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NOTE EVIDENCE FORWARDED TO EXAMINER

EXAMINER: Blazenska Skrobot
EVIDENCE MUST BE SIGNED FOR
Procedures for Returning Evidence
• Return in Person to N1 89
• Call Lars on (x 2909)
• Email to lars.anderssen@ipaaustralia.gov.au
WB: 158

Please reply to Melbourne office

Key contact: Brian Hendy
Assisted by: Peter Hallett

27 October 2008

Registrar of Trade Marks
IP Australia

URGENT
Acceptance
Deadline: 6 November 2008

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Dear Registrar

Re: **Australian Trade Mark Application No. 1165467
for MAGIC BULLET TRADE DRESS (Colour) in Class 07
in the name of Homeland Housewares, LLC**

Perth
362 Rokeby Road
Subiaco Western Australia 6008
Australia
Postal Address:
GPO Box 2512
Perth Western Australia 6001
Australia
Telephone +618 9325 1900
Facsimile +618 9325 4463

We refer to the examination report in respect of this application dated 6 June 2007.

We enclose the following in support of this application:

- Statutory Declaration of Elizabeth Diles, and
- Statutory Declaration of Alan Feldstein

The Examiner has objected that the mark does not have sufficient capacity to distinguish as a trade mark in relation to kitchen appliances.

We submit that the applicant has made extensive use of its three dimensional mark, such that the mark has clearly demonstrated a capacity to distinguish the applicant's goods from the goods of other traders.

The applicant's sales have been substantial (with sales revenues well in excess of [redacted] in Australia since March 2005). In the circumstances, we submit that the mark is registrable in respect of all of the goods covered by application no. 1165467.

We ask that the Examiner reconsider his objections to this application in light of the attached declarations.

Yours faithfully
WATERMARK

Peter Hallett
Senior Associate

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COMMONWEALTH OF AUSTRALIA

TRADE MARKS ACT 1995

IN THE MATTER OF Australian Trade
Mark Application No. 1165467 in the
name of Homeland Housewares, LLC

and

Evidence

STATUTORY DECLARATION OF ELIZABETH DILES


I, Elizabeth Diles, of 23-27 Bourke Road, Alexandria, New South Wales, Australia make the following declaration under the *Statutory Declarations Act 1959*:

1. I am the Chief Operations Officer of Danoz Direct Pty Ltd ("Danoz"). I make this declaration from my knowledge and based upon my inspection of the relevant books and records of Danoz, to which I have full access.
2. I make this declaration in support of Australian trade mark application no. 1165467 filed by Homeland Housewares, LLC ("Homeland").
3. Danoz is the Australian distributor of Homeland's MAGIC BULLET combination kitchen appliance, the appearance of which is the subject of Australian trade mark application no. 1165467 (the "MAGIC BULLET Product").
4. Danoz commenced sales of the MAGIC BULLET Product in Australia around March 2005. We have undertaken extensive promotion of the MAGIC BULLET product in Australia including via television advertising, in printed catalogues, and via the internet.
5. Attached and marked ED-1 is a copy of a 30 minute infomercial promoting the MAGIC BULLET Product. This is similar to an infomercial that has been screened frequently on Australian television. This infomercial won the 2005 "Infomercial of the year" honour at the 15th Annual Electronics Retailing Association Awards.
6. By virtue of our extensive advertising and promotion of the MAGIC BULLET Product in Australia, I consider that the distinctive appearance of the MAGIC BULLET Product has achieved a considerable degree of fame and recognition

in the Australian marketplace. Our advertising is highlighted by the unique appearance of the MAGIC BULLET Product.

7. Attached and marked ED-2 are copies of Danoz's television advertising schedules for advertisements and infomercials featuring the MAGIC BULLET Product. We have promoted the MAGIC BULLET Product on popular national shows including Good Morning Australia (Ten Network), 9am with David and Kim (Ten Network), Mornings with Kerri-Anne on Channel 9 and the Expo Channel (one of Australia's leading television direct marketing mediums).
8. In total, we have spent around [REDACTED] in advertising and promotion of the MAGIC BULLET Product. This figure and the media schedules attached as ED-2 represent highly sensitive commercial information and they are provided on the basis that they are treated as strictly confidential and used only for the purposes of obtaining a registration for Australian trade mark application no. 1165467.
9. In my view, the appearance of the MAGIC BULLET Product is distinctive of the MAGIC BULLET Product. I am familiar with the range of kitchen appliances available in Australia, and I am not aware of any combination kitchen appliance or similar product that features the appearance of the MAGIC BULLET Product, or a similar appearance. In my view, there is no reason why our competitors should wish to copy the appearance of the MAGIC BULLET Product, except to take unfair advantage of the reputation of that product.
10. The appearance of the MAGIC BULLET Product is an important point of difference between the MAGIC BULLET Product and competing kitchen appliances, and the appearance of the MAGIC BULLET Product is uniquely associated with Homeland.

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959*, and I believe that the statements in this declaration are true in every particular.


