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

Proceeding	77626840
Applicant	CityCenter Land, LLC
Applied for Mark	ARIA LAS VEGAS
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Submission	Supplemental Brief
Attachments	ARIAlV.pdf (3 pages)(16980 bytes) ARIALV1.pdf (3 pages)(142779 bytes) ARIALV2.pdf (1 page)(118088 bytes)
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Signature	/Michael J. McCue/
Date	08/07/2012

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

In re Application of:	)	
	)	
CityCenter Land, LLC	)	Law Office: 113
	)	
(Serial No. 77/626840)	)	Trademark Attorney
	)	Ameen Imam
Filed: December 4, 2008	)	
	)	
Mark: ARIA LAS VEGAS (stylized)	)	
	)	

SUPPLEMENTAL BRIEF FOR APPELLANT

Appellant, CityCenter Land, LLC hereby maintains its appeal of the Examiner's final refusal and corresponding denial of its Request for Reconsideration with respect to the registration of its ARIA LAS VEGAS (stylized) mark (Serial No. 77/626840), on the basis of a potential likelihood of confusion with the ARIA mark in U.S. Registration No. 1,687,167 (the "Komar Mark") registered by Charles Komar & Sons, Inc. ("Komar") in connection with "women's sleepwear, robes, and loungewear" in international class 25. Appellant respectfully requests that the Board reverse the Examiner's decision refusing to register the subject mark.

APPELLANT'S TRADEMARK

Appellant seeks registration on the Principal Register of ARIA LAS VEGAS (stylized), for clothing, namely t-shirts, tank tops, collared golf shirts, sweaters, jackets, jogging suits, sweat shirts, sweat pants, short pants, swim wear, dress shirts, skirts, blouses, dress pants, caps, hats and bandannas; headwear; shoes in international class 25.

I. Background

The appeal proceedings were suspended on January 31, 2012, based on appellant's request for suspension pending the determination of whether the cited Komar Mark would be renewed. Inasmuch as the cited registrant filed its §§8& 9 renewal affidavits on May 15, 2012, the Board has resumed the proceedings and invited appellant to submit this supplemental brief.

II. Argument

Appellant respectfully maintains that the subject mark is not likely to be confused with the Komar Mark, as provided in its initial brief. In addition to the arguments

presented in the initial appeal brief, appellant has become aware that the Komar Mark is being used in a manner that that is significantly different from the mark in the cited registration, and urges that the Office should not have permitted its renewal based on a material alteration thereto.

A. The Mark in the §8 Specimen does Not Depict Essentially the Same Mark as the Registered Mark.

According to TMEP §1604.12 (a) which addresses the required form of the specimen in a §8 affidavit, "the specimen must show use of essentially the same mark as the mark shown in the registration, and must be used on or in connection with the goods/services listed in the registration. A specimen that shows use of a materially different mark, or shows use of the mark on other goods or services, is unacceptable. An affidavit or declaration that does not include an acceptable specimen for each class of goods/services is deficient."

In that regard, the mark in the specimen submitted by the cited registrant in connection with its §§8&9 renewal affidavits is ARIA COLLECTION, whereas the mark in the original registration is ARIA alone. Appellant submits that the cited registrant's affidavit did not include an acceptable specimen as required, and this materially different version of the Komar Mark should have been rejected as deficient. Attached hereto as **Exhibit A,** are copies of an earlier specimen filed by the registrant, as well as that filed most recently on May 11, 2012, depicting the significant modification made to the Komar Mark.

Further to that end, in addition to the requirement that the mark in the §8 affidavit be essentially the same as the registered mark, TMEP §1604.13 provides that where the specimen submitted in connection with a §8 affidavit reflects a change in the mark since the registration issued, acceptance of the affidavit depends on the degree of such change. "A *material* alteration of the mark will result in refusal of the affidavit on the ground that the registered mark is no longer in use." *In re Int'l Nickel Co., Inc.*, 282 F.2d 952, 127 USPQ 331 (C.C.P.A. 1960); *In re Continental Distilling Corp.*, 254 F.2d 139, 117 USPQ 300 (C.C.P.A. 1958); *Ex parte Richards*, 153 USPQ 853 (Comm'r Pats. 1967). *See also Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986); *In re Holland American Wafer Co*., 737 F.2d 1015, 222 USPQ 273 (Fed. Cir. 1984).

The addition of the word COLLECTION to the registered mark is not an insignificant change. Given the manner in which the Komar Mark is depicted in the §8 specimen, appellant suggests that the affidavit should have been refused, as the modified version of the registered mark is a material alteration.

B. The Addition of COLLECTION to the Komar Mark Constitutes a Material Alteration.

TMEP §807.14 provides that the controlling question in the analysis of whether the modification of a mark constitutes a material alteration "is always whether the old and

new forms of the mark create essentially the same commercial impression." Appellant believes that the new form of the registered mark, i.e. ARIA COLLECTION, does not create essentially the same commercial impression as that conveyed by the originally registered Komar Mark. Consequently, the Komar Mark appears to have evolved in such a manner that the cited registrant has not adequately established its continuous use.

As appellant previously noted in its initial brief, ARIA alone means "song" in English and "air" in Italian. An aria is generally an expressive, melodious song performed by a solo singer. When properly considered in conjunction with the goods named in the cited registration, the term composing the original Komar Mark suggests that the clothing items are like a song, which suggests that wearing them will make the consumer experience a feeling of harmony, relaxation, or tranquility. This is particularly likely given the fact that Komar's clothing is specifically identified in the cited registration as the type one would wear when relaxing or sleeping.

On the other hand, in the context of clothing, COLLECTION, is defined as "a set of apparel designed for sale usually in a particular season." *See* merriam-webster.com. Thus, when considered in connection with the goods named in the cited registration, ARIA COLLECTION conveys the overall commercial impression that Komar's loungewear/sleepwear changes from season to season as the term "season" is understood in the fashion industry. Taken as a whole, the mark suggests to consumers that the clothing goods are trendy, or up-to-date based on their seasonal transitions.

Appellant contends that the added term transforms the original meaning of the Komar Mark so much that it results in a material alteration. Accordingly, the Office should have refused the cited registrant's §8 specimen on the basis that it is deficient.

III. Conclusion

Appellant maintains that the significant differences between appellant's mark and the Komar Mark in sight, sound, overall commercial impression, marketing channels, target consumers, and the form/function of the goods themselves, render confusion between appellant's mark and the Komar Mark unlikely.

Additionally, given the cited registrant's material alteration of the Komar Mark, the Office should have rejected its §8 specimen as deficient.

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