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

Proceeding	85876688
Applicant	Invention Development Management Company, LLC
Applied for Mark	COFFEE FLOUR
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Invention Development Management
Company, LLC

Mark: COFFEE FLOUR
Serial No.: 85876688
Filing Date: March 14, 2013
Examining Attorney: Yatsye I. Lee
Law Office 107

APPLICANT'S APPEAL BRIEF

I. Issue on Appeal

Applicant seeks to register the mark COFFEE FLOUR on the Supplemental Register in connection with the following goods:

Class 30: Flour made by processing and blending together coffee cherry skins, pulp, and pectin for use, alone or in combination with other plant and milk based products, as a dry ingredient in food and beverage products for consumer use

The Examining Attorney has refused registration under Trademark Act Section 23 on the ground that COFFEE FLOUR is generic. Applicant respectfully submits that its mark COFFEE FLOUR is not generic, and therefore eligible for registration on the Supplemental Register. The genericness refusal is the only issue on appeal.

II. The Evidence of Record

A. Applicant's Evidence

With its response of December 23, 2013, Applicant submitted the following pieces of evidence:

1. A product specification technical data sheet for the COFFEE FLOUR product; and
2. Internet evidence from <<http://science.howstuffworks.com/innovation/edible-innovations/coffee4.htm/printable>> (“How Stuff Works”) regarding the coffee plant and coffee-making process and describing the coffee cherry.

With its response of September 14, 2015, Applicant submitted the following pieces of evidence:

1. A copy of Applicant’s Reg. No. 4806487 for COFFEE FLOUR and design, which issued on the Principal Register on September 8, 2015; and
2. A copy of Applicant’s pending Application No. 86001293 for COFFEE FLOUR and design published in the Official Gazette on September 8, 2015 (which later registered on December 29, 2015).

With its request for reconsideration of April 14, 2016, Applicant submitted the following pieces of evidence:

1. A letter from U.S. Customs and Border Protection regarding the tariff classification of Applicant’s COFFEE FLOUR product, under the applicable sub-heading Tariff No. 0901.90.1000, which provides for “Coffee, whether or not roasted or decaffeinated; coffee husks and skins; coffee substitutes containing coffee in any proportion: Other Coffee husks and skins;”
2. Screenshots from the Foreign Trade Division Schedule B and U.S. Harmonized code showing this tariff designation as “coffee husks and skins;”
3. Applicant’s Material Safety Data Sheet showing the product components are “dried coffee cherry husks and skins;”

4. A press release showing Applicant's product explained as made from "coffee fruit, a by-product of coffee production" ("Coffee Flour And Sprouts Launch Exclusive Partnership With New Sprouts Bakery Product Line");
5. An article explaining Applicant's product as "milled from dried cherry pulp" ("There's So Much More to This Gluten-Free Flour Than Delicious Pastries" from <<http://www.takeapart.com/article/2015/07/05/coffee-flour>>);
6. An article explaining Applicant's product as a "super-ingredient made from dried coffee cherry pulp" ("Coffee Flour Chocolate Bar – Superfood Snack Is The Newest To the JCOCO American Couture Chocolate Line");
7. An online retailer describing Applicant's product as "a revolutionary new ingredient made from dried & ground coffee cherries, the fruit that grows around the coffee bean and is traditionally discarded" ("Coffee Flour For Sale Online | Marx Pantry" from <<http://www.marxpantry.com/Coffee-Flour>>);
8. A video describing the story of Applicant's product and its creation from coffee cherry husks and skins; and
9. The dictionary entry for "genus" from A Dictionary of Modern Legal Usage, 2d ed. Bryan A. Garner (1995).

B. The Examining Attorney's Evidence

In the Office Action dated June 25, 2013, the Examining Attorney submitted the following pieces of evidence:

1. A dictionary entry for "coffee" from <<http://www.collinsdictionary.com>>;
2. A dictionary entry for "coffee" from <<http://www.merriam-webster.com>>; and
3. A dictionary entry for "flour" from <<http://www.collinsdictionary.com>>.

