

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK EXAMINING DIVISION

APPLICANT : FCA US LLC  
TRADEMARK : DODGE HORNET  
SERIAL NO : 88818233

Christopher J Nodes  
Examining Attorney  
Law Office 116

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**RESPONSE TO FIRST OFFICE ACTION**

Applicant, FCA US LLC, f/k/a Chrysler Group LLC (“FCA US” or “Applicant”), submits the following Response to the May 6, 2020 First Office Action issued by Examining Attorney Christopher J Nodes, Law Office 116, regarding the above-referenced application.

For the reasons set forth below, Applicant respectfully submits that Applicant’s mark is not likely to cause confusion with Registration No. 1680241 or 2149016 cited by the Examining Attorney and requests that Applicant’s mark be approved for registration.

**I. ARGUMENT**

**A. Introduction**

The Examining Attorney has refused registration under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d), because of a purported likelihood of confusion between Applicant’s mark, DODGE HORNET, in International Class 12 for “Land vehicles, namely, passenger automobiles”, and U.S. Registration No. 1680241 owned by Voxx International Corporation (“Voxx Registrant”) for HORNET, in International Class 12 for “anti-theft alarms for vehicles”, and U.S. Registration No. 2149016 owned by Keystone RV Company (“Keystone Registrant”) for HORNET in International Class 12 for “recreational vehicles, namely, travel trailers and fifth wheel trailers.”

In support of the likelihood of confusion refusal, the Examining Attorney has argued that “In this case, the applicant’s goods in Class 12 are related to the anti-theft alarms for vehicles in

Registration No. 1680241 because they are often sold under the same mark and by the same retailers, and are targeted at the same purchasers” and the “applicant’s goods in Class 12 are related to the “recreational vehicles, namely, travel trailers and fifth wheel trailers” in Registration No. 2149016 because they are often provided by the same sources, and are targeted at the same purchasers.” The Examining Attorney also attached printouts from the websites of three automobile manufactures that sell anti-theft alarms and three recreational vehicle dealers that sell used cars.

The Examining Attorney’s conclusions are misplaced. First, Applicant’s mark includes its famous DODGE mark as a primary element which will clearly indicate the source of Applicant’s goods to consumers. Applicant’s passenger automobiles are also sold by its authorized DODGE brand dealers. The attached websites do not support his finding that the passenger automobiles provided by Applicant through its authorized dealers, and the anti-theft alarms provided by the Voxx Registrant or the travel and fifth wheel trailers provided by the Keystone Registrant (which *are not* Applicant’s authorized dealers), are necessarily closely related. The mere fact that Applicant’s goods and Registrants’ goods both broadly relate to “vehicles” does not automatically mean that the goods at issue are related or that consumers are likely to be confused. To the contrary, the evidence of record supports that they are not related in this instance. This is particularly true here, where full consideration of the relevant *DuPont* factors clearly demonstrates that confusion is not likely.

**B. No Likelihood of Confusion**

In determining the issue of likelihood of confusion, the Trademark Office must consider the thirteen evidentiary factors listed in *In re E. I. DuPont De Nemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). The similarity of the marks in their entirety as to appearance, sound,

connotation and commercial impression is just one factor for consideration in a likelihood of confusion analysis. See *In re SL&E Training Stable, Inc.*, 88 U.S.P.Q.2d 1216, 2008 WL 4107225 (T.T.A.B. 2008). The TTAB has held that the likelihood of confusion analysis must be based upon consideration of all relevant *DuPont* factors (i.e., all the known circumstances surrounding the use of the mark), not only on the “sound, sight and meaning” trilogy. *In re E. I. DuPont De Nemours & Co, supra*; *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 223 U.S.P.Q. 1281 (Fed. Cir. 1984). An equally important factor is a comparison of the goods/services at issue and a review of all of the known circumstances surrounding use of the marks in the relevant marketplace, because if the goods and services are not related in a manner that would cause consumer confusion, there is no likelihood of confusion.

