

PTO Form 1930 (Rev 9/2007)

OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77511013
LAW OFFICE ASSIGNED	LAW OFFICE 105
MARK SECTION (no change)	
ARGUMENT(S)	
<p>LIKELIHOOD OF CONFUSION</p> <p>The Examining Attorney has issued a final Office action refusing registration of the Applicant's proposed mark under Trademark Act Section 2(d), 15 U.S.C. §1052(d) because the Examining Attorney believes it so resembles the mark set forth in Registration No. 3,307,942 (the "Cited Mark") owned by Michal Clements ("Registrant"), as to be likely to cause confusion, or to cause mistake, or to deceive.</p> <p>As an initial matter, per the Examining Attorney's request, the goods and services identified by Applicant have been amended as set forth above. Applicant submits that these amendments should resolve any issues between the proposed mark and the Cited Mark as these amendments serve to further differentiate the goods and services of the two parties.</p> <p>In addition, for all the reasons set forth below, Applicant submits that no likelihood of confusion exists between its proposed mark and the Cited Mark. Therefore, Applicant's mark should be allowed to proceed toward registration on the Principal Register.</p> <p>I. THE APPLICANT'S MARK IS NOT CONFUSINGLY SIMILAR TO THE CITED MARK.</p> <p>Trademark law prohibits use of a senior user's mark on products "which would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner." See <i>Sands, Taylor & Wood Co. v. Quaker Oats Co.</i>, 978 F.2d 947, 958 (7th Cir. 1992) (quoting 2 J. McCarthy, TRADEMARKS AND UNFAIR COMPETITION § 24.3 at 66 (2d ed. 1984)). The basic principle in determining confusion between marks is that they must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used. <i>Glenwood Laboratories v. American Home Products Corp.</i>, 455 F.2d 1384, 1385 (C.C.P.A. 1972); <i>Industria Espanola v. National Silver Co.</i>, 59 C.C.P.A., 459 F.2d 1049, 173 U.S.P.Q. 796 (1972); <i>Rockwood Chocolate Co., Inc. v. Hoffman Candy Co.</i>, 54 C.C.P.A. 1061, 1065; 372 F.2d 552, 555;</p>	

152 U.S.P.Q. 599, 602 (1967) (finding “each case requires consideration of the effect of the entire mark including any term in addition to that which closely resembles the opposing mark.”); *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 750-51 (Fed. Cir. 1985). “[L]ikelihood of confusion is supported if the goods and services are related in some manner or because of marketing circumstances, the marks are likely to be encountered by the same persons under conditions that could give rise to the mistaken belief that they are in some way associated with the same source.” *In re Appetito Provisions Co. Inc.*, 3 U.S.P.Q.2d 1553, 1557 (T.T.A.B. 1987); *Continental Grain Co. v. Central Soya Co.*, 69 F.3d 555, 1995 U.S. App. LEXIS 35997 (Fed. Cir. 1995) (“The test for likelihood of confusion does not focus on similarity of competing marks in the abstract, but compels an evaluation of objective evidence that the competing marks, when used in the marketplace, are likely to confuse the purchasing public about the source of the products.”).

With respect to the term “likelihood,” in the likelihood of confusion standard, “[t]he [Lanham] Act refers to likelihood, not the mere possibility of confusion.” *Bongrain Int’l (American) Corp. v. Delice de France, Inc.*, 811 F.2d 1479, 1486 (Fed. Cir. 1987) (emphasis added). Proof that confusion is only “possible” is insufficient to establish that confusion is likely. *See Vitek Systems, Inc. v. Abbott Labs*, 675 F.2d 190, 216 U.S.P.Q. 476 (8th Cir. 1982); *A&H Sportswear Co. v. Victoria’s Secret Stores, Inc.*, 926 F. Supp. 1233, 1268 (E.D. Pa. 1996), *aff’d*, 49 U.S.P.Q.2d 1493 (3d Cir. 1999); *Estee Lauder Inc. v. The Gap, Inc.*, 108 F.3d 1503, 1511 (2d Cir. 1997); *Star Fin. Serv., Inc. v. AASTAR Mortgage Corp.*, 89 F.3d 5, 10 (1st Cir. 1996) (“We require evidence of a ‘substantial’ likelihood of confusion –not a mere possibility”). Even close similarity between two marks is not dispositive of the issue of likelihood of confusion.

The factors pertinent to the issue of likelihood of confusion are set forth in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973). When reviewing a trademark using the *DuPont* factors, “it is the duty of the examiner, the board, and [the] court to find, upon consideration of all the evidence, whether or not confusion appears likely.” *Id.* at 1362. (emphasis added). However, not all of the 13 factors identified in *DuPont* are relevant or of similar weight in every case. *See Opryland USA Inc. v. Great American Music Show*, 970 F.2d 847, 850 (Fed. Cir. 1992).

