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

Ex parte appeal no.	97085503
Appellant	HP Ingredients Corp
Applied for mark	IQ200
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APPEAL BRIEF

Applicant: HP Ingredients Corp.

Serial No. 97/085503

Mark: IQ200

Filing Date Oct. 21, 2021

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INTRODUCTION

Dell® computers include Intel® microprocessors. The end product (the computer) thus includes the INTEL INSIDE® trademark. Similarly, a can of diet COKE® can include SPLENDA® sweetener (and use the SPLENDA trademark on its label) and a CADILLAC® car can include BOSE® speakers (and thus use the BOSE trademark to show this). In each of these examples, the end product can use a component's trademark.

This is common practice. Applicant's application as filed thus includes a specimen showing such use. Yet the Examiner rejects it. The Examiner, however, fails to provide us with any factual evidence nor legal authority to support rejection.

We first summarize Applicant's *prima facie* case for registration. We then review the instant rejection.

THE APPLICATION EVINCES *PRIMA FACIE* REGISTRABILITY

A trademark is any word or device "used by a person ... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." *See* 15 U.S.C. § 1127.

In the instant case, Applicant sells a standardized extract of *Polygonum minus* (a plant commonly known as "kesum"). Consumers use it as a dietary supplement. Applicant sells its *Polygonum minus* extract under its IQ200™ brand.

Applicant also requires distributors who include its *Polygonum minus* extract in their products to also use the IQ200™ trademark on their labeling.

The application as filed includes a specimen of use. That specimen is a copy of the bottle label for a retail dietary supplement in Class 005. That label says, in relevant part:

“IQ200™ *Polygonum minus* Extract (0.45% Quercetin-3-glucuronide, 10% Phenols) (aerial parts)”

The label thus uses both a descriptive name for the product (*Polygonum minus* extract) and Applicant’s trade name (IQ200™). The label thus shows use of the “IQ200” device to identify and distinguish Applicant’s goods, including its unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. The label thus shows use as a trademark. *See* 15 U.S.C. § 1127.

The Examiner correctly recognizes that the mark, a coined phrase, is not confusingly-similar to any prior mark, and does not implicate any of the classes of non-registerable matter enumerated in 15 U.S.C. § 1052. The application as filed therefore proves *prima facie* registerability.

**EXAMINER FAILS TO PROVE A
PRIMA FACIE CASE TO REJECT**

The application as filed proves *prima facie* registerability. The Examiner nonetheless rejects the specimen “for failure to function as a trademark.” *See* March 12, 2022 Office Action pg. 1. The Examiner, however, fails to provide any

factual evidence nor legal authority to support rejection. We discuss his factual evidence first, and then discuss his legal authorities.

The Examiner Provides No Evidence To Support The Rejection

Under the Administrative Procedure Act, an Examiner must support a rejection with a “substantial” amount of evidence. *See e.g., Shammass v. Rea*, 978 F.Supp.2d 599, 605 (E.D.Va. 2013). For evidence to be “substantial,” it must be “more than a mere scintilla.” *In re Pacer Technology*, 338 F.3d 1348, 1349 (Fed.Cir. 2003), quoting *Consol. Edison v. N.L.R.B.*, 305 U.S. 197, 229 (1938). Rather, the APA requires “such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.” *Id.*

In the instant case, to support rejection the Examiner provides us with no evidence at all.

The Examiner finds that Applicant’s IQ200 mark “appears on the back of the goods where the ingredients are listed, and it clearly identifies an active ingredient of the supplements.” *See* March 1, 2022 Office Action pg. 2. This is correct. Applicant’s mark “clearly identifies” Applicant’s goods. The Examiner concedes this. *Id.* This undisputed fact confirms that Applicant’s mark functions as a trademark. *See* 15 U.S.C. § 1127.

The Examiner finds that Applicant’s mark “appears on the back of the goods.” *See* March 1, 2022 Office Action pg. 2. This is correct. But irrelevant. Even with its placement on the back of the goods, the Examiner concedes, as he must, that the mark “clearly identifies” Applicant’s goods. *See* March 1, 2022 Office Action pg. 2.

This undisputed fact confirms that Applicant's mark functions as a trademark. *See* 15 U.S.C. § 1127.

The Examiner reasons, "Because IQ200 only appears on the back of the goods where the ingredients are listed, and it clearly identifies an active ingredient of the supplements, consumers would not perceive it as an indicator of source, but rather as just one of the ingredients." *See* March 1, 2022 Office Action pg. 2. Consumers would indeed perceive Applicant's mark to indicate the source of one of the ingredients, i.e., the source of Applicant's *Polygonum minus* extract. This fact is undisputed. And the Office has repeatedly found such use acceptable.

For example, the INTEL INSIDE® trademark is used on computers that contain Intel® microprocessors. *See* March 4, 2022 Response To Office Action pp. 7-12; *see also* March 23, 2022 Request for Reconsideration at Exhibits. Use of the mark to indicate the source of one of the components of the complete computer is important because the quality of the computer is determined in part by the quality of its microprocessor. The source of the microprocessor thus informs consumers of the quality of the computer.

The Office has thus repeatedly found this kind of use acceptable. *Id.* Applicant's application thus provides a specimen showing this kind of use.

In response, the Examiner says, "The Intel® example cited by applicant shows trademark use on a microprocessor." *See* March 12, 2022 Office Action pg. 2. The Examiner is incorrect. The evidence of record clearly shows use of the INTEL INSIDE® mark not on microprocessors, but on computers. The evidence of record

clearly shows use of the INTEL INSIDE® mark on computers, to show the source of a component of that computer. The Office has repeatedly accepted such use as supporting registration.

