

This Opinion is Not a
Precedent of the TTAB

Mailed: September 21, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Olipop Inc.

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Serial No. 90381174

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Manon L. Burns and Ashley Rovner-Watson of Amin Talati Wasserman, LLP,
for Olipop Inc.

Edward Fennessy, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

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Before Kuhlke, Shaw and Cohen,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Olipop Inc. (“Applicant”) seeks registration of the proposed mark A NEW KIND OF SODA, in standard characters, on the Supplemental Register for goods identified as: “Non-alcoholic sparkling fruit juice beverages; non-alcoholic water-based beverages,” in International Class 32.¹ Applicant has disclaimed SODA.

¹ Application Serial No. 90381174 was filed on December 14, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce. Thereafter, Applicant filed an Amendment to Allege Use of the mark based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as December 1, 2020.

The Trademark Examining Attorney initially refused registration of Applicant's proposed mark on the ground that it is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and on the ground that it fails to function as a trademark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1151, 1052 and 1127. The Examining Attorney also refused registration on the ground that Applicant failed to comply with the requirement for information pursuant to Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b). The refusal to register under Section 2(e)(1) was withdrawn upon Applicant's filing of an Amendment to Allege Use along with an amendment to the Supplemental Register.

When the failure to function refusal and the information-requirement refusal were made final, Applicant appealed and requested reconsideration. The request for reconsideration was denied and the appeal resumed. Applicant then requested suspension of the appeal and remand of the application to the Examining Attorney for the introduction of additional evidence. Upon remand, the Examining Attorney continued the refusals to register and the appeal again resumed. The case is fully briefed.² We affirm the refusal to register on the ground that the proposed mark fails to function as a trademark under Sections 1, 2 and 45 of the Trademark Act and reverse the refusal to register pursuant to Trademark Rule 2.61(b).

² All TTABVUE and Trademark Status and Document Retrieval ("TSDR") citations reference 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.

I. Preliminary matter

Applicant argues that the Examining Attorney's evidence attached to the denial of the first request for reconsideration and to the denial of the second request for reconsideration on remand should be excluded because the evidence was improperly included and because Applicant was not given the opportunity to respond to the evidence.³ The evidence consisted of ten internet webpage excerpts attached the denial of the first request for reconsideration⁴ and four attached to the denial of the second request on remand.⁵ For support, Applicant relies on TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1207.02 (2023) ("The examining attorney may not, however, assert a new refusal or requirement unrelated to the new evidence unless the examining attorney files with the Board a request") and TBMP § 1207.05 ("If no new refusal or requirement is made, and the examining attorney instead returns the application to the Board, no additional evidence may be submitted").⁶

Applicant's request to exclude the Examining Attorney's evidence is not well taken. Neither of the TBMP statements relied on by Applicant are applicable because the Examining Attorney did not issue a "new refusal or requirement" in either of the denials. That is, the Examining Attorney merely denied the requests for

³ Applicant's Br., p. 5, 10 TTABVUE 6.

⁴ October 1, 2022 denial of first request for reconsideration, TSDR 8-73.

⁵ January 17, 2023 denial of second request for reconsideration on remand, TSDR 5-63.

⁶ Applicant's Br., p. 7, 10 TTABVUE 8.

reconsideration of the outstanding refusal of registration under Sections 1, 2 and 45 of the Trademark Act.

Applicant also ignores TBMP § 1704.04 which states: “When a timely request for reconsideration of an appealed action is filed (with or without new evidence), the examining attorney may submit, with their response to the request, new evidence directed to the issue(s) for which reconsideration is sought.” *See In re HerbalScience Grp. LLC*, 96 USPQ2d 1321, 1323 (TTAB 2010) (examining attorney may submit new evidence upon request for reconsideration and applicant may not submit additional evidence in response); *In re Fiesta Palms LLC*, 85 USPQ2d 1360 (2007) (Board considered Internet evidence submitted with the Trademark Examining Attorney’s denial of request for reconsideration).

