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

Proceeding	85627379
Applicant	Hughes Furniture Industries, Inc.
Applied for Mark	H HUGHES FURNITURE MOTION EAZE RECLINERS
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Serial Number : 85627379
Mark : H HUGHES FURNITURE MOTION EAZE RECLINERS
Applicant : Hughes Furniture Industries, Inc.
Filing Date : May 16, 2012
Examining Attorney : Alicia Collins Edwards
Law Office 115

EX PARTE APPEAL

APPLICANT'S BRIEF

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COMES NOW the Applicant, Hughes Furniture Industries (“Hughes Furniture”), by Counsel, and hereby respectfully appeals the Examining Attorney’s refusal to register the mark H HUGHES FURNITURE MOTION EAZE RECLINERS as a design mark.

DESCRIPTION OF THE RECORD

A. PROSECUTION HISTORY

The H HUGHES FURNITURE MOTION EAZE RECLINERS application was initially refused on September 13, 2012 in a non-final Office Action. Applicant filed a response to the office action on March 13, 2013. The Examining Attorney issued a Final Refusal of Registration for the mark H HUGHES FURNITURE MOTION EAZE RECLINERS on April 23, 2013 based on the Examining Attorney’s assertion that the H HUGHES FURNITURE MOTION EAZE RECLINERS mark created a likelihood of confusion with another registered mark under Lanham Act Section 2(d), 15 U.S.C. § 1052(d) and that it required a disclaimer pursuant to Lanham Act Section 6(a), 15 U.S.C. § 1056(a). Applicant timely filed its Notice of Appeal on October 23, 2013¹.

B. EXAMINING ATTORNEY’S EVIDENCE

September 13, 2012, Office Action

The Examining Attorney contends in the September 13, 2012 Office Action that Applicant’s H HUGHES FURNITURE MOTION EAZE RECLINERS mark for furniture is likely to confuse under the Lanham Act Section 2(d), 15 U.S.C. § 1052(d), with Registration No. 3916977 BRADLEY HUGHES for residential and commercial furniture. The Examining Attorney also contends that Applicant must issue a disclaimer pursuant to Lanham Act Section

¹ As discussed more fully below, Applicant consents to the Examining Attorney’s proposed disclaimer and does not appeal the refusal under Lanham Act Section 6(a), 15 U.S.C. § 1056(a). Accordingly, Applicant is filing a Request to Remand on this discrete issue concurrently with Applicant’s Appeal Brief.

6(a), 15 U.S.C. § 1056(a) for “FURNITURE” and “MOTION” and “RECLINERS.” Aside from a copy of the cited registration, the Examining Attorney did not include any other evidence in support of her refusal. *See* First Office Action.

April 23, 2013, Final Office Action

In the April 23, 2013 Office Action, the Examining Attorney maintained the rejection of Applicant’s H HUGHES FURNITURE MOTION EAZE RECLINERS mark in view of registrant’s BRADLEY HUGHES mark. The Examining Attorney further maintained the rejection of Applicant’s H HUGHES FURNITURE MOTION EAZE RECLINERS mark on the basis of requiring a disclaimer. The Examining Attorney included two exhibits to the Office Action relating to the requested disclaimer—a screen shot from a glossary of furniture terminology and a screen shot from Applicant’s website suggesting that Applicant sells motion upholstery. *See* Final Office Action. The Examining Attorney did not include any other evidentiary submissions with the Final Office Action related to the Lanham Act Section 2(d) refusal.

C. APPLICANT’S EVIDENCE

March 13, 2013, Response to Office Action

In response to the Examining Attorney’s non-final Office Action, Applicant timely filed an answer asserting that a comparison of Applicant’s H HUGHES FURNITURE MOTION EAZE RECLINERS mark and the registrant’s mark shows the two marks are not similar and therefore not likely to confuse. Applicant further asserted that goods and services and channels of the H HUGHES FURNITURE MOTION EAZE RECLINERS mark and the registrant’s mark were not similar and therefore not likely to confuse. Additionally, to the extent that any overlap in customers between Applicant’s and Registrant’s mark existed, Applicant argued that the

clients serviced by both the Applicant and the Registrant are highly sophisticated and are, therefore, unlikely to be confused between the Applicant's H HUGHES FURNITURE MOTION EAZE RECLINERS mark and the registrant's BRADLEY HUGHES mark.

