

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: May 4, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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*In re Delta Faucet Company*

—————  
Serial No. 88814907  
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Edgar A. Zarins of Masco Corporation,  
for Delta Faucet Company.

William T. Verhosek, Trademark Examining Attorney, Law Office 114,  
Nicole Nguyen, Acting Managing Attorney.

—————  
Before Kuhlke, Pologeorgis, and English,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Delta Faucet Company (“Applicant”) seeks registration on the Principal Register of the standard character mark AUBURN for, as amended, “Plumbing products, namely, faucets” in International Class 11.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88814907, filed on February 28, 2020, based on Applicant’s claim of a bona fide intention to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's proposed mark is deceptively misdescriptive of the identified goods.<sup>2</sup>

When the refusal was made final, Applicant appealed. Both Applicant and the Examining Attorney filed briefs. For the reasons explained below, we reverse the refusal to register.<sup>3</sup>

### **I. Preliminary Matter - Evidentiary Objection**

We initially turn to an evidentiary objection lodged by the Examining Attorney regarding evidence presented by Applicant for the first time with its appeal brief.<sup>4</sup> Specifically, the Examining Attorney objects to a screenshot from the website [www.homedepot.com](http://www.homedepot.com) and references to Google algorithms in connection thereto because this evidence was submitted for the first time as part of Applicant's appeal brief.<sup>5</sup> Additionally, the Examining Attorney objects to the [www.homedepot.com](http://www.homedepot.com) screenshot because it does not include the required URL and date of access.<sup>6</sup>

It is well-settled that the record in an ex parte proceeding should be complete prior to appeal. Trademark Rule 2.142(d); 37 C.F.R. § 2.142(d). Exhibits that are attached

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<sup>2</sup> The Examining Attorney also issued a final refusal on the ground that Applicant failed to provide additional information pursuant to an information request under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b). In his appeal brief, however, the Examining Attorney withdrew this refusal. Thus, this ground for refusal will be given no further consideration.

<sup>3</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.

<sup>4</sup> Examining Attorney's Brief, pp. 3-4 (6 TTABVUE 4-5).

<sup>5</sup> *Id.*

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

to a brief or included in the body of a brief but not made of record during examination are untimely, and will not be considered. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 1203.02(e) and 1207.01 (2021). To the extent Applicant wished to introduce additional evidence after its appeal had been filed, Applicant should have filed a written request with the Board to suspend the appeal and remand the application for further examination pursuant to Trademark Rule 2.142(d). Applicant did not do so. In addition, the submission of the [www.homedepot.com](http://www.homedepot.com) screenshot without the required URL and date of access did not make it properly of record. *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018) (“[W]e will no longer consider Internet evidence filed by an applicant in an ex parte proceeding to be properly of record unless the URL and access or print date has been identified, either directly on the webpage itself, or by providing this information in a response, except where the examining attorney does not object.”). Accordingly, the Examining Attorney’s evidentiary objection is sustained, and we give no consideration to the evidence submitted for the first time with Applicant’s appeal brief.

## **II. Deceptive Misdescriptiveness – Applicable Law**

The test for deceptive misdescriptiveness under Section 2(e)(1) has two parts. First, we must determine whether the matter sought to be registered misdescribes the goods or services. In order for a term to misdescribe goods or services, “the term must be merely descriptive, rather than suggestive, of a significant aspect of the goods or services which the goods or services plausibly possess but in fact do not.” *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002); *see also In re*

*Shniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006). The examining attorney bears the burden of showing that a term is merely descriptive (and thus is potentially deceptively misdescriptive) of the relevant goods or services. *See In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

Second, if the term misdescribes the goods or services, we must ask whether consumers are likely to believe the misrepresentation. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d at 1048; *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). The Board has applied the reasonably prudent consumer test in assessing whether a mark determined to be misdescriptive also would deceive consumers. *See R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985) (“On this evidence, we do not believe reasonably prudent purchasers are apt to be deceived.”).

