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

Proceeding	91203730
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ZILLOW, INC.

Opposer,

v.

SUPER T FINANCIAL INC. dba  
LOANZILLA

Applicant

Opposition No. 91203730

ZILLOW'S BRIEF ON THE CASE

**TO:** Trademark Trial and Appeal Board (via ESTTA)  
P.O. Box 1451, Alexandria, VA 22313-1451

And to

Super T Financial Inc. dba LoanZilla ("Applicant") via its counsel, John Janeway of Janeway Patent Law PLLC, 2208 NW Market St., Ste. 508, Seattle, WA 98115, solely via e-mail at [john@janewaypatentlaw.com](mailto:john@janewaypatentlaw.com) and [marianne@janewaypatentlaw.com](mailto:marianne@janewaypatentlaw.com), as agreed by the parties.

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## **ZILLOW'S BRIEF ON THE CASE**

### **I. Introduction and Summary of the Record**

Opposer Zillow, Inc. (“Opposer” or “Zillow”) hereby requests that the Trademark Trial and Appeal board deny the application to register the mark LOANZILLA (“Applicant’s Mark” or the “LoanZilla Mark”), Ser. No. 85316446 (the “Application”), filed by Super T Financial Inc. dba LoanZilla (“LoanZilla” or “Applicant”), applied for in connection with “mortgage brokerage” services (“Applicant’s Services”), on the basis of a likelihood of confusion between the LoanZilla Mark and Zillow’s well-known marks ZILLOW and ZILLOW.COM (“Zillow’s Marks”), registered for a wide variety of real estate-related and mortgage-related software and services as listed in Appendix A to the Notice of Opposition, Docket Entry #1 (“Zillow’s Goods and Services”).

The record consists of examples of use of both parties’ websites and from Zillow’s mobile applications, evidence of awards won by Zillow, media coverage of Zillow, details on Zillow’s mortgage-related services, press coverage of Zillow’s mortgage-related services, details about Zillow’s business from its 2012 annual report, the deposition of Erin Lantz, Zillow’s marketing director (including a very small portion of trade secret comments and documents), the parties’ interrogatories and responses, information about non-website use of the LoanZilla mark, and information about third-party marks containing the string “zill” in non-real estate, non-mortgage fields. For convenience, the page numbers of online PDFs for each docket entry are listed in addition to other identifying information like Bates numbering.

### **II. Zillow and Its Marks**

#### **A. Zillow’s Products and Services in General**

Zillow’s rights in the Zillow Marks date back to at least as early as September 29, 2004, the filing date of its earliest trademark application. *See* App. A to the Notice of Opposition,

Docket Entry #1, and Dockets #15 and 25 (including status and title copies of Zillow's registrations; many more applications were filed on March 17, 2005 and have since matured to registration). Zillow's website at [www.zillow.com](http://www.zillow.com), from which essentially the full scope of Zillow's Goods and Services can be accessed, was launched with great publicity in 2006, and its suite of mobile applications now provide the same set of services on a different platform. Any figures related to Zillow's services below combine user data from its website and mobile apps.

Zillow provides several core services for the general public. First, Zillow offers a comprehensive database of for-sale, pre-sale, not-for-sale homes, and rental housing and/or apartments. As of its 2012 Annual Report, Zillow offered housing value estimates for more than 110 million U.S. homes. ZILL000405, Docket # 16 (2012 Annual Report p. 4-6, PDF p. 268). Second, it offers instant, tailored mortgage quotes from third-party lenders and brokers. Third, it offers a wide variety of information about real estate, mortgage, home improvement, and related fields, and reviews of professionals in those areas.

From its outset, Zillow has been and remains one of the most popular online real estate properties in the United States. Zillow has averaged the following number of unique monthly users and revenues:

- 2012: 34.5 million unique monthly users; \$116.9 million in revenue; \$49.1 million in advertising and marketing expenditures
- 2011: 23.5 million unique monthly users; \$66.1 million in revenue; \$25.7 million in advertising and marketing expenditures
- 2010: 12.6 million unique monthly users; \$30.5 million in revenue; \$14.9 million in advertising and marketing expenditures

- 2009: 7.6 million unique monthly users; \$17.5 million in revenue; \$9.6 million in advertising and marketing expenditures
- 2008: 5.4 million unique monthly users; \$10.5 million in revenue; \$7.4 million in advertising and marketing expenditures

*See* ZILL000406, Docket # 17 (2011 Annual Report p. 2, PDF p. 107); ZILL000405, Docket # 16 (2012 Annual Report p. 4, PDF p. 268); all figures from the Annual Reports were authenticated by Erin Lantz, Zillow's mortgage marketing director. Dep. of E. Lantz, p. 13, Docket # 20. Zillow's branded Goods and Services have also been offered through Yahoo! Real Estate since 2011, and through other, smaller partners. *Id.* p. 14. In 2007, Zillow agreed to provide syndicated advertising content in the field of real estate to more than 282 newspapers nationwide, including major companies like Hearst Newspapers and papers like the San Francisco Chronicle, the Tampa Tribune, the St. Louis Post-Dispatch, and more, reaching more than 63 million people. *See* ZILL000332, Docket # 16 (PDF p. 47).

