

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Apple Sugar, LLC*  
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Serial No. 87330331  
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David M. Mello of Onello & Mello LLP,  
for Apple Sugar, LLC.

Edward Fennessy, Trademark Examining Attorney, Law Office 114,  
Laurie Kaufman, Managing Attorney.

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Before Kuhlke, Mermelstein, and Coggins,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Apple Sugar, LLC (“Applicant”) seeks registration on the Principal Register of the mark APPLE SUGAR (in standard characters) for “natural sweetener, sugar substitutes, and flavored sweetener including fruit skins and providing a low glycemic index,” in International Class 30.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87330331 filed on February 9, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney issued a final refusal to register on the four alternative grounds that the proposed mark is: (1) merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1); (2) deceptively misdescriptive under Section 2(e)(1); (3) deceptive under Trademark Act Section 2(a), 15 U.S.C. § 1052(a); and (4) merely informational about the goods and does not function as a trademark under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051-52 and 1127. After the refusal was made final as to each of the grounds, applicant filed an appeal which has been briefed.<sup>2</sup>

#### I. Procedural Issue

In its brief, Applicant for the first time mentions the Supplemental Register. Specifically, in its concluding section, Applicant argues that the proposed mark is “at least suggestive and, even if considered to be descriptive, entitled to registration on the Supplemental Register.” 8 TTABVUE 5. To the extent such argument may be construed as a proposed amendment, in the alternative, to seek registration on the Supplemental Register, it is untimely.

To seek an amendment, in the alternative, to the Supplemental Register after filing the notice of appeal, Applicant was required to file an Amendment to Allege Use and a request to suspend the appeal and remand the application for further

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<sup>2</sup> The application was abandoned based on Applicant’s failure to respond to the final Office action. See TSDR Notice of Abandonment, March 4, 2019. Applicant concurrently filed a petition to revive the application and an appeal of the refusals. The petition to revive was granted by the Office, and the appeal was instituted.

examination pursuant to Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).<sup>3</sup> This should have been done prior to filing Applicant's brief. *See* TBMP § 1206.01 (2019). Accordingly, the argument related to amendment in the alternative will be given no further consideration.

## II. Mere Descriptiveness Refusal

We begin with an analysis of the first alternative ground for refusal, that the proposed mark is merely descriptive under Trademark Act Section 2(e)(1).

### A. Applicable law for mere descriptiveness

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 or services 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 AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). “A mark 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)).

Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods for which registration is sought, the context in which it is being used, and the

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<sup>3</sup> A request for registration on the Supplemental Register under Trademark Act Section 23, 15 U.S.C. § 1091, is unavailable to an intent-to-use application until the applicant files an acceptable amendment to allege use or statement of use. Trademark Rule 2.47(d), 37 C.F.R. § 2.47(d). *See* TMEP § 1102.03 (Oct. 2018).

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.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *Bayer*, 82 USPQ2d at 1831), and “not in the abstract or on the basis of guesswork.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “whether someone who knows what the goods . . . are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive, and not merely descriptive, if it requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant’s proposed mark includes two components, APPLE and SUGAR. We “must consider the *commercial impression* of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering [a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] . . . the entire mark,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757), but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are “required to examine the meaning of each

component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758.

If the components APPLE and SUGAR are individually descriptive of the identified 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 *Oppedahl & Larson*, 71 USPQ2d at 1372). If each component 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).

“Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listing in dictionaries, trade journals, newspapers[,] and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods [or services],’” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218), as well as information provided by an applicant in response to a Rule 2.61(b) information request. *In re Calphalon Corp.*, 122 USPQ2d 1153, 1154 (TTAB 2017).

A. Examining Attorney's arguments

The Examining Attorney argues that the term "apple sugar" is widely used to refer to a type of sweetener made of apples or apple byproducts, as demonstrated by multiple websites made of record during examination; Applicant's goods include sweeteners made using apples and encompass sugar made from apples; and even if some of Applicant's goods may not be made from apples, that does not diminish the descriptiveness of the term as it applies to those goods that do include sweetener made from apples. *See generally* 7 TTABVUE 5-13.

B. Applicant's arguments

Applicant argues that while "[m]ost [consumers] encountering the mark APPLE SUGAR would likely assume [the] goods are sweeteners of some type," they "would not immediately perceive that the sweeteners are (1) natural, (2) include fruit skins, AND (3) are low glycemic;" therefore, the "essential features of the goods are not 'merely described' by the mark." 5 TTABVUE 3-4. Applicant believes that the Examining Attorney "completely ignore[s] the fact that the goods are low glycemic," 8 TTABVUE 2, and that the assertion that APPLE SUGAR "is widely used to refer to a type of sweeter made from apples or apple byproducts" lacks "critical foundation" because it is based on merely "a handful of web sites . . . most [of which are] very obscure." 8 TTABVUE 4.