ELIZABETH DILES


Declared at :

UNIT 0, 23-27 BOUNCE ROAD
ALEXANDRIA NSW 2015

Dated :

7 AUG 2008

Before me :


SONIA ONG

COMMONWEALTH OF AUSTRALIA

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DECLARATION OF ALAN FELDSTEIN

I, Alan Feldstein, of 15250 Ventura Blvd. Suite 300, Sherman Oaks, California 91403, United States of America, do solemnly and sincerely declare as follows:

1. I am the Vice President Business Affairs and General Counsel of Homeland Housewares, LLC (the "Applicant"), a position I have held for three years.
 2. I make this declaration in support of the Applicant's Australian trade mark application no. 1165467 for the three dimensional appearance of a kitchen appliance which is marketed under the MAGIC BULLET trade mark (the "MAGIC BULLET Product").
 3. The Applicant markets, distributes and sells a range of household products throughout the world.
 4. One of our most successful products is a high quality kitchen appliance that is used to blend, chop and mix food products, which we have marketed under the trade mark MAGIC BULLET and incorporates a distinctive transparent domed shape top with silver and black colors for the body of the appliance. We launched this product in the USA in August 2003.
 5. Applicant's Magic Bullet blender black and silver color combination with a rounded top is unique, but its shape affords no specific utilitarian advantages such that it is one of few superior designs and colors available. Its appearance is arbitrary and not dictated solely by functional considerations.
-

The foregoing is confirmed by the examples of various designs available for competing blenders, many copies of which are collectively attached hereto as Exhibit AF-1 in multiple blender shapes and colors sold by Macys.com [23 blenders], Smarter.com [19 blenders], Linens-N-Things.com [8 blenders], Theperfectgift.co.nz [12 blenders] and DavidJones.com.au [4 blenders]. In essence, the black/silver/black/clear coloring with a rounded top design is simply one of many equally feasible, efficient and competitive designs.

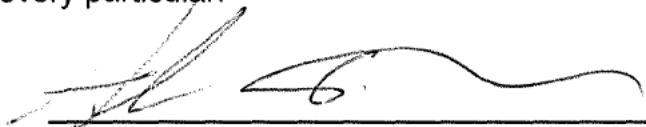
6. Sales of our MAGIC BULLET Product commenced in Australia in March 2005. Our MAGIC BULLET Product is sold In Australia by our Australian distributor Danoz Direct Pty Ltd.
 7. Our MAGIC BULLET Product is an extremely successful "combination" kitchen appliance that does the job of a number of different kitchen tools and appliances. For example, our MAGIC BULLET Product blends, grates, whips, minces and chops, and can be used in the preparation of a wide range of foods and beverages.
 8. Sales of our MAGIC BULLET Product in Australia have been substantial, totaling many tens of thousands of units, with sales revenues well in excess of AU\$7 million. Sales and promotion of our MAGIC BULLET product around the world have also been extensive. Worldwide sales of the MAGIC BULLET Product amount to approximately several hundreds of million dollars. Promotion of our MAGIC BULLET Product amount to approximately tens of millions of dollars.
 9. Our MAGIC BULLET Product has been advertised and promoted extensively in Australia, including via television, catalogues, brochures and the internet. Attached and marked AF-2 are some examples of how the MAGIC BULLET Product was, at the filing date of application 1165467, promoted and advertised. Attached and marked AF-3 is an extract from our Australian distributor's website showing the MAGIC BULLET Product. A substantial promotional campaign has been conducted since March 2005.
-

10. We have registered the appearance of the MAGIC BULLET Product in the United States. Attached and marked AF-4 are printouts from The United States Patent and Trademark Office website showing the particulars of two Federal Trademark Registrations and a pending Application for the appearance of the MAGIC BULLET Product.

11. I am not aware of any other company that has produced or marketed a kitchen appliance having the appearance of our MAGIC BULLET Product, as of March 8, 2007 (being the filing date of application no. 1165467).

12. In my opinion, a substantial portion of consumers viewing our MAGIC BULLET Product would, in the absence of any other branding, identify the product as unique to the Appliance. The appearance of our MAGIC BULLET Product is an important source of product differentiation in a crowded market. In my view, there is no reason why any other company dealing in kitchen appliances should naturally think of and seek to adopt the appearance of our MAGIC BULLET Product, except to take advantage of the unique reputation and goodwill we have developed in the product by virtue of our extensive sales and promotion.

AND I MAKE this solemn declaration conscientiously believing the statements contained therein to be true in every particular.



ALAN FELDSTEIN

Declared at: Sherman Oaks, California

Dated : 10/3/08

Before me : Melinda Thorne

State of California, County of Los Angeles
 Subscribed and sworn to (or affirmed) before me
 on this 3 day of October, 2008.
 by Alan Feldstein.
 personally known to me or proved to me on the
 basis of satisfactory evidence to be the person(s)
 who appeared before me.
 Signature: [Signature]



COMMONWEALTH OF AUSTRALIA

TRADE MARKS ACT 1995

IN THE MATTER OF Australian Trade
Mark Application No. 1165467 in the
name of Homeland Housewares, LLC

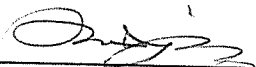
Evidence

EXHIBIT "ED-2"

This is the Exhibit marked "ED-2" which is referred to in clause 8 of the Statutory Declaration by Elizabeth Diles.

Dated : 7 AUG 2008

Before me :



SONIA ONG

