

## **THERE IS NO LIKELIHOOD OF CONFUSION**

The Examining Attorney has rejected the mark under Section 2(d) based on the contention that there is a likelihood of confusion between Applicant's mark KOIOS DS and U.S. Trademark Registration No. 5,266,358, COEUS HEALTH.

Applicant disagrees with the Examining Attorney's conclusion, and, submits that when all the relevant factors are analyzed, the unmistakable conclusion is that there is *no* likelihood of confusion.

In an effort to further distinguish, Applicant has amended its Identification of Goods to *Downloadable medical software for reading computed tomography (CT) scans and ultrasounds of individuals to determine a likelihood of malignancy installed on a local computer; Recorded medical software for reading computed tomography (CT) scans and ultrasounds of individuals to determine a likelihood of malignancy installed on a local computer.* This is a very particular set of goods, and, with this difference in goods and services, when combined with the differences in the marks, and the other relevant factors, further distinguishes the marks and further supports the finding of no likelihood of confusion.

## **FACTORS TO CONSIDER IN A LIKELIHOOD OF CONFUSION ANALYSIS**

The determination of a likelihood of confusion focuses on the question of whether the purchasing public would mistakenly assume that an applicant's goods originate from the same source as, or are associated with, the goods in the cited registration(s). Such a determination is made through application of the thirteen factors set out in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 USPQ 563 (CCPA 1973), namely,

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
2. The similarity or dissimilarity of 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 a 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, i.e., whether *de minimis* or substantial.
13. Any other established fact probative of the effect of use.

While the first two factors tend to be important to any likelihood of confusion determination, relevant factors cannot be overlooked. That is, not all factors may be relevant or of equal weight in a given case, and “any one of the factors may control a particular case.” *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-1407, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

Among the thirteen relevant factors, the *DuPont* factors that bear consideration in the present instance are factors 1, 2, 3 and 4.

### **FACTOR 1 – COMPARISON OF THE MARKS**

“Identity of the marks alone is not sufficient to establish a likelihood of confusion....” *In re Thor Tech, Inc.*, 113 U.S.P.Q.2d 1546 (TTAB 2015). As the TTAB recognized in *Thor*, if the

analysis were limited to only this factor, the Registrant would have rights in gross, which would be “against the principles of trademark law.” *Id.*

The Examining Attorney relies upon COEUS and KOIOS being related terms. Applicant submits that the relationship is not an alternative spelling, but an even more remote relationship of languages that are no longer existing and/or spoken. In Ancient Greek, one of the gods was Κοιος. Using Latin letters, the transliteration of this term is KOIOS. Coeus is the Latin spelling of the Ancient Greek term. Thus, the relationship between KOIOS and COEUS is not as if they are just alternative translations of words (i.e., a translation between English and Spanish), but, rather, a transliteration of a Ancient Greek word (using Greek characters) into a Latin characters, and that Latin set of characters is different than the word would be spelled in Latin.

Moreover, both of the languages are dead languages. That is, not a single country or peoples speaks Ancient Greek or Latin. This makes the relationship even more remote. That is, in common language, there would be no reference to either spelling. Moreover, using the Latinized script, a consumer would not understand how to spell these terms, much less any relationship between the terms.

For example, in the cited COEUS HEALTH application, the Applicant provided the following in response to an inquiry as to the significance of the mark:

“COEUS appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as applied to the goods/services listed in the application, or any geographical significance. The word(s) COEUS has no meaning in a foreign language.”

Applicant submits that the understanding to a consumer as to the meaning of COEUS is so remote (as it really means nothing in any known and currently used language) that the owner

of the cited registration placed its understanding as to the lack of any meaning of the claim on the record.

Not only is the relationship very remote, and, generally if known, misunderstood, but when viewed as a consumer in the United States in 2020 would review the marks, it is abundantly clear that the marks are substantially different.

Specifically, the Applicant's mark, KOIOS DS, does not look remotely like the Registrant's mark, COEUS HEALTH. The first word in the Applicant's mark starts with a "K", whereas the first word in the Registrant's mark starts with a "C". The only remote similarity between the two marks is that the first word of the Applicant's mark has two letters in common with the first word of the Registrant's mark – that is, they both use the letters "o" and "s". One would not even know how to pronounce either mark let alone think they sound similar since the spelling is so different. The spelling between the marks is so dissimilar that it would be common to pronounce the marks differently. In fact, the terms are so not well known, that if one searches for the pronunciation of the term KOIOS, different pronunciations can be found. Moreover, Applicant's own website provides a pronunciation key to a visitor to the website due to the fact that consumers have no idea how to pronounce the term, and, because there are alternative pronunciations.

