

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: October 30, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Upper Buena Vista Management LLC

Serial No. 97976656

Heidi Tandy of Berger Singerman LLP,
for Upper Buena Vista Management LLC.

Maureen Reed, Trademark Examining Attorney, Law Office 115.
Daniel Brody, Managing Attorney.

Before Dunn, Lebow and Stanley,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Upper Buena Vista Management LLC, seeks registration of the mark

PALAPA

in standard characters on the Principal Register, or pursuant to Trademark Act

Section 2(f) in the alternative, for the following services:

event venue services, namely providing banquet facilities for special occasions; event venue services, namely providing social function facilities including concert-quality audio-visual and lighting systems for special occasions; event venue services, namely, providing pavilion facilities that include concert-quality audio-visual and lighting systems for hosting concerts, exhibitions, markets and pop-up food courts and dining events,

in International Class 43.¹

After the Trademark Examining Attorney issued a final refusal to register the mark on the ground that it is merely descriptive of the identified services under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and had not acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. 1052(f), Applicant filed a request for reconsideration, which was denied. Applicant then filed an appeal, which has been fully briefed² and is now ready for decision. For the reasons discussed below, we affirm the refusal on the ground that the mark is merely descriptive for the identified services and has not acquired distinctiveness.

I. Preliminary Matters

A. Request to Amend to the Supplemental Register

In its appeal brief, Applicant states that “in the event the Board disagrees that

¹ Application Serial No. 97976656 (the child of Application Serial No. 97155909), was filed on December 3, 2021. The parent application, as filed, included goods and services in Classes 25 and 43 (both based on an allegation of use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a)), and Class 44 (based on an allegation of an intent use in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b)). However, in response to a first office action, Applicant deleted Class 44 and added Classes 41 and 35. *See* March 20, 2023 Response to Office Action. Applicant then submitted a request to divide, which divided Classes 25 and 43 from Classes 35 and 41. *See* April 19, 2023 Request to Divide. Applicant then submitted a further request to divide, leaving Application Serial No. 97155909 with only Class 25, and the present child application, Application Serial No. 97976656, with only the Class 43 services at issue in this refusal. *See* October 9, 2023 Request to Divide.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify the documents by title, date, and page in the downloadable .pdf version.

² References to the briefs and other filings following appeal cite the Board’s TTABVUE docket system. The number preceding “TTABVUE” represents the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specific page(s), if any, to which we refer.

the PALAPA mark for the Applied-for Services is suggestive, or descriptive with secondary meaning, Applicant asks that it be registered on the Supplemental Register.”³ Applicant repeats that request in its reply brief.⁴ However, the Examining Attorney thrice advised Applicant during prosecution that it could amend its application to seek registration on the Supplemental Register,⁵ but “Applicant did not amend its involved application ... to seek, in the alternative, registration on the Supplemental Register.” *In re Integrated Embedded*, No. 86140341, 2016 TTAB LEXIS 470, at *19.

An application may be amended, if at all, only in accordance with Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g), which states, “[a]n application which has been considered and decided on appeal will not be reopened except for the entry of a disclaimer ... or upon order of the Director ...”. Otherwise, once the Board has rendered a final decision, a request to amend to the Supplemental Register is not possible. *See Integrated Embedded*, 2016 TTAB LEXIS 470, at 24 (denying request to amend to Supplemental Register after finding that involved mark is primarily merely a surname); *In re Phillips-Van Heusen Corp.*, No. 75664835, 2002 TTAB LEXIS 45, at *2 n.2 (denying the applicant’s request to reopen the case to amend the application to the Supplemental Register in the event the refusals were maintained because “under Trademark Rule 2.142(g), ‘an application which has been considered and

³ 14 TTABVUE 20 (Applicant’s Brief).

⁴ 17 TTABVUE 10 (Applicant’s Reply Brief).

⁵ *See* Office Action of November 2023, at TSDR 4; Final Office Action of February, at TSDR 4; and Office Action of May 9, 2024, at TSDR 3.

decided on appeal will not be reopened’ for such purpose.”); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1218 (June 2025) and authorities cited therein. Accordingly, we will not consider Applicant’s belated request to amend the Application to the Supplemental Register.

B. Request to Incorporate Previous Arguments

Applicant, in its brief, asserts that its issues with the Examining Attorney’s evidence of the mark PALAPA’s mere descriptiveness “have been noted in [its] Office Action responses and are incorporated herein by reference....”⁶ Applicant also purports to “incorporate by reference the exhibits and specimens submitted to the Examining Attorney in various Office Action responses as evidence of secondary meaning for PALAPA in connection with and for the Applied-For Services.”⁷

Applicant’s attempt to incorporate previous arguments made during prosecution, but not presented in its brief on appeal, is improper. While we, of course, review the record and Applicant’s brief, we will not search the file for arguments made by Applicant during examination to address matters not raised in its brief. Any such arguments are waived. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006), approvingly quoting, *inter alia*, (1) *Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004) for the proposition that “[w]hen a party includes no developed argument on a point ... we treat the argument as waived under our well-established rule.”); and (2) *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) for

⁶ 14 TTABVUE 9 (Applicant’s Brief).

⁷ *Id.* at 18.

the proposition that arguments “adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”). *See also In re Princeton Equity Grp. LLC*, No. 97397212, 2025 TTAB LEXIS 242, at *8 (allowing argument by incorporation “problematic for several reasons, one being that arguments for and against registrability often shift or narrow during the course of examination ... It also shifts the expenditure of resources from an applicant to the Board. And, further, sanctioning such incorporation-by-reference statements in appeal briefs might well encourage circumvention of our rule setting a 25-page limit on appeal briefs unless prior Board authorization is obtained.”); TBMP § 1203.02(g) (“If an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.”).

C. New Evidence Attached to Applicant’s Brief

The Examining Attorney objects to Applicant’s submission of new evidence with its brief as Exhibit A, which consists of pages from the website of Joia Beach (joiabeachmiami.com) that had not been submitted during prosecution of the application.⁸ As the Examining Attorney correctly notes, citing 37 C.F.R. §2.142(d), TBMP §§1203.02(e), and 1207.01, and TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §710.01(c), “[t]he record in any application should be complete prior to the filing of an appeal.”⁹ We thus have not considered this new evidence.¹⁰

⁸ 16 TTABVUE 9 (Examining Attorney’s Brief).

⁹ *Id.*

¹⁰ Applicant argues in its reply brief that the new evidence should be considered because the Examining Attorney was on notice during prosecution that Applicant considered Joia Beach’s use of the term PALAPA to be an infringement, and that its submission of new evidence at

II. Mere Descriptiveness – Applicable Law

“One basis for refusing a trademark registration is when ‘a mark which ... when used on or in connection with the goods [or services] of the applicant is merely descriptive ... of them.’ 15 U.S.C. § 1052(e)(1).” *Curtin v. United Trademark Holdings, Inc.*, 137 F.4th 1359, 1361 (Fed. Cir. 2025).

“A mark is merely descriptive ‘if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.’” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 146 (Fed. Cir. 2021) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1378 (Fed. Cir. 2012) and *In re Bayer AG*, 488 F.3d 960, 963 (Fed. Cir. 2007)) (internal punctuation omitted). “A term ‘need not immediately convey an idea of each and every specific feature of the [services] in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the [services].” *In re Korn Ferry*, No. 90890949, 2024 TTAB LEXIS 224, at *5 (quoting *In re Zuma*

this stage, showing that the website had removed objectionable use of the word “palapa,” was therefore justified. 17 TTABVUE 8. According to Applicant, the Examining Attorney’s expression of “surprise that this usage is no longer on the internet is troublesome.” *Id.* We disagree. The Examining Attorney expresses no surprise; she simply objects to Applicant’s violation of this trademark rule on appeal. The submission of late evidence is unacceptable. If Applicant wanted to submit further evidence to be considered on appeal, it could have requested that the application be remanded to make such evidence of record, *see* TMEP § 1207.02 (June 2025), but Applicant did not do so. Even if it had, it would have been futile because the submission of two pages from a website that do not show use of the term “palapa” does not mean it is not shown on other pages, or that consumers had not been exposed to it up to that point. Nor would it matter if the wording was removed upon demand by Applicant for purported infringement, which would not be evidence of the mark’s distinctiveness. *See, e.g., In re Wella Corp.*, 565 F.2d 143, 144 n.2 (CCPA 1977) (discontinuance of use of proposed mark upon threat of legal action showed “a desire of competitors to avoid litigation rather than distinctiveness of the mark”). In any event, the Joia Beach website is just one example of many provided by the Examining Attorney showing descriptive usage of the term “palapa,” as discussed *infra*.

