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Subject: U.S. TRADEMARK APPLICATION NO. 86382828 - BELMONT - 1027-47-005 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86382828

MARK: BELMONT



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: ABBYSON LIVING LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

1027-47-005

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EXAMINING ATTORNEY'S APPEAL BRIEF

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: ABBYSON LIVING LLC : BEFORE THE

Trademark: BELMONT : TRADEMARK TRIAL

Serial No.: 86382828 : AND

Attorney: JAYE G. HEYBL, ESQUIRE : APPEAL BOARD

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STATEMENT OF THE CASE

The applicant Abbyson Living LLC has appealed the Trademark Examining Attorney's final refusal to register the trademark BELMONT for "luxury or high-end living-room furniture, namely, entertainment consoles, cabinets, drawers, and storage units" in International Class 20 on the grounds of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), with the marks BELMONT in U.S. Registration No. 0513425 for "box springs" and BELMONT in U.S. Registration No. 0732490 for "mattresses."

FACTS

The original applicant Abbyson Living Corporation applied for registration on the Principal Register for the trademark BELMONT for "furniture" classified in International Class 20 on September 2, 2014.¹ The examining attorney issued an initial Office Action on December 22, 2014 refusing registration of the

¹ The assignment of the proposed trademark in this application from Abbyson Living Corp. to Abbyson Living LLC was recorded with this Office on February 23, 2016.

mark under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), because of the likelihood of confusion with U.S. Registration Nos. 0513425 (“BELMONT” for “box springs” in International Class 20), 0732490 (“BELMONT” for “mattresses” in International Class 20), 1043955 (“BELMONT” for “beauty and barber shop furniture” in International Class 20), 3023769 (“BELMONT COLLECTION” for “commercial office furniture, namely, desks, chairs, shelving, bookcases, file cabinets, tables, credenzas, hutches, overhead storage” in International Class 20), and 3960678 (“BELMONT EMOTIONSESENTIELLES” for “children’s furniture; baby changing tables; bathing chairs; table seats, namely, booster seats; beds for children; bathtub for children; portable bath seats; bath rings for children, namely, portable baby bath seats for use in bath tubes; compact high chairs for children; booster seats for chairs; baby walkers” in International Class 20).

In the response received on January 12, 2015, the applicant argued against the Section 2(d) refusal and amended the identification of goods to “domestic, plush, living-room furniture, namely, chairs, recliners, sofas, couches, and ottomans” in International Class 20.

A final refusal to register the applicant’s mark was issued on January 30, 2015 based upon the marks in U.S. Registration Nos. 0513425 (“BELMONT”), 0732490 (“BELMONT”), and 3960678 (“BELMONT EMOTIONSESENTIELLES”). The refusal to register the mark under Section 2(d) of the Trademark Act based upon U.S. Registration Nos. 1043955 (“BELMONT”) and 3023769 (“BELMONT COLLECTION”) was withdrawn. The applicant’s amended identification of goods was found to be acceptable.

The applicant filed a notice of appeal to the Trademark Trial and Appeal Board on October 28, 2015 and a request for reconsideration on the same date. The application was remanded to the examining attorney on November 23, 2015, and the request for reconsideration was denied on December 2, 2015

as to in U.S. Registration Nos. 0513425 (“BELMONT”) and 0732490 (“BELMONT”). The refusal to register the mark under Section 2(d) of the Trademark Act based upon U.S. Registration No. 3960678 (“BELMONT EMOTIONSESENTIELLES”) was withdrawn.

The applicant filed its appeal brief on March 2, 2016 further amending the identification of goods to “luxury or high-end living-room furniture, namely, entertainment consoles, cabinets, drawers, and storage units” in International Class 20. The Trademark Trial and Appeal Board treated the amended identification of goods as a second request for reconsideration and returned jurisdiction to the examining attorney for further consideration of the refusal to register the mark under Section 2(d) of the Trademark Act. The amended identification of goods was found to be acceptable, however the second request for reconsideration was denied on April 14, 2016.

The application was then forwarded to the examining attorney by the Trademark Trial and Appeal Board for the examiner’s appeal brief.

