

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

In re Application of: Hauser, Thomas ) Date: December 30, 2019  
Serial No.: 88386119 )  
Filing Date: 04/15/2019 ) Trademark Law Office: 121  
Mark: GOAT ) Examiner: Shen, Elizabeth  
\_\_\_\_\_ ) Docket No.: SC-6132-001  
\_\_\_\_\_ )

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Commissioner for Trademarks  
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**RESPONSE TO NON-FINAL OFFICE ACTION UNDER 15 U.S.C. §1062(b); 37 C.F.R. §§2.62, 2.65(a)**

Dear Sir:

This response is submitted in reply to the Office Action mailed on 06/28/2019, in which Examining Attorney refused registration of Applicant’s applied-for mark, “GOAT”, based upon a

perceived likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d); TMEP §§1207.01 *et seq.* with United States Trademark Registration Nos. 3780591, 4983902, and 4983903.

In addition, in reference to applicant's applied-for-mark for use on goods classified in IC 021, the Examining Attorney respectfully refused registration of applicant's mark as being merely decorative or an ornamental feature of applicant's goods, and does not function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others. Trademark Act Sections 1, 2, and 45, 15 U.S.C. §1051-1052, 1127; TMEP §§904.07(b), 1202.03 *et seq.*

Applicant respectfully submits that there is no potential likelihood of confusion between applicant's mark and the marks listed in cited registration numbers 3780591, 4983902, and 4983903.

Applicant further respectfully submits applicant's applied-for mark has acquired secondary meaning or distinctiveness as a mark in relation to the goods identified thereunder, and therefore, is registrable on the Principal Register.

Accordingly, applicant respectfully requests the Examining Attorney's reconsideration in light of the following remarks.

**REMARKS**

Applicant respectfully requests the Examining Attorney's reconsideration in light of the following amendments and remarks.

**SECTION 2(d) REFUSAL – LIKELIHOOD OF CONFUSION**

The Examining Attorney respectfully refused registration on the Principal Register based upon a likelihood of confusion with the registered marks “GOAT SOUP AND WHISKEY”, U.S. Registration No. 3780591, “CABRA”, U.S. Registration No. 4983902 and “CABRA”, U.S. Registration No. 4983903.

Applicant respectfully submits that there is no potential likelihood of confusion between applicant's mark and the above-cited registered marks. Applicant has outlined herein the basis for applicant's position.

As set forth in T.M.E.P. 1207.01, the test for likelihood of confusion under Sec. 2(d) must consider the following:

*(1) The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.*

There are significant differences concerning the registrant's mark, “GOAT SOUP AND WHISKEY”, as compared to applicants' mark, “GOAT”.

First, in contrast to applicant's mark, the registrant's mark includes the terms “SOUP”, “AND”, and “WHISKEY”. In addition, the Examining Attorney submits the wording “SOUP AND

WHISKEY” is disclaimed in this registrant’s mark, thus rendering GOAT the dominant portion of the compared marks.

However, insofar as the wording “SOUP AND WHISKEY” is disclaimed and may be held to be the dominant portion of the registrant’s mark, the registrant’s trademark property rights claim nevertheless requires registrant to use the term GOAT in conjunction with the wording “SOUP AND WHISKEY” in order to enforce registrant’s trademark rights in registrant’s mark.

Thus, a reasonable, ordinary consumer can easily distinguish the following two marks:

- 1) GOAT; and
- 2) GOAT SOUP AND WHISKEY.

Second, *in sharp contrast* to the applicant’s mark which consists of standard characters, the term “GOAT” in registrant’s mark is in stylized oblong lettering or font encircled by an oval, and the wording “SOUP AND WHISKEY” positioned below the oval.

Arguably, the term “GOAT” in registrant’s mark is stylized to such a degree so as to be arguably indiscernible when viewed by a reasonable, ordinary consumer. It was only after having the benefit of being afforded with the spelling thereof was applicant able to identify this term. Initially, applicant was respectfully unable to identify the first term (GOAT) in registrant’s mark. It was only after having the benefit of being afforded with the spelling thereof was applicant able to identify the first term in registrant’s mark.

Hence, in view of the additional terms “SOUP AND WHISKEY” used in registrant’s mark, and in further view of the ambiguity regarding the stylized letters used in the first term (GOAT) of registrant’s mark, there are substantial differences when comparing the two marks.

