To: MICHAEL J. SCHWAB(mschwab@moritthock.com)
Subject: U.S. Trademark Application Serial No. 97117974 - VK9 - - M-9391.01.02
Sent: March 20, 2024 05:45:41 PM EDT
Sent As: tmng.notices@uspto.gov

Attachments

BuffK9- Harness_01.jpg
BuffK9- Harness_02.jpg
BuffK9- Harness_03.jpg
BuffK9- Harness_04.jpg
BuffK9- Harness_05.jpg
BuffK-9- Hip & Joint Supplements_01.jpg
BuffK-9- Hip & Joint Supplements_02.jpg
BuffK-9- Hip & Joint Supplements_03.jpg
BuffK-9- Hip & Joint Supplements_04.jpg
Bully Beds- Joint Supplements_01.jpg
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Bully Beds- Joint Supplements_04.jpg
Bully Beds- Joint Supplements_05.jpg
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Bully Beds- Rope Leash_01.jpg
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Bully Max- Leash_01.jpg
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Bully Max- Supplements_01.jpg
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Dogswell- E-Collar_01.jpg
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Dogswell- E-Collar_03.jpg
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Mendota Pet- Collar_01.jpg
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Mendota Pet- Probiotic Powder_01.jpg
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Mendota Pet- Probiotic Powder_03.jpg
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Mendota Pet- Probiotic Powder_05.jpg

United States Patent and Trademark Office (USPTO)
Office Action (Official Letter) About Applicant's Trademark Application

U.S. Application Serial No. 97117974

Mark: VK9

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Applicant: Vitamin K9 LLC

Reference/Docket No. M-9391.01.02

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REQUEST FOR RECONSIDERATION AFTER FINAL ACTION DENIED

Issue date: March 20, 2024

Applicant's request for reconsideration is denied. *See* 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant's request and determined the request did not: (1)

raise a new issue, (2) resolve all the outstanding issue(s), (3) provide any new or compelling evidence with regard to the outstanding issue(s), or (4) present analysis and arguments that were persuasive or shed new light on the outstanding issue(s). TMEP §§715.03(a)(ii)(B), 715.04(a).

Accordingly, the following requirement(s) and/or refusal(s) made final in the Office action dated August 29, 2023 are **maintained and continued**:

- SECTION 2(d) REFUSAL

See TMEP §§715.03(a)(ii)(B), 715.04(a).

SECTION 2(d) REFUSAL – LIKELIHOOD OF CONFUSION

Registration of the applied-for mark was refused because of a likelihood of confusion with the mark in U.S. Registration No. 6868828. Trademark Act Section 2(d), 15 U.S.C. §1052(d); see TMEP §§1207.01 et seq. *See* the previously attached registration.

Applicant has argued against the Section 2(d) refusal.

Applicant argues that the cited mark is "so highly stylized, fanciful and abstract that no reasonable consumer would understand the mark to be a representation of the letters V. K and the number 9." *See* Applicant's response.

However, the applicant's mark is a standard character mark.

If a mark (in either an application or a registration) is presented in standard characters, the owner of the mark is not limited to any particular depiction of the mark. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 950, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *42 (TTAB 2022); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018); *In re Cox Enters.*, 82 USPQ2d 1040, 1044 (TTAB 2007). The rights associated with a mark in standard characters reside in the wording (or other literal element, e.g., letters, numerals, punctuation) and not in any particular display. *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009). TEMP §1207.01(c)(iii).

That is, a mark in typed or standard characters may be displayed in any lettering style; the rights reside in the wording or other literal element and not in any particular display or rendition. *See In re Viterra Inc.*, 671 F.3d 1358, 1363, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012); *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); 37 C.F.R. §2.52(a); TMEP §1207.01(c)(iii). 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 word portion 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").

Applicant argues that its intended goods and the registrant's goods and services are "distinguishable such that consumers will not confuse the source of the goods and services they are purchasing." *See* Applicant's response.

The compared goods and/or services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); TMEP §1207.01(a)(i). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i); *see Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *44 (TTAB 2022) (quoting *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)).

In addition to the previously attached evidence, the current attached Internet evidence, consisting of various webpages, establishes that the same entity commonly manufactures, produces, or provides the relevant goods and/or services and markets the goods and/or services under the same mark. Thus, applicant's and registrant's goods and/or services are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Applicant argues that "[c]onsumers of the Cited Services are law enforcement, military, and private security clients with security and protection needs, who would exercise a relatively high degree of care in their purchasing decisions given the highly specialized nature of the Cited Services relating to safety and security, in sharp contrast to Applicant's Goods for food, beverages and dietary and nutritional supplements for dogs." *See* Applicant's response.

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. TMEP §1207.01(d)(vii); *see, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). Further, where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. at 1325, 110 USPQ2d at 1163), *aff'd per curiam*, 777 F. App'x 516, 2019 BL 375518 (Fed. Cir. 2019).

Even if consumers of the compared goods and/or services could be considered sophisticated and discriminating, it is settled that "even sophisticated purchasers are not immune from source confusion, especially in cases such as the present one involving identical marks and related goods [and/or services]." *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1413 (TTAB 2015) (citing *In re Research & Trading Corp.*, 793 F.2d 1276, 1279, 230 USPQ 49, 50 (Fed. Cir. 1986)), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *see also In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). The identity of the marks and the relatedness of the goods and/or services "outweigh any presumed sophisticated purchasing decision." *In re i.am.symbolic, llc*, 116 USPQ2d at 1413 (citing *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990)); *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014).

If applicant has already filed an appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

If applicant has not filed an appeal and time remains in the response period for the final Office action, applicant has the remainder of that time to (1) file another request for reconsideration that complies with and/or overcomes any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B).

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