

ESTTA Tracking number: **ESTTA742825**

Filing date: **04/27/2016**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

| | |
|---------------------------------------|---|
| Name | Akerue Industries, LLC d/b/a Kay Home Products |
| Granted to Date of previous extension | 04/27/2016 |
| Address | 90 McMillen Road Antioch, IL 60002 UNITED STATES |
| Attorney information | Lora L. LoCoco Rose & deJong SC 161 S. First Street, Suite 400 Milwaukee, WI 53204 UNITED STATES lll@rosedejong.com Phone:4142741400 |

Applicant Information

| | | | |
|------------------------|--|------------------------|------------|
| Application No | 86514644 | Publication date | 12/29/2015 |
| Opposition Filing Date | 04/27/2016 | Opposition Period Ends | 04/27/2016 |
| Applicant | Classic Brands, LLC 3600 Yosemite Street, Suite 1000 Denver, CO 80237 UNITED STATES | | |

Goods/Services Affected by Opposition

Class 021. First Use: 2013/03/01 First Use In Commerce: 2013/12/15
All goods and services in the class are opposed, namely: Bird feeders; plastic storage containers for storing and dispensing bird seed for domestic use

Grounds for Opposition

| | |
|---|---|
| The mark is not inherently distinctive and has not acquired distinctiveness | Trademark Act Sections 1, 2 and 45; and Section 2(f) |
| Related Proceedings | US District Court, District of Colorado, 15 CV 2512 |
| Attachments | doc00990820160427145009.pdf(3958542 bytes) doc00990920160427145040.pdf(4239699 bytes) doc00991020160427145103.pdf(5448237 bytes) |

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

| | |
|-----------|----------------|
| Signature | /s/ |
| Name | Lora L. LoCoco |
| Date | 04/27/2016 |

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

In re Trademark Application of:

Applicant: Classic Brands, LLC
Serial No: 86514627
Filed: January 26, 2015
Mark: Design as depicted on Exhibit A.

AKERUE INDUSTRIES LLC d/b/a
KAY HOME PRODUCTS

Opposer,

Opposition No. _____

v.

CLASSIC BRANDS, LLC

Applicant.

NOTICE OF OPPOSITION

Akerue Industries LLC d/b/a Kay Home Products, through counsel, Rose & deJong S.C., hereby opposes the registration of the alleged trademark described in Application Serial No. 86514644. In support of its opposition, opposer alleges the following:

1. Classic Brands, LLC (“Applicant”), a limited liability company organized under the laws of the State of Colorado, filed an application (“the Application”) for an alleged trademark in the United States Patent and Trademark Office (“PTO”) on January 26, 2015 for a design as depicted on Exhibit A, and described as “[t]he Mark consists of a three-dimensional configuration of a bird feeder vessel, consisting of a vessel with contiguous vertical flutes which are depicted in solid lines. The opening of the vessel and base of the vessel are not features of the

Mark and are depicted in broken lines. Color is not claimed as a feature of the Mark.” (“Applicant’s Alleged Trademark”)

2. Applicant’s Alleged Trademark is the contiguous vertical fluted pattern on a vessel.

3. The Application identified the goods as “Bird feeders; plastic storage containers for storing and dispensing bird seed.” (“Applicant’s Goods”)

4. The Application listed the date of first use anywhere as “at least as early as 03/01/2013” and the first use in commerce date was listed as “at least as early as 12/15/2013.”

5. Applicant seeks registration on the Principal Register under 15 U.S.C. 1052(f), asserting that Applicant’s Alleged Trademark has acquired distinctiveness and is, thus, entitled to registration. For at least the following reasons, Applicant has failed to meet the standards for proving acquired distinctiveness under Section 2(f) and, thus, this Opposition should be sustained and the Application should be refused registration.

6. The Application, which was assigned Serial No. 86514644 was published for opposition in the USPTO *Official Gazette* on December 29, 2015. Opposer requested and was granted extensions of time to oppose the Applicant’s Mark on both January 26, 2016 and February 26, 2016, and the time to respond was ultimately extended to April 27, 2016.

7. Akerue Industries LLC d/b/a Kay Home Products (“Opposer”) is a limited liability company organized under the laws of the State of Ohio and doing business under the trade name Kay Home Products and Woodlink, LLC.

8. Opposer is a well-known provider of patio, lawn, and garden products, including but not limited to, bird-feeders.

9. On June 11, 2011 Opposer purchased the assets of Woodlink Ltd. (“Woodlink”), another company in the same line of business.

10. At least as early as 2010, Woodlink began selling the Model 32420 fluted design bottle feeder, an image of which is attached hereto as Exhibit B. (“Opposer’s Design”)

11. Opposer has continued to use and develop Opposer’s Design in association with several of its bird feeders, including but not limited to, Audubon feeders, model numbers NA35243, NA07 and NA09, and Woodlink feeders, Woodlink Model No. 35243, images of which are attached hereto as Exhibit C.

12. In addition, several other products, including bird feeders that are sold in the marketplace by others than Applicant and Opposer and in the same channels as Applicant’s goods contain nearly identical or substantially similar designs. See attached as Exhibit D; images of First Nature, Blue Bunting, Homestead, and Hiatt Stokes models.

13. Customer reviews of the First Nature 3090 32-ounce Hummingbird Flower Feeder date back to September 8, 2012 suggesting that this feeder was on sale by that time, which is before Applicant’s disclosed date of first use. See Exhibit E.

14. Further, Applicant’s Goods featuring Applicant’s Alleged Trademark are not unique as they are in use by Opposer and other manufacturers, with and without designs substantially similar to the Applicant’s Mark, images of which are attached hereto as Exhibits D and F.

15. Applicant’s Alleged Trademark does not function as a trademark and has not been and is not now used by Classic Brands as a trademark.

16. Applicant’s Alleged Trademark is not capable of acquiring distinctiveness.

17. Applicant's Alleged Trademark is limited to conventional fluted pattern on a vessel. Such design is used on all sorts of products in all sorts of markets. See images attached as Exhibit G.

18. As stated above, Applicant's Alleged Trademark has been used on bird feeders long before Applicant's use, and is still used on many that are not produced by the Applicant, and therefore, it is not unique or unusual in this field. See Exhibit D.

19. The Applicant's Alleged Trademark is a merely incorporates a well and long-known form of ornamentation for bird feeders, as can be seen by the existence of the Opposer's designs and others in the marketplace.

20. The Applicant's fluted pattern is not inherently distinctive.

17. Further, Applicant's Alleged Trademark has not acquired distinctiveness.

18. During examination Applicant did not set forth sufficient evidence that the Mark has actually acquired distinctiveness with respect to of the goods in the application.

19. The customer comments provided to the examiner by the Applicant do not establish that the customer associates the Applicant's Alleged Trademark with the Applicant, at best the comments establish that Applicant's Alleged Trademark is aesthetically pleasing. Applicant's summary of customer comments is as follows:

As stated by customers: "This canister reminds me of an old fashion ice cream soda. Maybe that is why hummers like so well..." "This feeder has a great design..." "These are my favorite Humming Bird feeders ever!" "... Same design is made in several different sizes by this company."

See Exhibit H: Applicant's response to office action.

24. The record is devoid of any evidence linking Applicant's advertisements and sales of Classic Brands' goods to a public association of the fluted design and Classic Brands as the single source.

20. Applicant provides no consumer survey evidence or sworn declarations from customers which support any claim by Applicant that customers identify Applicant as the single source of Applicant's Goods because of consumers' recognition of Applicant's Alleged Trademark.

21. Likewise, Applicant's advertising does not draw a connection between Applicant and Applicant's Alleged Trademark, but instead only advertises based on the attractiveness of the design.

22. Applicant states in its Response to the Examiner's Office Action that "Applicant's advertising and promotional efforts for the applied-for-mark have focused on its fun playful design that is reminiscent of a soda bottle for birds." Ex. H: Applicant's Response to Office Action at 4.

