

This Opinion is Not a
Precedent of the TTAB

Mailed: March 31, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Three Lollies LLC

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Serial No. 86779106

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Three Lollies LLC, appearing *pro se*.

Rebecca A. Smith, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

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Before Cataldo, Masiello and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Three Lollies LLC (“Applicant”) seeks registration on the Principal Register of the mark TUMMY NATURALS (in standard characters; TUMMY disclaimed) for “medicinal preparations for the mouth to be applied in the form of drops, capsules, tablets and compressed tablets; nausea treatment preparations” in International Class 5.¹

¹ Application Serial No. 86779106, filed on October 6, 2015 based on an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive of the identified goods. After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Mere Descriptiveness - Applicable Law

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1). A term is "merely descriptive" within the meaning of Section 2(e)(1) if it "immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). "On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also*, *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980).

A term need only describe a single feature or attribute of the goods to be descriptive. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001). Moreover, a mark need not be merely descriptive of all recited

goods or services in an application. A descriptiveness refusal is proper, “if the mark is descriptive of any of the goods for which registration is sought.” *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)).

Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought, not in the abstract or on the basis of guesswork. Descriptiveness of a term must be evaluated “in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). “The question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods and services 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, 1316-17 (TTAB 2002)).

With these principles in mind, we start our analysis by defining the components of Applicant’s mark TUMMY NATURALS. The components of Applicant’s mark are defined as follows:

- The word “tummy” is defined as “a person’s stomach or abdomen.”²
- The term “naturals” is defined, *inter alia*, as “having undergone little or no processing and containing no chemical additives: natural food.”³

When applied to Applicant’s nausea treatment preparations, each component of Applicant’s TUMMY NATURALS mark retains its merely descriptive significance, and the mark in its entirety means and directly engenders the commercial impression of a product for the stomach that is made from relatively unprocessed ingredients or lacks chemical additives. This factual finding is corroborated not only by the fact that Applicant itself has disclaimed the term TUMMY⁴ but also by the Examining Attorney’s submission of third-party registrations which either disclaim the term TUMMY or NATURALS for goods similar in function and/or purpose to Applicant’s identified goods, i.e., preparations that aid in alleviating the discomfort of body

² See Oxford Dictionary (www.oxforddictionaries.com). The Board may take judicial notice of dictionary definitions, including online dictionaries and encyclopedias that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010). We also note that although the Examining Attorney did not submit a dictionary definition for the term “TUMMY,” Applicant acknowledged that the Examining Attorney defined the term “TUMMY” as referring to the stomach and did not contest this definition. See Applicant’s April 5, 2016, Response to Office Action, p. 9.

³ See January 27, 2016, Office Action.

⁴ By disclaiming the term TUMMY, Applicant has conceded that this term is merely descriptive when used in connection with its identified goods. *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 (TTAB 1988) (“By its disclaimer of the word LITE, applicant has conceded that the term is merely descriptive as used in connection with applicant’s goods; *In re Ampco Foods Inc.*, 227 USPQ 331, 333 (TTAB 1985) (“Finally, applicant has conceded the descriptive nature of the term ‘FRIES’ by disclaiming it apart from the mark as a whole”).

ailments and/or for promoting general good health and well-being or which contain natural ingredients.⁵ For example:

Third-party registrations in which the term “TUMMY” is disclaimed:

TUMMY CALM (Registration No. 410017) for “homeopathic medicine for digestive upset”;

HEATHER’S TUMMY TAMERS (Registration No. 4619448) for “dietary and nutritional supplements”;

TUMMY TUNEUP (Registration No. 4849964) for “nutritional supplements, namely, probiotic compositions”;

TUMMYCARE MAX (Registration No. 4862360; TUMMYCARE disclaimed) for “nutritional supplements for the treatment of acid reflux in infants”, and

TUMMY DROPS KEEP TUMMIES HAPPY (Registration No. 4247307; TUMMY DROPS disclaimed) for “dietary supplement.”

