

Applicant's mark is LEAF, U.S. Trademark Application Serial No. 88/866,317, for use in connection with “Gloves for medical purposes; Gloves for medical use; Masks for use by medical personnel; Dental gloves; Face masks for use by dental care providers; Face masks for use by health care providers; Medical gloves; Medical examination gloves; Protective gloves for medical use” in International Class 010, (“Applicant's Mark”):

Registration of Applicant's Mark was initially refused based on a finding of a likelihood of confusion with the registered mark LEAFIA, U.S. Trademark Registration No. 5,437,479, for use in connection with, *inter alia*, “Gardening gloves; Household gloves for general use” in International Class 021 (the “Cited Mark”);

Applicant respectfully submits this response in support of registration of Applicant’s Mark based upon the following arguments.

THE MARKS ARE NOT SIMILAR

The Examining Attorney found that Applicant’s Mark and the Cited Mark are similar and likely to cause confusion because, “Both marks begin with the word LEAF.” Applicant respectfully disagrees, and argues that the clear differences in the marks result in the marks creating completely separate and distinct commercial impressions in the minds of consumers.

The Marks Are Different In Appearance, Sound, Meaning and Commercial Impression

In the first part of the likelihood of confusion analysis, the marks are compared for similarities in their appearance, sound, connotation and commercial impression. TMEP §§1207.01, 1207.01(b). When comparing compound word marks which share a literal element, the addition or deletion of other matter in the marks may be sufficient to avoid a likelihood of confusion if the marks in their entireties convey different commercial impressions. TMEP §1207.01(b)(iii); *see Bass Pro Trademarks, L.L.C. v. Sportsman's Warehouse, Inc.*, 89 USPQ2d 1844, 1857-58 (TTAB 2008) (finding that, although petitioner's and respondent's marks were similar by virtue of the shared descriptive wording “SPORTSMAN'S WAREHOUSE”, this similarity was outweighed by differences in terms of sound, appearance, connotation, and commercial impression created by other matter and stylization in the respective marks); *In re Farm Fresh Catfish Co.*, 231 USPQ 495, 495-96 (TTAB 1986) (holding CATFISH BOBBERS (with "CATFISH" disclaimed) for fish, and BOBBER for restaurant services, not likely to cause confusion, because the word “BOBBER” has different connotation when used in connection with the respective goods and services).

The fundamental rule is that the marks must be considered in their entireties. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985) (“[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided *the ultimate conclusion rests on consideration of the marks in their entireties.*”); *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272 (C.C.P.A. 1974) (holding the fundamental rule is that marks must be considered in their entireties).

Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion. *See, e.g., In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) (CROSS-OVER for bras held not likely to be confused with CROSSOVER for ladies' sportswear, the Board finding that the term was suggestive of the construction of applicant's bras, but was likely to be perceived by purchasers either as an entirely arbitrary designation or as being suggestive of sportswear that "crosses over" the line between informal and more formal wear when applied to ladies' sportswear); *In re British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (PLAYERS for men's underwear held not likely to be confused with PLAYERS for shoes, the Board finding that the term PLAYERS implies a fit, style, color and durability adapted to outdoor activities when applied to shoes, but "implies something else, primarily indoors in nature" when applied to men's underwear); *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) (BOTTOMS UP for ladies' and children's underwear held not likely to be confused with BOTTOMS UP for men's clothing, the Board finding that the term connotes the drinking phrase "Drink Up" when applied to men's suits, coats and trousers, but does not have this connotation when applied to ladies' and children's underwear).

Here, the marks are different in appearance, sound, meaning and overall commercial impression. The marks appear different, because Applicant's Mark is the common term LEAF, whereas, the Cited Mark is a unique and uncommon term, LEAFIA. The Cited Mark contains the suffix "IA", whereas no suffix appears in Applicant's Mark. Consumers will be drawn to the uncommon suffix "IA", appearing only in the Cited Mark, as this suffix is wholly unique when combined with the common noun "LEAF." Consequently, consumers will be drawn to the more distinctive portion of the Cited Mark, namely the unique suffix "IA", when viewing the mark in

commerce. Such clear differences in the appearance of the marks at issue thus weigh heavily against a finding of a likelihood of confusion.