C. Analysis

No definition of "apple" or "sugar" is in the record. We take judicial notice that "apple" is defined, inter alia, as "a hard round fruit that is white inside and has a

smooth red, yellow, or green skin, which is called a peel when it has been removed,” and that “sugar” is defined, inter alia, as “a sweet substance consisting of very small white or brown pieces that is added to food or drinks to make them taste sweet.”<sup>4</sup>

In response to a Rule 2.61(b) information request by the Examining Attorney, Applicant indicated that: (1) APPLE SUGAR “refers to natural sweeteners used as sugar substitutes”; (2) “[s]ome of Applicant’s goods may contain apples”; (3) “[i]n cases where Applicant’s goods contain apples, they could contain dried apple peels, dried apple flesh, or both”; (4) the meaning and significance of the word “sugar” in the mark “is intended to indicate a product that could be used in place of traditional sugar - a sugar substitute”; and (5) “[i]n some instances, [Applicant’s] goods could contain sugar in combination with a dried fruit.” Nov. 8, 2017 Response to Office Action, TSDR 1. In another response, Applicant indicated that its “goods can be characterized as a natural sweetener that has a very low glycemic index, achieved by the goods comprising particles or crystals of fruit skins or peels, which also provide fiber.” June 11, 2018 Response to Office Action, TSDR 1. By Applicant’s own admission, its goods may contain apples and sugar; therefore, APPLE and SUGAR are individually descriptive of the identified goods.

Because the components APPLE and SUGAR are individually descriptive of the identified goods, we now determine whether their combination conveys any

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<sup>4</sup> MACMILLIAN DICTIONARY, [macmillandictionary.com/dictionary/american/apple](http://macmillandictionary.com/dictionary/american/apple) and [macmillandictionary.com/dictionary/american/sugar\\_1](http://macmillandictionary.com/dictionary/american/sugar_1). The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions. See *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018).

distinctive impression contrary to the descriptiveness of the individual words. *See Fat Boys*, 118 USPQ2d at 1515-16. There are multiple website examples of record showing APPLE SUGAR referring to a type of sweetener made using apples alone or apples and sugar. Excerpts from some of these websites are reproduced below. (All bold emphasis added.)

- From [learningandyearning.com/apple-sugar](http://learningandyearning.com/apple-sugar)  
Make Your Own **Apple Sugar**. . . . Wait. What? **Apple Sugar**? The pulp is dehydrated and then ground to a powder that is used for sweetening. . . . I'm still experimenting with using my **apple sugar**. It's really tasty on oatmeal. And I made an apple crisp using just **apple sugar** as the sweetener. I found that I needed twice as much **apple sugar** as the regular sugar called for in the recipe; we really enjoyed it. **Apple sugar** doesn't quite dissolve in tea, but I was still surprised by the delicate sweetness it added.<sup>5</sup>
- From [www.food.com/recipe/apple-sugar-467166](http://www.food.com/recipe/apple-sugar-467166)  
**Apple Sugar**  
Ingredients: peels from 3 large apple[s], 1/2 cup granulated sugar.  
Directions: Preheat oven to 200F, spray a cooling rack with non-stick spray. Spread out the peels in one layer on the rack and place in the oven. Bake until dry and brittle, about 2 hours. Let cool. In a coffee or spice grinder, combine drie[d] peels and sugar and process until fine and powdery. Store in an airtight container.<sup>6</sup>
- From [askaprepper.com/how-to-make-your-own-apple-sugar/](http://askaprepper.com/how-to-make-your-own-apple-sugar/)  
How to Make Your Own **Apple Sugar**  
Today we find added sugar in almost anything that we eat or drink. . . . No wonder the rate of obesity and diabetes have all risen up lately. . . . So it makes sense to cut off the added sugar from our daily foods and replace it with another sweetener that is less processed . . . . Because "**Apple Sugar**" contains a high concentration of fructose and because fructose contains a high concentration of unprocessed sugar (found in all fruits) this acts like a sweetener.<sup>7</sup>

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<sup>5</sup> May 8, 2017 Office Action at TSDR 2-5.

<sup>6</sup> *Id.* at TSDR 18-19.

<sup>7</sup> *Id.* at TSDR 22.

