

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 2, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re D2K IP*

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Serial No. 90471186

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Ashley D. Johnson of Dogwood Patent and Trademark Law,  
for D2K IP.

Matthew J. McDowell, Trademark Examining Attorney, Law Office 101,  
Zachary Sparer, Managing Attorney.

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Before Kuhlke, Wolfson and Coggins,  
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

D2K IP (“Applicant”) seeks registration on the Principal Register for the proposed mark HAVE A GREAT DAY in standard characters for the following goods: “Cups; Coffee cups; Insulating sleeve holder for beverage cups; Insulating sleeve holders made of paper or cardboard for jars, bottles or cans” in International Class 21.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90471186, filed on January 17, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on allegations of first use on January 14, 2021, and first use in commerce on January 17, 2021.

The Trademark Examining Attorney refused registration of 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 the phrase HAVE A GREAT DAY does not function as a mark because it is a commonplace expression "widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment." Ex. Att. Brief, 8 TTABVUE 8.<sup>2</sup>

Applicant filed an appeal and requested reconsideration. After the Examining Attorney denied the request, the appeal was resumed and briefed. We affirm the refusal to register.

## I. Failure to Function

### A. Applicable Law

Not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose. *In re Tex. With Love, LLC*, 2020 USPQ2d 11290, 2-3 (TTAB 2020) (quoting *In re Pro-Line Corp.*, 28USPQ2d 1141, 1142 (TTAB 1993) ("Mere intent that a phrase function as a trademark is not enough in and of itself to make it a trademark.)); *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016) (granting petition to cancel registration on the Supplemental Register where "the marketplace is awash in products that display the

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<sup>2</sup> Citations to TTABVUE throughout the decision are to the Board's public online database that contains the appeal file, available on the USPTO website, [www.USPTO.gov](http://www.USPTO.gov). The first number represents the docket number in the TTABVUE electronic case file and the second represents the page number(s).

Citations to the examination record refer to the USPTO's online Trademark Status and Document Retrieval system (TSDR).

term.”). Certain designations “are inherently incapable of functioning as trademarks to identify and distinguish the source of the products in connection with which they are used.” *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (affirming refusal to register ONCE A MARINE, ALWAYS A MARINE for clothing because it would be perceived as an informational slogan “to express support, admiration or affiliation with the Marines.”); *In re Volvo Cars of N. Am. Inc.*, 46 UPSQ2d 1455, 1460 (TTAB 1998) (“primary significance of the phrase DRIVE SAFELY, as used by applicant, and as likely to be perceived by purchasers and prospective purchasers, is merely that of an everyday, commonplace safety admonition”); *In re Wakenferm Food Corp.*, 222 USPQ 76 (TTAB 1984) (WHY PAY MORE! for supermarket services is not registrable because the slogan does not function as a service mark).

Matter fails to function as a trademark if it is a common term or phrase that consumers of the goods or services identified in the application are accustomed to seeing used by various sources to convey ordinary, familiar, or generally understood concepts or sentiments. Such widely used messages will be understood as merely conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function. *See, e.g., D.C. One Wholesaler*, 120 USPQ2d at 1716 (in addition to granting petition to cancel the applicant’s registration for the mark I ♥ DC for clothing, the Board also sustained opposition to applicant’s pending application for the same mark because it “has been widely used, over a long period of time and by a large number of merchandisers as an expression of enthusiasm, affection or affiliation with respect to the city of Washington, D.C.” and

thus would not be perceived as a source-indicator); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1202.04(b) (2022) (widely used messages).

“The critical inquiry in determining whether a proposed mark functions as a trademark is how the relevant public perceives it.” *Univ. of Ky. v. 40-0, LLC*, 2021 USPQ2d 253, at \*13 (TTAB 2021) (citing *In re Greenwood*, 2020 USPQ2d 11439, at \*2 (TTAB 2020)). When “there are no limitations on the channels of trade or classes of consumers of the [goods] identified in the application, the relevant consuming public comprises all potential purchasers of [such goods].” *Id.*, at \*24 (citing *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at \*3 (TTAB 2020)). “To make this determination, we look to [any] ... evidence of record showing how the designation is actually used in the marketplace.” *Tex. with Love*, 2020 USPQ2d 11290, at \*2 (quoting *Eagle Crest*, 96 USPQ2d at 1229, and noting that “widespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message.”).