Third-party registrations in which the term “NATURALS” is disclaimed:

GENTLE NATURALS (Registration No. 3650236) for “Teething drops for relieving teething pain, dietary supplements, earache drops, and bug repellents;”

JORDAN NATURALS (Registration No. 4610076) for “Topical lotions for relief of skin conditions;”

LISTERINE NATURALS (Registration No. 4568721) for “medicated mouthwash;”

HDI NATURALS (Registration No. 4884109) for “Dietetic Food, namely, sugar free lozenges adapted for medical use made primarily with natural ingredients; Dietary and Nutritional Supplements, made primarily with natural ingredients;”

EARTH TREE NATURALS (Registration No. 4463365) for “liquid vitamin supplements; vitamin and mineral supplements;”

INSTA NATURALS and design (Registration No. 4926022) for, among other things, “Vitamin supplements containing natural ingredients;”

⁵ See January 27, 2016 and April 19, 2016, Office Actions.

SOLLE NATURALS (Registration No. 4402551) for, among other things, “nutritional supplement for eliminating toxins from the body; nutritional supplement for eliminating toxins from the intestinal tract;”

BIOCLINIC NATURALS (Registration No. 4647564) for “Dietary and nutritional supplements; Dietary food supplements; Food supplements; Health food supplements; Herbal supplements; Nutraceuticals for use as a dietary supplement; Vitamin and mineral supplements; all of the foregoing derived primarily from natural ingredients;”

SMOKEY MOUNTAIN NATURALS, LLC (Registration No. 45336+9) for “natural supplements for treating menopause;”

ALPINE VALLEY NATURALS (Registration No. 4585985) for, among other things, “dietary supplement for eliminating toxins from the intestinal tract; dietary supplements for controlling cholesterol; dietary supplements for urinary health; herbal supplements for sleeping problems; natural supplements for treating erectile dysfunction; natural supplements for treating depression and anxiety;”

ZOLA NATURALS (Registration No. 4810843) for, among other things, “dietary and nutritional supplements in liquid capsule, softgel and tablet form consisting of vitamins, minerals and herbs for vitality, balance, libido, skin, digestion and general well-being;”

ANAPURE NATURALS (Registration No. 4867597) for “Dietary and nutritional supplements containing vitamins, minerals and amino acids made in significant part of natural ingredients;”

ZARBEE’S NATURALS (Registration No. 4754773) for “Allergy capsules; Cough treatment preparations; Natural sleep aid preparations;”

RAMI NATURALS and design (Registration No. 4747045) for “Dietary and nutritional supplements containing natural ingredients; Dietary supplements for a variety of health needs containing natural ingredients;” and

CALYX NATURALS (Registration No. 4869816) for “natural herbal supplements, namely, natural remedy preparations for the treatment of gastro-intestinal conditions, hormonal and chemical imbalances, and sleep disorders.”

Third-party registrations featuring the same or similar goods or services are probative evidence on the issue of descriptiveness where the relevant term is

disclaimed. *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 (Fed. Cir. 1987); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006); *In re Finisar Corp.*, 78 USPQ2d 1618, 1621 (TTAB 2006), *aff'd per curiam*, 223 Fed. Appx. 984 (Fed. Cir. 2007).

Applicant argues that if its applied-for mark, TUMMY NATURALS, is read in its entirety, instead of being dissected, it is not descriptive but merely suggestive of its identified goods inasmuch as the “mental link” between its mark and the identified goods is neither immediate nor instantaneous and therefore consumers will have to undergo a multi-step process to envision the relevance of TUMMY NATURALS to Applicant’s goods.⁶ Applicant further contends that the term NATURALS in the context of natural remedies is susceptible to many different interpretations and meanings and therefore when Applicant’s mark is viewed in its entirety it “fails to directly, immediately and almost intuitively provide information regarding Applicant’s goods.”⁷ Specifically, Applicant maintains that its TUMMY NATURALS mark can be (1) interpreted as medicinal preparations that are intended to assist the body in naturally alleviating discomfort and pain; (2) appreciated as goods that are wholesome and safe; or (3) viewed as medicinal remedies that are easily digestible and have no side-effects on the stomach or digestive system.⁸

⁶ Applicant’s Appeal Brief, pp. 7 and 10, 5 TTABVUE 8 and 11; Applicant’s April 5, 2016, Response to Office Action.

⁷ Applicant’s April 5, 2016, Response to Office Action.

⁸ *Id.* It is worth noting that all of Applicant’s proposed alternative interpretations of the meaning of the mark are, themselves, descriptive of features of Applicant’s goods.