Moreover, Applicant’s oft-repeated complaint that it was “not given the opportunity to respond”⁷ to the Examining Attorney’s evidence strains credulity. Applicant had three opportunities to respond to the Examining Attorney’s evidence: in its response to the initial office action, and in its first and second requests for reconsideration. “There is a point at which prosecution or examination must come to an end.” TBMP § 1207.02. Given the nature of the examination process, the Examining Attorney will generally have the last word before appeal. *See In re Davey*

⁷ Applicant’s Br., p. 5, 10 TTABVUE 6; *see also id.* at 7 (“Applicant was not given the opportunity to respond to Examiner’s ten additional third-party websites cited in Examiner’s First Denial”), *id.* at 10 (“The Examiner then submitted ten additional citations in his First Denial, to which Applicant was unable to respond”), Applicant’s Reply Br., p. 2, 13 TTABVUE 3 (“[T]he Examiner’s Brief fails to justify the Examiner’s submission of improper evidence to which Applicant was unable to respond”), *id.* at 8 (“Applicant was prejudiced by the Examiner’s submission of new evidence with both his First and Second Denials of Applicant’s Requests for Reconsideration and Applicant’s inability to respond.”).

Prods. Pty Ltd., 92 USPQ2d 1198, 1200 (TTAB 2009) (denying motion to strike evidence properly attached to a denial of reconsideration where applicant claimed it had “no opportunity to check the reliability of the evidence and offer rebuttal evidence.”).

II. Failure to function as a mark

“[A] proposed trademark is registrable only if it functions as an identifier of the source of the applicant’s goods or services.” *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, at *16 (TTAB 2019) (quoting *In re DePorter*, 129 USPQ2d 1298, 1299 (TTAB 2019)). “The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify.” *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976).

Slogans, phrases, and other terms that are considered to be merely informational in nature are generally not registrable. *See In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1232 (TTAB 2010) (“ONCE A MARINE, ALWAYS A MARINE is an old and familiar Marine expression, and as such it is the type of expression that should remain free for all to use.”). *See also, In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460-61 (TTAB 1998) (affirming refusal to register “Drive Safely” for automobiles because it would be perceived as an everyday, commonplace safety admonition). “The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public.” *Eagle Crest*, 96 USPQ2d at

1229. “To make this determination we look to the specimens and other evidence of record showing how the designation is actually used in the marketplace.” *Id.*

The Examining Attorney argues that the proposed mark A NEW KIND OF SODA “merely indicates that applicant’s goods are a type of carbonated beverage known as a soda, and that this soda was not previously in existence or introduced to the market. This wording thereby provides consumers with information about the applicant’s goods.”⁸ In support, the Examining Attorney introduced examples of the phrase A NEW KIND OF SODA used in connection with newly introduced sodas. The following examples are most relevant:

- Wavesoda.com – The website of Wave Soda describes its “healthy soda” product as an “unsoda” and states:

What Does It Mean To Be An Unsoda?

Being an unsoda means that we are **a new kind of soda**.

We don’t have a ton of sugar in us like a regular soda or all those artificial sweeteners like a diet soda!

We are **a new kind of soda** that has just 15-25 slightly sweet calories and 2-6 grams of sugar that comes naturally from the fruit juice. We are creating a healthy soda alternative from flavored sparkling water.

You will love our unsoda, that comes in Tangerine Soda, Apple Soda, Grapefruit Soda, Mango Soda, Cucumber Soda, Blackberry Soda, and Blueberry Soda. We are redefining soda to be a healthier option that is guilt free.

⁸ Examining Attorney’s Br., p. 4, 12 TTABVue 4.

Our refreshing drink is the best tasting soda on the market because it is an uplifting soda. We are simply soda.⁹

- The Facebook page of Heirloom Eats – The page highlights Maine Root brand beverages which it states is: “**a new kind of soda**. A soda with ingredients you can actually pronounce and a taste that is unlike anything you’ve tried before.”¹⁰
- Shared.com – A general-interest website article titled *There’s A New Kind Of Soda And It’s a Really Big Dill*. The article describes a carbonated “pickle juice soda.”¹¹
- The LinkedIn page of “SHRUB A NATURAL SODA” – The page describes SHRUB as “**A NEW KIND OF SODA LAUNCHING IN THREE FLAVORS!**” The webpage further describes SHRUB as “a refreshing new style of soft drink inspired and crafted using 17th century preserving techniques.”¹²
- Beverage Industry – An online article about a new beverage. The article, titled *HEALTH-ADE Kombucha launches soft drink alternative line*, reviews a product called Health-Ade Booch Pop. The article states that “Health-Ade Booch Pop is **a new kind of soda** that is lightly carbonated,

⁹ February 7, 2022, Office action, TSDR 26-27. Emphasis added.

¹⁰ *Id.* at TSDR 16. Emphasis added.

¹¹ *Id.* at TSDR 17-21. Emphasis added.