The Examining Attorney states that the *DuPont* factors to be considered in this case are the similarity of the marks, similarity of the services and similarity of the trade channels. Applicant respectfully submits that if the Examining Attorney reconsiders the evidence set forth with respect to these identified factors in addition to the fourth *DuPont* factor, the conditions under which and buyers to whom sales are made, the Examining Attorney will agree that no likelihood of confusion exists between the two marks, and that Applicant’s proposed mark should be permitted to proceed towards registration.

A. The Marks are Dissimilar in Sound, Connotation And Commercial Impression.

The first *DuPont* factor considered by the Examining Attorney was “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361. The individual components or features should not be “dissected” and analyzed piecemeal. *See Forschner Group Inc., v. Arrow Trading Co.*, 124 F.3d 402, 409 (2d Cir. 1997); *August*

Storck K.G. v. Nabisco, Inc., 59 F.3d 616 (7th Cir. 1995); *In re The Hearst Corp.*, 982 F.2d 493, 494, 25 U.S.P.Q.2d 1238 (Fed. Cir. 1992) (finding no likelihood of confusion resulting from contemporaneous use of VARGAS and VARGA GIRL on identical goods, namely, calendars). Instead, all components of the mark must be considered and given appropriate weight, not simply the commonalities. See *Opryland USA Inc. v. Great American Music Show*, 970 F.2d at 851; 2 J. Thomas McCarthy, *McCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, § 23:47 (4th ed. 1996). The fundamental rule in these circumstances is that the marks must be considered in their entireties. See, e.g., *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 U.S.P.Q. 272 (C.C.P.A. 1974).

Applicant reiterates the arguments from its previous response—namely, that an analysis of the three factors of visual appearance, pronunciation and connotation tend to show that the respective marks, when viewed in their entireties, are not alike in sight, sound or commercial impression. Applicant also submits that the alliterative cadence of INSIGHT INTO ACTION evokes a unique impression. The focus of pronunciation of the words INSIGHT INTO is clearly on the “in”, “in” cadence, an element completely absent from Registrant’s mark. Applicant’s playful use of alliteration and sound creates a distinct commercial impression. This unique element combined with the difference in appearance demonstrates that the marks, when looked at in their entirety, present no danger of confusion in the marketplace. Taken as a whole, the alliterative sound and commercial impression of the proposed mark will create a distinct impression in the minds of consumers when the marks are perceived.

When the factors of sound, sight, meaning and commercial impression are considered together and the marks are reviewed in their entireties, the marks are not sufficiently similar so as to create a likelihood of confusion among consumers. Therefore, the first *DuPont* factor weighs in favor of registering Applicant’s mark.

B. The Goods and Services of the Parties Are Not Related, and Consumers are Not Likely to Believe the Goods and Services Emanate from the Same Source.

The similarity or dissimilarity of the nature of the goods or services as described in an application or registration must be considered carefully in examining likelihood of confusion. *DuPont*, 476 F.2d at 1363. The Examining Attorney must look closely at the goods registered under the mark in order to determine their similarity. See *In re Amsted Industries, Inc.*, 972 F.2d 1326 (Fed. Cir. 1992) (error to refer to wire rope with a single orange strand and wire rope with both a black strand and an orange strand as simply “orange wire rope”).

The question of likelihood of confusion in this case must be determined based on an analysis of the marks as applied to the services recited in the respective applications. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 U.S.P.Q.2d 1813, 1815 (Fed. Cir. 1987). In the most recent Office action, the Examining Attorney restates the well-known proposition that, in order to find a likelihood of confusion, “the goods and/or services of two parties must be so related or the conditions surrounding their marketing must be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods and/or services come from a common source”. However, that is not the case in this instance. The services offered under each mark are completely distinct and are directed to

entirely different purchasers. The mere fact that both parties' goods and services may fall into the same broad category or field or even include research does not render the parties' goods or services, trade channels or customers sufficiently related to warrant a conclusion of likelihood of confusion. *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201 (1st Cir. 1983); *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713 (Fed. Cir. 1992).

As stated in its amended recitation of goods and services, Applicant offers research and learning solutions specifically for the healthcare industry. Through Applicant's proprietary databases, applications and questionnaires, hospital executives and management staff receive and use feedback from patients, hospital staff and the surrounding community to "create safer environments for patients, increase clinical competencies of their workforces, and facilitate the rapid transfer of the latest knowledge and technologies." See Exhibit A attached hereto and hereby made of record. Applicant is focused on identifying and interpreting the interactions between hospitals, hospital staff, physicians and patients in order to improve the efficacy, organization and administration of the hospital. Furthermore, Applicant's services are primarily directed toward patient experiences and relationships between physicians and hospitals in order to augment clinical competency of the hospital. As a result, Applicant exclusively focuses its data services on the healthcare industry and specifically identifies the purchaser of its services as the hospital and healthcare organization executive.

