

This Opinion is not a  
Precedent of the TTAB

Mailed: September 28, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Land Sky Sea, LLC*

\_\_\_\_\_  
Serial Nos. 85908330, 85908505, 85908525, 85908568, and 85908598

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Joseph E. Sutton of Law Offices, Ezra Sutton, P.A.,  
for Land Sky Sea, LLC

Marilyn D. Izzi, Trademark Examining Attorney, Law Office 112,  
Angela Bishop Wilson, Managing Attorney.<sup>1</sup>

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Before Quinn, Adlin and Hightower,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Land Sky Sea, LLC (“Applicant”) seeks registration on the Principal Register of  
CORONA<sup>2</sup> and CHURCHILL<sup>3</sup> for goods identified as follows:

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<sup>1</sup> Ms. Izzi performed the majority of the examination of all five applications. The Trademark Examining Attorney’s appeal brief for application Serial No. 85908330 was written by Danythe Johnson, and the appeal brief for application Serial No. 85908525 was written by Jeffrey Chery, both of Law Office 120, Michael W. Baird, Managing Attorney.

<sup>2</sup> Application Serial No. 85908330. The application includes the following translation statement: “The English translation of ‘CORONA’ in the mark is ‘CROWN.’”

<sup>3</sup> Application Serial No. 85908525. The application includes the following statements: “The wording ‘CHURCHILL’ has no meaning in a foreign language. The name(s), portrait(s), and/or signature(s) shown in the mark does not identify a particular living individual.”

Electronic cigars, namely, electronic device to heat liquids to create a vapor for a human to inhale by mouth, being a battery, an LED light source, a mouthpiece, and a cartomizer, in the nature of a compartment for the fluid to be heated, a heating coil, and a vaporizing chamber, in International Class 34 (as amended).

Applicant also seeks registration on the Principal Register of PANATELA<sup>4</sup> and ROBUSTO<sup>5</sup> for the following very similarly identified goods:

Electronic cigars, namely, electronic devices that utilize technology to heat liquids to create a vapor for inhaling, in the nature of a battery, an LED light source, a mouthpiece, and a cartomizer, being a compartment for the fluid to be heated, a heating coil, and a vaporizing chamber, in International Class 34 (as amended).

Finally, Applicant seeks registration on the Principal Register of TORPEDO<sup>6</sup> for:

Electronic cigars, namely, electronic devices that utilize technology to heat liquids to create a vapor for a human to inhale by mouth, being a battery, an LED light source, a mouthpiece, and a cartomizer in the nature of a compartment for the fluid to be heated, a heating coil, and a vaporizing chamber, in International Class 34 (as amended).

All of the five applied-for terms are in standard characters. Each application was filed on April 18, 2013, based on Applicant's allegation of a *bona fide* intention to use the marks in commerce under Trademark Act Section 1(b).

The Trademark Examining Attorney has refused registration of each of the applied-for terms under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that they are merely descriptive of Applicant's goods.

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<sup>4</sup> Application Serial No. 85908505.

<sup>5</sup> Application Serial No. 85908568.

<sup>6</sup> Application Serial No. 85908598.

In addition, the first two applications listed *supra* have been refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground of likelihood of confusion with the following marks, each registered to a different owner, for “cigars” in International Class 34:

- CORONA (Application Serial No. 85908330) – LA CORONA;<sup>7</sup> and
- CHURCHILL (Application Serial No. 85908525) – CHURCHILL.<sup>8</sup>

After the Trademark Examining Attorney made each refusal final, Applicant appealed to this Board.

#### Appeals Consolidated

We have considered all arguments and evidence filed in each case. These appeals present common questions of law and fact and overlapping records, despite the variations among the marks and slight variations in the identifications of goods, and the additional Section 2(d) refusals of two of the applications. Therefore, in the interest of judicial economy, we find it appropriate to consolidate the cases and decide them in this single opinion. *In re Country Music Ass’n Inc.*, 100 USPQ2d 1824, 1827 (TTAB 2011). We affirm the refusal to register as to each application.

#### I. Mere Descriptiveness

A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods with which it is used. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987).

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<sup>7</sup> Registration No. 92892, issued August 5, 1913 on the Principal Register; renewed.

<sup>8</sup> Registration No. 653575, issued October 22, 1957 on the Supplemental Register; renewed.