Confusion between Applicant’s Mark and Registrants’ Marks would be unlikely because the appearance, sound, connotation, and commercial impressions of Applicant’s Mark and Registrants’ Mark, when considered in their entirety, are substantially different. “That marks must be considered in their entirety in determining whether there is a likelihood of confusion or mistake is a basic rule in comparison of marks.” *Massey Junior College, Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1402 (C.C.P.A. 1974). As the Supreme Court has noted, “[t]he commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety.” *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 545–46 (1920); see also *In re Hearst Corp.*, 982 F.2d 493, 494 (Fed. Cir. 1992) (“Marks tend to be perceived in their entirety, and all components thereof must be given appropriate weight”). The Board has explained further that “it is the entire mark which is perceived by the purchasing public, and, therefore, it is the entire mark that must be compared to any other mark. It is the impression created by the involved

marks, each considered as a whole, that is important.” *Genesco Inc. v. Martz*, 66 U.S.P.Q.2d 1260, 1269 (T.T.A.B. 2003); accord *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (C.C.P.A. 1981) (MM design not confusingly similar to FM design); *New England Fish Co. v. Herwin Co.*, 511 F.2d 562, 563 (C.C.P.A. 1975) (BLUE MOUNTAIN KITTY O’s for cat food not confusingly similar to KITTY for same).

With respect to Applicant’s Mark and Registrants’ Mark, the Examining Attorney concluded that the marks are confusingly similar simply because “DODGE HORNET” and “HORNET” both share the wording “HORNET”. However, Applicant’s and Registrants’ respective marks differ in both sound and appearance. The Examining Attorney ignored the critical first portion of Applicant’s mark – “DODGE” which is one of Applicant’s famous brands of automobiles, and for which Applicant and its predecessors have owned a registration for automobiles since January 20, 1953 and first used the mark in commerce for automobiles in 1914. See U.S. Registration No. 0569431 for DODGE in Class 12 for “Automobiles and their structural parts.” Thus, the wording “DODGE” is significant as it specifically conveys to consumers that Applicant is the source of the goods and is an Original Equipment Manufacturer (OEM) of the famous line of DODGE brand vehicles.

In concluding that Applicant’s Mark is likely to be confused with Registrants’ Mark, the Examining Attorney clearly considered Applicant’s DODGE HORNET Mark similar in appearance, sound connotation, and commercial impression to Registrants’ Marks because of the single common element, i.e. “HORNET”. Courts have consistently rejected this type of argument. “Even close similarity between two marks is not dispositive of the issue of likelihood of confusion.” *Lever Bros. Co. v. American Bakeries Co.*, 693 F.2d 251, 257 (2d Cir. 1982) (finding AUTUMN GRAIN for bread not confusingly similar to AUTUMN for margarine).

*Accord Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373 (Fed. Cir. 1998) (finding CRISTAL for champagne not confusingly similar to CRYSTAL CREEK for wine). “Similarity in and of itself is not the acid test.” *McGregor-Doniger, Inc. v. Drizzle, Inc.*, 599 F.2d 1126, 1133 (2d Cir. 1979).

Moreover, even if the marks were identical, which they are not, it is well established that even identical marks for similar goods or services may not necessarily create a likelihood of confusion. *See, e.g., In re Mars, Inc.*, 741 F.2d 395 (Fed. Cir. 1984) (finding CANYON for fruit not likely to be confused with CANYON for candy bars); *Kiekhaefer Corp. v. Willys-Overland Motors, Inc.*, 236 F.2d 423 (C.C.P.A. 1956) (holding HURRICANE for outboard motors not likely to be confused with same mark for auto engines); *IDV North Am., Inc. v. S & M Brands, Inc.*, 26 F. Supp. 2d 815 (E.D. Va. 1998) (holding BAILEY’S for liqueurs not likely to be confused with BAILEY’S for cigarettes); *Modular Cinemas of Am., Inc. v. Mini Cinemas Corp.*, 348 F. Supp. 578 (S.D.N.Y. 1972) (holding MINI CINEMA for family movie theaters not confusingly similar to MINI CINEMA for an erotic movie theater); *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854 (T.T.A.B. 1984) (finding PLAYERS for shoes not confusingly similar to same mark for men’s underwear). *See also Freedom Sas. & Loan Ass’n v. Way*, 757 F.2d 1176, 1183 (11th Cir. 1985) (FREEDOM REALTY not confusingly similar to FREEDOM SAVINGS AND LOAN); *see also In re Bed & Breakfast Registry*, 791 F.2d 157 (Fed. Cir. 1986) (BED & BREAKFAST REGISTRY for making lodging reservations for others not likely to be confused with BED & BREAKFAST INTERNATIONAL for room booking services).

