

KEATS

Classes 3, 5, 29, 30, 31, 32, and 34

Application No. 88425617

Office Action Response

I. Amendment of Listed Goods

The Examiner requested amendment to the listed goods in within the Application. In response, Applicant has amended the goods recited in the Application, as set out herein.

Classes 3

Bath additives, namely, bath herbs, bath oils, bath oils for cosmetic purposes; beauty care cosmetics; beauty creams for body care; beauty gels; beauty lotions; body and beauty care cosmetics; body creams; body oils; cosmetic creams; cosmetic oils; cosmetics and make-up; face and body lotions; face and body milk; face lotion; hair care preparations; hair styling preparations; hand cream; hand lotions; non-medicated lip care preparations; lip conditioners; lip glosses; non-medicated liquid soaps; massage creams; massage oils; non-medicated bubble bath preparations; non-medicated preparations for the care of hair; non-medicated preparations for the care of skin; non-medicated preparations for the care of the scalp; non-medicated skin care preparations; oils for toiletry purposes; skin care preparations; skin creams; skin emollients; skin lotions; skin soap; soaps for body care, namely cream soaps, bath soaps, bar soaps, paper soaps; soaps for personal use namely, cream soaps, bath soaps, bar soaps, paper soaps; each of the foregoing containing permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

Class 5

Hemp cannabidiol derived products, namely, oils, salves, concentrated pastes, topical tinctures; oils, salves, concentrated pastes, topical tinctures, each containing resins and oils derived from hemp or derivatives thereof and for medical use; topical skin creams, bar and liquid soaps, bath additives in the nature of bath melts, bath herbs, and bath oils; body creams, body oils, face and body lotions, face and body milk, face lotion, and skin care preparations for the relief of pain, for relaxation, for reducing stress and fatigue, for mood enhancement, for maintaining general health and well-being, for relieving anxiety, for relieving depression, and as a sleep aid; personal sexual lubricants; transdermal patches for the relief of pain, for relaxation, for reducing stress and fatigue, for mood enhancement, for maintaining general health and well-being, for relieving anxiety, for relieving depression, as a sleep aid and for management of opioid addiction and relief of epilepsy; hemp cannabidiol or derivatives thereof for topical medicinal use; hemp cannabidiol derived product, namely, oils for topical medicinal use for the relief of pain, for relaxation, for reducing stress and fatigue, for mood enhancement, for maintaining general health and well-being, for relieving anxiety, for relieving depression, as a sleep aid and for management of opioid addiction and relief of epilepsy; oils derived from hemp for topical medicinal use for the relief of pain, for relaxation, for reducing stress and fatigue, for mood enhancement, for maintaining general health and well-being, for relieving anxiety, for relieving depression, as a sleep aid and for management of opioid addiction and relief of epilepsy; each of the foregoing containing permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

Class 29

Oils and resins derived from hemp for use as comestibles; hemp or cannabidiol related product, namely, oils for use as comestibles; oils derived from hemp or cannabidiol for use as comestibles; food products containing hemp, cannabidiol, resins and cannabidiol oils, namely, butter; each of the foregoing containing permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

Class 30

Food products containing hemp, cannabidiol or derivatives thereof, namely, chocolates, cookies, brownies, candy and food energy bars; tea, namely, teas containing hemp, cannabidiol or derivatives thereof, and teas containing hemp, cannabidiol or derivatives thereof; each of the foregoing containing permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

Class 31

Live hemp plants; hemp seeds; each of the foregoing containing permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

Class 32

Smoothies, fruit beverages and fruit juices, carbonated soft drinks, and energy drinks each containing hemp, cannabidiol or derivatives thereof; each of the foregoing containing permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

Class 34

Smokers' articles, namely, grinders for use with hemp; dried hemp; derivatives of hemp, namely, resins and oils, not for medical use; hemp cannabidiol and hemp for recreational use; smokers' articles, namely, smoking pipes, pouches for use with hemp, lighters for smokers, oral vaporizers for smokers, each of the foregoing for use with articles containing permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

II. Controlled Substances Act Refusal

The Examiner has refused registration on the basis that the Applicant cannot have a bona fide intent to lawfully use the applied-for mark in commerce with respect to the listed goods. Applicant respectfully asserts that this basis for refusal is moot in light of the amended recitations of goods adopted herein.

