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Mailed:
August 3, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Inca Tea, LLC

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Serial No. 85886579

Sandra M. Koenig and Rachel A. Smoot of Fay Sharpe LLP for Inca Tea, LLC.

Robert J. Struck, Trademark Examining Attorney, Law Office 109
(Michael Kazazian, Managing Attorney).

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Before Bergsman, Masiello, and Hightower, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Inca Tea, LLC (“Applicant”) filed an application for registration on the Principal Register of the mark shown below for “Teas comprised of purple corn; tea blends comprised of purple corn,” in International Class 30.¹

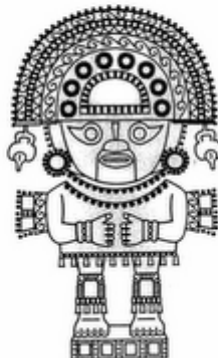
¹ Application Serial No. 85886579 was filed on March 26, 2013 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), on the basis of Applicant’s *bona fide* intention to use the mark in commerce.



Applicant disclaimed the exclusive right to use TEA, 100% ALL NATURAL INGREDIENTS, and ORIGINAL apart from the mark as shown. Color is not claimed as a feature of the mark. The application describes the design elements as “a sketch of mountains inside three concentric circles”; “a curved banner ribbon”; and “a horizontal row of three stars ...below the banner ribbon.”

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as used in connection with Applicant’s goods, so resembles the registered mark shown below as to be likely to cause confusion, or to cause mistake, or to deceive.²

INCA'S FOOD



² Reg. No. 4110531, issued March 13, 2012.

The cited mark is registered for “teas, namely, linden and chamomile,” as well as a variety of other foods in International Classes 29 and 30.³ Registrant has disclaimed the exclusive right to use FOOD apart from the mark as shown. The Registration describes the figure depicted in the mark as “an upper portion of a Tumi, a ceremonial knife of the pre-Incan cultures of Peru.” Color is not claimed as a feature of the mark.

When the refusal was made final, Applicant appealed to this Board and filed three requests for reconsideration. On remand, the Examining Attorney denied each of them, and this appeal proceeded. Applicant and the Examining Attorney have filed briefs.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case, Applicant and the

³ The full identification of goods in the cited Registration is as follows:

Canned or dried prepared food, namely, fruits, vegetables; canned or dried white corn, canned or dried hot peppers, namely, rocoto, panca, and amarillo; Dried prepared foods, namely, canary beans and potatoes; Canned or bottled food, namely, asparagus and olives in brine; fried chick peas; dried peaches; fried bananas; fried fava beans; and fried cassava; processed lemon grass, in International Class 29;

Hot pepper sauces, carob syrup; processed dried herbs, spices, flours, wheat hominy, and white corn hominy; dried prepared wheat; laurel leaves; processed herbs, namely, mint, white rosemary; spices, namely, oregano, ground ginger, ground paprika, ground annatto, tumeric; teas, namely, linden and chamomile, in International Class 30.

Examining Attorney have also presented evidence and arguments regarding trade channels and the number and nature of similar marks in use in the marketplace.

(a) The goods.

We will first consider the similarity or dissimilarity of the goods as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's goods are teas and tea blends composed of purple corn. Registrant's goods include, among other things, "teas, namely, linden and chamomile." The goods are similar in nature, in that they are all teas; however, they are not identical, and Applicant's goods, in particular, are somewhat unusual in that they are corn-based teas.

Applicant has submitted evidence regarding the nature of its business, which shows that Applicant offers a variety of teas. Applicant produces a "Peruvian Spiced Berry" tea under the mark.⁴ Applicant's website indicates that the ingredients of Peruvian Spiced Berry tea are "hibiscus petals, elderberries, currants, purple corn, apple pieces, cinnamon, cloves and natural flavors."⁵ Other flavors of tea offered under the mark include "PICK ME UP PEACH," a "combination of white tea, lush peaches and sweet herbs"; "MOUNTAIN OF MANGO," a "blend of mango, sweet herbs, and citrus flavors"; and "TAWANTIN BLACK TEA," a "combination of three quality

⁴ Applicant's response of May 21, 2014 at 8. *See also* Response of May 20, 2016 at 34.

⁵ Office Action of January 27, 2015 at 6-7.

black tea leaves and purple corn.”⁶ Applicant’s Twitter page includes a posting by Applicant that appears to indicate that Applicant offers a tea that combines purple corn with chamomile:

Cusco Chamomile is a soothing blend of Chamomile,
Purple Corn, Blood orange, vanilla & Citrus. #yummy
#organic.⁷

Applicant’s Facebook page includes an image of “Pachama Green” tea bearing the mark.⁸ The fact that Applicant itself markets herbal teas, fruit teas, green tea and black tea under the mark indicates that purple corn tea is commercially related to other forms of tea.