Included with Applicant's March 13, 2013 response to the Examining Attorney's non-final Office Action were the following exhibits:

Exhibit A: Screen shot of Registrant's website. This screen shot of the Registrant's publically available web page issues a press release informing the public that Registrant was rebranding from BRADLEY HUGHES to simply BRADLEY.

Exhibit B: Screen shot of Registrant's website. This screen shot of the Registrant's publically available web page provides an overview of a custom-made ottoman illustrating the types of goods provided by the Registrant.

Exhibit C: Screen shot of Registrant's website. This screen shot of the Registrant's publically available web page provides an overview of a custom-made hooded chair illustrating the types of goods provided by the Registrant.

Exhibit D: Screen shot of Registrant's website. This screen shot of the Registrant's publically available web page provides an overview of a custom-made teak root accent table illustrating the types of goods provided by the Registrant.

Exhibit E: Screen shot of Applicant's informational website. This screen shot of the Applicant's publically available web page provides an illustrative overview of the types of furniture provided by the Applicant. Here, a sofa and loveseat set.

Exhibit F: Screen shot of Applicant's informational website. This screen shot of the Applicant's publically available web page provides an illustrative overview of the types of furniture provided by the Applicant. Here, a separate sofa and loveseat set.

ARGUMENT

A. LEGAL STANDARD

The question of whether a mark sought can overcome a likelihood of confusion under Section 2(d) of the Lanham Act is answered using the *DuPont* factors. E.I. DuPont de Neumours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). The court in *E.I. du Pont* listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d). However, not all the factors are necessarily relevant or of equal weight. *E.I. DuPont* 476 F.2d at 1361-1362, 177 USPQ at 567.

A likelihood of confusion does not exist merely because two marks are similar. The relevant inquiry is whether the similarities are likely to cause confusion. See e.g., Brennan's, Inc. v. Brennan's Rest., L.L.C., 360 F.3d 125, 133, 69 U.S.P.Q.2d 1939, 1944 (2d Cir. 2004). Similarly, a likelihood of confusion does not exist merely because identical or similar marks are used for the same broad category of goods or services. The goods and services must also be sufficiently similar. See e.g., Dynamics Research Corp. v. Langenau Mfg. Co., 704 F.2d 1575, 1576, 217 U.S.P.Q. 649, 649-50 (Fed. Cir. 1983) (no likelihood of confusion between two "DRC" marks both used for goods in the metal fabrication industry); Electronic Design & Sales v. Electronic Data Sys., 954 F.2d 713, 717, 21 U.S.P.Q.2d 1388, 1391 (Fed. Cir. 1992) (no likelihood of confusion between EDS and E.D.S. where both marks used for products designed for the medical field); Reynolds and Reynolds Co. v. I.E. Sys., Inc., 5 U.S.P.Q.2d 1749, 1752 (T.T.A.B. 1987) (mere fact that ACCU prefix was used by both parties for computers insufficient to support a likelihood of confusion).

The sophistication of consumers is a significant factor in a likelihood of confusion analysis. "The sophistication and expertise of the usual purchasers can preclude any likelihood

of confusion among them stemming from the similarity of trade names.” Perini Corp. v. Perini Construction Inc., 915 F.2d 121, 127 (4th Cir. 1990) (citing Oreck Corp. v. U.S. Floor Systems, Inc., 802 F.2d 166, 173-74 (5th Cir. 1986) (reversing finding of infringement in part because purchasers, who buy goods for institutional purposes at a high price, are virtually certain to be informed buyers); Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 1206-07 (1st Cir. 1983) (affirming district court's summary judgment for defendant because “it is simply inconceivable that purchasers of the ... products could be confused” in light of the sophisticated purchasing decision).

B. ANALYSIS

The following *DuPont* factors are highly relevant to this application:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression;
- (2) The similarity or dissimilarity and nature of the goods described in an application or registration or in connection with which a prior mark is in use;
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels; and
- (4) The conditions under which and buyers to whom sales are made, *i.e.*, “impulse” vs. careful, sophisticated purchasing;

See E.I. DuPont de Neumours & Co., 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973).

In this case, a comparison of both the Registrant’s BRADLEY HUGHES and the Applicant’s H HUGHES FURNITURE MOTION EAZE RECLINERS reveals that the two marks are entirely dissimilar in the critical aspects of appearance, sound, connotation, and overall commercial impression. Additionally, Applicant and Registrant offer goods that are very different, despite co-existing in the same industry. Applicant and Registrant offer those goods through differing trade channels and are, therefore, unlikely to confuse sophisticated purchasers.

