

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: June 6, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Radical Marketing LLC

Serial No. 90381196

Melissa Gray of Klemchuk LLP,
for Radical Marketing LLC.

Josette Beverly, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Bergsman, Wellington, and Lynch,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Radical Marketing LLC (“Applicant”) seeks registration on the Principal Register
of the certification mark:



on “foods, beverages, and food products,” in Class A.¹ The wording IRRITABLE BOWEL SYNDROME has been disclaimed.

In the application’s certification statement, Applicant states that its certification mark is “used or intended to be used by persons authorized by the certifier, certifies or is intended to certify that the goods provided have met the certifier’s minimum dietary guidelines and standards for foods friendly for people with irritable bowel syndrome.”

Registration has been finally refused under Section 2(e)(1) of the Trademark Act (“the Act”), 15 U.S.C. 1052(e)(1), on the basis that the certification mark describes a feature of the goods that are intended to be certified and that the carrier design is nondistinctive.

When the refusal was made final, Applicant requested reconsideration of the refusal and filed an appeal. The Examining Attorney denied the request for reconsideration. The appeal has been briefed.²

¹ Application Serial No. 90381196 was filed on December 4, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s claim of a bona fide intent to use the mark in commerce.

² Applicant attached materials, as exhibits, to its brief. 6 TTABVue 17-42. “[T]he appeal brief is associated with the application file, so papers that are already in the application should not, as a matter of course, be resubmitted as exhibits to the brief.” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.01 (2022). Material that was not previously made of record should not be submitted with the appeal brief because it is untimely and generally will not be considered. *Id.* and cases cited therein. Thus, any of the materials submitted with Applicant’s brief that were not previously made of record are not given consideration.

Mere Descriptiveness

Absent an adequate showing of acquired distinctiveness,³ Section 2(e)(1) of the Act precludes registration of a mark on the Principal Register which, when used in connection with the identified goods, is merely descriptive of them. A mark is “merely descriptive” within the meaning of Section 2(e)(1) “if it immediately conveys information concerning a feature, quality, or characteristic of the goods for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer A.G.*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)).

For a mark to be found merely descriptive, it “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 the goods.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)).

Particular to this proceeding, in the case of a certification mark, the relevant goods for purposes of the descriptiveness analysis are those identified in the application, i.e., the goods being certified by Applicant and provided by the certified users. *See In re Council on Certification of Nurse Anesthetists*, 85 USPQ2d 1403, 1411 (TTAB 2007) (considering whether the certification mark “refer[s] to anesthesia services rendered and administered by certified registered nurse anesthetists”).

³ Applicant has not asserted a claim of acquired distinctiveness under Section 2(f) of the Act.

Also, relevant to some of Applicant's arguments, discussed *infra*, we point out that a proposed mark's descriptiveness is assessed "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." *Bayer AG*, 82 USPQ2d at 1831 (citing *In re Abcor Dev.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

In this case, the "average purchaser" is any consumer of food and beverage products, particularly items that are compatible with or meet the dietary needs of people who have irritable bowel syndrome disease.

Where a proposed mark consists of multiple terms, the mere combination of descriptive terms does not necessarily create a non-descriptive word or phrase. *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). A mark comprising a combination of merely descriptive components is registrable only if the combination of terms "function[s] as an indication of more than a mere description of the ingredients [or functions] of the goods on which the mark is used[.]" *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968), or results in the "coinage of hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and 'mental pause'." *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983).

If the words in the proposed mark are individually descriptive of the goods, we must then determine whether their combination "conveys any distinctive source-

identifying impression contrary to the descriptiveness of the individual parts.” *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). If each word instead “retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive.” *Id.* at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018); *In re Phoseon Tech.*, 103 USPQ2d at 1823 (“When two or more merely descriptive terms are combined, . . . [i]f each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive.”).

In analyzing the proposed certification mark:



we discern the components are the literal terms IRRITABLE BOWEL SYNDROME, IBS, FRIENDLY and the concentric circular border-design.

“Irritable bowel syndrome” is defined as:⁴

⁴ Printout of entry (“Irritable bowel syndrome. *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/>.... Accessed 21 Jun. 2021.) attached to Office Action issued June 22, 2021.

a chronic functional disorder of the colon that is characterized especially by constipation or diarrhea, cramping abdominal pain, and the passage of mucus in the stool —abbreviation IBS.

