

ESTTA Tracking number: **ESTTA686026**

Filing date: **07/27/2015**

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

Proceeding	85935569
Applicant	Left Nut Brewing Company, Inc.
Applied for Mark	LEFT NUT BREWING CO.
Correspondence Address	PETER E MORGAN BRISKIN CROSS & SANFORD LLC 1001 CAMBRIDGE SQ STE D ALPHARETTA, GA 30009-1840 UNITED STATES pmorgan@briskinlaw.com
Submission	Reply Brief
Attachments	Reply Brief v4 (final).pdf(273363 bytes )
Filer's Name	Peter E. Morgan
Filer's e-mail	pmorgan@briskinlaw.com, tm@briskinlaw.com
Signature	/Peter E. Morgan/
Date	07/27/2015

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

In re Application of

Left Nut Brewing Company, Inc.

Serial No. 85/935569

Appeal Filed: March 9, 2015

Trademark: LEFT NUT BREWING CO.

Trademark Examining Attorney:

Ellen Awrich

Law Office 116

---

**EX PARTE APPEAL**

**APPLICANT'S REPLY BRIEF**

In the matter of the petition for review of the final refusal of:

Applicant's Mark: LEFT NUT BREWING CO.

Application No. 85/935569

Applicant's Goods: Beers

International Class: 32

## **APPLICANT'S REPLY BRIEF**

Applicant hereby makes this its reply to the *Examining Attorney's Appeal Brief* ("Examiner's Brief") filed on July 6, 2015 in order to respond to new issues and clarify the issues on appeal. Although Applicant is only responding in part, Applicant reasserts its previous arguments from its Appellant Brief filed on May 26 2015.

### **RESPONSE TO NEW ISSUES RAISED BY EXAMINER**

It is Applicant's position that the post-appeal submission of evidence remains insufficient to meet the PTO's burden of proof with respect to a 2(a) rejection of Applicant's mark. Applicant's arguments and evidence cited in its appeal brief relate equally to the examining attorney's post-appeal evidence. In fact, the attachments to the rejection of Applicant's request for reconsideration are limited to examples of a particular idiom, the meaning of which is as expressly stated in these excerpts as it is *absent* from Applicant's mark. Without fail, the examining attorney's web excerpts feature someone referring to his own (i.e., "my") or another man's (i.e., "his") "nut," either while explicitly discussing testicles or while using an idiom about sacrificing or giving away a body part. The context clearly frames and limits the meaning. The examining attorney has not shown that this usage is applicable to Applicant's use of the mark in question.

As Applicant has maintained, if non-standard and undefined slang terms are to hold sway, the examiner ought not to have excluded from her analysis or so blithely dismissed those idioms with alternate definitions, for example, those using "left" and "nut" to mean "leftwing radical." Applicant's mark is "Left Nut Brewing Co." The examining attorney, however, has marshalled for her appeal brief a variety of obscure cites, from corners of the internet that likely have a very limited readership, and none of which has she demonstrated have any bearing on Applicant's use. The Applicant's mark in context does not exclude the leftwing radical idiom, nor does it exclude,

as the examining attorney's selective specimens do, the standard and universally non-vulgar definitions of "nut" or "left." The examiner's excerpts, in fact, reaffirm the overwhelming importance of context in the interpretation of even the most innocuous and commonplace words. The alternative would lead us down the Urban Dictionary path where everything is smutty.

## CLARIFICATION OF ISSUES ON APPEAL

### I. PTO'S BURDEN OF PROOF

It is not sufficient to show that in certain contexts unrelated to an Applicant's use of the mark, a term may be used in a vulgar manner. The examining attorney has emphasized the statement in *Fox* that "there is no requirement in the statute that a mark's vulgar meaning must be the only relevant meaning—or even the most relevant meaning." *In re Fox*, 702 F.3d 633, 638, 105 U.S.P.Q.2d 1247, 1250 (Fed. Cir. 2012). However, this phrase too must be read in the context of the rest of the holding. In full, *Fox*'s holding reads as follows:

[T]here is no requirement in the statute that a mark's vulgar meaning must be the only relevant meaning—or even the most relevant meaning. Rather, as long as a "substantial composite of the general public" perceives the mark, *in context*, to have a vulgar meaning, the mark as a whole "consists of or comprises ... scandalous matter. (emphasis supplied) *Id.*

As Applicant has maintained, the examiner hardly establishes a substantial composite by quoting the spurious Urban Dictionary lexicographer known only as "Your Mom." Neither does examiner's post-appeal submission reflect what a substantial composite would perceive in context of the Applicant's mark as required in *Fox*. Clearly, *Fox* does not require that words with *any* potential for vulgar usage must be excluded from the registry, as repeatedly shown by a body of case law *resolving ambiguity in favor of the applicant and requiring well-vetted information in the*

*form of dictionary evidence to reflect a substantial composite.* An absurd result would follow from taking *Fox's* statement that "there is no requirement in the statute that a mark's vulgar meaning must be the only relevant meaning" out of the specific context in which the Court carefully framed it and would dangerously expand the prohibition against scandalous matter under Section 2(a) of the Lanham Act.

Dated July 27, 2015.

/Peter E. Morgan/  
Peter E. Morgan, Esq.  
Georgia Bar Member, Bar No. 203055

BRISKIN, CROSS & SANFORD, LLC  
1001 Cambridge Square, Suite D  
Alpharetta, GA 30009  
pmorgan@briskinlaw.com  
(770) 410-1555; (770) 410-3281 (fax)

Attorney for Applicant,  
Left Nut Brewing Company, Inc.