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Subject: U.S. Trademark Application Serial No. 88439889 - WEGE - 101361-00110 - EXAMINER BRIEF

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United States Patent and Trademark Office (USPTO)

U.S. Application Serial No. 88439889

Mark: WEGE

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Reference/Docket No. 101361-00110

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the Trademark Examining Attorney's final refusal to register the mark "WEGE" for use on "beer" on the grounds that the specimens of record do not show the applied-for mark in use in commerce on the goods specified in the statement of use under Section 1 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1127, 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a).

FACTS

On May 21, 2019, Applicant filed an application under Trademark Act Section 1(b) for registration on the Principal Register for the mark "WEGE" for goods identified as "beer" in International Class 32. The application was published on September 24, 2019 for opposition and a "Notice of Allowance" was issued on November 19, 2019.

On November 26, 2019, Applicant filed a "Statement of Use" in support of the registration of the mark at issue. On December 9, 2019, an Office action was issued that refused registration because the specimens of record did not establish a direct association between the mark at issue and the goods identified in the application. Notwithstanding arguments made by Applicant that the specimens did establish proper use for the goods identified in the application, a Final refusal to register was issued on June 26, 2020 and maintained upon a request for reconsideration on February 17, 2021.

Applicant filed a "Notice of Appeal" on December 28, 2020.

ISSUE ON APPEAL

The sole issue on appeal is whether the specimens of record are acceptable to show use of the applied-for mark in connection with "beer".

ARGUMENT

A. <u>The Specimens Are Not Acceptable to Show Use of the Applied-for Mark in Connection with the Identified Goods.</u>

Applicant's specimens of record are not acceptable to show use of the applied-for mark in connection with "beer".

An application filed under Trademark Act Section 1(b), as in the instant case, will not proceed to registration until applicant provides a statement of use showing the mark in actual use in commerce on or in connection with the identified goods. 15 U.S.C. §§1051(d), 1127; 37 C.F.R. §§

2.88(c)(2); 2.56(b)(2). The specimen must show use of the mark in commerce on or in connection with the goods. 15 U.S.C. §1051(a)(1); 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a).

In the present case, neither the specimen dated November 26, 2019 nor the substitute specimen dated June 9, 2020 shows the applied-for mark in use in commerce in connection with the goods specified in the statement of use. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a); *In re Graystone Consulting Assocs., Inc.*, 115 USPQ2d 2035, 2037-38 (TTAB 2015); *In re Chengdu AOBI Info. Tech. Co.*, 111 USPQ2d 2080, 2081-82 (TTAB 2011); TMEP §§904, 904.07(a), 1301.04(d), (g)(i).

Applicant's specimen dated November 26, 2019 is an unattached label. An unattached tag or label may be accepted if, in addition to showing the mark, the tag or label bears indicia that it is an actual tag or label that is affixed to the goods as they are sold or transported in commerce. For example, the label "include[s] informational matter that typically appears on a label in use in commerce for those types of goods such as net weight, volume, UPC bar codes, lists of contents or ingredients, or other information that is not part of the mark but provides information about the goods." Examination Guide 1-20, at V.A.

In the instant case, the label shows informational matter that typically appears on a beer label like alcohol by volume and a government warning. However, the label does not sufficiently show the applied-for mark being used in commerce in connection with "beer". The label repeatedly mentions the beer is "Pretzel Wheat Ale". "Pretzel Wheat Ale" is displayed prominently at the center of the label where the name of the beer customarily appears. The label mentions how "we bring you Aldus Pretzel Wheat Ale". The only mention of "WEGE" in the specimen is in connection with the wording "Brewed with Wege of Hanover Pretzels" on the label. The use of "Brewed with" demonstrates the mark at issue is not being used in connection with beer but rather in connection with an ingredient of beer. That

"WEGE" indicates a component of beer is further emphasized when considering the label mentions how Aldus Pretzel Wheat Ale is packed with Pennsylvania Dutch pretzel flavor and "WEGE" is being used in connection with pretzels. Therefore, when considering all the statements on the label collectively, the specimen submitted on November 26, 2019 does not sufficiently show the mark at issue in use in commerce for "beer".

