Office Action Response
Mark: SYMPHONY
Serial No.: 90/483296
Our Ref.: TRUVC.004T

I. Response to Office Action:

The following amendments and remarks are submitted in response to the Office Action issued in connection with U.S. Application Serial No. 90/483296 for the mark SYMPHONY ("Applicant's Mark").

II. Remarks:

AMENDMENT TO THE IDENTIFICATION OF GOODS

Applicant hereby amends the description of goods in Class 10 to read as follows:

> Class 10: Medical, surgical and healthcare apparatus and instruments, **namely, medical and surgical apparatus and instruments for use in** thrombus clot, clot, and emboli removal**;** catheters for treating pulmonary embolisms**;** catheters for treating deep vein thrombosis**;** catheters for treating peripheral arterial occlusions**;** catheters for treating coronary occlusions**;** dialysis catheters**; medical devices, namely,** aspiration **control handles;** vacuum pumps **for medical purposes;** tubing sets **comprised of medical tubing for removal of blood and thrombus, aspiration, and removing occlusions**, filters and parts and fittings for the aforementioned goods

("Applicant's Goods").

LIKELIHOOD OF CONFUSION REFUSAL

A. There is No Likelihood of Confusion between Applicant's Mark and the Cited Mark

In the Office Action the Examining Attorney initially refused registration of Applicant's Mark because of a purported likelihood of confusion with the mark SYMPHONY (the "Cited Mark") in U.S. Reg. No. 5277827 (the "Cited Registration").

Applicant respectfully disagrees with the Examining Attorney's belief that a likelihood of confusion exists between Applicant's Mark and the Cited Mark and urges her to withdraw the objection in view of the following remarks.

B. Likelihood of Confusion Standard

The controlling standard for determining a likelihood of confusion is whether the purchasing public would mistakenly assume that the Applicant's goods originate with, are sponsored by, or are in some way associated with the goods offered in connection with the cited registration. *FBI v. Societe: "M. Bril & Co."*, 172 U.S.P.Q. 310 (T.T.A.B. 1971).

T.M.E.P. §1207.01 sets forth numerous factors that are relevant in making a determination of likelihood of confusion, including (1) the dissimilarity and nature of the goods and services as described in the application or registration; (2) the conditions under which and buyers to whom sales are made, i.e., careful, sophisticated purchasing; and (3) the dissimilarity in the channels of trade. *See* T.M.E.P. §1207.01; *In re E. I. du Pont de Nemours & Co*., 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973) ("*DuPont*"). These factors are not listed in the order of merit, and each may play a dominant role, depending on the case. *DuPont*, 476 F.2d at 1361–62.

i. Applicant's Goods are Dissimilar to the Goods in the Cited Registration

To support a conclusion that two marks are confusingly similar, the goods specified in Applicant's application must be so related to the goods listed in the Cited Registration that consumers would be confused about the source of origin. *See* T.M.E.P. §1207.01(a)(i). Where, as here, the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board's dismissal of opposer's likelihood-of-confusion claim, noting "there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source" though both were offered under the COACH mark); *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1551 (TTAB 2015) (finding use of identical marks for towable trailers and trucks not likely to cause confusion given the difference in the nature of the goods and their channels of trade and the high degree of consumer care likely to be exercised by the relevant consumers).

The Applicant's goods as amended above include various catheters including dialysis catheters, catheters, for use in thrombus clot, clot, and emboli removal, and for treating pulmonary embolisms, deep vein thrombosis, peripheral arterial occlusions, and coronary occlusions. The goods in the Cited Registration are "centesis catheters" (the "Registrant's Goods"). There are significant differences between these goods that make confusion between the producers of these goods unlikely. First, the centesis catheters produced by the Registrant are used specifically in procedures for removing fluid from a space in the abdomen or thorax. *See* **Exhibit A**. Any centesis procedure involves puncturing a body cavity, joint, organ, or space with a hollow needle to withdraw fluid. All centesis studies are invasive procedures, typically performed for either therapeutic or diagnostic purposes. The design of a centesis kit, like that of the Registrant, includes a large needle so that a physician can puncture the patient's skin and abdomen to reach the peritoneal or thoracic cavity. *Id*. Registrant's centesis kit is measured at 5 French gauge, which as described in more detail below is much different than Applicant's SYMPHONY system. *Id*.