Applicant's Mark and the Cited Mark are also different in sound. Applicant's Mark is composed of only one (1) syllable, whereas, the Cited Mark is composed of three (3) syllables. Furthermore, Applicant's Mark ends with a consonant, whereas, the Cited Mark ends in two separate vowel sounds. Such clear differences in the sounds of the marks thus weigh heavily against a finding of a likelihood of confusion.

The marks also have wholly different meanings. Applicant's Mark, LEAF, has a clear meaning of a "leaf," which is defined as, "a lateral outgrowth from a plant stem that is typically a flattened expanded variably shaped greenish organ." *See attached dictionary evidence*. In stark contrast there is absolutely no known standard or slang definition for the Cited Mark, LEAFIA. Instead, the Cited Mark creates a connotation of a "green leaf mafia", via its use of the uncommon suffix "AFIA", combined with the common term LEAF. "Mafia" is defined as, "a secret criminal organization". *See attached dictionary evidence*. As such, the Cited Mark creates a connotation of a secret, eco-conscious, criminal organization. No such connotation of an eco-conscious mafia organization can possibly be derived from Applicant's Mark. Such clear differences in the meanings conveyed by the marks at issue thus weigh significantly against a finding of a likelihood of confusion.

As a result, the commercial impressions of the marks are also completely different. Applicant's Mark creates a commercial impression of a growing, living extension protruding from a healthy plant. No such commercial impression of life or health can be attributed to the Cited Mark. Instead, the Cited Mark creates a commercial impression of a gang of gardeners, known as LEAFIA, the "leaf mafia." No such commercial impression of a secret criminal organization or a gang of gardeners can possibly be derived from Applicant's Mark.

Furthermore, and notably, as was the case in *In re Sears*, *In re British Bulldog*, and *In re Sydel Lingerie*, Applicant's Mark and the Cited Mark take on different commercial impressions when viewed in relation to the parties' respective goods, thus making confusion less likely. The Registrant's goods are gloves intended for gardening, cleaning and household chores; whereas, Applicant's goods are gloves intended for sterilized medical and/or dental use by medical practitioners. Consequently, Applicant's Mark, when viewed in connection with Applicant's products intended for medical use, tends to create a commercial impression associated with life,

growth and health. In stark contrast, the Cited Mark, when viewed in connection with the Registrant's products intended for household chores, creates a commercial impression associated with aggressively attacking tough-to-handle household projects. The reference to "mafia" in the Cited Mark LEAFIA suggests that the Registrant's products are surreptitiously rugged and tough, akin to a secret criminal organization. No such commercial impression of rough and tough products can be associated with Applicant's Mark. Similarly, no such commercial impression of products intended to promote health, wellness, life and growth can be derived from the Cited mark. Accordingly, Applicant's Mark and the Cited Mark create entirely distinct and separate commercial impressions, especially when applied to the parties' respective goods, thus weighing heavily against a finding of a likelihood of confusion.

THE GOODS ARE NOT RELATED

The Examining Attorney found that Applicant's goods are related to Registrant's, because, "[c]onsumers are free to use medical grade gloves for non-medical purposes. . . . Thus, applicant's class 10 goods and registrant's goods are considered related for likelihood of confusion purposes." Applicant respectfully disagrees. While consumers may, unnecessarily, use medical grade gloves for non-medical purposes, they may not safely use general, non-medical grade gloves, or gardening gloves, for medical purposes. The target consumer for medical grade gloves are those who intend to use the gloves for specialized, medical purposes. Applicant's goods description clearly limits its products solely to such medical and/or dental use, indicating its products are intended for specialized, not general, use. In stark contrast, the Registrant's goods description clearly limits its products solely to "gardening" and "general use." Consequently, by virtue of the limiting nature of the respective goods descriptions alone, the parties' goods are not related.