Applicant's specimen dated June 9, 2020 is a photograph showing the applied-for mark on a label attached to beer and on a beer carrier. An image of a real tag or label attached to the goods generally meets the requirement for a specimen showing the applied-for mark as actually used in commerce. 37 C.F.R. §2.56(a), (b)(1); TMEP §904.03(a). However, the instant case is distinguishable. The specimen does not show that the applied-for mark is being used in commerce in connection with beer. Rather, the specimen shows the applied-for mark being used in connection with an ingredient of beer. The packaging shows the beer as "Pretzel Wheat Ale". The only mention of "WEGE" in the specimen is in connection with the wording "Brewed with Wege of Hanover Pretzels" on the label. The use of "Brewed with" demonstrates the mark at issue is not being used in connection with beer but rather in connection with an ingredient of the finished good of beer. As such, the specimen submitted on June 9, 2020 does not sufficiently show the mark at issue in use in commerce for "beer".

B. <u>Applicant's Arguments Against the Requirement</u>

(1) <u>Both specimens are acceptable specimens that clearly and unequivocally show proper use of the mark in connection with "beer".</u>

Applicant argues that both specimens are acceptable specimens that clearly and unequivocally show proper use of the mark in connection with "beer" (Brief of Applicant, p6). Applicant argues that "WEGE" appears in large, bold letters in orange font directly on the beer bottle label and the six-pack beer carrier (Brief of Applicant, p6). Applicant cites to § TMEP 904.03(a): "[I]f a trademark is

ordinarily applied to the goods or the containers for the goods by means of labels, a label is an acceptable specimen" (Brief of Applicant, p6).

Applicant's argument ignore the context in which the applied-for mark appears. The specimens do not show the applied-for mark in use in commerce for beer. "WEGE" appears in connection with "Brewed with Wege of Hanover Pretzels" on the beer label and carrier in the specimens of record. "Brewed with" and "Pretzels" are significant wording that cannot be ignored because they indicate that "WEGE" is being used to indicate a component of beer. Packaging affixed to a cell phone that indicates the cell phone is called XYZ cellphone and is capable of Bluetooth technology would not show Bluetooth being used in commerce in connection with the finished good of cell phones—but this is the analogous argument that Applicant is making with its interpretation of TMEP 904.03(a).

As such, the specimens of the record are not acceptable.

(2) <u>Consumers encountering the beer would plainly perceive the prominently-featured "WEGE" mark as a trademark and associate the mark with the beer.</u>

Applicant argues that consumers encountering the beer would plainly perceive the prominently-featured "WEGE" mark as a trademark and associate the mark with the beer (Brief of Applicant, p6). The examining trademark attorney agrees that consumers encountering the beer would perceive "WEGE" as a trademark but in connection with pretzels. "WEGE" is mentioned next to pretzels. The submitted specimens indicate that the beer in the specimen is called "Pretzel Wheat Ale". When consumers read the information in the label in the specimen dated November 26, 2019, they would see the repeated mentions of how the beer is made out of pretzel flavor. Thus, when considering all the statements on the beer label and carrier, it is reasonable to presume that consumers would understand that the beer they are drinking is called Pretzel Wheat Ale and Pretzel Wheat Ale is made out from Wege of Hanover pretzels.

(3) "WEGE" is not generic for pretzels.

Applicant notes that "WEGE" is a registered trademark and is in no event generic for pretzels (Brief of Applicant, p6). The trademark examining attorney is not arguing that "WEGE" is generic for pretzels. However, the trademark examining attorney wants to point out the fact that "WEGE" is a registered mark for different goods is another reason why consumers would not see "WEGE" in the instant case as a source identifier for "beer". Instead, consumers would see the context of the registered mark for the other goods and perceive it as almost an informational phrase that tells the consumer about the goods.

(4) The "WEGE" trademark is being used as an enticement to consumers to purchase beer.

Applicant argues how the "WEGE" trademark is being used as an enticement to consumers to purchase the product offered in connection herewith (Brief of Applicant, p6-7). Whether "WEGE" is being used as an enticement to consumers does not directly address whether "WEGE" is being used in commerce in connection with "beer" in the specimens of record. Also, Applicant's argument reinforces the examining trademark attorney's position, in that "WEGE" can be construed as an enticement to consumers to purchase the Pretzel Wheat Ale because such beer is made from Wege of Hanover pretzels, which, as Applicant attests, is famous and presumably makes the beer unique.

CONCLUSION

For the aforementioned reasons, the Trademark Examining Attorney respectfully requests that the final refusal to register the mark on the grounds that the specimens of record do not show the applied-for mark in use in commerce on the goods specified in the statement of use under Section 1 and 45 of the Trademark Act be affirmed.

Respectfully submitted,

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