

This Opinion is Not a
Precedent of the TTAB

Mailed: May 24, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Blake Farms Hard Apple Cider, LLC

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Serial No. 90504414

Alex Szypa of Carlson, Gaskey & Olds, P.C., for Blake Farms Hard Apple
Cider, LLC.

Raul Cordova, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

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NOTICE OF CORRECTION

Before Wellington, Pologeorgis, and Johnson,
Administrative Trademark Judges.

By the Board:

On May 16, 2024, the Board issued a decision (“Decision”) in an ex parte appeal affirming the Examining Attorney’s refusal to register CINNAMON DONUT STOUT as a trademark. The Decision is corrected by removing references to “clear and convincing” as the burden of proof that the Examining Attorney must meet in order to support a refusal to register based on genericness. *See generally* Trademark

Manual of Examining Procedure (TMEP) § 1209.01(c)(i) (Nov. 2023). Specifically, the Board issues the following corrections to the Decision:

On page 5, “The Examining Attorney has the burden of proving genericness by ‘clear and convincing evidence.’ *Id.* at 1635; *In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *In re Gould Paper*, 5 USPQ2d at 1111.” **is corrected to read** “The Examining Attorney has the burden of proving genericness by a preponderance of the evidence. *See In re Uman Diagnostics AB*, 2023 USPQ2d 191, at *28 (TTAB 2023) (applying preponderance of the evidence standard).”

On page 20, “The Examining Attorney has the burden of proving genericness by ‘clear and convincing evidence.’ *In re Cordua Rests.*, 118 USPQ2d at 1635. Here, the Examining Attorney has proffered clear and convincing evidence that beer is offered in a variety of flavors that describe the central, or key, aspect of the beer. The Examining Attorney also submitted clear and convincing evidence that ‘cinnamon donut’ is the term that describes the most important, or key, aspect of ‘cinnamon donut beer’: its ‘cinnamon donut’ flavor, and that purchasers use the terms ‘cinnamon’ and ‘donut’ to describe the flavor of ‘cinnamon donut’ beer.” **is corrected to read** “The Examining Attorney has the burden of proving genericness by a preponderance of the evidence. *In re Uman Diagnostics*, 2023 USPQ2d 191, at *28. Here, the Examining Attorney meets that standard by proffering evidence demonstrating that beer is offered in a variety of flavors that describe the central, or key, aspect of the

beer. The Examining Attorney also meets that standard through the submission of evidence showing that ‘cinnamon donut’ is the term that refers to the most important, or key, aspect of ‘cinnamon donut beer’: its ‘cinnamon donut’ flavor, and that purchasers use the terms ‘cinnamon’ and ‘donut’ to refer to the flavor of ‘cinnamon donut’ beer.” The footnotes have not changed.

The mailing date of the original Decision is not changed by this correction. The period for filing any appeal continues to run from the date of the original Decision. A copy of the corrected Decision is attached to this Order.

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Before Wellington, Pologeorgis, and Johnson,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Blake Farms Hard Apple Cider, LLC (“Applicant”) seeks registration on the Supplemental Register of the standard character mark CINNAMON DONUT STOUT (“Applicant’s Mark”) for “Beer” (“Applicant’s Goods”) in International Class (“Class”) 32.¹

¹ Application Serial No. 90504414 was filed on February 2, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark anywhere and in commerce at least as early as March 1, 2019. On May 11, 2022, Applicant amended its application to the Supplemental Register. The exclusive right to use “STOUT” is disclaimed.

The Examining Attorney refused registration of Applicant's Mark on the ground that it was merely descriptive for "beer" under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). After the Examining Attorney made the refusal final, Applicant requested reconsideration and sought registration of its mark on the Supplemental Register. Thereafter, the Examining Attorney refused Applicant's Mark as generic for the identified goods under Sections 23(c) and 45 of the Trademark Act, 15 U.S.C. §§ 1091(c) and 1127.

The Examining Attorney issued a subsequent final Office action.² Applicant appealed and requested reconsideration, which the Examining Attorney denied,³ and the appeal proceeded. The appeal has been fully briefed.⁴ We affirm the refusal to register based on genericness.

² On page two of the Subsequent Final Office Action dated January 20, 2023, the Examining Attorney makes final the genericness refusal under Trademark Act Sections 23(c) and 45. However, on page four of the same Office action, the Examining Attorney states, "[t]herefore, for the foregoing reasons, the mark is merely descriptive of applicant's goods, and therefore, registration is refused pursuant to Section 1, Section 2(e)(1) and Section 23 of the Trademark Act." In the Request for Reconsideration After Final Action Denied dated August 18, 2023, the Examining Attorney only maintains and continues the genericness refusal based on Sections 23(c) and 45. In his Appeal Brief, the Examining Attorney did not argue mere descriptiveness under Section 2(e)(1) of the Act. To be clear, the mere descriptiveness refusal has been waived, or forfeited. *See In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at *2 n.13 (TTAB 2022); *see generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPE) § 714.04 (Nov. 2023) ("When making an action final, the examining attorney must restate any substantive refusals or requirements that remain outstanding, and must cite the rule(s) and/or statute(s) that provide the basis for these refusals or requirements.").