Furthermore, the Examining Attorney must provide evidence showing that the goods are related to support a finding of likelihood of confusion. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009). The relatedness of goods may not be assumed, and the Examining Attorney must show "something more" than that different goods are in the same environment or trade channels to demonstrate that the goods are sufficiently related to weigh in favor of a finding of likelihood of confusion. *See In re Coors Brewing Co.*, 343 F.3d 1340, 1345, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (quoting *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 1236, 212 USPQ 641, 642 (C.C.P.A. 1982)); *see also In re Giovanni Food Co.*, 97

USPQ2d 1990, 1991 (TTAB 2011). Specifically, if the evidence suggests that there is not a substantial overlap between the compared goods with respect to source, a finding of relatedness of the goods is not warranted. *See Id.* (holding overlap between microbrewery and restaurant services *de minimis* where dual-use registrations for microbreweries and restaurants accounted for only 1,450 of all 800,000 restaurants).

Additionally of importance, the fact that certain products are sold on the same websites, such as www.amazon.com, www.target.com or www.walmart.com, does not show that consumers would expect the sources of these products to be associated or related. *Federated Foods v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976) ("A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed"). *See also Irwin Auger Bit Co. v. Irwin Corp.*, 134 USPQ 37, 39 (TTAB 1962) ("It is common knowledge that there are sold in many hardware, grocery, variety and drug stores an almost unlimited variety of goods including tools, housewares, electrical appliances, seed, fertilizer, furniture and toys. The public being well aware of the diversity of goods to be found in such stores is not going to believe that all of those goods could originate with a single source.") Websites like conventional stores often serve to bring together various products from unrelated sources. The mere fact that goods are sold in the same store or on the same website does not establish that the goods are related, much less closely related.

Here, the entirety of the evidence and arguments submitted by the Examining Attorney in support of the conclusion the parties' goods are related consist exclusively of such mass retail websites. Such a limited showing of third-party, dual-use of Applicant's and Registrant's goods, cannot possibly rise to the level necessary to support a finding that the Applicant's and Registrant's goods are sufficiently related for a likelihood of consumer confusion to exist. Applicant submits that the Examining Attorney cannot do so here, as Applicant's goods are sold to wholly different consumers and in separate channels of trade than are the Registrant's goods.

Applicant's goods are gloves intended for *medical* and/or *dental* use; whereas, Registrant's goods are *gardening* gloves or *household* gloves intended for *general* use. The target consumer of Applicant's specialized medical products are medical and/or dental

practitioners and their staff. Medical/dental practitioners, interested in medically safe and effective products, are not the target of, and have no relevance to, the Registrant's gardening and household gloves intended for general use. Instead, the Registrant's target consumers are residential homeowners and/or occupants interested in gloves for cleaning and gardening. Consequently, in reality, despite both products consisting of "gloves", the target consumers of the respective products are completely different.

Similarly, the trade channels are separate. Applicant sells its products through channels of trade associated with the medical and/or dental industries; whereas, the Registrant sells its products through channels of trade associated with the home gardening and cleaning industries. Applicant's products are sold in outlets where medical equipment is sold. In stark contrast, the Registrant's products are sold in outlets where cleaning and/or gardening supplies are sold. Applicant's products are not marketed or sold in retail establishments where gardening and home sanitizing products are available, and the Registrant's products are not marketed or sold in retail establishments where medical equipment is available. The fact that both products are available online at mega-retailers, like Amazon, Walmart and Target, cannot be probative here. *See Federated Foods*, 544 F.2d at 1103. The clear differences and separation of these channels of trade channels thus weigh heavily against a finding of a likelihood of consumer confusion.

