

From: Shiner, Mark

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Subject: U.S. TRADEMARK APPLICATION NO. 85801669 - BALANCE - 01426-02097 - Request for Reconsideration Denied - Return to TTAB - Message 1 of 7

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Attachment Information:

Count: 35

Files: 75400325P001OF001.JPG, 75863088P001OF003.JPG, 75863088P002OF003.JPG, 75863088P003OF003.JPG, 76390977P001OF003.JPG, 76390977P002OF003.JPG, 76390977P003OF003.JPG, 76710642P001OF003.JPG, 76710642P002OF003.JPG, 76710642P003OF003.JPG, 77376362P001OF003.JPG, 77376362P002OF003.JPG, 77376362P003OF003.JPG, 77676094P001OF003.JPG, 77676094P002OF003.JPG, 77676094P003OF003.JPG, 78753337P001OF003.JPG, 78753337P002OF003.JPG, 78753337P003OF003.JPG, 78795046P001OF003.JPG, 78795046P002OF003.JPG, 78795046P003OF003.JPG, 79050124P001OF003.JPG, 79050124P002OF003.JPG, 79050124P003OF003.JPG, 85411945P001OF003.JPG, 85411945P002OF003.JPG, 85411945P003OF003.JPG, 85470072P001OF003.JPG, 85470072P002OF003.JPG, 85470072P003OF003.JPG, 85682466P001OF003.JPG, 85682466P002OF003.JPG, 85682466P003OF003.JPG, 85801669.doc

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**U.S. APPLICATION SERIAL NO.** 85801669

**MARK:** BALANCE



**CORRESPONDENT ADDRESS:**

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**GENERAL TRADEMARK INFORMATION:**

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

**APPLICANT:** Bayer SAS

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

01426-02097

**CORRESPONDENT E-MAIL ADDRESS:**

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**REQUEST FOR RECONSIDERATION DENIED**

**ISSUE/MAILING DATE:** 5/29/2014

The Office has reassigned this application to the undersigned trademark examining attorney.

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. See 37 C.F.R. §2.64(b); TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a). The Section 2(d) refusals made final in the Office action dated October 22, 2013, are maintained and continue to be final. See TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue(s) in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues.

The only outstanding issues are two Section 2(d) refusals. In its response, applicant deleted Class 001 and argued against the refusals. Applicant's arguments have been considered but are found unpersuasive.

With respect to U.S. Registration No. 3324044 (BALANCE and design) applicant argues that the design elements and the different goods obviates any Section 2(d) issue. The word portions of the marks, however, are nearly identical in appearance, sound, connotation, and commercial impression; therefore, the addition of a design element does not obviate the similarity of the marks in this case. See *In re Shell Oil Co.*, 992 F.2d 1204, 1206, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993); TMEP §1207.01(c)(ii). Further, applicant's mark is in standard characters and can be presented in any display or rendition. Thus, a mark presented in stylized characters and/or with a design element generally will not avoid likelihood of confusion with a mark in typed or standard characters because the marks could be presented in the same manner of display. See, e.g., *In re Viterra Inc.*, 671 F.3d at 1363, 101 USPQ2d at 1909; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) (stating that "the argument concerning a difference in type style is not viable where one party asserts rights in no particular display"). The goods are closely related as they have complimentary uses – fertilizer is used to promote seed growth. Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that "[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion"). Additionally, attached to this denial are screen captures showing the same entity under the same mark offering both fertilizers and agricultural seeds. See attached screen shots of Burpee and Johnny's Selected Seeds. Moreover,

the trademark examining attorney has attached evidence from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods and/or services as those of both applicant and registrant in this case. This evidence shows that the goods and/or services listed therein, namely fertilizer and agricultural seeds, are of a kind that may emanate from a single source under a single mark. See *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); TMEP §1207.01(d)(iii).

With respect to U.S. Registratoin No. 3744802, applicant argues that differences in the marks obviate any likelihood of confusion. Because the goods of the applicant and registrant are identical or virtually identical, 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 goods and/or services. See *In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); TMEP §1207.01(b). In any event, the only matter in applicant's mark is also the first wording of the registered mark – BALANCE. Applicant's mark has no additional matter to differentiate it from the registered mark. The mere deletion of wording from a registered mark may not be sufficient to overcome a likelihood of confusion. See *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010); *In re Optica Int'l*, 196 USPQ 775, 778 (TTAB 1977); TMEP §1207.01(b)(ii)-(iii). Applicant's mark does not create a distinct commercial impression because it contains the same common wording as the registered mark, and there is no other wording to distinguish it from the registered mark.

**Accordingly, the request is denied.**

The filing of a request for reconsideration does not extend the time for filing a proper response to a final Office action or an appeal with the Trademark Trial and Appeal Board (Board), which runs from the date the final Office action was issued/mailed. See 37 C.F.R. §2.64(b); TMEP §715.03, (a)(2)(B), (a)(2)(E), (c).

If time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to comply with and/or overcome any outstanding final requirement(s) and/or refusal(s) and/or to file an appeal with the Board. TMEP §715.03(a)(2)(B), (c). However, if applicant has already filed a timely notice of appeal with the Board, the Board will be notified to resume the appeal. See TMEP §715.04(a).

/Mark Shiner/

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