

ESTTA Tracking number: **ESTTA742839**

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 | 86514627 | 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: 2010/04/01 First Use In Commerce: 2010/10/30 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, Case No. 15 CV 2512 |
| Attachments | doc00992120160427150641.pdf(4962961 bytes) doc00992220160427150708.pdf(4247699 bytes) doc00992320160427150734.pdf(3966961 bytes) doc00992420160427150751.pdf(4081560 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:
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. 86514627. 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, consisting of a vessel with a swirl ridge pattern on the vessel which is depicted in solid lines. No claim is made to the profile shape of the vessel. The

opening of the vessel, base of the vessel, and profile 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 Mark”)

2. Applicant’s Alleged Mark is the swirl ridge pattern on the 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 04/01/2010” and the first use in commerce dates was listed as “at least as early as 10/30/2010.”

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. 86514627 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. In 2008 Opposer purchased the assets, including but not limited to all inventory and intellectual property, of Artline, another company in the same line of business.

10. At least as early as 2000, Artline began selling the Model 5549 glass swirl bottle feeder, an image of which is attached hereto as Exhibit B. (“Opposer’s Design”). As early as 1999 Artline’s catalog offered for the glass model 5549 and plastic model of the same design under Model 5542, which were referred to as “Glass Swirl Feeder” and “Plastic Swirl Design Feeder,” respectively, in the catalog.

11. Opposer has continued to use and develop Opposer’s Design in association with several of its hummingbird feeders, including but not limited to, several variations of Opposer’s Cherry Valley and Audubon feeders, 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 substantially similar designs.

13. 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 Exhibit D.

14. 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.

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

16. Applicant’s Alleged Trademark is limited to a conventional swirl ridge pattern on a vessel. Such design is used on all sorts of products in all sorts of markets. See attached Exhibit E.

17. 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.

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

19. The Applicant's swirl ridge pattern is not inherently distinctive.

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

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

22. 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: "The feeder itself is pretty! The swirled glass is simply, pretty!" Beautiful feeder..." "Very pretty. Real glass. Nice design..." "Best design on the market..." "This particular feeder is aesthetically pleasing to the eye..." "I bought this feeder for its attractive style."

(Exhibit F: Applicant's response to office action.)

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

24. 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 customer's recognition of Applicant's Alleged Trademark.

25. 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.

26. 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 catches light when its hung." (Ex. F: Applicant's Response to Office Action at 4.)

27. Applicant has not established that it has had substantially exclusive and continuous use in commerce of Applicant's Alleged Trademark for five years or more.

28. On information and belief, the dates of first use set forth in The Application were not accurate.

29. Applicant has a patent, U.S. Patent No. RE45,715 ("the '715 Reissue design patent"), which is a reissue of the original and now surrendered U.S. Patent No. D678,628 ("the '628 design patent") (attached hereto as Exhibit F and G respectively). The '715 Reissue design patent claims the same design that is now the subject of the pending Application.

30. The filing date listed for the application which led to issuance of the original '628 design patent is March 28, 2012.

31. Thus, by filing the application which led to issuance of the '715 Reissue design patent, Applicant certified that the alleged invention was not in public use or on sale prior to more than one year prior to the critical date, i.e., before March 28, 2011. Such certification by Applicant was inconsistent with Applicant's statement in the Application that the design was in use at least as early as October 30, 2010.

32. Based on these important and inconsistent date-related admissions by Applicant, Applicant has not established that it was using Applicant's Alleged Trademark for five or more consecutive years prior to submitting its claim seeking registration on the Principal Register under Section 2(f) based on alleged acquired distinctiveness.

33. Further, any alleged use by Applicant during this time period was not substantially exclusive as required by 15 U.S.C. § 1052(f), as the Opposer was continuing to market and sell products with Opposer's Design, a substantially similar design, and several versions of the Cherry Valley and Audubon feeders during the time period of 2011 to the present, as were other manufacturers. (See Exhibits B & C.)

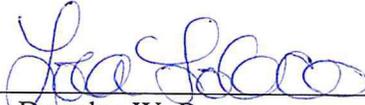
34. Many products and bird feeders with identical or substantially similar designs to the Applicant's Alleged Trademark have been used and continue to be used and sold to consumers in the marketplace.

35. 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 subsequent derivations or wrongfully expose Opposer to liability for use of an Opposer's Design and subsequent derivations. Therefore, registration of the Applicant's Alleged Trademark should be denied under Section 2(f) of the Lanham Act. (15 U.S.C. § 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 ____ day of April, 2016.

