

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

Mailed: April 13, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Lynda Truong

Serial No. 90612249
—

Gene Bolmarcich of Law Offices of Gene Bolmarcich,
for Lynda Truong.

William T. Verhosek, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

—
Before Wellington, Greenbaum and Lebow,
Administrative Trademark Judges.


Opinion by Greenbaum, Administrative Trademark Judge:

Lynda Truong (“Applicant”) seeks registration on the Principal Register of the
mark BEAUTY POPS (standard characters) for

Cosmetic kit for applying superfoods that function as a
facial mask for nourishing and revitalizing the skin, the kit
comprising face mask powder, tray, spatula and spoon, the
foregoing used, when the powder is mixed with water and
frozen, to create an applicator that has the appearance of a
lollipop, in International Class 3.¹

¹ Application Serial No. 90612249 was filed on March 30, 2021, based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as February 15, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

The Trademark Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used on or in connection with the identified goods, so resembles the registered marks (1) POPBEAUTY (standard character) for "cosmetics and non-medicated skin care preparations" in International Class 3 and "on-line retail store services featuring cosmetic and personal care products" in International Class 35,

and (2) POP BEAUTY (stylized, BEAUTY disclaimed), displayed as , for the same goods and services, as to be likely to cause confusion, mistake or deception.²

The Examining Attorney also refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), as merely descriptive of the identified goods.³

² Reg. Nos. 2859740 (standard character) and 2859741 (stylized) for the Class 3 goods issued on July 6, 2004 and have been maintained. Reg. Nos. 3875302 (standard character) and 3826831 (stylized) for the Class 35 services issued on November 16, 2010 and December 6, 2010, respectively, and have been maintained. The marks are owned by a single registrant.

Reg. No. 2859741 does not include a description of the mark, but Reg. No. 3826831 describes the mark as follows: "The mark consists of the word 'popbeauty' with 'POP' being next to a smaller 'beauty.'" Color is not claimed as a feature of Reg. Nos. 2859741 and 3826831.

³ The Examining Attorney also refused registration based on Applicant's failure to comply with a request for information under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b). However, on appeal, after the Examining Attorney filed a brief, Applicant requested remand of the application, which the Board granted. 9 and 10 TTABVue. On remand, the Examining Attorney "reviewed applicant's sole answer to the sole question asked as a requirement for information regarding the goods" and "accepted" it. August 23, 2022 Office Action, TSDR 1. We therefore deem the information request refusal withdrawn.

When the refusals were made final, Applicant appealed. Applicant and the Examining Attorney filed briefs.⁴ We reverse the Section 2(d) refusal and, as explained more fully below, we affirm the Section 2(e)(1) refusal: while BEAUTY POPS as a whole is not merely descriptive, the BEAUTY component of the mark is unregistrable and must be disclaimed.

I. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017)

⁴ In response to the likelihood of confusion refusal, Applicant submitted a screenshot of a page from Registrant’s website. November 23, 2021 Response to Office Action, TSDR 11 (and embedded in the response, at TSDR 4). The Examining Attorney explained to Applicant that this evidence could not be considered because it lacked a url and access date, and also explained how to properly make this evidence of record, December 10, 2021 Final Office Action, TSDR 1, but Applicant did not do so, and relied on the same screenshot in her Appeal Brief. App. Br., 6 TTABVUE 4. After the Examining Attorney objected to that evidence in her Appeal Brief for the same reason, Ex. Atty. Br., 8 TTABVUE 3-4, Applicant asked the Board to remand the application “to properly introduce Internet evidence into the record,” which evidence consisted of “the website page objected to by the Examining Attorney, showing the url and the access date.” 9 TTABVUE 3, 5. The Board granted the request and remanded the application for that very purpose. 10 TTABVUE 1. Nevertheless, on remand, the Examining Attorney maintained the “objection of evidence from registrant’s website,” stating that it “should not be a part of the record” due to its untimeliness, and refused to consider it, contrary to the Board’s remand order. August 23, 2022 Denial of Request for Reconsideration, TSDR 1. The Examining Attorney’s objection is therefore overruled and we have considered the webpage, though it did not impact our decision.

