

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
February 17, 2011
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Snowizard, Inc.

Serial No. 77471425

Kenneth L. Tolar for Snowizard, Inc.

Janice L. McMorrow, Trademark Examining Attorney, Law Office
115 (John T. Lincoksi, Acting Managing Attorney).

Before Seeherman, Bucher and Zervas, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Snowizard, Inc. seeks registration on the Principal
Register of the term **WHITE CHOCOLATE & CHIPS** (*in standard
character format*) for "food flavorings" in Int. Class 30.¹

The Trademark Examining Attorney refused registration on
the ground that the term is merely descriptive under Section
2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

At the same time as applicant filed this Notice of
Appeal, it also filed with the Trademark Examining Attorney a
Request for Reconsideration of the refusal to register in
which, in the alternative, it amended its application to the

¹ Application Serial No. 77471425 was filed on May 12, 2008,
based upon claims of first use anywhere and first use in commerce
at least as early as May 1, 1986.

Supplemental Register. The Trademark Examining Attorney has stated explicitly that she finds this proposed mark registrable on the Supplemental Register. Hence, based upon our analysis, *infra*, we find this proposed mark to be merely descriptive under Section 2(e)(1) of the Act, and affirm the refusal to register this application on the Principal Register, but a registration will issue in due course on the Supplemental Register.

The Trademark Examining Attorney takes the position that "the designation 'white chocolate & chips' immediately, and without conjecture or speculation, describes two of the most notable characteristics or features of the applicant's goods, namely, the type of flavor of the food flavorings, and the fact that they contain 'chips.' "

In partial support of her refusal, the Trademark Examining Attorney has submitted a dictionary definition of the term "white chocolate" as "cocoa butter combined with milk and a sweetener, often flavored with vanilla."² Applicant does not take issue with the conclusion that the term "white chocolate" alone immediately conveys information about the flavor of the involved goods. On the other hand, applicant argues that its goods do not contain "chips."

² THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Edition, 2000.

Hence, our determination turns on whether the word “chips” describes a characteristic of the goods, and whether the phrase, as a whole, is merely descriptive.

We turn then to applicant’s website, where under the heading of “Literature / Flavor Descriptions,” applicant lists alphabetically all of its food flavoring concentrates. The entry for “White Chocolate & Chips” flavoring identifies the color as “White with Specks” and describes the flavor as “A luscious Swiss Chocolate flavor with little specks.”³

SnoWizard

Flavor Concentrates

Nobody beats the Wiz

The Best Tasting Flavors in the Industry

SHARE

Place your Magical Cursor over a flavor to see the color and description!

FLAVOR DESCRIPTIONS

FLAVOR	COLOR	DESCRIPTION
White Chocolate & Chips™	✓ White with Specks	A luscious Swiss Chocolate flavor with little specks. ♪

³ <http://www.snowizard.com/> and <http://www.snowizard.com/literature/flavordescrip.htm>

Applicant has explained that the specks occur naturally because of the manufacturing process for its vanilla extract, which can leave behind tiny specks of spent vanilla bean seeds. These seeds are no longer whole seeds, but have actually been ground into very small particles.

The question then, as applicant and the Trademark Examining Attorney have framed it, is whether the word "Chips" describes these "specks." In connection therewith, the Trademark Examining Attorney and applicant have submitted several dictionary definitions, of which the following are most relevant:

5. a. A thin, usually fried slice of food, especially a potato chip. Often used in the plural.
b. A very small piece of food or candy. Often used in the plural: *chocolate chips*... .⁴
1. a. a small, slender piece, as of wood, separated by chopping, cutting, or breaking.
2. a very thin slice or small piece of food, candy, etc.: *chocolate chips*.⁵
1. a small piece removed by chopping, cutting, or breaking
5. (US), (Canadian) ,, a very thin slice of potato fried and eaten cold as a snack
6. a small piece or thin slice of food⁶
1. small piece broken or cut off: a small piece that has been broken, chopped, or cut off something hard or brittle
3. piece of thin crisp snack food: a very thin crunchy slice of a starchy food, usually potato or corn, that has been fried until it is crisp
 - *corn chips*⁷

⁴ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Edition (2000).

⁵ www.dictionary.com, Unabridged, Based on the RANDOM HOUSE DICTIONARY (2011).

⁶ www.dictionary.com, Based on the COLLINS ENGLISH DICTIONARY - Complete & Unabridged 10th Edition (2009).

⁷ <http://encarta.msn.com/encnet/features/dictionary/>

- 1 ... a : a small usually thin and flat piece (as of wood or stone) cut, struck, or flaked off
b: a small piece of food: as (1): a small thin slice of food; *especially*: [potato chip](#) (2):
[french fry](#)⁸ (3): a small cone-shaped bit of food often used for baking <chocolate chips>⁹

Referring specifically to the *Merriam-Webster* dictionary entry shown immediately above, applicant takes the position that in the context of foods, the word "chips" can mean only "cone-shaped baking morsels, fries or potato chips." Applicant's brief at 4-7.

The above entries show that there are two recurring usages of the word "chips" as applied to food items in the United States, namely, 'thin fried slices of food, such as potato chips or corn chips' or 'small pieces of food or candy, e.g., chocolate chips.' However, the Trademark Examining Attorney takes the position that these are not the only possible meanings of the word "chips" as applied to foodstuffs. She contends that the word "chips" describes the appearance of "specks, flakes, bits, morsels, fragments [or] smidgens." Trademark Examining Attorney's appeal brief at unnumbered 4.