ROSE & deJONG, S.C.
Attorneys for Opposer

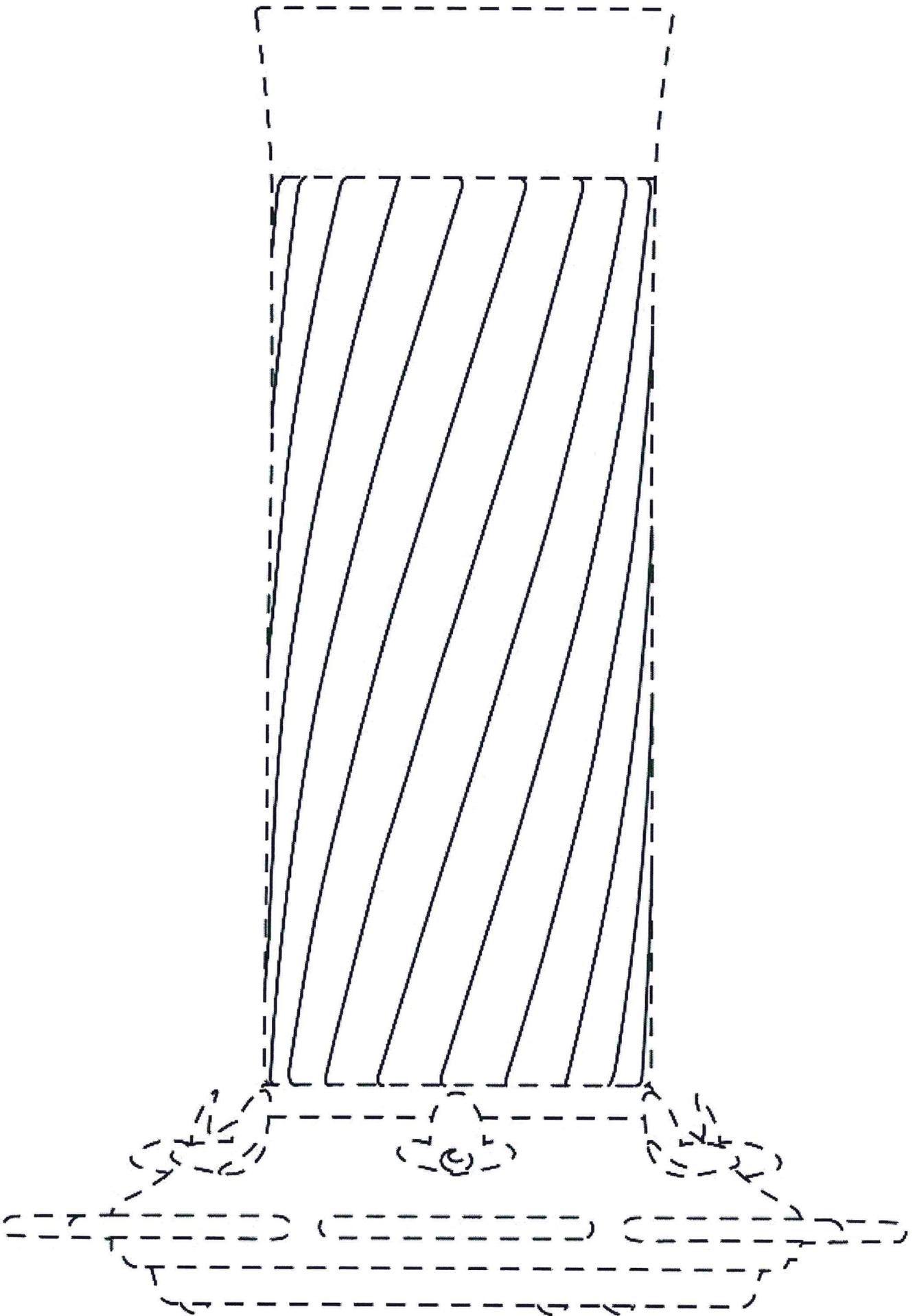
By: 

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









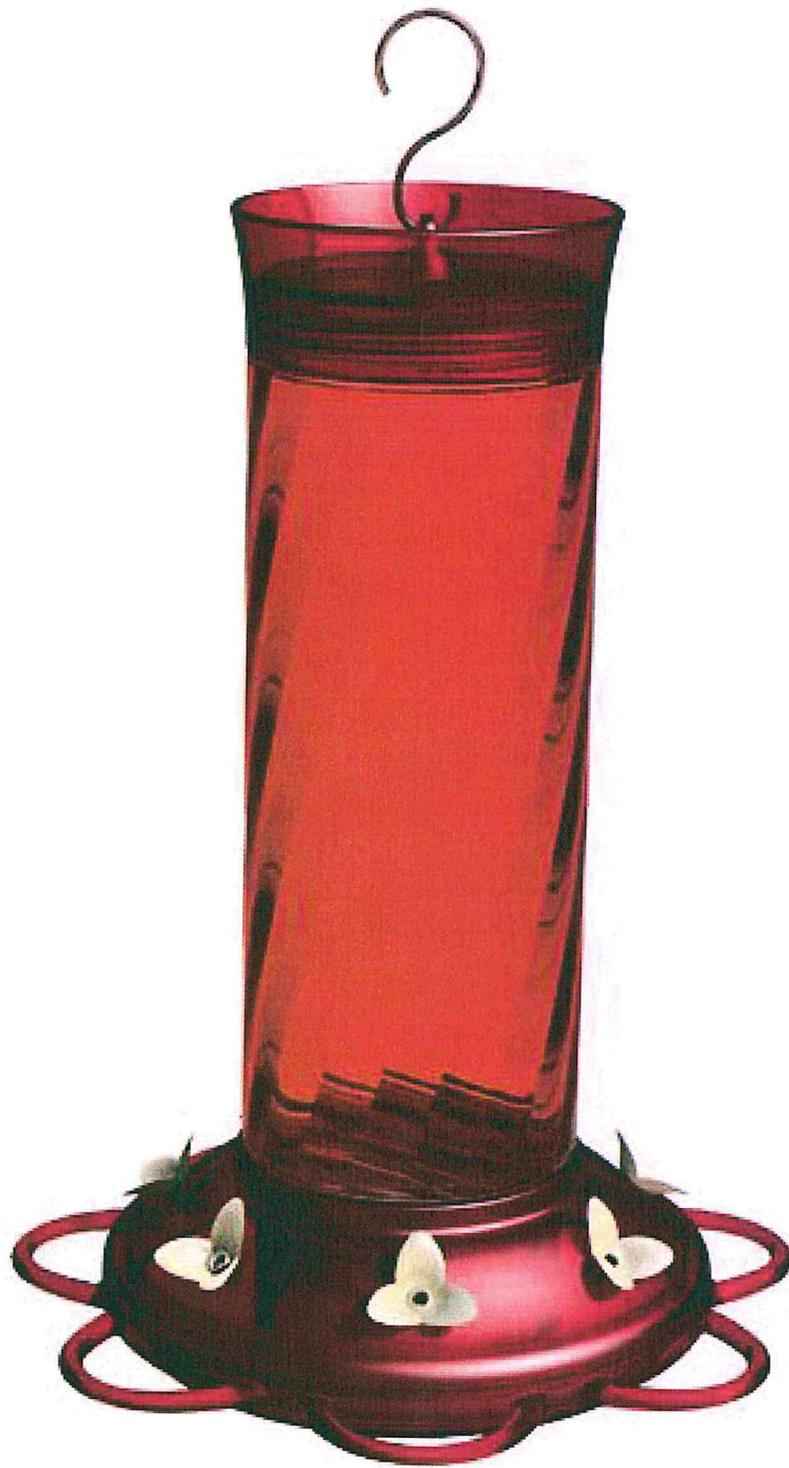
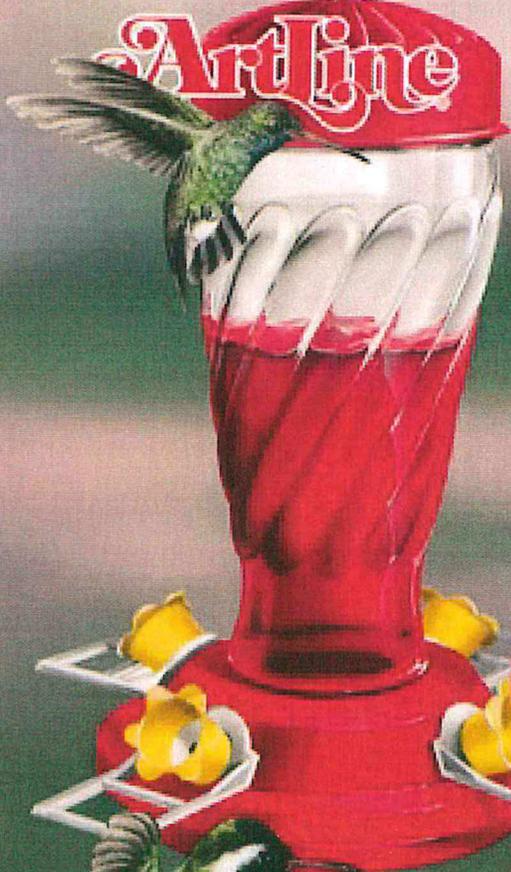