“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

For purposes of our likelihood of confusion analysis, we focus on the standard character mark POPBEAUTY for “cosmetics and non-medicated skin care preparations” in Class 3 (Reg. No. 2859740, hereafter “the Registration”). We consider this mark to be the most relevant of the cited registrations for our *DuPont* analysis because it most closely resembles Applicant’s standard character mark BEAUTY POPS and, as explained below, the goods are legally identical to the goods identified in the application. If we do not find a likelihood of confusion with respect to this registered mark and its goods, then there would be no likelihood of confusion with the other cited registration. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Similarity of the Goods and Channels of Trade

Under these *DuPont* factors, we compare the goods as they are identified in the application and the Registration. *See In re Detroit Athl. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

Here, the goods identified in the application and the Registration are legally identical because the broadly worded “cosmetics and non-medicated skin care preparations” identified in the Registration encompass the “cosmetic kit for applying superfoods that function as a facial mask for nourishing and revitalizing the skin, the kit comprising face mask powder, tray, spatula and spoon, the foregoing used, when the powder is mixed with water and frozen, to create an applicator that has the appearance of a lollipop” identified in the application. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant's broadly worded identification of ‘furniture’ necessarily encompasses Registrant's narrowly identified ‘residential and commercial furniture.’”).

Given the in-part legal identity of the identified goods, and the lack of restrictions or limitations in the application or Registration as to their nature, channels of trade, or classes of customers, we must presume that the channels of trade and classes of purchasers for these goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding

channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

These *DuPont* factors weigh in favor of likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

We compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Detroit Athl.*, 128 USPQ2d at 1048 (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *i.am.symbolic*, 123 USPQ2d at 1748 (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 558 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *Stone Lion*, 110 USPQ2d at 1161 (Fed. Cir. 2014). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Further, the marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). We focus on the recollection of the average consumer – here, an ordinary consumer – who

normally retains a general rather than a specific impression of trademarks. *Id.*; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Here, despite the overlap in the identification of goods and their channels of trade, we find that confusion is not likely because of the crucial differences between the marks. *See Odom's Tenn. Pride Sausage, Inc. v. FF Acquisition, LLC*, 600 F.3d 1343, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010) (“[E]ven if all other relevant *DuPont* factors were considered in [opposer’s] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.”); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989) (agreeing with the Board that the “more important fact for resolving the issue of likelihood of confusion in this case is the dissimilarity in commercial impression between the marks”). *Cf. Coach Servs.*, 101 USPQ2d at 1722) (where goods or services are identical or legally identical in part, “the degree of similarity necessary to support a conclusion of likely confusion declines.”).

Applicant’s mark BEAUTY POPS and the registered mark POPBEAUTY look and sound similar because each combines the word BEAUTY with the singular or plural form of the word POP, albeit in reverse order. When marks are applied to similar goods or services, a likelihood of confusion ordinarily is found where the primary difference in the wording is the transposition of the literal elements that compose the marks, and this transposition does not change the overall commercial impression. *See, e.g., Carlisle Chem. Works, Inc. v. Hardman & Holden*, 434 F.2d 1403, 168 USPQ

110 (CCPA 1970) (reversing dismissal of oppositions to registration of COZIRC based on use of ZIRCO for related goods, finding that the marks “are substantially similar, the difference being in a reversal of syllables which are essentially the same”); *In re Wine Soc’y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) (holding THE WINE SOCIETY OF AMERICA and design for wine club membership services including the supplying of printed materials, and AMERICAN WINE SOCIETY 1967 and design for newsletters, bulletins, and journals, likely to cause confusion); *In re Nationwide Indus., Inc.*, 6 USPQ2d 1882, 1884 (TTAB 1988) (holding RUST BUSTER for rust-penetrating spray lubricant, and BUST RUST for penetrating oil, likely to cause confusion).

