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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85886550
Applicant	Inca Tea, LLC
Applied for Mark	INCA TEA
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Date	09/14/2016

TRADEMARK

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of	:	Inca Tea, LLC
For the Mark	:	**INCA TEA**
Serial No.	:	85/886,550
Filing Date	:	March 26, 2013
Examining Attorney	:	Robert J. Struck
Law Office	:	109
Last Office Action	:	June 9, 2016
Attorney Docket No.	:	FLOR 5 00003

Cleveland, OH 44115
September 14, 2016

Attention: TTAB
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

BRIEF FOR APPLICANT

BACKGROUND

Applicant seeks to register INCA TEA on the Principal Register for:

Teas comprised of purple corn; tea blends comprise of purple corn in class 30.

This application was filed under Section 1(b) and received U.S. Trademark Application Serial No. 85/886,550 with a filing date of March 26, 2013. The application originally identified:

> Teas; herbal and non-herbal tea; tea beverages; beverages made with a base of tea; iced tea; ready-to-drink tea; low calorie tea; diet tea; fruit flavored beverages; tea with fruit flavorings; tea related products and accessories; clothing; and clothing, namely t-shirts, hats, jackets and sweatshirts in class 30.

The Examining Attorney refused registration under Section 2(e)(1) of the Lanham Act, alleging that the mark is merely descriptive. *See* Office Action mailing date April 9, 2013. The Examining Attorney also required clarification of the identification of goods and additional information about the goods, namely, whether the goods identified in the application comply with the Controlled Substances Act.

In Applicant's response to the initial refusal to register filed on October 9, 2013, Applicant argued the mark cannot be descriptive as INCA does not refer to any existing peoples, and use of ancient/historical terms is appropriate for trademark use. Applicant also responded that the identified goods do not relate to any illegal or controlled substance and provided numerous examples of INCA formatives. Further, Applicant addressed that individuals are accustomed to seeing the word INCA in connection with products that could be purchased in a grocery store or restaurant and that none of the provided registrations disclaimed INCA. Applicant also amended the identification.

In his non-final Office Action of October 31, 2013, the Examining Attorney repeated his reasoning that the mark is merely descriptive. The Examining Attorney also

cited the test for whether a mark is deceptively misdescriptive. The Examining Attorney alleged that the goods were misdescribed, as the Applicant's identification includes Inca tea, while Applicant asserted its goods do not include Inca tea. With respect to the second part of the test, the Examining Attorney alleged that consumers are likely to believe that the goods associated with the applied-for mark may have medicinal properties.

In response thereto on April 30, 2014, Applicant traversed the alleged descriptive and deceptively misdescriptive grounds for refusal and addressed the Controlled Substances Act requirements. Applicant maintained that INCA TEA is not descriptive but suggestive, as the ancient term INCA, when used in conjunction with the term TEA, evokes a natural product with roots or inspiration in ancient Andean civilizations and/or lands. The identification was amended to "teas comprised of purple corn; tea blends comprised of purple corn" in class 30 so as to clarify the nature of the product. Applicant further asserted that coca leaves are not part of the product, and further, coca tea (i.e. coca leaves) is not an equivalent to Inca tea, and "Inca tea." The Examining Attorney was only able to locate three citations relating Inca tea to coca tea and vice versa; however, all fail to immediately convey to consumers that INCA TEA does or does not contain coca leaves. Applicant further argued that even if the Examining Attorney's few irrelevant citations are deemed relevant, the citations do not establish that consumers would find the mark descriptive. Particularly, the Internet evidence cited by the Examining Attorney is non-probative given that the Internet can return uses of almost any term, no matter how isolated. Even assuming that "Inca tea" deceptively and directly describes tea with coca leaves, Applicant provided evidence that such deception would not be plausible, as consumers would more regularly encounter tea

containing coca so that they might assume a trademark with the word “coca” in it for tea describes an attribute of the tea, and no such attribution can be made with INCA TEA.

On May 22, 2014, the Examining Attorney issued another non-final Office Action, withdrawing his Section 2(e)(1) refusal but requiring Applicant to disclaim the word “tea.”

On June 2, 2014, Applicant filed an Allegation of Use and submitted a disclaimer.

On July 1, 2014, the Examining Attorney issued a non-final Office Action, refusing registration under Section 2(d) of the Lanham Act for the first time. The Examining Attorney alleged that the mark is likely to be confused with the mark INCA’S FOOD and design (), the subject of U.S. Reg. No. 4,110,531 for:

> Hot pepper sauces, carob syrup; processed dried herbs, spices, flours, wheat hominy, and white corn hominy; dried prepared wheat; laurel leaves; processed herbs, namely, mint, white rosemary; spices, namely, oregano, ground ginger, ground paprika, ground annatto, tumeric; teas, namely, linden and chamomile in class 30

because INCA is contained in Applicant’s mark and the goods are ostensibly related. The Examining Attorney reasoned that the differences in the marks are minor and do not change the commercial impression of the marks. Further, the Examining Attorney reasoned that Applicant’s goods are related because they all consist of tea.

Applicant responded on December 30, 2014 and argued that the Section 2(d) refusal should be withdrawn, as the initial and subsequent examinations were incomplete, and the Examining Attorney could not show clear error. Applicant further argued that the applied-for mark and cited registration are not confusingly similar. Namely, Applicant argued that on its face, and in its entirety, INCA TEA is blatantly different from  in pronunciation, meaning, and commercial impression. The

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