

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Klickitat Valley Chianina, LLC
Serial No.: 76/715,490
Filed: December 4, 2013
For: CERTIFIED CHIANINA BEEF
International Class: 029

TM Attorney: Emily Chuo
Law Office: 101
Docket No.: KLVC-2-0001
Date: July __, 2016

Commissioner for Trademarks
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

SUPPLEMENTAL EX PARTE APPEAL FROM EXAMINER OF TRADEMARKS
TO THE TRADEMARK TRIAL AND APPEAL BOARD

Applicant hereby appeals under 37 C.F.R. § 2.141 and 2.142 (a) to the Trademark Trial and Appeal Board from the undated decision of the Examiner of Trademarks refusing registration. The Final Rejection Under Lanham Act Section 2(e)(1) appears to have been issued July 8, 2016.

In accordance with 37 C.F.R. 2.6(a)(18) a fee in the amount of \$100 was previously enclosed with the Notice of Appeal filed March 16, 2016. The Board concluded that the former Notice of Appeal was premature and reestablished jurisdiction over the application with the Examining Attorney. The Board advised the Applicant that the appeal fee paid therein would be applicable to this appeal. The Commissioner is authorized to charge any additional fees in association with this communication or credit any overpayment to Deposit Account 50-1050.

Respectfully submitted,
Klickitat Valley Chianina, LLC



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**APPLICANT'S BRIEF ON APPEAL BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Klickitat Valley Chianina, LLC
Serial No.: 76/715,490 ORAL ARGUMENT NOT REQUESTED
Mark: CERTIFIED CHIANINA BEEF
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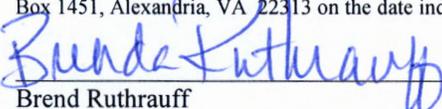
Commissioner for Trademarks
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SUPPLEMENTAL BRIEF ON APPEAL

This appeal is from an undated Final rejection which appears to have been issued on July 8, 2016 with respect to the above identified application. A Notice of Appeal with the requisite fee was timely filed on March 16, 2015. However, that Appeal was determined to be premature as the Examining Attorney had rejected the application twice but not on the same grounds. The rejection now having been made final, the appeal is believed to be timely. A Supplemental Notice of Appeal is filed herewith. Reversal of the final rejection is earnestly solicited.

CERTIFICATE OF MAILING

I hereby certify that this correspondence (together with all attachments and enclosures) is being deposited with the United States Postal Service, with sufficient postage as First Class Mail in an envelope addressed to Commissioner for Trademarks, Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313 on the date indicated below.


Brend Ruthrauff


Date

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Commissioner for Trademarks
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I. PROCEDURAL BACKGROUND

Klickitat Valley Chianina, LLC, hereafter “Applicant”, filed Trademark Application Serial No. 76/715,490 for the mark, “KLICKITAT VALLEY CHIENINA” for use in connection with “Meat and processed foods, namely – dressed beef products” under Section 2(a) of the Lanham Act.

The Applicant's representative received a first Office Action dated March 19, 2014, in which Examining Attorney Emily Chuo rejected the mark as lacking inherent distinctiveness under Lanham Act Section 2(e)(1) (merely descriptive); requested a disclaimer and invited the Applicant to amend the Application to the Supplemental Register. In a response to the March 19, 2014 action, the Applicant through Applicant's attorney timely filed an Amendment and Response on September 5, 2014 entering the requested Disclaimer, amending the recitation of goods as suggested by the Examining Attorney and amending the basis of the Application from Section 2(a) to Section 2(f) of the Lanham Act. The Applicant traversed the Section 2(e)(1) rejection and in the alternative, and submitted the Declarations of Robert E. Morrow and Nancy Becker, D.O. testifying to the secondary meaning acquired by the mark since its adoption at least as early as 2006. In a second Non-Final Office Action dated September 18, 2014, the Examining Attorney rejected the Applicant's evidence of acquired distinctiveness and requested a substitute specimen. The Applicant filed a timely Amendment and Response on March 16, 2015 amending the recitation of goods, submitting a substitute specimen and traversing the Examining Attorney's Section 2(f) rejection. The Applicant also contemporaneously filed a timely Notice of Appeal with the requisite fee as the application had been twice rejected. Nevertheless, this Board concluded in an order dated June 25,

2015 that the appeal was premature as the application had been rejected twice, but not on the same grounds: Jurisdiction was restored to the Examining Attorney. This Board noted that the appeal fee previously submitted would be applied to any new Notice of Appeal.

Thereafter, the Applicant through its undersigned representative filed a Supplemental Amendment and Response including a substitute specimen. The Examining Attorney issued an undated Final Office Action restating the rejection under Lanham Act 2(e)(1). It is believed that the Final Office Action issued July 8, 2016. Thereafter, the Applicant filed this Appeal Brief and contemporaneous Notice of Appeal.