Here, however, when the marks are viewed in their entirety, they are more than simple transpositions of essentially the same terms. The plural “pops” in Applicant’s mark BEAUTY POPS, and the use of the mark on goods that are identified as having “the appearance of lollipops” when mixed and frozen in the enclosed tray, convey the commercial impression of “lollipops.” Registrant’s mark POPBEAUTY, on the other hand, shares the same grammatical structure as common adjectival phrases such as “pop culture,” “pop music” and “pop art,” and therefore is more akin to those terms.

Even though marks may be composed of the same two root words, confusion may not be likely if, based on the transposition of these words and other slight differences, the marks create two distinctly different commercial impressions. *See, e.g., In re Best Prods. Co.*, 231 USPQ 988, 989-990 (TTAB 1986) (holding BEST JEWELRY and design for retail jewelry store services, and JEWELERS’ BEST for bracelets, not

likely to cause confusion); *In re Akzona Inc.*, 219 USPQ 94, 96 (TTAB 1983) (“Applicant’s mark ‘SILKY TOUCH,’ conveys the impression that applicant’s synthetic yarns are silky to the touch. On the other hand, registrant’s mark ‘TOUCH O’ SILK,’ suggests that registrant’s clothing products contain a small amount of silk.”); *Murphy, Brill and Sahner, Inc. v. N.J. Rubber Co.*, 102 USPQ 420 (Comm’r Pat. 1954) (finding that TOPFLITE for shoe soles conveys a different meaning than FLITE TOP for hosiery). We find that to be the case here.

Although the marks comprise nearly the same two component words and they are used on legally identical goods, Applicant’s mark and Registrant’s mark have very different connotations, which engender very different overall commercial impressions when they are considered in their entireties. *See In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750-51 (Fed. Cir. 1985) (“The basic principle in determining confusion between marks is that the marks must be compared in their entireties.... It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.”); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134-35 (Fed. Cir. 2015).

Accordingly, this *DuPont* factor weighs heavily against likelihood of confusion. Moreover, we find this factor to be dispositive, in that even with the other relevant *DuPont* factors weighing in favor of finding likelihood of confusion, this factor of the dissimilarities of the marks simply outweighs the other factors. *See Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed.

Cir. 2016) (“a single *du Pont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks”); *Odom’s Tenn. Pride Sausage*, 93 USPQ2d at 2032 (“[E]ven if all other relevant *DuPont* factors were considered in [opposer’s] favor, as the board stated, the dissimilarity of the marks was a sufficient basis to conclude that no confusion was likely.”); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (“[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the mark.”); *Kellogg Co. v. Pack’em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1144-45 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive,” holding that “substantial and undisputed differences” between two competing marks justified a conclusion of no likelihood of confusion); *Keebler*, 9 USPQ2d at 1739 (agreeing with the Board that the “more important fact for resolving the issue of likelihood of confusion in this case is the dissimilarity in commercial impression between the marks”).

C. Conclusion

The goods are legally identical and move through the same channels of trade to the same classes of consumers. However, we find no likelihood of confusion because when the marks are viewed in their entireties, they have different connotations and create different commercial impressions. *See, e.g., Odom’s Tenn. Pride Sausage*, (finding dissimilarity of the marks dispositive *DuPont* factor); *Best Prods.*, 231 USPQ

at 989-990 (BEST JEWELRY and JEWELERS' BEST not likely to cause confusion, largely due to different commercial impressions).

II. Mere Descriptiveness

Absent a showing of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register which, when used in connection with an applicant's goods, is merely descriptive of them.⁵ "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 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 TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). By contrast, a mark is suggestive if it "requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Suggestive marks, unlike merely descriptive terms, are registrable on the Principal Register without proof of acquired distinctiveness. See *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004).

⁵ "No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . ." 15 U.S.C. § 1052(e)(1). Applicant made no claim that the proposed mark has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

Whether a mark is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the mark is used, not in the abstract or on the basis of guesswork. *Bayer*, 82 USPQ2d at 1831; *see also In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). In other words, we evaluate whether someone who is familiar with the goods 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). In addition, the descriptiveness analysis concentrates on the identification of goods set forth in the application. *See In re Cordua Rests., Inc.* 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)).