Not only is the primary term quite different in appearance, but the second second word DS is vastly different from the second word HEALTH in the Registrant's mark. Furthermore, even though the term Health is disclaimed, it nonetheless forms part of the mark, and must be taken into consideration. That is, the marks need to be viewed in their entirety.

In this case, with so many of the factors weighing in the favor of no likelihood of confusion, much like *Thor*, the difference between the marks provides yet further support for a finding of no likelihood of confusion.

**FACTOR 2 – SIMILARITY OF THE GOODS AND/OR SERVICES**

Applicant submits that the goods and/or services associated with Applicant's mark are vastly different, and highly unrelated to those of Registrant. This factor weighs heavily in favor of a finding of no likelihood of confusion.

On their face, the services of Applicant are not the same as the services offered by the Registrant. Specifically, Applicant's goods, as amended are:

Downloadable medical software for reading computed tomography (CT) scans and ultrasounds of individuals to determine a likelihood of malignancy installed on a local computer; Recorded medical software for reading computed tomography (CT) scans and ultrasounds of individuals to determine a likelihood of malignancy installed on a local computer.

These goods are highly specialized goods that are configured to augment a highly trained individual, that is already trained to read CT and ultrasound images, to provide additional input as to the likelihood of a malignancy in the reviewed image. This provides improved diagnosis, reduced benign biopsy, among other improvements.

Quite to the contrary, the Registrant's services are directed with a broad brush at generally consumer level services, being primarily to:

Scientific and technological services, namely, providing scientific analysis and scientific testing in the wellness and medical fields; design and development of computer hardware and software in the wellness, medical and health fields; Providing online, non-downloadable, temporary use of software via the internet for use in receiving, retrieving, storing, analyzing, reporting and displaying, measuring, sensing, detecting, collecting, monitoring, generating, transmitting, managing, editing, tracking, sharing, and presenting

personal statistical medical and fitness data, namely, vital signs, physiological data, pulse wave velocity, weight, body composition, cardiovascular and/or cardiopulmonary data in the fields of wellness, medical and health; Application service provider featuring software for use in the operation of computers, transfer of data over private and public networks and the global computer network, transmitting and sharing of global network traffic data and information across computer networks in the fields of wellness, medical and health; Application service provider featuring application programming interface (API) software for developing digital health applications; Providing a website featuring technology that enables users to use digital health applications to manage their health and healthcare; Providing a website that gives computer users the ability to use digital health applications to manage their health and healthcare; Providing an interactive website featuring technology that allows users to use digital health applications to manage their health and healthcare; Providing on-line, non-downloadable software for managing health records and digital health information in class 42

Providing a website featuring content in the nature of information and advice regarding healthy living and lifestyle wellness; Providing a website featuring information about health and wellness, namely, how to manage health and healthcare; Providing a website featuring information about health, wellness and nutrition; Providing a website featuring information and advice in the fields of diet, weight loss, diet planning and lifestyle wellness; Providing an interactive website featuring information and links relating to healthy living and weight loss; Providing online, mobile and digital health and medical information for consumers, patients and caregivers in the field of medical, wellness and health services and products; Providing health and medical information including personal statistical medical and fitness data, namely, vital signs, physiological data, pulse wave velocity, weight, body composition, cardiovascular and/or cardiopulmonary data in class 44

Problematically, while all of these services are listed, Applicant has found only a website and no evidence of actual use of the marks for any of these services. While a website exists, there is no real information discussing any of the foregoing services. Moreover, the specimen submitted with the statement of use, attached as Exhibit A, does not cover a majority of these services. Thus, it is difficult, if not impossible to determine the scope of these services.

On the other hand, what is clear is that the services offered by the Registrant are not related to those of the Applicant. That is, nothing identified in the goods of the Registrant identify the utilization of highly specialized software for reviewing CT and/or ultrasound images, especially where the technology augments an already highly specialized and trained individual to provide a medical diagnosis of cancer through the use of ultrasound images and artificial intelligence software.

The Registrant's services deal with applications that allow users to manage their health and healthcare. They are directed to the average consumer. There is no mention of medical professionals using artificial intelligence software and ultrasound images to medically diagnose cancer.

Compare these remotely "related" goods and services to a situation where the goods are complementary and similar, like, for example, a towable trailer and a car or truck that can tow the trailer. The TTAB considered such complementary goods in *Thor*, yet, even in that case, the TTAB concluded that the goods were not related for a variety of reasons. *Thor*, at 1550.

With the difference in the marks, combined with the difference of the services, this factor weighs in favor of a finding of no likelihood of confusion.

### **FACTOR 3 – DIFFERENT CHANNELS OF TRADE**

The third factor is directed to an examination of the channels of trade. The services of Applicant travel through different channels of trade than the services of the Registrant.