II. STATEMENT OF THE ISSUES

The sole issue on appeal is whether the Applicant's mark, "CERTIFIED CHIANTINA BEEF" when applied to the following goods "Meat, namely dressed beef" has acquired distinctiveness.¹

III. ARGUMENT

The mark for which the Applicant seeks registration has acquired secondary meaning and has therefore acquired distinctiveness. In response to the March 19, 2014 Office Action, the Applicant submitted the Declarations of Robert E. Morrow and Nancy Becker, D.O. The Morrow Declaration asserts the following:

1. I am the Manager of the Applicant limited liability corporation.
2. I have been familiar with the Applicant's use of the Certified Chianina mark since at least as early as September 2005, and am familiar with the wholesale and retail market for beef and beef products in the United States and elsewhere.
3. The above Applicant has substantially exclusively used the "Certified Chianina Beef" mark for its qualified dressed beef products since at least September 30, 2005.

¹ The Final Office Action merely restates the Lanham Act Section 2(e)(1) rejection (mere descriptiveness) originally made in an Office Action dated March 19, 2014. Thereafter, the Applicant amended the application to Section 2(f). Thus, the 2(e)(2) Final Rejection is moot and the Applicant appeals as though the 2(f) rejection was made final.

4. The above Applicant has advertised and promoted its “Certified Chianina Beef” products by conducting and sponsoring dinners featuring the products to ranchers, cattlemen, restaurateurs, and beef product wholesalers, highlighting the undersigned’s trips to Italy to observe Chianina Steer animal husbandry. Applicant has also advertised nationally on RFD-TV.

5. Such information and products were presented to said customers at dinners on the following dates and locations:

Date	Location
Numerous (2000-2014)	Goldendale, WA
October, 2006	Platte City, MO
December, 2013	Long Beach, CA

6. Over 100 individuals have attended such events.

7. At least \$82,750.00 has been spent by the above Applicant in promoting its “Certified Chianina Beef” products to the relevant consuming public since the adoption of the mark.

8. The above activities have generated substantial goodwill in the mark and an association of the mark with the Applicant.

The Becker Declaration asserts the following:

1. I am a [wholesale/retail] customer of the above-identified Applicant. My residential address is 20833 Southeast 384th Street, Auburn, Washington, 98092.

2. I have been purchasing “Certified Chianina Beef” products from the Applicant since 1997 for personal consumption.

3. I have come to recognize the phrase “Certified Chianina Beef” as both a guarantee of consistent high quality Chianina beef products in terms of the raising and treatment of the cattle, quality of the processing and dressing operations, as well as storage and transportation of the products such as to guarantee a high quality final product.

4. I only associate said quality of product with the Applicant Klickitat Valley Chianina, LLC by virtue of its “Certified Chianina Beef” Trademark. I am not aware of anyone else using that same mark for Chianina beef products.

These Declarations demonstrate that the mark has been substantially exclusively used by the Applicant in excess of five years, and that significant sums have been expended on advertising creating a secondary source indicating significance to the relevant purchasing public. Further, the Applicant’s exclusive use and advertising has in fact created a secondary source indicating significance in the minds of the Applicant’s consumers.

The Examining Attorney has the burden of establishing a *prima facie* case for rejection of an application for registration on the Principal Register and such burden is by clear evidence. *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 40 U.S.P.Q. 2d 1141 (Fed. Cir. 1987). The Examining Attorney has failed to make such a *prima facie* case and has submitted no evidence to the contrary. A brief review of Supplemental Registrations² cited by the Examining Attorney as evidence of lack of secondary meaning for allegedly similar marks shows that the marks associated with each of those Supplemental Registrations had only a few months of actual use before being filed, and less than the Applicant's almost ten years of actual use, and none of these Supplemental Registrations included Declarations related to acquired distinctiveness. Thus, the Section 2(f) rejection fails as a matter of law.

The Examining Attorney's sole factual basis for rejecting the Applicant's evidence of secondary meaning is that the evidence relates to a relatively small number of people. However, the Board is requested to take judicial notice of the fact that the beef products sold by the Applicant cost approximately \$8.00 per ounce. Thus the market for said products is limited and the evidence of secondary meaning is thus commensurate with the relevant purchasing market.

Thus, in view of the Examining Attorney's failure to make out a *prima facie* case by clear evidence, and the Applicant's statutory presumption and submitted evidence of secondary meaning, the rejection must be reversed.

² "Certified Piedmontese Beef", Supp. Reg. No. 4,024,146; "American Certified Kobe Beef", Supp. Reg. No. 3,197,797; "Certified Kobe Beef", Supp. Reg. No. 3,175,677; "Certified Wagyu Beef", Supp. Reg. No. 3,161,122; "Certified Dexter Beef", Supp. Reg. No. 3,836,341; and "Certified Devon Beef", Supp. Reg. No. 3,902,279.

IV. PRAYER FOR RELIEF

In view of the above, the Applicant respectfully requests that this Board reverse the non-final rejection based on lack of secondary meaning.

Respectfully submitted,

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