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, *see Gyulay*, 3 USPQ2d at 1010, or if it describes the shape or form of a product. *See, e.g., In re Metcal Inc.*, 1 USPQ2d 1334, 1335-36 (TTAB 1986) (holding SOLDER STRAP merely descriptive of self-regulating heaters in the form of flexible bands or straps); *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982) (holding TOOBS merely descriptive of bathroom and kitchen fixtures in the shape of tubes).

When two or more merely descriptive terms are combined, the composite mark “is registrable only if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as

applied to the goods or services.” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *4 (TTAB 2019); *see also DuoProSS Meditech*, 103 USPQ2d at 1758-59 (SNAP SIMPLY SAFER merely descriptive of “medical devices, namely, cannulae; medical, hypodermic, aspiration and injection needles; medical, hypodermic, aspiration, and injection syringes”); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers).

The mark BEAUTY POPS will be found merely descriptive if the individual components are merely descriptive, they retain their descriptive meaning in relation to the identified goods, and the combination does not form a mark which has a distinctive nondescriptive meaning of its own as a whole. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (“Thus, the PTO may properly consider the meaning of ‘patents’ and the meaning of ‘.com’ with respect to the goods identified in the application. However, if those two portions individually are merely descriptive of an aspect of appellant’s goods, the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.”).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods....” *Abcor*, 200 USPQ at 218. Such evidence also may

be obtained from websites and publications. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017).

A. Evidence and Analysis

The Examining Attorney asserts that BEAUTY POPS is descriptive of the identified “cosmetic kit for applying superfoods that function as a facial mask for nourishing and revitalizing the skin, the kit comprising face mask powder, tray, spatula and spoon, the foregoing used, when the powder is mixed with water and frozen, to create an applicator that has the appearance of a lollipop” “because it immediately identifies a generic wording, BEAUTY, and a feature, POPS, in that it tells purchasers that the goods are beauty products that feature a lollipop-shaped applicator for applying facial masks or ‘lollipop-shaped beauty products.’” Ex. Atty. Br., 8 TTABVUE 8-9.


In support of this position, the Examining Attorney relies on an entry from gymglish.com, which defines “beauty products” as “a cosmetic,” and excerpts from three third-party websites showing that the term POP refers to lollipops (“tootsie pop,” “blow pop” and “pinwheel pop”). November 10, 2021 Office Action, TSDR 12-23. The Examining Attorney also points to the identification of goods, which states that the “applicator ... has the appearance of a lollipop,” and Applicant’s specimens, in which the goods resemble a lollipop:

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LOVE & PEBBLE

SHOP ▾ RESULTS GLOW SQUAD OUR STORY PRESS

Home > All Available Products > Beauty Pops Ice Mask Kit



Beauty Pops Ice Mask Kit

★★★★★ 8 reviews

\$46.00


Quantity

- 1 +

Due to high demand, Beauty Pop orders will currently take two weeks to be fulfilled.

Lynda
Co-Founder

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What is a Beauty Ice Mask Kit?
When an ice roller meets face mask.


Our beauty pops are an innovative superfood face mask that you freeze. They're made with natural, skin-loving superfoods such as papaya, banana, turmeric, and aloe vera and zero preservatives. This mask will gently exfoliate, tighten, and nourish your skin and reveal a radiant complexion!

Because beauty pops come in powder form, we don't need to use preservatives. It's paraben, alcohol, preservative, and cruelty-free - no nasties!

Clean beauty means no: SLS phthalates, petrolatum, parabens, silicones, mineral oil, DEA, phosphates, PEGs, artificial dyes, synthetic fragrances, or formaldehydes.

Size: 5oz/140grams

The Beauty Pops Tray is reusable and makes 2 Pops at a time. (Extra trays are available).