In providing the disclaimer of the wording IRRITABLE BOWEL SYNDROME,⁵ Applicant concedes the descriptiveness of this term, and admits that “[f]or a consumer to understand the certification, the words IRRITABLE BOWEL SYNDROME are included as part of the mark.”⁶ Applicant further stated that it “agrees that these three words can be considered as having descriptive qualities relative to dietary issues consumers may experience.”⁷

As to the term FRIENDLY, appearing at the bottom of the outer circular border, Applicant argues that the term FRIENDLY is not “merely descriptive, but rather suggestive.”⁸ Specifically, Applicant relies on the definition for “friendly” to mean “of, relating to, or befitting a friend.”⁹ Applicant argues that the Examining Attorney “fails to consider this primary (and more general) definition of the term.”¹⁰

However, the mark, including the term FRIENDLY, is not viewed in a vacuum and the most common or known meaning for a word is not always the most applicable. Rather, the mark must be viewed in its entirety and in the same manner and context

⁵ Applicant provided the disclaimer with its Request for Reconsideration, filed on July 25, 2022.

⁶ *Id.*, TSDR p. 7.

⁷ *Id.*

⁸ 6 TTABVUE 8.

⁹ 6 TTABVUE 10. Applicant relies on copy of dictionary definition (from www.merriam-webster.com) submitted with its Request for Reconsideration filed July 25, 2022, TSDR pp. 36-40.

¹⁰ *Id.*

as it is encountered by the relevant consuming public. Or, as the Examining Attorney explains, “determining descriptiveness must be assessed in relation to applicant’s goods, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use,”¹¹ citing, *inter alia*, *In re Chamber of Commerce*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012).

Here, consumers will encounter the term FRIENDLY as a continuation of the descriptive wording IRRITABLE BOWEL SYNDROME, given it appears directly below in the same font and within the same circular border. Also, when viewed in the context of a certification mark for food and beverage products, and following a reference to a digestive disease, the term FRIENDLY has a particular significance and meaning that is merely descriptive. That is, as used in Applicant’s mark and in the context Applicant intends to use the mark, the more appropriate and applicable defined meaning of the word “friendly” is: “designed or intended to accommodate particular needs, users, etc. – usually used in combination ... [e.g.] a kid-**friendly** restaurant ... providing a more business-**friendly** and professional environment ...” [emphasis in original].¹² Consumers encountering Applicant’s mark on food or beverage products will immediately understand FRIENDLY as indicating that the certified food or beverage products “accommodate the needs” of persons who have irritable bowel syndrome (IBS).

¹¹ 8 TTABVue 4.

¹² From dictionary definition submitted by Applicant (see Note 10).

Indeed, there is no question regarding the relevant meaning of the term FRIENDLY given the certification statement Applicant provided in its application – “to certify that the goods provided have met the certifier’s minimum dietary guidelines and standards **for foods friendly for people with irritable bowel syndrome.**” (Emphasis in bold). *See N.C. Lottery*, 123 USPQ2d at 1710 (information from an applicant’s own materials submitted with its application, including any explanatory text, may be relevant to the question of descriptiveness); *cf. In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) (use of the word “psychology” in the identification of goods demonstrated that the word was merely descriptive).

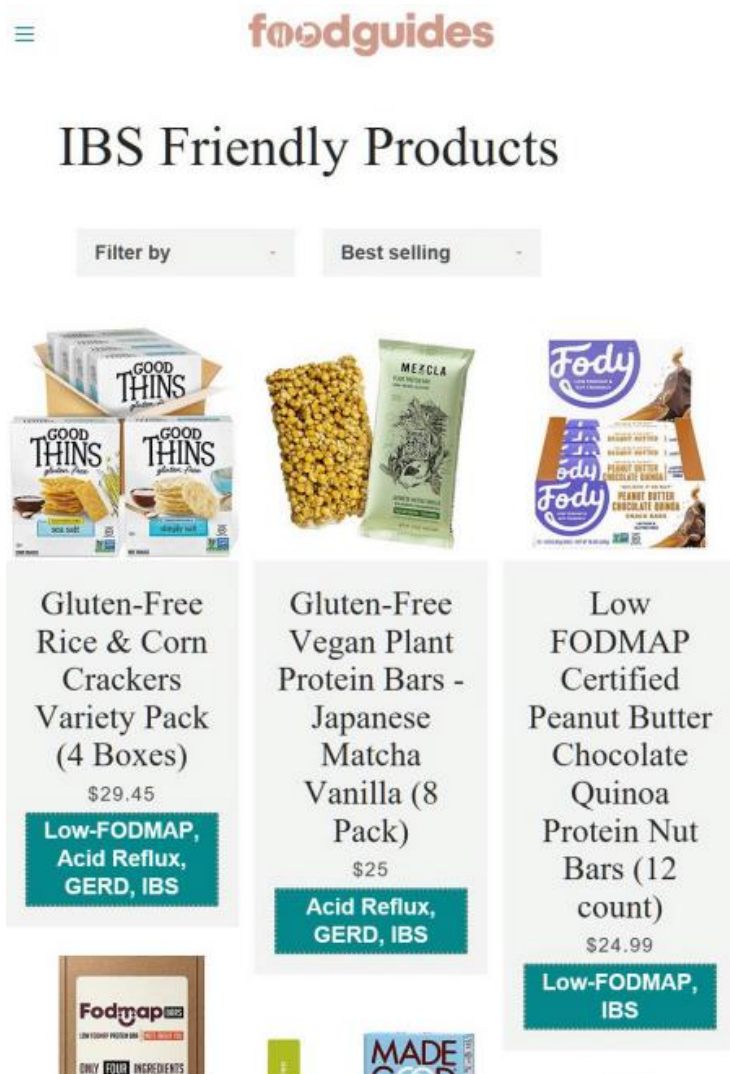
As to the initialism, IBS, Applicant also argues this is only suggestive and not descriptive of the goods it intends to certify. However, as provided in the dictionary definition entry, above, IBS is a recognized abbreviation for “irritable bowel syndrome.” Indeed, in a list of possible abbreviations (“IBS – What does IBS stand for?”), submitted by Applicant, “Irritable Bowel Syndrome” appears first.¹³ Applicant nonetheless argues that IBS is also only “suggestive” because IBS may be used to abbreviate other terms.¹⁴ Again, however, we must determine how the relevant consumer will perceive IBS, as it is used in Applicant’s mark and in the context of the goods being certified. Thus, once more, we find that a consumer interested in purchasing goods certified to be “friendly for people with irritable bowel syndrome,”

