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Subject: U.S. Trademark Application Serial No. 97073305 - KETO CHOW - Examiner Brief
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Attachments

United States Patent and Trademark Office (USPTO)

U.S. Application Serial No. 97073305

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Reference/Docket No. N/A

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark "KETO CHOW" in International Class 005 for "Meal replacement shakes for weight loss purposes designed to promote and maintain ketosis; dietary and nutritional supplements used for weight loss designed to promote and maintain ketosis; weight loss powders for nutritional purposes designed to promote and maintain ketosis" on the grounds that (1) the mark is merely descriptive of the goods under Section 2(e)(1), 15 U.S.C. §1052(e)(1), and (2) the evidence submitted by applicant to establish acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. §1052(f), is insufficient.

ARGUMENTS

I. “KETO CHOW” IS MERELY DESCRIPTIVE OF FOOD PRODUCTS DESIGNED TO PROMOTE AND MAINTAIN KETOSIS

A mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant’s goods. TMEP §1209.01(b); *see, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (*quoting In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005) (citing *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543 (1920)).

Generally, if the individual components of a mark retain their descriptive meaning in relation to the goods, the combination results in a composite mark that is itself descriptive and not registrable. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB (2002)); TMEP §1209.03(d); *see, e.g., Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1851 (TTAB 2017) (holding MEDICAL EXTRUSION TECHNOLOGIES merely descriptive of medical extrusion goods produced by employing medical extrusion technologies); *In re Cannon Safe, Inc.*, 116 USPQ2d 1348, 1351 (TTAB 2015) (holding SMART SERIES merely descriptive of metal gun safes); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of beds, mattresses, box springs, and pillows).

Only where the combination of descriptive terms creates a unitary mark with a unique, incongruous, or otherwise nondescriptive meaning in relation to the goods is the combined mark registrable. *See In re Colonial Stores, Inc.*, 394 F.2d 549, 551, 157 USPQ 382, 384 (C.C.P.A. 1968); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1162-63 (TTAB 2013).

Applicant seeks registration of “KETO CHOW” for “Meal replacement shakes for weight loss purposes designed to promote and maintain ketosis; dietary and nutritional supplements used for weight loss

designed to promote and maintain ketosis; weight loss powders for nutritional purposes designed to promote and maintain ketosis.”

In this case, both the individual components and the composite result are descriptive of applicant’s goods and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods.

The term “KETO” is defined as “a ketogenic diet.” Keto is a term for a diet trend that cuts out carbohydrates and sugars to stop the blood sugar from spiking and have the body enter a state of ketosis, a process in which the body burns fat for energy because it does not have enough carbohydrates to burn. The term “CHOW” is defined as “food.” See the definitions attached to the July, 19, 2022 Office action.

The specimen of record indicates the applicant is offering meal replacement powders for use as food for a ketogenic diet.

Third-party registrations featuring goods the same as or similar to applicant’s goods are probative evidence on the issue of descriptiveness where the relevant word or term is disclaimed, registered under Trademark Act Section 2(f) based on acquired distinctiveness, or registered on the Supplemental Register. E.g., *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (quoting *Inst. Nat’l des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 1581-82, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992)); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006). To support the first refusal in the July 19, 2022 Office action, the examining attorney attached records of third-party registrations with “KETO” or "CHOW" disclaimed, registered under Trademark Act Section 2(f) based on acquired distinctiveness, or registered on the Supplemental Register. in the context of food products. The examining attorney also attached records of applicant's prior U.S. Registration Nos. 5326165 and 5070406 to the July 19, 2022 Office action with "KETOCHOW" or "KETO CHOW" registered on the Supplemental Register for highly related goods to the instant application, i.e., "KETOCHOW," U.S. Registration No. 5326165 for "Dietary supplement beverage to promote the development of ketones in the bloodstream and maintain ketosis used for weight loss" in International Class 005, and "KETO CHOW," U.S. Registration No. 5070406 for "Chocolate-based

meal replacement shakes for weight loss purposes; Dietary and nutritional supplements used for weight loss; Dietary supplements in the nature of weight loss powders, all the foregoing goods designed to promote the development of ketones in the bloodstream and maintain ketosis" in International Class 005.

