

Date: 05/02/2020

Attention:

Jeffrey J. Look

Trademark Examining Attorney

Law Office 108

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571-272-1652

Dear Examiner Look,

The applicant's response to the examiner's Office Action, dated March 26, 2020, application serial #88416255; **HempPopcorn™**, is as follows:

SECTION 2(e)(1) REFUSAL - MERELY DESCRIPTIVE – POSSIBLY GENERIC

“Registration is refused because the applied-for mark merely describes a feature, characteristic or and/or ingredient of applicant's goods. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); see TMEP §§1209.01(b), 1209.03 et seq.”

In addition to being merely descriptive, the applied-for mark appears to be generic in connection with the identified goods. “..

Applicants response:

* The applicant disagrees.

* The mark does describe 2 components. Hemp and Popcorn. (filed as a unitary mark)

* The present mark is NOT merely descriptive, nor generic.

NOTE: the applicant herein cites the Federal registered mark HempWater® #4,899,643. In examiner Linsey Ben's first office action “merely descriptive was cited and overcome.

* In the present applied for mark, the consumer will recognize the word HEMP, but the question will be asked; **WHAT** part of the hemp plant is used within this mark. Is it, the leaves, the flowers, CBD, the stems of hemp seed oil or a combination of the aforementioned?

What do you do with the HEMP aspect of the mark? In the present case the user is buying Industrial hemp seed oil, in a handy spray bottle. The consumer makes their own popcorn, their way. A full explanation is printed on the label and the hangtag of the specimen(s) attached.

As applied to Applicant's goods, the HempPopcorn™ mark is at most suggestive, and thereby entitled to protection on the Principal Register. Applicant's Mark Is Suggestive and Entitled to Registration. A term is merely descriptive of goods within the meaning of Section 2(e)(1) of the Trademark Act only if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose, or use of the goods. In re Gyulay, 3 USPQ2d 1009 (Fed. Cir. 1987) (emphasis added); In re Abcor Development Corp., 200 USPQ 215, 217-18 (CCPA 1978); J.S. Paluch Co., Inc. v. Irwin, 215 USPQ 533, 536 (TTAB 1982); In re Tennis in the Round, Inc., 199 USPQ 496, 498 (TTAB 1978). **Under this standard, a mark is suggestive, rather than descriptive, if it requires imagination, thought, and perception to reach a conclusion as to the nature of the covered goods.** In re Mayer-Beaton Corp., 223 USPQ 1347, 1349 (TTAB 1984); Plyboo Am., Inc. v. Smith & Fong Co., 51 USPQ2d 1633, 1640 (TTAB 1999). The Examining Attorney bears the burden of proving that Applicant's mark is merely descriptive of the cited

goods. TMEP Section 1209.02. And any doubt as to the mere descriptiveness of a word or phrase must be resolved in an applicant's favor. In re Conductive Systems, Inc., 220 USPQ 84, 86 (TTAB 1983); In re Gourmet Bakeries, Inc., 173 USPQ 565 (TTAB 1972). A mark that suggests a number of things, but falls short of describing the goods with "any degree of particularity," is not merely descriptive. See In re TMS Corp. of the Americas, 200 USPQ 57, 59 (TTAB 1978). Rather, "[i]f information about the product or service given by the term used as a mark is indirect or vague, then this indicates that the term is being used in a 'suggestive' not descriptive manner." 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, Section 11:19. **To be merely descriptive, a mark must immediately convey some particular and clear idea about the goods.** See, e.g., In re Hutchinson Technology, 7 USPQ2d 1490, 1493 (Fed. Cir. 1988) (finding that "technology is a very broad term which includes many categories of goods" and thus "does not convey an immediate idea of the 'ingredients, qualities, or characteristics of the goods' listed in [the application]"). The term "hemp" has numerous meanings in various contexts. **In this instance, consumers must exercise some imagination to draw this connection and meaning from the term relative to Applicant's products - the very definition of a "suggestive" and not "descriptive" mark.** Certainly, any possible association between Applicant's mark and Applicant's goods is far less immediate than the association between marks and covered goods previously held to be suggestive. Examples include: 183 SUGAR & SPICE for bakery products, In re Colonial Stores, Inc., 394 F.2d 549 (CCPA 1968); 183 SNO-RAKE for a snow removal hand tool, In re Shutts, 217 U.S.P.Q. 363 (TTAB 1983); 183 WET/DRY BROOM for electric vacuum cleaners, In re Shop-Vac Corp., 219 U.S.P.Q. 470 (TTAB 1983); 183 HANDI WIPES for dusting cloths, In re Colgate-Palmolive Co., 149 U.S.P.Q. 793 (TTAB 1966). Each of these marks is far more direct than Applicant's mark in conveying a characteristic or quality of the relevant goods, yet each was found capable of registration on the Principal Register. Where, as here, the association between Applicant's mark and Applicant's goods is neither "clear," "direct," nor "instantaneous" (see 2 McCarthy, supra, at 11:67), a holding of mere descriptiveness is simply not supportable. The Examining Attorney Has Offered No Evidence of Competitors' Use or Competitors' Need to Use HempPopcorn™. In analyzing the descriptiveness of a mark, in addition to whether the mark immediately conveys to consumers an idea of the ingredients, qualities, or characteristics of the goods, the Board will consider whether (a) the mark has been used so frequently by others that consumers are unlikely to perceive the term as indicating source or origin (the "Competitors' Use" test) and (b) whether Applicant's use of the mark deprives competitors of an apt description of their goods (the "Competitors' Need" test). See No Nonsense Fashions, Inc. v. Consolidated Foods Corp., 226 U.S.P.Q. 502, 507-08 (TTAB 1985); 2 McCarthy, supra, at 11:66 n.1. It is notable that the Examining Attorney has failed to offer any evidence either of "Competitors' Use" or "Competitors' Need" in rendering her refusal. The explanation is simple. Such evidence does not exist. Competitors have no "need" to use the phrase **HempPopcorn™** to identify the covered products because that phrase conveys no clear, definitive, or descriptive information about them. Any Doubts About Descriptiveness Should Be Resolved in Favor of Publication Recognizing that

