EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the examining attorney's final refusal to register the trademark DAKOTA CUB AIRCRAFT for, "Aircraft and structural parts therefor." The trademark for which registration is sought gives rise to a likelihood of confusion with U.S. Registration Numbers 3,123,435, 3,123,441, and 3,200,812 under Trademark Act Section 2(d), 15 U.S.C. §1052(d). It is respectfully requested that this refusal be affirmed.

STATEMENT OF FACTS

On September 1, 2005, applicant, Mark D. Erickson applied for a federal trademark registration for the trademark DAKOTA CUB AIRCRAFT pursuant to 15 U.S.C. §1051(a). Applicant identified its trademark for, "Manufacture of aircraft and structural parts therefore."

On March 24, 2006, the examining attorney cited Application Serial Numbers 78688112, 78688587, and 78688134 against the applicant as potential refusals. The examining attorney also requested clarification of the applicant's identification, did not accept the applicant's specimen as to International Class 040, required a signed declaration, clarification of the applicant's entity type, and requested a disclaimer of the wording "DAKOTA" and "AIRCRAFT." On October 20, 2006, the examining attorney abandoned the application as no response was received within the six month response period.

On November 7, 2006, the applicant petitioned to revive the abandoned application stating that the delay in responding was unintentional. Applicant also clarified applicant's entity type, disclaimed "AIRCRAFT", entered a Section 2(f) in part claim as to DAKOTA, and clarified the applicant's identification of goods to read, "Aircraft and structural parts therefor" in International Class 012. On November 8, 2006, the application was reinstated. On December 18, 2006, the examining attorney suspended the application pending the disposition of Application Serial Number 78688112.

On July 11, 2007, the examining attorney issued a non-final office action and cited U.S. Registration Numbers 3,123,435, 3,123,441, and 3,200,812 against the applicant because of a likelihood of confusion. On December 12, 2007, the applicant filed a response with arguments in favor of registration. On January 7, 2008, the examining attorney suspended the application pursuant to Cancellation Numbers 92046577 and 92046585 that were filed against the cited registrations. On March 10, 2008, the applicant filed arguments in favor of registration. On March 31, 2008, the examining attorney issued a Notice of Incomplete Response as the incoming March 10, 2008 response was signed by an unauthorized attorney. On April 4, 2008, the applicant provided a properly signed Revocation of Attorney/Appointment of Attorney appointing William D. Wiese as the attorney of record. Additionally, the applicant submitted arguments in favor of registration.

On April 30, 2008, the examining attorney issued a final refusal based on Section 2(d) regarding U.S. Registration Numbers 3,123,435, 3,123,441, and 3,200,812. Applicant filed a timely appeal brief on October 30, 2008.

ISSUE

The sole issue on appeal is whether, under Section 2(d), there is a likelihood of confusion between the applicant's mark DAKOTA CUB AIRCRAFT in standard character form, for "Aircraft and structural parts therefor" and U.S. Registration Number 3,123,435, TOP CUB in standard character form for, "Aircraft and structural parts for aircraft", U.S. Registration Number 3,123,441, SPORT CUB in standard character form for, "Aircraft and structural parts for aircraft" and U.S. Registration Number 3,200,812, CUB CRAFTERS in standard character form for, "Aircraft and structural parts for aircraft."

ARGUMENTS

I. APPLICANT'S MARK IS CONFUSINGLY SIMILAR TO REGISTRANT'S MARKS AND THE GOODS ARE CLOSELY RELATED SUCH THAT A LIKELIHOOD OF CONFUSION, MISTAKE OR DECEPTION EXISTS UNDER SECTION 2(d) OF THE TRADEMARK ACT

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). The court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973) listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). *See* TMEP §1207.01. However, not all of the factors are necessarily relevant or of equal weight, and any one factor may be dominant in a given case, depending upon the evidence of record. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods and/or services, and similarity of trade channels of the goods and/or services. *See In re Opus One, Inc.*, 60 USPQ2d 1812 (TTAB 2001); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593 (TTAB 1999); *In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999); TMEP §§1207.01 *et seq.*

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988).