Alternatively, Registrant is engaged in the business of advertising, specifically the brand development of products. As indicated by its "Action Example" which provides a helpful illustration of the services it provides, Registrant specifically works with national corporations who wish to develop advertising strategies for a particular product. See Exhibit B attached hereto and hereby made of record. Registrant may tangentially offer market surveys, but as indicated by the Examining Attorney's evidence, the purpose of such surveys are to support Registrant's brand recommendations for marketing a client's product to specific demographics and for other product brand development. In other words, Registrant is an advertising/branding agency. Registrant is not in the business of researching hospital activities and management in order to advise hospitals and healthcare organizations how to more efficiently and effectively operate their organizations. Registrant is, in fact, in an entirely different line of business from Applicant altogether.

In this case, the goods and services of the two parties are not remotely related and would not be encountered by the same purchasers under circumstances that would give rise to a likelihood of confusion. The two companies operate in wholly distinct markets—Applicant catering to healthcare providers seeking to improve their efficiency, workforce and technology, and Registrant catering to companies in need of developing a trademark or brand. In addition, because of the separate markets for the services of the companies and the vast difference in consumers, the Applicant's services are not in the Registrant's logical zone of expansion. Since Applicant and Registrant offer services that are dissimilar in nature and attract different customers, no likelihood of confusion will result from simultaneous use of the marks. Therefore, this *DuPont* factor strongly favors registration of Applicant's mark.

C. The Trade Channels of the Parties' Goods and Services Are Different.

The third *DuPont* factor concerns “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361. Typically, where trade channels differ, confusion as to either source of origin or sponsorship is unlikely. Where, as in this case, the services of one party are sold to one class of buyers in a different marketing context than the services of another seller, the likelihood that a single group of buyers will be confused by similar trademarks is lessened. See *McCormick & Co., v. B. Manischewitz Co.*, 206 F.2d 744 (6th Cir. 1953). An analysis of this factor supports registration of Applicant’s mark.

As discussed above and as apparent from the descriptions of the services of the Applicant and the Registrant, the trade channels are not the same. Consumers simply would not encounter these services together. Registrant offers a variety of brand development services to businesses. As indicated by the “Clients Served” link on its website, the typical consumers of Registrant’s services are manufacturers of food, pharmaceuticals, clothing and other sundry items. See Exhibit C attached hereto and hereby made of record. It appears that Registrant’s customers are seeking the expertise of an advertising and marketing agency to develop a “brand” or a trademark.

In contrast, consumers will not come into contact with Applicant’s services unless they are a hospital or healthcare executive soliciting services that will help to improve the efficiency and effectiveness of their healthcare organization. These healthcare organizations are not seeking to brand a specific product, but to understand how to close or prevent operational inefficiencies.

The Registrant’s target market differs so greatly from Applicant’s healthcare and hospital consumers that the respective parties’ goods and services necessarily move in entirely different channels of trade. Therefore, confusion as to the source of origin of these services is highly unlikely and the third *DuPont* factor also weighs in favor of registering Applicant’s mark.

D. The Conditions Under Which The Public Would Encounter Applicant’s and Registrant’s Goods and Services Differ Considerably.

An analysis of an additional *DuPont* factor, the “conditions under which and buyers to whom sales are made” (*i.e.*, “impulse” vs. careful, sophisticated purchasing), also favors registration of Applicant’s proposed mark. See *DuPont*, 476 F.2d at 1361. Courts have specifically stated that sophisticated consumers are less likely to be confused where goods are of the type that will be purchased after careful consideration. See, *e.g.*, *Pignons S.A. DeMecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489 (1st Cir. 1981) (finding that the marks ALPA and ALPHA were not confusingly similar based in part on the sophistication of prospective purchasers). Indeed, “[s]ophisticated consumers may be expected to exercise greater care.” *Id.*

When purchasing expensive goods, the consumer purchases only after careful consideration, thus confusion is less likely. *McCarthy on Trademarks and Unfair Competition*, Section 23:96 (4th Ed. 1999); *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 212 USPQ 246 (1st Cir. 1981) (no likelihood of confusion between ALPA cameras costing \$550-\$1400 and ALPHA cameras costing \$188-\$233); and, *J.C. Penny Co. v. Arctic Enterprises, Inc.*, 375 F.Supp. 913, 183 USPQ 342 (D. Minn. 1974) (buyer of snowmobile costing \$1500 is knowledgeable and sophisticated and not likely to be confused

by same mark used on senior user's \$40 auto tires). As explained in *Astra Pharmaceutical Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1206, 220 U.S.P.Q. 786 (1st Cir. 1983), "[i]f likelihood of confusion exists, it must be based on the confusion of some relevant person, *i.e.*, a customer or purchaser. And there is always less likelihood of confusion where goods are expensive and purchased after careful consideration." Simply stated, the greater the degree of sophistication of customers or purchasers, the less likely the confusion.

