

THIS ORDER IS NOT
A PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: December 29, 2017

Cancellation No. 92062423

The Icelandic Milk and Skyr Corp.

v.

Saga Dairy, Inc.

**Before Wolfson, Heasley and Pologeorgis,
Administrative Trademark Judges.**

Opinion by Wolfson, Administrative Trademark Judge:

Saga Dairy, Inc. (“Respondent”) owns a registration on the Supplemental Register for the mark MORE PROTEIN THAN SUGAR in standard character form¹ and another registration, also on the Supplemental Register, for the mark



,² both for “yogurt” in International Class 29. The Icelandic Milk and Skyr Corp. (“Petitioner”) filed a petition to cancel the registrations, alleging that MORE PROTEIN THAN SUGAR is merely an informational phrase, or so highly

¹ Registration No. 4792255 registered August 11, 2015, claiming a first use date of July 31, 2014, and date of first use in commerce on August 22, 2014.

² Registration No. 4824104 registered September 29, 2015, claiming a first use date of July 31, 2014, and date of first use in commerce on August 22, 2014.

Cancellation No. 92062423

descriptive of the quality of Respondent's yogurt, that it is incapable of functioning as a trademark or serving as an indicator of origin of the goods. Petitioner further alleged that if the phrase is capable of functioning as a trademark, Petitioner was the first to use it, and that Respondent's continued use of the same phrase on identical goods is likely to cause confusion, or to cause mistake, or to deceive relevant consumers. Respondent denied the salient allegations of the complaint.

This case now comes before the Board for consideration of Petitioner's motion, filed October 26, 2017, for summary judgment on its claims that the marks are (1) merely informational and incapable of functioning as trademarks; (2) so highly descriptive that they are incapable of functioning as trademarks; and (3) that (as stated in Petitioner's brief) "Registrant's use of 'More Protein Than Sugar' was not exclusive and therefore not lawful use in commerce at the time of the application filing date."³ The motion is fully briefed.⁴

³ 21 TTABVUE 3. The petition to cancel did not allege that Respondent's use of the subject phrase as a mark was unlawful as of the filing date of the applications. Rather, the petition alleged that Petitioner was the first to use the phrase MORE PROTEIN THAN SUGAR, thus giving Petitioner priority, and that confusion was likely. In its reply brief, Petitioner explains that the arguments it makes regarding Respondent's use of the phrase are in support of Petitioner's priority claim; that is, because Respondent's use was allegedly "non-exclusive and unlawful," Petitioner has priority. "Because Petitioner at least adopted and used the phrase 'more protein than sugar' in a prominent, descriptive manner prior to the filing date of [Registrant's registrations], Registrant's use of [the phrase] prior to the application filing dates did not constitute 'lawful use in commerce,' and [the registrations] should be cancelled." 21 TTABVUE 22. For purposes of determining the motion for summary judgment, we need not be concerned with the basis for Petitioner's priority claim, inasmuch as we do not reach Petitioner's claim under Section 2(d).

⁴ Respondent's motion, filed November 28, 2017 (27 TTABVUE), to treat its response to the motion for summary judgment as confidential is granted. Although Respondent properly filed a public version of the response as required under Trademark Rule 2.126(c), Respondent is

Motion for Summary Judgment

Summary judgment is appropriate where the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1987). In reviewing a motion for summary judgment, the evidence of record and all reasonable inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the non-moving party. *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). In deciding a summary judgment motion, the Board does not decide issues of fact, but rather determines if there are any genuine disputes of material fact to be tried. *See Dyneer Corp. v. Auto. Prods. plc*, 37 USPQ2d 1251, 1254 (TTAB 1995).

