

**This Opinion Is Not a
Precedent of the TTAB**

Mailed: November 28, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Monday Night Ventures LLC
—

Serial No. 88817107
—

Trent Rinebarger, H. Michael Drumm, Marc Rietvelt and Ethan Larson of Drumm Law LLC, for Monday Night Ventures LLC.

Ashley Albano, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

—

Before Kuhlke, Lynch and Johnson,
Administrative Trademark Judges.

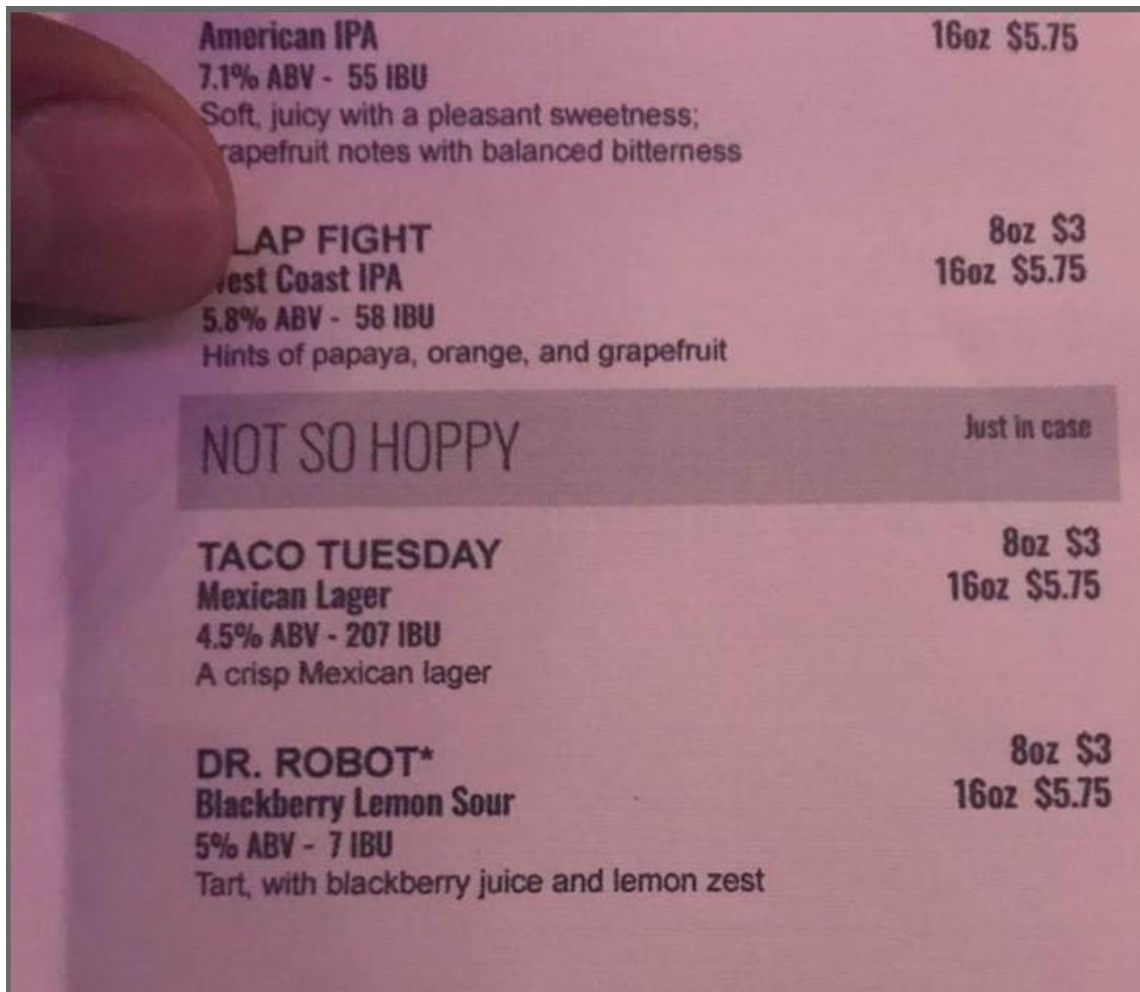
Opinion by Lynch, Administrative Trademark Judge:

I. Background

Monday Night Ventures LLC (“Applicant”) seeks to register on the Principal Register the proposed mark TACO TUESDAY in standard characters for “beer” in International Class 32.¹

¹ Application Serial No. 88817107 was filed March 2, 2020, based on an allegation of use of the mark in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

Applicant's specimen of use, which Applicant described as "Digital image of mark on menu in connection with the goods," appears below.