Array Ltd., No. 79288888, 2022 TTAB LEXIS 281, at *7).

“It is well-established that ‘[d]escriptiveness of a mark is not considered in the abstract[,]’ but instead “must be ‘considered in relation to the particular goods [or services] 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.’” *Coach Servs.*, 668 F.3d at 1378 (quoting *Bayer*, 488 F.3d at 963-64).

“Evidence of the public’s understanding of [a] term ... may be obtained from any competent source, such as ... listings in dictionaries, trade journals, newspapers[,] and other publications.” *Korn Ferry*, 2024 TTAB LEXIS 224, at *7-8 (citation omitted). “These sources may include [w]ebsites, publications and ... advertising materials directed to the goods [or services].” *Id.* (quoting *In re Fallon*, 2020 TTAB LEXIS 464, at *23 (quoting *In re N.C. Lottery*, 866 F.3d 1363, 1367-68 (Fed. Cir. 2017) (internal quotation omitted))).

“It is the Examining Attorney’s burden to show, prima facie, that a mark is merely descriptive of an applicant’s goods or services.” *Fallon*, No. 86882668, 2020 TTAB LEXIS 464, at *23 (quoting *In re Fat Boys Water Sports LLC*, No. 86490930, 2016 TTAB LEXIS 150, at *5) (italics omitted). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 1350 (Fed. Cir. 2003)).

III. The Examining Attorney’s Evidence and Arguments

To show the descriptiveness of PALAPA in connection with

event venue services, namely providing banquet facilities for special occasions; event venue services, namely providing social function facilities including concert-quality audio-visual and lighting systems for special occasions; event venue services, namely, providing pavilion facilities that include concert-quality audio-visual and lighting systems for hosting concerts, exhibitions, markets and pop-up food courts and dining events,

the Examining Attorney first points to several dictionary entries that she made of record to show that the word PALAPA refers to:

- “A structure, such as a bar or restaurant, in a tropical resort, that is open-sided and thatched with palm leaves.” – THE AMERICAN DICTIONARY¹¹
- “[A]n open-sided structure with a palm-thatched roof.” – COLLINS DICTIONARY¹²
- “[A] simple, thatched-roof dwelling, usually open on the sides” or “any building resembling this, especially in a resort area, as a restaurant, beachhouse, or the like.” – DICTIONARY.COM¹³

The Examining Attorney argues that the dictionary evidence “supports the refusal

¹¹ September 19, 2022 Office Action, at TSDR 13.

¹² November 3, 2023 Office Action, at TSDR 21. Applicant contends that this definition is “British English,” making it unclear whether it’s a common word in the United States at all,”

¹⁴ TTABVUE 16, but the notation directly beneath explanation indicates that the definition is also used in U.S. English:



November 3, 2023 Office Action, at TSDR 21. This meaning is also supported by other definitions of the record, as well as the third-party evidence discussed *infra*.

¹³ *Id.* at 22. Applicant provided the same definition with its March 20, 2023 Response to Office Action, at TSDR 13.

because it shows that ‘palapa’ is (1) any building or structure with (2) a thatched roof and (3) open sides.”¹⁴ She points out further that “Applicant has admitted that its venue is a structure with a thatched roof.”¹⁵

In addition, the Examining Attorney submitted evidence to show that Applicant’s venue, where it provides its services, has “opens sides” as seen in the below excerpts:¹⁶

- Photos of Applicant’s event facility with canvas sides that open:¹⁷



¹⁴ 16 TTABVUE 5 (Examining Attorney’s Brief).

¹⁵ *Id.* See September 20, 2023 Request for Reconsideration, at TSDR 14 (“[T]here is one meaningful similarity between a location Applicant provides the Applied-For Services – a thatched roof”).

¹⁶ While some of the photographs show structures with adjustable material like curtains and screens instead of permanent walls, we find the adjustable material does not preclude a structure from being “open sided.”

¹⁷ *Id.* at 24, 26-27. The size of some of the excerpts reproduced in this opinion have been modified for formatting purposes.



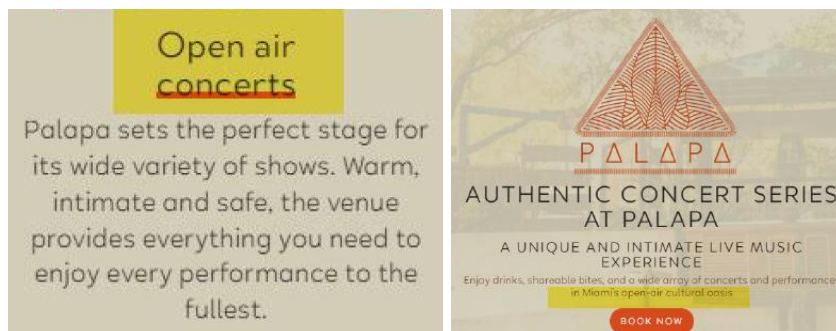
- Images from Instagram and Facebook that Applicant submitted show Applicant's venue with the sides open:¹⁸



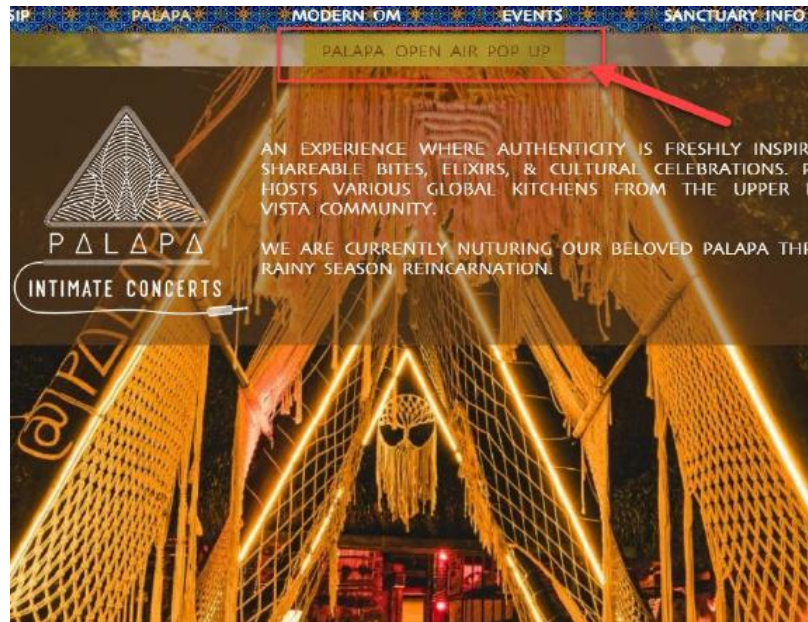
¹⁸ January 24, 2024 Response to Office Action, at TSDR 29, 32, 35.



- Applicant states on its website that it provides “Open air concerts,” describing itself as an “OPEN AIR POP UP” and an “open-air cultural oasis”:¹⁹

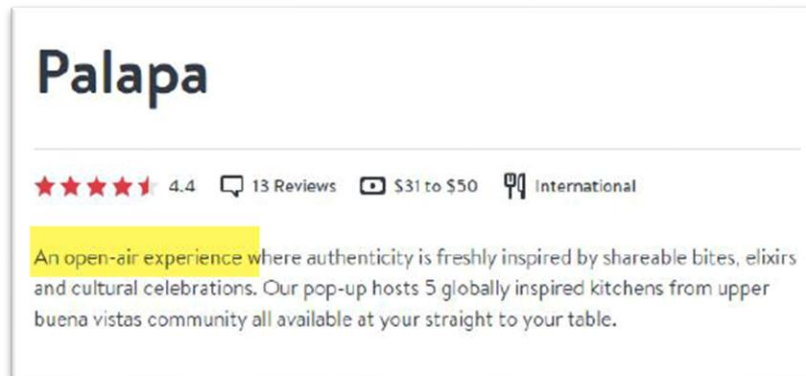


¹⁹ November 3, 2023 Office Action, at TSDR 17-18.



