

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF: Matthew Morgan

US Serial Number: 88359941

Mark: HIKERS

Application Filing Date: March 27, 2019

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RESPONSE TO OFFICE ACTION

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The examiner rejected the captioned application in the Office action dated June 13th, 2019, for the mark being Descriptive of the goods under 15 USC §1052(e), and requested the following Information:

(1) Fact sheets, instruction manuals, brochures, advertisements and pertinent screenshots of applicant's website as it relates to the goods and/or services in the application, including any materials using the terms in the applied-for mark. Merely stating that information about the goods and/or services is available on applicant's website is insufficient to make the information of record.;

(2) If these materials are unavailable, applicant should submit similar documentation for goods and services of the same type, explaining how its own product or services will differ. If the goods and/or services feature new technology and information regarding competing goods and/or services is not available, applicant must provide a detailed factual description of the goods and/or services. Factual information about the goods must make clear how they operate, salient features, and prospective customers and channels of trade. For services, the factual information must make clear what the services are and how they are rendered, salient features, and prospective customers and channels of trade. Conclusory statements will not satisfy this requirement.; and

(3) Applicant must respond to the following questions: Do applicant's goods for use by people who hike? Do applicant's competitors use HIKER or HIKERS to advertise

The answers to these questions immediately follow along with Arguments in favor of registration.

1) The only information the applicant has published about the product is on the website; www.hikersco.com It is noted the examiner cited this material as evidence that that the product was descriptive on the theory that it is intended for use by individuals when they engage in the sport of hiking. However, nothing on the applicant's own website supports such a conclusion, other than the bare name, which it should be noted is properly used with a TM symbol to assert common law rights in the name, and not as a description of the product or the intended use of the product. The word Hiker or Hikers is not used outside of the context of the trademark. To provide a full record, the pages from the WWW.HIKERSCO.COM are submitted herewith to show how these garments differ from the types of suspenders illustrated in the web pages the examiner has cited as evidence.

(2) To the extent the above material are not sufficient, it should be appreciated how the HikersTM brand suspenders are especially configured to be worn under a shirt, and NOT over it in the manner of conventional suspenders. In contrast to the conventional suspender products which connect to the wearer's pants at 3 or 4 places on the pant's waist band (with 2 connections to the front waist band, the HikersTM brand suspenders only connect at 2 places and they are readily concealed under garments. Furthermore, the HikersTM brand suspenders are configured to connect to the front of the waist at the zipper or fly button or snap, and do NOT straddle it. This connection to the zipper or fly button or snap is suitable for wearing a shirt, underwear and/or sweater over the HikersTM brand suspenders.

Moreover, the HikersTM brand suspenders also have a single point of connection to the rear pants waste band, clipping to a center belt loop.

HikersTM brand suspenders are not intended for people that hike, but rather for people that do not want to reveal they are using suspenders to keep their pants up, or do not feel that suspenders are stylistically appropriate to the clothes they are wearing.

(3) Applicant is unaware of the use of the terms “Hikers” to advertise any particular brand of suspenders.

As to the examiner’s evidence and arguments, it is noted the Chums branded product (<https://www.amazon.com/Chums-Suspenders/dp/B00E3KOKPE>) does not promote a specific use for hikers, but only that:

- *Feature: Newly designed pant-clips that don't tear your expensive garments like the metal clips do*
- *The clips grasp the front and rear waste bands directly, so they would be visibly if not worn with an outer garment that is placed over them and is not tucked in.*

It is further noted that as to the other to Amazon website cited by the examiner (<https://www.amazon.com/customerpick/Best-suspenders-for-hiking/1835cd8a0af4e9188327>) it was clearly generated by a computer algorithm based on the word -hike- appearing in the favorable customer reviews, of which there are only 3, This patent from the exclusive content being such reviews, without further explanations.

However, two of these three reviews use the work “hike” with a completely different meaning from the outdoor sport of hiking. The single references to the outdoor sport of hiking praised the product for:

“Used to hold up my hiking fanny pack and gear belt. Did not let me down. Worked great.”

Evidence is submitted herewith in the form pages from the Atlas46 website showing a range of hiking and outdoor sports gear similarly held up with suspender like straps.