Given the nature of the goods at issue and the price point of these goods, purchasers of either Applicant's or Registrant's goods are likely to make a well-researched and informed decision when deciding to purchase large scale residential furniture and are, therefore, unlikely to make an impulse buying decision.

1. Hughes Furniture's Mark and Registrant's Mark Create a Different Overall Commercial Impression

Applicant's H HUGHES FURNITURE MOTION EAZE RECLINERS mark is different than Registrant's mark. The Examining Attorney concludes that Registrant's Mark and Applicant's Mark are "substantially similar in overall commercial impression because both marks contain the wording HUGHES." The relevant factor under *E. I. du Pont de Nemours & Co.* requires examination of "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973) (emphasis added). Further, each mark must be viewed as a whole, and each case will turn on its own facts. See T.M.E.P. § 1207.01(b). It is respectfully submitted that a comparison of the marks in their entireties show that the marks are distinctly dissimilar.

Foremost and of significant importance, Applicant owns a U.S. Trademark Registration for the standard character trademark "MOTION EAZE,"² which registered on October 11, 2011. Applicant identified this registration in its application for H HUGHES FURNITURE MOTION EAZE RECLINERS pursuant to T.M.E.P. § 812. Applicant's Mark contains, in its entirety, the "MOTION EAZE" trademark. Consumers equate "MOTION EAZE" with Applicant's goods and/or services. The overall commercial impression of "MOTION EAZE" relates directly to Applicant. Because Applicant's Mark contains, as a subset, "MOTION EAZE," consumers will

² U.S. Reg. 4038175.

already be inclined to associate Applicant's goods and/or services with Applicant, as opposed to Registrant, by virtue of the "MOTION EAZE" trademark being included in Applicant's Mark. Applicant's Mark must, by virtue of the application filed, always contain the "MOTION EAZE" trademark. As such, consumers will additionally associate the Applicant Mark with Applicant's goods by virtue of their prior association of the "MOTION EAZE" trademark with Applicant's goods. Accordingly, the inclusion, in its entirety, of the "MOTION EAZE" trademark alleviates concern of a likelihood of confusion between Applicant's Mark and Registrant's Mark. The Examining Attorney suggests that the use of the word "MOTION" is generic in relation to the identified goods, presumably, by virtue of the Examining Attorney's request that "MOTION" be disclaimed. The Lanham Act Section 6(b), 15 U.S.C. § 1056(b) provides that "No disclaimer ... shall prejudice or affect the applicant's or registrant's rights then existing or thereafter arising in the disclaimed matter, or his right of registration on another application if the disclaimed matter be or shall have become distinctive of his goods or services." The disclaimer sought for Applicant's Mark cannot prejudice Applicant's right in the word "MOTION" as used in its registered trademark for "MOTION EAZE" which is distinctive of Applicant's goods and, most importantly, is included in its entirety within the H HUGHES FURNITURE MOTION EAZE RECLINERS mark.

With respect to the similarity of the marks, the appearance of a standard character mark arises from the overall impression of the words composing the mark. See In re Hearst Corp., 25 U.S.P.Q. 2d 1238, 1239 (Fed. Cir. 1992) ("Marks tend to be perceived in their entireties, and all components thereof must be given appropriate weight.") Disclaimed elements have no bearing on a likelihood of confusion analysis. See In re National Data Corp., 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985) ("The technicality of a disclaimer in National's application to register its mark

has no legal effect on the issue of likelihood of confusion. The public is unaware of what words have been disclaimed during prosecution of the trademark application at the PTO.”)

Further, nonverbal features such as spacing, location, layout, design, and typeface may affect the overall appearance and commercial impression of the marks. See Packman v. Chi. Tribune, 267 F.3d 628, 60 U.S.P.Q.2d 1245, 1255 (7th Cir. 2001) (“Although the words on [the parties’ products] are the same, the words’ appearances do not resemble each other and are not likely to cause confusion. Different packaging, coloring, and labeling can be significant factors.”); Henri’s Food Prods. Co. v. Kraft, Inc., 717 F.2d 352, 220 U.S.P.Q. 386, 388-89 (7th Cir. 1983) (words on separate lines); Lang v. Ret. Living Publ’g Co., 949 F.2d 576, 582, 21 U.S.P.Q.2d 1041, 1045 (2d Cir. 1991) (typeface and location). Here, the differences between the two marks significantly change the commercial impression made by Applicant’s Mark. See Recot Inc. v. Becton, 50 U.S.P.Q. 2d 1439 (T.T.A.B. 1999) (no likelihood of confusion found between “FRITO LAY” for snack foods and “FIDO LAY” for canine snacks, due to the differences in sound, appearance, and meaning).