The burden is on the moving party to demonstrate that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). If the movant makes out a *prima facie* case, the burden shifts to the nonmoving party to demonstrate the existence of a genuine dispute regarding at least one material fact that requires resolution at trial. *Enbridge, Inc. v. Excelerate Energy Ltd. P'ship*, 92 USPQ2d 1537, 1540 (TTAB 2009). The nonmoving party, however, may not rest on the mere allegations of its pleadings and assertions, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact

advised that the public version it filed should have indicated the location at which matter had been redacted.

for trial. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324; *see also Venture Out Props., LLC v. Wynn Resort Holdings LLC*, 81 USPQ2d 1887, 1893 (TTAB 2007) (holding that party opposing summary judgment may not rest on pleadings and assertions but must point to specific portions of record to show existence of genuine factual issue). In general, to establish the existence of disputed facts requiring trial, the nonmoving party “must point to an evidentiary conflict created on the record[,] at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant.” *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990).

Standing

In its petition to cancel, Petitioner alleges that it “is a dairy company that is well known for its SIGGI’S brand of Icelandic style yogurt products, which have been offered for sale since at least as early as August 2006”;⁵ that “[a]ll flavors of [Petitioner’s] yogurt cups have more grams of protein than sugar”;⁶ that Petitioner “uses the phrase ‘more protein than sugar’ on the lids of its yogurt products of its Icelandic-style yogurt products”;⁷ and that the continued registration of Respondent’s marks will cause Petitioner harm “by interfering with its ability to continue to use

⁵ 1 TTABVUE 4.

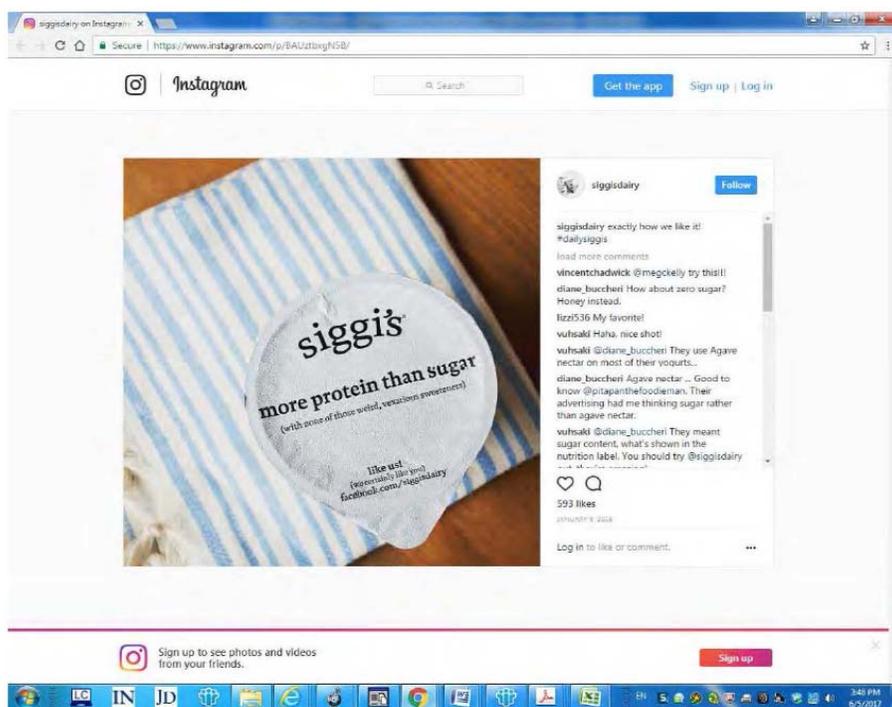
⁶ *Id.*

⁷ *Id.*

Cancellation No. 92062423

the phrase ‘more protein than sugar’ in connection with its yogurt products to accurately describe their nutritional content.”⁸

Jennifer Dong, Petitioner’s Vice President of Finance and Operations, attested to Petitioner’s first use of the phrase MORE PROTEIN THAN SUGAR in connection with yogurt on May 2, 2014,⁹ and verified representative samples of Petitioner’s product labels¹⁰ and advertising¹¹ bearing the phrase. One example of Petitioner’s use of the phrase on a yogurt cup is shown below:



⁸ 1 TTABVUE 6.

⁹ 21 TTABVUE 341.

¹⁰ See Exhibit D to Dong Dec., *e.g.*, at 21 TTABVUE 513 (shown above).

¹¹ See Exhibit C to Dong Dec., *e.g.*, at 21 TTABVUE 501: “When shopping for yogurt, make sure it is made with simple ingredients and has more protein than sugar per container, like @siggisdairy.”

