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U.S. Application Serial No. 87950215

Mark: ARTIZEN

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the trademark examining attorney's refusal to register the mark **ARTIZEN**, in stylized form, for "Essential oils for aromatherapy use; Fragrance oils; Absolute oils for personal use, use in the manufacture of scented products, for cleaning purposes; Essential oils; Essential oils for household use; Essential oils for personal use; Essential oils for use in the manufacture of scented products; Lavender oil; Natural essential oils; Oils for cleaning purposes; Oils for toiletry purposes; Peppermint oil; Fragrances" in International Class 3. The examining attorney refused registration on the Principal Register because applicant's applied-for mark is merely descriptive of the

stated goods. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). For the reasons and authorities cited below, it is requested that the refusal to register be affirmed.

STATEMENT OF FACTS

Applicant filed the present application on June 6, 2018, seeking to register the mark **ARTIZEN**, in stylized form, for “Essential oils for aromatherapy use; Fragrance oils; Absolute oils for personal use, use in the manufacture of scented products, for cleaning purposes; Essential oils; Essential oils for household use; Essential oils for personal use; Essential oils for use in the manufacture of scented products; Lavender oil; Natural essential oils; Oils for cleaning purposes; Oils for toiletry purposes; Peppermint oil; Fragrances” in International Class 3.

In the first Office action, dated September 29, 2018, registration was refused under Section 2(e)(1) of the Trademark Act because the applied-for mark merely describes a feature or characteristic of applicant’s goods per Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); *see* TMEP §§1209.01(b), 1209.03 *et seq.* The examining attorney also required the applicant to amend the mark drawing.

On March 28, 2019, applicant revoked the power of attorney of record and appointed a new attorney.

On March 29, 2019, applicant, by and through its attorney, filed a response to the Office action in which applicant presented arguments against the merely descriptive refusal and submitted an amended mark drawing, which was accepted. Subsequently, the examining attorney withdrew the mark drawing requirement.

On May 5, 2019, the examining attorney determined that applicant’s arguments were unpersuasive and the refusal under Section 2(e)(1) was made final.

On June 18, 2019, the applicant filed a request for reconsideration and filed a notice of appeal.

On July 31, 2019, the examining attorney denied the request for reconsideration.

The applicant submitted its Appeal Brief on September 20, 2019, and on September 26, 2019 it was forwarded to the examining attorney for review.

ISSUE ON APPEAL

The sole issue on appeal is whether the applicant's applied-for mark **ARTIZEN**, in stylized form, is merely descriptive of the identified goods, namely, "Essential oils for aromatherapy use; Fragrance oils; Absolute oils for personal use, use in the manufacture of scented products, for cleaning purposes; Essential oils; Essential oils for household use; Essential oils for personal use; Essential oils for use in the manufacture of scented products; Lavender oil; Natural essential oils; Oils for cleaning purposes; Oils for toiletry purposes; Peppermint oil; Fragrances" in International Class 3 under Section 2(e)(1) of the Trademark Act.

ARGUMENT

I. THE APPLICANT'S MARK IS MERELY DESCRIPTIVE OF THE APPLICANT'S IDENTIFIED GOODS

A mark is merely descriptive if "it immediately conveys information concerning a feature, quality, or characteristic of [an applicant's] goods or services." *In re N.C. Lottery*, 866 F.3d 1363, 1367, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); TMEP §1209.01(b); see *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1251, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (C.C.P.A. 1978)).

A. The Wording ARTIZEN is the Phonetic Equivalent of and a Novel and Intentional Misspelling of the Term ARTISAN that Merely Describes a Characteristic and Feature of the Applicant's Goods

In the present case, the wording “ARTIZEN” merely describes a feature and characteristic of the applicant’s goods because it is the phonetic equivalent of and a novel and intentional misspelling of the term “artisan”, which is a descriptive term used to describe the applicant’s goods.