Alternatively, the Examiner suggests “Other, more prominent wording on the front of the label would be more likely to function as an indicator of source.” *See* March 12, 2022 Office Action pg. 2. The Examiner is here well-intentioned, yet he ignores the controlling legal standard. Registration does not require the best possible use, *i.e.*, use in the way that it the most likely to function as an indicator of source. Rather, registration avails for any use that “may” distinguish the goods. *See* 15 U.S.C. § 1052 (“No trademark by which the goods of the applicant **may** be distinguished from the goods of others shall be refused registration”) (emphasis mine); *see also Yamaha Intern. Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 1576 (Fed.Cir. 1988) (“an applicant need not conclusively establish distinctiveness but need only establish a *prima facie* case”). Applicant appreciates the Examiner’s suggestion to reformat the label. That suggestion is helpful. But it fails as a matter of law to constitute valid grounds to reject registration.

The Examiner correctly finds that IQ200 “clearly identifies” Applicant’s goods. *See* March 1, 2022 Office Action pg. 2. The Examiner also correctly finds that consumers would correctly perceive Applicant’s mark as an indicator of source of Applicant’s goods. *Id.* These undisputed facts confirm that Applicant’s mark functions as a trademark. *See* 15 U.S.C. § 1127.

Under the Administrative Procedure Act, an Examiner must support a rejection with a “substantial” amount of evidence. *See e.g., Shammass v. Rea*, 978 F.Supp.2d 599, 605 (E.D.Va. 2013). The Examiner here fails to offer any evidence showing that consumers would not recognize Applicant’s mark as a designation of the source of Applicant’s *Polygonum minus* extract.

**The Examiner’s Own Factual Findings
Show That His Legal Authorities Do
Not Support Rejection**

The Examiner fails to offer us any evidence to support rejection. He likewise fails to offer any legal authority to support rejection. The Examiner cites to half a dozen cases and TMEP § 1202. *The Examiner’s own findings*, however, show why none of these legal authorities supports rejection here.

For example, the Examiner cites *In re Keep A Breast Found.*, 123 USPQ2d 1869, 1879 (TTAB 2017). In *Keep A Breast*, the specimens of use (individualized plaster casts of mastectomy patients) “fail to associate the proposed mark with any of the recited services, thus making it unlikely that the relevant consumers will perceive the casts as indicating source.” *See slip op.* at 18. In contrast, in the instant case, the Examiner expressly concedes - as he must - that IQ200 “appears on the goods and “clearly identifies” Applicant’s goods. *See* March 1, 2022 Office Action pg. 2. Thus, unlike in *Keep A Breast*, Applicant uses its trademark in association with its goods and its mark “clearly identifies” (Examiner’s words) Applicant’s goods. The Examiner’s own factual findings show that *Keep A Breast* is distinguishable.

Alternatively, the Examiner cites *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213 (C.C.P.A. 1976). In *Bose*, the applicant sought to register its mark for loudspeakers, yet its specimen showed use on computers. The Court thus held that the specimens show use as a trademark, albeit unfortunately not on the Goods described in the application. In contrast, in the instant case the Goods are

“Dietary supplements; Dietary supplements for human consumption; Dietary and nutritional supplements; Dietary food supplements; Natural dietary supplements; Nutraceuticals for use as a dietary supplement.”

The specimen shows use on such goods. *See* Oct. 21, 2021 Application pp. 10, 15. The Examiner does not dispute this. This undisputed fact confirms that *Bose* is distinguishable.

Alternatively, the Examiner cites *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). In *Volvo Cars*, the Board held that “DRIVE SAFELY” is not a trademark for cars because the phrase would be perceived merely as an “everyday, commonplace safety admonition.” In contrast, in the instant case the Examiner correctly recognizes that Applicant’s mark (IQ200) is a coined phrase, that has no everyday, commonplace meaning, and indeed has no meaning at all save designating Applicant’s goods. That undisputed fact confirms that *Volvo Cars* is distinguishable.

Alternatively, the Examiner cites *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1404 (TTAB 2018). In *Peace Love*, the Board held that the phrase I LOVE YOU, when used on bracelets, would be perceived merely as a decorative feature. In contrast, in the instant case the Examiner expressly concedes that

IQ200 is not decorative, but rather “clearly identifies” (Examiner’s words) Applicant’s goods. That undisputed fact confirms that *Peace Love* is distinguishable.

Alternatively, the Examiner cites *In re Manco, Inc.*, 24 USPQ2d 1938, 1941 (TTAB 1992). In *Manco*, the Board held that THINK GREEN would be perceived as an informational slogan promoting environmental awareness, rather than a designation of source. In contrast, in the instant case the Examiner correctly recognizes that IQ200 would not be perceived as an informational slogan and indeed has no meaning at all apart from clearly identifying Applicant’s goods. That undisputed fact confirms that *Manco* is distinguishable.

Alternatively, the Examiner cites TMEP §1202. TMEP § 1202 includes nineteen (19) subsections that enumerate the nineteen (19) ways that a word or device might be used in a non-trademark fashion. The Examiner, however, fails to hint at which of those nineteen subsections might be relevant here. He does not because he cannot: none of the nineteen subsections of § 1202 is relevant here.

PRAYER FOR RELIEF

Left unremedied, the rejection produces a dangerous situation. It could allow an unscrupulous third party to sell inferior or toxic “IQ200” branded dietary supplements not merely to deceive consumers, but to intentionally damage Applicant’s reputation for high quality. Applicant respectfully asks the Board to reverse because the rejection lacks supporting evidence or legal authority.

Respectfully submitted on behalf of Applicant by its Attorneys,

PHARMACEUTICAL PATENT ATTORNEYS, LLC

/j. mark pohl/

J. Mark Pohl, Member of the NJ bar

30 March 2022