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Sent: 6/17/2008 2:24:55 PM

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Subject: TRADEMARK APPLICATION NO. 77006212 - COCAINE - N/A

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 77/006212

**MARK:** COCAINE



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

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**EXAMINING ATTORNEY'S APPEAL BRIEF**

**INTRODUCTION**

Applicant appeals the examining attorney's refusal to register a mark consisting of the stylized word "COCAINE" in white lettering on a red background, which it has used on carbonated and non-carbonated soft drinks and energy drinks since March 30, 2006. Registration was refused pursuant to Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), on the grounds that the mark comprises immoral or scandalous matter.

**ARGUMENT**

- I. The applied-for mark is immoral or scandalous within the meaning of Trademark Act Section 2(a) because it glorifies illegal drug use.**

To be considered “scandalous,” a mark must be “shocking to the sense of truth, decency or propriety; disgraceful; offensive; disreputable; . . . giving offense to the conscience or moral feelings; . . . [or] calling out [for] condemnation,” in the context of the marketplace as applied to goods and/or services described in the application. *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 1371, 31 USPQ2d 1923, 1925 (Fed. Cir. 1994) (quoting *In re Riverbank Canning Co.*, 95 F.2d 327, 328, 37 USPQ 268, 269 (C.C.P.A. 1938); *In re Wilcher Corp.*, 40 USPQ2d 1929, 1930 (TTAB 1996); see TMEP §1203.01.

Scandalousness is determined from the standpoint of “not necessarily a majority, but a substantial composite of the general public, . . . and in the context of contemporary attitudes.” *In re Mavety Media Group Ltd.*, 33 F.3d at 1371, 31 USPQ2d at 1925; see TMEP §1203.01.

Cocaine is an illegal drug, with harsh penalties for its possession or use. Its use as a product name for energy drinks has been widely condemned. The evidence attached to the Final Office Action, dated July 8, 2007, shows that a former Cabinet secretary has denounced applicant’s drink as “insidious, disgraceful, irresponsible, reprehensible and disgusting.” The New York Times, *Politicians Say Soft Drink Name Glamorizes Drugs*, <http://www.nytimes.com/2006/10/02/nyregion/02cnd-cocaine.html> (accessed July 8, 2007). Four New York area politicians joined in the criticism, with one of them calling it “the height of irresponsibility for any company.” *Id.* The attorney general of Connecticut wanted to “literally flush Cocaine down the drain across the nation” because “its name and marketing strategy” seek to “glorify illegal drug use.” CBS News, *“Cocaine” Pulled From Shelves Nationwide*,

<http://www.cbsnews.com/stories/2007/05/07/health/main2772524.shtml> (accessed July 8, 2007).

The evidence attached to the first Office Action, dated October 19, 2006, shows that many stores have refused to stock applicant's product, and that protestors in some communities claim the drink glorifies drug use. Energy Fiend, *Cocaine Energy Drink Banned in Australia*, <http://www.energyfiend.com/2006/10/cocaine-energy-drink-banned-in-australia> (accessed October 19, 2006). The evidence of record establishes that a substantial composite of the general public regards applicant's proposed mark as offensive and calling out for condemnation.

The more egregious the allegedly scandalous nature of a mark, the less evidence is required to support a conclusion that a substantial composite of the general public would find the mark scandalous. *See In re Wilcher Corp.*, 40 USPQ2d 1929, 1934 (TTAB 1996) (finding that "the inclusion in a mark of a readily recognizable representation of genitalia certainly pushes the mark a substantial distance along the continuum from marks that are relatively innocuous to those that are most egregious"); TMEP §1203.01. Applicant's proposed mark is so egregious that the three articles cited above are sufficient for the Board to conclude that applicant's mark tends to glorify illegal drug use, which is offensive to a substantial composite of the general public and against public policy.

Applicant's various arguments in favor of registration are addressed at length in the next two sections. However, it bears pointing out that if the Board were to accept applicant's arguments, the Office would have no principled basis for refusing to register LSD for chewing gum, or MARIJUANA for cigarettes. Congressional intent in enacting this provision surely includes prohibiting registration of marks of this kind.

II. **The FDA's actions with regard to applicant's drink have no bearing on the question of whether or not the proposed mark is immoral or scandalous.**

Applicant argues that after changing its advertising and marketing strategy, the Food and Drug Administration (FDA) no longer has any objection to applicant's product, as the agency's objections were to applicant's advertising, and not to the name itself. However, the FDA's actions have no bearing on this proceeding. The FDA's mandate is to protect the public health and ensure that any health claims made are factual and not deceptive or untruthful. While the FDA's actions might have some bearing on the issue of deceptiveness, that is not the ground for refusal here. The FDA's actions simply have no bearing on the Board's determination of whether the proposed mark is immoral or scandalous.

III. **Societal attitudes towards cocaine remain strongly negative.**

Applicant characterizes those opposed to its mark as a small minority, comparable to the numbers of vegetarians and animal rights activists who would protest marks such as ANIMALS TASTE GOOD or REAL FUR IS FOR WINNERS. This is an exceedingly

poor analogy, as neither the eating of meat nor the wearing of fur is illegal. The fact is, Congress passed the Anti-Drug Abuse Act of 1986, which mandates long prison sentences for possessing even small amounts of cocaine, and that Act remains in effect. Unlike marijuana, there has been no movement to legalize cocaine for medical purposes. Those condemning applicant's product include a former Cabinet secretary, state attorneys general, and other politicians. Far from being a fringe group, those opposed to applicant's drink represent the mainstream of society.

Applicant's argument that the numerous references to drugs in movies and popular songs signals a major shift in social attitudes toward acceptance of illegal drug use is likewise unpersuasive. Movies and songs are also replete with obscenities, but this does not mean that there is no longer a substantial composite of the general public that finds obscenities offensive. The fact that profane words may be uttered more freely in contemporary American society than in the past does not render such words any less profane. *In re Tinseltown, Inc.*, 212 USPQ 863, 866 (TTAB 1981) (finding the wording BULLSHIT scandalous for handbags and other personal accessories); *cf. In re Red Bull GmbH*, 78 USPQ2d 1375, 1380-82 (TTAB 2006).

The strong societal condemnation of illegal drug use can also be seen in the Supreme Court's holding in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), where the Court held that the First Amendment does not prevent a school principal from restricting student speech at a school-supervised event when that speech is reasonably viewed as promoting illegal drug use.

CONCLUSION

Applicant's mark COCAINE promotes and glorifies illegal drug use, which is offensive to a substantial composite of the general public, and thus immoral and/or scandalous within the meaning of Section 2(a) of the Trademark Act. Therefore, it is respectfully submitted that the refusal of registration is proper and should be affirmed.

Respectfully submitted,

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