

This Opinion is not a
Precedent of the TTAB

Hearing: May 25, 2022

Mailed: June 13, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Walrus Rodeo LLC

Serial No. 88728723

Nathan Brown of Brown Patent Law
for Walrus Rodeo LLC

Jessie A. Maihos, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

Before Wolfson, Greenbaum, and Heasley,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Walrus Rodeo LLC (“Applicant”) seeks registration on the Principal Register of
the proposed standard character mark GOLDN PAYDIRT for:

Gold; Gold bullion; Gold ore; Gold and its alloys; Gold, unworked or semi-worked; Gold, unwrought or beaten; Palladium; Palladium and its alloys; Precious metals; Precious metals and their alloys; Precious metals, unwrought or semi-wrought; Silver; Silver bullion; Silver ore; Alloys of precious metal; Platinum; Unworked or semi-worked gold in International Class 14;

Hats; Hats for infants, babies, toddlers and children; Hoodies; Long johns; Long-sleeved shirts; Overalls; Sweat bands; Sweat pants; Sweat shirts; Sweat shorts; T-shirts; Underwear; Baseball caps and hats; Bib overalls;

Bucket hats; Cowboy hats; Disposable underwear; Graphic T-shirts; Hooded sweat shirts; Long underwear; Short-sleeved or long-sleeved t-shirts; Sports caps and hats; Stocking hats; Thermal underwear; Thong underwear; Women's hats and hoods; Working overalls in International Class 25;

Amusement park and theme park services; Amusement park services; Entertainment in the nature of a water park and amusement center; Entertainment in the nature of an amusement park ride; Entertainment services in the nature of an amusement park attraction, namely, a themed area; Entertainment services in the nature of an amusement park show; Entertainment services, namely, arranging and conducting special events at an amusement park; Entertainment services, namely, arranging for ticket reservations for amusement park attractions; Providing amusement parks; Provision of information relating to amusement park shows in International Class 41; and

Mining exploration and mineral exploration services in the field of metals; Geological prospecting in International Class 42.¹

The Trademark Examining Attorney has partially 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 it merely describes Applicant's goods in Class 14 and Applicant's services in Class 42.

When the partial refusal was made final, Applicant appealed. We have reviewed the briefs and record and have heard oral argument on appeal. Applicant did not pursue its appeal of the Class 42 refusal and presented no arguments in its brief, thereby waiving its entitlement to registration in that class. *In re Katch, LLC*, 2019

¹ Application Serial No. 88728723 was filed on December 16, 2019, based on a declared bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

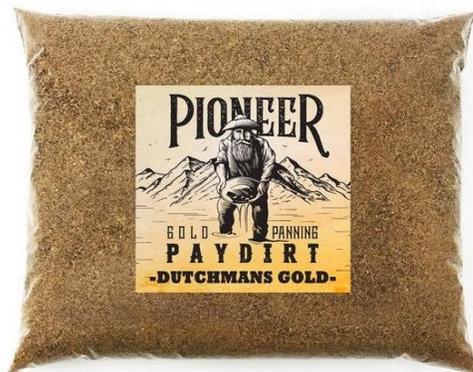
Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the downloadable .pdf version. References to the briefs and other materials in the appeal record refer to the Board's TTABVue online docketing system.

USPQ2d 233842, *1-2 (TTAB 2019). During oral argument, Applicant’s counsel confirmed that Applicant does not intend to offer the services identified in Class 42, and is not pursuing registration of its proposed mark with respect to those services. We accordingly affirm the refusal as to Class 42, *see In re Embiid*, 2021 USPQ2d 577, *14n.28 (TTAB 2021) (Board may affirm refusal on a different rationale than that relied on by the Examining Attorney), and focus our analysis on the sole remaining issue: whether GOLDN PAYDIRT merely describes Applicant’s goods in Class 14.

I. Analysis

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, . . . 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 mark is merely descriptive ‘if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.’” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 2021 USPQ2d 1069, *12 (Fed. Cir. 2021) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). “The major reasons for not protecting such [merely descriptive] marks 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.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978).

The Examining Attorney contends that GOLDN PAYDIRT merely describes a feature of Applicant's goods.² "GOLDEN" is defined as "consisting of, relating to, or containing gold."³ "PAY DIRT" means "earth or ore that yields a profit to a miner."⁴ "Specifically, Applicant's website shows that Applicant sells paydirt that is golden in color and contains gold and minerals," the Examining Attorney contends.⁵ For instance, the Examining Attorney provides the following excerpts from Applicant's website:



Pioneer 'DUTCHMANS GOLD' Paydirt - Gold Prospecting Panning Concentrate Pay Dirt Bag

1 IN 2 BAGS = "MEGA" BAG!!

13 Customer reviews

~~\$159.98~~ **\$79.99 Sale**

We have 9 left in stock.