Cancellation No. 92062423

This evidence establishes Petitioner's standing. *Books on Tape, Inc. v. Booktape Corp.*, 836 F.2d 519, 5 USPQ2d 1301, 1302 (Fed. Cir. 1987) (competitor has standing to challenge registration); *Kistner Concrete Prods., Inc. v. Contech Arch Technologies, Inc.*, 97 USPQ2d 1912, 1918 (TTAB 2011) (same); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) ("Petitioner has established his common-law rights in the mark DESIGNED2SELL, and has thereby established his standing to bring this proceeding."). There is no genuine dispute that Petitioner has standing to bring this cancellation action.

Failure to Function

Although advertising phrases and slogans are not *per se* unregistrable, a phrase or slogan that does not function as a trademark to indicate the source of registrant's goods and to identify and distinguish them from others cannot be registered on either the Principal or the Supplemental register. Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§1051-1052, 1127. "Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable." *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (finding that the phrase ONCE A MARINE, ALWAYS A MARINE "would be viewed as an informational message rather than as a trademark identifying the source of applicant's clothing." *Id.* at 1231); *In re Brass-Craft Mfg. Co.*, 49 USPQ2d 1849, 1853 (TTAB 1998) (informational labels containing instructions to installer of appliance connectors enclosed within a circular border and displayed in blue lettering against

Cancellation No. 92062423

a contrasting white background would not be perceived as source indicators); *In re Sanda Hosiery Mills*, 154 USPQ 631 (TTAB 1967) (slogan THE BABY BOOTIE SOCK THAT WILL NOT KICK OFF for socks held incapable of functioning as a mark and denied registration on Supplemental Register). *Cf. In re Boston Beer Co. Ltd. P'ship*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (finding THE BEST BEER IN AMERICA to be “so highly laudatory and descriptive as to be incapable of acquiring distinctiveness as a trademark.”).

The critical inquiry in determining whether a slogan functions as a mark is how the proposed mark would be perceived by the relevant public. “The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.” *In re Eagle Crest*, 96 USPQ2d at 1229 (ONCE A MARINE, ALWAYS A MARINE was an “old and familiar” motto commonly used by and about the U.S. Marine Corps.); *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1460 (TTAB 1998) (finding that the primary significance of the phrase DRIVE SAFELY “is merely that of an everyday, commonplace safety admonition.”); *cf. In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1827-28 (TTAB 2012) (SEMICONDUCTOR LIGHT MATRIX merely identifies a technology, not the source of applicant’s UV curing system); *In re T.S. Designs, Inc.*, 95 USPQ2d 1669 (TTAB 2010) (CLOTHING FACTS does not function as a mark for clothing); *In re Remington Prods., Inc.*, 3 USPQ2d 1714 (TTAB 1987) (PROUDLY MADE IN USA for electric shavers merely identifies the manufacturing

location of the goods); *see also* 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 7:23 (5th ed. 2017).

Based on the record, we find that Petitioner has met its burden to show the absence of genuine disputes with respect to any material facts that the phrase MORE PROTEIN LESS SUGAR, when used on yogurt containing more grams of protein than sugar per serving, is merely an informational slogan incapable of distinguishing one yogurt manufacturer's product from another's. Respondent uses the phrase "more protein than sugar" as an informational slogan to communicate the protein-to-sugar ratio in the yogurt it sells; third-party sellers of yogurt also use the phrase to inform consumers that their yogurt contains more protein per serving than sugar. Examples of Respondent's use of the phrase can be found on its Facebook page:¹²

¹² 21 TTABVUE 114.