In the Office Action dated August 13, 2014, the Examining Attorney submitted the following pieces of evidence:

1. A screenshot of a search for “pectin” in the Trademark ID Manual;
2. A screenshot of a search for “flour” in the Trademark ID Manual;
3. Screenshots from Applicant’s website; and
4. The Wikipedia entry for “coffee bean,” at
<http://en.wikipedia.org/wiki/Coffee_bean>.

In the Office Action dated March 16, 2015, the Examining Attorney submitted the following pieces of evidence:

1. A printout describing Applicant’s product from the website “the kitchn,” at
<<http://www.thekitchn.com/coffee-flour-have-you-heard-of-it-202810A>>
2. An article on Applicant’s product from The Atlantic, dated April 4, 2014, at
<<http://www.theatlantic.com/technology/archive/2014/04/coffee-flour-the-java-you-can-eat/360149/>>;
3. A printout from Google Patents of Patent Application No. 14/364,925, titled “Process for obtaining honey and/or flour of coffee from the pulp or husk and the mucilage of the coffee bean;” and
4. Screenshots from Applicant’s website.

In the Final Office Action dated October 15, 2015, the Examining Attorney submitted the following pieces of evidence:

1. An XSearch printout of Applicant’s published application No. 86001293 for
COFFEE FLOUR and Design;

2. An XSearch printout of Applicant's Registration No. 4806487 for COFFEE FLOUR and Design;
3. A printout of U.S. Patent Application No. 14/364,925, titled "Process for obtaining honey and/or flour of coffee from the pulp or husk and the mucilage of the coffee bean, from Google Patents, at
<<https://patents.google.com/patent/US20150017270A1/en?q='coffee+flour'&page=2>>;
4. A printout of an article from Bloomberg Business on Applicant's product, at
<<http://www.bloomberg.com/bw/articles/2014-04-09/introducing-coffee-flour>>;
5. An article on flours, including Applicant's product, at
<<http://www.eatclean.com/products/gluten-free-alternative-flours>>;
6. An article on Applicant's product, from
<<http://www.foodrepublic.com/2014/10/30/coffee-flour-rich-in-antioxidants-and-makes-a-pretty-good-cookie/>>;
7. A Huffington Post article on Applicant's product, at
<http://www.huffingtonpost.com/2014/04/25/coffee-flour-sustainable_n_5205950.html>;
8. A Seattle Times article on Applicant's product, at
<<http://www.seattletimes.com/business/a-cup-of-coffee-flour-may-hit-the-spot-for-seattle-startup/>>;
9. An article from The Guardian on Applicant's product, at
<<http://www.theguardian.com/sustainable-business/2014/jul/31/coffee-flour-starbucks-green-farmerscaffeine>>;

10. A printout describing Applicant's product from the website "the kitchn," at
<<http://www.thekitchn.com/coffee-flour-have-you-heard-of-it-202810>>;
11. An article from Vice on Applicant's product, at
<<http://munchies.vice.com/articles/how-a-failed-cattle-feed-became-the-latest-gluten-free-flour>>;
12. A dictionary entry for "coffee", from <<https://www.ahdictionary.com>>;
13. A dictionary entry for "flour", from <<https://www.ahdictionary.com>>;
14. An article on coffee, from <<http://www.ncausa.org/About-Coffee/What-is-Coffee>>;
15. Printouts from Applicant's website;
16. An online article about non-grain flour, from <<http://colorfuleatsnutrition.com/the-grain-free-kitchen/>>;
17. An online article about non-wheat flour and grains, from
<<https://www.craftybaking.com/learn/ingredients/flour-and-grains/non-wheat>>;
18. An online article about gluten-free, grain-free flours, from
<<http://food52.com/blog/7599-a-new-challenge-gluten-free-grain-free-baking>>;
19. A list of grain and grain-free foods and flour, from
<<http://www.grainfreeliving.com/list-of-grain-and-grain-free-foods/>>;
20. An article on grain-free foods and flour, from <<http://thehealthyfoodie.com/going-grain-free-lets-take-a-look-at-what-is-a-grain-what-isnt-and-where-they-hide/>>;
21. An article on wheat-free flours, from
<<http://blog.seattlepi.com/cookusinterruptus/2012/05/08/nine-fun-flours-for-wheat-free-baking/>>;

