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

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| Proceeding | 91194864 |
| Party | Defendant Undivided Design, LLC |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

H&M HENNES & MAURITZ AB,

Opposer,

vs.

UNDIVIDED DESIGN, LLC, ,

Applicant.

Opposition No.: 91194864

Application Serial No. 77/888,150

APPLICANT'S TRIAL BRIEF

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Pursuant to 37 CFR § 2.128 and TBMP 80102(b), applicant UNDIVIDED DESIGN, LLC (“**Applicant**”), through counsel, hereby submits its main brief.

I. PRELIMINARY STATEMENT

H&M Hennes & Mauritz AB (“**Opposer**” or “**H&M**”) opposes registration of Applicant’s mark “UNDIVIDED” on the alleged ground that it will cause confusion as to source. H&M, however, has not satisfied its burdens of proof and persuasion to establish a likelihood of confusion. H&M has not presented any expert opinion testimony. H&M has not offered any evidence of actual confusion between its mark “DIVIDED” and Applicant’s mark. H&M has not offered any evidence of consumer polling, or of a consumer test group.

H&M’s case depends entirely upon asking the Board to make an intuitive leap, without the assistance of any supporting evidence. The Board should not accept this invitation into the ether. Rather, the Board should overrule H&M’s Opposition and approve Applicant’s mark “UNDIVIDED” for several reasons, including:

- H&M’s mark is the antonym or opposite of Applicant’s branding and mark;
- Applicant’s mark is not likely to cause confusion, mistake or deception;
- Applicant’s mark and H&M’s mark are dissimilar in both appearance and sound;
- the marks are complete opposites in connotation and meaning;
- because the words are opposites in meaning and connotation (*e.g.*, black versus white), they are not similar in commercial impression and, as such, are not likely to confuse customers;
- H&M has not carried its burden to persuade the Board that consumers are likely to assume that H&M’s mark “DIVIDED” and Applicant’s mark “UNDIVIDED” indicate a single source for goods;
- even if the Board assumes that applicant’s mark “UNDIVIDED” may bring to mind H&M’s mark, the mind will be distinguishing, rather than being confused by, the disparate marks;

- consumers can differentiate between marks that have familiar dictionary meanings that are different from each other, even when the marks are similar in appearance and/or phonetics; and
- Applicant’s mark is sufficiently dissimilar to H&M’s mark such that the Board should not “assume” a likelihood of confusion as a matter of law, especially in the absence of any expert testimony or other competent evidence of consumer confusion.

II. DESCRIPTION OF THE RECORD

Opposer’s description of the record appears to be complete. Applicant notes that Opposer’s sole witness is Jeffrey Miller, an H&M merchandizer in Opposer’s employ. Mr. Miller did not testify as an expert. Indeed, Opposer did not timely designate any experts in this opposition proceeding.

III. STATEMENT OF THE ISSUES

Applicant concedes that Opposer has established standing and prior use. As such, the sole issue to be decided by the Board is whether Opposer has proved a likelihood of confusion as to source.

IV. RECITATION OF RELEVANT EVIDENCE

H&M’s mark “DIVIDED” does not refer to or evoke a stand-alone brand. Rather, it is a “line” or “concept” of Opposer’s core mark, “H&M”. (See Miller Dep., 98:18-18.) Stated another way, “DIVIDED” is a “sub-brand” of H&M – “one of many that make up the H&M assortment.” (Miller Dep., 99:2-7.) “Divided” also is a delineated “department” in H&M stores, which contains “its own free-standing collection.” (See Miller Dep., 100:20 to 101:3.)

H&M products bearing “DIVIDED” labels are sold only in H&M stores or from H&M’s websites. (Miller Dep., 101:4-7.) Clothing and other products branded with the “DIVIDED” mark are not distributed through any non-H&M retailers – either online or brick and mortar. (Miller Dep., 101:8-11.)

Further, all H&M products marketed and sold under the “DIVIDED” sub-brand additionally reference Opposer’s prime mark “H&M” somewhere on the same tag or another tag on the clothing, accessory or cosmetic product. (Miller Dep., 102:2-11, 108:2-7.) Indeed, many of the product labels identify the branding as “DIVIDED by H&M”. (Miller Dep., 102:5 to 108:7; see also Exs. 5, 6, 7, 8, 9, 10 and 11.)