EXHIBIT B



Artline

No. 5549
14 Oz. GLASS SWIRL
4 feeding stations &
4 removable perches

Size: 7-1/4" x 7-1/4" x 8-1/2"
Pack: 12 Wt. 13.00 Cube: 1.05



No. 5554
24 Oz. STRAWBERRY
4 feeding stations &
4 integral perches

Size: 6" x 6" x 7-1/2"
Pack: 12 Wt. 7.00 Cube: 2.24



EXHIBIT C



Audubon
NA35227



Cherry Valley
30 oz.



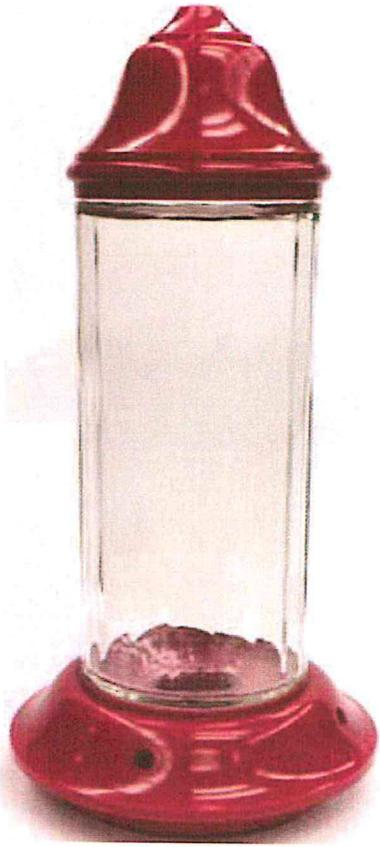
Audubon
NA35225



EXHIBIT D



Perky Pet
209B



2002 Outline
Model 5522
Crystal Lantern

EXHIBIT E

Search



WISH LIST



CART

CHECKOUT

ON SALE

DAILY SALES

BLOG

SIGN IN / CREATE ACCOUNT

RATE PAGE

CHANDELIERS CEILING LIGHTS WALL LIGHTS BATHROOM LIGHTS LAMPS CEILING FANS OUTDOOR LIGHTS DECOR FURNITURE

EURO STYLE LIGHTING > ALL PRODUCTS > TABLE LAMPS



Bella Swirl Aqua Glass Port 68 33-Inch-H Table Lamp

\$369.91

1 QTY

ADD TO CART

ADD TO WISH LIST

FREE SHIPPING +

FREE RETURNS

EUx0493 - Accent a contemporary living space with the eye-catching beauty of this swirl glass table lamp. Transparent aqua blue glass is hand-blown into an elegant... [read more](#)

MORE TABLE LAMPS:

FILTER: NEW STYLE FINISH COLOR TYPE PRICE RANGE BRAND HEIGHT SALE POPULAR

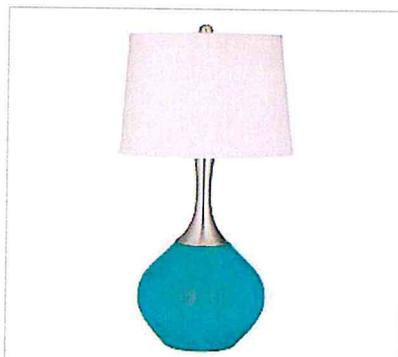
RESULTS: 7712

JUMP TO PAGE: 1 [NEXT](#)



BRUSHED NICKEL FLOATING SQUARE 20 1/2-INCH-H TABLE LAMP

\$79.99 | [Quick Look](#)



CARIBBEAN BLUE SEA SPENCER 31-INCH-H TABLE LAMP

\$129.99 | [Quick Look](#)



VIENNA FULL SPECTRUM WINDOW CRYSTAL 29-INCH-H TABLE LAMP

SALE: \$149.95 | [Quick Look](#)



ON THE SQUARE POSSINI EURO DESIGN 24-INCH ACCENT TABLE LAMP

\$149.99 | [Quick Look](#)



VIENNA FULL SPECTRUM TROPHY MODERN 30 1/2-INCH-H TABLE LAMP

SALE: \$129.95 | [Quick Look](#)



CONTEMPORARY RIGHT ANGLE 27 1/2-INCH-H TABLE LAMP

\$99.99 | [Quick Look](#)



Round Swirled Bowl - Blue & Silver

\$29.98
\$39.95 REG

Item: 2947439

Free Shipping.* Excludes Furniture, Rugs, Mirrors & Wall Decor. Use code SHIPSFREE at checkout. [Details >](#)

- Ship:**
In Stock for UPS/USPS Shipping to 53201 [change zip](#)
- Store Pick Up:**
In Stock at 6 stores near you [choose store](#)

Qty [Add to Basket](#) [Add to Wishlist](#)

CLEARANCE

Details & Dimensions

Saturate your style in swirls of blue and silver with our hand-painted bowl. Fill it with something lovely or simply

[READ MORE](#)

Questions? 800-245-4595 [Shipping Information](#) [FAQs](#)

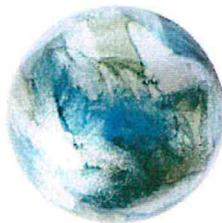
You May Also Like:



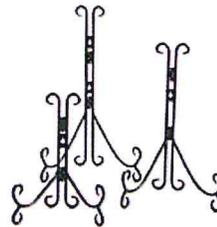
SALE
Oval Swirled Bowl - Blue & Silver
\$23.96 SALE
\$29.95 REG



Foil Sphere - Blue
\$4.00



Foil Sphere - Blue & Green
\$4.00



Scroll Metal Plate Stands
\$3.95 - \$5.95



SALE
Ombre Foil Vase - Blue
\$55.96 SALE
\$69.95 REG

Customers Also Viewed:

Item: #55039122 MFR: #39122



Buy 1 or more

\$12.49

Overall User Rating

from 1 review



Features:

- ✓ Stylish swirl design
- ✓ Holds 3.25 oz. of salt, pepper or any of your favorite spices
- ✓ Its easy-to-clean, glass construction allows your staff to see when seasoning levels are getting low

Shipping:

Usually Ships in 1 Business Day
When will I receive my item?

