

This Opinion is Not a
Precedent of the TTAB

Hearing: February 7, 2018

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Pan American Properties, Corp.
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Serial No. 86556214
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Aileen E. Vázquez of Hogle & Pamas PSC,
for Pan American Properties, Corp.

Morgan L. Meyers, Trademark Examining Attorney, Law Office 117,
Hellen Bryan Johnson, Managing Attorney.

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Before Wolfson, Shaw and Adlin,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Pan American Properties, Corp. (“Applicant”) seeks registration on the Principal Register of the mark WHITE SANGRIIIA (in standard characters, “white” and “sangria” disclaimed) for “Prepared alcoholic cocktail; Alcoholic beverages except beers,” in Class 33.¹

¹ Application Serial No. 86556214 was filed on March 6, 2015, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of an alcoholic cocktail prepared from white wine and other ingredients, known as a "white sangria." After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1). A term is "merely descriptive" within the meaning of Section 2(e)(1) if it "immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). "On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980).

The determination of whether a mark is merely descriptive is not decided in the abstract or on the basis of guesswork, but "in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible

significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). In other words, we evaluate whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

When two or more merely descriptive terms are combined, the determination of whether the combined mark also has a merely descriptive significance turns on whether the combination of terms evokes a non-descriptive commercial impression. Generally, if each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (quoting *Estate of P.D. Beckwith, Inc. v. Commr.*, 252 U.S. 538, 543 (1920)); *see also In re Tower Tech, Inc.*, 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publ'g. Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

Applicant does not dispute that “white” and “sangria” are merely descriptive of white sangria, and accordingly has disclaimed exclusive rights to both terms in its

application.² Applicant argues, however, that “the applied-for trademark ‘WHITE SANGRIIIA’ is not merely descriptive, but rather fanciful or suggestive and, thus, susceptible of being registered....”³ In the alternative, Applicant argues that SANGRIIIA has acquired distinctiveness.⁴

A. Inherent Distinctiveness

The record establishes that the term is a highly descriptive designation for a prepared alcoholic cocktail. The word “white” is defined as “having no hue due to the reflection of all or almost all incident light.”⁵ “Sangria” is defined as “a Spanish drink of red wine, sugar, spices, fruit, and soda water or lemonade, sometimes laced with rum or brandy.”⁶ The Examining Attorney argues that SANGRIIIA is a readily perceived misspelling of SANGRIA and that “white sangria” is a type of sangria that is made with white wine and is popular during summer months.⁷ In support of this assertion, the Examining Attorney has made of record a webpage from the Real

² Applicant correctly notes, “A different case would be if [Applicant] had applied for the registration of the phrase ‘white sangria’ and had to disclaim both terms. In such a case, the mark would not be registrable because all of its terms would be disclaimed.” 10 TTABVUE 10.

³ 10 TTABVUE 7.

⁴ The Examining Attorney did not address Applicant’s alternate claim of acquired distinctiveness in part until briefing, following which Applicant requested, and was granted, remand to allow presentation of evidence on the issue. The Examining Attorney subsequently issued a Final Office Action maintaining the descriptiveness refusal and rejecting Applicant’s Section 2(f) claim, and this appeal resumed.

⁵ April 9, 2015 Office Action, TSDR 4. From the COLLINS ENGLISH DICTIONARY, online at www.collinsdictionary.com. While Applicant does not contest the provided definition, the better practice is to cite a definition from the Collins American English dictionary, rather than the English (British) version, as differences in meaning may exist between the two.

⁶ April 9, 2015 Office Action, TSDR 2.

⁷ 12 TTABVUE 5.

