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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                        |   |
|------------------------|---|
| Proceeding             | 85436615  |
| Applicant              | Mott's LLP  |
| Applied for Mark       | MOTT'S  |
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| Submission             | Reply Brief   |
| Attachments            | MOTTS CL 31.pdf ( 5 pages )(23819 bytes )   |
| Filer's Name           | Pamela B. Huff  |
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| Signature              | /pbhuff35901/   |
| Date                   | 01/10/2013  |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APP. SER. NO.: **85/436,615**

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ATTY NO. 5338.4163

APPLICANT: MOTT'S LLP

EXAMINER: Thomas M. Manor

MARK: **MOTT'S**

FILING DATE: **September 30, 2011**

**REPLY TO EXAMINING ATTORNEY'S APPEAL BRIEF**

Applicant hereby timely files this Reply to Examining Attorney's Appeal Brief and maintains its request that the Trademark Trial and Appeal Board reverse the Examiner's decision on the ground that Applicant's mark is not primarily merely a surname. Applicant incorporates its arguments as presented in its BRIEF FOR APPELLANT and replies to the Examining Attorney's arguments as follows:

**A. Applicant's US Census Data evidence should be considered.**

The Examining Attorney requests that the 2000 US Census Data "be afforded no recognition or weight by the Board" on grounds that "Applicant provides no context for the understanding of how a ranking of 1,941<sup>st</sup> nationally is to be interpreted." Examiner's Brief at 5. The Examiner states that "[w]ithout the proper context, one cannot determine where a ranking of 1,941<sup>st</sup> places the surname 'MOTT' in comparison to all other surnames in the United States." *Id* at 6.

In response, Applicant urges that the 2000 US Census Data has been properly submitted for the Board's review and no additional "context" is required for its consideration. The website link submitted by Applicant contains a spreadsheet listing every surname used by more than 100 individuals within the United States in 2000. See U.S. Census Bureau, *Genealogy Data: Frequently Occurring Surnames from Census 2000, File B: Surnames Occurring 100 or More Times*,

<http://www.census.gov/genealogy/www/data/2000surnames> (last visited Jan. 10, 2013). This spreadsheet lists 151,671 separate surnames together with the number of individuals using each surname and the ranking of that surname relative to all the other listed surnames. *See id.* For example, the surname “SMITH” was used by 2,376,206 individuals in 2000 and was ranked 1<sup>st</sup> among all surnames in the United States. *Id.*

Applicant has simply requested that the Board take judicial notice of the surname ranking of MOTT, as well as other surname rankings discussed in Applicant’s Brief, namely, rankings for JOHNSON, MILLER, FORD, MCDONALD, FOX, KLEIN, and SEARS. Judicial notice of US Census data is well established. *See In re Spirits Int’l N.V.*, 86 U.S.P.Q.2d 1078, 1085 (T.T.A.B. 2008) (noting that the Board may take judicial notice of census data); *In re Tokutake Industry Co.*, 87 U.S.P.Q.2d 1697, 1700, n.1 (T.T.A.B. 2008) (taking judicial notice of census data cited in the examiner’s brief); *In re R. L. Anderson, Inc.*, 2011 TTAB LEXIS 342, at \*4-\*5 (T.T.A.B. Sep. 30, 2011) (taking judicial notice of official United States Census Data (2000)). Furthermore, US Census data is more persuasive on the issue of surname significance than the nationwide telephone directory of names cited by the Examiner. *See* TMEP § 1211.02(b)(iii) (“Because the [Census Data] database reflects the number of individuals, rather than the number of households, with a particular name, search results from this database may be more persuasive evidence of surname frequency than results from telephone directory listings.”).

