

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Application of)
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Consolidated Pipe and Supply Co., Inc.) Trademark Law Office: 115
)
For: CONSOLIDATED)
POWER SUPPLY) Attorney: Howard B. Levine
)
Serial No. 88/082,797) Attorney Docket No. 02562.0031
)
Filed: August 17, 2018)

1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, AL 35203-2618
May 3, 2019

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

AMENDMENT

Dear Madame:

Responsive to the Office action mailed December 4, 2018, applicant proposes amending the above-referenced application as follows:

Replace the Identification of Goods and Services for Class 042 only with the following:

- - design, engineering, research, development and testing services in the field of pressurizer heaters, ultrasonic testing, liquid penetration testing, corrosion testing, tensile testing, hardness testing, hydro testing, radiography testing, eddy current testing, chemical analysis, grain size determination, angles and channels, bars and rods, piping and tubular products, valves, fittings, fasteners and flanges, sheets and plates, castings,

forgings, ingots and billets, HDPE pipe, reinforcing steel and structural beams, wire, hard facing/wear surfacing materials, valve components, pressure boundary repair, and structural steel embeds for technological applications in the field of energy, all in Class 042 - -

Please enter the following disclaimer:

-- No claim is made to the exclusive right to use "POWER SUPPLY" apart from the mark as shown. --

REMARKS

This is in response to the Office action mailed on December 4, 2018.

Applicant proposes amending the Identification of Goods and Services to more particularly describe the Applicant's services.

Applicant has entered the requested disclaimer.

The Trademark Examiner has refused registration of Applicant's mark under Trademark Act Section 2(d) on the grounds that there is a likelihood of confusion between Applicant's mark CONSOLIDATED POWER SUPPLY ("Applicant's Mark") for design, engineering, research, development and testing services in the field of pressurizer heaters, ultrasonic testing, liquid penetration testing, corrosion testing, tensile testing, hardness testing, hydro testing, radiography testing, eddy current testing, chemical analysis, grain size determination, angles and channels, bars and rods, piping and tubular products, valves, fittings, fasteners and flanges, sheets and plates, castings, forgings, ingots and billets, HDPE pipe, reinforcing steel and structural beams, wire, hard facing/wear surfacing materials, valve components, pressure boundary repair, and structural steel embeds for technological applications in the field of energy; and custom fabrication of power generation plant components for others (collectively, "Applicant's Services") and U.S. Registration No. 4,327,075 (the "'075 Registration") for the mark CONSOLIDATED FABRICATORS CONFAB A DIVISION OF BRADEN MANUFACTURING LLC and Design for Structural accessory systems for gas turbine engines not for land vehicles, namely, fluid systems comprising bases, pumps, valves, fans piping, and controls; exciters for gas turbine engines not for land vehicles; collectors being structural parts for gas turbine engines not for land vehicles; enclosures being structural parts for gas turbine engines not for land vehicles; intake isolation dampers being structural parts for gas turbine

engines not for land vehicles; inlet filter houses being structural parts for gas turbine engines not for land vehicles; filtration and pressurization skids being structural parts for gas turbine engines not for land vehicles; gas turbine engine combustion system structural parts, not for land vehicles, namely, seals, brackets, spacers, shims, nozzles; and Custom metal fabrication to the order and specification of others in the power generation, naval propulsion and machine tools industries, and U.S. Registration No. 4,266,934 (the ‘934 Registration”) for the mark CONSOLIDATED CONTROLS for Instrument and control systems for nuclear power plants comprising microprocessors, computer software for controlling nuclear power plant operations, and computer hardware; pressure transmitters; pump speed sensors; voltage regulators; video display units in the nature of touch screen user interfaces for controlling nuclear power plant operations; and Designing of instrument and control systems for nuclear power plants; testing of instrument and control systems for nuclear power plants. The ‘075 Registration and the ‘934 Registration are hereafter referred to collectively as the “Cited Registrations.” The Examiner takes the position that because Applicant’s CONSOLIDATED POWER SUPPLY mark is highly similar to the marks of the Cited Registrations and Applicant’s Services are related to the goods and services of the ‘075 Registration and the ‘934 Registration, a likelihood of confusion exists between the marks. Applicant respectfully disagrees and argues below that there is no likelihood of confusion.