Viking Icelandic Yogurt
March 27 · 🌐

Taste what more protein than sugar is all about with 4 cups of milk in each cup of Viking Grass-Fed Icelandic Yogurt. 🍓🍓🍓🍓 Find your cup of Viking on our Store Locator, website above 📍 | #family #familyowned #protein #proteinpacked #moreproteinthansugar #knowyourprotein #viking #vikings #yogurt #skyr #vikingyogurt #balance #health #foodisfuel #grassfed #nongmo #fitness #entrepreneur #entrepreneurlife



Viking Icelandic Yogurt - Home | Facebook



13

Cancellation No. 92062423

and on its website: “Our pots of yogurt, with more protein than sugar, helped keep us fit and trim during the holiday season leading into our winter wedding.”¹⁴

Examples of third-party use can be found in online articles. An online Fox News article, “5 Heart-healthy Work Snacks,” suggests yogurt as a healthy food choice, providing important nutrients like protein and calcium. The article warns: “Since yogurts are often filled with added sugars, ideally choose one that has more protein than sugar.”¹⁵ Another online article, from Heinen’s Grocery Store, describes Respondent’s yogurt: “Viking is America’s ONLY full size 6oz Icelandic yogurt cup with milk from grass fed cows. It has more protein than sugar....”¹⁶ And an “Eat This, Not That!” online shopping guide offers the “25 Best Yogurts for Weight Loss,” describing the majority (17 out of 25) as being high in protein and low in sugar content. The phrase “more protein than sugar” is specifically used to describe one of the entries: “As far as fruit-flavored yogurts go, Chobani’s Simply 100 is a safe bet. Especially since it’s so rare to find a fruit-flavored yogurt with more protein than sugar.”¹⁷

These examples are further supported by the many third-party examples of Nutrition Facts labels displayed on yogurt containers where the protein content

¹⁴ 21 TTABVUE 81-82.

¹⁵ 21 TTABVUE 188-189.

¹⁶ *Lentz, Products We Love: Viking Icelandic Yogurt*, at <http://www.heinens.com> (January 8, 2016); 21 TTABVUE 124.

¹⁷ 21 TTABVUE 181.

outmeasures the sugar content.¹⁸ These labels, shown in online advertising for over a dozen brands, display the protein and sugar content of each company's yogurt as part of the Nutritional Facts required under FDA labeling laws. The protein content exceeds the sugar content, as in the following examples:



19

¹⁸ 21 TTABVUE 515-610.

¹⁹ 21 TTABVUE 515.



Nutrition Facts	Amount/Serving	%DV*	Amount/Serving	%DV*
Serving Size	Total Fat 0g	0%	Potassium 170mg	5%
1 Container (150g)	Saturated Fat 0g	0%	Total Carbohydrate 6g	2%
Calories 80	Trans Fat 0g	0%	Dietary Fiber 0g	0%
Calories from Fat 0	Cholesterol <5mg	1%	Sugars 6g	
	Sodium 60mg	3%	Protein 15g	30%
*Percent Daily Values (DV) are based on a 2,000 calorie diet. Vitamin A 0% - Vitamin C 0% - Calcium 15% - Iron 0%				

INGREDIENTS: CULTURED GRADE A NON FAT MILK.

20

PURE WHOLE MILK

Ingredients: Organic grade A pasteurized skim milk, organic grade A pasteurized whole milk, live and active cultures.

6g FAT 16g PROTEIN



Nutrition Facts	Amount/serving	% DV *	Amount/serving	% DV *
	Total Fat 6g	9%	Total Carb. 4g	1%
	Sat, Fat 4.5g	21%	Dietary Fiber 1g	6%
	Trans Fat 0g	0%	Sugars 3g	
	Cholest 65mg	21%	Protein 16g	31%
	Sodium 20mg	1%		
*Percent Daily Values (DV) are based on a 2,000 calorie diet. Vitamin A 8% - Vitamin C 2% - Calcium 10% - Iron 0%				

21

Finally, there are comparisons made in online advertising between “skyr” and yogurt that point up the competitive need to use the phrase “more protein than sugar.” Skyr is advertised by Icelandic Provisions (at www.icelandicprovisions.com) as a “cultured dairy product” that is similar to Greek yogurt. Icelandic Provisions compares its skyr to Greek yogurt as containing “more protein and less sugar”:²²

How does skyr differ from Greek yogurt?
 It is common to compare skyr to Greek yogurt, as they sit close together on grocery store shelves and share similar traits like thickness and protein. Only, skyr is not yogurt. Skyr has been a traditional dairy provision in Iceland for thousands of years and is made from its own unique skyr cultures. Icelandic Provisions skyr contains more protein and less sugar than the leading Greek yogurts.*

Respondent has not refuted Petitioner’s *prima facie* showing. Indeed, Respondent merely states in a conclusory fashion that the trademarks are “capable of acquiring distinctiveness” and that they have in fact become known to consumers as source-

²⁰ 21 TTABVUE 534.
²¹ 21 TTABVUE 632.
²² 21 TTABVUE 625.

