

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 29, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Humboldt Street Collective LLC*

Serial No. 87152277

H. Michael Drumm, Trent Rinebarger and Marc Rietvelt of Drumm Law LLC,  
for Humboldt Street Collective LLC.

Natalie L. Kenealy, Trademark Examining Attorney, Law Office 104,  
Zachary Cromer, Managing Attorney.

Before Kuhlke, Cataldo and Hightower,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Humboldt Street Collective LLC, dba Great Notion Brewing and Barrel House, has filed an application, amended to seek registration on the Supplemental Register, of the designation BLUEBERRY MUFFIN (in standard characters) for “beer” in International Class 32.<sup>1</sup>

<sup>1</sup> Application Serial No. 87152277 was filed on August 26, 2016 on the Principal Register under Trademark Act Section 1(a), 15 U.S.C. § 1051(a). In response to the Examining Attorney’s refusal of registration under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), Applicant amended its application to seek registration on the Supplemental Register.

The Trademark Examining Attorney refused registration on the Supplemental Register under Trademark Act Section 23(c), 15 U.S.C. §§ 1091(c), on the ground that BLUEBERRY MUFFIN is generic and thus incapable of distinguishing Applicant's goods. After the Examining Attorney made the genericness refusal final, Applicant appealed to this Board and filed a Request for Reconsideration, which was denied.

Both Applicant and the Examining Attorney have filed briefs. We affirm the refusal to register.<sup>2</sup>

### I. Applicable Law

By amending its application to seek registration of BLUEBERRY MUFFIN on the Supplemental Register, Applicant has conceded that the term is merely descriptive. Thus, we must determine whether BLUEBERRY MUFFIN is capable of distinguishing Applicant's goods from those of others. "Generic terms do not so qualify." *In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1089 (TTAB 2017); *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (generic terms "are by definition incapable of indicating a particular source of the goods or services"). A generic term "is the common descriptive name of a class of goods or services" and unregistrable on either the Principal or the Supplemental Register. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)).

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<sup>2</sup> The TTABVUE and Trademark Status and Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

There is a two-part test used to determine whether a designation is generic: (1) what is the genus (class or category) of the goods or services at issue? and (2) does the relevant public understand the designation primarily to refer to that genus of goods or services? *Princeton Vanguard*, 114 USPQ2d at 1830 (citing *Marvin Ginn*, 228 USPQ at 530); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1462 (TTAB 2014).

## II. What is the Genus of the Goods at Issue?

Our first task is to determine the proper genus of the goods at issue. In defining the genus, we commonly look to the identification of goods in the application. *In re Reed Elsevier Prop. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007); *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 Serial Podcast, LLC*, 126 USPQ2d 1061, 1063 (TTAB 2018) (proper genus generally is “set forth by the [identification of goods] in each subject application.”). The Examining Attorney contends that the proper genus is “beer,” the goods identified in Applicant’s application. Applicant agrees that the “Examining Attorney correctly identified the genus, which is ‘beer.’”<sup>3</sup>

To aid our determination of the proper genus, we may consider evidence of record showing the manner in which an applicant uses its mark. *In re Reed Elsevier*, 82 USPQ2d at 1380 (the Board, in order to define the proper genus of services, appropriately reviewed the applicant’s website to determine the context of the

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<sup>3</sup> 8 TTABVUE 7.

recitation of services in applicant's application); *In re Steelbuilding.com*, 75 USPQ2d 1420, 415 F.3d 1293, 1298 (Fed. Cir. 2005) (Federal Circuit interpreted the meaning of "computerized online retail services" in light of the actual use being made by the applicant on its web site).

Here, Applicant's specimen of use, reproduced in part as Figure 1 below, shows that Applicant identifies its product identified under the BLUEBERRY MUFFIN designation as one of its house beers.

**Figure 1.**



Accordingly, "beer" accurately reflects the goods on which Applicant uses its applied-for mark; the category of goods is identifiable and adequately defined by the identification of goods in Applicant's application.