Descriptiveness determinations are made in relation to an applicant's identified goods or services, the context in which the proposed mark is being used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use. *See Chamber of Commerce*, 102 USPQ2d at 1219. Descriptiveness is not considered in the abstract. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). Words that are merely descriptive must be left free for competitive use. *See In re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB 2001) (finding VIRTUAL FASHION merely descriptive of shopping software and electronic fashion retailing services).

Among the five applications before us, Applicant has used three slightly different goods identifications. Each begins "Electronic cigars, namely, . . . ." A "namely" clause is often used in an identification of goods to clarify terminology. Using "namely" typically focuses the scope of the identification to those particular items within the language following the word "namely." TMEP § 1402.03(a) (2015). In each of these applications, however, the wording after the "namely" clause merely provides a detailed description of the function and individual components of Applicant's devices. Therefore, we find that Applicant's goods are "electronic cigars," which is listed in the USPTO Acceptable Identification of Goods & Services Manual (ID Manual)<sup>9</sup> in Class 34 and appears from the record evidence – including the wording on boxes of Applicant's products – to be the common name for such goods, and assess whether each of the applied-for terms is descriptive of "electronic cigars."

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<sup>9</sup> The Board may take judicial notice of entries from the ID Manual.

The Examining Attorney submitted evidence establishing that each of the five terms Applicant seeks to register is a descriptive word designating a shape and size of a traditional cigar. The Examining Attorney also made of record evidence that many electronic cigar makers closely mimic traditional cigar designs: “Many vendors make extra effort on the design and package of the e-cigars to resemble the conventional cigars as much as possible.”<sup>10</sup>

In its appeal briefs, Applicant emphasizes that its products are not conventional cigars, but rather electronic inhaling devices that neither contain tobacco nor have the same dimensions as conventional tobacco products. E.g.: “Applicant’s products are electronic inhalers or vaporizers, shaped like a cigar, but with different dimensions and configurations.”<sup>11</sup> Applicant argues that consumers would not understand the words it seeks to register to describe such products, but rather as arbitrary or coined terms. Based on the record evidence that electronic cigar makers replicate and compare their goods to traditional cigars, we cannot agree.

We specifically address in turn each of the terms Applicant seeks to register.<sup>12</sup>

A. PANATELA (Application Serial No. 85908505)

“Panatela” is a noun defined as:

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<sup>10</sup> Application Serial Nos. 85908505 and 85908568, October 5, 2014 Final Office Action at 5; Application Serial No. 85908598, *id.* at 6; Application Serial Nos. 85908525 and 85908330, October 21, 2014 Final Office Action at 5 (from ecigsopedia.com); *see also id.* at 6, 8 (“These electronic devices look and feel like a real Cuban . . . Many electronic cigar vendors will spend a few extra bucks to make them look as authentic as possible before you even pick it up out of the package.”) (from info-electronic-cigarette.com/electronic-cigars/).

<sup>11</sup> Application Serial Nos. 85908568 and 85908598, Appeal Brief, 4 TTABVUE 6.

<sup>12</sup> Where not specified, citations are to the record of the application discussed in each subsection.

- “A long slender cigar,”<sup>13</sup>
- “a long slender straight-sided cigar,”<sup>14</sup> and
- “a cigar having a long, slender shape, usually about 5 inches in length and rounded at the mouth end.”<sup>15</sup>

One dictionary also provides the alternate spelling “panatella” for the latter definition.<sup>16</sup> Consistent with these dictionary definitions, the “Cigar Choice Guide” lists “Panatela” as a type of cigar, and describes “Panatela Cigars” as

generally similar to Coronas only they are usually [sic] longer and thinner. . . . Their typical sizes are 5.5 to 7 inches in length and have a ring gauge of 34 to 38. Due to the long, thin nature of Panatelas they are widely hailed as an elegant cigar for female smokers. This stereotype is not entirely true as it is enjoyed by both men and women alike.<sup>17</sup>

Examples of Panatela cigars given by this source are “The Padron Panatela” and “Baccarat Panatela.”

Applicant, which markets its products under the name “Tryst,” submitted a page from its website “relating to the PANATELA product” demonstrating that it is offering an electronic cigar in a long, slender, straight-sided shape, although in this evidence the name is spelled with an additional “l” – “Panatella.”<sup>18</sup>

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<sup>13</sup> March 8, 2014 Office Action at 2 (from education.yahoo.com/reference/dictionary), 7 (from yourdictionary.com, citing The American Heritage Dictionary of the English Language (4th ed. 2010)).

