

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 9, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re MJ Cobalt, LLC*

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Serial No. 97673097

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Andy I. Corea of Murtha Cullina LLC for MJ Cobalt, LLC.

Rebecca Smith, Trademark Examining Attorney, Law Office 110,  
Chris Pedersen, Managing Attorney.

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Before Lykos, Larkin, and Johnson,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

MJ Cobalt, LLC (“Applicant”) seeks registration on the Principal Register of the proposed standard-character mark ARBATA for “tea” in International Class 30.<sup>1</sup>

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that ARBATA is merely descriptive of tea. When the Examining Attorney made the refusal final,

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<sup>1</sup> Application Serial No. 97673097 was filed on November 11, 2022 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

Applicant requested reconsideration, which was denied, and then appealed. The appeal is fully briefed.<sup>2</sup> We reverse the refusal to register.

### **I. Prosecution History and Record on Appeal<sup>3</sup>**

We briefly summarize below the prosecution history of the involved application because it provides useful background to our disposition of the appeal.

In the first Office Action, the Examining Attorney refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act on the ground that ARBATA means tea in the Lithuanian language and thus "simply describes the applicant's goods which is tea."<sup>4</sup> The Examining Attorney also advised Applicant that the proposed mark appeared to be generic in connection with tea and thus was ineligible for registration on either the Principal or Supplemental Register.<sup>5</sup> The Examining Attorney made of record a page from wiktionary.org captioned "arbata" that stated that "arbata" means "tea" in the Lithuanian and Kashubian languages.<sup>6</sup>

Applicant responded to the Office Action by acknowledging that "[t]he word 'Arbata' is one of a few Lithuanian words that can mean 'tea,'" but argued that

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<sup>2</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney's brief appears at 6 TTABVUE.

<sup>3</sup> Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

<sup>4</sup> May 17, 2023 Office Action at TSDR 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at TSDR 2.

“Lithuanian is not a widely spoken or well-known language in the United States, and it is extremely unlikely that the average American consumer would understand the meaning of ‘Arbata.’”<sup>7</sup> Applicant argued, without supporting evidence, that “[o]nly approximately 200,000 people speak Lithuanian outside of Lithuania worldwide, most of which are in European countries,” and that “only an extremely small fraction of the U.S. population speaks Lithuanian.”<sup>8</sup> Applicant estimated that group to be “between 25,000 – 50,000 US citizens in total.”<sup>9</sup> Applicant also argued that “arbata” was not generic for tea because “Lithuanian is not a well-known language in the U.S.”<sup>10</sup>

The Examining Attorney then issued an Office Action making final the mere descriptiveness refusal to register.<sup>11</sup> The Examining Attorney made of record a page from wordsense.eu defining “arbata” as “tea” in Lithuanian;<sup>12</sup> a page from news.ycombinator.com containing a discussion of the meaning of “arbata” in Lithuanian;<sup>13</sup> and pages from various third-party websites,<sup>14</sup> including a page discussing the “Lithuanian American Population” in the United States.<sup>15</sup>

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<sup>7</sup> May 18, 2023 Response to Office Action at TSDR 1.

<sup>8</sup> *Id.* Applicant cited a link to a webpage, which is insufficient to make the referenced page of record. *In re ADCO Indus.-Techs., L.P.*, 2020 USPQ2d 53786, at \*2 (TTAB 2020).

<sup>9</sup> *Id.*

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

<sup>11</sup> June 16, 2023 Final Office Action at TSDR 1.

<sup>12</sup> *Id.* at TSDR 2.

<sup>13</sup> *Id.* at TSDR 3.

<sup>14</sup> *Id.* at TSDR 4-11.

<sup>15</sup> *Id.* at TSDR 11.

Applicant appealed and requested reconsideration of the final refusal to register, arguing that ordinary American consumers would not understand ARBATA to be descriptive of tea because few Americans speak Lithuanian.<sup>16</sup> Applicant made of record pages from a U.S. Census Bureau table released in October 2015 captioned “Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for United States: 2009-2013,” which stated that the number of Lithuanian speakers in the United States was 39,790.<sup>17</sup>

The Examining Attorney denied Applicant’s Request for Reconsideration,<sup>18</sup> making of record pages from the [deepl.com](http://deepl.com), [dict.com](http://dict.com), [glosbe.com](http://glosbe.com), and [lingvozone.com](http://lingvozone.com) websites translating “arbata” in Lithuanian into “tea” in English;<sup>19</sup> and pages from the website at [zodynas.lt](http://zodynas.lt).<sup>20</sup>

## **II. Mere Descriptiveness Refusal**

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them,” unless the mark has acquired distinctiveness under Section 2(f) of the Act.<sup>21</sup> “A term is deemed to be

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<sup>16</sup> August 3, 2023 Request for Reconsideration at TSDR 2-3.

<sup>17</sup> *Id.* at TSDR 4-12. Lithuanian is listed in the category of “Other Indo-European languages.” *Id.* at TSDR 5.

<sup>18</sup> August 27, 2023 Denial of Request for Reconsideration at TSDR 1.

<sup>19</sup> *Id.* at TSDR 2-18.

<sup>20</sup> *Id.* at TSDR 19-21. As discussed below, this page appears to be an engine that translates Lithuanian into English, and vice versa.

<sup>21</sup> Applicant does not claim that its proposed mark has acquired distinctiveness.

merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.” *In re Zuma Array Ltd.*, 2022 USPQ2d 736, at \*5 (TTAB 2022) (internal quotations and citations omitted).

“It is a well-established principle of trademark law in this country that the foreign equivalent of a merely descriptive English word is no more registrable than the English word itself despite the fact that the foreign term may not be commonly known to the general public.” *In re S. Malhotra & Co.*, 128 USPQ2d 1100, 1102 (TTAB 2018) (quoting *In re Highlights for Child., Inc.*, 118 USPQ2d 1268, 1270 (TTAB 2016)).

The Examining Attorney argues that ARBATA is merely descriptive of tea for two reasons: (1) “arbata” means “tea” in Lithuanian and under the doctrine of foreign equivalents, it should be translated into English as “tea,” 6 TTABVUE 2-4,<sup>22</sup> and (2) if the doctrine of foreign equivalents is inapplicable, “arbata” is merely descriptive because the record shows that “the term ARBATA is known in English-speaking circles” and that “upon a Google or other Internet search the term ARBATA would be found and would be used in reference to tea.” *Id.* at 5.

Applicant acknowledges that “[t]here is no dispute that ARBATA means tea in Lithuanian,” 4 TTABVUE 6, but argues that the doctrine of foreign equivalents does not apply because “there must be a sufficient number of consumers who speak the

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<sup>22</sup> As noted above, the Examining Attorney issued a genericness advisory in the first Office Action. “[A]dvisory statements are not refusals subject to appeal,” *In re Sheet Pile, LLC*, 2024 USPQ2d 522, at \*5 (TTAB 2024) (quoting *In re Nat’l Ass’n of Veterinary Technicians in Am., Inc.*, 2019 USPQ2d 269108, at \*2 n.11 (TTAB 2019) (citations omitted)), and, as a result, “genericness is not at issue in this appeal.” *Id.*

language in question and would therefore perceive the term as descriptive,” *id.*, and “Applicant’s evidence demonstrates that Lithuanian is not a commonly used language in the United States.” *Id.* at 7. Applicant further argues that “[i]f the doctrine is applied to languages as rare as Lithuanian, then almost any non-English term will be translated, regardless of the reality of consumer perception,” and that “[t]his is inconsistent with the purpose and established caselaw governing the doctrine of foreign equivalents.” *Id.* at 8.

Applicant also argues that the Examining Attorney “has provided sparse evidence for concluding that English-speaking consumers will immediately recognize ARBATA as descriptive of tea,” *id.* at 3, because the websites made of record by the Examining Attorney “primarily point to familiarity with the term in Lithuania (and its neighbor Estonia) and other European countries.” *Id.* at 4. Applicant concludes that “American consumers lack sufficient exposure to the term ARBATA to recognize it immediately as a reference to tea” and the “consistent message of the examining attorney’s evidence is that ARBATA means tea only to Lithuanian speakers.” *Id.* at 5.