### III. Who are the Relevant Purchasers?

The second part of the *Marvin Ginn* test is whether the term sought to be registered is understood by the relevant public primarily to refer to the genus of goods

under consideration. “The relevant public for a genericness determination is the purchasing or consuming public for the identified goods.” *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1187 (TTAB 2017) (citing *Magic Wand*, 19 USPQ2d at 1553); *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013). Applicant argues that the relevant public is “craft beer drinkers.”<sup>4</sup> The Examining Attorney argues that “the relevant public comprises ordinary consumers who purchase applicant’s goods because there are no restrictions or limitations to the channels of trade or classes of consumers.”<sup>5</sup> Because Applicant’s goods are identified as “beer” without limitation as to type, i.e., craft brews or mass marketed beer, price point or trade channel, we find the relevant purchasers of Applicant’s goods are ordinary members of the public who are beer drinkers.

#### IV. What is the Meaning of BLUBERRY MUFFIN to the Relevant Public?

We next turn to consider the meaning of the term BLUEBERRY MUFFIN. “Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018) (citing *In re Merrill Lynch*, 4 USPQ2d at 1143); *see also In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1634 (Fed. Cir. 2016); *Princeton Vanguard*, 114 USPQ2d at

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<sup>4</sup> 8 TTABVUE 7.

<sup>5</sup> 10 TTABVUE 5.

1830; *In re Reed Elsevier*, 82 USPQ2d at 1380 (finding third-party websites competent sources for determining what the relevant public understands mark to mean).

The Examining Attorney introduced into the record evidence from the following websites describing Applicant's beer and indicating it contains blueberry muffins as a key ingredient:

Blueberry Muffin

"A tart beer made with real blueberry muffins and locally sourced blueberries from Sauvie Island. Fermented with lactobacillus and wild yeast, this beer will remind you of your mother's freshly baked blueberry muffins. 5%" [alcohol].<sup>6</sup> (newschoolbeer.com);

Blueberry Muffin

"I'm sure I wasn't the only one thinking a blueberry muffin beer would be a stout, or even a wheat beer. Great Notion was inspired by the blueberry muffins their moms used to make when they created this variant of their Berliner Weisse. ... Great Notion manages to perfectly capture the aroma of a blueberry muffin." (pastemagazine.com);<sup>7</sup>

"After one whiff of Blueberry Muffin, Great Notion's wild ale designed to smell and taste like a blueberry muffin, we were hooked." (coolmaterial.com);<sup>8</sup>

Willamette Week describes two of Applicant's beers as "a blueberry beer that tastes exactly like a Costco blueberry muffin and a maple-drenched imperial breakfast stout." "Great Notion – home to a blueberry muffin beer that tastes like blueberry muffins, and a pancake beer that tastes kinda like pancakes – will do what comes naturally and host a breakfast beerfest with seatings at 9 am. and 11 am. (wweek.com);<sup>9</sup> and

Tavour Blog describes Applicant's beer as "a blueberry muffin sour – it tastes exactly like an actual blueberry muffin!" (tavour.com).<sup>10</sup>

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<sup>6</sup> May 1, 2017 Office Action at .pdf 19.

<sup>7</sup> November 28, 2017 Office Action at .pdf 13.

<sup>8</sup> May 1, 2017 Office Action at .pdf 25.

<sup>9</sup> June 23, 2017 Office Action at .pdf 9; November 28, 2017 Office Action at .pdf 16.

<sup>10</sup> November 28, 2017 Office Action at .pdf 18.

The Examining Attorney further introduced into the record evidence from the following websites describing blueberry or blueberry muffin beers produced by third parties:

Blueberry Muffin

This beer is everything you think of when a Blueberry Muffin comes to mind, We take our Maduro English-style Brown Ale and add blueberries and cinnamon to create this work of art. Pairs well with any breakfast or sweet dessert. (cigarcitybrewing.com);<sup>11</sup>

Blueberry Muffin Brown Ale (Strange Brew Beer Recipe Kit)

Strange Brew's Blueberry Muffin Ale is an English-style brown ale with Blueberry flavoring and a hint of cinnamon. (home-brew.com);<sup>12</sup>

A Reddit post discusses ingredients for a "blueberry muffin" summer ale, and recommends both Cigar City Brewing's "Blueberry Muffin" brown ale and a second brewery's "blueberry muffin coffee imperial stout" (reddit.com);<sup>13</sup>

Ordnance Brewing Bloops Blueberry Wheat

"Bloops is as much a wheat beer as a fruit beer. Perfect balance of aroma, flavor and character define what some call the ideal blueberry muffin." (ordnancebrewing.com);<sup>14</sup>

Miner Blueberry Cream Ale

"Reminiscent of a blueberry muffin with bright blueberry notes and baked sweetness from the malt, this cream ale is a light and refreshing summer beer." (minerbrewing.com);<sup>15</sup>

A review of Beards Brewery states "this brewery has 10 rotating taps featuring creative brews like blueberry muffin, candy cane porter and apple crisp, along with classics ..." (mynorth.com);<sup>16</sup>

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<sup>11</sup> December 8, 2016 Office Action at .pdf 4.