“Consumers ordinarily take widely-used, commonplace messages at their ordinary meaning, and not as source indicators, absent evidence to the contrary.” *In re Greenwood*, 2020 USPQ2d 11439, at \*6 (citing *Mayweather Promotions*, 2020 USPQ2d 11298, at \*1. “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). “Where 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, then the words fail to function as a mark.” *In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, at \*3 (TTAB 2019) (internal punctuation omitted).

B. Evidence and Arguments

The Examining Attorney contends the evidence of record shows that “the phrase HAVE A GREAT DAY is a commonplace message, nearly ubiquitous in our culture.” Ex. Att. Brief, 8 TTABVUE 4. Applicant asserts the record evidence is not sufficient for the Examining Attorney to meet their burden to establish that the proposed mark fails to function as a mark. For the failure-to-function analysis, we consider all the evidence of record, including an applicant’s specimens. *In re Team Jesus LLC*, 2020 USPQ2d 11489, at \*3 (TTAB 2020).

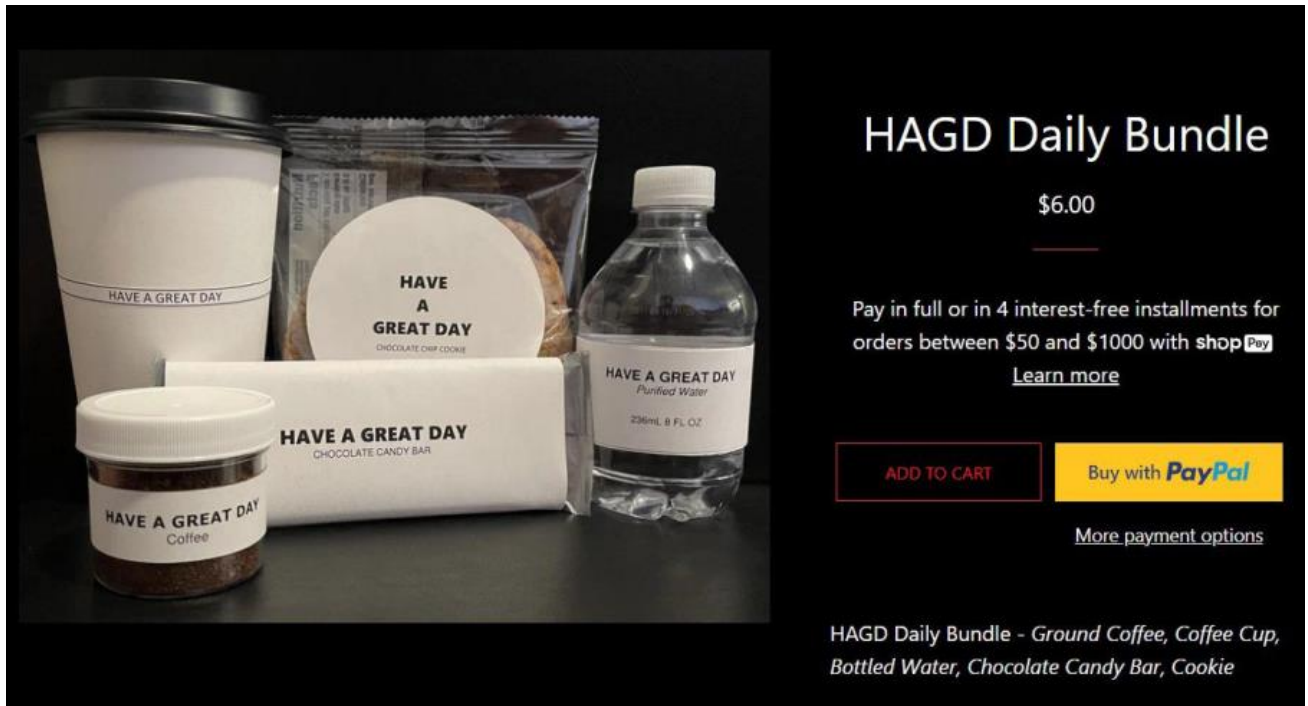
Applicant’s first specimen, shown below, was rejected as “a digitally created or altered image or a mockup of a depiction of the mark on the goods or their packaging.”<sup>3</sup>




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<sup>3</sup> June 28, 2021 Office Action, TSDR p. 1.