Although not submitted as a specimen, Applicant also provided the following evidence



of its use of the proposed mark on a can of beer:²

The Examining Attorney refused registration of the mark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051-52 and 1127, on the ground that the proposed mark fails to function as a mark because it is a widely used message. When the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed. The Examining Attorney denied reconsideration and maintained the refusal. The appeal resumed, but Applicant requested and received a remand in order to submit additional evidence. The Examining Attorney was not persuaded by the additional evidence, and again denied reconsideration. The appeal resumed, and Applicant and the Examining Attorney filed briefs.

Applicant's Brief included evidentiary exhibits as attachments. As required by Trademark Rule 2.142(d), the record must be complete before an appeal is filed. 37 C.F.R. § 2.142(d); *see* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE §§ 1203.02(e), 1207.01 (2022); TRADEMARK MANUAL OF EXAMINING PROCEDURE § 710.01(c) (2022). "[T]o the extent that any of the evidence attached to

² November 15, 2021 Request for Reconsideration at TSDR 6. Applicant's Brief incorrectly states that it filed "a new specimen" in its November 3, 2020 Response to Office Action. However, in that response, Applicant merely clarified that the menu shown above was a point-of-sale display, and the Examining Attorney thereafter accepted the original specimen.

the appeal brief was not previously submitted, it is not timely and we give it no consideration.” *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014).

We affirm the refusal to register, as explained more fully below.

II. Failure to Function

A. Legal Background

“When a proposed mark fails to meet the statutory definition of a trademark, it is ineligible for registration. Section 1 of the Trademark Act permits only a ‘trademark’ to be registered. 15 U.S.C. § 1051.” *In re Brunetti*, __ USPQ2d __ (TTAB 2022); *see also In re Std. Oil Co.*, 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960) (“The Trademark Act is not an act to register words but to register trademarks (or service marks). Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.”). Section 45 of the Trademark Act defines “trademark” and “service mark” as “any word, name, symbol, or device, or any combination thereof ... used by a person ... to identify and distinguish” goods or services, respectively, “and to indicate the source” of the goods or services, “even if that source is unknown.” 15 U.S.C. § 1127; *see also In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976) (“[T]he classic function of a trademark is to point out distinctively the origin of the goods to which it is attached.”). “In analyzing whether a proposed mark functions as a source identifier, the Board focuses on consumer perception.” *In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 2022 USPQ2d 115, at **5 (Fed. Cir. 2022) (citations omitted).

We must assess whether Applicant's proposed mark, TACO TUESDAY, functions as a mark based on whether the relevant public would perceive TACO TUESDAY as identifying the source or origin of the beer. *See e.g. In re Texas With Love, LLC*, 2020 USPQ2d 11290, at *2 (TTAB 2020) ("Whether the term ... falls within this definition and functions as a mark depends on whether the relevant public, i.e., purchasers or potential purchasers of Applicant's goods, would perceive the term as identifying the source or origin of Applicant's goods."); *In re TracFone Wireless, Inc.*, 2019 USPQ2d 222983, at *1-2 (TTAB 2019) ("The key question is whether the asserted mark would be perceived as a source indicator for Applicant's [goods or] services."); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1862 (TTAB 2006) ("[T]he critical inquiry is whether the asserted mark would be perceived as a source indicator."). In this case, because there are no limitations to the channels of trade or classes of consumers, the relevant consuming public comprises all potential purchasers of beer. *See Univ. of Ky. v. 40-0, LLC*, 2021 USPQ2d 253, at *24 (TTAB 2021); *In re Team Jesus LLC*, 2020 USPQ2d 11489, at *3 (TTAB 2020); *cf. CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983) (applying this principle in the likelihood of confusion context).