¹² *Id.* at TSDR 13. Emphasis added.

with prebiotics, minerals, and healthy acids from fermentation. Health-Ade Booch Pop is the evolution of soda.”¹³

- A 2015 human-interest story in the *Petoskey News-Review* (Michigan) in which the author states that he “bought a six pack of **a new kind of soda** that is good for you because its [sic] made with cane sugar, has the word ‘life’ on the can and was on display in the fake food, healthy section of the store.”¹⁴
- A 2015 neighborhood review in the *Advocate: Preston Hollow Edition* in which the author references a store called the Ko’mart Marketplace. The author encourages readers to “[b]rowse the aisles of the grocery store and try **a new kind of soda** or bag of chips.”¹⁵
- A 2006 transcript of a morning television news program on ABC 7 News in which a correspondent previews an upcoming story stating: “the makers of **a new kind of soda** claim the caffeine drink will do more than give you a jolt.”¹⁶
- A 2015 news article in *Atlantic Online* about an early sugar-free soda created for diabetic patients. According to the article:

The drink was called No-Cal, and it sold surprisingly well, much better than you’d expect for such an ostensibly niche product. It turned out that more than half of the consumers

¹³ *Id.* at TSDR 5-12. Emphasis added.

¹⁴ *Id.* at TSDR 29.

¹⁵ *Id.* at TSDR 30.

¹⁶ *Id.* at TSDR 31.

buying the drink were doing so not because of diabetes, but because of diets. **A new kind of soda** was born—with No-Cal quickly followed by Coca-Cola’s diet soda TAB, and Patio Cola, rebranded in 1964 as Diet Pepsi.¹⁷

- A 1999 article by in the *Chattanooga Times Free Press* (Tennessee) about a religious-themed soda called Holy Cross Soda. According to the article, “a 68-year-old businessman . . . wanted to spread God’s word in a different way: By making **a new kind of soda**.”¹⁸
- Ginsengup.com – A website promoting a soda called GINSENG UP. The website states: “GINSENG UP is a great tasting soda packed with natural premium ginseng. . . . We invite you to try **a new kind of soda**, one that is as beneficial as it is enjoyable.”¹⁹
- Thepourover.org – A beverage-focused website recommending Applicant’s OLIPOP soda. The website provides the following background of Applicant’s place in the “evolution of soda:”

A New Kind of Soda

Here’s TPO’s *guide to the evolution of soda*:

- Classic (tons of sugar, tastes great)
- Diet (no sugar, but, you know . . . chemicals and stuff)
- Zero (still replaces sugar with chemicals, but maybe tastes a little more like classic?)
- Sparkling Water (no sugar, no chemicals, basically no flavor)
- ****a massive leap in technology we can’t explain****

¹⁷ *Id.* at TSDR 32.

¹⁸ *Id.* at TSDR 33.

¹⁹ October 1, 2022 First Denial of Reconsideration, TSDR 32-33. Emphasis added.

- OLIPOP (2-5g sugar, prebiotics, 35% of daily fiber, tastes great)

We have a category for “drinks that are good for you”... but none of them taste like soda, and no soda that tastes this good only has 2g of sugar (for reference, Coca-Cola has 39g per can).

It’s time for you to try OLIPOP. Get 20% off and free shipping with code POUROVER. Enjoy!²⁰

- Kickstarter.com – A solicitation for funds for a project to create “A wonderfully healthy, probiotic soda using only 5 ingredients[.]” The title page offers “**A New Kind Of Soda: Better Health From Bottle To Belly.**”²¹
- Wikipedia.org - The Wikipedia entry for DR PEPPER sodas. According to the page, Dr Pepper “was introduced nationally in the United States at the 1904 Louisiana Purchase Exposition as **a new kind of soda** pop, made with 23 flavors. Its introduction in 1885 preceded the introduction of Coca-Cola by one year.”²²

In addition, according to the Examining Attorney, “[t]he evidence of record shows that phrases similar to the wording A NEW KIND OF SODA are used in the beverage industry to indicate that a beverage has recently been introduced to the market or is otherwise new.”²³ The Examining Attorney introduced a number of Internet webpage excerpts showing that the phrase “a new kind of ___” is commonly used in the

²⁰ January 17, 2023 Second Denial of Reconsideration, TSDR 5.

²¹ *Id.* at TSDR 7-21.

²² *Id.* at TSDR 28-39.

