

This Opinion is not a  
Precedent of the TTAB

Mailed: August 30, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Sharnazyan*

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Serial Nos. 86267290 and 86332806<sup>1</sup>

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Kelly F. Ryan of The Ryan Law Firm,  
for Aram Sharnazyan.

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

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Before Quinn, Shaw and Kuczma,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Aram Sharnazyan (“Applicant”) seeks registration on the Principal Register of the standard character marks PARIS OG KUSH INDICA<sup>2</sup> and HARDCORE OG KUSH INDICA<sup>3</sup> for “medicinal herbs,” in International Class 5.

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<sup>1</sup> Because the appeals involve the same issues and nearly identical records, we hereby consolidate them and issue a single opinion for both appeals. Citations to the record are to Serial No. 86267290, unless otherwise noted.

<sup>2</sup> Application Serial No. 86267290 was filed on April 30, 2014, under Section 1(b), 15 U.S.C. § 1(b), based upon Applicant’s bona fide intent to use the mark in commerce.

<sup>3</sup> Application Serial No. 86332806 was filed on July 9, 2014, under Section 1(b), 15 U.S.C. § 1(b), based upon Applicant’s bona fide intent to use the mark in commerce.

The Trademark Examining Attorney has refused registration of Applicant's marks under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the marks are deceptively misdescriptive of a feature of the identified goods. When the refusals were made final, Applicant appealed. We affirm the refusals to register.

### Analysis

The test for deceptive misdescriptiveness under Section 2(e)(1) has two parts. First, does the matter sought to be registered misdescribe 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 Hinton*, 116 USPQ2d 1051, 1052 (TTAB 2015) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002)). Second, if the term misdescribes the goods or services, are consumers likely to believe the misrepresentation. *Id.* The Board has applied the reasonably prudent consumer test in assessing whether a proposed mark determined to be misdescriptive involves a misrepresentation consumers would be likely to believe. *Id.*

### Whether Applicant's Marks Misdescribe Medicinal Herbs

The Examining Attorney introduced evidence establishing that PARIS OG, OG KUSH, and HARDCORE OG identify strains of marijuana.<sup>4</sup> Further, the Examining

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<sup>4</sup> Office Actions of August 11, 2014, and September 18, 2015; Ser. No. 86332806, Office Action of August 1, 2014.

Attorney introduced evidence establishing that INDICA is defined as one of “three species of the genus cannabis.”<sup>5</sup> In addition, the Examining Attorney submitted evidence that “medicinal cannabis” is also known as “medical marijuana,”<sup>6</sup> and is legally available in at least twenty-three states and the District of Columbia.<sup>7</sup> Applicant does not dispute that PARIS OG, OG KUSH, HARDCORE OG, and INDICA refer to strains of marijuana, or that medicinal marijuana is legally available in a number of U.S. states.

In light of the foregoing, the Examining Attorney required Applicant to provide written responses to the following questions:<sup>8</sup>

1. Do applicant’s identified goods include or contain marijuana, marijuana-based preparations, marijuana extracts or derivatives, or any other illegal controlled substance?
2. Do the goods identified in the application comply with the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-971?

Applicant responded that his goods “are not marijuana,” “do not fall within the CSA definition of marijuana,” and “are not derivative of marijuana in any way.”<sup>9</sup>

We find it is plausible that medicinal herbs could contain marijuana, based on the evidence detailed *infra* that medicinal cannabis already exists in the marketplace, and because PARIS OG, OG KUSH, HARDCORE OG, and INDICA are all merely descriptive of strains of marijuana likely found in medicinal cannabis or medical

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<sup>5</sup> Office Action of August 11, 2014, pp. 12-15.

<sup>6</sup> Office Action of September 18, 2015, pp. 2-5.

<sup>7</sup> Office Action of February 26, 2015, pp. 2-24.

<sup>8</sup> Office Action of February 26, 2015.

<sup>9</sup> Applicant’s Response of August 26, 2015, p.6.

marijuana. Because Applicant's medicinal herbs do not contain PARIS OG, OG KUSH, HARDCORE OG, or INDICA as those terms are defined in the evidence of record, the Examining Attorney has established that PARIS OG KUSH INDICA and HARDCORE OG KUSH INDICA misdescribe Applicant's "medicinal herbs."