In its reply brief, Applicant summarizes its arguments against the Examining Attorney’s two theories of descriptiveness as follows:

The Examining Attorney’s Appeal Brief restates the evidence relied upon during prosecution. However, that evidence largely originates outside the United States, and the examining attorney never connects it to U.S. purchasers. Likewise, the examining attorney relies on the translation of ARBATA from Lithuanian but does not provide a basis for applying the doctrine of foreign equivalents, given the low number of Lithuanian speakers in the United States. As a result, the record remains inadequate to conclude that ARBATA is a commonly

understood descriptive term for tea in English or that ordinary American purchasers would recognize and translate the Lithuanian word ARBATA.

7 TTABVUE 2.

**A. Does the Doctrine of Foreign Equivalents Apply to Lithuanian?**

We begin with the issue of the applicability of the doctrine of foreign equivalents to the Lithuanian language. “Under the doctrine of foreign equivalents, foreign words from common, modern languages are translated into English to determine . . . descriptiveness. . . . When it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005). “The doctrine of foreign equivalents ‘is not an absolute rule and should be viewed merely as a guideline’ that applies when it is likely that ‘the ordinary American purchaser would ‘stop and translate [the mark] into its English equivalent.’” *Id.* (internal quotation omitted). “Such ‘ordinary American purchaser’ in a case involving a foreign language mark includes purchasers knowledgeable in English as well as the pertinent foreign language[s].” *In re Taverna Izakaya LLC*, 2021 USPQ2d 1134, at \*2-3 (TTAB 2021).

Lithuanian is clearly a “modern” language for the purpose of application of the doctrine of foreign equivalents because unlike a “dead” language such as Latin, Lithuanian is currently spoken in Lithuania and elsewhere.<sup>23</sup> Whether it is also a “common” language in the United States for that purpose is another matter.

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<sup>23</sup> “The Board may take judicial notice of official United States government publications.” *M/S R.M. Dharwal (HUF) 100% v. Zarda King Ltd.*, 2019 USPQ2d 149090, at \*1 n.7 (TTAB

The Trademark Manual of Examining Procedure (“TMEP”) (Nov. 2023) instructs examining attorneys in descriptiveness cases that

[t]he foreign equivalent of a merely descriptive English word is no more registrable than the English word itself and that “[a] word taken from a well-known foreign modern language, which is itself descriptive of a product will be so considered when it is attempted to be registered as a trademark in the United States for the same product.”

TMEP § 1209.03(g) (quoting *In re N. Paper Mills*, 64 F.2d 998, 17 USPQ 492, 493 (CCPA 1933)).<sup>24</sup> TMEP Section 1209.03(g) further instructs examining attorneys that they will generally apply the doctrine of foreign equivalents “when the relevant English translation is literal and direct, the term comes from a common, modern language,<sup>25</sup> and there is no contradictory evidence of another relevant meaning,” *id.* (citation omitted), and that “[w]hile foreign words are generally translated into English for purposes of determining descriptiveness, foreign words from dead or obscure languages may be so unfamiliar to the American buying public that they should not be translated into English for descriptiveness purposes.” *Id.*

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2019). We take judicial notice of a webpage from the World Factbook of the Central Intelligence Agency, which states that Lithuanian is the official language of Lithuania, a Baltic country with an estimated 2023 population of almost 2,700,000 people ([cia.gov/the-world-factbook/countries/Lithuania/](https://cia.gov/the-world-factbook/countries/Lithuania/), last accessed on May 1, 2024).

<sup>24</sup> The TMEP does not have the force of law, but “it sets forth the guidelines and procedures followed by examining attorneys at the USPTO.” *In re Wood*, 2023 USPQ2d 975, at \*2 n.14 (TTAB 2023) (quoting *In re Ala. Tourism Dep’t*, 2020 USPQ2d 10485, at \*3 (TTAB 2020) (quoting *In re Int’l Flavors & Fragrances, Inc.*, 183 F.3d 1361, 51 USPQ2d 1513, 1516 (Fed. Cir. 1999))).

<sup>25</sup> Our dissenting colleague rightly points out that the word “common” in TMEP Section 1209.03(g) and in the case law is a misnomer because “[w]ith the exception of Spanish, all other foreign languages in the United States are only spoken or understood by a miniscule percentage of people.” *Infra* at 34. But the applicable cases use that term and we will do as well in determining whether the doctrine of foreign equivalents applies to Lithuanian.



TMEP Section 1209.03(g) cross-references TMEP Sections 1207.01(b)(vi)-(b)(vi)(C) regarding the doctrine of foreign equivalents in the context of likelihood of confusion refusals to register under Section 2(d) of the Trademark Act. Section 1207.01(b)(vi)(B) of the TMEP specifically instructs examining attorneys that they

should provide evidence to show that the foreign language is a common, modern language. The type of evidence will vary depending on the particular facts of the case **but, if available, the examining attorney should provide evidence of the percentage or number of United States consumers who speak the language in question.** For example:

Census evidence showing that, after English, Spanish is the most commonly spoken language in the United States, and that over 12% of the United States population speaks Spanish, supports established case law showing the Board has routinely applied the doctrine of foreign equivalents to Spanish-language marks. *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at \*7 (TTAB 2019); *see, e.g., In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127 (TTAB 2015); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1648 (TTAB 2008).

Census evidence provided by applicant, showing that only 0.6% of the American population speak French “very well” or “well,” was used by the Board against the applicant to find that French is a commonly spoken language and that, of the foreign languages with the greatest number of speakers in the United States, French was second only to Spanish. [*In re Thomas*, 79 USPQ2d [1021,] 1024 [(TTAB 2006)].

Evidence showing that 706,000 Russian-speakers live in the United States was persuasive evidence to establish that a “significant portion of consumers” would understand the English meaning of the Russian mark for Russian vodka. *In re Joint Stock Co. “Baik,”* 80 USPQ2d 1305, 1310 (TTAB 2006).

TMEP § 1207.01(b)(vi)(B) (emphasis added).

TMEP Section 1207.01(b)(vi)(B) further instructs examining attorneys that

[i]f such evidence is unavailable or unpersuasive, the examining attorney may instead provide other evidence that the language in question is a common, modern language by establishing, for example, that the foreign country where the language is spoken is a prominent trading partner of the United States or that the foreign language is spoken by a sizeable world population. Such evidence may be obtained from the USPTO's Translations Branch, as well as the Internet, LexisNexis®, and any other relevant electronic or print resources.

TMEP Section 1207.01(b)(vi)(B).

“[E]vidence of the percentage or number of United States consumers who speak the language in question,” *id.*, was available in this case, but it was Applicant, not the Examining Attorney, who provided it. Data from an October 2015 U.S. Census Bureau table shows that between 2009-2013, fewer than 40,000 persons in the United States spoke Lithuanian at home.<sup>26</sup>

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<sup>26</sup> August 3, 2023 Request for Reconsideration at TSDR 4-12. We may take judicial notice of U.S. Census Bureau data to determine the prevalence of the use of a foreign language in the United States, *Ricardo Media*, 2019 USPQ2d 311355, at \*7 n.9, and “regularly have done so.” *Malhotra*, 128 USPQ2d at 1103 n.5 (collecting cases). Based on our review of the website at census.gov (last accessed on May 2, 2024), the data provided by Applicant regarding the number of people who speak Lithuanian at home in the United States appears to be the most recent data available. A page on the census.gov website captioned “Language Use in the United States: 2019” provides a link to a Census Bureau publication with the same name issued in August 2022 that lists the 29 languages that were most commonly spoken at home in the United States as of 2019, ranging from about 170,000 speakers (Navajo) to more than 41,000,000 speakers (Spanish). Lithuanian is not included on that list and is not mentioned elsewhere in the publication. The publication also discusses the use of foreign languages in the 50 most populous metropolitan areas in the United States as of 2019, including Chicago, Illinois, which the webpage from ameredia.com made of record by the Examining Attorney and discussed immediately below states had the “second largest population of Lithuanians in the world.” June 16, 2023 Final Office Action at TSDR 11. Lithuanian is not listed among the five non-English languages that were most commonly spoken in the Chicago metropolitan area.

