

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Mitchell International, Inc.

Serial No.: 87/796,691

Filed: February 13, 2018

Mark: MPOWER

Law Office: 120

Examining Attorney: Jennifer O'Brien

RESPONSE TO OFFICE ACTION

The following is submitted in response to the Office Action dated October 23, 2018 against the above-identified trademark application for the mark MPOWER (“Applicant’s Mark”) filed by applicant Mitchell International, Inc. (“Applicant”).

In the Office Action, the Examining Attorney refused to register Applicant’s Mark under Section 2(d) of the Trademark Act, claiming that Applicant’s Mark, when used on or in connection with Applicant’s services is likely to be confused with U.S. Registrations Nos. 5,506,679 and 5,468,701.

I. AMENDMENT – IDENTIFICATION AND CLASSIFICATION OF SERVICES.

Applicant respectfully requests that the Examiner amend the identification of goods and services in class 41 as follows:

“On-line electronic newsletters in the field of management, processing and administration of automotive and healthcare insurance claims, excluding crop insurance claims; Providing recognition and incentives by the way of awards to demonstrate excellence in the field of management, processing and administration of automotive and healthcare insurance claims, excluding crop insurance claims; Educational services, namely, conducting conferences, seminars, workshops and classes in the field of management, processing and administration of automotive and healthcare insurance claims, excluding crop insurance claims.”

II. THERE IS NO LIKELIHOOD OF CONFUSION WITH U.S. REGISTRATION NO. 5,506,679.

The Examining Attorney refused to register Applicant's Mark claiming that it is likely to be confused with U.S. Registration No. 5,506,679 ("First Cited Mark").

The test for all refusals by the United States Patent and Trademark Office ("USPTO") under Section 2(d) is governed by *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973) ("*DuPont*"). *DuPont* set forth thirteen (13) factors that must be considered in determining whether confusion is likely. Examination of each of the *DuPont* factors is not necessary to a determination of likelihood of confusion, as different factors may play a dominant role in determining likelihood of confusion depending on the evidence of each case. *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1370 (Fed. Cir. 2002) (citing *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d. 350, 352 (Fed. Cir. 1992)). Moreover, the *DuPont* factors should not be considered in a vacuum. Rather, the marks should be examined as a whole, with an emphasis on how consumers are likely to perceive them and encounter them in the marketplace.

The Office bears the burden of showing that a mark falls within the statutory bars of Section 2(d). J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (Fourth Ed.) §19:75 at 19-230. To refuse registration under Section 2(d), the Examiner "must present sufficient evidence and argument that the mark is barred from registration." *Id.* §19:128 at 19-383.

Applicant respectfully submits that Examiner has not met this burden. Applicant's Mark is not confusingly similar to the First Cited Mark, owned by Watts and Associates, Inc. ("Registrant"), when the marks are viewed in their entireties and in light of all the relevant facts

and circumstances, particularly the factors enunciated in *DuPont*. Here, confusion between Applicant's Mark and the First Cited Mark is not likely because:

1. The Applicant's and the Registrant's services are significantly different in nature, function and purpose.
2. Applicant's Consumers Are Distinct From Those of Registrant.
3. The trade channels through which their respective services travel are different.
4. Applicant's Mark and the First Cited Mark have significant differences in appearance, sound, connotation, and commercial impression.

Considered together, these factors make it clear that confusion between Applicant's Mark and the First Cited Mark is not likely. Therefore, Applicant respectfully requests that the Section 2(d) refusal be withdrawn and that Applicant's Mark be approved for publication.

A. Confusion Is Not Likely Because The Parties' Respective Services Are Significantly Different In Nature, Function, And Purpose.

The Trademark Trial and Appeal Board (the "Board") has held that there can be no likelihood of confusion where the services differ. *See, e.g., In re The Ridge Tahoe*, 221 USPQ 839, (T.T.A.B. 1983) (finding no likelihood of confusion between RIDGE and THE RIDGE TAHOE where home building services are different from real estate brokerage services involving time sharing and other interests in resort property); *In re The Mercy Hospital of Pittsburgh*, 2002 WL 432957 (T.T.A.B. 2002) (stating, "While applicant's and registrant's services are both in the broad, general field of healthcare services, they are not identical services"). The Board has repeatedly recognized that confusion is not likely merely because similar marks are used in connection with the same field or category of goods and services.