<sup>14</sup> *Id.* at 3 (from merriam-webster.com/dictionary).

<sup>15</sup> *Id.* at 6 (from yourdictionary.com, citing Webster’s New World College Dictionary (2010)).

<sup>16</sup> We grant the Examining Attorney’s request and take judicial notice of this definition from the online Collins Dictionary (collinsdictionary.com – American English).

<sup>17</sup> September 8, 2014 Response to Office Action at 7 (from cigarchoiceguide.com). Cigar diameters, or “ring gauges,” are measured in 64ths of an inch. *See* Application Serial No. 85908568, March 8, 2014 Office Action at 10.

<sup>18</sup> *Id.* at 5, 8 (from Applicant’s website enjoytryst.com); *see also* October 5, 2014 Final Office Action at 3.



The “Panatella” page from Applicant’s website describes this product as “long, slim and elegant.”<sup>19</sup>

Applicant argues that its customers “do not smoke conventional cigars.”<sup>20</sup> Nonetheless, Applicant appears to market its goods to smokers of conventional cigars. Its website states: “Trysts [sic] trademarked Electronic Robusto or Electronic Panatella each posses[s] 5 unique flavors that will prove to be a special delight to cigar aficionados.”<sup>21</sup>

In addition, the record demonstrates that at least two third parties have used “Panatela” and the phonetically identical term “Panatella” descriptively or generically in association with electronic cigars. E-Lites offers a “slim, panatela style disposable E-Gar,”<sup>22</sup> while Totally Wicked offers a disposable “Panatella” electronic cigar.<sup>23</sup>

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<sup>19</sup> October 5, 2014 Final Office Action at 3 (“A long, slim and elegant cigar lends itself to conversation. And when it’s electronic, well, all the better. Gents and modern ladies both delight in the Tryst Panatella electronic cigar.”).

<sup>20</sup> Appeal Brief, 4 TTABVUE 5.

<sup>21</sup> October 5, 2014 Final Office Action at 2 (from [enjoytryst.com/about-tryst](http://enjoytryst.com/about-tryst)).

<sup>22</sup> March 8, 2014 Office Action at 19 (from [e-lites.org/electronic-cigar](http://e-lites.org/electronic-cigar)).

<sup>23</sup> *Id.* at 14-16 (review of Totally Wicked Panatella eCigar from [content.spinfuel.com/totally-wicked-e-cigars/](http://content.spinfuel.com/totally-wicked-e-cigars/)), 23 (from [vapingmegalist.com/list-vaporizer-cigar](http://vapingmegalist.com/list-vaporizer-cigar)).

Based on careful consideration of all the record evidence, we find that PANATELA is merely descriptive of Applicant's electronic cigars, just as it is descriptive of conventional Panatela cigars, in that it immediately conveys knowledge of features or characteristics of Applicant's goods, including their long, slender size and straight-sided shape.

## B. ROBUSTO (Application Serial No. 85908568)

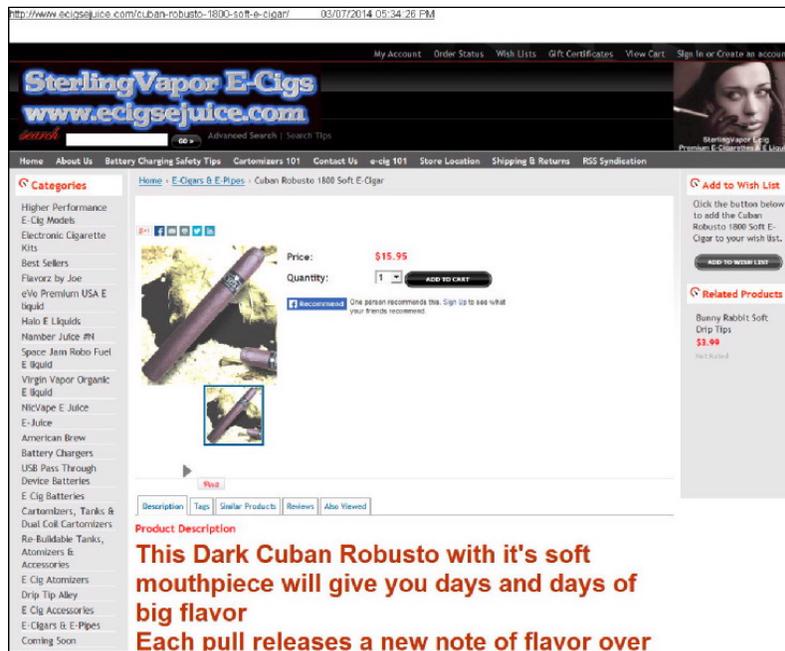
The Topcubans.com website (excerpted below) states that the Robusto is “[t]he most popular format being produced in Cuba,” with a length of 4 $\frac{7}{8}$  inches and a ring gauge, or thickness, of 50:<sup>24</sup>