In reference to U.S. Registration Nos. 4983902 and 4983903, there are substantial differences concerning the registrant's mark, "CABRA", as compared to applicants' mark, "GOAT".

When comparing the two marks, there lies no similarity in sound and appearance.

In addition, while a mark in a common, modern foreign language and a mark that is its English equivalent may be held confusingly similar, such would not be the case when comparing applicant's applied-for-mark, "GOAT" to the registrant's mark, "CABRA".

Examining Attorney argues, "[t]he ordinary American purchaser would likely stop and translate the mark because the Spanish language is a common, modern language spoken by an *appreciable* number of consumers in the United States." (Office Action, p. 4) (*Emphasis added*). Applicant respectfully disagrees.

According to the 2017 Census survey, an estimated 13.4% of the U.S. population speaks Spanish, and an estimated 7.4% of the U.S. population is bilingual, speaking both Spanish and English.

Whether or not 7.4% of the U.S. population being bilingual would be characterized or defined as an "appreciable" number of residents, it is nevertheless a significantly low number of persons constituting such populated group.

Therefore, in light of only 7.4% of U.S. population being bilingual, an ordinary American purchaser would NOT likely stop and translate the mark. On the contrary, it would be an extremely rare circumstance for such to occur. Consequently, the two marks in their entireties therefore also convey significantly different commercial impressions.

Hence, in view of the substantial dissimilarities between the two marks in sound and

appearance, because of the conveyance of significantly different commercial impressions by the two marks in their entireties, and given the unlikelihood that an ordinary American purchaser would stop and translate the registrant's mark, there are arguably very little to no similarities between the two marks.

(2) *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.*

In reference to the registrant's mark, "GOAT SOUP AND WHISKEY", Examining Attorney argues applicant's and registrant's goods and/or services are related because the goods and/or services of the respective parties are identical.

Applicant respectfully disagrees. Insofar as the services used under applicant's mark and the registrant's mark is restaurant and bar services, the services provided under both marks are nevertheless distinguishable.

Regarding the registrant's services, the registrant provides bar and restaurant services **open only seasonal**. In addition, registrant provides a *global cuisine* which includes, but is not limited to, lamb chops, goat cheese, frog legs, Reuben balls, duck breast, and braised goat ravioli.

In sharp contrast to the services provided under the registrant's mark, applicant provides bar and restaurant services **open year long**, and offers a menu which includes fried green tomatoes, fried pickles, nachos, sweet chili shrimp, cucumber wrap, chicken wings, onion rings, potato salad, cheese fries with bacon, chili, burgers, chicken sandwich, turkey sandwich, steak philly, fish sandwich, and chili cheese dogs.

Thus, when comparing the services under the applicant's mark and registrant's mark, no

similarity exists.

In reference to U.S. Registration Nos. 4983902 and 4983903, Examining Attorney argues applicant's and registrant's goods and/or services are related because the goods and services of the respective parties are of a type that are commonly provided by a single source under the same mark.

To support Examining Attorney's argument, Examining Attorney submits evidence in the form of internet advertisements concerning Crate & Barrel, Yeti, and Stanley to show the relevant goods are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use and are similar or complementary in terms of purpose or function.

Applicant respectfully disagrees and submits that applicant's mark for use with beer mugs, beverage glassware, and mugs are substantially distinguishable from the registrant's list of goods for bota bags and portable beverage dispensers.

In reference to the internet advertisements, the entities associated with the goods are companies which offer a substantially-wide variety of consumer goods in significantly high quantities. Although these various goods are offered under the same "roof" of each store, this does not necessarily signify the goods are all in fact related, provided through the same trade channels, used by the same classes of consumers in the same fields of use, and/or are similar or complementary in terms of purpose or function. For example, along with offering the sale of dispensers and glassware, Crate & Barrel also offers furniture and bed & bath goods. When comparing goods and/or services for purposes of making a determination of likelihood of confusion, neither furniture nor bed & bath goods are related to dispensers or glassware. Walmart® provides an example of a "brick-and-mortar" retail store entity which offers a high variety of goods in high

volume by a single source under a single mark. A customer shopping at a Walmart® store would not be confused by seeing a beverage dispenser in the HOUSEWARE department and later seeing coffee mugs in the KITCHEN & UTENSILS department. Given that the goods are offered for sale sold in completely different sections or departments of a store demonstrates the goods are unrelated.