Instead, the goods and/or services themselves must be sufficiently similar in nature, function, and purpose to support likely confusion. *Information Resources Inc. v. X*Press*

Information Services, 6 U.S.P.Q.2d 1034, 1038 (T.T.A.B. 1988) (finding no likelihood of confusion between EXPRESS and X*PRESS where the data stream services are different from data distribution software); *Beneficial Corp. v. Beneficial Capital Corp.*, 529 F.Supp. 445 (S.D.N.Y. 1982) (no likelihood of confusion between BENEFICIAL for consumer loans and BENEFICIAL CAPITAL for business loans); *Murray v. Cable Nat. Broadcasting Co.*, 86 F.3d 858 (9th Cir. 1996)(adding that there was no confusion between AMERICA SPEAKS for polling services for use in advertising and analysis of consumer products and AMERICA’S TALKING for use with polling services for use with a television program relating to nationwide opinions); *Alta Vista Corp., Ltd. v. Digital Equipment Corp.*, 44 F.Supp. 2d 72 (D. Mass. 1998) (no likelihood of confusion between ALTA VISTA for internet search engine and promotion of various media products, and ALTA VISTA for literary agency services); *Benjamin J. Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020 (T.T.A.B. 2009) (no likelihood of confusion between DESIGNED 2 SELL for the staging of rental property and DESIGNED TO SELL for a home design TV show). Similarly, there is no likelihood of confusion between Applicant’s Mark and the First Cited Mark, because the marks are not identical and the parties’ respective services have differences in nature, function, and purpose.

Although Applicant and Registrant each offer services pertaining to the insurance industry in general, those services are not similar in nature, function, and purpose. Particularly, the Applicant provides online newsletters, awards, and educational services, such as conferences, seminars, workshops and classes in the automotive and healthcare insurance fields. All of these services fall under **Class 41**, and expressly **exclude crop insurance**. Indeed, Applicant does not provide insurance of any kind.

In stark contrast, the services provided in connection with the First Cited Registration are in **Class 36** and are “insurance underwriting **in the field of crop insurance** featuring a non-reinsured supplement which offers additional coverage to selected policies utilizing a database management system for calculations to determine pricing.” Exhibit A. (emphasis added.) In other words, the Registrant provides Supplemental Crop Insurance Coverage. *See* Exhibit B. These services “allow[] the producer to complement the risk coverage of Margin Protection through additional crop price discovery methods starting in April the year before the crop is planted through August just before harvest.” Exhibit C, p. 3. Additionally, these services “allow[] growers to customiz[e] the price discovery for crop prices to achieve their minimum margin goals whenever the opportunity presents itself.” *Id.*

Even when two marks are identical (and here they are not), the courts and the Board routinely hold that there is no likelihood of confusion “if the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source” TMEP § 1207.01(a)(i) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ.2d 1156, 1158 (TTAB 1990) (“[A]s far as the general public is concerned confusion would not be likely because the goods and services are sold through different channels of trade to different classes of consumers.”). For example, in *Sunenblick v. Harrell*, the court found no confusion between jazz records and hip-hop records sold under the *identical mark* UPTOWN RECORDS because, although the recordings were both musical products, they were marketed to different consumers and sold in separate sections of record stores. *Sunenblick v. Harrell*, 895 F. Supp. 616, 629 (S.D.N.Y. 1995). *See also Harlem Wizards Entertainment Basketball, Inc. v.*

NBA Properties, Inc., 952 F. Supp. 1084, 1095 (D.N.J. 1997) (HARLEM WIZARDS for showcase basketball team and WASHINGTON WIZARDS for professional basketball team not likely to be confused). As is the case here, the Board has held that differences in the function or purpose of products or services may prevent a likelihood of confusion. Applicant's awards and educational services provided to individuals or businesses in the automotive, pharmaceutical and medical field are distinct from Registrant's supplemental crop insurance services. In short, Applicant provides educational and award services, while Registrant provides supplemental crop insurance. Thus, confusion here is not likely because the parties' respective services are different in nature, function and purpose and will not be encountered by the same consumers in situations that would create the mistaken assumption that they originate from the same source.

B. Confusion Is Also Not likely Because Applicant's Consumers Are Distinct From Those of Registrant.

Further, no likelihood of confusion exists between Applicant's Mark and the First Cited Mark because they are targeted to and purchased by different consumers. Confusion is unlikely where services used in connection with the trademarks fall within the same broad field and are sold to different consumers. *Astra Pharmaceutical Prods. v. Beckman Instruments*, 718 F.2d 1235, 1245 (6th Cir. 1991) (allowing concurrent registration of ASTRA marks on different applications within the healthcare field); *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 18 U.S.P.Q.2d 1587, 1594 (6th Cir. 1991) (Confusion is unlikely where [t]he companies operate at different levels in [a] broad . . . industry and sell to two completely distinct set of buyers). If the consumers and intended consumers for each product are different sets of individuals, confusion is not likely and concurrent registration is proper. *Electronic Data Systems Corp. v. EDSA Micro Corp.*, 954 F.2d. 713, 717 (TTAB 1992).