III. FDCA Refusal

The Examiner alleges that the Applicant does not have a bona fide intent to lawfully use the applied-for mark in commerce with relation to the goods identified in Classes 5, 29, 30 and 32 because pursuant to the FDCA it is unlawful to introduce food or beverages containing added CBD into interstate commerce or to market CBD as, or in, dietary and nutritional supplements, regardless of whether the substances are hemp-derived. However, applicant notes that it has a bona fide intent to lawfully use the applied-for mark in commerce because it is authorized to import products containing CBD into the United States in furtherance of one or more FDA-approved clinical trials.

IV. Primarily Merely a Surname Refusal

The Examining Attorney asserts that KEATS does not qualify for registration on the Principal Register on the ground that it is primarily merely a surname. The Examining Attorney bears the burden of establishing a prima facie case that Applicant's mark is "primarily merely" a surname. *In re Harris-Intertype Corp.*, 518 F.2d 629, 631, note 3, 186 U.S.P.Q. 238 (CCAP 1975) ("Harris"). In other words, the Examining Attorney must establish a prima facie case that the American purchasing public will recognize Applicant's mark only as a surname when it appears on Applicant's products. *Id.* Applicant would like to emphasize that KEATS is an inherently distinctive mark when used in connection with Applicant's listed goods. Further, Applicant asserts that the KEATS mark does not function primarily merely as a surname.

As noted in TMEP §1211.01, the Trademark Trial and Appeal Board has identified five factors to be considered in making determining whether the primary significance of a term is that of a surname:

- (1) *whether the surname is rare;*
- (2) *whether the term is the surname of anyone connected with the applicant;*
- (3) *whether the term has any recognized meaning other than as a surname;*
- (4) *whether it has the “look and feel” of a surname; and*
- (5) *whether the stylization of lettering is distinctive enough to create a separate commercial impression.*

Based upon a review of these factors, Applicant respectfully submits that the mark KEATS is not primarily merely a surname. Applicant agrees with the Examiner that because KEATS is a standard character mark, factor number five is not applicable in this case.

1) KEATS is a Rare Surname

Applicant agrees with the Examiner that use of the mark KEATS as a surname is relatively rare, and in fact, Applicant notes that KEATS as a surname is extraordinarily rare. There are only 689 individuals in the United States with that surname. See **Exhibit A** for screenshots of 2010 US Census Bureau data; also available at https://www.census.gov/topics/population/genealogy/data/2010_surnames.html. When compared to the entire US population at the time of the last census data (i.e., 308,745,538), the miniscule group of individuals with KEATS as their surname was 0.0002% of the total US population.

While the Examiner correctly notes that there is no minimum amount of evidence needed to establish that a term is primarily merely a surname, these statistical figures provide compelling evidence that Applicant's mark KEATS is not primarily merely a surname. *In re Benthin Management GmbH*, 37 U.S.P.Q.2d 1332, 1333 (TTAB 1995); *In re Sava Research Corp.*, 32 U.S.P.Q.2d 1380, 1381 (TTAB 1994). The overwhelming majority of the US population has likely never met anyone whose surname is KEATS. Thus, when faced with Applicant's mark in the marketplace under normal conditions, US consumers are highly unlikely to perceive it as merely a surname and not as a distinctive source identifier.

2) No One Connected with Applicant is Named KEATS

It is only coincidental that the term KEATS is a surname, albeit an exceedingly uncommon one. No one with the surname “Keats” is associated or connected with Applicant in any way. Even in circumstances where the marks at issue have a surname origin the USPTO allows registration under acquired distinctiveness, as the Examiner has offered to Applicant. However, in this case the mark KEATS has no surname origin and is purely a coined term to identify Applicant's goods, so a showing of acquired distinctiveness should not be necessary.