In addition, the registrant lists bota bags for use under registrant's mark. A bota bag is a traditional Spanish liquid receptacle, typically used to carry and transport wine. Conventional bota bags are depicted in Exhibit A, and incorporated herein by this reference. Applicant's mugs, beverage glassware, and beer mugs are clearly not related or similar to bota bags. Any similarity or relatedness that may exist between applicant's goods and bota bags would not create a likelihood of confusion.

Furthermore, the registrant lists portable beverage dispensers for use under registrant's mark. A beverage dispenser is a liquid-filled container designed to allow a desired or metered quantity of the liquid to be expelled (dispensed) therefrom. Conventional beverage dispensers are depicted in Exhibit B, and incorporated herein by this reference. Applicant's mugs, beverage glassware, and beer mugs are clearly not related or similar to dispensers. Any similarity or relatedness that may exist between applicant's goods and dispensers would not create a likelihood of confusion.

Interestingly, although glassware is offered for sale by Crate & Barrel, Yeti, and Stanley through their respective websites, bota bags are not offered for sale by any of these entities.

Thus, insofar as the goods for use under the applicant's and registrant's marks are both identified in IC 021, no likelihood of confusion exists.

(3) *The similarity or dissimilarity of established, likely-to-continue trade channels.*



Applicants feel that in view of the goods and services identified by applicants' mark, relevant customers and the public would clearly associate and identify applicant as the source of its goods, and restaurant and bar services, thus different trade channels are most certainly utilized, as previously demonstrated concerning bota bags.

(4) *The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.*

It is strongly felt that, due to the substantial differences in providing applicant's goods and services described hereinabove versus providing bota bags, beverage dispensers, and a dining menu featuring lamb chops, goat cheese, frog legs, Reuben balls, duck breast, and braised goat ravioli, a purchaser of the goods and services in connection with applicant's mark would be very unlikely to confuse such goods and services with the goods in connection with the cited registered marks.

(5) *The fame of the prior mark (sales, advertising, length of use).*

Applicant believes that the cited registered marks are not readily known to the general public.

(6) *The number and nature of similar marks in use on similar goods.*

Several U.S. trademark registrations currently exist which are identified with the term, "GOAT" in combination with at least one other term and which provide goods identified under IC 021. These registrations include, but are not limited to, the following:

Reg. no. 5256067, "NannyGoatsCloset";  
Reg. no. 4862170, "GOAT STORY"; and  
Reg. no. 5033972, "GOAT STORY 2014".

In addition, applicant feels that given the singular choice between restaurant and bar services and goods featuring mugs, beverage glassware, and beer mugs, or purchasing bota bags and beverage dispensers, an ordinary consumer or purchaser would be very unlikely to confuse the origin of the goods and services in connection with applicant's mark, with the origin of the goods and services in connection with the cited registered marks.

(7) *The nature and extent of any actual confusion.*

To applicant's knowledge, no actual confusion has yet existed.

(8) *The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.*

As stated above, to applicant's knowledge, no actual confusion has yet existed. Applicant first used its applied-for-mark in commerce on 10/06/2017.

(9) *The variety of goods on which a mark is or is not used (house mark, family mark, product mark).*

Applicant's mark is specific to providing restaurant and bar services and goods featuring mugs, beverage glassware, and beer mugs. In contrast, in reference to U.S. Registration No. 3780591, this registrant's mark is specific to providing bar and restaurant services, and in reference to U.S. Registration Nos. 4983902 and 4983903, this registrant's marks are specific to bota bags and portable beverage dispensers.

(10) *The market interface between the applicant and the owner of a prior mark.....*

No interface is currently known or exists.

(11) *The extent to which applicant has a right to exclude others from use of its mark on its*

*goods.*

It is strongly felt that given the substantial differences shown to exist when comparing applicant's mark and the goods and services identified thereunder with the goods and services identified under the cited registered marks, applicant has the right to exclude others from use of its mark on its goods and services.

*(12) The extent of potential confusion, i.e. whether de minimis or substantial.*

It is felt that, due to the *substantial* differences in the services and goods, their uses, their respective markets, trade channels, and the substantial differences in applicant's mark and the cited registered marks as argued above, no substantial confusion could occur among the relevant consumers/customers who wish to purchase restaurant and bar services and goods featuring mugs, beverage glassware, and mugs under applicant's mark.

