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

Proceeding	86081482
Applicant	B & B Spirits, LLC
Applied for Mark	CAROLINA'S SUMMER HUMMER
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TRADEMARK

ATTORNEY DOCKET NO.: BBSL-1-TM

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

In re Application of B&B Spirits, LLC)	Trademark Attorney: Andrea K.	
)	Nadelman	
Serial No.: 86/081,482)	Trademark Law Office:	110
Filed: Oct. 3, 2013)	Customer ID No.:	22827
Mark: CAROLINA'S SUMMER)		
HUMMER)		

EX PARTE APPEAL BRIEF PURSUANT TO 37 C.F.R. SECTIONS 2.142(b) AND 2.126

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P. O. Box 1451
Alexandria, VA 22313-1451

Dear Sirs:

Responsive to the September 10, 2014 Final Rejection, Appellant's Ex Parte Appeal Brief is submitted in the above-identified application, as follows. The subject Appeal Brief contains the following sections:

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I. INDEX OF CASES

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II. STATEMENT OF THE ISSUE

1. Whether the final refusal of Appellant's mark under Lanham Act Section 2(e) should be reversed.

III. RECITATION OF THE FACTS

The Appellant is B&B Spirits, LLC, a limited liability company of South Carolina having an address of 1200 Ben Barron Lane, Moncks Corner, SC 29461. Appellant filed USSN 86/081,482 on October 3, 2013 seeking registration on the Principal Register, based on an bona fide intent to use the mark CAROLINA'S SUMMER HUMMER.

Appellant seeks registration of the above mark in International Class 033, for the following goods and services: "Alcoholic beverages, namely, distilled liquors and distilled spirits."

The Examining Attorney issued an Office Action dated February 19, 2014, refusing registration on the basis of Lanham Act Section 2(e), based on the Examining Attorney's contention that Appellant's mark is primarily geographically descriptive of the origin of Appellant's goods and/or services. Appellant responded to the Office Action of February 19, 2014. Subsequently, the Examining Attorney issued a Final Office Action on September 9, 2014, presently on appeal, refusing registration again on the basis of Lanham Act Section 2(e).

Appellant filed a Notice of Appeal on March 10, 2015.

IV. **ARGUMENT**

The Examining Attorney in the Final Office Action of September 10, 2014 refused registration based on Trademark Act § 2(e) (15 U.S.C.A. §1052(e)), arguing that the applied for mark is allegedly primarily geographically descriptive of the origin of Appellant's goods. More specifically, the Examining Attorney argues that the term CAROLINA'S in Appellant's mark, CAROLINA'S SUMMER HUMMER, is primarily geographically descriptive of Appellant's goods. Additionally, the Examining Attorney argues that the additional terms SUMMER HUMMER in Appellant's mark are generic or highly descriptive.

Appellant respectfully disagrees and respectfully submits that even assuming, *arguendo*, that the term CAROLINA'S is geographically descriptive, Appellant's mark is still registerable.

A. A Geographic Term Combined with Additional Matter is Registerable

In the present application, the term CAROLINA'S is combined with the term SUMMER HUMMER. In general, a geographic term combined with additional matter that is inherently distinctive, i.e., not merely descriptive or otherwise incapable of registration, may be registered on the principle register. TMEP § 1210.06(a). Accordingly, even assuming, *arguendo*, that the CAROLINA'S element of the mark in the present application is primarily geographically descriptive, Appellant's mark is registerable if the mark includes additional inherently distinctive matter.

B. SUMMER HUMMER is not Generic

Generic terms are terms that the relevant purchasing public understands primarily as the common or class name for the goods or services. In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1811 (Fed. Cir. 2001); In re American Fertility Society, 188 F.3d 1341, 1346, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999). Appellant respectfully submits that SUMMER HUMMER is not generic.

1. SUMMER HUMMER not Generic

There is a two-part test to determine whether a designation is generic: (1) what is the class of goods or services at issue, and (2) does the relevant public understand the designation primarily to refer to that class of goods or services. H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986); TMEP § 1209.01(c)(1). The test turns upon the primary significance that the term would have to the relevant public.

With reference to the two-part test above, the classes of goods at issue in the present application are distilled liquors and distilled spirits. The Examining Attorney has presented no evidence that would suggest that the relevant public understands SUMMER HUMMER to primarily refer to distilled liquors and distilled spirits. For example, although the Examining Attorney cites various websites purporting to show a recipe for a cocktail called a “summer hummer,” Appellant’s goods are directed to distilled liquors and distilled spirits, not cocktails.

Additionally, apart from Appellant’s application, a search of the Trademark Office records uncovers not a single reference to “summer hummer,” let alone in connection with the goods identified in Appellant’s application. On the other hand, a search for “distilled liquor” and “distilled spirits” reveals many uses to identify such goods. This is not a surprising result since SUMMER HUMMER simply is not a generic phrase.