The common, lay meaning of the words “divided” and “undivided” are dissimilar. Indeed, they are antonyms or opposites. A lay understanding of the word “divided” is “Separate, disparate elements that are not attached to one another necessarily.” (Miller Dep., 108:19 to 109:2.) Meanwhile, a lay understanding of the word “undivided” refers to and connotes “Elements that are together, not separated.” (Miller Dep., 108:19 to 109:2.)

V. ARGUMENT

Applicant does not challenge H&M’s standing or its priority of use. As such, the sole issue for the Board to consider and decide is whether H&M has carried its burdens of proof and persuasion to establish a likelihood of confusion.

A. Opposer Has the Burden of Proof.

In an opposition proceeding under sections 2(a) through 2(e) of the Lanham Act, the opposer has the burden of proof. Specifically, H&M must show, by a preponderance of the evidence, that Applicant is not entitled to the registration sought. See Hoover Co. v. Royal Appliance Mfg. Co., 238 F.3d 1357, 1360, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001). More specifically, H&M must establish through competent evidence the ultimate conclusion of a likelihood of confusion as to source. See Yamaha Int’l Corp. v. Hoshino Gakki Co., 840 F.2d 1572, 1579-80, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988) (because “no trademark shall be refused unless it is shown that there is a likelihood of confusion with another mark, the requirement that the opposer both establish a prima facie case of likelihood of confusion and carry the ultimate burden of persuasion on that issue is proper”); see also Sanyo Watch Co. v. Sanyo Elec. Co., 691 F.2d 1019, 1022, 125 USPQ 833, 834 (Fed. Cir. 1982).

As the Board's review of the record will demonstrate, H&M has failed to carry its burdens of proof and persuasion to establish a likelihood of confusion as to source. Among other things, Opposer has offered no expert testimony on the issue, no evidence of actual confusion and no evidence of consumer polling or consumer testing.

B. H&M Has Not Proved a Likelihood of Confusion as to Source.

Likelihood of confusion is determined on a case-by-case basis, applying the thirteen DuPont factors, as delineated in the seminal case In re E.I. DuPont Denemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). On the record before the Board and in light of the DuPont factors, H&M has failed in its burden of proof. As such the Board must find and conclude that H&M has failed to establish a likelihood of confusion as to source.

The thirteen DuPont factors will be discussed below, *ad seriatim*.

1. The marks are sufficiently dissimilar in their entireties that the marks will not confuse consumers.

Applicant's mark "UNDIVIDED" is neither identical to H&M's "DIVIDED" mark, nor is it so similar that the disparate marks will confuse consumers. Although there are some common features, the record does not support a conclusion that consumers will believe the two marks are used by the same company.

It is well settled that marks must be compared in their entireties, because likelihood of confusion depends on the overall impression of the marks. See Sure-Fit Prods. Co. v. Saltzson Drapery Co., 254 F.2d 158, 160, 117 USPQ 295, 296 (CCPA 1958). Likelihood of confusion does not exist when the marks in their entireties project dissimilar commercial impressions. See, e.g., Citigroup Inc. v. Capital City Bank Group, Inc., 637 F.3d 1344, 1350, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011).

Although the two marks share a common root, they are dissimilar in appearance, phonetics, connotation and commercial impression. Regarding appearance, the marks are dissimilar. Applicant's mark "UNDIVIDED" starts with different letter and is longer. Even at a quick glance, a consumer will not confuse the two marks.

Phonetically the two marks are dissimilar as well. Applicant's mark consists of four syllables, with emphasis on the first syllable "UN-". H&M's mark consists of four syllables with a different emphasis.

The two words are complete opposites in both connotation and common meaning. Applicant chose "UNDIVIDED" as its mark because of the common meaning of the term "undivided," *to wit*:

1. **undivided** - not parted by conflict of opinion; "presented an undivided front"
[united](#) - characterized by unity; being or joined into a single entity; "presented a united front"
2. **undivided** not shared by or among others; "undivided responsibility"
[unshared](#) - not shared
3. **undivided** - not divided among or brought to bear on more than one object or objective; "judging a contest with a single eye"; "a single devotion to duty"; "undivided affection"; "gained their exclusive attention"
[exclusive](#), [single](#)
[concentrated](#) - gathered together or made less diffuse; "their concentrated efforts"; "his concentrated attention"; "concentrated study"; "a narrow thread of concentrated ore"
4. **undivided** - not separated into parts or shares; constituting an undivided unit; "an undivided interest in the property"; "a full share"
[whole](#) - including all components without exception; being one unit or constituting the full amount or extent or duration; complete; "gave his whole attention"; "a whole wardrobe for the tropics"; "the whole hog"; "a whole week"; "the baby cried the whole trip home"; "a whole loaf of bread"

<http://www.thefreedictionary.com/undivided>.

