

This Opinion is not a  
Precedent of the TTAB

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Choice Traders LLC*

Serial Nos. 87770413 and 87950215

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for Choice Traders LLC

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Before Bergsman, Ritchie, and Heasley,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Choice Traders LLC, seeks registration on the Principal Register of  
the mark ARTIZEN (in standard characters) for “essential oils,” in International

<sup>1</sup> As to Application Serial No. 87770413.

<sup>2</sup> As to Application Serial No. 87950215.



Class 3 and the stylized mark  for “Essential oils for aromatherapy use; Fragrance oils; Absolute oils for personal use, use in the manufacture of scented products, for cleaning purposes; Essential oils; Essential oils for household use; Essential oils for personal use; Essential oils for use in the manufacture of scented products; Lavender oil; Natural essential oils; Oils for cleaning purposes; Oils for toiletry purposes; Peppermint oil; Fragrances” in International Class 3.<sup>3</sup>

The Trademark Examining Attorneys have refused registration of Applicant’s marks under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that they are merely descriptive of its identified goods. When the refusals were made final, Applicant requested reconsideration, which was denied, and the appeals proceeded. We consolidate the appeals because they involve common issues of law and fact with similar records. *See In re S. Malhotra & Co. AG*, 128 USPQ2d

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<sup>3</sup> Application Serial Nos. 87770413 and 87950215 were filed on January 25, 2018 and June 6, 2018, respectively, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as May 23, 2017. According to the description of the mark in Application Serial No. 87950215, “[t]he mark consists of the stylized wording ‘ARTIZEN’ with a stylized shadow beneath the wording.” Color is not claimed as a feature of the mark.

Page references to the application records are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

Unless otherwise stated, all references are to the TSDR and TTABVUE entries for Application Serial No. 87950215.

1100, 1102 (TTAB 2018); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1214 (2019). We reverse the refusals to register.

### I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). A mark is “merely descriptive” within the meaning of Section 2(e)(1) “if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)).

“The major reasons for not protecting such [merely descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ2d 215, 218 (CCPA 1978), *quoted in In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089-90 (Fed. Cir. 2005) and *Apollo Medical Extrusion Technologies, Inc. v. Medical Extrusion Technologies, Inc.*, 123 USPQ2d 1844, 1851 (TTAB 2017). For those reasons, terms that are merely descriptive must acquire distinctiveness before they can be registered on the Principal Register. *Real Foods Pty Ltd. v. Frito-Lay North America, Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018).

The examining attorney bears the burden of showing that a term is merely descriptive of the relevant goods. *In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1512 (TTAB 2016). To meet this burden, she may obtain evidence “from any competent source, such as dictionaries, newspapers, or surveys,” *In re Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor Dev.*, 200 USPQ at 218. She may also obtain evidence from websites and publications, and, in the case of a use-based application, as here, from Applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 123 USPQ2d at 1710; *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001).

#### A. Evidence and Arguments

Applicant’s identified goods, essential oils, are “essential” not because they are necessary, but because they carry the fragrance or “essence” of the plants from which the oils are extracted. They are “any of a class of volatile oils that give plants their characteristic odors and are used especially in perfumes and flavorings, and for aromatherapy.”<sup>4</sup> Because the extraction and distillation of these essential oils requires skilled handiwork by artisans (defined as “a person skilled in making a

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<sup>4</sup> Merriam-Webster.com, 3/30/2020. “The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, \*6 n. 26 (TTAB 2020).

product by hand,")<sup>5</sup> essential oils are commonly described in the marketplace as “artisanal” or “artisan,” the Examining Attorneys maintain. The following examples from the Internet illustrate the point:

- **SNOW LOTUS** “is pleased to offer an outstanding collection of over 70 fully bioactive, organic artisan essential oils source directly from artisan producers and distillers worldwide”;<sup>6</sup>
- **BE KIND BOTANICALS:** “Shop for the highest quality and pure artisan essential oils...”;<sup>7</sup>
- **APOTHECARY’S GARDEN** offers “artisan essential oils”;
- **WABISABI** offers “artisan essential oils of the Colorado plateau”;<sup>8</sup>
- **WHITE SAGE LANDING:** “Our unique essential oils are produced by small artisan distillers.”<sup>9</sup>
- **FLOURISH AROMATHERAPY:** “Working with Artisan Essential Oils”;<sup>10</sup>
- **SARAHENNA:** “Artisan Blend essential oils, organic”;<sup>11</sup>
- **DOREY AROMA THERAPY:** “We offer our pure, authentic, artisan produced Essential Oils...”;<sup>12</sup>
- **RING BOTANICALS:** “All of our artisan essential oils are steam distilled by use personally or sourced from other trusted artisan distillers.”<sup>13</sup>

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<sup>5</sup> “Artisan” : “n. A person skilled in making a product by hand”; “adj. Made by hand or by traditional means and using high-quality ingredients; artisanal: artisan cheeses; artisan wine.” American Heritage Dictionary Sept. 29, 2018 Office Action TSDR at 5.

<sup>6</sup> Sept. 29, 2018 Office Action at 7.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 29.

<sup>9</sup> May 5, 2019 Office Action at 5.

<sup>10</sup> *Id.* at 7.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> July 31, 2019 Office Action at 6.

<sup>13</sup> *Id.* at 7.

- **HOUSE OF AROMATICS** “specializes in distilling small batches of artisan essential oil from wildcrafted plants.”<sup>14</sup>
- **BLUE DOLPHIN** : “Set of twelve, 10 ml bottles of unadulterated, artisan essential oils, properly diluted with pure, odorless organic jojoba for use on children.”<sup>15</sup>

From this evidence, the Examining Attorneys infer that the word “artisan” is commonly associated with a feature and characteristic of essential oils hand-crafted by artisans. And that, they contend, is exactly the sort of essential oils offered by Applicant under the mark ARTIZEN:



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<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 10.

WHY CHOOSE ARTIZEN?

Artizen Essential Oils offers some of the highest quality essential oils & blends available in the marketplace today. We have a deep love for essential oils and the properties they possess and it shows in our product offering.



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Applicant’s misspelling of “artisan” as ARTIZEN does not overcome its descriptive nature, the Examining Attorneys contend. “A novel spelling or an intentional misspelling that is the phonetic equivalent of a merely descriptive word or term is also merely descriptive if purchasers would perceive the different spelling as the equivalent of the descriptive word or term.”<sup>17</sup> *See, e.g., In re Quik-Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 & n.9 (CCPA 1980) (holding “QUIK-PRINT,” phonetic spelling of “quickprint,” merely descriptive of printing and photocopying services). In this case, “artisan” is pronounced as “ar-ti-zen” or “ar-te-zen” with the last syllable being “zen.”<sup>18</sup> The American Heritage Dictionary states that “ar•ti•san” is pronounced “är ti-zen, -sən.”<sup>19</sup> And the Merriam-Webster Dictionary agrees that it is pronounced “är-tə-zen, - sən.”<sup>20</sup>

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<sup>16</sup> Applicant’s specimens of use, Jan. 25, 2018.

<sup>17</sup> Examining Attorney’s brief, 9 TTABVUE 5-6.

<sup>18</sup> *Id.* at 6.

<sup>19</sup> AHDictionary.com, Sept. 29, 2018 Office Action at 5.

<sup>20</sup> Merriam-webster.com, July 31, 2019 Office Action at 5.

Despite the overlap in possible pronunciations, Applicant maintains that ARTIZEN is suggestive, not descriptive, because it suggests a reference to “zen”:

Applicant’s ARTIZEN mark is an inventive and incongruous play on words that projects more than one meaning. While consumers may pronounce “ARTIZEN” in a way that sounds similar to “ARTISAN” they will also see the play on word with the addition of “ZEN” instead of “SAN.” “Zen” is of course commonly understood to refer to a [calm] or relaxed state of mind or a more simplistic approach to life. Thus, when consumers encounter Applicant’s ARTIZEN mark on essential oils, they will perceive the entire mark as a pun or double entendre that plays on the term “ZEN.”