23. Applicant has not sought to establish that Applicant's Alleged Trademark has become distinctive of the goods/services through the Applicant's substantially exclusive and continuous use in commerce for five years or more.

30. Many products and bird feeders with identical or substantially similar designs to the Applicants' Alleged Trademark have been used and continue to be used and sold to consumers in the marketplace.

31. The Applicant's Mark is not distinctive and has not acquired distinctiveness, and if the Applicant succeeds in registering Applicant's Alleged Trademark, statutory rights will be created which will wrongfully prevent Opposer from using Opposer's Design and its derivations or wrongfully expose Opposer to liability for use of an Opposer's Design and derivations.

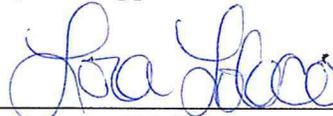
Therefore, registration of the Applicant's Alleged Trademark should be denied under Second 2(f) of the Lanham Act. (15 USC §1052(d)).

WHEREFORE, Opposer files this Notice of Opposition and prays that this Opposition be sustained and the Application rejected; and Opposer requests such other and further relief as may be deemed just and proper.

Dated this 27 day of April, 2016.

ROSE & deJONG, S.C.
Attorneys for Opposer

By: _____

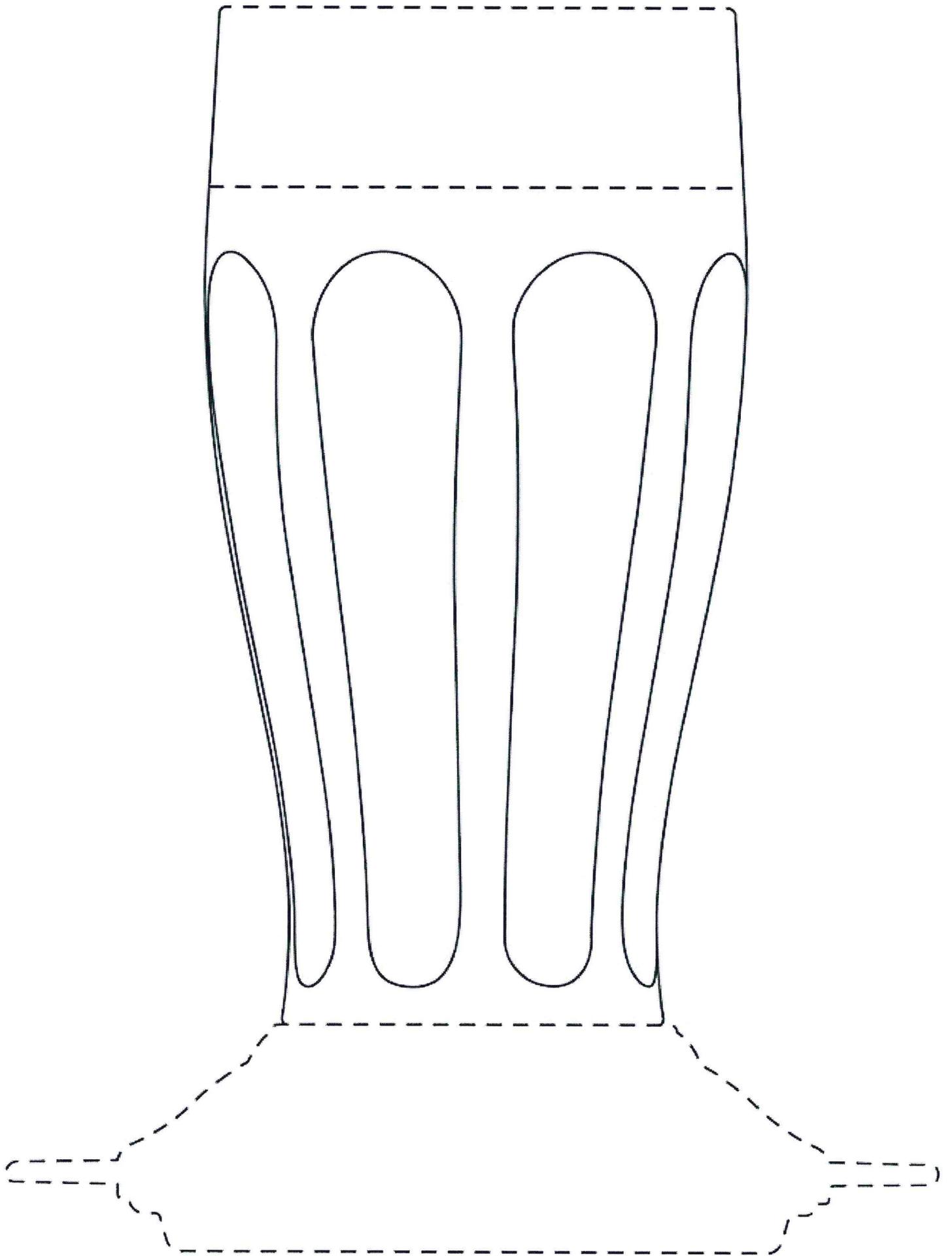


Douglas W. Rose
State Bar No. 1017205
Lora L. LoCoco
State Bar No. 1084491

P.O. ADDRESS:

161 South First Street
Suite 400
Milwaukee, WI 53204
Telephone: (414) 274-1400
Facsimile: (414) 274-1401

EXHIBIT A







Big Gulp

Bring more birds and more joy to your yard



[Home](#) / [Products](#) / [Hummingbird Feeders](#)

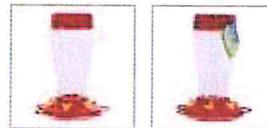


Big Gulp

Hummingbird Feeders

40 oz. Capacity

Model #41



[VIEW LARGER](#)

Description

Specifications

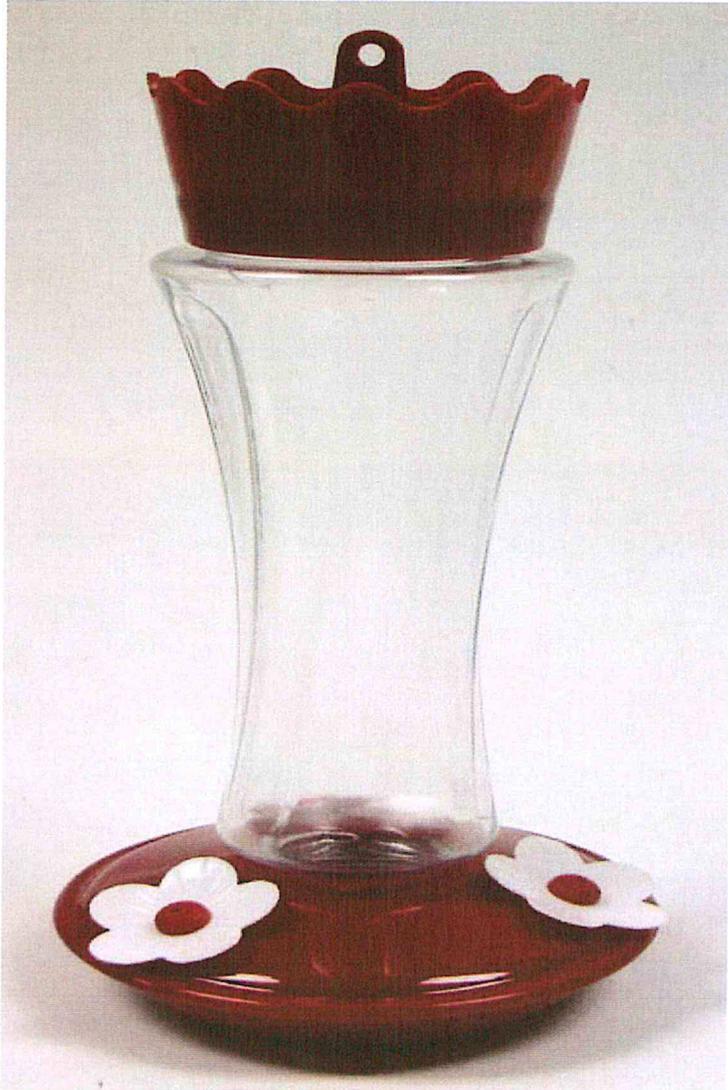
Featuring a glass bottle and built-in ant moat, the Big Gulp hummingbird feeder is an instant classic. The large 40 oz., wide mouth bottle is easy to fill and clean.