For the failure-to-function analysis, we consider all the evidence of record, including an applicant's specimens, as well as other evidence of "how the designation is actually used in the marketplace." *Vox Populi Registry*, 2022 USPQ2d 115, at **5 (citing *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1230 (TTAB 2010)); *see also Texas With Love*, 2020 USPQ2d 11290, at *2; *D.C. One Wholesaler, Inc. v. Chien*, 120

USPQ2d 1710, 1716 (TTAB 2016) (considering third-party use evidence as well as the applicant's specimens and other examples of use).

Matter that is widely used to convey ordinary or familiar concepts, or informational messages that are in common use, would not be perceived as indicating source and is not registrable as a mark. *See In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *1 (TTAB 2020) (“Widely used commonplace messages are those that merely convey ordinary, familiar concepts or sentiments and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function”); *Texas With Love*, 2020 USPQ2d 11290, at *2 (holding that TEXAS LOVE would be perceived not as a source identifier, but instead as a widely-used phrase that merely conveys a well-recognized and commonly expressed concept or sentiment”); *see also D.C. One Wholesaler*, 120 USPQ2d at 1716 (I ♥ DC was found not to function as a mark for clothing items because it would be perceived merely as an expression of enthusiasm for the city). “The more commonly a phrase is used, the less likely that the public will use it to identify only one source and the less likely that it will be recognized by purchasers as a trademark.” *In re Greenwood*, 2020 USPQ2d 11439, at *6 (TTAB 2020) (citing *Eagle Crest*, 96 USPQ2d at 1229).

B. Evidence and Analysis

The Examining Attorney argues that the proposed mark TACO TUESDAY is a commonplace message widely used by a variety of sources, including in the context of beer such as Applicant's. According the Examining Attorney, the term refers “to a

well-recognized, cultural phenomenon where persons consume tacos and beverages, including beer, on Tuesdays.”³

The Examining Attorney’s voluminous supporting evidence falls into two general categories: first, evidence reflecting general use of the phrase “Taco Tuesday” to refer to a regular Tuesday evening event incorporating tacos and drinks; and second, use of “Taco Tuesday” on or in connection with beer, in particular.

Even within the first more general category of evidence, the record makes clear that frequently, “Taco Tuesday” events at breweries and restaurants incorporate beer, for example by featuring beer specials. Representative examples from this first category of evidence include:

The website of Drink Up Youngstown provides a list of establishments observing “Taco Tuesday” including Reclamation Brewing Company with “great beer made on site,” BackYard Bar & Grill offering “a great selection of craft beer on tap & in the coolers,” Beef ‘O’ Brady’s with “\$2 domestic bottles & mugs & 27 beers on tap,” Chesty’s Blue Collar Tavern with specials on Corona & Corona Light, CrossRoads Bar & Grill with “\$15 imported beer buckets,” Shotz Bar & Grill with “select \$2 domestics,” El Tapatio Mexican Cantina with “select 16 ounce drafts just \$2.50,” and El Vallarta Mexican Restaurant with “all bottled beer \$3.50 all day.”⁴

The Royal Rooster website promotes its “Taco Tuesday” with a taco-and-beer special.⁵

³ 14 TTABVUE 3 (Examining Attorney’s Brief).

⁴ May 14, 2021 Office Action at TSDR 31-32 (drinkupyoungstown.net).

⁵ *Id.* at TSDR 76 (royalroostersandiego.com).

The Chuckanut Brewery & Kitchen features “Taco Tuesday” that includes their “many great beers that go with tacos.”⁶

The Combustion Brewery Taproom promotes its “TACO Tuesday” with “FRESH beers! Fresh TACOS!”⁷

The 1912 Brewing Company offers a “TACO TUESDAY” that features food to be paired “with a crisp 1912 Beer.”⁸

Last Days of Autumn Brewing holds a “Taco Tuesday” event, where “[e]ach week [they] feature a brand new taco and pepper beer.”⁹

The Facebook page for World of Beer promotes “Taco Tuesday” with “25% off all bottles/cans.”¹⁰

The Great Taste Magazine website includes a short feature that “Beer Garden Opens for Taco Tuesday.”¹¹

The Naked River Brewing Co. offers “\$3 Taco Tuesday, Pint Night & Trivia” that includes “\$1 off drafts.”¹²

The Chihuahua Cerveza Taproom promotes its “ALL DAY TACO TUESDAY” including “\$3 beers.”¹³

The Long Beach Beer Lab site describes that the Bread Lab Bakery is not “[j]ust another brewery doing another Taco Tuesday.”¹⁴

⁶ *Id.* at TSDR 64 (bellingham.org).