³ Request For Reconsideration After Final Action Denied dated Aug. 18, 2023; *see also* 4 TTABVUE.

⁴ Page references to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office's ("USPTO") Trademark Status & Document Retrieval (TSDR) system. Citations to the appeal record are from the publicly available documents in TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry, if applicable. Applicant's Appeal Brief appears at 6 TTABVUE, the Examining

I. Refusal of Registration under Trademark Act Sections 23(c) and 45

By amending its application to seek registration of CINNAMON DONUT STOUT on the Supplemental Register, Applicant has conceded that this wording is merely descriptive of beer. The Examining Attorney contends that CINNAMON DONUT STOUT is incapable of distinguishing Applicant's Goods because it is generic name for beer. Applicant, on the other hand, contends that its mark is not generic, since none of the Examining Attorney's cited evidence uses the precise term CINNAMON DONUT STOUT, and others do not need to use the term CINNAMON DONUT STOUT to describe their goods. (6 TTABVUE 7, 9).

II. Genericness: Law

"In order to qualify for registration on the Supplemental Register, a proposed mark 'must be capable of distinguishing the applicant's goods or services.'" *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017) (quoting 15 U.S.C. § 1091(c)). "Generic terms do not so qualify." *Id.*; *see also Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) ("The generic name by which a product is known is not a mark which can be registered on the Supplemental Register under [S]ection 23 because such a name is incapable of distinguishing applicant's goods from goods of the same name manufactured or sold by others."); *USPTO v. Booking.com B.V.*, 591 U.S. ___, 140 S. Ct. 2298, 2020 USPQ2d 10729, at *2 (2020) ("A generic [term] – the name of a class of products or services – is ineligible for federal trademark registration."); *In re Gould Paper Corp.*, 834 F.2d

Attorney's Appeal Brief appears at 8 TTABVUE, and Applicant's Reply Brief appears at 9 TTABVUE.

1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987) (“By definition a generic term identifies a type of goods not the source of such goods.”) (citation omitted). “Generally, where the matter sought to be registered identifies goods that are a primary or central focus of the [business], we [consider] the term to be generic.” *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1231 (TTAB 2014) (citations omitted), *aff’d sub nom. In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

The United States Court of Appeals for the Federal Circuit has set forth a two-step inquiry to determine whether a term is generic:

- First, what is the genus (category or class) of goods or services at issue? *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). The genus, in appropriate circumstances, may be defined by the goods identified in the application. *See Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (“a proper genericness inquiry focuses on the identification set forth in the [application or] certificate of registration”); *In re Reed Elsevier Props. Inc.*, 77 USPQ2d 1649, 1653 (TTAB 2005) (quoting *Magic Wand*, 19 USPQ2d at 1552), *aff’d*, 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007).

- Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus of goods or services? *Marvin Ginn*, 228 USPQ at 530; *see also Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (the relevant public’s perception is the principal consideration in determining whether a term is generic).

In the ex parte context, “[a] registration is properly refused if the word is the generic name of any of the goods or services for which registration is sought.” *In re Cordua Rests.*, 118 USPQ2d at 1638 (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:57 (4th ed. 2016)). The Examining Attorney has the burden of proving genericness by a preponderance of the evidence. *See In re Uman Diagnostics AB*, 2023 USPQ2d 191, at *28 (TTAB 2023) (applying preponderance of the evidence standard).

III. Whether Applicant’s Mark is Generic for the Identified Goods

Whether a particular term is generic is a question of fact. *In re Hotels.com*, 91 USPQ2d at 1533. “[T]he determination of whether a mark is generic must be made in relation to the goods or services for which registration is sought, not in the abstract.” *In re Virtual Indep. Paralegals, LLC*, 2019 USPQ2d 111512, at *2 (TTAB 2019); *see Magic Wand*, 19 USPQ2d at 1553-54 (the description of services in respondent’s registration defines the relevant public); *Remington Prods., Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1448 (Fed. Cir. 1990) (the mark must be considered in context, i.e., in connection with the goods). Therefore, we look to the evidence of record to determine whether CINNAMON DONUT STOUT is generic for “Beer.”

A. Defining the Genus of Applicant’s Mark

The genus of the goods may be defined by an applicant’s identification of goods. *In re Cordua Rests. LP*, 110 USPQ2d at 1229 (citing *Magic Wand*, 19 USPQ2d at 1552). The Board may also consider other competent evidence of record showing how Applicant’s goods are used or the manner in which an Applicant uses its mark.

See In re Steelbuilding.com, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005) (to determine genus, court interpreted meaning of identification of services in context of actual use made by applicant on its website); *In re Reed Elsevier*, 77 USPQ2d at 1653 (Board reviewed applicant's website to determine context of recitation of services in application).

Applicant's Goods are identified as "Beer." Thus, the proper genus for Applicant's Goods is "Beer."

