

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

TO THE COMMISSIONER FOR TRADEMARKS
United States Patent and Trademark Office

RE: Serial No: 88341772
Mark: N + B



Description of Mark: The mark consists of a black letter N and a black plus sign, overlaying a red horizontal line which begins at the western arm of the plus sign, followed by a red letter B which is bisected by a black vertical line.

Applicant: Nicole and Brizee LLC
Office Action of: 5/24/2019

RESPONSE TO OFFICE ACTION

The following is the response of Applicant, Nicole and Brizee LLC, (the “Applicant”), by and through its undersigned counsel, to the Office Action sent on May 24, 2019 by Mildred Black (the “Examining Attorney”).

I. NO LIKELIHOOD OF CONFUSION

In the Office Action, the Examining Attorney has refused registration of Applicant’s mark **N+B** which consists of a “black letter N and a black plus sign, overlaying a red horizontal line which begins at the western arm of the plus sign, followed by a red letter B which is bisected by a black vertical line,” where Black and Red are claimed as a feature of the mark, in International Class 3 for “body lotion; body scrubs; deodorant for personal use; eyebrow cosmetics; eyeliner; face milk and lotions; face and body creams; hair care lotions; lipstick; wipes impregnated with a cleaning preparation” (“Applicant’s Mark”). The refusal rests on the grounds that the mark is



allegedly confusingly similar to the mark **NATURAL IS BETTER** registered under U.S. Registration No. 5455734 in highly stylized text for “bleaching preparations and cleaning and washing preparations for laundry use made in whole or substantial part of natural ingredients; cleaning, polishing, degreasing and abrasive preparations for floors and walls made in whole or substantial part of natural ingredients; Non-medicated soaps made in whole or substantial part of natural ingredients; perfumery, essential oils, cosmetic preparations, hair lotions made in whole or substantial part of natural ingredients; dentifrices made in whole or substantial part of natural ingredients” in International Class 3 (the “Cited Mark”). The Cited Mark is owned by N & B s.r.l. Sociedad Responsabilidad Limitada (“Registrant”).

The Examining Attorney also raised an advisory on prior-filed U.S. Application Serial Nos. 88013571 for the standard character mark “LUSSÔME N&B” and 88013554 for the standard character mark “GENÔTIQ N&B” both for “nonmedicated skin and hair care lotions, creams and serum” in International Class 3, owned by Miguel Alvaro Zuñiga Benavides (collectively, “Prior Applications”).

The Examining Attorney focused on two factors under *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973), which are the similarity of the marks and the relatedness of the goods. It is Applicant’s submission, based on the following analysis and evidence , that there is no likelihood of confusion between Applicant’s Mark and the Cited Mark, nor between Applicant’s Mark and the Prior Applications, and respectfully requests reconsideration of the Office Action and approval of Applicant’s Mark for publication.

A. The Ampersand “N&B” is Only Entitled to A Narrow Scope of Protection.

In regard to the Prior Applications, if the evidence establishes that the consuming public is exposed to third-party use of similar marks on similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” TMEP 1207.01(d)(iii)(citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)). Additionally, “active third-party registrations may be relevant to show that a mark or a portion of the mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services.” See TMEP 1207.01(d)(iii).

The Examining Attorney has already identified, several trademarks in International Class 3 that use “&” in combination with the letters “n” or “b” or words such as nature, natural, beauty, or body. Evidently, seeing as these marks co-exist in the market-place, public consumers the Cited Mark and Prior Applications’ goods will look to other elements to distinguish the source of the goods. The public may, look toward the highly stylized and prominent ampersand in



NATURAL IS BETTER or the fact that the N&B element clearly refers to a descriptive aspect of goods to which the Cited Mark pertains, that they are comprised of natural ingredients.

The public may also look towards the clearly French visual and aural impressions that are intended by the “LUSSÔME N&B” and “GENÔTIQ N&B” standard character marks. Both use the typically French diacritic “Ô” and each use French linguistic elements such as a final “Q” and the “ÔME” the latter being designed to hearken to the famous “LANCÔME” mark U.S. Registration No. 3022836.