For best results, use *More Bird™ Premium Nectar*, which simulates natural nectar found in flowers.

Patents

US Patent D682,481

EXHIBIT B



Woodlink
Model 32420

EXHIBIT C



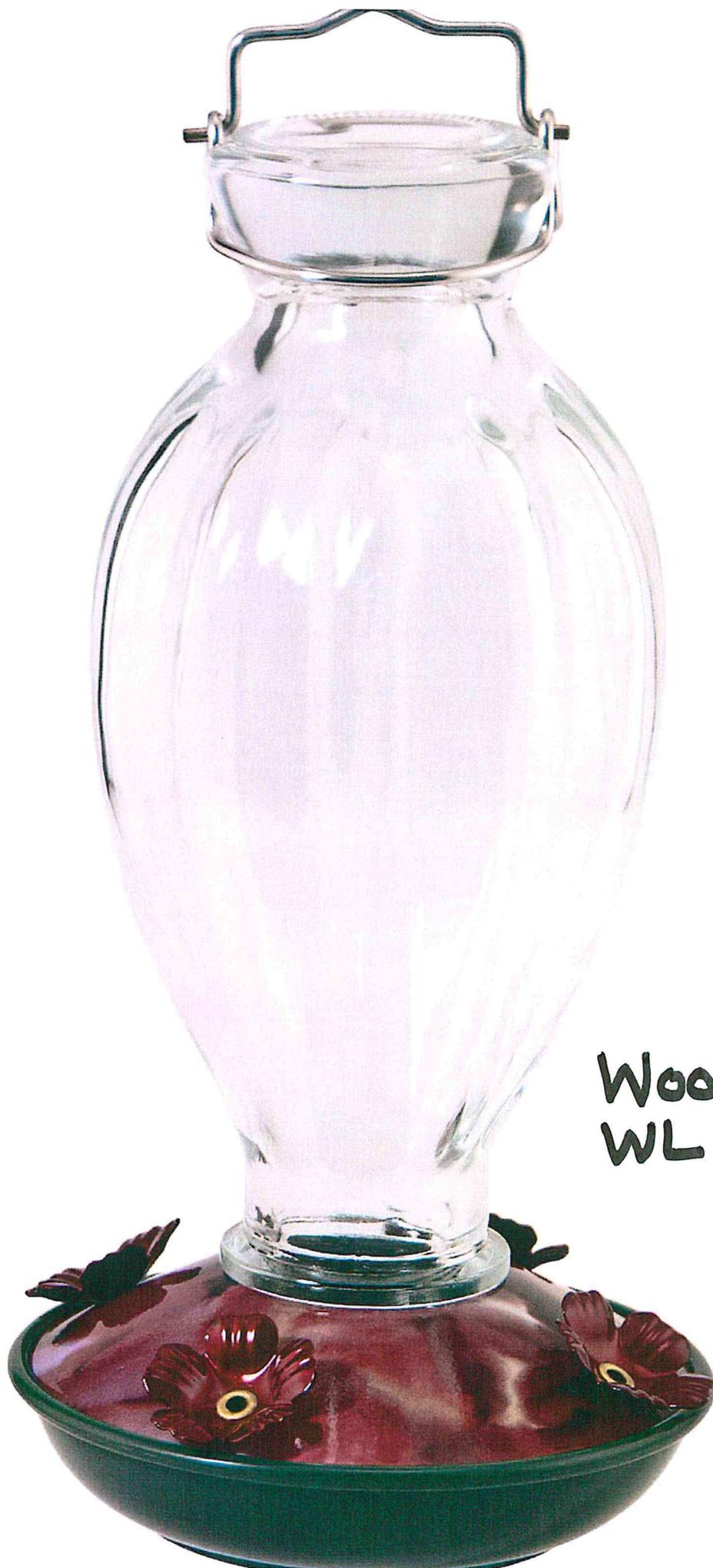
Audubon
NA 35243



Audubon
NA 07



Audubon
NA09



Woodlink
WL 35243

EXHIBIT D



First Nature
30 90 320Z
Hummingbird
Flower
Feeder

Try Prime

Patio, Lawn & Garden ▾ first nature 3090 32-ounce fl

Departments ▾

Your Amazon.com

Today's Deals

Gift Cards

Sell

Hello, Sign in

Your Account ▾

Try Prime ▾

Lists ▾

0

Cart

Patio, Lawn & Garden

Best Sellers

Deals

Gardening ▾

Outdoor Décor ▾

Patio Furniture ▾

Grilling

Tools ▾

Sign in

New customer? Start here.

springevent Freshen up your space

Patio, Lawn & Garden ▸ Outdoor Décor ▸ Backyard Birding & Wildlife ▸ Birds ▸ Feeders



Roll over image to zoom in

First Nature 3090 32-ounce Hummingbird Flower Feeder

by First Nature

516 customer reviews

| 18 answered questions

List Price: \$14.99

Price: **\$10.47** & **FREE Shipping** on orders over \$49.

[Details](#)

You Save: **\$4.52 (30%)**

In Stock.

Want it tomorrow, April 28? Order within **6 hrs 17 mins** and choose **One-Day Shipping** at checkout. [Details](#)

Ships from and sold by Amazon.com. Gift-wrap available.

Size: **Glossy Exclusive Paper**

- Wide-mouth reservoir and patented two-part base is easy to fill and clean
- The durable polymer feeder features 10 yellow flower feeding ports, 32 oz nectar capacity, built in ant moat, s-hook, and round perch design
- Innovative sealing ring aids in leak prevention
- Red base attracts inquisitive hummingbirds
- Made in usa

13 new from \$10.20

Share

Qty: 1 ▾

Yes, I want **FREE Two-Day Shipping** with **Amazon Prime**

Add to Cart

[Turn on 1-Click ordering for this browser](#)

Ship to:

MILWAUKEE, WI 53201

Add to List

Other Sellers on Amazon

\$11.14

+ Free Shipping

Sold by: JC's Wildlife

Add to Cart

\$14.75

& **FREE Shipping** on eligible orders. [Details](#)

Sold by: Deerso

Add to Cart

\$10.20

+ \$4.59 shipping

Sold by: EasyGlobalBuying

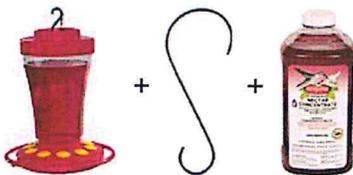
Add to Cart

13 new from \$10.20

Have one to sell?

Sell on Amazon

Frequently Bought Together



Total price: **\$19.53**

Add all three to Cart

Add all three to List

This item: First Nature 3090 32-ounce Hummingbird Flower Feeder **\$10.47**

Perky-Pet 67 12-Inch Metal Hook for Bird Feeders **\$1.88** Add-on Item

Perky-Pet 238 Hummingbird Nectar, 32-Ounce Concentrate **\$7.18** Add-on Item

Sponsored Products Related To This Item (What's this?)