¹³ *Id.*, TSDR pp. 16 (printout of a list of IBS acronyms from The Free Dictionary website (www.acronyms.thefreedictionary.com)).

¹⁴ 6 TTABVue 8.

will have no problem immediately understanding that IBS is an abbreviation for “irritable bowel syndrome.”

In addition to the plain meaning of the terms, the Examining Attorney submitted evidence showing various third-parties using the terms IRRITABLE BOWEL SYNDROME, IBS, and FRIENDLY, in describing foods that accommodate the dietary needs for persons with irritable bowel syndrome (IBS). For example:¹⁵



¹⁵ Printouts attached to Office Action issued January 25, 2022, at TSDR pp. 29-67.

20 IBS-Friendly Recipes to Try This Spring

Spring is the perfect time to mix up your meals and try something new.

Berries are just starting to arrive, trees are bursting with lemons, and herbs are abundant.

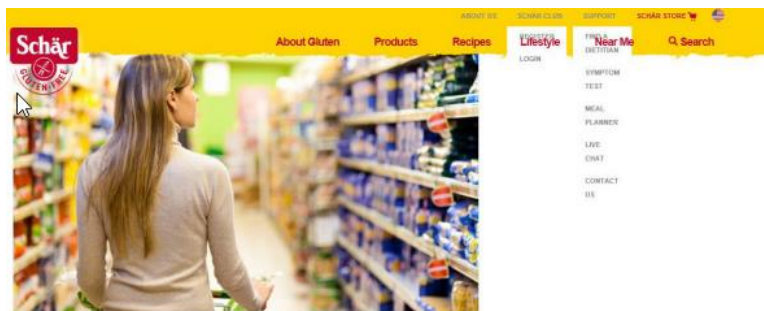
Farmers markets are overflowing with gorgeous produce, and everything is so fresh and full of flavor. Take advantage of the delicious spring produce with these IBS-friendly, low FODMAP recipes.

Breakfast

1. Gluten-free Dutch baby with blueberry maple syrup



Imagine a pancake, crepe, and fluffy angel cake all had a baby.



The Best IBS Friendly Foods


These are the best foods to eat (Low FODMAP) if you suffer from IBS.

If you suffer from irritable bowel syndrome (IBS), you're not alone. IBS affects anywhere from 25 to 45 million people in the United States alone and between 10% and 15% of the global population. While most people who develop IBS are under the age of 50, this chronic digestive disorder can affect people of all ages. Once you develop it, unfortunately, you won't be able to cure it.

While IBS has no cure, there are ways to manage the condition and mitigate symptoms. The exact cause of IBS is unknown, but most people who have IBS are able to identify specific things that trigger an onslaught of symptoms – many of those triggers are food.

Living with IBS can be a challenge, but with a little bit of planning and a lot of self-awareness, you can avoid symptoms for weeks, months, or even years at a time. Here's what you need to know about the best IBS-friendly foods to include in your diet.

How to Apply for Disability Benefits Due to IBS




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IBS can cause significant disruption to your personal and professional life. Here's what to know about applying for disability status with this...