The determination of whether a mark is merely descriptive is made in relation to an applicant’s goods, not in the abstract. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012); *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); TMEP §1209.01(b); *see, e.g., In re Polo Int’l Inc.*, 51 USPQ2d 1061, 1062-63 (TTAB 1999) (finding DOC in DOC-CONTROL would refer to the “documents” managed by applicant’s software rather than the term “doctor” shown in a dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242, 1243-44 (TTAB 1987) (finding CONCURRENT PC-DOS and CONCURRENT DOS merely descriptive of “computer programs recorded on disk” where the relevant trade used the denomination “concurrent” as a descriptor of a particular type of operating system).

“Whether consumers could guess what the product [or service] is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

Specifically, the applied-for mark is a novel and intentional misspelling of the word “artisan”. As the previously included definitions show, the term “artisan” is defined as “[a] person skilled in making a product by hand” and “made by hand or by traditional means and using high-quality ingredients; artisanal”. *See the previously attached evidence in the Examining Attorney’s Office Actions, dated September 29, 2018, May 5, 2019, and July 31, 2019, defining “artisan” and showing common usage of the wording “artisan” in the marketplace.* A novel spelling or an intentional misspelling that is the phonetic equivalent of a merely descriptive word or term is also

merely descriptive if purchasers would perceive the different spelling as the equivalent of the descriptive word or term. *See In re Quik-Print Copy Shop, Inc.* , 616 F.2d 523, 526 & n.9, 205 USPQ 505, 507 & n.9 (C.C.P.A. 1980) (holding “QUIK-PRINT,” phonetic spelling of “quick-print,” merely descriptive of printing and photocopying services); *In re Calphalon Corp.* , 122 USPQ2d 1153, 1163 (TTAB 2017) (holding “SHARPIN”, phonetic spelling of “sharpen,” merely descriptive of cutlery knife blocks with built-in sharpeners); *In re Carlson* , 91 USPQ2d 1198, 1203 (TTAB 2009) (holding “URBANHOUSING,” phonetic spelling of “urban” and “housing,” merely descriptive of real estate services); TMEP §1209.03(j). Thus, purchasers would perceive the different spelling of “**ARTIZEN**” as the equivalent of the descriptive word “artisan”.

For example, the term “artisan” could be pronounced the same as the applied-for mark “**ARTIZEN**”, since “artisan” is pronounced as “ar-ti-zen” or “ar-te-zen”, with the last syllable being “zen”. *See the previously attached evidence in the Examining Attorney’s Office Actions, dated September 29, 2018 and July 31, 2019.* In addition, the Applicant states in its Brief that consumers are likely to pronounce the applied-for mark in the same way as the term “artisan.” The applicant states that “consumers may pronounce ‘**ARTIZEN**’ in a way that sounds similar to ‘**ARTISAN**’” *See Applicant’s Brief at 9.* Accordingly, the applied-for mark “**ARTIZEN**” is a novel spelling and an intentional misspelling that is the phonetic equivalent of the word it represents: artisan. Thus, consumers are likely to view and pronounce the applied-for mark as “artisan”, which is descriptive of a feature of the applied-for goods, and as such registration on the Principal Register should remain refused.

B. The Applied-For Mark “ARTIZEN”, which is a Phonetic Equivalent and a Novel and Intentional Misspelling of the Term “artisan”, is Descriptive of the Applied-for Goods because the Term “artisan” is Commonly Used in the Industry to Describe a Feature of Such Goods

The assertion and the descriptiveness of the wording “**ARTIZEN**” is further supported by internet evidence submitted by the examining attorney in the initial Office Action, dated September 29, 2018, the final Office action, dated May 5, 2019, and the denial of the request for reconsideration, dated July 31, 2019. This evidence shows the common industry usage of the term “artisan” to describe goods related to the applicant’s goods. This evidence shows that goods such as oils are commonly marketed as being “artisan” in nature or “artisan made.” This evidence also shows that “artisan oils” are highly desired for their unique qualities and features. Therefore, consumers familiar with the applicant’s goods are likely to immediately recognize the applied-for mark as being a phonetic equivalent as well as a novel and intentional misspelling of the term “artisan”, which is commonly used to describe the applicant’s goods.

