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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applicant	ADG, LLC
Applied for Mark	VINTAGE PINK
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By: *Garen J. Garcia*

DATE: *September 15, 2009*

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicant	: ADG, LLC	: Law Office
	:	: 113
	:	:
Serial No.	: 77/093,617	: Examining Attorney:
	:	: Jennifer Vasquez
Filed	: January 1, 2007	:
	:	:
Mark	: VINTAGE PINK	: Attorney Docket No. 297836.00004

APPELLANT'S REPLY BRIEF

Applicant ADG, LLC hereby submits its reply brief pursuant to 37 C.F.R. § 2.142(b)(1).

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I. The Evidence Provided by the Examining Attorney Fails to Establish that “Vintage Pink” is a Specific Color Used in the Fashion and Jewelry Industries

The Examining Attorney argues that the proposed mark, VINTAGE PINK, is merely descriptive because “vintage pink” is a specific color of pale pink used in the clothing and jewelry industries and therefore immediately conveys to consumers the color of some of Applicant’s goods. Applicant respectfully disagrees because the Examining Attorney has provided only limited and weak evidence that fails to establish that “vintage pink” is and would be recognized by the relevant public as a specific color. The Examining Attorney’s submission of a handful of listings for products from Internet websites, including eBay, Amazon.com and some small independent retailers, is insufficient to establish that “vintage pink” is a *specific* color of pale pink used in the relevant *industries* and recognized by the relevant public. As noted in Applicant’s opening brief, a handful of examples from the Internet is not sufficient to establish that the term is merely descriptive. *See In re Grand Forest Holdings Inc.*, 78 USPQ2d 1152 (TTAB 2006) (press releases, news stories, and a handful of examples of changes to restaurant menus was insufficient evidence to support a § 2(e)(1) refusal to register FREEDOM FRIES for frozen french fried potatoes); *In re Jose Remacle*, 66 USPQ2d 1222 (TTAB 2002) (excerpts from websites and articles retrieved from LEXIS/NEXIS databases showing “cd” as an acronym for “compact disc” and “bio” as an abbreviation for “biological” was insufficient evidence to support a § 2(e)(1) refusal to register BIO-CD for modified compact discs on which biological molecules are fixed).

It is well established that whether a mark is merely descriptive is a question of fact, determined from the viewpoint of the relevant purchasing public. *In re Bed & Breakfast Registry*, 791 F.2d 157, 160 (Fed. Cir. 1986). Applicant acknowledges that both EBAY.COM

and AMAZON.COM are well-known websites receiving a large amount of Internet traffic. However, both of these websites contain listings for hundreds of thousands of goods and the Examiner has not provided evidence regarding the number of consumers that have viewed the two listings from EBAY.COM and AMAZON.COM submitted as evidence, although the listing from AMAZON.COM shows that the “Shilav Seaside Blush Cotton Voile Dress” is ranked number 187,216 in Amazon’s apparel sales. The listings submitted from Etsy.com for “A Jug of Wine, A Loaf of Bread - Vintage Serving Plate” and “Vintage looking hat in vintage pink color with satin ribbons and hearts” indicate that those listings were viewed 136 and 75 times, respectively. There is no evidence of the number of consumers that have viewed the remaining listings specifically discussed by the Examiner (*i.e.*, listings located on kaboodle.com, fashionjewelryforeveryone.com, ambersattic.com, thefarmchicks.com, and prettypetalsboutique.com), the volume of traffic that these websites receive, or the general significance of these websites to the relevant consumer. The listings specifically discussed by the Examiner fail to establish that the relevant consumer has even seen the phrase “vintage pink” in connection with clothing or jewelry.

Further, the listings provided by the Examiner tend to show that “vintage pink” does not describe a specific color to consumers of clothing and jewelry as several of the listings contain additional references to well-known colors. The listings from KABOODLE.COM, FASHIONJEWELRYFOREVERYONE.COM, and AMBERSATTIC.COM use the colors “rose,” “fuchsia,” and “candy pink” in the listings content, in addition to “vintage pink,” to describe the color of the goods.

Applicant also notes that the listing provided from PRETTYPETALSBOUQUE.COM uses “vintage pink” in conjunction with “fine grade glass glitter,” goods that are not listed in Applicant’s identification of goods and are not clearly related to any of Applicant’s listed goods.

Tellingly, the Examining Attorney has not provided any evidence from a major publication or source for the fashion industry, such as Vogue or Elle magazines, has not provided materials from any major newspaper or publication, has not provided listings from any major retailer known for its sales of clothing and/or jewelry, and has not provided any objective evidence such as color charts or definitions in support of its contention that “vintage pink” is a specific color.

In contrast, Applicant supplied evidence from the *Merriam-Webster Online Dictionary* and *Dictionary.com* showing that there is no definition of “vintage pink” and entries from Wikipedia entitled “List of colors” and “Variations of pink.” The Board has stated that “[it] will consider evidence taken from Wikipedia so long as the non-offering party has an opportunity to rebut that evidence by submitting other evidence that may call into question the accuracy of the Wikipedia information.” *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028 (TTAB 2007). The Examining Attorney has not offered evidence to rebut Applicant’s Wikipedia evidence regarding the various commonly known colors and variations of pink, and relies solely on the submitted product listings in support of its argument. The volume of material available on the Internet is such that one can search for and find use of almost any adjective preceding any color and can hardly be said to establish that the combination of terms is a specific shade or common commercial color.

