

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 15, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Galaxy Gaming, Inc.
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Serial No. 97065333
—

Daniel H. Bliss of Howard & Howard Attorneys PLLC,
for Galaxy Gaming, Inc.

Brandon Arey, Trademark Examining Attorney, Law Office 127
Mark Pilaro, Managing Attorney.

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Before Cataldo, Allard, and Elgin,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:¹

¹ As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, this decision varies from the citation form recommended in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2023). This decision cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director, this decision cites to the LEXIS legal database. To facilitate broader research, the proceeding or application number for cited Board decisions is listed. As of the date of this decision, the pilot is ongoing, using various citation forms. Until further notice, practitioners should continue to adhere to the citation form recommended in TBMP § 101.03.

Galaxy Gaming, Inc. (“Applicant”) seeks registration on the Principal Register of



the following mark  for goods ultimately identified as:

- “Computer hardware and computer display screen and monitor for game results,” in International Class 09; and
- “Gaming tables for gambling; wagering games, namely, gaming tables with gaming table layouts; gaming tables for playing wagering games with gaming table layouts for use on a gaming table in a casino; card games; casino card games,” in International Class 28.²

The Trademark Examining Attorney refused registration of the proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive as applied to Applicant’s goods identified in the involved application.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. The appeal is fully briefed.³ We affirm the refusal to register.

² Application Serial No. 97065333 was filed on October 8, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce. The mark consists of the stylized wording “3 CARD” above the stylized wording “PICKEM”.

³ Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s brief appears at 6 TTABVUE, the Examining Attorney’s brief appears at 8 TTABVUE, and Applicant’s reply brief appears at 9 TTABVUE.

I. Mere Descriptiveness

“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, 1300 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963 (Fed. Cir. 2007)); *In re Gyulay*, 820 F.2d 1216, 1217 (Fed. Cir. 1987).⁴ “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 Chamber of Commerce*, 675 F.3d at 1300 (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346 (Fed. Cir. 2001)). *See also In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173 (Fed. Cir. 2004) (“A mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.”) (citing *In re Dial-A-Mattress*, 240 F.3d at 1346).

Whether a particular term 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 Dev. Corp.*, 588 F.2d 811, 814 (CCPA 1978); *In re Remacle*, Ser. No. 75932290, 2002 TTAB LEXIS 715, at *7 (TTAB 2002). In other words, the question is whether someone who knows what the goods or services are will understand the mark to convey information about

⁴ A term that is merely descriptive of the identified goods and services may not be registered on the Principal Register without a showing of acquired distinctiveness. Sections 2(e)(1), 2(f) of the Trademark Act, 15 U.S.C. §§ 1052(e)(1), 1052(f). Applicant does not claim that its proposed mark (or any of its individual terms) has acquired distinctiveness; we therefore do not consider the issue. Applicant has not filed proof of use, therefore, it is not capable of amending its application to seek registration on the Supplemental Register.


them. *In re TriVita, Inc.*, 783 F.3d 872, 874 (Fed. Cir. 2015); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254 (Fed. Cir. 2012). “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.*, Ser. No. 38652, 1978 TTAB LEXIS 44, at *4 (TTAB 1978).

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a non-descriptive word or phrase. *In re Phoseon Tech., Inc.*, Ser. No. 77963815, 2012 TTAB LEXIS 306, at *4 (TTAB 2012); *In re Assoc. Theatre Clubs Co.*, Ser. No. 557499, 1988 TTAB LEXIS 48, at *6-7 (TTAB 1988). A mark comprising a combination of merely descriptive components is registrable if “the combination of the component words of Applicant’s mark ‘conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.’” *In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 TTAB LEXIS 150, at *14-15 (TTAB 2016) (quoting *In re Oppedahl & Larson*, 373 F.3d at 1174-75).

However, 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. *See, e.g., In re Oppedahl & Larson*, 373 F.3d at 1174-75 (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet); *see also In re Phoseon Tech.*, 2012 TTAB LEXIS 306, at *3 (“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.”).