First and foremost, rather than utilizing the ampersand “&” Applicant’s Mark consists of “N + B” in modern stylized text, which consists of a “black letter N and a black plus sign, overlaying a red horizontal line which begins at the western arm of the plus sign, followed by a red letter B which is bisected by a black vertical line.” In contradistinction, the Prior Applications are not stylized, contain no color and “N&B” is suffixed to a prior main word heavily laden with French aural and visual linguistic features. It is submitted that Applicant’s Mark would not appear to prospective purchasers as a shortened form of the Prior Applications’ marks because:

- a) Many varying examples on the market of products that use an N&B combination;
and
- b) The striking visual difference of Applicant’s Mark, which creates its own commercial impression;

Therefore, we submit that the Prior Application’s use of “N&B” in non-stylized text is only entitled to a narrow scope of protection.

B. The Appearances, Sounds, Connotations, & Commercial Impressions of the Marks are Different.

The Examining Attorney appropriately emphasizes existing case law that provides that “marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1369, 1371, 73, USPQ2d 1689, 1691 (Fed. Cir. 2014). Contrary to the Examining Attorney’s position, Applicant respectfully submits that there are significant distinctions between Applicant’s Mark and the Cited Mark, as well as the Prior Applications, which when properly viewed in their entireties, are more than adequate to distinguish the marks in the eyes and ears of relevant consumers,

rendering the subject refusal untenable. See *In re E.I. du Pont*, 177 U.S.P.Q. at 567; *In re Bigelow, Inc.*, 199 U.S.P.Q. 38, 40 (T.T.A.B. 1978)(instructing each case to be decided on basis of all relevant factors).

It is well-established that, when assessing likelihood of confusion, even slight differences may be sufficient to distinguish the marks in question. *The Wooster Brush Co. v. Prager Brush Co.*, 221 U.S.P.Q. 316 (T.T.A.B. 1986); *The Land-O-Nod Co. v. Peter Paulison*, 220 U.S.P.Q. 61 (T.T.A.B. 1983). The case *Lever Brothers Co. v. The Barcolene Co.* is instructive. There, the Court did not hesitate to find that the “obvious differences” between the marks “ALL CLEAR!” and “ALL,” both used in connection with household cleaning products, weighed against a likelihood of confusion. 463 F.2d 1107, 1109, 174 U.S.P.Q. 392, 393 (C.C.P.A. 1972). Similarly, in *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, the Court found that “[t]he difference in appearance and sound of the marks [PEAK and PEAK PERIOD] is too obvious to render detailed discussion necessary. In their entireties, they neither look nor sound alike.” 432 F.2d 1400, 1402, 167 U.S.P.Q. 529, 530 (C.C.P.A. 1970); see also *In re Hearst Corp.*, 982 F.2d 493 (Fed. Cir. 1992) (finding no likelihood of confusion between use of VARGAS and VARGA GIRL on calendars); *USA Network v. Gannett Co.*, 584 F. Supp. 195, 223 U.S.P.Q. 678, 681 (D. Colo. 1984) (finding no similarity in appearance, pronunciation, verbal translation, or suggestion of USA CABLE NETWORK and KUSA); *Travelhost, Inc. v. Welcome Host of America, Inc.*, 1996 T.T.A.B. LEXIS 285, at *4, *9 (T.T.A.B. 1996) (finding no likelihood of confusion where TRAVEL HOST and WELCOME HOST conjured different connotations, sounds, appearances, commercial impressions).

In addition, “[i]t is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”

Franklin Mint Corp. v. Master Mfg. Co., 667 F.2d 1005, 1007, 212 U.S.P.Q. 233, 234 (C.C.P.A. 1981); see also *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985) (emphasizing that a likelihood of confusion analysis “cannot be predicated on a dissection of a mark, that is, on only part of a mark” and that “the ultimate conclusion rests on consideration of the marks in their entirety”); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 916-17, 189 U.S.P.Q. 693, 695 (C.C.P.A. 1976) (finding no likelihood of confusion between marks when viewed in their entirety); *In re Rocktron Corp.*, 1999 T.T.A.B. LEXIS 504, at *2-*3 (T.T.A.B. Aug. 31, 1999) (instructing marks to be considered in their entirety and not side by side). Importantly, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re Sierra Madre Products, LLC*, 2018 TTAB LEXIS 104 at *11 (TTAB 2018).

In this case, the significant distinctions between Applicant’s Mark and the Cited Mark, as well as the Prior Applications, when properly viewed in their entirety with respect to appearance, sound, meaning, and overall commercial impression, make clear that a finding of likelihood of confusion cannot stand. The decision in the Office Action rests significantly on the alleged similarity of appearance between the Applicant’s Mark “N + B” in stylized text and the Cited Mark “N&B NATURAL IS BETTER” in stylized text.