A. <u>THE GOODS ARE IDENTICAL:</u>

The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the goods and/or services come from a common source. *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999); TMEP §1207.01(a)(i); *see, e.g., On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086-87, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

The applicant's goods are, "Aircraft and structural parts therefor." The registrant's goods in U.S. Registration Numbers 3,123,435, 3,123,441, and 3,200,812 are, "Aircraft and structural parts for aircraft." The applicant's goods are identical to the registrant's goods.

B. <u>THE MARKS ARE CONFUSINGLY SIMILAR:</u>

In a likelihood of confusion determination, the marks are compared for similarities in their appearance, sound, meaning or connotation and commercial impression. *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). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *see* TMEP §1207.01(b).

The applicant's mark is DAKOTA CUB AIRCRAFT. The mark in U.S. Registration Number 3,123,435 is TOP CUB. The mark in U.S. Registration Number 3,123,441 is SPORT CUB. The mark in U.S. Registration Number 3,200,812 is CUB CRAFTERS. The applicant's

mark is similar to the registrant's marks because they all contain the common wording CUB. Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii). Because the applicant's mark and the registrant's marks all contain the common wording CUB, the overall commercial impression of the marks is similar.

Further, the marks are compared in their entireties under a Trademark Act Section 2(d) analysis. *See* TMEP §1207.01(b). Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); *see* TMEP §1207.01(b)(viii), (c)(ii). Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. Disclaimed matter is typically less significant or less dominant when comparing marks. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir.

1985); TMEP §1207.01(b)(viii), (c)(ii). The dominant portion of U.S. Registration Numbers 3,123,441 and 3,200,812 is CUB as the registrant has disclaimed the wording "SPORT" from U.S. Registration Number 3,123,441 and the wording "CRAFTERS" from U.S. Registration Number 3,200,812. Additionally, the dominant portion of U.S. Registration Number 3,123,435 is also CUB as the wording "TOP" merely modifies the wording CUB. Additionally, the dominant portion of the applicant's mark is CUB, as the wording "DAKOTA" merely modifies the wording CUB and applicant has disclaimed the word "AIRCRAFT" from the mark. Because the dominant portion of the applicant's mark is identical in sound, appearance, and meaning to the dominant portion of the registrant's marks, the overall commercial impression of the marks is similar.

Applicant argues, "The Examining Attorney improperly asserts that the word 'cub' is entitled to protection and cannot be incorporated into another mark." (Applicant's Br. at 4.) Applicant further argues, "No Manufacturer can take out of the language a word, even a slang term, that has generic meaning as to a category of products and appropriate it for its own trademark use." (Applicant's Br. at 5.) Applicant additionally argues, "The word 'cub' is <u>not</u> a registered trademark, it is a generic term for a light aircraft. The Cited Marks are TOP CUB, SPORT CUB, and CUB CRAFTERS, but Applicant is not attempting to register any of those marks or incorporate any of those marks into its trademark." (Applicant's Br. at 5.) Applicant argues, "It is not at all clear why the Examining Attorney advances the argument that a certificate of registration has issued for the word 'cub' when that is not the case, or why the Examining Attorney believes that Applicant is making a collateral attack on the Cited Marks merely be arguing that the word 'cub' is generic for a light plane." (Applicant's Br. at 5.) The applicant further argues, "The fact that the composite terms TOP CUB, SPORT CUB, and CUB CRAFTERS have been registered simply does not, in an of itself, confer any protection to the generic term 'cub.'" (Applicant's Br. at 5.) These arguments, however, are not persuasive. The examining attorney has not advanced

