


**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Concentric Ag Corporation  
Mark: SPEARHEAD  
Serial No.: 88/371,878  
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Law Office 120

Commissioner for  
Trademarks  
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**RESPONSE TO OFFICE ACTION OF JUNE 24, 2019**

The applicant, Concentric Ag Corporation (“Applicant”) has filed to register the mark SPEARHEAD (the “Mark”) for use in connection with Applicant’s Goods as revised herein. In an Office Action dated June 24, 2019 (the “Office Action”), the United States Patent & Trademark Office (the “Office”) refused registration of Applicant’s Mark based upon: (i) a request for clarification of the goods; and (ii) a perceived likelihood of confusion with the following marks, all owned by Vestaron Corporation (separately, each a “Cited Mark” and collectively, “Cited Marks”):

- **SPEAR** (Reg. No. 5091694) for *insecticides* in Class 5
- **SPEAR & Design**  (Reg. No. 569523) for *pesticides* in Class 5

**I. APPLICANT’S REVISION OF THE GOODS.**

As a preliminary matter, Applicant submits the following revisions to the recitation of Applicant’s goods (collectively, “Goods”):

- Class 1: Agricultural chemicals, except fungicides, herbicides, insecticides and parasiticides; horticultural chemicals, except fungicides, herbicides, insecticides and parasiticides; biochemicals, biologicals **preparations**, **chemical** additives, fertilizers and **plant** nutrients for agricultural and horticultural use; microbial formulations for use in agriculture to improve plant and soil quality; microbial formulations for stimulation of growth and management of disease in plants, trees and vines; biological preparations for use in agriculture and horticulture to improve plant and soil quality; soil additives for agricultural use; biological preparations for the treatment of seeds for use in agriculture and horticulture; nutritive additive to enhance the biological activity of water, soil, seeds and plants for purposes of fertilization; plant nutrition preparations; providing information in the field of chemicals, biochemicals, biological

**preparations, chemical** additives, fertilizers and **plant** nutrients for agricultural and horticultural use

## **II. THE MARK AND THE CITED MARKS ARE NOT LIKELY TO BE CONFUSED.**

Likelihood of confusion is synonymous with “probable” confusion—it is not sufficient if confusion is merely “possible.” *Brennan's, Inc. v. Brennan's Restaurant, L.L.C.*, 360 F.3d 125, 135, 69 U.S.P.Q.2d 1939 (2d Cir. 2004). The test for likelihood of confusion evaluates thirteen separate factors. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (C.C.P.A. 1973). While no single factor is dispositive, the significance of a particular factor may differ from case to case, and any one factor may control a particular case. *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997). Though the Office initially determined that a likelihood of confusion may exist between the Mark and the Cited Marks, Applicant respectfully submits that the following factors should be considered when making such determination.

### **A. The Marks are Dissimilar in Appearance, Sound, Meaning and Commercial Impression.**

Applicant’s Mark and the Cited Marks are not similar in sight, sound, meaning and/or commercial impression. Consumer confusion, therefore, is not likely. “The points of comparison for a word mark are appearance, sound, meaning and commercial impression. Similarity of the marks in one respect – sight, sound or meaning – will not automatically result in a finding of likelihood of confusion even if the goods are identical or closely related.” TMEP § 1207.01(b)(i) (citing *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 U.S.P.Q.2d 1689, 1691 (Fed. Cir. 2005)). In *First Savings Bank*, the United States Court of Appeals for the Tenth Circuit compared the marks FIRSTBANK and FIRST BANK SYSTEM and concluded that there were “minimal” similarities between the two. *See First Savs. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 40 U.S.P.Q.2d 1865 (10th Cir. 1996). In its comparison of the marks, the court considered the visual differences between the marks such as the script, the addition of other words to the mark, and the marks’ respective meanings. *Id.* The court concluded that even though the marks contained some identical terms, the marks, when compared in their entireties, were not confusingly similar. *Id.* In *W.W.W. Pharmaceutical Co.*, the plaintiff trademark holder alleged that the defendant’s use of the mark SPORT STICK for deodorant infringed the plaintiff’s mark SPORTSTICK for lip balm. Even though the United States District Court for the Southern District of New York found that the goods were “customarily sold through the same channels of trade,” occasionally displayed on the same retail shelves, and identical in sound, the court held that there was no likelihood of confusion, in part, because the marks differed in appearance. *W.W.W. Pharm. Co. v. Gillette Co.*, 808 F. Supp. 1013, 23 U.S.P.Q.2d 1609 (S.D.N.Y. 1992), *aff’d*, 984 F.2d 567 (2d Cir. 1993).

