PTO Form 1930 (Rev 02/07)
OMB No. 0651-0050 (Exp. 4/30/2010)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77735348
LAW OFFICE ASSIGNED	LAW OFFICE 105
MARK SECTION (no change)	
ARGUMENT(S)	
Please see the actual argument text attached within the Evidence section.	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
ORIGINAL PDF FILE	evi_1731429201-151150280_._PURE_AIR_RFR.pdf
CONVERTED PDF FILE(S) (3 pages)	\\TICRS\EXPORT10\IMAGEOUT10\777\353\77735348\xml1\RFR0002.JPG
	\\TICRS\EXPORT10\IMAGEOUT10\777\353\77735348\xml1\RFR0003.JPG
	\\TICRS\EXPORT10\IMAGEOUT10\777\353\77735348\xml1\RFR0004.JPG
ORIGINAL PDF FILE	evi_1731429201-151150280_._Attachments_to_Pure_Air_RFR.pdf
CONVERTED PDF FILE(S) (2 pages)	\\TICRS\EXPORT10\IMAGEOUT10\777\353\77735348\xml1\RFR0005.JPG
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DESCRIPTION OF EVIDENCE FILE	Argument text and attachments as described in argument.
SIGNATURE SECTION	
RESPONSE SIGNATURE	/kathleen s. ryan/
SIGNATORY'S NAME	Kathleen S. Ryan
SIGNATORY'S POSITION	Attorney of record, Colorado bar member
DATE SIGNED	04/23/2010

AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	YES
FILING INFORMATION SECTION	
SUBMIT DATE	Fri Apr 23 15:24:21 EDT 2010
TEAS STAMP	USPTO/RFR-173.14.29.201-20100423152421895226-77735348-4608bad9c5be5a88fd054942ce784894e-N/A-N/A-20100423151502803520

PTO Form 1957 (Rev 9/2005)
OMB No. 0651-0050 (Exp. 08/31/2010)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **77735348** has been amended as follows:

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

Please see the actual argument text attached within the Evidence section.

EVIDENCE
Evidence in the nature of Argument text and attachments as described in argument. has been attached.
Original PDF file:
evi_1731429201-151150280_._PURE_AIR_RFR.pdf
Converted PDF file(s) (3 pages)
Evidence-1
Evidence-2
Evidence-3
Original PDF file:
evi_1731429201-151150280_._Attachments_to_Pure_Air_RFR.pdf
Converted PDF file(s) (2 pages)
Evidence-1
Evidence-2

SIGNATURE(S)

Request for Reconsideration Signature
Signature: /kathleen s. ryan/ Date: 04/23/2010
Signatory's Name: Kathleen S. Ryan
Signatory's Position: Attorney of record, Colorado 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.

Serial Number: 77735348
Internet Transmission Date: Fri Apr 23 15:24:21 EDT 2010
TEAS Stamp: USPTO/RFR-173.14.29.201-2010042315242189
5226-77735348-4608bad9c5be5a88fd054942ce
784894e-N/A-N/A-20100423151150280352

The Examining Attorney refused registration of Applicant's Mark, PURE AIR, on grounds that the mark is likely to cause confusion with U.S. Registration No. 2303846 for PUREAYRE ("Cited Mark").

Applicant disagrees and hereby requests the Examining Attorney to reconsider her refusal based on the following:

In Applicant's response dated August 10, 2009 to the Examiner's first refusal (Response to Office Action), Applicant argued that the Cited Mark is not strong and entitled only to narrow protection. Strength of the mark is a paramount factor and plays a dominant role in the likelihood of confusion analysis. Applicant submitted evidence of (1) other "Pure Air" and "Pure" and "Air" marks that are co-existing or have co-existed on the U.S. trademark registry; (2) the existence of other "Pure _____" marks for air fresheners and related goods; and, (3) actual evidence of third party uses of similar marks for goods or services that have something in common with the Applicant's and the Registrant's goods.

The Examiner summarily dismissed No. 1, above, stating that ". . . applicant's cited marks are dead marks that do not have probative value." First, this is not entirely correct. One of the cited marks, PURE OXYGEN, U.S. application serial no. 77/468,962 is merely suspended pending registration of the applicant's foreign application. Moreover, Applicant submits that the co-existence of identical or highly similar marks for identical or closely related goods shows that the Cited Mark is weak despite the fact that some of the applications and registrations have now gone abandoned is irrelevant. At the time of its application (1998), examination and registration (1999), the Cited Mark co-existed in the marketplace and on the federal registry with the mark, **PURE AIR** (Registration No. 1,146,729) for "deodorant for industrial use" (the "'729 Registration") until 2002, at which time the '729 Registration expired. That the '729 Registration eventually expired does not obviate the fact that the marks co-existed for at least four years. Indeed, such co-existence by PUREAYRE with PURE AIR is the exact same situation as the present situation with the Cited Mark and Applicant's Mark.