Other evidence provides similar information regarding the descriptive or generic use of the term Robusto to identify a kind of cigar. A glossary on the Epicurus.com

<sup>24</sup> March 8, 2014 Office Action at 7. The “Robusto” is the fourth cigar from the right, displayed in a darker color than the other sizes.

website defines Robusto as: “A cigar shape which is usually 5 to 5½ inches by a 50 ring gauge,”<sup>25</sup> while an educational site gives the length of a Robusto as 4½ to 5½ inches, again with a ring gauge of 50.<sup>26</sup> Applicant submitted a page from CigarChoiceGuide.com listing Robusto as a type of cigar with a length of approximately 5 inches and a ring gauge of approximately 50, yielding “a very full flavor and a powerful strength.”<sup>27</sup> The Examining Attorney also submitted evidence that at least one other purveyor of electronic cigars offers a Robusto style:<sup>28</sup>



<sup>25</sup> *Id.* at 2-3.

<sup>26</sup> *Id.* at 10 (from columbia.edu/cu/cigar/started.html).

<sup>27</sup> September 8, 2014 Response to Office Action at 8.

<sup>28</sup> March 8, 2014 Office Action at 13-14 (from ecigsejuice.com). Applicant argues that this evidence is not relevant because it is dated March 7, 2014, after Applicant filed the subject application. As the Examining Attorney correctly points out, however, the determination of registrability “must be on the basis of facts disclosed in evidence adduced by applicant and/or the Examiner during the prosecution of the application up to and including the time of appeal.” *In re Texas Meat Brokerage, Inc.*, 199 USPQ 40, 44 (TTAB 1978) (citing *In re Thunderbird Prods. Corp.*, 406 F.2d 1389, 160 USPQ 730, 732-33 (CCPA 1969)).

Applicant’s argument that evidence subsequent to its filing date is irrelevant is equally unavailing with respect to its other applications.

In addition, third-party website CSPnet.com (“The source for convenience store and fuel news”) compares Applicant’s product to a “traditional Robusto”:<sup>29</sup>

## Flavored e-cigar

BRANDY, CREME BRULEE AMONG FIVE FLAVORS IN ROBUSTO AND PANATELLA LENGTHS

With flavor development reflecting current consumer taste trends, two e-cigars are hitting the market in both traditional Robusto and Panatella lengths. The Robusto is equivalent to eight traditional Robusto cigars, while Panatella is equivalent to six traditional Panatella cigars, according to the manufacturer. Noted for capturing an authentic cigar-smoking experience with a full and smooth draw, the e-cigar comes in five flavors including Vanilla Spiced Rum, Creme Brulee, Brandy, Kona Coffee and American Classic Cigar.



### COMPANY DETAILS

Tryst Electronic Smoking Devices  
(212) 947-3790  
<http://www.enjoytryst.com>

Applicant’s ROBUSTO electronic cigar also appears to be the same shape as a conventional Robusto cigar:<sup>30</sup>

<http://www.enjoytryst.com/tryst-collections/robusto> 10/05/2014 10:22:36 AM



<sup>29</sup> March 8, 2014 Office Action at 15. As shown in the next image, Applicant submitted a page from its website demonstrating that this “Tryst” product is its ROBUSTO e-cigar. September 8, 2014 Response to Office Action at 9.

<sup>30</sup> October 5, 2014 Final Office Action at 3 (from [enjoytryst.com/tryst-collections/robusto](http://enjoytryst.com/tryst-collections/robusto)); see also September 8, 2014 Response to Office Action at 9.