While the Examining Attorney acknowledges the fact that the purchasers of the services of both the Registrant and Applicant are sophisticated purchasers, the Examining Attorney failed to consider the degree of care such purchasers will take with respect to the services identified herein. *Sun-Fun Products, Inc. v. Suntan Research & Development, Inc.*, 656 F.2d 186, 189 (5th Cir. 1981). Both Registrant's and Applicant's services are individually tailored for each consumer, and thus require a high level of involvement and sophisticated interaction with potential consumers. In addition, healthcare companies have been held generally to be sophisticated purchasers of services. *See Societe Anonyme De La Grande Distillerie E. Cusenier Fils Aine & Cie v. Julius Wile Sons & Co., Inc.*, 161 F. Supp. 545, 548 (S.D.N.Y. 1958). Applicant offers a service that not only targets healthcare organization executives, the product is only useful to a healthcare company. It cannot practically be used in other industries because it is designed exclusively to help hospitals. In light of this consumer base, Applicant's consumers are necessarily sophisticated and informed with respect to the services they are seeking and intend to use.

Applicant offers an expensive, industry-specific service. It is highly unlikely that a sophisticated, knowledgeable healthcare executive or administrator seeking healthcare-specific research and learning services would confuse Registrant as the source of such services. In view of the fact that neither Applicant's nor Registrant's services are of the type that would be subject to "impulse" selection, any likelihood of confusion as to the source of Applicant's or Registrant's services is remote. *See generally Astra Pharmaceuticals Prods., Inc.*, 718 F.2d at 1206. For this reason, this *DuPont* factor also favors registration of the proposed mark.

II. CONCLUSION.

For all the reasons set forth above, Applicant respectfully submits that the refusal to register Applicant's proposed mark was in error and submits that the proposed mark is not confusingly similar to the Cited Mark. Therefore, Applicant requests that the Examining Attorney allow the mark to proceed toward registration.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	http://tgate/PDF/RFR/2009/10/09/20091009163019320265-77511013-001_001/evi_6790153173-161112359_._Exhibits_for_Req_for_Reconsideration.pdf
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DESCRIPTION OF EVIDENCE FILE	Exhibits A-C printouts from websites
GOODS AND/OR SERVICES SECTION (035)(current)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Survey research and learning services, namely, conducting surveys and questionnaires to gather and interpret data regarding learning interactions; scientific research services, namely, engagement of customers through proprietary interactive computer-based and driven databases that derive information regarding learning interactions through such research	
FILING BASIS	Section 1(b)
GOODS AND/OR SERVICES SECTION (035)(proposed)	
INTERNATIONAL CLASS	035
DESCRIPTION	
Public opinion surveys, namely, conducting surveys to gather and interpret data regarding learning interactions	
FILING BASIS	Section 1(b)
GOODS AND/OR SERVICES SECTION (016)(class added)	
INTERNATIONAL CLASS	016

DESCRIPTION	
Questionnaires on hospital organization, administration and patient care	
FILING BASIS	Section 1(b)
GOODS AND/OR SERVICES SECTION (041)(class added)	
INTERNATIONAL CLASS	041
DESCRIPTION	
Education services, namely, providing seminars and courseware in the field of healthcare	
FILING BASIS	Section 1(b)
GOODS AND/OR SERVICES SECTION (042)(class added)	
INTERNATIONAL CLASS	042
DESCRIPTION	
Scientific research services, namely, engagement of customers through proprietary interactive computer-based and driven databases that derive information regarding learning interactions through such research	
FILING BASIS	Section 1(b)
PAYMENT SECTION	
NUMBER OF CLASSES	3
FEE PER CLASS	325
TOTAL FEES DUE	975
SIGNATURE SECTION	
DECLARATION SIGNATURE	/Cara L. Jackson/
SIGNATORY'S NAME	Cara L. Jackson
SIGNATORY'S POSITION	Attorney, TN Bar Member
DATE SIGNED	10/09/2009
RESPONSE SIGNATURE	/Cara L. Jackson/
SIGNATORY'S NAME	Cara L. Jackson
SIGNATORY'S POSITION	Attorney, TN Bar Member
DATE SIGNED	10/09/2009
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	

SUBMIT DATE	Fri Oct 09 16:30:19 EDT 2009
TEAS STAMP	USPTO/RFR-67.90.153.173-2 0091009163019320265-77511 013-460ee655d2b228fc64db6 14f9e94b1cb4-DA-2846-2009 1009161112359806

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OMB No. 0651-0050 (Exp. 4/30/2009)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **77511013** has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

LIKELIHOOD OF CONFUSION

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In addition, for all the reasons set forth below, Applicant submits that no likelihood of confusion exists between its proposed mark and the Cited Mark. Therefore, Applicant's mark should be allowed to proceed toward registration on the Principal Register.

I. THE APPLICANT'S MARK IS NOT CONFUSINGLY SIMILAR TO THE CITED MARK.

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B. The Goods and Services of the Parties Are Not Related, and Consumers are Not Likely to Believe the Goods and Services Emanate from the Same Source.

The similarity or dissimilarity of the nature of the goods or services as described in an application or registration must be considered carefully in examining likelihood of confusion. *DuPont*, 476 F.2d at 1363. The Examining Attorney must look closely at the goods registered under the mark in order to determine their similarity. *See In re Amsted Industries, Inc.*, 972 F.2d 1326 (Fed. Cir. 1992) (error to refer to wire rope with a single orange strand and wire rope with both a black strand and an orange strand as simply “orange wire rope”).