- From [bitofearthfarm.wordpress.com/2017/10/07/make-sugar-out-of-apples/](http://bitofearthfarm.wordpress.com/2017/10/07/make-sugar-out-of-apples/) Make Sugar Out of Apples. . . . Which brings me to **apple sugar**. Yes, you can turn apples into a sweet brown granular substance that can be used like sugar in SOME ways. It's certainly better for you than sugar because it's made out of apple flesh and skin, still as packed with fiber and nutrients as the whole apple it came from. . . . **Apple Sugar** Recipe. Wash apples well and allow them to dry. Core each apple and cut into pieces, then add them in *small* batches to your food processor or blender. . . . Spread a very thin, even layer of apple puree on your dehydrator's non-stick drying sheets. . . . In a completely dry blender or food processor, grind pieces of your apple sheets into a powder.<sup>8</sup>
- From [alsiano.com/news/show/organic-fruit-sugars-the-natural-choice...](http://alsiano.com/news/show/organic-fruit-sugars-the-natural-choice...) FructiSweet Original® BIO has the composition of sugars (fructose, glucose, sucrose and sorbitol) naturally present in the fruits. In this range of products, Nutritis offers **Apple Sugar** which allows obtaining for example products "100% from Apple."<sup>9</sup>
- From [rootsy.org/15-delicious-apple-recipes](http://rootsy.org/15-delicious-apple-recipes) **Apple sugar** is made by pureeing the apples then dehydrating them.<sup>10</sup>
- From [www.littlegirlsdesigns.com/how-to-make-fruit-sugar/](http://www.littlegirlsdesigns.com/how-to-make-fruit-sugar/) By the way, if you're making **apple sugar**, I highly recommend mixing in cinnamon. It makes an incredible cinnamon sugar toast treat. So far, I've made apple cinnamon, peach, and strawberry sugars—all of them are amazing.<sup>11</sup>
- From [www.shakenandsteeped.com/notes-from-the-new-england-womens...](http://www.shakenandsteeped.com/notes-from-the-new-england-womens...) The class was inspiring both in small ways (definitely making **apple sugar** this fall) and in big ones: This was a robust reminder of the abundance surrounding us.<sup>12</sup>

From the website evidence, we find that the commercial impression of the proposed mark APPLE SUGAR is merely descriptive when used on natural

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<sup>8</sup> July 13, 2018 Office Action at TSDR 12-15.

<sup>9</sup> December 11, 2017 Office Action at TSDR 36.

<sup>10</sup> July 13, 2018 Office Action at TSDR 22.

<sup>11</sup> *Id.* at TSDR 28.

<sup>12</sup> *Id.* at TSDR 32.

sweeteners, sugar substitutes, and flavored sweeteners including fruit skins and providing a low glycemic index. *See Real Foods*, 128 USPQ2d at 1374; *DuoProSS*, 103 USPQ2d at 1758. APPLE SUGAR is the term used to refer to these goods when they contain apples alone or apples and sugar. Although none of the webpages appear to directly mention the low glycemic-index properties of apple- or other fruit-sugars, some nonetheless contemplate the health benefits of apple sugar over regular sugar alone.

While Applicant criticizes some of the website evidence as “very obscure,” 8 TTABVUE 4, we are not troubled by the number or nature of the examples provided by the Examining Attorney. “[I]t is well settled that articles obtained from the Internet, websites, and blog posts are admissible as evidence of information available to the consuming public and of the way in which a term is being used or would be understood by the relevant public.” *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1156 (TTAB 2019). Because the website evidence submitted by the Examining Attorney consists of copies of complete webpages, it is probative of the meaning the term “apple sugar” has to consumers and how they would perceive it when used by Applicant for the identified natural sweeteners, sugar substitutes, and flavored sweeteners including fruit skins and providing a low glycemic index. *Id.*

The primary purposes for refusing registration of a merely descriptive mark are “(1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the

registrant against others who use the mark when advertising or describing their own products.” *Abcor Dev.*, 200 USPQ 215 at 217. It would be difficult for competitors to describe the ingredients and characteristics of their own similar products, (i.e., that their natural sweeteners, sugar substitutes, and flavored sweeteners including fruit skins are made from apples alone or apples and sugar) if Applicant were allowed to register APPLE SUGAR. Based on the evidence of record we find that Applicant’s proposed mark APPLE SUGAR is merely descriptive of the identified goods.

### III. Other Refusals

The Examining Attorney included as alternative grounds for refusal that the proposed mark is either deceptively misdescriptive or is deceptive as to the sweeteners and sugar substitutes, and that the proposed mark merely conveys general information about the goods and does not function as a trademark. Because we affirm on the merely descriptive refusal, we need not reach the other refusals. *Yazhong Inv. Ltd. v. Multi-Media Tech Ventures, Ltd.*, 126 USPQ2d 1526, 1540 n.52 (TTAB 2018) (citing *Multisorb Tech., Inc. v. Pactiv Corp.*, 109 USPQ2d 1170, 1171 (TTAB 2013)).

### IV. Decision

The refusal to register Applicant’s proposed mark APPLE SUGAR because it is merely descriptive under Section 2(e)(1) is affirmed.