This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Acquachar, LLC

Serial No. 88539430

Jennie S. Malloy of Malloy & Malloy, P.L.,
for Acquachar, LLC.

Kim Teresa Moninghoff, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

Before Zervas, Bergsman and Lykos,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Acquachar, LLC ("Applicant") seeks registration on the Principal Register of the mark

for "water filtration products, namely, carbon-based filtration media for use in water treatment, aquariums, and other devices, and systems" in International Class 1.[1]

The Examining Attorney has determined that the term AQUACHAR in the mark is merely descriptive of a characteristic of Applicant's water filtration products, and must be disclaimed as "AQUA CHAR." *See* Trademark Act §§ 2(e)(1) and 6(a), 15 U.S.C. §§ 1052(e)(1) and 1056(a).

After the Trademark Examining Attorney issued a final requirement for a disclaimer, Applicant filed an appeal along with a request for reconsideration. The Examining Attorney was not persuaded and denied the request for reconsideration. The Board then resumed the appeal and set the time for filing briefs. Both Applicant and the Examining Attorney filed briefs. We reverse the disclaimer requirement.

I. Evidentiary Issue

In response to the first Office Action, Applicant submitted a list of registrations and applications for marks including the term CHAR, with no disclaimer of that term. The following Office Action states:

> As a preliminary matter, the applicant references a number of third-party registered marks (and three marks in pending applications), but has not made any of these registrations or applications of record. The mere submission of a list of registrations does not make such registrations and applications part of the record.

[1] Application Serial No. 88539430 was filed on July 26, 2019. Applicant alleges first use anywhere on March 26, 2019 and first use in commerce on March 31, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The mark is described in the application as "consist[ing] of the stylized lettering of the words 'AquaChar MAKING MIRACULOUSLY CLEAN WATER' with a line appearing … between the word 'AquaChar' and the words 'MAKING MIRACULOUSLY CLEAN WATER'. A design of four water drops overlapping each other appears above the word 'AquaChar.'" Color is not claimed as a feature of the mark.

> To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO's automated systems, prior to appeal. However, the Examining Attorney waives any objection and has made these registrations of record by attachment to this Office action. (citations omitted).[2]

Because the Examining Attorney introduced all of the registrations and applications identified by Applicant in its list,[3] all of the information submitted in Applicant's list is of record.

II. Applicable Law

Absent a showing of acquired distinctiveness, merely descriptive terms are unregistrable, under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), and, therefore, are subject to disclaimer if the mark is otherwise registrable. An Examining Attorney may therefore require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a), 15 U.S.C. § 1056(a). Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) ("FirsTier" for banking services is merely descriptive and unregistrable without a disclaimer of the exclusive right to use the term "First Tier"); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46 (CCPA 1975) ("it follows that if the words SOLID

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[2] May 6, 2020 Office Action, TSDR 1.

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal are to the Board's TTABVUE docket system.

[3] *Id.*, TSDR 3-99.

STATE [in the mark RICO SOLID STATE], which it appears appellant has declined to disclaim, are descriptive of appellant's goods within the prohibition of section 2(e)(1), then the Commissioner did not err in conditionally refusing registration."); *In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007) (ZOGGS TOGGS for clothing is unregistrable without a disclaimer of the exclusive right to use the word "Toggs").

Thus, a term must be disclaimed apart from the mark as shown if it is deemed to be merely descriptive of the subject goods or services. "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978).

Evidence that a term is merely descriptive to the relevant purchasing public may be obtained from any competent source, *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001), such as dictionaries, newspapers, or surveys. *In re Bayer*, 82 USPQ2d at 1831. It also may be obtained from websites and publications. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017). In short, "the [US]PTO has satisfied its evidentiary burden if ... it produces evidence including dictionary definitions that the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound." *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111-12 (Fed. Cir. 1987).