### **III. Arguments and Analysis**

The Examining Attorney argues that Applicant’s proposed AUBURN mark merely describes a color in which the Applicant’s goods are presented and that consumers would immediately believe that Applicant’s faucets are sold or provided in the color “auburn.”<sup>7</sup> The Examining Attorney further maintains that Applicant has made clear that its faucets will not be presented in an “auburn” finish.”<sup>8</sup> The Examining Attorney concludes that because (1) the term “auburn” is a definable term meaning a particular

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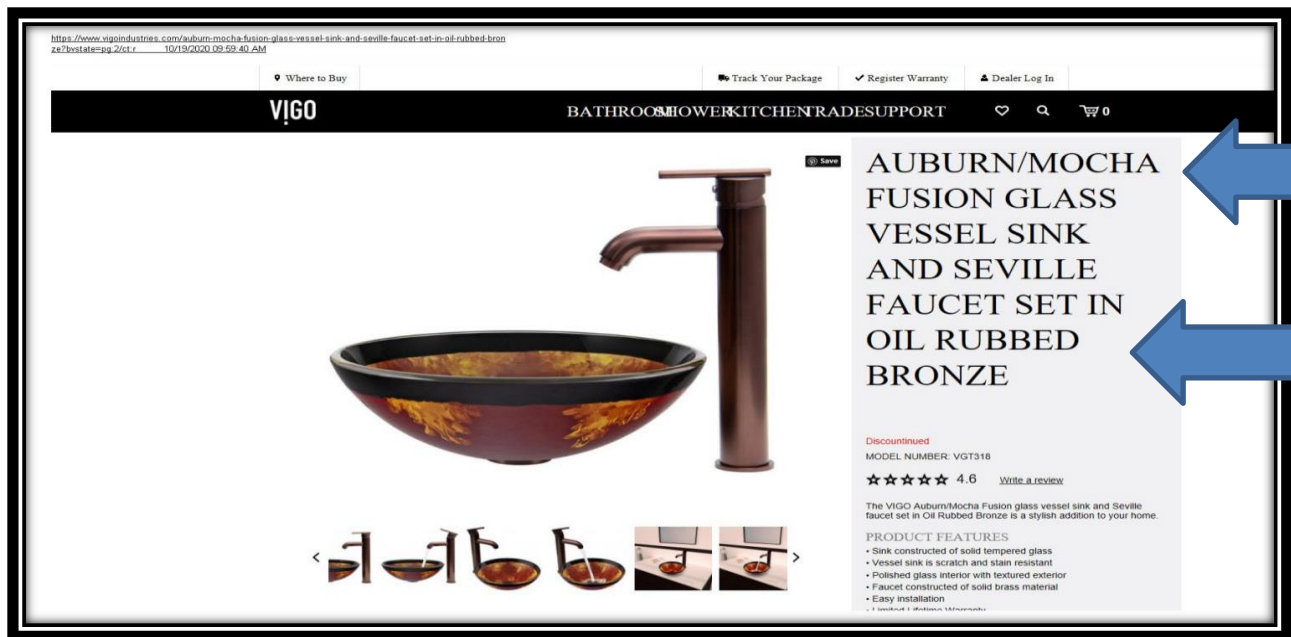
<sup>7</sup> Examining Attorney’s Appeal Brief, p. 5 (6 TTABVUE 6).

<sup>8</sup> *Id.* and Applicant’s October 13, 2020 Response to Office Action (TSDR p. 1).

color, and (2) there is evidence of record demonstrating that third parties use the auburn color on their plumbing faucets and inasmuch as Applicant's goods will not be sold in an "auburn" finish, consumers encountering the mark AUBURN would falsely believe Applicant's faucets are in the color auburn.<sup>9</sup>

In support of the refusal, the Examining Attorney submitted the dictionary definition of "auburn" which is defined as "of a reddish-brown color" or "a moderate reddish brown to brown."<sup>10</sup> The Examining Attorney also submitted screenshots from various online retailers purportedly demonstrating that the designation "AUBURN" has been used to refer to the color of faucets. The evidence is shown below:<sup>11</sup>

- [www.vigoindustries.com](http://www.vigoindustries.com)