Hummingbird Nectar- All Nat, No Preservatives, No Mix

EZ Nectar All-Natural, Ready-to-Use Hummingbird Foo

15

\$6.98

[Ad feedback](#)

Large bottle - Left
"Homestead Model"
Middle & right bottles - Blue
Bunting





Royal Hummingbird Feeder

Item# 38135

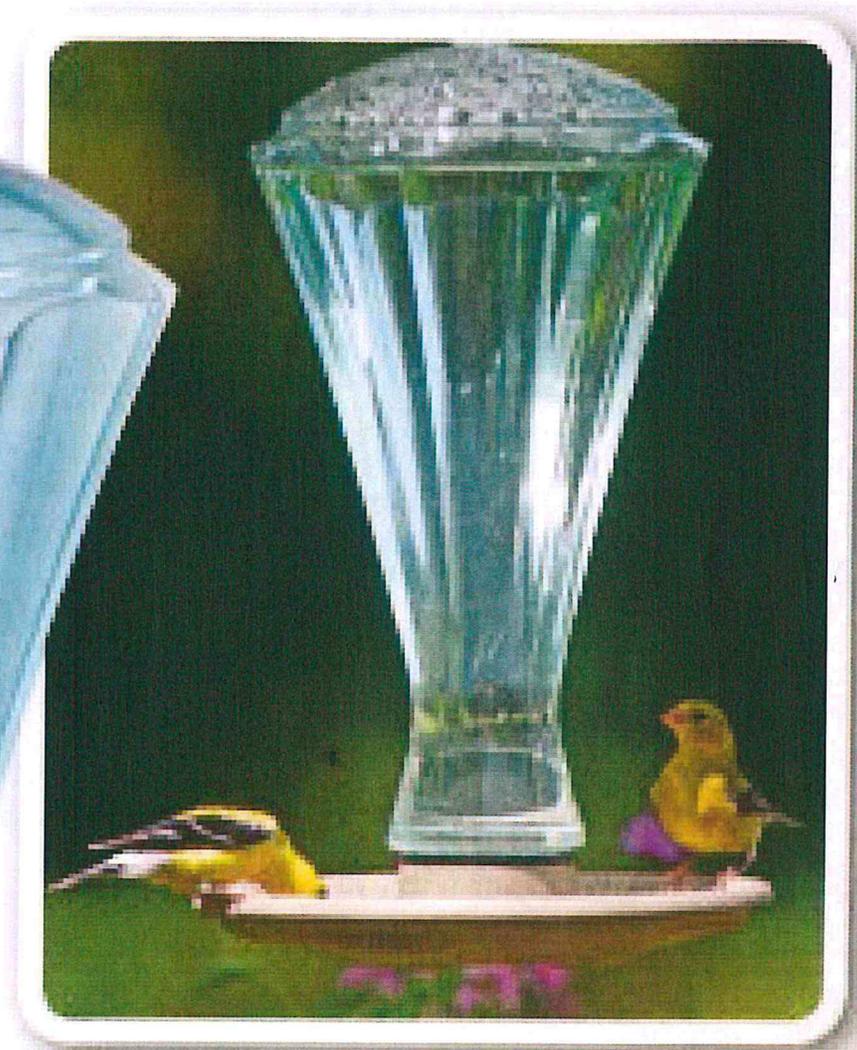
Case Pack: 4

Capacity: 28 oz.

Facing Dimensions:

6.3 x 6.3 x 11.2

Haitte - Stokes



Goldfinches

Drink 'N' Bathe Water Feeder

Item# 38248

Case Pack: 2

Capacity: 64 oz.

Facing Dimensions:

8.0 x 8.0 x 13.0

Haitte - Stokes



Hollyhock Hummingbird Feeder

Item# 38104

Case Pack: 4

Capacity: 25 oz.

Facing Dimensions:

5.2 x 5.2 x 10.0

EXHIBIT E

All ▾

Departments ▾

Shopping History ▾

Lora's Amazon.com

Today's Deals

Hello, Lora

Your Account ▾

Prime ▾

Lists ▾

0

Cart

First Nature 3090 32-ounce Hummingbird Flower Feeder › Customer Reviews

Customer Reviews

516



First Nature 3090 32-ounce Hummingbi...

by First Nature

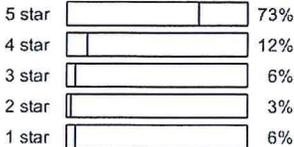
Size: Glossy Exclusive Paper [Change](#)

Price: \$10.47

Add to Cart

Add to Wish List

4.4 out of 5 stars



Rate this item

Write a review

Top positive review

See all 440 positive reviews ›

108 people found this helpful

ROUND 32 Oz FIRST NATURE:

Has Ant Moat. Easiest to Fill, Easiest to Clean. Easiest to Assemble (with arthritic hands)

By L. M. L. Wilson on February 12, 2014

Has a built-in ant moat. It doesn't leak.. No awkward spills when filling the wide mouth container. You don't need special size brushes to get out the insidious pink/grey/black fungus (that will kill/sicken Hummingbirds). No frustratingly slow pouring out of rinse water from a narrow neck

[Read more](#)

Top critical review

See all 76 critical reviews ›

7 people found this helpful

Let sugar water cool before using

By B. MacPherson on August 9, 2015

The reservoir is made of a thin plastic, like a shampoo bottle. I made my second batch of sugar water and apparently did not let the water cool enough. The jug hanger top will no longer stay on and the bottom will not screw into the base. The plastic shrunk and it is now useless. I will drop it to 3 stars due to the thin plastic jug, and will raise it to 3 stars because I probably should have read the directions and warnings about not using hot liquid. Now the hummingbirds and my wife are

2,604

Clean, bright, and white!

“ My mouth felt fresh, my gums were very clean and tingly, and my teeth look amazingly white and bright! ” Vine Review of Free Product

[Ad feedback](#)

Sort

by:

Most recent

Filter

by:

All re...

All st...

All fo...

Keyword

Search

wide throat great for cleaning.

By Ed Hovden on March 2, 2013

Size: Glossy Exclusive Paper [Verified Purchase](#)

the wide mouth is so much easier to clean than the standard narrow throated feeders. holds up well. the yellow flowers do fade a bit though after a while. but that does not take away frm anything from the product.

Comment Was this review helpful to you? Yes No [Report abuse](#)

Pretty but ...

By David A. McElhannon on February 24, 2013

Size: Glossy Exclusive Paper [Verified Purchase](#)

I got this feeder to replace two very old feeders. The feeder looks real pretty in the window but the hummingbirds will not feed out of it! I've cleaned it a number of times, I've tried putting sugar water with and without the red dye, and the birds will look but they won't feed. So I have had to put my real old feeders back out and once again, they numbers are more than you can count. I have to refill the old 16-ounce feeders once everyday now. That's why I wanted the bigger feeders.

3 comments 4 people found this helpful. Was this review helpful to you? Yes No [Report abuse](#)

Excellent Hummingbird feeder

By J. Parks Hammond on October 11, 2012

Size: Glossy Exclusive Paper [Verified Purchase](#)

In August, I had 15-18 hummingbirds feeding and fussing on my deck. It is thrilling for me and my niece,

Questions? Get fast answers from reviewers

What do you want to know about First Nature 3090 32-ounce Hummingbird Flower Feeder?

See all 18 answered questions

Ask

Customers also viewed these items



First Nature 3055 32-ounce Hummingbird Feeder by First Nature \$9.97

1,222



First Nature 3091 16-Ounce Hummingbird Flower Feeder by First Nature \$9.58

511

nephew, grand-niece and grand nephew to watch 10 hummingbird perched and feeding from the same feeder simultaneously. Grac design and good nectar capacity.

Comment One person found this helpful. Was this review helpful to you? Report abuse

Kend

By Lokl8 on September 16, 2012

Size: Glossy Exclusive Paper

MADE IN USA

This is a very well made feeder, the built in ant moat is a must put in a little oil or water and no more ants. One of the best feeders that I have ever had. The birds swarm to it. Whoever designed it must be a hummer fan. If you like hummers get it

Comment 2 people found this helpful. Was this review helpful to you? Report abuse

First Nature Hummingbird feeder

By Lucyb on September 11, 2012

Size: Glossy Exclusive Paper **Verified Purchase**

This is a plastic feeder and has multiple spots for hummers. It opens easy for cleaning and easy to fill. The only exception is the fake flowers fall off very easy but does not seem to bother my hummers. The price was under \$10.00 when I bought it and I feel for that price a decent buy.