Applicant's SYMPHONY goods will be used in the vascular system and are made to be inserted in target vessels to remove thrombus, occlusions, or clots. In complete contrast to the aim of centesis catheters, Applicant's Goods are *not* used to remove fluid. In fact, in a thrombectomy the aim is to remove as much thrombus or clot as possible and *minimize* the

removal of fluid. The goal is to remove as little blood as possible in order to maximize the thrombus or clot removal. Also, unlike with centesis catheters which involve puncturing a body cavity, a physician or surgeon would be unable to puncture the wall of a patient's abdomen or chest with Applicant's devices as the tips are too large (with 16 and 24 French gauge) and are designed to be atraumatic. Because Applicant's catheters will be moved in and through the patient's vascular system, the purpose is not to do damage to the interior of a patient's delicate vasculature.

Given these very distinct differences in both the intended uses and the size of the respective goods, it is highly unlikely the relevant purchasers would be confused as to the source of the goods. Registrant's Goods are not used in coronary application and are used by cardio-thoracic surgeons. Applicant's Goods, on the other hand, are used by surgeons and physicians in the vascular system. Because the goods are used in two completely different procedures by different highly skilled medical professionals, confusion is unlikely.

Moreover, as discussed below, multiple marks that contain the word "SYMPHONY" coexist on the Register and in the marketplace used in connection with medical goods and services. As such, even minor distinctions in the respective goods would further obviate any likelihood of confusion.

ii. Consumers of Both Applicant's and Registrant's Goods are Sophisticated Purchasers and Exhibit a High Degree of Care

The nature of the goods at issue and the degree of care likely to be exercised by purchasers of those goods must be considered in a likelihood of confusion analysis. *Accuride Int'l Inv. v. Acuride Corp.,* 10 U.S.P.Q. 1589, 1595 (9th Cir. 1989). The more careful and sophisticated the consumer, the less likely he or she will be confused. *In re N.A.D.,* 224 U.S.P.Q. 969, 971 (Fed. Cir. 1985); *Pfizer Inc. v. Astra Pharmaceutical Products Inc.,* 33 U.S.P.Q.2d 1545, 1562 (S.D.N.Y. 1994) ("[t]he consumers here are doctors, as sophisticated a group as one could imagine"); *Weiss Assocs., Inc. v. HRL Assocs., Inc.,* 902 F.2d 1546, 1548 (Fed. Cir. 1990) (considering the specialized nature of the respective goods and the fact that the consumers are sophisticated, knowledgeable, and highly trained professionals, such consumers would not make these purchases on impulse).

Consumers of Applicant's Goods are vascular surgeons. Surgeons are some of the most highly trained, educated, and skilled doctors in the entire medical field. Surgical procedures require highly specialized goods. The highly specialized vascular surgical goods covered by Applicant's Application are selected by technically trained, professional medical purchasers and vascular surgeons only after thorough deliberations. Consumers of the Registrant's Goods are medical professionals. The Applicant's and the Cited Registrant's consumers are extremely well-educated, sophisticated purchasers of medical goods and services. It has long been recognized that purchasers of medical goods and services, whether hospital personnel or physicians, are highly sophisticated, and, as such, are more likely to distinguish between marks and goods than is the general consuming public. *See In re Inspired Technologies, Inc.,* Serial No. 77/272,899 (non-precedential) (T.T.A.B. 2011). Further, surgical goods are purchased directly from the manufacturer, rather than off the shelf, which further mitigates likelihood of confusion with the

goods intended for use with Applicant's Mark. Therefore, Applicant's and Registrant's consumers are highly aware of the source of the goods intended for Applicant's and Registrant's Mark and are unlikely to be confused.

Both Applicant's and the Cited Registrant's consumers exercise a high degree of care in purchasing medical goods. Medical goods are not an "impulse" purchase. Rather medical goods are purchased with the utmost care. Applicant's and Registrant's medical goods are expensive, require technical expertise to operate, and are used on patients. The lives of these consumer's patients are quite literally at stake, and thus the utmost care goes into picking such goods.

Therefore, Applicant's and the Cited Registrant's consumers are unlikely to be confused and are highly aware of the source of respective goods. Accordingly, this factor also weighs in favor of a finding of no likelihood of confusion.

iii. Existence of Third-Party Registrations for SYMPHONY Marks: Cited Mark is Entitled to Only a Narrow Scope of Protection

The Cited Mark does not warrant a broad scope of protection. In support of this position, Applicant submits that there are third-party registrations for SYMPHONY and SYMPHONY-inclusive marks for various medically related goods and services, all of which include Class 10, yet the marks coexist without causing consumer confusion. *See* **Exhibit B** and the table provided below. Third-party registration or use of a mark may be used to show that a particular term is not entitled to a broad scope of protection. *See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 U.S.P.Q.2d 1689, 1693 (Fed. Cir. 2005).

