

Date: May 22, 2019

To: USPTO

From: Satinder Singh, Compliance Advisor a Law Firm

Re: Response to Office Action – Libra – 88212759 – 2/12/2019

Summary of Issues

- Section 2(d) – Likelihood of Confusion – Classes 30 and 32 Only

Section 2(d) – Likelihood of Confusion – Classes 30 and 32 Only

The stated refusal refers to International Classes 30 and 32 only and does not bar registration in the other class.

Registration of the applied-for mark is refused because of a likelihood of confusion with the mark in U.S. Registration Nos. 5479848, 5009090, 4326246, and 4519602. Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 et seq.

The Applicant's Mark is "LIBRA" for, in part, "Beverages made of coffee; Beverages made of tea; Coffee – based iced beverages; Confectioneries, namely, snack foods, namely, chocolate; Frozen confections; Grain-based snack foods; Herbal food beverages; Multigrain-based snack foods; Rice-based snack foods; Snack foods, namely, chocolate-based snack foods; Tea-based beverages; Tea-based ice beverages; Wheat-based snack foods" in International Class 30 and "Water beverages; Bottled water; Bottled drinking water; drinking water; drinking water with vitamins; Flavored bottled water; Flavored enhanced water; Flavoured mineral water; Mineral water; Non-alcoholic beverage, namely, carbonated beverages; Soda water; Sparkling water; spring water; still water" in International Class 32.

The cited registrations are:

"AQUA LIBRA" (Reg. No. 5479848) for "Non-alcoholic beverages, namely, fruit flavoured beverages; drinking waters; flavoured waters; beverages, namely vegetable juices; non-alcoholic fruit beverages; fruit drinks and fruit juices; fruit flavoured drinks; herbal based beverages, namely, herbal juices; fruit nectars; energy drinks; non-alcoholic aperitifs; non-alcoholic cocktails; non-alcoholic cordials; non-alcoholic fruit flavoured squashes; carbonated non-alcoholic drinks; syrups and concentrates for beverages; slush drinks namely, semi frozen carbonated and non-carbonated beverages; flavouring tablets, powders, pastilles; sodas; sherbet beverages; preparations for making beverages namely, syrups and concentrates for making fruit drinks, fruit juices, sports drinks, energy drinks, non-alcoholic fruit cordials, non-alcoholic herbal based beverages and cordials" in International Class 32.

"LIBRA" (Reg. No. 5009090) for "Coffee" in International Class 30.

"LIBRA VALUE SELECT" (Reg. No. 4326246) for, in part, "Rice; rice-based snack foods and products made from rice, namely, snack bars, bread, chips, cereal, flour, biscuits, cookies, custard, noodles, vermicelli, edible rice paper, pudding, frozen rice entrees, prepared rice entrees, packaged rice entrees" in International Class 30.

"LIBRA FAMILY CHOICE" (Reg. No. 4516902) for "Rice" in International Class 30.

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the

goods and/or services of the parties. See 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A 1973) (called the “*du Pont factors*”). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2s 1744, 1747 (Fed. Cir. 2017). Only those factors that are “relevant and of record” need be considered. *M2 Software, Inc. v. m2 Commc’ns, Inc.*, 450 F.3d 1378, 1382, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1241, 73 USPQ2d 1350, 1353 (Fed. Cir. 2004)); see *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018).

Although not all *du Pont factors* may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and/or services. See *In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.); TMEP §1207.01.

Here, respectfully, the Examiner has erred in its determination that the Applicant’s Mark should be refused from the USPTO register because there would be likelihood of confusion with marks listed herein. The Examiner has in some comparisons failed to compare the entireties of the marks, the differences in the goods represented by the marks, and the Examiner also failed to take into consideration the fact that the third-party marks already on the USPTO register, including the marks the Examiner has mentioned for comparison, weaken the Examiners argument to refuse the Applicant’s mark. Furthermore, the Examiner must consider the target audience and the proposition provided by each mark. The Applicant’s marks and the referred to marks attract different consumers as the Applicant’s mark focuses on those who believe in Zodiac calendar. Furthermore, the likelihood of confusion is minimal as the marketing will contain distinct references alluding to only one interpretation, the zodiac calendar.

