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**Subject:** U.S. Trademark Application Serial No. 90885309 - DEATH FROM ABOVE - 12431.002 - Examiner Brief  
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**Attachments**

**United States Patent and Trademark Office (USPTO)**

**U.S. Application Serial No.** 90885309

**Mark:** DEATH FROM ABOVE

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**Applicant:** HEARTLAND CLIMBERS, L.L.C.

**Reference/Docket No.** 12431.002

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**EXAMINING ATTORNEY'S APPEAL BRIEF**

Applicant, Heartland Climbers, L.L.C., appeals the trademark examining attorney's refusal to register the mark **DEATH FROM ABOVE** in standard characters for "Hunting stands" in International Class 28 on the Principal Register. Registration was refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), based on a likelihood of confusion with the mark in U.S. Registration No. 4668538, **HUNT FROM ABOVE**, in standard characters for "Fall protection equipment for fall restraint and fall arrest, namely, a lifeline system to which a user is attached for protection against fall hazards, composed primarily of safety harnesses and climbing tree lifeline straps" in International Class

9, and "Hunting stands for use in trees; seats especially adapted for hunting stands for use in trees" in International Class 28.

### **ISSUE**

Whether Applicant's proposed mark is likely to be confused with that of Registrant so as to preclude registration under Section 2(d) of the Trademark Act.

### **STATEMENT OF FACTS**

On August 16, 2021, applicant Heartland Climbers, L.L.C., applied for registration on the Principal Register of the mark **DEATH FROM ABOVE** in standard characters for "Hunting stands" in International Class 28. In an Office action dated December 17, 2021, the Office refused registration under Section 2(d) of the Trademark Act, on the ground that the applied-for mark is likely to cause confusion with the mark in U.S. Registration No. 4668538, **HUNT FROM ABOVE** in standard characters for "Fall protection equipment for fall restraint and fall arrest, namely, a lifeline system to which a user is attached for protection against fall hazards, composed primarily of safety harnesses and climbing tree lifeline straps" in International Class 9, and "Hunting stands for use in trees; seats especially adapted for hunting stands for use in trees" in International Class 28.

Following Applicant's response on June 13, 2022, the Office issued a Final Office action wherein the Section 2(d) Refusal was maintained and made final on July 20, 2022. On January 17, 2023, Applicant filed for appeal. Applicant submitted its appeal brief on March 7, 2023, arguing that confusion is unlikely due to different dominant features in the marks and distinct commercial impressions of the marks.

### **DISCUSSION**

**THE MARK "DEATH FROM ABOVE" IS SO SIMILAR IN APPEARANCE AND MEANING SO AS TO CREATE A LIKELIHOOD OF CONFUSION WITH THE REGISTERED MARK "HUNT FROM ABOVE" FOR HIGHLY RELATED GOODS, AND, ACCORDINGLY, THE REFUSAL OF REGISTRATION UNDER SECTION 2(d) OF THE TRADEMARK ACT SHOULD BE AFFIRMED.**

Trademark Act Section 2(d) bars registration of an applied-for mark that is so similar to a

registered mark that it is likely consumers would be confused, mistaken, or deceived as to the commercial source of the goods and/or services of the parties. *See* 15 U.S.C. §1052(d). Likelihood of confusion is determined on a case-by-case basis by applying 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) (called the “*du Pont* factors”). *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017). Any evidence of record related to those factors need be considered; however, “not all of the *DuPont* factors are relevant or of similar weight in every case.” *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)).

Although not all *du Pont* factors may be relevant, there are generally two key considerations in any likelihood of confusion analysis: (1) the similarities between the compared marks and (2) the relatedness of the compared goods and/or services. *See In re i.am.symbolic, llc*, 866 F.3d at 1322, 123 USPQ2d at 1747 (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) (“The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”); TMEP §1207.01.

#### *Similarity of the Marks*

Marks are compared in their entireties 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 Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d per curiam*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019); TMEP §1207.01(b).

