

This Opinion Is Not a  
Precedent of the TTAB

Mailed: September 28, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Christopher C. Hinton*  
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Serial No. 85663019  
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Luke Brean of BreanLaw, LLC,  
for Christopher C. Hinton

Robert J. Struck, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Bucher, Masiello, and Hightower,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Christopher C. Hinton (“Applicant”) seeks registration on the Principal Register of the mark **TeaHC** (in standard characters) for “tea-based beverages” in International Class 30.<sup>1</sup> The Trademark Examining Attorney has refused registration of Applicant’s mark under Trademark Act Section 2(e)(1), 15 U.S.C.

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<sup>1</sup> Application Serial No. 85664019 was filed on June 27, 2012, based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. On August 26, 2012, Applicant filed an amendment to allege use, claiming first use anywhere since June 27, 2012, and use in commerce since August 13, 2012. The amendment to allege use was accepted on October 18, 2012.

§ 1052(e)(1), on the ground that the mark is deceptively misdescriptive of a feature of the identified goods.<sup>2</sup>

When the refusal was made final, Applicant appealed to this Board. We affirm the refusal to register.

### Analysis

The test for deceptive misdescriptiveness under Section 2(e)(1)<sup>3</sup> has two parts. First, we must determine whether the matter sought to be registered misdescribes the goods or services. In order for a term to misdescribe goods or services, “the term must be merely descriptive, rather than suggestive, of a significant aspect of the goods or services which the goods or services plausibly possess but in fact do not.” *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002); *see also In re Shniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006). Second, if the term misdescribes the goods, we must ask whether consumers are likely to believe the misrepresentation. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d at 1048; *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). The Board has applied the reasonably prudent consumer test in assessing whether a proposed mark determined to be misdescriptive involves a

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<sup>2</sup> The mark was refused registration as merely descriptive under Section 2(e)(2) in the initial Office Action, but that refusal was withdrawn in the Final Office Action. Registration also was refused pursuant to Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127, on the ground that the mark on Applicant’s drawing did not match the mark on his specimen. The Examining Attorney, however, stated in his appeal brief that he was persuaded by Applicant’s arguments and withdrew that refusal. 6 TTABVUE 3 n.1, 5.

<sup>3</sup> We note that the issue of whether Applicant’s mark is deceptive under Trademark Act Section 2(a) is not before us.

misrepresentation consumers would be likely to believe. *See R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985).

Whether TeaHC Misdescribes Applicant's Tea-Based Beverages

Applicant's mark incorporates the generic name of its goods ("tea") into a term phonetically identical to "THC." The Examining Attorney introduced a dictionary definition showing that THC, from tetrahydrocannabinol, is "either of two physiologically active isomers C<sub>21</sub>H<sub>30</sub>O<sub>2</sub> from hemp plant resin; *especially* : one that is the chief intoxicant in marijuana."<sup>4</sup> There is no evidence demonstrating that the term THC has any other established meaning. A misspelling that is the equivalent of a merely descriptive term also is merely descriptive if it would be immediately and directly perceived by consumers as the equivalent of the merely descriptive term. *See, e.g., In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (finding URBANHOUSING to be perceived as the phonetic equivalent of the descriptive term URBAN HOUSING and thus merely descriptive of real estate services).

The Examining Attorney also introduced evidence showing that it is plausible for tea-based beverages to contain THC. This comprises printouts from several online chat rooms in which participants discussed recipes and methods of brewing tea featuring THC, calling the resulting beverage "TeaHC." The evidence includes:

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<sup>4</sup> June 5, 2013 Office Action at 2 (from Merriam-Webster.com); *see also* definition of "TeaHC" from urbandictionary.com ("Tea using Marijuana as an alternative of getting high without smoking it 1: *Dude I forgot a pipe* 2: *It's okay we can make some TeaHC and be high as a kite*"), November 26, 2012 Office Action at 2; June 5, 2013 Office Action at 12. Although we have recognized the limitations of evidence from Urban Dictionary, *see In re Star Belly Stitcher, Inc.*, 107 USPQ2d 2059, 2062 n.3 (TTAB 2013), Applicant had the opportunity to rebut this evidence.