In order to demonstrate that the goods of Applicant and Registrant are related, the Examining Attorney has submitted evidence from the Internet showing that various types of teas and herbal teas have been marketed under the same mark. Examples follow:

<u>BRAND</u>	<u>TYPES OF TEA</u>
ASSI	Roasted corn tea; roasted barley tea. ⁹
BADIA	Chamomile, eucalyptus, green, linden, mint, anise, and yerba mate teas. ¹⁰
GOOD NATURE	Chamomile tea, linden blossom tea, elderflower tea, and rose hip and hibiscus tea. ¹¹

⁶ Request for Remand of October 23, 2015 at 17.

⁷ Applicant’s response of May 20, 2016 at 56.

⁸ Response of May 20, 2016 at 25.

⁹ Office Action of January 3, 2017 at 3-10.

¹⁰ Office Action of January 27, 2015 at 8-9.

¹¹ *Id.* at 10-11.

LIPTON	Chamomile tea; Green tea; white tea; orange blossom hibiscus tea; jasmine tea; ginseng tea; purple acai blueberry tea. ¹²
TAZO	Chamomile tea, green tea, Darjeeling tea. ¹³
TEAVANA	Chamomile, peach, peach-berry-jasmine, mango-black tea, white, black, oolong, green, jasmine. ¹⁴

This evidence, combined with the fact that Applicant itself offers its purple corn tea alongside peach, mango, black and green teas under the same mark, indicates a strong commercial relationship between the goods of Applicant and Registrant.

The record indicates that Applicant's and Registrant's goods are similar in another way, inasmuch as both are perceived as having healthful benefits. *See* the articles, "The Healing Properties of Purple Corn" and "The Potential Health Benefits of Purple Corn,"¹⁵ which extol the corn as "Packed with Phytonutrients and Antioxidants." Applicant makes similar health claims in its brief.¹⁶ Compare to the article "Chamomile Health Benefits,"¹⁷ which states that "Both the fresh and dried flowers of chamomile have been used to create teas for centuries to cure a number of health problems"; and indicates that chamomile tea can be used to treat insomnia, anxiety, skin conditions, and cramps. *See also* "Linden Tea" and "Benefits of Linden

¹² Office Action of August 24, 2015 at 4-17.

¹³ *Id.* at 23.

¹⁴ *Id.* at 32, 39, 42, 44-46, 51, 61.

¹⁵ Applicant's response of July 27, 2015 at 13-18.

¹⁶ Applicant's brief at 22, 18 TTABVue 23 ("Purple corn ... has been dubbed a super food due to its phytonutrients, anthocyanins, and antioxidants. Anthocyanins provide anti-inflammatory effects and are said to promote tissue regeneration, while antioxidants help to prevent disease, improve blood circulation and reduce cholesterol.").

¹⁷ Applicant's response of July 27, 2015 at 20-21.

Flower Tea,”¹⁸ which discuss “medicinal properties” and “traditional uses ... to help treat flu or cough, or to relieve nervous tension and digestive problems.” Applicant’s Facebook page also touts the health benefits of its product:

I am trying to fill my body with as many antioxidants as I can on my journey to feel better and look better. I am thrilled to be trying out “Inca Tea” chock full of Peruvian purple corn, ...¹⁹

Tea as a dehydrator is a myth as reported by the Mayo Clinic and other sources and our teas are packed with the powerful anti-inflammatory -purple corn- which aides in connective tissue regeneration and blood flow regulation ... so throw a Pick Me Up Peach in your fuel belt - you’ll thank us later!²⁰

The evidence of record is sufficient to show that the goods of Applicant and Registrant are commercially related, such that if they were offered under similar marks, customers would believe that they could come from the same source. Accordingly, the *du Pont* factor of the similarity or dissimilarity of the goods weighs in favor of a finding of likelihood of confusion.

(b) Trade channels.

With respect to trade channels, the Examining Attorney has shown that herbal teas like chamomile and linden tea can be purchased online through the websites of supermarkets such as Harris Teeter, Safeway, and Peapod by Giant.²¹ Applicant’s website shows that Applicant offers its tea through its own café located in the

¹⁸ *Id.* at 23-26; *see also id.* at 32.

¹⁹ Applicant’s response of May 20, 2016 at 15.

²⁰ *Id.* at 23.

²¹ Office Action of August 24, 2015 at 69-97.

