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December 22, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re R&M Materials Handling, Inc.

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Serial No. 78660611

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Robert J. Morgan of Porter, Wright, Morris & Arthur LLP for R&M Materials Handling, Inc.

Mary Boagni, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Seeherman, Zervas and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

R&M Materials Handling, Inc. ("applicant"), filed an intent-to-use application on the Principal Register for the mark EZ LIFT, in standard character form, for goods ultimately identified as "manually operated hoists suspended by means of an overhead structure used in manufacturing, construction, and utilities applications, all excluding truck bed mounted lifting cranes," in Class 7. Applicant disclaimed the exclusive right to use the word "lift."

The Trademark Examining Attorney refused to register applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to cause confusion with the registered mark MCKISSICK EASY-LIFT, in standard character form, for "overhead bridge crane blocks," in Class 7.[1]

Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.,* 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. <u>The similarity or dissimilarity and nature of the goods described in the application and registration</u>.

We turn first to the similarity or dissimilarity and nature of the goods described in the application and the cited registration. To properly analyze the relationship of the goods, we must first discuss what they are. The relevant products are defined below:

[1] Registration No. 3035460, issued December 27, 2005.

1. A "hoist" is "an apparatus for hoisting [lifting], as a block and tackle, a derrick, or crane."[2]
2. A "block" is "a part enclosing one or more freely rotating, grooved pulleys, about which ropes or chains pass to form a hoisting or hauling tackle."[3]
3. "Tackle" is defined as "a mechanism or apparatus, as a rope and block or a combination of ropes and blocks, for hoisting, lowering, and shifting objects or materials."[4]
4. A "crane" is "a device for lifting and moving heavy weights in suspension."[5]
5. A "bridge crane" is an overhead crane system.[6]

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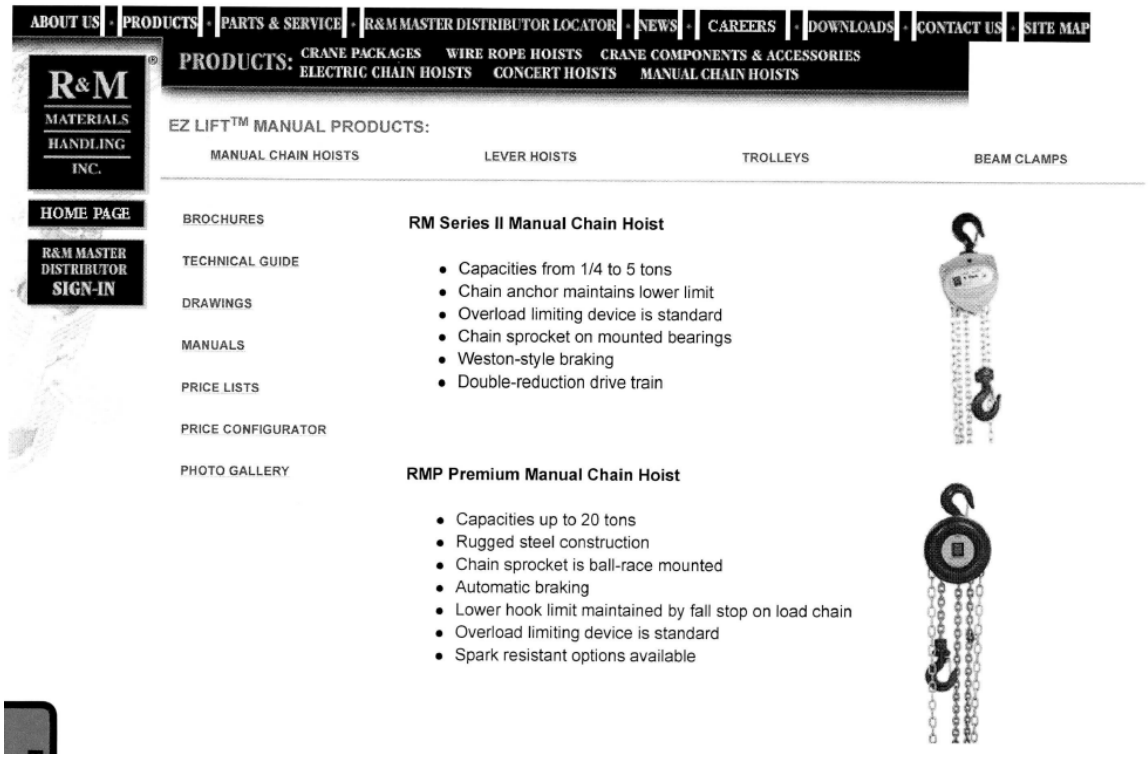
[2] The Random House Dictionary of the English Language (Unabridged), p. 910 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).
[3] The Random House Dictionary of the English Language (Unabridged), p. 910.
[4] The Random House Dictionary of the English Language (Unabridged), p. 1934.
[5] The Random House Dictionary of the English Language (Unabridged), p. 470.
[6] Glennmachineworks.com and standardcrane.com attached to the November 10, 2007 Office Action.