the argument that a certificate of registration has issued for the word "cub." Registrations have, however, issued for U.S. Registration Numbers 3,123,435, 3,123,441, and 3,200,812 for the marks TOP CUB, SPORT CUB and CUB CRAFTERS none of which include a disclaimer of the word "CUB". Additionally, it is important to note that none of these registrations are registered on the Principal Register with a Section 2(f) Claim or are registered on the Supplemental Register. The owner of these registrations has rights in these trademarks. An ex parte proceeding is not an appropriate forum to limit the registrant's rights by finding that "CUB" is a generic term, which would have impact on the trademark rights of the registrant. Specifically, it is not appropriate to limit the rights of a registrant in an ex parte proceeding because the registrant is not able to make any arguments in their favor to protect their trademark rights. The appropriate forum to make such an argument would be a cancellation proceeding, where the registrant would have an opportunity to present arguments in their favor. As stated above, none of the registrations cited against the applicant include a disclaimer of "CUB", none are registered on the Principal Register with a Section 2(f) Claim, and none are registered on the Supplemental Register, therefore, finding that the term "CUB" is generic term for the registrant's goods would, in fact, impact the trademark rights of the registrant. Further, Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), provides that a certificate of registration on the Principal Register shall be prima facie evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate. TMEP §1207.01(d)(iv).

Applicant argues, "In fact, the Examining Attorney's position is entirely at odds with decisions rendered by the courts. In *Harley Davidson*, the court held that 'hog' was currently a generic nickname for large motorcycles and could not be appropriated as a mark by Harley-Davidson. The facts in that case [sic] virtually identical to the facts in the instant case."

(Applicant's Br. at 5 – 6.) This argument, however, is not persuasive. Specifically, *Harley Davidson v. Grottanelli* is not an ex parte proceeding. In fact, it is an inter partes proceeding where the applicant and registrant were both present and able to make arguments in their favor.

Applicant further argues, "Several dictionaries include a definition of 'cub' as a light plane." (Applicant's Br. at 6.) For the Board's convenience, the examining attorney has attached the dictionary definitions submitted by the applicant. Specifically, the dictionary at InfoPlease.com defines cub as, "*Trademark. Aeron.* Any small, light monoplane with a high wing, a single engine, and an enclosed cabin" which shows that the word is considered a Trademark and not a generic term for aircraft.

Applicant argues, "The Examining Attorney's position that the Applicant's Mark should be parsed for comparison with the Cited Marks, and that the dominant portion of the Applicant's mark is the generic word 'cub,' is entirely unsupportable." (Applicant's Br. at 9.) Applicant further argues, "The law requires a mark to be considered in its entirety." (Applicant's Br. at 9.) This argument, however, is not persuasive. Specifically, as stated above, the marks are compared in their entireties under a Trademark Act Section 2(d) analysis. *See* TMEP §1207.01(b). Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987); *see* TMEP §1207.01(b)(viii), (c)(ii). Further, although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. Disclaimed matter is typically less significant or less dominant when comparing marks. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34

(Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). The dominant portion of U.S. Registration Numbers 3,123,441 and 3,200,812 is CUB as the registrant has disclaimed the wording "SPORT" from U.S. Registration Number 3,123,441 and the wording "CRAFTERS" from U.S. Registration Number 3,200,812. Additionally, the dominant portion of U.S. Registration Number 3,123,435 is also CUB as the wording "TOP" merely modifies the wording CUB. Additionally, the dominant portion of the applicant's mark is CUB, as the wording "DAKOTA" merely modifies the wording CUB and applicant has disclaimed the word "AIRCRAFT" from the mark. Because the dominant portion of the applicant's mark is identical in sound, appearance, and meaning to the dominant portion of the registrant's marks, the overall commercial impression of the marks is similar.

