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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86393524
Applicant	Bald Eagle Health Group, LLC
Applied for Mark	SUNRISE DETOX
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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In re Application of

Bald Eagle Health Group, LLC  
(a Delaware Limited Liability Company)

Serial Number 86/393,524  
for the mark SUNRISE DETOX  
Filed September 12, 2014

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On Appeal from the United States  
Patent and Trademark Office

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BRIEF FOR APPLICANT/APPELLANT

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**I. INTRODUCTION**

Applicant/Appellant, BALD EAGLE HEALTH CARE GROUP, LLC, hereby appeals from the Examining Attorney's final refusal to register the mark SUNRISE DETOX, and respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney's decision. Applicant seeks registration of the above-identified mark for addiction treatment services, *inter alia*, in International Class 044. The Examining Attorney has refused registration of Applicant's mark on the grounds that it is likely to be confused with the mark SUNRISE RECOVERY RANCH, previously registered under U.S. Trademark Registration No. 3,346,110 for addiction treatment services, notwithstanding the differences in sound, appearance and commercial impression between the marks.

Applicant further respectfully submits that its co-pending applications have been treated in an inconsistent manner. The present application is one of five applications filed simultaneously by Applicant to register marks, each examined by the same Examining Attorney. Nevertheless, the Examining Attorney appears to have dissected the marks in the present application and Applicant's U.S. Trademark Application Serial Number 86/393,297 for the mark DETOX WITH DIGNITY, but did not do so in examining the applications to register the marks RECOVERY WITH DIGNITY, COUNSELING WITH DIGNITY and SUNRISE CARES, each of which is now the subject of an issued U.S. Trademark Registration. In doing so, the Examining Attorney appears to have considered certain elements of Applicant's marks interchangeable and/or merely descriptive in some instances - but not in others - to support the refusal of this and the DETOX WITH DIGNITY applications.<sup>1</sup> Had the applications been treated consistently, the present application should have proceeded toward registration.

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<sup>1</sup> An Ex- Parte Appeal for the DETOX WITH DIGNITY application is pending simultaneously herewith.

**II. STATEMENT OF JURISDICTION**

The Trademark Trial and Appeal Board has jurisdiction over this matter, as this Appeal is taken to the Board from the Trademark Examining Attorney's Final Refusal of registration dated July 11, 2015 and denial of Applicant's Request for Reconsideration on October 7, 2015. 15 U.S.C. § 1070; TBMP § 1201.01.

**III. STATEMENT OF THE ISSUES**

- A. Whether Applicant's mark is confusingly similar to the cited registered mark.
- B. Whether Applicant's co-pending applications have been treated inconsistently.

**IV. DESCRIPTION OF THE RECORD**

Appellant filed the present application on September 12, 2014. The application is directed to the mark SUNRISE DETOX in standard character format without any claims to font, style, size, format or color. The goods and services identified in the application are: Addiction treatment services; Alternative medicine services, namely, detoxification services; Drug and alcohol testing for substance and alcohol abuse; Rehabilitation of alcohol and drug and narcotic addicted patients; Rehabilitation patient care services which includes inpatient and outpatient care and counseling, in International Class 044. Appellant has used the mark in interstate commerce since at least as early as June 1, 2012.

An Office Action refusing registration of the mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), and requiring a disclaimer for the word DETOX, was issued on January 1, 2015. Applicant filed a Response to the Office Action, arguing against the Section 2(d) refusal but accepting the disclaimer, on June 19, 2015. A final Office Action maintaining the Section 2(d) refusal was issued on July 11, 2015.

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Applicant submitted a Request for Reconsideration on September 9, 2015. A Reconsideration Letter denying the Request was issued on October 7, 2015.

In keeping with the Office's Consistency Initiative, Applicant submitted a Request for Consistency Review of a Substantive/Procedural Issue on December 7, 2015. Applicant has yet to receive a response to this Request. Applicant filed the Notice of Appeal on December 7, 2015.

**V. SUMMARY OF EXAMINING ATTORNEY'S ARGUMENT**

In the Office Actions, the Examining Attorney has argued that Applicant's mark is confusingly similar to the cited mark because: 1) the dominant term in Applicant's mark – SUNRISE - is identical to that of the cited mark; 2) the marks are directed to identical services; 3) the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean they are knowledgeable in the field of trademarks and immune from source confusion; and 4) each mark is decided on its own facts and merits. *See, e.g.*, Office Action of July 11, 2015, pp. 3-4.

