

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Green Bark Gummies, Inc.

Serial No. 86283461

Howard L. Hoffenberg of IP and Business Law Offices of Howard L. Hoffenberg,
Esq. for Green Bark Gummies, Inc.

David C. Mayer, Trademark Examining Attorney, Law Office 121,
Michael W. Baird, Managing Attorney.¹

Before Seeherman, Wolfson and Hightower,
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Green Bark Gummies, Inc. (“Applicant”) has appealed from the final refusal of the Trademark Examining Attorney to register GUMMY BITES in standard characters for “dog treats, namely, treats that are a soft solid without having the attribute of being a gum or a sticky or chewy substance that require mild to moderate forces to masticate a few times before breaking apart, being ground down and being

¹ Mr. Mayer assumed responsibility for the file at the time the application was forwarded for preparation of the Examiner’s brief. Prior to that, Benji Y. Paradewelai examined this application.

swallowed.”² Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the grounds that the mark is deceptively misdescriptive of the identified goods or, in the alternative, that the mark is merely descriptive of them.

A recital of the history of examination/prosecution will make clear how these alternative refusals were issued. In its initial application, Applicant identified its goods as “dog treats.” The Examining Attorney refused registration on the ground that the mark was merely descriptive, relying on the definition of GUMMY of “made of, containing, or covered with gum or a sticky or chewy substance” and of BITES as “snack,” and asserting that when these two words were combined, the resulting mark immediately conveyed that the goods are a dog snack that is made of, containing, or covered with gum or a sticky or chewy substance.³ In addition to the dictionary definitions, he made of record third-party registrations showing that the word BITES has been disclaimed, or that marks containing the word BITES were registered on the Supplemental Register.

² Application Serial No. 86283461, filed May 16, 2014, based on Section 1(b) of the Trademark Act (intent-to-use).

³ July 1, 2014 Office action. The definition of “gummy” was taken from the Merriam-Webster online dictionary at www.merriam-webster.com. The definition of “bite” submitted with this Office action was taken from the *Collins English Dictionary*. This dictionary does not necessarily reflect the definitions of words as used in the United States. However, with the December 23, 2014 Office action, the Examining Attorney made of record, *inter alia*, definitions taken from the *Collins American English Dictionary*, which confirms the meaning of “bite” as a “mouthful or morsel” and “a light meal or snack.” p. 106.

Applicant traversed this refusal, arguing that its mark only suggests “that a dog will chomp on the treat several times and enjoy it.”⁴ It also asserted that neither “gummy” nor “bites” is a word that is commonly or readily used in the vocabulary of dog treat consumers to describe a snack for dogs. *Id.* The Examining Attorney was not persuaded by Applicant’s response, and on December 23, 2014 issued a final refusal on the ground that the mark was merely descriptive. With that Office action, the Examining Attorney submitted substantial evidence from third-party websites showing that the words GUMMY and BITES are both used to describe dog treats.

Applicant thereupon filed a request for reconsideration on January 5, 2015, in which Applicant amended the identification of goods, as follows:

Dog treats, namely, treats that are a soft solid without having the attribute of being a gum or a sticky or chewy substance that require mild to moderate forces to masticate a few times before breaking apart, being ground down and being swallowed.

Applicant also explained that, although Applicant had not yet formulated the product, it “will not be a traditional gummy product.”

The statements made by Applicant in its request for reconsideration led to the Examining Attorney issuing, on January 15, 2015, a nonfinal Office action in which he refused registration under Section 2(e)(1) on the ground that the mark is deceptively misdescriptive of Applicant’s goods, noting Applicant’s statement that its product will not be a traditional gummy product. He also continued the refusal on the

⁴ Response filed December 8, 2014.

basis of mere descriptiveness in view of third-party website evidence describing Applicant's dog treats as "gummy."

Applicant then attempted, on July 10, 2015, to amend its application by disclaiming *both* the word GUMMY and the word BITES, as well as by arguing against both refusals. In the last Office action, mailed July 30, 2015, the Examining Attorney made both refusals final, and advised Applicant that the proffered disclaimers were not acceptable because an entire mark may not be disclaimed.

This appeal followed, with Applicant filing a notice of appeal on January 6, 2016. Applicant also filed its appeal brief on that date, and filed a corrected appeal brief on January 7, 2016. We treat the corrected appeal brief as the brief of record.

As a preliminary matter, we note that Applicant has not contested the Examining Attorney's refusal to accept the disclaimer of the words GUMMY and BITES. Applicant's brief, 5 TTABVue 6. In view thereof, we do not consider the propriety of the disclaimer as an issue on appeal.

We turn first to the refusal based on the ground that Applicant's mark is deceptively misdescriptive of the identified goods.

The test for deceptive misdescriptiveness under Section 2(e)(1) 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." Second, if the term misdescribes the goods, we must ask whether consumers are likely to believe the misrepresentation.

