

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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July 25, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Tri-Coastal Design Group, Inc.

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Serial No. 85302240

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Tedd S. Levine of Law Offices of Tedd S. Levine LLC for Tri-Coastal Design Group, Inc.

James W. Stein, Trademark Examining Attorney, Law Office 107 (J. Leslie Bishop, Managing Attorney).

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Before Quinn, Greenbaum and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Tri-Coastal Design Group, Inc. has applied to register on the Principal Register the mark APPLE BROWN SUGAR in standard character form for the following goods:

Bath gel; Bath salts; Bath soaps; Body cream; Body lotion; Body oil; Body scrub; Body sprays; Bubble bath; Dusting powder; Foot scrubs; Lip balm; Lip gloss; Liquid soap;

Nail polish; Reeds and scented oils sold as a unit for use
in room scent diffusers, in International Class 3.¹

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that applicant's mark merely describes the goods. When the refusal was made final, applicant filed a request for reconsideration. Upon reconsideration the examining attorney maintained his refusal. This appeal ensued. Applicant and the examining attorney have filed briefs.

"A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). The mark need not describe all of the recited goods and services in an application in order to be deemed merely descriptive. Rather, a descriptiveness refusal is proper if the mark is descriptive of any of the goods or services for which registration is sought. *In re Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217 (Fed. Cir. 2012); *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). A mark

¹ Application Serial No. 85302240 filed on April 22, 2011 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). Applicant has disclaimed the exclusive right to use APPLE and BROWN apart from the mark as shown.

that, when applied to the goods or services at issue, requires imagination, thought, or perception to reach a conclusion as to the nature of those goods or services is not merely descriptive, but suggestive, and is registrable. *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004); *In re George Weston Ltd.*, 228 USPQ 57 (TTAB 1985). The determination that a mark is merely descriptive is a finding of fact and must be based upon substantial evidence. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 964, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007).

Applicant admits in its brief that “APPLE is clearly a characteristic of the goods in that the associated bath & body products possess the scent and color of APPLE.”² However, applicant argues that “when combined with BROWN SUGAR, the term as a whole is incompatible with the goods. ... [T]he goods sold under this heading use ‘BROWN SUGAR’ in a purely fanciful manner to give a consumer a feeling of sweetness or freshness, which requires unrestrained imagination.”³ The examining attorney maintains that the proposed mark is merely descriptive of a scent or flavor of applicant’s goods.

Of particular interest in the present appeal is the Federal Circuit’s opinion in *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). In that case, the applicant sought to register APPLE PIE as a trademark for “potpourri.” The Board affirmed the refusal to register under Section 2(e)(1) on the ground that the applied-for mark was merely descriptive of the scent of the potpourri, that is, the potpourri

² Applicant’s brief at 3.

³ *Id.*

was scented to smell like apple pie. Applicant's catalog showed this scent among others for its potpourri, including "Gingerbread," "Spice Cake," "Cherry Cobbler," "Blueberry Muffin," "Peach Cobbler," "Strawberry Shortcake," and "Cinnamon Roll." In affirming the Board's decision, the Federal Circuit relied on a decision of its predecessor court finding that the term CRÈME DE MENTHE was merely descriptive of a flavor for candy. *In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156 (CCPA 1973). The Federal Circuit also pointed out that a term may be descriptive even though it merely describes only one of the qualities or properties of the goods, and that such qualities or properties include "color, odor, function, dimensions, or ingredients." *In re Gyulay*, 3 USPQ2d at 1010, citing *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 217 USPQ 988, 994 (5th Cir. 1983). The Federal Circuit concluded that the term APPLE PIE described the scent of the goods, especially because potpourri is sold for and by its scent.

The examining attorney introduced evidence, in the form of excerpts of third-party websites, to show that certain bath and body products are promoted as smelling like particular fruits, flowers and foods, such as coconut, jasmine, mint chocolate and even root beer. Further, the evidence shows that products such as lip gloss and lip balm commonly are flavored, with evidence of flavors such as apple, cherry cola, candy, coconut, and even bacon.