The meaning of the word "undivided" connotes unity, wholeness and/or one-ness. Mr. Miller, H&M's merchandizer, testified as to his lay understanding of the meaning as: "Elements that are together, not separated." (Miller Dep., 108:19 to 109:2.)

H&M's mark is the antonym or opposite of Applicant's mark. Mr. Miller testified as to his lay understanding of the meaning as: "Separate, disparate elements that are not attached to one another necessarily." (Miller Dep., 108:19 to 109:2.)

Because the words are opposites in meaning and connotation (*e.g.*, black versus white) they are not similar in commercial impression. In short, the marks are not likely to confuse customers.

Further, the evidence shows that H&M uses its “DIVIDED” mark to delineate a “sub-brand” of H&M products and to delineate a “department” in H&M’s brick and mortar and online stores. (See Miller Dep., 98:18-18; 99:2-7; 100:20 to 101:3.) H&M products bearing “DIVIDED” labels are sold only in H&M stores or from H&M’s websites. (Miller Dep., 101:4-7.) Clothing and other products branded with the “DIVIDED” mark are not distributed through any non-H&M retailers – either online or brick and mortar. (See Miller Dep., 101:8-11.)

Further, all H&M products marketed and sold under the “DIVIDED” sub-brand additionally reference “H&M” somewhere on the same tag or another tag on the clothing, accessory or cosmetic product. (See Miller Dep., 102:2-11, 108:2-7.) Indeed, many of the product labels identify the branding as “DIVIDED by H&M”. (See Miller Dep., 102:5 to 108:7; see also Exs. 5, 6, 7, 8, 9, 10 and 11.)

Accordingly, where Applicant’s “UNDIVIDED” products will not be sold in H&M stores or from H&M websites and where “UNDIVIDED” products cannot include references to Opposer’s prime mark “H&M”, the two marks are not similar in commercial impression.

Finally, even if the Board assumes that Applicant’s mark “UNDIVIDED” will bring to mind H&M’s mark, the fact that one mark may bring another mark to mind does not establish likelihood of confusion as to source. Rather, “[t]he very fact of calling to mind may indicate that the mind is distinguishing, rather than being confused by, two marks.” In re Ferrero, 479 F.2d 1395, 1397 (CCPA 1973). On the record before the Board, Applicant submits that the minds of the purchasing public will distinguish, rather than be confused by, the disparate marks.

In summary, the Board should conclude that, when considered in their entirety, the two marks are not so similar as to cause a likelihood of confusion as to source. See, e.g., R. J. Reynolds Tobacco Co. v. Am Brands, Inc., 493 F.2d 1235, 1239 (CCPA 1974) (finding that the marks “ADVANCE” and “VANTAGE” would not cause confusion); Singer Co. v. Unishops,

Inc., 421 F.2d 1371, 1372 (CCPA 1970) (holding that the marks “SINGER” and “SLINGER” would not cause confusion); Lever Bros. Co. v. Babson Bros. Co., 197 F.2d 531, 533 (CCPA 1952) (holding that the marks “SURGE” and “SURF” would not cause confusion).

2. The goods covered by the two marks are very similar.

The registrations for both Applicant’s mark and H&M “DIVIDED” sub-brand cover the same category of goods. Although this factor supports H&M’s opposition, it is outweighed by the other factors, especially on the record before the Board.

3. The goods will not be sold through the same or similar channels. H&M products labeled with the “DIVIDED” sub-brand are sold directly by H&M only from its own brick and mortar stores and its own proprietary websites.

The evidence in the record rebuts any presumption that products bearing Applicant’s “UNDIVIDED” mark will be sold through the same channels as H&M’s sub-branded products.

The record clearly establishes that H&M products labeled with the “DIVIDED” sub-brand are sold only in H&M stores or from H&M’s websites. (See Miller Dep., 101:4-7.) Clothing and other products branded with the “DIVIDED” mark are not distributed through any non-H&M retailers – either online retailers or brick and mortar retailers. (See Miller Dep., 101:8-11.)