In re Hinton, 116 USPQ2d 1051, 1052 (TTAB 2015) (internal citations and footnote omitted).

In support of his position that GUMMY BITES is descriptive of a characteristic that dog treats plausibly possess, the Examining Attorney has submitted evidence of the definitions of the individual words GUMMY and BITES, third-party use of these terms in connection with dog treats and dog nutrition items, and third-party registration evidence showing the descriptiveness of the individual words. With respect to the descriptiveness of GUMMY, the evidence includes the following:

From the July 30, 2015 Office action:

YUP! Peanut Butter Gummi Bones Treat for Dogs
... Soft, gummy texture is easy to chew and swallow
www.amazon.com
p. 2

Smart n' Tasty® Canine Dental Treats
...By extruding our treats, we are able to retain a gummy texture that surrounds the tooth during chewing. This gummy texture scrapes the teeth clean during both the up and down motion of the jaw for twice the scraping action.
Emerald Pet Products
www.emeraldpet.com
p. 5

“The gummy texture that is typical in soft treats is largely because of the use of syrupy glycerin in these formulas.” [statement by Clear Conscience Pet founder Anthony Bennie, in January 31, 2013 press release for Sliders Tender Dog Treats]
www.prweb.com
p. 11

From the January 15, 2015 Office action:

Low Calorie, Gummy Treats for Pets
...Researchers at Kansas State University have developed low calorie, gelatin-based, gummy-textured, bite-sized pet treats that are thermally stable at common ambient temperatures.
www.k-state.edu
p. 32

Gypsy Glen K-9 Kastle

...

We recommend you bring:

... Healthy treats (No Milk-Bones (indigestible tallow), dyed, soft or gummy treats).

www.gypsyglenk9kastle.com

p. 34

Petbrandz, which also makes gummy treat vitamins and mints for dogs and cats....

<http://nypost.com>

p. 47

From the December 23, 2014 Office action:

NPIC – N-Bone – Puppy Teething Treat

...Puppy Teething Ring is flexible and pliable and safe for a teething puppy because the gummy or chewy texture of the treat will not break or damage immature teeth. ... Edible & Digestible

www.k9cuisine.com

p. 45

Our Dog goes CRAZY for these gummy treats!

[purchaser comment on “Fruitables Skinny Minis Rotisserie Chicken Flavor Soft & Chewy Dog Treats, 5-oz bag]

www.chewy.com

pp. 50-51

Nature’s Dynamics™ Announces World’s FIRST Whole Food Organic Gummy Supplement for Dogs

... Nature’s Dynamics™, makers of whole food organic gummy supplements and probiotics, has announced its latest product will be made for dogs. ... Crazy Doggy Omega-3 Gummy is in a great tasting easy to digest gummy supplement.

August 26, 2013 press release, www.prlog.org

p. 104

In addition, Applicant itself, in prosecuting its application Serial No. 85820733 for GREEN BARK GUMMIES for dog treats (which issued as Registration No. 4463958 with a disclaimer of GUMMIES), stated that the mark has the meaning of “A gummie style dog treat that leads to an environmentally sound dog breath.” January 15, 2015

Office action, p. 30. Others, in describing Applicant's Green Bark Gummies, have described them as "gummy":

Green Bark Gummies Hip and Joint Bites.

...They are cute, teddy-bear-shaped gummy treats, which Neeko seems to enjoy.

[from My Rotten Dogs, a blog]

www.myrottendogs.com

Jan. 15, 2015 Office action, p. 36

Green Bark Gummies treats for dogs, we're [sic] the best dog treats I've seen yet. They were healthy, organic, and the gummy texture was fun.

...I think that the gummy texture was a nice surprise for my dog!

[two separate review comments on Swaggable]

<http://swaggable.com>

January 15, 2015 Office action, pp. 40, 41

Green Bark Gummies Hip and Joint treats.

Rachel says: the gummy, chewy texture of these confused Khaleesi at first, and it's funny watching her eat these.

[blog review]

www.withlove-rachel.com

January 15, 2015 Office action, p. 43

As for the word BITES, there is substantial evidence that BITES is used to indicate the size of a dog treat, and also as the name for such a treat, including the following evidence from third-party websites:

From the December 23, 2014 Office action:

Wild Pacific Salmon Marrow Bites

These bite sized crunchy dog treats

www.northcoastpetc.com

p. 12

Barkin Bites Meat Snacks – 4 oz. Bag

Barkin' Bites all natural meat snacks for dogs are a wholesome, delicious treat....

www.calvetsupply.com

p. 53

Savory Bites

Rachael Ray™ Nutrish® Savory Bites are hearty, soft and chewy morsels inspired by Rachael's home-style recipes. Chock-full of the savory, real meaty goodness dogs love....

<http://nutrish.rachaelray.com>

p. 56

Oscar bites

Healthy, All Natural Dog Treats

... Each treat is individually hand pressed and made with all natural ingredients.