²³ *Id.* at TSDR 5.

beverage industry, as well as other industries, to introduce new products. The following examples are most relevant:

- Seltzernation.com – Offering a review of Cantina tequila hard seltzer soda. The website states: “Cantina combines carbonated water with Tequila and natural flavors to create **a new kind of ready-to-drink cocktail in a can.**”²⁴
- CNN.com – A 2020 CNN Business article discussing new flavors from Coca-Cola, titled *There’s a new kind of Coke on shelves. You’ll be forgiven if you missed it.* The article states:

A new kind of Coke quietly hit US stores earlier this month. Four varieties, including Coke Energy, Coke Energy Zero Sugar, Coke Energy Cherry and Coke Energy Cherry Zero Sugar, recently reached US retail shelves. The Coke-energy-drink hybrid beverage became available in international markets last year. . . . People are increasingly seeking functional beverages, which offer an added nutritional or practical benefit, like a boost of energy.²⁵
- Pepsicoproductfacts.com – An informational webpage from Pepsico providing nutritional information about one of its products, PEPSI TRUE. The website describes PEPSI TRUE as: “**A new kind of cola** made for True carefree enjoyment. All the fun you love about Pepsi with 30% less sugar and regular Pepsi and no artificial sweeteners.”²⁶

²⁴ October 1, 2022 First Denial of Reconsideration, TSDR 8-16. Emphasis added.

²⁵ *Id.* at TSDR 17-25. Emphasis added.

²⁶ *Id.* at TSDR 37-39. Emphasis added.

- Punchdrink.com – An online article titled ***A New Kind of Dry Vermouth***, describing sherry vermouth, a vermouth made from sherry rather than the traditional wine.²⁷
- Prnewswire.com – A press release titled ***Rockstar Energy Drink Unveils a New Kind of Energy Drink Rockstar Unplugged – with Hemp Seed Oil and B Vitamins***. The press release states:

Designed to give you the right amount of caffeine when you need it, Rockstar Energy Drink is creating **a new kind of energy drink** with the launch of Rockstar Unplugged. Rockstar Unplugged focuses less on providing a big hit of energy and more focus on enhancing good vibes with ingredients like hemp seed oil and B vitamins. These elements combined with a fruit-forward energy boost help maintain an easy-going, free-flowing, and soul-fueling attitude for any mood or occasion.²⁸

- Sutterhome.com – The website of Sutter Home Wines, which provides information about three “wine cocktails.” The page describes the products as **“A New Kind of Wine Cocktail.”**²⁹
- Forcebrands.com – A website discussing the 2020 rollout of a new hand sanitizer. The title of the article states: **“CPG Entrepreneurs Team Up to Launch a New Kind of Hand Sanitizer with Cleanli[.]”**³⁰

²⁷ *Id.* at TSDR 40-46. Emphasis added.

²⁸ *Id.* at TSDR 47-51. Emphasis added.

²⁹ *Id.* at TSDR 69-73. Emphasis added.

³⁰ *Id.* at TSDR 26-31. Emphasis added.

- Mixicles.com – The website for Mixicles brand “premium drink mixers in ice-cube form.” The web page heading identifies Mixicles as “**A NEW KIND OF MIXER[.]**”³¹
- Bitcoin.org – A website explaining how Bitcoin works, stating “Bitcoin is an innovative payment network and **a new kind of money.**”³²
- Apple.com – A press release discussing the Apple Card, a “**new kind of credit card** created by Apple[.]”³³
- Kickstarter.com – A solicitation for donations to help fund “**OUYA: A New Kind of Video Game Console[.]**”³⁴

We find that the phrase “a new kind of soda” is commonly used in the beverage industry to identify sodas that differ from previous types or “generations” of soda products. For example, Wave, Maine Root, Shrub, Booch Pop, No-Cal, GINSENG UP, Holy Cross, and even Dr Pepper have been described as “a new kind of soda.” Similarly, the phrase “a new kind of ___” has been used in association with other beverages, including Cantina hard seltzer, Coke Energy, PEPSI TRUE, sherry vermouth, and Rockstar Unplugged. Nor is the phrase “a new kind of ___” limited to the beverage industry. The record shows it also has been used by Bitcoin, Apple, and Kickstarter, in their respective industries. We find that the Examining Attorney’s evidence establishes that the phrase “a new kind of ___” is used to describe new

³¹ *Id.* at TSDR 34-36. Emphasis added.