⁷ *Id.* at TSDR 66 (combustionbrewing.com).

⁸ *Id.* at TSDR 67 (1912brewing.com).

⁹ *Id.* at TSDR 69 (knoxvillebrewers.com).

¹⁰ *Id.* at TSDR 33 (facebook.com).

¹¹ *Id.* at TSDR 36 (great-taste.net).

¹² *Id.* at TSDR 50 (eatonthehouse.com).

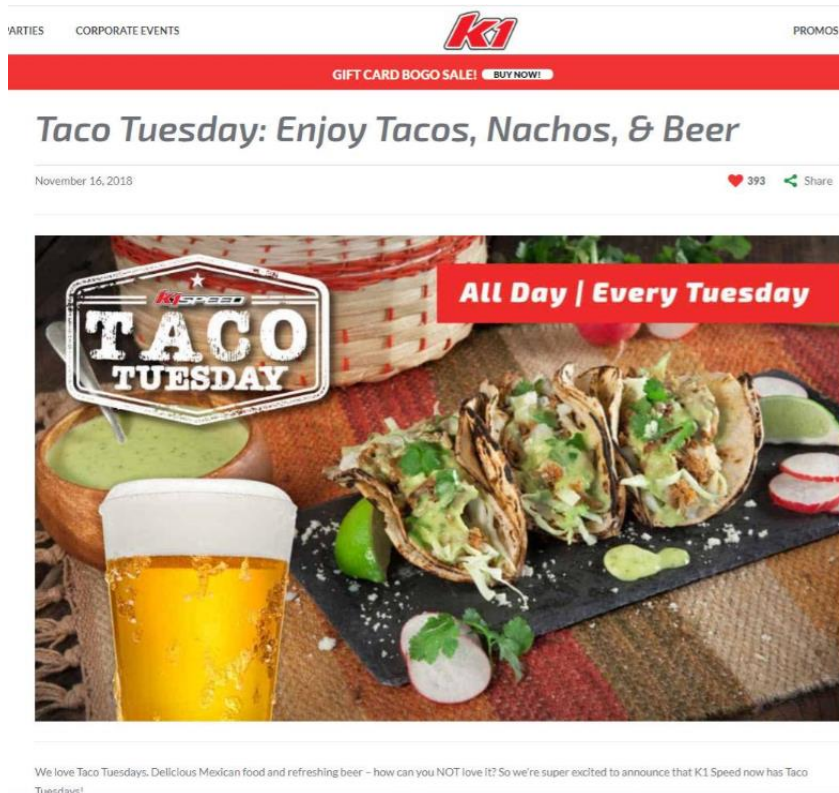
¹³ *Id.* at TSDR 51 (chihuahuacerveza.com).

¹⁴ *Id.* at TSDR 38 (lbbeer.com).

The Lagunitas Brewing Company features “Taco Tuesday & Lagunitas Beer Pairing.”¹⁵

“Taco Tuesday at Big Top Brewing” includes “3 tacos + a beer for \$10.”¹⁶

The K1 website promotes its TACO Tuesday as shown below.¹⁷



The Brew Republic Bierwerks website invites customers to “Join us every Tuesday for tacos. Mix and match 3 pork, chicken, or fish tacos, and get a glass of beer, all for only \$9.99!”¹⁸

The Original Craft Beer Club website includes a blog on “Craft Beers to Enjoy on Taco Tuesday,” discussing “taco Tuesday, the event that makes the beginning of the week

¹⁵ *Id.* at TSDR 52 (kalamazoocraftbeverage.com).

¹⁶ *Id.* at TSDR 70 (941area.com).

¹⁷ December 9, 2021 Denial of Reconsideration at TSDR 14 (k1speed.com).

¹⁸ November 30, 2020 Office Action at TSDR 13 (brewrepublic.beer).

tolerable,” and suggesting “instead of sticking to margaritas or traditional Mexican Lager, try a craft beer to compliment [sic] all the delicious flavors of your favorite tacos.”¹⁹

The first category of evidence also includes more general third-party references to “Taco Tuesday” as an event, including the following representative examples.

