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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re JELD-WEN, inc.

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Serial No. 78773836

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Nelson, Mullins, Riley & Scarborough, L.L.P. for JELD-WEN,  
inc.

Susan Leslie DuBois, Trademark Examining Attorney, Law  
Office 111 (Craig D. Taylor, Managing Attorney).

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Before Quinn, Holtzman and Walsh, Administrative Trademark  
Judges.

Opinion by Walsh, Administrative Trademark Judge:

JELD-WEN, inc. (applicant) has applied to register the  
mark MEDITERRANEAN in standard characters on the Principal  
Register for "decorative glass panels sold as an integral  
component of metal doors" in International Class 6.<sup>1</sup> The  
Examining Attorney has finally refused registration under

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<sup>1</sup> Application Serial No. 78773836, filed December 15, 2005, based  
on a statement of a bona fide intention to use the mark in  
commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

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Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with Registration No. 2675552 for the mark MEDITERRANEAN in standard characters for goods identified as "wooden sectional garage doors" in International Class 19. Applicant has appealed. Applicant and the Examining Attorney have filed well written briefs. We affirm.

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion ..." 15 U.S.C. § 1052(d). In *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977), the Court set forth the factors to consider in determining likelihood of confusion. See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Below, we will consider each of the factors as to which applicant or the Examining Attorney have presented arguments or evidence.

#### The Marks

Applicant has not argued that the marks differ. In fact, the marks are not only similar but identical. Accordingly, we will proceed with our analysis of the other relevant factors on the basis that the marks are identical.

The Goods

We begin our consideration of the goods by noting that "... where both parties are using the identical designation, ... the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar. Cf. *AMF Incorporated v. Sleekcraft Boats et al.*, 204 USPQ 808 (CA 9, 1979) and *Fotomat Corporation v. Ace Corporation*, 208 USPQ 92 (DC, Calif. 1980)." *Ancor, Inc. v. Ancor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981) (AMCOR for glass windows and doors having metal frames held confusingly similar to AMCOR for concrete construction block and glazed block and other construction materials).

As a general proposition, the goods of applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from the same source. *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Applicant's arguments with regard to the goods focus principally on differences in the trade channels and mode of sale for the respective goods. As to the goods identified in the cited registration, applicant argues that wooden garage doors are sold to homeowners principally through specialized installers. Applicant argues further that the involvement of the expert installer in this purchase would diminish the likelihood of confusion. Applicant makes a similar argument with regard to purchases of garage doors for new homes, whether the home is a custom-built home or a home built for general sale. Applicant again argues that experts, either architects, builders or installers, will be involved, either as the primary purchaser or in advising the primary purchaser if it is a custom home. And again, the involvement of the expert would diminish the likelihood of confusion, applicant argues. Applicant also argues that the same expert-guided process would apply to its goods, metal doors with decorative glass panels, when the door is for a new home.

Applicant does concede that both wooden garage doors and glass-paneled metal doors are also sold through home retail centers, such as Lowe's and Home Depot. However, applicant points out that these retailers typically do not

stock garage doors themselves, but rather customers make selections from catalogs. Again, applicant argues that the purchaser is likely to employ an expert installer, and again that the expert involvement would diminish the likelihood of confusion.

On the other hand, the Examining Attorney states, "The goods at issue are related in four critical ways. In short the goods are not limited to any particular specialized channels of trade; they are available in the same commercial setting; they are produced by the same entities; and while not directly complementary, given the wood versus metal distinction, many types of doors have decorative glass panels." Examining Attorney's Brief at 4.

Applicant concedes that the trade channels overlap, at least to the extent that both types of doors are sold through home retail centers. Also, even though applicant contends that the markets are distinct, applicant acknowledges that it manufactures and sells both types of doors. Applicant also contends that this is "unusual." Shane Thomas Affidavit at 3. The Examining Attorney also submitted (i) copies of two registrations applicant owns, Registration Nos. 3067184 and 3072535, which identify both types of doors and (ii) excerpts from applicant's website showing that applicant offers both types of doors. Thus,

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the scope of applicant's own business is strong evidence that the respective goods are related, that is, that the respective goods could and do come from the same source under the same mark. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).

The Examining Attorney also submitted excerpts from the websites of third parties. The excerpt associated with BP shows that this entity offers both glass-paneled garage doors and glass-paneled entry doors. The excerpt also suggests that homeowners may wish to select both types of doors with a compatible design and appearance. The Examining Attorney also provided excerpts from websites showing that a single entity offers both wooden and metal garage doors and that both types could include glass panels, for example, raynor.com and amarr.com.