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 argues that "the packaging of Applicant's product will be clearly labeled with, for lack of a better term, a disclaimer, 'Not Marijuana,' which clearly dispels any potential plausible inference that the product contains marijuana."<sup>10</sup> This argument is unpersuasive. We must consider the marks Applicant seeks to register as they are set forth in the applications. We cannot assume that Applicant will display his proposed marks in combination with words such as "Not Marijuana." *In re Budge Mfg. Co. Inc.*, 857 F.2d 773, 8 USPQ2d 1259, 1261 (Fed. Cir. 1988) ("[T]he mark standing alone must pass muster, for that is what the applicant seeks to register, not extraneous explanatory statements.").

Accordingly, Applicant has not overcome the *prima facie* case set forth by the Examining Attorney, and we find that PARIS OG KUSH INDICA and HARDCORE OG KUSH INDICA misdescribe Applicant's "medicinal herbs."

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<sup>10</sup> Applicant's Br., p. 6.

Whether Consumers Are Likely to Believe the Misrepresentation

The second part of our inquiry is whether reasonably prudent consumers are likely to believe the misrepresentation that Applicant's "medicinal herbs" contain PARIS OG, OG KUSH, HARDCORE OG, and INDICA.

The Examining Attorney introduced evidence summarizing the laws governing the medicinal use of marijuana in 23 states and the District of Columbia. Based on this evidence, the Examining Attorney argues that reasonably prudent consumers are likely to believe the misrepresentation that Applicant's "medicinal herbs" contain these strains: "Consumers are likely to believe the misrepresentation because goods that consist of, or contain, cannabis are lawful under local laws and available in some areas."<sup>11</sup> Additionally, as the Examining Attorney argues: "The present application is not restricted to any geographic region or channel of trade. Therefore, it must be presumed that Applicant's medicinal herbs could be offered where marijuana possession is considered legal under state law in various circumstances." Record evidence shows that to be the case in nearly half of U.S. states.

Applicant argues that consumers are unlikely to believe that the goods contain the named strains of marijuana "because a prudent consumer is well aware that the commercial sale of marijuana is illegal pursuant to federal statute."<sup>12</sup> Instead, Applicant argues, the strains named in the marks will:

[C]onjure up feelings and emotions commonly associated with the recreational and medicinal use of marijuana. Applicant's goods do not create a "marijuana high." Yet, Applicant's Mark

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<sup>11</sup> Examining Attorney's Br., p. 10.

<sup>12</sup> Applicant's Br., p. 6.

puts the sensate memory of a “marijuana high” already present in the mind of the consumer without the involvement of THC, the active ingredient in marijuana. Essentially, Applicant is seeking a trademark for medicinal herbs that elicit a previously experienced sensation and the near or imagined feelings of euphoria and the philosophical thinking commonly associated with marijuana usage already existent in the consumer’s mind. The consumer must engage in a multistage reasoning process and exercise imagination to associate the Mark with the goods it identifies.<sup>13</sup>

This argument too is unpersuasive. We see no reason why consumers would rely on the power of suggestion, as argued by Applicant, to “conjure up feelings and emotions commonly associated with the recreational and medicinal use of marijuana” when “medicinal cannabis” containing actual PARIS OG, OG KUSH, HARDCORE OG, or INDICA is legally available in nearly half of the U.S. On the contrary, we find it far more likely that consumers would expect Applicant’s “medicinal herbs” to contain blends of the named strains inasmuch as these strains are sold in medical marijuana dispensaries across the country.<sup>14</sup>

In sum, we find that PARIS OG KUSH INDICA and HARDCORE OG KUSH INDICA misdescribe Applicant’s “medicinal herbs” because they do not contain any of these strains, and that consumers are likely to believe the misrepresentation.

**Decision:** The refusal to register Applicant’s marks under Section 2(e)(1) is affirmed.

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<sup>13</sup> *Id.* at 6-7.

<sup>14</sup> Office Action of September 18, 2015.