

This reply is responsive to the Office Action dated April 6, 2018.

The Examining Attorney has refused the proposed word mark NOBLE under Section 2(d) based on an alleged likelihood of confusion with U.S. Trademark Registration No. 5,106,479 for NOBLE in connection with “stuffed and plush toys, namely, a stuffed and plush dog.”

The Examining Attorney reasoned that the two marks are identical, and that they travel in the same trade channels, i.e. they would be offered by the same source. Thus, they are considered related for likelihood of confusion purposes.

Applicant disagrees with the Examining Attorney’s reasoning, and submits that there is no likelihood of confusion between the present application and U.S. Trademark Registration No. 5,106,479.

The Examiner concedes that the goods are not identical. The “stuffed and plush toys, namely, a stuffed and plush dog” of the registered trademark are different from, and do not compete with, the “inflatable sports balls” of the present application.

The Examiner’s argument rests solely on the premise that the goods are related to each other because they could be offered by the same source. As evidence, the Examining Attorney cited three websites.

The first website is partypalooza.com. Applicant notes that Partypalooza indicates its products are “beach balls”. The second website is RINovelty.com (Rhode Island Novelty). RI Novelty also depicts an inflatable beach ball described as a carnival prize. The third website is BMIMerchandise.com (BMI Merchandise). This website offers a husky plush toy and an assorted collection of mini beach balls. Some of the mini beach balls are decorated to look like inflatable sports balls. To expedite prosecution, the listing of goods and services is amended to exclude beach balls.

In addition, several cases hold that the mere fact that goods are sold in the same store by itself is not sufficient to show a likelihood of confusion.

In *In re Mars, Inc.*, 741 F.2d 395, 222 UPSQ 938 (Fed. Cir. 1984), the court summarily held that the use of CANYON for fresh citrus fruits and candy bars was not likely to cause confusion.

In *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976), the court held there was no confusion between HY-TEX for toilet tissue

and HY-TOP for plastic bags, aluminum foil, or sponges, even though these products are all sold in the same source, supermarkets, because the products are dissimilar and have different uses.

In *7-Eleven, Inc. v. HEB Grocery Co., LP*, 83 USPQ2d 1715 (TTAB 2007), the court found no confusion between CLASSIC SELECTION for drinking water and CLASSIC SELECTIONS for frozen entrees. The court made the following statements, among others:

“...we must determine if consumers would believe that goods as diverse as drinking water and frozen food entrees would emanate from a single source.”

“However, as has long been held, the presence of goods in the same store does not necessarily lead to the conclusion that confusion would arise under such conditions.”

“The record shows that frozen foods and drinking water are sometimes sold in close proximity; however, as applicant points out, charcoal and anti-freeze are also sold in close proximity to drinking water and frozen foods in many convenience stores which is simply due to a matter of limited space.”

“We find that the marketing conditions do not compel a finding of likelihood of confusion given the inherent differences between these goods.”

“While the consumers of the parties’ respective goods are the same and these are relatively inexpensive ordinary consumer items, which would be purchased with a lesser degree of care, this factor does not outweigh the inherent differences in the goods.”

In *The Nestle Co. Inc. v. Nash-Finch Co.*, 4 USPQ2d 1085, 1087 (TTAB 1987), no confusion was found between QUIK for powdered drink products and DELI QUIK for deli products even though both goods were sold in supermarkets. The court stated that their characteristics are so different that purchasers would not be likely to believe the deli products are associated with powdered drink products or that they are related. The court also stated, “We decline to find likelihood of confusion in these circumstances based on what amounts to speculative, theoretical possibilities.”

Finally, in *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171–72 (TTAB 1987), no confusion was found between HI-COUNTRY for fruit juices and HI-COUNTRY for meat snack foods even both they have common trade channels, because they are completely different in character, and would not be expected to originate from the same entity.

When the holdings of these cases are considered together with the Examiner’s concession that “stuffed and plush toys” are different from “inflatable sports balls”, Applicant believes it must be found that there would be no likelihood of confusion about the source of the goods, even though the marks are identical. The goods are different from each other in character. Inflatable sports balls are not stuffed. Stuffed and plush toys do not need to be inflated. The goods have different uses, because stuffed and plush toys are generally not used in sports games like sports balls. Applicant does not believe that consumers would believe that goods as diverse as “stuffed and plush toys” and “inflatable sports balls” would emanate from a single source.

The mere fact that the goods might be sold in the same store is insufficient by itself to support a likelihood of confusion. Applicant therefore requests withdrawal of the Section 2(d) rejection.