

Wild Harvest  
88284885

Response

Applicant has deleted seafood from its goods and therefore submits that Registration Nos. 2896651 and 3128439 no longer constitute a bar to registration.

Applicant respectfully disagrees with the finding that its WILD HARVEST mark so resembles the mark in U.S. Registration Nos. 4704956, 5131938 and 5131939 as to be likely to cause confusion, mistake or to deceive. Applicant bases this finding upon, among other factors, the differences in the marks, the differences in the goods, the dilution of the cited marks, and the ability of similar marks (including the cited marks themselves) to coexist in the marketplace and Applicant's registration of the mark for related goods.

The likelihood of confusion determination must be made in light of the total effect of the product and package in the eye and mind of the ordinary purchaser. *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 616 (9th Cir. 1989). "A variety of factors may be material in assessing the likelihood of confusion and no one of these factors by itself is dispositive of the likelihood of confusion question." *McGraw-Edison Co. v. Walt Disney Productions*, 787 F.2d 1163, 1167 (7th Cir. 1986). The analysis of the likelihood of confusion involves consideration of several factors.

The relevant factors in analyzing the likelihood of confusion are as follows:

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 or 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 the 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.
11. The extent to which applicant has a right to exclude others from use of its mark on its goods.
12. The extent of potential confusion.
13. Any other established fact probative of the effect of use.

In re E.I. DuPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Applicant will analyze all of the factors listed above for which there is evidence.

### **1. The similarity of the marks in appearance and suggestion.**

Applicant's composite mark WILD HARVEST mark is different in appearance and suggestion to the cited marks.

Composite marks must be considered in their entirety. See e.g., Massey Junior College, Inc. v. Fashion Institute of Technology, 492 F.2d 1399, 181 USPQ 272 (C.C.P.A. 1974). The comparison of composite marks must be done on a case-by-case basis without reliance on mechanical rules of construction. See e.g., Spice Islands, Inc. v. Frank T. & Spice Co., 505 F.2d 1293, 184 USPQ 35 (C.C.P.A. 1974) (SPICE TREE and tree design held not confusingly similar to SPICE ISLANDS and tree design, both for spices).

The use of identical words, or even dominant words in common, does not automatically mean that the two marks are similar. See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd., 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (RITZ and THE RITZ KIDS create

different commercial impressions); *In re Farm Fresh Catfish Co.*, 231 USPQ 495 (TTAB 1986) (CATFISH BOBBERS (with "CATFISH" disclaimed) for fish held not likely to be confused with BOBBER for restaurant services); *In re Shawnee Milling Co.*, 225 USPQ 747 (TTAB 1985) (GOLDEN CRUST for flour held not likely to be confused with ADOLPH'S GOLD'N CRUST and design (with "GOLD'N CRUST" disclaimed) for coating and seasoning for food items); *In re S.D. Fabrics, Inc.*, 223 USPQ 54 (TTAB 1984) (DESIGNERS/FABRIC (stylized) for retail fabric store services held not likely to be confused with DAN RIVER DESIGNER FABRICS and design for textile fabrics). Rather, in analyzing the similarities of sight, sound and meaning between two marks, a court looks to the overall impression created by the marks and does not merely compare individual features.


Applicant's trademark is for the wording WILD HARVEST while the cited marks, which coexist with each other, consist of **WILD HARVESTED NATIVE NECTARS and OREGON'S WILD HARVEST** and “ **OREGON'S WILD HARVEST HERBAL SUPPLEMENTS SINCE 1994**. The use of identical words, or even dominant words in common, does not automatically mean that the two marks are similar. Rather, in analyzing the similarities of sight, sound and meaning between two marks, a court looks to the overall impression created by the marks and does not merely compare individual features. The appearance of Applicant's WILD HARVEST trademark is significantly different than that used by the cited marks. Applicant's mark with the different wording from the cited mark and the marks are different enough to avoid consumer confusion.

## **2. The similarity of the goods or services.**

In order to find that a likelihood of confusion exists, the conditions surrounding the marketing of the goods at issue must be such that they would be encountered by the same consumers under circumstances that would give rise to the mistaken belief that they come from a common source. *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984).

The goods in Applicant's application are no more similar to the cited marks goods than Applicant's earlier registrations for the mark WILD HARVEST as shown in the chart below (TARR Records also attached):

<b>Mark/Name</b>	<b>Full Goods/Services</b>	<b>App. No./Reg. No.</b>
<a href="#"><u>WILD HARVEST</u></a>	(Int'l Class: 16) plastic garbage bags (Int'l Class: 21) Plates (Int'l Class: 29) cheese; coffee creamer; milk substitutes; olives, preserved; pickles; potato puffs; soups; canned beans; dried beans; hash brown potatoes; hot dogs; sliced meat (Int'l Class: 30) barbeque sauce; pickle relish; quinoa-based snack foods; salsa; confectionery chips for baking; frozen dough; pita chips	RN: 5807549 SN: 87648889
<a href="#"><u>WILD HARVEST</u></a>	(Int'l Class: 35) retail and online grocery store services	RN: 5353790 SN: 87329786
<a href="#"><u>WILD HARVEST</u></a>	(Int'l Class: 29) rice-based food beverage used as a milk substitute; soy milk, meat, beef, sausage, poultry and eggs (Int'l Class: 30)	RN: 3138351 SN: 78625480