Thus, the wording "KETO CHOW" in the instant application merely describes a key quality, characteristic, or feature of applicant's food products that are used as part of a ketogenic Diet. In response to this refusal, applicant maintains that the mark has acquired distinctiveness under Trademark Act Section 2(f) (Applicant's Brief, page 2).

II. APPLICANT HAS NOT ESTABLISHED ACQUIRED DISTINCTIVENESS OF THE MARK UNDER TRADEMARK ACT SECTION 2(F)

A. 5 YEARS USE IS INSUFFICIENT TO ESTABLISH ACQUIRED DISTINCTIVENESS OF "KETO CHOW"

Applicant asserted a claim of acquired distinctiveness under Trademark Act Section 2(f) in the October 7, 2022 response based on use of the mark in commerce with the goods for five years prior to the date on which the claim was made. *See* 15 U.S.C. §1052(f).

However, the allegation of five years use or specifically eight years use, (Applicant's Brief, page 17), is insufficient to show acquired distinctiveness because the applied-for mark is highly descriptive of applicant's goods, i.e., the wording "KETO CHOW" immediately describes food products that are used as part of a ketogenic diet. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1336-37, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015); *Alacatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1765 (TTAB 2013); TMEP §1212.05(a). *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1336-37, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015); *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, at *11-12 (TTAB 2019); TMEP §1212.05(a). An applicant's evidentiary burden of showing acquired distinctiveness increases with the level of descriptiveness of the mark sought to be registered; as in this case, a more descriptive term requires more evidence. *Royal Crown Co. v. Coca-*

Cola Co., 892 F.3d 1358, 1365, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (citing *In re Steelbuilding.com*, 415 F.3d 1293, 1300, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005)).

When determining whether the evidence shows the mark has acquired distinctiveness, the trademark examining attorney will consider the following six factors: (1) association of the mark with a particular source by actual purchasers (typically measured by customer surveys linking the name to the source); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage. *See Converse, Inc. v. ITC*, 909 F.3d 1110, 1120, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018) (“the Converse factors”). “[N]o single factor is determinative.” *In re Steelbuilding.com*, 415 F.3d at 1300, 75 USPQ2d at 1424; see TMEP §§1212.06 et seq. Rather, all factors are weighed together in light of all the circumstances to determine whether the mark has acquired distinctiveness. *In re Steelbuilding.com*, 415 F.3d at 1300, 75 USPQ2d at 1424. This evidence must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of applicant’s product or service rather than identifying the product or service itself. *In re Steelbuilding.com*, 415 F.3d at 1297, 75 USPQ2d at 1422.

B. EXTRINSIC EVIDENCE IS INSUFFICIENT TO ESTABLISH ACQUIRED DISTINCTIVENESS

Applicant contends that extrinsic evidence consisting of declarations of top company officers, sales record amounts, advertising expenditure amounts, customer product reviews and internet search result records establish that the mark has acquired distinctiveness under Trademark Act Section 2(f) (Applicant’s Brief, pages 19-22). However, this evidence is insufficient to show acquired distinctiveness because the applied-for mark is highly descriptive of applicant’s goods. *See In re MetPath Inc.*, 1 USPQ2d 1750, 1751-52 (TTAB 1986); TMEP §1212.06.

First, Applicant provided affidavits and declarations from applicant’s paid marketing consultant and corporate officers to support its claim that the applied-for mark has acquired distinctiveness under Trademark Act Section 2(f). Specifically, applicant submitted declarations from (1) Ryan Bennion, an

outside marketing consultant, (2) Jared Haddock, applicant's vice president in charge of marketing, and (3) Chris Blair, applicant's founder and president, all in support of proving the claim of acquired distinctiveness. (Applicant's Brief, pages 19-20). Although consumer affidavits and declarations that assert recognition of a mark as an indicator of source are relevant in establishing acquired distinctiveness, affidavits and declarations of an applicant's employees, officers, and attorneys are usually self-serving and entitled to little weight. *See In re David Crystal, Inc.*, 296 F.2d 771, 773, 132 USPQ 1, 2 (C.C.P.A. 1961); *In re Gray Inc.*, 3 USPQ2d 1558, 1560 (TTAB 1987); *In re Cent. Counties Bank*, 209 USPQ 884, 888 (TTAB 1981); TMEP §1212.06(c). Affidavits or declarations that assert recognition of the mark as a source indicator are relevant in establishing acquired distinctiveness. Accordingly, the Ryan Bennion, Jared Haddock, and Chris Blair statements are noted but are not found persuasive because the individuals have a vested interest in the registration of the applied-for mark.

