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PRECEDENT OF THE TTAB

Mailed:
August 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. 85886579

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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 shown below for “Teas comprised of purple corn; tea blends comprised of purple corn,” in International Class 30.¹

¹ Application Serial No. 85886579 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 disclaimed the exclusive right to use TEA, 100% ALL NATURAL INGREDIENTS, and ORIGINAL apart from the mark as shown. Color is not claimed as a feature of the mark. The application describes the design elements as “a sketch of mountains inside three concentric circles”; “a curved banner ribbon”; and “a horizontal row of three stars ...below the banner ribbon.”

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.²

INCA'S FOOD



² Reg. No. 4110531, issued March 13, 2012.

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The cited mark is registered for “teas, namely, linden and chamomile,” as well as a variety of other foods in International Classes 29 and 30.³ 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 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 appealed to this Board and filed three requests for reconsideration. On remand, the Examining Attorney denied each of them, and this appeal proceeded. Applicant and the Examining Attorney have filed briefs.

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

³ 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.

Examining Attorney have also presented evidence and arguments regarding trade channels and the number and nature of similar marks in use in the marketplace.

(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 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 composed 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 business, which shows that Applicant offers a variety of teas. Applicant produces a "Peruvian Spiced Berry" tea under the mark.⁴ 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."⁵ 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

⁴ Applicant's response of May 21, 2014 at 8. *See also* Response of May 20, 2016 at 34.

⁵ Office Action of January 27, 2015 at 6-7.

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black tea leaves and purple corn.”⁶ 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.⁷

Applicant’s Facebook page includes an image of “Pachama Green” tea bearing the mark.⁸ 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:

<u>BRAND</u>	<u>TYPES OF TEA</u>
ASSI	Roasted corn tea; roasted barley tea. ⁹
BADIA	Chamomile, eucalyptus, green, linden, mint, anise, and yerba mate teas. ¹⁰
GOOD NATURE	Chamomile tea, linden blossom tea, elderflower tea, and rose hip and hibiscus tea. ¹¹

⁶ Request for Remand of October 23, 2015 at 17.

⁷ Applicant’s response of May 20, 2016 at 56.

⁸ Response of May 20, 2016 at 25.

⁹ Office Action of January 3, 2017 at 3-10.

¹⁰ Office Action of January 27, 2015 at 8-9.

¹¹ *Id.* at 10-11.

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