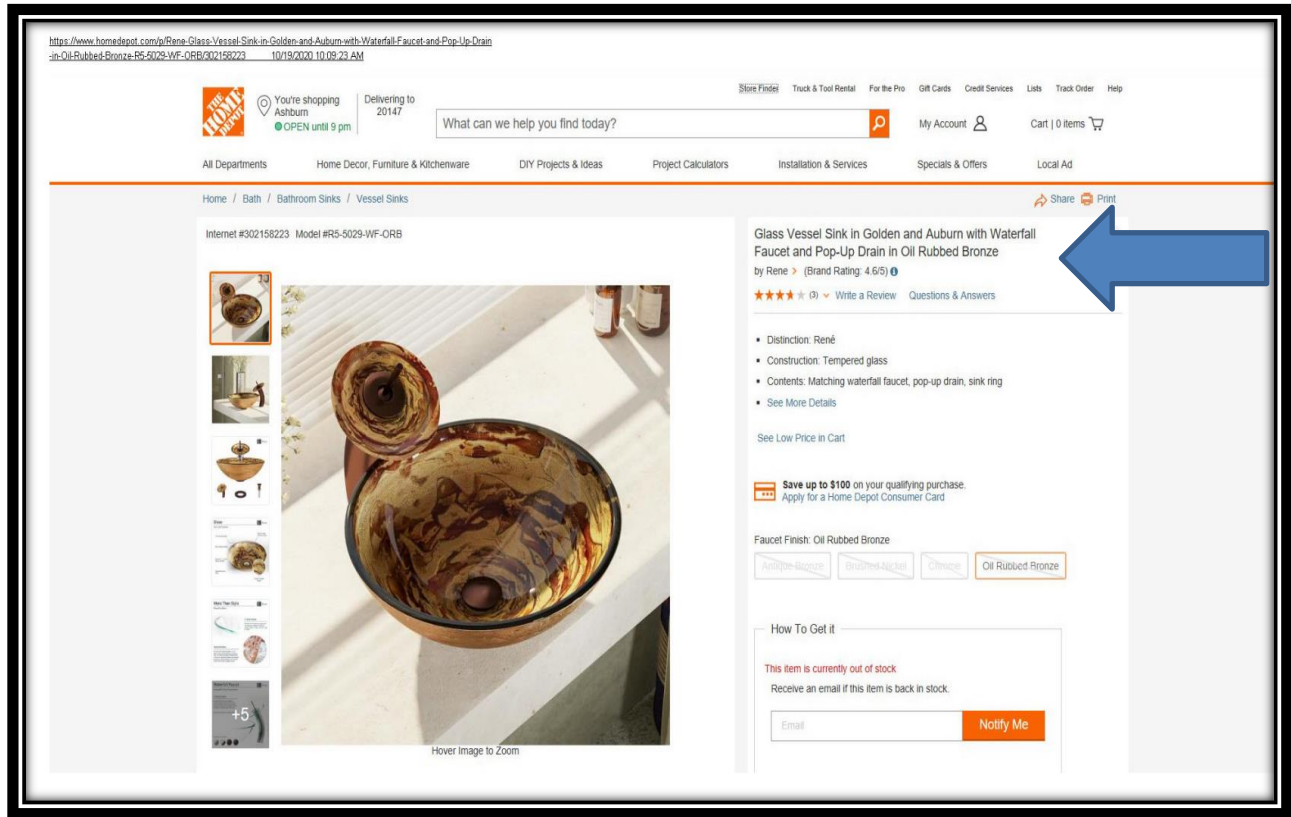


<sup>9</sup> Examining Attorney's Appeal Brief, p. 6-7 (TSDR pp. 7-8).