The following is a sample of evidence provided by the examining attorney:

1. <http://www.snowlotus.org/essential-oils/> The printouts of web pages show Snow Lotus offering a collection of over 70 “organic artisan essential oils”. (See pp. 7-9, Outgoing Office Action dated September 29, 2018).
2. <https://naha.org/marketplace> The printouts of web pages show Artisan Aromatics offering “therapeutic quality essential oils procured from smaller suppliers and artisan distillers worldwide”. (See pp. 10-19, Outgoing Office Action dated September 29, 2018).
3. <http://flourisharomatherapy.com/working-with-artisan-essential-oils> The printout of a web page shows Flourish Aromatherapy describing “artisan essential oils” as “a superior type of essential oils to work with for aromatherapy”. (See p. 7, Outgoing Office Action dated May 5, 2019).

4. <https://bkbotanicals.com/blogs/pure-essential-oil-blog/artisan-essential-oils-versus-commercial-essential-oils> The printout of a web page shows a blog post comparing “artisan essential oils versus commercial essential oils”. (*See* p. 9, Outgoing Office Action dated May 5, 2019).
5. <https://doreyaromatherapy.com/> The printout of a web page shows Dorey Aromatherapy offering “pure, authentic, artisan produced essential oils”. (*See* p. 6, Outgoing Office Action dated July 31, 2019).

The sample Internet evidence above illustrates the descriptiveness of the applicant’s mark. The evidence shows that the word “artisan” is commonly associated with a feature and characteristic of a type of high-quality essential oils as well as essential oils hand-crafted by artisans. Thus, registration should remain refused on the Principal Register as consumers will immediately view the applied-for mark of “**ARTIZEN**” as having the same meaning as the highly descriptive term of “artisan.”

C. The Applicant’s Own Statement Supports the Conclusion That The Applied-For Mark is not Suggestive when Considered in Relation to the Applied-for Goods

Applicant contends that “Applicant’s mark **ARTIZEN** is not descriptive of the goods, but is suggestive”. *See* Applicant’s Brief, page 6 and Applicant’s March 29, 2019, Response to Office Action at 1. Further, applicant states “[b]ecause Applicant’s **ARTIZEN** mark is a double entendre requiring imagination, it is suggestive, not descriptive”. Applicant’s Brief, page 7. However, most importantly, Applicant upholds that although “essential oils may often be described as ‘artisanal’ or made by ‘artisans’...Applicant’s **ARTIZEN** mark has a double meaning” (emphasis added). *See id.* The examining attorney respectfully disagrees and notes for the record that the applicant’s own statement noting that “although essential oils may often be described as

‘artisanal’ or made by ‘artisans’” solidifies the examining attorney’s position that the applied-for mark should be refused under Section 2(e)(1) of the Trademark Act.

A mark is suggestive if some imagination, thought, or perception is needed to understand the nature of the goods and/or services described in the mark; whereas a descriptive term immediately and directly conveys some information about the goods and/or services. *See Stoncor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1332, 111 USPQ2d 1649, 1652 (Fed. Cir. 2014) (citing *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1251-52, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012)); TMEP §1209.01(a). As further explained above and below, the applied-for mark “**ARTIZEN**” is not suggestive, but is as a novel spelling and an intentional misspelling of the word “artisan” that directly conveys information about applicant’s identified goods for “essential oils”. Therefore, because as the applicant states, goods such as the applicants are often described as being “artisanal” or “made by artisans”, the applied-for mark is not suggestive. Rather, it is merely descriptive of a feature of the goods as no thought or imagination is required to derive the nature of the goods used in connection with the applied-for mark.

D. The Applied-for Mark ARTIZEN is not a Double Entendre

As noted above, the applicant also argues that the applied-for mark is a double entendre. The wording “**ARTIZEN**” is not a double entendre that would be well-recognized by the purchasing public. A “double entendre” is an expression that has a double connotation or significance as applied to the goods and/or services. TMEP §1213.05(c); *see In re Colonial Stores Inc.*, 394 F.2d 549, 552-53, 157 USPQ 382, 384-85 (C.C.P.A. 1968) (finding SUGAR & SPICE a double entendre and not descriptive for bakery products because it evokes the nursery rhyme “sugar and spice and everything nice”).