Applicant’s Mark is visually distinct by virtue of the plus sign versus a prominent and dominating ampersand in rounder and higher font. As stated above, Applicant’s Mark consists of a “black letter N and a black plus sign, overlaying a red horizontal line which begins at the western arm of the plus sign, followed by a red letter B which is bisected by a black vertical line,”



, whereas, the Cited Mark consists of the stylized letters “N”, “&” and “B” with



the letter “&” depicted in a rounder and higher font, **NATURAL IS BETTER**. Further,

‘[E]ven if the marks [contain] identical words while competing head to head, that may, standing alone, still is insufficient to establish similarity’ . . . Instead, [e]ven if the marks are composed of the same words are pronounced the same, they may be distinguished by the use of a company name in close proximity, the use of different font sizes, and dissimilar modes of presentation.’ *Globalaw*, 452 F.Supp. 2d at 40; *see also King of the Mountain Sports v. Chrysler*, 185 F.3d 1084, 1090-91 (10th Cir. 1999) (finding that marks with the same dominant text are dissimilar due to differences in style, presentation, and visual impact). *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V.*, 69 F. Supp. 3d 175, 199-200, (D.C. District Court 2014).

Moreover, the notable and striking differences in style, presentation, and visual impact of Applicant’s Mark, which creates its own commercial impression, would never appear to prospective purchasers as a shortened form of the Cited Mark.

The first notable and striking difference in appearance is that Applicant’s Mark claims the colors red and black, whereas the Cited Mark does not claim color. Second, Applicant’s Mark consists of a black plus sign, whereas the Cited Mark uses a prominent ampersand in “rounder and higher font.” Third, no descriptive text is found beneath Applicant’s Mark, whereas in the Cited Mark, “centered underneath ‘N&B’ is the stylized wording ‘Natural Is Better,’” which in of itself is gives the cited mark a distinct commercial impression of organic or earthy ingredients. Fourth, Applicant’s Mark consists of a “black letter N . . . followed by a red letter B,” whereas the Cited Mark consists of “stylized letters “N” and “B.” Fifth, Applicant’s Mark consists of “a red horizontal line which begins at the western arm of the plus sign” and a “red letter B which is bisected by a black vertical line,” which is absent from the Cited Mark. Sixth, there are spaces


between the black plus sign and the black letter “N” and the red letter “B” in Applicant’s Mark, whereas, the Cited Mark consists of no spaces between the stylized “N,” rounder, higher stylized “&,” and stylized “B.” Finally, the plus sign in Applicant’s Mark is minimized because it is smaller than the black letter “N” and red letter “B,” whereas the Cited Mark’s stylized ampersand is center-focus and enlarged because it is wider, rounder, taller, and appears to be in a different font. Furthermore, these differences outlined above equally apply to the Prior Application’s Mark, which include a non-stylized, non-colored, non-spaced, non-lined, “N,” “&,” and “B.”

Just as  is distinct from  NATURAL IS BETTER in appearance, it is unmistakable

to a consumer in its sound. The Examining Attorney’s argument that prospective purchasers would consider Applicant’s Mark a shortened form is negated based on the difference in pronunciation of Applicant’s Mark, which generates a different sound, emphasis, and cadence than the Cited Mark. There is also no basis that consuming public refer to the Cited Mark by “Natural is Better” or “N&B Natural is Better” or “N&B.” It is well established that sound is vital factor in the likelihood of confusion analysis. *Celanese Corp. v. E. I. du Pont de Nemours & Co.*, 154 F.2d 143, 145, 69 U.S.P.Q. 69, 71-72 (C.C.P.A. 1946); *Colgate-Palmolive Co.*, 432 F.2d at 1402, 167 U.S.P.Q. at 530; *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 351-52, 204 U.S.P.Q. 808, 817 (9th Cir. 1979). Here, the Cited Mark spoken fully sounds “N and B” “Natural Is Better,” whereas Applicant’s Mark is “N plus B.” Moreover, Applicant’s Mark uses a plus sign, which is pronounced \ `pləs \, <https://www.merriam-webster.com/dictionary/plus>, whereas the Cited Mark uses an ampersand, which is pronounced \ ən(d) \, <https://www.merriam-webster.com/dictionary/and>.

These aural differences alone render Applicant's Mark and the Cited Mark, when properly viewed in their entireties, easily recognizable and distinguishable from one another.