Accordingly, applicant's product is a manually operated lifting device (a hoist), including block and tackle, that is suspended overhead. Applicant's manually operated hoists are depicted below.[7]



[7] rmhoist.com attached to applicant's July 26, 2006 Response.

Registrant's "overhead bridge crane blocks" are enclosures for pulleys used in lifting devices suspended overhead. The overhead crane blocks are depicted below.[8]

Crane servicing : Blocks McKissick Overhead Crane Block

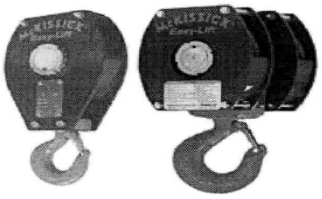
To find the product you require use the left navigation followed by the drop down menu above (shown when needed)

Crosby Overhead Crane Blocks Designed to provide a Quality replacement block with a Quick Delivery

The McKissick Easy-Lift

Features

- **Quick delivery**
- **Easy to Reeve** - Removeable housing allows block to be reeved without complete disassembly.
- **Bearing life and Design Factors meet:** ASME HST-4, Class H4 - CMAA 70 Class D - FEM 9.511 Class 2M ISO 4301.1 Class M5
- **Sheave pitch diameter minimum of 16 times rope diameter on standard sizes** (see yellow boxes in tables left).
- **All single point shank hooks** are genuine Crosby®, forged alloy steel, Quenched and Tempered, contain the patented QUIC-CHECK® markings and come with a "world class" latch that integrates with hook tip.
- **Sheave bearings are maintenance free** and sealed for life (10,000hrs).
- **Wide range of product available** (see table left).
- **Ability to attach optional "anti two-block" device**
- **Available with shackle as lower connection point**



An overhead bridge crane is an "overhead structure" encompassed within the language "suspended by means of an overhead structure" in applicant's description of goods. Accordingly, the registrant's crane blocks may be used as part of applicant's hoists. In fact, registrant's

[8] www.certex.co.uk attached to applicant's July 26, 2006 Response.

website indicates that registrant's products are replacement blocks. Thus, applicant's hoists and registrant's blocks are complementary products because a block may be used as part of a hoist. *See Wincharger Corporation v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 291-292 (CCPA 1962) (power supply equipment such as motors and generators and voltage dividing instruments, potentiometers and rheostats are complementary products because "[t]he products are all within the field of electrical apparatus and in some instances devices similar to those manufactured by appellee are used in connection with the various items produced by appellant"); *Wet Seal Inc. v. FD Management Inc.,* 82 USPQ2d 1629, 1640 (TTAB 2007) (women's clothing and fragrances are complementary products because they are used together for the same purpose, to enhance physical appeal and create an overall fashionable image).

The record also establishes that material handling equipment companies, including applicant, sell hoists, cranes, and parts for the hoists, cranes and other equipment.[9] Thus, relevant consumers may mistakenly believe

[9] washingtoncrane.com, sisscohoist.com, safetysling.com, aacm.net, ocieg.com and rmhoist.com attached to the November 10, 2007 Office Action.

that "overhead bridge crane blocks" and "manually operated hoists suspended by an overhead structure" identified by similar marks emanate from the same source.

In view of the foregoing, we find that applicant's "manually operated hoists suspended by means of an overhead structure used in manufacturing, construction, and utilities applications" and the registrant's "overhead bridge crane blocks" are related products.