A mark that comprises a “double entendre” will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods and/or services. TMEP §1213.05(c). However, the multiple meanings that make an expression a “double entendre” **must be well-recognized by the public and readily apparent from the mark itself.** *See In re Calphalon Corp.*, 122 USPQ2d 1153, 1163-64 (TTAB 2017) (quoting TMEP §1213.05(c)) (finding SHARPIN not a double entendre in relation to cutlery knife blocks with built-in sharpeners and affirming descriptiveness refusal); *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1287 (TTAB 2006) (finding GALA ROUGE not a double entendre in relation to wines and affirming disclaimer of ROUGE); *In re The Place, Inc.*, 76 USPQ2d 1467, 1470-71 (TTAB 2005) (finding THE GREATEST BAR not a double entendre in relation to restaurant and bar services and affirming descriptiveness refusal) (emphasis added). Here, the purported double meaning of the applied-for mark is not immediately apparent to consumers given the applied-for mark’s overall resemblance to the descriptive term “artisan.” Thus, the applied-for mark is not a double entendre.

In each of applicant’s responses, applicant contends that the wording “**ARTIZEN**” “is not merely descriptive, but instead, is a distinctive double entendre” as “an expression that has a double connotation or significance as applied to the goods...” *See* TMEP § 1213.05(c); Applicant’s Brief, pages 6-7. Applicant states that while “consumers may pronounce ‘**ARTIZEN**’ in a way that sounds similar to ‘ARTISAN’ they will also see the play on word[s] with the addition of ‘ZEN’ instead of ‘SAN’”. *See id.* at 9. As a result, applicant maintains “when consumers encounter Applicant’s **ARTIZEN** mark on essential oils, they will perceive the entire mark as a pun or double entendre that plays on the term ‘ZEN’”. *See id.* at 9. Applicant argues that “the double meaning of the mark **ARTIZEN** as a whole creates a suggestive significance...and distinct commercial

impression apart from the mark sounding similar to ‘ARTISAN’ such that any descriptive significance of the mark is lost”. *See id.*

However, the multiple interpretations that make an expression a “double entendre” must be associations that the public would make fairly readily, and must be readily apparent from the mark itself. TMEP §1213.05(c); *see In re RiseSmart Inc.* , 104 USPQ2d 1931, 1934 (TTAB 2012) (finding that TALENT ASSURANCE does not present a double entendre such that “the merely descriptive significance of the term [TALENT] is lost in the mark as a whole”); *In re The Place, Inc.* , 76 USPQ2d 1467, 1470 (TTAB 2005) (holding THE GREATEST BAR laudatory and merely descriptive of restaurant and bar services; the Board stating that “[i]f the alleged second meaning of the mark is apparent to purchasers only after they view the mark in the context of the applicant’s trade dress, advertising materials or other matter separate from the mark itself, then the mark is not a double entendre”); *In re Wells Fargo & Co.* , 231 USPQ 95, 99 (TTAB 1986) (holding EXPRESSERVICE merely descriptive for banking services, despite applicant’s argument that the term also connotes the Pony Express, the Board finding that, in the relevant context, the public would not make that association); *In re Ethnic Home Lifestyles Corp.* , 70 USPQ2d 1156, 1158 (TTAB 2003) (holding ETHNIC ACCENTS merely descriptive of “entertainment in the nature of television programs in the field of home décor,” because the meaning in the context of the services is home furnishings or decorations which reflect or evoke particular ethnic traditions or themes, which identifies a significant feature of applicant’s programs; viewers of applicant’s programs deemed unlikely to discern a double entendre referring to a person who speaks with a foreign accent). Therefore, applicant’s argument is unconvincing.

Applicant takes the erroneous position that “ZEN” has a meaning in order to argue that the wording “**ARTIZEN**” has a double meaning or significance as applied to the goods. Further, applicant has failed to provide any evidence, other than mere definitions for the word “ZEN”, to establish a connection between the word “ZEN” and the applicant’s identified goods. Instead, the Examining

Attorney's evidence in the record, as well as the applicant's own statements, demonstrate that the word "artisan" is commonly used in the essential oil industry to describe a type of essential oil as artisanal, that is artisan made and/or artisan essential oils. As such, consumers of applicant's goods will immediately believe that applicant's essential oils are artisanal. Thus, applicant's arguments fail to overcome the immediate descriptiveness of the wording and registration should remain refused.

