

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

Butler

August 14, 2023

Concurrent Use No. 94003139

MGM Grand Hotel, LLC
(Application Serial Nos. 87861550;
87861582; 87861631; 87861661)

v.

Level Up, LLC
(Registration No. 5700182)

By the Trademark Trial and Appeal Board:

MGM Grand Hotel, LLC (Applicant) filed applications seeking concurrent use registration of the following marks:¹

LEVEL UP in standard character for “Entertainment services in the nature of conducting live, interactive skill-based games; entertainment services in the nature of hosting social entertainment events; video arcade services” in Class 41;²

LEVEL UP in standard character for “Providing facilities for social functions” in Class 43;³

¹ Hakkasan Holdings, Inc. was the original applicant. The assignment to MGM Grand Hotel, LLC was recorded on May 13, 2021, prior to commencement of this proceeding on April 21, 2023, at reel 7291, frame 0573

² Application Serial No. 87861550, filed on April 3, 2018, claiming a date of first use anywhere and in commerce of July 10, 2010.

³ Application Serial No. 87861582, filed on April 3, 2018, claiming a date of first use anywhere and in commerce of July 10, 2010.



LEVEL UP for “Entertainment services in the nature of conducting live interactive skill-based games; casino services; entertainment services in the nature of hosting social entertainment events; amusement arcade services; Entertainment in the nature of tournaments for skill-based games” in Class 41;⁴ and



LEVEL UP for “Restaurant, bar and cocktail lounge services; providing facilities for social functions” in Class 43.⁵

Applicant recites its territory of use as the geographic area consisting of “the entire United States with the exception of the states of Oregon, Washington, Idaho, and that portion of the state of California north of 37th latitude.”

Applicant named Level Up, LLC (Registrant) as the sole exception to its exclusive right to use its mark. Registrant’s mark is LEVEL UP in standard character for “entertainment and gaming services in the nature of amusement arcades and excluding entertainment and gaming services offered in facilities that offer and provide casino gaming services” in Class 41 and for “bar and cocktail services; restaurant services offered only in facilities that do not offer and provide casino gaming services” in Class 43.⁶ Registrant’s territory of use is identified as “the states

⁴ Application Serial No. 87861631, filed on April 3, 2018, claiming a date of first use anywhere and in commerce of December 29, 2016.

The mark consists of the letter “L” followed by an Up sign inside a square, with the words “LEVEL UP” beneath.

⁵ Application Serial No. 87861661, filed on April 3, 2018, claiming a date of first use anywhere and in commerce of December 29, 2016.

The mark consists of the letter “L” followed by an Up sign inside a square, with the words “LEVEL UP” beneath.

⁶ Registration No. 5700182 issued on March 19, 2019 claiming a date of first use anywhere and in commerce of April 2012.

of Oregon, Washington, Idaho, and that portion of the state of California north of 37th latitude.”⁷

This case now comes up for consideration of the parties’ Concurrent Trademark Use Consent Agreement (Agreement).⁸ In the Agreement, the parties acknowledge their contemporaneous use of the marks for at least six years without confusion; and express their belief that, given the differences in products, services, customers, channels of trade, geographic regions, cost, and relevant industries, that confusion is not likely. 4 TTABVue 8, ¶F. The parties agree not to use their respective marks in the region of the other. *Id.*, ¶¶2-3. The parties further agree they will not intentionally promote, market, advertise, license, or sell their goods or services under their marks in a manner that would cause confusion; acknowledge that, although online presence may reach consumers in the other’s territory, each will not direct online advertising to the other’s region; and agree to communicate and cooperate in the event either receives consumers inquiries about the other. *Id.* at pp. 10-11, ¶5 and 7.

⁷ At some point when Registrant’s underlying application was pending, the recitations of services were amended to add the geographic limitations. However, this is inappropriate. The underlying application should have been amended to one seeking a concurrent use registration, and subsequently should have published with a concurrent use statement. Trademark Manual of Examining Procedure (TMEP) §§ 1207.04(b) (amending a use-based application to one seeking concurrent use registration), (1207.04(e)(1) (concurrent use statement for the record at publication).

Accordingly, and to correct the Office’s mistake of entering the geographic statements into the recitation of services, and to expedite matters, the geographic restrictions are being removed from the recitation of services. Instead, as addressed below, a concurrent use statement will be entered into the registration record.

⁸ Although the Agreement was executed between Registrant and Hakkasan Holdings, LLC, a provision of the Agreement permits assignment, such assignment to be binding on the successor. 4 TTABVue 12, ¶12. Thus it is appropriate to review the Agreement as between current Applicant and Registrant.

Based upon the Agreement, the Board is persuaded that MGM Grand Hotel, LLC and Level Up, LLC are entitled to concurrent use registrations. In making its determination, the Board has taken into account not only the provisions of the Agreement and the actual geographic restrictions of the areas of use, but also the voluntary entry by the parties into an agreement that includes provisions for concurrent use when it would be clearly against their business interests to cause confusion on the part of the public. *See Amalgamated Bank of N.Y. v. Amalgamated Trust & Savings*, 842 F.2d 1270, 6 USPQ2d 1305, 1308 (Fed. Cir. 1988).

Decision

Concurrent use registration is **approved** for MGM Grand Hotel, LLC's pending applications for the marks as follows:

LEVEL UP in standard character for "Entertainment services in the nature of conducting live, interactive skill-based games; entertainment services in the nature of hosting social entertainment events; video arcade services" in Class 41;

LEVEL UP in standard character for "Providing facilities for social functions" in Class 43



LEVEL UP "Entertainment services in the nature of conducting live interactive skill-based games; casino services; entertainment services in the nature of hosting social entertainment events; amusement arcade services; Entertainment in the nature of tournaments for skill-based games" in Class 41; and



LEVEL UP for "Restaurant, bar and cocktail lounge services; providing facilities for social functions" in Class 43.

Restriction of Level Up, LLC's registration is **approved**.

Concurrent Use No. 94003139

The concurrent use statements will read as follows:

MGM Grand Hotel, LLC's Application Serial Nos. 87861550; 87861582; 87861631; and 87861661

Registration limited to the area consisting of the entire United States with the exception of the states of Oregon, Washington, Idaho, and that portion of the state of California north of 37th latitude pursuant to Concurrent Use No. 94003139. Concurrent registration with Level Up, LLC (Registration No. 5700182).

Level Up, LLC's Registration No. 5700182

Registration limited to the area consisting of the states of Oregon, Washington, Idaho, and that portion of the state of California north of 37th latitude pursuant to Concurrent Use No. 94003139. Concurrent Registration with MGM Grand Hotel, LLC (Application Serial Nos. 87861550; 87861582; 87861631; and 87861661).