20076440391224

New

UPC Code:

Condition:



SPECS

| | |
|------------------|--------------|
| Height | 3 3/8 Inches |
| Bottom Diameter | 1 7/8 Inches |
| Maximum Diameter | 1 5/8 Inches |
| Top Diameter | 1 5/8 Inches |

Lamps Plus | Table Lamps | Traditional

LIGHTING FIXTURE SALE
& HOME DÉCOR **SHOP NOW >**



Blue Swirl Optic Shade Night Light Hurricane Table Lamp

\$174.91 FREE SHIPPING + FREE RETURNS*

1

ADD TO CART

ADD TO WISH LIST

Style # F7924 - A beautiful design in blue patterned after classic oil lantern lamps.

MORE DETAILS >

MORE TRADITIONAL TABLE LAMPS:

Filter by: Finish Color Type Price Brand Height **Specials** **Sale**

page 1 Previous | Next

color+plus
LIGHTING COLLECTION

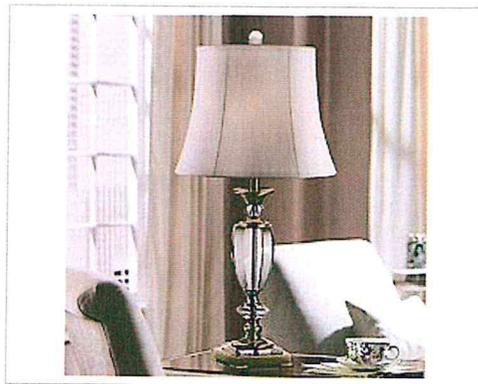
150 Colors
12 styles - 100's of shade options.

SHOP COLOR PLUS >



Blue and White Porcelain Temple Jar Table Lamp

\$79.95 Sale Save \$20
Free Shipping & Free Returns* **QUICK LOOK**



Vienna Full Spectrum Crystal and Brass Table Lamp

\$149.95 Sale Save \$50
Free Shipping & Free Returns* **QUICK LOOK**

EXHIBIT F

I. NON-DISTINCTIVE PRODUCT DESIGN

Inherently Distinctive

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 swirl ridge vessel design creates a unique visual impression. In this context of a bird feeder, this design 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), "*The swirl is a very distinct pattern. The eye travels up the swirls towards the cap. It is more eye-catching than a plain smooth bottle would be. . . Many alternative designs were developed and ultimately discarded in favor of the final swirl ridge design. We also explored a smooth bottle and one with straight vertical lines. We also explored various sizes of swirls. These alternatives were not as visually appealing as the final swirl design we chose.*"

Second, the design of the food-containing vessel for Applicant's bird feeder is conceptually separate from the bird feeder product itself. Applicant's swirl ridge vessel design 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 "Diamond" and "Unity" feeders sold by Applicant feature the swirl design covered by applied-for mark solely for purpose of drawing consumer's eyes to the product, and to assist consumers 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 "Diamond" and "Unity" feeders on Amazon.com, indicating customers' recognition of the feeder as sold by Applicant, as well as customer's attraction to the design. As stated by customers: "The feeder itself is pretty! The swirled glass is simply, pretty!" Beautiful feeder." . . . "Very pretty. Real glass. Nice design." . . . "Best design on the market." . . . "This particular feeder is aesthetically pleasing to the eye." . . . "I bought this feeder for its attractive style."

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 is it 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 swirl ridge vessel design shape is *not* a common or basic design for a bird feeder, but rather is very unique for a bird feeder.

Acquired Distinctiveness

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: (1) actual evidence that the mark has acquired distinctiveness of the goods and/or services (which evidence is attached under the 2(f) claim of this Response form; and (2) the fact that this the mark has become distinctive of the goods and/or services through Applicant's substantially exclusive and continuous use in commerce for at least five years immediately before the date of this statement (Applicant's mark has been in continuous use in commerce since at least as early as October 30, 2010).

2(f) Claims:

Based on Five or More Years' Use:

The mark has become distinctive of the goods/services through the Applicant's substantially exclusive and continuous use in commerce that the U.S. Congress may lawfully regulate for at least five years immediately before the date of this statement.

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.

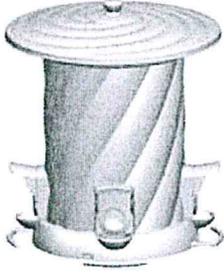
If trade dress is not inherently distinctive, the owner of the trade dress may seek to prove secondary meaning under Section 43(a) of the Lanham Act. Pursuant to the Supreme Court's decision in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, secondary meaning exists when "in the minds of the 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)).

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.

Certain features of the applied-for mark – particularly the swirl pattern of the vessel - are the subject of three design patents owned by Applicant (two of which have been granted, one of which is currently pending). A summary of each design patent is provided below. Full copies of each design patent registration or application, as applicable, are attached under the "Evidence" folder of this Response.