The Examining Attorney also submitted an entry from MERRIAM-WEBSTER DICTIONARY which defines “open air” as “the space where air is unconfined[.]”²⁰

There is also an Open Table (opentable.com) webpage promoting reservations at Applicant’s venue, which invites customers to an “open-air experience”:

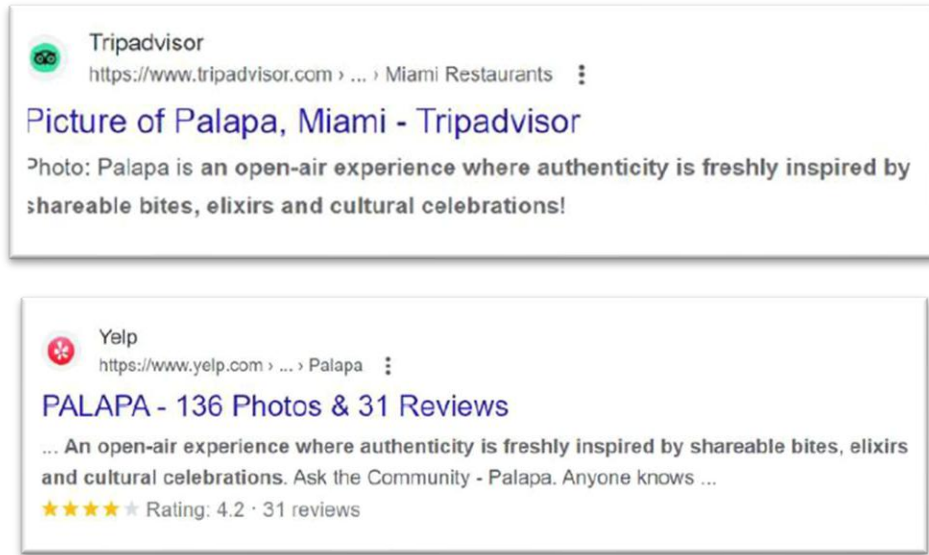


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²⁰ February 9, 2024 Final Office Action, at TSDR 7.

²¹ November 3, 2023 Office Action, at TSDR 16. Applicant points out that this page is “operated by a third party, not by Applicant,” and therefore is not an example of how Applicant describes itself. 14 TTABVue 7. Applicant also suggests without evidence that the page “quotes either Yelp or TripAdvisor,” *id.*, but it seems rather unusual that a third party would refer to Applicant’s venue as “**Our** pop-up,” (emphasis added). Regardless, consumers exposed to that webpage would likely find that description consistent with the definition of a palapa as an open-sided structure. Indeed, as Applicant acknowledges immediately

Two additional third parties, TripAdvisor (tripadvisor.com) and Yelp (yelp.com), note that “palapa is an open-air experience,” using verbatim language: ²²



Based on the foregoing and other evidence in the record, the Examining Attorney concludes that “Applicant’s event venue is a palapa, as the venue is a structure of building with a thatched roof and sides that are frequently opened, so the air inside is unconfined.”²³

The Examining Attorney also provides Internet evidence, as shown in the below excerpts, which she argues shows that “the word ‘palapa’ is often used in connection with similar event venues and social function facilities to mean that the venue or facility has a thatched roof and open sides....”:²⁴


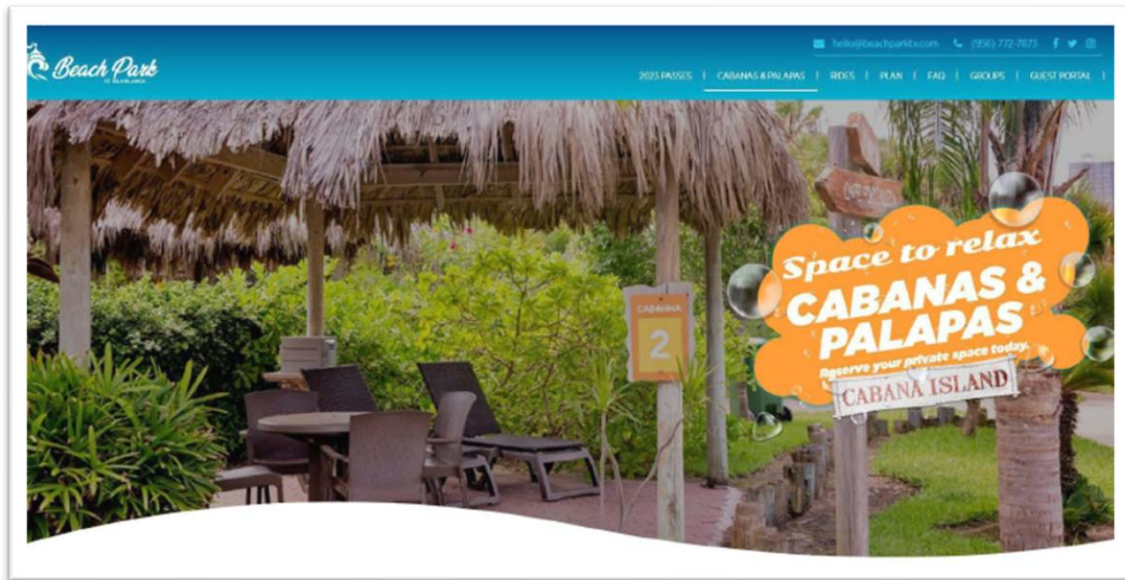
thereafter, *id.*, evidence of a public’s understanding may be obtained from any competent source. *See e.g., In re Cox Enters.*, No. 76591278, 2007 TTAB LEXIS 5, at *6 (finding that website evidence showing use of a term demonstrates consumer exposure to that term).

²² January 24, 2024 Response to Office Action, at TSDR 21.

²³ 16 TTABVUE 5 (Examining Attorney’s Brief).

²⁴ *Id.*


- Beach Park at Isla Blanca (beachparktx.com) provides “Space to relax CABANAS & PALAPAS” including “BBQ Palapas.”²⁵



Palapas

Palapas are rented on an advance reservation basis only.

Palapas are located in the North Beach section of Beach Park surrounding the Lily Pad area and located right off the Rio Aventura. Palapas provide covered seating for up to 35 people and are furnished with a BBQ grill. Reserve early as palapa space is limited.

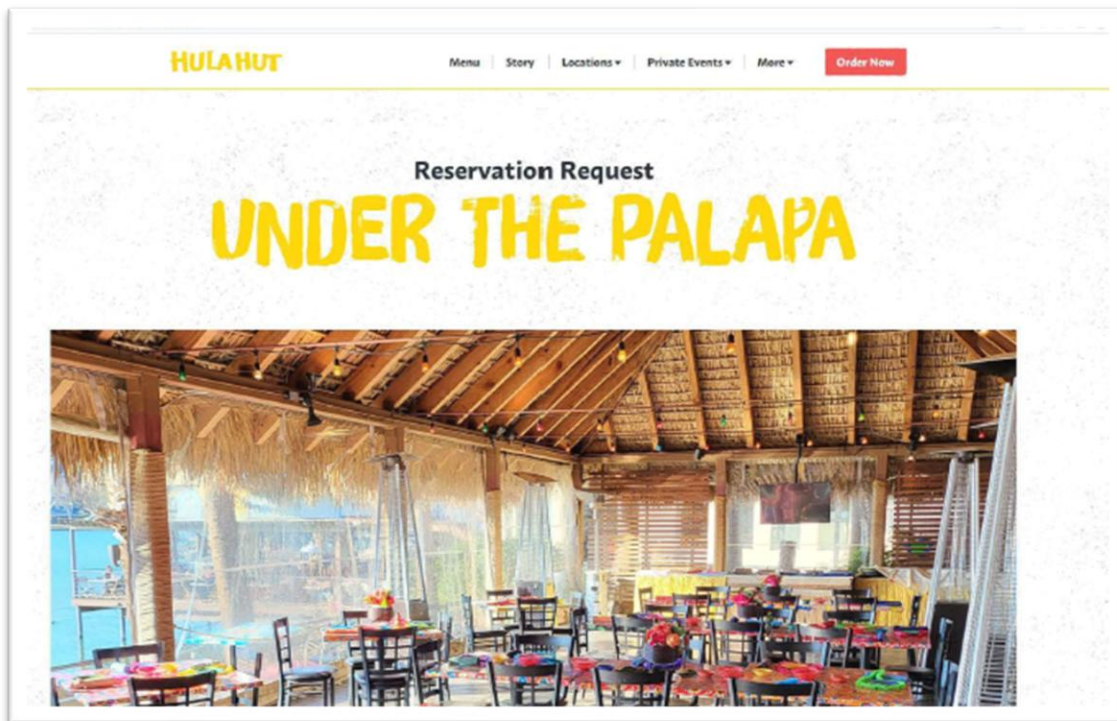


Palapa Type: BBQ Palapa
Max Guests:
Pricing: \$200 - \$250

[BOOK NOW](#)

²⁵ *Id.* at 15-16.