Quantity

1

ADD TO CART

✓ FAST & FREE U.S. SHIPPING

✓ 100% UNCONDITIONAL GUARANTEE

✓ GREAT COMPETITIVE VALUE

GUARANTEED SAFE CHECKOUT

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² Examining Attorney's brief, 10 TTABVUE 6.

³ Merriam-Webster.com, March 20, 2020 Office Action at TSDR 14.

⁴ *Id.* at 21.

⁵ Examining Attorney's brief, 10 TTABVUE 7.

⁶ GoldnPaydirt.com, March 20, 2020 Office Action at 5.



TOP SELLING GOLD PAYDIRT

			
<p>2 & 1/2 Lb. NUGGET RESERVE™ Gold Paydirt Unsearched BOGO BUY 1 GET 1 FREE \$159.99 \$79.99 Sale <small>(12)</small></p>	<p>"New" MAMMOTH™ TROY OUNCE NUGGET HUNT™ Gold Paydirt - Gold Paydirt Concentrate FIND TROY OUNCE GOLD \$199.99 \$164.99 Sale <small>(25)</small></p>	<p>'\$2K NUGGET RUSH' Gold Paydirt - *1 in 50 Bags Contains a Nugget Valued \$2,000* - Jackpot Paydirt GOLDN PAYDIRT \$179.99 \$89.99 Sale <small>(2)</small></p>	<p>5 Lb. NUGGET RESERVE™ Gold Paydirt Unsearched BOGO BUY 1 GET 1 FREE \$209.99 \$104.99 Sale <small>(12)</small></p>

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Applicant argues that its goods are novelty items: bags of dirt through which consumers can sift in hopes of striking gold. The mark GOLDN PAYDIRT should not be taken literally, Applicant states, but “as a figurative and thus suggestive indicator of the rewards offered to the consumer.”⁸ Thus, it contends, “GOLDN PAYDIRT is the prize available for the winner of the novelty game, similar to using the word JACKPOT for a lottery. Applicant would like to point out that the U.S. Trademark Office has allowed countless JACKPOT trademarks. Each JACKPOT trademark indicates or suggests to the consumer that they are winners.”⁹ Applicant concludes that its goods “are novelty games to learn to pan for gold. [The proposed mark GOLDN

⁷ *Id.* at 9.

⁸ Applicant’s brief, 8 TTABVUE 2.

⁹ Applicant’s brief, 8 TTABVUE 5.

PAYDIRT] is highly suggestive that they contain paydirt, especially goldn paydirt.”¹⁰ See *Brooklyn Brewery* 2021 USPQ2d 1069, at *12 (“[A] mark is not descriptive, but is instead ‘suggestive,’ if it requires imagination, thought and perception to reach a conclusion about the nature of the goods.”).

Applicant disputes the Examining Attorney’s definitions and factual findings:

- “Golden can also mean supremely favored or fortunate, marked by peace and prosperity, and very favorable or advantageous.”¹¹
- “Paydirt” can also mean “(figuratively) A profitable area or period; success.”¹²
- Applicant’s product “is NOT gold in color. ... Any belief that Applicant’s product is golden in color is suggestive lighting by the product designer and not the products’ actual color. Applicant’s product **might** contain gold, but the gold or other precious metal would be invisible to the naked eye.”¹³

In sum, Applicant maintains, when a consumer buys one of its products: “There is no guarantee of gold. It is suggestive that there might be gold in there. It is the equivalent of playing a slot machine. ... Applicant’s products are novelty items that suggest a Gold’n Paydirt.”¹⁴

We agree with the Examining Attorney, however, that GOLDN PAYDIRT is merely descriptive of Applicant’s identified goods. “Descriptiveness must be evaluated ‘in relation to the particular goods or services for which registration is

¹⁰ Applicant’s brief, 8 TTABVUE 6-7.

¹¹ *Id.* at 3. See *Macmillandictionary.com*, Sept. 27, 2020 Response to Office Action (Petition to Revive) at 9.

¹² Applicant’s brief, 8 TTABVUE 6.

¹³ Applicant’s reply brief, 14 TTABVUE 2.

¹⁴ *Id.* at 5.

sought, the context in which the mark is used, and the possible significance the term would have to the average consumer 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 *In re Bayer AG*, 82 USPQ2d at 1831).