The Board has not hesitated to find an absence of likelihood of confusion, even in the face of identical marks applied to services used in a common industry, where the services differ and where there is no evidence that the respective services would be encountered by the same consumers. *In re Fesco, Inc.*, 219 USPQ 437, 439 (TTAB 1983) (FESCO for farm equipment distributorships not likely to be confused with FESCO for fertilizer and processing equipment).

Here, Applicant's clients are individuals or businesses in the automotive and healthcare industry, such as auto repair shops, pharmaceutical or medical companies, seeking information and expert opinions on the latest technology and business trends in the areas of "collision claims, collision repair, first or third party casualty, workers' compensation or pharmacy." Exhibit D. Applicant "brings together technology leaders and industry experts to provide insights into the ever-changing Property & Casualty and collision repair landscape...find technology trends, industry insights and expert opinions on subjects that resonate across the industry." Exhibit E. For example, Applicant's annual conference is an opportunity for Applicant and its clients to "collaborate, share what [they] are seeing in the industry, discuss emerging technologies and trends, and spark new ideas for how [they] might leverage them in [their] businesses in the future. Exhibit F.

In complete contrast, Registrant's clients are "producers" or "growers" in the farming industry interested in supplemental crop insurance. *See* Exhibit C. In other words, Registrant's clients are farmers. Registrant's consumers are looking to increase their insurance margin coverage. Exhibit B. Furthermore, the fact that consumers for both parties are required to directly contact Applicant or Registrant or an agent in order to receive their respective services, mitigates against any likely confusion. Such differences in consumers means that it is highly

unlikely that the two consumers would encounter the same mark in the contexts of the respective services.

C. Applicant's and Registrant's Services Are Marketed Differently From Registrant's In Such A Way That Consumers Would Not Mistake A Common Source of the Services.

The Examining Attorney has refused to register Applicant's Mark based on the assumption that "services are considered related for likelihood of confusion purposes." Office Action, pp. 3-4. Relatedness of the services under Applicant's Mark and the First Cited Mark, as well as the channels of trade, is critical to the likelihood of confusion determination. *See DuPont*, 476 F.2d at 1361. The courts and the TTAB routinely hold that - even in a situation where two marks are identical - there is no likelihood of confusion "if the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source..." TMEP § 1207.01(a)(i) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related). The relatedness inquiry focuses on whether goods and services are "similarly marketed and appeal to common clients" and are therefore "likely to lead consumers to believe that they 'come from the same source, or are somehow connected with or sponsored by the same company.'" *Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 633 (6th Cir. 2002), quoting *Homeowners Grp.*, 931 F.2d at 1109.

In *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 18 U.S.P.Q.2d 1587, 1594 (6th Cir. 1991), the court was faced with two marks, both used the letters "HMS" with a rooftop design. The first company marketed to real estate brokers and targeted its marketing to that commercial group. The second company sold exclusively to the owners of real estate who

might consider selling their property. Naturally, it was likely that any number of real estate brokers would see the consumer service marketed in the real estate section of newspapers. Despite this reality, the Court held that “services are ‘related’ not because they coexist in the same broad industry, but are ‘related’ if the services are marketed and consumed such that buyers are likely to believe that the services, similarly marked, come from the same source.”

The circumstances in *Homeowners* are precisely the circumstances here. As explained above, Registrant’s clients are farmers looking for supplemental insurance protection for their crops. Thus, Registrant provides extremely individualized services. Applicant, on the other hand, specifically focus its services on providing education and awards to professionals and businesses in the automotive and healthcare field. Those clients are seeking out Applicant’s newsletters and educational services in order to keep up with the latest trends in their industries. So, although both coexist in the same broad industry, Applicant’s educational and award services only remotely pertain to automotive and healthcare insurance, and the services are not marketed and consumed such that buyers of crop insurance would ever encounter them – much less believe that the services come from the same source.