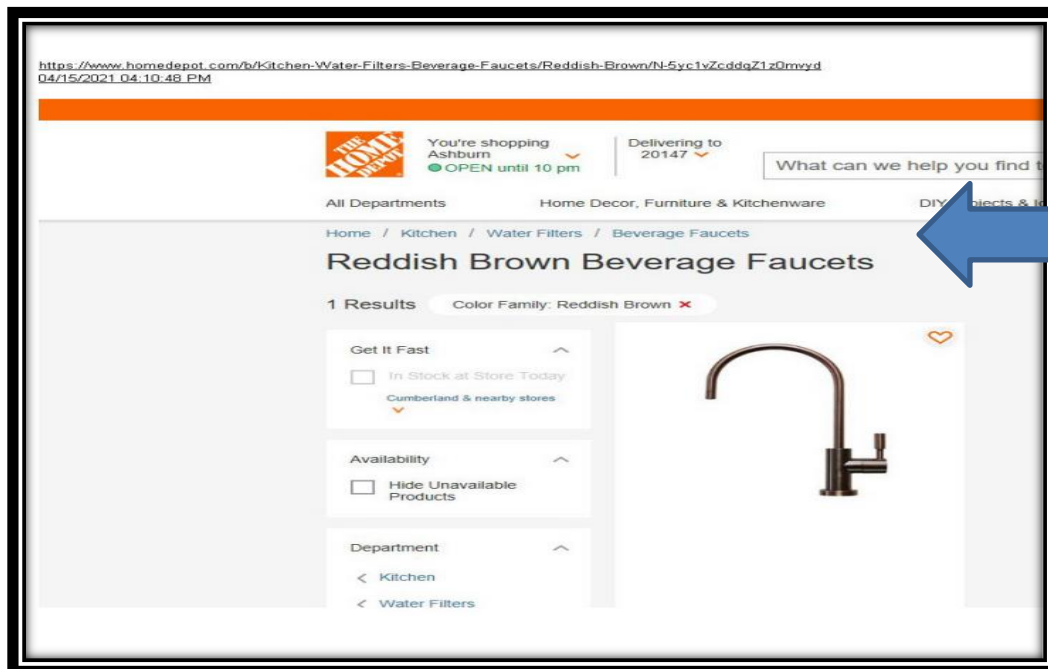
<sup>10</sup> April 16, 2020 Office Action (TSDR pp. 5-14).

<sup>11</sup> October 19, 2020 Office Action (TSDR pp. 5-26) and April 16, 2021 Final Office Action (TSDR pp. 5-21). The blue arrows have been added by the Board for emphasis.

- [www.homedepot.com](http://www.homedepot.com)



- [www.homedepot.com](http://www.homedepot.com) (cont'd)



Serial No. 88814907

[www.kingstonbrass.com](http://www.kingstonbrass.com)



ADA COMPLIANT, FAUCET, KITCHEN FAUCETS, KITCHEN FIXTURES, OIL RUBBED BRONZE, PULL DOWN KITCHEN FAUCET, SINGLE HANDLE



- [www.kingstonbrass.com](http://www.kingstonbrass.com) (cont'd)



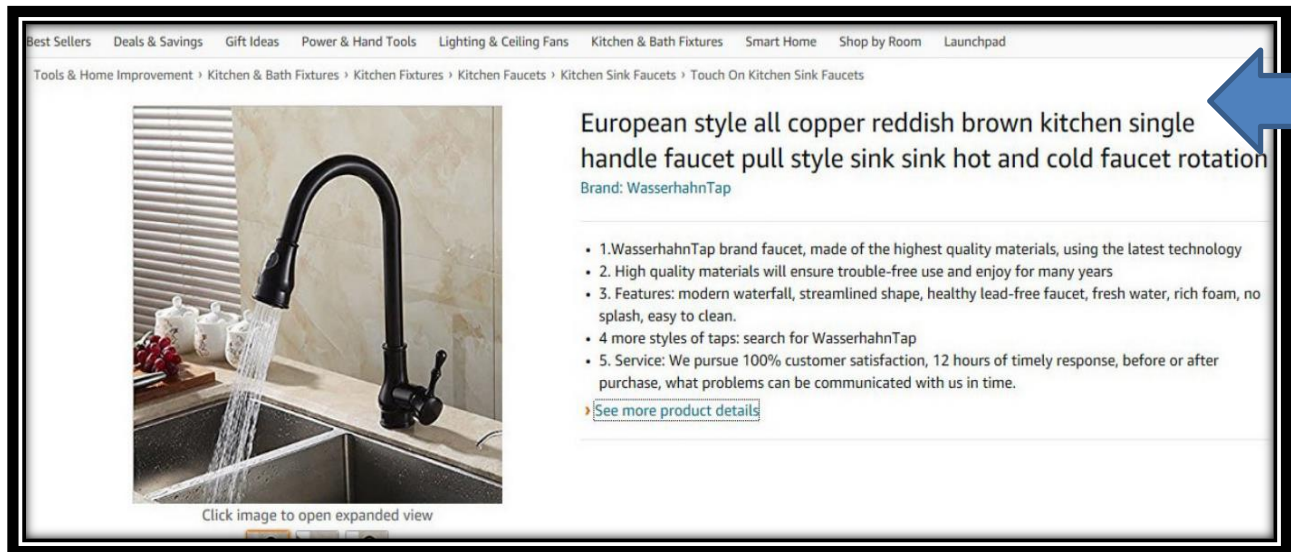
Touched with a hint of refined splendor, the Continental Collection will assuredly transcend your home into the futuristic utopia you have been dreaming about. Create a contemporary aesthetic inundated with the brilliant craftsmanship of modern curvature on the spouts and slim, ergonomic levers guaranteed to last years to come thanks to Kingston Brass' renowned solid brass composition. Redefine modernized luxury with the collection's array of finishes from the gleaming radiance of polished chrome to the hidden history of oil rubbed bronze. Build the ultimate cutting edge home with the assistance of the Continental Collection.