Cleveland airport²² and has sought to place its goods with the supermarkets Whole Foods²³ and Heinen's Grocery Store,²⁴ and the home accessories store Bed Bath & Beyond.²⁵ It is also clear that Applicant has sought to publicize its product through a wide range of media. There are obvious similarities between channels such as Whole Foods and Harris Teeter, and supermarkets like Safeway, Giant and Heinen's. Moreover, because there are no limitations as to trade channels in the identifications of goods in the application and the cited registration, we presume that the goods move in all normal channels of trade for such goods. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012). The teas of Applicant and Registrant are types of goods that would normally be offered in food stores and they are, in fact, offered in similar food outlets. We see substantial overlap between the established and likely to continue trade channels of Applicant and Registrant. This *du Pont* factor favors a finding of likelihood of confusion.

(c) Similar marks in use.

Applicant contends that the INCA portion of Registrant's mark is weak and entitled only to a narrow scope of protection because there are many marks that include the term INCA or its purported equivalent INKA in use in the marketplace.




²² Response of May 20, 2016 at 17, 29-30.

²³ *Id.* at 19-20.

²⁴ *Id.* at 21, 34-35.

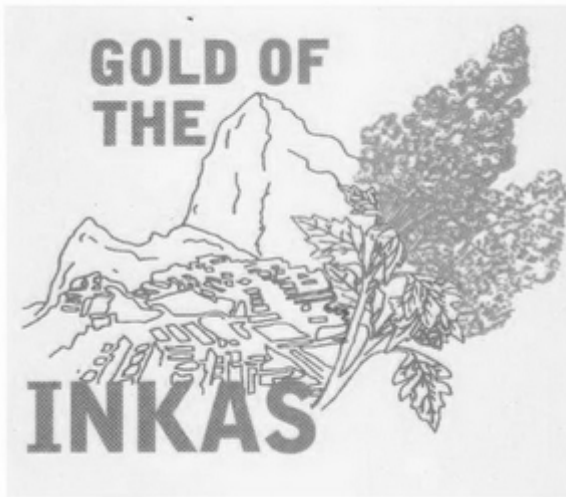
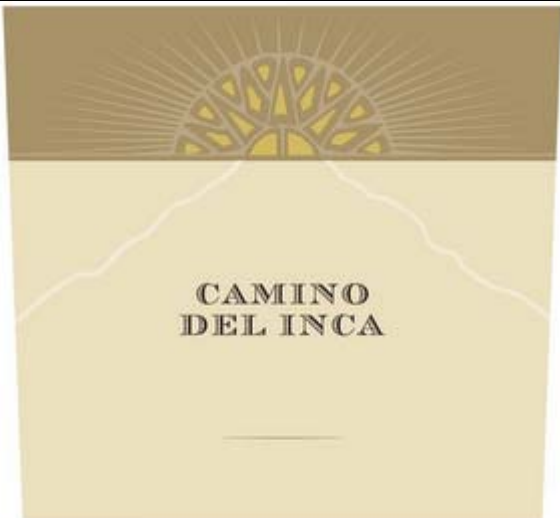
²⁵ *Id.* at 27, 30, 34.

Applicant has submitted copies of a number of U.S. registrations,²⁶ showing registration of the following marks for the goods and services indicated:²⁷

<u>Reg. No.</u>	<u>Mark</u>	<u>Relevant Goods and Services</u>
4186935		Coffee, coffee substitutes, coffee-based beverage, vegetal preparations for use as coffee substitutes
3939703		“Non-alcoholic beverages derived from grains, fruits, and spices, namely, cocktail bases, fruit-juice beverages, and punch”
0731229	INCA KOLA	“Soft drinks”
4615976		“Roasted corn”
4048013	IMPERIAL INKA QUINOA THE ORIGINAL	“Processed quinoa”

²⁶ Response of October 11, 2013 9-34; Response of December 30, 2014 at 26-39.

²⁷ Where the identification of goods or services is *not* set within quotation marks, it is a paraphrase.

4048012		“processed quinoa, sesame seeds, namely, roasted and ground sesame seeds”
2754267	INCA RED	“unprocessed grains for eating”
4054809	TIERRA DEL INCA	Beans, bean paste, rice, gravies, seasoning mixes
3901100	INCA SWEETS PERUVIAN SWEET ONIONS	“fresh sweet onions”
3518101	INCA GOLD	“Beer”
4001479		“Wine”
3590002	INCA	“Wine”

4819749		“Restaurant services”
4010851		“Restaurants”
4298601		“restaurant, carry-out food and bar services”
3959490		“restaurant, carry-out food and bar services”
2628769	INCA GOLD	Herbal supplements, dietary supplements, nutritional supplements
3989204	INCA BEAN SALAD	“pet food, namely, bird food”
4555207		Cocoa, chocolate, chocolate substitutes, confectionery, pastry, ices, candy.