For the reasons set forth above and in Appellant's Opening Brief, § IV(A)(3), Applicant submits that the listings provided by the Examining Attorney fail to establish that "vintage pink" is a specific color that is recognized by the relevant public in connection with clothing and jewelry.

II. The Examining Attorney has not Provided Evidence or Argument Demonstrating that Color is a Significant Function, Attribute, or Property of Applicant's Goods

Regardless of whether "vintage pink" is a specific color commonly known in the clothing and jewelry industries, the mark is not merely descriptive because color is not a significant function, attribute, or property of any of Applicant's goods. Although the mark does not need to immediately convey an idea of each and every specific feature of Applicant's goods or services to be considered merely descriptive, the mark must describe one *significant* attribute, function, or property of the goods or services. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (emphasis added). There is no indication that consumers would perceive a color name as descriptive of an entire line of clothing or jewelry or that color is a significant attribute or property of clothing or jewelry. Rather, consumers expect clothing and jewelry to come in a wide variety of shapes, styles, and colors. Applicant explained that it intends to use the mark on clothing and jewelry in a wide range of colors, as is customary in the clothing and jewelry industries, and that Applicant's goods will not all be pink or even pink in part. Furthermore, "pink" carries suggestive connotations in regards to clothing and accessories. (See Appellant's Opening Brief, § IV(A)(1).) Applicant also submitted numerous third-party registrations of marks incorporating a color term to demonstrate that color is not a significant feature of clothing or jewelry. (*Id.*) The Examining Attorney has never provided an explanation of how color is a *significant* feature of Applicant's goods or otherwise responded to Applicant's

argument, other than to state that the mark is descriptive because some of Applicant's goods will be pink in color.

III. The Evidence Provided by the Examining Attorney Fails to Establish the Descriptive Significance of the Term "Vintage" in the Clothing and Jewelry Industries

The only evidence provided by the Examining Attorney regarding the descriptive significance of the term "vintage" is third-party registrations where the term VINTAGE was disclaimed for clothing or jewelry items. The Examining Attorney has never provided a definition for "vintage" or explained how "vintage" describes Applicant's goods. Rather, the Examining Attorney has asserted that "vintage" is descriptive of Applicant's goods based on its own conclusion that Applicant will be selling "vintage" clothing and jewelry items. Applicant has withdrawn its disclaimer of the term "vintage," provided definitions and other evidence regarding the meaning of "vintage," provided third-party registrations for clothing where "vintage" was not disclaimed, and presented argument regarding why "vintage" is not descriptive of its goods. (*See* Appellant's Opening Brief, § IV(A)(2).) The Examining Attorney has not presented any response other than to restate its argument that the composite term "vintage pink" has a common commercial meaning. Applicant submits that the Examining Attorney has failed to provide sufficient evidence showing that the term "vintage" is merely descriptive of Applicant's goods and that "vintage" must be disclaimed apart from the mark as a whole.

IV. The Examining Attorney does not Address Applicant's Argument that VINTAGE PINK is Inherently Distinctive Because it is a Unitary Mark with a Unique and Nondescriptive Connotation, and Thereby Fails to Refute Applicant's Argument

The VINTAGE PINK mark, as a whole, is inherently distinctive and registrable because the combination of terms creates a unitary mark with a unique and nondescriptive meaning as applied to the goods. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (C.C.P.A. 1968) (SUGAR & SPICE held not merely descriptive of bakery products); *In re Computer Business Systems Group*, 229 USPQ 859 (TTAB 1985) (AUTO*MATE not merely descriptive of computer programs recorded on tape used to automate bookkeeping and accounting functions of automotive jobbers); *In re National Tea Co.*, 144 USPQ 286 (TTAB 1965) (NO BONES ABOUT IT not merely descriptive for fresh precooked ham); *In re Jones Investment Co.*, Serial No. 77249189 (TTAB January 21, 2009) (GREEN INDIGO mark incongruous and suggestive for clothing).

Specifically, Applicant has argued that the terms “vintage” and “pink” and the combination of those terms in the mark VINTAGE PINK results in a composite mark that has a second incongruous meaning apart from any descriptive significance the phrase may have. (*See* Appellant's Opening Brief, § IV(A)(3).)

The Examining Attorney has failed to address this portion of Applicant's argument and so does nothing to refute it.

V. Conclusion

It is well established that the burden lies with the Examiner to prove that a mark is merely descriptive. Any doubts as to the mere descriptiveness of a term are to be resolved in Applicant's favor and in favor of publication of the mark for opposition. *See In re Grand Forest*

Holdings Inc., 78 USPQ2d 1152 (TTAB 2006); *In re Grand Metropolitan Foodservice, Inc.*, 30 USPQ2d 1974 (TTAB 1994).

For the reasons stated above and in its opening brief, Applicant submits that neither the elements of Applicant's mark nor Applicant's mark as a whole is merely descriptive of Applicant's goods. Applicant's mark is a unitary mark that is no more than suggestive.

Accordingly, Applicant respectfully requests that the Board reverse the final refusal to register on the basis that the mark is merely descriptive and allow the mark of the present application to proceed to publication.

Respectfully submitted,

Date: September 16, 2009

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