B. Who Are the Relevant Purchasers?

We turn to the second part of the *Marvin Ginn* inquiry: whether the term CINNAMON DONUT STOUT is understood by the relevant public primarily to refer to the genus "Beer." *See Marvin Ginn*, 228 USPQ at 530. The relevant public encompasses "actual [and] potential purchasers of . . . goods or services" identified in the application. *Loglan Inst. Inc. v. Logical Language Grp. Inc.*, 962 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992) (quoting *Magic Wand*, 19 USPQ2d at 1553). Because Applicant's Goods are identified as "Beer" without limitation as to type, price point, or trade channel, we find that the relevant purchasers of Applicant's Goods are ordinary adult members of the public who are beer drinkers.

C. What is the Meaning of CINNAMON DONUT STOUT to the Relevant Public?

Next, we consider the meaning of CINNAMON DONUT STOUT to the relevant public. "An inquiry into the public's understanding of a mark requires consideration of the mark as a whole. Even if each of the constituent words in a combination mark is generic, the combination is not generic unless the entire formulation does not add

any meaning to the otherwise generic mark.” *Princeton Vanguard*, 114 USPQ2d at 1831 (quoting *In re Steelbuilding.com*, 75 USPQ2d at 1421).

Determining whether a term is generic is fact-intensive and record-dependent. *Royal Crown v. Coca-Cola Co.*, 892 F.2d 1358, 127 USPQ2d 1041, 1044 (Fed. Cir. 2018) (“Whether an asserted mark is generic or descriptive is a question of fact” based on the entire evidentiary record); *In re Tennis Indus. Ass’n*, 102 USPQ2d 1671, 1680 (TTAB 2012) (“Genericness is a fact-intensive determination and the Board’s conclusion must be governed by the record which is presented to it.”). Evidence of the relevant public’s understanding of a term may be obtained from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Princeton Vanguard*, 114 USPQ2d at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)); *see also In re Gould Paper*, 5 USPQ2d at 1019 (applicant’s specimen used as evidence of genericness); *In re Empire Tech. Dev. LLC*, 123 USPQ2d 1544, 1552-60 (TTAB 2017) (applicant’s specimen, pages from applicant’s website, and a promotional video embedded in applicant’s website used as evidence of genericness). Use by competitors in the field is strong evidence of genericness. *See, e.g., Royal Crown*, 127 USPQ2d at 1048 (“zero” used by competitors generally for soft drinks, sport drinks, and energy drinks with zero or near zero calories); *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 35 USPQ2d 1554, 1558 (Fed. Cir. 1995) (“Walking Fingers” logo, used by many competing telephone companies and directory publishers, found informational for Yellow Pages). Third-party websites are also

competent sources for determining what the relevant public understands a mark to mean. *In re Reed Elsevier*, 82 USPQ2d at 1380.

Applicant's specimen of use is reproduced below:




The text on the packaging of Applicant's specimen reads: "Made with **Blake's Cider Mill famous donuts** & locally sourced cold brew coffee, this stout has notes of rich chocolate, vanilla and cinnamon."

Pages from Applicant's blakesbeerco.com website that display the involved goods are reproduced below:

REAL. LOCAL. HONEST. CRAFT.

We are always experimenting with new beers, but below are the staples you can expect to find out at Blake's.

SEE WHAT'S ON TAP




DARLIN'
WHEAT ALE
Smooth crisp American Wheat ale with Spanish orange peel + Idaho 7 hops.
5.1% ABV

FOR SURE!
HAZY I.P.A.
A juicy unfiltered Hazy I.P.A.
7% ABV

BACK FORTY
LAGER
Light American lager, brewed in the back of Blake's and served up front.
4.5% ABV

CINNAMON DONUT STOUT
STOUT
Brewed with Blake's famous donuts, Great Lakes cold brew coffee and bourbon vanilla.

5



YES, THIS BEER WAS BREWED WITH DONUTS...

Your welcome...