A number of screenshots showing the Zillow Marks in use for the Zillow Goods and Services for which they are registered are included in the record. ZILL00002-55, Docket # 15 (PDF p. 9-62) (examples of current use); ZILL000055-99, Docket #15 (examples of use on the early use) (PDF p. 63-106). Zillow did not advertise extensively for several years, but still experienced rapid word-of-mouth growth. It has since done extensive online and television advertising, e.g. ZILL000335-68, Docket # 16 (PDF p. 50-83); 2012 Annual Report, *supra* (growth from \$7.4 million in advertising expenditures in 2008 to \$49.1 million in 2012).

Finally, Zillow's Goods and Services offered under the ZILLOW Marks have received numerous awards, including its inclusion as one of TIME Magazine's "50 Coolest Websites" in

2006, and have been extensively covered by the media. *See* “Awards & Accolades,” ZILL000100-07, Docket # 15 and “In the News,” ZILL000108-64, Docket # 15.

**B. Zillow’s Mortgage-Related Products and Services**

Zillow has continually expanded and upgraded its goods and services. From the time the Zillow services first launched, they included extensive information about mortgages, and mortgage rates, and included a directory of mortgage professionals, including mortgage brokers and lenders. Dep. of E. Lantz, p. 23, Docket #20, and Ex. B, F, G (current mortgage rate quotes and ads), H (list of lenders and broker professionals and reviews), K (mortgage and real estate information, ZILL000557-61). From soon after its site launched in 2006, Zillow allowed third parties to embed ZILLOW branded real estate and mortgage data onto their site. *Id.*, Ex. I (PDF p. 98; current use at ZILL000375-76, PDF p. 103-04). It has also provided extensive local reports on market conditions, including mortgage information, since soon after its launch. *See, e.g., id.*, ZILL000347 (PDF p. 133-35, reports for Springfield). Many third-parties also use ZILLOW branded widgets on their sites to provide mortgage information and other housing related data; these additional consumer impressions are not included in the user figures provided above or below. *See* Response to LoanZilla’s Rog. 22, Docket #17 (PDF p. 237-38) and ZILL00369-000381 (download pages for same).

On April 2, 2008, Zillow launched the “Zillow Mortgage Marketplace,” which supplemented and expanded the extensive mortgage related information and advertising available on its site since launch with a new service that allows users to receive competitive mortgage quotes from third party mortgage brokers through Zillow. *See* Dep. of E. Lantz, p. 18, Docket #20, and Ex. F to same (ZILL000272-73, PDF p. 89), and “How to Use Zillow Mortgage Marketplace,” ZILL000553-54, Docket #16 (PDF p. 252). The Zillow Mortgage Marketplace service is a revolutionary comparison shopping tool in that it allows consumers to receive

tailored mortgage quotes from a wide cross-section of lenders without providing any personal identifiable information. Dep. of E. Lantz, p. 19, Docket # 20. Since 2010, mortgage lenders and brokers have paid Zillow when consumers click for more information about the quote provided through Zillow Mortgage Marketplace or click onto the lender or broker's website from that quote. *Id.* p. 18-19.

The launch of the Zillow Mortgage Marketplace was a major event, and widely covered by prominent media such as the Chicago Tribune, the New York Times, and the Los Angeles Times. Docket # 17, PDF p. 93-102. Zillow's mortgage-related services, including the Zillow Mortgage Marketplace, have been the subject of extensive, routine unpaid media coverage. Representative examples of coverage in some of the nation's most prominent media are of record, including the New York Times, the Pittsburgh Post-Gazette, the Seattle Times, the Wall Street Journal, the Dallas Morning News, the Los Angeles Times, the Washington Post, the Cincinnati Enquirer, the Chicago Tribune, American Banker, the San Francisco Chronicle, USA Today, CNN, the Los Angeles Times, the Kansas City Star, and more. ZILL000165-223, Docket # 15 (PDF p. 172-230); *see also* "In the News," ZILL000108-64, Docket # 15 (PDF p. 115-71) (summarizing additional media coverage). In addition to extensive unpaid media coverage, Zillow advertises extensively for its Zillow Mortgage Marketplace services, as shown in Docket #20, Ex. J, ZILL000550 (PDF p. 106).

