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Mailed:
May 9, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Argo Tea, Inc.

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Serial No. 85011197

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David J. Marr of Clark Hill PLC for Argo Tea, Inc.

Michael P. Keating, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Zervas, Taylor and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Argo Tea, Inc. (“applicant”) filed a use-based application to register the mark POMEGRANATEA, in standard character form, for “tea-based beverages,” in International Class 30. Applicant originally sought registration on the Principal Register, however, during the prosecution of the application, applicant filed a request to amend its application to the Supplemental Register.

The Trademark Examining Attorney initially refused registration under Section 2(e)(1) on the ground that applicant’s mark is merely descriptive while noting that the mark appeared to be generic. Upon applicant’s amendment to the

Supplemental Register, the Trademark Examining Attorney refused registration under Section 23 of the Trademark Act, 15 U.S.C. § 1091, on the ground that applicant's proposed mark is generic and, as such, unregistrable. **TRADEMARK MANUAL OF EXAMINING PROCEDURE** ("TMEP") §§ 815.04 and 1209.02(a)(i) (8th ed. 2012) (when an applicant amends its application to the Supplemental Register in response to a Section 2(e)(1) descriptiveness refusal, if the Trademark Examining Attorney determines that the designation is a generic name for the applicant's goods, the statutory basis for such a refusal is Section 23 of the Trademark Act). *See also In re Controls Corp. of America*, 46 USPQ2d 1308, 1309 n. 2 (TTAB 1998).

Preliminary Issue

In its brief, applicant, for the first time, submitted a list of nine third-party registrations consisting of a descriptive term and the word "tea" (*e.g.*, TEACOLA, ICED BREW TEA, JAVA TEA, etc.). Applicant argued that its mark "is no more generic than these marks, and should be accorded the same eligibility for registration."¹

The Trademark Examining Attorney objected to the list of registrations on two grounds: (1) the submission of a list of registrations without a copy of the registration does not make the registrations of record; and (2) the list of registrations was not timely. The Trademark Examining Attorney's objections are sustained.

¹ Applicant's Brief, pp. 8-9.

First, to make registrations of record, copies of the registrations or the complete electronic equivalent (*i.e.*, complete printouts taken from the USPTO's automated system, TSDR) must be submitted. *In re Ruffin Gaming LLC*, 66 USPQ2d 1924, 1925 n.3 (TTAB 2002); *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1456 n.2 (TTAB 1998); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1561 n.6 (TTAB 1996); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 n.3 (TTAB 1994). *See also* TMEP § 710.03.

With respect to timeliness, Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal. Accordingly, if a Trademark Examining Attorney or an applicant attempts to introduce new evidence at the time of the appeal, the new evidence will generally be excluded from the record. TBMP § 1207.01(c). *See also In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *In re Trans Cont'l Records, Inc.*, 62 USPQ2d 1541, 1541 n.2 (TTAB 2002).

Nevertheless, even if we consider the third-party registrations, they have little probative value. The Board must assess each mark in an application on the record of public perception submitted with the application. Thus, even if some prior registrations have characteristics similar to applicant's mark, the PTO's allowance of such prior registrations does not bind the Board because we must decide each case on its own merits. *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424 (Fed. Cir. 1985). *See also In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Whether POMEGRANTEA is a generic term?

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving that the mark is generic by "clear evidence" thereof. See *In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); and *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987).

The critical issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods or services in question. *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *In re Women's Publishing Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992). Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?" *Ginn*, 228 USPQ at 530. Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. See *Merrill Lynch*, 4 USPQ2d at 1143 (Fed. Cir. 1987), and *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

A. The genus of goods at issue.

The broad general category of goods involved in this application is tea-based beverages. *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (“[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.”).

B. The relevant public.

The second part of the generic test is whether the relevant public understands the designation primarily to refer to that class of goods. The relevant public for a determination of whether a mark is generic is the purchasing or consuming public for the identified goods. *Magic Wand Inc. v. RDB Inc.*, 19 USPQ2d at 1553. Because there are no restrictions or limitations to the channels of trade or classes of consumers for tea-based beverages, the relevant consuming public comprises ordinary consumers who purchase and drink tea.