22. An article on gluten-free flours, from <<http://www.shape.com/blogs/fit-foodies/new-gluten-free-flours-made-fruits-and-veggies>>;
23. An article on wheat free and gluten free alternative flours, from <<http://www.wheat-free.org/wheat-free-gluten-free-alternative-flours.html>>; and
24. An article on paleo flours, from <<http://paleoleap.com/coconut-vs-almond-flour/>>.

In the Denial of Applicant's Request for Reconsideration dated May 16, 2016, the Examining Attorney submitted the following pieces of evidence:

1. A screenshot of the Google shopping search results for "flour," at <https://www.google.com/?gws_rd=ssl#tbm=shop&q=flour>;
2. A screenshot of the Google shopping search results for "almond flour," at <https://www.google.com/?gws_rd=ssl#tbm=shop&q=almond+flour>;
3. A screenshot of the Google shopping search results for "coconut flour," at <https://www.google.com/?gws_rd=ssl#tbm=shop&q=coconut+flour>;
4. A screenshot of the Google shopping search results for "gluten free flour," at <https://www.google.com/?gws_rd=ssl#tbm=shop&q=gluten+free+flour>;
5. A screenshot of the Google shopping search results for "rice flour," at <https://www.google.com/?gws_rd=ssl#tbm=shop&q=rice+flour>;
6. An article on alternative flours, at <<http://www.anti-grain.com/products.html>>;
7. An online retail site for flours, at <<http://www.bobsredmill.com/shop/flours-and-meals.html>>;
8. An online retail site for nut flours, at <<https://nuts.com/cookingbaking/flours/>>;
9. An online retail site for banana flour, at <<http://www.bananaflour.com/>>;

10. An article on using fruit powder as flour, at <<http://healthyeating.sfgate.com/use-fruit-powder-flour-11227.html>>;
11. An article on alternative “paleo” flours, at <<http://www.thepaleomom.com/2012/11/the-science-and-art-of-paleofying-part-1-paleo-flours.html>>;
12. An article on flours, at <<http://www.authenticfoods.com/products/item/25/arrowroot-flour>>;
13. An article on arrowroot flour, at <<http://www.the-gluten-free-chef.com/arrowroot-flour.html>>; and
14. An article on wheat-free flours, at <<http://pioneerthinking.com/cooking/wheat-free-flours-alternatives>>.

III. Considerations Used to Determine If a Mark Is Generic

A term is generic if the relevant purchasing public understands it primarily as the common or class name for the goods or services. In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 U.S.P.Q.2d 1807, 1811 (Fed. Cir. 2001); In re Am. Fertility Soc'y, 188 F.3d 1341, 1346, 51 U.S.P.Q.2d 1832, 1836 (Fed. Cir. 1999). Whether a particular term or phrase is generic is a question of fact. In re Trek 2000 Int'l Ltd., 97 U.S.P.Q.2d (BNA) 1106, 1108, 2010 Lexis 425 (T.T.A.B. 2010). A generic term “can never be registered as a trademark because such a term is...incapable of acquiring de jure distinctiveness under § 2(f).” H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986). “Whether a term is classified as ‘generic’ or as ‘merely descriptive’ is not easy to discern.... It is basic to the inquiry to determine whether members of the relevant public primarily use or

understand the term to refer to the genus of goods or services.” In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 1571, 4 U.S.P.Q.2d (BNA) 1141, 1142 (Fed. Cir. 1987).

The determination of whether a mark is generic involves a two-step inquiry:

1. What is the genus of goods or services at issue?
2. Is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services?

In re Trek 2000 Int’l Ltd., 97 U.S.P.Q.2d (BNA) 1106, 1108, 2010 Lexis 425 (T.T.AB. 2010).