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What Are the Different Types of Irritable Bowel Syndrome (IBS)?



Medically reviewed by [Saurabh Sethi, M.D., MPH](#)

IBS is often talked about as a standalone condition, but it's actually an umbrella of different syndromes. Knowing the exact type of IBS you have is...

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This evidence amply demonstrates the descriptiveness of the terms IRRITABLE BOWEL SYNDROME, IBS, FRIENDLY, and IBS FRIENDLY in connection with food. Specifically, the evidence shows how these terms are used together to describe certain foods and their importance to the relevant consumers of the goods Applicant intends to certify, namely, persons with irritable bowel syndrome (IBS). Moreover,

the descriptive significance of each individual component of Applicant's mark is not lost when they are combined. As demonstrated by the above third-party evidence, the merely descriptive components retain their merely descriptive significance in relation to the goods when used in conjunction with one another. The resulting combination of terms is also merely descriptive. *See, e.g., In re Oppedahl & Larson*, 71 USPQ2d at 1372; *In re Tower Tech*, 64 USPQ2d 1314 (TTAB 2001) (SMARTTOWER held merely descriptive of commercial and industrial cooling towers). Here, nothing about the combination of descriptive components creates a different, non-descriptive meaning, and we find that the commercial impression of the proposed mark as a whole is merely descriptive. *See Real Foods Pty Ltd. V. Frito-Lay N. Am., Inc.*, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018); *DuoProSS*, 103 USPQ2d at 1758. No imagination is required of the relevant consumer who "will understand the mark to convey information about [the goods]." *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757).

Finally, as to the concentric circular border design element of the mark in conjunction with the literal elements, Applicant argues that "[t]he placement of each of the words in arched format within concentric circles, with different sized font and the large IBS letters in the middle, form a unique arrangement and create a separate and unique commercial impression."¹⁶ Applicant concludes that its design, "taken as a whole, constitutes a unique arrangement creating a unique commercial impression

¹⁶ 6 TTABVue 9.

that makes the mark registrable on the Principal Register.”¹⁷ In support, Applicant relies on several Board decisions involving the following marks that were found, in their entirety, not merely descriptive:



(non-precedential decision);¹⁸



; ¹⁹ and



. ²⁰

In contrast to these three marks, Applicant’s proposed certification mark:



¹⁷ *Id.*

¹⁸ *In re L. Perrigo*, 1998 WL 663299 (TTAB 1998) (holding registrable despite descriptive component wording because “portions of the words are capped with the ‘oval’ or ‘tapered arch’ design, with the letters C and D depicted in larger size outside of the line design, the design is not a mere background.”).

¹⁹ *In re Clutter Control Inc.*, 231 USPQ 588 (TTAB 1986) (holding registrable despite component wording found merely descriptive of goods used to construct personal storage systems).

²⁰ *In re Jackson Hole Ski Corp.*, 190 USPQ 175 (TTAB 1976) (held “the letters JH are displayed in a manner sufficiently distinctive to create a commercial impression separate and apart from the disclaimed words ‘JACKSON HOLE’”).

does not possess a composite word-and-design element or prominent and distinctive stylization that creates a separate, distinctive or unique quality. Specifically, the circular design element of Applicant's mark merely serves as an ordinary, nondescript background carrier for the wording. In each of the example marks that Applicant relies upon, the Board found a distinctive feature created by the word-and-design combination or stylization (see explanations in Notes 18-20).

Rather, we find the concentric circular design in Applicant's mark is a common basic shape that falls into the category of elements of marks that have been deemed insignificant in terms of making a separate commercial impression. *See, e.g., In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1742 (TTAB 2016) (finding a "circular carrier for [the] mark" to be merely an "ordinary geometric shape that serves as a background for the [stylized letter] mark" that "is not sufficiently distinctive to change the commercial impression conveyed by the mark."), citing *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1267 (TTAB 2011) ("And certainly the oval designs in the marks are merely background . . . and do not make a strong commercial impression.")). For sake of completeness, we also find the font of the wording in the mark is common and ordinary. There is nothing about the lettering that creates its own impression, apart from the merely descriptive meaning of the words. *See In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484 (TTAB 2012) (stylization insufficient given blue "slightly stylized block lettering").

In sum and put simply, the design element of Applicant's mark does not create a sufficiently distinct commercial impression separate from the non-source-identifying wording in the mark. *In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 2022 USPQ2d 115 (Fed. Cir. 2022).

Decision: The refusal to register Applicant's proposed certification mark under Trademark Act Section 2(e)(1), on the ground that it is merely descriptive of the goods it intends to certify, is affirmed.