

## **REQUEST FOR RECONSIDERATION**

### **Likelihood of Confusion**

The Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because she believes that Applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 1,759,423 as to be likely to cause confusion, or to cause mistake, or to deceive. Applicant respectfully disagrees with the Examining Attorney and submits that a comprehensive review of all pertinent facts and application of the law thereto leads inevitably to the conclusion that confusion is unlikely and that Applicant is entitled to registration of its mark. Accordingly, Applicant respectfully traverses the refusal to register and requests reconsideration.

As the Examining Attorney correctly stated, under United States trademark law, the touchstone test to determine if a mark is available for registration is whether registration of the subject mark would be likely to cause confusion among ordinarily prudent consumers in view of a mark previously registered. Applicant acknowledges that the United States Patent and Trademark Office and the Court of Appeals for the Federal Circuit assess the likelihood of confusion by considering the principal factors set forth in *In re DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), which are reproduced hereinbelow:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression;
2. The similarity or dissimilarity and nature of the goods or services as described in an application or registration in connection with which a prior mark is in use;
3. The similarity or dissimilarity of established likely-to-continue trade channels;
4. The conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing;
5. The fame of the prior mark (sales, advertising, length of use);
6. The number and nature of similar marks in use on similar goods;
7. The nature and extent of any actual confusion;
8. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion;
9. The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark);
10. The market interface between applicant and the owner of a prior mark: (a) a mere "consent" to register or use, (b) agreement provisions designed to preclude confusion, i.e., limitations on continued use of the marks by each party, (c) assignment of mark, application, registration, and good will of the related business, (d) laches and estoppel attributable to the owner of the prior mark and indicative of lack of confusion;

11. The extent to which the applicant has a right to exclude others from use of its mark on its goods;
12. The extent of potential confusion, i.e., whether de minimis or substantial; and
13. Any other established fact probative of the effect of use.

Applicant also appreciates that one or more of the factors may be dominant in any given case but does not agree with the Examining Attorney's conclusion that the most relevant factors in this case, *i.e.*, similarity of the marks, the similarity of the goods, and the similarity of the channels of trade, result in a finding that the marks are confusingly similar.

Applicant respectfully submits that when all the facts of the present case are considered, particularly the dissimilarities of the goods, the dissimilarity of the trade channels, the differences in the consumers of the respective goods, and the evidence relating to other third-party marks, such analysis leads to the conclusion that there is no likelihood of confusion between the marks. These and other factors are addressed herebelow to present a complete analysis.

In this case, the Examining Attorney has refused registration on the ground that the Applicant's mark BULLSEYE is confusingly similar to Registrant's mark BULLSEYE.

1. **Dissimilarity of the Goods Associated With the Marks**

Applicant respectfully submits that the goods associated with the respective marks are quite different, and thus, there is no likelihood of confusion.

As the Examining Attorney accurately stated, the goods associated with a mark need not be identical or even competitive to find likelihood of confusion. It is sufficient that the goods are related in some manner, or that they are marketed in ways where the same people would likely encounter the different goods in situations that would give rise to a mistaken belief of the source of the goods, or that the goods are associated with the same source. *See Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 U.S.P.Q.2d 1715, 1724 (TTAB 2007)). However, the fact that a particular term may generically describe the goods and services is not enough to support a likelihood of confusion finding. *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 716 (1992) (use of an identical mark on goods in the *same broad field* of products is not sufficient to demonstrate genuine likelihood of confusion); *See also General Electric Company v. Graham Magnetics Incorporated*, 197 USPQ 690 (TTAB 1997); *Harvey Hubbell Incorporated v. Tokyo Seimitsu Co., Ltd.* 188 USPQ 517 (TTAB 1975). Likelihood of confusion must be determined in light of the goods or services as identified in the involved application(s) and registration(s). *See Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