Simple website for a recipe called “White Sangria,” made from white wine, sugar, white grape juice, club soda and fruit,⁸ as well as copies of similar white wine-based recipes for “white sangria” from three additional websites: thekitchn.com,⁹ foodnetwork.com,¹⁰ and allrecipes.com.¹¹

In support of its argument that SANGRIIA is inherently distinctive, Applicant claims ownership of prior Registration No. 4099580 for the mark GASOLINA SANGRIIA for “prepared alcoholic cocktails” and argues that the registration indicates the Office accepts SANGRIIA as a fanciful or suggestive term. Although both Applicant and the Examining Attorney discussed Applicant’s prior registration, neither made it of record. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal, and the Board does not take judicial notice of registrations residing in the Office. *In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1644 n.11 (TTAB 2011); *Cf.* TBMP § 1208.04 (Board does not take judicial notice of third-party registrations when an applicant or examining attorney requests that such notice be taken during the course of an appeal); *In re House Beer*,

⁸ At <http://www.realsimple.com/food-recipes/>, Office Action April 9, 2015 at 9.

⁹ 7 TTABVUE 4.

¹⁰ 8 TTABVUE 7.

¹¹ 8 TTABVUE 12. The additional pages from allrecipes.com (at 8 TTABVUE 18-29) have very little probative value because they are entirely blank but for a drink title (such as White Sangria with Lemonade) appearing above a series of dots, a line, and “recipe by...”. As such, they do not directly show that the titles relate to an alcoholic beverage or a recipe for same.

LLC, 114 USPQ2d 1073, 1075 (TTAB 2015) (Board does not take judicial notice of entries in file of cited registration).¹²

In this case, the term “sangriiii” will be readily perceived by the relevant consumer class for Applicant’s prepared alcoholic cocktails as a play on the word “sangria.” The misspelling only slightly affects the overall appearance (and possibly pronunciation) of the purported mark. “In general, a mere misspelling of a word is not sufficient to change a merely descriptive term into an inherently distinctive trademark.” *In re Carlson*, 91 USPQ2d at 1200 (holding “URBANHOUSING” merely descriptive of real estate services); *see also In re Bayer Aktiengesellschaft*, 488 F.2d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (holding ASPIRINA merely descriptive for analgesic goods, being “sufficiently close in appearance, sound, and meaning” to the term aspirin); *In re Omaha Nat’l Corp.*, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987) (holding FIRSTIER merely descriptive of “first tier” banking services); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1164 (TTAB 2017) (holding SHARPIN, merely descriptive of knife blocks with built-in sharpeners); TMEP § 1209.03(j) (Oct. 2017).¹³

When consumers encounter Applicant’s prepared alcoholic cocktails and alcoholic beverages bearing the term WHITE SANGRIIIA, they will instantly perceive the

¹² We add that even if the registration was properly of record, it would not help Applicant overcome the Section 2(e)(1) refusal because, as discussed below, there are clear differences between the registered mark and the mark at issue in this proceeding.

¹³ The Examining Attorney argues that because SANGRIIIA is disclaimed, it validates the finding that the term is merely descriptive. Applicant counters that it has not disclaimed “sangriiii,” but the correct spelling of the term: “sangria.” However, in the case of a misspelled word that must nonetheless be disclaimed, the examining attorney must require its disclaimer in the correct spelling. *See, e.g., In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009); *In re Newport Fastener Co.*, 5 USPQ2d 1064, 1067 n.4 (TTAB 1987).

designation as descriptive of sangria drinks or cocktails that are made with white, rather than red, wine. The word WHITE designates an ingredient or feature of the beverage. *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1576 (Fed. Cir. 2015) (“The Board found that the relevant consumer, knowing that the goods are supplements containing nopal cactus juice, would understand the mark NOPALEA to convey information that the goods contain ingredients from the *Nopalea* cactus ...Substantial evidence supports the Board’s findings, and its conclusion that ‘nopalea’ is merely descriptive of TriVita’s goods.”). The term SANGRIIA will be readily perceived as an intentional misspelling or play on the word “sangria.” Further, each component retains its merely descriptive significance in relation to the goods when combined; indeed, the combination WHITE SANGRIIA is highly descriptive as applied to Applicant’s “prepared alcoholic cocktail; alcoholic beverages except beers.”

