US Serial No. 90/078,119
VALIANT
Response to Office Action

Examining Attorney has initially refused registration of U.S. Serial No**.** 90/078,119 for VALIANT (the "Application") based on a likelihood of confusion with the U.S. trademark registration listed below.

The Application is as follows:

Mark	Services
VALIANT Serial No. 90/078,139	Class 9: "Gloves for laboratory purposes; Personal protective equipment (PPE), namely, protective work gloves; Protective gloves for industrial use"; Class 10: "Dental gloves; Gloves for medical purposes; Gloves for medical use; Medical gloves; Protective gloves for medical use; Nitrile gloves for medical use".

The Application has been rejected based on a likelihood of confusion with the following mark (the "Registration"):

Mark	Services
VALIANT Registraiton No. 1,774,633	Class 009: Safety headgear; namely, hard hats and hard caps

The Examiner refused the Application based on the alleged conclusions that the Application and Registration are identical in appearance, sound, and meaning, and …"have the potential to be used . . . in exactly the same manner." The Applicant respectfully disagrees with the Examiner's conclusions. The registration of a mark may be refused when it so resembles a registered mark "as to be likely, when used on or in connection with goods or services of the applicant to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d) (1994). Likelihood of confusion is determined on a case-specific basis, requiring consideration of a variety of factors, including (i) the relatedness of the services as described in an application or registration; and ii) the conditions under which and buyers to whom sales are made. *E.J DuPont De NeMours & Co.*, 476 F.2d. 1357, 1361, 177 U.S.P.Q. 563,567 (CCPA 1973). *See also,* Trademark Manual of Examining Procedure ("TMEP") §1207.01. Dissimilarity based on even one of the *DuPont* factors can warrant a finding that there is no likelihood of confusion. *Kellogg Co. v. Pack'em Enter., Inc.,* 951 F.2d 330,333 (Fed. Cir. 1991). Here, the Applicant respectfully submits that there are at least three reasons why there is no likelihood of confusion between the Applicant's mark and the Registrations. First, the Applicant's goods are distinct from the Registrant's goods. Second, the goods identified in the Application and Registration travel in different channels of trade and are marketed to different consumers. Third, the purchasers of the goods identified in the Registration and Application are sophisticated and discriminating.

1. Dissimilarity Between the Goods Negates Confusion.

First, the goods on the face of the identifications of goods of the Application, and the Registration, are distinctly different in terms of nature, use and function. In evaluating the relatedness of the goods and services, channels of trade and classes of consumers, the determination is based on the goods and services as they are identified in the application and cited registration. *See In re Dixie Restaurants Inc*., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

The Registration is for safety headgear, namely, hard caps and hard hats. The Application is for various gloves worn on hands, and no headgear. TMEP contemplates that the same or similar marks are not likely to cause confusion *if* differences exist between the parties' respective goods in terms of their nature and purpose. More specifically, Paragraph 2 of TMEP 1207.01 (a)(i) states:

"Conversely, if the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely." See, e.g., Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board's dismissal of opposer's likelihood-of-confusion claim, noting "there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source" though both were offered under the COACH mark); Shen Mfg. Co. v. Ritz Hotel Ltd., 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); Local Trademarks, Inc. v. Handy Boys Inc., 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); Quartz Radiation Corp. v. Comm/Scope Co., 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties' respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by).

Based on this quotation from the TMEP, Applicant contends that it is extremely unlikely that consumers would be confused as to the source of the goods provided under these marks. Applicant's applied-for goods are associated with medical and protective gloves, while Registrant's goods are for hard hats. As a practical matter, it is highly improbable that a consumer would believe a safety hardhat is associated with medical gloves.

To support a finding of likelihood of confusion between the Applicant's and Registrants' goods, the Trademark Examining Attorney has introduced information retrieved from the Internet of entities that provide safety gear, including hard hats, often provide gloves. While the Examining Attorney is correct in stating that these mega online retailers sell both headgear and gloves, the argument that the websites have probative value to suggest the goods of the Application and Registration are of a kind that may emanate from a single source and cause consumer confusion is not solidified by the evidence of record.