The record thus demonstrates that electronic cigars made by Applicant and others are designed to replicate the style, if not the tobacco content, of conventional Robusto cigars. Although Applicant's identified goods are not limited as to size or shape, the evidence from CSPnet.com indicates that Applicant's electronic Robusto product mimics the length of traditional Robusto cigars; even if it does not, because the identification is not limited, Applicant could seek to use ROBUSTO in association with goods matching those dimensions.

Moreover, although Applicant contends that its customers do not smoke conventional cigars, Applicant appears to market its goods to just such consumers. Applicant's website states in part that: "Trysts [sic] trademarked Electronic Robusto or Electronic Panatella each posses[s] 5 unique flavors that will prove to be a special delight to cigar aficionados."<sup>31</sup>

Based on careful consideration of all the record evidence, we find that ROBUSTO is also descriptive of electronic cigars, just as it is descriptive or generic of conventional Robusto cigars, in that it immediately conveys knowledge of features or characteristics of Applicant's goods, including their size and shape.

### C. TORPEDO (Application Serial No. 85908598)

According to the Topcubans.com website, a "Torpedo" cigar measures 6½ inches long with a 52 ring gauge and is "easily recognized through the Montecristo No.2 (most popular Cuban cigars in the world)":<sup>32</sup>

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<sup>31</sup> October 5, 2014 Final Office Action at 2 (from enjoytryst.com/about-tryst).

<sup>32</sup> March 8, 2014 Office Action at 2. The "Torpedo" cigar is the fifth cigar from the left, displayed in a darker color.



The site offers a “Torpedo Sampler (box of 6)” for \$108, which appears to comprise similarly shaped cigars from different manufacturers, as shown in this excerpt:<sup>33</sup>



Consistent with this evidence, the “Cigar Choice Guide” lists “Torpedo” as a type of cigar, stating:

<sup>33</sup> *Id.* at 3.

The Torpedo cigar has is [sic] a straight cigar which comes to a pointed cap at the end. Typical sizes are 6 to 7 inches in length and ring gauges ranging from 50 to 55. They are one of the most universally recognized kinds of cigars as they are the type that Montecristo No. 2 is – the most popular cigar throughout the world. You should spend way over an hour trying to smoke and therefore savour this beloved cigar type.<sup>34</sup>

Similarly, the “Best Cigar Blog” describes the subtle differences in the tapered head shape among three types of cigars, including the torpedo.<sup>35</sup> The Stogie Fresh website includes the Torpedo in “An Introduction to Cigar Sizes,” which discusses “the **common names** of cigar types and their typical dimensions.”<sup>36</sup> The Torpedo is described as typically 6-6.5 inches with a larger ring gauge shaft (often 52 to 56) “which then gently tapers to a point,” and is illustrated as follows:<sup>37</sup>



The record also contains evidence of a descriptive or generic use of “torpedo” in association with electronic cigars by a third party, which offers an electronic cigar packaged with “one torpedo tip and one extended ash tip.”<sup>38</sup>

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<sup>34</sup> September 8, 2014 Response to Office Action at 7 (from cigarchoiceguide.com).

<sup>35</sup> March 8, 2014 Office Action at 4 (from bestcigarprices.com/blog/cigar-101-cigar-shapes/).

<sup>36</sup> *Id.* at 7-9 (from stogiefresh.info/edu-cigars/articles/cigar-sizes.html).

<sup>37</sup> *Id.* at 9.

<sup>38</sup> October 5, 2014 Final Office Action at 7.



The TORPEDO application was filed on an intent-to-use basis and contains no limitations as to the size or shape in which Applicant’s electronic cigars may be offered, including the conventional cigar shape called a “Torpedo.”<sup>39</sup> We therefore find that TORPEDO is descriptive in association with electronic cigars in that it immediately conveys knowledge of features or characteristics of those goods, including their size and shape.

D. CORONA (Application Serial No. 85908330)

Definitions of “corona” include: “[from *La Corona*, a trademark]: a long cigar having the sides straight to the end to be lit and being roundly blunt at the other end.”<sup>40</sup> Applicant did not specify dimensions of its goods, but submitted the image below, described as a photo of “Applicant’s intended product, specifically relating to its **CORONA** brand product.”<sup>41</sup>



<sup>39</sup> Applicant indicates that it submitted an artist’s rendering of its TORPEDO product during examination, but no image of Applicant’s TORPEDO goods is of record.

<sup>40</sup> March 13, 2014 Office Action at 35 (from merriam-webster.com dictionary).

