

**This Opinion is Not a
Precedent of the TTAB**

Mailed: February 4, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re French Meadow Organic Bakery, LLC
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Serial No. 86243820
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Michael A. Bondi of Dicke, Billig & Czaja, PLLC,
for French Meadow Organic Bakery, LLC.

Robert J. Struck, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Acting Managing Attorney.

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Before Zervas, Bergsman and Kuczma,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

French Meadow Organic Bakery, LLC (“Applicant”) seeks registration on the Principal Register of the mark HEALTHY HEMP (in standard characters) for “bakery goods; breads; tortillas; all of the foregoing containing hemp,” in International Class 30.¹ Applicant disclaimed the exclusive right to use the word “Hemp.”

¹ Application Serial No. 86243820 was filed on April 6, 2014, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive. According to the Trademark Examining Attorney the terms "HEALTHY HEMP" merely describe bakery goods, breads and tortillas that are conducive to health and contain hemp.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

A term is merely descriptive of goods or services 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 or services. *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). Whether a mark or a component of a mark is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). A term need not immediately convey an idea of each and every specific feature of the goods or services 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 H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). This

² May 8, 2014 Office Action.

requires consideration of the context in which the mark is used or intended to be used in connection with those goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services in the 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.*, 200 USPQ at 218; *In re Venture Lending Assocs.*, 226 USPQ 285 (TTAB 1985). The question is not whether someone presented only with the mark could guess the products or activities listed in the description of goods or services. Rather, the question is whether someone who knows what the products or 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, 1316-1317 (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).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on the question of whether the combination of terms evokes a nondescriptive commercial impression. If 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 re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (quoting *Estate of P.D. Beckwith, Inc. v. Commissioner*, 252 U.S.

538, 543 (1920)). See also *In re Tower Tech, Inc.*, 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry). However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has an incongruous meaning as applied to the goods or services. See *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). Thus, we must consider the issue of descriptiveness by looking at the mark in its entirety.

“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 at 364-65; *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980). In this regard, “incongruity is one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark.”

In re Shutts, 217 USPQ at 365. See also *In re Tennis in the Round, Inc.*, 199 USPQ at 498 (the association of applicant’s mark TENNIS IN THE ROUND with the phrase “theater-in-the-round” creates an incongruity because applicant’s services do not involve a tennis court in the middle of an auditorium).

The word “healthy” is defined, *inter alia*, as “conducive to health.”³

The word “hemp” is defined as “a tall widely cultivated Asian herb (*Cannabis sativa* of the family Cannabaceae, the hemp family) that has a tough bast fiber used especially for cordage and that is often separated into a tall loosely branched species (*C. sativa*) and a low-growing density branched species (*C. indica*).”⁴

The Trademark Examining Attorney submitted a copy of a news article posted on the SparkPeople.com website entitled “7 Healthy Hemp Foods to Try.”⁵ An excerpt from that news article is set forth below:

7 Healthy Hemp Foods to Try

Hemp is the New Flax

By Liza Barnes Health Educator

... Just as growing hemp is a boon to the environment, eating it is a boon to your health.

Although the leaves of the hemp plant can be eaten, the part of the plant best known for nutritional value is the seeds. These small seeds are highly nutritious, containing essential fatty acids, and minerals. About a third of the weight of the seeds is made up of oil, and most of that oil is the healthy variety: ALA (alpha-linoleic acid, a type of

³ Merriam-Webster Online (merriam-webster.com) attached to the May 8, 2014 Office Action.

⁴ *Id.*

⁵ May 8, 2014 Office Action.

Omega-3 fat) and linoleic acid. These essential fatty acids (EFA's for short) can benefit your health in many ways. Hemp seeds also contain complete, high-quality protein and all eight essential amino acids.

* * *

A continually expanding variety of other hemp food products, like granola, snack bars, protein powders, waffles, and even hemp milk, hemp tofu, and hemp butter are available these days, usually at natural foods stores and online retailers. Keep in mind that the least processed products will be the most affordable, so if you're itching to add the healthfulness of hemp to your diet, try plain hemp seeds and create your own recipes.

An excerpt from the All Hemp Bakery (theallhempbakery.weebly.com), shown below, references "healthy hemp goodies."⁶

GOODIES

Take a look at some of the delicious and healthy hemp goodies we offer at the All Hemp Bakery. You're sure to find something everyone can enjoy!

Finally, an excerpt from the Yummly.com website refers to "Healthy Hemp Bread Recipes."⁷

Based on this evidence, we find that the mark HEALTHY HEMP directly conveys to consumers that the bakery products, breads and tortillas are healthful products, and that they are hemp-based products. Therefore, the proposed mark HEALTHY HEMP is a combination of two adjectives which describe Applicant's products (*e.g.*, a healthy, hemp tortilla).

⁶ December 2, 2014 Office Action.

⁷ December 2, 2014 Office Action. Although the excerpt submitted by the Trademark Examining Attorney did not display the URL, because the Trademark Examining Attorney provided the URL in the text of the Office Action, Applicant had the ability to review the website. In view thereof, we will consider the Yummly.com webpage.

Applicant argues that just because the words “Healthy” and “Hemp” are descriptive by themselves “does not mean that the mark as a whole is not registrable.”⁸ “Applicant’s mark as a whole has no meaning and thus, is not descriptive of any goods. ... [C]ombining the terms has no known significance and creates a unique impression which is inventive [sic].”⁹ We disagree. The individual words “Healthy” and “Hemp” retain their dictionary definitions and ordinary meanings when combined to form the mark HEALTHY HEMP. There is nothing incongruous or unique about the combination of HEALTHY HEMP. This is corroborated by the descriptive use of the phrase HEALTHY HEMP in the websites SparkPeople.com (“7 Healthy Hemp Foods to Try”), Yummly.com (“Healthy Hemp Bread Recipes”), and theallhempbakery.weebly.com (“Take a look at some of the delicious and healthy hemp goodies we offer”). Applicant ignores the evidence and does not explain why the term “Healthy Hemp” as used by these websites does not show that HEALTHY HEMP is merely descriptive.

Applicant argues that in the past, the Board has approved marks that “convey more about the respective goods or services than does Applicant’s mark. Registration of such marks is consistent with Trademark Office practice and the holdings of the Board. Thus, for the same reason that each of these marks are registrable, Applicant’s mark HEALTHY HEMP should likewise be deemed capable of registration.”¹⁰ It is well settled that the Board must address each case on its own

⁸ 4 TTABVUE 3.

⁹ 4 TTABVUE 4.

¹⁰ 4 TTABVUE 6.

merits. Prior decisions to register marks by the USPTO, the Board and the Federal Circuit do not bind the Board in this case because the Board must assess each mark on the record presented. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Based on the record before us, we find that the mark HEALTHY HEMP is merely descriptive for bakery products, breads and tortillas.

Decision: The refusal to register Applicant's mark HEALTHY HEMP is affirmed.