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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Diamondback Tactical, LLLP

Serial No. 78362120

Christopher M. Parent of Brownstein Hyatt Farber Schreck,
PC for Diamondback Tactical, LLLP.

Christopher L. Buongiorno, Trademark Examining Attorney,
Law Office 102 (Thomas V. Shaw, Managing Attorney).

Before Zervas, Walsh and Cataldo, Administrative Trademark
Judges.

Opinion by Walsh, Administrative Trademark Judge:

Diamondback Tactical, LLLP (applicant) has applied to register the mark CAT in standard characters on the Principal Register for "Armored vests for use in the fields of military and law enforcement activities" in International Class 9.¹ The Examining Attorney has finally

¹ Serial No. 78362120, filed February 4, 2004 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), and asserting first use anywhere and first use of the mark in commerce on April 27, 2004 in the statement of use.

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refused registration under Trademark Act Section 1, 15 U.S.C. § 1051, based on applicant's failure to provide a specimen with its statement of use showing use of the mark conforming to the mark shown in the application drawing. Applicant has appealed. Applicant and the Examining Attorney have filed briefs. We reverse.

Applicant submitted the specimen shown here:

Battlelab **CAT** **FAST ATTACK**

Plate Harnesses

Battlelab/CAT Fast Attack Plate Carrier (F.A.P.C.)
The Fast Attack Plate Carrier was designed to meet the needs of operators who want a high mobility plate carrier with great load carrying capacity. The F.A.P.C. has 1/4" closed cell foam in both the shoulders and upper torso regions to relieve load stress on the operator's back and shoulders. It also allows for quick adjustments and modifications as loads, clothing or positions from walking to sitting in a vehicle change.

To further the usefulness of the F.A.P.C. we have created the FAST Attack RACK (F.A.R.). Adapting the F.A.R. will allow you to have your standalone plates or combination of your multi hit plates and CAT's optional ballistic Level 3A inserts as a plate backer, and the FAR for side ballistic protection as the ultimate in high speed and high mobility tactical platforms.

(Small)
FAPC-S-CT Camel Tan
FAPC-S-OD Olive Drab
FAPC-S-BK Black
FAPC-S-RG Ranger Green
FAPC-S-CYT Coyote Brown
FAPC-S-ACU ACU Digital
FAPC-S-CRE CRYE
\$89.95

(Medium)
FAPC-M-CT Camel Tan
FAPC-M-OD Olive Drab
FAPC-M-BK Black
FAPC-M-RG Ranger Green
FAPC-M-CYT Coyote Brown
FAPC-M-ACU ACU Digital
FAPC-M-CRE CRYE
\$89.95

(Large)
FAPC-L-CT Camel Tan
FAPC-L-OD Olive Drab
FAPC-L-BK Black
FAPC-L-RG Ranger Green
FAPC-L-CYT Coyote Brown
FAPC-L-ACU ACU Digital
FAPC-L-CRE CRYE
\$89.95

FAPC Level 3R Soft Armor Inserts
CAT-FAPC-SA (Small)
CAT-FAPC-MA (Medium)
CAT-FAPC-LA (Large)
\$189.95

Call for qty, discounts and GSA pricing

To Order Call (800) 735-7030 USPTO TM Appl. SN: 78362120

Applicant filed the specimen with its statement of use; the specimen is a page from applicant's catalog. The Examining Attorney asserts that the specimen does not show use of CAT as a distinct mark for the identified goods.² The Examining Attorney states that, "...the drawing of the mark must be a substantially exact representation of the mark as intended to be used on or in connection with the goods or services, and as actually used as shown by the specimens filed with the amendment to allege use or statement of use," citing 37 C.F.R. §§ 2.51(b) and 2.72(b)(1), as well as TMEP §§ 807.12. Examining Attorney's Appeal Brief at 2.

The Examining Attorney then argues:

There are no instances in the specimen where the mark is presented as "CAT" to identify the goods in the application. There is however one instance throughout the entire specimen (catalog page) where the letters CAT appear without additional terms or letters. In paragraph two of the catalog page, the proposed mark appears in possessive form in the following sentence:

Adapting the F.A.R. will allow you to have your standalone plates or combination of your multi hit plates and CAT's optional Level 3A inserts as a plate backer... (footnote omitted)

² The Examining Attorney also advised applicant in both office actions in the case that he would not accept an amendment to the drawing to resolve the issue.