The swirl ridge pattern is purely decorative and has no function other than ornamentation designed to enhance the overall appearance of Applicant's bird feeder and storage container products which contain vessels featuring the applied-for mark.

| PRODUCT NAME | PROTECTABLE FEATURE | PROTECTION MECHANISM TITLE | APPL'N OR REG. NO. & STATUS |
|---|--|---|---|
| UNITY | Overall design.  | Design Patent BIRD FEEDER | GRANTED 29/387,518 Filed 3/14/11 Granted 4/02/2013 Design Patent No. D679,453 Issued: 4/02/2013 |
| 2012 NECTAR FEEDERS NAMELY GLORY, (COPPER METAL) RUBY, GARNET, AND DIAMOND | Bottle design with four embodiments (Straight with smooth side, straight with swirl side).  | Design application NECTAR BOTTLE FOR A BIRD FEEDER | GRANTED 29/416,890 Filed 3/28/12 Granted 3/19/2013 Design Patent No. D678,628 Issued: 3/19/2013 |
| 2012 NECTAR FEEDERS NAMELY GLORY, (COPPER METAL) RUBY, GARNET, AND DIAMOND | Bottle design with swirl side.  | Reissue Design Application Reissue Application of Design Patent No. 678,628 Issued 3/19/2013 NECTAR BOTTLE FOR A BIRD FEEDER - REISSUE | PENDING 29/486,002 Filed 3/25/2014 Reissue Design Patent No. RE45715 Issue date: 10/6/2015 |

(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 \$2.6 million USD. Applicant has spent a total of at least \$9,000 USD to date on advertising for bird feeder and storage container 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 2012, 2013, 2014, 2015 and 2016; (ii) screenshots from Applicant's website; (iii) 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 catches the light when it is hung outside. As a result, the applied-for mark is a distinctive, unique and clever design, 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 a swirl ridge pattern. 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 a variety of large, national retailers. In fact, Amazon.com, the world's largest online retailer, carries hundreds of brands and varieties of bird feeders and seed containers. Except for the instances of trademark infringement noted below, Applicant's swirl ridge vessels are the only vessels featuring such a design.

The swirl ridge design is a purely ornamental choice without a functional purpose. Applicant chose to manufacture the swirl design in order to make it more attractive, competitive and desirable to consumers. The look and feel of the vessel enhances the overall aesthetics of Applicant's bird feeders.

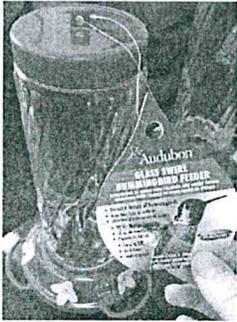
Although bird feeders serve the functional purpose of feeding birds, but they serve an equally important – if not *more* important – purpose of ornamentation (both in terms of the feeder itself – as hung – and the variety of birds the feeder attracts). This ornamental purpose is the main factor

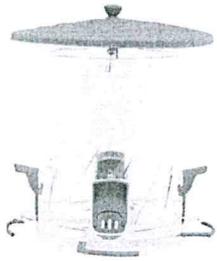
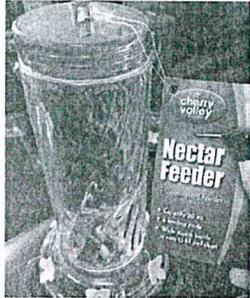
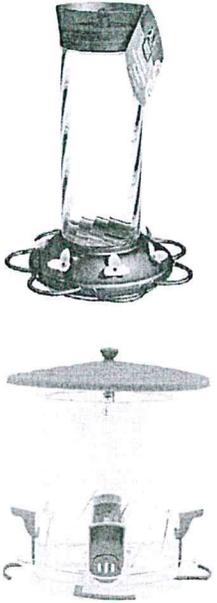
driving consumer recognition and sales of a particular bird feeder. Applicant's swirl ridge vessel is designed to enhance the overall appearance of Applicant's bird feeder and to draw consumer attention.

Similar Designs Used by Competitors: Applicant's products featuring the swirl ridge pattern are among the most popular and highest-grossing products offered for sale by Applicant. As a result of such strong consumer popularity, Applicant has become aware of several intentional "knock-off" products that feature identical or highly similar designs to Applicant's propriety design. Applicant has, and continues to, actively fight to enforce its priority rights in the applied-for mark against competitors and infringers who seek to copy its original design. Applicant's efforts to fight such infringement include filing the instant trade dress application for the applied-for mark.

Courts view intentional copying of trade dress as *probative* of secondary meaning. See *Perfect Fit Indus. v. Acme Quilting Co.*, 618 F.2d 950, 954 (2d Cir. 1980). In addition, intentional copying creates a *presumption* that the copier intended to create a confusing similarity of appearance, and will be presumed to have succeeded. *Id.*; *RJR Foods, Inc. v. White Rock Corp.*, 603 F. 2d 1058, 1060 (2d. Circ. 1979); *Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc.*, 281 F.2d 755, 758-59 (2d Cir. 1960); *American Chicle Co. v. Topps Chewing Gum, Inc.*, 208 F.2d 560, 562-63 (2d Cir. 1953).

Examples of infringing designs are summarized in the comparison chart below, and photographic evidence of such infringement is attached to this Argument, including (i) photographs of "knock-off" bird feeders sold by Woodlink (located in Mount Ayr, IA) featuring a swirl pattern copied from Applicant's design (the "Audubon" design feeder); and (ii) photographs of "knock-off" bird feeders sold by Cherry Valley (located in Antioch, IL) featuring a swirl pattern copied from Applicant's design (the "Nectar Feeder" design feeder).

| Infringing Product Description & Manufacturer | Photograph of Infringing Product | Applicant's Design | Photograph of Applicant's Product(s) |
|--|---|--|---|
| <p>Swirl Nectar Feeder AUDUBON NA 35227 Swirl Glass Hummingbird Feeder, 30 ounce</p> <p><u>Manufacturer:</u> Woodlink, Ltd. PO Box 508 1010 Cleveland St. Mounty Ayr, IA</p> |  | <p>Applicant's 2012 line of nectar feeders with swirl bottle, including the "Diamond" design</p> <p>Applicant's songbird feeder "Unity" design</p> |  |

| | | | |
|---|---|--|--|
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| <p>Cherry Valley Swirl Nectar Feeder</p> <p><u>Manufacturer:</u> Akerue Industries, LLC d/b/a Cherry Valley 90 McMillen Road, Antioch, IL</p> |  | <p>Applicant's 2012 line of nectar feeders with swirl bottle, including the "Diamond" design</p> <p>Applicant's songbird feeder "Unity" design</p> |  |

(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 swirl ridge vessels are significantly more expensive to manufacture than smooth-surfaced vessel. One of the main reasons for the increased cost is that Applicant's swirl ridged vessels are more complex than smooth 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 swirl-ridged 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 swirl ridge pattern ranges from \$0.42 to \$0.50 per unit (depending on the size and materials comprising the vessel) –as compared to \$0.29 per unit for certain of Applicant’s smooth surface vessels.

The specific tooling and molds required to create the swirl ridge pattern (comprising the applied-for mark) on Applicant’s vessels cost an additional \$5,000 (as compared to the cost of the tooling and molds needed to manufacture vessels featuring smooth surfaces). 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 swirl ridge pattern (comprising 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.