In addition, the Examining Attorney relies on Applicant's website, which, according to the Examining "shows the applicant using the term 'beauty pops' and 'pops' at least descriptively, if not generically, for the goods, e.g., 'Because beauty pops come in powder form' 'Using the beauty pop powder' and 'Your pops are ready!'" December 10, 2021 Final Office Action, TSDR 2-7. The Examining Attorney also relies on four third-party websites, which show ice pops and lollipops shaped similarly to Applicant's goods (as shown in Applicant's specimen), *id.*, at TSDR 8-25, to support

a finding that “it is common for rounded food shapes on a stick to be known as pops. Thus, the applicant’s goods would be recognized as pops.” Ex. Atty. Br., 8 TTABVUE 11. In addition, the Examining Attorney relies on two third-party websites, which show that foods, including “superfoods” of the type identified in the application, may be “frozen into ice pops,” as well as Applicant’s website, which states that the “face mask is made with natural, skin loving superfoods such as papaya, bananas, turmeric and aloe vera.” Ex. Atty. Br., 8 TTABVUE 11-12. December 10, 2021 Final Office Action, TSDR 26-35 (third-party websites), 2-7 (Applicant’s website).

Finally, the Examining Attorney submitted 10 use-based third-party registrations, registered on the Principal Register, for BEAUTY-inclusive marks covering goods similar to those identified in the application, where the term BEAUTY is disclaimed. December 10, 2021 Final Office Action, TSDR 36-65. This type of evidence is probative of the issue of descriptiveness. *See, e.g., In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (quoting *Inst. Nat’l des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992)).

The record supports a finding that the BEAUTY component of the mark BEAUTY POPS is, at a minimum, merely descriptive of the identified goods, which are, in essence, beauty products. Applicant’s argument that the term BEAUTY is “broad” and “cannot immediately describe anything about the goods,” App. Br., 6 TTABVUE 5, is unpersuasive.

However, the record does not support a finding that the component POPS, or the mark BEAUTY POPS, as a whole, immediately describes a significant feature or characteristic of the identified goods. *See Specialty Brands, Inc. v. Coffee Bean Distrib., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1285 (Fed. Cir. 1984) (“third-party usage can demonstrate the ordinary dictionary meaning of a term of the meaning of a term to those in the trade”) (internal citation omitted). *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (third-party use and registration of a term may be an indication that a term has a suggestive or descriptive connotation in a specific industry). Nor do we find the mark unitary or incongruous such that a disclaimer of BEAUTY would not be required. *See Omniome*, 2020 USPQ2d 3222, at *4. Applicant’s arguments to the contrary are not persuasive.⁶ App. Br., 6 TTABVUE 5-6.

B. Conclusion

Although the mark BEAUTY POPS is not merely descriptive in its entirety, we affirm the Section 2(e)(1) refusal absent a disclaimer of BEAUTY, which is an unregistrable component of the mark. *See In re Taverna Izakaya LLC*, 2021 USPQ2d 1134, at *11 (TTAB 2021) (“Nonetheless, as explained above, TAVERNA is a recognized English language word that refers to a type of restaurant. Therefore, because this component of the mark is unregistrable, we affirm the refusal to register in the absence of a disclaimer of TAVERNA.”) *Cf. In re Haden*, 2019 USPQ2d 467424,

⁶ Applicant made these arguments in the context of arguing against a finding that the entire mark is not merely descriptive,

at *7 (TTAB 2019) (proposed mark as a whole not generic, but affirming refusal to register unless the applicant submits a disclaimer of the component deemed unregistrable); *In re Country Music Ass'n Inc.*, 100 USPQ2d 1824, 1835 (TTAB 2011) (“COUNTRY MUSIC ASSOCIATION as a whole is not generic; however, the word ASSOCIATION is. Accordingly, we affirm the refusal to the extent that the mark may not be registered without a disclaimer of ASSOCIATION”).

Decision: The refusal to register Applicant’s mark is reversed under Trademark Act Section 2(d).

The Section 2(e)(1) refusal to register Applicant’s mark is affirmed to the extent that the mark may not be registered without a disclaimer of BEAUTY. However, if Applicant submits a properly worded disclaimer of BEAUTY to the Board within 30 days from the date of this decision and prior to filing any appeal of this decision, the refusal will be set aside and the application will proceed. *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g). The appropriate standardized disclaimer text is as follows:

No claim is made to the exclusive right to use “BEAUTY”
apart from the mark as shown.