The Zillow Mortgage Marketplace has grown rapidly and is very popular. At its inception in 2008, the service initially processed nearly 100,000 loan requests per month. In 2012 alone, consumers submitted nearly 12 million mortgage loan requests in Zillow Mortgage Marketplace. *See* Zillow 2012 Annual Report, p. 10, Docket # 16, (PDF p. 274; the Bates numbers are dublicately labeled as ZILL000411). As of the middle of 2013, consumers were

submitting over 1.6 million loan requests per month. Dep. of E. Lantz, p. 28, Docket #20. The service is popular with and widely adopted in the mortgage industry; representative comments about the service from mortgage lenders and brokers are attached. *Id.*, Ex. N, ZILL000327-331 (PDF p. 127-31). The Zillow Mortgage Marketplace is a platform for brokers like LoanZilla to compete for consumers' mortgage business, and for consumers to shop for the best mortgage options.

Zillow offers standalone Zillow Mortgage Marketplace mobile apps for iPad, ZILL000226, *id*, Docket #20, Ex. I (PDF p. 101), for Android, and for iPhone. These ZILLOW brand mobile apps allow users to access the full range of the Zillow Mortgage Marketplace services, and most of the key features of these mortgage-specific apps are also available on Zillow's extremely popular ZILLOW real estate apps. These tools are used by companies like the Applicant. LoanZilla's Responses to Rogs. 34 and 35, Docket # 17 (PDF p. 206-07) (Applicant "us[ed] the [Zillow] website for loan quotes" and "considered advertising on the [Zillow] site").

In late 2012, Zillow also acquired Mortech, a company that provides lender-focused software. This company, which also operates under the ZILLOW brand, provides customer relationship management, lead generation services, and paperwork management services for mortgage lenders and brokers. *Id.*, Docket #20, p. 28-29 and Ex. M, ZILL000350-52 (PDF p. 123-35).

In all, the ZILLOW brand is well known in the mortgage field. First, consumers receive over 1.5 million personalized mortgage quotes from Zillow's services each month. Second, since every page with housing information includes estimated mortgage cost information, the vast majority of its 34 million monthly unique visitors use Zillow's services to view mortgage-

related information. This is true of most of the millions of monthly users of Zillow's services since its 2006 launch. Finally, mortgage lenders and brokers use ZILLOW branded software to manage their customer relationships. There is no question that the ZILLOW brand is a strong, well-known, and highly protectable mark in the mortgage space.

### **III. Applicant and Its Mark**

The LOANZILLA application was filed on May 10, 2011 with a claim of use since at least as early as May 19, 2010. *See also* LoanZilla's Response to Rog. 17, Docket # 17 (PDF p. 198). The Applicant bought its LoanZilla.com domain name on May 13, 2010. *See* SuperT-000003, Docket # 17 (PDF p. 158). The Application covers "mortgage brokerage" services in International Class 36.

The specimen provided with the application says that users of the LOANZILLA service can "find your own loan" using the service.<sup>1</sup> The home page for LoanZilla.com, where Applicant's LOANZILLA services are provided, further explains that the LOANZILLA service will be for "self-service home loans," akin to how "Expedia® and other travel sites have revolutionized travel purchases." "LoanZilla," ZILL000001, Docket # 15 (PDF p. 8).

The Applicant is located in Kirkland, Washington, a suburb of Seattle, where Zillow is located. The Applicant was aware of and had used the Zillow.com website, and its Zillow Mortgage Marketplace services in particular, prior to adopting the LOANZILLA mark. LoanZilla's Responses to Rogs. 32-37, Docket # 17 (PDF p. 205-08).

Applicant initially made a counterclaim, but it has since been withdrawn and is no longer part of this proceeding. Docket # 10.

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<sup>1</sup> The specimen, and the rest of the LOANZILLA application case file, is of record in this proceeding automatically. *TBMP* § 704.03(a).

**IV. Confusion Is Likely to Occur, and Registration of the LOANZILLA Mark Should be Refused.**

In determining whether a likelihood of confusion exists between two marks, the Trademark Trial and Appeal Board must consider the following elements, when relevant.

- (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 or services as 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.
- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
- (10) The market interface between applicant and the owner of a prior mark.
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion. i.e., whether de minimis or substantial.
- (13) Any other established fact probative of the effect of use.

*In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973).

All the relevant factors and all the evidence on record here support granting the relief requested by Zillow and denying registration of the application. The ZILLOW mark is inherently strong, highly unique, and famous in the real estate and mortgage fields, the ZILLOW and LOANZILLA marks are very similar, the parties offer services that are closely connected (brokers like LoanZilla compete for consumers' mortgage business using Zillow's services) to an identical consumer base through identical channels of trade, and the Applicant had used Zillow's mortgage-quotation services and considered advertising on Zillow prior to adopting the LOANZILLA mark.