VISIT THE TAP ROOM

6

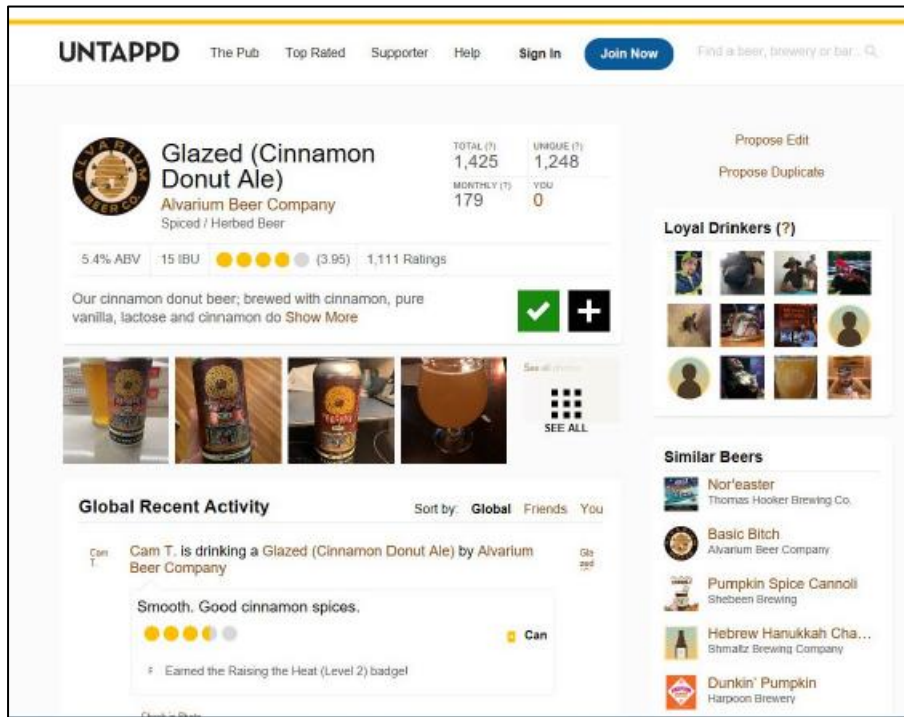
⁵ Final Office Action dated Nov. 19, 2021 at 16-17 (cropped pages from blakesbeerco.com).

⁶ *Id.* at 17-18 (cropped pages from blakesbeerco.com).

From the text on its own website, it is clear that Applicant refers to its goods as “stout” or “beer.” “Stout,” which Applicant has disclaimed in its application, is defined as “a very dark, heavy beer.”⁷

The Examining Attorney introduced into the record evidence from the following third-party websites that include the terms “cinnamon donut”⁸ in the name of the beer.

Untappd website page review of Alvarium Beer Company’s Glazed Cinnamon Donut Ale:

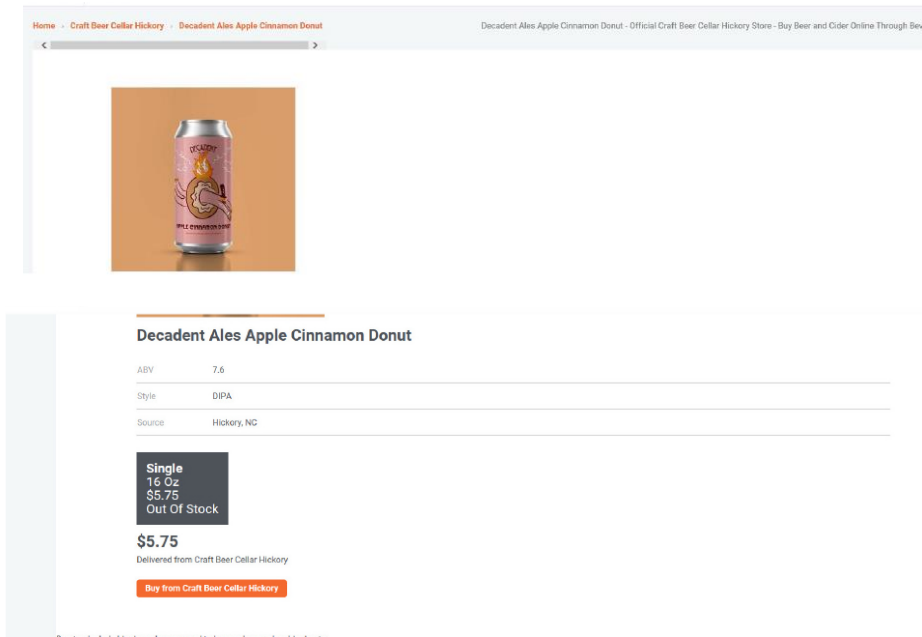


⁷ Nonfinal Office Action dated Aug. 27, 2021 at 24 (from Merriam-Webster.com).

⁸ In addition to the definition of “stout,” the Examining Attorney proffered definitions of “cinnamon” and “donut.” “Cinnamon” is defined as “the tan to dark brown spice that is prepared from cinnamon bark by powdering and has a somewhat sweet and spicy taste.” Nonfinal Office Action dated Aug. 27, 2021 at 5 (from Merriam-Webster.com). “Donut” is defined as “a small usually ring-shaped piece of sweet fried dough.” *Id.* at 13 (from Merriam-Webster.com).

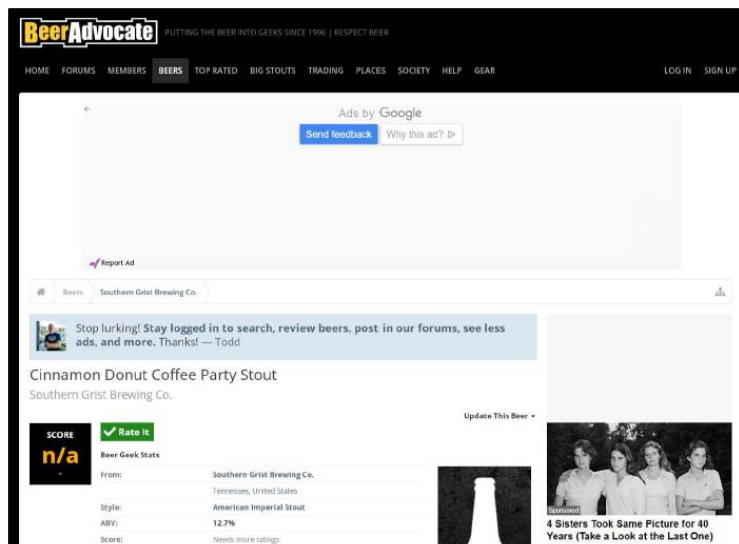
⁹ Final Office Action dated Nov. 19, 2021 at 5 (cropped image from untappd.com).