Comment One person found this helpful. Was this review helpful to you? Report abuse

hummingbird feeder

By Sully on September 8, 2012

Size: Glossy Exclusive Paper **Verified Purchase**

Nice bird feeder, bought to keep bees from inside base but did not do the job. Still would use when bees aren't around.

Comment One person found this helpful. Was this review helpful to you? Report abuse



First Nature 3051 Hummingbird Feeder, 16-Ounce by First Nature \$7.21

702



More Birds 41 Classic Brands Big Gulp Humming Bird Feeder, 40 Fluid Ounce, Red/Clear by More Birds \$18.83

75

Send us feedback

How can we make Amazon Customer Reviews better for you?

Let us know here.

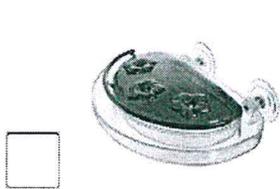
← Previous 1 ... 49 50 51 52 Next →

◀ See all details for First Nature 3090 32-ounce Hummingbird Flower Feeder

Your Recently Viewed Items and Featured Recommendations

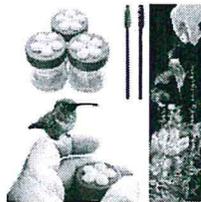
Inspired by your browsing history

Page 1 of 5



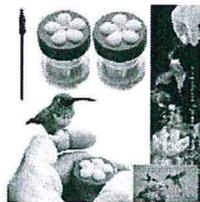
Aspects 407 Jewel Box Window Hummingbird Feeder, 8-Ounce

779 \$17.02



Complete Handheld Hummingbird Button Feeder Kit

21 \$15.39



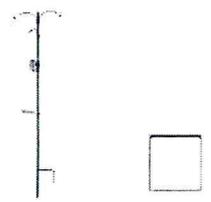
2 MINI HAND HELD HUMMINGBIRD FEEDERS WITH INSTRUCTIONS...

15 \$12.49



Kaytee Hummingbird Electro Nectar Concentrate, 16-Ounce

39 \$12.41



Panacea 89143 Wild Birc Feeding Station Kit, Blac

138 \$29.33

You viewed



View or edit your browsing history

Back to top

Get to Know Us

- Careers
- About Amazon
- Investor Relations
- Amazon Devices

Make Money with Us

- Sell on Amazon
- Sell Your Services on Amazon
- Sell on Amazon Business
- Sell Your Apps on Amazon
- Become an Affiliate
- Advertise Your Products
- Self-Publish with Us
- Become an Amazon Vendor
- > See all

Amazon Payment Products

- Amazon.com Rewards Visa Card
- Amazon.com Store Card
- Amazon.com Corporate Credit Line
- Shop with Points
- Credit Card Marketplace
- Reload Your Balance
- Amazon Currency Converter

Let Us Help You

- Your Account
- Your Orders
- Shipping Rates & Policies
- Amazon Prime
- Returns & Replacements
- Manage Your Content and Devices
- Amazon Assistant
- Help



Australia Brazil Canada China France Germany India Italy Japan Mexico Netherlands Spain United Kingdom

6pm
Score deals
on fashion brands

AbeBooks
Rare Books
& Textbooks

ACX
Audiobook Publishing
Made Easy

Alexa
Actionable Analytics
for the Web

Amazon Business
Everything For
Your Business

AmazonFresh
Groceries & More
Right To Your Door

AmazonGlobal
Ship Orders
Internationally

Home Services
Handpicked Pros
Happiness Guarantee

Amazon Web Services
Scalable Cloud
Computing Services

Audible
Download
Audio Books

BeautyBar.com
Prestige Beauty
Delivered

Book Depository
Books With Free
Delivery Worldwide

Casa.com
Kitchen, Storage
& Everything Home

ComiXology
Thousands of
Digital Comics

CreateSpace
Indie Print Publishing
Made Easy

Diapers.com
Everything
But The Baby

DPRreview
Digital
Photography

East Dane
Designer Men's
Fashion

Fabric
Sewing, Quilting
& Knitting

Goodreads
Book reviews
& recommendations

IMDb
Movies, TV
& Celebrities

Junglee.com
Shop Online
in India

Kindle Direct Publishing
Indie Digital Publishing
Made Easy

MYHABIT
Private Fashion
Designer Sales

Shopbop
Designer
Fashion Brands

Soap.com
Health, Beauty &
Home Essentials

TenMarks.com
Math Activities
for Kids & Schools

Wag.com
Everything
For Your Pet

Warehouse Deals
Open-Box
Discounts

Woot!
Discounts and
Shenanigans

Yoyo.com
A Happy Place
To Shop For Toys

Zappos
Shoes &
Clothing

Conditions of Use Privacy Notice Interest-Based Ads © 1996-2016, Amazon.com, Inc. or its affiliates

EXHIBIT F



Audubon
NA 35225



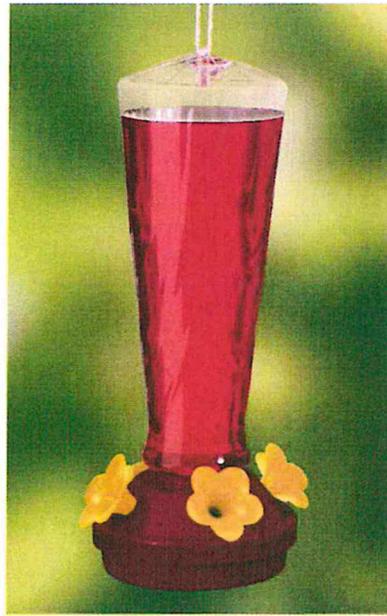
Audubon
NA35231



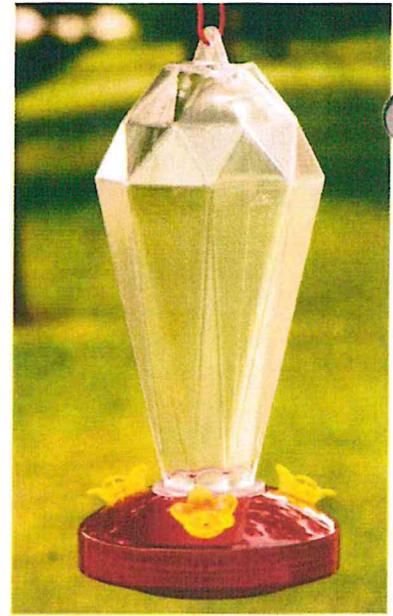
Audubon
NA07



Item: 5545
Plastic Bottle
Hummingbird Feeder 
 Size: 3.5"D X 3.5"W X 9.8"H
 UPC 0 25845 12345 5
 Weight: 0.19 lbs. / Case 12
 • Capacity 12 oz.



Item: NA5542
Swirl Plastic
Hummingbird Feeder 
 Size: 4.25"D X 4.25"W X 9"H
 UPC 0 47977 00590 4
 Weight: 0.20 lbs. / Case 6
 • Capacity 16 oz.



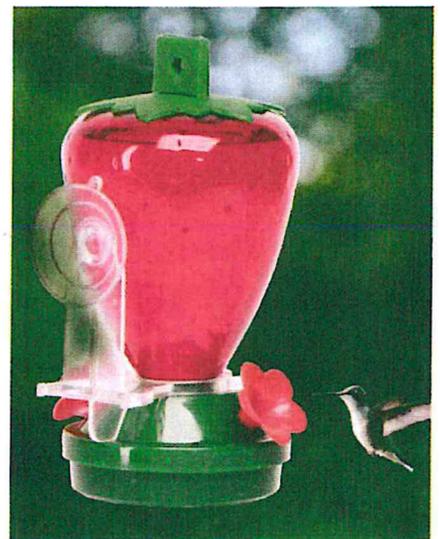
Item: NAH10
Crystal Tower Plastic
Hummingbird Feeder
 Size: 4.5"D X 4.5"W X 9.5"H
 UPC 7 15038 30498 2
 Weight: 0.36 lbs. / Case 4
 • Capacity 24 oz.



