighs heavily in Opposer's favor.

Any differences in the description of Applicant's Applied-for-Services and the recited services in Opposer's registrations as well as the use of Opposer's Mark jobs information, including software for a jobs boardare not dispositive of an absence of a likelihood of confusion as providers of entertainment, soft\ and social media services also provide jobs boards under the same brand to the same consumer. For example, see Second NOR Exhibit X (RLP 232 – 258) and Exhibit Y (RLP 259 - 263) for the brand FACEBOOK that provides services in International Classes 42 (Computer Services) and 45 (Social Media) as well as a jobs board.

In summation, Applicant's Applied-for-Services recited in Applicant's Application are identical or closely related to Opposer's services. Consequently, both marks are likely to be encountered by the same class of consumers under circumstances that would give rise to the mistaken belief that they originate from the same source or that there is an association between the parties. In view of the similarity of the marks and the goods, confusion is likely to occur.

C. Opposer's Services and Applicant's Applied-for-Services Are Offered in Identical Channels of Trade.

The evidence on record demonstrates that the third du Pont factor weighs heavily in Opposer's favor as the channels of trade overlap.

The third du Pont factor requires the Board to analyze whether Opposer and Applicant use similar channels of trade for the offer of their respective services. To the extent that the services claimed by the parties are the same, it is presumed that the parties' services will be sold in the same channels of trade and to the same relevant purchasers. See Genesco, Inc. v. Martz, 66 U.S.P.Q.2d 1260, 1268 (T.T.A.B. 2003); In re Smith and Mehaffey, 31 U.S.P.Q.2d 1526 (T.T.A.B. 1994). Where, as here, the Opposer's services and Applicant's services are legally identical, the Board is entitled to presume that the channels of trade and classes of consumers are also identical. In re Yawala Iron & Steel Co., 159 USPQ 721, 723 (CCP A 1968) (where there are legally identical goods, the channels of trade and classes of consumers are considered identical); see also American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute, 101 USPQ2d 1022,1028 (TTAB 2011); In re Viterra Inc., 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

Since its launch, the Opposer's has offered its services throughout the United States. The Opposer's services are targeted to consumers of all types, including consumers interested in jobs information and a jobs board. Both Applicant's Applied-for-Services and Opposer's services are offered via a web interface. See Miller Decl. ¶¶ 4-8; Perry Decl. ¶¶ 4 and 9-10; K. Prioleau Decl. ¶¶ 4 and 8-10; First NOR, Exhibit C (RLP 28 – 36) and Exhibit O (RLP 127 – 135) . *Cf*. Second NOR Exhibit X (RLP 232 – 258) and Exhibit Y (RLP 259 - 263) for the brand FACEBOOK that provides services in International Classes 42 (Computer Services) and 45 (Social Media) as well as a jobs board.

Although Applicant provided Opposer information in response to Opposer's discovery requests, the Applicant has not provided prima facie evidence dated on or before Application

Date of use in interstate commerce Applicant's Mark for the Applied-for-Services recited in Applicant's Application.

In fact, Applicant's Applied-for-Services are identical or closely related to Opposer's services because they are items that commonly emanate from the same source as Opposer. Id.

Thus, analysis of the three determining du Pont factors is so compelling that likelihood of confusion exists between MOSAEC and Applicant's Mark.

D. Opposer will be Damaged by Registration of Applicant's Mark

The registration of the Applicant's Mark is likely to cause harm and damage to Opposer in that it falsely represents to the public that there is an association between Applicant's Applied-for-Services and Opposer services that are offered under the respective marks. The confusingly similar marks are likely to result in actual confusion for the same class of consumers in the identical or overlapping channels of trade.

Opposer has invested a great deal of time, money, and sweat into developing the services and brand associated with the Opposer's Mark for over 20 years and Applicant's Mark is likely to cause confusion about the source of those services. See Prioleau Decl. and Exhibits thereto.

CONCLUSION

Since Opposer has demonstrated through the arguments set forth in this brief: (i) Opposer has standing; (ii) Opposer has superior rights to its mark; (iii) Applicant's non-use of Applicant's Mark on each of the services recited in Applicant's Application in interstate commerce on or before the Application Date; (iv) Applicant's Mark is confusingly similar to Opposer's Mark; (v) Applicant's services are identical or closely related to Opposer's services;

and (vi) Opposer will be damaged by the registration of Applicant's Mark. Accordingly, registration of Applicant's Mark should be denied as a matter of law

WHEREFORE. Opposer prays that registration of Applicant's Mark for the services in Class 42 identified therein be denied and that this opposition be sustained.

RLP VENTURES, LLC

Dated: July 28, 2020

By: /Ramona Prioleau/

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OPPOSER

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Trial Brief Of Opposer has been served on the following by delivering the document via email to Applicant:

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