<sup>41</sup> September 15, 2014 Response to Office Action at 10, 13-14.

Applicant's intended product thus fits the definition of "a long cigar having the sides straight to the end to be lit and being round blunt at the other end."

The website CigarChoiceGuide.com lists "Corona" as a cigar type, and indeed states that Coronas "are one of the most popular cigar types. Coronas are made in numerous cigar manufacturers across the globe . . . . The majority of cigars fall into the corona bracket."<sup>42</sup> The cigaraficionado.com website calls the Corona, a straight-sided cigar, "the benchmark size against which all other sizes are measured."<sup>43</sup>

In addition, several third parties have used "Corona" descriptively in association with electronic cigars:

- Smokin' Cuban Disposable E-Cigar: "The Vaporillo's Smokin' Cuban Disposable Electronic Cigar is the premier choice E-Cigar for any traditional smoker! This Electronic Cigar is a timeless original. It's [sic] sleek, innovative style will remind you of your favorite 7" Corona style cigar."<sup>44</sup>
- HD Corona Disposable Electronic Cigar: "The HDCorona Cigar looks like a real Corona-style cigar, and has a realistic ash tip. Equivalent to approximately 35 Cigars!"<sup>45</sup>
- The Belvedere<sup>TM</sup> Smart Smoke Cigar: "Comparable to **6** domestic traditional Grand Corona cigars. Length range of 5<sup>5</sup>/<sub>8</sub> – 6<sup>5</sup>/<sub>8</sub>. Ring gauge of 45-47."<sup>46</sup>
- Totally Wicked Large Soft Bodied Luxury Disposable e-cigar: "The e-cigar is approximately the size of a long Corona cigar. . . ."<sup>47</sup>

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<sup>42</sup> *Id.* at 12.

<sup>43</sup> March 13, 2014 Office Action at 40.

<sup>44</sup> *Id.* at 51-52 (from vaporillos.com).

<sup>45</sup> *Id.* at 41-42 (from hdsмоke.com).

<sup>46</sup> *Id.* at 48 (from smartsmoke.com).

<sup>47</sup> October 21, 2014 Final Office Action at 6-7 (from totallywicked-liquid.com).

The CORONA application was filed on an intent-to-use basis and contains no limitations as to the size or shape in which Applicant’s electronic cigars may be offered, including the conventional cigar shape called a “Corona,” the shape of Applicant’s intended product. We therefore find that CORONA is descriptive in association with electronic cigars in that it immediately conveys knowledge of features or characteristics of those goods, including their size and shape.

E. CHURCHILL (Application Serial No. 85908525)

According to the website Topcubans.com, the “Churchill” cigar size is 7 inches long with a 47 ring gauge:<sup>48</sup>

<http://www.topcubans.com/cuban-cigars/newsiz.php?idsize=3> 03/14/2014 03:46:17 PM



<sup>48</sup> March 14, 2014 Office Action at 45. The “Churchill” is the third cigar from the left, displayed in a darker color than the other sizes.

Similarly, the website CigarChoiceGuide.com lists “Churchill” as a cigar type, and states in part: “The Churchill is named after Sir Winston Churchill. It was very rare that he was seen without a cigar in his hand. Churchill cigars are also known as Julieta cigars and are typically around 7 inches in length and have a ring gauge of around 47.”<sup>49</sup>

Applicant did not specify dimensions of its goods, but did submit the image at right, which it described as “a picture of Applicant’s intended product.”<sup>50</sup> The shape of Applicant’s intended product thus closely approximates the shape of the “Churchill” cigar represented on the Topcubans.com website on the preceding page.



The record contains evidence of two third-party uses of the term in association with electronic cigars: the ROK Stogie, described as “a Churchill-style full corona,”<sup>51</sup> and the First Union gift box of three e-cigars, called “the Churchill of E-Cigars!”<sup>52</sup>

The CHURCHILL application was filed on an intent-to-use basis and contains no limitations as to the size or shape in which Applicant’s electronic cigars may be offered, including the conventional cigar shape for which the descriptive name is

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<sup>49</sup> September 15, 2014 Response to Office Action at 10.

<sup>50</sup> September 15, 2014 Response to Office Action (second entry) at 1-2.

<sup>51</sup> March 14, 2014 Office Action at 53 (from vapemeup.com).

<sup>52</sup> *Id.* at 51-52 (from shop.vapinusa.com).