Applicant identifies its Class 14 goods as:

Gold; Gold bullion; Gold ore; Gold and its alloys; Gold, unworked or semi-worked; Gold, unwrought or beaten; Palladium; Palladium and its alloys; Precious metals; Precious metals and their alloys; Precious metals, unwrought or semi-wrought; Silver; Silver bullion; Silver ore; Alloys of precious metal; Platinum; Unworked or semi-worked gold.

Under this identification, Applicant’s goods must contain gold or some other precious metal. Applicant’s website, tellingly, advertises “Guaranteed Real Native Gold Inside!”¹⁵ and states “When used correctly, all paydirt will contain randomly varied amounts of gold.”¹⁶ Applicant’s attempt to recharacterize its goods as bags of dirt that may or may not contain gold is unavailing, as neither Applicant nor the Board may read limitations into such an unrestricted application. *See In re Country Oven, Inc.* 2019 USPQ2d 443903, *5 (TTAB 2019) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017)). “[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application[,] regardless of what the record may reveal as to the particular nature of an applicant’s goods” *Real Foods Pty Ltd. v. Frito-Lay North America, Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1379 (Fed. Cir. 2018) (quoting *In re Cordua,*

¹⁵ GoldnPaydirt.com, March 20, 2020 Office Action at 9.

¹⁶ *Id.* at 6.

823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016)).

Applicant's identified goods are thus "golden," meaning "consisting of, relating to, or containing gold."¹⁷ And GOLDN, the first word in its applied-for mark, describes this feature or characteristic. The slight misspelling of "GOLDN" does not affect its descriptiveness, as "slight misspellings generally do not turn a descriptive term into a distinctive one, or a generic term into one capable of indicating source." *In re GJ & AM, LLC*, 2021 USPQ2d 617, *7 (TTAB 2021) (citing *Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (finding CUSH-N-GRIP the equivalent of "CUSHION-GRIP" and generic)).

Applicant's alternative definition of "golden," "supremely favored or fortunate, marked by peace and prosperity, and very favorable or advantageous,"¹⁸ is figurative. But the Examining Attorney's definition is literal: it describes a feature of the identified goods. If any one of the definitions of a word describes the identified goods, the word may be deemed merely descriptive. *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018). It does not matter that Applicant's goods may, from time to time, contain metals other than gold. "A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute." *In re Omniome, Inc.*, 2020 USPQ2d 3222, at

¹⁷ Merriam-Webster.com March 20, 2020 Office Action at TSDR 14. Because we rely on the identification of goods, we find it unnecessary to rely on the Examining Attorney's argument that Applicant depicts its goods on its website as golden in color.

¹⁸ *Id.* at 3. See Macmillandictionary.com, Sept. 27, 2020 Response to Office Action (Petition to Revive) at 9.

*3 (TTAB 2020) (quoting *In re Chamber of Commerce*, 102 USPQ2d at 1219). GOLDN describes a feature of Applicant's identified goods.

Similarly, Applicant's definition of "paydirt" as "a profitable area or period; success" is figurative.¹⁹ The Examining Attorney's definition, "earth or ore that yields a profit to a miner," is literal.²⁰ In fact, etymologically speaking, the literal meaning came first, forming the groundwork from which the figurative definition later sprang.²¹ In the context of Applicant's goods, the literal meaning would be readily apparent, as is evident from its website, which advertises "Pioneer 'DUTCHMAN'S GOLD' Paydirt- Gold Prospecting Panning Concentrate Pay Dirt Bag."²² "Evidence of mere descriptiveness may originate from Applicant's own descriptive use of its proposed mark. *In re Omniome, Inc.*, 2020 USPQ2d 3222, *4 (TTAB 2019) (citing *In re Chamber of Commerce*, 102 USPQ2d at 1220); see also *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709-10 (Fed. Cir. 2017) ("The commercial context here demonstrates that a consumer would immediately understand the intended meaning of [the term].").

Applicant's competitors use "PAYDIRT" in the same sense in their websites. The

¹⁹ Applicant's brief, 8 TTABVUE 6.

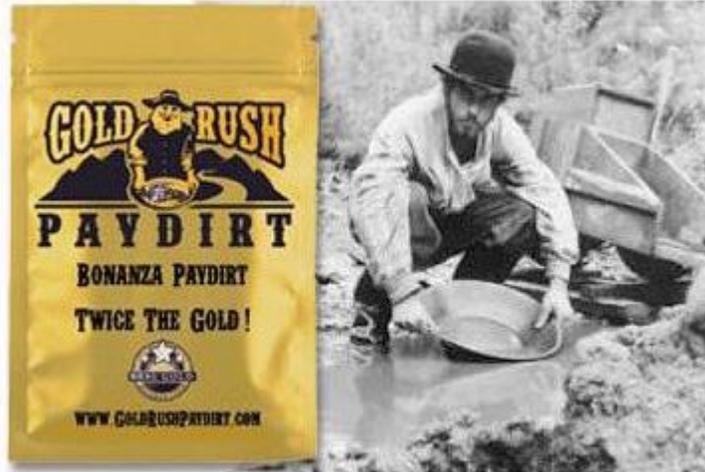
²⁰ Merriam-Webster.com, March 20, 2020 Office Action at 21.