It is submitted that for such use, holding up a fanny pack, gear belt and the like, the HikersTM brand suspenders would not be suitable because they lack multiple end clip, such as in the Chums and other products, which can universally grips a various of accessory garments. In contrast, the HikersTM brand suspenders only have 2 points of attachment to the waist band, and the front point is suitable for the existing button or

snap above the pants zipper, and hence would not connect to a wide range of hiking and outdoor sports gear.

As to the examiner's evidence from the website of the Suspender Store (<https://www.suspenderstore.com/novelty-suspenders/outdoor-suspenders/>), the suspenders shown are featured as suitable for outdoor activities, hiking among other, because of the decorative patterns deploy outdoor themes, and not for any technical feature related to the applicant product. The most relevant text from this URL is underlined below.

“Show off your love of the great outdoors with SuspenderStore's collection of outdoor suspenders. However you like to spend your time outside - whether it's hunting, hiking, boating, gardening, or just enjoying nature and observing the wildlife - we have the perfect outdoor themed suspender for you! Enjoy our extensive offering of unique, practical and affordable elastic novelty outdoor suspenders. Or, for the treat of a lifetime, splurge on one of our exquisitely detailed handwoven silk braces which feature many outdoor themes. Each is a work of art made of 100% pure silk and is produced in limited quantities making it an extraordinarily exclusive and memorable wardrobe accessory.”

The applicant's product does not use outdoor themes for the product, which would in fact not be relevant as they are intended to be hidden under a shirt.

As an initial matter, the product sold under the applied for mark is not descriptive because –hikers- does NOT describe the intended user or group of users of the product.

Two of the three comments by reviews on Amazon web page *Best-suspenders-for-hiking* indicate –hikers- has in fact a suggestive meaning in relation to the product, in that to –hike- may refers to pulling ones pants higher if they slip lower than desired about ones waistline.

It has been held that *“A descriptive term-identifies a characteristic or quality of an article or service and, though ordinarily not protectable, may become a valid trade name if it acquires a secondary meaning. A suggestive term suggests, rather than describes, a characteristic of the goods or services and requires an effort of the imagination by the*

consumer in order to be understood as descriptive” General Shoe Corp. v. Rosen, 111 F.2d 95, 98 (4th Cir. 1940). A suggestive term requires no proof of secondary meaning in order to receive trade name protection. An arbitrary or fanciful term bears no relationship to the product or service and is also protectable without proof of secondary meaning.”

The term –hikers- is suggestive because it requires the consumer to use their imagination to appreciate that the term –hikers- refers NOT to the product being used by a hiker, but rather is a subtle reflection on what the product avoids the consumer having to do. That is the consumer wearing the product would not need raise their pants somewhat frequently as they slipped from the waist. The consumers imagination is required to appreciate the term –hikers- refers not to an outdoor sport, but the act of raising or hiking pants higher on the waist when the slip.

The facts and supporting evidence attached hereto are much analogous to those in which the Board has held for the applicant that the examiner precluding registration.

The examiner relied on the *In re Camel Mfg. Co.*, 222 U.S.P.Q. (BNA) 1031, 1984 TTAB LEXIS 84 (Trademark Trial & App. Bd. July 11, 1984) and *In re Planalytics, Inc.*, 70 USPQ2d 1453 (TTAB 2004), but these are less applicable as the Board was considering if the marks describe customers for services, not customers for products. Further, these case turned on a showing of an appreciable number of the potential users of the services would perceive the mark as being descriptive.

In re Planalytics, Inc., 70 USPQ2d 1453 (TTAB 2004) the mark GASBUYER was merely descriptive of intended user of risk management services in the field of pricing and purchasing natural gas) because a gas buyer was almost the sole use of these services. The supporting evidence of such use and the applicant’s intent was found in the product literature.

In re Camel Mfg. Co., 222 USPQ 1031 (TTAB 1984), the Board held the mark was descriptive because the term “MOUNTAIN CAMPER”, for retail services, was a category of purchaser to whom the applicant specifically directed potential buyers of camping equipment for mountain camping.

