

## Response to Office Action (Ser. No. 87/669,708)

Applicant, Target Brands, Inc. ("Target"), submits this response to the Office Action issued on May 1, 2018, in connection with Target's Application Serial No. 87/669,708 (the "Application") for HEYDAY in standard characters ("Target's Mark"). The Examining Attorney refused registration of the Application because of a likelihood of confusion under Section 2(d), 15 U.S.C. §1052(d) with U.S. Registration No. 4,970,933 for the mark HAY DAY in standard characters (the "Cited Mark"). The Cited Mark is owned by Supercell Oy Osakeyhtio of Finland ("Supercell"). The Examining Attorney also requests for clarification of "electronic security monitoring systems" in Class 09 and product information for the goods identified as "cell phone lenses, clips and stands for use with smartphone cameras; portable video projectors," in Class 09. Together with this response Target provides information for the goods "cell phone lenses, clips and stands for use with smartphone cameras; portable video projectors," requests the Examining Attorney reconsider the request for amendment of "electronic security monitoring systems" in Class 09, and respectfully requests reconsideration of the likelihood of confusion rejection.

As an initial matter, Target would like to draw to the Examining Attorney's attention an office action response filed by Supercell in which Supercell argued the wording HAY DAY and HEYDAY are not confusingly similar. See Exhibit A.

Further, Target has other pending applications for HEYDAY including allowed application Ser. No. 87/636,094 covering related Class 09 goods, and which was reviewed by the Examining Attorney in this case. See Exhibit B. Since a likelihood of confusion refusal wasn't issued in the 87/636,094 application, and Supercell didn't object to registration of Target's Mark, Target believes this is sufficient evidence that the Application should be approved for publication.

### No Likelihood of Confusion

*In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973), sets forth a list of several factors which should be considered when determining a likelihood of confusion under Section 2(d). Those "evidentiary elements are not listed . . . in order of merit." Rather "[e]ach may from case to case play a dominant role." *Id.* Based upon an analysis of all of the factors, it appears that there are insufficient grounds upon which to base a determination that there exists a likelihood of confusion. Moreover, likelihood of confusion is synonymous with "probable" confusion – it is not sufficient if confusion is merely "possible." *Brennan's, Inc. v. Brennan's Restaurant, L.L.C.*, 360 F.3d 125, 135, 69 U.S.P.Q.2d 1939 (2<sup>nd</sup> Cir. 2004). Target respectfully requests that the Examining Attorney reverse his position in view of the analysis set forth below.

#### I. Comparison of the Marks

##### *Appearance, Meaning and Commercial Impression*

The appearance, meaning and commercial impression of Target's Mark and the Cited Mark are different. While the marks have a similar sound, this does not translate to a finding that there would be a likelihood of confusion between the marks. As shown below, the marks are clearly not identical in appearance:

Target's Mark: **HEYDAY**  
Cited Mark: **HAY DAY**

Target's Mark is one word with no spacing while the Cited Mark consists of a space between the words HAY and DAY. Further, the spelling of the marks differs in that the second letter in Target's Mark consists of "e" while the second letter the Cited Mark consists of the letter "a".

In addition, Target's Mark and the Cited Mark convey significantly different meanings and commercial impressions. HEYDAY is a word to express or exclaim elation or wonder, high spirits; the period of one's greatest popularity, vigor, or prosperity. See Exhibit C. The term "HAY" can mean herbage and especially grass mowed and cured for fodder; reward; slang for bed; a small sum of money. See Exhibit D. Therefore, the prefix of Target's Mark and the first word in the Cited Mark convey significantly different meanings. Moreover, and as briefly mentioned above, Supercell argued the wording HAY DAY and HEYDAY are not confusingly similar because HEYDAY in the minds of consumers means "high spirits or the period of one's greatest popularity, vigor or prosperity." In stark contrast, HAY DAY in the minds of consumers, and when used in connection with Supercell's farming game, means hay that one might find on a farm or in a barn. See Exhibit A.

Applicant respectfully submits that the differences outlined above, and the admission on record by Supercell that HEYDAY and HAY DAY are not confusingly similar marks, weigh heavily against a finding of *likely* confusion in this case.