With scant evidence that the goods are related, the similarity of the marks used in connection therewith is not sufficient to demonstrate a likelihood of confusion. Confusion among consumers, while possible, is not likely. The Trademark Act does not prevent registration of a mark on the mere possibility of consumer confusion but requires that confusion be likely. Based upon the record, the likelihood of confusion between the marks amounts to only a speculative, theoretical possibility. *See In re Digirad Corp.*, 45 USPQ2d 1841, 1845 (TTAB 1998) (no likelihood of confusion between the mark DIGIRAD for gamma radiation sensors, signal processors and display apparatus for use in medical isotopic tracing and nuclear imaging, and the DIGIRAY mark for electronic digital x-ray system comprised of an x-ray scanning beam tube and detector for medical use); *see also Bongrain International (American) Corporation v. Delice de France Inc.*, 811 F.2d 1479, 1 USPQ2d 1775, 1779 (Fed. Cir. 1987); and *In re The Ridge Tahoe*, 221 USPQ 839, 840 (TTAB 1983). The following language from the Trademark Trial and Appeal Board's primary reviewing court is helpful in resolving the likelihood of confusion issue in this case: "[w]e are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." *Electronic Design & Sales Inc. v. Electronic Data Systems Corp*., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed Cir. 1992) (citing *Witco Chemical Co. v. Whitfield Chemical Co., Inc*., 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (C.C.P.A. 1969), aff'g 153 USPQ 412 (TTAB 1967)). Therefore, the Applicant respectfully submits the evidence presented by Examining Attorney to show the similarity of the goods at issue is *de minimis* at best and does not prove consumer confusion is more than a speculative, theoretical possibility.

Applicant submits that when the evidence of similarity of the goods associated with the marks is considered, the applied-for VALIANT mark and the Registration are sufficiently different to avoid any potential confusion.

2. The Parties' Goods Travel in Different Channels of Trade and are Offered to Different Consumers

As discussed in the previous section, the identification of goods in the Application are gloves for protection in medical and industrial settings. On the other hand, the Registration identifies safety headgear. If goods or services are not related or marketed in a way that they would be encountered by the same consumers in situations that would create the incorrect assumption that they originate from the same source, then, even if the mark are identical, confusion is not likely. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board's dismissal of opposer's likelihood-of-confusion claim, noting 'there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source" though both were offered under the COACH mark).

Here, Applicant's applied-for goods protective gloves are marketed and travel in different channels of trade than the goods offered by the Registration. Registrant is a "provider of indirect industrial supplies…"and supplies materials that are not part of the products their customers manufacture, not a seller of VALIANT branded safety headgear, as shown in Exhibit A. Specifically, Registrant sells various brands (i.e., 3M, Honeywell, and Rustoleum) of a wide range of products, such as abrasives, paint, tape, cutting tools, and chemicals, including various brands of safety headgear,

as shown in Exhibit B. Hardhats and other headgear for protection of the head are marketed to those in construction and other industries where head protection is necessary, not to those in the medical industry looking to protect their hands. Therefore, since the goods offered by Applicant are marketed in entirely different trade channels than the Registration to wholly different consumers, consumer confusion is highly unlikely.

3. Purchasers of Registrant's Goods are Discriminating and Sophisticated

The degree of care likely to be exercised by purchasers is a vital consideration in determining whether or not two marks are confusingly similar. Restatement of Torts Section 729 (1938) (Comment g). "Generally, in assessing the likelihood of confusion to the public, the standard used by the courts is the typical buyer exercising ordinary caution. However, when a buyer has expertise or is otherwise more sophisticated with respect to the purchase of the [goods and services] at issue, a higher standard is proper... [O]ther things being equal there is less likelihood of confusion." *Homeowners Group, Inc. v. Home Marketing Specialists, Inc*., 931 F.2d 1100, 1111 (6th Cir. 1991). *See, also, E.I. DuPont De NeMours & Co*., 476 F.2d 1357 (C.C.P.A. 1973).

Workers, companies or retailers purchasing hard hats must be sophisticated buyers because construction safety gear is regulated by various federal and state standards. Registrant conducts safety equipment inspection, maintenance, certification and solution design, as shown in Exhibit A. Thus, Registrant's consumers are businesses or individuals who will take extreme care in making purchase decisions, as they directly affect the legality and success of their businesses and safety of themselves or their employees or consumers. When there is care involved in making a purchase decision, there is less likelihood of confusion. *Electronic Design & Sales Inc. v. Electronic Data Sys. Corp.*, 21 U.S.P.Q.2d 1388, 1393 (Fed. Cir. 1992) ("In sum, since the parties' respective purchasers and potential purchasers are substantially different, are usually sophisticated, and operate independent of mere users of opposer's discontinued line of computer terminals, and since applicant's equipment and opposer's services are different, under a proper analysis of the DuPont factors, likelihood of confusion for relevant persons has not been established, even among retail customers."). Thus, there is no likelihood that such sophisticated and discriminating consumers would confuse the Registration with the Application.