III. Examining Attorney's Evidence

The Examining Attorney submitted the following definitions:

> • Definitions of "aqua" from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2019) as "water"; "an aqueous solution"; and "a light bluish green to light greenish blue."[4]
>
> • Definition of "char" from MERRIAM-WEBSTER DICTIONARY as "to convert to charcoal or carbon usually by heat: BURN" and "a charred substance: CHARCOAL *specifically*: a combustible residue remaining after the destructive distillation of coal."[5]

In addition, the Examining Attorney submitted webpages from:

> • pets.thenest.com – "Filtration is one of the most important components of a successful aquarium. Many filters include charcoal to help remove unpleasant odors and colors in the tank. … The type of charcoal used to filter aquarium water is called activated carbon. … Along with being used in the fish tank, activated carbon is commonly used to purify drinking water and remove bad smells from the air."[6]
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> • animals.mom.me – "Homemade Aquarium charcoal Bags" stating "Aquarium charcoal, also called activated carbon, provides a means of chemical filtration for fish tanks."[7]
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> • www.hunker.com – "How to Make an Activated Charcoal Water Filter".[8]

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[4] October 23, 2019 Office Action, TSDR 2.

[5] *Id.*, TSDR 3.

[6] *Id.*, TSDR 4-5.

[7] *Id.*, TSDR 6-7.

[8] *Id.*, TSDR 11.

• aquasana.com

> Good for removal of chlorine, chloroform, agricultural chemicals, organic substances, sediment, and magnesium. … This is the basis of activated charcoal or activated carbon.
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> Activated charcoal is created when organic material with high carbon content (like wood, coal, or coconut shells) is heated in such a way that it does not burn, but instead results in char. The char is then treated to create a porous material that binds to certain toxins and impurities, thus pulling them out of the water flowing through the system."[9]

• amazon.in – "Aqua Char (Aquarium Charcoal) with Free Media/Filter Bag 450 gm".[10]

• oxbowactivatedcarbon.com

> Activated carbon is a unique, highly porous material that attracts and binds a staggering array of chemical compounds. It is made from organic matter, such as wood, peat or coal, that contains a high concentration of carbon. The material is heated slowly to dry it without burning, creating a product known as char. The char is then activated through a series of chemical and physical processes that increase its surface area and create a network of submicroscopic pores. Activated carbon works through a process known as physical adsorption. Carbon's surface molecules seek out other molecules to which they can bond. The targeted material creates a sort of film along the porous surface area of the activated carbon. It can bind with not only solids and liquids, but also some gases.[11]

• aquachar.com (Applicant's webpage)

> "Carbon has long relationship with purifying water. Almost all of the activated carbon used in aquariums

[9] *Id.*, TSDR 24.

[10] *Id.*, TSDR 14.

[11] *Id.*, TSDR 12.

> (and water purification in general) starts with a base of lignite or bituminous carbon"; and "What makes AquaChar unique is our process burns wood to several thousand degrees higher than the ash point allowing for no post-production processing or use caustic chemicals. As the carbon molecules structures inside AquaChar it forces out impurities which are used as fuel to increase temperature. This leaves behind the lightweight carbon skeleton while keeping the … natural porosity trees use to bring water to their leaves."[12]

Also in the evidentiary record are third-party registrations and applications,[13] including the following Principal Register registrations with disclaimers of AQUA, BIOCHAR or CHAR:

> Registration No. 0833162 for AQUA NUCHAR for "activated carbon."[14]
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> Registration No. 2082422 for AQUA PLUS for "chemicals, namely, agents for treating water in aquariums."[15]
>
> Registration No. 5628697 for AQUA CAIMAN for "Water filtering apparatus." [16]
>
> Registration No. 5464177 for AQUA ADVANCED and design for "Organic chemicals for the treatment of water; organic chemicals for use in the purification of water."[17]
>
> Registration No. 5918743 for PRO + AQUA and design for "water conditioning, filtering and treating apparatus for household use, namely, water softening apparatus, and parts thereof; filters for removing sediment, iron, sulfur,

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[12] *Id.*, TSDR 16-17.

[13] "Applications are evidence of nothing more than that they were filed." *In re Binion*, 93 USPQ2d 1531, 1535 n.3 (TTAB 2009). We do not further consider these applications.

[14] May 6, 2020 Office Action, TSDR 3.

[15] *Id.*, TSDR 8.

[16] *Id.*, TSDR 55-56.