The question of likelihood of confusion in this case must be determined based on an analysis of the marks as applied to the services recited in the respective applications. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 U.S.P.Q.2d 1813, 1815 (Fed. Cir. 1987). In the most recent Office action, the Examining Attorney restates the well-known proposition that, in order to find a likelihood of confusion, “the goods and/or services of two parties must be so related or the conditions surrounding their marketing must be such that they could be encountered by the same purchasers under circumstances that could give rise to the

mistaken belief that the goods and/or services come from a common source”. However, that is not the case in this instance. The services offered under each mark are completely distinct and are directed to entirely different purchasers. The mere fact that both parties’ goods and services may fall into the same broad category or field or even include research does not render the parties’ goods or services, trade channels or customers sufficiently related to warrant a conclusion of likelihood of confusion. *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201 (1st Cir. 1983); *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713 (Fed. Cir. 1992).

As stated in its amended recitation of goods and services, Applicant offers research and learning solutions specifically for the healthcare industry. Through Applicant’s proprietary databases, applications and questionnaires, hospital executives and management staff receive and use feedback from patients, hospital staff and the surrounding community to “create safer environments for patients, increase clinical competencies of their workforces, and facilitate the rapid transfer of the latest knowledge and technologies.” See Exhibit A attached hereto and hereby made of record. Applicant is focused on identifying and interpreting the interactions between hospitals, hospital staff, physicians and patients in order to improve the efficacy, organization and administration of the hospital. Furthermore, Applicant’s services are primarily directed toward patient experiences and relationships between physicians and hospitals in order to augment clinical competency of the hospital. As a result, Applicant exclusively focuses its data services on the healthcare industry and specifically identifies the purchaser of its services as the hospital and healthcare organization executive.

Alternatively, Registrant is engaged in the business of advertising, specifically the brand development of products. As indicated by its “Action Example” which provides a helpful illustration of the services it provides, Registrant specifically works with national corporations who wish to develop advertising strategies for a particular product. See Exhibit B attached hereto and hereby made of record. Registrant may tangentially offer market surveys, but as indicated by the Examining Attorney’s evidence, the purpose of such surveys are to support Registrant’s brand recommendations for marketing a client’s product to specific demographics and for other product brand development. In other words, Registrant is an advertising/branding agency. Registrant is not in the business of researching hospital activities and management in order to advise hospitals and healthcare organizations how to more efficiently and effectively operate their organizations. Registrant is, in fact, in an entirely different line of business from Applicant altogether.

In this case, the goods and services of the two parties are not remotely related and would not be encountered by the same purchasers under circumstances that would give rise to a likelihood of confusion. The two companies operate in wholly distinct markets—Applicant catering to healthcare providers seeking to improve their efficiency, workforce and technology, and Registrant catering to companies in need of developing a trademark or brand. In addition, because of the separate markets for the services of the companies and the vast difference in consumers, the Applicant’s services are not in the Registrant’s logical zone of expansion. Since Applicant and Registrant offer services that are dissimilar in nature and attract different customers, no likelihood of confusion will result from simultaneous use of the marks. Therefore, this *DuPont* factor strongly favors registration of Applicant’s mark.

C. The Trade Channels of the Parties’ Goods and Services Are Different.

The third *DuPont* factor concerns “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361. Typically, where trade channels differ, confusion as to either source of origin or sponsorship is unlikely. Where, as in this case, the services of one party are sold to one class of buyers in a different marketing context than the services of another seller, the likelihood that a single group of buyers will be confused by similar trademarks is lessened. See *McCormick & Co., v. B. Manischewitz Co.*, 206 F.2d 744 (6th Cir. 1953). An analysis of this factor supports registration of Applicant’s mark.

As discussed above and as apparent from the descriptions of the services of the Applicant and the Registrant, the trade channels are not the same. Consumers simply would not encounter these services together. Registrant offers a variety of brand development services to businesses. As indicated by the “Clients Served” link on its website, the typical consumers of Registrant’s services are manufacturers of food, pharmaceuticals, clothing and other sundry items. See Exhibit C attached hereto and hereby made of record. It appears that Registrant’s customers are seeking the expertise of an advertising and marketing agency to develop a “brand” or a trademark.

In contrast, consumers will not come into contact with Applicant’s services unless they are a hospital or healthcare executive soliciting services that will help to improve the efficiency and effectiveness of their healthcare organization. These healthcare organizations are not seeking to brand a specific product, but to understand how to close or prevent operational inefficiencies.

The Registrant’s target market differs so greatly from Applicant’s healthcare and hospital consumers that the respective parties’ goods and services necessarily move in entirely different channels of trade. Therefore, confusion as to the source of origin of these services is highly unlikely and the third *DuPont* factor also weighs in favor of registering Applicant’s mark.

D. The Conditions Under Which The Public Would Encounter Applicant’s and Registrant’s Goods and Services Differ Considerably.