Given the differences between the goods, channels of trade, and consumers outlined above, the Applicant respectfully submits that no confusion is likely. Therefore, Applicant respectfully requests that the Examining Attorney withdraw the Section 2(d) rejection.

EXHIBIT A

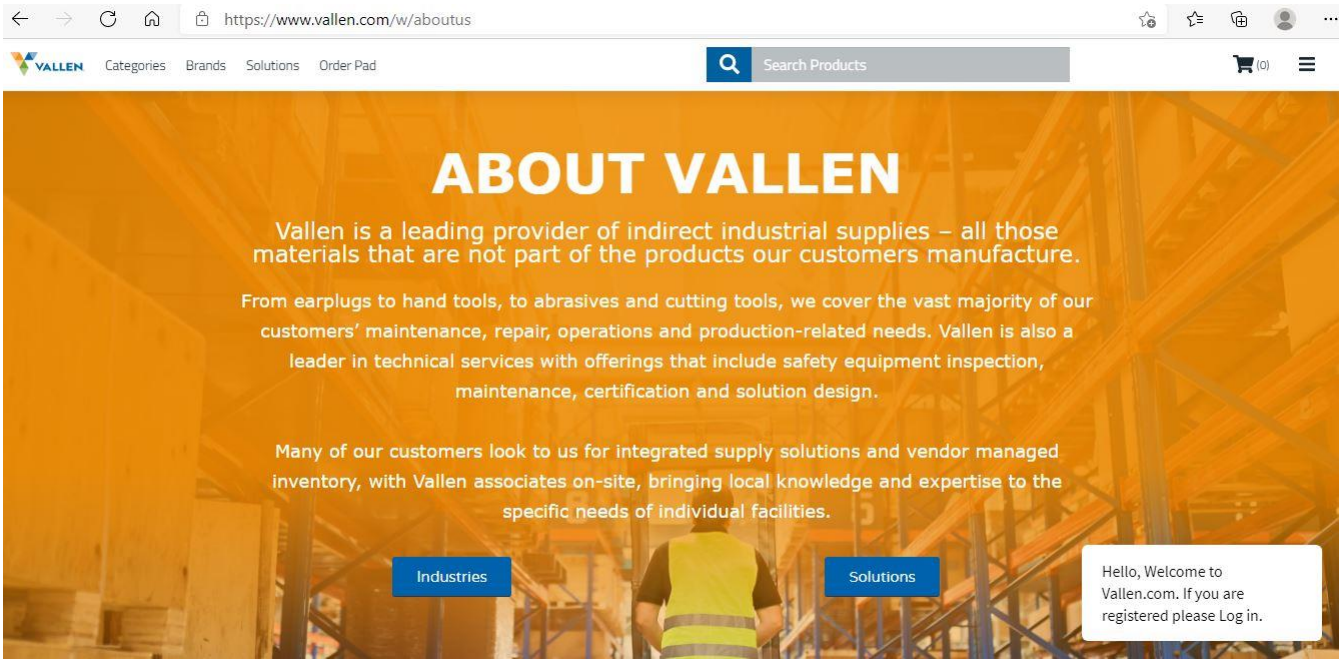
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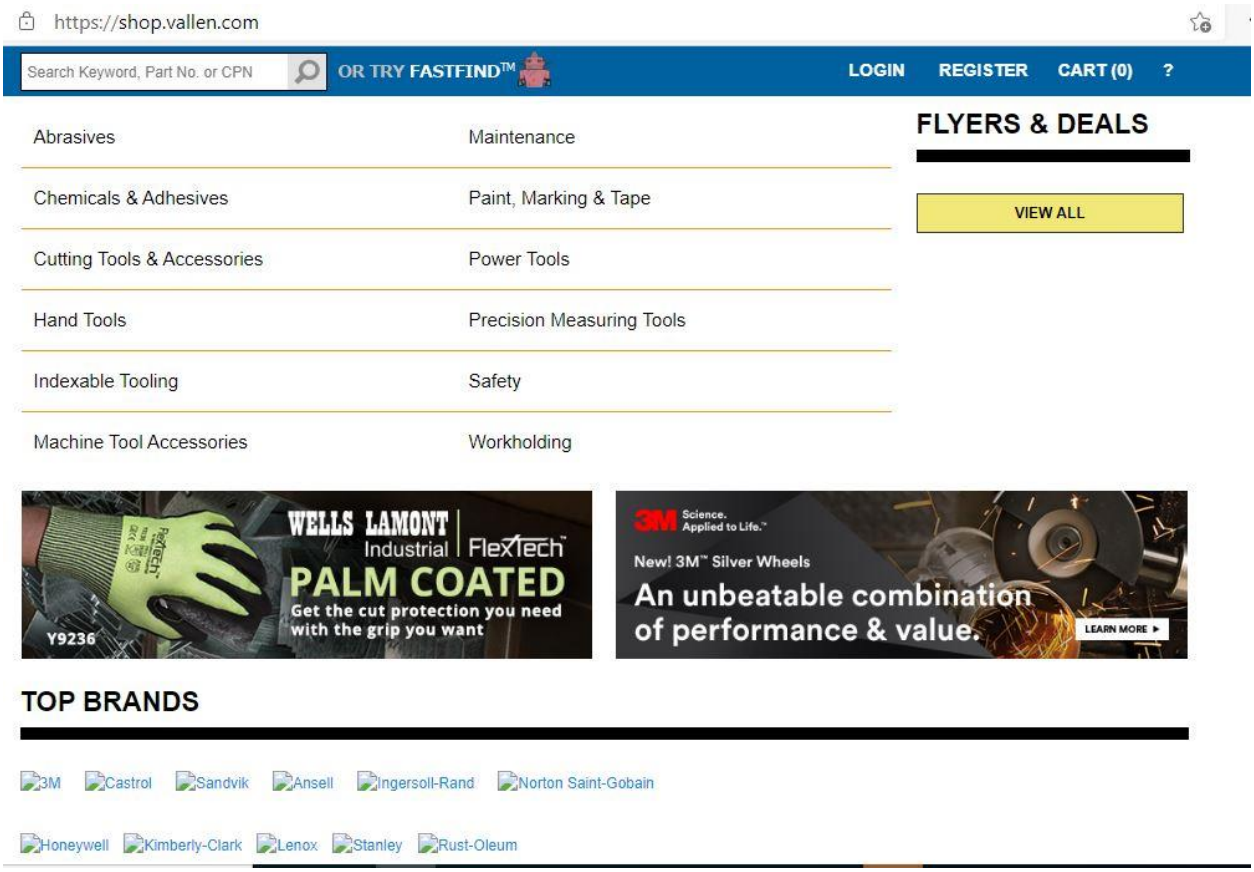
EXHIBIT B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MATERIAL +
SUSPENSION TYPE +
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3MS M-354
Versaflo™ Replacement Forehead Seal for Versaflo™ M-300 Series Hardhats Black

