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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aero Design and Manufacturing Company, Inc.

Serial No. 78188620

Martha M. Markusen of Fryberger, Buchanan, Smith &
Frederick for Aero Design and Manufacturing Company, Inc.

Cynthia Sloan, Trademark Examining Attorney, Law Office 116
(Meryl Hershkowitz, Managing Attorney).

Before Simms, Hanak and Chapman, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Aero Design and Manufacturing Company, Inc.
(applicant) seeks to register in typed drawing form
AUTHENTIKRUD for "mail order catalog services featuring
clothing and accessories for motorcycle riders." The
application was filed on November 25, 2002 with a claimed
first use date of May 2002.

The Examining Attorney refused registration "because
the specimens [original and substitute] do not show use of
the mark for the services identified in the application."

(Examining Attorney's brief page 1). When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

Applicant's original specimen is a page from its mail order catalog. Applicant's substitute specimen is a printout from its website. Both specimens feature a bottle bearing the mark AUTHENTIKRUD. The mail order catalog features the AUTHENTIKRUD bottle along with five of applicant's other products. The website features the AUTHENTIKRUD bottle by itself. Next to the bottle bearing the mark AUTHENTIKRUD there appears again the mark AUTHENTIKRUD above text which reads, in part, as follows: "A stained stitch is a badge of honor. Your personal 3-D signpost of rides, experiences, and events past. A piece of gear that says seasoned, serious rider. Like stonewashed jeans. Each Aero Authentikrud stain kit is scientifically formulated to put legitimate looking stains, dirt and assorted other 'road wear' on your suit. Say goodbye to the embarrassing newby look ..." Thereafter there appears the order code (RTWD) and the price (\$10.00).

Obviously, it is clear that as used in both applicant's mail order catalog and on applicant's website, the mark AUTHENTIKRUD functions as a trademark to identify

a product that is called a "stain kit." As so used, the mark AUTHENTIKRUD functions as a trademark, and not as a service mark.

However, at page 4 of its brief, applicant argues that AUTHENTIKRUD functions as a service mark for its mail order catalog services in the following manner: "Applicant freely admits that it does not sell a stain kit or any other product under the designation AUTHENTIKRUD. It simply uses AUTHENTIKRUD in jest to promote its catalog services. The service mark and corresponding copy in the catalog and on applicant's website are written to amuse the reader, the potential purchasers of applicant's high-end motorcycle clothing. As applicant has previously argued, use of jokes and items offered in jest are part of applicant's promotional style."

During the course of the application process, applicant submitted the affidavit of Kim Brody, its General Manager. In paragraph 2 of her affidavit, Ms. Brody stated as follows: "Applicant frequently uses an irreverent style in marketing its goods and services. As part of this style, on occasion its catalog and website offer certain products in jest. For example, the trademark AUTHENTIKRUD is used adjacent to a drawing of three bottles and language referring to a stain kit formulated to put legitimate

looking stains, dirt and other associated 'road wear' on your suit. No product is sold under the AUTHENTIKRUD trademark, but the mark is used as part of the way applicant markets its goods and services." (emphasis added).

We have two problems with applicant's position. First, applicant has offered no direct proof that its customers would perceive its AUTHENTIKRUD stain kit as a non-existent, "joke" product. In paragraph 3 of her affidavit, Ms. Brody merely states that our "customers are amused by our use of AUTHENTIKRUD and have told us they find it creative and funny." Applicant presented no affidavits from customers.

As noted, in applicant's mail order catalog applicant's AUTHENTIKRUD stain kit is offered on the same page with five of applicant's other, presumably "legitimate" products. Moreover, like applicant's "legitimate" products, applicant's AUTHENTIKRUD stain kit has an order code and a price. Thus, consumers could easily perceive AUTHENTIKRUD stain kit to be a legitimate product, and thus perceive AUTHENTIKRUD to be a trademark. Indeed, in paragraph 2 of her affidavit, Ms. Brody even notes that AUTHENTIKRUD is a trademark that is used to

promote applicant's goods, as well as purportedly applicant's services.

Second, even if we assume purely for the sake of argument that consumers would understand that applicant's AUTHENTIKRUD stain kit is a "joke" product, this does not mean that they would understand that AUTHENTIKRUD functions as a service mark for applicant's "mail order catalog services featuring clothing and accessories for motorcycle riders." In order to obtain a service mark registration, applicant must not only "be a provider of services," but in addition "applicant also must have used the mark to identify the named services for which registration is sought." In re Advertising & Marketing, 821 F.2d 614, 2 USPQ2d 2010, 2014 (Fed. Cir. 1987). Applicant has failed to demonstrate how customers would perceive AUTHENTIKRUD as identifying "mail order catalog services featuring clothing and accessories for motorcycle riders." Accordingly, while applicant's "joke" AUTHENTIKRUD stain kit product may "amuse" applicant's customers, this does not mean that AUTHENTIKRUD functions as a service mark identifying applicant's mail order catalog services featuring clothing and accessories for motorcycle riders.

Decision: The refusal to register is affirmed.