

This Opinion is not a
Precedent of the TTAB

Mailed: September 20, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re JHO Intellectual Property Holdings LLC
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Serial No. 88784575
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Nicole M. Murray of Quarles & Brady LLP
for JHO Intellectual Property Holdings LLC.

Jacquelyn A. Jones, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Goodman, Heasley and Larkin,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

JHO Intellectual Property Holdings LLC (“Applicant”) seeks registration on the Principal Register of the proposed mark COGNITIVE CANDY (in standard characters) for “Dietary supplement drink mixes; Dietary supplemental drinks; Dietary and nutritional supplements; Liquid nutritional supplement; Nutritional supplement energy bars; Nutritional supplements; Nutritional and dietary

supplements formed and packaged as bars; Powdered nutritional supplement drink mix” in International Class 5.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the applied-for mark is merely descriptive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1) prohibits registration on the Principal Register of a mark which, when used on or in connection with an applicant’s goods, is merely descriptive of them, unless the mark has been shown to have acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).² “A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is

¹ Application Serial No. 88784575 was filed on February 4, 2020, based upon Applicant’s assertion 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). An amendment to allege use was filed after denial of reconsideration in connection with a request to divide out Class 32 goods, alleging a date of first use and first use in commerce of October 7, 2020 of the mark for the Class 5 goods. The request to divide was granted, and only Class 5 is before us on appeal.

Page references to the application record refer to the online database pages of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Applicant’s brief is at 11 TTABVUE; the Examining Attorney’s brief is at 14 TTABVUE.

² Applicant does not claim its mark has acquired distinctiveness.

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)); *see also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

Descriptiveness must be evaluated “in relation to the particular goods for which registration is sought, the context in which [the proposed mark] 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 Bayer*, 82 USPQ2d at 1831. The fact that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). The question is whether someone who knows what the goods are will understand the term to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See, e.g., In*

re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1372, 1374 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet).

II. Record Evidence

Dictionary Definitions:

The Examining Attorney submitted the following dictionary definitions:

Cognitive: “connected with thinking or conscious mental processes.” April 22, 2020 Office Action at TSDR 12-13, CAMBRIDGE DICTIONARY (dictionary.cambridge.org).

Candy: “a sweet food made from sugar or chocolate or a piece of this”; “a small piece of sweet food made from sugar with chocolate, nuts, fruits or flavors added.” April 22, 2020 Office Action at TSDR 16-17, CAMBRIDGE DICTIONARY (dictionary.cambridge.org).

Applicant submitted the following dictionary definitions:

Cognitive: “of or relating to the mental processes of perception, memory, judgment, and reasoning, as contrasted with emotional and volitional processes.” August 26, 2020 Request for Reconsideration at TSDR 63-65, RANDOM HOUSE UNABRIDGED DICTIONARY (dictionary.com).

Candy: “any variety of confections made with sugar, syrup, etc. often combined with chocolate, fruit, nuts etc.,” August 26, 2020 Request for Reconsideration at TSDR 67-69, RANDOM HOUSE UNABRIDGED DICTIONARY (dictionary.com).

Candy: “a confection made with sugar and often flavoring or filling,” August 26, 2020 Request for Reconsideration at TSDR 70, MERRIAM-WEBSTER DICTIONARY (merriam-webster.com).

Candy: “something that is pleasant or appealing in a light or frivolous way,” August 26, 2020 Request for Reconsideration at TSDR 70, MERRIAM-WEBSTER DICTIONARY (merriam-webster.com).

Candy: “a person or thing that is regarded as being attractive or superficial: arm candy,” August 26, 2020 Request for Reconsideration at TSDR 68, COLLINS ENGLISH DICTIONARY (dictionary.com),

Brain candy: “something that is entertaining but lacks seriousness or substance: mindless entertainment,” August 26, 2020 Request for Reconsideration at TSDR 3, COLLINS ENGLISH DICTIONARY (dictionary.com).

Brain candy: “something that is entertaining or enjoyable but lacks depth or substance,” August 26, 2020 Request for Reconsideration at TSDR 5, MERRIAM-WEBSTER DICTIONARY (merriam-webster.com).

Negative dictionary evidence: no entry for “cognitive candy,” August 26, 2020 Request for Reconsideration at TSDR 7-9, MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) and Dictionary.com.

Third party registrations:

Applicant submitted eleven third-party registrations covering nutritional and dietary supplements or energy drinks containing the term “candy” or “kandy.” Five Principal Register registrations showed no disclaimers of the term “candy” while the remaining registrations were on the Supplemental Register, or on the Principal Register with disclaimers of “candy.”³ August 26, 2020 Request for Reconsideration at TSDR 14-61.