Accordingly, the double meaning of the mark ARTIZEN as a whole creates a suggestive significance and separate and distinct commercial impression apart from the mark sounding similar to “ARTISAN” such that any descriptive significance of the mark is lost.<sup>21</sup>

## B. Discussion and Analysis

It has long been held that a novel spelling does not overcome evidence of mere descriptiveness if purchasers would perceive the different spelling as the equivalent of the descriptive term. *See, e.g., Nupla Corp. v. IXL Manufacturing Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (CUSH-N-GRIP “which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law”); *King-Kup Candies, Inc. v. King Candy Co.*, 288 F.2d 944, 129 USPQ 272, 273 (CCPA 1961) (“the syllable ‘Kup,’ which is the full equivalent of the word ‘cup,’ is descriptive”); *In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355, 358 (CCPA 1953)(finding “Fastie” merely a phonetic spelling of “fast tie” is descriptive); *Andrew J. McFarland*,

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<sup>21</sup> Applicant’s brief, 7 TTABVUE 10 citing dictionary definitions: “Zen”: “relaxed and not worrying about things that you cannot change” The Cambridge Academic Content Dictionary; “zen: a state of calm attentiveness in which one’s actions are guided by intuition rather than by conscious effort,” “having or showing qualities “such as meditative calmness and an attitude of acceptance) popularly associated with practitioners of Zen Buddhism” Merriam-Webster Dictionary. March 29, 2019 Response to Office Action at 7, 10-18.

*Inc. v. Montgomery Ward & Co.*, 164 F.2d 603, 76 USPQ 97, 99 (CCPA 1947)(KWIXTART merely descriptive for electric storage batteries); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1164 (TTAB 2017) (finding SHARPIN phonetically identical to “sharpen,” describing knife-sharpening goods); *Nazon v. Ghiorse*, 119 USPQ2d 1178, 1185 (TTAB 2016) (“one cannot obtain rights in a mark merely by a slight misspelling of a recognized descriptive term”); *see generally* 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:31 (5th ed. March 2020 update)(“A slight misspelling of a word will not usually turn a descriptive word into a non-descriptive one.”).

The policy underlying the general rule that misspelled words may be merely descriptive is set forth in the Restatement of Unfair Competition as follows:

The misspelling or corruption of an otherwise descriptive word will not ordinarily alter the descriptive character of the designation. In many instances the contrivance will not overcome the ordinary meaning of the term, and prospective purchasers will thus continue to understand the designation in a purely descriptive sense. Indeed, in some instances the alteration may go entirely unnoticed by a significant number of consumers. If the altered form is phonetically equivalent to the original word, its aural significance will also remain merely descriptive. Recognition of exclusive rights in variants and corruptions of descriptive words also imposes a risk of liability on subsequent users of the original words. ... Thus, unless the alteration is sufficient to avoid encumbering use of the original word, the variation remains descriptive.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION (Oct. 2019 update) § 14, Cmt. a.

The issue in this case is whether the relevant public—those who buy essential oils for aromatherapy and similar uses—would tend to perceive ARTIZEN as simply a misspelling of “artisan,” or as more than simply a misspelling, conveying a different, suggestive commercial impression. As the Restatement notes, the spelling of a

descriptive term may be so altered that it is not perceived as the equivalent of the original descriptive word, but merely suggestive of it. “The concept of mere descriptiveness, it seems to us, must relate to general and readily recognizable word formulations and meanings, either in a popular or technical usage context, and should not penalize coinage of hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and ‘mental pause.’” *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983).