When all of the known circumstances surrounding the use of Applicant’s and Registrants’ respective marks in the relevant marketplace are considered, it is clear that confusion is not likely. Indeed, because Applicant’s goods are sold through its authorized dealers and neither of

the Registrants are one of Applicant's authorized dealers, and because Applicant's and Registrants' respective goods are not similar, are not in head-on competition in the same market, and are sold to careful and sophisticated purchasers, Applicant's mark and Registrants' marks are not likely to be confused.

**1. The Goods And Services At Issue Are Not Closely Related.**

The Examining Attorney found that the goods offered under Applicant's Mark are "related" to the goods offered under each of the Registrants' Marks. Applicant respectfully disagrees. It is well established that "use in the same broad field is not sufficient to demonstrate that a genuine issue exists concerning likelihood of confusion." *Elec. Design & Sales, Inc. v. Elec. Data Sys. Co.*, 954 F.2d 713, 716, 21 U.S.P.Q.2d 1388, 1391 (Fed. Cir. 1992). Further, *per se* rules for categories of supposedly related goods or services are "improper and inconsistent with § 2(d) of the Lanham Act." *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 928, 198 U.S.P.Q. 151, 153 (C.C.P.A. 1978) (no likelihood of confusion between ZINGERS for cakes and RED ZINGER for herb tea); *see also In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854 (no likelihood of confusion between PLAYERS for shoes and PLAYERS for men's underwear).

In the present case, the Examining Attorney has improperly applied a *per se* rule that use of the same mark on goods and services in the broad category of "vehicle" related goods and services will cause confusion. However, merely because both Applicant's goods and each of the Registrant's goods relate to vehicles does not mean that confusion must result. Applicant's and Registrants' goods used in connection with their respective HORNET marks inhabit different parts of the motor vehicle market. Simply put, consumers seeing Applicant's use of DODGE

HORNET for passenger automobiles will not think of the Voxx Registrant’s anti-theft alarms or the Keystone Registrant’s travel and fifth wheel trailers.

The reality of the motor vehicle market is that consumers are accustomed to seeing the same mark used for different types of goods and services that fall under the broad “vehicle” category, and they are not necessarily confused as to the source of such goods. This is exemplified by the fact that the USPTO has consistently allowed the coexistence of the same or similar marks for passenger automobile model names or other vehicle names *and anti-theft devices and trailers* owned by different entities as outlined in the chart below. For example, the marks VENOM, VIPER, PANTHER an PYTHON are all owned, or have been owned, by different registrants for passenger automobiles or other vehicles and anti-theft alarms, *including the Voxx Registrant and Applicant*. In addition, the marks BLACKHAWK, FUSION, TRAILBLAZER and SPRINTER are also all owned, or have been owned, by different registrants for passenger automobiles and other vehicles and trailers (travel and fifth-wheel), *including the Keystone Registrant*. Examples of the same or similar marks registered for passenger automobiles or other vehicles and anti-theft alarms and trailers include:

Mark	Goods/Services	Owner	Ser./Reg. No.
VENOM	Automobiles and structural parts therefor	HPE Design, LLC	4924931
VENOM	Anti-theft alarms for vehicles; anti-theft alarm systems for vehicles comprising electronic sensors, sirens, remote control transmitters and receivers; and replacement parts for the foregoing.	Voxx International Corporation	2404885
VIPER	Automobiles and structural parts therefore	FCA US LLC	1800654
VIPER	Vehicle tracking devices comprised of cellular radio modules, computer software and computer hardware, sensors, transmitters, receivers and global positioning satellite receivers, all for use in connection with vehicle tracking, vehicle monitoring and anti-theft vehicle alarms.	Voxx International Corporation	3000663
PANTHER	Anti-theft alarm units for vehicles and parts therefor.	Voxx International Corporation	4355385