4559345	INCA LINK	Charitable services, volunteer programs, compassion ministry
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Evidence of extensive registration and use by others of a term on the same or very similar goods can be “powerful” evidence of weakness. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). The purpose of introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that they have been educated to distinguish between different marks on the basis of minute distinctions. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

In this case, Applicant’s evidence of purported weakness is not particularly persuasive. None of the third-party registrations relates to tea, so they are, at best, of peripheral relevance to the strength or weakness of a mark in the field of tea. Further, Applicant has not presented evidence showing that the third-party marks are in actual use, but only that they are registered. While we may assume that use-based registrations issued only after their owners asserted to the USPTO that the marks were in use, the registrations themselves do not directly demonstrate that the marks are in fact present in the marketplace, the extent to which they have been used, or the extent to which customers have been exposed to them. *See Palm*

Bay v. Veuve Clicquot Ponsardin, 73 USPQ2d at 1693 (quoting *Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 192 USPQ 289, 294 (2d Cir. 1976) (“The significance of third-party trademarks depends wholly upon their usage. Defendant introduced no evidence that these trademarks were actually used by third parties, that they were well promoted or that they were recognized by consumers.”)). Nevertheless, the third-party marks are probative with respect to the suggestive meaning of the word INCA. *Juice Generation v. GS Enters.*, 115 USPQ2d at 1675. The registrations demonstrate that INCA suggests a connection with Peru or South America where the Inca civilization once flourished.

The evidence submitted by Applicant does not rise to the level of demonstrating that third-party use of the term INCA is so widespread as to “condition” the consuming public such that customers are used to seeing marks containing the term INCA for tea, undermining the strength of Registrant’s mark. However, in view of the suggestive nature of INCA, Registrant’s mark is not entitled to such a broad scope of protection that it will bar the registration of every mark comprising, in whole or in part, the word INCA. It will bar the registration of marks “as to which the resemblance to [Registrant’s mark] is striking enough to cause one seeing it to assume that there is some connection, association or sponsorship between the two.” *Anthony’s Pizza & Pasta Int’l Inc. v. Anthony’s Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff’d*, 415 Fed. Appx. 222 (Fed. Cir. 2010) (quoting *Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983)).

(d) The marks.

We next consider the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay v. Veuve Clicquot* 73 USPQ2d at 1689. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721.

The marks are similar in appearance, sound and meaning to the extent that each includes the word INCA. Aside from this point of similarity, there are many differences between the two marks. The wording TEA, ORIGINAL, and 100% ALL NATURAL INGREDIENTS in Applicant’s mark, and the word FOOD and the possessive ’S in Registrant’s mark all affect the marks’ appearance, sound, and meaning, although we appreciate that customers will perceive a relationship in meaning between TEA and FOOD. The graphic style and design elements of the marks are also very different. The wording in Registrant’s mark is presented in a very unusual typeface. The design, which might be perceived as a representation of a human figure or of the handle of a “Tumi, a ceremonial knife of the pre-Incan cultures of Peru,”²⁸ is geometrically complex and presented in a two-dimensional, schematic manner. In Applicant’s mark, the lettering resembles typical modern typefaces. The central design element represents a view of mountains, presented in

²⁸ See the description of the mark in the Registration.

perspective (*i.e.*, with the illusion of three dimensions); and the entire mark is organized within concentric circular carriers with a banner and the added feature of three stars. In overall visual style, the two marks are very different.

Turning to the overall commercial impressions created by the marks, both share the suggestion of a connection with Peru or South America arising from the common term INCA. However, Registrant's mark, with its flat, geometric image of an ancient artifact and unusual lettering, creates an impression of antiquity, while Applicant's mark creates a more modern impression. The image of the mountain peak in Applicant's mark, combined with the wording 100% ALL NATURAL and TEA, suggests mountain-grown tea; while the design of Registrant's mark, combined with the word FOOD, engenders the impression of an ancient civilization and perhaps food of a South American type.

The Examining Attorney has ably argued that, for many reasons, the term INCA should be considered the dominant element of both marks at issue. We agree that the term INCA plays a special role in each mark. However, we must consider the marks in their entireties and, in this case, there are so many differences between the marks in appearance, sound, meaning, and overall commercial impression that we find them dissimilar. Accordingly, the *du Pont* factor of the similarity or dissimilarity of the marks weighs against a finding of likelihood of confusion.²⁹

²⁹ This case is distinguishable from the Examining Attorney's refusal to register Applicant's word mark INCA TEA on the basis of the same cited registration, which we affirmed. *In re Inca Tea, LLC*, Serial No. 85886550 (Feb. 3, 2017).

(e) Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. The goods at issue are similar in nature, are commercially closely related, and travel through similar channels of trade. On the other hand, we have found the marks to be dissimilar in overall commercial impression, and we have found their common element, INCA, to be suggestive and therefore somewhat weak. Overall, we find that confusion is not likely as to the source of Applicant's goods.

Decision: The refusal under Section 2(d) is REVERSED.