Applicant is in the dietary and nutritional supplements industry and provides dietary and nutritional supplements for human consumption to retail stores for resale and to the general public through its website and third party websites. *See Exhibit A, Screenshot of relevant portions of Applicant's website, [www.vibranthealth.com](http://www.vibranthealth.com), Description of Applicant's business and its products.* Applicant is seeking registration of the trademark BULLSEYE for "nutritional and dietary supplements." In order to clarify the Applicant's goods, Applicant has amended its identification of goods to state "Nutritional and dietary supplements for human consumption." Applicant's goods are sold to individual consumers, namely, men, women, and children, who are seeking nutritional supplements, and to resellers who operate retail or online stores selling to individual consumers, namely, men, women, and children, seeking nutritional supplements. *See Exhibit B, Product information brochure for Applicant's BULLSEYE nutritional supplement; Reseller information for Applicant's products; Online shopping cart for Applicant's products.* Applicant's BULLSEYE nutritional supplement is not meant for animal consumption.

In contrast, the mark which is the subject of the cited registration is used in association with "food supplements for livestock." The current Registrant, Ridley USA Inc., manufactures, distributes, and sells animal nutrition products. *See Exhibit C, Screenshot of Registrant's website "Our Company," [www.ridleyusa.com](http://www.ridleyusa.com).* Its BULLSEYE product is specifically formulated to meet the nutritional needs of beef cattle. *See Exhibit D, Registrant's BULLSEYE product brochure; Exhibit E, Registrant's BULLSEYE product label.* None of the goods offered by Registrant are similar to any of the goods offered by Applicant, and specifically, the BULLSEYE nutritional supplement offered by Applicant to its customers, is quite different from Registrant's BULLSEYE mineral supplement fed to beef cattle.

Applicant respectfully submits that a review of the goods provided in association with Applicant's trademark, and the goods provided in association with Registrant's trademark establishes that the goods are so different from each other that there is no likelihood of confusion between the two marks. Consumer confusion must be a "probability", not merely "a possibility." *Elec. Design & Sales, Inc.*, 954 F.2d at 719. Providing nutritional and dietary supplements for human consumption to individuals is far different than offering livestock breeders a mineral supplement for beef cattle. As such, Applicant submits that there is no likelihood of confusion between Applicant's mark and Registrant's mark as the goods associated with the respective marks are distinctly different.

## **2. Differences in Channels of Trade**

As the goods related to Applicant's and Registrant's respective marks are different, so too are the channels of trade for the goods. According to Registrant's web site, Registrant's customers include "livestock and poultry breeders and growers who produce meat, milk and egg products.....Ridley's products are sold to the equine, companion animal and lifestyle segments." *See Exhibit C, supra.* As discussed supra, the

goods associated with Registrant's BULLSEYE mark are mineral supplements for beef cattle which are offered to livestock breeders. In contrast, Applicant, a provider of nutritional and dietary supplements for human consumption, markets its goods to the relevant consuming public that are seeking to improve their health through the use of nutritional supplements. See *Exhibit A, Screenshot of relevant portions of Applicant's website, [www.vibranthealth.com](http://www.vibranthealth.com)*.

Applicant respectfully asserts that the ultimate consumers of Applicant's goods are not livestock breeders. Thus, a consumer looking to obtain Registrant's goods would not likely be confused by a company offering nutritional supplements through its website or through third party retailers that sell vitamins and nutritional supplements for human consumption. Indeed, Applicant submits that, since Applicant's goods and Registrant's goods are provided in completely different types of settings, and by completely different retailers, it is not likely that the relevant consumers of Registrant's goods would even encounter Applicant's goods, let alone be confused as to their respective sources.