PANTHER	Land vehicles; utility terrain vehicles (UTVs); all-terrain vehicles; tracked vehicles, namely, all-terrain, self-propelled tracked carriers; tractors; tracked vehicles for transporting materials and people, namely, all-terrain, self-propelled tracked carriers; all-terrain vehicles and structural parts for these vehicles, namely, mills, winches, trailers, cabs, tracks and chains, excluding transmission belts and other transmission components; all of the aforesaid vehicles for use in connection with land clearing, removing beetle-infested wood, and extracting plants from the soil for right-of-way maintenance, drilling soil, extracting wood, vegetation and weeds from soil, harvesting biomass, plants and wood; and excluding aluminum alloy wheels for automobiles; crankshafts for internal combustion engines, blast-protected armored vehicles, fire and rescue vehicles, anti-theft alarm units for vehicles and parts therefore, and amphibious vehicles; all aforesaid goods excluding crop and beet harvester	Trackfin GmbH	6092888
PYHTON	Vehicle tracking devices, namely cellular radio modules, computer software and computer hardware, sensors, transmitters, receivers and global positioning satellite receivers, all for use in connection with vehicle tracking, vehicle monitoring and anti-theft vehicle alarms and associated wireless, cellular, network services, namely geofencing, roadside assistance, speed notification and vehicle usage monitoring.	Vox International Corporation	2895459
PYTHON	Amphibious vehicles	March, J. David	3750394
BLACKHAWK & DESIGN	Trailers	E.D. Etnyre & Co.	2951805
STUTZ BLACKHAWK	Automobiles	Stutz Motor Car of America, Inc.	4224264
FUZION	Trailers	Thor Tech, Inc.	3255470
FUSION	Motor vehicles, namely, automobiles	Ford Motor Company	3109881
TRAILBLAZER	Travel trailers, fifth wheel trailers	Thor Tech Inc.	2629101
TRAILBLAZER	Motor vehicles, namely, sport utility vehicles, engines thereof and structural parts therefor	General Motors Corporation	2257873
SPRINTER	Recreational <b>vehicles</b> , namely, fifth-wheels, travel trailers,	Keystone RV Company	2249313
SPRINTER	*Delivery * vans and their structural parts, excluding recreational <b>vehicles</b>	DaimlerChrysler AG	2631131



The USPTO has also consistently allowed the registration and coexistence of numerous different types of vehicle-related products when owned by different entities. For example, the marks, OUTLAW, PREDATOR, RANGER, SPORTSMAN, TRAIL BLAZER and TRAILHAWK (to name just a few) are all owned by different entities in connection with different types of vehicle related goods as outlined in the following chart:

Mark	Goods/Services	Owner	Ser./Reg. No.
BLACKHAWK & DESIGN	Trailers	E.D. Etnyre & Co.	2951805
BLACKHAWK AUTOMOTIVE	Automobile and truck tools	Snap-On Incorporated	3946681
BREEZE	Automobiles and structural parts therefor	FCA US LLC	2057877
BREEZE	Electric low-speed and recreational vehicles, namely, golf carts, golf cars, and 4-wheeled land vehicles for use in primarily closed communities	Polaris Industries, Inc.	3842593 (Registered through April 7, 2017)
FUZION	Non-motorized scooters	Nextsport, Inc.	4436506
FUZION	Trailers	Thor Tech, Inc.	3255470
FUZION	Vehicle tires	Bridgestone Brands LLC	2882553
FUSION	Motor vehicles, namely, automobiles	Ford Motor Company	3109881
FUSION	Bicycles	Industries Rad Inc.	1890990
GLACIER	Motor vehicles, namely, passenger automobiles, their structural parts, trim and badges	FCA US LLC	4269692
GLACIER	Snow plow blades for all-terrain vehicles	Polaris Industries Inc.	2968437
LEGEND	[Automobiles and structural parts thereof]* Structural parts for automobile*	Honda Motor Co., LTD	1574715
LEGEND	Suspension systems for motorcycles.	Independent Cycle, Inc.	4262877
MAGNUM	Structural parts therefor [for motor vehicles]	FCA US LLC	2917994
MAGANUM	Internal combustion engines for motor vehicles used primarily for transportation and having multiple cylinders with a combined displacement of over two liters.	FCA US LLC	2419240
MAGNUM	Parts, fittings, and accessories for land vehicles	Northwood Games LLC	4124065
MAGNUM	Auto theft alarms for motor vehicles	Mitek Corporation	2560896