It should be noted that the Board, in its discretion, may take judicial notice of any relevant fact that is “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” TBMP § 704.12(a). Additionally, the Board may take judicial notice of relevant facts presented at any stage of a Board proceeding, including facts presented in Applicant’s Brief. *See* TBMP § 704.12(b). Applicant urges that surname rankings provided by the official United States Census Data (2000) are relevant, not subject to reasonable dispute, generally known

within the United States, and capable of accurate and ready determination. As such, Applicant requests the Board take judicial notice of the following facts:

- MOTT is ranked as the 1,941<sup>st</sup> most common surname in the 2000 Census;
- JOHNSON is ranked as the 2<sup>nd</sup> most common surname in the 2000 Census;
- MILLER is ranked as the 6<sup>th</sup> most common surname in the 2000 Census;
- FORD is ranked as the 124<sup>th</sup> most common surname in the 2000 Census;
- MCDONALD is ranked as the 127<sup>th</sup> most common surname in the 2000 Census;
- FOX is ranked as the 167<sup>th</sup> most common surname in the 2000 Census;
- KLEIN is ranked as the 359<sup>th</sup> most common surname in the 2000 Census; and
- SEARS is ranked as the 1,019<sup>th</sup> most common surname in the 2000 Census

Even if the Board chooses not to take judicial notice of United States Census Data, Applicant provided in its August 14, 2012 Request for Reconsideration a screenshot of the U.S. Census Bureau website from which the referenced database was accessed, as well as a screenshots of the Microsoft Excel spreadsheet which references the surnames MOTT, JOHNSON, MILLER, FORD, MCDONALD, FOX, KLEIN, and SEARS. *See* Request for Reconsideration at **EXHIBIT A**. Applicant has included with this publicly available document the date on which the material was accessed and printed together with its source (URL). As such, Applicant requests, in the alternative, that this United States Census Data be accepted as Internet Material pursuant to TBMP § 704.08(b).

In the Final Rejection and again in the Examiner's Brief, the Examiner argues that the aforementioned Census data was not made of record through the provision of electronic attachments and

should therefore not be considered by the Board. The cited database comprises more than six thousand pages of statistical surname data and therefore does not fall within the technical uploading capabilities of the TEAS system. Likewise, with respect to using regular mail, common sense weighs against depositing more than six thousand pages of statistical surname data to the Trademark Office, especially when the voluminous data is relied upon for simple, verifiable and undisputed facts. The entrance of certain undisputed facts presented within a six thousand page document created and maintained by the United States Census Bureau is exactly the kind of evidence for which judicial notice is intended. However, if the Board decides not to take judicial notice of the aforementioned facts, or accept Applicant's Internet Material as proof of the same, then Applicant requests the opportunity to submit into the record six thousand pages of statistical evidence from the 2000 Census.

**B. The Examining Attorney has mischaracterizes Applicant's prior registrations.**

The Examiner states that "Applicant has on rare occasion managed to register the single term 'MOTT' for similar goods as those presently at issue." Examiner's Brief at 7. Applicant takes issue with the Examiner's characterization of Applicant's registration history. As noted previously, Applicant owns ten (10) separate trademark registrations on the Principal Register for the MOTT'S Mark, alone and in combination with other terms, none of which cite a §2(f) claim to acquired distinctiveness. *See* Request for Reconsideration at **EXHIBIT C**. These registrations claim a broad variety of goods in Classes 18, 29, 30, 32, and 35. It should further be noted that three (3) of these prior registrations claim protection for the singular MOTT'S mark.

While the Examiner cites four (4) prior registrations for the MOTT'S mark which entered the Principal Register pursuant to a §2(f) claim to acquired distinctiveness, when Applicant's entire portfolio of MOTT'S marks is considered, Applicant's MOTT'S mark has been allowed, in a majority of instances, to register *without* a §2(f) claim to acquired distinctiveness. Just as these other MOTT'S trademarks have

been afforded protection on the Principal Register without a §2(f) claim to acquired distinctiveness, Applicant's Mark deserves similar consideration.

### **CONCLUSION**

For the reason set forth above and in Applicant's BRIEF FOR APPELLANT, Applicant submits its mark is not primarily merely a surname within the meaning of 15 U.S.C. § 1052(e)(4) of the Trademark Law Revision Act. Accordingly, Applicant maintains that its mark is entitled to registration without a claim to acquired distinctiveness. The Board is therefore respectfully requested to reverse the Examiner's decision refusing registration.

Respectfully submitted,

Dated: January 10, 2013

By: */pbhuff/*

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