The Examining Attorney submitted an article titled “Candy Supplements,” about nutritional or dietary supplements that taste like candy. September 16, 2020 Denial of Reconsideration at TSDR 2-3. Healthy Fellow (healthyfellow.com) states:

Walk down the supplement isles [sic] of most health food stores and pharmacies and you’ll undoubtedly see bottles that are seemingly filled with enticing candies. These days calcium, fish oil, multivitamins and other dietary aids are often being sold in the form of chocolates, gummy

³ The limited record of third-party registrations shows mixed treatment by the Office of the term “candy” in connection with dietary and nutritional supplements. While the Office strives for consistency, we must decide each case on its own facts and record. *See In re Consolidated Foods Corp.*, 200 USPQ 477 (TTAB 1978). The mere fact that there have been inconsistencies in how Examining Attorneys treated the word CANDY does not raise a doubt, on this record, as to the merely descriptive nature of this term in the context of Applicant’s proposed mark.

bears and even jelly beans. Some of these are 100% natural ... Others are loaded with the same types of artificial ingredients you expect to find in conventional candy.

Candy-like multivitamins are now being marketed more aggressively than ever before. . . How can something formulated to taste like candy support health to the same degree as boring and sometimes unpleasant smelling/tasting pills? But sure enough, there are those who imply or make that precise claim.

The Examining Attorney submitted webpages from companies offering candy-flavored or candy-like supplements:

Chewies (through groupon.com) offers “muscle candy supplements” also identifying them as “muscle candy.” The supplements are described as “muscle supplements in a tasty candy-like format.” April 22, 2020 Office Action at TSDR 75-76.

Good Day Chocolate (gooddaychocolate.com) offers various supplements in the form of “candy coated pieces.” April 22, 2020 Office Action at TSDR 78-82.

Purbolics (purbolics.com) offers “rainbow candy flavor” caffeine free aminos. April 22, 2020 Office Action at TSDR 83.

Wellution (through amazon.com) offers Hemp Gummies Premium: a “fun & delicious alternative - Stimulates brain function – enhance your productivity with more focus ... Since gummy is an all time fave, we decided to make our supplements look, smell and taste like it. ... Gummies with hemp can also make you better at focusing on your tasks and remembering important things.” September 16, 2020 Denial of Reconsideration at TSDR 6.

The Examining Attorney submitted webpages from companies that offer brain supplements for cognitive support:

A webpage from Vitamin Shoppe (vitaminshoppe.com) discusses supplements if offers to support brain health:

“Shop specialized and herbal supplements for brain health at the Vitamin Shoppe to support maximum cognitive function every day. Herbal brain supplements and other brain-friendly compounds can

support functions such as memory, concentration, alertness, thinking, focus and mood.” The web page lists supplements that “help support cognitive function” such as fish oil supplements, Vitamin E, and lion’s mane. September 16, 2020 Denial of Reconsideration at TSDR 64.

A webpage from Now Foods (nowfoods.com) discusses supplements for cognitive health:

“Maintaining cognitive health, and the health of our brain, is vitally important for our survival and success in life. More importantly it’s absolutely essential for a good quality of life. Healthy cognitive function throughout life depends on many different variables, not the least of which is good nutrition. There are a variety of natural nutrients and brain supplements that can nourish our brain and nervous system to keep you processing information at faster-than-light speeds.” April 22, 2020 Office Action at TSDR 69.

Walmart (Walmart.com) offers supplements for brain and cognitive function such as memory support, attention support, mental sharpness, memory improvement, concentration improvement, and mental focus. For example, Complete Brain offers “cognitive support.” April 22, 2020 Office Action at TSDR 54-56, 58.

Vitamin Shoppe (vitaminshoppe.com) offers various brain and memory herbal supplements that support cognitive function. September 16, 2020 Denial of Reconsideration at TSDR 51-65. For example:

VThrive supports cognitive function;

Cognizin Citicoline supports cognitive health and mental focus.

Neuro-Mag supports memory enhancement and cognition function.

MagMind supports cognition and brain health.

September 16, 2020 Denial of Reconsideration at TSDR 52, 53 59, 61-62.

Other websites offering supplements for supporting cognitive functions include the following:

My Supplement Store (mysupplementstore.com) offers supplements for “cognitive functions such as focus, enhanced sleep and motivation.” April 22, 2020 Office Action at TSDR 60.

CVS (cvs.com) offers a cognitive health dietary supplement. September 16, 2020 Denial of Reconsideration at TSDR 46.