The Examining Attorney addresses this evidence only in passing, 6 TTABVUE 3, and relies instead on a webpage of a private marketing and advertising agency, captioned “Lithuanian American Demographics,” which states that the “Lithuanian American Population” in the United States is 659,992 or 0.2 percent of the total U.S. population, and that “[t]he second largest population of Lithuanians in the world is in Chicago, Illinois.”<sup>27</sup> The webpage does not explain how these figures were derived or how persons were identified as “Lithuanian American.” The Examining Attorney speculates that they “could be fluent speaker [sic] of Lithuanian,” *id.*, but offers no proof that they are. The mere fact that people identify themselves as having a particular ethnic heritage obviously does not establish that they speak any associated language. Indeed, with the exception of Native Americans, all persons in the United States necessarily have ancestry in one or more foreign countries, but that does not mean that all such persons speak any foreign language.<sup>28</sup> The lack of a logical or demonstrated causal connection between having a particular ethnic heritage and speaking any associated foreign language likely explains why the TMEP instructs examining attorneys to use Census data when available to establish whether a foreign language is commonly spoken in the United States. The Census data provided

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<sup>27</sup> June 16, 2023 Final Office Action at TSDR 11.

<sup>28</sup> Like the Examining Attorney, our dissenting colleague accepts the statements appearing on the webpage of the marketing and advertising agency at face value, and finds that “as of 2019, there were over 650,000 Americans of Lithuanian descent living in the United States in almost half the states, and that Chicago, Illinois had the ‘second largest population of Lithuanians in the world,’” *infra* at 37, and that “the United States is home to the largest diaspora of individuals of Lithuanian descent outside of the country of Lithuania.” *Infra* at 38. For the reasons discussed above, we cannot make such findings on this record.

by Applicant shows that relative to the size of the entire U.S. population, there are in fact very few “fluent speaker[s] of Lithuanian” in the United States. 6 TTABVUE 3.<sup>29</sup>

The Board’s precedents regarding the doctrine of foreign equivalents, including those discussed in TMEP Sections 1207.01(b)(vi)(B) (“Doctrine of Foreign Equivalents” in the context of the similarity of marks) and 1209.03(g) (“Foreign Equivalents” in the context of genericness or descriptiveness), do not set a minimum threshold number of speakers of a foreign language that is required for the language to be considered a “common” one in the United States,<sup>30</sup> but the Census data here shows that there are fewer than 40,000 home speakers of Lithuanian in an overall U.S. population well in excess of 300,000,000 people. Figuratively speaking, the number of Lithuanian speakers in the United States represents a few drops in our

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<sup>29</sup> The number of home speakers of Lithuanian is an imperfect measure of the number of persons in the United States who understand Lithuanian well enough to be able to translate the word “arbata.” This figure undercounts such persons because it does not include those who do not speak Lithuanian at home, but who have learned it through academic study, in business, or in the course of foreign travel. But there is simply no evidence in the record of how many such persons there may be in the United States because there is no evidence regarding the extent to which Lithuanian is taught in U.S. schools or colleges, is used in public gatherings or on social media, or has appeared in popular culture. On this record, the Census figure is the only evidence probative of the extent to which Lithuanian is spoken in the United States.

<sup>30</sup> We have not located a precedential decision in which the Board has found a modern language to be sufficiently uncommon to preclude application of the doctrine of foreign equivalents. Applicant cites a non-precedential decision, *In re Dunville Peat & Herbal Prods. Ltd.*, 2014 WL 1390503 (TTAB Mar. 24, 2014), 4 TTABVUE 7, in which the Board reversed a refusal to register the proposed mark ÓGRA for hygienic and beauty care services on the ground of mere descriptiveness because “ógra” means “youth/young people” in Irish Gaelic. The Board found that the examining attorney’s evidence, which did not include Census data, fell “short of establishing that any number of ordinary American purchasers is knowledgeable in the Irish language, that is, the number of such purchasers who would stop and translate the Irish word into its English equivalent.” *Dunville Peat & Herbal Prods.*, 2014 WL 1390503, at \*4.

nation's linguistic ocean.<sup>31</sup> The number of Lithuanian speakers in the U.S. population is at least one order of magnitude smaller than the percentages of speakers of Spanish, French, and Russian in the United States in the cases discussed in TMEP Section 1207.01(b)(vi)(B), and it is many times smaller than the number of speakers of modern languages found to be "common" in other cases. *See Ricardo Media*, 2019 USPQ2d 311355, at \*7 (Spanish is spoken by over 12% of the United States population); *Thomas*, 79 USPQ2d at 1024 (as of 2006, more than 1,500,000 people out of the then-U.S. population of about 230,000,000 people spoke French very well); *Joint Stock Co. "Baik"*, 80 USPQ2d at 1309 (as of 2006, there were about 706,000 Russian speakers in the United States); *see also Malhotra*, 128 USPQ2d at 1103 (finding Greek to be a common language in the United States based on Census data that as of 2015, 304,932 people in the United States spoke Greek at home); *In re Tokutake Indus. Co.*, 87 USPQ2d 1697, 1699 (TTAB 2008) (finding Japanese to be a modern language spoken by "hundreds of thousands of people in the United States" based on Census data available in 2008).<sup>32</sup>

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<sup>31</sup> Our dissenting colleague argues that we have departed "from established case law to find that the doctrine only applies to a modern languages well-known to the entire U.S. public; in other words, the majority focuses on consumer perception of all U.S. consumers." *Infra* at 31. That is not so. We are simply trying to determine the number of speakers of Lithuanian in the United States to determine whether Lithuanian is a "common" language for purposes of the application of the doctrine of foreign equivalents. We readily acknowledge, as our dissenting colleague points out, that almost all foreign languages are not well-known, or even known at all, to "all U.S. consumers."

<sup>32</sup> In a 2016 non-precedential decision, *In re Green Dragon Tavern, Inc.*, 2016 WL 552606 (TTAB Jan. 26, 2016), the Board found that Vietnamese was not an uncommon language in the United States because a 2011 Census report showed that Vietnamese was the fourth most common language spoken in the United States after Spanish, Chinese, and Tagalog, with more than 1,400,000 speakers. *Green Dragon Tavern*, 2016 WL 552606, at \*4.

As discussed above, the TMEP instructs examining attorneys that if Census data is unavailable or unpersuasive, they “may instead provide other evidence that the language in question is a common, modern language by establishing, for example, that the foreign country where the language is spoken is a prominent trading partner of the United States or that the foreign language is spoken by a sizeable world population.” TMEP § 1207.01(b)(vi)(B). The Examining Attorney did not provide any such evidence here.