Applicant submitted the following substitute specimen which was not rejected.<sup>4</sup>



The image shows a screenshot of an Amazon product listing for the 'HAGD Daily Bundle'. On the left, there is a photograph of the bundle's contents: a white coffee cup with a black lid, a clear plastic bottle of water, a chocolate chip cookie, a chocolate candy bar, and a small jar of coffee. Each item has a white label with the text 'HAVE A GREAT DAY' and a description of the item. On the right, the product title 'HAGD Daily Bundle' is displayed in white text on a black background, followed by the price '\$6.00'. Below the price, there is a description: 'Pay in full or in 4 interest-free installments for orders between \$50 and \$1000 with shop '. There is a 'Learn more' link and an 'ADD TO CART' button. A yellow button with the text 'Buy with PayPal' is also visible. Below the buttons, there is a link for 'More payment options'. At the bottom right, there is a description of the bundle: 'HAGD Daily Bundle - Ground Coffee, Coffee Cup, Bottled Water, Chocolate Candy Bar, Cookie'.

The evidence submitted by the Examining Attorney includes:

- Coffee cup for sale on Ebay.com displaying “Have a Great Day”<sup>5</sup>



- Coffee cups displaying “Have a Nice Day”<sup>6</sup>

<sup>4</sup> September 3, 2021 Specimen.

<sup>5</sup> June 28, 2021 Office Action, TSDR pp. 2-3.

<sup>6</sup> *Id.* at 5-7.



Have A Nice Day Coffee Mug Middle...

- Stock image of a disposable coffee cup displaying “Have a Great Day”<sup>7</sup>



- Various goods, from coffee cups to stickers, door mats, hats and shirts for sale on Etsy.com featuring the message “Have a Great Day”<sup>8</sup>



Have a great day sticker |waterproof...



Have A Great Day With Middle Finger...

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<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.* at 13-16.



HAVE A GREAT DAY smiley 25-500...



Have a Great Day  
Ad by deannaspapercrafts

- Suggestions in marketing strategy article to personalize holiday messages including with variations of “have a great day”<sup>9</sup>
- Real estate company website with responses to customer comments closing with “We hope you have a great day!”<sup>10</sup>
- Web discussion where the interchangeability of “Have a Nice Day” and “Have a Great Day” is discussed<sup>11</sup>
- Wikipedia article on expression “Have a Nice Day” and variants, including its common usage in business to conclude transactions<sup>12</sup>
- Article on ubiquitous nature of “Have a good/great day” in conversation.<sup>13</sup>

The Examining Attorney asserts that “[t]he evidence shows that the phrase ‘Have a great day’ is a commonplace salutation used, perhaps, ceaselessly by all levels of American society and particularly in business. Because consumers are accustomed to seeing this term or expression commonly used in everyday speech by many different sources, they would not perceive it as a mark identifying the source of applicant’s

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<sup>9</sup> November 12, 2021 Office Action, TSDR p. 12.

<sup>10</sup> *Id.* at 31.

<sup>11</sup> *Id.* at 33-34.

<sup>12</sup> *Id.* at 35-40.

<sup>13</sup> *Id.* at 43-45.



goods but rather as only conveying an informational message.” Ex. Att. Brief, 6 TTABVUE 6.

Applicant argues that many of the examples are for different goods or services and have no probative value. However, as the Examining Attorney explains:

Derivatives or variations of widely used messages also fail to function as marks if they convey the same or similar type of information or sentiment as the original wording. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (noting that the informational significance of I ♥ DC was “reinforced by the fact that similar expressions in the form of ‘I ♥\_\_’ have also been widely used to express such enthusiasms with respect to other places and things”); *In re Remington Prods., Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987) (finding PROUDLY MADE IN THE USA informational in nature; the addition of “Proudly” before the common phrase “Made in USA” merely added “further information about the state of mind of the manufacturer and/or its employees in connection with the production of the goods”); *In re Melville Corp.*, 228 USPQ 970, 971 (TTAB 1986) (finding BRAND NAMES FOR LESS failed to function as a mark based [on] evidence of widespread use of similar marketing phrases, noting that “[t]he fact that applicant may convey similar information in a slightly different way than others is not determinative.”).

