

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

Applicant, Target Brands, Inc. (“Target”), submits this response to the Office Action issued on November 28, 2018, in connection with Target’s Application Serial No. 87/669,708 for the mark HEYDAY. The Examining Attorney continued a refusal of the Application because of a perceived 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 (the “Cited Mark”) and requested clarification of the identification of goods in Class 9. Based on the arguments and amendments submitted herewith, Target respectfully requests that the subject Application be approved for publication.

### **No Likelihood of Confusion with Registration No. 4,970,933:**

An evaluation of likelihood of confusion must be made on the basis of all the factors in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973); T.M.E.P. § 1207.01, even though various *du Pont* factors may have more or less significance in any given case. In this case, there are very important facts that significantly tip the scale to a finding that there is not a likelihood of consumer confusion.

First, Target already owns an allowed application for the mark HEYDAY & Design in connection with the identical goods covered in the Application (U.S. Serial No. 87/671,355, a printout of which is attached hereto as Exhibit A). Target would be unfairly prejudiced by the refusal to register the applied-for mark for the identical goods covered in its allowed application. *See In re Strategic Partners, Inc.*, 102 USPQ2d 1397 (TTAB 2012) (invoking the thirteenth *du Pont* factor, the Board found no likelihood of confusion when balancing the similarities between the marks and goods against the fact that applicant already owned a registration for a substantially similar mark for the identical goods).

Second, both Target and the owner of the Cited Mark, Supercell Oy (“Supercell”), believe HEYDAY and HAY DAY are sufficiently distinguishable and not likely to cause consumer confusion. Supercell has stated on record, in connection with the prosecution of the Cited Mark,

“The [other party’s] mark is HEYDAY. Consumers will automatically think of the word’s meaning which is high spirits or the period of one’s greatest popularity, vigor or prosperity...The term connotes great fortune or success that consumers will receive in using the goods of the registrant. By contrast, [Supercell’s] mark is HAY DAY, which will make a consumer think of a farm or barn as one would associate with hay...The differences between the marks in spelling and meaning will alert consumers that the goods come from different and unrelated sources.”

See, Supercell’s response to Office Action attached hereto as Exhibit B.

When the parties in the marketplace believe that consumer confusion is not likely, the Examiner should not substitute her judgement concerning likelihood of confusion for the judgment of the real parties in interest without good reason. See, TMEP §1207.01(d)(viii).

Finally, marks that have such different connotation, like in this case, are often held not confusingly similar, even when applied to the same types of goods or services. See, e.g., *Safeway Stores Inc. v. The Bell Canto Fancy Foods Ltd.*, 5 U.S.P.Q.2d 1980, 1982 (T.T.A.B. 1987) (finding no likelihood of confusion between BEL ARIA for food products and BEL-AIR for frozen food products).

### **Class 09 Amendment**

Target amends the identification of goods as follows (additions are in **bold**):

Computer hardware; mobile phones, PC tablets, personal digital assistants, namely, PDA's; computer mice and computer mouse pads; computer keyboards; portable photo and document

printers; record players; audio cassette and CD players; microphones; power strips, computer cables and extension cords; electric outlet covers; cell phone lenses, clips and stands for use with smartphone cameras; portable video projectors; converters; electrical adapters; virtual reality headsets, glasses, headphones, and handheld controllers; USB wall chargers, outlets, adapters, plugs; computer application software used to control network products and internet of things (IoT) products such as smart home and wearable products; wearable computers in the nature of smartwatches; wearable computer peripherals in the nature of wireless mice and USB adapters; wearable activity trackers; computer application software for mobile phones for measuring, tracking, analyzing, displaying, uploading, and transmitting data from the smart watches or wearable computers or wearable activity trackers; baby monitors; electronic devices, namely, mobile phones, MP3 players, tablet computers and hand-held computing devices for use in monitoring home environments, including temperatures, security systems, lighting, HVAC, electronic air purification systems; downloadable computer software for connecting, operating, and managing networked devices including kitchen appliances, HVAC systems in the internet of things (IoT); remote controls for controlling computers, alarms and security systems, smoke and carbon monoxide detection devices, energy-savings devices, window coverings, garage doors, electric appliances; electronic security monitoring systems for protecting personal property, **comprised of wireless and wired controllers, cameras, monitors, microphones and recorders**; remote controls for lighting devices, fans, sound systems, door locks; digital photo frames