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Subject: U.S. TRADEMARK APPLICATION NO. 86393524 - SUNRISE DETOX - 4703U.000005 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE
(USPTO)

U.S. APPLICATION SERIAL NO. 86393524

MARK: SUNRISE DETOX



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Bald Eagle Health Group, LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

4703U.000005

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's final refusal to register the mark, "**SUNRISE DETOX**", in standard characters, as a service mark, for *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, under Trademark Action 2(d), 15 U.S. C. Section 1052(d).

Registration is refused because applicant's mark is likely to be confused with, "**SUNRISE RECOVERY RANCH**" in standard characters, in U.S. Registration No. 3346110, used with *addiction treatment services*.

I ISSUE ON APPEAL

Whether applicant's mark, **SUNRISE DETOX** used with *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, is likely to be confused with **SUNRISE RECOVERY RANCH** for *addiction treatment services*.*

II PROCEDURAL HISTORY

Applicant, Bald Eagle Health Group, LLC, applied to register the mark, "**SUNRISE DETOX**" used with *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*.

The examining attorney finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), because of a likelihood of confusion with U.S. Registration No. 3346110, for the mark, **SUNRISE RECOVERY RANCH**.

Applicant filed its appeal and subsequently filed two requests for reconsideration which were denied by the examining attorney.

III ARGUMENTS

A. APPLICANT'S MARK AND REGISTRANT'S MARK ARE SIMILAR IN SOUND AND COMMERCIAL IMPRESSION, AND THE SERVICES ARE IDENTICAL IN PART AND RELATED, SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, AS TO THE SOURCE OF THE SERVICES UNDER SECTION 2(D) OF THE TRADEMARK ACT

The Court in *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (C.C.P.A. 1973), listed the principal factors to be considered in determining whether there is a likelihood of Confusion under Section 2(d). The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression, and the similarity of the goods or services as described in the application and registration. Any one of the factors listed may be dominant in any given case, depending upon the evidence of record.

In this case, the similarities in the mark, nature of the services and trade channels are the most relevant. The dominant and shared standard character term, **SUNRISE** is identical in appearance and sound in applicant's mark, **SUNRISE DETOX**, and registrant's mark, **SUNRISE RECOVERY RANCH**. **SUNRISE** is dominant because consumers are generally more inclined to focus on the first word in any service mark. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions).

SUNRISE is also dominant because the additional wording, **DETOX** in applicant's mark and **RECOVERY RANCH** in registrant's ranch are disclaimed and less dominant. Matter that is generic

(**DETOX**)¹ and descriptive (**RECOVERY RANCH**) are less significant in terms of affecting the marks commercial impression and renders **SUNRISE** the more dominant element in the mark. Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. *In re Viterro Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Greater weight is often given to this dominant feature when determining whether marks are confusingly similar. *In re Nat'l Data Corp.*, 753 F.2d at 1058, 224 USPQ at 751.

Applicant's mark, **SUNRISE DETOX** and registrant's mark, **SUNRISE RECOVERY RANCH** create a similar commercial impression, when used with *addiction services*, provided by both parties, as addiction treatment comprises both detox and recovery. See *FINAL Office Action – Outgoing July 11, 2015, page 1*. Therefore, when consumers are seeking addiction services, they might seek detox, and would look for a facility that offered such services such as a recovery center or ranch.

Applicant disagrees that the marks have been compared in their entirety, and asserts “rather than dissected into component parts, their dissimilarity would weigh against finding of a likelihood of confusion.” The examining attorney submits not all the du Pont factors, however are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260.

Lastly, applicant asserts there has been no known incidents of actual confusion between the marks. The examining attorney, in the denial of the first request for reconsideration, stated it is well settled that the relevant test is likelihood of confusion, not actual confusion; thus it is unnecessary to show

¹ See Office Action in the record. Outgoing dated 01/01/2015 - “DETOX is an abbreviation of detoxification, which describes treatment in a special hospital to help someone to stop taking drugs or drinking alcohol, and is a key feature of applicant's services.” See definition – Exhibit 2 The name of a key aspect, a central focus or feature of services may be generic for those services. See *In re Tires, Tires, Tires, Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009) (holding TIRES TIRES TIRES generic for retail tire store services).

actual confusion to establish likelihood of confusion. *Herbko Int'l, Inc. v. Kappa Books, Inc.* 308 F.3d 1156, 1165, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002).

Overall, the marks of the parties are similar in sound and commercial impression, as to cause a likelihood of confusion among consumers as to the source of the services.

B. APPLICANT'S SERVICES ARE IDENTICAL IN PART AND RELATED TO REGISTRANT'S SERVICES AND ARE FOUND IN THE SAME CHANNELS OF TRADE

Applicant provides *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; and alternative medicine services, namely, detoxification services.* Registrant provides *addiction treatment services.* Applicant and registrant both provide *addiction treatment services,* which are targeted to consumers who have a compulsive need for and use of a habit-forming substance. Applicant's remaining services, are often a part of addiction treatment services, and generally recognized as being related. In the final Office action (*See final Office action, Outgoing July 11, 2015, page 2*) the examining attorney provided evidence of the relatedness of applicant's and registrant's services where addiction treatment is also provided along with detox services, inpatient and outpatient care and counseling. Furthermore, where the services of an applicant and registrant are "similar in kind and/or closely related," the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse services. *Shen Mfg. Co. v. Ritz Hotel Ltd.,* 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).

Applicant asserts that *other DuPont factors* should be considered, particularly consumer sophistication, however, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); TMEP §1207.01(b).

Consumers seeking addiction treatment services, who encounter applicant's and registrant's marks for identical services and related services, are likely to be confused as to the source or origin of the services.

C. APPLICANT'S CLAIM OF INCONSISTENT TREATMENT IN EXAMINATION OF APPLICANT'S MARK, SUNRISE DETOX, WITH ITS CO-PENDING APPLICATION IS NOT A FACTOR IN DETERMINING LIKELIHOOD OF CONFUSION

Applicant claims the mark, **SUNRISE DETOX** was examined for likelihood of confusion in a manner inconsistent with the mark, **SUNRISE CARES** in U.S. Registration No. 4738393, by the examining attorney. As pointed out in the final Office action issued July 11, 2015, the examining attorney states the mark in this registration was decided on its own facts, and each mark stands on its own merit. *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009). As previously stated in the response denying applicant's second request for reconsideration, (*see INCOMING, 03/05/2016, page 1*) the registered mark, **SUNRISE CARES** creates a different commercial impression from the mark, **SUNRISE DETOX**, in this application. Previous decisions by examining attorneys in approving other marks are without evidentiary value and not binding on the agency or the Board. *In re Davey Prods. Pty.* 92 USPQ2d 1198, 1206 (TTAB 2009).

IV. CONCLUSION

In this case, applicant's mark, **SUNRISE DETOX** is likely to cause confusion as to the source of the services among consumers, with registrant's mark, **SUNRISE RECOVERY RANCH**, because of similarity in sound and commercial impression, and identical services in part, found in the same channels of trade. Therefore, it is respectfully requested that the Board refuse registration of applicant's mark, **SUNRISE DETOX**, under the Trademark Act Section 2(d) Likelihood of Confusion.

Respectfully submitted,
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