Moreover, evidencing that the public does not understand SUMMER HUMMER to refer primarily to the genus of Appellant’s goods, i.e., distilled liquors and spirits, is the fact that established dictionaries have no definition for “summer hummer.” A printout of such established dictionaries was provided as Appendix A to Appellant’s Response dated August 19, 2014. Accordingly, the consuming public would not be able to determine the nature of Appellant’s goods from the mark alone, and instead the phrase SUMMER HUMMER leaves something up to consumer imagination.

Furthermore, each of the words in SUMMER HUMMER individually has several different meanings. A printout of dictionary definitions of “summer” and “hummer” individually were

provided as Appendix B to Appellant's Response dated August 19, 2014`. Accordingly, SUMMER HUMMER could, for example, allude to a great summer (e.g., a hummer or humdinger of a summer), great summertime memories, a means to create great summertime memories, and so on. See, e.g., In re Homes & Land Publishing Corp., 24 U.S.P.Q.2d 1717, 1718, 1992 WL 340756 (T.T.A.B. 1992) (holding that RENTAL GUIDE for real estate listing magazine for rental properties is not generic, in part, because "a 'rental guide' may be a book or manual instructing or directing one's thinking about an amount to be paid for rent, a list of tenants and schedule of rents, property which may be available for renting, or the act of renting").

Accordingly, Appellant respectfully submits that SUMMER HUMMER is not a generic term as it relates to Appellant's goods.

2. A Strong Showing is Required to Establish a Term is Generic

A strong showing is required when the Office seeks to establish that a term is generic. In re K-T Zoe Furniture, Inc., 16 F.3d 390, 29 U.S.P.Q.2d 1787 (Fed. Cir. 1994) (THE SOFA & CHAIR COMPANY not generic for furniture and upholstering services). "The burden of showing that a proposed trademark is generic remains with the Patent and Trademark Office." In re Merrill Lynch, Pierce, Fenner, and Smith, Inc., 828 F.2d 1567, 4 U.S.P.Q.2d 1141, 1143 (Fed. Cir. 1987) (finding that CASH MANAGEMENT ACCOUNT is not generic for stock brokerage services, administration of money market fund services, and providing loans against securities services). The "substantial showing by the Examining Attorney that the matter is in fact generic ... must be based on clear evidence of generic use." In re Merrill Lynch, 4 U.S.P.Q.2d at 1143 (Fed. Cir. 1987) (citing the TMEP) (emphasis added). Appellant respectfully submits that the Examining Attorney has not met this burden. For example, as previously stated above, although the Examining Attorney cites various websites purporting to show a recipe for a cocktail called a "summer hummer," Appellant's goods are directed to distilled liquors and distilled spirits, not cocktails.

Additionally, as has been clearly established, all doubt as to whether a term is generic must be resolved in Appellant's favor. In re Waverly Inc., 27 U.S.P.Q.2d 1620, 1624, 1993 WL 311934 (T.T.A.B. 1993). See also, In re Merrill Lynch, 4 U.S.P.Q.2d at 1144.

In sum, Appellant respectfully submits that the Examining Attorney has not provided sufficient and appropriate evidence to support the conclusory statement that SUMMER HUMMER is a generic term.

C. SUMMER HUMMER is not Merely Descriptive

Furthermore, Appellant respectfully submits that SUMMER HUMMER clearly is not merely descriptive under Section 2(e)(1) of the Trademark Act.

Trademark Act Section 2(e)(1) bars registration of a mark which “when used on or in connection with the goods of the appellant is *merely descriptive* . . . of them.” 15 U.S.C. § 1052(e)(1) (emphasis added). It is well established that a mark is “merely descriptive” under Section 2(e)(1) of the Trademark Act where, as applied to the goods or services in question, the mark immediately describes “an ingredient, quality, characteristic, function, feature, composition, purpose, attribute, use, etc. of such goods or services.” Henry Siegel Co. v. M&R Int'l Mfg. Co., 4 U.S.P.Q.2d 1154, 1159 (T.T.A.B. 1987). Said another way, to be “merely” descriptive, the term must be “only” descriptive and serve no purpose other than to describe the goods or services or an ingredient, quality, characteristic, function, feature, composition, purpose, attribute, use, etc. of such goods or services. See id.; In re Quick-Print Copy Shop, Inc., 205 U.S.P.Q. 505 (C.C.P.A. 1980).

1. SUMMER HUMMER has a Variety of Meanings

Appellant respectfully submits that SUMMER HUMMER is not merely descriptive of Appellant’s goods and services for at least the reason that SUMMER HUMMER has a variety of meanings. Notably, if a mark suggests a number of possible uses or characteristics of the

goods or services, including one that is descriptive, the mark is not merely descriptive. In re National Tea Co., 144 U.S.P.Q. 286, 287 (T.T.A.B. 1965). Similarly, if a mark projects a double meaning, it is not merely descriptive within the meaning of Section 2(e)(1) of the Trademark Act. Henry Siegel Co., 4 U.S.P.Q.2d at 1159. Any doubt in determining the fine line between whether Appellant's mark is suggestive or merely descriptive must be resolved in favor of the Appellant by publishing the mark and allowing any person who believes he or she would be damaged by the registration of the mark to file an opposition. See In re Bed-Check Corp., 226 U.S.P.Q. 946, 948 (T.T.A.B. 1985).

