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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ex Parte Appeal - Serial No.	97073305
Appellant	Keto Chow LLC
Applied for mark	KETO CHOW
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN RE KETO CHOW LLC

Ex Parte Appeal No. 97073305
Mark: KETO CHOW
Applicant: Keto Chow LLC
Examining Attorney: Anthony Rinker, Esq.
Law Office 102

**EX PARTE APPEAL
APPLICANT KETO CHOW'S
REPLY BRIEF**

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I.

INTRODUCTION

After more than a year, the Examining Attorney, Anthony Rinker, Esq., has still not located any use of the term “keto chow” by American consumers to refer to anything other than Applicant Keto Chow, LLC and its products which are used by people following ketogenic diets. Nothing.

Not only does Applicant’s “keto chow” mark have secondary meaning among consumers thanks to acquired distinctiveness, but, as a practical matter, Applicant’s products are basically the primary meaning of the two-word term in the minds of consumers, as any Google search will reveal.

In this Reply, Applicant will first address the semantic reason why “chow,” either alone or in combining form, is not merely interchangeable with the word “food,” so that “keto chow” is not “highly descriptive.” Second, Applicant will discuss the importance of Google searches to the issue at hand. After that, Applicant will (1) deal with the Examining Attorney’s treatment of Applicant’s evidence from its officers on such items as sales, marketing, and advertising and (2) explain why the absence of a consumer survey (which is merely optional in such proceedings) is not of any consequence.

II.

THE WORD “CHOW” IS NOT SIMPLY INTERCHANGEABLE WITH “FOOD” AND IS AN INFORMAL, SLANGY TERM WITH DIFFERENT CONNOTATIONS RELEVANT TO DESCRIPTIVENESS ANALYSIS.

In his July 19, 2022 First Nonfinal Office Action letter (Application File Document Number 6), the Examining Attorney attached an online Merriam-Webster entry defining “chow” as “FOOD, VICTUALS.” However, “victuals” is not readily interchangeable in speech or writing with “food,” and neither is “chow.” They are used in different contexts.

Every word has two aspects – its denotation and its connotation. “The denotation of a word or expression is its direct meaning. Its connotation consists of the ideas or meanings associated with it or suggested by it.” www.dictionary.com/e/denotation-vs-connotation/ (“The connotation of a word depends on cultural context”).

Wikipedia says the word “chow” may refer to “A slang term for food in general (such as in the terms ‘chow down’ or ‘chow hall’).” Likewise, the online Collins Dictionary says that “Food can be referred to as chow [US, informal].”

“Chow” is a slangy, informal word that is not used in formal contexts and often cannot be used interchangeably with the word “food.” It is hard to imagine a person asking someone to “get me some organic chow at Whole Foods” or advising someone to eat “nutritious chow” or entering a restaurant and saying to a waiter that they wanted some “Italian chow.” People just don’t talk like that.

Therefore, when “chow” is used in combination with another word, the overall two-word term is not nearly as descriptive as combining “food” with that same other word.¹ “Keto chow” is far from being as descriptive as the term “keto food” would be on the distinctiveness spectrum. The Examiner seemingly does not intuitively understand that. He continues to say in

¹ Applicant notes that “dog chow” (Registration Number 845968) and “cat chow” (Registration No 1272052) have long been registered trademarks (now owned by Nestle after it acquired Purina) that

his Appeal Brief that the combination of the two words “keto” and “chow” created a “highly descriptive term,”² and yet he has mentioned no use of the two words together by anyone in the United States except when referring to the products of Keto Chow, LLC. It is not highly descriptive.

III.

**THE TTAB JUDGES ON THE PANEL ARE REQUESTED TO PERFORM
THEIR OWN GOOGLE SEARCHES, WHICH WILL CONFIRM THAT
“KETO CHOW” IS EXCLUSIVELY USED BY CONSUMERS TO
REFER TO APPLICANT AND ITS PRODUCTS**

Ten years ago, a law review article author observed that the “complicated doctrines surrounding trademark distinctiveness are aimed at determining what products or services people associate with a mark [and] ... ‘the perceptions of large groups of ordinary people are key factual issues.’” L. Ouellette, *The Google Shortcut To Trademark Law*, 102 California Law Review 351, 353 (2014) (“*Google Shortcut*”) (quoting McCarthy on Trademarks). She went on to state: “What we need, in essence, is a simpler way to tell us whether consumers associate a mark with a certain product. Fortunately, we now have an easy way to do that: Google.” *Id.* at 353; *accord Mophie, Inc. v. Shah*, 2014 WL 10988347 at *19 & n.14 (C.D. Cal. November 12, 2014) (“an Internet search for terms ... may be probative of the association between a trademarked word or phrase and a product in the minds of the masses ... and distinctiveness of a trademarked word or phrase”).

apparently had no difficulty getting registered.

² Because it is not actually “highly descriptive,” its exclusive use for over eight years is prima facie

We are now ten years further into the Age of the Internet and Google’s search engine dominance. Thus, Google search evidence of how consumers view words used as trademarks now makes even more sense. *See, e.g., Universal Life Church Monastery Storehouse v. King*, 2023 WL 5688346, at *1 (W.D. Wash, August 24, 2023) (AMM showed acquired distinctiveness with evidence that “a Google search of the [American Marriage Ministries] mark generated results that uniformly referred to AMM”).

