

THIS OPINION IS NOT  
A PRECEDENT OF  
THE TTAB

Hearing: May 2, 2017

Mailed: June 20, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Volcano Produce, Inc.*

Serial No. 86321169

Ira Cohen and Daniel Hirschman of Henkel & Cohen  
for Volcano Produce, Inc.

Michael Eisnach, Trademark Examining Attorney, Law Office 104,  
Dayna Browne, Managing Attorney.

Before Quinn, Lykos and Hightower,  
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Volcano Produce, Inc. (“Applicant”) filed an application to register on the Principal Register the designation GOLDENBERRY (in standard characters) for “fresh fruit” in International Class 31.<sup>1</sup>

<sup>1</sup> Application Serial No. 86321169, filed June 26, 2014 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging dates of first use of January 15, 2014.

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 proposed mark, as used on Applicant's goods, is merely descriptive thereof.<sup>2</sup>

When the refusal was made final, Applicant requested reconsideration.<sup>3</sup> The

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<sup>2</sup> The Examining Attorney also initially refused registration on the ground that the applied-for mark is a varietal name for a type of fruit. This refusal subsequently was withdrawn.

<sup>3</sup> In its brief Applicant asserts that registration alternatively was refused on the basis that the applied-for mark is generic. In this regard Applicant points to the Examining Attorney's statement that "the applied-for mark appears to be generic," but Applicant goes on to observe that the Examining Attorney "appears to have back-tracked on the generic issue" in the denial of the request for reconsideration. 5 TTABVUE 11. In any event, Applicant felt compelled to address genericness "out of an abundance of caution." *Id.* For his part the Examining Attorney states that he never refused registration on genericness. Rather, he issued only an advisory to Applicant that because the applied-for mark appeared to be generic, no amendment to proceed under Section 2(f) (acquired distinctiveness) or an amendment to the Supplemental Register could be recommended. 7 TTABVUE 4. Our review of the prosecution history comports with the Examining Attorney's characterization of this matter, and his actions were in accordance with TMEP § 1209.02(a) (Apr. 2017):

The examining attorney must not initially issue a refusal in an application for registration on the Principal Register on the ground that a mark is generic for the goods or services, unless the applicant asserts that the mark has acquired distinctiveness under § 2(f) in the application itself. Even if it appears that the mark is generic, the proper basis for the initial refusal is § 2(e)(1) descriptiveness. If there is strong evidence that the proposed mark is generic, a statement that the subject matter appears to be a generic name for the goods or services should be included in conjunction with the refusal on the ground that the matter is merely descriptive. . . . If, in response to a first-action refusal under § 2(e)(1), the applicant merely argues that the mark is registrable on the Principal Register without claiming acquired distinctiveness or amending to the Supplemental Register, the examining attorney must issue a final refusal under § 2(e)(1), on the ground that the proposed mark is merely descriptive, if he or she is not persuaded by the applicant's arguments. (citations omitted).

In its reply brief, Applicant acknowledges that genericness is not an issue on appeal. 8 TTABVUE 4. Thus, Applicant's suggestion to remand the application file to the Examining Attorney for "explanation, clarification, and further consideration," is moot. 5 TTABVUE 11. We confirmed Applicant's understanding at the oral hearing and, so as to be clear, the only issue on appeal is mere descriptiveness.

Examining Attorney denied the request for reconsideration and Applicant appealed. Applicant and the Examining Attorney filed briefs, and an oral hearing was held.

Applicant argues that its proposed mark is inherently distinctive and, at worst, is just suggestive. More specifically, Applicant contends that while its fruit is a berry, it is yellow in color; in this connection, Applicant states that “golden” is not a color, and that the term is used as an adjective in its mark, and not as a color. Applicant asserts that its fruit is properly referred to as a “Gooseberry” or “Cape Gooseberry.” Applicant submitted Internet website and articles; and an excerpt from a government manual.

The Examining Attorney maintains that the proposed mark merely describes Applicant’s fruit, namely a berry that is golden in color. In making the refusal, the Examining Attorney points to use of the term by the media, as well as by others in the fruit industry. The Examining Attorney submitted dictionary excerpts; an excerpt from Wikipedia; and portions of Applicant’s website, as well as of third-party websites.

A term is merely descriptive of goods within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). The Board repeatedly has stated that “the [only] test for descriptiveness is whether a term ‘immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is

used,” and this is the test we have applied here. *Anheuser-Busch Inc. v. Holt*, 92 USPQ2d 1101, 1104 n.8 (TTAB 2009) (citing *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009)). A term need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of them. See *In re Gyulay*, 3 USPQ2d at 1010; *In re Driven Innovations, Inc.*, 115 USPQ2d 1261, 1266 (TTAB 2015). This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the relevant marketplace. See *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Venture Lending Assocs.*, 226 USPQ 285, 286 (TTAB 1985).

Contrary to the gist of Applicant’s argument that “[a] fair degree of imagination is required to make the leap from the mark to what goods are involved,” (5 TTABVue 19), the question is not whether someone presented only with the mark could guess what the goods listed in the identification are. Rather, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002)). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association*

*of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

The word “berry” is defined as “a small roundish juicy fruit without a stone; a small fruit that has many seeds.” The word “golden” is defined as “colored or shining like gold”; “having the deep yellow color of gold.” (www.oxforddictionaries.com; www.merriam-webster.com, attached to Feb. 1, 2016 Office Action). “Cape gooseberry” is described as a “cherry-sized, yellow-fleshed, slightly sour fruit . . . also called physalis, goldenberry.” Dictionary of Food: International Cooking Terms from A to Z (2005). (www.credoreference.com, attached to Oct. 9, 2014 Office Action). Wikipedia includes an entry for “Physalis peruviana,” which is described as “the plant and its fruit, also known as Cape gooseberry (South Africa, UK), Inca berry, Aztec berry, golden berry . . . .” The entry includes a picture of the fruit as shown below. (Apr. 29, 2015 Office Action).