Manufacturer: 3M
Manufacturer #: m-354

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$53.89 / ea

1 ea

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NOR N10R01/4177A
HARDHAT N10R WHTTRANSMOUNTAIN LOGO

Manufacturer: NORTH SAFETY
Manufacturer #: n10r01/4177a

In Stock

$28.38 / ea

1 ea

ADD TO CART

NOR N20R01/4178A
HARDHAT N20R WHTTRANSMOUNTAIN LOGO

Manufacturer: NORTH SAFETY
Manufacturer #: n20r01/4178a

Out of Stock
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$38.01 / ea

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3MS M-316
Deflector airflow for hardhats & helmets blue 1/case

Manufacturer: 3M
Manufacturer #: m-316

Out of Stock
Available for backorder

$27.82 / ea

1 ea

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DSI EPAFK04
FLASH KT ARC 12CAL HARDHAT HEADGEAR VISOR

Manufacturer: DYNAMIC SAFETY INTERNA...
Manufacturer #: epafk04

Out of Stock
Available for backorder

$202.46 / ea

1 ea

ADD TO CART

3MS MT73H7P3E4D10NA
HEADSET PELTOR WS LCPRO III HARDHAT

Manufacturer: 3M
Manufacturer #: mt73h7p3e4d10na

Out of Stock
Available for backorder

$1,717.62 / ea

1 ea

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3MS MT73H7P3E4D10NA-50
HEADSET PELTOR WS LCPRO III IS HARDHAT

Manufacturer: 3M
Manufacturer #: mt73h7p3e4d10na-50

Out of Stock
Available for backorder

$2,161.40 / ea

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MSA C204198
NOT CSA APPROVED HARDHATV-GARD STAZ-ON BLU LB&C

Manufacturer: MSA
Manufacturer #: c204198

Out of Stock
Available for backorder

$40.49 / ea

1 ea

ADD TO CART