Item: NA5546
Plastic Window Mount
Hummingbird Feeder 
 Size: 4.25"D X 6.3"W X 7"H
 UPC 0 47977 00592 8
 Weight: 0.40 lbs. / Case 6
 • Capacity 12 oz.



Item: 5571
Heart Window Mount
Hummingbird Feeder 
 Size: 3.625"D X 5.5"W X 8.25"H
 UPC 0 25845 12371 4
 Weight: 0.30 lbs. / Case 12
 • Capacity 12 oz.



Item: 5558
Strawberry Window Mount
Hummingbird Feeder 
 Size: 6.1"D X 4"W X 6.5"H
 UPC 0 25845 12380 6
 Weight: 0.31 lbs. / Case 12
 • Capacity 12 oz.

EXHIBIT G

| | | | |
|-------------------------------------|---|--|-------------------|
| 5% No Minimum Code: TAKE5 | 10% Orders Over \$99 Code: SALE10 | 20% Personalized Glassware Code: GLASS20 | 2 DAY SALE |
|-------------------------------------|---|--|-------------------|

[New Products](#) [Sign in](#) [Register](#)



Order by Phone: 877-323-0001

Save Now **Click here!**

Enter search keywords here...

[Wedding Favors](#) [Wedding Favors Themes](#) [Favor Packaging](#) [Wedding Essentials](#) [Stationery](#) [Novelty Wedding Gifts](#) [Other Occasions](#) [On Sale](#)

[Home](#) [Wedding Favors](#) [Candle & Votive Wedding Favors](#) [Candle Holder Wedding Favors](#) [Silver Mercury Glass Vase \(fluted urn design\)](#)



[View detailed images \(1\)](#)

Silver Mercury Glass Vase (fluted urn design)

1

SKU: FCIV226SV

Processing Time: 3-6 business days, transit time not included.

Price: **\$6.90** Quantity: [add to cart](#)

Volume Discount (applies automatically)

| | | |
|---------------|---------------|---------------|
| 4 item + | 12 items + | 24 items + |
| \$6.90 | \$6.20 | \$5.50 |

Features and Facts:

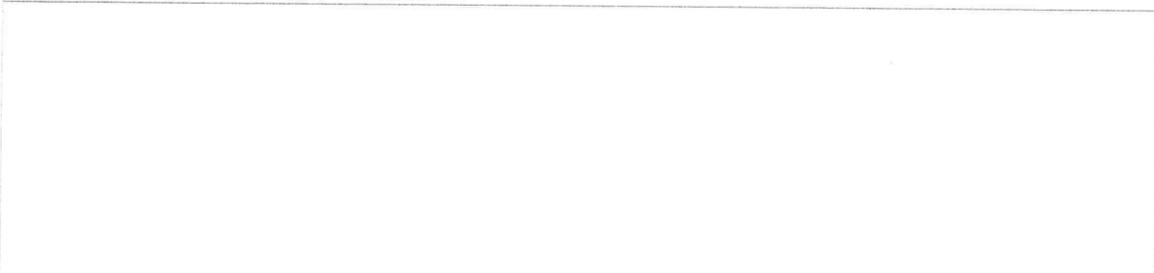
[Product Description - View More](#) ▼



Previous \$8.55
 Next \$10.72

Customers Who Bought This Item Also Bought:

Check our latest products



[Calculate Shipping](#) [Send to friend](#) [Reviews](#)

Shipping Options

SHADES OF LIGHT

1(800)262-6612 CONTACT US LOCATIONS ACCOUNT CART SEARCH

LIGHTING | LAMP SHADES | RUGS | HOME DECOR | MIRRORS | NEW ITEMS | SALES & SPECIALS | CONTRACT & HOSPITALITY

Shades of Light > Lighting > Pendants & Hanging Lights > All Pendants & Hanging Lights > Fluted Glass Globe Pendant

PRINTABLE VERSION

◀ PREVIOUS

NEXT ▶

Size & Color Options

Fluted Glass Globe Pendant

Heavy fluted glass globe shimmers from within. Trimmed with chrome band and crystal finial, it's perfect for lofty breakfast nooks or hip hallways. (22"-76" Hx10"W) 60 watt (medium base socket) Rod lengths: (3x16" rods/ 2x8" rods/ 2x12" rods) Minimum hanging height: 22". Glass Globe 14" diameter.

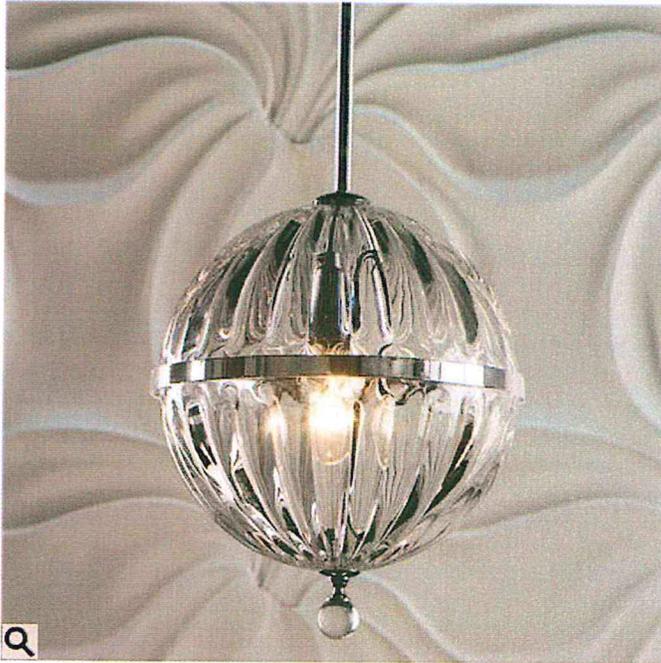


Clear

Product SKU: PEC1036 CL

Price: \$ 399.00

Quantity Clear \$399.00



[Pin it](#)

Item: #375SW1420 MFR: #SW-1420-1-SAN-CL



Each only

\$74.99

Features:

- ✓ The look of glass without the hassle of breakage

400010486472

UPC Code:

New

Condition:

Usually Ships in 2-3 Business Days

Shipping:



SPECS

Height 8 1/4 Inches

Top Diameter 2 3/4 Inches

Capacity 6 oz.



BALLARD DESIGNS

wish list gift registry retail stores blog

Sign In/Register Order Status Request a Catalog Shipping To: Shopping Cart (0 items)

Questions? Call us at 1.800.536.7551

KEYWORD/ITEM #

FURNITURE OUTDOOR LIVING LIGHTING FABRIC & SLIPCOVERS RUGS & DRAPERY BED & BATH WALL DECOR ACCESSORIES & PILLOWS TABLETOP COLLECTIONS & NEW ITEMS TRENDS & FEATURES SALE

Special Offer

SAVE 15% ON YOUR ORDER. TODAY ONLY

Use Offer Code: MN31615

*Offer cannot be combined with any other special offers. Cannot be applied to previous orders, gift certificates or Best of Ballard items.

Home [Fluted Glass Finial - Set of 2](#)

Fluted Glass Finial - Set of 2

Was \$24.00
Now \$9.99

Item Number:RH002

Qty 1



Overview **Specifications**

Add a touch of old world charm to your windows with our Fluted Glass drapery rod finial. It's made of mouth-blown glass to capture the look of recycled glass, one of our favorite accents. The fluted details catch the light for subtle sparkle.