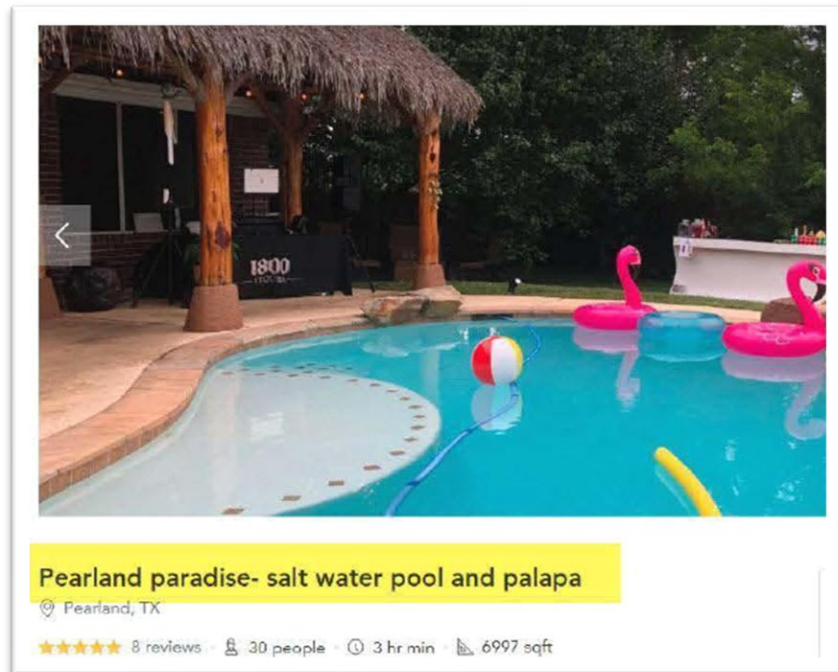
- Hula Hut (hulahut.com) lets consumers reserve a palapa for hosting group parties and other events, such as “birthday gatherings, corporate functions, rehearsal dinners and even a wedding”:²⁶



- Peerspace (peerspace.com) offers to reserve a “salt water pool and palapa” with accommodations for up to 30 people:²⁷

²⁶ *Id.* at 18-19.

²⁷ *Id.* at 20.

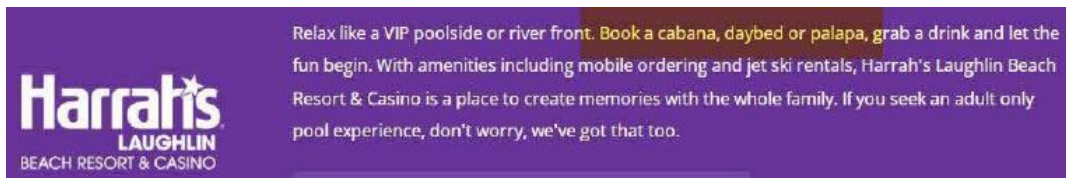


- Poolside Vacation Rentals (poolsidevacationrentals.com) offers to reserve a “Palapa Paradise” that accommodates up to six people:²⁸



²⁸ *Id.* at 21.

- Harrah's Laughlin Beach Resort and Casino (ceasers.com) invites customers to "[r]elax like a VIP poolside or river front" and "book a cabana, daybed or palapa...."²⁹



- Catalina Island Company (visitcatalinaisland.com) invites consumers to book rustic palapas:³⁰



SOUTH PACIFIC AMBIANCE MEETS TWO HARBORS CHARM

Soft sand and swaying palms lend South Pacific charm to this beautiful oasis on the shore of Isthmus Cove, where friendly staff serves signature food and drinks from **Harbor Reef Restaurant** to your rustic palapa, beachside lounge chair or ocean view table.

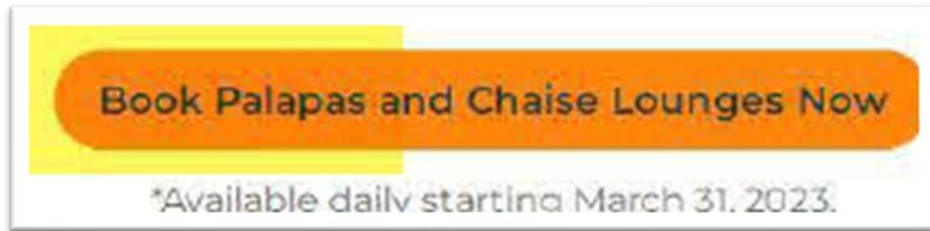
Our rustic-style furnished palapas are roomy enough for small groups, yet intimate enough for couples to enjoy a peaceful, relaxing day at the beach. Other Harbor Sands amenities include lounge chair rentals, beachfront dining deck, enhanced group picnic areas and more.

Palapas

- Comfortable seating for up to eight
- Bottled water and fruit smoothies (May - Sept only)
- Watermelon slices and Monster Pops (May - Sept only)
- Beach towels

²⁹ April 10, 2023 Office Action, at TSDR 68.

³⁰ *Id.* at 69-70.



- Eagle Ranch Palapas (eagleranchpalapas.com) invites consumers to “Book one of our Palapas or ask us about custom packages to build a Palapa Party to fit your needs!”³¹



- Paradise Cove Beach Café (paradisecovemalibu.com) offers a “Day at the Beach” by offering a combo package that includes a palapa:³²



- Six Flags Hurricane Harbor offers standard and grand palapas that accommodate between six and twelve people:

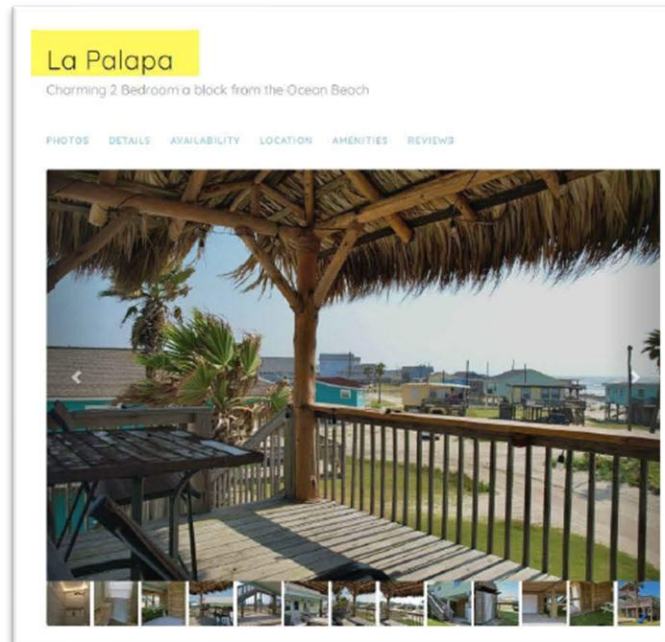
³¹ *Id.* at 71.

³² *Id.* at 72.

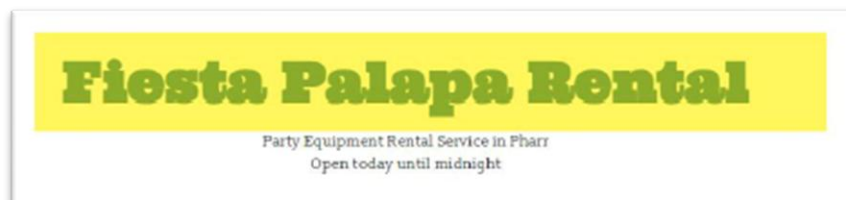


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- TX Vacation Rentals (txvacationrentals.com) rents “La Palapa” a block from the Ocean Beach:³⁴



- Fiesta Palapa Rental (fiestapalaparental-partyequipmentrentalservices.business.site) rents palapas for various social events:³⁵



³³ *Id.* at 73.

³⁴ *Id.* at 74.

³⁵ November 3, 2023 Office Action, at TSDR 7-10.



ABOUT US

Fiesta Palapa is a place to Celebrate those special events such as Birthdays, Bridal Showers, Baby Showers, Graduations, Family Reunions, Posadas and all types of Social Gatherings. We offer affordable pricing and convenient payment options.