Additionally, the Examining Attorney cited a number of third-party websites purportedly providing the same services as the Applicant and Registrant to support the proposition that “third parties commonly offer crop insurance underwriting services along with online newsletters and educational services together.” Office Action, p. 3. However, none of the companies listed by the Examiner offer automotive and healthcare online newsletters, awards, and educational events on the one hand, and crop insurance on the other. Thus, these websites do not show (and the Examining Attorney has not demonstrated), that Applicant’s services are offered to the same consumers or through the same channels of trade, such that confusion with Registrant’s services

is likely. In the absence of such evidence, the Examining Attorney has not met her burden of demonstrating that Applicant's and Registrant's services are confusingly similar. In short, Applicant provides entirely different services than Registrant and Applicant markets those services directly to companies and professionals in the automotive and healthcare industry. Applicant does not provide, has never provided, and has no plans to provide crop insurance, or any type of insurance for that matter. Because each party's respective services are marketed so differently, it is highly unlikely that the same consumer would ever encounter – let alone confuse - Applicant's and Registrant's services.

Simply put, the purchasing conditions weigh in favor of a finding of no likelihood of confusion.

D. Applicant's Mark and the First Cited Mark Have Significant Differences in Appearance, Sound, Connotation, and Commercial Impression.

In determining whether two marks are likely to be confused, the similarity of the marks in their entireties must be considered with respect to appearance, sound, connotation, and commercial impression. *DuPont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567 (C.C.P.A. 1973). In other words, when comparing an applied-for mark to a registered mark, the marks should not be dissected, and no feature should be ignored. *In re Hearst Corp.*, 982 F.2d 493, 494 (Fed. Cir. 1992) (rehearing *en banc* denied).

Courts and the Trademark Trial and Appeal and Board ("Board") have repeatedly held that the inclusion of the whole of one party's mark within another's party's mark "does not automatically bespeak likelihood of confusion." *Electronic Reality Associates, Inc. v. Kayser-Roth Corp.*, 216 USPQ 61, 65 (TTAB 1982). *See also, Electronic Data Systems Corp. v. EDSA Micro Corp.*, 23 U.S.P.Q.2d 1460, 1463 (TTAB 1992) (finding no likelihood of confusion

between EDS for computer programming services including the design, implementation and management of electronic data processing programs and EDSA for computer programs for electrical distribution system analysis and design); *First Sav. Bank, F.S.B. v. First Bank Sys.*, 101 F.3d 645, 653 (no likelihood of confusion between “FirstBank” and “First Bank System” service marks where bank logos were visually distinct); *Clayton Mark & Co. v. Westinghouse Electric Corp.*, 356 F.2d 943, 148 USPQ 672 (C.C.P.A. 1966) (finding no likelihood of confusion between MARK for electrical conduits and MARK 7 for circuit breakers); *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 167 USPQ 529, 531 (CCPA 1970)(PEAK and PEAK PERIOD, both for toilet preparations, not likely to be confused). In fact, “there is no rule that confusion is automatically likely if a junior user has a mark that contains in part the whole of another’s mark.” *4 McCarthy on Trademarks and Unfair Competition* § 23:41.


Here, the Examiner states that Applicant’s Mark and the First Cited Mark are similar “in appearance and meaning as the marks consist of the nearly identical, “MPOWER” and “MPOWERD”, in connection with insurance-related services, thereby resulting in the same impression of a play of the word “empower” and “empowered”.” Office Action, p. 3. However, it is not enough to simply note that Applicant’s mark shares common wording with the First Cited Mark. *See Murray Corp. of America V. Red Spot Paint & Varnish Co.*, 280 F.2d 158, 161, 47 C.C.P.A. 1152, 1155-56 (C.C.P.A. 1960) (“[A]lthough appellee’s mark embodies Appellant’s entire mark, when considering those marks in their entireties, as we must...we are of the opinion that the likelihood of confusion, mistake or deception contemplated by Section 2(d) of the Lanham Act does not exist.”).

The Examiner also states that the First Cited Mark “begins with the nearly identical, “MPOWERD”, thereby resulting in an impression of an association between the marks.

Consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark.” Office Action, p.3. However, the use of identical, even dominant, words in common does not automatically mean that two marks are similar. *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627 (8th Cir. 1987). Indeed, such a rule would violate the anti-dissection rule. *Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538, 546-46 (1920) (“The commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail.”)