A Wikipedia article titled “Taco Tuesday” describes it as “a custom in many US cities of going out to eat tacos” or other Mexican dishes on Tuesday nights, and noting some similarity to the concept of happy hour.²⁰

An article on the Wide Open Eats website, titled “Where Does Taco Tuesday Come From?,” starts with “Taco Tuesday is one of those phrases that seems like it’s been around forever.”²¹

The website of Benito’s Authentic Mexican Food restaurant includes a page with the heading “How Did Taco Tuesday Start?” and states, “At Benito’s, and plenty of other Mexican restaurants, Tuesdays have come to be known as Taco Tuesday.”²²

An article from the DC Eater website it titled “Where to Celebrate Taco Tuesday Around D.C. – Deals for tacos and drinks across the DMV.” Its introduction states that “[s]avvy marketers have used ‘Taco Tuesday’ as an excuse to offer discounts for nearly a century.” The list of options includes numerous restaurants such as El Tamarindo where “Taco Tuesday goes from 11 a.m. to 11 p.m. on Tuesdays” and includes both taco and drink specials, and El Techo, where customers can “celebrate Taco Tuesday.”²³

¹⁹ November 30, 2020 Office Action at TSDR 9 (craftbeerclub.com).

²⁰ *Id.* at TSDR 38 (wikipedia.com).

²¹ May 14, 2021 Office Action at TSDR 15 (wideopeneats.com).

²² *Id.* at TSDR 28 (benitosmexican.com).

²³ *Id.* at TSDR 39-44 (dc.eater.com).

A similar article from the website of The Infatuation covers “The LA Taco Tuesday Directory – The best Taco Tuesday specials in Los Angeles, organized by neighborhood.”²⁴

El Centro D.F.’s website promotes its “TACO TUESDAY” with “rotating taco specials all day long!” for those “[l]ooking for the best Taco Tuesday in Georgetown DC.”²⁵

Chevy’s Fresh Mex restaurant reportedly offers a carryout pack “available on Tuesdays under the ‘Taco Tuesday’ section” of its menu.²⁶

El Fenix Mexican Restaurants “has a \$6.99 Taco Tuesday special.”²⁷

Taco Bueno offers a taco platter special on Tuesdays, with a description that ends with “Happy Taco Tuesday!”²⁸

Tico DC promotes “Taco Tuesday \$2 Tacos Every Week.”²⁹

Turning to the second category of evidence, consisting of third-party use of TACO TUESDAY specifically on or in connection with beer (or in one instance, a hard kombucha promoted on a beer-themed website), representative samples from the record include:

²⁴ *Id.* at TSDR 53 (theinfatuation.com).

²⁵ November 30, 2020 Office Action at TSDR 2 (eatelcentro.com).

²⁶ *Id.* at TSDR 11 (eatdrinkdeals.com).

²⁷ *Id.* at TSDR 14 (eatdrinkdeals.com).

²⁸ *Id.* at TSDR 28 (eatdrinkdeals.com).

²⁹ *Id.* at TSDR 34 (ticodc.com).


The North Country Brewing Company offers a “Taco Tuesday” Brown Ale, as shown below.³⁰

The screenshot shows the Untappd website interface. At the top, the 'UNTAPPD' logo is on the left, and navigation links for 'The Pub', 'Top Rated', 'Insiders', 'Help', 'Store', 'Sign In', and 'Join Now' are on the right. A green banner for 'Total Wine & More' advertises 'BEER SINGLES' for 10% off. Below the banner is a 'Report Ad' link. The main content area features the beer profile for 'Taco Tuesday' by North Country Brewing Company. The profile includes a bottle icon, the beer name, brewery name, and style ('Brown Ale - American'). A statistics table shows 247 total ratings, 228 unique ratings, 0 monthly ratings, and 0 ratings from the user. The alcohol content is 5.4% ABV and it has 0 IBU. A 3.12 average rating is shown with 3 yellow and 2 grey circles. There are 210 ratings in total. A description reads 'Everything you love about tacos in a glass. Contains beef'. Below the description are icons for 'Like' (checkmark) and 'Add' (+). A row of five images shows the beer in various settings, with a 'SEE ALL' button. The 'Global Recent Activity' section shows a post by Jody B. who is drinking a Taco Tuesday by North Country Brewing Company, with a 3.5 star rating and a 'Can' icon.