ISSUE

The sole issue on appeal is whether the similarity of the applicant’s mark and the marks in U.S. Registration Nos. 0513425 (“BELMONT”) and 0732490 (“BELMONT”) is likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d) given the related nature of the parties’ goods.

ARGUMENT

BECAUSE THE PROPOSED MARK CREATES AN IDENTICAL COMMERCIAL IMPRESSION TO THE REGISTERED MARKS AND THE GOODS ARE CLOSELY RELATED, CONSUMER CONFUSION AS TO THE SOURCE IS LIKELY.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In any likelihood of confusion determination, two key considerations are similarity of the marks and similarity or relatedness of the goods. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 (TTAB 2015) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976)); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); see TMEP §1207.01. That is, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)); TMEP §1207.01(b)-(b)(v). Additionally, the goods are compared to determine whether they are similar or

commercially related or travel in the same trade channels. See *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369-71, 101 USPQ2d 1713, 1722-23 (Fed. Cir. 2012); *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1381 (Fed. Cir. 2002); TMEP §1207.01, (a)(vi).

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods. See *In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

A. THE PROPOSED MARK CREATES THE SAME COMMERCIAL IMPRESSION AS THE REGISTERED MARKS

Marks are compared in their entirety for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

In this case, the parties' marks are identical in appearance, sound, and meaning, "and have the potential to be used . . . in exactly the same manner." *In re i.am.symbolic, Llc*, 116 USPQ2d 1406, 1411 (TTAB 2015). The applicant's mark BELMONT is identical to the commonly owned registered marks BELMONT in U.S. Registration No. 0513425 and BELMONT in U.S. Registration No. 0732490. Because the parties' mark are identical, they are likely to engender the same connotation and overall commercial impression

when considered in connection with applicant's and registrant's respective goods. *In re i.am.symbolic, Llc*, 116 USPQ2d at 1411.

Where the marks of the respective parties are identical, as in this case, the degree of similarity or relatedness between the parties' goods needed to support a finding of likelihood of confusion declines.

See In re i.am.symbolic, Llc, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 1207, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993)); TMEP §1207.01(a).

B. THE GOODS ARE CLOSELY RELATED AND ARE LIKELY TO TRAVEL THROUGH THE SAME CHANNELS OF TRADE

The applicant's goods are related to the registrant's goods in that luxury or high-end living-room furniture, namely, entertainment consoles, cabinets, drawers, and storage units are marketed in the same channels of trade as box springs and mattresses and are purchased by the same consumers seeking to furnish their homes. This determination is supported by the evidence made of record on January 30, 2015, December 2, 2015, and April 14, 2016. Examples of this relevant evidence are as follows.

Attached to the January 30, 2015 Final Office action:

Bills' Bros. Furniture markets mattresses, box spring sets, and living room sets. (See Pages 2 to 6 of the attachments).

American Furniture Warehouse markets living room collections, mattresses, box springs, and foundations. (See Pages 7 to 12 of the attachments).

Raymour & Flanigan Furniture markets living room furniture, mattresses, and box springs. (See Pages 13 to 17 of the attachments).

Atlantic Bedding and Furniture markets foundations, box springs, mattresses, entertainment centers, tables, and living room furniture. (See Pages 18 to 21 of the attachments).

MathisBrothers.com markets living room furniture, bedroom furniture, and mattresses. (See Pages 40 to 44 of the attachments).

Pottery Barn markets living room furniture, benches, trunks, media centers, cabinets, bookcases, bedroom furniture, and mattresses. (See Pages 59 to 65 of the attachments).

Attached to the December 2, 2015 Request for Reconsideration Denied Office action:

Ashley Furniture Industries, Inc. markets entertainment centers, tables, living room furniture, mattresses, and foundations. (See Pages 2 to 4 of the attachments).

IKEA markets sofas, chairs, living room furniture, mattresses, and foundations. (See Pages 17 to 24 of the attachments).

Simmons markets sofa collections, living room sectionals, and mattresses. (See Pages 25 to 30 of the attachments).