[17] *Id.*, TSDR 57-59.

tastes and odors from water for household use, and for clarification of water supplies, and parts thereof."[18]

Registration No. 5419406 for BOOST BIOCHAR for, inter alia, "filter media comprised of biochar, namely, biochar in the nature of filtering materials in water filtering; filters containing biochar, namely, biochar in the nature of filtering materials in water filtering; materials for water and waste recycling, namely, chemicals for the treatment of water and wastewater; filter media comprised of biochar, namely, biochar in the nature of filtering materials in filtering heavy metals from water; all of the foregoing include biochar as the main ingredient."[19]

Registration No. 5488338 for QFE CHAR for, inter alia, "Bio char, namely, charcoal for use as a soil conditioner," in Class 1.[20]

Registration No. 5507233 for BIOCHAR NOW, for, inter alia, "filter media comprised of biochar, namely, biochar in the nature of filtering materials in water filtering; filters containing biochar, namely, biochar in the nature of filtering materials in water filtering; materials for water and waste recycling, namely, chemicals for the treatment of water and wastewater in the nature of biochar; filter media comprised of biochar, namely, biochar in the nature of filtering materials in filtering heavy metals from water; biochar, namely, concrete additives and asphalt additives, all of the foregoing include biochar as the main ingredient."[21]

Registration No. 5708205 for NAKED CHAR for "Agriculture, horticultural and forestry products, namely, soil conditioners and soil amendments for landscapes, golf courses, farming, and gardening; soil conditioners and soil amendments for agriculture, domestic and horticultural use for landscapes, golf courses, farming, and gardening; all-natural, organic soil enhancement preparations; biochar soil enhancers, namely, organic soil enhancement

[18] *Id.*, TSDR 91-93.

[19] *Id.*, TSDR 48-50.

[20] *Id.*, TSDR 71-72.

[21] *Id.*, TSDR 60-62.

> preparations; biochar soil conditioners for agricultural, domestic, and horticultural use; biochar soil amendments for agricultural, domestic, and horticultural use."[22]

IV. Applicant's Evidence

Applicant submitted the following:

- application and registration records for a number of marks containing CHAR or AQUA as a component of the marks, all for goods and services unrelated to Applicant's identified goods, such as restaurant services, coffee, spices and barbecue grills; [23]

- evidence from various dictionaries to show that there is no entry for AQUACHAR,[24] to show that "aqua" is a color and to demonstrate that "char" is a type of fish;[25]

- one page of search results for "aquachar" from the Google search engine;

- an entry for a webpage entitled "Think Baby Names";[26]

- the list of registrations discussed above in the section of this opinion entitled "Evidentiary Issue" including the following Principal Register registrations which do not contain disclaimers:[27]

> Reg. No. 5307092 for TRUECHAR for charcoal for use as a soil conditioner;
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> Reg. No. 4936433 for SUPERCHAR for charcoal for horticultural purposes, namely, a blend of biochar and worm castings and humate from humic acid;
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> Reg. No. 5038822 for JUNGLE-CHAR for fertilizers soil amendments bio-char, namely, charcoal for use as a soil conditioner;

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[22] *Id.*, TSDR 68-70.

[23] November 6, 2020 Request for Reconsideration, TSDR 48-175.

[24] *Id.*, TSDR 12-41.

[25] *Id.*, TSDR 42-43.

[26] *Id.*, TSDR 44-47.

[27] April 23, 2020 Office Action Response, TSDR 9-11.

Reg. No. 5504336 for MAXCAPCHAR for specially prepared charcoal used to clean large bodies of water for removing toxins, heavy metals, nutrients, algae, and salts;

Reg. No. 4882569 for ALL BIOCHARS ARE NOT CREATED EQUAL for bio-grade engine and heavy oils and related petroleum based products, namely, fuel oil, diesel fuel, heating oil, motor oil, lubricating oil and charcoal;

Reg. No. 5843622 for CHARBLOX for Machine-made charcoal briquettes;

Reg. No. 2654314 for EZ CHAR for activated charcoal used to absorb poisons from the body;

Reg. No. 1137171 for CHARKING for charcoal briquettes;

Reg. No. 5218147 for CHARLOC for material for thermal insulation and fire protection, namely, fire-resistant carbon fiber mesh;

Reg. No. 6008848 for CHAR-PIT for Grill accessories, namely, charcoal grill conversion units for converting charcoal grills to electric smokers grill accessories;

Reg. No. 3873614 for CHARKING & Design for fireplace logs and lighter fluid charcoal briquets;

Reg. No. 3990349 for CHARLESS for barbecue grills charcoal grills;

Reg. No. 4893444 for CHARCO FLARE for smokers' articles, namely, hookah charcoal;

Reg. No. 5251330 for CHAR-GRILLER for charcoal briquettes fuel pellets lighter fluid combustible briquettes hardwood charcoal for smoking and grilling food lump charcoal;

Reg. No. 5022572 for ECONOCHAR for charcoal stoves; and

Reg. No. 4247386 for CHARCOBLAZE & Design for smokers' articles, namely, hookah charcoal.