Registrant’s Mark consists of the two literal elements “BRADLEY” and “HUGHES”. Applicant’s Mark consists of the six literal elements “H”, “HUGHES”, “FURNITURE”, “MOTION”, “EAZE”, and “RECLINERS” in addition to four design elements: (1) script upper case “H”; (2) horizontal bar separating “HUGHES” and “FURNITURE”; (3) horizontal bar separating the script “H” and “HUGHES” and “FURNITURE” from “MOTION EAZE RECLINERS”; (4) multi-layered rectangles. The only common element, as identified by the Examiner, is the word “HUGHES.” Although the root of the alleged confusing similarity

between the marks is the use of “HUGHES³,” the mere fact that the Applicant Mark and Registrant’s Mark share this element does not compel a conclusion of likely confusion. See Gen. Mills, Inc. v. Kellogg Co., 824 F.2d 622, 627, 3 U.S.P.Q.2d 1442, 1445 (8th Cir. 1987) (“The use of identical, even dominant, words in common does not automatically mean that two marks are similar”). The common element here differs greatly in appearance when you compare the entireties of the two marks. In Registrant’s Mark, “HUGHES” simply appears after “BRADLEY” with no particular typeface or layout elements. By contrast, “HUGHES” in Applicant’s Mark appears predominantly atop a horizontal bar that appears above “FURNITURE”. The “HUGHES” element in Applicant’s Mark is also contained within a rectangle that does not include most of the other literal elements of the mark. As a design mark, “HUGHES” must always appear as provided in Applicant’s Mark. Specifically, it must always (1) appear above a horizontal bar, (2) appear above the word “FURNITURE”, (3) be contained within a rectangle, and (4) must always appear to the right of a script capital “H”. Its location in Applicant’s Mark is significant. Based upon the foregoing, a comparison of the marks in their entirety clearly demonstrates significant dissimilarities between the appearances of the two marks such that the commercial impression left on a consumer by each mark is distinctly different.

Additionally, with respect to the aural or sound features of the Cited Mark and Applicant’s Mark, a comparison of the two marks in their entireties also compels a finding that the two marks are significantly dissimilar. The Cited Mark contains three syllables: “Brad”, “Ley”, and “Hughes.” In stark contrast, Applicant’s Mark contains eleven syllables and would require a consumer to recite: “H”, “Hughes”, “Fur”, “Nit”, “Ture”, “Mo”, “Tion”, “Eaze”, “Re”,

³ The Examining Attorney has not shown how “HUGHES” is the dominant element in Registrant’s Mark.

“Clin”, and “Ers.” There is no logical basis for believing the sounds the two marks make somehow create a confusingly similar impression when heard.

Turning to the connotation or meaning of the two marks, Registrant’s Mark has no meaning to the average consumer because the literal elements “BRADLEY” and “HUGHES” are merely common names that do not, in and of themselves, hold particular meaning in the English language. Similarly, “HUGHES” as used in Applicant’s Mark, conveys no particular meaning to a consumer.

Upon application of the traditional “sight, sound and meaning” test encompassed by the mark similarity factor of the *DuPont* test, the commercial impression of the two marks at issue is significantly different and this factor weighs heavily in favor of Applicant.

2. Hughes Furniture’s and Registrant’s Goods are Different and Travel In Different Channels of Trade

Applicant’s H HUGHES FURNITURE MOTION EAZE RECLINERS mark is not sought for use for the same goods as Registrant’s Mark. The Examining Attorney suggests that because the Applicant’s and Registrant’s goods both relate to furniture, consumers will be likely to believe the goods of the applicant and the registrant emanate from the same source. The goods of the Applicant and of the Registrant are significantly different and that they are sold in completely different channels of trade such that a likelihood of confusion is minimal.

a. Applicant and Registrant Offer Distinct Goods

According to the Registrant’s website, Registrant’s goods relate primarily to “luxury furnishings” and customizable “artisan-made furnishings.”⁴ Samples of Registrant’s goods are identified in Exhibit B, C, and D to the March 13, 2013 Office Action Response. Registrant serves a very niche segment of the furniture industry. Applicant, by comparison, focuses