Finally, the Examining Attorney argues that Applicant's Mark does not create a distinct commercial impression from the Cited Mark because it contains some of the wording in the registered mark and does not add any wording that would distinguish it from that mark. As an initial point, the use of plus rather than ampersand is a very distinctive in and of itself. It evokes an impression of mathematics or science rather than literature. Applicant's Mark is visually distinguishable and has a distinct overall commercial impression from the Cited Mark because the (i) black plus sign in combination with (ii) the black sans-serif letter "N" and and red serif letter "B," as well as the (iii) T-shaped horizontal and vertical lines, lends a commercial impression of the unification of duality or opposites. The red and black sit against each other in roulette, the

font change in  unites modern and yesteryear and both x and y axes are brought together.

In stark contrast, the ampersand is suggestive of combination of ingredients rather than collaboration of people, which is intended by Applicant to relate to the WWE dynamic duo Nicole and Brizee. Applicant's use of a black plus sign rather than an ampersand creates the twin team commercial impression, which makes its dissimilar from the Cited Mark. In stark contrast, the ampersand is overused and has no distinct commercial impression without adding more, which is why the Cited Mark needs to add "Natural Is Better" centered underneath to separate it from the fold. Here, the mere usage of a black plus sign adds a difference, which does not require additional wording to create the impression of a collaboration or team on the beauty line.

It is submitted, that there is no doubt that the marks, when properly viewed in their entireties, contain more than recognizable differences sufficient to create significantly distinct commercial impressions, thereby rendering Applicant's Mark easily distinguishable from the Cited Mark and obviating any possibility—let alone likelihood—of confusion between the marks. Indeed, any similarity between Applicant's Mark and the Cited Mark is vastly overshadowed by their appreciable differences in appearance, sound, connotation, and overall commercial impression. Consequently, the marks are not likely to be confused in the minds of relevant consumers. This factor in the likelihood of confusion analysis therefore weighs decidedly in Applicant's favor. Accordingly, Applicant respectfully requests reconsideration of the Office Action and approval of Applicant's mark for publication.


C. Applicant's and Registrant's Goods are Unrelated.

Furthermore, no likelihood of confusion exists between Applicant's mark and the Cited Marks in view of the wholesale differences between Applicant's and the Cited Mark's goods. See *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. at 567.

In the Office Action, the Examining Attorney contends that "Applicant and registrant both provide cosmetics and body care goods," and adding further that "the registration uses broad wording to describe soaps, cosmetics, and lotions," and "the goods are legally identical." However, the Cited Mark does not use broad wording but adds the pertinent description of "made in whole or substantial part of natural ingredients," which also ties to the Cited Mark's "Natural Is Better." The website of <https://www.nbnaturalisbetter.com/en/products/> states that the brand focuses on "natural and organic certified ingredients." The Cited Mark also guarantees

the best “Green Quality,” based on moving from organic farming, to organic raw material extraction, to R&D quality control, to organic cosmetic production, to private label. Based on the Cited Mark’s description that its goods are “made in whole or substantial part of natural ingredients,” it removes Applicant’s goods from being considered “legally identical.”

Further, Applicant and Registrant, an Italian brand, offer their distinct goods through separate channels of commerce. As mentioned above, the Cited Mark’s goods move from organic farming to organic cosmetic production to private label and no products are sold bearing the Cited Mark. <https://www.nbnaturalisbetter.com/en/private-label/>. Also, Registrant does not provide a statement of first use in commerce. A search of “N + B,” “N&B,” and “N&B Nature is Beauty” on Amazon.com’s beauty and personal care department did not generate results for either Applicant or Registrant within the first several pages generated: https://www.amazon.com/s?k=%22N+%2B+B%22&i=beauty&qid=1559513748&ref=sr_pg_1, https://www.amazon.com/s?k=%22N%26B%22&i=beauty&ref=nb_sb_noss_2, and https://www.amazon.com/s?k=%22N%26B+Nature+Is+Beauty%22&i=beauty&ref=nb_sb_noss.

Therefore, the mere possibility of confusion, if any at all, that a customer would confuse  the collaboration from the twin team Nicole + Brizee with Registrant, an Italian seller of natural and organic certified products for private label i.e. not consumer-facing but rather wholesale focused, is far too remote to substantiate the Examining Attorney’s position. This factor in the likelihood of confusion analysis similarly weighs in Applicant’s favor.