Thus, our determination as to whether the proposed mark  is merely descriptive is based on an analysis of the proposed mark as a whole. *DuoProSS Meditech*, 695 F.3d at 1252 (“When determining whether a mark is merely descriptive, the Board must consider the commercial impression of a mark as a whole.”). “The Board, to be sure, may ascertain the meaning and weight of each of the components that makes up the mark[,]” so long as it ultimately considers the mark as a whole. *Id.* at 1253.

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries,” *In re Bayer*, 488 F.3d at 964, as well as “advertising material directed to the goods[,]” *In re Abcor Dev.*, 588 F.2d at 814. It also may be obtained from websites and publications. *In re N.C. Lottery*, 866 F.3d 1363, 1368 (Fed. Cir. 2017); *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341-42 (Fed. Cir. 2001). Additionally, evidence that a term is descriptive may be found in its third-party usage in connection with products or services similar or related to those at issue. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1378 (Fed. Cir. 2012).

Neither Applicant nor the Examining Attorney identifies who the relevant purchasing public may be. Because the question of whether a mark is merely descriptive is determined from the viewpoint of the relevant purchasing public, *see In re Omniome, Inc.*, Ser. No. 87661190, 2019 TTAB LEXIS 414, at *16 (TTAB 2019)

(quoting *In re Stereotaxis, Inc.*, 429 F.3d 1039, 1043 (Fed. Cir. 2005)), we must first determine who the relevant consumers are. The record evidence in this case supports a finding that the relevant consumer consists of members of the general public who play casino card games in gaming establishments or online.

II. Evidence of Mere Descriptiveness

The record contains evidence relating to each term in the proposed mark and, in some instances, two terms used together, which we address in turn.⁵

A. Dictionary Definitions

The following dictionary definitions are of record:

- “3” or “THREE” is defined as “a number that is one more than 2.”⁶
- CARD is defined as a “playing card”⁷ and “A flat, usually rectangular piece of stiff paper, cardboard, or plastic, especially: a. One of a set or pack bearing significant numbers, symbols, or figures, used in games and in divination.”⁸

⁵ Although the Examining Attorney’s brief indicates that the terms are used on Applicant’s website (8 TTABVUE 8), the brief does not cite to the record where evidence of Applicant’s website can be found nor do we find that it is of record. However, such evidence is typically useful in deciding a mere descriptiveness refusal and we encourage its being made of record, where possible.

⁶ January 31, 2023 Response to Office Action at TSDR 22 (referencing the MERRIAM-WEBSTER DICTIONARY at merriam-webster.com).

Citations in this opinion to the application record are to pages in the USPTO’s Trademark Status & Document Retrieval (“TSDR”) database.

⁷ *Id.* at TSDR 36 (referencing the MERRIAM-WEBSTER DICTIONARY at merriam-webster.com).

⁸ August 18, 2022 Office Action at TSDR 7 (referencing THE AMERICAN HERITAGE DICTIONARY at ahdictionary.com).

B. Descriptiveness of the phrase “3 CARD” or “Three Card”

The record includes the following evidence of third-party use of the combined terms “3 card” and “three card” in the gaming industry:

- Caesars.com website provides “**3 Card** Poker Rules for Beginners.”⁹ “The object of the game,” it states, “is to make the best poker hand possible with only **three cards**.”¹⁰
- LiveAbout.com provides information about “**Three Card** Poker: How to Play.”¹¹
- VegasHowTo.com provides information about “How to Play **Three Card** Poker in Las Vegas”.¹² “**Three Card** Poker is an exciting variation of Poker game [sic] played with a standard 52-**card** deck.... [Players] can bet on the value of their own **three-card** hand”¹³ “Each player and the dealer then receive **three cards** which are dealt face down.”¹⁴
- Table-games-online.com provides the rules for **Three Card** Poker.¹⁵
- 888Poker.com, in an article titled, “Learn how to play and win **3 card** poker,” shows the terms **3 CARD** used together to refer to a poker game, which is played “online and in live casinos.”¹⁶ For online play, “**Three Card** Poker most often has virtual representations of **cards**” and credit meters to show how much is available for wagering. Some casinos use streaming video of a live dealer instead of virtual **cards**.¹⁷ To win: “[M]ake the best **three-card poker hand possible!**”¹⁸

⁹ August 18, 2022 Office Action at TSDR 2 (emphasis added).