Cancellation No. 92062423

indicators.²³ As evidence, Respondent submitted a copy, under seal, of an email internal to Petitioner, discussing Petitioner's "more protein than sugar lid" in an effort to dispute Petitioner's claim of first use of the phrase. However, this issue is not relevant to whether the mark is merely informational and thus incapable of functioning as a trademark. Respondent did not submit any other evidence or testimony. Further, Petitioner served admissions on Respondent that were not answered.²⁴ If a party on which requests for admission have been served fails to file a timely response thereto, the requests are deemed admitted by operation of Fed. R. Civ. P. 36(a) unless the party is able to show that its failure to timely respond was the result of excusable neglect; or unless a motion to withdraw or amend the admissions is filed pursuant to Fed. R. Civ. P. 36(b), and granted by the Board. In this case, no discussion of the impact of the deemed admissions was presented in the parties' briefs. Nonetheless, Respondent did not move to withdraw or amend the admissions, and they are deemed admitted. They are insufficient, on their own, to support an entry of summary judgment, but they bolster Petitioner's claim that no genuine disputes exist and that Petitioner is entitled to judgment as a matter of law. Admission No. 21 is an admission that "the phrase 'more protein than sugar' accurately describes the nutritional content of [Respondent's] yogurt," Admission No. 20 is an admission that Respondent's marks "inform[] consumers about the

²³ 28 TTABVUE 3.

²⁴ See Kayser Dec., ¶ 4, 21 TTABVUE 28; Exhibit 2 (Request for Admissions Nos. 1-75), 21 TTABVUE 34-61.

Cancellation No. 92062423

comparative protein-to-sugar content of [Respondent’s] yogurt” and Admission No. 74 is an admission that “17 of the 25 products featured in the Eat This, Not That! article titled ‘25 best Yogurts for Weight Loss’ ... have more protein than sugar.”

Based on the entirety of the record herein, summary judgment is an appropriate remedy in this case. Petitioner made a *prima facie* showing that there are no genuine disputes of material fact that Respondent’s mark MORE PROTEIN THAN SUGAR is commonly used to describe the nutritional content of yogurt and will be perceived as merely an informational slogan and not as a trademark by the relevant consumer class. Respondent has not rebutted Petitioner’s showing.

Accordingly, summary judgment is entered against Respondent with respect to Registration No. 4792255 and the registration will be cancelled in due course.

Registration No. 4824104

We draw a different conclusion with respect to Registration No. 4824104 for the



Petitioner argues that the design in Respondent’s mark is minimal, “adds nothing of trademark significance and will not prevent the descriptive message conveyed by the phrase ‘more protein than sugar’ from being the primary message perceived by consumers when they encounter the ‘104 Mark in commerce.”²⁵ Respondent counters

²⁵ 21 TTABVUE 15, n. 4.

Cancellation No. 92062423

that the mark is “capable of acquiring distinctiveness and registerable on the USPTO’s Supplemental Register, as the trademark[] become[s] known to consumers....”.²⁶ Neither party has presented any testimony or evidence to address how relevant consumers may perceive the curved lines of the design mark, or whether the addition of the exclamation point affects their perception of the mark as a whole.