Mark/Name	Full Goods/Services	App. No./Reg. No.
	salsa, bread, crackers, cookies, maple syrup, honey (Int'l Class: 32) drinking water, fruit juice and lemonade	
<a href="#">WILD HARVEST</a>	(Int'l Class: 42) retail food store services	RN: 2056158 SN: 74702903
<a href="#">WILD HARVEST</a>	(Int'l Class: 05) baby foods (Int'l Class: 29) canned tomatoes; applesauce; peanut butter; frozen vegetables; milk; yogurt; butter; soy milk; canned vegetables; edible oils; soups; frozen meals consisting primarily of meat, poultry and vegetables (Int'l Class: 30) teas; cocoa; salad dressings; tortilla chips; macaroni and cheese; tomato sauce; ketchup; pasta sauces; mustard; candy; oatmeal; seasonings; granola snacks; processed cereals; popcorn; breads; coffee; pizza; crackers; pasta; rice; sugar (Int'l Class: 31) fresh vegetables; unprocessed cereals	RN: 3822419 SN: 77449116
<a href="#">WILD HARVEST and Design</a>  	(Int'l Class: 05) baby foods (Int'l Class: 29) canned tomatoes; applesauce; peanut butter; frozen vegetables; milk; yogurt; butter; rice-based food beverage used as a milk substitute; soy milk; meats; eggs; canned vegetables; edible oils; soups; frozen meals consisting primarily of meat, poultry and vegetables (Int'l Class: 30) teas; cocoa; cappuccino mix; salad dressings; tortilla chips; macaroni and cheese; tomato sauce; ketchup; pasta	RN: 3815034 SN: 77449117

Mark/Name	Full Goods/Services	App. No./Reg. No.
	sauces; mustard; candy; oatmeal; seasonings; granola snacks; processed cereals; popcorn; breads; coffee; pizza; salsa; crackers; cookies; maple syrup; honey; pasta; rice; sugar; non-alcoholic tea beverages with fruit flavor (Int'l Class: 31) fresh vegetables; unprocessed cereals (Int'l Class: 32) fruit juices; lemonades (Int'l Class: 35) retail and online grocery store services	

### **3. Strength of Cited Mark.**

Generally, the strength of a mark depends on two factors: (1) distinctiveness of the mark; and (2) the extent to which the mark is recognized by the relevant consuming class. *Aveda Corp. v. Evita Marketing, Inc.*, 706 F.Supp. 1419, 1428 (D. Minn. 1989). The strength of the mark is typically shown by factors like: the degree and manner of the owner's advertising; the length and manner of the owner's use of the mark; and whether the owner's use has been exclusive. *Clamp Mfg. Co. v. Enco Mfg. Co.*, 870 F.2d 512, 517 (9th Cir. 1989). Here, the strength of the cited mark is not significant. Given the number of other users of the wording "WILD HARVEST" discussed in the section 4 below and as the two owners of cited marks are coexisting with each other, the strength of the cited marks is not a significant factor.

### **4. The Number And Nature Of Similar Marks On Similar Goods.**


In addition to the cited marks (which coexist with each other), there are numerous federal registrations or published applications for marks containing "WILD HARVEST", including applicant's WILD HARVEST registrations discussed above. These listings


demonstrate the lack of market penetration, the insignificant manner of the use of the cited marks and the ability of marks using these words to co-exist without confusion in the marketplace. The chart below contains marks which demonstrate the dilute nature of the cited marks.

Mark/Name	Full Goods/Services	Owner Information	App. No./Reg. No.
<a href="#">WILD HARVEST</a>	(Int'l Class: 16) plastic garbage bags (Int'l Class: 21) Plates (Int'l Class: 29) cheese; coffee creamer; milk substitutes; olives, preserved; pickles; potato puffs; soups; canned beans; dried beans; hash brown potatoes; hot dogs; sliced meat (Int'l Class: 30) barbeque sauce; pickle relish; quinoa-based snack foods; salsa; confectionery chips for baking; frozen dough; pita chips	Supervalu Licensing LLC (Delaware Limited Liability Company) 11840 Valley View Road Eden Prairie Minnesota 55344	RN: 5807549 SN: 87648889
<a href="#">WILD HARVEST</a>	(Int'l Class: 35) retail and online grocery store services	Supervalu Licensing LLC (Delaware Limited Liability Company) 11840 Valley View Road Eden Prairie Minnesota 55344	RN: 5353790 SN: 87329786
<a href="#">WILD HARVEST</a>	(Int'l Class: 29) rice-based food beverage used as a milk substitute; soy milk, meat, beef, [ pork, ] sausage, poultry and eggs (Int'l Class: 30) salsa, bread, crackers, cookies, maple syrup, honey	Supervalu Licensing LLC (Delaware Limited Liability Company) 11840 Valley View Road Eden Prairie Minnesota 55344	RN: 3138351 SN: 78625480