“Churchill,” the shape of Applicant’s intended product. We therefore find that CHURCHILL is descriptive in association with electronic cigars in that it immediately conveys knowledge of features or characteristics of those goods, including their size and shape.

## II. Likelihood of Confusion

Although we have found each of the applied-for terms to be merely descriptive and therefore unregistrable, we will, in order to render a decision on all the issues before us, now consider the refusals based on the ground of likelihood of confusion. In discussing these refusals, we will treat the terms Applicant seeks to register, CORONA and CHURCHILL, as highly suggestive. We accord the cited mark LA CORONA, which is registered on the Principal Register, the presumptions to which it is entitled under Section 7(b) of the Trademark Act. *See King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974). As to the cited mark CHURCHILL, the scope of protection extended to marks registered on the Supplemental Register “has been limited to the substantially identical notation and/or to the subsequent use and registration thereof for substantially similar goods.” *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975);<sup>53</sup> *see also In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978).

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567

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<sup>53</sup> Applicant’s cite of this case to support its assertion that the goods must be “substantially identical” is inaccurate. ’525 Application, Appeal Brief at 5-6, 4 TTABVUE 6-7.

(CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

#### A. Similarity of the Marks

We first consider the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “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*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013).

1. CHURCHILL (“525 Application”)

Applicant seeks to register CHURCHILL, which is identical to the cited mark CHURCHILL.

2. CORONA (“330 Application”)

The applied-for term CORONA differs from the cited mark LA CORONA only by the absence of the initial two-letter word “la.”

We grant the Examining Attorney’s request to take judicial notice that “la” is the Spanish word for the English definite article “the.”<sup>54</sup> Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine similarity of connotation with English word marks. *Palm Bay*, 73 USPQ2d at 1696. The doctrine is applied when it is likely that the ordinary American purchaser would “stop and translate [the word] into its English equivalent.” *Id.* Spanish is a “common language” in the United States, and the Board has routinely applied the doctrine of foreign equivalents to Spanish-language marks. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127 (TTAB 2015). We find that ordinary purchasers of electronic cigars would translate “la” in the cited mark as “the.” It is well-established that the definite article “the” has no trademark significance. *See, e.g., In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1034 (TTAB 1984).

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<sup>54</sup> See Definition from Collins Spanish-English Dictionary (2015) (collinsdictionary.com) attached to Examiner’s Statement, 6 TTABVue 17. The Board may take judicial notice of dictionary definitions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014).

We find, when the marks are considered in their entireties, CORONA highly similar to LA CORONA in sight, sound, meaning, and overall commercial impression. The first *du Pont* factor weighs strongly in favor of a likelihood of confusion with respect to both applications.

#### B. Similarity of the Goods

We turn next to the second *du Pont* factor, the similarity of the goods. It is not necessary that the goods be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods. *In re Thor Tech Inc.*, 90 USPQ2d at 1635. The greater the degree of similarity between the marks, the lesser the degree of similarity between the goods necessary to support a finding of likelihood of confusion. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

In both cited registrations, the goods are identified as “cigars.” Applicant’s goods are identified in both subject applications as:

Electronic cigars, namely, electronic device to heat liquids to create a vapor for a human to inhale by mouth, being a battery, an LED light source, a mouthpiece, and a cartomizer, in the nature of a compartment for the fluid to be heated, a heating coil, and a vaporizing chamber.

As discussed *supra*, because such goods are commonly known as “electronic cigars,” we compare cigars and electronic cigars.

First, “cigars” may be broad enough to encompass both traditional cigars made of rolled tobacco leaves and electronic cigars. Our decision does not rest on this basis, however, because we find cigars and electronic cigars to be closely related “smoking” devices. Indeed, the Examining Attorney submitted evidence that electronic cigars are marketed as comparable to, and a substitute for, traditional cigars. For example, the website Ecigsopedia.com states that: “*Smoking* electronic cigars or e-cigars is the most novel way of *smoking cigars*.” (emphasis added).<sup>55</sup> Third party “Smart Smoke” states the following on a page of its website offering an electronic cigar for sale: “Looking for the authentic cigar experience without the tar and smoke? Smart Smoke is proud to offer the Belvedere, a one-of-a-kind simple one-piece disposable design in an authentic and desirable cigar flavor and strength.”<sup>56</sup> The site says that the electronic Belvedere is “Comparable to 6 domestic traditional Grand Corona cigars.”<sup>57</sup> Some of the customer reviews at the bottom of this page underscore the relatedness of the goods:

- Reviewer: Richard Keenley from Spokane Valley, WA  
I was very skeptical at first, I am a avid cigar user in the sense of taste. No way will a “electric cigar” ever replace my real ones especially with a good glass of brandy... WOW! I was blown away.. My wife bought me on[e] in the mall as a gift and it took me a week to even try it, but sure glad I did... Thanks SmartSmoke!