The swirl ridge pattern claimed as a feature of the applied-for mark was specifically chosen to differentiate Applicant’s products, and for purely ornamental and decorative reasons. By choosing the swirl ridge pattern, designed specifically to draw the eye up the vessel as it hangs and spins in the air catching light on the swirls, Applicant hoped to increase the aesthetic appearance of its vessels and thus, make them more appealing and recognizable to consumers.

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 swirl is a very distinct pattern. The eye travels up the swirls towards the cap. It is more eye-catching than a plain smooth bottle would be.”

- 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. Client [Classic Brands (the Applicant)] agreed that the swirl pattern was the most eye catching and the overall preferred design.”

Regarding the design stages necessary to finalize the design:

“First, research and idea generation. Second, conceptual development. Third, design refinement. Fourth, design detailing.”

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

“Many alternative designs were developed and ultimately discarded in favor of the final swirl ridge design. We also explored a smooth bottle and one with straight vertical lines. We also explored various sizes of swirls. These alternatives were not as visually appealing as the final swirl design we chose.”

- 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.*

IV. DESCRIPTION OF MARK

Applicant adopts the following revised description of the mark:

Color is not claimed as a feature of the mark. The mark consists of a three-dimensional *packaging* of a bird feeder vessel. 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.

EXHIBIT G



US00D678628S

(12) **United States Design Patent**
Krueger

(10) **Patent No.:** **US D678,628 S**
(45) **Date of Patent:** **** Mar. 19, 2013**

- (54) **NECTAR BOTTLE FOR A BIRD FEEDER**
- (75) Inventor: **Bryan Krueger**, Denver, CO (US)
- (73) Assignee: **Classic Brands, LLC**, Denver, CO (US)
- (**) **Term: 14 Years**
- (21) Appl. No.: **29/416,890**
- (22) Filed: **Mar. 28, 2012**
- (51) **LOC (9) Cl.** **30-03**
- (52) **U.S. Cl.** **D30/127**
- (58) **Field of Classification Search** D30/121,
D30/124-128, 133; 119/51.01, 52.2-52.4,
119/57.8, 57.9, 248, 77; 248/219.1, 222.11,
248/224.7, 229.1, 230.1, 689
See application file for complete search history.

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Primary Examiner — Susan Moon Lee
(74) *Attorney, Agent, or Firm* — Polsinelli Shughart PC

(57) **CLAIM**

The ornamental design for a nectar bottle for a bird feeder, as shown and described.

DESCRIPTION

FIG. 1 is a front perspective view of an embodiment of a nectar bottle for a bird feeder embodying my new design. FIG. 2 is a left side view thereof. FIG. 3 is a right side view thereof. FIG. 4 is a top view thereof; and, FIG. 5 is a bottom view thereof.

1 Claim, 5 Drawing Sheets



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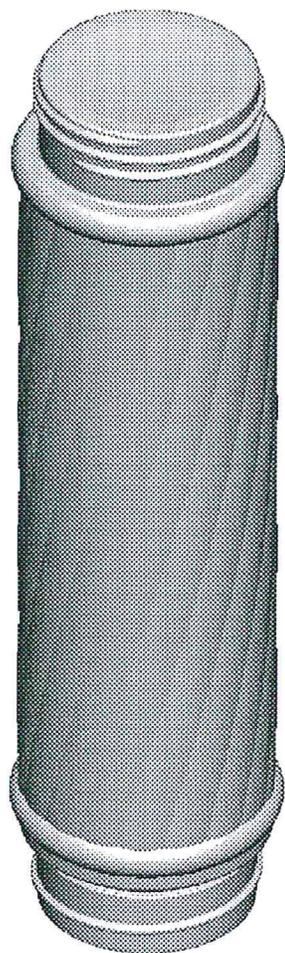