- Joia Beach (joiabeachmiami.com) offers “a stunning waterfront palapa” for “private events, beach weddings, corporate functions, or commercial partnerships” that can accommodate up to 200 guests; “the ideal restaurant and venue for your private event needs:³⁶



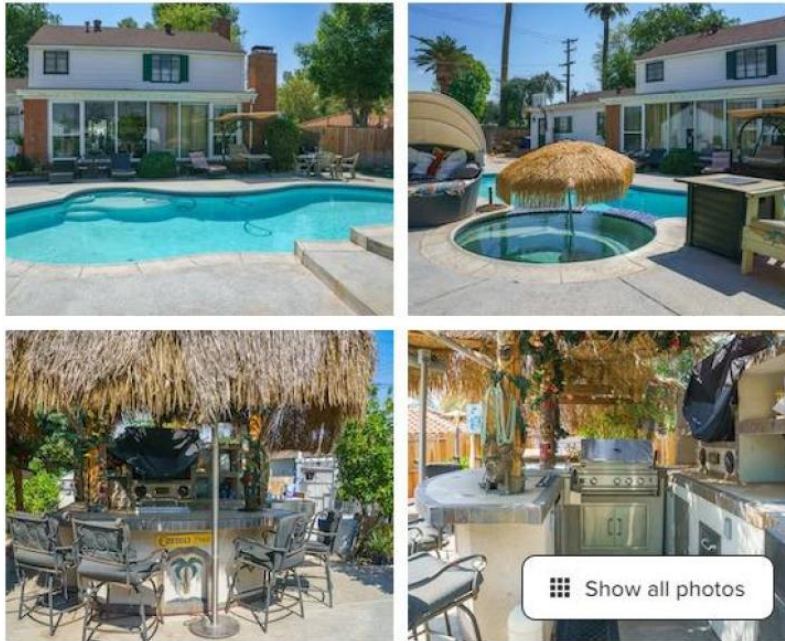
a stunning waterfront palapa with unparalleled views of biscayne bay and the magic city skyline. our main dining room features high beamed ceilings, ambient lighting, and tulum-inspired decor. ideal for those seeking miami restaurants on the water or a seaside hotspot, our main dining room is the quintessential joia beach experience to celebrate a special occasion.

available for: full venue buyouts, large group dining, family-style dining, birthday dinner miami, and multi-course dinners.

capacity: 200 seated or up to 60 guests for large group dining.

³⁶ *Id.* at 11-13.

- On the website Swimply (swimply.com), which rents pools by the hour, one can rent what is referred to as a “Palapa Party Pool,” which comes with a Palapa:³⁷



- On the vacation website Vrbo (vrbo.com), one can rent a dog-friendly palapa with a private patio on the waterfront:³⁸



³⁷ *Id.* at 14.

³⁸ *Id.* at 15.

- Blessington Farms (blessingtonfarms.com) offers a “Palapa Rental” that seats 100+ and includes 10 tables.³⁹



Based on the third-party Internet evidence of record, the Examining Attorney concludes that “it is common in the industry to refer to event venues and social function facilities using the term ‘palapa’ when such facilities feature a thatched roof and open sides, as Applicant’s venue does.”⁴⁰ And based on all of the record evidence, she concludes that “the word ‘PALAPA’ in the applied-for mark merely describes a feature or characteristic of Applicant’s social function facility because the facility includes a thatched roof and open sides, and is therefore a palapa.”⁴¹

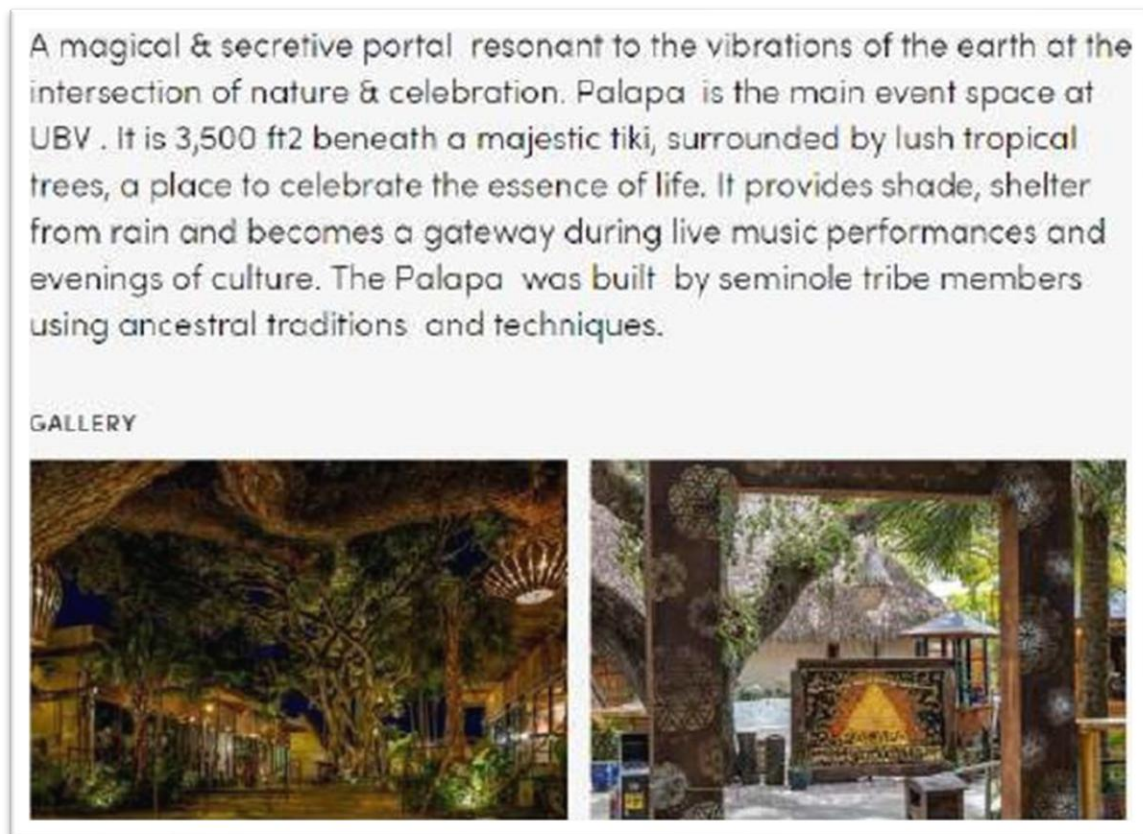
We further note that Applicant, during prosecution, made of record a webpage from The Vendry (thevendry.com), a third-party website that allows businesses to

³⁹ September 19, 2022 Office Action, at TSDR 17.

⁴⁰ 16 TTABVUE 7 (Examining Attorney’s Brief).

⁴¹ *Id.*

promote their event space, and it uses PALAPA descriptively as the name of Applicant's venue, rather than as a designation for its services: **"Palapa is the main event space** at UVB. ... It is ... surrounded by lush tropical trees.... **It provides shade, shelter from rain** and becomes a gateway during live performances.... **The Palapa** was built by Seminole trade members...." (emphasis added):⁴² Whether the language for this promotional page is sourced from Applicant or not, it shows Applicant's venue being referred to as a "palapa."



We find that the Examining Attorney has satisfied her burden to show, prima facie, that the word PALAPA is merely descriptive of the identified services because

⁴² September 20, 2023 Request for Reconsideration, at TSDR 70.

it immediately conveys the feature or characteristic that Applicant's services are provided in a palapa. Accordingly, the burden shifts to Applicant to rebut that showing. *See Fat Boys*, 2016 TTAB LEXIS 150, at *5

IV. Applicant's Evidence and Argument

Applicant submits a number of arguments against the refusal, none of which are persuasive. One of Applicant's main arguments is that the venue where Applicant provides its services is not a "palapa" as that term is defined. For example, Applicant argues that "the definitions of ... a palapa say that [it] is a dwelling," but points out that its services aren't performed in a dwelling.⁴³ Nevertheless, Applicant concedes that "there is one meaningful similarity between a dictionary's definition of a palapa on the one hand, and an edifice where Applicant provides Applied-For Services, on the other hand – specifically, a thatched roof...."⁴⁴ However, according to Applicant, "said location does not manifest or include any of the other features that would be part of a palapa, as defined by the American Heritage Dictionary or as described within Wikipedia in the Examining Attorney's citations, namely, open sides or a resort beach location...."⁴⁵

These arguments are unavailing. As the Examining Attorney notes, the definitions of record listed above (and repeated here) do not limit palapas to dwellings at beaches or resorts.⁴⁶ As explained, a "palapa" is:

⁴³ 14 TTABVUE 7 (Applicant's Brief).

