Applicant Third Eye Comics Inc. seeks registration of the mark

for "golf flags" ("Applicant's Mark"). The examining attorney has issued a refusal to register the mark under Section 2(d), 15 U.S.C. §1052(d), because of likelihood of confusion with the registered trademarks HALO and RFI HALO both for "golf clubs" ("the Cited Marks"). Applicant respectfully disagrees for the reasons discussed herein.

A likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the thirteen factors set forth in *In re E.I. Du Pont DeNemours & Co*., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). Whether a likelihood of confusion exists is a question of law based on underlying facts and evidence. *In re Dixie Restaurants, Inc*., 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). Moreover, "not all of the Du Pont factors are relevant or of similar weight in every case." *Opryland USA Inc. v. Great Am. Music Show*, 23 USPQ2d 1471, 1473 (Fed. Cir. 1992). The various Du Pont factors "may play more or less weighty roles in any particular determination." *In re Shell Oil*, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). Further, any one of the factors may control a particular case. Du Pont, 476 F.2d at 1361-62, 177 USPQ at 567. In the present case the different channels of trade (Du Pont factor 3) and, thus, the lack of any overlap in potential purchasers, makes confusion impossible.

The evidence offered by the examining attorney comprises several third-party trademark registrations that show golf clubs and golf flags registered under a single trademark. Such registrations always have limited probative value. *In re Mucky Duck Mustard Co. Inc*., 6 U.S.P.Q.2d 1467, 1470 n.6 (T.T.A.B. 1988). ("Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have *some probative value* to the extent that they *may serve to suggest* that such goods or services are of a type which may emanate from a single source.") (emphasis added).

Applicant's golf clubs are offered to the general consuming public (i.e. golfers). In contrast, golf flags are purchased by golf course owners. There is thus no overlap in the normal channels of trade for these goods. In *In re Bentley Motors Ltd.* Serial No. 85325994 (December 3, 2013) the Board stated:

> "In a particular case, any of the du Pont factors may play a dominant role. In re E. I. du Pont de Nemours & Co., 177 USPQ at 567. In fact, in some cases, a single factor may be dispositive. Kellogg Co. v. Pack'em Enterprises Inc., 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("we know of no reason why, in a particular case, a single du Pont factor may not be dispositive"). In the present case, the lack of evidence showing an overlap in the channels of trade for applicant's and registrants' products is pivotal. See, e.g., In re HerbalScience Group LLC, 96 USPQ2d 1321, 1324 (TTAB 2010) ("There is nothing in this record to show that a normal channel of trade for dietary and nutritional supplements is that they are sold to the companies that would purchase applicant's identified goods."). Because we find that the amendment to

> restrict applicant's channel of trade means "there is virtually no opportunity for confusion to arise" (Id. at 1324), we need not consider the other du Pont factors discussed by the examining attorney and applicant."

For the reasons explained herein, Applicant respectfully requests that the examining attorney withdraw the refusal to register Applicant's Mark and approve it for publication in due course.