Bevv.com (a defunct website) entry offering Decadent Ale's Apple Cinnamon Donut craft beer:



10

Beeradvocate.com review page for Southern Grist Brewing Co.'s "Cinnamon Donut Coffee Party Stout":

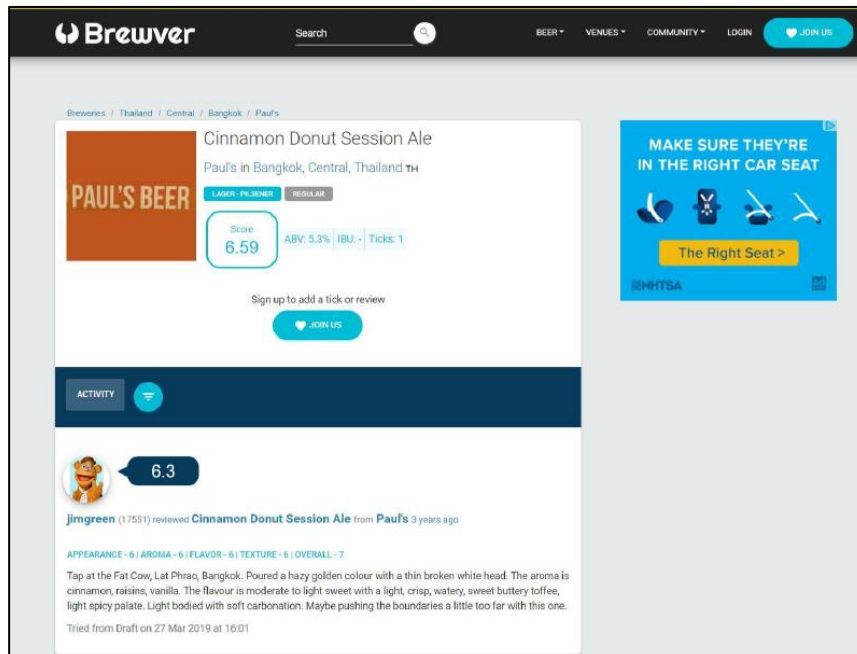


11

¹⁰ *Id.* at 24-25 (cropped images from bevv.com).

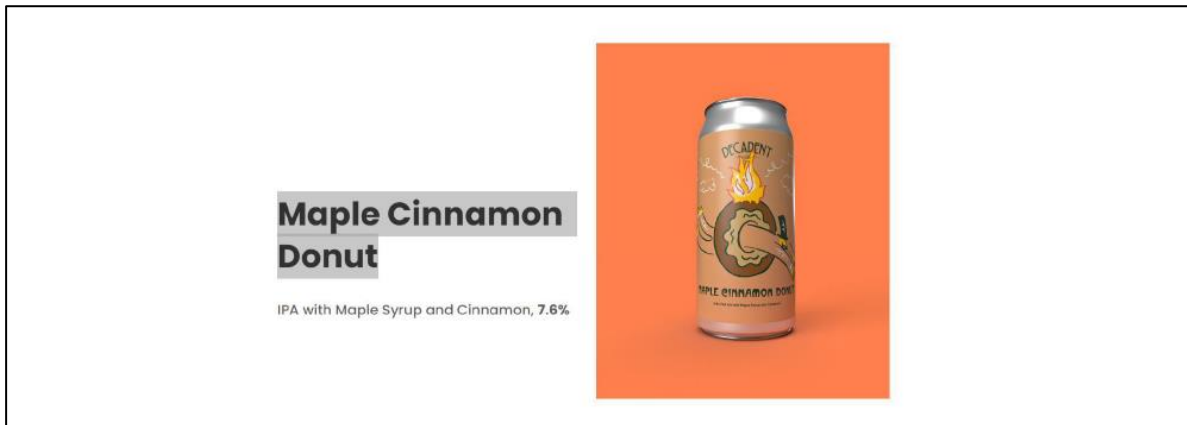
¹¹ Subsequent Final Office Action dated Jan. 20, 2023 at 6-10 (cropped image).

Brewver review page for “Cinnamon Donut Session Ale” offered by Paul’s Beer:



12

Entry for Decadent Ale’s Maple Cinnamon Donut craft beer at Craftroads Beverage webpage:



13

¹² *Id.* at 21-22 (cropped image from brewver.com). We note that Paul’s Beer appears to be a brewery in Bangkok, Thailand. Although the review is from the website brewver.com and is in the English language, we have no information about whether this beer is offered in the United States to the relevant purchasers. Applicant has not objected to this evidence. Therefore, we evaluate this webpage evidence for whatever probative value it is worth.