Foreign words from languages that are not commonly spoken in the United States “may be so unfamiliar to the American buying public that they should not be translated into English for descriptiveness purposes.” TMEP § 1209.03(g). Our dissenting colleague reads the applicable precedents as rejecting this principle and instead applying a per se rule that “the only requirements for applying the doctrine of foreign equivalents to a mere descriptiveness or genericness refusal is evidence of translation (i.e. that the mark is a common word in a foreign language) coupled with the applicant’s admission,” *infra* at 33 (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016)), eliminating the need to determine whether the involved foreign language is “so unfamiliar to the American buying public” that the mark “should not be translated into English for descriptiveness purposes.” TMEP § 1209.03(g). We do not read the Federal Circuit, CCPA, and Board cases cited by our dissenting colleague as permitting us to dispense with a threshold inquiry as to whether Lithuanian is a “common” language in the United States simply because this is a descriptiveness case, or as lowering the number of speakers of Lithuanian in the

United States required for us to find that Lithuanian is a “common” language because this is a descriptiveness case.<sup>33</sup>

The Federal Circuit and CCPA cases cited by our dissenting colleague uniformly hold that a foreign language must be a “common” one in the United States for the doctrine of foreign equivalents to apply. *See Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d. 845, 129 USPQ 411, 413 (CCPA 1961) (applying the doctrine of foreign equivalents to Hungarian and citing *N. Paper Mills*, 17 USPQ at 493 (“a word taken from a well-known foreign modern language, which is, itself, descriptive of a product, will be so considered when it is attempted to be registered as a trademark in the United States for the same product.”); *Palm Bay Imps.*, 73 USPQ2d at 1696 (“Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks.”); *Cordua Rests.*, 118 USPQ2d at 1637 (“Under the doctrine of

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<sup>33</sup> Our dissenting colleagues suggests in a few places that a lower number of speakers of a foreign language relative to the U.S. population as a whole may be required for the language to be found to be “common” for purposes of the application of the doctrine of foreign equivalents in genericness or descriptiveness cases. *Infra* at 28-29 (“While a statistical analysis of U.S. Census Bureau data to determine the percentage of Lithuanian language speakers in the United States may be of more importance in determining whether the doctrine applies in the context of a likelihood of confusion refusal, it has never been the key factor in deciding whether to apply the doctrine to descriptiveness or genericness refusals”), 34 (“The key point is that the doctrine applies to mere descriptiveness and genericness refusals for common foreign languages even if the general public is unfamiliar with the language”), 35 (“The logical implication is that the meaning of “common modern language” cannot possibly hinge on a statistical/percentage analysis for descriptive and generic refusals.”). To the extent that our dissenting colleague does not rely on the per se rule discussed above, she offers no limiting principle as to how few speakers of a foreign language in the United States would be too few for the language to be deemed “common” in a genericness or descriptiveness case.

foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks.”) (quoting *Palm Bay Imps.*, 73 USPQ2d at 1696); *In re Spirits Int’l B.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1491 (Fed. Cir. 2009) (“Under the doctrine of foreign equivalents, foreign words from common languages are translated into English . . . . [T]he ‘doctrine of foreign equivalents’ is not an absolute rule, for it does not mean that words from dead or obscure languages are to be literally translated into English for descriptive[ness] purposes.”).<sup>34</sup> These cases do not distinguish between the application of the doctrine of foreign equivalents in likelihood of confusion cases and in genericness or descriptiveness cases.<sup>35</sup>

The Board cases cited by our dissenting colleague similarly either expressly acknowledge the need to determine whether the involved language is a “common” one in the United States, or implicitly assume that the involved language is one. *Malhotra*, 128 USPQ2d at 1102-03 (holding that “[u]nder the doctrine of foreign equivalents, foreign words from common languages are translated into English to

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<sup>34</sup> Our dissenting colleague also cites an unpublished Federal Circuit case, *In re Magnesita Refractories Co.*, 716 Fed. Appx. 978 (Fed. Cir. Nov. 27, 2017). *Infra* at 34-35. In that case, the Federal Circuit held that “[t]he doctrine of foreign equivalents is used to ascertain the genericness or descriptiveness of a foreign-word mark from a common language by translating the mark into English.” *Id.* at 980 (citing *Palm Bay Imps.*, 73 USPQ2d at 1696). The applicant in that case did not dispute the applicability of the doctrine of foreign equivalents to a proposed mark that was a word in Spanish, Portuguese, and Italian.

<sup>35</sup> For example, *Palm Bay Imps.*, a likelihood of confusion case, is cited in *Cordua Rests.*, a genericness case, as setting forth the standards for application of the doctrine of foreign equivalents. *Cordua Rests.*, 118 USPQ2d at 1637.



determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks”) (quoting *Palm Bay Imps.*, 73 USPQ2d at 1696) and finding that Greek “is a common, modern language, not one that is dead or obscure” on the basis of U.S. Census data judicially noticed by the Board and discussed above); *In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1485 (TTAB 2012) (applying the doctrine of foreign equivalents to Japanese, “a common modern language”); *Tokutake*, 87 USPQ2d at 1699 (holding that “[u]nder the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks” (quoting *Palm Bay Imps.*, 73 USPQ2d at 1696) and finding that Japanese is a modern language spoken by “hundreds of thousands of people in the United States” based on Census data available in 2008); *Thomas*, 79 USPQ2d at 1024 (applying the doctrine of foreign equivalents to French in a likelihood of confusion case because “French is a common foreign language spoken by an appreciable segment of the population”); *In re Isabella Fiore, LLC*, 75 USPQ2d 1564, 1569 (TTAB 2005) (applying the doctrine of foreign equivalents to Italian in a Section 2(e)(4) surname case because “it does not require any authority to conclude that Italian is a common, major language in the world and is spoken by many people in the United States”) (quotation omitted); *In re Oriental Daily News, Inc.*, 230 USPQ 637, 638 (TTAB 1986) (applying the doctrine of foreign equivalents to Chinese where the purchasing public “includ[ed] a sizable number of readers familiar with both the Chinese and English languages . . . .”); *In*

*re Sweet Victory, Inc.*, 228 USPQ 959 (TTAB 1986) (applying the doctrine of foreign equivalents to French); *In re Le Sorbet, Inc.*, 228 USPQ 27 (TTAB 1985) (same); *In re Optica Int'l*, 196 USPQ 775 (TTAB 1977) (same) (citing *N. Paper Mills*); *In re Geo. A. Hormel & Co.*, 227 USPQ 813 (TTAB 1985) (applying the doctrine of foreign equivalents to Italian); *In re Jos. Schlitz Brewing Co.*, 223 USPQ 45 (TTAB 1983) (applying the doctrine of foreign equivalents to German and citing, inter alia, *N. Paper Mills*).<sup>36</sup>

The per se rule applied by our dissenting colleague, or a rule lowering the number of United States speakers of a foreign language required for it to be found to be “common” in genericness and descriptiveness cases, may be wise as a matter of policy. But in the absence of a change to the Trademark Act, or a decision from our primary reviewing court doing away with the rule set forth in *Cordua Rests.*, *Palm Bay Imps.*, and the other cases discussed above, namely, that the doctrine of foreign equivalents applies only to foreign languages that are “common” in the United States, we must decide whether Lithuanian is a “common” language before we can apply the doctrine and we must make that determination against the backdrop of the number of speakers of other languages in the cases discussed above. On this record, we find that Lithuanian is not a “common” language in the United States, making it very unlikely

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<sup>36</sup> Our dissenting colleague also cites a non-precedential Board decision, *In re S. Kechri and CO G.P. with the Distinctive Title Doriki Potopoiia*, Serial No. 79310949 (TTAB Aug. 1, 2023). *Infra* at 36 n.56. In that case, the Board cited *Palm Bay Imps.*, 73 USPQ2d at 1696, for the proposition that “foreign words from common modern languages are translated into English to determine similarity of connotation with English word marks.” 8 TTABVUE 4 (Serial No. 79310949).

that the ordinary American consumer of tea “would ‘stop and translate [ARBATA] into its English equivalent.’” *Malhotra*, 128 USPQ2d at 1102 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1696). It is far more likely that such a consumer will simply “take [ARBATA] as it is . . . .” *Palm Bay Imps.*, 73 USPQ2d at 1696. Accordingly, the doctrine of foreign equivalents will not be applied for the purpose of evaluating whether ARBATA is merely descriptive.