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The term "CAT's" in that sentence refers to inserts, parts to be inserted into the vests. But it is not used to (sic) in connection with the armored vests themselves.

Id. at. 2-3.

The Examining Attorney then points to the listing at the bottom of the catalog page as further support for his position that CAT refers to a component part of the vests or carriers, but not the vests.

In the first instance, the Examining Attorney rejects the proposition that the display at the top of the page is sufficient to show use of CAT as a mark for the vests. The Examining Attorney argues that CAT is so integrated with other subject matter here that it does not function as a separate mark for the identified goods. The Examining Attorney concludes by arguing, "Looking at the specimen one cannot readily determine that the proposed mark is the trademark for the vests. The mark is used to identify inserts, components of the vest, but not the actual vest."

Id. at 5.

On the other hand, applicant argues that the specimen does show use of CAT as a distinct mark for the identified goods. Applicant states, "In cases of alleged mutilation of a mark, the determinative factor is whether or not the subject matter in question makes a separate and distinct

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commercial impression apart from the other elements.”

Applicant’s Brief at 4.

More specifically, applicant argues that CAT creates a distinct commercial impression as used in the heading, “BattleLab/CAT Fast Attack Plate Carrier (F.A.P.C.).” Applicant argues that this heading includes three distinct marks/elements differing in scope, that is, “BattleLab” which is used as a mark for applicant’s broader product line, CAT which identifies applicant’s line of armored vests or plate carriers, and “Fast Attack” or “Fast Attack Plate Carrier (F.A.P.C.)” indicating that the products are for use in situations “requiring high mobility and significant freedom of movement.” *Id.* at 6. Applicant argues further that the additional uses of CAT on the catalog page reinforce its status as a distinct mark.

At the outset of our analysis we note that the only question in this appeal is whether CAT, as used in the specimen, creates a distinct commercial impression. In his brief, the Examining Attorney also suggests that the specimen, a catalog page, may not qualify as a display associated with the goods under *Lands’ End Inc. v. Manbeck*, 797 F.Supp. 511, 24 USPQ2d 1314 (E.D. Va. 1992). The Examining Attorney suggests that the one use of CAT alone is not positioned near enough to the picture of the goods

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to associate CAT as a mark with the goods. Examining Attorney's Brief at 3. However, the Examining Attorney did not object to the specimen on that basis, by referring to *Lands' End* or otherwise, either in the first Office action or in the final refusal. Consequently that objection is not before us in this appeal. Nevertheless, for the record, we conclude that the specimen complies fully with the requirements of *Lands' End*. In particular, the picture of the vest fills a substantial portion of the page in question and all of the text on the page is sufficiently near the product picture to be associated with the goods.

We now turn to the issue at hand. Applicant has correctly characterized the focus of our analysis here, that is, whether CAT, as used in the specimen, creates a distinct commercial impression. *The Institut National des Appellations D'Origine v. Vintners Internbational Co. Inc.*, 958 F.3d 1574, 22 USPQ2d 1190 (Fed. Cir. 1992); *In re Royal BodyCare Inc.*, 83 USPQ2d 1564 (TTAB 2007); *In re Raychem Corp.*, 12 USPQ2d 1399 (TTAB 1989); *In re Big Pig Inc.*, 81 USPQ2d 1436 (TTAB 2006); *In re Berg Electronics, Inc.*, 163 USPQ 487 (TTAB 1969). The determination is one which must be based on the particular facts in each case. *Institut National des Appellations D'Origine v. Vintners Internbational Co. Inc.*, 22 USPQ2d at 1197.

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In this case, we find the Board's decision in *Raychem*, cited by applicant, instructive. In *Raychem*, the applicant sought registration of the mark TINEL-LOCK. The specimen showed the mark displayed as TR06AI-TINEL-LOCK-RING. Apart from the specimen itself, the Board considered a brochure related to the product submitted by the applicant. The brochure indicated that TR06AI, which preceded TINEL-LOCK in the display, was part of a parts numbering system, and that RING, which followed TINEL-LOCK in the display, was the name of the goods. Based on the full record in the case the Board concluded that TINEL-LOCK created a distinct commercial impression, as used in the specimen, and reversed the refusal based on the specimen. *In re Raychem Corp.*, 12 USPQ2d at 1400.