C. Public perception.

1. Dictionary Definitions.

“Pomegranate” is defined as follows:

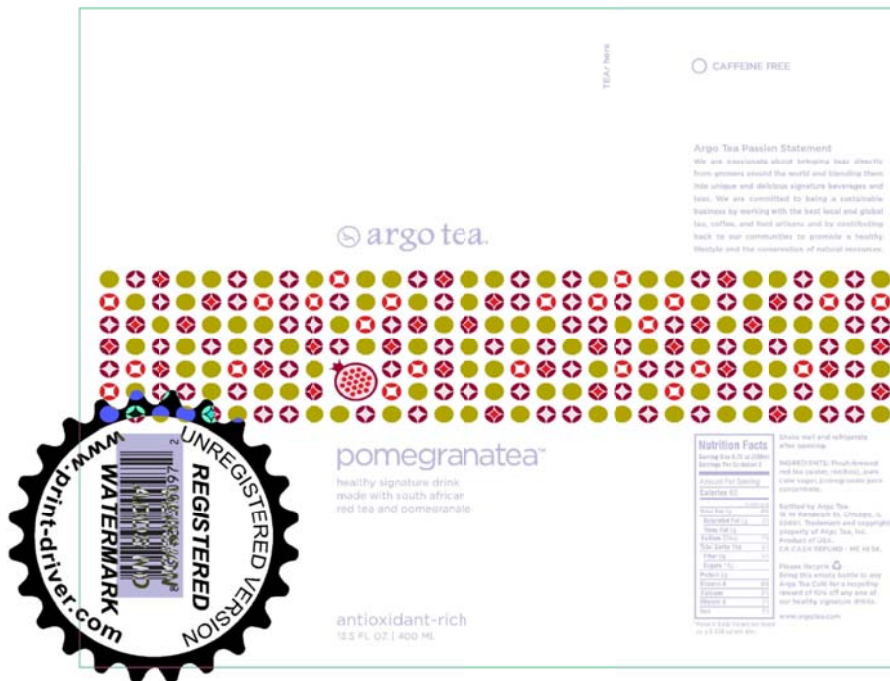
1 : a several-celled reddish berry that is about the size of an orange with a thick leathery skin and many seeds with pulpy crimson arils of tart flavor²

2. Applicant’s use of the term POMEGRANATEA.

a. Application file.

² Merriam-Webster (m-w.com) attached to applicant’s February 24, 2012 response to Office action.

The specimen initially submitted with the subject application is identified as a label and is shown below.



b. Applicant's website (argotea.com)³



³ February 7, 2011 Office action.

The website includes the following information:

PomegranaTea

Renew with a blend of antioxidant-rich South African rooibos, commonly known as red tea, and pomegranate.

A balanced mix of red tea and tangy pomegranates define this one-of-a-kind signature favorite delivering a pleasant taste one sip at a time.

3. Third-party use of POMEGRANTE TEA.
 - a. July 21, 2010 Office action.
 1. Revolution Tea White Pomegranate Tea (amazon.com)



Product Features

Light and refreshing, White Pomegranate is perfect any time of day. Made from the finest Bai Mu Dan white tea, this blend fills your cup with the aroma of fresh-picked pomegranate and a delicate, mellow taste. Each sip is brimming with antioxidants.

2. The Tea Nation Pomegranate Tea, Black Tea (amazon.com)



This Amazon.com entry also references three different Bigelow Green Teas with Pomegranate, Bentley's Royal Pomegranate Green Tea, and AriZona Green Tea with Pomegranate and Acai. In addition, "Customers Viewing This Page May Be Interested in These Sponsored Links" ... "Pomegranate Tea."

3. Emergen-c Oseries Pomegranate Tea Blend – Acer Corp (thebetterhealthstore.com)

The website states that "In our Pomegranate Tea Blend we took the best of organic green, white and black tea extracts, then added pizzazz of organic pomegranate along with the sparkly effervescent fizz you've enjoyed for years."

2. August 25, 2011 Office action.

In this Office action, the Trademark Examining Attorney submitted numerous examples of third-party use of the term Pomegranate Tea. For example,

- a. Minute Maid Pomegranate Tea (facebook.com)

b. White Pomegranate Tea (foodzie.com)

The flavor of pomegranate is the featured presence in this hand-crafted blend of our top-grade organic India Oothu Estate White tea (bai mudan), which also contains organic high Vitamin C rose hips! Nectafarious and rich, the chocolate-y overtones of the tea combine effortlessly with the sweet tartness of the pomegranate flavor.

c. Twining's Pomegranate Tea (yahoo.com)

Twining's Pomegranate Tea combines the slightly sweet taste of ripe pomegranates for a unique fresh flavor with a tasty black tea for a cup full of flavor. This This [sic] amazing tea has a light fruity aroma with a delicious taste that is sure to become your new favorite afternoon refreshment!

d. A review of Pomegranate Tea from Windsor Gardens Tea posted on The Tea Review website (teareviewblog.com)

The website also referenced Pomegranate Green from the Boston Tea Co., White Tea Pomegranate from Tea of Life, and Pomegranate Raspberry Green from Stash Tea.

e. A review of Hyson Pomegranate Tea posted on the TeaAmigos Tea Reviews website (teaamigos.com)



- f. Organic Pomegranate Tea offered for sale at the Unique Coffee Roasters website (uniquecoffeeasters.com)