D. Analogous Third-Party B Marks Negate Any Likelihood of Confusion.

Applicant's position against likelihood of confusion is further underscored by the concurrent existence of other third-party marks using the letters or words starting with "N" or "B" in combination with "&" and "+", and words such as nature, natural, beauty, or body. Registered third-party usage in International Class 3, includes, (i) "N" (Registration Number 5392469), which "consists of a circle containing a diagonally slanted 'N' with extended end lines" for "Lip balm; sunscreen preparations; toothpaste; mouthwash; cosmetics; cosmetic face and body care preparations; hair care preparations; cosmetic bath preparation; fragrances; essential oils;" (ii) "B" (Registration Number 5760456), which consists of "a stylized letter 'B' with the vertical component comprised of stylized female figure with arms extended and the curving components comprised of curving lines that resemble ribbons, with three stars situated equilaterally around the design," for "body lotion, body oil, shower gel, non-medicated lip balm, non-medicated beauty soap, body polish, body and foot scrub and non-medicated foot cream; Beauty creams for body care; beauty lotions; beauty masks; body masks; body scrub; body wash; body powders;" (iii) "B" (Registration Number 5734025), which consists of a stylized B for "Shampoo; Hair conditioner; Hair styling products, namely, gels and defining creams;" (iv) "B&N ALL NATURAL" (Registration Number 5693203) in stylized words, for "non-medicated shampoos, detanglers, and conditioners;" (v) "B&N ALL NATURAL" (Registration Number 5693191) in standard characters, for "non-medicated shampoos, detanglers, and conditioners;" (vi) "BODY +" (Registration Number 5698794), which consists of a stylized "O" and "+" for "Body lotion; body lotions; essential oils for use in the manufacture of scented products; hair conditioner; lotions for face and body care; shampoo-conditioners; shower and bath foam; shower and bath gel; shower

creams; shower gel; hair shampoo; hair shampoos and conditioners; hair rinses; moisturizing body lotions; scented body lotions and creams; skin and body topical lotion;” (vii) “N:P BEAUTIFUL” (Registration Number 5602283) for “Hair conditioner; Hair nourishers; Hair oils; Hair shampoo; Hair spray; Shampoo-conditioners; Shampoos; Dry shampoos,” as well as, (viii) “BND” (Registration Number 5708796) in stylized words above Koren characters for “Laundry detergents,” which are similar goods as the Cited Mark,

Importantly, the Prior Applications pending cited by the Examining Attorney in the Office Action, “LUSSÔME N&B” and “GENÔTIQ N&B” for “nonmedicated skin and hair care lotions, creams and serum” is just another example of the profuse usage of the letter and word combination of “N”, “&,” “B.”

A review of these “N”, “&,” “B” marks makes clear that even slight differences between the marks distinguish them from one another. See T.M.E.P. § 1207.01(d)(iii) (Apr. 2017) (“[A]ctive third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services.”). Given that the Trademark Office permitted registration of the Cited Mark and these directly analogous third-party marks and that these marks peacefully

coexist, Applicant’s mark “N + B” in stylized text  can similarly coexist with the Cited Mark and the Prior Applications without giving rise to consumer confusion.

E. The Extent of Potential Confusion is De Minimis

Finally, where the scope and extent of any potential confusion is *de minimis*, as opposed to substantial, there can be no support for a refusal pursuant to Section 2(d) of the Lanham Act. See *In re E.I. du Pont*, 177 U.S.P.Q. at 567. Applicant respectfully submits that where, as here, the Cited Mark is entitled to a narrow scope of protection, Applicant's Mark and the Cited Mark differ significantly in appearance, sound, and connotation and convey entirely distinct commercial impressions, Applicant's and Registrant's respective goods are unrelated, and other directly analogous third-party marks coexist on the Register and in the marketplace, there can be little doubt that any potential confusion is *de minimis*, much less likely. Indeed, as the foregoing demonstrates, consumers are simply not likely to believe that Applicant's and Registrant's respective goods emanate from the same source. All of the aforementioned distinctions between Applicant's Mark and the Cited Mark necessitate a finding that the extent of potential confusion is absolutely and unequivocally *de minimis*. The mere possibility of confusion is simply too remote to justify a Section 2(d) refusal.

Accordingly, because there is no likelihood of confusion between Applicant's mark and the Cited Mark, as well as the Prior Applications, Applicant respectfully requests reconsideration of the Office Action and approval to allow Applicant's Mark to proceed to publication.

CONCLUSION

For the foregoing reasons, Applicant Nicole and Brizee LLC, by and through its counsel, requests that the Office Action of the Examining Attorney, with regard to Section 2(d) of the

Lanham Act, 15 U.S.C. §1052(d), be reconsidered and that the Mark "N + B"



entered for publication on the Principal Register.

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Respectfully submitted,

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