FIG. 1

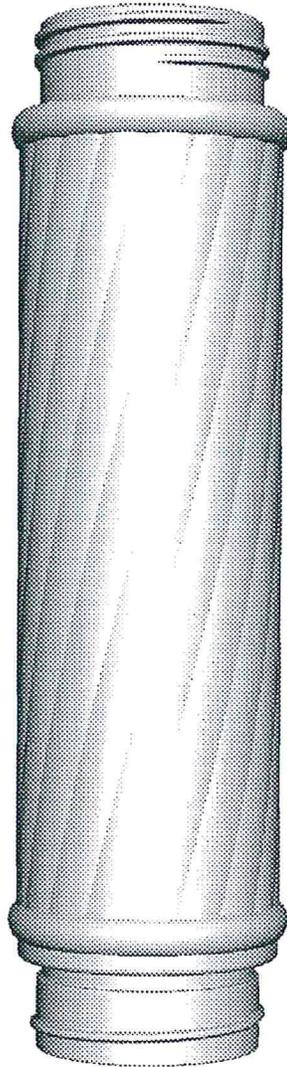


FIG. 2

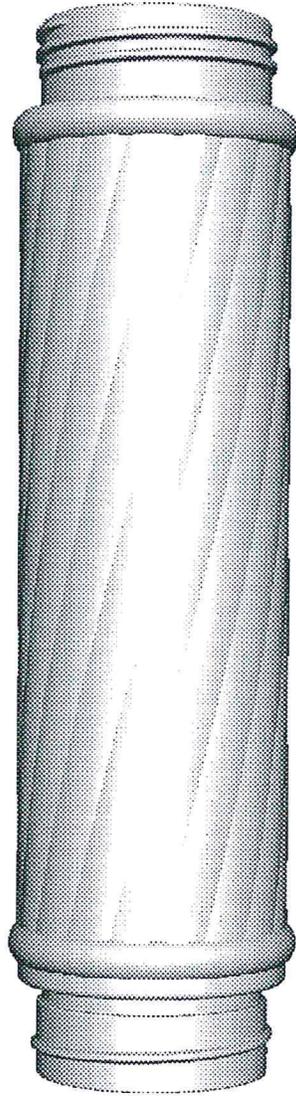


FIG. 3

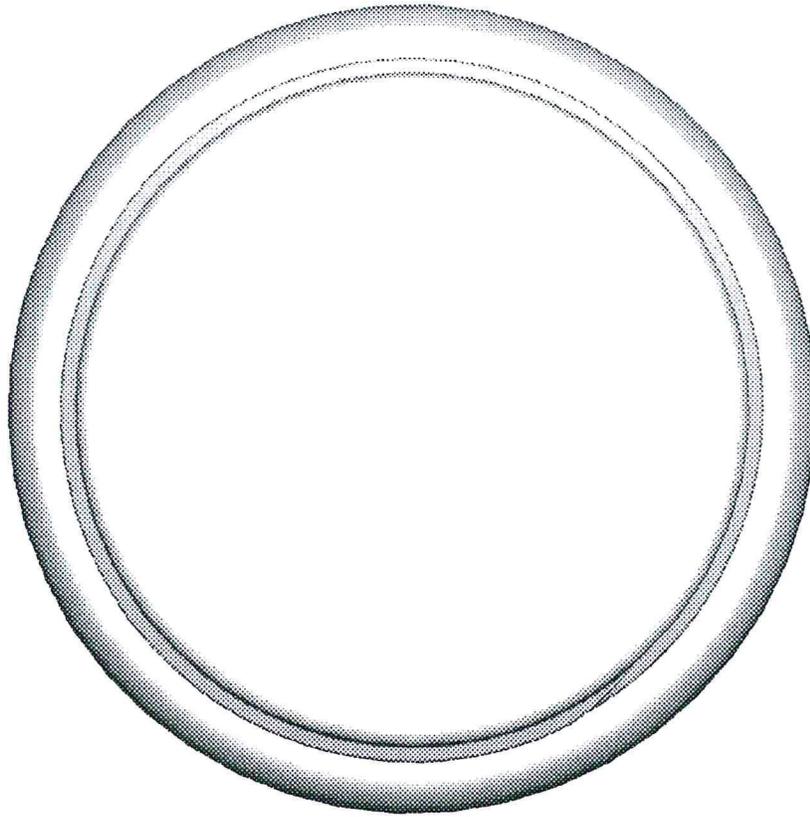


FIG. 4

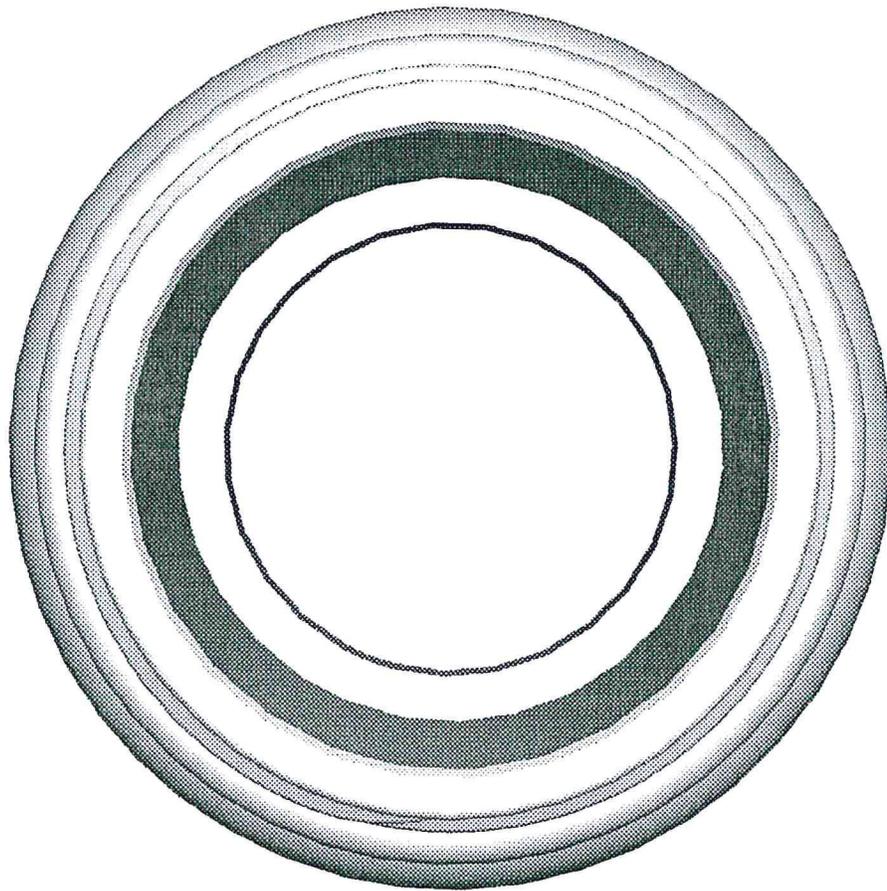


FIG. 5

EXHIBIT H



US00RE45715E

(19) **United States**
(12) **Reissued Patent**
Krueger

(10) **Patent Number:** **US RE45,715 E**
(45) **Date of Reissued Patent:** **Oct. 6, 2015**

- (54) **NECTAR BOTTLE FOR A BIRD FEEDER**
- (71) Applicant: **Classic Brands, LLC**, Denver, CO (US)
- (72) Inventor: **Bryan Krueger**, Denver, CO (US)
- (73) Assignee: **Classic Brands, LLC**, Denver, CO (US)
- (21) Appl. No.: **29/486,002**
- (22) Filed: **Mar. 25, 2014**

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Reissue of:

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- Issued: **Mar. 19, 2013**
- Appl. No.: **29/416,890**
- Filed: **Mar. 28, 2012**
- (51) **LOC (10) Cl.** **30-03**
- (52) **U.S. Cl.**
- USPC **D30/127**
- (58) **Field of Classification Search**
- USPC D30/121, 124-128, 133; D7/523, 525;
D25/129; D9/552; D6/709.18;
119/51.01, 27.8, 57.9, 52.2, 52.4
- See application file for complete search history.

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Primary Examiner — Phillip S Hyder
(74) *Attorney, Agent, or Firm* — Polsinelli PC

(57) **CLAIM**

The ornamental design for a nectar bottle for a bird feeder, as shown and described.

DESCRIPTION

FIG. 1 is a front perspective view of an embodiment of a nectar bottle for a bird feeder embodying my new design.
 FIG. 2 is a left side view thereof.
 FIG. 3 is a right side view thereof.
 FIG. 4 is a top view thereof; and,
 FIG. 5 is a bottom view thereof.
The broken lines depict portions of the nectar bottle for a bird feeder in which the design is embodied that are not considered part of the claimed design.

1 Claim, 5 Drawing Sheets

Matter enclosed in heavy brackets [] appears in the original patent but forms no part of this reissue; matter printed in italics indicates the additions made by reissue.