"the suggestive/descriptive dichotomy can require the drawing of fine lines and often involves a good measure of subjective judgment," the TTAB in *Shutts* held that "it is clear that such doubts are to be resolved in favor of applicants." In re *Shutts*, 217 USPQ 363, 365 (TTAB 1983). The Examining Attorney should follow *Shutts* and resolve any doubts about the descriptiveness of the **HempPopcorn™** mark in favor of Applicant.

CONCLUSION: for the reasons stated above, Applicant respectfully requests that the Examining Attorney reconsider and withdraw the refusal to register, and that the application be passed to publication at an early date.

REQUEST FOR INFORMATION – HEMP RELATED GOODS

“To permit proper examination of the application, applicant must submit additional information about the goods and/or services. 37 C.F.R. §§2.61(b), 2.69; Cf. Star Fruits S.N.C. v. United States, 393 F.3d 1277, 1284, 73 USPQ2d 1409, 1414 (Fed. Cir. 2005) (discussing Patent Rule 1.105(a)(1), which is the equivalent of Trademark Rule 2.61(b)); TMEP §§814, 907. The requested information should include fact sheets, brochures, advertisements, and/or similar materials relating to the goods and/or services. If such materials are not available, applicant must provide a detailed factual description of the goods and/or services. Any information submitted in response to this requirement must clearly and accurately indicate the nature of the goods and/or services identified in the application.

In addition, applicant must submit a written statement indicating whether the goods/services identified in the application comply with the Food, Drug and Cosmetic Act (FDCA). 21 U.S.C. §331(ll); see also 21 U.S.C. §321(ff) (indicating that a dietary supplement is deemed to be a food within the meaning of the Federal Food, Drug and Cosmetic Act). See 37 C.F.R. §2.69; TMEP §907. Finally, applicant must provide written responses to the following questions:”

1. Do or will the goods include cannabidiol (CBD)?

* The applicants answer to #1 question is: NO

2. If so, will there be more than a trace amount of CBD in the goods, e.g., more than 50 parts per million (PPM)?

* The applicants answer to #2 question is: NONE

3. Do or will applicant’s identified goods include CBD which is derived from, oils, extracts or ingredients from plants other than Cannabis sativa L (also known as hemp, marijuana or cannabis)?

* The applicants answer to #3 question is: NO

DOMICILE ADDRESS REQUIREMENTS FOR NON-U.S. CITIZENS

“Applicant must either provide documentation to support applicant’s domicile address or appoint a U.S. licensed attorney.”

Applicants response:

Herein, the submitted 2 pieces of documentation are a recent copy of the applicants current **Florida Driver’s License**. In the form of a picture. The picture clearly shows my domiciled USA address as 2525 Gulf City Road Ruskin, FL. 33570.

Also presented, and attached, is a current copy of my **Progressive Motor Vehicle Insurance Policy** with the matching address, as seen above.

Kindest regards,

John D. Blue / applicant-owner