**B. Has the Examining Attorney Shown That ARBATA is Merely Descriptive Even If It is Not Translated Into English?**

As discussed above, the Examining Attorney’s fallback position is that the record shows that “the term ARBATA is known in English-speaking circles,” and that “upon a Google or other Internet search the term ARBATA would be found and would be used in reference to tea.” 6 TTABVUE 5.<sup>37</sup> In essence, the Examining Attorney argues that ARBATA has an independent descriptive meaning as a word in English. *See In re Twenty-Two Desserts, LLC*, 2019 USPQ2d 292782, at \*4 (TTAB 2019) (finding that the word “malai,” which means “cream” in Hindi, was generic for ice cream and other frozen desserts based on “evidence showing use of ‘malai’ in English-language sources available to U.S. consumers,” which made it unnecessary to apply the doctrine of foreign equivalents). The Examining Attorney argues that eight websites made of

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<sup>37</sup> The probative value of foreign websites is, in part, a function of the likelihood that “U.S. consumers will encounter foreign websites in the field in question.” *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1781 n.10 (TTAB 2017). But the Examining Attorney does not explain why U.S. consumers of tea would engage in “a Google or other Internet search [of] the term ARBATA” in the course of buying the goods. 6 TTABVUE 5. As discussed below, five of the foreign websites cited by the Examining Attorney are, or are in the nature of, dictionaries, and the Examining Attorney does not explain why U.S. consumers of tea would search for the dictionary definition of the word “arbata” and would do so by searching for these particular non-U.S. websites.

record in the Final Office Action, and five websites made of record in the Denial of Request for Reconsideration,

show that the term ARBATA is known in English-speaking circles. The websites provided are in English and show that upon a Google or other Internet search the term ARBATA would be found and would be used in reference to tea. This demonstrates that the term is not an obscure term only found in Lithuanian references or only used in Lithuania and that the term has a more widely understood meaning. In addition to the fact that there is no other meaning for this term in the record no other meaning for the term ARBATA was found in any conducted search as a result, the term must be held to be descriptive.

6 TTABVUE 5.

In its appeal brief, Applicant provides a table discussing a number of these websites:

Website	Reference to Arbata	Citation to Record
Wiktionary.com	means tea in Kashubian <sup>3</sup> and Lithuanian	May 17, 2023 Office Action, TSDR p. 4
Wordsense.eu	means tea in Kashubian and Lithuanian	June 16, 2023 Final Office Action, TSDR pp. 6-8
new.ycombinator.com	Lithuanians call tea “arbata”	<i>Id.</i> , TSDR p. 9
Spotify® music streaming site	musician name Arbata (translated as tea) – no reference to tea as a beverage	<i>Id.</i> , TSDR p. 10
Tealure.it	no explicit reference to arbata	<i>Id.</i> , TSDR pp. 11-14
Gurmans.eu	no explicit reference to arbata	<i>Id.</i> , TSDR pp. 15-16
Rimi.it	Arbata appears in the URL, but not in the text of the page	<i>Id.</i> , TSDR p. 17
Louder.hk	Arbata appears in the site, but in a logo that may indicate brand usage	<i>Id.</i> , TSDR pp. 18-19
Steepster.com	Arbata is referenced in the name of an Estonian tea brand	<i>Id.</i> , TSDR pp. 20-21
Ariadne.lt:	Lithuanian website references arbata tea	<i>Id.</i> , TSDR pp. 22-24

4 TTABVUE 4. Applicant argues that “[t]his evidence does not establish familiarity with the term ARBATA among ordinary American purchasers” because the “websites primarily point to familiarity with the term in Lithuania (and its neighbor Estonia) and other European countries,” the “domain names and URLs feature European,

Lithuanian, or other non-U.S. country identifiers,” and “[w]here prices are indicated, they are in Euros, with no evidence that goods may be purchased for shipment to the United States.” *Id.*

In its reply brief, Applicant argues that the Examining Attorney “relies on evidence from publications originating outside the United States and/or noting the term’s meaning in Lithuanian,” that this evidence “does not identify any usage of the term in English or among English-speaking consumers,” and that “nothing in the record establishes that American consumers would be familiar with the cited foreign sources.” 7 TTABVUE 3.

“[I]t is settled that ‘[i]nformation originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.’” *Well Living Lab*, 122 USPQ2d at 1781 n.10 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007)). “We evaluate the probative value of foreign information sources on a case-by-case basis,” and “[v]arious factors may inform the probative value of a foreign website in any given case, such as whether the website is in English (or has an optional English language version), and whether the nature of the goods or services makes it more or less likely that U.S. consumers will encounter foreign websites in the field in question.” *Id.*

Five of the 13 websites cited by the Examining Attorney either translate “arbata” from Lithuanian into English,<sup>38</sup> or discuss such a translation.<sup>39</sup> These websites are, or are the functional equivalents of, dictionaries, and there is no evidence that U.S. consumers of tea would investigate the meaning of the word in these dictionaries.

Four of the websites cited by the Examining Attorney have the “.lt” country code TLD for Lithuania,<sup>40</sup> and two others appear to be those of Lithuanian companies.<sup>41</sup> Three of them have text primarily in Lithuanian,<sup>42</sup> while two others have text primarily in English,<sup>43</sup> and one uses a combination of the two languages.

With respect to the websites that are primarily in Lithuanian, a page from the rimi.lt website offers aroma tea for purchase online in Euros, but as far as we can tell, there is no use of the word ARBATA in the text of the webpage;<sup>44</sup> a page from the ariadne.lt website offers “ŽALIA ARBATA / GREEN TEA” for purchase online in

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<sup>38</sup> June 16, 2023 Final Office Action at TSDR 2 (wordsense.eu); August 27, 2023 Denial of Request for Reconsideration at TSDR 2-5 (deepl.com/translator), 6-8 (dict.com), 9-15 (glsobe.com), and 16-18 (lingvozone.com).

<sup>39</sup> June 16, 2023 Final Office Action at TSDR 3 (news.ycombinator.com).

<sup>40</sup> *Id.* at TSDR 5, 7, 10; August 27, 2023 Denial of Request for Reconsideration at TSDR 19-21.

<sup>41</sup> June 16, 2023 Final Office Action at TSDR 6 (gurmans.eu). This webpage displays the Lithuanian flag above the masthead

<sup>42</sup> *Id.* at TSDR 7, 10; August 27, 2023 Denial of Request for Reconsideration at TSDR 19-21.

<sup>43</sup> June 16, 2023 Final Office Action at TSDR 5.

<sup>44</sup> *Id.* at TSDR 7. The part of the website in English is obscured. The word “arbata” appears only in the full URL “rimi.lt/e-parduotuve/en/products/groceries/tea/fruit-tea/vasine-arbata-aroma-tea-orange-ginger-40-g/p/1008174.” *Id.*

Euros;<sup>45</sup> and a page from the zodynas.lt website appears to translate the word “arbata” into English as “tea,” but does not appear to offer tea for sale.<sup>46</sup>

With respect to the websites that are primarily in English, the tealure.lt and gurmans.eu webpages offer various teas for purchase online in Euros, but neither uses the word ARBATA.”<sup>47</sup>

A page from the steepster.com website that appears in a combination of English and Lithuanian displays the phrase “Pu-Her arbata” and offers a numerical rating of “Pu’erh Tea” about a tea brand sold by an Estonian company identified as “Skonis ir kvapas,” and one English-language comment about the tea.<sup>48</sup> It does not appear that tea can be purchased on this page.

A page from the louder.hk website with the “.hk” country code TLD for Hong Kong, cited by the Examining Attorney, is captioned “ARBATA” and displays the logo shown below:



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<sup>45</sup> *Id.* at TSDR 10.

<sup>46</sup> August 27, 2023 Denial of Request for Reconsideration at TSDR 19-21.

<sup>47</sup> June 16, 2023 Final Office Action at TSDR 5-6. In a column on the left-hand side of the page from the tealure.lt website, there are listings under the heading “Atraskite” of the words “Naujausios arbatos” and “Retos arbatos” in what we assume is Lithuanian. *Id.* at TSDR 5.

<sup>48</sup> *Id.* at TSDR 9.

This website appears to be that of a Hong Kong company that offers a variety of teas for online purchase in Hong Kong dollars under links displaying the word “ARBATA.”<sup>49</sup> This website appears to be directed primarily to English-speaking residents of Hong Kong, a colony and territory of the United Kingdom for more than a century before it became a Special Administrative Region of the People’s Republic of China in 1997, and a city in which English is still widely used.<sup>50</sup> The use of “ARBATA” on this website appears to be trademark use, not generic or descriptive use of the word.