The test turns upon the primary significance that the wording would have to the relevant public.

TMEP § 1209.01(c)(i). Generic terms are incapable of acquiring distinctiveness under §2(f).

H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc., 782 F.2d 987, 989, 228 U.S.P.Q. 528,

530 (Fed. Cir. 1986). Generic marks are incapable of functioning as indicators of source, and as

such are not registrable on the Principal Register under §2(f) or on the Supplemental Register.

TMEP § 1209.01(c).

To deny the registration of a mark as generic, the Office has the burden of showing “that the matter is in fact generic...based on clear evidence of generic use.” In re Steelbuilding.com,

415 F.3d 1293, 75 U.S.P.Q.2d 1420, 1421 (Fed. Cir. 2005); In re Nordic Naturals, Inc., 755 F.3d

1340, 111 U.S.P.Q.2d 1495, 1498 (Fed. Cir. 2014). This “difficult burden” is not easily met, and

“any doubts must be resolved in [the] applicant’s favor.” In re Tennis Industry Association,

102 U.S.P.Q.2d 1671, 1680 (T.T.A.B. 2012) (reversing examining attorney’s determination that

TENNIS INDUSTRY ASSOCIATION was generic). Generic terms are terms that the relevant

purchasing public understands primarily as the common or class name for the goods or services.

In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 U.S.P.Q.2d 1807, 1811 (Fed. Cir.

2001); In re Am. Fertility Soc’y, 188 F.3d 1341, 1346, 51 U.S.P.Q.2d 1832, 1836 (Fed. Cir.

1999).

Further, the test for genericness is the same whether the mark is a compound term or a phrase and the record must include evidence, if available, of use of the mark as a whole. See Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc., 786 F.3d 960, 114 U.S.P.Q.2d 1827, 1832 (Fed. Cir. 2015) (citing In re Am. Fertility Soc’y, 188 F.3d 1341, 1348-49, 51 U.S.P.Q.2d 1832, 1837 (Fed. Cir. 1999)).

IV. Argument: COFFEE FLOUR Is Not Generic and is Registrable on the Supplemental Register

A. The Evidence of Record Shows COFFEE FLOUR Is Not The Genus of Goods

Applicant contends that the Examining Attorney has not shown by clear evidence that COFFEE FLOUR is the genus of the goods for which Applicant seeks to register its mark on the Supplemental Register. The evidence of record shows that the genus, or major class or kind, of the goods in question is not COFFEE FLOUR. As set forth in TMEP Section 1209.01(c)(i), “[t]he examining attorney has the burden of proving that a term is generic by clear evidence. Moreover, “the correct inquiry is whether the relevant public would understand the term to be generic” and that “the mark as a whole [has] generic significance.” Id. Further, the Court of Appeals for the Federal Circuit has held that “[t]he critical issue in genericness cases is whether the relevant public primarily use or understand the term sought to be registered refers to a genus of goods or services in question.” TMEP Section 1209.01(c)(ii) citing to H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc., 782 F.2d 987, 989–990, 228 U.S.P.Q. 528, 530 (Fed. Cir. 1986). “Genus” is defined as “a major class or kind of thing” (from A Dictionary of Modern Legal Usage, 2d ed. Bryan A Garner (1995)).

The Examining Attorney’s evidence of record includes dictionary definitions of “coffee” and “flour,” articles about Applicant’s product, Applicant’s patent application, screenshots from Applicant’s website, and online retail search results for various kinds of flours. Yet, while, as in

In re Tennis Industry Association, some of these webpages do appear to use the term “coffee flour” descriptively, they do not support the Office’s position that “coffee flour” is a genus. COFFEE FLOUR describes Applicant’s product, but it does not define a major class or kind of product. The Examining Attorney’s evidence is equivocal and does not clearly show that the relevant public understands the term “coffee flour” to reference a genus of flour, rather than merely a combination of the generic word “flour” to which the descriptor “coffee” has been applied. In re Jasco Solutions L.L.C., Serial No. 86308947 (T.T.A.B. 2016).

