

The Examining Attorney has cited Reg. No. 5617808 for the mark TULA covering “pharmaceutical preparations for the treatment of ear, nose and throat conditions” owned by Tusker Medical, Inc. (the “Cited Mark”). Applicant notes that the citation applies only to “nutritional supplements; probiotic supplements.” Applicant requests that the citation be withdrawn for the reasons discussed below.

#### Applicant’s Prior Registration

Applicant owns U.S. Reg. No. 5347003 for the mark TULA covering “nutritional supplements; probiotic supplements” (the “’003 Registration”). A TESS printout of this registration is attached. The goods covered by the ‘003 Registration are identical to those refused in the instant application. The ‘003 issued without any Office Action, specifically without a citation from the Cited Mark. If Applicant’s mark was not refused over the Cited Mark in its ‘003 Registration, it should not be refused now.

Applicant is mindful of the Trademark Office’s oft-cited admonition that decisions of other Examining Attorneys are not binding. Nevertheless, the Trademark Office launched a Consistency Initiative in 2013 with the goal of providing better consistency in examination. In the same vein, the Federal Circuit has also stated that it “encourages the PTO to achieve a uniform standard for assessing registrability of marks,” notwithstanding the rule that the Trademark Office is not bound by prior registrations when examining applications. See *In re Nett Designs, Inc.*, 236 F.3D 1339, 1342, 57 U.S.P.Q.2d 1564, 1566 (Fed. Circ. 2001). It has also been recognized that “[c]onsistency in the application of decisions is desirable and should, as far as possible, be practiced.” *In re Ralston Purina Co.*, 191 U.S.P.Q. 237 (T.T.A.B. 1976).

The Consistency Initiative is directly applicable in this case because of the USPTO’s past treatment of Applicant’s prior registration for the same mark and the same goods. In addition, Applicant’s ‘003 Registration issued in 2017, within the five-year applicable time period for the Consistency Initiative. See <https://www.uspto.gov/trademark/trademark-updates-and-announcements/consistency-initiative>.

#### The Evidence Provided is Insufficient

The Office Action states that “commercial entities commonly product dietary and probiotic supplements for use in treating conditions of the ear, nose and throat, which is identical to the function and purpose of registrant’s goods.” First, Applicant notes that supplements do not have the same function as pharmaceutical preparations. According to the National Institute of Health, “supplements are intended to enhance the diet, they are not intended to treat or cure medical conditions. Supplements “are not medicines.” See attached Exhibit. Conversely, by definition, pharmaceuticals are intended to treat a disease or medical condition.

The Office Action further states that “the goods of the applicant and registrant are competitive and marketed to the same consumers with ailments pertaining to the ear, nose or throat may purchase either supplement or pharmaceutical preparation.” However, this is not the standard in determining whether goods are related for likelihood of confusion analysis. By the same reasoning, both applicant’s and registrant’s goods would both be related to tea used to soothe a sore throat or tissues to alleviate a runny nose.

As evidence of the relatedness of the goods, the Office Action provides printouts of five websites. However, none of the websites include evidence that shows supplements and pharmaceuticals sold under the same mark. The websites only provide information on certain supplements purported to

improve or support ear, nose and throat health. None of the websites mention pharmaceuticals or show pharmaceuticals and supplements sold by the same retailer, let alone under the same trademark.

With the above, Applicant requests that the citation be withdrawn.