Mark	**App./Reg. No.**	**Goods/Services**	**Owner**
SYMPHONY	6014178	Class 10: surgical implants comprising artificial material solely for use in spinal surgeries and surgical instruments solely for use in spinal surgeries.	DePuy Synthes, Inc.
SYMPHONY	2687875	Class 10: Breast pumps and accessories therefor	Medela Holding AG
SYMPHONY	5521263	Class 10: Massage chairs; Massage chairs with built-in massage apparatus.	U.S. Jaclean, Inc.
SYMPHONY	5233917	Class 10: Medical devices for use in patient immobilization and transfer for diagnostic imaging and radiotherapy treatments; patient stretchers; stretchers for patient transport; hospital gurneys; trolleys for medical equipment; trolleys for patient transport.	QFIX SYSTEMS LLC
SYMPHONY	3159800	Class 10: automated microscope slide staining device for medical and clinical use.	ROCHE DIAGNOSTICS GMBH

SYMPFINY	5431412	Class 10: Medical apparatus for dosing and dispensing drugs.	HS Design Inc AKA HSD
SYMPHONY	90022189 Notice of Allowance	*In relevant part:* Class 10: Medical and health monitors and sensors, namely, blood pressure monitors, heart rate monitors, cardiac output monitors, pulse rate monitors, and respiratory monitors; Medical and health monitors to detect falls, motion, air quality and temperature changes for medical purposes; Health monitors and sensors that monitor the health of individuals, particularly seniors, in their own homes.	CVS Pharmacy, Inc.
A SYMPHONY FOR FOOT AND ANKLE REPAIR	6070382	Class 10: Medical implants, namely, bone plates made from artificial materials and associated surgical instruments for foot and ankle surgery.	Nextremity Solutions, Inc.
SYMPHONYSUITE	79239318 Notice of Publication	*In relevant part:* Class 10: Medical, surgical and healthcare apparatus and instruments, namely, medical imaging apparatus and instruments excluding spinal instruments and devices.	Koninklijke Philips N.V.
SYMPHONX	5338097	Class 10: laparoscopic surgical instruments.	Fortimedix Surgical B.V. besloten vennootschap (b.v.)
SYMPHONIE AQUA SYSTEM Symphonie Aqua System	5076608	Class 10: Devices for fitting prostheses; Devices for creating plaster casts of patients' limb stumps for manufacturing prosthesis stems or prostheses.	Radspieler, Andreas
TECNIS SYMFONY TECNIS Symfony	4792439	Class 10: Intraocular lenses; intraocular lens implantation devices and parts and fittings therefor; accessories for intraocular lenses and intraocular lens implantation devices, namely, ophthalmic surgical instrument, namely, handheld device used during cataract surgery and vitrectomy.	Johnson & Johnson Surgical Vision, Inc.

The peaceful coexistence of the Cited Mark SYMPHONY and the third-party registrations for SYMPHONY and SYMPHONY-inclusive marks, even though the marks cover

similar medically related goods and services, demonstrates that the term SYMPHONY in Registrant's registration is not entitled to a broad scope of protection. Even minor distinctions in the respective goods would obviate any likelihood of confusion. Consumers, particularly the extremely sophisticated medical consumers like those of the Applicant and Registrant, are accustomed to distinguishing the origin of these marks. Any trademark rights the Cited Registrant possesses are narrow in scope. Therefore, Applicant's mark will *not* create a likelihood confusion with the Cited Mark.

The Cited Mark and Applicant's Mark can peacefully coexist on the Principal Register without causing a likelihood of confusion. This factor weighs heavily in favor of a finding that no likelihood of confusion exists between Applicant's Mark and the Cited Mark.

C. Conclusion: There is No Likelihood of Confusion

In performing any likelihood of confusion analysis, it is essential to remember that likelihood of confusion "is synonymous with 'probable' confusion—it is not sufficient if confusion is merely 'possible.'" 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (4th ed. 2006). Further, the Court of Appeals for the Federal Circuit stated that "[w]e 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." *Elec. Design & Sales Inc. v. Elec. Data Sys. Corp.*, 21 U.S.P.Q.2d 1388, 1391 (Fed. Cir. 1992).

In view of the differences between the goods, the sophistication and high level of care that consumers of Applicant's and Registrant's goods exercise, and the peaceful coexistence of many SYMPHONY and SYMPHONY-inclusive registrations used in connection with medical goods and services on the Principal Register, Applicant submits that confusion is highly unlikely. Applicant respectfully requests that the Examining Attorney withdraw the Section 2(d) refusal and allow the application to pass to publication.

III. Conclusion:

Applicant submits that it has responded to all outstanding issues raised in the Office Action and thus respectfully requests that the Examining Attorney approve the application for publication. Should the Examining Attorney have any questions, the Examining Attorney is encouraged to contact the undersigned.