Furthermore, the Federal Circuit has stated that “marks tend to be perceived in their entireties,” and therefore, “all components thereof must be given appropriate weight” when determining whether two marks look and sound alike. *In re Hearst Corp.*, 982 F.2d 493, 494, 25 U.S.P.Q.2d 1238 (Fed. Cir. 1992). In *Hearst*, the Trademark Trial and Appeal Board (the “Board”) refused Hearst’s application to register VARGA GIRL for calendars, on the ground of

likelihood of confusion with the registered trademark VARGAS for calendars and other items. *Id.* at 493. The Federal Circuit reversed the Board’s refusal, stating that “[b]y stressing the portion ‘varga’ and diminishing the portion ‘girl’, the Board inappropriately changed the mark . . . . When GIRL is given fair weight, along with VARGA, confusion with VARGAS becomes less likely.” *Id.* at 494. While the dominant portion is given greater weight, each mark still must be considered as a whole. *First Savings Bank*, 101 F.3d at 653 (citing *Sun Banks of Florida, Inc. v. Sun Fed. Sav. & Loan Ass’n*, 651 F.2d 311, 317-18 (5th Cir. 1981) (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, cmt. b (1938))).

Under the Federal Circuit’s holding in *Hearst*, the descriptive term “girl” was sufficient to distinguish Hearst’s mark from the prior registration for identical goods. In this case, Applicant’s Mark and the Cited Marks are as distinct from each other as the marks discussed in *Hearst*. Specifically, the Cited Mark is a single word pronounced in one syllable, whereas Applicant’s Mark is made up of two words pronounced in two syllables. Moreover, the addition of “HEAD” in the Mark sufficiently distinguishes the marks in appearance.

**Appearance**

Applicant’s Mark	SPEARHEAD
Cited Mark	SPEAR

**Sound**

Applicant’s Mark	two syllables	spear·head; 'spir- hed
Cited Mark	one syllable	'spir

The foregoing weights in favor of finding that the marks are not confusingly similar.

In addition, “spearhead” has more than one meaning, including “a leading element, force, or influence in an undertaking or development; to serve as a leader.” In stark contrast, the meaning of “spear” is “a sharp-pointed instrument; throwing weapon; or otherwise some sort of sudden action to jab or ram.” See Exhibit A. As a result, the unshared word, not only changes the appearance and sound of the Mark, but it also affects the overall meaning and/or commercial impression. Moreover, the Cited Mark under Reg. No. 569523 contains a “spear” design element. The design is used to suggest the action of a spear to reflect the impact of the goods to *kill* or otherwise *deter* insects, pests, and weeds. This is quite the opposite attribute Applicant would want associated with its Goods. Instead, Applicant’s Mark is meant to suggest product that stimulates *growth* and promotes *healthy* plants, trees, and vines. These significant differences among the marks weighs in favor of finding that the marks are not confusingly similar. Therefore, when Applicant’s Mark is considered in its entirety, such that the “HEAD” element is given fair weight, confusion between Applicant’s Mark and the Cited Marks is unlikely because the marks engender a very different meaning and commercial impression.

Each element of the foregoing analysis regarding the appearance, sound, meaning and/or commercial impression of the Mark and the Cited Marks weighs in favor of a finding that the marks are not confusingly similar.

## **B. Applicant's Goods Differ in Utility Than The Cited Marks.**

The plain language of Applicant's Goods is sufficient to distinguish its goods from those offered under the Cited Marks. At a high level, Applicant's Goods cover agricultural and horticultural chemicals to stimulate the growth of plants, trees, and vines. Moreover, Applicant's Goods specifically exclude the types of goods under the Cited Marks, which are substances to kill insects and deter pests and weeds. In *Shen*, the Federal Circuit made clear that no significant relationship or competitive proximity can be established where products are designed for distinct purposes. See, *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356-57 (Fed. Cir. 2004). Examples provided in *Shen* include: (i) a barbeque mitt and gloves (not competitive though each is a type of hand covering and technically a "glove"), and (ii) hard hats and fedoras (no competitive though each is a head covering and technically a "hat"). *Id.* Though each of the foregoing share definitional commonalities, they are designed for different purposes, such as keeping hands or heads warm, as opposed to protection. The same is true in the instant case – all of the marks cover agricultural products, but the purpose and use of each product is distinct. Namely, Applicant's Goods differ in utility from those provided under the Cited Marks. This weighs in favor of a finding that no likelihood of confusion results from co-existence of the Mark and the Cited Marks.