The Continental Single-Handle Pre-Rinse Kitchen Faucet in oil rubbed bronze is one of Kingston Brass' newest products, reflecting in its optimal features and internal construction. Mirroring the professionalism

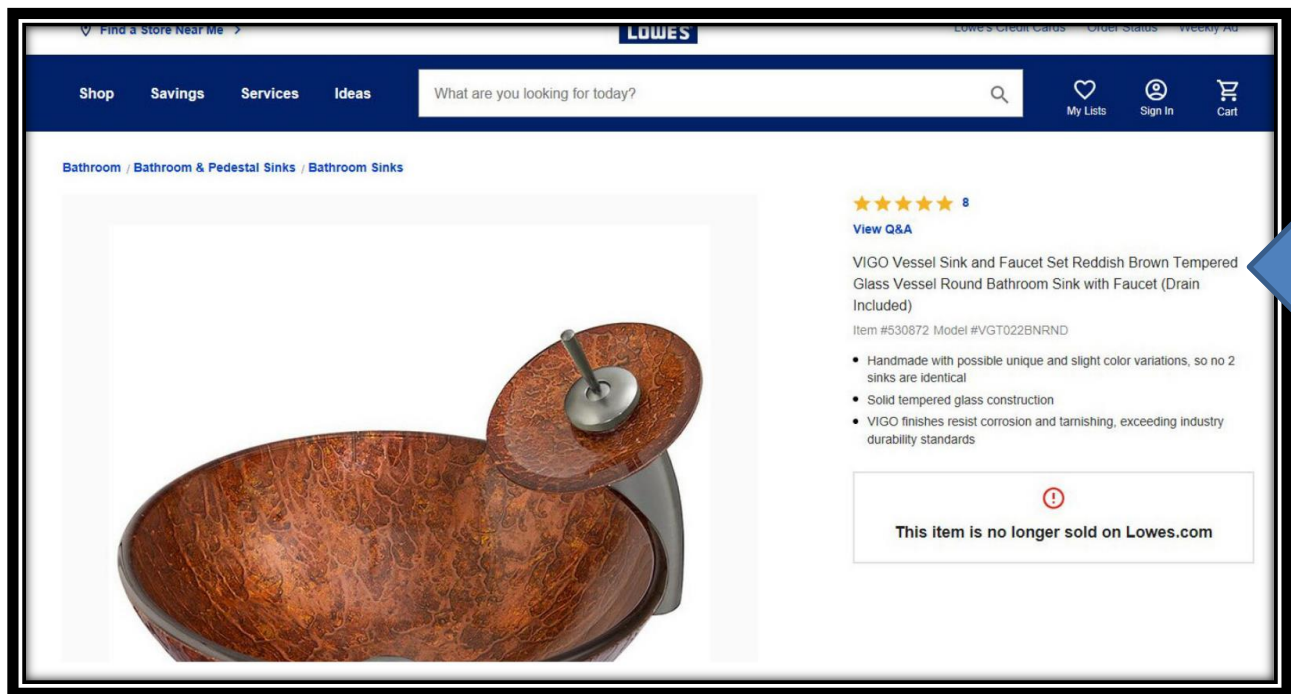




- [www.amazon.com](http://www.amazon.com)



