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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77980412
Applicant	Gulf Coast Nutritionals, Inc.
Applied for Mark	PLAQUE-ZAPPER
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Trademark Application of
Gulf Coast Nutritionals, Inc.

Serial No.: 77/980,412

Filed: January 8, 2008

Mark: PLAQUE-ZAPPER

Law Office 110

Trademark Attorney

Jennifer Hazard Dixon

APPLICANT'S APPEAL BRIEF

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INTRODUCTION

In accordance with the provisions of 37 C.F.R. §§ 2.141 and 2.142, Applicant hereby appeals to the Trademark Trial and Appeal Board from the decision of the Trademark Examining Attorney refusing the specimens submitted in PLAQUE-ZAPPER in Serial No. 77/980412 pursuant to 15 U.S.C. §1056. Applicant respectfully traverses the Examining Attorney's refusal that the specimens submitted do not support use of the mark for the goods in Class 31 as being without any basis in the law or evidence submitted.

I. STATEMENT OF FACTS

The application for registration of the subject mark, PLAQUE-ZAPPER, identifies the following goods:

Class 31: **Pet products, namely, edible pet treats, pet food and pet beverages.**

a. DESCRIPTION OF THE RECORD

The chronology of papers in the case is as follows:

January 8, 2008 – The original (parent) application was filed requesting registration of the mark for goods identified in International Class 31 based on an intent to use (Serial No. 77366701).

April 16, 2008 – An Office Action was issued by Examining Attorney Jennifer Dixon requiring an amendment of the original identification of goods, and requiring the payment of additional fees for any classes added to the application.

September 19, 2008 – Applicant filed a Response amending the description of goods in Class 31, adding Classes 1, 3, 5 and 21 and providing the payment of fees for four additional classes.

December 24, 2008 – a Notice of Publication was issued, setting a publication date of January 13, 2009.

April 7, 2009 – a Notice of Allowance was issued.

September 30, 2009 – a First Request for Extension of Time to File Statement of Use was filed.

October 15, 2009 – a Notice of Approval of Extension Request #1 was issued.

April 5, 2010 – a Second Request for Extension of Time to File Statement of Use was filed.

April 10, 2010 – a Notice of Approval of Extension Request #2 was issued.

July 8, 2010 – a Request to Divide was filed, requesting that Class 5 goods be allowed to proceed in child application #1, and that Class 31 goods be allowed to proceed in child application #2, and allowing Classes 1, 3 and 21 to remain in the parent application.

July 15, 2010 – an Office Action was issued, denying the Request to Divide as untimely.

August 23, 2010 – a Statement of Use (deleting Classes 1 and 21) and a Request to Divide were filed.

September 16, 2010 – a Notice of Divisional Request Completed was issued. The parent application will contain the Class 3 goods on an intent-to-use basis, and child application 77980412 was created, containing Classes 5 and 31. The Statement of Use was sent to the examining attorney for examination for 77980412.

October 13, 2010 – an Office Action was issued by Examiner Jennifer Dixon, refusing the specimen for Class 31 only.

April 13, 2011 – Applicant filed a Brief in Response to Office Action, submitting arguments and evidence.

April 28, 2011 – A Final Office Action was issued by Examiner Dixon, continuing the refusal of the specimen for Class 31.

October 28, 2011 – A Request for Reconsideration was filed, and a Notice of Appeal was filed with the Trademark Trial and Appeal Board.

December 8, 2011 – A Request for Reconsideration Denied was issued.

December 9, 2011 – a Request to Divide Application was filed, requesting that the goods in Class 5 proceed in a separate child application.

December 14, 2011– Order from the Board mailed, resuming the appeal and setting the deadline to file applicant’s Brief as Sunday, February 12, 2012

January 18, 2012 – a Notice of Divisional Request Completed was issued, creating child application 77928918 for the goods in Class 5. The parent application 77980412 contains the goods in Class 31 only.

II. STATEMENT OF THE ISSUE

Whether the Office Action, dated October 13, 2010, the final Office Action, dated April 28, 2011, and the Action Denying the Request for Reconsideration, dated December 8, 2011, erred in refusing the specimen submitted for the goods in Class 31

III. ARGUMENT

Applicant hereby relies on the evidence and arguments currently in the record, and traverses the finding by the Examining Attorney that the goods are not considered a pet treat. The Examining Attorney possessed, but did not meet, the heavy burden of proof to show conclusively that the product is not as identified in the application.