⁴ See Exhibit A to Applicant’s March 13, 2013 Office Action Response.

specifically on manufactured furniture that appeals to a much broader segment of the consumer public. A sampling of Applicant's goods is identified in Exhibits E and F to Applicant's March 13, 2013 Office Action Response. Applicant's manufactured furniture differs greatly from Registrant's custom-made designer furniture and consumers are not likely to encounter these goods such that a likelihood of confusion would exist. The issue of relatedness of goods and services relates specifically to consumer expectations. The fact that both Applicant and Registrant's goods relate to furniture which can be categorized as the same "industry" does not in and of itself provide sufficient basis for finding the goods related. See Bose v. QSC Audio, 293 F.3d 1367, 1376, 63 U.S.P.Q.2d 1303, 1310 (Fed Cir. 2002) ("a broad general market category [electronic sound products] is not a generally reliable test of relatedness of products"); Therma-Scan v. Thermoscan, 295 F.3d 623, 633, 63 U.S.P.Q.2d 1659 (6th Cir. 2002) ("Goods or services are not necessarily related ... simply because they coexist in the same broad industry."), UMC Indus., Inc. v. UMC Elecs. Co., 207 U.S.P.Q. 861, 879 (T.T.A.B. 1980) ("the fact that one term, such as 'electronic', may be found which generally describes the goods of both parties is manifestly insufficient to establish that the goods are related in any meaningful way"), Heartsprings, Inc. v. Heartspring, Inc., 143 F.3d 550, 46 U.S.P.Q.2d 1481, 1486 (10th Cir. 1998) ("Beyond ... the fact the parties conduct business within the very broad category of products for children, there is little overlap between the parties' products, services or marketing strategies").

The actual goods, as described above, of Applicant and Registrant vary significantly, are marketed significantly different, and appeal to significantly different segments of the consumer population and as such, are clearly dissimilar. The Examining Attorney has offered no evidence of goods similarity other than indicating Applicant's and Registrant's goods co-exist in the same

broad market industry. The Board has held that to be insufficient reasoning and this factor, therefore, strongly favors the Applicant.

b. Purchasers of Hughes Furniture's and Registrant's Goods Use Diverse, Likely-to-Continue Trade Channels

A detailed examination into the channels of trade and the sophistication of the relevant purchasers is required when determining likelihood of confusion. Electronic Design, 954 F.2d at 717, 21 U.S.P.Q.2d at 1391 (citing Astra Pharmaceutical Prods., Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 1206, 220 U.S.P.Q. 786, 790 (1st Cir. 1983) (The likelihood of confusion must be shown to exist not in a purchasing institution, but in a 'customer or purchaser.');

Accord Electronic Data Sys. Corp. v. EDSA Micro Corp., 23 U.S.P.Q.2d 1460 (T.T.A.B. 1992) (no likelihood of confusion for computer programming services including electronic data processing programs and EDSA for computer programs for performing system analysis and design even though parties' software was often purchased by the same large companies because ultimate consumers occupied different positions in companies and purchasers were highly sophisticated).

The Federal Circuit examined the trade channels factor in Dynamics Research. That case involved parties who used identical marks for goods marketed in the metal fabrication industry. The Opposer sold its goods to manufacturers of press brakes and sheet metal fabrication shops, whereas the Applicant sold its goods to state highway departments and airport authorities. The court affirmed the Board's finding of no likelihood of confusion primarily because the Applicant sold its goods to sophisticated purchasing agents of large corporations. Thus, although the goods were sold in the same metal fabrication industry, they were sold to different customers through different trade channels. The court affirmed the Board's finding of no likelihood of confusion:

... the customers of the respective products do not appear to be the same and any overlap in purchasers or customers is *de minimis* ... [In] those instances where the same customers might be exposed to both applicant's and opposer's goods sold

under the identical mark, there would not be any likelihood of confusion as to the source of the goods in view of the nature of the goods involved **and the nature of the purchasers who would be responsible for the acquisition of the products.**

Dynamics Research, 704 F.2d at 1576, 217 U.S.P.Q. at 649-50 (emphasis added).