- g. Turkish Pomegranate Tea by HazerBaba sold on Amazon.com



3. March 13, 2012 Office action

Celestial Seasonings Red Moroccan Pomegranate Tea offered for sale at the Google product search website (google.com)



D. Analysis

At the outset, we note that when the words “Pomegranate” and “Tea” are combined into the compressed term POMEGRANATEA that is sought to be registered, the term is the equivalent in sound and meaning to the individual words. The individual words “Pomegranate” and “Tea” retain their dictionary or ordinary meanings because the compression of the two terms is not incongruous and does not evoke a separate, distinct and unique commercial impression. *See In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, 1860 (Fed. Cir. 1987) (FirstTier is the phonetic equivalent of “first tier” and is merely descriptive of banking services); *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010); *In re 3Com Corp.*, 56 USPQ2d 1060, 1062 (TTAB 2000) (the deletion of a space between the terms ATM and LINK does not transform the otherwise generic term into a trademark or change the commonly understood meaning of the term); *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1631 (TTAB 1998) (the fact that MASSFLO is a telescoped, slightly misspelled version of “mass flow” does not transform a generic term into a trademark); *In re Stanbel, Inc.* 16 USPQ2d 1469 (TTAB 1990), *aff’d without pub. op.*, 925 F.2d 1480, 20 USPQ2d 1319 (Fed. Cir. 1991) (where the record established that the term “ice pack” was a generic designation for a “nontoxic reusable ice substitute for use in food and beverage coolers,” applicant's asserted mark ICE PAK was held generic and, therefore, unregistrable).

Based on the record before us, we find that POMEGRANATEA, as used by applicant, identifies as type or category of tea-based beverage. The commonly

understood meaning of “Pomegranate Tea,” applicant’s own use of the term, and third-party uses demonstrate that purchasers understand that POMEGRANATEA identifies a pomegranate flavored tea-based beverage. We accordingly find that POMEGRANATEA is generic for “tea-based beverages.”

The extensive third-party use makes clear that “Pomegranate Tea” is widely used to refer to pomegranate flavored tea. In short, POMEGRANATEA is the name of a category of tea. Because the term POMEGRANATEA directly names the most important or central aspect of applicant’s tea, that is, that the tea is pomegranate flavored, POMEGRANATEA is generic. And because POMEGRANATEA describes a category of tea-based beverages, it should be freely available for use by competitors. *See In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985) (BUNDT for coffee cake); *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970) (CUSTOMBLENDED for gasoline held generic because category of gasoline was blended personally for motorist); *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 161 USPQ 606 (CCPA 1969) (PASTEURIZED for face cream held generic); *In re Preformed Line Products Co.*, 323 F.2d 1007, 139 USPQ 271 (CCPA 1963) (PREFORMED for preformed electrical equipment held generic); *Servo Corp. of America v. Servo-Tek Products Co.*, 289 F.2d 437, 126 USPQ 362 (CCPA 1960) (MATCHBOX for toy vehicles held generic because that category of toy cars was sold in matchbox-sized boxes).

Applicant contends that “tea comes in several different types, including black tea, white tea, green tea, and red tea,”⁴ and that flavorings added to the previously-identified teas merely modifies the characteristics of those teas⁵ and, therefore, “pomegranate” does not identify a species of tea.

For example, “raspberry black tea,” “peach white tea,” and “green tea with pomegranate and acai” are all “species” of tea because they identify both the type of tea they contain and the added flavorings.

Nothing in the words “pomegranate tea” conveys to the relevant public which genus or species of tea it is, meaning that the mark falls entirely outside the realm of meaningful classifications of tea-based beverages.⁶

However, black tea, white tea, green tea, and red tea may also fall into more narrow categories of tea based on flavor. *Cf. In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1897 (TTAB 2001) (RUSSIANART for “dealership services in the field of fine art, antiques, furniture and jewelry” falls within the category of Russian art); *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1197 (TTAB 1998) (ATTIC for “automatic sprinklers for fire protection” falls within the narrower category of sprinklers for fire protection of attics); *Stromgren Supports Inc. v. Bike Athletic Co.*, 43 USPQ2d 1100, 1106 (TTAB 1997) (COMPRESSION for “elastic athletic garments and outerwear, namely, sports girdles” falls within the category of sports medicine products including compression shorts or girdles); *In re Analog Devices, Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff’d*, 871 F.2d 1097, 10 USPQ2d 1879

⁴ Applicant’s Brief, p. 5.

⁵ Applicant’s Brief, pp. 5-6.

⁶ Applicant’s Brief, p. 6.

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(Fed. Cir. 1989) (unpublished) (ANALOG DEVICES for a laundry list of electronic products falls within the category or class of goods having analog capability). The key in the analysis is that the term at issue must be generic for the items in the description of goods. In this case, “Pomegranate Tea” is a generic term for pomegranate-flavored tea.

Decision: The refusal to register is affirmed.