We find that it is very unlikely that U.S. consumers of tea will encounter these websites of Lithuanian and Hong Kong companies. Although they use English, the five websites that actually sell teas price the goods in Euros or Hong Kong dollars, not U.S. dollars, suggesting that the websites are directed primarily to English-speaking consumers in Europe and Hong Kong.

Finally, we display below the pertinent portion of the webpage from the spotify.com website cited by the Examining Attorney:<sup>51</sup>

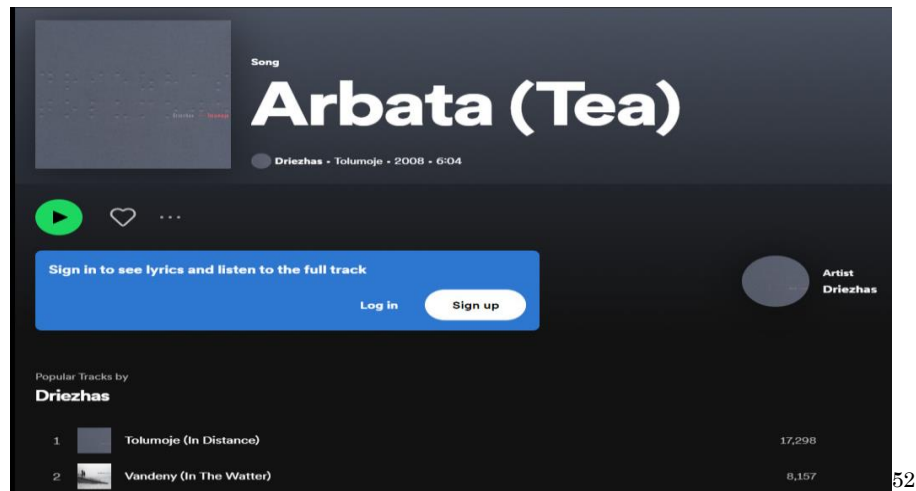
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<sup>49</sup> *Id.* at TSDR 8.

<sup>50</sup> We take judicial notice of a U.S. government webpage entitled “U.S. Relations With Hong Kong” ([state.gov/u-s-relations-with-hong-kong/](https://state.gov/u-s-relations-with-hong-kong/), last accessed on May 1, 2024).

<sup>51</sup> The spotify.com website provides “music streaming services, which allow users to locate and stream music (or other content) from a large database of songs, albums (and other content)” using mobile and desktop applications from a variety of devices. *Spotify AB v. U.S. Software Inc.*, 2022 USPQ2d 37, at \*3 (TTAB 2022).





This page refers to a song called “Arbata (Tea)” by a group or artist named Driezhas. We find it very unlikely that United States consumers of tea would ever search for or encounter this page, which has nothing to do with the sale of tea.

On this record, the Examining Attorney has not shown why U.S. consumers of tea, a staple beverage in the United States, are likely to search for and be exposed to websites of tea companies located in Lithuania and Hong Kong. *Cf. In re Larian, LLC*, 2022 USPQ2d 290, at \*12 (TTAB 2022) (where “the evidence of record establishe[d] the international nature of the fashion industry,” foreign websites were probative of the issue of “whether consumers are aware that the [handbag] design is common and emanates from more than one source”); *Well Living Lab*, 122 USPQ2d at 1781 n.10 (foreign website evidence found to be relevant because “[p]otential consumers of Applicant’s scientific research services and product testing services are likely to encounter the foreign websites as part of a search for companies that offer services related to the research, testing and development of products that are designed to

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<sup>52</sup> June 16, 2023 Final Office Action at TSDR 4.

improve one's health and well-being, particularly research that can be applied to indoor environments such as a workplace."); *In re IBM Corp.*, 81 USPQ2d 1677, 1683 n.7 (TTAB 2006) ("in this case involving computer technology, it is reasonable to consider a relevant article regarding computer hardware from an Internet web site, in English in another country"); *In re Remacle*, 66 USPQ2d 1222, 1224 n.5 (TTAB 2002) (professionals in certain fields, such as medicine, engineering, computers and telecommunications, are likely to monitor developments in their fields without regard to national boundaries). The Examining Attorney's Internet evidence falls short of showing that "arbata" "has an independent meaning in English" that makes it descriptive of tea if it is not translated into English. *Cf. Twenty-Two Desserts*, 2019 USPQ2d 292782, at \*3 (finding that "malai" had a descriptive meaning in English based on multiple English-language articles, recipes, food blogs, and other Internet materials).

### **III. Conclusion**

"It is the Examining Attorney's burden to show, prima facie, that a mark is merely descriptive of an applicant's goods or services." *Zuma Array*, 2022 USPQ2d 736, at \*3 (quotation marks and quotation omitted). Because the doctrine of foreign equivalents does not apply to Applicant's proposed mark and there is no showing that ARBATA has an independent descriptive meaning in English, the Examining Attorney has failed to carry that burden.

On this record, we have no doubt that ARBATA does not have an independent descriptive meaning in English. To the extent that we have doubt regarding the

inapplicability of the doctrine of foreign equivalents to Lithuanian, we must “resolve[] doubts as to the mere descriptiveness of a mark in favor of the applicant,” *id.* (internal quotation omitted), and allow the application to be published for opposition. A third party with a commercial interest in preventing Applicant from obtaining the exclusive right to use ARBATA for tea in the United States, such as the competitive sellers of tea to the Lithuanian community in the United States referenced by our dissenting colleague, *infra* at 37, would have the opportunity in any such opposition to prove, through additional evidence, that the doctrine of foreign equivalents should apply to the issue of the mere descriptiveness of Applicant’s proposed mark.<sup>53</sup>

**Decision:** The refusal to register is reversed.

Opinion by Lykos, Administrative Trademark Judge, dissenting in part:

I respectfully dissent in part.<sup>54</sup> Because I believe the doctrine of foreign equivalents applies in this case, making Applicant’s proposed mark ARBATA for “tea” merely descriptive, if not generic,<sup>55</sup> I would affirm the refusal to register the mark under Trademark Act Section 2(e)(1).

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<sup>53</sup> Our dissenting colleague posits that “Applicant’s products may ultimately be marketed in stores in areas of the United States serving primarily Lithuanian speakers.” *Infra* at 37. Evidence of such marketing to Lithuanian speakers might support a claim in an inter partes proceeding that the doctrine of foreign equivalents should apply to Applicant’s proposed mark. But at this stage in the life of the involved application there is no specimen of use, and for the reasons discussed above, the record made by the Examining Attorney is insufficient to show that the doctrine applies to Lithuanian.

<sup>54</sup> I agree with the majority’s decision that the Examining Attorney has failed to show that ARBATA is merely descriptive of “tea” if it is not translated into English.

<sup>55</sup> The Examining Attorney advised Applicant in the first Office Action dated May 17, 2023 that Applicant’s mark appears generic for the identified goods, meaning that it is not entitled to registration on either the Principal or Supplemental Register. Because the application was

The majority relies primarily on U.S. Census Bureau data and balances the percentage of speakers in the United States that speak Lithuanian at home against: (1) the total population in the United States, and (2) speakers of other foreign languages to find that Lithuanian is not a common foreign language because the “ordinary American consumer of tea” would not “stop and translate [ARBATA] into its English equivalent” in the United States. Placing the sole emphasis on this statistical analysis represents a departure from our precedent governing the application of the doctrine of foreign equivalents in the context of mere descriptiveness and genericness refusals. *See, e.g., In re Taverna Izakaya LLC*, 2021 USPQ2d 1134, at \*2-3 (TTAB 2021) (“Such ‘ordinary American purchaser’ in a case involving a foreign language mark includes purchasers knowledgeable in English as well as the pertinent foreign language[s]”); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (the “ordinary American purchaser” refers to the ordinary American purchaser who is knowledgeable in the foreign language). The majority relies heavily on TMEP Section 1207.01(b)(vi)(B) and case law (both precedential and non-precedential) which discuss the doctrine of foreign equivalents as applied to likelihood of confusion refusals under Section 2(d) of the Trademark Act. This is not the refusal before us. While a statistical analysis of U.S. Census Bureau data to determine the percentage of Lithuanian language speakers in the United States may be of more importance in determining whether the doctrine applies in the context of a likelihood

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filed under Trademark Section 1(b) and Applicant has yet to file an Amendment to Allege Use, a genericness refusal would have been premature. *See* TMEP § 1209.01(c).

of confusion refusal, it has never been the key factor in deciding whether to apply the doctrine to descriptiveness or genericness refusals. This is because the underlying policy rationale is different and arguably stronger for applying the doctrine of foreign equivalents in the context of mere descriptive and genericness refusals as compared to likelihood of confusion refusals. Such refusals pertain to the validity of a trademark as opposed to consumer confusion.