Applicant argues, "When the marks in this case are viewed as a whole, there is simply no similarity. When taken as a whole, DAKOTA CUB AIRCRAFT is not at all similar to SPORT CUB, to TOP CUB, or to CUB CRAFTERS." (Applicant's Br. at 10.) This argument, however, is not persuasive. As stated above, the applicant's mark is similar to the registrant's marks because they all contain the common wording CUB. Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424

(TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii). Further, the question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods and/or services they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 USPQ 558, 558-59 (C.C.P.A. 1972); TMEP §1207.01(b). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *See Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 1329-30, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 189 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537, 540-41 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); TMEP §1207.01(b). Additionally, if the goods and/or services of the respective parties are "similar in kind and/or closely related," the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods and/or services. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b). In this case, the applicant's goods are identical to the registrant's goods and the marks are similar, therefore, confusion as to source is likely.

Applicant argues, "In terms of overall appearance, Applicant's Mark is significantly different from the TOP CUB, SPORT CUB, and CUB CRAFTERS words in the Cited Marks." (Applicant's Br. at 12.) Applicant further argues, "First, Applicant's Mark begins with the distinctive word 'DAKOTA' as the first element seen by customers as they read the Applicant's Mark from left to right. In contrast, the Cited Marks do not include the word 'DAKOTA' and, instead begin with words, 'TOP', 'SPORT' and 'CUB', the first of two which are not even

included in the Applicant's Mark." (Applicant's Br. at 12.) Applicant further argues, "Second, Applicant's Mark contains three separate words, DAKOTA CUB AIRCRAFT, in contrast to the Cited Marks which each only contain two words." (Applicant's Br. at 12.) Applicant argues, "Third, Applicant's Mark ends with the word 'AIRCRAFT' which does not appear in any of the Cited Marks." (Applicant's Br. at 12.) These arguments, however, are not persuasive. As stated above, marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii). Because the applicant's mark is similar to the registrant's marks and the goods are identical, confusion as to source is likely and registration is refused under Section 2(d).

Applicant argues, "In this case, the visual distinctions between the two marks have significance with respect to the services [sic] described." (Applicant's Br. at 13.) Applicant further argues, "In particular, the first element of Applicant's Mark, the element 'DAKOTA', evokes images of a division of the earth and spirit world in the cultural beliefs of the Dakota people of the Great Sioux Nation and, in the context of Applicant's Mark, conjures up images of an aircraft that can metaphorically travel between them." (Applicant's Br. at 13.) Applicant further

argues, "In contrast, the Cited Marks employ the much more literal, if not laudatory, terms TOP, SPORT, and CRAFTERS to describe specific attributes or types of uses for the Cubs sold by the registrant." (Applicant's Br. at 13.) This argument, however, is not persuasive. Specifically, the registrant owns three registrations for marks which include the term "CUB" for aircraft and aircraft parts. Therefore, the relevant purchaser who is familiar with the registrant's CUB marks would likely assume that any other mark including the term "CUB" also belongs to the registrant. Because the applicant's mark is similar to the registrant's marks and the goods are identical, registration is refused under Section 2(d).

Finally, applicant argues, "The overall sound of the Applicant's Mark is also readily distinguishable from the sound of the Cited Marks. Specifically, Applicant's Mark begins with the element 'DAKOTA' that is not present in the Cited Marks." (Applicant's Br. at 14.) Applicant argues, "Also, Applicant's mark is pronounced in six syllables, while the Cited Marks, on the other hand, are each pronounced in either two syllables, as is the case for the First and Second Cited Marks, or in three syllables, as is the case for the Third Cited Mark." (Applicant's Br. at 14.) These arguments, however, are not persuasive. As stated above, marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975)

(LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii). Additionally, if the goods and/or services of the respective parties are "similar in kind and/or closely related," the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods and/or services. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b). Because the applicant's mark is similar to the registrant's mark and the goods are identical, confusion as to source is likely, and registration is refused under Section 2(d).

CONCLUSION

The examining attorney, having established that the respective marks are highly similar and the respective goods are identical, respectfully submits that the applicant's mark so resembles the registered marks that it is likely, when applied to the applicant's goods, to cause confusion, or to cause mistake, or to deceive. Accordingly, registration of applicant's mark is properly refused under Trademark Act Section 2(d).

Respectfully submitted,

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