The test for determining the applicability of § 2(d) of the Trademark Act is whether an appreciable number of ordinarily prudent purchasers are likely to be misled or confused as to the source of the products or services. *McGregor-Doniger, Inc., v. Drizzle, Inc.*, 202 USPQ 81 (2nd Cir. 1979) (holding no likelihood of confusion between DRIZZLE for women’s overcoats and DRIZZLER for golf jackets). In considering the issue of likelihood of confusion, the trademarks

must be compared in their entireties and must be considered in conjunction with the particular goods and services with which they are used. *In re National Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). Likelihood of confusion has been said to be synonymous with “probable” confusion—it is not sufficient if confusion is merely “possible.” *See Rodeo Collection, Ltd. v. W. Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987) (stating that “[l]ikelihood of confusion requires that confusion be probable, not simply a possibility”); *see also* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (“McCarthy”) § 23:3, 16-17 (4th ed. 2004). Further, the Trademark Office must take into consideration the scope of protection to be accorded the marks.

Similarities or differences in the appearance, sound, meaning, and commercial connotation of trademarks play a significant role in determining whether a likelihood of confusion exists. *See AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 351 (9th Cir. 1979). However, “[s]imilarity of the marks in one respect—sight, sound or meaning—will not automatically result in a finding of likelihood of confusion even if the goods are identical or closely related.” TMEP § 1207.01(b)(i); *see also* McCarthy § 23:21.

Here, the marks look different in that Applicant’s Mark consists of a three-word, twenty-three letter phrase, while the marks of the Cited Registrations consist of a two-word, twenty-letter phrase and a nine-word, sixty-two letter phrase consists of a five-word, thirty-three letter phrase, respectively (CONSOLIDATED POWER SUPPLY vs CONSOLIDATED CONTROLS and CONSOLIDATED FABRICATORS CONFAB A DIVISION OF BRADEN MANUFACTURING LLC). Furthermore, the parties’ marks sound different. Applicant’s Mark consists of nine syllables, while the marks of the Cited Registrations consist of 7 syllables and 26 syllables, respectively. Additionally, the marks of the Cited Registrations include sounds and words not found in Applicant’s Mark, while excluding words and sounds found in Applicant’s

Mark. In particular, the mark of the '075 Registration includes the words “fabricators,” “confab,” “a,” “division,” “of,” “braden,” “manufacturing” and “llc,” none of which is found in Applicant’s Mark, and excludes the words “power” and “supply,” which are found in Applicant’s mark. The mark of the '934 Registration includes the word “controls,” which is not found in Applicant’s Mark, and excludes the words “power” and “supply,” which are found in Applicant’s mark. The parties’ respective marks therefore sound differently, appear differently and are spelled differently. These differences between the parties’ respective marks, when taken together, are sufficient to preclude a likelihood of confusion. *See EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 706 F.2d 1213 (Fed. Cir. 1983) (finding SUPERLOADER not confusingly similar to EZ LOADER or MINI LOADER for boat trailers).

The parties’ marks also have different connotations. In particular, Applicant’s Mark includes the phrase “power supply” which, in view of Applicant’s Services, connotes filling the wants or needs of entities that generate power. *See Merriam-Webster* at <https://www.merriam-webster.com/dictionary/power>, attached hereto at **Exhibit A** and <https://www.merriam-webster.com/dictionary/supply>, attached hereto at **Exhibit B**. This connotation is absent from the marks of the Cited Registrations. The mark of the '934 Registration, on the other hand, includes the term “controls” which, in view of the goods and services of the registration, connotes a device or mechanism used to regulate or guide the operation of a machine, apparatus, or system (*see Merriam-Webster* at <https://www.merriam-webster.com/dictionary/controls>, attached hereto at **Exhibit C**), while the mark of the '934 Registration includes the phrase “fabricators confab a division of braden manufacturing llc,” which, in view of the goods and services of the registration, connotes an entity that constructs products from diverse and usually standardized parts and promotes discussion about same and that is a division of Braden Manufacturing, LLC.