Second, applicant provided sales and advertising expenditures for applicant's goods to support the claim that the applied-for mark has acquired distinctiveness under Trademark Act Section 2(f). However, this evidence is not dispositive of that claim. Specifically, applicant submitted evidence of \$67 million dollars in sales revenue for the goods, as well as having spent \$13 million in marketing and advertising for the goods since 2017. (Applicant's Brief, pages 20-21). Applicant's sales and promotion figures may be used to demonstrate the commercial success of applicant's goods, but not that relevant consumers view the matter as a mark for these goods. *See In re Boston Beer Co.*, 198 F.3d 1370, 1371-73, 53 USPQ2d 1056, 1057-58 (Fed. Cir. 1999); *In re Busch Entm't Corp.*, 60 USPQ2d 1130, 1132-34 (TTAB 2000). Advertising expenditures are merely indicative of efforts to develop distinctiveness; not evidence that the mark has acquired distinctiveness. *See In re Pennzoil Prods. Co.*, 20 USPQ2d 1753, 1757-58 (TTAB 1991).

Specifically, applicant submitted advertisements "including SEO, email marketing (with a current customer list of over 200,000 people), print advertising, influencer marketing, paid search advertising on Google and Bing, social media marketing, and podcast advertising." (Applicant's Brief page 21). This evidence is insufficient to show acquired distinctiveness of the applied-for mark because it only demonstrates that

applicant has advertised the goods with a proposed trademark, which is a common business practice of all manufacturers for any types of goods. Establishing acquired distinctiveness by actual evidence was explained as follows in *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125, 227 USPQ 417, 422 (Fed. Cir. 1985):

"An evidentiary showing of secondary meaning, adequate to show that a mark has acquired distinctiveness indicating the origin of the goods, includes evidence of the trademark owner's method of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product."

In this case, applicant has not provided sufficient evidence to show that the advertisements has caused the purchasing public to identify the mark with the source of the product. The mere existence of advertising is insufficient. Applicant's advertising expenditures and advertising are merely indicative of its efforts to develop distinctiveness; not evidence that the mark has acquired distinctiveness. *See In re Pennzoil Prods. Co.*, 20 USPQ2d 1753, 1757-58 (TTAB 1991).

Without additional evidence showing how applicant is educating the public to associate the proposed mark with a single source, this evidence is not probative. TMEP §1212.06(b) (citing *In re Redken Labs., Inc.*, 170 USPQ 526, 529 (TTAB 1971) (holding Section 2(f) evidence insufficient to establish acquired distinctiveness notwithstanding long use of the mark and significant promotion and sponsorship expenses, where advertising and promotional material showed only descriptive usage of applied-for mark)); *see In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *25 (TTAB 2019) (holding Section 2(f) evidence including significant sales and advertising figures deficient in part because "[a]pplicant's consumer facing advertisements, like its ones to the trade, do little more than show the products, and they do not establish that consumers associate the features of the applied-for trade dress mark with [a]pplicant").

Third, applicant provided copies of product reviews, from its website, of a mere seven consumers. The first review is from an anonymous user. Applicant claims there are "around 23K reviews." (Applicant's Exhibit B in the May 8, 2022 Response.) Applicant included various URLs to support these

claims. Applicant's internet materials have not been properly made of record and are objected to. Although applicant has discussed the contents of webpages as evidence against the refusal, applicant provided only their web addresses and/or hyperlinks. This is insufficient to introduce the underlying webpages into the record. *See In re ADCO Indus. – Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020) (citing *In re Olin*, 124 USPQ2d 1327, 1331 n.15 (TTAB 2017); *In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012); TBMP §1208.03); TMEP §710.01(b).

To properly introduce internet evidence into the record, an applicant must provide (1) an image file or printout of the downloaded webpage, (2) the date the evidence was downloaded or accessed, and (3) the complete URL address of the webpage. *See In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018); TBMP §1208.03; TMEP §710.01(b). Accordingly, the underlying webpages associated with the web addresses and/or links will not be considered.

