

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

VV/jk

Mailed: August 24, 2016

Opposition No. 91213235

*Hershey Chocolate & Confectionery
Corporation, The Hershey Company*

v.

Mars, Incorporated

By the Trademark Trial and Appeal Board:

On July 26, 2016, Applicant filed a proposed amendment to application Serial No. 85441471, with Opposers' consent, and Opposers' withdrawal without prejudice of the opposition, contingent upon entry of the amendment.

The application currently includes the following required description of the mark statement, and color claim statement:

The mark consists of a cross-section of a candy bar showing layers within the candy, namely, a middle light brown layer containing several tan-colored peanut shapes and a bottom tan layer, all surrounded by a brown layer.

The color(s) brown and tan is/are claimed as a feature of the mark.

By the proposed amendment Applicant seeks to amend the "mark description and disclaimer statement"¹ in the involved application to:

¹ 35 TTABVUE 2.

The mark consists of a cross-section of a candy bar showing layers within the candy, namely, a middle light brown layer containing several tan-colored peanut shapes and a bottom tan layer, all surrounded by a brown layer. The mark depicts a distinctive two-dimensional cross-sectional view of a candy bar. No claim is made to the selection of candy bar ingredients depicted in the mark or to the configuration of a candy bar containing those ingredients, except as depicted in the applied-for mark.

Applicant may not include the disclaimer statement as part of the description of the mark statement; the two statements must remain separate, and are printed as separate statements on the registration certificate. TMEP § 1213.08.

Accordingly, the Board construes the amendment as one which seeks to:

- 1) amend the description of the mark statement to:

The mark consists of a cross-section of a candy bar showing layers within the candy, namely, a middle light brown layer containing several tan-colored peanut shapes and a bottom tan layer, all surrounded by a brown layer. The mark depicts a distinctive two-dimensional cross-sectional view of a candy bar

- 2) add the following disclaimer statement:

No claim is made to the selection of candy bar ingredients depicted in the mark or to the configuration of a candy bar containing those ingredients, except as depicted in the applied-for mark.

With respect to the color claim statement, this is also a separate statement that is printed separately on the registration certificate. TMEP §§ 807.07(a) (“Requirements for Color Drawings”) and 807.07(a)(ii) (“Applicant Must Specify the Location of the Colors Claimed”). Accordingly, Applicant cannot include the color claim statement as part of the description of the mark statement, and the current color claim statement remains separate and unchanged:

The color(s) brown and tan is/are claimed as a feature of the mark.

The amendment to the description of the mark statement, and the amendment to add the disclaimer statement, as construed by the Board, are approved and entered.

The contingency in Opposer's withdrawal having now been met, the opposition is dismissed without prejudice.