Pet EXPO Atlanta, December 23, 2014

p. 58

Dr Becker's Bites

...are a great healthy dog snack

...Our bites have one high quality ingredient, beef liver or bison liver, nothing else!

www.drbeckersbites.com

pp. 60-61

Wellness Petite Treats

Crunchy Mini-Bites with Chicken, Cherries & Spearmint

www.wellnesspetfood.com

p. 63

PEDIGREE® GOOD BITES® Hip & Joint Treats for dogs are delicious, bite-sized meaty treats that deliver healthy benefits for all dogs.

www.pedigree.com

p. 76

In addition, the Examining Attorney made of record with the July 1, 2014 Office action third-party registrations showing the descriptiveness of BITES. For example, in Registration No. 3736538 for DR. BECKER'S BITES for dog treats, BITES is disclaimed (p. 11); in Registration No. 4129367 for CHOICE BITES for edible dog treats, BITES is disclaimed (p. 15); and LARGE BREED BITES for dog food and dog treats, Registration No. 3826678, is registered on the Supplemental Register (p. 13). Further, the specimens in Applicant's prior application for GREEN BARK

GUMMIES describe the size of the treats as, respectively, “Medium-Large Bites,” January 15, 2015 Office action, p. 15, and “Small Bites,” p. 17.

When the words GUMMY and BITES are combined in the mark GUMMY BITES and used in connection with dog treats, the term immediately describes characteristics of dog treats. We have no doubt that a consumer for dog treats would understand the mark to describe a gummy bite-sized dog treat. Further, Applicant’s restriction of its identification to dog treats that do not have “the attribute of being a gum or a sticky or chewy substance” is enough to show that the dog treats do not in fact possess the characteristic of being “gummy.” Thus, the Office has met its burden in answering the first part of the test for deceptive misdescriptiveness in the affirmative. Applicant appears to think that by restricting its identification to exclude dog treats with the attribute of being a gum or a sticky or chewy substance it can avoid a refusal based on mere descriptiveness. “The amended description was crafted to be exclusive of the examining attorney’s definitions which are the predicate for the merely descriptiveness refusal.” Applicant’s brief, 5 TTABVUE 8. However, Applicant cannot avoid a finding of deceptive misdescriptiveness by excluding from its identification the very characteristic that its mark is misdescribing.

The second part of the test for deceptive misdescriptiveness is whether, if the term misdescribes the goods, consumers are likely to believe the misrepresentation. Again, the evidence shows that dog treats may be “gummy” and are described as such by those in the industry and by ordinary consumers, while “bites” is a common term

to describe the size of dog treats. As a result, consumers who see the mark GUMMY BITES for dog treats are likely to believe that the dog treats are gummy or chewy.

Applicant argues that “typical gummy bears” have as their pertinent ingredients gelatin and glazing agents, and that Applicant’s current GREEN BARK GUMMY brand dog treat does not contain such ingredients, nor do they look like typical gummy bears. The “typical gummy bears” referred to by Applicant appear to be the fruit gum candies for human consumption. We are not persuaded by Applicant’s argument regarding its use of a different brand for different dog treats. The question is not what ingredients might be contained in the dog treats for which Applicant intends to use its mark—a product that Applicant has acknowledged has not yet even been formulated. The question is whether the word GUMMY in the mark has a significance for dog treats, such that when the word is combined with BITES the mark as a whole describes characteristics of dog treats. The evidence, as detailed above, clearly shows this.

In its reply brief Applicant makes further arguments based on its ingredient list for a different dog treat that it is currently selling. Applicant contends that the ingredient list *for this other product* “‘jumps out’ at a consumer to say this is not a typical gummy product,” and that this list “disabuses that consumer would likely believe a misrepresentation about a gummy product.” 8 TTABVUE 4. However, because the product to be sold under the applied-for mark has not been formulated, we see no reason to treat the new product as having the ingredients of a different product sold under a different mark. Moreover, whether a consumer would have to

read through some 25 ingredients and have knowledge of the chemical properties of each does not determine whether or not a mark misdescribes the goods. Rather, because dog treats can be “gummy,” and they are described as such, a consumer, upon seeing the mark GUMMY BITES for dog treats, is likely to believe that these bites have a gummy characteristic.

Applicant has asserted throughout examination, and again in its briefs, that any doubt must be resolved in favor of Applicant. We agree with this principle. However, Applicant’s arguments as to why there is doubt, e.g., doubt about what the amount of “gummy” ingredients will be in the as not-yet-formulated dog treats, is not the kind of doubt that invokes this principle. Rather, the question is whether consumers, upon seeing the mark GUMMY BITES for dog treats, are likely to believe that the dog treats are small-size pieces having a gummy characteristic. Based on the evidence of record, we have no doubt that the answer to that question is yes.

Decision: The refusal to register Applicant’s mark GUMMY BITES on the ground that it is deceptively misdescriptive is affirmed. In view thereof, we need not consider the alternative ground for refusal that the mark is merely descriptive.