⁴⁴ *Id* (emphasis added).

⁴⁵ *Id.*

⁴⁶ 16 TTABVUE 8 (Examining Attorney's Brief).

- “[a] **structure**, such as a bar or restaurant, in a tropical resort, **that is open-sided and thatched with palm leaves**.” – THE AMERICAN DICTIONARY
- “[A]n **open-sided structure with a palm-thatched roof**.” – COLLINS DICTIONARY
- “[A] simple, thatched-roof dwelling, **usually open on the sides**” or “**any building resembling this**, especially in a resort area, as a restaurant, beachhouse, or the like.” – DICTIONARY.COM⁴⁷

In addition, the OXFORD ENGLISH DICTIONARY (OED), defines a “palapa” in U.S.

English as:

A traditional Mexican rustic shelter, roofed with palm leaves or branches; **(also) the palm leaves or branches used in such a construction. Hence: any structure built in imitation of this**, esp. on a beach[,]

and gives these examples:

[1957] A lot of last minute work had to be done: weeds cleared, painting finished, construction of a **temporary palapa shelter** for serving meals to guests, and so on. G. Fisher in M. S. Edmonson et al., *Synoptic Stud. Mexican Culture* ii. ii. 117 Citation details for G. Fisher in M. S. Edmonson, *Synoptic Stud. Mexican Culture*

[1964] Those roofs over there are **covered with palapa**, coconut leaves. *National Geographic*

[1975] Popular hangout for Perula locals and visitors is a **palapa-style** restaurant ... serving octopus, red snapper, pargo—whatever the day’s catch. *Sunset*

[1986] He will swim for his customary hour, and then **rest beneath his palapa**. *New Yorker*

[2000] The terracotta-tiled and **thatched palapa roofs** of the charming Villa del Sol are a welcoming sight. *You & your Wedding*⁴⁸

⁴⁷ See notes 10-12 *supra* (emphasis added).

⁴⁸ https://www.oed.com/dictionary/palapa_n?tab=meaning_and_use&tl=true (accessed October 15, 2025, emphasis added). See *University of Notre Dame du Lac v. J. C. Gourmet*

A “palapa” thus also refers to “the palm leaves or branches” used in the construction of a palapa, one of the characteristics of Applicant’s thatched venue for its services,⁴⁹ as well as “**any structure built in imitation of this**” (emphasis added).

The above-recited definitions also do not limit a palapa to a structure that is “open on four sides,” as Applicant contends.⁵⁰ And as the Examining Attorney points out, “Applicant’s own evidence of record [discussed above] shows that several of [Applicant’s] facility’s ‘walls’ are mere canvas panels which can be opened, consumers of Applicant’s services have provided pictures of the venue in use with the sides open, and Applicant’s website touts the venue as ‘open air,’ conveying that the air inside the venue is unconfined and the sides are frequently opened.”⁵¹ Applicant’s contention that its services “are not performed in an edifice that is open on all side, and thus, ... not ‘open-sided’” is unconvincing.

Applicant criticizes Dictionary.com’s definition of “palapa” because it describes PALAPA as not only a “simple, thatched-roof dwelling, **usually open on the sides,**”

Food Imports Co., No. 61847, 1982 TTAB LEXIS 146, at *7 (“[T]he Board may take judicial notice of use of a term in dictionaries.”). *See also B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988) (“dictionaries and encyclopedias may be consulted”).

⁴⁹ “Thatch” simply refers to “plant stalks or foliage, such as reeds or palm fronds, used for roofing.” <https://www.ahdictionary.com/word/search.html?q=thatched> (accessed October 20, 2025).

⁵⁰ 14 TTABVUE 13 (Applicant’s Brief).

⁵¹ 16 TTABVUE 8 (Examining Attorney’s Brief). Applicant finds it “baffling why the Examining Attorney choses to focus on whether or not Applicant’s location is an open air structure, when being ‘open air’ is not part of the definition of a palapa anyway.” The Examining Attorney has not “focused” on that issue at Applicant contends; she merely points out—given that one definition of “open air” in the MERRIAM-WEBSTER DICTIONARY is “the space where air is unconfined,” especially outdoors—one more reason why consumers are likely to Applicant’s services as being provided in a palapa.

but also “**any building resembling this**, especially in a resort area, as a restaurant, beachhouse **or the like**.”⁵² Applicant asserts that the wording “or the like” is “inherently vague,”⁵³ though it does not argue that the wording “any building resembling this” is vague. In any event, as discussed above, Applicant’s venue fits several of the definitions for “palapa.” The fact that the term may also apply to structures that are also dwellings does not detract from the fact that other definitions aptly describe Applicant’s venue. *NextGen Mgmt., LLC*, No. 88098031, 2023 TTAB LEXIS 1, at *8. On the other hand, it demonstrates the somewhat flexible nature of that term, as supported by the Internet evidence of third-parties using that term for thatched, open-sided huts and structures in a variety of forms, all of which are referred to as “palapas” by the purveyors of the offered services.

Applicant asserts that the definitions and third-party Internet evidence of record “cannot be accepted for the truth of what is included on those pages.”⁵⁴ But we are concerned with consumer perception here, not the truth of what is shown on any webpage. Furthermore, as to the dictionary evidence, we may and routinely rely on dictionary definitions, including from online dictionaries. *See Bayer*, 488 F.3d at 966 (“Definitions available from an online resource that are readily available and as such capable of being verified are useful to determine consumer perception ... The online dictionaries and translations as well as the print dictionary evidence that Bayer

⁵² 14 TTABVue 6 (Applicant’s Brief) (emphasis added).

⁵³ *Id.*

⁵⁴ *Id.* at 10.

submitted and the print dictionary cited by the Board provide substantial evidence that ASPIRINA means ‘aspirin’”).

Finally, Applicant argues that PALAPA cannot be considered merely descriptive because

not a single piece of evidence shows use of the term “palapa” as descriptive of a third party’s banquet or social function facilities, or pavilion facilities used for concerts or exhibitions; at most, one of the Examining Attorney’s submissions could possibly be seen in this way, but said usage in the same county as Applicant, Applicant believes it may have been an infringement on its mark and its rights, and such usage ceased well before Applicant is filing this trial brief.⁵⁵

Applicant’s argument is misplaced. First, “[t]he fact that Applicant may be the first or only user of a term does not render the term distinctive’ if, as here, it has been shown to be merely descriptive of the [services] identified in the application.” *Zuma Array*, 2022 TTAB LEXIS 281, at *21 (quoting *Fat Boys*, 2016 TTAB LEXIS 150, at *10); see also *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004) (the Trademark Act does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it first” and thereby “depriv[ing] commercial speakers of the ordinary utility of descriptive words”) (citation omitted).

Second, as we discussed and Applicant has acknowledged,⁵⁶ a mark need not describe every aspect, detail, or nuance of the identified services to warrant refusal as merely descriptive; it is sufficient if the term describes a single significant

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 4.

attribute, feature, or characteristic thereof. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300 (Fed. Cir. 2012) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, (Fed. Cir. 2001)). The evidence in this case includes dictionary definitions showing that Applicant’s event venue services are provided in a venue that fits the definition of a “palapa,” and significant third-party Internet evidence shows the term “palapa” being used in connection with the rental of a variety of structures that fit the definition of a “palapa.” The evidence thus establishes that PALAPA describes a significant characteristic or feature of the services—namely, that the services are provided in a palapa. The lack of exact alignment with every detail of the recitation of services is irrelevant, as the mark PALAPA immediately conveys that the services are provided in a palapa structure, a central feature of Applicant’s services. *See Dial-A-Mattress Operating Corp.*, 240 F.3d at 1346 (finding the applicant’s argument that the mark did not describe the full extent of its services unavailing because a mark “need not recite each feature of the relevant goods or services in detail to be descriptive.”).

Applicant analogizes this case with the Board’s non-precedential decision in *In re Halal Shack Inc.*, No. 87633904, 2018 TTAB LEXIS 535, contending that PALAPA, as used with its services “is more figurative than literal, more connotative than denotative, conveying a commercial impression of resorts and relaxation and fun, much in the manner than ‘shack’ did not manifest descriptiveness in the mark [THE] HALAL SHACK.”⁵⁷ Applicant also argues that this case “is not dissimilar from *In re*

⁵⁷ *Id.* at 3.