**A. Zillow has Priority**

There is no question as to priority. Zillow owns numerous registrations for ZILLOW whose filing dates predate the filing date of the Application,<sup>2</sup> and Zillow's first use of ZILLOW for all of its consumer-facing mortgage-related services substantially predates the Applicant's first use of LOANZILLA. The Applicant admits that it was aware of and had used the Zillow.com website, and the Zillow Mortgage Marketplace services in particular, prior to adopting the LOANZILLA mark. LoanZilla's Responses to Rogs. 32-37, Docket # 17 (PDF p. 205-08).

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<sup>2</sup> Reg. No. 3493872 in Class 9, Reg. No. 3437690 in Class 35, Reg. Nos. 3332886 and 3437691 in Class 36, Reg. No. 3175031 in Class 39, and Reg. No. 3150074 in Class 42, all now incontestable, and Reg. No. 3565882 in Class 42.

**B. The Marks are Very Similar.**

Zillow's Marks are arbitrary, inherently distinctive marks that are registered on the Principal Register. All but two of its registrations are now also incontestable.<sup>3</sup> Zillow's incontestable registrations, Reg. No. 3493872 in Class 9, Reg. No. 3437690 in Class 35, Reg. Nos. 3332886 and 3437691 in Class 36, Reg. No. 3175031 in Class 39, and Reg. No. 3150074 in Class 42, are conclusive evidence of the validity of the ZILLOW (or the legally-equivalent ZILLOW.COM)<sup>4</sup> mark, its registration, Zillow's ownership of the mark, and Zillow's exclusive right to use the mark in commerce or in connection with the services specified in those registrations. 15 U.S.C. § 1115(b). Zillow's other registrations, Reg. Nos. 4201269 in Classes 9, 35, 36, 39, and 42 and Reg. No. 3565882 in Class 42, are prima facie evidence of the validity of the ZILLOW mark, its registration, Zillow's ownership of the mark, and Zillow's exclusive right to use the mark in commerce or in connection with the services specified in those registrations. 15 U.S.C. § 1115(a).

Applicant's Mark and Zillow's mark are very similar. "While [the Board] ha[s] resolved the issue of likelihood of confusion based on a consideration of the marks in their entireties, as we must, there is nothing improper in according the dominant portion more weight." *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); (citing *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985)); *Palm Bay Imports, Inc. v. Neuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ 2d 1689 (Fed. Cir. 2005)

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<sup>3</sup> Copies of current status and title at various times were attached (a) with the Complaint, Docket # 1, (b) in Docket # 17, PDF p. 103 – 154, and (c) in Docket # 25. Several of the registrations initially issued as ZILLOW.COM but have since been amended to ZILLOW to conform with Zillow's current use of the mark.

<sup>4</sup> See TMEP § 1215.08(a) ("Generally, an applicant may add or delete a non-source-identifying TLD to/from the drawing of a domain name mark [...] without materially altering the mark.").

(finding VEUVE to be the “prominent feature” of VEUVE CLIQUOT, as the first word in the mark).

The ZILLOW and LOANZILLA marks are highly similar and share the distinctive letter string “zill,” the most distinctive and memorable part of each mark. “Loan” is descriptive or generic for the Applicant’s mortgage brokerage services, and Applicant admits that LOAN as part of LOANZILLA “refers to residential and commercial property loans.” LoanZilla’s Response to Rog. 11, Docket # 17 (PDF p. 195). Descriptive terms like “loan” have little impact on consumer perception of a mark. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002) (even though applicant's mark PACKARD TECHNOLOGIES, with “technologies” disclaimed, did not incorporate every feature of the opposer’s HEWLETT PACKARD marks, it created a similar overall commercial impression); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988) (MACHO COMBOS, with “combos” disclaimed, was held likely to be confused with MACHO (stylized), both for food items as a part of restaurant services).

The marks are similar visually and in pronunciation, and even the points of difference, like the trailing “ow” diphthong and vowel “a,” yield similar sounds. *See, e.g., Industria Colombiana de Café S.A. v. Hena, Inc.*, Opp. No. 91125510 (TTAB Jun. 8, 2005), available at <http://e-foia.uspto.gov/Foia/ReterivePdf?system=TTABIS&fINm=91125510-06-08-2005> (comparing COLCAFE and CALCAFE & Design, both for coffee, and holding that “we cannot find that purchasers are likely to ascribe different connotations to the marks because of the difference in the letters O and A in the first syllables of the respective marks”). Consumers are likely to assume that the LOANZILLA service is a new service offered by or in connection with the pre-existing ZILLOW services in the mortgage field.