Product reviews cannot be considered to be consumer survey evidence. Applicant has not provided survey evidence of consumers to support applicant's claim that the applied-for mark has acquired distinctiveness under Trademark Act Section 2(f). *See* 15 U.S.C. §1052(f). An applicant may, in support of registrability, "submit . . . statements from the trade or public" to prove distinctiveness. 37 C.F.R. §2.41(a)(3); *see* TMEP §1212.06(d).

However, to be probative, survey results must show that consumers view the applied-for mark as indicating the source of the relevant goods. TMEP §1212.06(d) (citing *Nextel Commc'ns, Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1402-03 (TTAB 2009); *Boston Beer Co. v. Slesar Bros. Brewing Co.*, 9 F.3d 175, 183, 28 USPQ2d 1778, 1784 (1st Cir. 1993)). A survey must also be properly conducted to have probative value. *See Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1569-71 (TTAB 2009); *In re Wilcher Corp.*, 40 USPQ2d 1929, 1934 (TTAB 1996) (citing *Flowers Indus. Inc. v. Interstates Brands Corp.*, 5 USPQ2d 1580 (TTAB 1987)). Thus, in addition to relevance, "how [the] survey was conducted, the number of participants surveyed, and the geographic scope of the survey" are assessed when determining the probative weight of the survey. TMEP §1212.06(d).

In the present case, applicant's has not conducted a survey. Product reviews are unpersuasive due to the format and/or the method in which they are collected, and thus have little or no probative value on the issue of acquired distinctiveness. *See Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d at 1569-71; TMEP §1212.06(d); J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* §§32:158, 32:170 (rev. 4th ed. Supp. 2016).

Moreover, applicant contends that several customer reviews are sufficient; that it would not "burden the record by submitting, say, 1,000 pages of customer reviews." (Applicant's Brief page 21). However, applicant is seeking to prove acquired distinctiveness of the mark, which is a matter fact and evidence. An applicant bears the burden of proving that a mark has acquired distinctiveness under Trademark Act Section 2(f). *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1335, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015) (citing *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005)); TMEP §1212.01. "To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself." *In re Steelbuilding.com*, 415 F.3d at 1297, 75 USPQ2d at 1422.

The ultimate test in determining acquisition of distinctiveness under Section 2(f) is not applicant's efforts, but applicant's success in educating the public to associate the claimed mark with a single source. *In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1208 (TTAB 2016) (quoting *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016)); TMEP §1212.06(b).

Finally, applicant contends evidence comprised of a record of Google internet search results for the terms "KETO CHOW" is probative on the issues of acquired distinctiveness of the mark to consumers. (Applicant's Brief page 21-22). This is not persuasive. Search results summaries for "KETO CHOW" from an internet search engine have limited probative value because such results do not show the context in which the term or phrase is used on the listed web pages and may not include sufficient surrounding text to show the context within which the term or phrase is used. TBMP §1208.03; *see In re Bayer AG*, 488 F.3d 960, 967, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007); *In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013); TMEP §710.01(b).

SUMMARY

Because the applied for mark is highly descriptive of the goods, and applicant's evidence of acquired distinctiveness is insufficient, the applicant's claim of acquired distinctiveness is not accepted and the mark must be properly finally refused under Trademark Act Section 2(e)(1).

CONCLUSION

For the foregoing reasons, the refusal to register under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), and (2) under Trademark Act Section 2(f), 15 U.S.C. §1052(f), should be affirmed.

Respectfully submitted,

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USPTO OFFICIAL NOTICE

Examining attorney's appeal brief has issued
on March 3, 2024 for
U.S. Trademark Application Serial No. 97073305

A USPTO examining attorney has issued an appeal brief. Follow the steps below.

- (1) **[Read the appeal brief](#)**. This email is NOT the appeal brief.
- (2) **Submit reply brief within 20 days of March 3, 2024**, if you wish to do so. If submitted, a reply brief must be submitted using the [Electronic System for Trademark Trials and Appeals \(ESTTA\)](#) and received by the USPTO on or before 11:59 p.m. **Eastern Time** of the last day of the reply period.
- (3) **Direct questions** about the appeal proceeding to the Trademark Trial and Appeal Board at 571-272-8500 or TTABInfo@uspto.gov.