<sup>12</sup> November 28, 2017 Office Action at .pdf 12.

<sup>13</sup> November 28, 2017 Office Action at .pdf 7-10.

<sup>14</sup> June 23, 2017 Office Action at .pdf 12.

<sup>15</sup> June 23, 2017 Office Action at .pdf 14.

<sup>16</sup> November 28, 2017 Office Action at .pdf 22.

Blue Point Brewing Company – Blueberry Ale

“Aroma – Smells like blueberry muffins and bread. Not many ‘beer’ notes in the aroma but I’ll be damned if it doesn’t smell delicious. Flavor – It also tastes like a blueberry muffin. It tastes like an honest to god, liquid blueberry muffin.” (saintbrewis.com);<sup>17</sup>

Bellevue Biltmore Blueberry Vanilla Wheat – American Wheat Ale

Two Henrys Brewing Company offers a wheat ale “reminiscent of a blueberry muffin, but in a beer.” (twohenrysbrewing.com);<sup>18</sup>

Kitty Kat Blues Infused Pale Ale

Black Raven Brewing Co. offers “an easy drinking pale ale [that] finishes like this morning’s blueberry muffin.” (blackravenbrewing.com);<sup>19</sup>

Blueberry Ale

Marin Brewing Co. offers an ale with “the aroma of a freshly baked blueberry muffin and just a slight peppery blueberry taste.” (marinbrewing.com);<sup>20</sup>

Blueberry Vixen AKA Blue Fox

Old Bust Head Brewing Co.’s “Blueberry puree combines with the caramelized roast flavor of our Vixen Irish Red to invoke the flavor of a freshly baked blueberry muffin in this fruited ale.” (oldbusthead.com);<sup>21</sup>

Black Hills Miner Brewing Co. describes one of its beers as “reminiscent of a blueberry muffin” (Office action of June 23, 2017, p. 11);

BlueBerry

The Original Craft Beer Club reviews the Ellicottville Brewing Company’s BlueBerry Wheat beer as “A blueberry muffin in a glass! The Blueberry Wheat is EBC’s most popular brew with luscious aromas and flavors of fresh blueberries.” (craftbeerclub.com);<sup>22</sup> and

Blueberry Wheat Ale

Kaitlyn Cooks blog reviews Kennebunkport Brewing Co.’s beer’s aftertaste as “Blueberry muffin! Literally! After a few sips of this beer the barley malts mix

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<sup>17</sup> June 23, 2017 Office Action at .pdf 11.

<sup>18</sup> December 8, 2016 Office Action at .pdf 9.

<sup>19</sup> December 8, 2016 Office Action at .pdf 8.

<sup>20</sup> December 8, 2016 Office Action at .pdf 7.

<sup>21</sup> June 23, 2017 Office Action at .pdf 5.

<sup>22</sup> May 1, 2017 Office Action at .pdf 20.

with the blueberry and it tastes like you just ate a blueberry muffin!” (kaitlyncooks.blogspot.com).<sup>23</sup>

The Examining Attorney also introduced into the record the following examples of non-beer beverages described as a blueberry muffin:

**Blueberry Muffin**

Dunkin’ Donuts offers “No mixes here – just fresh brewed muffin flavor hot out of the kitchen. Brew up a cup of your favorite pastry, and drink it in.” (duninathome.com);<sup>24</sup>

**Blueberry Muffin Smoothie**

Iowa girl eats offers the following recipe: “Skip the muffin and drink a healthy, gluten-free Blueberry Muffin Smoothie that tastes like one instead!” (iowagirleats.com);<sup>25</sup>

**The Blueberry Muffin Shot**

Common Man Cocktails offers a recipe for “The blueberry muffin shot, the concept is to build a shooter that has the flavors of a blueberry muffin. We test our theory with actual blueberry muffins. One thing is for certain, taking the shot doesn’t make it hard to talk after you finish it. But, actual food, it totally gets in the way of speaking.” (everydaydrinkers.com);<sup>26</sup>

**Blueberry Muffin**

Sugarlands Distilling Co. offers 70 proof – seasonal “Blueberry Muffin moonshine, tastes like newly picked blueberries buried in a freshly baked pastry with a hint of candied lemon peel.” (sugarlandsdistilling.com);<sup>27</sup> and

**Apple Blueberry Muffin**

Peaks of Otter Winery offers an Apple Blueberry Muffin wine. (barrelchestwineandbeer.com).<sup>28</sup>

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<sup>23</sup> May 1, 2017 Office Action at .pdf 22.