The record also contains dictionary definitions of APPLE and BROWN SUGAR.⁴ Also of record is evidence to show that the scent and/or flavor of apple

⁴ An "apple" is "a hard round fruit that is white inside and has a smooth red, yellow, or green skin...." <macmillandictionary.com>, submitted with Office action of July 17, 2011.

and brown sugar are known in the marketplace in the field of bath and body products. Examples follow:

LUSH brand porridge soap, with customer comments stating, “To me it smells like brown sugar with a hint of floral”; “It smells like brown sugar and honey and delicious”; “It smells syrupy sweet, like brown sugar or something”; “It smells like sweet brown sugar with a hint of orange.”⁵

Anti-Bacterial CLASSICS Gentle Foaming Soap – Brown Sugar & Fig, with customer comments stating, “The brown sugar and fig is by far my best fragrance”; and “It smells like brown sugar, musk, and a nice hint of greenery.”⁶

CARESS Evenly Gorgeous soap, with comment stating, “I have been searching for a soap that smells like brown sugar... and I finally got it. It literally has brown sugar in it.”⁷

Clear Hills Honey Natural Beeswax Lip Balm in Juicy Apple flavor: “Tastes like a Red Delicious; sweet and juicy, with just a hint of tartness.”⁸

Khol Exclusive Apple Pear Bath Salts: “Bright, juicy apple-pear scents add a delicious dose of fragrance to your steamy bath time soak.”⁹

To state the obvious, and as confirmed by the evidence of record, body and bath products and fragrance oils are often scented and, in the case of lip products,

“Brown sugar” is “sugar that is brown and has not been refined (=made pure) or has been only partly refined.” *Id.*

⁵ Item advertised on <makeupalley.com>, Office action of September 19, 2012, pp. 81-84.

⁶ Item advertised on <reviews.bathandbodyworks.com>, Office action of September 19, 2012, pp. 86-88.

⁷ Item discussed on blog at <brown-sugar-spice.blogspot.com>, Office action of September 19, 2012, pp. 86-88

⁸ Item advertised on <clearhillshoney.com>, Office action of September 19, 2012, p. 22.

⁹ Item advertised on <sears.com>, Office action of September 19, 2012, p. 58.

flavored. These scents and flavors include apple and brown sugar. Due to this industry practice, consumers are accustomed to making their purchasing decision based on their desire for a particular scent or flavor. The third-party references described above are an indication that manufacturers and retailers, as well as ultimate consumers, will view such terms as merely descriptive of the scent or flavor of a product. We find that to be the case with respect to the applied-for mark for applicant's body and bath products, as well as its scented oils; that is, consumers will view the proposed mark as nothing more than the name of the scent or flavor of the products, namely, the scent or flavor of apple combined with brown sugar.

The combination of the terms APPLE and BROWN SUGAR does not evoke a new and unique commercial impression for applicant's applied-for mark. Rather, these terms, when combined and interpreted according to their ordinary meanings, result in an expression that merely describes a feature of applicant's goods: *i.e.*, the flavor of apple sweetened with sugar or the scent and flavor of apple combined with brown sugar. Applicant argues that the designation BROWN SUGAR is merely *suggestive* of "sweetness or freshness."¹⁰ No imagination is required to derive the concept of "sweetness" from the words BROWN SUGAR. With regard to "freshness," there is no evidence of record that brown sugar has a refreshing quality or that customers would perceive a suggestion of freshness in the words BROWN SUGAR. Applicant argues that "BROWN SUGAR in this context does not represent

¹⁰ Applicant's brief at 3.

a scent, color, or flavor.”¹¹ However, it is difficult to accept the proposal that BROWN SUGAR does not at least indicate a “flavor,” as the primary attribute of any kind of sugar is its sweet flavor. Aside from applicant’s argument that BROWN SUGAR suggests “freshness,” which we find unconvincing, applicant does not explain what other meanings the words BROWN SUGAR could have to typical consumers. Applicant also argues that “since the goods are not edible, any reference to taste is irrelevant.”¹² However, applicant’s identified goods include lip balm and lip gloss, goods that are commonly flavored, as the evidence shows. To the extent that applicant’s goods are not typically tasted when used (for example, bath soaps and bath salts), the evidence shows that customers for such goods do perceive brown sugar as a recognizable scent.

For the reasons stated, we find that the proposed mark APPLE BROWN SUGAR, when considered as a whole, is merely descriptive of applicant’s goods.

Decision: The refusal to register is affirmed.

¹¹ *Id.* at 4.

¹² *Id.* at 6.