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<sup>55</sup> ’330 Application, October 21, 2014 Final Office Action at 4.

<sup>56</sup> *Id.*, March 13, 2014 Office Action at 48.

<sup>57</sup> *Id.*

- *Reviewer: Happy Customer*  
I absolutely love a good cigar, and must admit didn't even want to try one, I stopped by the valley mall and the sales associate there caught me eyeballing the box in their display, and offered to let me try it. I said "no thanks, I like the real thing" he then said "Well what if this is just as good if not BETTER, and you're missing out by not trying the flavor?" So when he handed it out to me I took a couple puffs and was BLOWN AWAY. You guys nailed it! Congrats!
- *Reviewer: Anonymous Person*  
This flavor is unbelievable! It tastes just like a Montecristo cigar! LOVE IT!
- *Reviewer: Anonymous Person from Spokane, WA United States*  
I cannot tell you enough how much I love this cigar flavor. It feels, tastes, and smells just like a cigar. You guys nailed it!<sup>58</sup>

Based on all the evidence of record, we find that cigars and electronic cigars are substantially similar goods. Therefore, the second *du Pont* factor weighs in favor of a finding of likelihood of confusion for both applications.

### C. Classes of Customers and Channels of Trade

Finally, Applicant contends that the customers and channels of trade are different for its products than for the conventional cigars identified in the cited registrations. These arguments pertain to the third and fourth *du Pont* factors. Because there are no limitations as to channels of trade or classes of purchasers in the description of goods in the cited registrations, we presume that the registrants' goods move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers. See *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

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<sup>58</sup> *Id.* at 49-50.

There is record evidence that traditional cigars are sold through the same channels of trade as electronic *cigarettes*,<sup>59</sup> but no evidence establishing that the same is true of electronic cigars. We therefore find the third *du Pont* factor to be neutral.

As quoted in the immediately preceding subsection, there is record evidence that electronic cigar makers specifically market their goods to smokers of conventional cigars (“Looking for the authentic cigar experience without the tar and smoke?”; “The Vaporillo’s Smokin’ Cuban Disposable Electronic Cigar is the premier choice E-Cigar for any traditional smoker!”),<sup>60</sup> and that some consumers use both kinds of cigars. For example, ElectricCigars.net states that:

Sophistication has reached a new high, as the electronic cigar emerges on the market, more cigar aficionados are switching to this new way to enjoy a cigar without the ash, smoke, or leftover stink! . . . If you like cigars but don’t like the smoke or smell that comes with them, then it’s time to try this premium electronic cigar which has great flavor and vapor, it’s as close to the real thing as you can get.<sup>61</sup>

Applicant itself, as noted *supra*, touts that its electronic cigars “will prove to be a special delight to cigar aficionados.” The fourth *du Pont* factor thus weighs in favor of a likelihood of confusion.

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<sup>59</sup> See ’525 Application, March 14, 2014 Office Action at 24-37 (from smokersoutlet online.com), 38-44 (from bnbtabacco.com).

<sup>60</sup> ’330 Application, March 13, 2014 Office Action at 48 (from smartsmoke.com), 52 (from vaporillos.com).

<sup>61</sup> *Id.* at 43, 47.

Conclusion as to Likelihood of Confusion

We have considered all of the arguments and evidence of record as they pertain to the *du Pont* likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Trademark Examining Attorney may nonetheless be applicable, we treat them as neutral.

With respect to both applications, the first, second, and fourth *du Pont* factors weigh in favor of a likelihood of confusion – the first heavily so – while the third factor is neutral. We find that the terms Applicant seeks to register, CORONA and CHURCHILL, are likely to cause confusion with the registered marks LA CORONA and CHURCHILL, respectively, when used in association with Applicant's identified goods.

**Decision:** The refusals to register are affirmed on all grounds as to all five applications.