Mitchell Gold + Bob Williams markets living room furniture, bedroom furniture, and mattresses. (See Pages 31 to 42 of the attachments).

Belfort Furniture markets living room furniture, bedroom furniture, and mattresses. (See Pages 43 to 59 of the attachments).

Macy's markets sofas, couches, living room furniture, bedroom furniture, and mattresses. (See Pages 60 to 75 of the attachments).

Rooms to Go markets living room furniture, bedroom furniture, and mattress sets. (See Pages 76 to 80 of the attachments).

Attached to the April 14, 2016 Request for Reconsideration Denied Office action:

Houzz markets on-line luxury furniture products such as ottomans, storage ottomans, dining room chairs, coffee tables, club chairs, tables, nightstands, sofas, bedroom furniture, dining room furniture sets, chaise loungers, storage furniture, and mattresses. (See Pages 2 to 22 of the attachments).

Bloomingdale's markets luxury mattresses and box springs, chairs, sofas, tables, ottomans, bedroom furniture, dining room furniture, sofa sectionals, media consoles, curio cabinets, chests, end tables, and bedroom furniture. (See Pages 23 to 65 of the attachments).

Macy's markets living room furniture, dining room furniture, bedroom furniture, sofas, couches, chairs, tables, luxury mattresses and box springs. (See Pages 66 to 79 of the attachments).

Harrods markets mattresses, mattress sets, box springs, living room furniture, sofas, chairs, tables, and storage furniture. (See Pages 80 to 85 of the attachments).

Green Front Furniture markets mattresses, bedroom furniture, dining room furniture, leather furniture, media cabinets, accent tables, and recliners. (See Pages 86 to 91 of the attachments).

Long's Furniture World and Mattress markets high quality mattresses and living room furniture. (See Pages 96 to 99 of the attachments).

Colfax Furniture & Mattress markets mattresses, box springs, sofas, and loveseats. (See Pages 106 to 112 of the attachments).

Winterport Discount Mattress & Furniture markets mattresses, dining room sets, hutches, living room sets, bedroom sets, and entertainment furniture. (See Pages 113 to 114 of the attachments).

Also attached to the April 14, 2016 action are numerous trademark registrations that show goods like those identified by the parties do originate from common sources and bear the same trademarks. These registrations were found during a search of the records of this Office conducted on April 14, 2016.

As indicated by the evidence of record, purchasers of home goods such as furniture and mattresses/box springs are accustomed to purchasing these goods from a common source. Upon seeing the BELMONT name on living room furniture such as entertainment consoles, cabinets, drawers, and storage units and on mattresses and box springs, purchasers could reasonably and mistakenly believe that the parties' goods come from a common source.

The goods of the parties need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i). They need only be “related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i). The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205

(Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01.

Furthermore, based upon the evidence of record, the examining attorney maintains that the parties' goods are commonly marketed in the same channels of trade, regardless of whether they are luxury or high-end goods. The presumption under Trademark Act Section 7(b), 15 U.S.C. §1057(b), is that the registrant is the owner of the mark and that use of the mark extends to all goods identified in the registration. The presumption also implies that the registrant operates in all normal channels of trade and reaches all classes of purchasers of the identified goods. *In re Melville Corp.*, 18 USPQ2d 1386, 1389 (TTAB 1991); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1899 (TTAB 1989); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964-65 (TTAB 1980); see TMEP §1207.01(a)(iii). The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); see, e.g., *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011).

In sum, when confronted by marks with an identical commercial impression on closely related goods, a consumer is likely to have the mistaken belief that the goods originate from the same source. Because this likelihood of confusion exists, registration of the applicant's proposed mark must be refused. The overriding concern is not only to prevent buyer confusion as to the source of the goods, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP

§1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

CONCLUSION

The examining attorney has shown that both parties are using the wording “BELMONT” on related furniture goods for home use that are marketed in the same channels of trade to the same purchasers. When consumers encounter these related goods bearing identical marks, confusion as to source of those goods is substantially likely. For the foregoing reasons, the examining attorney respectfully requests that the refusal to register the applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), be affirmed.

Respectfully submitted,

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