We agree with the position of the Trademark Examining Attorney. Whether one focuses on the primary dictionary definitions above of 'small pieces cut off of something hard'

⁸ Because this is chiefly a British usage of the term "chips," and we are concerned with the meaning of the term to consumers in the U.S., we have given this particular definition no consideration.

⁹ MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/>

or the somewhat more narrow and later entry of 'small pieces of food,' we find that the word "chips" can be used to describe the specks that are a notable feature of applicant's goods.

Moreover, the record shows descriptive usage of the term "White Chocolate & Chips" by third parties. The Trademark Examining Attorney has submitted at least three examples of such usage for snow cone flavorings by applicant's main competitors in the New Orleans metropolitan area:



Southern Snow ®
2010 (504) 393-8967

FLAVOR CONCENTRATE
(800) 393-8933 2010

— WHITE CHOCOLATE & CHIPS

¹⁰ <http://snow-balls.com/flavors.htm>



In addition, the Trademark Examining Attorney included an excerpt of an article that appeared in the Sunday edition of *The Houston Chronicle* on July 21, 1996 (*emphasis* supplied):

HEADLINE: *In search of vendors, flavors?*

“Here’s a sample of snowball vendors in the Houston area:

“MVP’s New Orleans Snowballs, 11006 Dorrance (Highway 59 at Murphy Road); 530-5544. Open noon-10 p.m., Mondays-Saturdays, 1-9 p.m., Sundays. Seating: two benches under a shade ...

“... in the front window.

“Probably the fluffiest, smoothest snow this side of the Crescent City, made not too juicy but just right.

“Flavors include vanilla malt, cranberry, hazelnut, Andes

chocolate mint, **white chocolate and chips**, cantaloupe, butter cream and creamy coconut. For an extra 30 cents, MVP [Mark Vincent Paul] will add such toppings as cream, condensed milk, Hershey’s chocolate syrup, cherries and Knottsberry [sic] Farm crushed pineapples and strawberry. Mario Monterroza uses a gentle touch with the snow machine and creates a sublime coffee-flavored snoball topped with sweetened condensed milk. Prices start at \$1.⁰⁰ for small and go up to \$3.⁸⁵ for 44-ounce size.”

¹¹ <http://sno-joe.com/flavors.html>

¹² <http://www.tyssno.com/flavors.htm>

These third-party uses support our view that the term "White Chocolate & Chips" is merely descriptive. Applicant dismisses these uses by its competitors by asserting that they are "unlawful use," although it is not clear what applicant has done to counteract this usage. In any event, the fact that third parties consistently use this term to describe a flavoring is an indication that manufacturers and retail merchants as well as the ultimate snow cone consumers in New Orleans and Houston view "White Chocolate & Chips" as a descriptive term for this particular flavoring. In determining descriptiveness, tribunals often look to whether competitors actually use the identical term and/or need to use the disputed term to compete within an established product line. See 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, §§ 11.68 and 11.69, 4th Edition (2010).

Thus, we find that "White Chocolate" is highly descriptive of the flavor of the goods, and that "Chips" is merely descriptive of the specks, and when joined together with an ampersand, the resulting term, "White Chocolate & Chips," is merely descriptive.

Nonetheless, applicant argues that, even if the involved term otherwise appears to have a descriptive meaning, it is registrable on the Principal Register because it conveys a double entendre. In this regard, applicant likens its

alleged mark to the well-known example of **SUGAR & SPICE** in arguing that its applied-for term should be found to be non-descriptive. Indeed, a mark is registrable if it has, in addition to a descriptive meaning, a unique, incongruous, or otherwise non-descriptive meaning in relation to the goods. *See The Institut National des Appellations D'Origine v. Vintners International Co. Inc.*, 958 F.2d 1574, 22 USPQ2d 1190 (Fed. Cir. 1992) [affirming Board's position that **CHABLIS WITH A TWIST** projects a double meaning, e.g., the unusual approach of garnishing wine with a citrus flavoring]; *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 384 (CCPA 1968) [the term **SUGAR & SPICE** held not to be merely descriptive of bakery products]¹³ and *In re National Tea Co.*, 144 USPQ 286 (TTAB 1965) [**NO BONES ABOUT IT** for fresh pre-cooked ham]. In addition to the straightforward and merely descriptive meaning, the term in each of these cases creates a second, non-descriptive meaning that members of the public would readily understand, thereby rendering the term registrable on the Principal Register as an inherently distinctive mark.

¹³ In this oft-cited decision of the predecessor to our principal reviewing court, the Court found this matter clearly functioned as a trademark because "sugar and spice" is a well-known phrase taken from a nursery rhyme. The composite mark is inherently distinctive as applied to bakery products - even ones containing these two ingredients - precisely because this combination from the nursery rhyme is familiar to anyone seeing or hearing this mark.

However, applicant has not explained what non-descriptive meaning consumers would ascribe to its mark, and a non-descriptive meaning is certainly not readily apparent to us. Therefore, we find that the term "White Chocolate & Chips" does not consist of a clever or incongruous combination and conveys no double entendre.

Rather, we find that the Trademark Examining Attorney has demonstrated that the term, "White Chocolate & Chips," when viewed as a whole, immediately conveys readily understood information about the primary flavor of the goods, as well the presence of tiny specks in the goods. Hence, we conclude that applicant's applied-for mark is merely descriptive of its identified "food flavorings."

Genericness

The question of whether this term is capable of functioning as a source identifier is not before us. The Trademark Examining Attorney has already determined that this term is registrable on the Supplemental Register. Hence, this mark will not be published for opposition, but will proceed to issuance on the Supplemental Register.

Decision: In view of the above findings, the refusal to register on the Principal Register is hereby affirmed. However, the registration will issue on the Supplemental Register in due course.