The predecessor court to the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Customs and Patent Appeals, recognized the reasoning for this distinction years ago in *Weiss Noodle Co. v. Golden Cracknel & Speciality Co.*, 290 F.2d. 845, 129 USPQ 411 (CCPA 1961). The underlying cancellation proceeding was brought against the mark “Ha-Lush-Ka” registered on the Principal Register under Trademark Act Section 2(f) for “Egg Noodles; and Egg Noodle Products--Namely, Macaroni, Spaghetti, and Egg Noodle Novelties in Different Shapes, All Having the Required Egg Contest.” *Id.* at 412. The record included dictionary definitions for the term, and showed that the petitioner was a competitor of respondent. The Board cancelled the registration, finding that “Ha-Lush-Ka” was “nothing more than a hyphenated, phonetically spelled version of the Hungarian word ‘haluska” which translates to noodles in English and therefore is the “common descriptive name for egg noodles.” *Id.* The Court affirmed the Board’s decision, reasoning that:

On review of the record, we are compelled to regard the subject matter of the registration as the name, in Hungarian, of at least some of the noodle products enumerated in the registration. As such it falls within the statutory prohibition of section 2(e) which proscribes the registration of descriptive words. The name of a thing is the

ultimate in descriptiveness. *In re Cooper*, 45 CCPA 923, 254 F.2d 611, 117 USPQ 396. It is immaterial that the name is in a foreign language. *In re Northern Paper Mills*, 20 CCPA 1109, 64 F.2d 998, 17 USPQ 492.

*Id.* at 413. The Board, in *In re Le Sorbet, Inc.*, 228 USPQ 27 (TTAB 1985), further explained the Court's reasoning for applying the doctrine of foreign equivalents when the evidence shows that an applied-for mark is merely descriptive, or generic, of the identified goods:

The primary rationale for the *Weiss Noodle* rule that generic terms in foreign languages are treated no differently under our law than are their English language equivalents concerns the maintenance of fair competition in the international movement of goods in commerce.

...

**The international trade foundation for the rule is significant from the standpoint of the protection of the United States trading interests in foreign countries.** Since prior to the Lanham Act, the United States, through its Departments of State and Commerce, has protested the registration in foreign countries of terms considered to be generic names in the English language of products sold in the United States and sold or intended to be sold in export trade. The rationale of these protests is that registration of generic terms as trademarks would interfere with the free flow of international trade in products known by that generic term. Such protests continue to be made by these Departments, with the active participation of the United States Trademark Association. *See generally*, J. Lightman, "Protection of Generic Words Against Trademark Registration Abroad," 54 TRADEMARK REP. 80 (Feb., 1964). Obviously, to permit registration here of terms in a foreign language which are generic for products sold in a foreign country would be inconsistent with the rationale supporting these international protests.

*Id.* at 30 (emphasis added). *See also Holland v. C. & A. Imp. Corp.*, 8 F. Supp. 259, 22 USPQ 249, 251 (S.D.N.Y. 1934) (“a word commonly used in other countries to identify a kind of product and there in the public domain as a descriptive or generic name may not be appropriated here as a trademark on that product, even though the person claiming the word was the one who introduced the product here and the word then had no significance to our people generally. ... If others who may bring the same product here later cannot sell it under its real name, fair competition would be greatly impeded.”).

Instead, the majority deviates from established case law to find that the doctrine only applies to a modern language well-known to the entire U.S. public; in other words, the majority focuses on consumer perception of all U.S. consumers. “It is settled law that the foreign equivalent of a merely descriptive English word is no more registrable than the English word itself, **despite the fact that the foreign term may not be commonly known to the general public.**” *In re Sweet Victory, Inc.*, 228 USPQ 959, 961 (TTAB 1986) (citing *In re Optica Int’l*, 196 USPQ 775 (TTAB 1977) and cases cited therein) (emphasis added). *See also In re S. Malhotra & Co.*, 128 USPQ2d 1100, 1102 (TTAB 2018) (same) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005)).

The Board, following the reasoning from *Weiss Noodle*, has consistently applied the doctrine of foreign equivalents to mere descriptiveness or genericness refusals when the relevant English translation is direct and literal and there is no

contradictory evidence establishing another relevant meaning, *In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1485 (TTAB 2012), and “it is likely that the ordinary American purchaser would ‘stop and translate [the word] into its English equivalent.’” *Palm Bay*, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)). The “ordinary American purchaser” includes “all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English.” *In re Spirits Int’l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009). The ‘ordinary American purchaser’ in this context refers to the ordinary American purchaser who is knowledgeable in the foreign language. . . . **[Defining “ordinary American purchaser” as the “average American buyer”] would write the doctrine out of existence.**” *In re Thomas*, 79 USPQ2d at 1024 (emphasis added).

This is the precise guidance set forth by the U.S. Court of Appeals for the Federal Circuit more recently in *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016):

Cordua concedes that the term “churrasco” is a word in Spanish and Portuguese referring to barbecue, and the ‘191 Application itself acknowledges that “[t]he English translation of churrascos in the mark is barbecue.” J.A. 30. “Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation . . . .” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1377 (Fed. Cir. 2005); see also *In re Spirits Int’l, N.V.*, 563 F.3d 1347, 1351 (Fed. Cir. 2009). **Because “churrasco” is a common word in Spanish and Portuguese and because the ‘191 Application itself concedes that “churrascos” means “barbecue,” the**



**PTO would have been justified in translating “churrascos” into “barbecue” and subsequently determining whether the term “barbecue” is generic when applied to restaurant services. Indeed, the examiner aptly remarked that “a foreign equivalent of a generic English word is no more registrable than the English word itself.”**

*Id.* at 1637 (dicta) (emphasis added). In *Cordua*, the Federal Circuit again acknowledged that the only requirements for applying the doctrine of foreign equivalents to a mere descriptiveness or genericness refusal is evidence of translation (i.e. that the mark is a common word in a foreign language) coupled with the applicant’s admission. No statistical analysis balancing the number of Spanish or Portuguese speakers in the United States vis-à-vis speakers of other languages or the U.S. population as a whole was deemed necessary.

Consistent with this guidance, in *In re S. Malhotra & Co.*, the Board more recently applied the doctrine of foreign equivalents to two marks in Greek to affirm a mere descriptiveness refusal. The applicant sought to register on the Principal Register the marks GÁMOS, in standard characters, and ΓΑΜΟΣ for “precious metals and their alloys and goods made of these materials or coated therewith included in this class, namely, jewelry and watches” in International Class 14. The record showed that “[t]he English translation of the word ‘GÁMOS’ in the mark is ‘wedding, matrimony or marriage.’” *In re S. Malhotra & Co.*, 128 USPQ2d at 1100.