Applicant submitted a Trademark Documentation Report indicating that the first 20,000 results of a Google search for “keto chow” all related to Keto Chow LLC and its products (and not a generic reference to ketogenic food). That Report and the Declaration of Michael Hambly both attached printouts of the first few pages of separate Google searches (showing both sponsored/paid and organic results all relating to Applicant and its products). The context of most results was clear from the excerpt for each result. The Attorney Examiner was invited to do his own Google search.

Courts and administrative bodies are, of course, free to conduct their own Google searches and reference their findings in their decisions of trademark matters. *See, e.g., First Franklin Financial Corp. v. Franklin First Financial, Ltd.*, 356 F. Supp.2d 1048, 1052 (N.D. Cal. 2005); *24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC*, 277 F. Supp.2d 356, 366, 68 USPQ2d 1031 (S.D.N.Y. 2003); *Google Shortcut*, 102 Cal. L. Rev. at 371 & n.104 (discussing three cases).

The Administrative Judges on the TTAB panel are requested to perform their own Google searches of the term “keto chow.” There will be no difficulty seeing the context for each

evidence of its distinctiveness.

result for three reasons: (1) each result has an excerpt/blurb; (2) if there is any lack of clarity, one can click on the provided link to go to the indicated website; and (3) every context is the same for page and after page after page of results – Keto Chow’s products, reviews, recipes, etc. In the segment of results one would normally look at, there appear to be no results using the term “keto chow” in a merely descriptive way to simply mean ketosis promoting foods in general.

IV.

THE ATTORNEY EXAMINER’S DOWNPLAYING OF EVIDENCE FROM COMPANY OFFICERS ON SUCH ITEMS AS SALES AND ADVERTISING MAKES LITTLE SENSE (SINCE NOBODY ELSE WOULD KNOW MORE ABOUT THEM), AND HIS FOCUS ON THE ABSENCE OF A NON-ESSENTIAL CONSUMER SURVEY IS MISGUIDED.

The Examining Attorney deemed the declarations of Applicant’s officers to be of minimal probative value because they are “self-serving,” but who knows more about a company’s advertising, marketing, and sales of its products than such officers? He did not say. In business litigation between companies, most of the percipient fact witness testimony in such cases comes from officers and other employees of the companies involved and their testimony is not severely discounted en masse because of self-interest.

Officer declarations are often used to support a showing of acquired distinctiveness. *See, e.g., In re Synergistics Research Corp.*, 218 USPQ 165, 1983 WL 51947 (TTAB 1983).

“[W]hile a declaration of long use by an officer of an applicant is sometimes dismissed as self-serving, its significance cannot be undervalued.” *Id.*, 1983 WL 51947 at *2 (refusal of

registration reversed).

At pages 8-9 of his Appeal Brief, the Examining Attorney made much of Applicant not having submitted a consumer survey. “But courts and commentators note that surveys are often unreliable and expensive.” *Google Shortcut*, 102 Cal. L. Rev. at 361 (“surveys can cost hundreds of thousands of dollars”). Indeed, the Examining Attorney himself pointed out that consumer surveys are not always probative unless they meet certain criteria.

Why spend \$50,000 to conduct a survey of 500 consumers when a Google search is free to see how all people with Internet access view a term used as a mark (and can be replicated by an Examining Attorney and TTAB members themselves). Moreover, an Applicant would not submit a survey whose results were unfavorable to it, so any submitted survey will inherently be biased in favor of the Applicant (ironically, the Examining Attorney’s criticism of officer declarations). “Google dominates the web search market ... by generally being able to predict what online consumers associate with a search term – effectively operating as an inexpensive and neutral survey.” *Google Shortcut*, 102 Cal. L. Rev. at 363, 407.

In any event, consumer surveys are not required to show acquired distinctiveness. *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1583, 6 USPQ2d 1001 (Fed. Cir. 1988) (consumer survey not needed to prove secondary meaning in applying to register).

In *Converse, Inc. v. ITC*, 909 F.3d 1110, 1120, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018), the Federal Circuit described six factors to be considered in determining whether a mark has developed secondary meaning in the minds of consumers, and expressly included as two of them “(3) amount and manner of advertising [and] (4) amount of sales and number of customers.”

Thus, the Examining Attorney’s assertion at page 6 of his Brief that “sales and promotion

figures ... of applicant's goods" may not be used to demonstrate "that relevant consumers view the matter as a mark for these goods" is flat out incorrect and precluded by *Converse*. The cases that the Examiner cited to support his assertion pre-dated *Converse* by almost two decades. Applicant submitted evidence that it spent over \$13 million on advertising and marketing efforts and had over \$67 million in sales revenues as of the time of proceedings below.

V.

CONCLUSION

The "elephant in the room" that the Examining Attorney avoided addressing in his Brief is why he was unable to find and cite to any use of the term "keto chow" by a human that did not relate to the Applicant's products. The reason is that consumers don't use "keto chow" to refer to ketogenic foods generally but rather only to Keto Chow LLC's products.

For the foregoing reasons and those stated by Applicant in its submissions below and in the Opening Brief, the TTAB should reverse the Examining Attorney's decision and declare "KETO CHOW" to be properly registrable by Keto Chow LLC on the Principal Register.

Dated: March 22, 2024.

Respectfully submitted,

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