Applicant’s products will not be sold in H&M stores or from H&M’s website. This negates any likelihood of confusion. Stated another way, “DIVIDED” is a sub-brand of H&M sold only from H&M brick and mortar stores and H&M websites. “UNDIVIDED” will never be sold from the same stores or websites – at least not without H&M’s cooperation and consent.

In summary, Applicant’s products will not be sold through the same trade channels as H&M’s products.

4. The purchasing public, although not extremely sophisticated, will not confuse the two marks.

Applicant concedes that a consumer purchasing a T-shirt is not necessarily “sophisticated.” The average consumer, however, is sophisticated enough to know that goods it purchases in an H&M store or on an H&M website are goods of H&M. (See Miller Dep., 101:4-

7; 101:8-11.) Further, the purchasing public is sophisticated enough to avoid confusion where Applicant's products (a) are not sold in H&M stores or on H&M websites, and (b) unlike products labeled with H&M's sub-brand, do not mention H&M anywhere on the product labeling or packaging. (See Miller Dep., 102:2-11; 108:2-7; 102:5 to 108:7; see also Exs. 5, 6, 7, 8, 9, 10 and 11.)

5. H&M has not presented competent evidence to establish that its "DIVIDED" mark is a "famous" or "strong" mark.

The record before the Board does not establish that H&M's "DIVIDED" mark is famous, or even strong. Although H&M has presented evidence regarding sales of products bearing the sub-brand, this evidence does not establish any fame or market strength.

H&M's own witness concedes that Opposer considers "DIVIDED" to be a "line" or "concept" of Opposer's core mark, "H&M". (See Miller Dep., 98:18-18.) "DIVIDED" is a "sub-brand" of H&M – "one of many that make up the H&M assortment." (Miller Dep., 99:2-7.) "Divided" also is a delineated "department" in H&M stores, which contains "its own free-standing collection." (See Miller Dep., 100:20 to 101:3.)

The evidence shows that H&M uses its "DIVIDED" mark to delineate a "sub-brand" of H&M products and a separate "department" in both H&M's brick and mortar and online stores. (See Miller Dep., 98:18-18; 99:2-7; 100:20 to 101:3.) H&M products bearing "DIVIDED" labels are sold only in H&M stores or from H&M's websites. (Miller Dep., 101:4-7.) Clothing and other products branded with the "DIVIDED" mark are not distributed through any non-H&M retailers – either online or brick and mortar. (See Miller Dep., 101:8-11.)

Further, all H&M products marketed and sold under the "DIVIDED" sub-brand additionally reference Opposer's prime mark "H&M" somewhere on the same tag or another tag on the clothing, accessory or cosmetic product. (See Miller Dep., 102:2-11, 108:2-7.) Indeed, many of the product labels identify the branding as "DIVIDED by H&M". (See Miller Dep., 102:5 to 108:7; see also Exs. 5, 6, 7, 8, 9, 10 and 11.)

In short, the evidence does not establish that H&M's "DIVIDED" sub-brand has any fame or strength of its own. Rather, the evidence supports the conclusion – one recognized by H&M in its approach to sales and marketing of products – that any fame or strength resides solely in the prime "H&M" mark.

Exhibit H offered by H&M is prime evidence of this. In a section of the article appearing under the bolded heading "H&M", the August 20, 2010 article mentions H&M's sub-brand as "[t]he Divided collection." The photograph in the article depicts an H&M brick and mortar store prominently displaying Opposer's prime mark "H&M." The article contains no photographs depicting the "DIVIDED" mark.

Similarly, the article submitted as Exhibit I references "H&M" in the article's title. The article references Opposer's prime mark "H&M" at least seven times. The "Divided collection" is mentioned only once. Exhibit M also refers to the sub-brand as "H&M Divided Collection"

Likewise, the article submitted as Exhibit J makes reference to "H&M's Divided department." The article submitted as Exhibit K prominently refers to Opposer's prime mark "H&M" several times, and makes but a single reference to "H&M Divided departments."

Exhibit L offered by H&M references "Divided by H&M." Exhibit M makes numerous references to Opposer's prime mark "H&M". All references to the sub-brand are stated: "H&M Divided" and refers to the sub-brand as a "collection." All references to the sub-brand in Exhibit N similarly are stated as "H&M Divided" or "H & M Divided H & M". Finally, Exhibit P references the sub-brand as "H&M Divided".