With the exception of Registration Nos. 1137171 (CHARKING) and 3873614 (CHARKING and Design), the foregoing registrations are owned by different entities.

Applicant also provided a list of applications. We do not further consider these applications because, as noted above, "[a]pplications are evidence of nothing more than that they were filed." *In re Binion*, 93 USPQ2d at 1535 n.3.

V. Analysis

The larger sized letter "C" in AQUACHAR and the entries for "aqua" and "char" in the MERRIAM WEBSTER DICTIONARY persuades us that AQUACHAR in Applicant's mark is a combination of two individual components, AQUA and CHAR, and that consumers will perceive them as such.

Turning first to the term AQUA in Applicant's mark, we find that consumers – who include members of the general public requiring water treatment such as in aquariums – will read the inverted letter "V" as a stylized version of the letter "A" because it is readily apparent that the first term is the term AQUA.[28] Once reading that term as AQUA, they will immediately perceive its meaning as "water" because (i) the dictionary definition of "aqua" is clear and unequivocal; (ii) Applicant's mark incudes the tag line MAKING MIRACULOUSLY CLEAN WATER, referring to water, directly under the term AQUA; and (iii) the goods on which the mark is used concerns water filtration. We note too that the mark includes a depiction of interlinked drops, which Applicant describes as water drops, directly above the term AQUA.

[28] Reply brief, 11 TTABVUE 6-7.

Applicant argues that AQUA connotes a color. The determination of whether a mark is merely descriptive is made in relation to an applicant's identified goods, not in the abstract. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). Also, we "determine whether the mark as a whole is merely descriptive." *DuoProSS*, 103 USPQ2d at 1758. Thus, in the context of water treatment in "devices" and "systems" such as aquariums, and considering the other elements of Applicant's mark mentioning or suggesting water, we find it implausible that "AQUA" will be perceived as a color. Applicant's identification of goods specifically mentions that its carbon-based filtration media is for use in water treatment.

Turning next to the term CHAR in Applicant's mark, we find that three definitions have relevance in the context of water filtration.

First, "char" is defined in MERRIAM-WEBSTER DICTIONARY as "charcoal."[29] Two websites discuss charcoal in the context of water filtration systems in aquariums, but label the actual substance which filters water as "activated charcoal" or "activated carbon":

> • pets.thenest.com – "Filtration is one of the most important components of a successful aquarium. Many filters include charcoal to help remove unpleasant odors and colors in the tank. … The type of charcoal used to filter aquarium water is called activated carbon. … Along with being used in the fish tank, activated carbon is commonly

[29] October 23, 2019 Office Action, TSDR 3.

> used to purify drinking water and remove bad smells from the air."[30]
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> • animals.mom.me – "Homemade Aquarium charcoal Bags" stating "Aquarium charcoal, also called activated carbon, provides a means of chemical filtration for fish tanks."[31]

As explained in the ENCYCLOPEDIA BRITANNICA, there is a difference between "charcoal" and "activated charcoal":[32]

> Charcoal, impure form of graphitic carbon, obtained as a residue when carbonaceous material is partially burned, or heated with limited access of air. … The use of special manufacturing techniques results in highly porous charcoals that have surface areas of 300–2,000 square metres per gram. These so-called active, or activated, charcoals are widely used to adsorb odorous or coloured substances from gases or liquids, as in the purification of drinking water, sugar, and many other products, in the recovery of solvents and other volatile materials, and in gas masks for the removal of toxic compounds from the air.

We therefore find that "charcoal" as a single term meaning "impure form of graphitic carbon, obtained as a residue when carbonaceous material is partially burned, or heated with limited access of air" is not a term which would immediately come to mind when considering Applicant's goods which make use of activated charcoal, also known as activated carbon. Applicant itself does not refer to "char" in its advertising; rather Applicant refers to "Activated Charcoal," or "activated

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[30] *Id*. TSDR 4.

[31] *Id*. TSDR 6.