Comparison of Marks

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 Cliquot Ponsardin Maison Fondée 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 Inn at St. John’s, LLC*, 126 USPQ2d at 1050 (citing *In re Dixie Rests.*, 105 F.3d at 1407, 41 USPQ2d at 1533-34).

Marks that are identical in appearance sound, and meaning, “and have the potential to be used...in exactly the same manner.” *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) *aff’d* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017). Additionally, if marks are identical, they are likely to engender the same connotation and overall commercial impression when considered in connection with applicant’s and registrant’s respective goods and/or services. *Id.*

There is no mechanical test to determine the dominant element of a mark, consumers would be more likely to perceive a distinctive term, even if suggestive, rather than a generic or descriptive term as the source-identifying feature of the mark. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059-60 (TTAB 2017) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009)).

MEMORANDUM

Although the applicant's mark may not contain the entirety of the registered mark, the applicant's mark is likely to appear to prospective purchasers as a shortened form of the registrant's mark. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (*quoting United States Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985)). Thus, merely omitting some of the wording from a registered mark may not overcome a likelihood of confusion. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257; *In re Optica Int'l*, 196 USPQ 775, 778 (TTAB 1977); TMEP §1207.01(b)(ii)-(iii).

Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii). The disclaimed matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant when comparing marks. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (*citing In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TMEP §1207.01(b)(viii), (c)(ii).

Registration No. 5009090

The first comparison is between the Registered Mark No. 5009090 "LIBRA" and the Applicant's mark. The Applicant concedes that the Applicant's Mark and the Registered Mark are similar but the goods associated with the Applicant's Mark are so substantially different, as discussed below, that there would be a substantially different commercial impression and therefore there would be little likelihood of confusion, among reasonable purchasers as to the origin of the goods.

Registration No. 5479848

The second comparison is between the Registered Mark No. 5479848 "AQUA LIBRA" and the Applicant's Mark. The Examiner in its Office Action Letter dated February 12, 2019 does not take into consideration the difference of the marks in its analysis, and therefore has not compared the marks in their entirety. Although the Applicant's Mark "LIBRA" is contained in the Registered Mark, the Registered Mark also contains the descriptor "AQUA" as part of its mark. The descriptor "AQUA" invokes the commercial impression of the color, water, fluid, the ocean and other bodies of water, etc. which makes it distinct. Although the word "AQUA" is only a descriptor and is not the more dominant feature of the Registered Mark, because of the similarities between the primary word in each mark, "LIBRA", the descriptor creates a substantial difference in the commercial impression of the mark and therefore eliminates any possible likelihood of confusion among reasonable purchasers as to the origin of the goods.

Registration No. 4326246

The third comparison is between the Registered Mark No. 4326246 "LIBRA VALUE SELECT" and the Applicant's Mark. The Examiner in its Office Action Letter dated February 12, 2019 does not take into consideration the difference of the marks in its analysis, and therefore has not compared the marks in their entirety. Although the Applicant's Mark "LIBRA" is contained in the Registered Mark, the Registered Mark also contains the descriptor "VALUE SELECT" as part of its mark. The descriptor "VALUE SELECT" invokes the commercial impression of a deal, bargain, or sale on a premium product, which makes it distinct. Although the words "VALUE SELECT" are only a descriptor and are not the more dominant feature of the Registered Mark, because of the similarities between the primary word in each mark, "LIBRA", the descriptive words create a substantial difference in the commercial impression that

the mark makes on purchasers and therefore eliminates any possible likelihood of confusion among reasonable purchasers as to the origin of the goods

Registration No. 4519602

The fourth comparison is between the Registered Mark No 4519602 “LIBRA FAMILY CHOICE” and the Applicant’s Mark. The Examiner in its Office Action Letter dated February 12, 2019 does not take into consideration the difference of the marks in its analysis, and therefore has not compared the marks in their entirety. Although the Applicant’s Mark “LIBRA” is contained in the Registered Mark, the Registered Mark also contains the descriptor “FAMILY CHOICE” as part of its mark. The descriptor “FAMILY CHOICE” invokes the commercial impression of family, wholesome values, and premium or select products, which makes it distinct. Although the words “FAMILY CHOICE” are only a descriptor and are not the more dominant feature of the Registered Mark, because of the similarities between the primary word in each mark, “LIBRA”, the descriptive words create a substantial difference in the commercial impression that the mark makes on purchasers and therefore eliminates any possible likelihood of confusion among purchasers as to the origin of the goods.