Glass Drapery Rod Finial features:

- Quick fashion update for your room
- Also available with drapery rod

AVAILABLE OPTIONS



Black

OPTIONS

Fluted Glass Finial - Set of 2 RH002

Select Finish



Tweet

98 | |

Was \$24.00
Now \$9.99

QTY 1

[Email a Specialist](#) [Return Policy](#) [Shipping Information](#) [Guarantee](#)

(800) 375-3410 Available Now Live Chat Chat Now

Are you a Pro? My Account Order Status Contact Us Help



What are you shopping for?

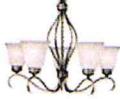
Search

Cart - 0 Items

Home Ceiling Lights Wall Lights Outdoor Lights Ceiling Fans LED Lights Home Decor Brands Style Sales!



Bathroom Lights



Chandeliers



Pendant Lights



Wall

Indoor Ceiling Fans

Outdoor Ceiling Fans

Ceiling Fans with Lights

Hugger Fans

Ceiling Fans with Remotes

LED Ceiling Fans



Ceiling Fans



Lamps



Outdoor Lights

Call or Live Chat for Best Price

Low Price Guarantee

ng*

No Restocking Fees

Rewards Program

You are: Home > Brands > Progress Lighting > Indoor Lighting > Progress Lighting P3

Print Page

Progress Lighting P3287-15 Polished Chrome Economy Fluted Glass Series Single-Light Bathroom Sconce with Clear Ribbed Glass Shade

Series Single-Light Bathroom Sconce with

Item #: BCI355846

View the entire [Fluted Glass Collection](#)



\$23.58

Originally \$39.30, You Save 40%

24

Compare

5/5 [Read 5 Reviews](#) | [Write a Review](#)

Shipping: **Free Shipping on orders over \$49.00!** [See Details](#)

Finish:

[Tech Specs](#)

29 In Stock

Leaves the Warehouse by Tomorrow, April 28th

Qty

Add To Cart

[Return Policy](#)

[Live Chat](#)

[Ask A Question](#)

Earn 24 points with the purchase of this product [Learn More](#)



[Click to view larger image](#)



Product Videos

Do It Yourself: Installing an Indoor Wall Sconce

Follow Kyleen Bromley of Build.com as she shows you the step-by-step process of replacing and installing an indoor wall sconce.

Product Details for the Progress Lighting P3287-15 in Polished Chrome

Sleek and classic, this wall sconce pairs classic and curving metal supports with a clear fluted glass shade. This functional and versatile sconce can be mounted in the up or down position, and covers a standard outlet box for easy use.

Features:

- Wall sconce
- Clear fluted glass shade
- Can be mounted in the up or down position
- Covers outlet box
- Mounting strap for outlet box included



Live Product Expert

EXHIBIT H

I. NON-DISTINCTIVE PRODUCT DESIGN

Applicant respectfully disagrees with the Examiner's refusal of the applied-for mark on the basis that "the applied-for mark consists of a nondistinctive product design or nondistinctive features of a product design." Applicant strongly believes that the applied-for mark is inherently distinctive and thus, eligible for trademark protection.

As set forth in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992), the Supreme Court held that the establishment of inherent distinctiveness sufficiently evokes trade dress protection without the need for proof of a secondary meaning. See *Id.* at 763. Courts have developed a variety of tests and factors for determining whether trade dress is inherently distinctive. As established in *Duraco Prod., Inc. v. Joy Plastic Enter., Ltd.*, the Third Circuit applies the following three-pronged test for inherent distinctiveness: inherently distinctive trade dress is (1) unusual and memorable, (2) conceptually separate from the product, and (3) likely to serve primarily as a designator of origin of the product. 40 F.3d 1431, 1449 (3d. Cir. 1994).

All three prongs of the *Duraco* test are met by the applied-for mark. First, Applicant's scalloped ridged design, coupled with its flared, curving bottle shape creates a unique visual impression akin to an old fashioned soda bottle. In this context of a bird feeder, this design and vessel shape is extremely unique and memorable. As demonstrated by the attachments submitted under the Evidence file, there are countless different designs for bird feeders. However, Applicant's feeder featuring the applied-for mark is unique and is not in use by any other manufacturer. As set forth in *Brooks Shoe Mfg. v. Suave Shoe Corp.*, 716 F.2d 854, 858 (11th Cir. 1983), to evaluate the inherent distinctiveness of trade dress, the design must be unique and *not* a basic shape. Applicant's feeders featuring the applied-for mark are not basic shapes as seen in many other feeders, but instead a very creative and original design. As explained by a member of Applicant's design team, Lindsey Nifong (Marketing Manager for Applicant), "*We explored a smooth finish bottle, but it looked too plain.*"

Second, the design and shape of the food-containing vessel for Applicant's bird feeder is conceptually separate from the bird feeder product itself. Applicant's "soda bottle" design for the vessel in no way enhances or assists the utilitarian function of the overall product – namely, holding and dispensing bird food. The design is totally separate from this utilitarian function, and serves a purely decorative purpose to enhance customer's notice and attraction to the product (as compared to countless other feeder products).

Third, the applied-for mark serves primarily as a designator of origin for Applicant's bird feeder products. The "Big Gulp" feeder sold by Applicant features the design covered by applied-for mark solely for purposes of driving home the concept of a "soda bottle" for birds. Applicant created this design to draw consumer's eyes, and to assist them in distinguishing Applicant's products from competitor products. (See *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1008 (2d. Cir. 1995), *aff'd* 104 F.3d 353 (2d. Cir. 1996), holding that trade dress is inherently

distinctive when the owner shows that the *primary intention* of the design is to function as a source identifier for a particular product.” Please also see the attached customer reviews from sales of the “Big Gulp” feeder on Amazon.com, indicating customers’ recognition of the feeder as sold by Applicant, and attraction to the design. As stated by customers: “This canister reminds me of an old fashion ice cream soda. Maybe that is why hummers like so well.” . . . “This feeder has a great design.” . . . “These are my favorite Humming Bird feeders ever!” . . . “Same design is made in several different sizes by this company.”

According to relevant case law, consumer surveys are the most useful evidence of acquired distinctiveness because “the chief inquiry [in trademark law] is . . . whether or not the consumer identifies a mark with a specific producer.” *Sec. Ctr., Ltd. v. First Nat’l Sec. Ctrs.*, 750 F.2d 1295, 1301 (5th Cir. 1985). Indeed, courts have routinely held that customer survey evidence “is the most direct and persuasive way of establishing secondary meaning.” *Id.* (quoting *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 795 (5th Cir. 1983)).

Further, the Eleventh Circuit conducts the following examination to determine whether trade dress is inherently distinctive: (1) whether the particular trade dress consists of a “common basic shape or design”; (2) “whether it is unique or unusual in a particular field”; and (3) “whether it is a mere refinement of a commonly-adopted and well-known form of ornamentation for the [particular class of] goods.” *Brooks Shoe Mfg. v. Suave Shoe Corp.*, 716 F.2d 854, 857-58, (11th Cir. 1983) (quoting *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977)). Clearly, the old fashioned soda bottle shape is not a common or basic design for a bird feeder, but rather is very unique for a bird feeder. While the soda bottle may be considered a well-known design for beverages consumed by humans, it is not a common or well-known design for a hanging feeder for supplying nectar to hummingbirds.

If trade dress is not inherently distinctive, the owner of the trade dress may seek to prove secondary meaning under Section 43(a) of the Lanham Act. Pursuant to the Supreme Court’s decision in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, secondary meaning exists when “in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.” 450 U.S. 844, 851 (1982) (citing *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 118 (1938)).

Therefore, in the event the Examiner does not find Applicant’s arguments of inherent distinctiveness convincing, **Applicant alternatively seeks to amend the application to seek registration on the Principal Register based on a claim of acquired distinctiveness under Section 2(f), based on actual evidence that the mark has acquired distinctiveness of the goods and/or services.** See attached evidence of acquired distinctiveness under the Evidence folder of this Response, as well as the claim of Section 2(f) further in the Response form.