B. Acquired Distinctiveness

In the alternative, Applicant argues that its mark has acquired distinctiveness in part, through widespread use and recognition in the marketplace. “A claim of distinctiveness under Section 2(f) normally is not raised in a Section 1(b) application before the applicant files an amendment to allege use or a statement of use because a claim of acquired distinctiveness, by definition, requires prior use.” *In re Olin Corp.*, 124 USPQ2d 1327, 1333 (TTAB 2017) (citing *In re Binion*, 93 USPQ2d 1531, 1538 (TTAB 2009). If, however, an applicant can show that it has created distinctiveness in a term for certain goods, and that such distinctiveness will transfer to the involved

application when it begins to use the mark on similar or related goods, then registration will not be refused for the mark with respect to the similar or related goods. *Id.* In the case at hand, Applicant argues that even though it has not used the mark WHITE SANGRIIIA in the marketplace, SANGRIIIA has become distinctive for Applicant's goods, and that such distinctiveness will transfer to the application when it begins to use the mark WHITE SANGRIIIA. Applicant attempts to establish acquired distinctiveness through its alleged continuous and exclusive use of the term SANGRIIIA since 2011.¹⁴

Applicant contends that “the term ‘SANGRIIIA’ in the applied-for mark ‘WHITE SANGRIIIA’ has acquired secondary meaning through [Applicant’s] use of the ‘GASOLINA SANGRIIIA’ trademark.”¹⁵ In support, Applicant’s Vice President, Alberto Fernandez, declares that Applicant has used the mark GASOLINA SANGRIIIA in the United States (including in the Commonwealth of Puerto Rico) since 2011, has spent \$5 million per year for the past 5 years in advertising GASOLINA SANGRIIIA, and has sold over 10 million units of GASOLINA SANGRIIIA annually for the past 5 years.¹⁶ However, there are clear differences between GASOLINA SANGRIIIA and SANGRIIIA by itself, and the presence of the arbitrary term “gasolina” in Applicant’s registered mark dramatically sets it apart

¹⁴ Applicant also attempts to establish acquired distinctiveness through the GASOLINA SANGRIIIA registration, but as indicated it is not of record.

¹⁵ 10 TTABVUE 19.

¹⁶ Applicant submitted two identical affidavits, both executed by Mr. Fernandez. The only difference between them is their dates of execution, June 9, 2014 (4 TTABVUE 15-16) and August 18, 2016 (16 TTABVUE 51).

from the applied-for mark. Inasmuch as the testimony is solely directed to Applicant's use of the mark GASOLINA SANGRIIIA, it does not support a finding that SANGRIIIA as part of WHITE SANGRIIIA has acquired distinctiveness.¹⁷

Applicant also submitted photographs of product packaging, advertising and promotional materials allegedly showing its use of the mark SANGRIIIA. Examples include pouches, in-store displays, and other advertising:

1. Pouches¹⁸



¹⁷ Likewise, to the extent the evidence submitted by Applicant shows use of the mark GASOLINA SANGRIIIA, it does not support a finding that SANGRIIIA per se has acquired distinctiveness.

¹⁸ July 13, 2017 Response at 316 and 30.

2. In-store displays¹⁹



¹⁹ *Id.* at 309 and 13.

3. Advertising²⁰



²⁰ *Id.* at 333, 318 and 310.

Because few of the photos are dated, or marked to indicate where they were taken,²¹ they do not support a finding of exclusive and continuous use since 2011 in the United States (including in the Commonwealth of Puerto Rico).

Applicant also submitted copies of ten dated posters advertising a concert, fashion show or the like, allegedly taken from 2012 to 2017. Examples include:²²



²¹ Mr. Fernandez states that Applicant has commercialized its products not only in the United States, including Puerto Rico, but also in “Panama, Dominican Republic, and Saint Marteen,” and “thus the mark has also had international exposure and recognition.” Fernandez Sworn Statement, August 18, 2016, at 374, attached to Applicant’s July 13, 2017 Response.