Comparison of the Goods and/or Services

The compared goods and/or services 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); TMEP §1207.01(a)(i). they 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 [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 v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i). In the present case, the marketing of the products focuses on two different things, the zodiac calendar and the one is simply a name that the Registrant uses. The commercial impression is clearly unique and distinct.

Determining likelihood of confusion is based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1307, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (*citing In re i.am.symbolic, llc*, 866 F.3d 1315, 1325, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)

The registrant’s use of broad wording to describe goods and/or services presumably encompasses all goods of the type described including registrant’s more narrow description of goods and/or services. *See e.g., In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). If an application uses broad wording to describe goods and/or services which presumably encompass all goods and/or services of the type described, including those listed in the registration. *See, e.g., In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007 1025 (TTAB 2015). If so, it would make the applicant’s and registrant’s goods legally identical. *See, e.g., In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2017) (*citing Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.* 648 F.2d 1335, 1336, 209 USPQ 986, 988 (C.C.P.A. 1981); *Inter IKEA Sys., B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004). However, the fundamental difference would still remain, the commercial impression would be distinct.

Additionally, the goods of the parties have no restrictions as to nature, type, channels of trade, or classes of purchasers and are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)).

If there is evidence that establishes that the same entity commonly manufactures and provides the relevant goods and/or services under the same mark than the applicant’s and registrant’s goods and/or services may be considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009)

Registration No. 5479848

Here the goods represented by the Registrant’s Mark “AQUA LIBRA” (Reg. No. 5479848) are “Non-alcoholic beverages, namely, fruit flavoured beverages; drinking waters; flavoured waters; beverages, namely vegetable juices; non-alcoholic fruit beverages; fruit drinks and fruit juices; fruit flavoured drinks; herbal based beverages, namely, herbal juices; fruit nectars; energy drinks; non-alcoholic aperitifs; non-alcoholic cocktails; non-alcoholic cordials; non-alcoholic fruit flavoured squashes; carbonated non-alcoholic drinks; syrups and concentrates for beverages; slush drinks namely, semi frozen carbonated and non-carbonated beverages; flavouring tablets, powders, pastilles; sodas; sherbet beverages; preparations for making beverages namely, syrups and concentrates for making fruit drinks, fruit juices, sports drinks, energy drinks, non-alcoholic fruit cordials, non-alcoholic herbal based beverages and cordials” in International Class 32.

In its Office action letter dated February 12, 2019 the Examiner states that the Applicants applied for goods conflicts with the goods represented by Registrant’s Mark in part. Here the Applicant’s Mark is for, “Beverages made of tea; Tea-based beverages; Tea-based ice beverages; Water beverages; Bottled water; Bottled drinking water; drinking water; drinking water with vitamins; Flavored bottled water; Flavored enhanced water; Flavoured mineral water; Mineral water; Non-alcoholic beverage, namely, carbonated beverages; Soda water; Sparkling water; spring water; still water”.

The Applicant concedes that the goods of the Registrant’s Mark and the goods of the Applicant’s mark are similar, but the Applicant contends that there is a substantial enough difference between the commercial impression of the Registrant’s Mark and the Applicant’s Mark and therefore there would be no likelihood of a purchaser mistaking the origin of the goods

Registration No. 5009090

Here the goods represented by the Registered mark “LIBRA” (Reg. No. 5009090) are “Coffee” in International Class 30.

In its Office action letter dated February 12, 2019 the Examiner states that the Applicants applied for goods conflicts with the goods represented by the Registrant’s Mark in part. Here the Applicant’s Mark is for, “Beverages made of coffee; Coffee – based iced beverages”. The Applicant contends that the goods of the Registrant’s Mark and the goods of the Applicant’s Mark not similar because the goods of the Registrant’s Mark is for the category of coffee. The Applicant’s Mark only represents coffee-based beverages. This is at most a small subset of the goods that the goods of the Registrant’s Mark may apply to. This substantial difference in the type of goods that are represented by the marks shows that a likelihood of confusion of a purchaser as to the origin of the goods in unlikely.