The critical issue here is not whether the mark currently distinguishes Respondent’s yogurt products, but rather whether it possesses the capability to do so at some time in the future. That is, if the design features of the asserted mark can create an impression on the relevant consumers separate and apart from the impression made by the words themselves, or if it can be shown by evidence that the particular display the applicant has adopted can acquire distinctiveness, the mark as a whole may be capable, and thus registrable on the Supplemental Register. *In re Cordua Rests., Inc.*, 118 USPQ2d 1632 (Fed. Cir. 2016) (stylized font display of the generic name CHURRASCOS (barbecue) for restaurants that specialize in churrascos-style steak was not so unusual that it created a separate impression); *see also In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1486 (TTAB 2012) (display of generic term was not distinctive enough to create a commercial impression apart from the word itself); *In re Cosmetic Factory, Inc.*, 220 USPQ 1103, 1103 (TTAB 1983) (stylized display of BODY SOAP for body shampoo insufficiently “striking, unique or distinctive so as to overcome its inherent incapacity and render the mark capable of

²⁶ 28 TTABVUE 3.

Cancellation No. 92062423

serving as a source indicator” on Supplemental Register); 2 J. Thomas McCarthy, *supra* at § 12:40 (5th ed. December 2017 Update).

Even if the mark as a whole is registrable, there is no protection given to an informational phrase *per se*; thus any rights in the mark reside solely in the particular combination of the words and curved lines, and not in the phrase alone. *Cf. Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987) (registration for the mark **sweats dd** did not prevent use of ULTRA SWEATS on competitive goods; registration “protects only the particular manner in which it displays the word ‘sweats.’ ... [T]he registrant’s rights would reside solely in the particular style of display of the words.”); *United States Steel Corp. v. Vasco Metals Corp.*, 394 F.2d 1009, 1011-12, 157 USPQ 627, 629 (CCPA 1968) (applicant’s rights in CONSUMABLE VACUUM MELTED “reside entirely in the particular design arrangement of these three descriptive words”).

On this record, we find that Petitioner has not met its initial burden of establishing that there are no genuine disputes of material fact as to whether the curved lines in the mark create a commercial impression apart from the wording, rendering the mark as a whole capable of indicating the source of Registrant’s yogurt products. Accordingly, the motion for summary judgment with respect to Registration No. 4824104 is denied. However, in light of the fact that we find the phrase MORE PROTEIN THAN SUGAR to be incapable of signifying a source of origin for the goods, even if the design mark as a whole is found capable of serving a trademark function, Respondent will be required to submit a disclaimer to the wording, in the following

Cancellation No. 92062423

format: “No claim is made to the exclusive right to use “More Protein Than Sugar!” apart from the mark as shown.”²⁷ Trademark Act § 6(a). As we have previously explained:

Just as the registration of a mark may be opposed (or cancelled, if the registration is less than five years old) on the Section 2(e)(1) ground that the entire mark, when applied to the goods or services of the applicant (or registrant), is merely descriptive of them, so too it may be on the ground that an undisclaimed portion of the mark is merely descriptive of the applicant’s goods or services (and that the mark should not be registered without a disclaimer of that portion.)

Kellogg Co. v. Pack’Em Enters., Inc., 14 USPQ2d 1545, 1549 (TTAB 1990) (counterclaim for cancellation of registration on ground that registration failed to include disclaimer to allegedly descriptive term states a ground upon which relief may be granted); *cf. In re Clutter Control, Inc.*, 231 USPQ 588, 589 (TTAB 1986) (“When words which are merely descriptive, and hence unregistrable, are presented in a distinctive design, the design may render the mark as a whole registrable, provided that the words are disclaimed, under Section 6 of the Trademark Act.”); *In re Carolyn’s Candies, Inc.*, 206 USPQ 356, 360 (TTAB 1980) (“It has been held that while an entire mark cannot be disclaimed and also registered, nevertheless where the unregistrable components of a mark are combined in a design or display which is

²⁷ The final punctuation mark (!) at the end of the phrase is inseparable from the wording, does not change the impact of the wording or imbue it with source-identifying significance, and must be included in the disclaimer. *See, e.g., DuoproSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1756-1758 (Fed. Cir. 2012) (finding SNAP!, with a broken exclamation point, merely descriptive of medical syringes using snap-off plungers); *In re Litehouse, Inc.*, 82 USPQ2d 1471, 1474 (TTAB 2007) (CAESAR! CAESAR! merely descriptive of salad dressing); *In re Promo Ink*, 78 USPQ2d 1301, 1305 (TTAB 2006) (exclamation point in the mark PARTY AT A DISCOUNT! “simply emphasize[d] the descriptive nature of the mark” for advertising services in the field of private party venues).