UNTAPPD The Pub Top Rated Insiders Help Store Sign In Join Now

Total Wine & MORE BEER SINGLES Exclusions Apply **10% OFF** SHOP NOW

Report Ad

 **Taco Tuesday**
North Country Brewing Company
Brown Ale - American

TOTAL (?)	247	UNIQUE (?)	228
MONTHLY (?)	0	YOU	0

5.4% ABV No IBU (3.12) 210 Ratings

Everything you love about tacos in a glass. Contains beef

SEE ALL

Global Recent Activity Sort by: Global Friends You

Jody B. is drinking a Taco Tuesday by North Country Brewing Company

Can

³⁰ December 9, 2021 Denial of Reconsideration at TSDR 9 (untapped.com).

Shades Brewing makes a “Taco Tuesday” Sour “American-Style Ale”, as shown below.³¹

UNTAPPD The Pub Top Rated Insiders Help Store Sign In Join N

Total Wine & MORE BEER SINGLES Exclusions Apply **SHOP NOW**

Taco Tuesday
Shades Brewing
Sour - Other

TOTAL (?)	117	UNIQUE (?)	113
MONTHLY (?)	1	YOU	0

6.5% ABV No IBU (3.22) 103 Ratings

Taco Tuesday American-Style Ale brewed with Tomato, Cumin, Chili Powder, Paprika, BI [Show More](#)

SEE ALL

Global Recent Activity Sort by: Global Friends You

_W. is drinking a Taco Tuesday by Shades Brewing at Fairmont Concrete Shred Center

Can

³¹ *Id.* at TSDR 10 (untapped.com).

The BrickHouse Brewery and Restaurant offers “Taco Tuesday Lager,” as shown below.³²

The screenshot shows the UNTAPPD website interface. At the top, there is a navigation bar with the UNTAPPD logo and links for 'The Pub', 'Top Rated', 'Insiders', 'Help', 'Store', 'Sign In', and 'Join'. Below the navigation bar is a promotional banner for 'Total Wine & MORE' featuring 'BEER PACKS' with a 'SHOP NOW' button. The main content area displays the beer profile for 'Taco Tuesday Lager' by BrickHouse Brewery and Restaurant. The profile includes a bottle image, the beer name, and the brewery name. It also shows statistics: 69 total ratings, 59 unique ratings, 2 monthly ratings, and 0 ratings from the user. The beer has a 3.55 average rating based on 54 ratings. Technical details include 5.5% ABV and 15 IBU. A description reads: 'Mexican style lager with a hint of like throughout! Perfect for any Taco Tuesday ce Show More'. Below the description are two buttons: a green checkmark and a black plus sign. A row of five images shows various views of the beer: a social media post, a menu, a beer being poured, a glass of beer, and a 'SEE ALL' button. The 'Global Recent Activity' section shows a recent activity by Nicole C. who is drinking the beer at BrickHouse Brewery. Her activity includes a comment 'Another swing and a miss', the purchase location 'Purchased at BrickHouse Brewery', a 3.5-star rating, and the role of 'Taster'.

³² *Id.* at TSDR 13 (untapped.com).

The Facebook page of BlackStack Brewing promotes its “TACO TUESDAY Mexican Lager w/ Limes & Salt,” as shown below.³³



³³ November 30, 2020 Office Action at TSDR 7 (facebook.com).

A “Taco Tuesday” Blonde Ale by 11 Below Brewing, as shown below.³⁴

11 BELOW BREWING COMPANY - HOUSTON, TX

TACO TUESDAY

Made with real lime puree and sea salt, this ultra refreshing, margarita-inspired beer just makes it next level. Poolside, beachside, inside, or outside, Taco Tuesday makes every day a party.

Availability: Year-round
Package: Draft, 12oz cans

STYLE: MARGARITA STYLE BEER

ABV: 4.7%	IBU: 13	SRM: 13	OG: 10.6P
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MALTS: 2-ROW, CARAFOAM, VIENNA

HOPS: AMARILLO, MOSAIC

PAIR WITH: IF YOU HAVE TO ASK...