1. *The Examining Attorney did not err in Disregarding Precedential Case Law Cited by Applicant since **ARTIZEN** is Descriptive*

An applied-for mark that is merely descriptive does not become registrable simply because other seemingly similar marks appear on the register. *In re Scholastic Testing Serv., Inc.*, 196 USPQ at 519; TMEP §1209.03(a).

It is well settled that each case must be decided on its own facts and the Trademark Trial and Appeal Board is not bound by prior decisions involving different records. *See In re Nett Designs, Inc.*, 236 F. 3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014); TMEP §1209.03(a). The question of whether a mark is merely descriptive is determined based on the evidence of record at the time each registration is sought. *In re theDot Commc'ns Network LLC*, 101 USPQ2d 1062, 1064 (TTAB 2011); TMEP §1209.03(a); *see In re Nett Designs, Inc.*, 236 F.3d at 1342, 57 USPQ2d at 1566.

Applicant relies on the case *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062 (TTAB 2008), in which the Board found the applied-for mark "THE FARMACY" to be a registrable double entendre. *See* Applicant's Brief, page 10. Applicant maintains that "[j]ust because the mark at issue in that case (THE FARMACY) is no longer an active registration does not mean that the case law is unconvincing, or that the Examining Attorney can disregard it." *See id.* Further, Applicant claims that "THE FARMACY" case is relevant because "the Examiners in both instances refused to register the marks and found them to be

merely descriptive...[and] [i]t does not matter that the mark at issue in the precedential TTAB opinion listed services, and the Application lists goods.” *See id.*

Additionally, applicant relies on a string cite of cases where the Board found registrable unitary marks or found the marks to be a double entendre and maintains “while many of the cases cited incorporate two or more terms in the trademark, it is not required that a mark consist of two or more terms in order to succeed with the double entendre argument”. *See id.* at 11 and Applicant’s June 18, 2019, Request for Reconsideration at pages 5-6. Further, applicant argues that the case “NEWTRITIOUS” is an example “of a single term trademark that was registered in standard characters for powdered mixes in the nature of powdered nutritional supplement mix”.

However, although the Examining Attorney agrees that the Board found the marks “THE FARMACY” and “NEWTRITIOUS” to have a double meaning, only “THE FARMACY” case is precedential. Nevertheless, it is well settled that each case must be decided on its own facts and contrary to applicant’s arguments, the present case is not analogous to those. Here, Applicant concedes that “consumers may pronounce ‘**ARTIZEN**’ in a way that sounds similar to ‘ARTISAN’”, and that oils are commonly referred to as being “artisanal”. *See* Applicant’s Brief at pages 7 & 9. As further explained above, the applied-for mark **ARTIZEN** is a novel spelling and an intentional misspelling. Moreover, the evidence in the record overwhelmingly demonstrates that the word “artisan” is commonly used in the essential oil industry to describe a type of essential oils and also essential oils made by an artisan. Thus, consumers of applicant’s goods will immediately believe that applicant’s essential oils are artisanal, artisan made and/or artisan. As a result, the Examining Attorney did not err in finding “THE FARMACY” case and applicant’s additional string cite of cases to be unconvincing for determining the descriptiveness of the applied-for mark “**ARTIZEN**”.

In brief, the term “artisan” unmistakably is a type and category of essential oils. Therefore, the applied-for mark “**ARTIZEN**” is a novel and an intentional misspelling that is the exact phonetic equivalent of a merely descriptive word or term and does not create a unique, incongruous, or nondescriptive meaning in relation to the goods. In view of the foregoing, the applied-for mark should remain refused on the Principal Register under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

CONCLUSION

Based on the foregoing, applicant’s applied-for mark merely describes a feature and characteristic of the identified goods. Accordingly, it is therefore respectfully requested that the refusal to register under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1) be affirmed.

Respectfully submitted,

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