Integrative Therapeutics (integrativepro.com) offers Prothrivers Wellness Brain to support “cognitive clarity.” September 16, 2020 Denial of Reconsideration at TSDR 48.

Memory Health (memoryhealth.com) offers a nutritional supplement that supports memory and cognitive function which improves memory, mood, focus, and clarity. September 16, 2020 Denial of Reconsideration at TSDR 29.

Applicant’s amendment to allege use specimen for its liquid nutritional supplements states:

“Watermelon Redline Cognitive Candy” is “designed to support focus, energy, performance, and reaction time.”

The specimen lists the following flavors for the product: candy apple crisp, cotton candy, frose rose, purple kiddles, radical skadattle, star blast, triple berry, watermelon, rainbow unicorn, and peach mango.

The specimen -shows a photograph of the goods:



January 21, 2021 Amendment to Allege Use at TSDR 1-15.

III. Arguments

Applicant acknowledges the Examining Attorney's evidence showing that "cognitive' is used with goods such as 'cognitive health supplements' that purport to improve cognitive function" and that "candy' is used to describe certain types of supplements that resemble actual candies, have supplements embedded in chocolates or candies, or that advertise having a sweet taste." 11 TTABVUE 16. However, Applicant submits that the evidence is insufficient to establish the descriptiveness of COGNITIVE CANDY as a whole. 11 TTABVUE 16.

Applicant argues that COGNITIVE CANDY is "a clever play on connotations and alliteration that is suggestive, but not merely descriptive, of qualities of the goods." 11 TTABVUE 16. Applicant submits that "cognitive" "carries a specific scientific and psychological meaning" relating "to 'the mental processes of perception, memory, judgment, and reasoning'" while "candy" is "defined as 'a sweet food made from sugar or chocolate'" but also is defined as "'something that is pleasant or appealing in a light or frivolous way,' leading to slang or colloquial uses in phrases like 'eye candy' or 'arm candy,' typically connoting superficiality, a lack of pretension, quick satisfaction—overall, decidedly more grounded and immediate meanings than those of 'COGNITIVE.'" 11 TTABVUE 13, 14. Applicant submits that "the lofty connotations of 'cognitive' are in stark contrast to the literal and colloquial connotations of 'candy,' creating an incongruous commercial impression." 11 TTABVUE 14.

Applicant contends that the incongruous meaning of COGNITIVE CANDY "overrides any descriptive qualities." 11 TTABVUE 16. It asserts that the

circumstances here are similar to the precedential case *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978) (finding TENNIS IN THE ROUND not merely descriptive for providing tennis facilities arrayed in a circular structure because the association of that applicant's marks with the phrase "theater-in-the-round" created an incongruity) or the non-precedential cases *In re Original Grain, LLC*, No. 87511343, 2020 WL 582930, at *16 (TTAB Jan. 15, 2020) (ORIGINAL GRAIN does not "immediately describe, ... that menu items containing whole grains or unrefined grains are the 'specialty of the house' or its 'principal attraction'"); and *In re Quicksilver, Inc.*, No. 77734610, 2012 WL 2166300 (May 18, 2012) (SURF COUTURE not descriptive of eyewear, luggage, and clothing; "at best, the submitted [dictionary] definitions support a finding that SURF COUTURE may be defined somewhat incongruously as high fashion clothing and related goods designed for surfers and surfing").⁴

The Examining Attorney argues, on the other hand, that the evidence shows that "cognitive" and "candy" are merely descriptive terms in connection with Applicant's goods and that the combination is not incongruous. 14 TTABVUE 7. The Examining Attorney submits that COGNITIVE CANDY is merely descriptive because it

⁴ A decision that is not designated as precedential is not binding on the Board, but may be cited for whatever persuasive value it might have. *In re Fiat Grp. Mktg. & Corp. Comm'ns S.p.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014) (non-precedential decisions are not binding on the Board, but may be cited to and considered for whatever persuasive value they may hold). We find these cases distinguishable as in *In re Original Grain LLC*, the issue of incongruity was not raised, and in *In re Quicksilver, Inc.* the reversal of the refusal to register was based on the insufficiency of the evidence to support a descriptiveness refusal rather than incongruity.

“immediately and directly conveys to consumers that Applicant’s supplements are sweet tasting and for improving cognitive functions or thinking.” 14 TTABVUE 7.