**VI. SUMMARY OF APPLICANT'S ARGUMENT**

Pertinent case law requires an Examining Attorney evaluating an applied-for mark for potential likelihood of confusion with a cited mark to look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. It is well settled that the marks must not be dissected or split into component parts, with each part compared to other parts. It is the entire mark which is perceived by the purchasing public and, therefore, it is the entire mark that must be compared to any other mark.

The applied-for mark and the cited mark do not resemble each other or sound alike. Rather, the marks have improperly been dissected to support a finding of likelihood of confusion.

Meanwhile, other applicable factors in determining likelihood of confusion have been disregarded.

Additionally, Applicant's co-pending applications have been treated in an inconsistent manner, resulting in the refusal to register the present application while other applications have proceeded to registration.

**VII. APPLICANT'S ARGUMENT**

As set forth herein, the Examining Attorney erred in issuing a Section 2(d) refusal for likelihood of confusion. This refusal appears to follow at least in part from the inconsistent treatment of Applicant's co-pending applications.

A. *Applicant's Mark is not Confusingly Similar with the Cited Mark*

Under Section 2(d) of the Lanham Act, registration of a mark must be refused if it so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive. *In re Viterra, Inc.*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012), *citing* 15 U.S.C. § 1052(d). Whether a likelihood of confusion exists is determined on a case-by-case basis aided by the application of factors set out in *In re E.I. DuPont de Nemours & Co.*, 177 USPQ 563, 567 (CCPA 1973). *Id.*

In each Office Action, the Examining Attorney reviewed the *DuPont* factors of similarity of the marks, similarity and nature of the services, and similarity of trade channels of the services as being most relevant, but did so at the apparent exclusion of other factors raised by Applicant. In any event, the similarity of the applied-for mark and the cited mark does not support a likelihood of confusion.

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1. *Similarity of the Marks*

Evaluation of the *DuPont* factors requires an Examining Attorney to look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. It is well settled that marks must not be dissected or split into component parts, with each part compared to other parts. This is so because it is the entire mark which is perceived by the purchasing public and, therefore, it is the entire mark that must be compared to any other mark. It is the impression created by the involved marks, each considered as a whole, which is important. *Genesco, Inc. v. Martz*, 66 U.S.P.Q.2d 1260, 1269 (TTAB 2003). Although more weight may be placed on a dominant portion of the mark, for example, if another feature of the mark is descriptive or generic standing alone, the ultimate conclusion nonetheless must rest on consideration of the marks in total. *In re Viterra*, 101 USPQ2d at 1908, citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000).

Applicant is seeking to register the mark SUNRISE DETOX, whereas the cited registered mark is SUNRISE RECOVERY RANCH. The two marks do not resemble each other to such a degree that requires barring registration of Applicant's mark. To state the obvious, SUNRISE DETOX is two words while SUNRISE RECOVERY RANCH is three words. Only one of the words in the marks is the same. The marks also have very different appearances and sounds.

The finding of likelihood of confusion in the present case appears based on an improper dissecting of the marks, focusing on the presence of the word SUNRISE at the complete exclusion of the remainder of each mark. As stated above, more weight can be placed on a dominant portion of the mark, but the ultimate consideration must be of the marks in total.

Rather than being dissected, the marks should have been compared in their entirety, along with the commercial impression associated therewith. Applicant respectfully submits that, had

the marks been compared in their entirety rather than dissected into component parts, their dissimilarity would weigh against finding of a likelihood of confusion.

Though the Office Actions also duly looked to the similarity of the goods and services and channels of trade, the analysis in each appears to have unfairly discounted other *DuPont* factors. The *Viterra* case, as cited in the Office Actions, does not support the proposition that the similarity of the marks, similarity and nature of goods and services and similarity of the trade channels are the most relevant to this inquiry *at the exclusion of other factors*. Other *DuPont* factors should also be considered, as set forth below.

2. *Applicant's Services are not Purchased on Impulse*

The Court of Appeals for the Federal Circuit has cautioned the Trademark Office not to overlook the great importance of consumer sophistication in deciding whether confusion is likely. The decision in *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 21 USPQ2d 1388 (Fed. Cir. 1992) is instructive. The Federal Circuit held that confusion was unlikely between “E.D.S.” for computer services and “EDS” for power supplies and battery chargers because the buyers were sophisticated commercial purchasers. The Federal Circuit strongly stressed that the sophistication of discriminating customers is an extremely important likelihood of confusion factor, even in cases where the marks are identical, much less as dissimilar as Applicant’s mark and the cited mark.