B. The similarity or dissimilarity of likely-to-continue trade channels and classes of consumers.

As indicated above, material handling equipment companies sell hoists, cranes, and parts for hoists, cranes and other equipment. Because there are no limitations as to channels of trade or classes of purchasers in the description of goods for the registered mark, it is presumed that registrant's "overhead bridge crane blocks" move in all channels of trade that would be normal for those products and are available to all classes of purchasers for such goods, including in the fields of manufacturing, construction, and utilities applications. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Moreover, because blocks are a component of hoists and the evidence shows that both are used by the same companies for use in lifting and moving products, we find that the

products move in the same channels of trade and are sold to the same classes of purchasers, specifically, but not limited to, purchasers of hoists and companies that service hoists.

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* The marks are similar in terms of sight, sound, meaning and commercial impression to the extent that they both include the term EASY-LIFT or its phonetic equivalent EZ LIFT. Because the letters "ez" are the phonetic equivalent of the word "easy," the different spelling of that word is not sufficient to distinguish applicant's mark EZ LIFT from the EASY-LIFT part registrant's mark. *See Mobil Oil Corp. v. Teagarden,* 192 USPQ 560, 564-565 (TTAB 1976) ("we cannot overlook the fact that . . . 'MOBIL' is often misspelled 'MOBILE'"); *In re South Bend Toy Mfg. Co., Inc.,* 218 USPQ 479, (TTAB 1983) (LIL' LADY BUGGY similar to LITTLE LADY because "[c]ontractions of a term do not alter the essential identity of character and meaning between the full word and

the contraction); *In re Strathmore Products, Inc.,* 136 USPQ 81, 82 (TTAB 1962) (GLISTEN is phonetically equivalent to GLISS'N and they have the same meaning since GLISS'N is a contraction of GLISTEN). Nevertheless, the marks are different because the registered mark begins with the name MCKISSICK. Thus, the issue before us is whether applicant's mark EZ LIFT is distinguishable from registrant's mark MCKISSICK EASY-LIFT simply because applicant's mark omits the name MCKISSICK. For the reasons stated below, we find that the similarities of the marks outweigh the differences.

There is no *per se* rule that if two product marks (*e.g.,* EZ LIFT and EASY-LIFT) are confusingly similar, the inclusion of a house mark or name (*e.g.,* MCKISSICK) in one of them is sufficient to differentiate the marks. *New England Fish Co. v. Hervin Co.,* 511 F.2d 562, 184 USPQ 817, 819 (CCPA 1975). In such cases, we must consider the entire marks, including the presence of the house mark in light of the evidence of record.

The Board has previously described the different effects the addition (or subtraction) of a house mark can have in the likelihood of confusion analysis:

> [S]uch addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in

> distinguishing the marks so as to avoid source confusion. On the other hand, where there are some recognizable differences in the asserted conflicting product marks or the product marks in question are highly suggestive or merely descriptive or play upon commonly used or registered terms, the addition of a housemark and/or other material to the assertedly conflicting product mark has been determined sufficient to render the marks as a whole sufficiently distinguishable.

In re Christian Dior, S.A., 225 USPQ 533, 534 (TTAB 1985) (citations omitted) (applicant's LE CACHET DE DIOR confusingly similar to CACHET because applicant failed to prove that the word "cachet" was highly suggestive, descriptive or commonly used or registered). *See also Nike Inc. v. WNBA Enterprises LLC*, 85 USPQ2d 1187, 1201-1202 (TTAB 2007) (noting that there was no evidence that the unitary S and star design as a whole was weak, the Board held that applicant's "S" and star design for athletic bags and clothing is likely to cause confusion with S STARTER and star design for identical products); *In re The United States Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (CAREER IMAGE for retail women's clothing store services is likely to cause confusion with CREST CAREER IMAGES for clothing). *Compare In re Shawnee Milling Company*, 225 USPQ 747,748 (TTAB 1985) (having found that the term "golden crust" is highly suggestive, the Board held that GOLDEN CRUST for

flour is not likely to cause confusion with ADOLF'S GOLD'N CRUST for combination coating and seasoning for poultry, fish and vegetables); *In re S. D. Fabrics, Inc.,* 223 USPQ 54, 55-56 (TTAB 1984) (having found the word portions of the marks descriptive, the addition of the house mark DAN RIVER in registrant's mark DAN RIVER DESIGNER FABRICS and design for textile fabrics was sufficient to avoid confusion with applicant's mark "designers/fabric" and design for retail store services in the field of fabrics, wall hangings, buttons and accessories).

