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

Proceeding	88002149
Applicant	Outer Aisle Gourmet, LLC
Applied for Mark	CAULITHINS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Appl. No. : 88/002,149  
Mark : CAULITHINS  
Applicant : Outer Aisle Gourmet, LLC  
Law Office : 113  
Examiner : Timothy Schimpf  
Docket No. : O218.T18B64

**Appeal Brief**

The following appeal brief is submitted in support of the Notice of Appeal filed November 11, 2019.

**Summary**

The Examiner has refused registration of Applicant's mark on the basis that the mark is merely descriptive. Applicant applied for the mark CAULITHINS in connection with "Vegetable-based snack foods; Vegetables, dried; Prepared meals consisting primarily of vegetables; Vegetable souffles." Specifically, the Examiner argues that the mark CAULITHINS "merely describes an ingredient and type of applicant's goods." Applicant respectfully disagrees and asserts that CAULICHIPS is fanciful, arbitrary or suggestive rather than merely descriptive, and is thus entitled to trademark registration on the Principal Register.

**Argument**

**The Prefix "Cauli" Does Not Function as an Abbreviation Alone or in Combination With "Chips"**

The Examiner begins the analysis of the mark stating that the prefix "cauli" is an abbreviation for the word "cauliflower". However, no evidence is presented showing that the term "cauli" is synonymous with cauliflower. Instead, the Examiner presents examples of the prefix "cauli" with additional words such as "rice", "pizza", "turmeric poppers", and "bread". (Office action dated 5-3-2019). From this evidence, the Examiner argues that consumers have

been trained to understand “Cauli” is an abbreviation for “cauliflower” in the context of snack foods.

This analysis is respectfully in error. “Cauli” is not merely descriptive of the goods to which they are applied. There is no evidence on the record that demonstrates “Cauli” is generally understood as Cauliflower. The Examiner only cites to very recent advertisements and blog posts. Recent advertising and blogging is insufficient evidence that “Cauli” is generally understood by the public as meaning Cauliflower. At most, the recently dated advertisement evidence offered up by the Examiner means that the term may be suggestive. Under similar facts, the appellant prevailed in the *Modern Optics* case when “[w]hile the record shows there are individuals to whom the letters “CV” constitute a generic designation of trifocal lenses, we are of the opinion it has not been established that such is the rule rather than the exception. We therefore agree with the Assistant Commissioner that ‘The record is unconvincing that ‘CV’ is a generally recognized term for multifocal lenses and lens blanks.’”. *Modern Optics, Inc. v. Univis Lens Co.*, 234 F.2d 504, 506, 110 USPQ 293, 295 (C.C.P.A. 1956).

**2. CAULICHIPS Does Not Immediately Convey an Understanding of Snack Foods and is Merely Suggestive.**

Section 2(e)(1) of the Lanham Act prohibits registration of a mark when the primary significance of the words comprising the mark is to describe the applicant’s goods or services or their feature or characteristics. *See In re Waldorf Paper Prods. Co.*, 155 U.S.P.Q. 174, 174 (T.T.A.B 1967) (finding that the mark STRIP-FLAP used in connection with a device containing strips and flaps to open paper board containers is not merely descriptive). Here, the mark CAULITHINS does not merely describe “Vegetable-based snack foods; Vegetables, dried; Prepared meals consisting primarily of vegetables; Vegetable souffles.” Rather it “require[s] imagination, thought, or perception to reach a conclusion” that when a consumer is purchasing CAULITHINS, they are purchasing dried vegetable-based snacks. *See also, in In re Ray J. McDermott and Co., Inc.*, 170 U.S.P.Q. 524 (TTAB 1971) (the mark SWIVEL-TOP for use on

rotating tops on fuel transfer mooring buoys was not merely descriptive, but rather suggestive of the goods.); *In re Realistic Co.*, 440 F.2d 1393 (C.C.P.A. 1971) (finding that the mark CURV is not merely descriptive of curling products); *Ex parte Great West Lubricants, Inc.*, 118 U.S.P.Q. 169 (Comm'r Pat. 1958) (finding that the mark TUBE-O-LUBE used on tubes of lubricating grease not descriptive but suggestive).

If the mental leap between the word and the product's attributes is not instantaneous, this indicates suggestiveness, not direct descriptiveness. To be non-registrable because of descriptiveness, A mark must not only be descriptive, but must be 'merely' descriptive of the goods or services to which it relates. *See* TMEP § 1209.01(b). In other words, the mark must do nothing other than immediately convey an understanding of the goods for which registration is sought. *See In re Quik-Print Copy Shops*, 205 U.S.P.Q. 505 n.7 (C.C.P.A. 1980) ("merely" descriptive means "only" descriptive); *In re Colonial Stores, Inc.*, 157 U.S.P.Q. 382, 385 (C.C.P.A. 1968) (holding the mark nondescriptive because it "does not tell the potential purchaser only what the goods are, their function, their characteristics or their use, or . . . their ingredients."). The term Cauli is completely arbitrary. If anything, it has merely become a trending "slang" term in the context of today's trending organic and health food industry. There is no evidence on the record that consumers use "Cauli" as synonymous with Cauliflower, such as, for example: "Hey Mom, don't forget to pick up some Cauli at the store." Arbitrary marks are "inherently distinctive" and are registrable on the Principal Register without proof of acquired distinctiveness. TMEP § 1209.01

The case law supporting Applicant is voluminous. The Examiner has failed to present sufficient evidence that the mark as used in connection with the stated goods is merely descriptive. Like the case *In re George Weston Ltd*, where the Board found the mark SPEEDI BAKE only vaguely suggestive of a desirable characteristic of frozen dough, just like here where CAULITHINS only vaguely suggests a possible characteristic of a snack food product. *See.*, 228 USPQ 57 (TTAB 1985) Similarly, in the case *In re Pennwalt Corp*, where the Board held DRI-FOOT was suggestive, not descriptive, of deodorant for feet in part. 173 USPQ 317 (TTAB

1972). *See also In re Getz Found.*, 227 USPQ 571, 572 (TTAB 1985) (finding the mark MOUSE HOUSE wasn't descriptive and just fanciful for mice figurine displays). Suggestive marks, like fanciful and arbitrary marks, are registrable on the Principal Register without proof of secondary meaning. *See Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

Applicant is entitled to protection of its Trademark on the Principal Register because it consists of existing words used in an uncharacteristic way, which the law refers to as "fanciful" or "arbitrary" or "suggestive", and which is the exact type of mark encouraged and desired by the USPTO.

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Respectfully submitted,

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