³² June 5, 2021 Office Action, TSDR 5-7. Emphasis added.

³³ *Id.* at TSDR 8-15. Emphasis added.

³⁴ *Id.* at TSDR 16-17. Emphasis added.

products that fall into traditional product categories, but may differ significantly from previous product iterations so as to warrant differentiation. This is particularly so in the beverage industry where soda evolution has included pseudo-medicinal drinks, sugar drinks, diet drinks, energy drinks, and now healthy drinks. Indeed, the webpage “Thepourover.org”—touting Applicant’s OLIPOP sodas—highlights the soda evolution and identifies Applicant’s soda as the latest iteration, i.e., “drinks that are good for you.”³⁵

Because consumers are accustomed to seeing “a new kind of soda” commonly used in beverage advertising—much less the phrase “a new kind of ___” used in advertising in general—they would not perceive it as a mark identifying the source of Applicant’s goods but rather as merely conveying an informational message. *Eagle Crest*, 96 USPQ2d at 1229.

In response, Applicant argues that “[t]he limited amount of evidence submitted by the Examining Attorney is, on its face, insufficient to support a claim that the Mark is a common or widely used message in the relevant marketplace for the same or similar goods.”³⁶ We disagree. The Examining Attorney properly introduced a diverse array of evidence establishing not only that the exact same phrase “a new kind of soda” is used in the beverage industry, but also establishing that similar formative phrases are used in the beverage industry, as well as other industries. “Consumers ordinarily take widely-used, commonplace messages at their ordinary meaning, and

³⁵ January 17, 2023 Second Denial of Reconsideration, TSDR 5.

³⁶ Applicant’s Br., p. 8, 10 TTABVUE 9.

not as source indicators, absent evidence to the contrary.” *In re Greenwood*, 2020 USPQ2d 11439, at *6 (TTAB 2020) (citing *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *1 (TTAB 2020). “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.” *Id.* (citing *Eagle Crest*, 96 USPQ2d at 1229). We find that the evidence is sufficient to support the refusal to register the proposed mark on the ground that it fails to function as a trademark.

Regarding the evidence showing use of the phrase “a new kind of___,” Applicant argues that “none of the goods in these references are even remotely similar to Applicant’s healthy tonic goods, and none use A NEW KIND OF SODA, which provides a wholly different commercial impression in Applicant’s specific context.”³⁷ This argument is unpersuasive as well. It is not necessary to show use on the specific goods identified in the application to prove the case. *See In re Manco*, 24 USPQ2d 1938, 1939 (TTAB 1992) (use of phrase THINK GREEN in television show broadcast, contest announcement, and news articles probative of public perception of phrase as mere informational expression for household items such as cardboard boxes, wrapping paper, and weather-stripping). The fact that consumers see the phrase “a new kind of ___” used in connection with a variety of other goods reinforces the finding that the proposed mark fails to function as a trademark.

Applicant also argues that the five news stories dating back to 1999 introduced by the Examining Attorney are limited and sporadic: “Five uses of the phrase over a 20+

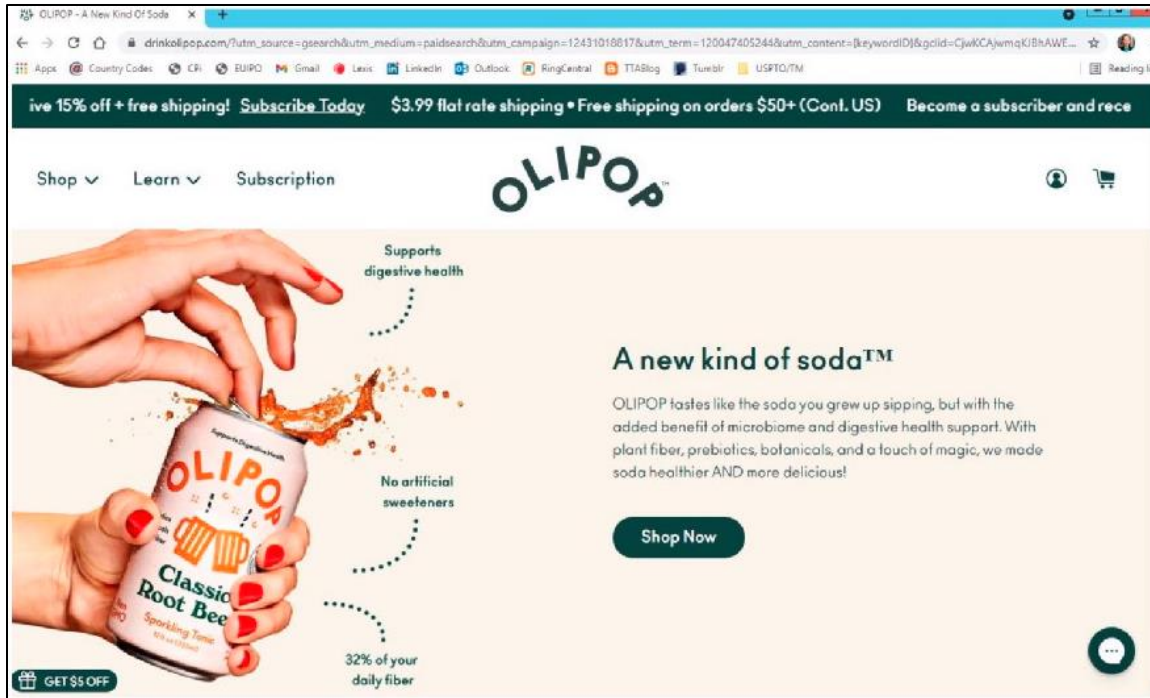
³⁷ *Id.* at 7, 10 TTABVUE 8.