In *Knight Textile Corp. v. Jones Investment Co.,* 75 USPQ2d 1313 (TTAB 2005), upon which applicant relies, the Board found no likelihood of confusion between applicant's mark NORTON MCNAUGHTON ESSENTIALS and opposer's mark ESSENTIALS, both for clothing, because the word "essentials" was highly suggestive when used in connection with clothing. As evidence of the highly suggestive nature of the word "essentials," the Board relied on a dictionary definition of "essentials" as connoting that "the clothing items sold under the marks are basic and indispensable components of, or 'essentials' of, one's wardrobe," as well as 23 third-party registrations, owned by 21 different entities, that include the word "essentials" as part of the

mark. *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d at 1316.

Likewise, in this case, applicant argues that the common elements of the marks (*i.e.*, EZ LIFT and EASY-LIFT) are highly suggestive, weak terms, entitled to only a narrow scope of protection. In other words, applicant contends that consumers viewing registrant's mark will focus on the name MCKISSICK, not the term EASY-LIFT, thus allowing consumers to distinguish the marks.

To show that "Easy Lift" is a highly suggestive term, applicant submitted copies of the following third-party registrations:[10]

MARK	**Reg. No.**	**Goods**
E-Z LIFT	0815787	Industrial and farm elevators
EASYLIFT	2642266	Industrial machine parts, namely gas springs; shock absorbers for machines
DAMO EASY LIFT	2667539	Machine and machine tools, namely hydraulic lifts
EZ-LIFT	2827828	Non-motorized mechanism, namely, a lift used in storage and shipping containers for raising displays to a presentation height

[10] Applicant submitted three other registrations which we do not consider here because the goods are not similar or related to material handling equipment in general and hoists and blocks in particular.

MARK	Reg. No.	Goods
EZY-LIFT	3146150	Truck bed mounted lifting device, namely, mobile cranes used in loading and unloading objects and material

We note that in three of the registrations, the word "LIFT" is a generic term for the goods, (E-Z-LIFT for elevators, DAMO EASY LIFT for a hydraulic lift, EZ LIFT for a lift). Thus, there are only two third-party registrations which use "easy lift" or a variation thereof in the same way that applicant and registrant do, to engender the commercial impression that their marks make it easy to lift an object. *General Mills Inc. v. Health Valley Foods,* 24 USPQ2d 1270, 1277 (TTAB 1992); *In re Dayco Products-Eaglemotive Inc.,* 9 USPQ2d 1910, 1911 (TTAB 1988). *See also* the websites promoting the EZ-LIFT mechanism for raising display presentations (Registration No. 2827828) ("the EZ-LIFT mechanism gently raises the large screen display with ease"[11] and the EZY-LIFT truck mounted mobile crane (Registration No. 3146150) ("Ezy-Lift lifts and loads large heavy objects up to 1,000 lbs. easily and safely")[12].

However, the third-party registrations are not evidence of what happens in the marketplace or that

[11] jelcoinc.com attached to applicant's July 26, 2006 response.
[12] ezylift.com attached to applicant's July 26, 2006 response.

customers are familiar with the marks. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). The only evidence of record regarding the use of EASY LIFT marks in connection with material handling equipment is the EZY-LIFT truck mounted mobile crane referenced above. The website for the EZ-LIFT mechanism for lifting display presentations is of little probative because these goods do not fall within the meaning of "material handling equipment" in the sense of a hoist or crane block. *See* the discussion in the preceding section about the relatedness of the goods and the definitions of the relevant products. The one relevant website for the EZY-LIFT truck mounted crane is not sufficient to prove that the term "Easy Lift" or variations thereof are commonly used in connection with material handling equipment, specifically hoists and blocks.

Finally, it is clear, as shown by the third-party registrations and the obvious dictionary meaning of the words, that EASY LIFT has a suggestive significance. However, we cannot accept applicant's argument that consumers will assume that its mark, EZ LIFT, identifies a separate source from MCKISSICK EASY-LIFT, simply because applicant's mark does not include the house mark. On the contrary, consumers are likely to view EASY-LIFT in

registrant's mark as a product mark, such that when they see EZ LIFT they will view it as a variation of registrant's mark, in which registrant has used only the product mark without the house mark. *See In re The United States Shoe Corp.*, 229 USPQ at 709 (applicant's mark CAREER IMAGE would appear to be a shortened form of the registered mark CREST CAREER IMAGES).