Applicant’s evidence of record includes articles and online evidence showing COFFEE FLOUR being used to indicate Applicant as the source of the product (flour made of the skins, pulp, and pectin of the coffee cherry); internet evidence about the coffee-making process and the coffee cherry portion of the plant; copies of Applicant’s Reg. No. 4806487 for COFFEE FLOUR and design and Serial No. No. 86001293 for COFFEE FLOUR and design (now Reg. No. 4876584); A letter from U.S. Customs and Border Protection regarding the tariff classification of Applicant’s COFFEE FLOUR product, as “Coffee, whether or not roasted or decaffeinated; coffee husks and skins; coffee substitutes containing coffee in any proportion: Other Coffee husks and skins; and screenshots showing the Foreign Trade Division showing this designation is “coffee husks and skins;” press releases and articles describing Applicant’s product as being made from coffee cherries or coffee fruit.

“Generic terms are terms that the relevant purchasing public understands primarily as the common or class name for the goods or services.” T.M.E.P. § 1209.01(c) (citing In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 U.S.P.Q.2d 1807, 1811 (Fed. Cir. 2001); In re Am. Fertility Soc’y, 188 F.3d 1341, 1346, 51 U.S.P.Q.2d 1832, 1836 (Fed. Cir. 1999)). A mark is descriptive, on the other hand, if it “describes an ingredient, quality, characteristic, function,

feature, purpose, or use of the specified goods or services.” T.M.E.P. § 1209.01(b) (citing In re Gyulay, 820 F.2d 1216, 3 U.S.P.Q.2d 1009 (Fed. Cir. 1987)). One way to distinguish a generic mark from a descriptive one is by acknowledging that “descriptive terms describe a thing, while generic terms name the thing.” 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 12:20 (4th ed. 2013).

B. Consumers Will Not Immediately Recognize Applicant’s Goods as Flour Made From the Skins, Pulp and Pectin of the Coffee Cherry

Applicant’s mark does describe features of Applicant’s goods. A consumer who sees the mark COFFEE FLOUR is likely to recognize the overall nature of Applicant’s goods – that it is a coffee product ground up into a powder like flour. Applicant contends, however, that the consumer will assume (incorrectly) that the product is made from coffee beans, tastes or smells like coffee, or contains the drink coffee. The mark is not, therefore, the genus for flour made of the skins, pulp, and pectin of the coffee cherry. While COFFEE FLOUR may describe the goods or convey knowledge of the qualities or characteristics of the goods, it does not “immediately and unequivocally” describe flour made of the skins, pulp, and pectin of the coffee cherry, and therefore, it is not generic. See In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 1346 (Fed. Cir. 2001) (citing In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 1571, 4 U.S.P.Q.2D (BNA) 1141, 1144 (Fed. Cir. 1987)). Accordingly, Applicant’s mark may be descriptive, but it is not generic.

C. The Evidence of Record Does Not Demonstrate a Competitive Need for Others to Use the Mark COFFEE FLOUR

The evidence of record consistently shows COFFEE FLOUR used as a trademark, in reference to Applicant as the source of the relevant products. The articles submitted by the Examining Attorney that reference “coffee flour” are all about Applicant and/or Applicant’s

products. No third-party uses of “coffee flour” as a generic term are included. Thus, the relevant public would not understand COFFEE FLOUR as a genus of goods. The evidence of record does not support an unequivocal finding that the marketplace has concluded that COFFEE FLOUR is a genus of goods. *In re Jasco Solutions L.L.C.*, Id. Indeed, there is no evidence to that point and consumers are not likely to come to the conclusion that COFFEE FLOUR is the genus of flour made of coffee cherry skins, pulp, and pectin. Consumers who ask for the relevant goods by using its name COFFEE FLOUR will be referred to the Applicant’s product, not a selection of generic products to choose from. Applicant will identify the source of its product with its trademark COFFEE FLOUR. A designation is used generically only if it is used to denominate a type of good or service irrespective of source. In short, Applicant’s use of “Coffee Flour” on its website and in other promotional and press materials is clear trademark usage and, therefore, cannot be treated as generic.