Here, applicant’s mark is **DEATH FROM ABOVE** in standard characters, and registrant’s mark is **HUNT FROM ABOVE** in standard characters. The wording **FROM ABOVE** in applicant’s

mark is identical in sound and appearance to the wording **FROM ABOVE** in registrant's mark. Moreover, and as noted previously, this shared wording conveys the same meaning of "from a higher place or position." (See Office action dated December 17, 2021, TSDR p. 5).

The visual and phonetic differences between the first word of each mark does not obviate the overall similarities between the marks. Consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 1336, 164 USPQ 301, 304 (C.C.P.A. 1970) (holding MISTER STAIN likely to be confused with MR. CLEAN on competing cleaning products); see *In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (holding CITY WOMAN for ladies' blouses likely to be confused with CITY GIRL for a variety of female clothing); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 260-61 (TTAB 1979) (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (holding TUNA O' THE FARM for canned chicken likely to be confused with CHICKEN OF THE SEA for canned tuna); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105, 109 (TTAB 1973) (holding UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services); TMEP §1207.01(b).

In the present case, applicant's mark begins with the wording **DEATH** and registrant's mark begins with the wording **HUNT**. Although this wording is different in appearance and sound, the wording **DEATH** and **HUNT** convey the same idea, stimulate the same mental reaction, and create the same overall meaning. Applicant's mark **DEATH FROM ABOVE** conveys the idea of ending life from a higher position. (See Office action dated July 20, 2022, TSDR p. 8-23). Similarly, registrant's mark **HUNT FROM ABOVE** conveys the idea of pursuing and killing wild animals and game from a higher position. (See Office action dated July 20, 2022, TSDR p. 19-32). Thus, the applicant's and registrant's marks create the same general overall image and mental reaction of ending life or killing from a higher position. Accordingly, the overall similarities between the marks in connotation and commercial impression outweigh their visual and phonetic differences.

In its appeal brief, applicant asserts that the wording **DEATH** in applicant's mark and the wording **HUNT** in registrant's mark are the dominant elements of each mark. Applicant then argues that the dominant wording, **DEATH** and **HUNT**, create distinct commercial impressions in each mark. However, as set forth previously and reiterated above, the marks do not create distinct commercial impressions. Rather, they convey similar commercial impressions because the wording in each mark creates the same meaning in the minds of consumers. Particularly, applicant's mark **DEATH FROM ABOVE** and registrant's mark **HUNT FROM ABOVE** are unitary phrases in which the elements of the marks are so integrated or merged together that they cannot be regarded as separable. TMEP §1213.05. Marks must be considered in their entirety. See *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1371, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015); *In re Shell Oil Co.*, 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). When the marks are read in their entirety, the combined overall meaning of applicant's and registrant's marks is the same: killing or death by hunting from a higher vantage point. Accordingly, applicant's argument is not persuasive, and the marks create the same overall commercial impression.

Next, applicant asserts that the only common elements of the marks, **FROM ABOVE**, are weak and descriptive of a function or purpose of applicant's and registrant's goods because they allow users to "hunt from above" without falling. Applicant additionally argues that the descriptive nature of this wording weighs against a finding that the marks are confusingly similar "because there is nowhere else for confusion to arise." (See Appeal brief dated March 7, 2023, TSDR p. 5-6). However, applicant's argument is unpersuasive and cannot be considered because the applicant cannot challenge the validity of the cited registration. Applicant argues that the registered mark has little or no source-identifying significance because it is descriptive in relation to registrant's goods. Trademark Act Section 7(b), however, provides that a certificate of registration on the Principal Register is prima facie evidence of the validity of a registered mark. 15 U.S.C. §1057(b). The validity of a cited registration "cannot be challenged in an ex parte proceeding." *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). Thus, applicant's argument is not being considered because to do so would fail to give the cited registered mark the validity to which it is entitled. *In re Fat Boys Water Sports LLC*, 118 USPQ2d at 1517 (citing *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007)).

Even if the cited registration is weak or merely descriptive, registrant's mark is still entitled to

protection because it is a valid registration on the Principal Register. The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection under Section 2(d) against the registration by a subsequent user of a similar mark for closely related goods and/or services. TMEP §1207.01(b)(ix); *see King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010). Accordingly, the marks are not only confusingly similar because they share the common elements **FROM ABOVE**, but they are also confusingly similar because the wording **DEATH** and **HUNT** convey the same general meaning in each mark.