<sup>24</sup> May 1, 2017 Office Action at .pdf 5.

<sup>25</sup> May 1, 2017 Office Action at .pdf 10.

<sup>26</sup> May 1, 2017 Office Action at .pdf 12.

<sup>27</sup> May 1, 2017 Office Action at .pdf 13.

<sup>28</sup> November 28, 20-17 Office Action at .pdf 11.

The Examining Attorney introduced into the record the following definition from Urban Dictionary of “blueberry muffins” as a “synonym for Leinenkugel’s Sunset Wheat beer, which tastes suspiciously of blueberry muffins.” (urbandictionary.com).<sup>29</sup> The Examining Attorney introduced additional evidence that flavored beers, including beers flavored with pumpkin, habanero, grapefruit, blueberry, peach, chocolate and coconut, are gaining popularity among Millennial beer drinkers and are part of a growing trend among breweries to create flavored beers.<sup>30</sup>

Applicant introduced into the record copies of the following third-party registrations, issued on the Principal Register for marks in standard characters, unless otherwise noted:

Reg. No. 3770316 for the mark HONEYPIE, identifying “wine,” in Class 33;

Reg. No. 4908011 for the mark STRAWBERRY SHORT’S CAKE (STRAWBERRY and CAKE disclaimed), identifying “beer, ale and lager,” in Class 32;

Reg. No. 4776866 for the mark BIRTHDAY CAKE, identifying “alcoholic beverages except beers,” in Class 33;

Reg. No. 4110903 for the mark APPLE PIE, identifying “liqueurs,” in Class 33;

Reg. No. 4251649 for the mark ICED CAKE (CAKE disclaimed), identifying “alcoholic beverages except beers,” in Class 33;

Reg. No. 4704474 for the mark KING CAKE ALE (ALE disclaimed), identifying “beer, ale, lager, stout and porter.” In Class 32;

Reg. No. 3954690 for the mark PIECE OF CAKE, identifying “alcoholic beverages except beers,” in Class 33;

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<sup>29</sup> November 28, 2017 Office Action at .pdf 14.

<sup>30</sup> June 22, 2018 Office Action at .pdf 5-23.

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Reg. No. 5450308 for the mark INDIAN RIVER GRAPEFRUIT IPA (IPA disclaimed), identifying “beer,” in Class 32;

Reg. No. 5441961 for the mark MANGO MAGIC (MANGO disclaimed), identifying various types of smoothies, not including wine in Class 32;

Reg. No. 5457541 for the mark MELON DROP (MELON disclaimed), identifying “ale, beer,” in Class 32;

Reg. No. 5451990 for the mark PINEAPPLE EXPRESS, identifying “beer,” in Class 32;

Reg. No. 5449189 for the mark TASTY AF PEANUT BUTTER CHOCOLATE STOUT (PEANUT BUTTER CHOCOLATE STOUT disclaimed), identifying “beer,” in Class 32;

Reg. No. 5448477 for the mark WHOA-MANGO, identifying “beer,” in Class 32; and

Reg. Nos. 5458194, 5458192, 5458196 and 5458195 for the marks WILD OHIO BREWING BLOOD ORANGE TANGERINE (OHIO BLOOD ORANGE TANGERINE disclaimed), WILD OHIO BREWING BLUEBERRY LAVENDER (OHIO BLUEBERRY LAVENDER disclaimed) WILD OHIO BREWING CRANBERRY (OHIO BREWING CRANBERRY disclaimed) and WILD OHIO BREWING MANGO & HOPS (OHIO BREWING MANGO & HOPS disclaimed), all identifying “beer, craft beer, flavored beer, tea-flavored beer,” in Class 32.