Based on the evidence of record, applicant's omission of the name MCKISSICK in its mark is not sufficient to differentiate the marks. Unlike *Knight,* this record does not show that the term EASY-LIFT is so highly suggestive that the applicant's omission of the name MCKISSICK creates significant differences in the marks. There is only one third-party registration that reasonably falls within the definition of material handling equipment and in which "Lift" is not used as a generic term,[13] and there is only one website that shows superficial third-party usage. Because applicant has not demonstrated that "Easy-Lift" is highly suggestive when used in connection with material handling equipment such as hoists and crane blocks, the absence of the name MCKISSICK from applicant's mark EZ LIFT does not distinguish it from registrant's mark MCKISSICK

[13] Registration No. 3146150 for the mark EZY-LIFT for truck mounted mobile cranes.

EASY-LIFT. *See Gulf States Paper Corp. v. Hammermill Paper Co.*, 135 USPQ 456, 458 (TTAB 1962), *aff'd*, 337 F.2d 662, 143 USPQ 237 (CCPA 1964) (HAMMERMILL E-Z CARRY-PAK for cardboard cartons is likely to cause confusion with E-Z PAK and E-Z CARI for paper products).

In view of the foregoing, we find that MIKISSICK EASY-LIFT and EZ LIFT are similar in appearance, sound, meaning and commercial impression.

D. The conditions under which and buyers to whom sales are made (*i.e.*, "impulse" vs. careful, sophisticated purchasing).

Applicant contends that the products at issue are expensive, and therefore consumers will exercise a high degree of care when making a purchase. "Consumers and potential consumers of registrant's and applicant's goods will undoubtedly make careful, considered purchases due to the expense, sophistication, and specialized use of the goods associated with each of the marks."[14] Even if the

[14] Applicant's Brief, pp. 13-14. One problem with applicant's "degree of care" argument is that applicant did not provide any evidence regarding the decision making process used by these careful and sophisticated purchasers, the role trademarks play in their decision making process, or how observant and discriminating they are in practice. *See Refreshment Machinery Inc. v. Reed Industries, Inc.*, 196 USPQ 840, 843 (TTAB 1977) (selling to a sophisticated purchaser does not automatically eliminate the likelihood of confusion because "[i]t must also be shown how the purchasers react to trademarks, how observant and discriminating they are in practice, or that the decision

goods are specialized items that will be purchased by sophisticated customers, given the highly similar marks, with EZ LIFT being virtually identical to EASY-LIFT, such consumers are not likely to remember the slight difference in spelling. Further, the absence of the house mark MCKISSICK in applicant's mark is likely to be viewed as merely a variant of the registrant's mark using only the product mark, rather than as a mark indicating a separate source for the goods. Thus, even careful purchasers who note the differences in the marks are not likely to recognize these differences as identifying different sources. We therefore find that even though the factor of the degree of customer care favors applicant, it is not sufficient to outweigh the other factors favoring a finding of likelihood of confusion.

F. Balancing the factors.

When we consider all the relevant *du Pont* likelihood of confusion factors, particularly, the similarity of the goods and the similarity of the marks, we believe that

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to purchase involves such careful consideration over a long period of time that even subtle differences are likely to result in recognition that different marks are involved"). Nevertheless, as discussed below, we can reasonably assume that consumers of material handling equipment such as hoists and crane blocks would be discriminating purchasers.

consumers familiar with registrant's MCKISSICK EASY-LIFT mark for "overhead bridge crane blocks" are likely to believe, when they encounter applicant's EZ LIFT "manually operated hoists suspended by means of an overhead structure used in manufacturing, construction, and utilities applications" that there is an association or sponsorship. Indeed, a consumer may believe that applicant's EZ LIFT mark is a variation of the registered mark, in which registrant has used just the product mark without the house mark. *See In re The United States Shoe Corp.*, 229 USPQ at 709. To the extent that we have any doubts on the issue of likelihood of confusion, we resolve them, as we must, in registrant's favor. *In re Hyper Shoppes (Ohio), Inc.,* 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988). Accordingly, we find that there is a likelihood of confusion.

Decision: The refusal to register is affirmed.