**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

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RE: Serial No.:

Mark:

Applicant:

Action of:

# APPLICANT’S RESPONSE TO OFFICE ACTION

Applicant, HAYSTACK BURGERS & BARLEY (hereinafter “Applicant”), respectfully submits the following response to the Office Action, regarding the above referenced application:

# ARGUMENT AGAINST REFUSAL UNDER § 2(d) LIKELIHOOD OF CONFUSION

The Examining Attorney refused registration of Applicant’s word mark because of the mark in U.S. Registration No. 2855816

# The Standard

The likelihood of confusion between two marks under Section 2 of the Lanham Act, 15 U.S.C. § 1052, is determined on a case-by-case basis, aided by the *Du Pont* factors. The thirteen factors set forth in DuPont are used to determine a likelihood of confusion between two marks, where available. These factors are:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
2. The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
3. The similarity or dissimilarity of established, likely-to-continue trade channels.
4. The conditions under which and buyers to whom sales are made, i. e. “impulse” vs. careful, sophisticated purchasing.
5. The fame of the prior mark (sales, advertising, length of use).
6. The number and nature of similar marks in use on similar goods.
7. The nature and extent of any actual confusion.
8. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
9. The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
10. The market interface between applicant and the owner of a prior mark:
11. The extent to which applicant has a right to exclude others from use of its mark on its goods.
12. The extent of potential confusion, i. e., whether de minimis or substantial.
13. Any other established fact probative of the effect of use.

*Application of E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973)

1. The dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression

In examining the dissimilarity of the marks, "HAYSTACK BURGERS & BARLEY" versus "BURGERS & BARLEY," it is evident that the inclusion of the word "HAYSTACK" in the applicant's mark significantly alters its appearance, sound, and overall commercial impression. The word "HAYSTACK" introduces a distinctive and unique element that draws an immediate visual and auditory distinction from the simpler "BURGERS & BARLEY" mark. Phonetically, "HAYSTACK BURGERS & BARLEY" is a longer phrase, creating a different rhythm and cadence that serves to establish a separate identity. Connotatively, the term "HAYSTACK" may evoke imagery associated with the countryside or rural contexts, adding an imaginative and whimsical quality to the mark that is entirely absent from "BURGERS & BARLEY," which merely describes its two main food offerings. This additional word imbues the applicant’s mark with a distinct commercial impression, causing consumers to associate it with unique branding and atmosphere that would be unlikely to cause confusion with the simpler, more straightforward conflicting mark.

1. The dissimilarity and nature of the goods or services and trade channels of the two marks

Although both marks pertain to restaurant services, there exists a notable distinction in the scope and nature of the services offered under "HAYSTACK BURGERS & BARLEY" and "BURGERS & BARLEY." The applicant's mark not only specifies full-service restaurant offerings but also emphasizes an eclectic menu including sandwiches, salads, chili, appetizers, shakes, desserts, and craft beer, promoting both dining-in and take-out services. In contrast, "BURGERS & BARLEY" focuses broadly on restaurant and bar services without the same level of detail concerning specific menu items or service style. This divergence points to potentially different market segments and consumer experiences; "HAYSTACK BURGERS & BARLEY" suggests a more differentiated and possibly thematic dining offering which might appeal to patrons seeking a unique dining experience beyond standard bar and restaurant services. Furthermore, the mention of varied and crafted items in "HAYSTACK BURGERS & BARLEY" may indicate targeting a niche demographic interested in artisanal or gourmet experiences, thereby reducing the likelihood of consumer confusion between the two marks in their respective trade channels.

1. The conditions under which and buyers to whom sales are made, sophisticated purchasing

In considering the conditions under which purchases are made and the sophistication of buyers, it is important to note that the clientele for "HAYSTACK BURGERS & BARLEY" appears to be those seeking a comprehensive and distinct dining experience, one that may be characterized by its diverse menu and crafted beverages. This suggests a level of buyer sophistication, where consumers might be more discerning and attentive to brand differentiation. Such buyers are less likely to be confused by surface similarities in trademarks alone, particularly when the establishment’s branding endeavors to cultivate a unique identity around the "HAYSTACK" theme. Contrastingly, patrons of "BURGERS & BARLEY" might expect a more straightforward restaurant and bar experience. Thus, the context in which the two services are engaged by consumers indicates that the target audience for each mark is likely inclined to recognize the distinctive nature and branding elements intended by "HAYSTACK BURGERS & BARLEY," diminishing any potential for confusion regarding the source of services. The sophistication and expectations of the consuming public play a critical role in delineating clear distinctions between these competing marks, further supporting the argument against likely confusion.

**Conclusion**

There is no likelihood of confusion between the Applicant’s mark HAYSTACK BURGERS & BARLEY and the Cited Mark BURGERS & BARLEY . Considering the foregoing arguments, Applicant respectfully requests that the Examining Attorney withdraw the partial refusal to register Applicant’s mark.mark HAYSTACK BURGERS & BARLEY and the Cited Mark BURGERS & BARLEY . Considering the foregoing arguments, Applicant respectfully requests that the Examining Attorney withdraw the partial refusal to register Applicant’s mark.

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