year period does not establish common and widespread use of the phrase.” We disagree with this contention as well. The fact that the phrase “a new kind of soda” has been used for more than twenty years to describe new kinds of sodas is compelling evidence of the phrase’s ubiquity, particularly when considered with the other evidence of record. What is more, the “evolution of soda” timeline detailed above and fact that Dr Pepper is considered to have been “a new kind of soda” when it was introduced in 1885 suggest that the public’s understanding of soda “evolution” is considerably longer than 20+ years.

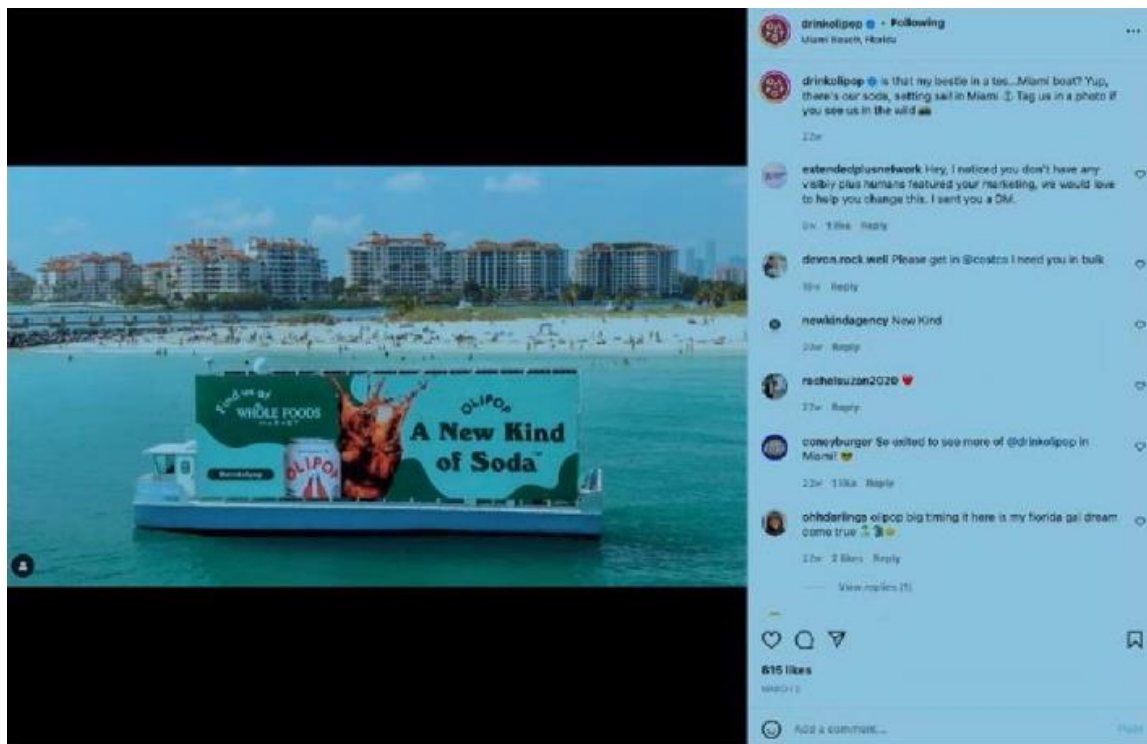
Despite the evidence of record, Applicant argues that consumers associate the proposed mark with Applicant and its product: “[C]onsumers are likely to purchase Applicant’s goods for the goods themselves because they are a unique product offered by Applicant specifically (and decidedly different from what consumers expect from a soda); thus, the Mark connects the goods to the Applicant as the source.”³⁸ In other words, according to Applicant, it “does not use A NEW KIND OF SODA to mean ‘recent,’ but rather ‘unique,’ comparing its healthy qualities to the traditionally unhealthy qualities of soda, which is apparent given Applicant’s marketplace context.”³⁹ For support, Applicant submitted examples of product packaging and advertising showing use of the proposed mark. The following examples are representative:

³⁸ *Id.* at 11, 10 TTABVUE 12.

³⁹ *Id.* at 13, 10 TTABVUE 14.



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⁴⁰ November 29, 2021 Response to Office Action, TSDR 15.

⁴¹ August 8, 2022 First Request for Reconsideration, TSDR 8.



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This argument is unavailing. Applicant’s proposed mark is A NEW KIND OF SODA, not A UNIQUE KIND OF SODA. Nor do we find that Applicant’s use of the proposed mark on its goods suggests anything but the ordinary meaning of the phrase “a new kind of soda.” As the Examining Attorney’s evidence establishes, the phrase “a new kind of soda” is sufficiently common so as to merely inform consumers that Applicant’s OLIPOP is not unique. Rather, it is one of several new “healthy” sodas that contains ingredients such as plant fiber, prebiotics, and botanicals to provide “microbiome and digestive health support.”⁴³ Thus, consumers likely will view OLIPOP soda as one soda in a long line of “new” sodas that have evolved to suit changing consumer tastes.

Not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose. *In re Texas With Love, LLC*, 2020 USPQ2d 11290, at *2-3 (TTAB 2020) (quoting *In re Pro-Line Corp.*, 28 USPQ2d 1141,

⁴² *Id.* at TSDR 11.

⁴³ Applicant’s Br., p. 14, 10 TTABVUE 15.

1142 (TTAB 1993) (“Mere intent that a phrase function as a trademark is not enough in and of itself to make it a trademark.”)). We find that the manner of use of the proposed mark on Applicant’s specimens as well as its other materials would likely reinforce the perception of A NEW KIND OF SODA as merely an informational statement. *Eagle Crest*, 96 USPQ2d at 1230.

To further support its arguments in support of registration, Applicant alleges that a number of similarly-structured marks have registered. Applicant introduced copies of fifteen third-party registrations for marks comprised of the phrase “A NEW KIND OF ____.”⁴⁴ The marks are listed below.

Mark	Reg. No.
A NEW KIND OF DEODORANT	5022401
A NEW KIND OF U	5128373
A NEW KIND OF DEALERSHIP	5862461
A NEW KIND OF OLD-FASHIONED BARBERSHOP	5294770
A NEW KIND OF GREEN	5939910
A NEW KIND OF OLD	6685745
A NEW KIND OF INSURANCE EXPERIENCE	5928182
TULSA A NEW KIND OF ENERGY	3522267
TODAY DEMANDS A NEW KIND OF LEADER	4395860
HI DOC A NEW KIND OF HOUSE CALL	5346961
HI DOC A NEW KIND OF HOUSE CALL	5397000
TRANSITION TO A NEW KIND OF WELLNESS	5581770
COMMUNEATY A NEW KIND OF SOCIAL GATHERING	5670009
CREATE A NEW KIND OF COOL.	6873726
BAYSHORE RADIO A NEW KIND OF SMOOTH	6887634

⁴⁴ Applicant’s Request for Remand, 6 TTABVUE 7-78.

Applicant argues that “prevalence of registered marks that incorporate the phrase ‘A NEW KIND OF [_____]’ indicate that consumers are capable of perceiving such marks as source identifiers.”⁴⁵

We find that the majority of the foregoing marks have significantly different connotations so that they are not merely informational and, therefore, they do not establish that A NEW KIND OF SODA functions as a trademark. For example, some of the marks, unlike Applicant’s mark, are double-entendres, such as TULSA A NEW KIND OF ENERGY, A NEW KIND OF U, A NEW KIND OF OLD-FASHIONED BARBERSHOP and A NEW KIND OF OLD. Others, such as HI DOC A NEW KIND OF HOUSE CALL, COMMUNEATY A NEW KIND OF SOCIAL GATHERING, and BAYSHORE RADIO A NEW KIND OF SMOOTH, combine the phrase “A NEW KIND OF ___” with other registrable matter. Arguably, only two registrations, A NEW KIND OF DEODORANT, A NEW KIND OF DEALERSHIP, have the same simple declaratory structure as Applicant’s mark. These two registrations do not outweigh the Examining Attorney’s evidence.