2(f) Claim Based on Evidence:

The mark has become distinctive of the goods/services, as demonstrated by the attached evidence, which includes: examples of Applicant's advertising, marketing and promotional materials for the applied-for mark; and consumer recognition relating to the applied-for mark.

Relevant factors in assessing secondary meaning include: (1) the length of time the trade dress has been used by a single producer; (2) the amount of sales and image advertising of the trade dress; (3) actual buyer association; and (4) the fact of copying. *Freixenet, S.A. v. Admiral Wine & Liquor Co.*, 731 F.2d 148, 150 (3d Cir. 1984). Applicant provides information regarding these factors below in Section II, Requirement for Information.

II. REQUIREMENT FOR INFORMATION

(1) A written statement as to whether the applied-for mark, or any feature(s) thereof, is or has been the subject of a design or utility patent or patent application, including expired patents and abandoned patent applications. Applicant must also provide copies of the patent and/or patent application documentation.

No features of the applied-for mark currently are or have been the subject of any design or utility patent or patent application, including expired patents and abandoned patent applications.

(2) Advertising, promotional, and/or explanatory materials concerning the applied-for configuration mark, particularly materials specifically related to the design feature(s) embodied in the applied-for mark.

To date, Applicant's total sales revenue for products featuring the applied-for mark totals approximately \$153,000 USD. Applicant has spent a total of at least \$2,000 USD to date on advertising products featuring the applied-for mark. Applicant's principal forms of advertising include print brochures, information available on its website, www.morebirds.com, and social media (i.e., its Facebook page available at: <https://www.facebook.com/Classic-Brands-More-Birds-203758209746952/>, and its Pinterest page available at: <https://www.pinterest.com/Classicbrands/>). Please see the attached files under the Evidence folder for examples of Applicant's advertising, promotional and explanatory materials concerning the design features embodied in the applied-for mark, including: (i) print brochures and order catalogues from 2014 and 2015, including customer reviews; (ii) screenshots from Applicant's website; screenshots from Applicant's social media pages; (iv) photographs of Applicant's products featuring the applied-for mark; and (v) examples of listings in major national retail stores for Applicant's products featuring the applied-for mark.

Applicant's advertising and promotional efforts for the applied-for mark have focused on its fun, playful design that is reminiscent of a soda bottle for birds. Similarly, the name of Applicant's bird feeder product featuring the applied-for mark design is the "Big Gulp." Thus, Applicant focused on a designing a vessel that with a vertical ridged scallop pattern and curved, tapering vessel shape that looks like it could be a soda bottle from which birds drink nectar. All design

decisions were fueled by the “Big Gulp” theme and to create an overall brand with a “soda bottle” look and feel. As a result, the applied-for mark is a distinctive, unique and clever design based the “Big Gulp” play on words, and it creates a very distinguishable commercial impression that is significantly different than other bird feeder designs.

(3) A written explanation and any evidence as to whether there are alternative designs available for the feature(s) embodied in the applied-for mark, and whether such alternative designs are equally efficient and/or competitive. Applicant must also provide a written explanation and any documentation concerning similar designs used by competitors.

Alternative Designs: There are numerous alternative designs available for bird feeders and bird seed storage container vessels other than the vertical ridged scallop pattern and curved, tapering vessel shape claimed as features of the applied-for mark. Options range from smooth-surfaced vessels to various textures, and vessel profile shapes included straight up-and-down shapes, rounded shapes, and “ballooning” shapes. Please see the attached files under the “Evidence” section of this Response, which include photographs of various alternative vessel designs sold by large, national retailers. In fact, Amazon.com, the world’s largest online retailer, carries hundreds of brands and varieties of bird feeders and seed storage containers. Applicant’s products are the only bird feeder products featuring a vessel design with a vertical ridged scallop pattern and curved, tapering shape – reminiscent of a soda bottle.

The scalloped design and profile shape of the applied-for mark are purely ornamental features without a functional purpose. Applicant chose to manufacture the “Big Gulp” design in order to make it more attractive, competitive and desirable to consumers. The “soda bottle” look and feel of the vessel enhances the overall aesthetics of Applicant’s bird feeders.

Although bird feeders serve the functional purpose of feeding birds, but they serve an equally important – if not *more* important – purpose of ornamentation (both in terms of the feeder itself – as hung – and the variety of birds the feeder attracts). This ornamental purpose is the main factor driving consumer recognition and sales of a particular bird feeder. Applicant’s ridged scalloped pattern and curved profile vessel is designed to enhance the overall appearance of Applicant’s bird feeder and to draw consumer attention.

Similar Designs Used by Competitors: Applicant is not aware of any competitive products that feature a similar scalloped design and soda bottle profile for bird feeders.

(4) A written statement as to whether the product design or packaging design at issue results from a comparatively simple or inexpensive method of manufacture in relation to alternative designs for the product/container. Applicant must also provide information regarding the method and/or cost of manufacture relating to applicant’s goods.

Applicant’s vessels featuring the applied-for mark are significantly more expensive to manufacture than other vessels shapes that Applicant manufactures, such as smooth surface vessels and tapering vessels. One of the main reasons for the increased cost is that Applicant’s scallop-ridged and curving vessels are more complex than smooth, straight-line vessels, and therefore the molds and tooling necessary to manufacture such vessels are more expensive. There

is also an additional inspection/approval process during manufacturing required for the vessels featuring the applied-for mark design, given the more intricate nature of this design versus a smooth design. This adds additional cost to the manufacturing process for Applicant's design in order to achieve the features claimed in the applied-for mark.

The total manufacturing cost for a vessel featuring the applied-form mark design is \$0.50 per unit (as opposed to some of its smooth, straight-line or tapering vessels, which costs \$0.29 per unit). After placing an order, the manufacturing process takes approximately 60 to 90 days for each batch of vessels ordered by Applicant featuring the applied-for mark.

Applicant's manufacturer of vessels featuring the applied-for mark is Jiang Su Xuzhou Kai Rui Glassware Co., Ltd., located in China (Mapo Industrial Area, Tong Shan, Xuzhou City, Jiang Su Province).

(5) Any other evidence that applicant considers relevant to the registrability of the applied-for configuration mark.

As demonstrated below by statements provided by Applicant's design team, the scallop ridge pattern and curving profile design claimed as features of the applied-for mark were specifically chosen to differentiate Applicant's products from other competitor products, and for purely ornamental and decorative reasons.

Statements from Applicant's Design Team:

Applicant's marketing and design team has provided the following explanatory statements regarding the design and distinctiveness of the applied-for mark:

Regarding why Applicant chose the particular design featured in the applied-for mark:

"The scallops create an attractive visual detail that catches the eye, especially when sunlight hits it. The wide vertical scallops combined with the flared top draw your eye upwards creating visual motion. There is a dichotomy between a petite hummingbird feeder (typical among competitor products) and a "super-size" fast food & convenience store drink size feeder. This is our largest capacity hummingbird feeder and we wanted it to look like a large "super-sized" soda fountain drink."

Regarding alternative designs that were rejected due to a preference for the applied-for mark:

"We explored a smooth finish bottle, but it looked too plain. We considered adding raised scallops but liked the recessed look better. We also looked at different scallop proportions, but the final version we chose looked the best."

- John Bruno, VP Sales and Marketing
- Bob Donegan, CEO
- Lindsey Nifong, Marketing Manager

Applicant's design engineer (who developed the mold for the swirl-ridge pattern) offers the following explanatory statement with respect to the applied-for mark:

Regarding the design process:

"I explored several options and presented a variety of concepts as potential designs. The wide vertical scallop design looked the best."

- Bryan Krueger, Product Engineer

III. IDENTIFICATION OF GOODS

Applicant adopts the following revised identification of goods:

International Class 21: Bird feeders; *plastic storage containers for storing and dispensing bird seed for domestic use.*