In summary, there is no evidence that "DIVIDED" by itself is a famous or strong mark. All media references to the "DIVIDED" sub-brand are as a junior attaché or attendant to Opposer's prime mark "H&M." Indeed, H&M's use of the sub-brand on its own products always is accompanied by the prime "H&M" mark. H&M's marketing expenditures are no different. There is no evidence regarding the content of H&M's advertising and no evidence that H&M advertises and promotes its "DIVIDED" sub-brand separate and apart from Opposer's prime mark "H&M."

6. There is no evidence in the record regarding the nature and number of similar marks in use on similar products.

Because the record is devoid of any evidence of similar marks in use on similar products, this factor should not be considered.

7. H&M has presented no evidence of actual confusion.

H&M attempts to conflate two of the DuPont factors to disguise its failure to present any competent evidence of actual confusion. H&M did not designate any experts to analyze or determine whether either a “likelihood” or confusion or any “actual confusion” does or may exist. It did not conduct any consumer polling or testing.

While actual confusion evidence is not required for an opposer to satisfy its burden of proving a likelihood of confusion as to source, H&M’s failure to present any evidence of actual confusions supports the conclusion that no likelihood of confusion exists.

8. There has been no concurrent use.

At the time H&M filed its opposition, Applicant was in the developmental stage of producing a clothing line to be marketed and sold under the label “UNDIVIDED”. Concurrent with the filing of its opposition, H&M threatened to pursue claims for infringement if Applicant used its contested mark in commerce.

In respect for this administrative process and to avoid unnecessary litigation, Applicant has delayed launching its branded products pending the outcome of this proceeding. As such, there has been no concurrent use of the marks.

9. The variety of goods on which the marks are used.

H&M uses its sub-brand “DIVIDED” in connection with clothing, accessories and cosmetics within a delineated “department” in its brick and mortar and online stores. There is a small variety of related products. H&M, however, has not used its “DIVIDED” mark in connection with a wide variety of products. Further, as discussed above, “DIVIDED” is merely a department or sub-brand of Opposer’s prime mark “H&M”. It is the prime mark “H&M” that is a “house mark.”

10. There is no market interface.

There is no market interface between Applicant and H&M. Opposer was not interested in entering into any agreements with Applicant, but demanded that Applicant withdraw its application.

11. The extent to which registrant has a right to exclude others from use of its mark on its goods.

Applicant has delayed launching its branded products pending the outcome of this proceeding. Applicant's right to exclude others from using its "UNDIVIDED" mark are limited to its registration rights and the authority of the Lanham Act that the registration affords. As such, the Board need not consider this factor.

12. The potential for confusion is *de minimus*, not substantial.

The evidence establishes that H&M's "DIVIDED" sub-brand (a) is never used on products or marketing without the accompanying use of Opposer's prime mark "H&M", (b) is recognized in the media as a department, collection or line of H&M-branded products, (c) is sold only by H&M and by no other retailers, and (d) is sold only from H&M's own brick and mortar stores and own websites.

In contrast, Applicant's products bearing the "UNDIVIDED" mark will not be sold from H&M stores or H&M websites. Applicant's products will not mention "H&M" on the products, packaging and labeling.

It is H&M's burden to prove that the potential for confusion is substantial. H&M has failed to carry its burden. Indeed, there is no expert testimony, evidence of consumer testing or polling or other competent evidence of potential for confusion. The Board is left to naked speculation.

VI. CONCLUSION

H&M has failed to carry its burdens of proof and persuasion. The record does not support a finding or conclusion that Applicant's registration will result in a likelihood of confusion as to source.

The marks are dissimilar in appearance, phonetics, connotation and commercial impression. They are antonyms readily distinguishable by the average consumer. There is no evidence of actual confusion. H&M has not offered any expert testimony or evidence of consumer testing or polling. There is no evidence that the potential for confusion is substantial.

Meanwhile, H&M's "DIVIDED" sub-brand is sold only in a department in its own stores. Applicant's products, in contrast, will never be sold from the same stores or websites. The "DIVIDED" mark is never used by Opposer without the accompanying use of its prime mark "H&M" on the product, labeling and/or packaging. Applicant's products will not include references to "H&M" on the product or labeling. There is no evidence that H&M's sub-brand, by itself, is a famous or strong mark.

WHEREFORE, the Board should overrule and deny H&M's Opposition, and should approve Applicant's mark "UNDIVIDED".

DATED this 12th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of September, 2012, I served or caused to be served a true and correct copy of the foregoing **APPLICANT'S TRIAL BRIEF** upon the following named persons by depositing the same in the United States mail, postage prepaid, addressed as shown below:

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