## **C. The Number of Third-Party Marks Containing the Same Elements of the Cited Marks Tend to Amplify the Differences and Suggest the Marks are Not Confusingly Similar.**

It is also notable that there are several marks containing the term "SPEAR" that have peacefully co-existed without issue in connection with goods and services that are at least as, if not more, related to each other than Applicant's Goods and those offered under the Cited Marks. The co-existence of such marks suggests that the relevant purchasing public is accustomed to differentiating between them and that relatively minor differences in the marks can be enough to distinguish marks that may, on the surface, appear confusingly similar. This tends to magnify the differences discussed above and suggests the Mark and Cited Marks are not confusingly similar. For example,

- (i) **SUNSPEAR** (Reg. No. 5742229) registration owned by Nissan Chemical Corporation for "*fumigants only for agricultural purposes except for use with insecticides; fungicides only for agricultural purposes; rodenticides only for agricultural purposes; herbicides, namely, weed killers; antiseptics only for agricultural purposes*" in Class 5; and
- (ii) **SPEAR & JACKSON** is used by Spear & Jackson in connection with *agricultural planting tools*.



- (iii) **SPEARHEAD PEST CONTROL and Design** (disclaims PEST CONTROL) (Reg. No. 5506956) registered to Rudy Ayala for “*fumigating; pest control for commercial buildings; pest control for residential homes; termite exterminating; other than for agricultural, aquaculture, horticulture and forestry*” in Class 37;



- (iv) **SILVER SPEAR** (Reg. No. 5753924) registration owned by Denis-Plants for “*flowering plants, namely, flowering plant of the botanical genus Brunnera*” in Class 31.



- (v) **SPEAR and IVORY SPEAR** (US Reg. Nos. 5476661; 5487639) registrations owned by J. Frank Schmidt & Son Co. for “*living trees*” in Class 31.

**Malus 'JFS KW214MX' P.A.F.**  
**Ivory Spear™ Crabapple**

**Zone:** 4    **Height:** 18'    **Spread:** 7'



**Shape:** Narrow, tightly columnar  
**Foliage:** Dark green  
**Flower:** White  
**Fruit:** Bright red, 1/2"



Deep pink buds open to white flowers on this densely upright, narrow crabapple. Leaves stay clean and disease free throughout the growing season, forming a uniform column of dark green foliage in the landscape. Bright cherry red fruits contrast well with the dark green leaves and persist into late autumn, when a touch of yellow fall color adds seasonal interest.

Part of the Spear® family of trees.

**Disease Resistance:**

Scab: Excel. Fireblight: Excel.  
Cedar-Apple Rust: Excel. Mildew: Excel.

- (vi) **SPEARS** (California Reg. No. 2754) registration owned by Spears Manufacturing Co. for “*agricultural systems.*”



The TESS records for the federal registrations and/or website printouts of the common law uses in connection with the above-listed marks have been included in Exhibit B.

The purpose of listing third-party uses is to show how customers have become conditioned by such similar marks that customers “have been educated to distinguish between different such marks on the bases of minute distinctions.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). Likewise, active third-party registrations demonstrate that the public will look to other elements to distinguish the source of the goods or services. See, e.g., *Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016). Further, evidence of third-party use bears on the strength or weakness of a mark. The weaker the mark, the closer another’s mark can come without causing a likelihood of confusion and “thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

Each of the foregoing contains the term “SPEAR” and is registered and/or used in connection with goods and services that are at least as similar, if not more similar, to each other than Applicant’s Goods and those provided by the Cited Marks. These marks suggest that consumers can distinguish between marks that are otherwise fairly similar based on relatively minor differences in the associated marks. This amplifies the differences between the respective marks of each party, particularly since Applicant does not offer the same goods covered by the Cited Marks. Further, these marks exemplify the weakness of the term “SPEAR” alone and allows other marks, including Applicant’s Mark, to co-exist without causing a likelihood of confusion with the Cited Marks or the above-listed marks. This weighs strongly in favor of a finding that no likelihood of confusion results from co-existence of Applicant’s Mark and the Cited Marks.

### **III. CONCLUSION**

For all the reasons set forth above, Applicant respectfully requests that the Office accept Applicant’s revised recitation of the Goods, withdraw its likelihood of confusion refusal, and approve the Mark for publication.