MAGNUM	Recreational vehicles, namely, fifth wheel trailers and truck campers.	Magnum Custom Trailer Manufacturing Company	2158428
OUTLAW	Recreational vehicles, namely motor homes	Thor Tech Inc.	3306995
OUTLAW	Automobile structural parts for racing purposes, namely, fuel storage cells	Aircraft Rubber Manufacturing, Inc.	3695448
OUTLAW CONVERTERS	Automotive parts, namely, high performance torque converters and transmissions, all for land vehicles	ATI Performance Products Inc.	3660899
PREDATOR	Industrial use land motor vehicles, namely trucks equipped for vacuum loading, transporting and dumping.	Guzzler Manufacturing, Inc.	1996827
PREDATOR	Monster trucks	Predator Racing Inc.	1927280
PREDATOR	Motor vehicle tires	Yokohama Tire Corporation	1505752
RANGER	Dual wheel drive heavy duty motorcycle	Rokon International Inc.	3201277
RANGER	Motor trucks for highway use	Ford Motor Company	0836232
SPORTSMAN	Concept motor vehicles, namely, pickup trucks	FCA US LLC	3908097 (Registered through August 25, 2017)
SPORTSMAN PRO	Tires	Max-Trac Tire Co., Inc.	2008576
SPORTSMAN RACING PRODUCTS	High performance automotive engine parts, namely pistons and piston rings	Delaware Capital Formation Inc.	1985999
SPORTSMAN	Automobile structural parts for racing purposes, namely, fuel storage cells	Aircraft Rubber Manufacturing, Inc.	3695446
SPORTSMAN	Pickup truck caps and pickup truck bed covers	Custom Fiberglass Manufacturing company	1621086
SPORTSMAN'S PARADISE	Recreational vehicles, namely, towable travel trailers and motor homes for use in hunting, fishing and camping	Margolis Group Inc.	4358363 (Registered through December 28, 2015)
TRAILBLAZER	Travel trailers, fifth wheel trailers	Thor Tech Inc.	2629101
TRAILBLAZER	Motor vehicles, namely, sport utility vehicles, engines thereof and structural parts therefor	General Motors Corporation	2257873
TRAILBLAZER	Bicycles	Pacific Cycle, LLC	2036101
TRAILHAWK	Motor vehicles, namely, passenger automobiles, their structural parts, trim and badges.	FCA US LLC	4280729
TRAIL HAWK	All-terrain vehicle tires.	Carlisle Intangible Co Corp	1885964 (Registered through January 15, 2019)

Consumers are already accustomed to distinguishing product sources in the motor vehicle industry, including in many circumstances, the sources of motor vehicles and anti-theft alarms or travel and fifth wheel trailers when goods are marketed under the same or similar marks.

Therefore, it follows that consumers would not confuse the sources of Applicant's DODGE HORNET passenger vehicles and Registrants' HORNET anti-theft alarms and trailers, especially when neither of the Registrants are one of Applicant's authorized dealers.

The above-referenced registrations displaying the same or similar marks owned and used by different companies for "vehicle" related goods demonstrate that consumers are used to seeing the same or similar marks for various vehicles and vehicle related parts and services and are not necessarily confused as to source in every instance. In other words, while the Examining Attorney's refusal is based upon a purported likelihood of confusion caused by the use of similar marks for passenger automobiles and anti-theft alarms and trailers, the market for these goods and services indicates that they are not necessarily related.

The coexistence of all of these marks in use and on the Principal Register further indicates that the *owners* of these marks do not believe that there is necessarily a likelihood of confusion between various motor vehicle related goods and services, including passenger automobiles and their parts or accessories and anti-theft alarms and trailers, and that the same or similar marks can coexist for various motor vehicle related goods and services without necessarily causing confusion or mistake in the marketplace. Indeed, if all these identical or similar marks have coexisted on the Principal Register, then it is both incongruous and inconsistent to hold that Applicant's DODGE HORNET mark cannot coexist with the Registrants' registrations without confusion as well.

In sum, the evidence of record clearly supports that passenger automobiles and anti-theft alarms and travel and fifth-wheel trailers, are not necessarily closely related.