- [www.lowes.com](http://www.lowes.com)



In challenging the refusal, Applicant maintains that while it is well established that “auburn” is considered a color, it is also the name of a well-known university and city in Alabama yet no one would be led to believe that an arbitrary faucet collection

name would be associated with any of those.<sup>12</sup> Applicant further argues that in order to meet the reasonably prudent consumer test, a consumer would have to be likely to believe the misrepresentation.<sup>13</sup> Applicant contends, however, that consumers are going to view the term as an arbitrary collection name.<sup>14</sup> Applicant concludes that while certainly appealing as a hair color, no consumer would seek out an auburn-colored faucet and therefore its proposed mark cannot be deceptively misdescriptive.<sup>15</sup>

After reviewing the evidence of record, we find that the Examining Attorney has failed to meet his burden of establishing that the designation AUBURN is deceptively misdescriptive of Applicant's goods. We initially find that the term "auburn" is plausibly merely descriptive of Applicant's goods, namely, the color or finish of the faucets. However, as to the critical question of consumer perception of "auburn" in relation to faucets, we note that none of the Internet evidence submitted by the Examining Attorney describes the color or finish of any of the faucets as "auburn."<sup>16</sup> Instead, the faucets appear in "oil rubbed bronze," "copper reddish brown," or "reddish brown." Therefore, the evidence submitted by the Examining Attorney does not show that the consuming public has been accustomed or exposed to seeing faucets for sale

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<sup>12</sup> Applicant's Appeal Brief, p. 1 (4 TTABVUE 2).

<sup>13</sup> *Id.* at p. 2 (4 TTABVUE 3).

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

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

<sup>16</sup> We note that the screenshots from the websites [www.vigoindustries.com](http://www.vigoindustries.com) and [www.homedepot.com](http://www.homedepot.com) attribute the color "auburn" to the sinks displayed for sale, but not the faucets themselves.

that are in an “auburn” finish. In the cases holding a term deceptively misdescriptive, “the deception usually comes from the fact that the product on which the term in question is used contains a significant ingredient which is absent in the product in question but present in other products of the same kind.” *R. J. Reynolds Tobacco Co.*, 226 USPQ at 179. In the case before us, the evidence submitted by the Examining Attorney does not establish that the term “auburn” indicates any particular characteristic of this nature. On this record, we do not believe reasonably prudent purchasers are apt to be deceived. *See, e.g., Roux Labs. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34 (CCPA 1970) (HAIR COLOR SO NATURAL ONLY HER HAIRDRESSER KNOWS FOR SURE not deceptively misdescriptive of hair coloring); *In re Harrington*, 219 USPQ 854 (TTAB 1983) (COLLEGE ACADEMY not deceptively misdescriptive of special summer learning programs for gifted children in grades 4 to 8); *Binney & Smith Inc. v. Magic Marker Indus., Inc.*, 222 USPQ 1003 (TTAB 1984) (LIQUID CRAYON not deceptively misdescriptive of marking pens which are not liquified crayons); *In re Perfect Fit Indus., Inc.*, 223 USPQ 92 (TTAB 1984) (COTTAGE CRAFTS not deceptively misdescriptive of bedspreads, quilts and like products); *In re Econoheat*, 218 USPQ 381 (TTAB 1983) (SOLAR QUARTZ not deceptively misdescriptive of electric space heaters that heat by infrared light).

In view thereof, we find that the Examining Attorney has failed to demonstrate, on this record, that reasonably prudent consumers would believe Applicant’s proposed AUBURN mark misdescribes Applicant’s identified goods.

#### **IV. Conclusion**

While the evidence submitted by the Examining Attorney does establish that it is plausible that the designation AUBURN may be merely descriptive of Applicant's goods, i.e., the color or finish of its faucets, the evidence nonetheless falls short of demonstrating that reasonably prudent consumers of Applicant's faucets are likely to believe that the term AUBURN misdescribes the identified goods because Applicant's goods would not be sold in an "auburn" finish.

**Decision:** The refusal to register Applicant's AUBURN mark under Section 2(e)(1) of the Trademark Act on the basis that the mark is deceptively misdescriptive of the goods is reversed.