[N]ormally no distinction can be made between English terms and their foreign equivalents with respect to registrability. *In re Optica Int’l*, 196 USPQ 775, 777 (TTAB 1977). “Foreign language words, not adopted into the English language, which are descriptive of a product, are so considered in registration **proceedings despite the fact that the words may be meaningless to the public**

**generally.”** *Nestle’s Milk Prods., Inc. v. Baker Importing Co.*, 182 F.2d 193, 86 USPQ 80, 82 (CCPA 1950).

128 USPQ2d at 1102 (quoting *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1270 (TTAB 2016)).

The key point is that the doctrine applies to mere descriptiveness and genericness refusals for common foreign languages even if the general public is unfamiliar with the language. The majority disregards this guidance by making the factual determination that “[t]he percentage of Lithuanian speakers in the U.S. population is at least one order of magnitude smaller than the percentages of speakers of Spanish, French, and Russian in the United States in the cases discussed in TMEP Section 1207.01(b)(vi)(B)” as well as the U.S. population as a whole. Aside from the problem of invoking the TMEP section and case law governing the application of the doctrine to likelihood of confusion refusals instead of mere descriptiveness refusals, relying solely on such an analysis would lead to absurd results. With the exception of Spanish, all other foreign languages in the United States are only spoken or understood by a miniscule percentage of people. Using the percentage analysis as the determining factor would eliminate the doctrine of foreign equivalents for virtually all foreign languages spoken or understood in the United States such as Arabic, Mandarin, Japanese, German, Italian, French, Portuguese and Greek. Yet the Federal Circuit and Board have consistently found such languages to be common modern languages and has applied the doctrine to refuse marks translated into English that are merely descriptive or generic for the identified goods. *See, e.g., In re Magnesita Refractories Co.*, 716 Fed. Appx. 978 (Fed. Cir. 2017) (MAGNESITA,

translated as “magnesia” from Italian and “magnesite” from Spanish and Portuguese held generic for refractory products) (non-precedential); *In re Tokutake Indus. Co.*, 87 USPQ2d 1697 (TTAB 2008) (AYUMI and its Japanese-character equivalent held merely descriptive for footwear where the evidence, including applicant’s own admissions, indicated that the primary meaning of applicant’s mark is “walking”); *In re Oriental Daily News, Inc.*, 230 USPQ 637 (TTAB 1986) (Chinese characters that mean ORIENTAL DAILY NEWS held merely descriptive of newspapers); *In re Geo. A. Hormel & Co.*, 227 USPQ 813 (TTAB 1985) (SAPORITO, an Italian word meaning “tasty,” held merely descriptive because it describes a desirable characteristic of applicant’s dry sausage); *In re Jos. Schlitz Brewing Co.*, 223 USPQ 45 (TTAB 1983) (KUHLBRAU translated as “cool brew” from German held generic for “beer”). These precedents are predicated on evidence regarding the translation of the mark with no other meaning in English. We have the same type of evidence here, with Applicant conceding that “[t]here is no dispute that ARBATA means tea in Lithuanian.” 4 TTABVue 6. The logical implication is that the meaning of “common modern language” cannot possibly hinge on a statistical/percentage analysis for descriptive and generic refusals.

From a linguistics standpoint, TMEP Section 1209.03(g), which governs the application of the doctrine to mere descriptiveness and genericness refusals, counsels against applying the doctrine to foreign words from “obsolete,” “dead” or “obscure” languages. *See also Enrique Bernat F. S.A. v. Guadalajara Inc.*, 210 F.3d 439, 54 USPQ2d 1497, 1499 (5th Cir. 2000) (“courts need not concern themselves with words

from obsolete, dead, or obscure languages because one policy undergirding the doctrine is ‘the assumption that there are (or someday will be) customers in the U.S. who speak that foreign language.’”) (citations omitted); *cf. Gen. Cigar Co. v. G.D.M. Inc.*, 988 F. Supp. 647, 45 USPQ2d 1481 (S.D.N.Y. 1997) (finding applicant had no obligation to disclose that the term COHIBA for cigars means “tobacco” in the language of the Taino Indians in the Dominican Republic, because cigar smokers in the United States would not be aware of such a meaning). In other words, a “common” foreign language is a language that is not obscure, obsolete, or dead. *See In re S. Malhotra*, 128 USPQ2d at 1103 (taking judicial notice of 2015 U.S. Census Bureau data that 304,932 U.S. residents age five and over speak Greek at home to find that “Greek is a common, modern language, not one that is dead or obscure.”) (citing *Spirits Int’l*, 90 USPQ2d at 1491 and TMEP § 1209.03(g) (Oct. 2017)).<sup>56</sup> Yet instead of following the Board’s most recent precedent, the majority has devised its own new standard that the doctrine only applies to modern foreign languages that are well-

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<sup>56</sup> In *In re S. Kechri and CO G.P. with the Distinctive Title Doriki Potopoia*, 2023 BL 280590 (TTAB Aug. 1, 2023) (non-precedential), the Board explicitly rejected the calculating of percentages based U.S. Census Bureau data to determine whether a foreign language is “modern” and neither “obscure” or “dead.” The applicant in that appeal argued that:

Given that the current United States population is approximately 330 million people, Greek speakers in the United States constitute less than one-tenth of one percent (0.092 percent) of the total U.S. population. This is a vanishingly small, nearly imperceptible portion of the overall U.S. population. As such, it is clear mathematical evidence that Greek should not be considered to be a common language in the United States.

In rejecting this argument, the Board explained that “balancing the percentage of speakers in the United States that speak Greek against the total population number of people in the United States, as a percentage, is [not] the end-all be-all in determining whether a language is common and modern.” *Id.* at 5.

known in the United States to the entire U.S. public to determine if a mark is merely descriptive, as opposed to the segment of the population who speaks or understands that particular foreign language.<sup>57</sup>

The majority overlooks that the doctrine of foreign equivalents is designed to account for regional differences within the United States. The United States is a country of immigrants with no national language. Vast differences in immigration patterns and settlement exist from state to state. The record shows that as of 2019, there were over 650,000 Americans of Lithuanian descent living in the United States in almost half the states, and that Chicago, Illinois had the “second largest population of Lithuanians in the world.”<sup>58</sup> Applicant’s products may ultimately be marketed in stores in areas in the United States serving primarily Lithuanian speakers. To permit Applicant to register ARBATA, the Lithuanian word for “tea,” for goods identified as “tea,” would prevent competitors in this niche market from advertising their own products. *See Enrique Bernat*, 54 USPQ2d at 1500 (“No merchant may obtain the exclusive right over a trademark designation if that exclusivity would prevent competitors from designating a product as what it is in the foreign language their

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<sup>57</sup> The factual scenario in *Taverna Izakaya* is not relevant here because the mark at issue in that appeal was comprised of two words in two different foreign languages. “Courts and the Board frequently have found that consumers would not ‘stop and translate’ marks comprised of terms in multiple languages, often finding that the marks combine the different languages for suggestive purposes to create a certain commercial impression.” *Taverna Izakaya*, 2021 USPQ2d 1134, at \*4. By contrast, this appeal involves a single word mark in a single foreign language.

<sup>58</sup> June 16, 2023 Final Office Action at TSDR 25 (printout of entry for “Lithuanian American Demographics from Ameredia [www.ameredia.com](http://www.ameredia.com)) accessed on 6/16/23.

customers know best.”) (quoting *Takayama Co. v. Wine of Japan Imp., Inc.*, 175 F.3d 266, 50 USPQ2d 1626, 1629 (2d Cir. 1999)).

The doctrine of foreign equivalents should not be applied “mechanically.” *In re Isabella Fiore, LLC*, 75 USPQ2d 1564, 1569 (TTAB 2005). In this case, it is undisputed that Applicant’s single word mark ARBATA is the Lithuanian word for “tea;” that the identified goods consist of “tea;” and there is no other meaning in English of the word “arbata.” The record shows that the United States is home to the largest diaspora of individuals of Lithuanian descent outside of the country of Lithuania.<sup>59</sup> Under these circumstances, where the validity of a proposed mark is implicated, the Examining Attorney’s mere descriptiveness refusal should be affirmed.

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<sup>59</sup> June 16, 2023 Final Office Action at TSDR 25 (printout of entry for “Lithuanian American Demographics from Ameredia [www.ameredia.com](http://www.ameredia.com)) accessed on 6/16/23.