¹⁰ *Id.* (emphasis added).

¹¹ *Id.* at 3 (emphasis added).

¹² *Id.* at 8 (emphasis added).

¹³ *Id.* (emphasis added).

¹⁴ *Id.* (emphasis added).

¹⁵ May 3, 2022 Office Action at TSDR 2 (emphasis added).

¹⁶ *Id.* at 3 (emphasis added).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* (emphasis in italics in original, and bold here).

- MyPokerCoaching.com explains “**3 Card** Poker Strategy-How to Play **Three Card** Poker and Win More Often.”¹⁹ “As the name suggests, **three card** poker is played with three cards.”²⁰

C. Descriptiveness of the Term “PICK’EM”

The record contains the following evidence of the use of PICK’EM in the gaming industry:

- Casinocenter.com describes “How to Play **Pick ’Em** Poker: This non-traditional video poker games [sic] has some pretty positive characteristics[.]”²¹ “On a recent visit to my local casino I noticed they had the video poker game **Pick’em**.”²²
- CasinoEncyclopedia.com describes the rules of “**pick’em** poker,” which it describes as “a type of video poker.”²³
- WizardofOdds.com states that “**Pick’em** Poker ... is a simplified version of video poker The game is usually found on Bally Game Make machines under the name **Pick’em** Poker”²⁴
- GamblingSites.org offers a “Conclusion on **Pick ’em** Poker Video Poker: **Pick ’em** Poker video poker makes for a kind of quick and easy spin on basic video poker”²⁵
- BeatingBonuses.com describes “**PICK’EM** POKER as a video poker variation[.]”²⁶
- VegasSlotsOnline.com offers online video play of **Pick’em** Poker.²⁷

¹⁹ *Id.* at 4 (emphasis added).

²⁰ *Id.* (emphasis added).

²¹ August 18, 2022 Office Action at TSDR 4 (emphasis added).

²² *Id.* (emphasis added).

²³ *Id.* at 5 (emphasis added).

²⁴ *Id.* at 6 (emphasis added).

²⁵ May 3, 2023 Office Action at TSDR 6.

²⁶ *Id.* at 7 (emphasis added).

²⁷ *Id.* at 8 (emphasis added).

- SuperCasinoSites.com claims that “[t]here are various reasons for so many video poker fans choosing **Pick ’Em** Poker as their favorite game.”²⁸ According to the site, it is easy to understand “why one would prefer to delve into **Pick ’Em** Poker betting.”²⁹

III. Discussion

The dictionary evidence shows and Applicant concedes that the number 3 in the proposed mark is defined as “a number that is one more than 2.”³⁰ Similarly, the dictionary evidence shows and Applicant concedes that the term “card” in the proposed mark is defined as “a playing card.”³¹ Applicant’s own identification of goods identifies “**card** games; casino **card** games,” further underscoring the descriptive nature of the term. *See In re Taylor & Francis (Publ’rs), Inc.*, Ser. No. 75229157, 2000 TTAB LEXIS 380, at *5 (TTAB 2000) (use of the word “psychology” in the identification of goods demonstrates that the word is merely descriptive).

The evidence of record also shows that the terms 3 CARD, when combined, are used to describe a type of poker game where the objective is to obtain the best hand possible with only three cards. Because Applicant identifies casino card games and computer equipment for monitoring game results, the terms 3 CARD merely describe a feature, function, purpose or use of the identified goods, namely, that the goods are for use in playing a particular poker game where the object is to have the best possible hand with only three cards and computer equipment for monitoring the game results.

²⁸ *Id.* at 9 (emphasis added).


