

## **RESPONSE TO OFFICE ACTION**

Applicant submits this response to the June 19, 2019 Office Action in the instant application, Serial No. 88375524, in which the Trademark Office refused registration of applicant's mark based on the premise that the specimens do not show the applied-for mark in actual use in commerce and requiring additional information about the specimens and use of the mark in commerce. Applicant respectfully submits that the specimens as filed with the application were in use in commerce at the time the application was filed and provides the additional information requested by the Examiner.

### **I. THE SPECIMENS AS FILED ARE NOT DIGITALLY ALTERED IMAGES AND SHOW USE OF THE MARK IN COMMERCE**

In this case, the Examiner determined that the specimens appear to consist of digitally altered images or mock-ups of the mark on the goods or their packaging and do not show the applied-for mark in actual use in commerce. The Examiner opined:

In the present case, the applicant submitted two specimens showing the packaging for the goods. However, elements of the images appear to be digitally altered. Specifically, certain wording on the packaging in the specimens appears to be floating above the packaging. Additionally, certain wording appears to be sharper than other wording similarly placed wording on the packaging which is usually a sign of digital alteration. Moreover, certain wording in the specimens is misspelled, which is also common in digitally altered images.

For example, in the first specimen showing a box, the wording "sweetened snowflake coconut" appears to be superimposed onto the label, contains the misspelled wording "sweetened," and appears discolored compared to the mark TRADEWINDS above. Moreover, additional wording on the label including "1/50 LB. CTN," "50LBS. (22.68 KG)," and the letter "K" inside a circle all appear to be digitally added as well, as the wording is floating above the label, is off color, and appears to be pixilated.

In the second specimen, the same can be said of the wording "COCONUT," which appears to be pixilated and floating above the packaging.

Taken as a whole, these marks give the impression that they have been digitally altered.

Applicant advises that the specimens as filed are photographs of the goods that were taken in a warehouse in California where the goods are housed pending shipment to customers. They are not digitally altered photographs, just poor quality photographs. The palletized box is affixed with the label depicting the product name, and then the entire unit is wrapped in shrink-wrap plastic for shipping. The flash photograph of the package reflects back off the shrink-wrap plastic giving the impression that the label is superimposed and causing color differences due to the reflected light. Regarding the misspelling of the word "sweetened" in the specimens, applicant did not realize that the word was misspelled on the labels until the Examiner noted it the present Office Action. Applicant intends to have its supplier that ships the goods to the

warehouses where the goods are housed, correct this typographical error when new product is ordered.

Applicant is submitting additional specimens in response to this Office Action that more clearly show the labels attached to the packaging for the goods. As can be seen from these additional photographs the goods are clearly shown in the warehouses where the goods are housed until shipped to the ultimate consumer. In some of the images one can see the pallets on which the containers for the goods reside. In the last submitted image, applicant has taken a photograph of the goods on the pallet wherein the warehouse can be seen in the background of the photograph. It is respectfully submitted that the specimens as filed as well as the additional specimens provided in response to this Office Action, show the applied-for mark in actual use in commerce.

## **II. REQUEST FOR INFORMATION REQUIREMENT**

The Examiner required applicant to submit additional information for the record about the specimens and how the mark as shown in the specimen is in use in commerce with the applicant's goods, to allow proper examination of the present application.

The Examiner made the following specific inquires:

1. How are applicant's goods sold? Specify the retail, wholesale, or other sales environment in which the goods are sold.

Applicant advises that the goods are packaged and the labels with applicant's mark are attached to the packages in Georgia where applicant's supplier is located. The goods are then shipped to warehouses in California where the goods are housed until they are subsequently sold and shipped to applicant's end customer. Applicant sells its goods wholesale in bulk to businesses such as restaurants, donut shops and the like. See the Declaration of Brian Dunning in Response to this Office Action (the "Dunning Decl.") at paragraph 2, attached hereto.

2. Please provide copies of invoices, bills of sale, or other documentation of sales of the goods.

Attached as Exhibits "A" and "B" are invoices and shipping documents showing the sale of the goods and shipping of the goods.

3. Was the specimen created for the submission of the application?

Applicant advises that the photographs of the goods filed with the instant application were taken in one of the warehouses where the goods are housed pending their sale and shipment to customers. Applicant also advises that the specimen images were not digitally "created" or altered and are not a mock-up of use of the mark, before being submitted with the instant application. See the Dunning Declaration, Paragraph 3.

4. Does the specimen show applicant's product as it is currently being sold to customers?

Applicant advises that the specimens as filed and the additional specimens attached to this Response to Office Action, show applicant's product as it is currently being sold to customers. See the Dunning Declaration, Paragraph 4.

5. How do applicant's goods appear in the actual sales environment?

Applicant advises that the goods appear as shown in the specimens submitted with the application and the additional specimens provided in response to this Office Action. Applicant's sales are made at wholesale to restaurants and the like where they are used in the restaurants or in the food products made at the restaurants and sold to customers of the restaurants.

### III. CONCLUSION

Applicant submits that the specimens as filed show actual use of the mark on the goods in commerce as do the additional specimens submitted herewith. In addition, applicant submits that the information requested by the Examiner has been provided in this response to Office Action. The Examiner is requested to accept the specimens as filed and submitted herewith and approve this application for publication and further processing by the USPTO.

Should the Examining Attorney have questions with regard to this response to Office Action, require further evidence or believe that other issues remain that would benefit from a conversation with the undersigned, the Examining Attorney is invited to contact him by telephone to resolve any such remaining issues.

Respectfully submitted:



---

Dale A. Stern  
Downey Brand LLP  
Attorney of Record  
621 Capitol Mall, 18th Floor  
Sacramento, CA 95814

T: 916-444-1000  
F: 916-444-2100  
E: [trademark@downeybrand.com](mailto:trademark@downeybrand.com)

1597495.1