## II. Comparison of the Goods

### *Consumer Sophistication and Exercise of Great Care*

The goods at issue under Target's Mark include: "power strips, computer cables and extension cords; electrical outlet covers; converters; electrical adapters; headphones; USB wall chargers, outlets, adapters, plugs," in Class 09 due in main part to the following goods under the Cited Mark: headphones; portable flash memory card; and power supplies electrical" in Class 09. While the goods are identical or similar, consumers do not typically purchase these types of goods on impulse.

The Trademark Trial and Appeal Board has held that circumstances suggesting care in purchasing may tend to minimize the likelihood of confusion. See, e.g., *In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED); *In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378, 1380, 1383 (TTAB 2006).

Target respectfully submits that electronics and electronics accessories play a big role in our daily lives, and consumers buying these items exercise great care and do not purchase on an impulse basis.

Supercell is a mobile game development company based in Finland. One of its games is "HAY DAY" in which players sell crops/products to earn coins which can be used to buy production buildings, pets and decoration items. See Exhibit E. Consumers of Supercell's goods are online gamers (or consumers familiar with Supercell's online game) seeking collectible items associated with the "HAY DAY" game characters. Again, Supercell supports this notion as shown in Exhibit A in which Supercell states buyers of its goods are knowledgeable and discriminating because they want to purchase items specifically associated with Supercell's online games. For example, as shown below and attached as Exhibit F is a print screen of Supercell's online store for merchandise sold under Supercell's Mark, which clearly

shows each item is associated with the mobile farming game with a prominent display of the game characters or game logo with a straw of hay design.



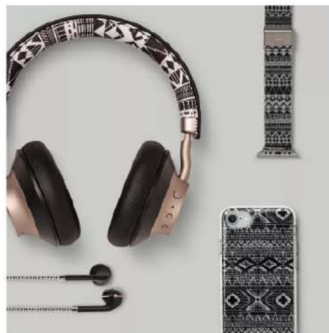
In sharp contrast to Supercell's collectible items sold at Supercell's online store, goods under Target's Mark are or will be sold in TARGET® stores and online at <target.com>, and the focus of the goods is to bring style to tech accessories. See Exhibit G and snapshot below.

On-trend cases, chargers, headphones & more...  
**Pick the look that speaks to you**



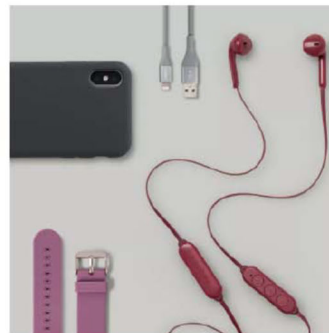
**Luxe life**  
All that glitters really is gold. Add a touch of blush for chic styling your way.

Pink & Gold



**Graphic glory**  
Classic & monochromatic, you live for versatile color combos that go with anything.

Black & White



**You do hue**  
New day, different color. Find your fave one & run with it.

Solid Colors

### III. Conclusion

Confusion must be likely, not merely possible, to refuse registration of Target's Mark. Given the differences in the parties' marks, the parties' trade channels, and the sophistication and care by the consumers of both parties' goods, Target respectfully requests the Examining Attorney to reconsider his

position and withdraw the likelihood of confusion refusal and approve the Application for publication. Target appreciates the Examiner's consideration.

#### **Clarification of Goods**

For purposes of portfolio consistency, Target requests the Examining Attorney reconsider the request for amendment of “electronic security monitoring systems,” in Class 09. Target has several pending or recently published applications consisting of this same identification and the issue of the identification being indefinite or too broad was never raised. See Exhibit H and snapshot below:

- 87671328 – Meridith Debus – published July 31, 2018.
- 87771884 – Dominic Fathy – pending; no issue raised with respect to the goods in question.
- 87713426 – Michele Swain – pending; no issue raised with respect to the goods in question.
- 87691699 – Howard Levine – pending; no issue raised with respect to the goods in question.
- 87671355 – Meridith Debus – pending; no issue raised with respect to the goods in question.
- 87671369 – Meridith Debus – pending; no issue raised with respect to the goods in question.

#### **Information Request**

Target’s Mark is not yet in use in connection with “cell phone lenses, clips and stands for use with smartphone cameras; portable video projectors” but provides for the Examining Attorney’s consideration information from other sources for goods of the same type. See Exhibit I. Once available, the goods in question will be sold in TARGET® retail stores and online at <target.com>. See Exhibit G.