An analysis of an additional *DuPont* factor, the “conditions under which and buyers to whom sales are made” (*i.e.*, “impulse” vs. careful, sophisticated purchasing), also favors registration of Applicant’s proposed mark. See *DuPont*, 476 F.2d at 1361. Courts have specifically stated that sophisticated consumers are less likely to be confused where goods are of the type that will be purchased after careful consideration. See, *e.g.*, *Pignons S.A. DeMecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 489 (1st Cir. 1981) (finding that the marks ALPA and ALPHA were not confusingly similar based in part on the sophistication of prospective purchasers). Indeed, “[s]ophisticated consumers may be expected to exercise greater care.” *Id.*

When purchasing expensive goods, the consumer purchases only after careful consideration, thus confusion is less likely. *McCarthy on Trademarks and Unfair Competition*, Section 23:96 (4th Ed. 1999); *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 212 USPQ 246 (1st Cir. 1981) (no likelihood of confusion between ALPA cameras costing \$550-\$1400 and ALPHA cameras costing \$188-\$233); and, *J.C. Penny Co. v. Arctic Enterprises, Inc.*, 375 F.Supp. 913, 183 USPQ 342 (D. Minn. 1974) (buyer of snowmobile costing \$1500 is knowledgeable and sophisticated and not likely to be confused by same mark used on senior user’s \$40 auto tires). As explained in *Astra Pharmaceutical Prods., Inc. v.*

Beckman Instruments, Inc., 718 F.2d 1201, 1206, 220 U.S.P.Q. 786 (1st Cir. 1983), “[i]f likelihood of confusion exists, it must be based on the confusion of some relevant person, *i.e.*, a customer or purchaser. And there is always less likelihood of confusion where goods are expensive and purchased after careful consideration.” Simply stated, the greater the degree of sophistication of customers or purchasers, the less likely the confusion.

While the Examining Attorney acknowledges the fact that the purchasers of the services of both the Registrant and Applicant are sophisticated purchasers, the Examining Attorney failed to consider the degree of care such purchasers will take with respect to the services identified herein. *Sun-Fun Products, Inc. v. Suntan Research & Development, Inc.*, 656 F.2d 186, 189 (5th Cir. 1981). Both Registrant’s and Applicant’s services are individually tailored for each consumer, and thus require a high level of involvement and sophisticated interaction with potential consumers. In addition, healthcare companies have been held generally to be sophisticated purchasers of services. *See Societe Anonyme De La Grande Distillerie E. Cusenier Fils Aine & Cie v. Julius Wile Sons & Co., Inc.*, 161 F. Supp. 545, 548 (S.D.N.Y. 1958). Applicant offers a service that not only targets healthcare organization executives, the product is only useful to a healthcare company. It cannot practically be used in other industries because it is designed exclusively to help hospitals. In light of this consumer base, Applicant’s consumers are necessarily sophisticated and informed with respect to the services they are seeking and intend to use.

Applicant offers an expensive, industry-specific service. It is highly unlikely that a sophisticated, knowledgeable healthcare executive or administrator seeking healthcare-specific research and learning services would confuse Registrant as the source of such services. In view of the fact that neither Applicant’s nor Registrant’s services are of the type that would be subject to “impulse” selection, any likelihood of confusion as to the source of Applicant’s or Registrant’s services is remote. *See generally Astra Pharmaceuticals Prods., Inc.*, 718 F.2d at 1206. For this reason, this *DuPont* factor also favors registration of the proposed mark.

II. CONCLUSION.

For all the reasons set forth above, Applicant respectfully submits that the refusal to register Applicant’s proposed mark was in error and submits that the proposed mark is not confusingly similar to the Cited Mark. Therefore, Applicant requests that the Examining Attorney allow the mark to proceed toward registration.

EVIDENCE

Evidence in the nature of Exhibits A-C printouts from websites has been attached.

Original PDF file:

http://tgate/PDF/RFR/2009/10/09/20091009163019320265-77511013-001_001/evi_6790153173-161112359_._Exhibits_for_Req_for_Reconsideration.pdf

Converted PDF file(s) (11 pages)

[Evidence-1](#)

[Evidence-2](#)

[Evidence-3](#)

[Evidence-4](#)

[Evidence-5](#)

[Evidence-6](#)

[Evidence-7](#)

Evidence-8

Evidence-9

Evidence-10

Evidence-11

CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 035 for Survey research and learning services, namely, conducting surveys and questionnaires to gather and interpret data regarding learning interactions; scientific research services, namely, engagement of customers through proprietary interactive computer-based and driven databases that derive information regarding learning interactions through such research

Original Filing Basis:

Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

Proposed: Class 035 for Public opinion surveys, namely, conducting surveys to gather and interpret data regarding learning interactions

Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

Applicant hereby adds the following class of goods/services to the application:

New: Class 016 for Questionnaires on hospital organization, administration and patient care

Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

Applicant hereby adds the following class of goods/services to the application:

New: Class 041 for Education services, namely, providing seminars and courseware in the field of healthcare

Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

Applicant hereby adds the following class of goods/services to the application:

New: Class 042 for Scientific research services, namely, engagement of customers through proprietary interactive computer-based and driven databases that derive information regarding learning interactions through such research

Filing Basis: Section 1(b), Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date of the application. (15 U.S.C. Section 1051(b)).

