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PRECEDENT OF
THE T.T.A.B.**

Mailed: April 14, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michael Weinberger

Serial No. 77915887

Jason R. Lee of Lee Lee & Associates PC for Michael Weinberger.

Russ Herman, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Quinn, Walters and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Michael Weinberger, filed an application to register on the Supplemental Register the mark SMOKELESS LOG in standard characters for goods identified as "artificial fireplace logs" in International Class 4¹

The examining attorney refused registration under Section 23 of the Trademark Act, 15 U.S.C. §1091, on the ground that applicant's mark is incapable of identifying

¹ Serial No. 77915887 was filed on January 20 2010, based on an allegation of September 1, 2008 as a date of first use of the mark anywhere and September 10, 2008 as a date of first use of the mark in commerce.

applicant's goods and distinguishing them from those of others. When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs on the issue under appeal.²

A mark is a generic name if it refers to the class, genus or category of goods and/or services on or in connection with which it is used. See *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. See Section 14(3) of the Act. See also *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, *supra*. The examining attorney has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. See *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d

² We note that applicant appended as exhibits to his appeal brief additional copies of evidence made of record during prosecution of his involved application. Applicant is reminded that such submissions are unduly cumulative and unnecessary.

1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. See *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985).

In the case of *In re American Fertility Society*, *supra*, our primary reviewing court stated that if the PTO can prove "(1) the public understands the individual terms to be generic for a genus of goods and services; and (2) the public understands the joining of the individual terms into one compound word to lend no additional meaning to the term, then the PTO has proven that the general public would understand the compound term to refer primarily to the genus of goods or services described by the individual terms." (*Id.* at 1837.)

In the case of *In re Dial-A-Mattress Operating Corp.*, *supra*, 1-888-M-A-T-R-E-S-S for "telephone shop-at-home retail services in the field of mattresses," the court further clarified the test as follows (*Id.* at 1810):

Where a term is a "compound word" (such as "Screenwipe"), the Director may satisfy his burden of proving it generic by producing evidence that each of the constituent words is generic, and that "the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words

as a compound." *In re Gould Paper Corp.*, 834 F.2d 1017, 1018, 5 USPQ2d 1110, 1110 (Fed. Cir. 1987). However, where the proposed mark is a phrase (such as "Society for Reproductive Medicine"), the board "cannot simply cite definitions and generic uses of the constituent terms of a mark"; it must conduct an inquiry into "the meaning of the disputed phrase as a whole." *In re The Am. Fertility Soc'y*, 188 F.3d at 1347, 51 USPQ2d at 1836. The *In re Gould* test is applicable only to "compound terms formed by the union of words" where the public understands the individual terms to be generic for a genus of goods or services, and the joining of the individual terms into one compound word lends "no additional meaning to the term." *Id.* at 1348-49, 51 USPQ2d at 1837.

The court concluded that "1-888-M-A-T-R-E-S-S," as a mnemonic formed by the union of a series of numbers and a word, bears closer conceptual resemblance to a phrase than a compound word, and the court reiterated that the PTO must produce evidence of the meaning the relevant purchasing public accords to the proposed mnemonic mark "as a whole."

In this case, the terms comprising the proposed mark SMOKELESS LOG include the adjective SMOKELESS followed by the noun LOG which it clearly modifies. As such, SMOKELESS and LOG form a union of words, notwithstanding the space between its component terms. *See In re American Institute of Certified Public Accountants*, 65 USPQ2d 1972, 1982 n. 8 (TTAB 2003). Therefore, we find that SMOKELESS LOG is more analogous to the compound word considered in *Gould* than it is to the phrase considered by the court in *American*

Fertility. See, for example, In re William B. Coleman Co.,
93 USPQ2d 2019, 2021 (TTAB 2010).

Thus, we look first to the dictionary definitions of the terms comprising SMOKELESS LOG to determine whether they support the refusal to register the proposed mark. The examining attorney submitted with his June 17, 2010 Office action definitions of "smokeless" and "log." According to these definitions, "smokeless"³ may be defined as (**adjective**) "emitting, producing, or having little or no smoke;" and "log"⁴ may be defined as (**noun**) "a portion or length of the trunk or of a large limb of a felled tree." Thus, SMOKELESS LOG may be defined as a portion or length of a tree trunk or limb that, presumably when burned, emits or produces little or no smoke.