Idiag,” No. 75592564, 2001 TTAB LEXIS 475, another non-precedential Board case, “where the Board found that SPINALMOUSE was not descriptive of a computerized noninvasive scanning devices used to measure the shape and mobility of the spine and other parts of the body.”⁵⁸

“The Board does not encourage the citation to nonprecedential decisions because they are not binding on the Board, nor are they a substitute for evidence needed to support or traverse a refusal. *See In re tapio GmbH*, No. 87941532, 2020 TTAB LEXIS 483, at *10 n.34 (TTAB 2020) (Board found unpersuasive nonprecedential decisions decided on different records). “[A]s we shall evidently have to continue saying ad nauseam: ... prior decisions on other marks for other goods [or services] are of very little help one way or the other in cases of this type. Each case must be decided on its own facts and the differences are often subtle ones.” *Curtice-Burns, Inc. v. Nw. Sanitation Prods., Inc.*, 530 F.2d 1396, 1399 (CCPA 1976) (cleaned up; citation omitted).

And as is typical, the two cases Applicant cites are distinguishable. In *Halal Shack*, the Board found that even though SHACK, as used in connection with the applicant’s restaurant services appeared “at first blush to describe the sort of building in which the services are provided,” 2018 TTAB LEXIS 535, at *16, it required a mental process involving imagination, thought and perception to articulate the way the term conveyed information about the restaurant services. *Id.* at *15. But as the Board further explained, just one “‘seafood shack’ article and its reprint, included in

⁵⁸ *Id.* at 6.

the record as the only evidence of descriptiveness, apart from third-party registrations, use[d] the term ‘seafood shack’ in reference to a variety of restaurants, some of which were neither small nor simple [as the term was defined in the record].” *Id.* at *15-16. And as for the third-party registrations, the applicant had presented “a nearly equal number of marks for restaurant services treating the term SHACK as inherently descriptive, “many consist[ing] simply of the name of a food or beverage (e.g., BURGER or SHAKE disclaimed) coupled with SHACK (not disclaimed).” *Id.* at *17. The Board thus found that “the mark THE HALAL SHACK, taken as a whole, [fell] more on the suggestive than the descriptive side of the [distinctiveness] spectrum.” *Id.* at *19. Not so here, where the definitions of record show that Applicant’s venue where it provides its services are accurately described as a PALAPA as that term has been defined. Moreover, in contrast to the single article in *Halal Shack* that referred to seafood restaurants as “seafood shacks” in a “figurative or poetic sense,” *id.* at *20, the Internet evidence in this case is replete with third parties renting or otherwise offering venues that they not only refer to the structures as “palapas,” but which are palapas as that term has been defined. We find nothing “figurative or poetic” about the third-party use of “palapa” in this case.

In re Idiag, regarding SPINALMOUSE, is distinguishable just from Applicant’s summary alone, which points out that “[w]hile there were, as the Board noted, some superficial similarities, such as buttons, being palm-sized to grip in one hand, and having a cable to attached to a computer, there were also significant differences, including the purpose of the device and the fact that it could not rest on a flat surface,

but instead, but instead sat in a cradle in a base station,”⁵⁹ and thus “[o]n balance... falls outside the scope of a computer mouse,” 2001 TTAB LEXIS 475, at *7. Furthermore, and “[b]eyond the fact that [the] device is not technically a mouse,” the Board “agree[d] with applicant that the combined expression, SPINALMOUSE, is somewhat incongruous, and that no purpose or characteristic, and that no purpose or characteristic is readily described by this combined term, either generally or with particularity.” 2001 TTAB LEXIS 475, at *8-9. In this case, there are no superficial similarities or other facts that prevent Applicant’s structure from being considered a palapa. Applicant is simply displeased with reliance on other definitions it considers too expansive. But based both on the definitions and third-party Internet use evidence of record, we conclude that Applicant provides its services in a palapa. Moreover, and contrary to Applicant’s unsupported contention, we do not agree that “PALAPA is likely suggestive as applied to the Applied-For Services” because it “manifests incongruity.”⁶⁰ We find no incongruity with respect to that term and the way it is used by Applicant.

Applicant has failed to rebut the prima facie case showing that the mark PALAPA is merely descriptive of the identified services under Section 2(e)(1).

V. Applicant’s Section 2(f) Claim

Merely descriptive terms can qualify for registration upon proof of that they have acquired distinctiveness. *See* Section 2(f) of the Trademark Act. As we noted earlier,

⁵⁹ *Id.*

⁶⁰ *Id.* at 3.

Applicant asserts a claim under Section 2(f) in the alternative, which we now address.

Section 2(f) provides:

Except as expressly excluded in subsections (a), (b), (c), (d), (e)(3), and (e)(5) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.

The Federal Circuit has “long held that ‘the applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.’” *Royal Crown Cola Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1368 (Fed. Cir. 2018) (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005)); *see also In re Boston Beer Co.*, 198 F.3d 1370, 1373 (Fed. Cir. 1999) (“[T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” (quoting *In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 1317 n.4 (Fed. Cir. 1990))).

Based on the evidence of record in this case, including dictionary definitions, pages from Applicant’s website, and significant third-party uses, we agree with the Examining Attorney that PALAPA is not only merely descriptive but also highly descriptive of the identified services.⁶¹ *See In re Guaranteed Rate*, No. 87054820, 2020 TTAB LEXIS 265, *10 (third-party uses of the terms “guaranteed rate,” “guaranteed mortgage rate,” and “guaranteed interest rate” established that claimed mark

⁶¹ 16 TTABVUE 10 (Examining Attorney’s Brief).

GUARANTEED RATE was highly descriptive of mortgage-related services). As such, the declaration of acquired distinctiveness based on five years use is insufficient to overcome the refusal. Instead, Applicant bears a relatively heavy burden in showing acquired distinctiveness.

Applicant contends that even if the mark is merely descriptive, “the Examining Attorney has not made a prima facie case that the mark PALAPA is “highly descriptive” for the identified services because (1) “the consuming/purchasing public is apt to see the mark PALAPA for the Applied-For Services as a service mark, and not a commonly-understood term for certain kinds of pavilion and event-space services that have high quality AV and lighting systems and banquet facilities”; (2) “‘Palapa’ is not ... the natural or normal terminology one would employ to describe services in the nature of” the identified services” (internal quotation omitted); and (3) “[t]he Examining Attorney has not established that, when applied to the Applied-For Services, the term PALAPA immediately describes, without conjecture or speculation, a significant feature or function of Applicant’s Applied-For Services, and, ... the term ‘palapa’ is sufficiently vague or nebulous that, ‘when used in conjunction with the identified services, it does not immediately convey information about a feature or characteristic of the ... services.’”⁶²

Applicant appears to conflate the test for finding a mark merely descriptiveness (which we have already found based on the evidence of record and Applicant’s failure to rebut that evidence) with the determination of whether a mark is not only merely

⁶² 14 TTABVue 14-15, 18 (Applicant’s Brief).

descriptive, but also highly descriptive. The issue here is not whether consumers are “apt to see the mark PALAPA for the Applied-For Services as a service mark” or whether that term is “commonly-understood,” but instead whether PALAPA immediately conveys information about a feature, function, or characteristic of the services, which we have found. As noted above, whether a mark is “highly descriptive” only becomes relevant after it has already been found to be merely descriptive under Section 2(e)(1), thus informing us as to an applicant’s burden in demonstrating acquired distinctiveness.

“To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *Virtual Indep. Paralegals*, No. 86947786, 2019 TTAB LEXIS 74, at *35 (quoting *Steelbuilding.com*, 415 F.3d at 1297). In other words, the applicant must demonstrate that “consumers have come to associate the mark with a single source.” *In re MK Diamond Prods., Inc.*, No. 86813875, 2020 TTAB LEXIS 263, at *56.

The Federal Circuit sets forth the relevant factors for proving acquired distinctiveness:

[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the [mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product [or service] embodying the mark.

Converse, Inc. v. Int’l Trade Comm’n, 909 F.3d 1110, 1121 (Fed. Cir. 2018). No single factor is determinative and all six factors are to be weighed together in determining the existence of secondary meaning. *In re Post Foods, LLC*, No. 88857834, 2024 TTAB LEXIS 1, at *15.