Applicant's goods can be purchased by consumers throughout the country and are generally available to the public at large. Applicant's goods are also sold in on-line commerce channels. In contrast, Registrant's goods are limited to specialty showrooms run by Registrant in select cities around the country as well as select design trade professionals around the world. In order to view certain product information provided by Registrant, a consumer must have a registered trade account which generally is supplied to designers, architects, and purchasing agents. See Exhibit A to the March 13, 2013 Office Action Response. Based on the foregoing, it is clear that the channels of trade in which both sets of goods pass are significantly different.

3. Purchasers of Hughes Furniture's and Registrant's Goods are Sophisticated Consumers

The relative sophistication of the buyers who may purchase the goods of the Applicant and of the Registrant is another factor that weighs against a likelihood of confusion. See E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563, (C.C.P.A. 1973); Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 45, 38 U.S.P.Q.2d 1449, 1454 (4th Cir. 1996). Sophisticated consumers are generally expected to exercise greater care in their field of expertise and so are less likely to be confused as to the source of the goods they purchase. See Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 127, 16 U.S.P.Q.2d 1289, 1293 (4th Cir. 1990).

As discussed above, the Registrant's furniture related goods can be generally considered "stylish, custom-made contemporary furnishings." Consumers who purchase furnishings in this segment of the market are generally sophisticated purchasers who know the designer products and their respective sources and are not likely to be confused. In contrast, although Applicant's

goods also relate to the furniture industry, Applicant primarily manufactures upholstery furniture, including sofas, love seats, and recliners. Applicant's goods, while of a high manufacturing quality, are not custom designed, nor are they limited to a few select showrooms around the country like Registrant's goods. As the Examining Attorney has indicated, the issue is whether "the conditions surrounding [the goods'] marketing are such that they would be encountered by the **same** purchasers under circumstances that would give rise to the mistaken belief that the goods come from a common source." In re Total Quality Group, Inc., 51 U.S.P.Q.2d 1474, 1476 (T.T.A.B. 1999). Simply put, the purchasers of both Applicant's goods and Registrant's goods will rarely, if ever, overlap. A customer looking for high-end custom furnishings is not likely to also be a consumer for manufactured furniture that is widely available to the consuming public. A customer seeking custom-made furniture is doing so, in part, because they desire to own furniture that others do not have. Since the customers will not overlap, it is unlikely that a given consumer will encounter both types of products when shopping for either high-end custom furnishings or manufactured furniture. Accordingly, confusion is unlikely.

Further, the goods in question (either from Applicant or the Registrant) carry a retail price in the high three figures to low four figures for Applicant and, presumably, low four figures to high four figures for Registrant's goods, depending on the specific item. Although price alone is not determinative in a sophistication analysis, the generally high price of furniture, both manufactured and custom, would make a potential purchaser of either of these goods more careful of the purchase and ultimately reduce a likelihood of confusion. See Weiss Assocs., Inc. v. HRL Assocs., Inc., 902 F.2d 1546, 1548, 14 U.S.P.Q.2d 1840, 1841 (Fed. Cir. 1990) (in

making purchasing decisions regarding expensive goods, “the reasonably prudent person standard is elevated to the standard of the ‘discriminating purchaser’”).

4. Hughes Furniture Consents to the Examining Attorney’s Suggested Disclaimer

Applicant agrees with the Examining Attorney suggested disclaimer that includes “MOTION” and proposes the application be amended to include the following disclaimer: “No claim is made to the exclusive right to use ‘FURNITURE’ and ‘RECLINERS’ apart from the mark as shown.” This is outlined in Applicant’s Request for Remand being filed concurrently with Applicant’s Appeal Brief.

CONCLUSION

The relevant *DuPont* factors all weigh strongly in favor of a finding that Applicant’s H HUGHES FURNITURE MOTION EAZE RECLINERS mark does not create a likelihood of confusion with the Registrant’s mark because: (1) Hughes Furniture’s mark and Registrant’s mark create different overall commercial impressions; (2) Hughes Furniture and the Registrant offer different goods and services; (3) Hughes Furniture and the Registrant operate in separate and distinct markets; and (4) Hughes Furniture and the Registrant each enjoy cautious, sophisticated clients who are unlikely to be confused by similar marks in the relevant industry. The Examining Attorney has failed to meet her burden that a likelihood of confusion exists between H HUGHES FURNITURE MOTION EAZE RECLINERS and the Registrant’s mark.

Therefore, in light of the above, Applicant respectfully requests that the Board grant this Ex Parte Appeal and allow for the registration of the H HUGHES FURNITURE MOTION EAZE RECLINERS mark.

Respectfully submitted, this the 23rd day of December, 2013.



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