The Applicant posits that “zilla” as a part of its mark is supposed to call to mind “Godzilla,” and has submitted evidence that “-zilla” is used as a prefix as part of marks outside of the real estate or mortgage fields. Neither argument presents a convincing case that consumer will not be likely to confuse the ZILLOW and LOANZILLA marks. First, “Godzilla” has nothing to do with mortgage brokerage services, and there is no reason that consumers would associate the LOANZILLA mark (or home loans or mortgage brokers) with a fire-breathing mutant dinosaur. They are far more likely to parse the mark as “loan Zill[ow],” a famous brand in the real estate and mortgage fields, and that’s exactly the problem. Second, the Applicant presented evidence of other “-zilla” suffix marks in unrelated fields. *See* Docket # 22-24. None of them have anything to do with mortgages or real estate. The Board has made it clear that third-party usage of similar marks for unrelated goods or services is completely irrelevant. *In re Melville Corp.*, 18 USPQ2d 1386, 1388-89 (TTAB 1991) (“Registrations for goods unrelated to the clothing field are irrelevant to our discussion”); *SBS Products Inc. v. Sterling Plastic & Rubber Products Inc.*, 8 USPQ2d 1147, 1149 n.6 (TTAB 1988) (“[E]ven if evidence of such third-party use were submitted, it would be of no aid to respondent herein where the third-party usage was for goods unrelated to either petitioner’s skin care products or respondent’s stuffing box sealant”); *Anderson, Clayton & Co. v. Christie Food Products Inc.*, 4 USPQ2d 1555, 1557 n.7 (TTAB 1987) (“The other third-party registrations relating to marks in unrelated fields are of no probative value”).

The only active trademark filings that include the string “zill” at the USPTO are owned by Zillow, or are actively being opposed by Zillow (namely, this LOANZILLA application). *See* Affidavit of M. Schneller, Docket # 25, and documents attached thereto. Others have attempted to register confusingly similar marks, but Zillow has actively defended and protected its unique

and valuable mark. It successfully opposed applications for ZILLOAN.COM for mortgage brokerage services, Opposition No. [91183214](#), for HOMEZILL REALTY for real estate services, Opposition No. [91183213](#), secured the express abandonment of an application for HOMEZILLA for online real estate services, Ser. No. 85604593 (after taking extensions of time to oppose), and cancelled a registration for HOMEZILL for online real estate services, Cancellation No. [92049291](#). The ZILLOW mark, and the “zill” string that is its most prominent part, are and remain highly unique and are the exclusive assets of Zillow in the real estate and mortgage fields.

For all of these reasons, this factor strongly favors Zillow.

**C. Opposer’s Mark Is Strong and Well-Known, and Entitled to the Broadest Scope of Protection.**

“The fifth *du Pont* factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection.” *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992). As “a mark’s fame increases, the [Lanham] Act’s tolerance for similarities in competing marks falls.” *Id.* (refusing registration on the basis of a likelihood between applicant’s mark FUNDOUGH and opposer’s famous mark PLAY-DOH, each for modeling compounds). Zillow has had over \$270 million in sales since 2008 alone, comparable to or exceeding the sales figures the Board has required to show fame in the past, and in far less time. *Nina Ricci, S.A.R.L. v. E.T.F. Enters., Inc.*, 889 F.2d 1070, 1072, 12 USPQ2d 1901, 1902 (Fed. Cir.1989) (\$200 million in sales for NINA RICCI for perfume, clothing and accessories over 37 years); *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146-47, 227 USPQ 541, 542 (Fed. Cir.1985) (\$300 million in sales for HUGGIES diapers over 9 years); *Specialty Brands Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 674-75, 223 USPQ 1281, 1284 (Fed.

Cir.1984) (around \$26 million annually in sales of SPICE ISLANDS teas, spices and seasonings). While there is less case law specifically setting the standards of “fame” by the metric of unique users of online services, the Board has found that the AUTOZONE mark was famous when it had 3.4 million unique monthly visitors online and 6 million customers per week in stores. At under 10 million combined, this is well shy of Zillow’s 34 million monthly users. *AutoZone Parts, Inc. v. Dent Zone Companies, Inc.*, Cancellation No. 82044502 (TTAB Aug. 30, 2011), available at <http://e-foia.uspto.gov/Foia/RetrievePdf?system=TTABIS&flNm=92044502-08-30-2011>.

As discussed above in Section II and the evidence referred to therein, Zillow, the Zillow Marks, and Zillow’s Goods and Services are well known and famous in the real estate and mortgage fields. Consumers request over a million and a half mortgage quotes from ZILLOW branded services each month, and the presence of mortgage estimate information on every property record page means that the vast majority of Zillow’s 34 million unique monthly visitors use Zillow’s services to access more general mortgage information. Zillow has also invested heavily in advertising, with over \$106 million invested in sales, marketing, and advertising since 2008, and it has paid off, with more than \$271 million in revenue since 2008. As such, this factor strongly favors Zillow, and Zillow is entitled to a broad range of protection above and beyond the normal presumption that any doubts must be resolved in favor of the owner of the prior registration.<sup>5</sup>

**D. Applicant’s Services are Closely Related to the Zillow’s Goods and Services.**

It “has often been said that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services

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<sup>5</sup> See, e.g., *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services." *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991).

