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

Proceeding	87519612
Applicant	CORPORATE GREEN, LLC
Applied for Mark	BIG BARK
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Date	03/28/2019

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

IN RE APPLICATION OF:	CORPORATE GREEN, LLC		
MARK:	BIG BARK		
APPLICATION NO.:	87/519,612		
FILING DATE:	July 7, 2017	**EXAMINING ATTORNEY:**	Mark Sparacino
ATTORNEY DOCKET NO.:	12370.003		

BOX RESPONSES
NO FEE
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Applicant's Reply Brief

Dear Madam:

This is in reply to the Examining Attorney's Appeal Brief, dated March 11, 2019. This Brief is believed to be timely filed. However, if any extension is required, please consider this a petition for the same. The fee for an ex parte appeal was paid on October 29, 2018. No additional fee is believed to be required with this reply; however, if any is due, the Commissioner is hereby authorized and requested to charge the same to deposit account number 18-2210.

I. Applicant's Evidence is Sufficient to Both Rebut the Examiner's *Prima Facie* Showing of Descriptiveness and Establish that BIG BARK Has a Well Recognized Meaning

Applicant produced evidence showing that the phrase BIG BARK has been used to refer to the loud vocalization of a dog from at least 1894 to 2017. The phrase has been used in the English language in the manner asserted by the Applicant for at least 120 years, and is commonly used in this manner today in literature and advertising.

The examiner contends that all of the uses of BIG BARK submitted by the Applicant were in the context of dogs. This does not undermine Applicant's position. The phrase means the loud vocalization of a dog. There is a canine connection. Applicant's argument is that the mark evokes a *well-known* canine connotation, and that such a connotation is not descriptive of Applicant's goods. Applicant's evidence shows widespread use of the phrase in its canine sense, from over a century of literature to advertisements for services as diverse as graphics, charitable fund raising, and photography. The *loud vocalization of a dog* sense of BIG BARK is widely known and understood.

The examiner claims that an internet search of phrases such as *barking up the wrong tree*, *every dog has its day*, *can't teach an old dog new tricks* and *his bark is worse than his bite* "would result in a great deal of evidence" outside of the context of dogs.

None of these searches are in the record. In addition to simply being improper citation to evidence outside the record, the argument illustrates the examiner's misunderstanding of the issue at hand, something demonstrated repeatedly throughout the brief. The question is not whether there are other idioms more well-known than BIG BARK. There undoubtedly are. But, a phrase doesn't have to be hackneyed into a cliché to be sufficiently well-known for consumers to get its non-descriptive, double meaning. The non-descriptive sense of BIG BARK is well-known. In fact, it is the primary sense of the phrase. There is no evidence in the record of the phrase being used in any other way.[1]

The examiner argues that if BIG BARK were "a common phrase for a loud canine vocalization, then one would expect evidence of 'big bark' used as a double entendre in

[1] BIG BARK is occasionally used to refer to a large type of ship – a barque, where *bark* is a spelling variation of *barque*. This is a rare use of the phrase in a sense other than the canine one. Examples of the phrase being used in the descriptive sense of a large outer layer of a tree are virtually non-existent. None are in the record.

connection with tree bark. If indeed 'big bark' is a term widely recognized by the public since at least 1894 . . . it is unlikely that applicant would be the first to express this double entendre."

The examiner cites no authority for the proposition that originality precludes a composite mark from being unitary. Following the examiner's logic, the first entity to come up with the idea of calling a beauty salon CROSS HAIRS would have to disclaim HAIRS because it was first despite the well-known, non-descriptive meaning of CROSS HAIRS. This makes no sense whatsoever. It appears to be a condition the examiner made up out of whole cloth. He certainly cites no authority for it.

Second, this is the first time the examiner has raised these objections to Applicant's evidence. The examiner ignored Applicant's literary evidence completely until his appellate brief. The examiner issued a Final Rejection and a Reconsideration Letter, neither of which mention the Applicant's literary evidence of how BIG BARK is used.

Raising this issue at this late date is especially troubling. Had the Applicant been aware the examiner considered evidence that the phrase has been in use in English literature for 120 years insufficient to establish that BIG BARK has a well-known meaning, a Google Books™ search could have been conducted which, to use the examiner's words, "would result in a great deal of evidence" of the many, many authors who have used this phrase to mean a loud vocalization of a canine. This is not in the record because the examiner simply ignored the Applicant's literary evidence until he submitted his Appellate brief. First objecting to the volume of evidence submitted after the record is closed is not exactly even handed.

Finally, the insistence that the phrase BIG BARK be used outside the canine context in order to be unitary evidences another misunderstanding of what it means for a mark to be unitary. The question is whether the non-descriptive meaning of the phrase is sufficiently well-

known that the non-descriptive meaning will naturally occur to consumers when they encounter the mark. In the seminal case, *In re Colonial Stores*, 394 F.2d 549, 552-53 (CCPA 1968), SUGAR & SPICE was held to evoke a well-known nursery rhyme (Little girls are made of sugar & spice and everything nice . . .). That nursery rhyme was not descriptive of the applicant's bakery goods. There was no showing that SUGAR & SPICE had a meaning – other than the descriptive one – beyond the nursery rhyme or that the nursery rhyme meaning was used as an analogy in the bakery context. The non-descriptive, nursery rhyme sense of the phrase was well-known. That was enough to establish that the phrase was likely to evoke the non-descriptive meaning to consumers.

Similarly, in *In re Delaware Punch Co.*, 186 U.S.P.Q. 63 (T.T.A.B. 1975) THE SOFT PUNCH was found to have a double entendre because SOFT PUNCH evoked a "non-alcoholic beverage" meaning (descriptive) and a "soft or pleasing hit" meaning (non-descriptive). *Id.* There was no requirement of any showing that the non-descriptive meaning had ever been used outside of the physical contact context or in the soft drink context.

In re Priefert Mfg. Co., Inc., 222 USPQ 731 (TTAB 1984) provides another example. The mark, HAY DOLLY, for a device for transporting hay evoked the greeting HEY, DOLLY as in *hello, Dolly*. As with Applicant's mark here, the non-descriptive meaning of the mark was wholly arbitrary with respect to the goods. There was no evidence that anyone had ever used the greeting meaning of HAY DOLLY in the context of hay. Because HAY DOLLY and HEY, DOLLY were phonetic equivalents and the latter, greeting meaning was non-descriptive of the applicant's goods, there was sufficient doubt about descriptiveness to allow the mark to be advanced to publication. The Board resolved doubt with respect to whether a mark was unitary in favor of publication of the mark. *Id.* Here, instead of resolving doubt in favor of publication, the

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