1. Applicant’s Mark Differs from the First Cited Mark Visually and in Commercial Impression.

As shown below, although the marks share a common term, when compared side-by-side, the differences are striking:

<u>Applicant’s Mark</u>	<u>First Cited Mark</u>
MPOWER	

a. **The First Cited Mark contains additional wording.**

Undeniably, inclusion of the additional words “MARGIN POWERD PROTECTING FARM WEALTH” makes the First Cited Mark very different from Applicant’s Mark. When the First Cited Mark is viewed in its entirety, it is longer, consisting of six words, whereas Applicant’s Mark consists of only one word. Marks must be viewed in their entireties and cannot be improperly dissected and compared based on their component parts. *See Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 1296 (CCPA 1974) (holding that it is improper to ignore a portion of a composite mark and finding no likelihood of confusion between SPICE TREE & Design and SPICE ISLANDS & Design, both for spices). Additionally, the Federal

Circuit has cautioned “[t]here is no general rule as to whether letters or design will dominate in composite marks...No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Laboratories, Inc.*, 13 F.3d 930 (Fed. Cir. 1990), corrected 929 F.2d 645 (Fed. Cir. 1990). Thus, even if the words in the marks are accorded greater weight, the design elements are not to be overlooked and, at the very least, provide additional elements to distinguish Applicant’s Mark from the Cited Mark.

b. **The First Cited Mark is limited to the claimed design elements.**

In the present case, the differences in appearance and commercial impressions are compounded by the presence of design elements, including stylized lettering, font selection, upper and lower case designations and lettering colors, as well as the concentric circles present in the First Cited Mark. The design factors are prominent in the appearance and commercial impression created by First Cited Mark. Indeed, Registrant’s stylized mark is limited in scope to its registered design, which Registrant explicitly states consists of:

“letters “MPowerD” with the MP in large green bold font, the “O” consists of two concentric green circles and the D in large black font, beneath on line 2 are the letters “margin powerd.” in lower case, and beneath on line 3 are the words “Protecting Farm Wealth.” with initial capital letters.”

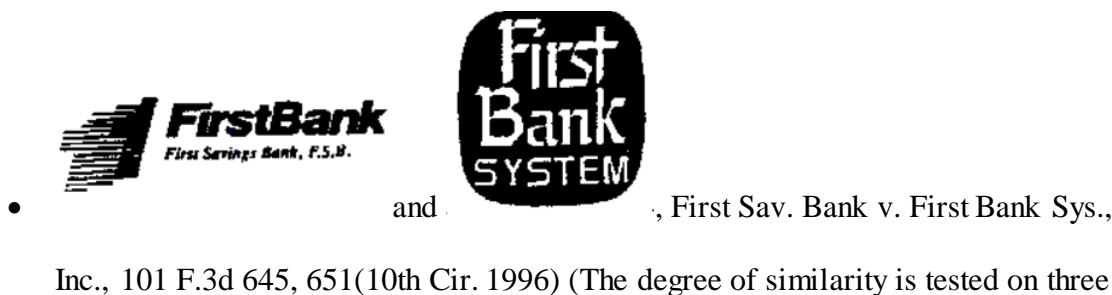
See Exhibit A. The Registrant has purposely limited its registration to the specific colors green and black, font type, upper and lower case letters, and other design elements. Therefore, the protection for the First Cited Mark should be limited to the elements claimed.

A design is viewed, not spoken, and a stylized letter design cannot be treated simply as a word mark. *In re Burndy Corp.*, 300 F.2d 938, 940 (CCPA 1962). The nature of stylized letter marks is that they partake of both visual and oral indicia, and both must be weighed in the context in which they occur. *In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 647 (Fed. Cir.


1990). Consumers, when viewing the marks, perceive both the words which comprise the mark, as well as the design elements, if any, contained in marks, not just the words contained within the marks. *See Sun Banks of Florida, Inc.*, 651 F.2d at 317-18 (similarity of appearance is determined “on the basis of the total effect of the designation, rather than on a comparison of individual features” (quoting Restatement of Torts § 729 (1938)); *see also Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 1296 (CCPA 1974) (the court held that it is improper to ignore portion of a composite mark and found no likelihood of confusion between SPICE TREE & Design and SPICE ISLANDS & design, both for spices).


The Board has found that inclusion of design elements that convey a specific meaning in a mark may create a substantially different commercial impression from a mark without said design elements. For example, in *In re The Ridge Tahoe*, the Board found that THE RIDGE TAHOE, accompanied by a mountain peak design, an eagle, and the sun, suggests the specific mountainous locale where applicant’s services are rendered, while RIDGE, standing alone, conveys a much less elaborate, less precise image. *In re The Ridge Tahoe*, 221 USPQ 839, (T.T.A.B. 1983).