- A recipe for “Tea-H-C (Weed Tea)” with the following introduction: “Do you enjoy an occasional cup of hot tea? How about some iced tea too [sic] cool off in the summer? Lastly, are you a pothead? Well if you answered yes to 2 of the 3 questions, I have just the thing for you. It’s called Tea-H-C. But this isn’t the same tea your grandma drinks . . . . That’s because this tea (T), contains an H, and a C, the main active ingredient found in marijuana (THC).”<sup>5</sup>
- A discussion on a grasscity.com forum about sources of THC and amounts needed to make tea, under the heading “Making TeaHC.”<sup>6</sup>
- A discussion under the heading “TeaHC?” sparked by the question: “Does anyone know if it is possible to make a tea with dried leaf cuttings? If so, how?” from the “Cannabis Cafe Cooking with Cannabis” forum on the website rollitup.org, “The Marijuana Source.” Three different users responded with instructions.<sup>7</sup>
- Another recipe for “TeaHC – Tea my way” and discussion thread in “Cooking with Marijuana Recipes” on the website marijuana.com.<sup>8</sup>
- A discussion in a different forum on grasscity.com of the aroma produced by “brewing some marijuana pot grass tea,” under the heading “Marijuana Pot TeaHC brewing smell.”<sup>9</sup>
- A Wikipedia article on “Cannabis tea,” which discusses “the active ingredient THC” and states: “Because of its smokeless form of ingestion, it is preferred by some as a method of using the plant for medicinal purposes.”<sup>10</sup>

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<sup>5</sup> November 26, 2012 Office Action at 8-10 (from voices.yahoo.com/marijuana-recipes-tea-h-c-weed-tea-8255683.html).

<sup>6</sup> June 5, 2013 Office Action at 10-11 (from forum.grasscity.com/incredible-edible-herb/461081-making-teahc.html).

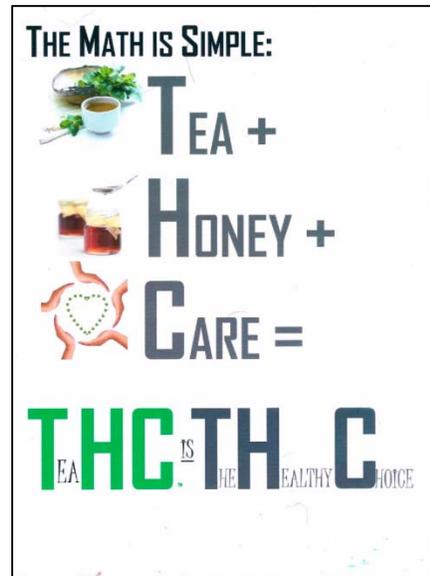
<sup>7</sup> *Id.* at 14-17 (from rollitup.org/cooking-cannabis/21428-teahc.html).

<sup>8</sup> *Id.* at 5-9 (from marijuana.com/threads/teahc-tea-my-way.225574/).

<sup>9</sup> November 26, 2012 Office Action at 4-7 (from forum.grasscity.com/apprentice-tokers/451430-marijuana-pot-teahc-brewing-smell.html).

<sup>10</sup> December 31, 2013 Office Action at 28-29; March 17, 2015 Final Office Action at 31-33. The Board gives guarded consideration to evidence taken from Wikipedia, bearing in mind the limitations inherent in this reference work, so long as the non-offering party has an opportunity to rebut the evidence by submitting other evidence that may call its accuracy into question. *See In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1032 (TTAB 2007). In the case before us, the Wikipedia evidence was first submitted in a non-final Office Action, and Applicant had an opportunity to rebut it.

Once a *prima facie* case is established, the burden of coming forward with competent evidence in rebuttal shifts to Applicant. *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003). Applicant states that TeaHC is intended to stand for “TeaHoneyCare.”<sup>11</sup> Applicant submitted the two “example advertisements” below:<sup>12</sup>



We must consider the term that Applicant seeks to register as it is set forth in the Application. We cannot assume that Applicant always will display his proposed mark in combination with words such as “TeaHoneyCare.” *Cf. Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (noting that standard character marks are not limited to any particular presentation); *Vornado, Inc. v. Breuer Elec. Mfg. Co.*, 390 F.2d 724, 156 USPQ 340, 342 (CCPA 1968) (noting that “the display of a mark in a particular style is of no material significance since the display may be changed at any time as may be dictated by the fancy of the applicant or the owner of the mark”); *Frances Denney v.*

<sup>11</sup> Applicant’s Brief at 3, 4 TTABVUE 4.