In its consideration of the brochure, the Board was following a long-standing practice of considering relevant evidence in addition to the specimen which may be helpful in understanding how relevant consumers will perceive a mark and accompanying subject matter. *See In re Dempster Bros., Inc.*, 132 USPQ 300 (TTAB 1961).

We also note a consistent line of cases which recognize that relevant purchasers generally will perceive a company name or house mark as distinct from accompanying

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subject matter/marks. See *In re Royal BodyCare Inc.*, 83 USPQ2d at 1567 and cases cited therein.

In this case, the specimen itself provides certain cues which assist the Board in determining how relevant purchasers of applicant's vests will perceive the specimen and the mark as used in the specimen. We first note that CAT does appear by itself in the text of the specimen, as the Examining Attorney points out. However, we disagree with the Examining Attorney's interpretation of the use of CAT in the text. We conclude that the more reasonable interpretation of the use of CAT in the text is as a reference to and mark for the identified goods, not as a reference to a component part of the goods. With regard to the listing at the bottom of the page, here too. The more reasonable interpretation is that the references are to the vests only or to both the vests and the inserts for the vests. The references in question identify the three sizes of the vests themselves. These uses of CAT in the specimen are likely to prompt relevant purchasers to perceive CAT as a distinct element and mark.

We now turn to consideration of the page heading, "BattleLab/CAT Fast Attack Plate Carrier (F.A.P.C.)."

First, we conclude that relevant purchasers will perceive "BattleLab" as a distinct mark. Applicant argues

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that "BattleLab" is a house mark. However, the Examining Attorney argues that applicant has failed to establish that "BattleLab" is a house mark and further that Diamondback Tactical is applicant's company name, implying that Diamondback Tactical must then be applicant's house mark.

We reject the Examining Attorney's suggestion that a company name must be the one and only house mark of that company. There is no support for that proposition in the record.

Furthermore, in its response to the first office action, applicant advised the Examining Attorney that "BattleLab" was its house mark and that applicant owned two pending, approved applications to register "BattleLab." In that response, applicant identified those applications (78347450 and 78348007) and advised that the applications each covered five classes of goods which included "nylon holster covers, gun, shells and cartridge belts, pouches for holding arms, ammunition, and magazines for weapons, medical kits, bullet-proof vests, and helmet covers, backpacks, knapsacks, fanny packs, pouches and water-proof duffel bags, as well as vests and belts." Applicant's Response of March 3, 2006 at 2 n.1. In its reply brief applicant advised the Examining Attorney further that its

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"BattleLab" applications had matured to registrations and provided the registration numbers, 3136537 and 3151599.

As a general rule, the Board will not consider a mere listing of applications or registrations, and the Board will not take judicial notice of USPTO records. *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Applicants must submit copies of USPTO paper or electronic records. In this case, however, the Examining Attorney failed to advise applicant of these requirements in his final action following the response; he merely stated, "There is no evidence in the record to show that "BattleLab" is a recognized 'house mark.'" Final Office Action at 2. Under the circumstances present here, we will consider the information applicant provided regarding its "BattleLab" registrations because the Examining Attorney failed to advise applicant in a timely manner of the requirements related to making USPTO records properly of record. *See In re Hayes*, 62 USPQ2d 1443, 1443 n.3 (TTAB 2002).

Accordingly, based on the record before us, we conclude that relevant purchasers would perceive "BattleLab" as a separate mark distinct from CAT as used in "BattleLab/CAT Fast Attack Plate Carrier (F.A.P.C.)." We conclude so whether or not relevant purchasers would necessarily recognize "BattleLab" as a house mark. *Raychem*

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instructs that accompanying elements can be distinguished from the mark at issue for a number of different reasons. *In re Raychem Corp.*, 12 USPQ2d 1400. The record here is more than adequate to establish that relevant purchasers would perceive CAT as a separate mark of applicant for a broader class of goods than the vests identified in this application.

Furthermore, with regard to "Fast Attack Plate Carrier (F.A.P.C.)," we also conclude that relevant purchasers would view this subject matter as explanatory and distinct from CAT, as used in "BattleLab/CAT Fast Attack Plate Carrier (F.A.P.C.)." *Id.*

Finally, we conclude, based on the particular facts of this case, that relevant purchasers would perceive CAT, as used in the specimen, as a separate mark identifying applicant's vests. Accordingly, we find the specimen acceptable and reverse the refusal to register applicant's mark based on the adequacy of the specimen.

Decision: We reverse the refusal to register based on the use of the mark on the specimen.