Applicant submits that in light of the above arguments along with the Examining Attorney's submission of no distinctly probative evidence illustrating the possible relatedness of Applicant's and Registrant's goods, Applicant's and Registrant's goods are not sufficiently related to support a finding of a likelihood of confusion.

APPLICANT'S CONSUMERS ARE HIGHLY SOPHISTICATED

It is indisputable that the sophistication of consumers and the care they will exercise in making purchasing decisions minimizes the likelihood of confusion. TMEP 1207.01(d)(vii). Even when two marks cover identical goods, there is no likelihood of confusion when consumers are sophisticated and can be expected to use care when making their purchasing decision. *In re Homeland Vinyl Prods., Inc.*, 81 U.S.P.Q.2d 1378, 1380 (T.T.A.B. 2006) (finding no likelihood of confusion between marks for identical goods, fence rails, in part because fence rails are not impulse purchases and construction and installation of a fence would require some level of knowledge and experience). Similarly, when "only very sophisticated purchasers who would buy with great care and unquestionably know the source of the goods," there is no likelihood of

confusion between similar marks. *In re N.A.D., Inc.*, 754 F.2d 996, 999-1000, 224 USPQ 969, 971 (Fed. Cir. 1985) (concluding that, because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between the marks NARCO and NARKOMED); *In re Homeland Vinyl Prods., Inc.*, 81 USPQ2d 1378, 1380, 1383 (TTAB 2006); TMEP §1207.01(d)(vii). Thus, the inquiry focuses on whether consumers will exercise care in the purchasing process, such that they will know the source of the goods they are purchasing, not whether consumers are sophisticated in the field of trademarks.

Applicant's consumers are medical and/or dental practitioners who are interested in the quality and performance of their medical equipment and accessories. These consumers will exercise great care in selecting quality products that will meet their needs, are medically safe and effective, and can withstand the specialized nature of their intended use. Therefore, they will make it a priority to know precisely with whom they are dealing, prior to making any purchase. When the source and quality of goods are critical, purchasing decisions are made with great care, and not on impulse. *See e.g., Dynamics Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 1576 (Fed. Cir. 1983) (holding that use of identical marks would not result in consumer confusion based on the sufficiently different nature of the goods and the discriminating nature of their purchasers).

The medical and dental gloves sold by Applicant are purchased only after careful consideration by consumers having direct and specialized knowledge and experience of the specific needs of medical and/or dental personnel. As such, these purchasers would tend to notice subtle differences between marks, due to the heightened care used in making their purchasing decisions. Such distinctions are made even further apparent in this context, given Applicant's intended use of Applicant's Mark solely in connection with medical and/or dental gloves, which are not at all closely related to gardening or household cleaning gloves sold by the Registrant.

Due to the sophistication of Applicant's consumers and the care likely taken in the assessment and selection of gloves intended for medical and/or dental use, confusion is unlikely. Accordingly, the fact that consumers of Applicant's products are highly sophisticated weighs heavily against a finding of a likelihood of confusion.

CONCLUSION

Finally, Applicant respectfully reminds the Examiner that the Board is tasked only with considering actual practicalities of the commercial world, and not mere theoretical possibilities of consumer confusion. *See Primrose Retirement Communities, LLC v. Edward Rose Senior Living, LLC* 112 USPQ2d 1030, 1054 (TTAB 2016) [precedential]; *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) (“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.”).

Here, the reality is that (1) the marks at issue are not similar, as they create completely separate and distinct commercial impressions; (2) the goods are not closely related, as they target wholly separate consumers in different channels of trade; and (3) Applicant’s consumer is highly sophisticated. In view of the differences in the products, the sophistication of Applicant’s consumers, and the clear distinctions in the appearance, sound, meaning, and commercial impressions of the marks at issue, Applicant respectfully submits that consumer confusion is not likely to occur.

In light of the foregoing, Applicant submits that there is no likelihood of confusion among Applicant's Mark and the Cited Mark.

WHEREFORE, Applicant requests that the Examining Attorney's refusal of registration be reversed and that registration be granted.