Although Applicant’s brief is 19 pages, Applicant devotes just one paragraph to its argument that the facts in this case support a finding of distinctiveness.⁶³ We go through each line of that paragraph. Applicant first contends that it “has provided, while prosecuting its application, over a dozen social media posts and numerous examples of unsolicited media coverage,” thus addressing the *Converse* factors (1) and (6) above, “showing association of the mark with a particular source – namely, Applicant – by actual purchasers and media.”⁶⁴ But as the Examining Attorney points out, “most of Applicant’s evidence shows Applicant’s own social media posts as well as social posts from approximately twenty individuals users which tag or mention Applicant’s venue.”⁶⁵ A few are from customers mentioning a good experience at Palapa, but some just tag the venue; others appear to be from vendors or individuals

⁶³ *Id.* at 19. Applicant, during prosecution submitted seven responsive filings, some of them attaching various documents. But Applicant, in its brief on appeal, does not cite to the record at all when discussing its own evidence, thus requiring us to forage for supporting documentation. It is incumbent on Applicant and its counsel to point us to specific materials in the record that support the claims Applicant makes in its brief. See *RxD Media, LLC v. IP Application Dev. LLC*, Nos. 91207333 and 91207598, 2018 TTAB LEXIS 37, at *7-8, *aff’d*, 377 F.Supp.3d 588 (E.D. Va. 2019), *aff’d*, 986 F.3d 361 (4th Cir. 2021) (quoting *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) (“A skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim [for appellate review] Judges are not like pigs, hunting for truffles buried in briefs.”)).

⁶⁴ *Id.* at 19.

⁶⁵ 16 TTABVUE 11 (Examining Attorney’s Brief).

working an event there, as seen in the following sample excerpts:⁶⁶



⁶⁶ January 24, 2024 Response to Office Action, at TSDR 24, 28, 32, 37, 41 (arrow emphasis added).



Applicant also provides several articles referencing Applicant's venue. But most of them do not appear to be unsolicited media coverage of Applicant's mark and services, but rather promotions of various events that happen to take place at Applicant's venue, as seen in the following sample excerpts:⁶⁷

⁶⁷ April 26, 2024 Request for Reconsideration, at TSDR 10.

At this magical concert, the triplet will explore the traditional chants that sing the language of the plants — the icaros — in a romantically illuminated setting. Like a blooming flower, flutes and strings will gently accompany the group as their voices intertwine in a celestial jungle dance.

The concert series will be held at **Palapa Miami in Upper Buena Vista**, where you'll be able to enjoy the soothing sounds of Fuerza Femenina in a stunning open-air setting.

The screenshot shows the homepage of 'MIAMI'S COMMUNITY NEWS'. At the top right is a '1 First Bank' advertisement with the text 'EARN M 5.40'. Below the header is a navigation bar with links: PUBLICATIONS, PODCASTS, CATEGORIES, EVENTS, LEGAL NOTICES, and INSPIRE HEAL. The main content area shows a breadcrumb trail: Home > Biscayne Bay Tribune > 150 young professionals celebrate Jewish 'Earth Day' at PALAPA Miami. Below this is a sub-header 'Biscayne Bay Tribune' and the main headline '150 young professionals celebrate Jewish 'Earth Day' at PALAPA Miami'.

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The screenshot shows the homepage of '7 NEWS MIAMI'. The top navigation bar includes links for News, Investigations, Weather, Sports, Entertainment, and a 'Watch' button. The temperature is displayed as 73°. The main headline reads: 'Margarita Live Experience at Palapa invites you to sip America's favorite cocktail while learning its origin'.

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Taking the stage in Miami, Margarita Live will be performed on November 18 at the PALAPA Miami's open-air venue. The evening will have two showtimes, at 7 p.m. and 9:30 p.m., with plenty of time to take in the amazing music, dancing and cocktails.

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⁶⁸ *Id.* at 12.

⁶⁹ *Id.* at 15.

⁷⁰ *Id.* at 17.

Applicant next asserts that its “length of use [*Converse* factor] (No. 2) has already been documented, and is substantively exclusive for Applicant’s for Applicant’s Applied-For Services.”⁷¹ It is, however, unclear what evidence of length of use Applicant is referring to. While Applicant claims a date of January 1, 2018 in the application as its date of first use in commerce in connection with the identified services, Applicant provides no evidence of that use apart from its statement in the application. “The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence.” Trademark Rule 2.122(b)(2). 37 CFR 2.122(b)(2). Applicant has provided no declaration or other competent evidence of its first date of use of PALAPA beyond the five years attested in its declaration of acquired distinctiveness.

Regarding Applicant’s claim that its use of PALAPA has been substantially exclusive, we agree with the Examining Attorney that the record includes several other companies, discussed above, that use the word “palapa” descriptively for similar event venue services.⁷² As such, Applicant’s use of PALAPA to describe a social event venue appears not to be substantially exclusive. Exact identity between the third-party services and an applicant’s recitation of services is not required; use in analogous and overlapping fields are probative if they expose relevant consumers to competing sources. *See, e.g., Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1403

⁷¹ 14 TTABVUE 19 (Applicant’s Brief).

⁷² 16 TTABVUE 11 (Examining Attorney’s Brief).

(Fed. Cir. 1984) (emphasizing that “[w]hen the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term of device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances,” without mandating identical goods.). *See also In re Jasmin Larian, LLC*, No. 87522459, 2022 TTAB LEXIS 99, at *48-49 (holding that “the widespread use, sale of and discussions/comments about bamboo handbag designs similar to [the] Applicant’s applied-for mark” negated substantial exclusivity, as these related but non-identical uses in the fashion field diluted source identification.); *In re Gen. Mills IP Holdings II, LLC*, No. 86757390, 2017 TTAB LEXIS 262, at *26 (finding the presence of “yellow-packaged cereals from various sources” in the consumer goods market detracted from the perception of a yellow background as a source indicator, despite variations in specific product formulations.). These authorities align with the evidentiary record here, where the various examples of third-party uses of “palapa” for social events generally – such as gatherings, parties, and venue rentals – constitute significant marketplace exposure in the event services field.

Applicant next asserts that *Converse* factor “No. 5, international copying, is not a current issue per documentation presented by either the Examining Attorney or Applicant.”⁷³ We agree that Applicant has not shown international copying of PALAPA.

Applicant further asserts that “[w]ith regard to amount and manner of advertising

⁷³ 14 TTABVUE 19 (Applicant’s Brief).

at [*Converse* factor] No. 3, Instagram posts constitute advertising, ... and Applicant has documented almost 37,000 followers of its @PALAPAMIAMI Instagram account which inherently and clearly includes its PALAPA mark as part of the account username, which appears in followers' feeds."⁷⁴ Applicant provides a screenshot of its Facebook page showing it has 2.7k followers, and its Instagram page showing it has 36.7K followers,⁷⁵ but absent supporting testimony, the number of followers is hearsay. Even so, Applicant gives no context for these numbers vis-à-vis its competitors or how many of its followers are located in the United States. Applicant also provides no evidence of the extent of its advertising. "In the absence of contextual evidence, we cannot ascertain whether [Applicant's] advertising ... [is] extraordinary or little more than commonplace." *State Permits, Inc. v. Fieldvine, Inc.*, No. 92075095, 2024 TTAB LEXIS 291, at *38-39 (citing *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1320 (Fed. Cir. 2018)). See also *Mini Melts, Inc. v. Reckitt Benckiser LLC*, No. 91173963, 2016 TTAB LEXIS 151, at *57.

Moving on, Applicant asserts, with respect to *Converse* factor (5), that it "is not comfortable making its sales or numbers of customers public at this state." We thus have no information regarding Applicant's sales or number of customers.

Applicant wraps up by arguing that, "Collectively, this evidence establishes that Applicant's PALAPA mark has manifested secondary meaning in connection with the Applied-For Services, in a manner that is sufficient to show acquired distinctiveness

⁷⁴ *Id.*

⁷⁵ April 26, 2024 Request for Reconsideration, at TSDR 19.

for a merely descriptive mark or a highly descriptive mark that the Examining Attorney has admitted is not generic.”

We disagree. Based on a careful review of the record, we find that Applicant has failed to demonstrate that the highly descriptive word PALAPA has acquired distinctiveness for its identified services. Applicant has not shown that “consumers have come to associate the mark with a single source.” *MK Diamond Prods.*, 2020 TTAB LEXIS 263, at *56.

VI. Conclusion

We conclude that Applicant’s mark PALAPA is merely descriptive because it immediately conveys knowledge to consumers that a feature or characteristic of Applicant’s service is that they are provided in a palapa. We further find that Applicant has failed to demonstrate that PALAPA, which is highly descriptive, has acquired distinctiveness for the identified services.

Decision: The refusal to register is affirmed under Section 2(e)(1) of the Trademark Act.