In addition, the Applicant also contends that there is a substantial enough difference between the commercial impression of the Registrant's Mark and the Applicant's Mark and therefore there would be no likelihood of a purchaser mistaking the origin of the goods

Registration No. 4326246

Here the good represented by the Registrant's Mark "LIBRA VALUE SELECT" (Reg. No. 4326246) are, in part, "Rice; rice-based snack foods and products made from rice, namely, snack bars, bread, chips, cereal, flour, biscuits, cookies, custard, noodles, vermicelli, edible rice paper, pudding, frozen rice entrees, prepared rice entrees, packaged rice entrees" in International Class 30.

In its Office action letter dated February 12, 2019 the Examiner states that the Applicants applied for goods conflicts with the goods represented by the Registrant's Mark, in part. Here the Applicant's Mark is for "Confectioneries, namely, snack foods, namely, chocolate; Frozen confections; Grain-based snack foods; Herbal food beverages; Multigrain-based snack foods; Rice-based snack foods; Snack foods, namely, chocolate-based snack foods; Wheat-based snack foods"

The Applicant concedes that the goods of the Registrant's Mark and the goods of the Applicant's Mark are similar, but the Applicant contends that there is a substantial enough difference between the commercial impression of the Registrant's Mark and the Applicant's Mark and therefore there would be no likelihood of a purchaser confusing the origin of the goods

Registration No. 4516902

"LIBRA FAMILY CHOICE" (Reg. No. 4516902) for "Rice" in International Class 30.

In its Office action letter dated February 12, 2019 the Examiner states that the Applicants applied for goods conflicts with good represented by the Registrant's Mark, in part. Here the Applicant's Mark is for "Rice-based snack foods". The Applicant concedes that the goods of the Registrant's Mark and the goods of the Applicant's Mark are similar, but the Applicant contends that there is a substantial enough difference between the goods of the Registrant's Mark and the Applicant's Mark and therefore there would be no likelihood of a purchaser mistaking the origin of the goods. Here, the Applicant's goods are distinctly for Rice based snack foods, whereas the Registrant's Mark's good is solely Rice. Rice based snack foods represent, at most, a small subset of the goods that the goods of the Registrant's Mark may apply to. This substantial difference in the type of goods that are represented by the marks shows that a likelihood of confusion of a purchaser as to the origin of the goods is unlikely.

In addition, the Applicant also contends that there is a substantial enough difference between the commercial impression of the Registrant's Mark and the Applicant's Mark and therefore there would be no likelihood of a purchaser mistaking the origin of the goods

Third Party Marks

It appears that the Examiner has also not considered the third-party use of other substantially similar registered marks that are considered by the USPTO not likely to cause confusion.

Generally, the existence of third-party registrations cannot justify the registration of another mark that is so similar to a previously registered mark as to create a likelihood of confusion, or to cause mistake, or to deceive. *E.g., In re Max capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010); *In re Toshiba Med. Sys. Corp.* 91 USPQ2d 1266, 1272 (TTAB 2009). However, active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. *See e.g., In re i.am.symbolic, llc*

886 F.3d 1315, 123 USPQ 2d 1744 (Fed. Cir. 2017); *Jack Wolfskin Ausrüstung Fu Daussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.* 797 F.2d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters, LLC*, 794 F.3d 1334 1338-40, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); *Primrose Ret. Cmtvs., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016); *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *Plus Prods. V. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). Properly used in this limited manner, third-party registration similar to dictionaries showing how language is generally used. *See, e.g. Tektronix, Inc. v. Daktronics Inc.*, 534 F.2d 915, 917, 189 USPQ 693, 694095 (C.C.P.A. 1976); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987). However, cancelled or expired third-party registrations for similar marks are not probative evidence of a mark's descriptiveness, suggestiveness, or strength. *See Bond v. Taylor*, 119 USPQ2d 1059, 1054 n. 10 (TTAB 2106).