BEER
BREWERY
LOCATOR
CONTACT
EVENTS

f t i

³⁴ May 14, 2021 Office Action at TSDR 2-3 (untapped.com).

A “Taco Tuesday” IPA by 450 North Brewing Company, as shown below.³⁵

UNTAPPD The Pub Top Rated Supporter Help Sign In [Join Now](#)

Taco Tuesday
450 North Brewing Company
IPA - Imperial / Double New England

TOTAL (?)	1,407	UNIQUE (?)	1,240
MONTHLY (?)	1	YOU	0

8% ABV No IBU (4.16) 1,130 Ratings

Taco Tuesday is a DDH DIPA hopped with a 50/50 blend of Citra and Cashmere.

Global Recent Activity Sort by: Global Friends You

David H. is drinking a Taco Tuesday by 450 North Brewing Company at Flying Saucer Draught Emporium

³⁵ *Id.* at TSDR 6 (untapped.com).

The Rohrbach Brewing Company makes a “Taco Tuesday” IPA, as shown below.³⁶

UNTAPPD The Pub Top Rated Insiders Help Store Sign In Join N

Total Wine & More BEER SINGLES Exclusions Apply **SHOP NOW**

Taco Tuesday
Rohrbach Brewing Company
IPA - American

TOTAL (?)	40	UNIQUE (?)	39
MONTHLY (?)	0	YOU	0

6.4% ABV No IBU (3.46) 34 Ratings

IPA spiced with limes, cilantro, peppers, and taco seasoning.

Global Recent Activity Sort by: Global Friends You

Jay-Z is drinking a Taco Tuesday by Rohrbach Brewing Company at Rohrbach Railroad Street Beer Hall

Great beer right after Mexican!

³⁶ December 9, 2021 Denial of Reconsideration at TSDR 19 (untappd.com).

The Beer Info website reports that Jiant “modern alcohol brand” announced the launch of a hard kombucha, “its second seasonal flavor, Taco Tuesday,” shown below.³⁷

The screenshot shows the Beer Info website header with navigation links: Home, Top 10 Beers, GABF, World Beer Cup, U.S. Open, U.S. Open Cider, U.S. Open College, and More. The main article title is "Jiant Launches Second Seasonal Hard Kombucha, Taco Tuesday" by Dustin Scoggins, dated May 19, 2021. The article features a photograph of Jiant cans surrounded by pineapples and jalapeños. To the right of the article are social media icons and a list of awards: "2021 U.S. Open Beer Championship Medal Winners" and "2020 U.S. Open Cider & Beverage Championship Medal Winners". At the bottom right of the article area is an "Archives" link for December 2021.

The Toxic Brew Company website touts an event called “Pat and Rich Taco Tuesday Jalle Berry Release” to mark a craft brew release.³⁸

³⁷ December 9, 2021 Denial of Reconsideration at TSDR 16 (beerinfo.com).

³⁸ May 14, 2021 Office Action at TSDR 44 (toxicbrewcompany.com).

The Dogfish Head Alehouse promotes a “Taco Tuesday Beer Dinner” featuring beer pairings.³⁹

The Craftbeer.com website includes a page with the heading “TACO TUESDAY!” highlighting the use of beer in fish taco batter.⁴⁰

Similarly, the Mother Earth Brew Co. website features a post with this headline:⁴¹



Taco Tuesday Craft Beer Edition: You Can Make These IPA-Battered Fish Tacos In Under 35 Minutes

Applicant contends that the failure to function refusal in this case is “illogical and incongruous” because TACO TUESDAY “is not informational at all as it relates to the goods in the application – namely, beer.”⁴² According to Applicant “instances of restaurants or breweries intending to sell tacos at discounted prices on Tuesdays ... [are] irrelevant as to Applicant’s Mark.”⁴³ Also, Applicant claims that reviews by many consumers on the Untappd website, a rating on the BeerAdvocate website, and press coverage of its beer prove that the public perceives TACO TUESDAY as a mark. Finally, in support of its claim that the term can function as a mark, Applicant points

³⁹ May 14, 2021 Office Action at TSDR 46 (dogfishalehouse.com).

