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

Proceeding	85969016
Applicant	Michael Starr
Applied for Mark	VAPOR CUP
Correspondence Address	HOWARD DAVID LEIB HOWARD LEIB PC 1861 HANSHAW ROAD ITHACA, NY 14850 UNITED STATES HowardLeib@aol.com
Submission	Reply Brief
Attachments	HDL Reply1.pdf(43889 bytes )
Filer's Name	Howard David Leib
Filer's e-mail	howardleib@aol.com
Signature	/hdl/
Date	03/20/2015

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

Serial Nos. 85969016 and 85971474

Marks: VAPOR CUP and WEVAPS VAPOR CUP

Applicant: Michael Starr

Examining Attorney: Brian Pino

Law Office 114

**EX PARTE APPEAL**

**APPLICANT'S REPLY TO EXAMINER'S  
DENIAL OF RECONSIDERATION**

Howard D. Leib, Esq.  
Howard Leib, Esq. PC  
1861 Hanshaw Road  
Ithaca, NY 14850  
212-545-9559  
HowardLeib@aol.com

Applicant's Reply to Examiner's Denial of Reconsideration - Ex Parte Appeal: SN 85969016

Pursuant to an order of this Board dated January 8, 2015, this matter was remanded to the Examiner for consideration of Applicant's argument that a finding by a different Examiner, in a virtually identical pending application (Serial No. 86226640) constituted persuasive and/or definitive evidence that, at the least, there is doubt as to the descriptive vs suggestive categorization of the mark "VAPOR CUP." The Examiner responded by denying the request to reconsider.

Although the examiner states that he "has carefully reviewed applicant's request for reconsideration," his response belies this assertion. The entirety of his analysis of the argument set out by Applicant is:

The actions taken in later filed Serial No. 86226640 for the applied for mark VAPOCUP, a different mark, are in no way binding upon the examining attorney or the Trademark Trial and Appeal Board. The facts in this case plainly show that the wording VAPOR CUP is merely descriptive of the applicant's goods.

In this response, Examiner, inadvertently or purposely, misses the entire thrust of Applicant's argument. That the "actions taken in later filed Serial No. 86226640 for the applied for mark VAPOCUP..., are in no way binding upon the examining attorney" is not at issue here. Applicant does not claim the Examiner is bound. Applicant believes that the record shows that reasonable minds, Mr. Pino and Ms. Brown, for example, can disagree on whether Vapor Cup (or its functionally identical mark "Vapocup") are suggestive or merely descriptive. Mr. Pino's refusal to recognize Ms. Brown's actions does not change the fact that they exist. As such, while Mr. Pino may believe the mark to be merely descriptive, he cannot argue that there is not, within the Trademark Office, doubt as to his position. In the face of such doubt, and as set out more fully in Applicant's prior brief, Applicant is entitled to registration of his mark.

Nor is Mr. Pino's statement that Vapocup is "a different mark" availing. While there is, in fact, a single letter difference between the two marks, there is no functional difference. As set out more fully in Applicant's prior brief, the Vapocup applicants were issued a Psuedomark notice on April 4, 2014, stating that the mark "Vapocup" is functionally identical to the mark "Vapor Cup."

Mr. Pino asserts that he has attached additional evidence to his response purporting to "plainly show that the wording VAPOR CUP is merely descriptive of the applicant's goods." The additional evidence annexed to Mr. Pino's response does no such thing.

Annexed to the response are the following:

1. A page from the instruction manual for the Vapor Cup, as found on-line, making two references to the production of vapor.

2. A search Mr. Pino appears to have conducted for the word “cup” within the Vapor Cup manual revealing only a use of the mark “vapor cup” which has, inadvertently, not been capitalized.
3. The Home page of the VaporCup.com website, showing a picture of the Vapor Cup.
4. Two pages showing a single page from the VaporCup.com website, showing a single image of the Vapor Cup.

None of these pieces of “additional evidence” in any way address the arguments made in Applicant’s brief, let alone contradict that, faced with virtually identical facts, Mr, Pino and Ms. Brown came to diametrically differing conclusions as to the registrability of the mark Vapor Cup.

Applicant’s brief is not predicated on some notion that our vaporizer does not produce vapor. We have acknowledged that it does. Not wanting to belabor our arguments, we will not restate them in full here, but rather respectfully direct the Board to our original Brief. With this in mind, the fact that our manual may use the word “vapor” twice, or a thousand times, has no relevance to our mark’s registrability.

Applicant is at a loss as to what Mr. Pino sought to demonstrate with his second piece of “additional evidence.” There are numerous uses of the mark “Vapor Cup” in the Vapor Cup manual, indeed, it would be odd if we were not using our trademark to identify our goods. That a single usage happened to get past the proof reader as uncapitalized has no significance whatsoever. The error has been corrected on the website.

The sentence cited states “Before using your vapor cup for the first time, please check out our ‘Before First Use Instructions’ PDF.” Taken in context, it is abundantly clear that the use of the term “your vapor cup” uses “vapor cup” as a trademark, not in a descriptive or generic fashion. Again, Applicant does not understand how Mr. Pino believes this piece of “evidence” strengthens his position.

The two images of the Vapor Cup in Mr. Pino’s third and fourth pieces of “evidence” also add nothing to this discussion, other than to strengthen Applicant’s argument, as set out more fully in the original brief, that the Vapor Cup does not meet any of the definitions of “cup” to which Mr. Pino’s earlier submitted dictionary definition refers. The Vapor Cup, as demonstrated in the “additional evidence” submitted by the examiner, has no handle, is not an open container, and is not used for drinking. It has no “bottom” in the sense of a saucer. Nor does it meet any of the other first ten definitions (nor the 12<sup>th</sup>) of “cup” supplied by the examiner.

In short, the Examiner has failed to address in more than the most perfunctory manner, the issue put before him on re-examination. His additional evidence does not address that issue, nor any of the other issues and arguments raised by the Applicant in his brief.

In light of the above, Applicant respectfully requests that the Board grant this Ex Parte

Appeal and direct publication for opposition of both the Vapor Cup and WeVaps Vapor Cup marks.

Dated this 20th day of March, 2015

Howard D. Leib, Esq.  
Howard Leib, Esq. PC  
Attorneys for Applicant  
1861 Hanshaw Road  
Ithaca, NY 14850  
212-545-9559  
HowardLeib@aol.com