Applicant has established by evidence previously filed that the dictionary definition of treat is “*entertainment, food, drink, etc., given by way of compliment or as an expression of friendly regard*”. See **Exhibit 1**. One could spend a half an hour looking at nothing but dictionary definitions of the term “treat” and every single one of them would describe exactly what is inside Applicant’s previously submitted packaging. Indeed, many pets consider Applicant’s product to be a treat. The Examining Attorney does not dispute that the product is something the pet consumes at meal time or snack time. Pets are not known for consuming things begrudgingly, or

for consuming things like, for example, broccoli, which perhaps they despise, on the notion that, hey, it's good for them. Pets do not operate that way. Pets like to consume only certain things, and not other things, and their response to being offered food or beverage items is rather honest. That's how pets work when it comes to treats. Plaintiff would be out of the pet treat business right away if pets had anything but a "go forward" attitude to ingesting Applicant's pet treat. Pet owners tend to avoid buying food or drink products for pets which are, at the end of the day, totally rejected by the pet (the "not a treat" scenario). The "going out of business immediately" effect tends to kick in for companies who cannot get past that first hurdle.

No Evidence that the Product is Not a Treat

The kind of evidence needed from the Examining Attorney in order to contradict all these pets who are happy to have Applicant's product is the evidence that would show the product is not a treat. The term "treat" necessarily involves the perspective of the receiving party. The evidence submitted by the Examining Attorney would have needed to show that Applicant's product was not considered by a pet to be a treat. There is no such evidence in the record. Perhaps it is contended that the pet is not the relevant consumer, but rather the pet's owner who buys the treats. Even on that one, there is no evidence whatsoever that a single human buyer ever considered the product *not* to be a treat.

The Plain English Meaning of “Treat” Governs

There is also no evidence from the Examining Attorney that would counter the Applicant’s earlier submission of the standard dictionary definition of a treat which was earlier submitted by Applicant and is a part of the record. The same is also **Exhibit 1** hereto. There is also no evidence mandating that a dictionary-defined treat has to possess certain features like a specific weight, color, size, taste, texture, effect, or fragrance, or exactly what level of enjoyment has to be produced in order to qualify as a “treat”.

Applicant’s Product is Undeniably a Treat

Applicant has already established in the record that its product is a treat. The packaging and specimen coupled with Applicant’s sworn statement of use, as well as Applicant’s earlier arguments in the record establish the requirements for issuance of the certificate of registration.

Fizzy Treats

Applicant’s product is fizzy, as the specimen shows. Many pets like the feel of fizz on their tongues when they are consuming something. The fizzy attribute is prominently lauded on the Applicant’s packaging (which is already of record in this matter), as the term “Fizzy” appears in a stand-alone special blue oval with eye-catching multi-color flourishes setting off the left and right side of the oval displaying the word “Fizzy”. The below image is a clip from the product packaging already of record in this case showing how this fun attribute is communicate:



Pets are not the only ones who like fizzy things, children and even adults consider fizziness a special or desirable attribute of a product, such as candy or carbonated beverages like *Coke®* or *Pepsi®*. Again, Applicant's product delivers, and pets consume it. Pets don't lie. The product is a treat.

Even if the only thing the product ever did was get consumed and thereby then help a dog to have better oral hygiene, be healthier, live longer – that is a treat to the pet. It is a treat if you are a dog, to have all those things happen to you because of what you consumed. There is also no evidence to the contrary. Applicant has already established by evidence previously filed that the dictionary definition of treat is “*entertainment, food, drink, etc., given by way of compliment or as an expression of friendly regard*”. Applicant's **Exhibit 1** hereto is the previously submitted definition. Exactly what has the Examining Attorney entered of record that contradicts the applicability of plain English meaning of the term “treat”?

The ID Manual

If the PTO was not comfortable using the term “treat” as a standard dictionary-defined term, then it would not have used the term in the ID Manual at all. If the PTO believed that the term needed a specialized proprietary definition, then it would have found the word unsuitable for general use in the Manual and would not have placed an entry in there for “pet treats” in Class 31. The Examining Attorney now argues that the term has some private interpretation. Applicant

should not be told that its product is not a treat. The product is, at the very least, a treat.

The party bearing the burden of proof to show that something is not a treat to a pet certainly has a weighty undertaking. But, according to the dictionary, the ultimate arbiter of whether the product is a pet treat, is the pet. The party wishing to challenge that needs to submit evidence going to the heart of the matter. The Examining attorney has submitted no evidence of any acceptable kind.

In the April 28, 2011 Office Action, the Examining Attorney continued the refusal of the specimen stating,

...the term “treat” is not used anywhere on the packaging, and the packaging specifically states: “Odorless – Colorless – Tasteless Will Not Change Pet’s Drinking or Eating Habits.” This does not suggest that the goods are any type of “treat” or that the goods are intended to be used along with any other type of pet treat product. **Again, there is no mention of “pet treats” anywhere on the packaging.**

There is of course no rule that all treats have to have the word “TREAT” on the packaging. Nor would it be the role of the PTO to require that. There are lots of treats out there, not all of them ship with the term “TREAT” on the packaging. That statement by the Examining Attorney is conjecture without any basis, when the occasion called for evidence.

