

From: Leipzig, Marc J.

Sent: 4/28/2014 12:34:46 PM

To: TTAB EFiling

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Subject: U.S. TRADEMARK APPLICATION NO. 85773334 - CHICKEN WAFFLE TENDERS - N/A - Request for Reconsideration Denied - Return to TTAB - Message 1 of 2

Attachment Information:

Count: 3

Files: tend1-1.jpg, tend1-2.jpg, 85773334.doc

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 85773334

MARK: CHICKEN WAFFLE TENDERS



CORRESPONDENT ADDRESS:

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ATLANTA, GA 30309

GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

APPLICANT: POPEYES LOUISIANA KITCHEN, INC.

CORRESPONDENT'S REFERENCE/DOCKET NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

tdmkatlanta@duanemorris.com

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE: 4/28/2014

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. See 37 C.F.R. §2.64(b); TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a). The requirement(s) and/or refusal(s) made final in the Office action dated September 28, 2013 are maintained and continue to be final. See TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue(s) in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Accordingly, the request is denied.

Pending applicant's response to the issue raised below, the examining attorney's refusal pursuant to Section 2(e)(1) of the Trademark Act is continued and maintained.

Insufficient Showing of Acquired Distinctiveness

Applicant has asserted acquired distinctiveness based on the evidence of record; however, such evidence is not sufficient to show acquired distinctiveness because, as demonstrated by the attached and previously attached evidence, applicant's mark is of a highly descriptive nature. See 15 U.S.C. §1052(e)(1), (f); *In re MetPath, Inc.*, 1 USPQ2d 1750, 1751-52 (TTAB 1986); TMEP §1212.04(a). Additional evidence is needed.

When asserting a Trademark Act Section 2(f) claim, the burden of proving that a mark has acquired distinctiveness is on the applicant. *Yamaha Int'l Corp. v. Yoshino Gakki Co.*, 840 F.2d 1572, 1578-79, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988); *In re Meyer & Wenthe, Inc.*, 267 F.2d 945, 948, 122 USPQ 372, 375 (C.C.P.A. 1959); TMEP §1212.01. Thus, applicant must establish that the purchasing public has come to view the proposed mark as an indicator of origin.

In the present case, applicant's evidence consists of the following: applicant's declaration regarding sales and notoriety, sales and marketing totals, and online articles.

However, considering that applicant barely has used its mark in commerce for one (1) year (was introduced as a “Limited Time Offer” in July 2013), this evidence is insufficient to show acquired distinctiveness of the mark.

Indeed, the record is not clear as to whether applicant’s use of the mark has been “substantially exclusive.” *See* TMEP § 1212.05(b). As the attached evidence indicates, several other parties are currently using the phrase “CHICKEN WAFFLE TENDERS” to refer to a particular food product. *See* attached.

If applicant cannot submit additional evidence to support the claim of acquired distinctiveness, applicant may respond to the refusal by arguing in support of registration and/or amending the application to seek registration on the Supplemental Register. *See* 15 U.S.C. §1091; 37 C.F.R. §§2.47, 2.75(a); TMEP §§801.02(b), 816. If applicant amends the application to the Supplemental Register, applicant is not precluded from submitting evidence and arguments against this refusal. TMEP §816.04.

Application Returned to TTAB

The filing of a request for reconsideration does not extend the time for filing a proper response to a final Office action or an appeal with the Trademark Trial and Appeal Board (Board), which runs from the date the final Office action was issued/mailed. *See* 37 C.F.R. §2.64(b); TMEP §715.03, (a)(2)(B), (a)(2)(E), (c).

If time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to comply with and/or overcome any outstanding final requirement(s) and/or refusal(s) and/or to file an appeal with the Board. TMEP §715.03(a)(2)(B), (c). However, if applicant has already filed a timely notice of appeal with the Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

/Marc J. Leipzig/

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Chicken Waffle Tenders

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Double-dipped chicken tenders are served with double sauces for twice the pleasure and flavour for dipping!



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Yield: 24 servings, 1 tender plus 1 oz. sauce each (66 g)

Ingredients	Weights	Measures
frozen breaded chicken tenders	2.4 lb. [1 kg]	24 each

Average Rating
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Recipe Recommendations

- [Chicken Waffle Bowl](#)
- [Beacon Waffle Top Cream Sandwich with Maple Cream](#)
- [Caramel Apple-Cream Cheese Spread](#)
- [Carrot Cake Spread](#)



frozen oreoado chicken tenders	2.4 lb. (1.1 kg)	24 each
prepared waffle batter	3 lb. [1.4 kg]	1-1/2 qt. [1.5 L]
Bull's-Eye Honey Garlic Bonance Barbecue Sauce	12 oz. (340 g)	1-1/2 cups [375 mL]
Kraft Honey Mustard Dressing	12 oz. (340 g)	1-1/2 cups [375 mL]



Directions

FRY frozen tenders in 350°F (180°C) deep fryer as directed on package. Drain.

COAT tenders in batter. Deep-fry 1 to 2 min. or until golden brown. Drain.

SERVE 1 tender with 1/2oz. (15 mL) of **sauce** in a ramekin.

Kraft Kitchens Tips

Substitute

Prepare using [Bull's-Eye Bold Original Barbecue Sauce](#) and [Kraft Calorie Wise Rancher's Choice Dressing](#).

Time-Saving

Chicken tenders can prepared ahead of time. Fry as directed on package and hold in warming drawer. Dip in waffle batter and deep fry as needed when ready to serve.

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