One of the policy considerations for prohibiting trademark registration of generic terms is to prevent competitive harm. *In re Trek 2000 Int’l Ltd.*, 97 U.S.P.Q.2d (BNA) 1106, 2010 Lexis 425 (T.T.AB. 2010). See also *CES Publ’g Corp. v. St. Regis Publ’n*, 531 F.2d 11, 13 (2d Cir. N.Y. 1975) (“To allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold, even when these have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.”). Refusing a mark as generic, however, has important consequences. Refusing a trademark as generic penalizes the trademark owner for successfully turning the trademark into a household name and confuses buyers who associate the trademark with the owner if they encounter the name on another company’s products. *Ty Inc. v. Softbelly’s, Inc.*, 353 F.3d 528, 532 (7th Cir. 2003). “The fateful step ordinarily is not taken until the trademark has gone so far toward

becoming the exclusive descriptor of the product that sellers of competing brands cannot compete effectively without using the name to designate the product they are selling.” Id.

If the evidence of record does not show that competitors use the term at issue, it creates doubt as to whether the term actually primarily refers to a genus of goods or services and whether competitors can effectively identify their goods or services without using that particular phrase. In re Trek 2000 Int’l Ltd., 97 U.S.P.Q.2d (BNA) 1106. In In re Trek 2000 Int’l Ltd., the T.T.A.B. determined that the record created doubt as to whether the term THUMBDRIVE was generic, and that the doubt had to be resolved in the applicant’s favor. Id. As was the case in In re Trek 2000 Int’l Ltd., the Examining Attorney’s evidence of record in this matter contains no examples of competitors or other third parties using the Applicant’s mark. See id. Overall, both the Applicant’s and the Examining Attorney’s evidence demonstrates that it is not necessary for a company to use COFFEE FLOUR to convey that it provides flour made of coffee cherry skins, pulp, and pectin, and that Applicant’s mark is not generic for flour made of coffee cherry skins, pulp, and pectin. Indeed, there are other ways to describe the Applicant’s products. For example, “powdered coffee cherry skins, pulp pectin,” or “finely ground coffee cherry skins, pulp and pectin.”

The Examining Attorney has not demonstrated by clear evidence that members of the relevant public primarily use or understand COFFEE FLOUR to refer to the genus of goods in question. Additionally, the evidence of record in this matter does not demonstrate a need for Applicant’s competitors to use COFFEE FLOUR to describe their own goods. This further casts doubt on the genericness of Applicant’s mark. Any doubts are to be resolved in favor of the applicant when the generic status of a term is in doubt. See In re Bel Paese Sales Co.,

1 U.S.P.Q.2d 1233, 1986 WL 83304 (T.T.A.B. 1986) (DOLCELATTE held not a generic name for a type of cheese.).

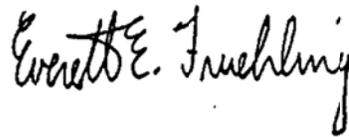
Finally, ask any coffee drinker, chef, baker, pastry lover or other relevant consumer, what is COFFEE FLOUR? The answers will vary from “flour that tastes like coffee,” “flour made from coffee beans,” “flour flavored with coffee,” “finely ground coffee,” “flour that smells like coffee,” or other association with the beverage and the bean. They may also refer to our client and their groundbreaking innovative product that uses what was previously viewed as a waste product, which is clearly the intent of a trademark. Otherwise, Applicant firmly believes no one will answer that the product is exclusively a flour made from dried coffee cherry skins, pulp and pectin used as an ingredient in other products that does not taste like the beverage made from the roasted coffee bean.

V. Conclusion

For the foregoing reasons, Applicant respectfully requests that the Board reverse the genericness refusal, and allow registration of COFFEE FLOUR on the Supplemental Register.

Respectfully submitted,

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Dated: August 17, 2016

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