⁴⁰ May 14, 2021 Office Action at TSDR 5 (craftbeer.com).

⁴¹ *Id.* at TSDR 41 (motherearthbrewco.com).

⁴² 12 TTABVUE 7-8 (Applicant’s Brief).

⁴³ *Id.* at 7. To the extent Applicant emphasizes that “there is nothing that would indicate that [its TACO TUESDAY beer] is a limited time offer,” we note Applicant’s own website refers to the beer as “SEASONAL,” and the article Applicant submitted from the Atlanta Journal Constitution calls it “[t]he most recent addition to [Applicant’s] seasonal offerings.” November 15, 2021 Request for Reconsideration at 13 (mondnightbrewing.com), 19 (ajc.com).

to the existence of two third-party concurrent-use registrations for TACO TUESDAY (TACO disclaimed) for restaurant services and another registration of TECHNO TACO TUESDAY on the Supplemental Register for advertising, marketing and promotion services.

The evidence makes clear that “Taco Tuesday” is a very commonplace term that refers to having tacos and drinks on that particular day of the week. *See Texas With Love*, 2020 USPQ2d 11290, at *3 (“It is clear from how the term is used by multiple third parties that [the term] merely conveys a well-recognized concept or sentiment.”). The record also shows that “Taco Tuesdays” commonly involve beer consumed along with tacos, and “Taco Tuesday” events often feature beer specials. “[T]he marketplace is awash” in use of the term for events and specials including beer. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d at 1716. Thus, consumers are accustomed to encountering “Taco Tuesday” in the context of beer. We therefore find that consumers would perceive TACO TUESDAY as an informational indication that the beer is suitable or intended for drinking at such “Taco Tuesday” events. We note that Applicant’s own website evidence promotes its beer as “the ultimate pairing for tacos.”⁴⁴

Although Applicant provided a menu specimen and evidence of TACO TUESDAY on its cans of beer, showing use in a non-informational manner, we remain unconvinced that the term actually functions as a mark because of the environment in which it is perceived by consumers. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d

⁴⁴ November 15, 2021 Request for Reconsideration at 13 (mondaynightbrewing.com).

823, 166 USPQ 34, 39 (CCPA 1970) (“The mere fact that a combination of words or a slogan is adopted and used by a manufacturer with the intent Clairol has manifested here--that it identify its goods and distinguish them from those of others--does not necessarily mean that the slogan accomplishes that purpose in reality.”); *In re Texas With Love*, 2020 USPQ2d 11290, at *3 (notwithstanding trademark use shown on specimens, and the applicant’s apparent intent it function as a mark, the third-party use shows that TEXAS LOVE does not function as a mark); *D.C. One Wholesaler*, 120 USPQ2d at 1716. Therefore, even when displayed on packaging or on a menu as the “name” of the beer, consumers will not perceive TACO TUESDAY as pointing uniquely to Applicant as a single source because of the widespread third-party informational use of that phrase on goods and services that overlap and are related to Applicant’s. As noted in *D.C. One Wholesaler*, such widespread third-party use, particularly in connection with beer-related events, services, and goods, “is part of the environment in which the [mark] is perceived by the public and . . . may influence how the [mark] is perceived.” 120 USPQ2d at 1716 (citations omitted). In this case, “the evidence suggests that the ordinary consumer would take the words at their ordinary meaning rather than read into them some special meaning distinguishing the goods and services from similar goods and services of others.” *Greenwood*, 2020 USPQ2d 11439, at *6 (quoting *In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, at *3 (emphasis added, internal punctuation omitted)). We do not agree with Applicant’s contentions that online consumer reviews or ratings of its beer equate to proof of consumer perception of TACO TUESDAY as a mark.

Our analysis is not changed by the three third-party registrations Applicant introduced for marks with the same wording for other services. We must consider the eligibility for registration of TACO TUESDAY for the goods identified by Applicant, based on the record in this case. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement....”); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

We find that consumers will not perceive the widely-used informational term TACO TUESDAY as distinguishing Applicant’s goods in commerce and indicating their source.

Decision: We affirm the refusal to register Applicant’s proposed mark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051-52 and 1127, on the ground that it fails to function as a mark.