3) KEATS Has Significance Other Than as a Surname

The term KEATS is a distinctive mark that evokes in the consumer a unique commercial impression of Applicant's goods. While, as the Examiner correctly notes, the only truly well-known use of KEATS as a surname is John Keats the famous poet, Applicant notes that when used with the applied-for goods, there is no connection to poetry, literature, education, or otherwise, that could prompt consumers to perceive it as a surname. In fact, the lack of meaning combined with the extreme rarity of its use as a surname results in an overall consumer perception that the term KEATS is the source identifier for Applicant's goods and nothing else.

4) KEATS Does Not Have the Look and Feel of a Surname

The term KEATS is so rare that to the average consumer under normal purchasing conditions would not have the appearance of a surname. Applicant concedes that in a specialized compilation studying the structure of surnames it may be true that some surnames may begin with the letters "KEA;" however, absent such in-depth research, the usual consumer is unlikely to name even a single surname beginning with those letters and much less think of Applicant's mark given its extreme rarity and public's overall lack of experiencing encountering the term "KEATS" in any context.

For all of the foregoing reasons, Applicant respectfully requests that the Examiner withdraw the surname refusal and allow the application to proceed.

V. Additional Information

While the Examiner has not requested additional information regarding the Applicant's applied for goods. Applicant submits the following responses to particular questions that may aid in the examination of the Application.

1. Do or will all of the goods identified in the application include cannabidiol (CBD) as a component or ingredient?

None of the listed goods identified in the application include cannabidiol (CBD), beyond any legally permissible level, as a component or ingredient, except those goods in Class 31.

2. If not all of the goods listed in the application will contain CBD, specify the goods which will not have any CBD as a component.

None of the listed goods identified in the application include cannabidiol (CBD), beyond any legally permissible level, as a component or ingredient, except those goods in Class 31.

3. Do or will all of the goods listed in Classes 3, 5, 29, 30, 32 or 34 of the application be derived from *Cannabis sativa* L with a delta-9 tetrahydrocannabinol (THC) content of no more than 0.3 percent on a dry weight basis?

None of the goods will have a THC content of more than the permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

4. If the answer to Question 3 is "No," identify the goods which will have THC content of more than 0.3 percent on a dry weight basis.

None of the goods will have a THC content of more than the permissible delta-9 THC concentrations as set forth in applicable federal legislation of the United States

5. Do or will applicant's identified goods in Classes 5, 29, 30 or 32 which include CBD have CBD derived from, oils, extracts or ingredients from plants other than *Cannabis sativa* L?

None of the listed goods identified in the application include cannabidiol (CBD), beyond any legally permissible level, as a component or ingredient, except those goods in Class 31.

6. Is applicant currently seeking FDA approval of the marketing of any of its goods identified in Class 5 of the application?

Applicant is not directly seeking FDA approval of the marketing of any of its goods identified in Class 5 of the application.

7. If the answer to Question 6 is “yes,” please provide a copy of such application.

The answer to Question 6 was “no,” therefore this question is moot.

EXHIBIT A

US Census Data – 2010

Frequently Occurring Surnames in the 2010 Census: Surnames Occurring at Least 100 Times Nationally

Column header	Definition
name	Surname
rank	National rank in 2010
count	Frequency: number of occurrences nationally in 2010
prop100k	Proportion per 100,000 population for name
cum_prop100k	Cumulative proportion per 100,000 population
pctwhite	Percent Non-Hispanic White Alone
pctblack	Percent Non-Hispanic Black or African American Alone
pctapi	Percent Non-Hispanic Asian and Native Hawaiian and Other Pacific Islander Alone
pctaian	Percent Non-Hispanic American Indian and Alaska Native Alone
pct2prace	Percent Non-Hispanic Two or More Races
pcthispanic	Percent Hispanic or Latino origin

Source: U.S. Census Bureau, 2010 Census.
 Note: Fields suppressed for confidentiality are assigned the value (S).

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q
1	name	rank	count	prop100k	cum_prop100k	pctwhite	pctblack	pctapi	pctaian	pct2prace	pcthispanic						
33215	KEATS		33196	689	0.23	79622.15	87.95	4.21	(S)	2.61	3.19	(S)					
162256																	
162257																	