Third-party registrations that cover a number of different goods or services may have some probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source, if the registrations are based on use in commerce. *Hewlett-Packard Co. v. Packard Press, Inc.* 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)(evident that “a single company sells goods and services of both parties, if presented, is relevant to the relatedness analysis”); *In re Mucky Duck Mustard Co.* 6 USPQ2d 1567, 1470 n.6 (TTAB), *aff'd per curiam*, 864 F.2d 149 (Fed. Cir. 1988); *see also In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509, 1511 (TTAB 2010) (“While third-party registrations can play an important role in establishing that the types of goods at issue are related, examining attorneys must review the review the registrations carefully to ensure that each registration presented is probative and that the number of registrations is sufficient, along with other types of evidence, to establish that the types of goods at issue are related.”) Third-party registrations that are not based on use in commerce, such as those registered under §66 of the Trademark Act. (15 U.S.C. §1141f(a)), or those registered solely under §44 of the Trademark Act (15 U.S.C. §1126(e)), and for which no §8 or §71 affidavits or declaration of continuing use have been filed (15 U.S.C. §1058), have very little, if any persuasive value. *See Calypso Tech. Inc. v. Calypso Capital Mgmt, LP*, 100 USPQ2d 1213, 1221 n.15 (TTAB 2011); *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

A list of registrations or a copy of a search report is not proper evidence of third-party registrations. *See, e.g. In re Promo Ink*, 78 USPQ2d 1301, 1304 (TTAB 2006); 78 USPQ2d 1301, 1304 (TTAB 2006); *In re Dos Padres, Inc.*, 49 USPQ2d 1860, 1861 n.2. (TTAB 1998); TBMP §1208.02. To make registration of record, copies of the registrations or the electronic equivalent thereof (i.e. printouts or electronics copies of the registrations taken from the electronic database of the USPTO) must be submitted. *In re Ruffin Gaming, LLC*, 66 USPQ2d 1924, 1925 n.3 (TTAB 2002); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (TTAB 1994); TBMP §1208.02; TMEP §710.03.

Evidence of third-party use falls under the sixth du Pont factor – the “number and nature of similar marks in use on similar goods.” *In re E.I. du Pont de Nemours & Co.* 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). If the evidence establishes that the consuming public is exposed to third-party use of similar marks on similar, it “is relevant to show that the mark is relatively weak and entitles to only a narrow scope of protection. *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772* 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1683 (Fed. Cir. 2005); *see also In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1675 (TTAB 2018) (finding the component term SMOKING HOT in the marks I'M SMOKING HOT and SMOKIN' HOT SHOW TIME to be “somewhat weak” based in part on evidence of third-party use of the

term on similar cosmetics goods, noting that such uses “tend to show consumer exposure to third-party use of the term on similar goods”); *Mini Melts, Inc. v. Reckitt Benckiser LLC* 118 USPQ2d 1454, 1470 (TTAB 2016) (noting that evidence that third parties had adopted marks that were the same as or similar to opposer’s mark for use in connection with food products “may show that a term carries a highly suggestive connotation in the industry and, therefore, may be considered weak”); but see *Lilly Pulitzer, Inc. v. Lilly Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (“the existence of confusingly similar marks already on the register will not aid an applicant to register another confusingly similar mark.”)

Currently, there are FIFTY-NINE (59) registered marks on the USPTO TESS database with the mark or a substantially similar mark to “LIBRA”. FOUR (4) of those marks have goods that are substantially similar to the goods of applicant including the marks, the four Registered Marks as discussed herein. (See attached as “Exhibit A”). The number of similar marks registered with the USPTO register weaken the protection given to each of those registered marks. The existence of these marks on the USPTO register weakens the Examiner’s conclusion to refuse the applicant’s ability to register its mark on the USPTO

Conclusion

Respectfully, the conclusion that there would be a likelihood of confusion between the registrant’s mark and the applicant’s mark is incorrect. Although the two marks are similar, the other *du Pont factors* including the differences in the goods, marketing, target consumers and the additional third-party marks that have been registered all weigh against any likelihood of confusion between the two marks.