

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85690391

MARK: Configuration of Cheese Design

ATTORNEY

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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ON APPEAL

EXAMINING ATTORNEY'S APPEAL BRIEF

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD ON APPEAL

TRADEMARK EXAMINING ATTORNEY'S REQUEST FOR REMAND

The trademark examining attorney requests the Trademark Trial and Appeal Board remand this case to the examining attorney under 37 C.F.R. §2.142(d) for the following reasons:

The case was recently reassigned to a new examining attorney. Also, further review of the application has revealed the following issues not involved in the appeal may render the application unregistrable.

The mark appears to constitute the three dimensional configuration of the goods, and as such, it is not inherently distinctive. *Wal-Mart Stores, Inc. v Samara Bros.*, 529 U.S. 205, 215, 54 USPQ2d 1065, 1069 (2000); TMEP §1202.02(b). Therefore, this mark is not registrable on the Principal Register without sufficient proof of acquired distinctiveness. §§1, 2, and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052, and 1127. Additionally, because the mark appears to be a configuration mark, the drawing and mark description must be amended reflect accurately the nature of the mark as it appears on the goods. 37 C.F.R. §2.51; 37 C.F.R. §2.52(b); 37 C.F.R. §2.52(b)(4); 37 C.F.R. §2.52(b)(5); *see In re Water Gremlin Co.*, 635 F.2d 841, 844, 208 USPQ 89, 91 (C.C.P.A. 1980) (affirming the functionality of a circular-shaped container for the goods and the requirement for an amended drawing to either delete the representation of the container from the drawing or show it in dotted lines); TMEP §1202.02(c)(i).

Respectfully submitted,

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