With respect to No. 2, above, the Examiner states that "Each of applicant's cited marks create a commercial impression different from that of the applicant and Registrant." Applicant disagrees. The Examiner provided no evidence to support her conclusion that these cited marks create a commercial impression different from either PURE AIR or the Cited Mark. Applicant provided ample evidence of "Pure ___" marks for identical or related goods – all of which contain the main element "PURE," which is contained in both applicant's mark and the Cited Mark and a different second word - many of which correspond to AIR or are otherwise descriptive of the product or its purpose. Clearly, these examples create a similar commercial impression and, more importantly, support the proposition for which they were submitted in the Response to Office Action: namely that the Cited Mark is weak because many other third parties use marks in the same field that are **similar, either wholly or in part**. *Data Concepts, Inc. v. Digital Consulting, Inc.* 150 F3d 620, 47 U.S.P.Q.2d 1672, 1676 (6th Cir. 1998). As such, the Cited Mark is entitled only to a narrow scope of protection. The logical conclusion is that because the Cited Mark is weak, consumer confusion is unlikely because the mark's components are

so widely used that the public can easily distinguish slight differences in the marks, even if the goods are related. As such, Applicant's mark and the Cited Mark can be distinguished.

With respect to No. 3, above, the Examiner notes that "Third-party registrations are entitled to little weight on the question of likelihood of confusion because they are 'not evidence of what happens in the market place or that customers are familiar with them.'" This is precisely why applicant submitted actual evidence of third party uses of similar marks for goods or services that have something in common with the goods/services of the Applicant's mark and the Cited Mark. This evidence clearly shows what is happening in the marketplace. Applicant submits that this evidence, of which the Examiner makes no mention, shows that the Cited Mark is weak and clearly demonstrates that Applicant's mark can co-exist with the Cited Mark without confusion.

Finally, the Examiner states that "the existence on the register of other seemingly similar marks does not provide a basis for registrability for the applied-for mark." Perhaps this fact does not provide "the basis" for registrability, but it certainly does go to the strength of the Cited Mark – a major factor in determining likelihood of confusion. Indeed, assessing a mark's strength via the existence of third-party registrations and common law marks is the very reason applicant's go to the time and expense of commissioning searches. Moreover, assessing that similar marks, distinguished only by slight variations, can co-exist on the U.S. Register as well as in the marketplace is one of the primary tools applicants use to discharge their legal duty to select a mark that is dissimilar to trademarks already in use.

Applicant submits that the marks at issue here are dissimilar in appearance and overall commercial impression and made extensive arguments in support of this proposition in the Response to Office Action. The Examiner did not address these arguments, but focused on the similarity of sound stating that "[t]he marks are essentially phonetic equivalents and thus sound similar" and " . . . such similarity in sound alone may be sufficient to support a finding of likelihood of confusion." Applicant submits that sound is of lesser importance when prospective purchasers are likely to encounter the marks visually rather than aurally, such as when ordered via the Internet or on the shelf in a self-service store. *See First Int'l Servs. Corp. v Chuckles, Inc.*, 5 U.S.P.Q.2d 1628, 1632 (TTAB 1988). Conversely, sound is very significant for marks which are primarily used orally, such as in sales markets, telephone solicitations or word-of-mount advertising. *See Virgin Enters. Ltd. v. Nawab*, 335 F.3d 141, 67 U.S.P.Q.2d, 1420 (2d Cir. 2003). In the instant case, the Cited Mark is sold to the public via online ordering through the Internet and in national retail stores. Consumers are unlikely to ask for the product by name. Rather, they will order online or take the goods from the store shelf without asking for them by name. A copy of the Internet advertisement for the Cited Mark is attached hereto as Exhibit A showing that the Cited Mark is offered via the Internet and in national retail stores.

Although sound alone may be enough to support a finding of likelihood of confusion, it is not enough in this case. As discussed in the Response to Office Action, Applicant

submits that the marks are dissimilar in appearance. Indeed, the owner of the Cited Mark recently filed specimens with the Trademark Office in its Section 9 renewal. A review of the specimen filed clearly shows that the Cited Mark appears very different from the Applicant's mark. A copy of the specimen is attached as Exhibit B. If, as the Examiner posits, the key question is "whether the marks will confuse people into believing that the goods they identify come from the same source," then the way the Cited Mark looks compared to Applicant's mark answers that question as "absolutely not" – the marks will not confuse people. In fact, they appear so different that it is unfathomable that even the most unaware of all consumers could possibly confuse the two marks.

Applicant submits that confusion is unlikely because consumers exercise a higher degree of care, which is a relevant factor in the likelihood of confusion analysis. A consumer who is purchasing a product to use near a person with asthma and other respiratory problems will use care when selecting such a product. Similarly, a consumer who is purchasing a product to use in their child's nursery or playroom or around an elderly person, likewise will exercise a greater degree of care. Thus, consumers are "discriminating" even though the goods are relatively inexpensive.

The Examiner argues that even if a consumer is knowledgeable in a particular field it does not follow that they are immune from source confusion. Applicant agrees that sophistication does not preclude likelihood of confusion. However, in this case, the differences in the appearance of the marks and the high number of "PURE"-type marks for similar goods and services supports a finding that relatively discerning consumers will not be confused by the two marks.

As such, the "care exercised" factor weighs in favor of no likelihood of confusion. Applicant respectfully requests that the Examiner allow the application to register.

Applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration after Final Action.

Conclusion

For all the foregoing reasons, Applicant respectfully requests that the Examiner reconsider her final refusal and allow the subject application to proceed to publication.

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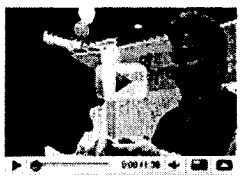

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