¹³ Subsequent Final Refusal dated Jan. 20, 2023 at 23-28 (cropped image from craftroadsbev.beer).

Entry for “Jelly Filled Cinnamon Donut” beer at the Backward Flag Brewing Co. webpage:

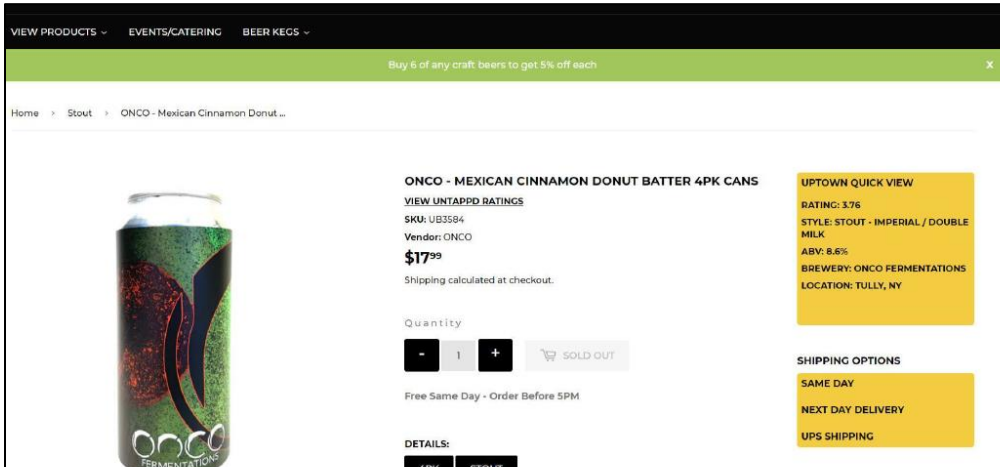
Jelly Filled Cinnamon Donut: 7%



A beautiful concoction that marries two of our most popular beers Silencio and She Sounds Lovely. Our Milk sugar raspberry sour lends sweetness and fruit while Silencio offers the indulgent fried dough and cinnamon of the donut dunked in a splash of coffee.

14

Uptown Beverage webpages featuring Onco Fermentations’ Mexican Cinnamon Donut Batter 4pk Cans:



VIEW PRODUCTS ▾ EVENTS/CATERING BEER KEGS ▾

Buy 6 of any craft beers to get 5% off each

Home > Stout > ONCO - Mexican Cinnamon Donut ...

ONCO - MEXICAN CINNAMON DONUT BATTER 4PK CANS

VIEW UNTAPPED RATINGS

SKU: UB3584

Vendor: ONCO

\$17.99

Shipping calculated at checkout.

Quantity

- 1 +

SOLD OUT

Free Same Day - Order Before 5PM

DETAILS:

UPTOWN QUICK VIEW

RATING: 3.76

STYLE: STOUT - IMPERIAL / DOUBLE MILK

ABV: 8.6%

BREWERY: ONCO FERMENTATIONS

LOCATION: TULLY, NY

SHIPPING OPTIONS

SAME DAY

NEXT DAY DELIVERY

UPS SHIPPING

Abv: 8.6%

Style: Stout - Imperial / Double Milk

Description: Imperial Milk Stout with cinnamon donuts from Syracuse's Glazed & Confused, vanilla, honey, Grand Guayacan cocoa, and a hint of Ancho and Pasilla chili peppers. Imperial Milk Stout with cinnamon donuts from Syracuse's Glazed & Confused, vanilla, honey, Grand Guayacan cocoa, and a hint of Ancho and Pasilla chili peppers.

Brewery: ONCO Fermentations

Brewery Location: Tully, NY

¹⁴ Request for Reconsideration After Final Action Denied dated Aug. 18, 2023 at 104-109 (cropped page from backwardflagbrewing.com).

¹⁵ *Id.* at 125-28 (cropped images from uptownbeverage.com).

The Examining Attorney proffered the following webpages that use the term “cinnamon donut” to describe the flavor of the beer:

Kite Hill Brewing Co. Instagram page discussing “The Adjunct Professor,” a “coffee **cinnamon donut** imperial stout by Kite Hill:



16

Equilibrium brewery webpage discussing “Churro Puffs,” a stout with a “rich and velvety brownie batter-like foundation” that is “laced with flavors of toasted almond, marshmallow-stuffed **cinnamon donut** holes, and sugar cookie dough.”:

¹⁶ *Id.* at 122-24 (Instagram.com @kitehillbrewing).



The Examining Attorney also proffered website evidence that does not include the exact term “cinnamon donut” when describing the flavor of beer;¹⁸ is duplicative¹⁹ of the webpages already proffered; and that uses the term “cinnamon donuts” for cinnamon donuts, cinnamon donut holes, and other food items unrelated to beer.²⁰

¹⁷ *Id.* at 112-21 (cropped image from equilibriumbreweryoutofstateshipping.square.site).