Mark/Name	Full Goods/Services	Owner Information	App. No./Reg. No.
	(Int'l Class: 32) drinking water, fruit juice and lemonade		
<a href="#"><u>WILD HARVEST</u></a>	(Int'l Class: 42) retail food store services	Supervalu Licensing LLC (Delaware Limited Liability Company) 11840 Valley View Road Eden Prairie Minnesota 55344	RN: 2056158 SN: 74702903
<a href="#"><u>WILD HARVEST</u></a>	(Int'l Class: 05) baby foods (Int'l Class: 29) canned tomatoes; applesauce; peanut butter; frozen vegetables; milk; yogurt; butter; soy milk; canned vegetables; edible oils; soups; frozen meals consisting primarily of meat, poultry and vegetables (Int'l Class: 30) teas; cocoa; salad dressings; tortilla chips; macaroni and cheese; tomato sauce; ketchup; pasta sauces; mustard; candy; oatmeal; seasonings; granola snacks; processed cereals; popcorn; breads; coffee; pizza; crackers; pasta; rice; sugar (Int'l Class: 31) fresh vegetables; unprocessed cereals	Supervalu Licensing LLC (Delaware Limited Liability Company) 11840 Valley View Road Eden Prairie Minnesota 55344	RN: 3822419 SN: 77449116
<a href="#"><u>WILD HARVEST and Design</u></a>	(Int'l Class: 05) baby foods (Int'l Class: 29) canned tomatoes; applesauce; peanut butter; frozen vegetables; milk; yogurt; butter; rice-based food beverage used as a milk substitute; soy milk; meats; eggs;	Supervalu Licensing LLC (Delaware Limited Liability Company) 11840 Valley View Road Eden Prairie Minnesota 55344	RN: 3815034 SN: 77449117



Mark/Name	Full Goods/Services	Owner Information	App. No./Reg. No.
	<p>canned vegetables; edible oils; soups; frozen meals consisting primarily of meat, poultry and vegetables (Int'l Class: 30)</p> <p>teas; cocoa; cappuccino mix; salad dressings; tortilla chips; macaroni and cheese; tomato sauce; ketchup; pasta sauces; mustard; candy; oatmeal; seasonings; granola snacks; processed cereals; popcorn; breads; coffee; pizza; salsa; crackers; cookies; maple syrup; honey; pasta; rice; sugar; non-alcoholic tea beverages with fruit flavor (Int'l Class: 31)</p> <p>fresh vegetables; unprocessed cereals (Int'l Class: 32)</p> <p>fruit juices; lemonades (Int'l Class: 35)</p> <p>retail and online grocery store services</p>		
<p><a href="#">OREGON'S WILD HARVEST</a></p>	<p>(Int'l Class: 05) herbal supplements</p>	<p>Oregon's Wild Harvest, Inc. (Oregon Corp.) 1601 Ne Hemlock Ave. Redmond Oregon 97756</p>	<p>RN: 5131938 SN: 86980342</p>
<p><a href="#">OREGON'S WILD HARVEST HERBAL SUPPLEMENTS SINCE 1994 and Design</a></p>	<p>(Int'l Class: 05) herbal supplements</p>	<p>Oregon's Wild Harvest, Inc. (Oregon Corp.) 1601 Ne Hemlock Ave. Redmond Oregon 97756</p>	<p>RN: 5131939 SN: 86980350</p>

Mark/Name	Full Goods/Services	Owner Information	App. No./Reg. No.
			
<a href="#">WILD HARVESTED NATIVE NECTARS</a>	(Int'l Class: 03) body and beauty care cosmetics; cosmetic nourishing creams; cosmetics; cosmetics in the form of milks, lotions and emulsions; non- medicated preparations all for the care of skin, hair and scalp; soaps	Yurrku LLC (Delaware Limited Liability Company) 300 Broad Street #406 Stamford Connecticut 06901	RN: 4704956 SN: 86148249

The above information demonstrates the lack of market penetration and the insignificant manner of the use of the cited mark. Review of the marketplace evidences the diluted status of the Registrant's wording in relation to food products, the ability of consumers to distinguish between similar marks, and the ability of multiple marks to co-exist without consumer confusion in the marketplace and on the Federal Register. This factor strongly supports the fact that there is no likelihood of confusion between the cited mark and Applicant's mark.

**5. Actual Confusion.**

Applicant is unaware of any case of actual confusion by a consumer despite its registration and use of WILD HARVEST on other products and services.

**6. Conclusion**

In light of all of the foregoing, Applicant respectfully requests that the United States Patent and Trademark Office reverse its prior 2(d) finding and allow Applicant's application to proceed in the application process.

The Office Action requested information regarding whether the seafood was wild caught. Applicant has deleted the seafood from its application, but does note that the seafood is wild caught. Applicant submits that since seafood has been deleted from its application, no disclaimer is necessary.

By this Amendment and Response, Applicant has addressed the issues raised by the Examining Attorney and respectfully requests that the application be approved for publication at an early date.

If the Examining Attorney has any questions or comments, Applicant respectfully requests that the Examining Attorney contact the undersigned Attorney for Applicant