In addition, the examining attorney submitted with his Office actions advertisements and articles retrieved from Internet web pages. Certain excerpts from these articles and web pages follow:

³ The Random House Dictionary (2010), retrieved from Dictionary.com.

⁴ *Id.*

bizrate search.compare.conquer. smokeless logs

Home > smokeless logs

Smokeless logs

related searches: smokeless eshtay, smokeless indoor stove top grill, more

see other matches in:

- [Medicine & Remedies](#)
- [Fireplaces & Mantels](#)
- [more](#)

Microsoft

Click [here](#) to download the world's most widely used browser.



refine your results

price

Under \$100

\$100 - \$225

Over \$225

sort by: show only: free shipping coupons sales view as: add tax & shipping:

	Smokeless Log Fireplace Insert Yardiac.com \$129.95 <input type="button" value="go to store"/>
	Smokeless Large Outdoor Log Yardiac.com \$249.95 <input type="button" value="go to store"/>
	Natural Flame Smokeless Gel Cartridge Fire Amazon Marketplace \$29.99 <input type="button" value="go to store"/> store rating: 

[See more stores selling smokeless logs](#)

Stores Selling smokeless logs (Sponsored Links)

[log files](#)
Log Analysis & Reporting Software For Windows, Linux, & Cisco Devices
ManageEngine.com/EventLogAnalyzer

http://www.google.com/products?hl=er&q=smokeless+logs&um=1&ie=UTF-8&ei=EGHYG_CjkoP_8AbZ4IO&sa=X&oi=product_re
sult_group&ct=title&resnum=1&ved=0CBcQrQGwAA 04/26/2010 10:25:05 AM



... 172917 Item Weight: 16 lb(s) Product Information: Place the **smokeless log** in any wood fireplace for a real fire with no smoke, no sparks and no odor. ...

[Add to Shopping List](#)

eBay



Wholesale Everlog - Natural Flame - Smokeless Log

Everlog - Natural Flame - **Smokeless Log** Fireplace Insert Fully Assembled. Never worry about hauling wood, messy ashes or flying embers again! ...

[Add to Shopping List](#)

\$33.35 new

DollarDays International
★★★★☆ 29 seller ratings



Candle Lamp SL8 8 Hour "Smokeless" Paraffin Wax Lamp Fuel...

The Candle Lamp SL8 "**Smokeless**" disposable oil lamp fuel cartridge uses highly refined ... The disposable Candle Lamp SL8 "**Smokeless**" paraffin wax lamp fuel ...

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\$63.49 new

The WFRestaurant Store
★★★★☆ 2,51 seller ratings



Candle Lamp 24HR Lamp Fuel (1 CS) L0024

Let the soft glow of a gently flickering flame set a romantic mood at your restaurant, bistro, or cafe with this SL24 24 hour paraffin wax lamp fuel cartridge from Candle Lamp. ...

[Add to Shopping List](#)

\$51 new

from 5 sellers

[Compare prices](#)



Everlog - Natural Flame - Smokeless Log

Everlog - Natural Flame - **Smokeless Log**.

[Add to Shopping List](#)

\$36.67 new

www.StorePhills.com
★★★★☆ 3 seller ratings



The smokeless coal fields of West Virginia a brief history [Book]

by William Purviance Tams; Ronald D. Eller - West Virginia University Press (2001) - Paperback - 106 pages

William Tams lived coal. He spent the first half of the twentieth century engaged in the business, rising from a young coal engineer to a coal czar. The **Smokeless** Coal Fields

\$18 new, \$10 used

from 10 sellers

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19 nearby stores

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★★★★☆ (3)
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★★★★★ (1)
\$19.99



[GFP Group Pleasant Hearth 20" Electric Crackling Natural Wood Log](#)
★★★★☆ (4)
\$49.99



[Schleich Campfire](#)
★★★★★ (1)
\$11.75



[Indoor Campfire Pmp for Scouting Ceremonies](#)