IV. Analysis

Applicant recognizes that “‘cognitive’ and ‘candy’ may be individually apt when used in connection with Applicant’s goods.” 11 TTABVUE 15. See also 11 TTABVUE 16 (“[t]he evidence establishes only that the term ‘cognitive’ is used with goods such as ‘cognitive health supplements’ that purport to improve cognitive function ..., or that the term ‘candy’ is used to describe certain types of supplements that resemble actual candies, have supplements embedded in chocolates or candies, or that advertise having a sweet taste.”). Indeed, the evidence submitted by the Examining Attorney clearly supports the descriptive meaning of each word in connection with dietary and nutritional supplements.

In particular, the evidence reflects that “cognitive,” defined as “connected with thinking or mental processes” or “relating to the mental processes of perception, memory, judgment, and reasoning,” describes dietary and nutritional supplements with “brain-friendly” compounds that are offered to support brain health and cognitive functions such as mental clarity, memory, alertness, concentration and focus.

As to the term “candy,” Applicant contends that “candy” has other possible meanings than “a sweet food” or confection such as “pleasant or appealing in a light or frivolous way” or colloquial phrases that connote “superficiality, a lack of pretension, quick satisfaction.” However, this argument is unavailing because as

stated, descriptiveness is considered in relation to the relevant goods and the fact “[t]hat a term may have other meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest*, 204 USPQ at 593. In the context of Applicant’s goods, the relevant definitions for “candy” are “a sweet food made of sugar or chocolate,” “a confection made with sugar and often flavoring or filling,” or “any variety of confections made with sugar, syrup, etc. often combined with chocolate, fruit, nuts.” As the record reflects, these definitions are descriptive of dietary and nutritional supplements that are sweet and candy-like, either offered in a candy-type form (e.g., gummies, jelly beans), enrobed in chocolate, or containing candy-like flavorings.

Under “section 2(e)(1), incongruity exists, for example, where a term evokes an immediate association with something unrelated to the goods or services.”⁵ *In re Calphalon Corp.*, 122 USPQ2d 1153, 1163 (TTAB 2017).

Here, we find that combining the two merely descriptive terms “cognitive” and “candy” into the composite COGNITIVE CANDY does not negate their mere descriptiveness, nor does it create a composite that is incongruous. COGNITIVE CANDY, when considered in connection with the goods, immediately calls to mind dietary or nutritional supplements for brain or cognitive support that are sweet and candy-like.

⁵ We take judicial notice of the dictionary definitions for “incongruous,” which is defined as : “lacking congruity: such as a: not harmonious : INCOMPATIBLE b: not conforming : DISAGREEING c: inconsistent within itself.” Merriam-Webster Dictionary (merriam-webster.com). The Board may take judicial notice of dictionaries, including online dictionaries which exist in print format. *In re Jonathan Drew, Inc.*, 97 USPQ2d 1640, 1642 n.4 (TTAB 2011).

The evidence submitted by the Trademark Examining Attorney supports this finding, as it shows third-parties that offer various sorts of candy-type dietary or nutritional supplements: hemp supplements in gummy form for stimulating brain function to “enhance your productivity with more focus”; rainbow candy flavor caffeine free aminos; muscle supplements “in a tasty candy-like format”; and supplements in the form of candy-coated chocolate pieces. Applicant’s goods, as identified, and as shown by the specimen, are liquid dietary and nutritional supplements with sweet candy-like flavorings (e.g., cotton candy, purple kiddles, radical skadattle, rainbow unicorn, and starblast) that are offered to improve cognition, including mental focus. Thus, the composite designation COGNITIVE CANDY directly and merely describes features of Applicant’s goods.

We find that the combined term COGNITIVE CANDY does not create incongruity, as consumers have been exposed to brain support supplements for mental cognition as well as supplements being candy-flavored or in the form of candy such as chocolates, candy-coated chocolates, gummy bears and jelly beans. Thus, there is nothing incongruous about the combination of the words COGNITIVE and CANDY because it does not evoke “an immediate association with something unrelated to the goods or services.” *In re Calphalon Corp.*, 122 USPQ2d at 1163. COGNITIVE CANDY will simply call to mind sweet or candy-flavored dietary or nutritional supplements that support brain function or cognition. Simply because an applicant may have been the first or only user of a merely descriptive designation does not necessarily render the designation incongruous or distinctive if the only significance conveyed by the

term is merely descriptive, as is the case here. *See In re Phoseon Tech.*, 103 USPQ2d 1822, 1826 (TTAB 2012).

In view of the foregoing, we conclude that COGNITIVE CANDY is merely descriptive of Applicant's goods.

Decision: The Section 2(e)(1) refusal to register Applicant's mark COGNITIVE CANDY is affirmed.