Theoretically, it is true that if a combination of terms creates a non-descriptive or incongruous meaning, the composite mark is registrable. *See generally In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (“[I]f ... two portions individually are merely descriptive of an aspect of appellant's goods, the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.”); *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ at 364-65. But if, on the other hand, each component retains its merely descriptive significance in relation to the goods, then the mark as a whole is merely descriptive. *E.g.*, *In re Oppedahl & Larson*, 71 USPQ2d at 1374 (“In this case, the mark ..., as a whole, is merely descriptive of appellant's goods.”); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (“The two component words of the mark combine in a manner and order that would be easily interpreted by persons familiar with the English language and the goods. They would be immediately understood”); *In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1341 (TTAB 2009) (“[B]ecause the combination of the terms does not result in a composite that alters the meaning of either of the elements, refusal on the ground of descriptiveness is appropriate”).

Applicant's goods include "nausea treatment preparations," and nausea is a stomach-related condition.⁹ Based on the evidence of record and contrary to Applicant's arguments, we find that consumers in the market for the types of goods offered by Applicant, such as nausea preparations, are accustomed to encountering terms like TUMMY and NATURALS when purchasing these types of goods and will understand that the goods are naturally-based preparations for treating stomach conditions. No additional mental step is required to understand the nature of the goods and no imagination is required to make this connection when the mark is used in connection to the actual goods. Moreover, we find that the combination of the terms TUMMY and NATURALS does not result in a composite mark that conveys any distinctive source-identifying impression other than the descriptiveness of the individual terms. Furthermore, we find unpersuasive Applicant's argument that, because the term NATURALS may have multiple meanings, its mark cannot be viewed as descriptive of its identified goods. As indicated above, because descriptiveness is evaluated in relation to the particular goods for which registration is sought, the context in which the term is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use, we focus our analysis on definitions that are related to the goods, i.e., nausea treatment preparations.¹⁰ Based on the definitions of the terms at

⁹ Nausea is "a sensation of discomfort in the region of the stomach usu. Associated with an urge to retch or vomit." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) p. 1508.

¹⁰ As noted above, a descriptiveness refusal is proper, "if the mark is descriptive of any of the goods for which registration is sought." *In re Chamber of Commerce of the U.S.*, 102 USPQ2d

issue, it is clear that when Applicant's mark TUMMY NATURALS is viewed in its entirety in connection with Applicant's nausea treatment preparations consumers would perceive the mark as merely describing a feature of Applicant's goods, namely, that the goods are a preparation containing natural ingredients for alleviating discomfort in the stomach caused by nausea. In other words, Applicant's mark lacks the type of suggestiveness or incongruous meaning that might avoid mere descriptiveness. *See generally In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) ("unusual association or arrangement in the applicant's mark [SUGAR & SPICE] results in a unique and catchy expression which does not, without some analysis and rearrangement of its components suggest the contents of applicant's goods").

Applicant next argues that there is little evidence that the phrase TUMMY NATURALS is commonly used in the trade.¹¹ Additionally, Applicant maintains that its competitors have numerous choices in regard to alternative language that can be used to identify their own specific goods.¹²

Applicant's arguments are unavailing. The Board has made clear that the Examining Attorney is not required to show competitive need or concurrent use by others in order to establish that a term is descriptive: "Under the current standard, there is no requirement that the Examining Attorney prove that others have used the

at 1219 (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)) (emphasis added).

¹¹ Applicant's Appeal Brief, p. 11, 5 TTABVUE 12.

¹² *Id.*

mark at issue or that they need to use it, although such proof would be highly relevant to an analysis under Section 2(e)(1).” *In re Fat Boys Water Sports*, 118 USPQ2d at 1514. Here, however, the Examining Attorney did submit numerous third-party registrations for goods similar to those of Applicant in which the marks incorporate the terms TUMMY or NATURALS and those terms are disclaimed as merely descriptive of the identified goods. This evidence demonstrates, at a minimum, that competitors of goods similar to those of Applicant seek to register trademarks containing the terms TUMMY or NATURALS to be used in association with goods for alleviating ailments of the stomach and/or which contain natural ingredients. Moreover, the fact that potential competitors of Applicant may be able to describe and advertise the same or similar goods by terms other than TUMMY NATURALS that are similar in meaning does not obviate the descriptiveness of Applicant’s mark. *See, e.g., Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962).

II. Conclusion

We have carefully considered all arguments and evidence of record, including any not specifically discussed. We find that TUMMY NATURALS is merely descriptive of nausea treatment preparations identified in Applicant’s application under Section 2(e)(1) of the Trademark Act.

Decision: The refusal to register Applicant’s mark TUMMY NATURALS is affirmed.