Indeed, courts routinely allow concurrent registration of marks that contain similar or the same word components but are distinguished by one mark’s design features. The following are examples:



levels as encountered in the marketplace: sight, sound, and meaning. A reasonable jury could only conclude that the similarity between marks is minimal.)

- RACEGIRL and  , *In re Covalinski*, 101 F.3d 645 U.S.P.Q.2d 1166 (T.T.A.B. 2014) (overall commercial impression of applicant's mark dominated by its design features, with the words in small lettering as part of design. This distinguished applicant's mark from cited word mark, notwithstanding use on identical goods)

- FERRO and  , *Ferro Corp. v. Ronco Labs, Inc.*, 356 F.2d 122 (C.C.P.A. 1966) (confusion unlikely between applicant's composite mark and several marks owned by opposer consisting of or containing FERRO, due to dominance of design elements of applicant's mark)

- STEVE'S and  , *Steve's Ice Cream v. Steve's Famous Hot Dogs*, 3 U.S.P.Q.2d 1477 (T.T.A.B. 1987) (no likelihood of confusion found due to "obvious differences in the marks" including the design elements of Applicant's mark, which were "distinguishable from the registered mark of opposer, which is simply the word STEVE'S in block letter form.")

Like these cases cited above, the First Cited Mark's incorporation of distinctive design elements renders Applicant's Mark and the First Cited Mark sufficiently dissimilar in sight and overall commercial impression. These dissimilarities are sufficient to preclude confusion, and accordingly, registration of Applicant's Mark is appropriate.

Clearly, consumers viewing Applicant's Mark and the First Cited Mark will perceive words and design element alike, and be able to differentiate the marks based on the registrant's claimed design elements.

2. The Marks Differ in Sound and Meaning.

When the words "MARGIN POWERD PROTECTING FARM WEALTH" are afforded due weight, Applicant's Mark and the First Cited Mark differ not only in appearance and commercial impression, but also in sound and meaning. The Applicant and Registrant's marks contain a different number of words and syllables, and have widely different pronunciations. *See e.g., Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 167 U.S.P.Q. 529, 530 (C.C.P.A. 1970) ("PEAK" and "PEAK PERIOD" both for toilet preparations, not likely to be confused); *Kayser-Roth Corp. v. Morris, Co., Inc.*, 164 U.S.P.Q. 153, 153-154 (T.T.A.B. 1969) ("PAUL JONES ESQUIRE" and "ESQUIRE" not likely to be confused for apparel items). Likewise, the words "MARGIN POWERD PROTECTING FARM WEALTH" change the meaning of the First Cited Mark. This is because such words, when added to the mark, connote enhancing margin protection of farm wealth, i.e., crops. *See* Exhibit B. In fact, this is made known by one of Registrant's Producer Presentations, which states that it "allows the producer to complement the risk coverage of Margin Protection through additional crop price discovery methods starting in April the year before the crop is planted through August just before harvest." Exhibit C, p. 4. In contrast, Applicant's Mark takes emphasis from the element MPOWER, with no further defining element as offered by the additional terms in First Cited Mark.

Consequently, the average consumer, who retains a general impression of the trademark, will easily be able to distinguish these marks based on the additional wording contained in the First Cited Mark.

III. THERE IS NO LIKELIHOOD OF CONFUSION WITH U.S. REGISTRATION NO. 5,468,701.

The Examining Attorney further refused to register Applicant's Mark claiming that it is likely to be confused with U.S. Registration No. 5,468,701 ("Second Cited Mark"). Office Action, p. 2.

U.S. Registration No. 5,468,701 is also owned by the Registrant and encompasses exactly the same services as U.S. Registration No. 5,506,679, discussed above. Therefore, for the reasons discussed in sections II.A-C of this response, there is no likelihood of confusion between Applicant's Mark and the Second Cited Mark.

Accordingly, Applicant respectfully requests that the Examining Attorney withdraw refusal under Section 2(d) of the Trademark Act and allow Applicant's Mark to proceed to publication.

III. CONCLUSION

For the reasons stated above, Applicant respectfully submits that all issues raised by the Examining Attorney have been addressed, and it is believed the Application should now proceed to publication.

Respectfully submitted,

By: /Lisa M. Martens/_____

Lisa M. Martens
SHEPPARD MULLIN RICHTER & HAMPTON LLP
12275 EL CAMINO REAL, SUITE 200
SAN DIEGO, CA 92130

Attorneys for Applicant,
MITCHELL INTERNATIONAL, INC.