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

Ex Parte Appeal - Serial No.	90669052
Appellant	Flower Love USA, Corp.
Applied for mark	CLARITY COMES FROM WITHIN
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Submission	Appeal brief
Attachments	TTAB Appeal Brief re CLARITY COMES FROM WITHIN 230288-00003.pdf(2508945 bytes)
Appealed class	Class 025. First Use: Mar 20, 2020 First Use In Commerce: Mar 20, 2020 All goods and services in the class are appealed, namely: Sweatshirts; T-shirts; Hoodies
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Application Serial No. 90669052
For the Mark: CLARITY COMES FROM WITHIN
Filed: April 24, 2021

Applicant: Flower Love USA, Corp.

Trademark Law Office 127
Trademark Examining Attorney:
Joseph P McCarthy

Table of Authorities

Cases

In re Watkins Glenn International, Inc., 227 USPQ 727, 728 (TTAB 1985)

In re Olin Corp., 181 USPQ 182 (TTAB 1973)

In re Paramount Pictures Corp., 213 USPQ 1111, 1112 (TTAB 1982)

In re Expo '74, 189 USPQ 48, 49 (TTAB 1975)

Treatises

Trademark Manual of Examining Procedure § 1202.03 *et seq.* (October 2018).

APPLICANT'S APPEAL BRIEF

I. Introduction

Pursuant to a timely filed Notice of Appeal, Applicant Flower Love USA, Corp. ("Applicant") hereby appeals the Examining Attorney's refusal to register the mark CLARITY COMES FROM WITHIN ("Mark") for sweatshirts; t-shirts; hoodies in International Class 25 ("Goods") on the grounds that the Mark as used on the specimen of record is a merely ornamental feature of the goods and, thus, does not function as a trademark to indicate the source of the goods under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051-1052, 1127. Applicant respectfully requests the Trademark Trial and Appeal Board reverse the Examining Attorney's decision.

I. Argument

Applicant respectfully disagrees with the Examining Attorney's assessment of "ornamentation." Applicant asserts that the Mark is an indicator of secondary source because it is already recognized as a source indicator for other goods that Applicant sells.

The Trademark Trial and Appeal Board has held that "[i]t is well settled... that matter which serves as part of the aesthetic ornamentation of goods, such as shirts, hats, patches and the like may nevertheless be registered as a trademark for such goods if it also serves a source-indicating function." *In re Watkins Glenn International, Inc.*, 227 USPQ 727, 728 (TTAB 1985); *see also* Trademark Manual of Examining Procedure § 1202.03 ("Ornamental matter that serves as an identifier of a 'secondary source' is registrable on the Principal Register"). Further the "ornamentation of a t-shirt can be of special nature which inherently tells the purchasing public the source of the t-shirt, not the source of manufacture but the secondary source. *In re Olin Corp.*, 181 USPQ 182 (TTAB 1973).

On June 20, 2022, Applicant responded to the December 20, 2021 Office Action with screenshots from Applicant's website to demonstrate that the Mark is recognized as a trademark through its use with goods and services other than those being refused as ornamental. The Examining Attorney made the refusal final, stating that, "Applicant [...] responded to [the] refusal by submitting a substitute specimen [...] that does not show proper use of the [Mark]." However, contrary to the Examining Attorney's statement, Applicant did not submit a substitute specimen. Applicant submitted evidence to support the argument that consumers already associate the Mark with Applicant, pursuant to Trademark Manual of Examining Procedure § 1202.03(c):

"To show that a proposed mark that is used on the goods in a decorative or ornamental manner also serves a source-indicating function, the applicant may submit evidence that the proposed mark would be recognized as a mark through its use with goods or services other than those being refused as ornamental."

Applicant uses the Mark on its website in various locations, including the age gate webpage, homepage, and on the bottom banner of every webpage. In order to purchase various goods on Applicant's website, consumers are required to interact with the website in a manner that makes the Mark readily apparent. Consumers immediately view the Mark when directed to Applicant's website, upon entering the website, and towards the bottom of every webpage the consumer visits. Thus, when consumers visit Applicant's website, they recognize the Mark as being an indicator of a trusted source. While the cannabis-related goods sold on Applicant's website may not qualify as "trademark use" on goods that are lawfully in commerce under the federal Trademark Act, they are legal in California and Florida where Applicant sells its products, and sales of these goods in connection with the Mark demonstrate that consumers identify the Mark with a single source.

The Trademark Trial and Appeal Board has held that "the question is not whether the mark has been associated with the goods *by a particular mode or manner* but whether the matter sought to be registered performs the function of a trademark by signifying to purchasers the source of the goods sold or offered for sale." *In re Paramount Pictures Corp.* 213 USPO 1111, 1115 (TTAB 1982) (*emphasis added*). Section 45 of the federal Trademark Act provides that a mark is used in commerce when it is placed "in any manner on the goods." 15 U.S.C. § 1127. The Trademark Trial and Appeal Board has interpreted this language to be "broad enough to encompass the affixation of a mark across the front of a garment." *In re Expo '74*, 189 USPQ 48, 49 (TTAB 1975).

In this case, the Examining Attorney refused registration solely because the "[M]ark appears in large font across the center of the clothing merchandise in a manner and location reserved for designs and ornamentation rather than source identifiers." Applying the Board's reasoning in *In re Expo '74*, the size and position of the Mark does not preclude consumers from

associating the Mark with a single source. *Id.* Applying the Board's reasoning in *In re Paramount*, Applicant's particular mode and manner of use combines the functions of ornamentation and source indication. The large font size and location of the Mark across the front of the clothing merchandise does not take away from consumers' ability to recognize that Applicant sells cannabis-related goods under the same Mark and, therefore, consumers will identify Applicant's Mark with the source of the clothing merchandise identified in the present application.

II. Conclusion

Applicant believes that it has established that the Mark does function as an indicator of source. Therefore, Applicant respectfully requests reversal of the Examining Attorney's decision and requests that the application be allowed to proceed to publication.

Date: March 7, 2023

Respectfully submitted,

WARD AND SMITH, P.A.



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