Applicant's goods are sold directly to medical professionals and used in a medical, professional settings to determine a likelihood of malignancy, and to augment an already highly sophisticated individual to make a cancer determination. In many instances, the software

augments GE Healthcare LOGIQ E10 scanners and is available on such equipment. Such Ultrasound equipment has a cost that is between \$40,000 and \$50,000 and comprises a very sophisticated piece of equipment. The software of the Applicant is available on this equipment. It is further available for use with other PACS systems in the medical industry.

To the contrary, Registrant's services are directed to use by the average consumer looking to individually manage their lifestyle wellness (again, to the best that can be currently understood). It seems that the only concrete use of the mark was in association with a study in State College, Pennsylvania for a clinical weight loss trial. It is unclear, however, how the services of the Registrant were even associated with the same. See, Exhibit A.

Thus, the services of the Applicant do not travel in the same channels of trade as those of the Registrant, they could not be further apart. The consumers are different, the manner of communication is different, and the manner of interaction is vastly different.

Thus, this factor likewise weighs in favor of a finding of no likelihood of confusion.

#### **FACTOR 4 – SOPHISTICATION OF THE PURCHASER**

The fourth factor is directed to the level of sophistication of the purchaser of the services of the Applicant and the Registrant. This factor weighs in favor of a finding that no likelihood of confusion exists.

In particular, the purchasers of the goods of the Applicant are typically highly specialized medical professionals that understand the product. They are certainly NOT an impulse purchase. They are made only after very careful consideration of the specifications and performance of the goods, as well as the careful planning of the use of the software. This is true especially when we



are dealing with goods that determine the likelihood of malignancy. There is nothing impulsive about the purchase of Applicant's goods.

Moreover, in the instance wherein the software is on, for example, a GE Healthcare LOGIZ E10 Scanner, the software is in addition to the \$40,000 to \$50,000 that is spent on the scanner itself. Thus, the goods become part of the discussion for the purchase of highly specialized equipment by highly trained individuals. The software is not something that is purchased from an app store on a trial basis and used by average consumers. Rather, not only is the purchase highly studied and dissected, but the purchase is *on top of* additional equipment purchases that are very expensive.

The Registrant's services are for the everyday average consumer looking to manage one's health and wellness. It is highly unlikely that the consumers of Applicant's goods would cross paths with the consumers of Registrants services. These are two very different types of consumers; one of which is highly sophisticated and the other who is your average everyday consumer. There is very little likelihood that a consumer would believe that there is a relation.

In a similar case, *Dynamics Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 217 USPQ 649 (Fed.Cir.1983), the Federal Circuit affirmed the Board's conclusion that "because the marks are used on goods that are 'quite different' and sold to different, discriminating customers, there is no likelihood of confusion" even though both parties used the identical mark." *Id.* at 1576, 217 USPQ at 649. *See also, Electronic Design & Sales, Inc. v. Electronic Data Systems Corporation*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir 1992) (reversal of Board decision based upon the sophistication of the buyers).

As such, this factor likewise weighs in favor of a finding of no likelihood of confusion.

## CONCLUSION

The differences in the marks, the services, the differences in the channels of trade and the differences in the sophistication of the purchaser, far outweigh any similarity in the marks, such that at best, a likelihood of confusion is only a speculative, theoretical possibility.

And, as stated by the Federal Circuit:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with *de minimis* situations but with the practicalities of the commercial world, with which the trademark laws deal.

*Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), *citing* *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

Based on the foregoing, reconsideration and withdrawal of the Section 2(d) refusal is respectfully solicited.

# Exhibit A



Coeus Health

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## Seeking adult Android smartphone users for clinical weight loss trial!

Year-long NIH-funded study of a weight loss app with four (4) testing appointments throughout the year.

Receive up to \$100 compensation for your time.

### You may be eligible to participate if you:

- Have a BMI between 25-40
- Are 21-65 years old
- Own and use an android smartphone

Contact Shawna at [shawna@coeusapis.com](mailto:shawna@coeusapis.com) or 814-954-2564

Study approved by the Sport & Spine Rehab Clinical Research Foundation Institutional Review Board

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# Clinically-Proven Digital Health Solutions

Coeus Health unlocks the tools to provide health and wellness programs that work.



Coeus Health makes clinically proven solutions available to you

Coeus Health was founded by world-renowned experts who know the science & how to use it.

We start with programs that have been rigorously tested in clinical trials.

We know these programs work.

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Coeus Health was founded with the goal of speeding the pipeline from discovery to dissemination for health and wellness interventions.

We identify evidence-based behavioral solutions from the scientific evidence base that have high potential for translation into the commercial market.



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