When comparing marks, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that [consumers] who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*4 (TTAB 2020) (citing *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016)); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018); TMEP §1207.01(b); *see In re St. Helena Hosp.*, 774 F.3d 747, 750-51, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014). As set forth and reiterated above, the marks have differences in appearance and sound because of different first words. However, the marks are sufficiently similar in terms of their commercial impression such that consumers would be likely to assume a connection between the parties. Here, the wording **DEATH** and **HUNT** look and sound different, but they convey a similar overall meaning and commercial impression of killing or causing death. Thus, despite the descriptive nature of the wording **FROM ABOVE** in each mark, the marks are confusingly similar because their dominant features, **DEATH** and **HUNT**, convey a similar meaning.

Applicant further argues that the overall commercial impressions created by the marks are very different, and thus, confusion is unlikely. In support of this assertion, applicant concludes that the commercial impression of registrant's mark, **HUNT FROM ABOVE**, is that of safety in connection

with their goods “fall protection equipment for fall restraint and fall arrest.” Applicant then states that the commercial impression is created "with this product, you can hunt from a tree without falling out and breaking your neck." (*See* Appeal brief dated March 7, 2023, TSDR p. 6). However, the wording **HUNT FROM ABOVE** does not convey the commercial impression of safety. First, applicant has not provided evidence or further explanation to support this assertion of safety. Second, as set forth and reiterated above, this wording conveys the idea of hunting, or pursuing and killing wild animals and game from a higher position. (*See* Office action dated July 20, 2022, TSDR p. 19-32). Agreeably, applicant notes that applicant's mark **DEATH FROM ABOVE** does not convey a safety message, and focuses on the killing aspect of hunting. In light of the evidence, the commercial impressions of each mark is the same: killing or causing death. Accordingly, the overall commercial impressions created by the marks are the same.

Furthermore, applicant fails to note that registrant's mark, **HUNT FROM ABOVE**, is also used in connection with "hunting stands for use in trees," which are goods that are nearly identical and encompassed by applicant's broader goods, "hunting stands." Moreover, where the goods of an applicant and registrant are “similar in kind and/or closely related,” the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).

Accordingly, because the Applicant's mark could reasonably be perceived by consumers as the same in meaning and commercial impression to the Registrant's mark, and a significant portion of Applicant's mark is identical in sound and appearance to a significant portion of the Registrant's mark, consumers are likely to believe the marks identify the same source of goods. Therefore, the marks are confusingly similar.

#### *Relatedness of the Goods*

The goods are compared to determine whether they are similar, 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, 1207.01(a)(vi).

The compared goods and/or services 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); TMEP §1207.01(a)(i). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] 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); *see Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*44 (TTAB 2022) (quoting *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)).

Here, applicant’s hunting stands are related to registrant’s safety harnesses and climbing tree lifeline straps and hunting stands for use in trees.

As previously set forth, determining likelihood of confusion is based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1307, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1325, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)).

In this case, the application uses broad wording to describe "hunting stands," which presumably encompasses all goods of the type described, including registrant’s more narrow "hunting stands for use in trees." *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*44 (TTAB 2022); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). Thus, applicant’s and registrant’s goods are legally identical. *See, e.g., In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 1336, 209 USPQ 986, 988 (C.C.P.A. 1981); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004)).

Additionally, the goods of the parties have no restrictions as to nature, type, channels of trade, or classes of purchasers and are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005



(Fed. Cir. 2002)); *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*49.

The trademark examining attorney has properly attached and made of record nine different third-party websites, establishing that the same entity commonly manufactures, produces, or provides the relevant goods—safety harnesses, climbing tree lifeline straps, and hunting stands—and markets these goods under the same mark. These referenced third-party websites include:

- Sportsman's Guide, offering safety harnesses and hunting tree stands (*See* Office action dated December 17, 2021, TSDR p. 26-54);
- Summit, offering safety harnesses and hunting stands (*See* Office action dated December 17, 2021, TSDR p. 55-56);
- Muddy, offering safety harnesses, climbing tree lifeline straps, and hunting tree stands (*See* Office action dated December 17, 2021, TSDR p. 57-62);
- Primal Tree Stands, offering safety harnesses and hunting stands (*See* Office action dated July 20, 2022, TSDR p. 33-37);
- Guide Gear, offering climbing tree lifeline straps and hunting tree stands (*See* Office action dated July 20, 2022, TSDR p. 41-46);
- X-Stand, offering climbing tree lifeline straps and hunting stands (*See* Office action dated July 20, 2022, TSDR p. 49-55);
- Hawk, offering safety harnesses and hunting stands (*See* Office action dated July 20, 2022, TSDR p. 59-63);
- Millennium, offering safety harnesses and hunting stands (*See* Office action dated July 20, 2022, TSDR p. 70-73);
- River's Edge, offering climbing tree lifeline straps and hunting tree stands (*See* Office action dated July 20, 2022, TSDR p. 65-69)

Moreover, the trademark examining attorney also properly attached and made of record dictionary definitions that demonstrate the following: hunting tree stands are open or enclosed platforms used by hunters and are secured to trees in order to elevate the hunter for a better vantage point, and a safety harness is a form of personal protective equipment that consists of rope, locking hardware, webbing, and body wear that is designed to catch a person in case of falling while working at a height. (See Office action dated July 20, 2022, TSDR p. 74-80). Accordingly, the relevant hunting stands, which include climbing stands, ladder stands, and elevated platforms, and safety harnesses which include rope, locking hardware, and body wear, are being provided by various third party entities under the same mark.

Thus, this evidence of record demonstrates that the applied-for and registered goods may be offered by a single source under the same mark, frequently travel in the same channels of trade, and are marketed to the same consumers. As such, applicant's and registrant's goods are considered related for likelihood of confusion purposes. See, e.g., *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009). Accordingly, when consumers encounter hunting stands, climbing tree lifeline straps, and safety harnesses offered under highly similar marks, they are likely to be confused as to the source or sponsorship of the goods.

In its appeal brief, applicant acknowledges that the applicant's and registrant's goods overlap because they both offer hunting stands. Applicant concludes that the applicant's and registrant's goods are at least related, if not competitive. Applicant has not raised any arguments concerning the relatedness of the goods in its brief, and thus, appears to concede this issue. As such, as set forth above, the marks are confusingly similar and the goods are related. Therefore, consumers are likely to be confused as to the source of the goods. Thus, the Office maintains its position that registration is properly refused pursuant to Section 2(d) of the Trademark Act.

### **CONCLUSION**

For the reasons set forth above, the trademark examining attorney respectfully submits that the applied-for mark, **DEATH FROM ABOVE**, in standard characters for "Hunting stands" in International Class 28 is likely to cause confusion with the registered mark, **HUNT FROM ABOVE**, in standard

characters for “Fall protection equipment for fall restraint and fall arrest, namely, a lifeline system to which a user is attached for protection against fall hazards, composed primarily of safety harnesses and climbing tree lifeline straps” in International Class 9, and "Hunting stands for use in trees; seats especially adapted for hunting stands for use in trees" in International Class 28. Accordingly, the applied-for mark’s registration is properly refused under Section 2(d) of the Trademark Act. Therefore, it is respectfully submitted that the refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), should be affirmed.

Respectfully submitted,

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**United States Patent and Trademark Office (USPTO)**

**USPTO OFFICIAL NOTICE**

Examining attorney's appeal brief has issued  
on May 4, 2023 for  
**U.S. Trademark Application Serial No. 90885309**

A USPTO examining attorney has issued an appeal brief. Follow the steps below.

- (1) **[Read the appeal brief](#)**. This email is NOT the appeal brief.
- (2) **Submit reply brief within 20 days of May 4, 2023**, if you wish to do so. If submitted, a reply brief must be submitted using the [Electronic System for Trademark Trials and Appeals \(ESTTA\)](#) and received by the USPTO on or before 11:59 p.m. **Eastern Time** of the last day of the reply period.
- (3) **Direct questions** about the appeal proceeding to the Trademark Trial and Appeal Board at 571-272-8500 or [TTABInfo@uspto.gov](mailto:TTABInfo@uspto.gov).