## **2. Purchasers of Goods Under Applicant's Mark and Services Under Registrant's Mark Use Great Care in Their Purchasing Decisions, Thus Minimizing Risk of Confusion.**

In determining a likelihood of confusion, courts must examine “[t]he conditions under which, and buyers to whom, sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *In re E.I. Du Pont Nemours*, 476 F.2d at 1361. Where consumers are likely to exercise attention and care in selecting the provider of the goods or services sought, there is less likelihood of confusion. *See Checkpoint Sys., Inc. v. Check Point Software Tech., Inc.*, 269 F.3d 270 (3d Cir. 2001) (noting that purchasers who “take care in making purchasing decisions and are not likely to be confused by the parties’ similar marks”); *Homeowners Grp. v. Home Mktg.*, 931 F.2d 1100, 1111 (6th Cir. 1991) (no likelihood of confusion between HMS & Design for marketing and advertising services for real estate brokers and HMS & Design for real estate broker services because “selling one’s property is likely the most significant commercial transaction ever undertaken for most people, [Defendant’s] customers are likely to carefully select the provider of sales services”).

Additionally, where a product is provided at a significant cost, the purchasers of that product are more likely to be sophisticated, discriminating purchasers who are less likely to be confused. *See Checkpoint Sys., Inc.*, 269 F.3d at 276 (finding no likely confusion between plaintiff’s CHECKPOINT electronic surveillance and theft detection systems and defendant’s CHECK POINT for corporate computer firewall security programs); *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384 (2d Cir. 1995) (finding that purchasers of defendant’s T50 series \$400 pneumatic stapler gun are sophisticated and unlikely to be confused by lower-priced stapler guns sold by plaintiff under the T-50 mark); see also *Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201 (1st Cir. 1983) (less likelihood of confusion where goods are expensive).

Indeed, when the goods are relatively expensive, it follows that potential purchasers exercise more care in their decision-making process and are less likely to be confused about the source or the affiliation of a product bearing a particular mark than instances where the goods are inexpensive. The Court of Appeals for the Second Circuit propounded this conclusion in the *McGregor-Doniger, Inc., v. Drizzle Inc.*, supra, stating, “The greater the value of an article, the more careful the typical consumer can be expected to be; the average purchaser of an automobile will no doubt devote more attention to examining different products and determining their manufacturer than will the average purchaser of a ball of twine.” *Id.* at 92.

As McCarthy notes, “If the goods are expensive, the reasonably prudent buyer does not buy casually, but only after careful consideration. Thus, confusion is less likely than where the goods are cheap and bought casually.... Thus, the reasonably prudent buyer is assumed to take more care in purchasing “expensive” items which he buys infrequently, than in buying everyday, relatively inexpensive items.” *J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition*, Vol. 4 (2006), § 23.96, p. 23-311. “Expensive goods” include automobiles and motorcycles. *Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 USPQ2d 1917, 1932 (TTAB 2006)(“it is clear that automobiles are expensive and would only be purchased after careful consideration, thereby reducing the risk of confusion”).

The conditions under which the purchase of Applicant’s goods occurs ensures that confusion is not likely. First, Applicant manufactures and sells its famous DODGE branded motor vehicles through its authorized dealers, who ensure that the consumers are educated about the brand and products they are purchasing. Second, purchasers of passenger automobiles do not undertake the purchase lightly or without adequate consideration and careful evaluation of the type and brand of vehicle they desire to purchase. Given the price involved, for most consumers,

an automobile vehicle is either the most expensive or second most expensive item that they purchase in their lives, causing them to take great care in the purchase process.

Likewise, purchasers of Registrants' anti-theft alarms and trailers are also likely to take time and care in their purchases. Registrants are not one of Applicant's authorized dealerships. Consumers also purchase Registrants' goods for a specific purpose (protecting from theft or recreational travel) and typically make their purchases in the aftermarket or separate from any purchase of a passenger automobile. Registrants include consumers with product information on their websites and at the point of sale ensuring that the consumers are educated about the brand and the source of the products they are purchasing. In addition, the average price of a fifth-wheel trailer is between \$75,000-\$100,00. The Voxx Registrant's anti-theft alarms also range in price from \$100.00-\$500.00. Because consumers purchase Registrants' goods for a specific purpose, and they make a significant cost investment when making their purchase, it is likely that they will take time and care in making the purchase decision.