Determining whether a term is generic is fact intensive and depends on the record. *See In re Tennis Indus. Ass’n*, 102 USPQ2d 1671, 1680 (TTAB 2012); *see also Royal Crown v. Coca-Cola Co.*, 127 USPQ2d at 1044 (“Whether an asserted mark is generic or descriptive is a question of fact” based on the entire evidentiary record). As noted above, we must give due consideration to the evidence of consumer perception of the use of the mark as a whole. *Princeton Vanguard*, 114 USPQ2d at 1831 (quoting *In re Steelbuilding.com*, 75 USPQ2d at 1421 (“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.”).

Based upon the evidence of record, we make the following findings of fact:

- beers are often flavored, and flavored beers are growing in popularity; Applicant, for instance, offers numerous flavored beers, in addition to BLUEBERRY MUFFIN, including KEY LIME PIE, STRAWBERRY CREAM PIE and CHERRY;
- consumers refer to Applicant’s blueberry muffin-flavored beer as “blueberry muffin;”
- consumers also refer to blueberry muffin-flavored beer produced by third parties, inter alia, as “blueberry muffin;”
- third parties create and market blueberry muffin-flavored beverages other than beer, including smoothies, coffee, wine, liquor and mixed drinks, and refer to them as “blueberry muffin.”

Based upon the record, we find that flavored beer is a type of beer within the genus “beer” defined by Applicant’s identification of goods. *Royal Crown Co. v. Coca-Cola Co.*, 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). When an applied-for 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. *See In re*

*Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) (finding ATTIC generic for automatic sprinklers for fire protection). Here, the record shows that flavor, including flavors resulting in beer tasting like another food or beverage, is an important and central aspect for beer, and blueberry muffin refers to a specific flavor of beer for Applicant and several third parties. *See A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 1 USPQ2d 1364 (3<sup>rd</sup> Cir. 1986) (CHOLCOATE FUDGE generic for diet sodas with chocolate fudge flavor). Accordingly, we find that consumers would readily understand “blueberry muffin” to refer to the subset of blueberry muffin flavored beers.

To the extent that “blueberry muffin” is an adjective for Applicant’s flavored beer, it is settled that an adjective can be a generic term. *See Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d at 1366 (finding the adjective “footlong” generic in connection with sandwiches); *In re Cent. Sprinkler Co.*, 49 USPQ2d at 1199 (finding the adjective ATTIC to be 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 (TTAB 1991) (the expression “generic name for the goods or services” is not limited to noun forms but also includes “generic adjectives,” that is, adjectives which refer to a genus or species, category or class, of goods or services). The significance of “blueberry muffin” is as a generic adjective for this type of beer; thus BLUEBERRY MUFFIN is incapable of distinguishing the source of the goods. *In re Empire Tech.*, 123 USPQ2d 1544, 1565-66 (TTAB 2017) (COFFEE FLOUR generic for flour made from coffee

berries); *In re Demos*, 172 USPQ 408, 409 (TTAB 1971) (“CHAMPAGNE” merely names principal ingredient of applicant’s salad dressing and is unregistrable).

We are not persuaded that Applicant’s third-party registration evidence suggests a different result. First, nearly half of the registrations include a disclaimer of the flavor terms, such as “STRAWBERRY,” “CAKE,” “MANGO,” “MELON,” and “PEANUT BUTTER CHOCOLATE STOUT.” Second, the application files for these registrations are not in the record. As a result, we cannot ascertain the evidence and arguments put forth during prosecution of the applications underlying these registrations by the respective applicants and examining attorneys. Finally, we simply are not bound by the decisions of examining attorneys in other applications. The Board must make its own findings of fact, and that duty may not be delegated by adopting the conclusions reached by an examining attorney. *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994); *In re BankAmerica Corp.*, 231 USPQ 873, 876 (TTAB 1986). “It has been said many times that each case must be decided on its own facts.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted).

## V. Conclusion

Taken as a whole, the evidence indicates that the relevant public would understand and use BLUEBERRY MUFFIN primarily as the name for a type of beer. Accordingly, the term is generic “and should be freely available for use by competitors.” *In re Cent. Sprinkler Co.*, 49 USPQ2d at 1199. *See generally In re*

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*Cordua Rests.*, 118 USPQ2d at 1635; *Marvin Ginn*, 228 USPQ at 530; *In re 1800Mattress.com*, 92 USPQ2d at 1685.

**Decision:**

The refusal to register Applicant's mark on the Supplemental Register is affirmed.