*(13) Any other established fact probative of the effect of use.*

As submitted above, applicant wishes again to note that there are not only significant differences concerning the actual terms between applicant's mark and the cited registered marks, but also substantial differences regarding the goods and services in connection with applicant's mark and the goods and services in connection with the cited registered marks.

As delineated above and as set forth in T.M.E.P. 1207.01, the test for likelihood of confusion under Sec. 2(d) must consider the preceding thirteen indicia. In reviewing these, applicant strongly feels that each and every one leads to the conclusion that the determination that the mark is likely to be confused with the cited registered marks is incorrect.

**SECTIONS 1, 2, and 45 REFUSAL – ORNAMENTAL USE**

The Examining Attorney refused registration of applicant's applied-for-mark as being merely decorative or an ornamental feature of applicant's goods, and does not function as a trademark to indicate the source of applicant's goods and to identify and distinguish them from others.

Applicant respectfully disagrees and argues his applied-for mark has acquired secondary meaning or distinctiveness as a mark in relation to the goods identified thereunder, and therefore, applicant's applied-for-mark is registrable on the Principal Register.

Applicant's mark identifies a secondary source for goods not in applicant's application. The goods not identified in the present application, for which applicant's applied-for-mark serves as a source identifying function, includes souvenirs and gifts. *See In re Paramount Pictures Corp.*, 213 U.S.P.Q. 1111 (TTAB 1982); *In re Expo '74*, 189 U.S.P.Q. 48 (TTAB) 1975; *In re Olin Corp.*, 181 U.S.P.Q. 182 (TTAB) 1973.

In addition, applicant is the owner of a *pending, use-based application* for the *same mark*, used in a non-ornamental manner, for other goods or services. Applicant's mark serves a source-indicating function, and such mark is recognized as a mark through its use with goods and services other than those being refused as ornamental. TMEP §1202.03(c). In reference to applicant's current application, applicant has used the same applied-for-mark ("GOAT") in a non-ornamental manner for restaurant and bar services.

Furthermore, applicant has and continues to promote and advertise mugs, beer mugs, and beverage glassware and restaurant and bar services under applicant's applied-for-mark, "GOAT" substantially exclusive and continuous in commerce since October 06, 2017. More specifically,

applicant has and continues to promote and advertise applicant's goods and services under applicant's applied-for-mark on the internet and from applicant's principal place of business, located at 11824 Frontage Rd A, Murrells Inlet, SC 29576, substantially exclusive and continuous in commerce since October 06, 2017.

Applicant's applied-for-mark has been promoted and used in advertisements in a manner such that it is recognized by the consuming public as a source identifier for mugs, beer mugs, and beverage glassware. In accordance with one exemplary advertising use, applicant's goods are prominently displayed in various locations inside applicant's business establishment.

In light of applicant's advertisement and promotional efforts, the *primary* significance of the term "GOAT" in the minds of the consuming public is not the goods (mugs, beer mugs, beverage glassware) but applicant, as the source of these goods. *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F. Supp. 129, 133, 173 USPQ 820, 823 (S.D.N.Y. 1972). The term, "GOAT", embellished on mugs, beer mugs, and beverage glassware, acts as a source indicator as the result of acquired distinctiveness and is only incidentally ornamental or decorative. *In re Penthouse Int'l Ltd.*, 195 U.S.P.Q. 698 (CCPA 1977).

Applicant has used the applied-for-mark extensively on mugs, beer mugs, and beverage glassware, and in advertising in a manner which has drawn the attention of the purchasing public to applicant's mark which conveys to the purchasing public the "secondary source" (applicant) of the goods, rather than the manufacturing source. Thus, the manner in which applicant has extensively used and continues to use his mark on the goods and in advertising draws the attention of the purchasing public to applicant's mark and for them to look at applicant's mark as an identifier of the

secondary source (applicant) of the goods. See *Anchor Hocking Glass Corp. v. Corning Glass Works*, 162 USPQ 288 (TTAB 1969).

Applicant feels he has established that the matter in question has acquired secondary meaning or distinctiveness as a mark in relation to the named goods, and therefore, applicant's applied-for-mark is registrable on the Principal Register under §2(f) of the Trademark Act, 15 U.S.C. §1052(f).

Applicant has addressed each of the concerns raised by the Examining Attorney in the Office Action mailed June 28, 2019.

Accordingly, applicant respectfully submits that the application is in the proper form for prompt publication and favorable disposition is earnestly requested.

Respectfully submitted,

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