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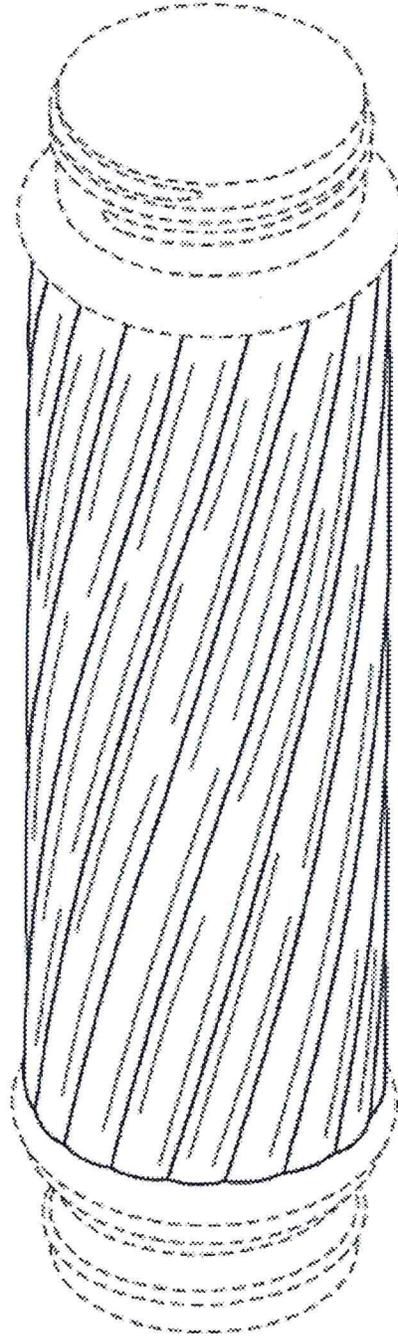


FIG. 1
AMENDED

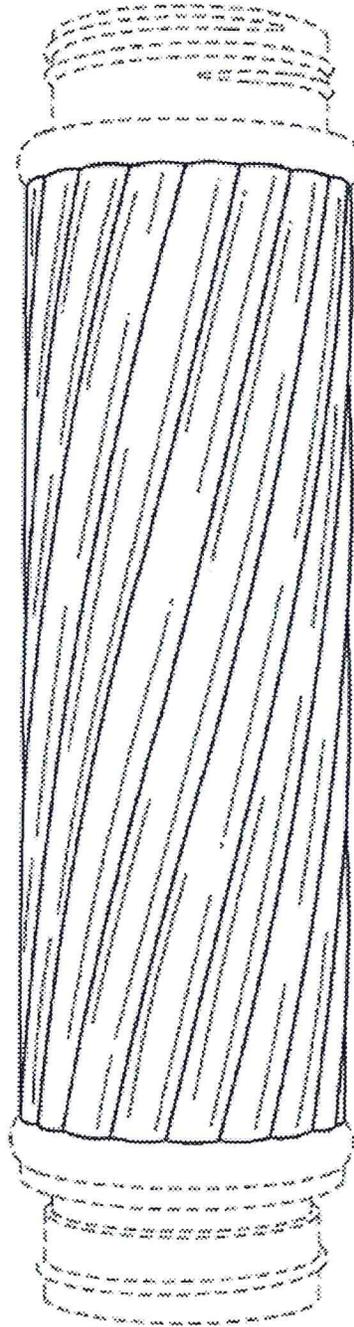


FIG. 2

AMENDED

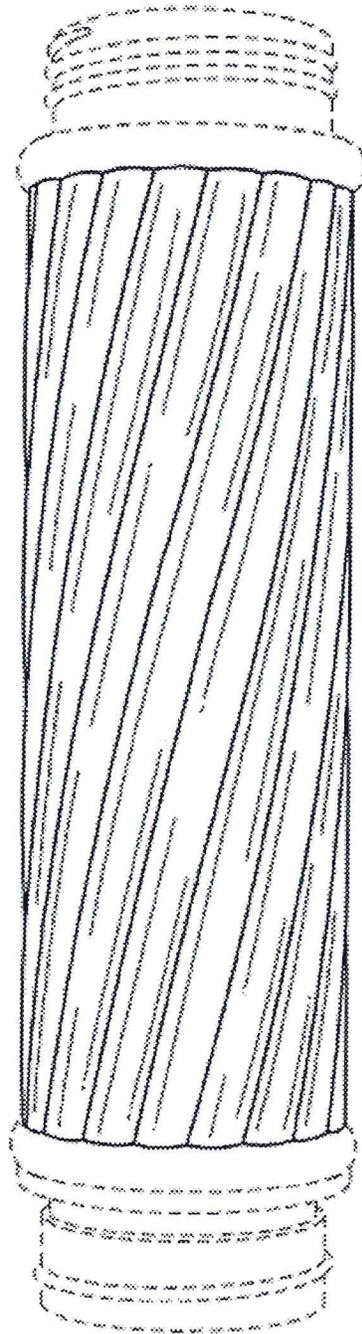


FIG. 3
AMENDED

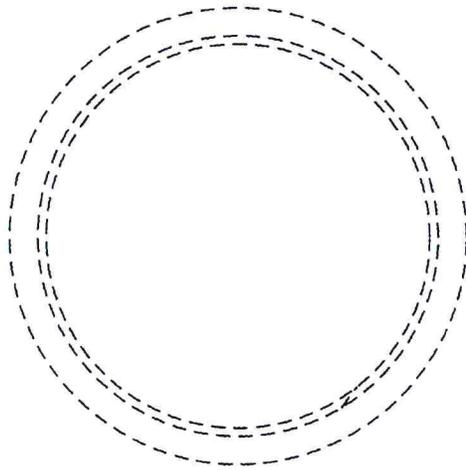


FIG. 4
AMENDED

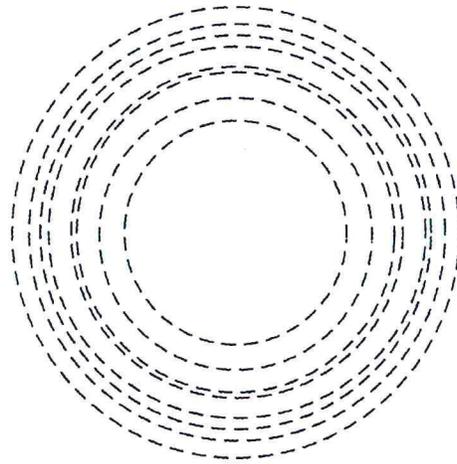


FIG. 5

AMENDED