FEE(S)

Fee(s) in the amount of \$975 is being submitted.

SIGNATURE(S)

Declaration Signature

If the applicant is seeking registration under Section 1(b) and/or Section 44 of the Trademark Act, the applicant has had a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services as of the filing date

of the application. 37 C.F.R. Secs. 2.34(a)(2)(i); 2.34 (a)(3)(i); and 2.34(a)(4)(ii); and/or the applicant has had a bona fide intention to exercise legitimate control over the use of the mark in commerce by its members. 37 C.F. R. Sec. 2.44. If the applicant is seeking registration under Section 1(a) of the Trademark Act, the mark was in use in commerce on or in connection with the goods and/or services listed in the application as of the application filing date or as of the date of any submitted allegation of use. 37 C.F.R. Secs. 2.34(a)(1)(i); and/or the applicant has exercised legitimate control over the use of the mark in commerce by its members. 37 C.F.R. Sec. 244. The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; that if the original application was submitted unsigned, that all statements in the original application and this submission made of the declaration signer's knowledge are true; and all statements in the original application and this submission made on information and belief are believed to be true.

Signature: /Cara L. Jackson/ Date: 10/09/2009
Signatory's Name: Cara L. Jackson
Signatory's Position: Attorney, TN Bar Member

Request for Reconsideration Signature

Signature: /Cara L. Jackson/ Date: 10/09/2009
Signatory's Name: Cara L. Jackson
Signatory's Position: Attorney, TN Bar Member

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

RAM Sale Number: 2846
RAM Accounting Date: 10/13/2009

Serial Number: 77511013
Internet Transmission Date: Fri Oct 09 16:30:19 EDT 2009
TEAS Stamp: USPTO/RFR-67.90.153.173-2009100916301932
0265-77511013-460ee655d2b228fc64db614f9e
94b1cb4-DA-2846-20091009161112359806

Exhibit A



Knowledge Network

Ask the Experts



Insight Into Action

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"Could you explain what 'Insight into Action' means?"

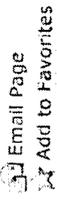
Answer provided by:

Mollie Condra, Ph.D.
Senior Director, Communications, Research, & Investor Relations
HealthStream, Inc.

HealthStream provides research and learning solutions for the healthcare industry that enable healthcare organizations to transform insight into action. Through our research products, executives from healthcare organizations gain valuable **insight** about patients' experiences, workforce challenges, physician relations, and community perceptions of their services. Through HealthStream's learning solutions, which have been contracted by over 1.7 million hospital-based healthcare professionals, healthcare organizations take **action** to create safer environments for patients, increase clinical competencies of their workforces, and facilitate the rapid transfer of the latest knowledge and technologies.

Our innovative approach to bridge research and learning in our solution set means that we can provide healthcare organizations with targeted actions through learning to address challenges revealed through research. In this way, healthcare organizations' investment in learning is optimized with solutions that maximize workforce development, improve physician alignment, and build strong community relations.

Moreover, we believe the process of helping healthcare organizations transform insight into action is dynamic and continuous.



That is, the results of measuring the satisfaction levels of patients, employees, physicians, and members of the community provide valuable insight regarding learning solutions most needed. As action is then taken via the learning solutions, results are measured once again to track progress. In other words, the cycle of transforming insight into action is dynamic—just like healthcare organizations and the people who work in them.

Do you have a question you'd like to send to our team of experts? Send an email to researchinfo@healthstream.com, and our interdisciplinary team of experts will provide you with a detailed answer. Specify if you wish to remain anonymous.

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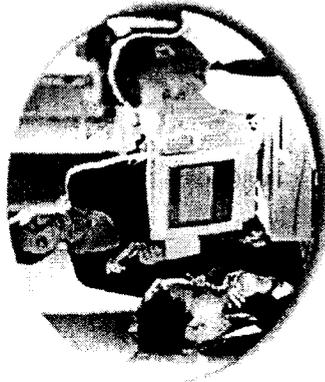
[Add to Favorites](#)

About HealthStream Research

HealthStream (NASDAQ: HSTM) is a leading provider of learning and research solutions for the healthcare industry, transforming insight into action to deliver outcomes-based results for healthcare organizations. Through HealthStream Research, executives from approximately 1,100 healthcare facilities gain valuable insight about patients' experiences, workforce challenges, physician relations, and community perceptions of their services. Through HealthStream's learning solutions—which are used by approximately 1.7 million hospital-based healthcare professionals—healthcare organizations create safer environments for patients, increase clinical competencies of its workforce, and facilitate the rapid transfer of the latest knowledge and technologies.