<sup>12</sup> December 5, 2013 Response to Office Action, Exhibit A, at 9-10.

*Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959) (“In determining the applicant’s right to registration, only the mark as set forth in the application may be considered; whether or not the mark is used with an associated house mark is not controlling.”). Indeed, on Applicant’s specimen of use, the proposed mark is displayed without any such accompanying wording:



There is no evidence that consumers encountering Applicant’s goods would interpret **TeaHC** as signifying “TeaHoneyCare.”

Applicant does not argue that **TeaHC** is a double entendre. Even had he done so, a double entendre is registrable only if one of its meanings is non-descriptive and that second meaning would be readily apparent to the consumer. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive for bakery products); *In Positec Group Ltd.*, 108 USPQ2d 1161, 1173 (TTAB 2013) (affirming refusal to register SUPERJAWS); *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012). Here,

the record establishes that the term does not have a non-descriptive significance in association with tea containing THC as a significant ingredient.

Based on the evidence of record, we find that it is plausible that tea-based beverages could contain THC and that **TeaHC**, when used for tea-based beverages, is merely descriptive for tea containing THC as a significant ingredient.

Applicant states that his goods “do not contain and are not advertised as containing the federally controlled substance THC.”<sup>13</sup> Because Applicant’s tea-based beverages do not contain THC as that term is defined in the dictionary evidence of record, we find that **TeaHC** misdescribes the goods.

Whether Consumers Are Likely to Believe the Misrepresentation

The second prong of our inquiry is whether reasonably prudent consumers are likely to believe the misrepresentation that Applicant’s beverages contain THC.

Both Applicant and the Examining Attorney introduced evidence relating to the legal status of marijuana under various state laws and summarizing the laws governing the medicinal use of marijuana in as many as 23 states and the District of Columbia.<sup>14</sup> The Examining Attorney also introduced a November 8, 2012 news story about the passage of state law ballot initiatives in Colorado and Washington allowing marijuana for recreational use.<sup>15</sup>

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<sup>13</sup> Applicant’s Brief at 2-3, 4 TTABVUE 3-4.

<sup>14</sup> April 25, 2013 Response to Office Action, Exhibit A, at 10-21 (“18 Legal Medical Marijuana States and DC”); December 5, 2013 Response to Office Action, Exhibit B, at 11-24 (“20 Legal Medical Marijuana States and DC”); December 31, 2013 Office Action at 2-22 (same); March 17, 2015 Final Office Action at 2-24 (“23 Legal Medical Marijuana States and DC”). All lists are printed from ProCon.org.

<sup>15</sup> December 31, 2013 Office Action at 23-27; March 17, 2015 Final Office Action at 25-30.

Relying on this evidence, the Examining Attorney argues that consumers are likely to believe that Applicant's goods contain THC because such goods "are lawful under local laws and available in some areas." "While cannabis and items containing cannabis remain unlawful under Federal law," the Examining Attorney writes, "consumers are able to purchase cannabis, as well as drinks and teas containing cannabis and THC, for both medical and recreational use in certain states and the District of Columbia."<sup>16</sup>

In contrast, Applicant argues that the restrictions on marijuana and THC make it unlikely consumers will perceive his goods as containing a controlled substance:

A consumer of average intelligence is well aware that possession of marijuana and THC is illegal under federal law. Even in the 18 states where there are "medical marijuana" laws, possession is limited to those who have a documented medical condition, often terminal in nature, and possession is still tightly regulated with various bureaucratic hoops for an individual to jump through before possession is permitted under limited circumstances. (citation omitted).