²² Applicant’s July 13, 2017 Response at 33 and 54 and 63.



There is no product displayed in any poster except in the following:²³



At best, we can infer from the posters that Applicant is an event sponsor, but the evidence does not establish that it is a beverage product supplier. In addition, Applicant provided copies of pages from its Twitter and Facebook accounts that

²³ *Id.* at 42.

include postings from 2012 to 2017,²⁴ but the postings do not provide the context within which the term SANGRIIIA is used, and the majority include the term GASOLINA.²⁵ Applicant also submitted a print-out of excerpts from a 2016 Google search for “sangriiia.”²⁶ The Google hits are truncated to such an extent that we cannot ascertain the nature or purpose of the term’s use and appear to point as much to “gasolina sangriiia” as to white or other types of “sangriiia.” Such a list “does not show sufficient context in which the term is used on the listed web pages.” *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1461 n.10 (TTAB 2014). Without context, the extent to which consumers have been exposed to the term SANGRIIIA, as well as the extent to which the term has made an impact on the marketplace, is unknown. Nevertheless, we have considered the Twitter and Facebook postings and the Google hit list to the extent that we can glean from them any evidence of value. Finally, the “Sales Cost Profit” statement²⁷ purporting to indicate sales of SANGRIIIA beverages from “2011 to 4/30/2014” is unverified, does not indicate specifically when any of the specific items were sold or shipped, or even whether they were sold within the United States (including Puerto Rico).

²⁴ July 13, 2017 Response at 107-211 (Twitter) and 269-308 (Facebook).

²⁵ Further, the majority of the Twitter and Facebook postings appear to be in Spanish, and no translation has been provided. “Because the Board conducts its proceedings in English, these documents have no probative value.” *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1928 (TTAB 2011); *cf. Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 (TTAB 1998) (holding that documents in a language other than English are inadmissible).

²⁶ *Id.* at 355-366.

²⁷ July 13, 2017 Response at 315.

“[T]he higher the degree of descriptiveness of the designation in question, the higher the burden Applicant faces in proving acquired distinctiveness.” *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1849 (TTAB 2017); *see also In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005) (“The proposed mark is highly descriptive. Therefore, applicant had the burden to show a concomitantly high level of secondary meaning.”).

In short, the evidence is insufficient to prove that the term SANGRIIIA has acquired distinctiveness. Even assuming it were sufficient to show that sales were made from 2012 to 2017, and that the mark used on the product was SANGRIIIA or WHITE SANGRIIIA and not GASOLINA SANGRIIIA, five years use of this highly descriptive mark would be insufficient. *See In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262 (Fed. Cir. 2015) (holding that the Board was within its discretion not to accept applicant’s allegation of five years’ use given the highly descriptive nature of the mark); *Apollo Med.*, 123 USPQ2d at 1856 (finding, despite applicant’s claim of use since 1991, that much more evidence, especially in the quantity of direct evidence from the relevant purchasing public, would be necessary to show that the designation MEDICAL EXTRUSION TECHNOLOGIES has become distinctive for applicant’s medical extrusion goods); *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1766 (TTAB 2013) (“Given the highly descriptive nature of registrant’s mark [ANNAPOLIS TOURS], continuous use alone since 1992 would not be sufficient to establish acquired distinctiveness.”).

Because the designation WHITE SANGRIIIA is highly descriptive as applied to Applicant's "prepared alcoholic cocktail; alcoholic beverages except beers," Applicant's burden of proving acquired distinctiveness is likewise very high. We find that Applicant has failed to carry that burden.

Decision: The refusal to register Applicant's mark WHITE SANGRIIIA on the ground that it is merely descriptive under Trademark Act § 2(e)(1), and has not acquired distinctiveness in part under Section 2(f), is affirmed.