HealthStream provides full service research (patients, employees, physicians, and community) and integrates results, analyses, recommendations, and consulting across the entire healthcare spectrum. Through **HealthStream Research™**, leaders from approximately 1,100 healthcare facilities gain valuable insight about patients' experiences, workforce challenges, physician relations, and community perceptions of their services.

Over 1,700,000 healthcare professionals—representing over 1,700 healthcare organizations—subscribe to our Internet-based learning platform, the **HealthStream Learning Center™**, for training and education, creating the healthcare industry's most expansive learning network.



Through research and learning, HealthStream turns **Insight** into **Action**.

Insight through Research

- Research for all constituencies of healthcare—patients, employees, medical staff, and the communities you serve.
- Thorough analyses provide insightful recommendations for change.
- Comprehensive databases provide benchmarking down to the department level, against competitors, and against business outcomes.
- Onsite consulting ensures your organization will see results as an outcome of your research by providing action plan training at the department level, goal setting recommendations, counsel on communicating results and programs to employees.

Action through Learning

- Through HealthStream's state-of-the-art web-based learning platform, the **HealthStream Learning Center™**, approximately 1.4 million hospital-based healthcare professionals get the knowledge and tools to create safer environments for patients, increase clinical competencies of its workforce, and facilitate the rapid transfer of the latest information and technologies.

HealthStream Research Services:

- HCAHPS and Patient Satisfaction and Loyalty Measurement
- Community and Brand Equity Research
- Physician Research for active medical staff.
- Referring Physicians Research
- Physician Office Patients Research
- Employee Satisfaction and Engagement
- Onboarding and Exit Interviewing

Our Client Base Includes:

- Acute Care
- Ambulatory Care
- Specialty Healthcare Companies
- Rehabilitation Centers
- Behavioral Health Care
- Disease Management
- Long-term Care
- Physician Office Practices

Why HealthStream Research?

Throughout your project, you can have confidence in:

- Our ability to understand and address your issues with our exclusive healthcare focus
- Making decisions that affect your business.
- The direction in which you move your organization with our quality analysis, actionable recommendations and on-site training and presentation of results
- Knowing how you compare against other organizations with our robust national benchmarking databases.
- Choosing the methodology that is right for your organization. Depending on your project, we will use one, or a combination, of phone, online, and mail collection methods to obtain the most responses possible.
- On-time delivery of your reports.

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Exhibit B

About Us

INSIGHT TO ACTION is a high touch client-focused consulting firm. As our name describes, we combine in-depth industry, customer and competitive marketplace insights with creativity and client collaboration to create a credible, definable and measurable blueprint for action.



Founded by Michal Clements, an industry leader with both consulting and operational experience, INSIGHT TO ACTION'S services encompass:

- Creating, naming and positioning new brands
- Evaluating and building brand architecture and equity
- Customer focused targeting and segmentation for brand building
- Positioning and re-positioning existing brands, assuring brand integrity
- Nurturing, expanding and protecting existing brands and brand equity

Nimble and organizationally flat, every INSIGHT TO ACTION client is served by a principal of the firm. The firm has experience in a wide array of business to business and business to consumer industries.

about us

our team:

Michal Clements
Leslie Berger
Judy Harrison
Laura Ehlers
Elise Basket
Maria Gracia
Ashleigh Meyn
Ketul Patel
Marcia Delaney
Fraser Clark
Kristen Toton
Julie M. Zaideman

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action example:

Captique

recent research

Womens Business Enterprise

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Action Examples

Breakfast Cookie Case Study

Industry: Food & Beverage

Marketing Challenge:

Identify And Prioritize Growth Opportunities In The Breakfast Meal Occasion



A leading consumer packaged goods client with major food and beverage brands needed to identify opportunities to grow its position within the breakfast meal occasion

The goal was to identify the most significant growth opportunity areas based on a sound marketplace map. Then, for each prioritized opportunity area, several specific new product concepts were created. The new product ideas were quantitatively tested and top performers were pursued for in market testing and launch.

The challenge was not only creative (creating innovative ideas), but also strategic, to develop an integrated strategic map to use in guiding development ongoing vs. "stop and start" initiatives.

- Marketing Challenge
- Insight To Action Approach
- Business Results

©2006-2009 Insight to Action

about us

our team:

- michal clements
- leslie berger
- judy harrison
- laura ehlers
- elise basket
- maria gracia
- ashleigh meyn
- ketul patel
- marcia delaney
- fraser clark
- kristen toton
- julie m. zaideman

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Exhibit C

Clients Served



about us

our team:

- michal clements
- leslie berger
- judy harrison
- laura ehlers
- elise basket
- maria gracia
- ashleigh meyn
- ketul patel
- marcia delaney
- fraser clark
- kristen toton
- julie m. zaideman

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RAM SALE NUMBER: 2846
RAM ACCOUNTING DATE: 20091013

INTERNET TRANSMISSION DATE:
2009/10/09

SERIAL NUMBER:
77/511013

Description	Fee Code	Transaction Date	Fee	Number Of Classes	Total Fees Paid
New App	7001	2009/10/09	325	3	975