

This Order is Not a
Precedent of the TTAB

Mailed: November 8, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Litehouse, Inc.
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Serial No. 97501419
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Remand

Mark W. Hendricksen of Wells St. John P.S.,
For Litehouse, Inc.

Keri-Marie Cantone, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

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Before Lykos, Coggins and English,
Administrative Trademark Judges.

Order by Lykos, Administrative Trademark Judge:

On July 13, 2022, Litehouse Inc. (“Applicant”) applied to register the mark VEGGIES IN EVERY BITE in standard characters on the Principal Register for, as amended, “pasta, macaroni and cheese, pasta sauce, pizza, pizza crust, croutons, frozen meals consisting primarily of pasta or rice” in International Class 30.¹

¹ Application Serial No. 97501419, filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark on the ground that VEGGIES IN EVERY BITE "is so widely used by numerous third parties to convey a message that food is nutritional such that it fails to function as a trademark under Sections 1, 2, 3,² and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, 1053, 1127."³ The appeal is fully briefed.

Trademark Rule 2.142(f)(1), 37 C.F.R. § 2.142(f)(1), provides that:

If, during an appeal from a refusal of registration, it appears to the Trademark Trial and Appeal Board that an issue not previously raised may render the mark of the appellant unregistrable, the Board may suspend the appeal and remand the application to the examining attorney for further examination to be completed within the time set by the Board.

After careful review of the record and briefs, the Board remands the application to the Examining Attorney to consider whether to:

- refuse registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive of the identified goods;
- issue an information request pursuant to Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b), asking Applicant relevant information about the goods, including, but not limited to, whether the goods will contain vegetables;
- refuse registration, if appropriate, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is deceptively misdescriptive; and

² The Examining Attorney should not that Trademark Section 3 only applies to failure to function refusals involving services, not goods.

³ Examining Attorney's Brief, 6 TTABVUE 2.

- refuse registration, if appropriate, under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), on the ground that Applicant's mark is deceptive.

Thus, in accordance with Trademark Rule 2.142(f), we suspend the appeal and remand the application to the Examining Attorney for further examination to be conducted **within thirty (30) days of the mailing date of this order**. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1209.01 (2024).

If the further examination does not result in an additional ground for refusal of registration, the Examining Attorney shall promptly return the application to the Board, for resumption of the appeal, with a written Office Action (omitting the three-month response clause) that further examination did not result in an additional ground for refusal of registration, and maintain and continue the final refusal on the ground that the proposed mark fails to function as a source identifier. See Trademark Rule 2.142(f)(2), 37 C.F.R. § 2.142(f)(2).

If the further examination does result in an additional ground(s) for refusal of registration, the Examining attorney and Applicant shall proceed as provided by Trademark Rules §§ 2.61, 2.62, and 2.63. See Trademark Rule 2.142(f)(3), 37 C.F.R. § 2.142(f)(3). If the ground(s) for refusal is/are made final, the Examining Attorney shall return the application to the Board, which shall thereupon issue an order allowing Applicant sixty (60) days from the date of the order to file a supplemental brief limited to the additional ground(s) for the refusal of registration. *Id.* If the supplemental brief is not filed by the Applicant within the time allowed, the appeal may be dismissed. *Id.*

If Applicant files a supplemental brief, the Examining Attorney shall, within sixty (60) days after the supplemental brief of the Applicant is sent to the Examining Attorney, file with the Board a written brief answering the supplemental brief of Applicant and shall mail or email a copy of the brief to the Applicant. *See* Trademark Rule 2.142(f)(4), 37 C.F.R. § 2.142(f)(4). The Applicant may file a reply brief within twenty (20) days from the date of mailing of the brief of the Examining Attorney. *Id.*

Following supplemental briefing, an oral hearing on the new ground(s) for refusal may be requested. *See* Trademark Rule 2.142(f)(5), 37 C.F.R. § 2.142(f)(5).

The Examining Attorney is reminded that the scope of the remand is limited solely to whether to also refuse registration on the additional grounds summarized above. The Examining Attorney should not issue a new ground for refusal or requirement not specified in this order, nor should the Examining Attorney supplement the record on other issues or advance any new arguments regarding the original refusal.⁴ *See* TBMP § 1209.01. Likewise, Applicant's response to any nonfinal Office action issued on remand must be limited to the matters raised in that Office action.

⁴ If the Examining Attorney, upon remand, wishes to make a requirement or refuse registration on a new ground not specified in this order, the Examining Attorney must file a request with the Board, pursuant to Trademark Rule 2.142(f)(1), 37 C.F.R. § 2.142(f)(6), for jurisdiction to make a requirement or refuse registration on the new ground.