²¹ Merriam-Webster.com: "First known use of pay dirt: 1853, in the meaning defined at sense 1 [earth or ore that yields a profit to a miner]". *Id.* at 21-22. Because "PAYDIRT" has this literal meaning, Applicant's attempt to equate its figurative meaning with "JACKPOT" fails. And Applicant's assertion that the "U.S. Trademark Office has allowed countless JACKPOT trademarks" is both unsupported and irrelevant.

²² GoldnPaydirt.com, March 20, 2020 Office Action at 5.

Examining Attorney has adduced approximately ten third-party websites,²³ of which the following are illustrative:

GOLD RUSH TRADING POST — “If you’d like to get some of this rich Alaskan paydirt without traveling north, bags of God Rush Paydirt can be shipped to you direct from the source!”



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FELIX’S PAYDIRT GOURMET— “Explore Felix’s Gourmet Gold Paydirt”



All from the heart of
Alaska

This is the home of THE FINEST gold-bearing concentrates your gold pan will ever see. Rich paydirt from placer mines in the historic Fairbanks mining district, the richest in all of Alaska. And now, it's available to YOU.

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GOLD FEVER PROSPECTING—

²³ Jan. 27, 2021 Office Action at 7-56. To this, the Examining Attorney adds four online magazine articles about gold mining, prospecting, and “hitting paydirt.” *Id.* at 57-88.

²⁴ GoldRushtradingPost.com, Jan. 27 2021 Office Action at 7.

²⁵ FelixPaydirt.com, *id.* at 10-12.



PAYDIRT – Gold Panning Concentrates

**GOLD PANNING
PAYDIRT
CONCENTRATES
WITH GUARANTEED GOLD
RECOVERY!
LYNCH MINING—**

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**THE MOST REPUTABLE GOLD PAYDIRT ON
EARTH!™**

Natural Gold Paydirt, Gold Nuggets And Gold Flakes For Sale.

VERIFIED PAYDIRT REVIEWS

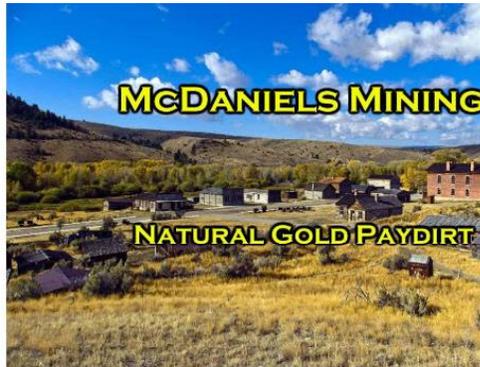
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GOLDBAY— “PayDirt Goldbay Paydirt for sale. I have been selling paydirt online since 1999.”²⁸

MCDANIELS MINING—
Our paydirt comes from creeks and streams that we have discovered on our many prospecting trips.

SHOP MCDANIELS MINING

All orders are double-bagged and full of clean, dry paydirt!



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²⁶ GoldFeverProspecting.com, *id.* at 16.

²⁷ LynchMining.com, *id.* at 24.

²⁸ Goldbay.com, *id.* at 40.

²⁹ McDanielsMining.com, *id.* at 49.

Third-party websites of this sort evidence the public's understanding of the term "PAYDIRT." See *In re Fallon*, 2020 USPQ2d 11249, *7-8 (TTAB 2020). They also show frequent use of "GOLD" with "PAYDIRT", rebutting Applicant's unsupported assertion that GOLDN PAYDIRT is somehow incongruous.³⁰ See *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (if the individual components of a mark retain their descriptive meaning in relation to the goods, the combination results in a mark that is descriptive and not registrable). Such "descriptive terms are in the public domain and should be free for use by all who can truthfully employ them to describe their goods." *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (citing *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 543-44 (1920)).

II. Conclusion

For these reasons, we find that Applicant's proposed mark, GOLDN PAYDIRT, merely describes its goods in Class 14. 15 U.S.C. § 1052(e)(1).

Decision: The partial refusal to register Applicant's proposed mark for Applicant's goods in Class 14 and its services in Class 42 is affirmed. The application may proceed to publication as to Classes 25 and 41.

³⁰ Applicant's brief, 8 TTABVUE 4.