As applied to Appellant's goods, i.e., distilled liquors and distilled spirits, the term SUMMER HUMMER has a variety of meanings. For example, as indicated in the definitions from established dictionaries previously referenced, "hummer" has a variety of meanings ranging from "one that hums," to a hummingbird, to a humdinger (i.e., "a striking or extraordinary person or thing"), to a fastball. Accordingly, the term SUMMER HUMMER, when viewed in connection with distilled liquors and distilled spirits, could allude to a striking or extraordinary summer that results from the product, great summer memories, a great product for the summer, a liquor that hits you as hard as a fastball, and so on.

Accordingly, Appellant submits that the mark SUMMER HUMMER does not immediately tell customers what the goods or services are, and instead the mark requires the exercise of imagination, thought, and perception by the consumer. TMEP § 1209.01(a); In re Shutts, 217 U.S.P.Q. 363, 365 (T.T.A.B. 1983) (SNO-RAKE held not merely descriptive of a snow-removal hand tool).

2. Use in a Non-Descriptive Manner

The Examining Attorney cites in the Final Office Action dated September 10, 2014 evidence purportedly showing that the term SUMMER HUMMER is merely descriptive of distilled spirits. Appellant respectfully disagrees. By contrast, the evidence cited by the Examining Attorney clearly shows that Appellant's mark CAROLINA'S SUMMER HUMMER is

not merely descriptive of Appellant's goods as Appellant's mark is shown being used as an ingredient in a variety of cocktails not described or otherwise referred to as a "Summer Hummer" cocktail. For example, the Examining Attorney cites to "<http://hummerdrinks.com/recipes/>", Appellant's website, showing the following drink recipes:

- "Dixie Train" (a cocktail including Appellant's distilled spirit sold under the mark in question combined with ginger liquor, cucumber, mint sprigs, lemon juice and simple syrup);

- "Hummer Tea" (a cocktail including Appellant's distilled spirit sold under the mark in question combined with iced tea, lemon juice and simple syrup);

- "Blue Bird" (a cocktail including Appellant's distilled spirit sold under the mark in question combined with ginger liquor, blueberries, mint sprigs, and lemon juice); and

- "Hummer Punch (a cocktail including Appellant's distilled spirit sold under the mark in question combined with elderflower liquor, strawberry slices, cucumber, and lemon juice).

In addition to the above, the Appellant's website features a story of a bartender at Nacho Hippo, Cantina Maximo, a bar located in Myrtle Beach, South Carolina, who makes a cocktail using Appellant's distilled spirit sold under the mark in question combined with simple syrup, cranberry juice, raspberry puree, and cranberry juice. The cocktail is entitled "Nacho Hippo's Nacho Mama Cosmopolitan." This featured story may be found at the following web address: <http://hummerdrinks.com/category/whats-hummin/>.

3. Citation to Recipes for Mixed Drinks

Further, the Examining Attorney cites to various recipes found online for various cocktails having some variation of "summer hummer" in the title. Notably, Appellant respectfully submits that each of these recipes are for mixed drinks and none of the citations depict the term "summer hummer" being used in a descriptive manner of Appellant's goods, i.e., distilled liquors and distilled spirits. For example, recipe cited from "recipetips.com" by the Examining Attorney in the Final Office Action dated September 10, 2014 calls for a mixed drink comprised of less than 1/3 of a distilled liquor (i.e., vodka). Accordingly, Appellant respectfully submits that

SUMMER HUMMER is descriptive of Appellant's goods, i.e., distilled liquors and distilled spirits. Therefore, Appellant respectfully submits that the evidence cited by the Examining Attorney only strengthens Appellant's argument that SUMMER HUMMER is not merely descriptive of Appellant's goods.

4. Doubt Should Be Resolved In Favor of the Appellant

It is well established that the Trademark Office has the burden of proof to demonstrate that a mark is descriptive and that any doubt should be resolved in Appellant's favor. See In re Gourmet Bakers, Inc., 173 U.S.P.Q. 565 (T.T.A.B. 1972); see also In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 4 U.S.P.Q.2d 1141 (Fed. Cir. 1987) (“[i]t is incumbent on the Board to balance the evidence of public understanding of the mark against the degree of descriptiveness encumbering the mark, and to resolve reasonable doubt in favor of the appellant, in accordance with practice and precedent.”).

V. **SUMMARY**

In view of the foregoing, Appellant respectfully submits that there are no proper grounds for refusing registration of Appellant's application based on the Examining Attorney's arguments that Appellant's mark, CAROLINA'S SUMMER HUMMER, is primarily geographically descriptive under §2(e) of the Trademark Act, and that the term SUMMER HUMMER is generic or merely descriptive for distilled liquors and distilled spirits. Accordingly, Appellant respectfully requests reversal of the stated grounds of refusal of the Appellant's subject application, and requests approval for publication of same.

Respectfully submitted,

DORITY & MANNING,
ATTORNEYS AT LAW, P.A.



Date May 11, 2015

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