In the case of marks for goods, the Board has held for the applicant in the absence of a very strong showing that the goods are of the type that would only be used by a single type of person that is described or named in the mark.

The Board in *In re CHESEBROUGH-POND'S INC.* 1969 TTAB LEXIS 122;163 U.S.P.Q. (BNA) 244 held that the proposed mark "MANICURIST BY CUTEX" for nail polish was merely suggestive, as the board was of the opinion that an average woman upon encountering the term "MANICURIST BY CUTEX" in the ordinary channels of trade would not thereby conclude that the mark signified a nail polish specifically for use by manicurists. The board held "*that the entire mark is merely suggestive that the product would give professional results in the care of finger nails.*"

Similarly the Board held for the applicant in *In re John Berg Manufacturing Co.* 1970 TTAB LEXIS 8; 164 U.S.P.Q. (BNA) 607 finding the mark "MILLWRIGHT", in which the described goods were ladders, was merely suggestive of the fact the ladder is one that could be used by a millwright, because in part many types of persons user ladders.

The Board reflected on *In re Camel Manufacturing Co., Inc., supra*, 222 USPQ 1031 in the non precedential opinion *In re True Value Goods* 2008 TTAB LEXIS 392, considering if an "*appreciable number or all*" of applicant's goods are directed towards "master plumbers". The Board concluded "MASTER PLUMBER" was not descriptive of a range of hardware components because professional or masters plumbers are not an appreciable number of the customers, with many do-it yourselfers buying these good at True Value hardware stores. The Board noted that "*Applicant had submitted probative evidence that they are not*". The Board also noted as probative that "*nothing in the identifications of goods in these applications limits the class of consumers to "master plumbers," nor was there anything inherent in the nature of the listed items which would limit their use to "master plumbers."*" The Board further concluded do-it-yourself "*purchasers would likely constitute the overwhelming majority of purchasers, and these purchasers would likely perceive the suggestive meaning of the mark posited by applicant.*"

The Board held recently in the published opinion *In re Joseph E. Sielski 2015 TTAB LEXIS 537*, the mark CHEF'S CUBE was not merely descriptive of the listed goods being "vacuum packaging machines for sealing plastic pouches" because the mark failed to identify an intended user of the goods.

Following the consistent line of reasoning from *In re CHESEBROUGH-POND'S INC.*, to sustain a Descriptiveness rejection the examiner must in this matter establish the applicant's product is intended for hikers and the average buyer would conclude these suspenders are specifically for hikers or hiking.

Evidence has been provided from other on-line sellers that ordinary suspenders (connecting to the waist line at 3 or 4 points) are used by construction workers and others involved in physical labor (Carhartt), as well as with business suits and formal wear (Nordstrom, BrooksBrothers). Evidence is also submitted to show how such conventional suspenders are used or combined with pants for a range of outdoor sports (Columbia, Northface and Atlas 46). Given that ordinary suspenders used by hikers are not structurally different than the those worn for other purposes (unless affixed permanently to pants), such as over a shirt and under a suit jacket, the examiner's position is unreasonable.

There is nothing in the applicant's description of the goods in the application or the website, also submitted as evidence, that suggests Hikers[™] brand suspenders are for any particular class of wearer that is different than ordinary suspenders. Further, as the applicant's novel product is intended to be hidden under clothes and are not suitable for grasping ancillary equipment, they are less likely to be purchased or worn by hikers. In fact, this ability to hide the suspenders appeals to consumers whom intend to wear them in social circumstance in which they do not want to be seen or perceived as wearing conventional suspenders. Given that suspenders are appropriate to wear for many types of outdoor sports and as garments for physical workers, not only is there not a compelling reason for hikers to wear the novel suspenders, but some hikers would be less inclined to wear the Hikers[™] brand product.

Accordingly, it is unlikely those engaged in hiking and other outdoor sports will form an appreciable number of customers, nor is it likely consumers will perceive the product as intended for hikers.

The examiner is kindly requested to withdraw the rejection of the mark for being descriptive and allow the application to proceed to publication.

Respectfully submitted:

by: /Edward_S_Sherman/ on 7/22/2019

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