When goods or services are relatively low-priced and subject to frequent replacement or impulse buying, the risk of likelihood of confusion is increased because purchasers of such goods or services exercise less purchasing care than when the cost of the goods or services is high. *Recot, Inc. v. Becton*, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000). Here, however, the marks are both used for addiction treatment services. Applicant respectfully submits that consumers

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making the significant, personal decision to send either themselves or a loved one for such treatment would not do so lightly. Addiction treatment services are not an impulse purchase akin to chewing gum. Relevant consumers would not be confused even where the marks were less dissimilar than Applicant’s mark and the cited mark.

The second Office Action summarily dismisses Applicant’s argument as to this factor, only stating the general principle that sophisticated consumers are not necessarily immune from source confusion, but without applying this conclusion to the marks and their services. Office Action of July 11, 2015, p. 4. This factor should weigh in favor of granting registration.

3. *The Nature and Extent of Any Actual Confusion, and*

4. *Length of Time and Conditions without Evidence of Actual Confusion*

Applicant has openly and conspicuously offered its addiction treatment services under the applied-for mark since June 1, 2012. The cited registration indicates use since May 25, 2006. However, as noted in Applicant’s Office Action Response and Request for Reconsideration, there have been no known incidents of actual confusion between the two marks during that time. These factors should weigh in favor of granting registration, not merely discarded.

B. *Applicant’s Applications Have Been Treated Inconsistently*

In addition to the inappropriate finding of likelihood of confusion, the present application has been treated in a manner inconsistent with the treatment given to Applicant’s other co-pending applications. Applicant is the owner of the following co-pending applications and registrations:

<b>Mark</b>	<b>Serial/Registration Number</b>	<b>Status</b>
DETOX WITH DIGNITY	Ser. No. 86/393,297	On Appeal after Final Refusal
RECOVERY WITH DIGNITY	Reg. No. 4,878,331	Registered December 29, 2015
COUNSELING WITH DIGNITY	Reg. No. 4,875,414	Registered December 22, 2015
SUNRISE DETOX	Ser. No. 86/393,524	On Appeal after Final Refusal
SUNRISE CARES	Reg. No. 4,738,393	Registered May 19, 2015

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The foregoing marks are directed to identical services. The applications were all filed on September 12, 2014, and examined by the same Examining Attorney.

Applicant submitted a Request for Consistency Review on December 7, 2015, on the belief that its applications for DETOX WITH DIGNITY and SUNRISE DETOX have been treated inconsistently from its other applications, notwithstanding that each of its applications were reviewed by the same Examining Attorney.

The present application has been refused registration based on a likelihood of confusion with the mark SUNRISE RECOVERY RANCH. The application for SUNRISE CARES however, proceeded to registration without such a refusal. The only difference between the present application and the registered SUNRISE CARES mark is the second word of the mark, namely DETOX rather than CARES.

Applicant includes discussion concerning its application for DETOX WITH DIGNITY for the purpose of further demonstrating the inconsistent treatment its applications have received, both with respect to its applications which have been granted registration and those which have been refused. The DETOX WITH DIGNITY application has been refused registration based on a likelihood of confusion with the mark PUTTING DIGNITY BACK IN DETOX for addiction treatment services, U.S. Registration No. 4,392,221. Applicant's registrations for the marks RECOVERY WITH DIGNITY and COUNSELING WITH DIGNITY, however, were granted without such a refusal. The only difference between Applicant's DETOX WITH DIGNITY, RECOVERY WITH DIGNITY and COUNSELING WITH DIGNITY applications is the first word of the mark, namely DETOX rather than RECOVER or COUNSELING.

The inconsistency in treatment of Applicant's applications is that the Examining Attorney appears to have dissected the marks in the DETOX WITH DIGNITY and SUNRISE DETOX

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applications though not in the applications to register its other marks, and in doing so appears to have considered certain elements of Applicant's marks interchangeable and descriptive in some instances but not in others.

For example, with the present application the Examining Attorney appears to have considered the term DETOX *interchangeable* with the term RECOVERY RANCH in refusing registration for SUNRISE DETOX – but not SUNRISE CARES - for a likelihood of confusion with SUNRISE RECOVERY RANCH. The Examining Attorney issued a disclaimer requirement for the term DETOX for the present application. The term SUNRISE is the dominant portion of the both the SUNRISE DETOX and SUNRISE CARES marks, as well as in the cited registration for SUNRISE RECOVERY RANCH. Nevertheless, the SUNRISE CARES mark does not appear to have been dissected in the same manner as the SUNRISE DETOX mark, and the SUNRISE RECOVERY RANCH mark was not cited as a conflicting mark against the SUNRISE CARES application during prosecution.