¹⁸ See Final Office Action dated Nov. 19, 2021 at 19-20 (“Apple Cider Donut Imperial Cream Ale”), 21-22 (“Mini Donut Beer”), 27-28 (“Cinnamon Brown Sugar Donut Daylight Cravings”); Nonfinal Office Action dated June 13, 2022 at 4-6 (“Double Donuts (Barrel-Aged) w/Cinnamon & Vanilla”); Subsequent Final Refusal dated Jan. 20, 2023 at 11-12 (“Stowe Cider Donut”), 13-20 (online news article discussing “Krumpe’s Cinnamon Raisin Brown Ale” and “Krumpe’s Boston C.R.E.A.M. Ale”).

¹⁹ See Nonfinal Office Action dated June 13, 2022 at 8-20 (duplicate entry from Untappd.com website for “Glazed (Cinnamon Donut Ale)” from the Alvarium Beer Company), 21 (drizly.com webpage for “Alvarium Glazed Cinnamon Donut Ale”).

²⁰ See Request for Reconsideration After Final Action Denied dated Aug. 18, 2023 at 55

We have not considered the evidence for food items that are unrelated to beer, nor have we considered the duplicative evidence.

Applicant introduced into the record its specimen, pages from its own website, and a page from its YouTube channel;²¹ a webpage from Totalwine.com for “Decadent Ales Apple Cinnamon Donut” IPA;²² a webpage from Untappd.com for “Decadent Ales Apple Cinnamon Donut” IPA;²³ news stories about Applicant;²⁴ a page from Kroger.com displaying Blake’s Cinnamon Sugar Donuts for purchase;²⁵ a definition of “donut” from the Oxford Advanced Learners Dictionary;²⁶ a Wikipedia entry for “Potato doughnut”;²⁷ Google search results for “cinnamon donut stout” showing that all of the results are for Applicant’s Goods;²⁸ an article discussing the difference between a stout and an ale at the website expertbrewing.com;²⁹ webpages from

(Edenton Coffee House webpage for “cinnamon donut”), 57 (Katz Gluten Free webpage for “Cinnamon Donut Holes”), 61-66 (Wholefoods Refillery webpage for “Cinnamon Donut Spread”), 67-95 (Real Housemoms webpage for “Cinnamon Donut Bread”), 96-98 (Happylicious webpage for “Boozy Cinnamon Donut Edible Cookie Dough”), 100-103 (recipe for “Cinnamon Donut Muffins” from the Pinecone Pastries webpage).

²¹ Response to Office Action dated Oct. 22, 2021 at 9-19; Response to Office Action dated Dec. 12, 2022 at 44-52, 59.

²² Response to Office Action dated Dec. 12, 2022 at 11. “IPA” stands for “India Pale Ale” and is “a pale ale made with extra hops.” MERRIAM-WEBSTER DICTIONARY (<https://www.merriam-webster.com/dictionary/IPA>) (last accessed May 14, 2024). An “ale” is “a beer that is brewed by fast fermentation with a quick-acting yeast (*Saccharomyces cerevisiae*) at relatively high temperatures.” MERRIAM-WEBSTER DICTIONARY (<https://www.merriam-webster.com/dictionary/ale>) (last accessed May 14, 2024). The Board may take judicial notice of dictionary definitions, including definitions from online dictionaries which exist in printed format or have fixed regular editions. *In re Cordua Rests.*, 110 USPQ2d at 1229 n.4.

²³ Response to Office Action dated Dec. 12, 2022 at 15-28.

²⁴ *Id.* at 30-41.

²⁵ *Id.* at 54-57.

²⁶ *Id.* at 61-63.

²⁷ *Id.* at 65-67.

²⁸ Request for Reconsideration after Final Action dated July 20, 2023 at 14-15.

²⁹ *Id.* at 16-32.

Untappd for Applicant's Cinnamon Donut Stout;³⁰ and the registration and file wrapper for HONEYPIE (standard characters), Reg. No. 3770316, identifying "wine" in Class 33.³¹ Notably, at the Untappd webpage, purchasers' comments about Applicant's Goods ranged from "A good stout but not much cinnamon flavor," to "I am not tasting any donut or cinnamon. Nice stout but disappointing," to "Lots of cinnamon, very good," to "I kept on waiting for the cinnamon to show up."³²

1. "Cinnamon Donut" Is A Key, or Central, Aspect of CINNAMON DONUT STOUT.

Based on the evidence of record, we find that flavored beer is a type of beer within the genus "beer" defined by Applicant's identification of goods. *Royal Crown*, 127 USPQ2d at 1046 (directing the Board to consider whether the relevant public understands the term ZERO to refer to a "key aspect" of the relevant genus of goods); *In re Cordua Rests.*, 118 USPQ2d at 1638 ("churrascos," a type of grilled meat, is generic for restaurant services). When a term "directly names the most important or central aspect or purpose of [an] applicant's goods" and would be understood by the relevant consumers as referring to a category of those goods, the term is generic. *In re Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) ("[B]ecause the term ATTIC directly names the most important or central aspect or purpose of applicant's goods, that is, that the sprinklers are used in attics, this term is generic and should be freely available for use by competitors."). Here, the record shows that flavor, including flavors resulting in beer tasting like another food or beverage, is an

³⁰ *Id.* at 33-74.