Product Features

- Log fits nicely in most wood freplaces providing a rea fire without smoke
- Ventless, odorless and perfectly safe
- Can be used in broken wood fireplace
- Substitutes for electric logs but provides real fire, no light bulbs
- 8-pk. replacement cartridges Item# 172919 sold separately

Product Description

Product Description

Place the smokeless log in any wood fireplace for a real fire with no smoke, no sparks and no odor. Looks like gas fireplace logs or an electric log, but burns gas fuel cartridges. Ventless and perfectly safe. No mess and no cleanup. Fire lasts about 2 hours per cartridge. Can be extinguished anytime with included snuffer. Provides approximately 8000 BTUs of heat. Eco-friendly - recycle cartridges as you would any other empty metal can. Instant fireplace repair.

Product Details

Shipping Weight: 16 pounds

ASIN: B001C3PLV8

Average Customer Review: ★★★★★ (1 customer review)

Amazon Bestsellers Rank: #38,121 in Jewelry (See Top 100 in Jewelry)

#21 in Home & Garden > Furniture & Décor > Home Décor > Fireplaces & Accessories > Gel-Fuel Fireplaces

The screenshot shows the MoneySavingExpert.com forum interface. At the top, there is a navigation bar with categories like Cards, Loans, Reclaim, Shopping, Deals, Utilities, Banking, Travel, Insurance, Mortgages, Income, and News. The main content area features a thread titled "Open Fire Smokeless Logs" by user "sparky883" posted on 17-02-2009. The thread content includes a post where the user asks for advice on using artificial fireplace logs and a fireguard. To the right of the thread, there is a "Thread Stats" box showing 294 views and a "Share This Thread" section with social media icons. The page also includes various promotional banners, such as "Free MoneySaving Email" and "Free £400 Fridges".

We find that the genus of the goods at issue is "artificial fireplace logs," that is, the goods as identified in the involved application. While the record does not establish whether all artificial fireplace logs are smokeless, we also find that SMOKELESS LOG is understood by the relevant public to refer to at least a substantial subset of that genus of goods. See *H. Marvin Ginn, supra*. A product may have more than one generic

name. *In re Sun Oil Co.*, 426 F.2d 401, 165 UPSQ 718, 719 (CCPA 1970) (Rich, J., concurring) ("All of the generic names for a product belong in the public domain") (emphasis in the original); *Roselux Chemical Co., Inc. v. Parsons Ammonia Company, Inc.*, 299 F.2d 855, 132 UPSQ 627, 632 (CCPA 1962) (a product may have more than one common descriptive name). In this case, the dictionary definitions, supported in addition by advertisements made of record by the examining attorney clearly establish that a "smokeless log" is an artificial portion or length of a tree that emits or produces little or no smoke. Applicant argues that the examining attorney's evidence points to applicant's own goods. However, we note that these materials show use of SMOKELESS LOG as a generic term as applied to applicant's goods.

In addition, applicant has failed to introduce evidence sufficient to rebut the examining attorney's evidence of genericness. Instead, applicant submits truncated results from several search engines in support of his position that the consuming public does not understand "smokeless log" to refer to the genus of goods. Such evidence is insufficient to rebut the examining attorney's prima facie case of genericness. *Cf. In re American Online, Inc.*, 77 USPQ2d 1618 (TTAB 2006). We are not

persuaded that because "there is not a single mention of the applicant's mark in the first two pages of a search performed in three separate search engines"⁵ the evidence made of record by the examining attorney somehow fails to demonstrate that SMOKELESS LOG is used as a generic term applied to artificial fireplace logs that emit little or no smoke. Similarly, the fact that other terms, such as "smokeless artificial logs" or "logs that produce no smoke" are also available to competitors to use as generic designators for such goods does not diminish the genericness of SMOKELESS LOG.

Accordingly, the record is sufficient to establish that the relevant public would find SMOKELESS LOG a generic term denoting applicant's identified artificial fireplace logs.

Decision: The refusal under Section 23 of the Act on the ground that the proposed mark is generic is affirmed.

⁵ Applicant's brief, p. 3.