Conversely, with respect to the DETOX WITH DIGNITY application the Examining Attorney appears to have considered the term DETOX *distinct* from the terms RECOVERY and COUNSELING in refusing registration for DETOX WITH DIGNITY – but not RECOVERY WITH DIGNITY or COUNSELING WITH DIGNITY – for likelihood of confusion with the PUTTING DIGNITY BACK IN DETOX mark. It is noted that the Examining Attorney initially issued but later withdrew a disclaimer requirement for the term DETOX for the DETOX WITH DIGNITY application, yet maintained this requirement for the present application. The RECOVERY WITH DIGNITY application, meanwhile, was subject to a disclaimer requirement for the term RECOVERY, but the COUNSELING WITH DIGNITY application was not subject to any disclaimer. Thus, because of the inconsistent treatment it received, the DETOX WITH

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DIGNITY application received a Final Refusal, while the applications for RECOVERY WITH DIGNITY and COUNSELING WITH DIGNITY proceeded toward registration.

The inconsistent treatment given to these applications has had the following results: 1) the term DETOX was disclaimed as being merely descriptive for the SUNRISE DETOX application, and was apparently considered interchangeable with the term RECOVERY RANCH in connection therewith; yet 2) the term DETOX was not disclaimed for the DETOX WITH DIGNITY application, and was apparently considered distinct from the terms RECOVERY and COUNSELING enough to lead to an opposite outcome from the RECOVERING WITH DIGNITY and COUNSELING WITH DIGNITY applications. Whereas the disclaimer of the term DETOX appears to have led to the Final Refusal to register SUNRISE DETOX because the term has been given *lesser* weight, the withdrawal of the disclaimer for *the same term* for the DETOX WITH DIGNITY application appears to have led to the Final Refusal to register that mark because the term was given *greater* weight, with the Examining Attorney focusing on the terms DETOX and DIGNITY rather than DIGNITY alone.

Applicant identified this inconsistent treatment in its Office Action Response and its Request for Reconsideration. In response, the Office Action of July 11, 2015 and Reconsideration Letter of October 7, 2015 each cite authority generally holding that each mark is decided on its own facts and stands on its own merits, but give no indication of why these applied-for marks have been treated differently from Applicant's other co-pending marks. No explanation has been provided as to a difference in the facts that would support the refusal to register Applicant's DETOX WITH DIGNITY and SUNRISE DETOX marks while Applicant's RECOVERY WITH DIGNITY, COUNSELING WITH DIGNITY and SUNRISE CARES marks proceeded toward publication and registration. For example, no explanation has been

provided as to why the disclaimer requirement for the word DETOX was withdrawn for the DETOX WITH DIGNITY application but not the present application, or therefore why the word DETOX is interchangeable with RECOVERY RANCH, but distinct from the term RECOVERY, in supporting the Final Refusals to register the SUNRISE DETOX and DETOX WITH DIGNITY marks while Applicant's SUNRISE CARES and RECOVERY WITH DIGNITY marks proceeded toward registration.

The RECOVERY WITH DIGNITY, COUNSELING WITH DIGNITY, SUNRISE CARES, DETOX WITH DIGNITY and SUNRISE DETOX marks are owned by the same entity, directed toward the same services and the subject of applications filed on the same date and assigned to the same Examining Attorney. Nevertheless, while the RECOVERY WITH DIGNITY, COUNSELING WITH DIGNITY and SUNRISE CARES marks proceeded toward registration, the SUNRISE DETOX and DETOX WITH DIGNITY marks have been refused registration. Applicant believes that this is the result of inconsistent treatment of these applications in examination, and therefore requests that the Final Refusal be reversed in connection with the present application, as well as the DETOX WITH DIGNITY application.

#### **VIII. CONCLUSION**

Applicant submits that, for the reasons set forth above, consumers of Applicant's services and the cited registrant's services are not likely to be confused as to the source of each. Applicant's SUNRISE DETOX mark and the cited SUNRISE RECOVERY RANCH mark are not so similar in sound, appearance or meaning to support the refusal to register Applicant's mark. Furthermore, the Final Refusal to register the mark appears based at least in part on the inconsistent treatment given to Applicant's co-pending applications by the same Examining Attorney.

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For no less than the reasons set forth herein, Applicant respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney's Final Refusal, and return the present application to the Examining Attorney for publication.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Brian M. Taillon', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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