In short, given the nature and cost of Applicant's and Registrants' respective goods and the careful, sophisticated purchase process for those goods, confusion is unlikely.

**C. The Record Does Not Contain Persuasive Evidence that the Goods and Services Are So Related Such That Confusion of Source Is Likely.**

As mentioned above, in refusing registration of Applicant's mark, DODGE HORNET, it appears that the Examining Attorney has improperly adopted a "per se" rule that the use of the same or similar marks for two different types of goods/services that are somehow broadly related to motor vehicles will likely cause confusion. This is not the law. The law requires the likelihood of confusion decision to be firmly based on evidence. "In every case turning on likelihood of confusion, it is the duty of the examiner, the board and this court to find, upon consideration of all the evidence, whether or not confusion appears likely. That determination

ends the decisional process.” *In re E. I. DuPont De Nemours & Co.*, 476 F.2d 1357, 1362, 177 U.S.P.Q. 563, 568 (C.C.P.A. 1973) (emphasis in original); *In re General Motors Corp.*, 23 U.S.P.Q.2d 1465, 1468 (T.T.A.B. 1992).

Simply put, there can be no *per se* rule in determining likelihood of confusion between two marks. *Interstate Brands Corporation v. Celestial Seasonings, Inc.*, 196 U.S.P.Q. 321, 324 (T.T.A.B. 1977), *aff’d*. 198 U.S.P.Q. 151 (C.C.P.A 1978). The Trademark Manual of Examining Procedure specifically states:

The facts in each case vary and the weight to be given each factor may be different in the light of the varying circumstances; therefore, there can be no rule that certain goods or services are *per se* related, such that there must be likelihood of confusion from the use of similar marks in relation thereto.

*TMEP §1207.01(a)(iv)*.

The party asserting likelihood of confusion (i.e., the Examining Attorney) bears the burden of showing something more than a mere relationship between the goods by providing evidence that the relationship between the goods is sufficient to support a finding of likelihood of confusion. *TMEP §1207.01(a)(vi)*. Here, the Examining Attorney has submitted very little evidence to demonstrate the relationship between passenger automobiles and anti-theft alarms or travel and fifth wheel trailers, relying solely on the websites of three automobile manufactures that sell anti-theft alarms and three recreational vehicle dealers that sell used cars, none of which are Applicant’s authorized dealers, to demonstrate relatedness. He has essentially argued that merely because Registrants’ goods relate to motor vehicles the use of the same mark for anti-theft alarms or trailers and any type of passenger automobile model name will necessarily cause a likelihood of confusion. The evidence submitted by Applicant shows that this conclusion is illogical, especially considering the realities of the market and full consideration of the *DuPont* factors.

## II. CONCLUSION

“A showing of mere possibility of confusion is not enough; a **substantial likelihood** that the public will be confused must be shown.” *Omaha Nat’l Bank v. Citibank (S.D.), N.A.*, 633 F. Supp. 231, 234 (D. Neb. 1986) (emphasis added). The facts and the evidence in this record establish that there is no likelihood of confusion, let alone a substantial one. Indeed, Applicant has established that: (1) the Examiner Attorney incorrectly ignored the significant element of Applicant’s famous DODGE brand included in Applicant’s DODGE HORNET mark; (2) Applicant’s goods are sold through its authorized dealers and neither Registrant is one of Applicant’s authorized dealers; (3) numerous third-party registrations for the same or similar marks by different companies for passenger automobiles or other vehicles, and anti-theft alarms and trailers evidence that consumers have become accustomed to encountering the same or similar marks by different companies for Applicant’s goods and Registrants’ goods without confusion; (4) numerous registrations of the same or similar marks used for “vehicle” related goods evidence that consumers have become accustomed to encountering the same or similar marks without necessarily being confused; and (5) consumers exercise a high degree of care in selecting passenger automobiles and antitheft alarms and travel and fifth wheel trailers.

In view of the foregoing, Applicant respectfully requests that the refusal to register under Section 2(d) of the Lanham Act be withdrawn and the above-captioned application be approved for publication.

Dated: **November 6, 2020**

Respectfully submitted,

/s/Kristen Spano

Kristen Spano

*Senior Trademark Counsel, FCA US LLC*