Zillow's Goods and Services and Applicant's Services are self-evidently related. Zillow's Goods and Services include "operating marketplaces... in the field of real estate," "financial valuation of real estate," "providing information in the field of real estate," advertising in the fields of (and provision of information related to) real estate and other "consumer services" (like mortgage loans and mortgage brokerage services), downloadable software related to real estate, real estate research services, and services in the field of real estate.

The Applicant also admits that it was aware that Zillow used the ZILLOW mark in connection with a wide range of mortgage services prior to the Applicant's first use of or filing for the LOANZILLA mark – and, indeed, that the Applicant used Zillow's service for loan quotes. LoanZilla's Responses to Rogs. 32-37, Docket # 17 (PDF p. 205-09). Zillow's mortgage-related services are all explicitly covered by Reg. No. 4201269, and numerous other registrations include providing information on real estate and "consumer services," which include mortgage services.<sup>6</sup> Applicant's Services listed in its application are mortgage brokerage services. Both the factual record here and the Board's prior case law strongly support finding that the parties' services are closely related.

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<sup>6</sup> See, e.g., *In re Instant Funding Solutions, LLC*, Ser. No. 78814885, p. 11, n 11 (TTAB Aug. 18, 2008), available at <http://e-foia.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=78814885-08-18-2008> (noting a registration in Class 36 for "consumer services, namely, providing consumer loans...; mortgage lending services").

First, the Applicant has admitted the close relationship between the parties' services: it "us[ed] the [Zillow] website for loan quotes" and "considered advertising on the [Zillow] site." LoanZilla's Responses to Rogs. 34 and 35, Docket # 17 (PDF p. 206-07). Brokers like LoanZilla use Zillow's Mortgage Marketplace to provide personalized quotes to customers and compete for their businesses. Two services cannot be much more closely related than that.

Second, the relevant case law strongly supports the close relationship between Zillow's real estate services and LoanZilla's mortgage services. The Board decided the issue in 2007, holding that MEMBERS HOME ADVISOR for "mortgage lending services" was likely to be confused with prior registration for HOMEADVISOR for "providing information concerning real estate ... all via computer networks and global communications services." *In re Univ. Fed. Cred. Union*, 2007 WL 2219700 (Ser. No. 78439822) (TTAB Jul. 23, 2007), available at <http://e-foia.uspto.gov/Foia/ReterivePdf?system=TTABIS&fNm=78439822-07-23-2007>. The Board emphasized that the services were closely related – there, as here, the applicant's website offering mortgage services advertised them in connection with home buying or refinancing; indeed, what else would a consumer seek out a mortgage for? The Board went further, holding that the "complementary nature of the services is *obvious*. Because mortgage lending services ... are necessarily offered to and obtained by people who wish to buy a home, those same people will require information about real estate..." *Id.* at \*4-5 (emphasis added).

Similarly, the Board held that FREEDOM REALTY for real estate brokerage services – of which providing information in the field of real estate are a necessary part – was likely to be confused with a prior registration for FREEDOM MORTGAGE for mortgage services. *Freedom Federal Sav. & Loan Ass'n v. Way*, 217 USPQ 971 (TTAB 1981). Notwithstanding that both mortgage services and real estate brokerage services require state licenses, the Board held that

because the opposer's mortgage services "pertain in some way to real estate transactions," the two services "go hand-in-glove." *Id.* at 973; *see also Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992) (noting that the plaintiff provided both real estate brokerage services and mortgage brokerage services).

Given the Applicant's admissions, the clear overlap between the goods and services, the broad registrations for and use of the Zillow Marks, and the clear TTAB precedent directly on point holding the parties' services to be "obviously" related and "hand in glove," consumers are likely to consider Applicant's Services and Zillow's Goods and Services to be closely related and complementary.

**E. The Channels of Trade for Applicant's Services are Identical to the Channels of Trade for Zillow's Goods.**

"[I]n the absence of specific limitations in the application and registration," the Trademark Trial and Appeal Board must presume the listed services to travel in all "normal and usual channels of trade and methods of distribution." *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581, 218 USPQ 198, 199 (Fed. Cir. 1983). Neither party's services have any limitations, and must be presumed to travel in all channels of trade normal for such services. Overlapping channels of trade substantially increases the likelihood of consumer confusion, because consumers are likely to encounter the same types of goods in the same environments – that is, when seeking, purchasing, financing, or refinancing real estate. *See, e.g., Univ. Fed. Cred. Union, supra*, at \*6 (holding that mortgage services and online real estate information services are in part offered through identical channels of trade, i.e., the Internet) (App. K); *In re Orion Mortgage Advisors, LLC*, 2002 WL 31375540 (Ser. No. 76221175) (TTAB Oct. 22, 2002), available at <http://e-foia.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=76221175-10-22-2002> (holding that "real estate brokerage services and mortgage brokerage services are offered to a wide range of

consumers, many of whom are not likely to be sophisticated in the buying and financing of real estate, much less capable of distinguishing between the sources of these related services”).