It has long been acknowledged that there is a very thin line of demarcation between terms that are merely descriptive and those that are suggestive. *Nautilus Grp., Inc. v. ICON Health & Fitness, Inc.*, 372 F.3d 1330, 1340, 71 USPQ2d 1173, 1181 (Fed. Cir. 2004); *Anheuser-Busch, Inc. v. Holt*, 92 USPQ2d 1101, 1105 (TTAB 2009). “The categories are in actuality ‘central tones in a spectrum ... and are frequently difficult to apply.’” *In re Gyulay*, 820 F.2d 1216, 1217, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987) (quoting *Soweco, Inc. v. Shell Oil, Co.*, 617 F.2d 1178, 207 USPQ 278, 282 (5th Cir.1980), cert. denied, 450 U.S. 981 (1981)). The present case is a close one, but we find that Applicant’s marks fall on the suggestive side of the line.

The marks do not immediately describe any specific characteristic or feature of Applicant’s goods. Consumers are not likely to perceive ARTIZEN, as used in connection with Applicant’s goods, as just a misspelling, but rather as a play on words—suggesting that its essential oils, if used in aromatherapy or other uses, will evoke a zenlike feeling of calm relaxation. In that sense, this case is reminiscent of *In re Grand Metropolitan Foodservice Inc.*, 30 USPQ2d 1974 (TTAB 1994), where the

Board found that the mark *Muffins* for “baked mini muffins sold frozen or fresh” was suggestive:

[W]e believe that this case involves more than simply a misspelling of a descriptive or generic word. That is to say, the mark presented for registration will be perceived, we believe, as not just a misspelled word. As applicant has pointed out, its mark does project a dual meaning or suggestiveness — that of muffins and of the “fun” aspect of applicant’s food product. ... We have a situation, therefore, where applicant’s mark has a different connotation from that conveyed by a misspelled generic or descriptive term.

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In view of the nature of applicant’s inventive and somewhat stylized mark, being an obvious play on the word “muffin” and the word “fun,” we believe that the meaning or commercial impression of applicant’s mark will be more than that simply of the word “muffins.”

*Id.* at 1975-76.

The Board quoted *Grand Metropolitan Foodservice in In re Tea & Sympathy*, 88 USPQ2d 1062 (TTAB 2008), noting that the applied-for mark THE FARMACY was more than just a misspelling of “the pharmacy”: “Applicant’s mark is inventive and just clever enough, being an obvious play on ‘the pharmacy’ and ‘farm,’ so that the meaning or commercial impression of applicant’s mark will be more than simply ‘the pharmacy.’ Accordingly, applicant’s mark is not merely descriptive.” *Id.* at 1064.

So too here. As with “THE FARMACY,” Applicant’s marks are inventive and just clever enough, being an obvious play on “artisan” and “zen.” As with “MUFFUNS,” Applicant’s marks suggest the zenlike calm and relaxation one can attain from its redolent essential oils. Even though Applicant’s marks do not have the same stylization as *Muffins*, to help consumers see the play on words, they call upon

consumers' perception and imagination to make the connection between its essential oils and achieving the peace and relaxation of the results. That is the essence of suggestiveness, requiring imagination, thought, and perception to arrive at the qualities or characteristics of the goods. *In re Gyulay*, 3 USPQ2d at 1009. To the extent we have any doubts about where the marks lie along the spectrum of suggestiveness and descriptiveness, such doubts are to be resolved in favor of Applicant. *In re Pennwalt Corp.*, 173 USPQ 317 (TTAB 1972) ("DRI-FOOT" for anti-perspirant foot deodorant).

## II. Conclusion

For the foregoing reasons, we find that Applicant's marks, ARTIZEN and



, are suggestive of Applicant's identified goods. We emphasize, however, that the rights represented by their registration would be extremely narrow, without any rights in the word "artisan" or "artisanal" per se, as the registrations cannot serve to preclude others from using "artisan" or "artisanal" on or in connection with the same or similar goods. *Cf. In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987) (rights represented by registration limited to distinctive design for "FirsTier"; disclaims rights in "first tier" for banking services); *In re Miller Brewing Co.*, 226 USPQ 666, 670 (TTAB 1985) (rights represented by registration limited to particular display of LITE for beer).

**Decision:** The refusals to register Applicant's marks under Section 2(e)(1) on the basis that the marks are merely descriptive of the identified goods are reversed.