Finally, it is [a] regularly reported topic in the news about the conflict between state legalization efforts and the status of marijuana and THC as federally controlled substances. As such, it would be a rather gullible, uninformed consumer that would think that a bottle [of] TEAHC available in a grocery store, a gas station, a coffee shop, or other places that tea based beverages appear would contain a substance that is illegal under federal law and illegal under most state laws. As such TEAHC is

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<sup>16</sup> Examining Attorney's Brief, 6 TTABVue 10, 12. In the June 5, 2013 Office Action, the application was refused registration on the grounds that the proposed mark is not in lawful use in commerce under Trademark Act §§ 1 and 45 or, in the alternative, is deceptively misdescriptive. Applicant stated in his December 5, 2013 Response to Office Action that his goods "do not contain and are not advertised as containing the federally controlled substance THC," and the former refusal was not maintained. Thus, the question whether a mark for goods containing THC is in lawful use under §§ 1 and 45 is not before us.

not likely to be perceived by the reasonably prudent purchaser as describing a feature or characteristic of the product and thus the mark is not deceptively misdescriptive.<sup>17</sup>

We note that the application is not restricted to any geographic region or channel of trade. Therefore, we must presume that Applicant's tea could be offered where marijuana possession is considered legal under state law in certain circumstances. Record evidence shows that to be the case in nearly half of U.S. states.

The record provides little information regarding retail sales of tea-based beverages containing THC; as noted, most of the evidence pertains to brewing such beverages at home. There is, however, some evidence that teas containing THC are commercially available. This includes a picture of a package of "Honeybush Hemp Infusion" under the title "cannabis tea," as well as cans of "cannabis drinks" that appear to be part of an in-store display, from [forum.sensiseeds.com](http://forum.sensiseeds.com). There is no indication where these goods are offered for sale.<sup>18</sup> Also of record are a picture and discussion of a canned beverage called "C-ICE Swiss Cannabis Ice Tea" on [rockingtherepublic.com](http://rockingtherepublic.com). Participants in the discussion represent that the product was previously available in the United States and would be available again, although one post indicates that the product does not actually contain THC.<sup>19</sup>

We consider as a whole the following facts: the descriptive nature of the term **TeaHC**; that marijuana, although illegal under federal law, may be possessed

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<sup>17</sup> Applicant's Brief at 4, 4 TTABVue 5.

<sup>18</sup> December 31, 2013 Office Action at 30-33; March 17, 2015 Final Office Action at 34-37.

<sup>19</sup> December 31, 2013 Office Action at 34-40.

legally under state law in some circumstances in 23 states and the District of Columbia; and that nothing in the application indicates that Applicant's goods will not be offered through medical marijuana dispensaries or locations where marijuana products are legally (under state law) sold at retail for adult recreational use, either of which may offer consumable goods containing THC.

Based on these facts, we find that a reasonably prudent consumer would be likely to believe that Applicant's **TeaHC** tea-based beverages contain THC although they do not. *Cf. In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1848 (TTAB 2012) (collecting cases in which marks that include CUBA or HAVANA formatives have been held primarily geographically deceptively misdescriptive despite embargo on sale of Cuban goods in the United States); *In re Quady Winery Inc.*, 221 USPQ at 1213-14 (finding ESSENSIA deceptively misdescriptive for wines not containing essencia, a rare, commercially unavailable type of Hungarian Tokay wine). Furthermore, whether Applicant's products feature the intoxicant THC would be highly relevant to a consumer's purchasing decision. *See In re Shniberg*, 79 USPQ2d at 1311 (explaining that "the misdescription must concern a feature that would be relevant to a purchasing decision").<sup>20</sup>

We therefore find Applicant's mark to be deceptively misdescriptive within the meaning of Section 2(e)(1). *Cf. In re Christopher C. Hinton*, \_\_\_ USPQ2d \_\_\_,

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<sup>20</sup> The relevancy requirement contrasts with the materiality required for deceptive marks. *In re Shniberg*, 79 USPQ2d at 1311; *see also* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 11:55 (4th ed. September 2015) ("The key difference between 'deceptively misdescriptive' marks under § 2(e)(1) and 'deceptive' marks absolutely barred under § 2(a) is that a 'deceptive' mark is one in which the mis-description or falsity is 'material' in that it is likely to significantly induce a purchaser's decision to buy."). We reiterate that Applicant's mark is not refused registration under Section 2(a) of the Act.

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Application Serial No. 85713080 (TTAB Sept. 14, 2015) (holding THCTea deceptively misdescriptive for tea-based beverages).

***Decision:*** The refusal to register Applicant's mark TeaHC is affirmed.