The Examining Attorney asserts that the identification of goods set forth in the application and the registration have no restrictions as to nature, type, channels of trade, or classes of purchasers, and that, therefore, it is presumed that these goods travel in all normal channels of trade, and are available to the same class of purchasers. The Examining Attorney also states that Applicant uses broad wording to describe the goods associated with its mark, and that this wording is presumed to encompass all goods of the type described, including those in registrant's more narrow identification for its goods for use with livestock. Applicant respectfully asserts that the Examining Attorney has simply assumed that just because both nutritional and dietary supplements, and food supplements for livestock are considered "supplements" that Applicant's and Registrant's goods are therefore related and travel in the same channels of trade. Applicant submits that such an assumption is nothing more than speculation. It is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as identified in the involved application and registrations. *In re Blenheim Group USA, Inc.*, Serial No. 74/565,448, 1999 WL 20924 (1999). It is clear from Applicant's amended identification of goods that Applicant does not have anything to do with any food supplements for livestock, nor does Registrant have anything to do with nutritional and dietary supplements for human consumption.

Accordingly, Applicant submits that it is unlikely that the purchasers of its goods, *i.e.*, vitamin and supplement retail stores, and individuals seeking nutritional and dietary supplements, would believe that Applicant's goods come from the same source as Registrant's goods which are marketed to the livestock and animal industry. As such, Applicant respectfully asserts that these differences in the channels of trade in which consumers are likely to encounter Registrant's and Applicant's goods further reduce the likelihood of confusion as to the source of such goods.

### 3. Nature of Similar Marks

Finally, Applicant submits that it is quite possible for the same or similar mark to be owned by two different entities, one entity providing nutritional supplements for human consumption, and one entity providing food supplements for livestock and animals. These marks co-exist because, although the marks may be arguably similar, the goods are not related and the goods do not travel in the same channels of trade.

For example, U.S. Trademark Registration No. 3,085,316 for the trademark LIGHTHOUSE BRAND (AND DESIGN), owned by Wilbur-Ellis Company of San Francisco, California, is used in association with dietary feed supplements for livestock; poultry, pets, and marine animals, while U.S. Trademark Registration No. 4,983,723 for the trademark LIGHTHOUSE FORMULAS, owned by Karma-Free LLC of Geneva, Illinois, is used in association with herbal supplements. These two registrations co-exist because, although the marks are almost identical, the goods are not related and the goods do not travel in the same channels of trade. *See Exhibit F, U.S. Trademark Registration Nos. 3,085,316 and 4,983,723.* Similarly, U.S. Trademark Registration No. 2,260,364 for the mark DYNAMITE ENERGY SHAKE, owned by Naura Hayden of New York, NY, is used in association with a dietary food supplement, namely, powdered vitamins, protein and mineral fortified preparation for making milk shakes, while U.S. Trademark Registration No. 4,748,013 for the mark DYNAMITE SPECIALTY PRODUCTS, owned by Dynamite Marketing, Inc. of Meridian, Idaho, is used in association with vitamin and mineral supplements for use as ingredients in feed for livestock, domestic pets, and exotic animals. Again, the registrations co-exist because although the dominant word in both marks is identical, the goods are not related and the goods do not travel in the same channels of trade. *See Exhibit G, U.S. Trademark Registration Nos. 2,260,364 and 4,748,013.* Indeed, after the date of registration of Registrant's mark BULLSEYE, *i.e.*, March 23, 1993, the mark BULLSEYE for use in association with nutritional supplements was registered by an unrelated entity for use in association with nutritional supplements. *See Exhibit H, U.S. Trademark Registration No. 2,962,389, dated June 14, 2005.*<sup>1</sup>

Applicant believes that these registrations support Applicant's position that the goods identified in Applicant's application are so different from the goods identified in Registrant's registration that even identical marks identifying these different types of goods can all co-exist.

Accordingly, Applicant submits that it is unlikely that its consuming public, would believe that Applicant's nutritional and dietary supplements would come from the same source as Registrant's food supplements for livestock.

In summary, Applicant respectfully submits that there is no likelihood of confusion between its mark BULLSEYE and the cited registration for the mark BULLSEYE, and respectfully requests that this citation be withdrawn based on the arguments above.

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<sup>1</sup> This registration was cancelled on October 5, 2012 for failure to file a Declaration under Section 8.