Cancellation No. 92062423

so distinctive as to create a commercial impression separate and apart from the unregistrable components, it is possible to disclaim those unregistrable components and still have a mark which is registrable as a whole.”).

Conclusion

Petitioner’s motion for summary judgment is granted with respect to Registration No. 4792255 and denied with respect to Registration No. 4824104.²⁸ Registration No. 4792255 will be cancelled in due course. If the mark in Registration No. 4824104 is found to be capable of indicating source and thus registrable on the Supplemental Register, Respondent will be allowed time within which to enter a disclaimer of the wording MORE PROTEIN THAN SUGAR!, failing which the petition to cancel the registration will be granted.

As we have found the phrase MORE PROTEIN THAN SUGAR incapable of serving a trademark function, we need not reach Petitioner’s claim that Respondent’s marks are “so highly descriptive” that they must be cancelled, or Petitioner’s claim that it has priority of use and that there is a likelihood of confusion between the marks. Indeed, these claims are moot. Further, because the remaining issues in this proceeding have been considerably narrowed and require only limited further

²⁸ The parties should note that evidence submitted in connection with the motion for summary judgment and opposition thereto is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1438 n.14 (TTAB 2007); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). Moreover, the fact that we have identified certain issues that are in dispute should not be construed as a finding that these are necessarily the only issues which remain for trial.

briefing, the parties are precluded from filing any additional motions for summary judgment.

Accelerated Case Resolution

In light of our grant of Petitioner’s motion for summary judgment with respect to Respondent’s word mark, and our findings with respect to the word and design mark, the remaining legal issues presented in this proceeding have effectively been limited to the issue of whether the curved lines in Respondent’s word and design mark can render the mark capable of indicating the origin of the goods in Respondent and distinguishing them from those of others. In addition, it appears that the parties are well-acquainted with the relevant facts. Accordingly, the parties may wish to stipulate to resolution of this proceeding by means of the Board’s accelerated case resolution (“ACR”) procedure, on summary judgment briefs and incorporating the current record pursuant to an agreement to proceed under ACR with respect to Petitioner’s claim that Respondent’s mark fails to function. *See e.g., Freeman v. National Association of Realtors*, 64 USPQ2d 1700 (TTAB 2002) (parties agreed that evidence and arguments submitted with the opposer’s motion for summary judgment and applicant’s response could be treated as the final record and briefs). *See also* TBMP § 528.05(a)(2) (June 2017) and authorities cited therein. In the event the parties agree to ACR using summary judgment briefs and incorporating the current evidence, including any supplementation of evidence they may agree would be appropriate, they will need to stipulate that the Board may determine any genuine

Cancellation No. 92062423

disputes of material fact the Board may find to exist.²⁹ See TBMP § 702.04 for more information.

The parties are therefore encouraged, within **FIFTEEN DAYS** of the mailing date of this order, to jointly contact the Board's interlocutory attorney responsible for this proceeding by telephone to discuss the possibility of ACR, any necessary stipulations, and an agreed-upon schedule for proceeding under ACR.

If the parties determine not to proceed via ACR the proceeding will continue on the schedule as set below.

Schedule

Proceedings are resumed. Petitioner is allowed until **TWENTY DAYS** from the mailing date of this order to serve its pretrial disclosures. Remaining trial dates are reset as follows:

Plaintiff's 30-day Trial Period Ends	3/1/2018
Defendant's Pretrial Disclosures Due	3/16/2018
Defendant's 30-day Trial Period Ends	4/30/2018
Plaintiff's Rebuttal Disclosures Due	5/15/2018
Plaintiff's 15-day Rebuttal Period Ends	6/14/2018

Generally, the Federal Rules of Evidence, Federal Rules of Civil Procedure and Trademark Rules of Practice apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements

²⁹ Absent such an agreement, the evidence submitted in connection with Petitioner's motion for summary judgment is of record only for consideration of that motion. See n. 28, *supra*.

Cancellation No. 92062423

relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).