Applicant’s advertisement, showing a picture of Applicant’s fruit, is reproduced below. (Apr. 9, 2015 Response to Office Action).

**Product of the Month  
Goldenberry™**



Also known as the Uchuva Cape Gooseberry, or *Physalis Peruviana*, the Goldenberry™, Volcano Produce's brand of the super fruit, is native to some countries in South America. It is comprised of many nutritious qualities including vitamins A, B and C, proteins, anti-oxidants, and various minerals. The sweet and tangy Goldenberry™ makes for a perfect healthy snack.

Contact us now to discuss your needs or to place an order.

**News**

**Goldenberry™ Now Available in Chicago Area**

The Goldenberry™ is now available in the food service industry and select grocery stores throughout the Chicago area. The Goldenberry™, the Volcano Produce™ brand of *Physalis Peruviana*, offers a multitude of health-benefiting nutritional elements, including polyphenols, which carry anti-inflammatories and antioxidants. ...

Please click [here](#) to read more.

**Volcano Produce™ highlighted in Tastebuz.com**



"...One of these new exhibitors was Volcano Produce, a ten-year-old grower, shipper and importer of certified organic produce. They also import exotic fruits from Latin America and are the largest importers of **GoldenBerries** (sometimes know as Cape Gooseberries). A bona fide superfood loaded with vitamins and antioxidants, these members of the nightshade family look like tomatoes with a papery shell resembling a part-open umbrella." ...

The record include numerous third-party websites showing uses of “golden berry” or “golden berries” to name or describe fresh fruit of the type produced by Applicant. These websites include the following: sunfood.com; bulkfoods.com; rawguru.com; renegadehealth.com; greatideas.people.com; globalhealingcenter.com; gardenate.com; foodprocessing.com; digital.vpr.net; amazon.com (Navitas Naturals); popsugar.com; huffingtonpost.com; eastbayexpress.com; nj.com; and indiancountry todaymedianetwork.com. (Apr. 29, 2015, Nov. 18, 2015, Feb. 1, 2016 Office Actions). By way of example, we highlight three typical uses: “Though new to the market in the U.S., golden berries have a long history of exportation and use in Europe, the Middle East, and China.” (renegadehealth.com); “Once you learn about aronia berries and golden berries, both of which are increasingly available in stores and online, you’ll be chomping at the bit to sample them.” (people.com); and “Golden berries, also known as *Physalis peruviana*, is South American fruit that’s highly concentrated with nutrients and bioactive compounds.” (globalhealingcenter.com).

The evidence of record further confirms, as maintained by Applicant, that the type of fruit produced by Applicant is also referred to as a “Cape Gooseberry” or

simply “Gooseberry.” (Apr. 9, 2005 Response to Office Action). Nevertheless, the evidence clearly shows that another commonly used name for the fruit is “goldenberry” or “golden berry.” Indeed, a product may be described by more than one merely descriptive term, or a product may have more than one name. *See In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574 (Fed. Cir. 2015) (NOPALEA held descriptive of dietary and nutritional supplements; “the word ‘nopal’ is a common name for prickly pear cacti including cacti in the genus *Nopalea*,” and “the words ‘nopal’ and ‘nopalea’ are used interchangeably to refer to cacti of that genus”). In addition to being the name of the fruit, the evidence establishes that the term is merely descriptive of a berry that is golden in color (“deep yellow” as described in the dictionary, *supra*).

We are not persuaded by Applicant’s attempt to diminish the probative value of the Examining Attorney’s evidence by characterizing it as “a hodge-podge of non-academic articles, along with a ‘Wikipedia’ entry, the latter of which clearly is not a scholarly, peer-reviewed article.” 5 TTABVUE 19. Internet evidence is admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1087 n.4 (TTAB 2016) (citing *In re Bayer AG*, 82 USPQ2d at 1833) June 20, 2017. *See generally* TMEP § 710.01(b). In the present case, the Internet evidence is entitled to probative value. Further, while Applicant states that the Examining Attorney “points to no supporting survey evidence” in support of the refusal, the Office is under no obligation to proffer survey evidence. *Id.* And, although Applicant shows the existence

of many other types of berries that are yellow or golden in color, this fact is hardly supportive of the argument that the proposed mark is just suggestive. 5 TTABVUE 20.

Applicant principally relies on the U.S. Department of Agriculture’s Fresh Fruit and Vegetables Manual (2d ed. 2012). (Jan. 11, 2016 Request for Reconsideration). Although the manual includes listings for “Cape Gooseberry” and “Gooseberry,” there is no entry for “goldenberry” or “golden berry.” Applicant contends that “the gossamer wings of tabloid pages [Applicant’s characterization of the Examining Attorney’s evidence] should [not] be allowed to serve as a substitute for the agricultural oracle that is the USDA. Stated otherwise, if the USDA – the competent U.S. government agency having expertise in plants, produce, fruits, vegetables, etc. – does not recognize GOLDENBERRY as the descriptive name for the fruit, should that not, *ipso facto*, end the inquiry for the USPTO?” 8 TTABVUE 7. Notwithstanding this omission, the plethora of recent third-party uses of the term “goldenberry” in the fruit industry outweighs the probative value of this manual, which was issued five years ago.

We have considered all of the evidence of record pertaining to the mere descriptiveness issue, as well as all of the arguments related thereto, including any evidence and/or arguments not specifically discussed in this opinion. We conclude that Applicant’s proposed mark GOLDENBERRY, when used in connection with Applicant’s fresh fruit, is merely descriptive thereof under Section 2(e)(1).

**Decision:** The refusal to register is affirmed.