

PTO Form (Rev 4/2000)

OMB No. 0651-.... (Exp. 08/31/2004)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	77839607
LAW OFFICE ASSIGNED	LAW OFFICE 107
MARK SECTION (no change)	
ARGUMENT(S)	
REMARKS	
<p>1. <u>Section 2(d) - Likelihood of Confusion</u></p> <p>The Examining Attorney has initially refused registration of Applicant's mark, WEIS HEALTHY BITES, on the Principle Register on the basis of alleged likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). The Examining Attorney alleges that Applicant's mark, when used on or in connection with the identified goods and services, is likely to be confused with Registration Nos. 2,154,469 for HEALTHY BITES for "potato and processed corn-based snack foods" and "pretzels; rice and corn meal-based snack foods; corn chips and corn curls"; and Registration Nos. 3,190,939 for HEALTHY BITES for "pet food." For the reasons set forth below, Applicant respectfully traverses the Examining Attorney's basis for rejection.</p> <p>Applicant has amended its identification of goods and services to read, "Retail grocery store services limited to nutrition and wellness education programs" In contrast, the goods identified in the registered marks include, pet and snack foods. The identification of goods for the registered marks do not include any indication of use in connection with educational programs. Similarly, the application for Applicant's mark does not identify food stuffs, a central feature of the goods identified in registered markss. These differences between the goods and services are even more significant given the substantial differences between the marks.</p>	

Further, the seventh and eighth *DuPont* factors, the nature and extent of any actual confusion and the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion, further support a finding of no likelihood of confusion. See, TMEP §1207.01; See also, In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Applicant has been using its mark in interstate commerce for over three years. During this time, Applicant is not aware of even a single instance of actual confusion between the services or mark of the Registrant. The Examining Attorney may accept this as evidence that confusion is not likely. See, In re General Motors Corp. 23 USPQ2d 1465, 1470 (TTAB 1992); Opryland USA Inc. v. Great American Music Show, Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Based on the above factors, Applicant respectfully submits that it is beyond reason to bar registration of Applicant's mark based on likelihood of confusion with the cited registrations. Accordingly, Applicant respectfully requests the Examining Attorney to withdraw his refusal to register Applicant's mark under Section 2(d).

GOODS AND/OR SERVICES SECTION (current)

INTERNATIONAL CLASS	035
DESCRIPTION	Grocery Store Services
FILING BASIS	Section 1(b)

GOODS AND/OR SERVICES SECTION (proposed)

INTERNATIONAL CLASS	035
TRACKED TEXT DESCRIPTION	
Grocery Store Services ; <u>Retail grocery store services limited to nutrition and wellness education programs</u>	
FINAL DESCRIPTION	
Retail grocery store services limited to nutrition and wellness education programs	
FILING BASIS	Section 1(b)

SIGNATURE SECTION

RESPONSE SIGNATURE	/efb/
SIGNATORY'S NAME	Drinker Biddle & Reath LLP By: Edward F. Behm, Jr.
SIGNATORY'S POSITION	Attorneys for Applicant

DATE SIGNED	01/25/2011
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Jan 25 18:30:24 EST 2011
TEAS STAMP	USPTO/RFR-66.7.190.194-20 110125183024175939-778396 07-48086eb18c0b0d7ba56195 78639cdd91198-N/A-N/A-201 10125182525040687

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OMB No. 0651-.... (Exp. 08/31/2004)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **77839607** has been amended as follows:

ARGUMENT(S)

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

REMARKS

1. Section 2(d) - Likelihood of Confusion

The Examining Attorney has initially refused registration of Applicant's mark, WEIS HEALTHY BITES, on the Principle Register on the basis of alleged likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). The Examining Attorney alleges that Applicant's mark, when used on or in connection with the identified goods and services, is likely to be confused with Registration Nos. 2,154,469 for HEALTHY BITES for "potato and processed corn-based snack foods" and "pretzels; rice and corn meal-based snack foods; corn chips and corn curls"; and Registration Nos. 3,190,939 for HEALTHY BITES for "pet food." For the reasons set forth below, Applicant respectfully traverses the Examining Attorney's basis for rejection.

Applicant has amended its identification of goods and services to read, "Retail grocery store services limited to nutrition and wellness education programs" In contrast, the goods identified in the registered marks include, pet and snack foods. The identification of goods for the registered marks do not include any indication of use in connection with educational programs. Similarly, the application for Applicant's mark does not identify food stuffs, a central feature of the goods identified in registered marks. These differences between the goods and services are even more significant given the substantial differences between the marks.

Further, the seventh and eighth *DuPont* factors, the nature and extent of any actual confusion and the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion, further support a finding of no likelihood of confusion. See, TMEP §1207.01; See also, In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Applicant has been using its mark in interstate commerce for over three years. During this time, Applicant is not aware of even a single instance of actual confusion between the services or mark of the Registrant. The Examining Attorney may accept this as evidence that confusion is not likely. See, In re General Motors Corp. 23 USPQ2d 1465, 1470 (TTAB 1992); Opryland USA Inc. v. Great American Music Show, Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Based on the above factors, Applicant respectfully submits that it is beyond reason to bar registration of Applicant's mark based on likelihood of confusion with the cited registrations. Accordingly, Applicant respectfully requests the Examining Attorney to withdraw his refusal to register Applicant's mark under Section 2(d).

CLASSIFICATION AND LISTING OF GOODS/SERVICES

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

Current: Class 035 for Grocery Store Services

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:

Tracked Text Description: ~~Grocery Store Services~~, Retail grocery store services limited to nutrition and wellness education programs

Class 035 for Retail grocery store services limited to nutrition and wellness education programs

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)).

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /efb/ Date: 01/25/2011

Signatory's Name: Drinker Biddle & Reath LLP By: Edward F. Behm, Jr.

Signatory's Position: Attorneys for Applicant

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 not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 77839607

Internet Transmission Date: Tue Jan 25 18:30:24 EST 2011

TEAS Stamp: USPTO/RFR-66.7.190.194-20110125183024175

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