Additionally, we are not bound by the existence of these registrations. It is well-established that prior decisions and actions of other trademark examining attorneys in applications for other marks have little evidentiary value and are not binding upon the USPTO or the Board. *See In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). Each case must be decided on its own facts, and each mark stands on its own merits. *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342,

⁴⁵ Applicant’s Br., p. 18, 10 TTABVUE 19.

57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). The existence on the register of other seemingly similar marks does not provide a basis for registrability of the applied-for mark. *See Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at *9 (TTAB 2020) (quoting *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973)).

For the foregoing reasons, we affirm the refusal to register the proposed mark on the ground that it fails to function as a trademark under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1151, 1052 and 1127.

III. Information requirement

The second issue on appeal is whether Applicant has responded fully and accurately to the Examining Attorney's requirement for information under Trademark Rule 2.61(b), 37 C.F.R. Section 2.61(b). Trademark Rule 2.61(b) provides that the examining attorney "may require the applicant to furnish such information, exhibits, affidavits or declarations . . . as may be reasonably necessary to the proper examination of the application." *Id.*

In the first Office Action, the Examining Attorney issued a requirement for additional information, including the following: "Are applicant's goods a type of soda?" and "Please explain the type of soda that identifies applicant's goods."⁴⁶ The Examining Attorney included a definition of "soda" as, inter alia, "carbonated water," "soft drink" or "tonic."⁴⁷ Based on this definition, the Examining Attorney states that

⁴⁶ June 5, 2021 Office Action, TSDR 3.

⁴⁷ The American Heritage Dictionary of the English Language, ahdictionary.com, *Id.* at TSDR 4.

“the word ‘soda’ means a type of beverage or refreshment, especially carbonated beverages.”⁴⁸

Applicant provided several responses to the question over the course of examination. Applicant first stated it “does not know what the Examining Attorney means by ‘type of soda.’”⁴⁹ Applicant later opined that “[w]hether the goods are a ‘soda’ as defined in the provided dictionary evidence is open to interpretation” and “[t]he covered goods contain or may contain carbonated water but are not exclusively carbonated water.”⁵⁰ Applicant further described the requirement for information as “vague and ambiguous,” arguing that it is unclear “what exactly a ‘type of soda’ is.”⁵¹ The refusal under Rule 2.61(b) was continued and made final notwithstanding Applicant’s responses.⁵² In its brief, Applicant simply argues that “it adequately responded to the Examiner’s inquiries.”⁵³

We find that the definition of “soda” provided by the Examining Attorney is cryptic, at best. The terms “carbonated water” and “tonic” are inadequate by themselves to define goods that consumers would generally consider, in general parlance, to be “sodas.” There is no mention of other ingredients such as sugar or flavorings, and no mention of “refreshment,” as the Examining Attorney alleges.

⁴⁸ Examining Attorney’s Br., p. 11, 12 TTABVUE 11.

⁴⁹ November 29, 2021, response, p. 16.

⁵⁰ August 8, 2022, request for reconsideration, p. 16.

⁵¹ *Id.*

⁵² February 7, 2022 Office Action.

⁵³ Applicant’s Br., p. 18, 10 TTABVUE 19.

Similarly, the term “soft drink” is not further defined so as to provide Applicant with sufficient information to answer the questions. In fact, the totality of the record indicates the public understanding of the term “soda” is consistently evolving to suit consumer taste. This is precisely why beverage makers claim their products are “a new kind of soda.” Accordingly, we find the Applicant sufficiently responded to the Examining Attorney’s information request and reverse the refusal based on that request.

Decision: The refusal to register Applicant’s proposed mark, A NEW KIND OF SODA, under Sections 1, 2 and 45 of the Trademark Act on the ground that it fails to function as a trademark is affirmed. The refusal to register Applicant’s proposed mark because Applicant failed to comply with a requirement to provide information about the identified goods issued pursuant to Trademark Rule 2.61(b) is reversed.