

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
February 3, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Inca Tea, LLC*

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Serial No. 85886550

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Sandra M. Koenig and Rachel A. Smoot of Fay Sharpe LLP for Inca Tea, LLC.

Robert J. Struck, Trademark Examining Attorney, Law Office 109  
(Michael Kazazian, Managing Attorney).

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Before Bergsman, Masiello, and Hightower, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Inca Tea, LLC (“Applicant”) filed an application for registration on the Principal Register of the mark INCA TEA in standard characters for “Teas comprised of purple corn; tea blends comprised of purple corn,” in International Class 30.<sup>1</sup> Applicant disclaimed the exclusive right to use TEA apart from the mark as shown.

<sup>1</sup> Application Serial No. 85886550 was filed on March 26, 2013 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), on the basis of Applicant’s *bona fide* intention to use the mark in commerce. Applicant later filed an allegation of use, stating January 13, 2014 as the date of first use and first use in commerce.

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The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with Applicant's goods, so resembles the registered mark shown below as to be likely to cause confusion, or to cause mistake, or to deceive.<sup>2</sup>

**INCA'S FOOD**



The cited mark is registered for “teas, namely, linden and chamomile,” as well as a variety of other foods in International Classes 29 and 30.<sup>3</sup> Registrant has disclaimed the exclusive right to use FOOD apart from the mark as shown. The Registration describes the figure depicted in the mark as “an upper portion of a Tumi, a

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<sup>2</sup> Reg. No. 4110531, issued March 13, 2012.

<sup>3</sup> The full identification of goods in the cited Registration is as follows:

Canned or dried prepared food, namely, fruits, vegetables; canned or dried white corn, canned or dried hot peppers, namely, rocoto, panca, and amarillo; Dried prepared foods, namely, canary beans and potatoes; Canned or bottled food, namely, asparagus and olives in brine; fried chick peas; dried peaches; fried bananas; fried fava beans; and fried cassava; processed lemon grass, in International Class 29;

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 International Class 30.

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ceremonial knife of the pre-Incan cultures of Peru.” Color is not claimed as a feature of the mark.

When the refusal was made final, Applicant filed two requests for reconsideration, both of which the Examining Attorney denied. Applicant appealed to this Board, and subsequently requested that the Application be remanded to the Examining Attorney for consideration of additional evidence. Upon remand, the Examining Attorney again maintained his refusal of registration, and this appeal proceeded. The case is fully briefed.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case, Applicant and the Examining Attorney have also presented evidence and arguments regarding trade channels, the number and nature of similar marks in use in the marketplace, lack of actual confusion, and the need for consistent examination practice.

(a) The goods.

We will first consider the similarity or dissimilarity of the goods as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *Octocom*

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*Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's goods are teas and tea blends comprised of purple corn. Registrant's goods include, among other things, "teas, namely, linden and chamomile." The goods are similar in nature, in that they are all teas; however, they are not identical, and Applicant's goods, in particular, are somewhat unusual in that they are corn-based teas.

Applicant has submitted evidence regarding the nature of its product, which shows that purple corn is not always the only component of the tea. Applicant produces a "Peruvian Spiced Berry" tea under the mark.<sup>4</sup> Applicant's website indicates that the ingredients of Peruvian Spiced Berry tea are "hibiscus petals, elderberries, currants, purple corn, apple pieces, cinnamon, cloves and natural flavors."<sup>5</sup> Other flavors of tea offered under the mark include "PICK ME UP PEACH," a "combination of white tea, lush peaches and sweet herbs"; "MOUNTAIN OF MANGO," a "blend of mango, sweet herbs, and citrus flavors"; and "TAWANTIN BLACK TEA," a "combination of three quality black tea leaves and purple corn."<sup>6</sup> Applicant's Twitter page includes a posting by Applicant that appears to indicate that Applicant offers a tea that combines purple corn with chamomile:

Cusco Chamomile is a soothing blend of Chamomile,  
Purple Corn, Blood orange, vanilla & Citrus. #yummy  
#organic.<sup>7</sup>

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<sup>4</sup> Applicant's response of April 30, 2014 at 8. *See also* Response of May 20, 2016 at 34.

<sup>5</sup> Office Action of January 27, 2015 at 6-7

<sup>6</sup> Request for Remand of October 23, 2015 at 17.

<sup>7</sup> Applicant's response of May 20, 2016 at 56.

Applicant's Facebook page includes an image of "Pachama Green" tea bearing the mark.<sup>8</sup> The fact that Applicant itself markets herbal teas, fruit teas, green tea and black tea under the mark indicates that purple corn tea is commercially related to other forms of tea.

In order to demonstrate that the goods of Applicant and Registrant are related, the Examining Attorney has submitted evidence from the Internet showing that various types of teas and herbal teas have been marketed under the same mark.

Examples follow:

<b><u>BRAND</u></b>	<b><u>TYPES OF TEA</u></b>
ASSI	Roasted corn tea; ginger tea. <sup>9</sup>
DONG SUH	Korea purple corn tea; corn tea; green tea; roasted barley tea. <sup>10</sup>
GOOD NATURE	Chamomile tea, linden blossom tea, elderflower tea, and rose hip and hibiscus tea. <sup>11</sup>
LIPTON	Chamomile tea; Green tea; white tea; orange blossom hibiscus tea; jasmine tea; ginseng tea; purple acai blueberry tea. <sup>12</sup>
TAZO	Chamomile tea, green tea, Darjeeling tea. <sup>13</sup>
TEAVANA	Chamomile, peach, peach-berry-jasmine, mango-black tea, white, black, oolong, green, jasmine. <sup>14</sup>

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<sup>8</sup> Response of May 20, 2016 at 25.

<sup>9</sup> Office Action of July 10, 2015 at 3-6.

<sup>10</sup> *Id.* at 9-12.

<sup>11</sup> Office Action of January 27, 2015 at 10-11.

<sup>12</sup> Office Action of August 24, 2015 at 4-17.

<sup>13</sup> *Id.* at 23.

<sup>14</sup> *Id.* at 32, 39, 42, 44-46, 51, 61.

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