The Examining Attorney has also provided copies of use-based, third-party registrations showing marks registered for both types of goods, entry doors and wooden garage doors, including: Registration No. 2908883 for goods including "entry, passage, patio, and garage doors, all being made of metal" and "non-metallic ... entry doors, ... garage doors"; Registration No. 2879520 for goods including "metal doors, metal garage doors, metal patio doors" and

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"non-metal doors, non-metal garage doors, non-metal patio doors"; and

Registration No. 2871775 for goods including "metal doors, metal garage doors, metal patio doors" and "non-metal doors, non-metal garage doors, non-metal patio doors."

These registrations provide some further evidence that the respective goods may emanate from the same source, further confirming the evidence we noted regarding applicant. *In re TSI Brands Inc.*, 67 USPQ2d 1657, 1659 (TTAB 2002); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The Board's observations in the *Amcors* case apply here:

Thus, there is in the present situation products, although different, that are promoted in a similar fashion to similar "specifiers" in the construction industry and which can be used in the construction or renovation of the same commercial structures. Thus, if these "specifiers" were to be interested in windows and in concrete or glazed block for incorporation in the same structure [it should be noted that windows can be set in block], and they were to come across these products under the same arbitrary designation "AMCOR", it would not be unreasonable for them to assume mistakenly that they are products emanating from the same producer.

*Amcors, Inc. v. Amcor Indus., Inc.*, 210 USPQ at 78-79. See also *In re Johns-Manville Corp.*, 180 USPQ 661, 662 (TTAB 1973) (WEATHER KING for asphalt shingles held confusingly

similar to WEATHER-KING for building doors and panels therefor).

Accordingly, based on the evidence of record, we conclude that applicant's goods are related to the goods identified in the cited registration and that the channels of trade for the respective goods overlap and are otherwise related. We find unpersuasive applicant's arguments that the circumstances of purchase would diminish confusion, including the argument that the potential use of catalogs in purchase of either or both types of goods would diminish the likelihood of confusion.

Conditions of Purchase

In a similar vein, applicant also argues that the types of goods identified in both the application and the cited registration are relatively expensive, and that purchasers will exercise more thought and care in purchasing the products, thus diminishing the likelihood of confusion. As we noted, applicant has also argued that the purchasers are either experts or advised by experts. We are not persuaded by these arguments. The Board has stated, "The law has long recognized that even technically sophisticated and careful purchasers of industrial equipment and products are not necessarily expert in trademark evaluation or immune from source confusion." *In*

*re Pellerin Milnor Corporation*, 221 USPQ 558, 560 (TTAB 1983). See also *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). In particular, in a case such as this where the marks are identical, we find the relative cost of the products and the sophistication of purchasers would not diminish the likelihood of confusion. *Amcors, Inc. v. Amcor Indus., Inc.*, 210 USPQ at 78.

Actual Confusion

Applicant also argues that confusion is not likely because there is no evidence of actual confusion to date. First we note that the application is based on applicant's statement of a bona fide intention to use the mark in commerce. Although applicant has indicated that it has used its mark for over one year, there is no evidence that there has been a true opportunity for confusion. More importantly, as the Court of Appeals for the Federal Circuit has stated:

... uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See *In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries

little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 964, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context.

*In re Majestic Distilling Company, Inc.*, 65 USPQ2d at 1205.

Accordingly, we reject applicant's arguments asserting the absence of actual confusion.

#### Fame

Applicant also argues that the absence of evidence of fame of the cited mark favors a finding that there is no likelihood of confusion. The Federal Circuit addressed this argument also in *Majestic*, stating:

Even if such evidence [of a lack of fame] were of record, though, it would have little probative value. Although we have previously held that the fame of a registered mark is relevant to likelihood of confusion, *DuPont*, 476 F.2d at 1361, 177 USPQ at 567 (factor five), we decline to establish the converse rule that likelihood of confusion is precluded by a registered mark's not being famous.

*Id.* Accordingly, we also reject applicant's arguments regarding the absence of a showing of fame.

#### Conclusion

Finally, based on all evidence of record in this case related to the *du Pont* factors, we conclude that there is a likelihood of confusion between applicant's MEDITERRANEAN mark when used in connection with "decorative glass panels sold as an integral component of metal doors" and the cited

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MEDITERRANEAN mark when used in connection with "wooden sectional garage doors."

**Decision:** We affirm the refusal to register applicant's mark under Trademark Act Section 2(d).