[32] From https://www.britannica.com/science/charcoal (accessed on July 1, 2021). The Board may take judicial notice of standard reference works. *In re Broyhill Furniture Indus. Inc.*, 60 USPQ2d 1511, 1514 n.4 (TTAB 2001) (taking judicial notice of dictionary entries and other standard reference works). We take judicial notice of this entry.

carbon."[33] A vague suggestion of a feature or characteristic of Applicant's goods is insufficient to establish mere descriptiveness. See *In re George Weston Ltd.*, 228 USPQ 57 (TTAB 1985) (SPEEDI BAKE for frozen dough found to fall within the category of suggestive marks because it only vaguely suggests a desirable characteristic of frozen dough, namely, that it quickly and easily may be baked into bread); *In re Pennwalt Corp.*, 173 USPQ 317 (TTAB 1972) (DRI-FOOT held suggestive of anti-perspirant deodorant for feet in part because, in the singular, it is not the usual or normal manner in which the purpose of an anti-perspirant and deodorant for the feet would be described)..

Second, MERRIAM-WEBSTER DICTIONARY broadly defines "char" as "a charred substance."[34] Applicant's website explains that by burning wood to several thousand degrees higher than the ash point, Applicant produces carbon-based filtration media through charring:

> "Almost all of the activated carbon used in aquariums (and water purification in general) starts with a base of lignite or bituminous carbon"; and "AquaChar … burns wood to several thousand degrees higher than the ash point allowing for no post-production processing or use caustic chemicals. As the carbon molecules structures inside AquaChar it forces out impurities which are used as fuel to increase temperature. This leaves behind the lightweight carbon skeleton …."[35]

In addition, aquasana.com uses the term "char" to identify a substance produced through heating an organic material such as wood, stating,

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[33] October 23, 2019 Office Action, TSDR 23-24.

[34] *Id.*, TSDR 3.

[35] *Id.*, TSDR 19.

> Activated charcoal is created when organic material with high carbon content (like wood, coal, or coconut shells) is heated in such a way that it does not burn, but instead results in char. The char is then treated to create a porous material that binds to certain toxins and impurities, thus pulling them out of the water flowing through the system.[36]

See also oxbowactivatedcarbon.com, stating:

> Activated carbon … is made from organic matter, such as wood, peat or coal, that contains a high concentration of carbon. The material is heated slowly to dry it without burning, creating a product known as char. The char is then activated through a series of chemical and physical processes that increase its surface area and create a network of submicroscopic pores.[37]

The webpages which use the term "char" in the context of filtration make clear that the char produced through heating is further treated to create activated charcoal or activated carbon, which is used in filtration. Because the char itself is not used in filtration, we find that any association of CHAR meaning "a charred substance" in the context of Applicant's goods requires thought or conjecture.

Third, the record reflects that "char" is a verb, meaning "to convert to charcoal or carbon usually by heat: BURN."[38] This definition applies to the creation of Applicant's filtering substances, but there no evidence of use of "char" as a verb by Applicant or third parties in the context of water filtration.

With regard to the third-party registrations containing the term CHAR, only the following are relevant – the others recite goods unrelated to water filtration:

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[36] *Id.*, TSDR 15.

[37] *Id.*, TSDR 12.

[38] *Id.*, TSDR 3.

> ● Registration No. 0833162 for the mark AQUA NUCHAR for "activated carbon." Registrant disclaims the exclusive right to use the word "Aqua."[39]
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> ● Registration No. 5419406 for the mark BOOST BIOCHAR for, inter alia, biochar for filtering water.[40] Registrant disclaimed the exclusive right to use "Biochar."
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> ● Registration No. 5504336 for the mark MAXCAPCHAR for "specially prepared charcoal used to clean large bodies of water for removing toxins, heavy metals, nutrients, algae, and salts."[41]
>
> ● Registration No. 5507233 for the mark BIOCHAR NOW for, inter alia, biochar for filtering water.[42] Registrant disclaimed the exclusive right to use "Biochar."

None is particularly probative – they do not show marks which include the single term CHAR.

In sum, while the term "char" has three meanings relevant to Applicant's goods, none of them immediately describe, without thought or conjecture, a feature or characteristic of Applicant's identified goods.

Decision: The requirement for a disclaimer is reversed.

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[39] May 6, 2020 Office Action, TSDR 9.

[40] *Id.*, TSDR 54.

[41] *Id.*, TSDR 59.

[42] *Id.*, TSDR 66.