Ex. Att. Brief, 8 TTABVUE 6.

Applicant contends that the examples do not show use of the phrase on Applicant’s goods. However, there are examples on coffee mugs which if not legally identical to cups or coffee cups are nearly identical. Moreover, 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 weatherstripping). In addition:

The use of the phrase in other unrelated industries merely demonstrates how widespread and commonplace the use of this salutation is in commerce. The evidence also demonstrates that the mark is not just used in business, but also almost universally in everyday life in this country. The more commonly a term or phrase is used in everyday speech by various sources, the less likely consumers will perceive the matter as a trademark for any goods. *E.g.*, *In re Greenwood*, 2020 USPQ2d 11439, at 2-3 (TTAB 2020) (citing *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 (TTAB 2018)); *In re DePorter*, 129 USPQ2d 1298, 1303 (TTAB 2019) (quoting *In re Hulting*, 107 USPQ2d 1175, 1177 (TTAB 2013)); *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1153 (TTAB 2019).

Ex. Att. Brief, 8 TTABVUE 7.

Finally, Applicant provided a list and TSDR printouts of 37 third-party registrations for various marks comprising what Applicant refers to as “similar marks” that the USPTO has registered. For the first time in its brief, Applicant also referenced its other applications for the same mark but for different goods that were approved for publication; however, these applications were not made of record.<sup>14</sup>

Prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Board. *Nett Designs*, 57 USPQ2d at 1566 (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior

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<sup>14</sup> To the extent Applicant’s reference to its other applications is considered, those applications allegedly cover goods not at issue here. *Eagle Crest*, 96 USPQ2d at 1129 (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

registrations does not bind the Board or this court.”). We are not privy to the records of those prior registrations and therefore must assess the registrability of Applicant’s proposed mark on its own merits and not simply based on the existence of other registrations for different marks or different goods. *Nett Designs*, 57 USPQ2d at 1566 (“The Board must decide each case on its own merits.”). *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014). Each case is decided on its own facts, and each mark stands on its own merits. *See In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017).

Moreover, many of the marks in the third-party registrations are almost all comprised of wording that is different from the wording in Applicant’s mark in addition to containing design elements in some cases (e.g., GOOD DAY, IT’S A GOOD DAY, MAKE IT A GREAT DAY, GOOD NIGHT, HAVE THE BEST DAY EVER, QUEEN FOR A DAY, GOOD NIGHT, GREAT DAY TO BE ALIVE!!!, WHAT A DAY!, CALL IT A DAY, HAVE A BLAST, HAVE A HEART, HAVE A BALL, HAVE A GOOD TIME) and are for very different goods or services (e.g., HAVE A GREAT DAY! for various entertainment services; HAVE A GOOD DAY for newsletter; HAVE A NICE DAY for cosmetics; HAVE A LUCKY DAY for shampoo; GREAT DAY for television broadcasting and automotive cargo rack; GOOD NIGHT for insecticides; GOOD DAY for chocolates; IT’S A GREAT DAY for hats and shirts; WHAT A GREAT DAY! for automobile dealership; MAKE A GREAT DAY for clothing, pencils and jewelry (mugs are similar); GREAT DAY TO BE ALIVE!!! for educational and entertainment services). As such, they are not probative of the commonplace usage of the phrase

HAVE A GREAT DAY for cups, coffee cups and insulating sleeves, and underscore why we make determinations based on each case. *Mayweather Promotions*, 2020 USPQ2d 11298.

The record evidence shows that the proposed mark comprises a phrase that is used interpersonally, professionally and as an informational slogan on goods like those identified in the application. The use of the proposed phrase on Applicant's specimens is similar to the ubiquitous usage on a variety of goods. Therefore, based on the record presented, the proposed mark does not function as a trademark for the goods identified in the application.

## II. Conclusion

In sum, we hold that HAVE A GREAT DAY is a widely used message that fails to function as a mark for Applicant's goods.

**Decision:** The refusal to register Applicant's mark is affirmed.