³¹ *Id.* at 75-131.

³² *Id.* at 38-39, 42, 62.

important and central aspect for beer. Specifically, the flavor “cinnamon donut” refers to a key, or central, aspect of Applicant’s Goods as well as the goods of several third parties. *See* evidence at Part III.C., *supra* at 8-15. Accordingly, we find that consumers would readily understand CINNAMON DONUT STOUT to refer to a subset of beer – that is, cinnamon donut flavored beers. *See In re Pepcom Indus., Inc.*, 192 USPQ 400, 402 (TTAB 1976) (refusal to register JIN.SENG on Supplemental Register for soft drinks affirmed because it is the phonetic equivalent of “ginseng,” the “generic name of an herb that might be an ingredient in applicant’s goods”); *In re Demos*, 172 USPQ 408, 409 (TTAB 1971) (“CHAMPAGNE” is deemed unregistrable to applicant irrespective of the amount of purported secondary meaning evidence submitted” because it “merely names the principal ingredient of [applicant’s] salad dressing”); *see also A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 1 USPQ2d 1364 (3rd Cir. 1986) (CHOCOLATE FUDGE found generic for diet soda, because “the term ‘chocolate fudge’ denotes a particular full and rich chocolate flavor, that distinguishes Canfield’s product from plain chocolate sodas” and “it appears difficult if not impossible for a competing producer to convey to the public that its product shares this functional flavor characteristic without using the words ‘chocolate fudge’”).

2. “Cinnamon Donut” is a Generic Adjective for Beer.

In addition, an adjective such as “cinnamon donut” can serve as a generic term for Applicant’s beer. *See Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1366 (TTAB 2013) (adjective “footlong” found generic in connection with sandwiches); *In re Cent. Sprinkler Co.*, 49 USPQ2d at 1199 (adjective ATTIC found generic for

“automatic sprinklers for fire protection”; “applicant’s mark does not present the classic case of a generic noun, but rather a generic adjective”); *In re Reckitt & Colman, N. Am. Inc.*, 18 USPQ2d 1389, 1390 (TTAB 1991) (“generic name” includes nouns as well as “generic adjectives”; that is, adjectives which refer to a genus or species, category or class, of goods or services).

The primary significance of “cinnamon donut” is as a generic adjective for cinnamon donut beer, and the fact that CINNAMON DONUT STOUT is not the common name of one type of beer does not mean that the term is registrable. “Generic terms ... are not to be limited to those which identify one common name of a genus in which the goods fall, but may also include terms which identify in a nonproprietary sense a different genus or category in which the particular goods also may be placed.” *In re Reckitt & Colman*, 18 USPQ2d 1391. Here, the term “cinnamon donut” immediately describes the most important or central aspect of Applicant’s Goods — the “cinnamon donut” flavor. Thus, “cinnamon donut” is a term that identifies a category of beer. *See, e.g., In re Empire Tech. Dev.*, 123 USPQ2d at 1565-66 (COFFEE FLOUR generic for flour made from coffee berries); *In re Demos*, 172 USPQ at 409 (CHAMPAGNE merely names principal ingredient of applicant’s salad dressing and is unregistrable).

In view of the evidence of record, we find that the words CINNAMON DONUT STOUT are understood by the relevant purchasing public as referring to beer with a “cinnamon donut” flavor.

IV. Conclusion

The Examining Attorney has the burden of proving genericness by a preponderance of the evidence. *In re Uman Diagnostics*, 2023 USPQ2d 191, at *28. Here, the Examining Attorney meets that standard by proffering evidence demonstrating that beer is offered in a variety of flavors that describe the central, or key, aspect of the beer.³³ The Examining Attorney also meets that standard through the submission of evidence showing that “cinnamon donut” is the term that refers to the most important, or key, aspect of “cinnamon donut beer”: its “cinnamon donut” flavor,³⁴ and that purchasers use the terms “cinnamon” and “donut” to refer to the flavor of “cinnamon donut” beer.³⁵ Taken as a whole, this evidence demonstrates that the relevant public would understand and use CINNAMON DONUT STOUT primarily as the name for a type of beer. Accordingly, CINNAMON DONUT STOUT is generic “and should be freely available for use by competitors.” *In re Cent. Sprinkler Co.*, 49 USPQ2d at 1199.

Decision: The refusal to register Applicant’s proposed CINNAMON DONUT STOUT mark on the Supplemental Register on the ground that the designation is the generic name of the identified goods is affirmed.

³³ See *supra* note 18.

³⁴ See evidence at Part III.C., *supra* at 8-15.

³⁵ See Request for Reconsideration after Final Action dated July 20, 2023 at 38-39, 42, 62.