In the December 8, 2011 Request for Reconsideration Denied, the Examining Attorney then goes on with further conjecture to say that pet treats “are usually given to a pet as a *reward* for good performance or to encourage certain desired behaviors during *pet training*.” From what authority does that emanate? If that is the official position of the PTO, it should have been stated somewhere. It would certainly be unusual to revise common everyday English terms to a customized construction, convenient for just this singular issue now pending before the Board, but unfitting for any other venue or publication. The PTO cannot fashion creative definitions simply

for the purpose of one-time-only arguments. Further, it has to be noted that the Examining Attorney did nothing to rule out the very application of her own stating, namely for “reward” or “training”. How is it that one would assert, without evidence, that pet owners would *not* use Applicant’s product for those purposes? Those kinds of leaps require a strong basis in evidence.

There is no authority whatsoever for the assertion that Applicant’s submitted dictionary definitions do not apply. A pet owner may give their pet a “treat” for any number of reasons, and not just to reward them for good behavior or to train them. Some pets are untrained couch potatoes that do nothing but break into pet treat boxes and eat the contents for no good reason other than it was a treat for them to do so. Just the same, pet treats can also be a part of a pet’s regular health routine, prudently offered by pet owners for reasons such as good health and well being.

In all known sources for definitions of words, the definition of “treat” supports the Applicant’s position herein every single time a definition appears.

The Examiner’s own evidence in the Request for Reconsideration Denied on December 8, 2011, shows multiple types of items as “pet treats” and they are made from a variety of different materials. The Examining Attorney’s evidence utterly fails in its purpose however, as it only shows what *some* kinds of pet treats may look like, but does not purport to be a complete universe of all treats. The question of what *some* kinds of treats look like was not the matter to be proven. Putting a group of “some” treats together (a subset) in no way establishes a universe, and in no way proves what items are excluded from the universe. One cannot submit a small selection of items as proof that other items, which were not included, do not exist. That is not how proof works. Where is the evidence that Applicant’s product is not a treat?

CONCLUSION

For all the foregoing reasons, the Examining Attorney's decision should be reversed.
Applicant's Statement of Use should be accepted.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that the original of Applicant's Appeal Brief is being submitted electronically at the ESTTA system at www.estta.uspto.gov on February 10, 2012.

/JENNIFER L. WHITELAW/
JENNIFER L. WHITELAW

Exhibit 1



treat

Did you know: You may expect "Ouija" in Ouija board to have some magical origin. Here's [the real deal](#).

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- Spam
- Cake
- Surprise

Synonyms

- gratification
- entertainment
- satisfaction
- celebration
- deliberate
- manipulate
- administer

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Nearby Words

- treasury-merits
- treasury-note
- treasury-stock
- treat**
- treat like dirt
- treatability
- treatably

Related Questions

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treat - 6 dictionary results

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If Your Meeting is Less Than Great We'll Make it Right, On Us. www.HyattMeetings.com

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treat

[treet] [Show IPA](#)

-verb (used with object)

- to act or behave toward (a person) in some specified way: *to treat someone with respect.*
- to consider or regard in a specified way, and deal with accordingly: *to treat a matter as unimportant.*
- to deal with (a disease, patient, etc.) in order to relieve or cure.
- to deal with in speech or writing; discuss.
- to deal with, develop, or represent artistically, especially in some specified manner or style: *to treat a theme realistically.*
- to subject to some agent or action in order to bring about a particular result: *to treat a substance with an acid.*
- to entertain; give hospitality to: *He treats diplomats in the lavish surroundings of his country estate.*
- to provide food, entertainment, gifts, etc., at one's own expense: *Let me treat you to dinner.*

-verb (used without object)

- to deal with a subject in speech or writing; discourse: *a work that treats of the caste system in India.*
- to give, or bear the expense of, a treat: *Is it my turn to treat?*
- to carry on negotiations with a view to a settlement; discuss terms of settlement, negotiate.

-noun

- entertainment, food, drink, etc., given by way of compliment or as an expression of friendly regard.
- anything that affords particular pleasure or enjoyment.
- the act of treating.
- one's turn to treat.

Origin:

1250-1300; Middle English *treten* (v.) < Old French *tretier, traitier* < Latin *tractāre* to drag, handle, treat, frequentative of *trahere* to drag. See [tract](#)¹

-Related forms

- treat·er, *noun*
- non-treat·ed, *adjective*
- o-ver-treat, *verb*
- self-treat·ed, *adjective*
- un-treat·ed, *adjective*
- well-treat·ed, *adjective*

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