Applicant’s Services are provided and advertised at least in part over the Internet, as Applicant admits. LoanZilla’s Response to Rog. 8-10, Docket # 17 (PDF p. 194-96). The same is true of Zillow’s Goods and Services. *See* Section II, *passim*. As such, Applicant’s Services and Zillow’s Goods and Services travel at least in part through identical channels of trade.

For all of the reasons discussed above, this factor strongly favors Zillow.

**F. Both Parties’ Services are Provided to the Same Classes of Consumers.**

Neither Zillow’s Goods and Services nor those in the Application are limited to certain classes of customers, and must be presumed to be marketed to all normal classes of purchasers of such services. *In re Elbaum*, 211 USPQ 639 (TTAB 1981); *In re MediaNews Group Interactive, Inc.*, 2008 WL 4803891 (Ser. No. 78433038) (TTAB Oct. 24, 2008), available at <http://e-foia.uspto.gov/Foia/ReterivePdf?system=TTABIS&fNm=78433038-10-24-2008> (finding likely customers were identical, and refusing application for BAY HOMESITE for online real estate marketing services, on the basis of a prior registration for HOMESITE for online real estate advertising services).

As admitted by Applicant, Zillow’s Goods and Services and those in the Application are provided to identical classes of consumers – persons and businesses interested in real estate information, in purchasing real estate, in selling real estate, and in financing or refinancing real estate. *See* LoanZilla’s Response to Rog. 2-6, Docket #17 (PDF p. 191-93); Section II above and Lantz Dep., Docket #20, both *passim* (describing Zillow’s customers). Both parties’ services seek to allow consumers seeking mortgages to navigate at least part of the mortgage purchase process themselves. *See* ZILL00001 (screenshot from loanzilla.com describing it as for “self-

service home loans”) and Dep. of E. Lantz, Docket #20, *passim* (describing Zillow Mortgage Marketplace’s personalized instant mortgage quote feature at length).

Because these services are offered to identical classes of consumers, confusion between the very similar marks is more likely to occur. This factor strongly favors Zillow.

**G. Zillow’s Marks are Registered for a Wide Variety of Goods and Services.**

Use of a mark by an opposer on a variety of products and/or services makes it more likely that relevant consumers will be confused by the applicant’s similar mark. *See, e.g., Uncle Ben’s Inc. v. Stubenberg Int’l Inc.*, 47 USPQ2d 1310, 1313 (TTAB 1998); *Henry Siegel Co. v. M & R Int’l Mfg. Co.*, 4 USPQ2d 1154 (TTAB 1987) (confusion found between L.A. CHIC and CHIC for identical and related clothing items; the Board noted that “[o]ther factors in petitioner’s favor include the close relationship between the goods of the parties” and “the fact that petitioner has used its mark ‘CHIC’ together with a variety of other items”).

Here, Zillow’s Marks are the subject of eight live trademark registrations encompassing a wide range of software and services in five International Classes: 9, 35, 36, 39, and 42. *See* Section V(b), *supra*. Because of the wide range of goods and services for which Zillow’s Marks is registered and in use, this factor strongly favors Zillow.

**H. Other Factors Also Favor Zillow.**

The Board may infer Applicant’s bad faith intent to trade on the substantial goodwill the Zillow Marks by its adoption of a very similar mark that is used for closely related services, with full knowledge of Zillow’s rights. *See L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1890 (TTAB 2008). “[A] party which knowingly adopts a mark similar to one used by another for related goods should not be surprised to find scrutiny of the filer’s motive.” *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1442 (TTAB 2012).

The Applicant admits that it was aware of and had used Zillow, Zillow's Marks, and Zillow's mortgage-related services prior to its adoption of the LoanZilla mark and prior to filing the Application. LoanZilla's Responses to Rogs. 32-37, Docket # 17 (PDF p. 205-08). Applicant had even "considered advertising on [Zillow's] site." *Id.*, Response to Rog. 34 (PDF p. 207). Applicant is located in Kirkland, Washington, a suburb just a few miles away from Zillow's corporate offices in downtown Seattle, Washington. Applicant also advertised its services as the mortgage equivalent of Expedia Inc.'s services in the travel world. Eleven of Zillow's founders and senior executives worked at Expedia Inc. before creating Zillow. *See* Zillow 2012 Annual Report, p. 8, ZILL000409 (duplicate numbering), Docket # 16 (PDF p. 272). Given Applicant's admitted knowledge of Zillow and its use of Zillow's mortgage-related services, and the local prominence of both Expedia and Zillow in their respective fields and in the Seattle area in particular,<sup>7</sup> it strains credibility to suggest that this was an accident or coincidence. It further blurs the line between Applicant and Zillow, and emphasizes how likely it is that consumer confusion would result from registration of the LoanZilla mark. This factor also strongly favors Zillow.