See *Merriam-Webster* at <https://www.merriam-webster.com/dictionary/fabricator>, attached hereto as **Exhibit D**, and <https://www.merriam-webster.com/dictionary/confab>, attached hereto as **Exhibit E**. These connotations are not found in the Registrant's Mark.

In addition to the fact that the parties' respective marks are different and have different connotations, the buyers of Applicant's Services and the goods and services of the Cited Registrations are companies that generate power including nuclear power. These sophisticated purchasers are not likely to be confused as to source by the use of Applicant's CONSOLIDATED POWER SUPPLY mark and the Cited Marks because the purchasers are knowledgeable about the specific types of goods and services they need. See *Blue Bell Bio-Med. v. Cin-Bad, Inc.*, 864 F.2d 1253, 1260 (5th Cir. 1989) (finding that when hospitals purchase medical carts, a mistaken purchase is unlikely due to the high degree of care with which such purchases are made); *Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 U.S.P.Q.2d 1390 (no confusion between the marks HP and HPM for medical equipment, in part, because the potential purchasers were "highly educated, sophisticated purchasers who [knew] their equipment needs and would be expected to exercise a great deal of care in [their] selection[s]").

Further evidence that there is no likelihood of confusion exists between Applicant's Mark and the Cited Marks is that the Cited Marks coexisted on the Principal Register with Applicant's expired U.S. Registration No. 3,812,759 for the mark CONSOLIDATED POWER SUPPLY for custom fabrication of power generation plant components for others, and design engineering, research, development and testing services in the field of energy, which expired on February 10, 2017. U.S. Registration No. 3,812,759 was based on an application filed prior to the filing of the applications ("Cited Applications") that led to the Cited Registrations. See TESS printout for

U.S. Registration No. 3,812,759, attached hereto as **Exhibit F**. Certainly, if no likelihood of confusion existed between Applicant's U.S. Registration No. 3,812,759 for the mark CONSOLIDATED POWER SUPPLY for custom fabrication of power generation plant components for others, and design engineering, research, development and testing services in the field of energy and the Cited Registrations at the times of filing of the respective Cited Applications, no likelihood of confusion exists between the Applicant's Mark and the Cited Marks.

The Trademark Trial and Appeal Board and the courts have held in a number of cases that even though trademarks may be similar *or the same* in sound and appearance, where the goods/ services are different, or the purchasers of the goods/ services are different, there will be no likelihood of confusion. *See Reedco Inc. v. Hoffmann-LaRoche Inc.*, 2 USPQ2d 1994 (1987) (finding TEGRIN for the over the counter medicated soaps and salves and TEGISON for oral prescription drugs for treating psoriasis not confusingly similar since, inter alia, products' forms, channels of trade and treatment uses make them distinguishable); *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (no likelihood of confusion found between PLAYERS in stylized form for men's underwear and PLAYERS for shoes); *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) (no likelihood of confusion found between BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's suits, coats and trousers); *Morton-Norwich Products, Inc. v. N. Siperstein, Inc.*, 222 USPQ 735 (TTAB 1984) (holding use of FANTASTIC for paints not confusingly similar to FANTASTIK for spot remover, laundry starch cleaners); *Haydon Switch and Instrument Inc. v. Rexnord, Inc.*, 4 USPQ2d 1510 (D. Conn. 1987) (holding no likelihood of confusion between PLANETGEAR for mechanical drum wheel digital display time counters and PLANETGEAR for planetary gear speed reducers and motor drive shafts).

Due to, *inter alia*, the differences in the parties' respective marks, sophistication of the parties' consumers and relevant case law, it is clear that Applicant's Mark and the Cited Marks are not confusingly similar as an *appreciable number of ordinarily prudent purchasers* of the parties' respective services are not likely to be misled or confused as to the source of the respective services. Therefore, Applicant respectfully requests that the Trademark Examiner reconsider and withdraw the citation to the mark in the Cited Registrations.

If the Trademark Examiner requires further information from the Applicant, it is respectfully requested that he contact the undersigned to expedite the matter.

Publication is respectfully requested.

Respectfully Submitted,

Consolidated Pipe and Supply Company, Inc.

/cbrandonbrowning/

By _____
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CBB

Enclosures – Exhibits A through F