#### **V. Conclusion – the LOANZILLA Application Should Be Refused**

The relevant *du Pont* factors strongly favor finding a likelihood of confusion between the ZILLOW mark for the Zillow Goods and Services and the LOANZILLA mark for the LoanZilla Services. To quickly recap the key factors:

- (1) The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

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<sup>7</sup> Zillow had 560 full-time employees, most of whom are in Seattle, as of its 2012 Annual Report. *Supra*, p. 16. As of Expedia's 2012 Annual Report, it had 12,330 full-time or part-time employees. *See* Expedia, Inc., Annual Report 2012, at [http://files.shareholder.com/downloads/EXPE/2700894553x0x659394/517E31CE-FF79-42C0-899C-DF6831888E54/EXPE\\_2012\\_Annual\\_Report.PDF](http://files.shareholder.com/downloads/EXPE/2700894553x0x659394/517E31CE-FF79-42C0-899C-DF6831888E54/EXPE_2012_Annual_Report.PDF).

- a. LOANZILLA is very similar to the famous, inherently strong, and incontestable ZILLOW mark, which is the only mark in the real estate or mortgage fields containing the “zill” letter string, the most prominent portion of both the LOANZILLA and ZILLOW marks.<sup>8</sup>
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- a. Zillow’s online mortgage quotation services, a forum for mortgage brokers like LoanZilla to compete for consumers’ business, are self-evidently related to LoanZilla’s mortgage brokerage services (indeed, LoanZilla has used Zillow’s services for loan quotes and considered advertising on Zillow). The Board has also held that real estate related services like those provided by Zillow are “obviously” related to, and “hand in glove” with, mortgage services like those LoanZilla provides.<sup>9</sup>
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- a. They are in part identical, serving customers over the Internet.<sup>10</sup>
- (5) The fame of the prior mark (sales, advertising, length of use).
- a. The ZILLOW mark is unquestionably famous in the real estate / mortgage field. Customers request more than 1.5 million mortgage quotes from Zillow’s services each month, and over 34 million unique users using Zillow’s general real estate and mortgage services each month. Zillow has generated

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<sup>8</sup> Pages 10-13 of this Brief.

<sup>9</sup> Pages 15-17 of this Brief.

<sup>10</sup> Pages 17-18 of this Brief.

over \$270 million in revenue since 2008 on advertising and marketing expenditures exceeding \$106 million.<sup>11</sup>

(6) The number and nature of similar marks in use on similar goods.

- a. The ZILLOW mark is the only active mark on the USPTO registry (other than the LOANZILLA mark opposed here) containing the string “zill” for mortgage or real estate services. The ZILLOW mark is highly unique and protectable.<sup>12</sup>

(9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).

- a. The ZILLOW mark is registered for a wide variety of real estate and mortgage related products and services in International Classes 9, 35, 36, 39, and 42.<sup>13</sup>

(10) The market interface between applicant and the owner of a prior mark.

- a. LoanZilla used Zillow’s real estate services and mortgage services prior to adopting the LOANZILLA mark or filing this Application, and has considered advertising its services on Zillow.<sup>14</sup>

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

- a. The Zillow mark is inherently distinctive, famous, and unique in the field. It has a broad and unfettered right to exclude others.<sup>15</sup>

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<sup>11</sup> Pages 13-14 of this Brief.

<sup>12</sup> Page 19 of this Brief.

<sup>13</sup> Page 19 of this Brief.

<sup>14</sup> Pages 20-21 of this Brief.

<sup>15</sup> Pages 12-13 of this Brief.

(13) Any other established fact probative of the effect of use.

- a. Intent to free ride on the goodwill associated with the well-known mark of another can be inferred from the circumstances. The Applicant is located a few miles away from Zillow, admitted to using Zillow's real estate services and mortgage services prior to adopting the LOANZILLA mark or filing this Application, has considered advertising its services on Zillow, and more.<sup>16</sup>

All other factors are neutral or favor Zillow. All benefits of the doubt must be resolved in favor of the prior registrant, Zillow, and the Lanham Act has little tolerance for any similarities where a later comer adopts a mark that is similar to a famous brand in a closely related market. For all the reasons listed above, judgment should be entered in favor of Zillow, and registration of the Application should be refused.

DATED: October 23, 2013.

**CERTIFICATE OF SERVICE**

I hereby certify that this, ZILLOW'S BRIEF ON THE CASE, is being submitted via e-mail to counsel for Applicant on October 23, 2013, as agreed by the parties: John Janeway, Janeway Patent Law PLLC, [john@janewaypatentlaw.com](mailto:john@janewaypatentlaw.com) and [marianne@janewaypatentlaw.com](mailto:marianne@janewaypatentlaw.com).

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<sup>16</sup> Pages 20-21 of this Brief.