²⁹ *Id.* (emphasis added).

³⁰ 6 TTABVUE 6; January 31, 2023 Response to Office Action at TSDR 22.


³¹ 6 TTABVUE 6; January 31, 2023 Response to Office Action at TSDR 36.

Turning to the term PICK'EM, we find that the term PICK'EM refers to a type of poker game. Because Applicant identifies casino card games and computer equipment for monitoring game results, the term PICK'EM merely describes a feature, function, purpose or use of the identified goods, namely, that the goods are for use in playing pick'em poker and for use in monitoring the game results.

Having found that the individual terms 3, CARD and PICK'EM each are merely descriptive of Applicant's goods, this leaves us to decide whether the proposed mark as a whole is merely descriptive. As we said above, if each component of the proposed mark (3, CARD and PICK'EM) retains its merely descriptive significance in relation

to Applicant's goods, the combination (3 CARD PICK'EM or ) results in a composite that is itself merely descriptive. *In re Oppedahl & Larson*, 373 F.3d at 1174-75; *In re Phoseon Tech.*, 2012 TTAB LEXIS 306, at *3-4.

We find that, when used in connection with Applicant's goods, each of the 3, CARD and PICK'EM elements of Applicant's proposed mark retains its merely descriptive significance in relation to those goods. The combination of terms (3 CARD PICK'EM) does not create a unitary mark with a non-descriptive meaning, nor does the composite have a bizarre or incongruous meaning as applied to Applicant's goods. We

find that, as a whole, the applied-for mark  merely describes Applicant's casino card games and computer equipment for monitoring game results, as consumers will immediately understand that the proposed mark describes a feature,

function, purpose or use of Applicant's goods, i.e., for playing a pick'em poker game where players try to obtain the best possible hand using only three cards and for computer equipment for monitoring the game results, and we do not need to engage in extensive thought or follow a multi-stage reasoning process in order to make this determination.

Applicant argues that the proposed mark is registerable on the Principal Register because its design feature creates a commercial impression separate and apart from the impression made by the wording itself:

The Design is distinctive because the wording "3 CARD PICK'EM" has a design element of the wording "3 CARD" stacked above the wording "PICK'EM". The design element creates a commercial impression separate and apart from the impression made by the wording itself. Applicant submits that the design element of the wording in a stacked configuration is not common or ordinary letter [sic].³²

"A display of descriptive or otherwise unregistrable matter is not registrable on the Principal Register unless the design features of the asserted mark create an impression on the purchasers separate and apart from the impression made by the words themselves, or if it can be shown by evidence that the particular display which the applicant has adopted has acquired distinctiveness." *In re Sadoru Grp., Ltd.*, Ser. No. 77941164, 2012 TTAB LEXIS 325, at *4 (TTAB 2012). Here, Applicant has not made a claim of acquired distinctiveness, and therefore the stylization of the proposed mark must create a separate and inherently distinctive impression. *Id.*; *see also*

³² 6 TTABVUE 6-7.

TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1209.03(w) (2023) and cases cited therein. In the case before us, however, we find that the stylization of the lettering in which the literal elements 3 CARD PICK'EM appear does not create a separate and inherently distinctive commercial impression apart from the words themselves, nor does their appearance in a stacked form, i.e., with the terms 3 CARD appearing on top of the word PICK'EM. *In re Northland Aluminum Prods.*, 777 F.2d 1556, 1561 (Fed. Cir. 1985) (“The Board also correctly found that the form of the lettering of the mark is ‘not so distinctive as to create a commercial impression separate and apart from the term BUNDT.’”) (quoting *In Northland Aluminum Prods.*, Ser. No. 433565, 1984 TTAB LEXIS 171, at *12 n.9 (TTAB 1984)).

Applicant argues that “the Office has granted third party registrations for marks with ‘3 CARD’ with and without a design element such as [the marks below].”³³ Applicant maintains that “[t]hese registrations were granted on the Principal Register and, as such, entitle Applicant’s mark 3 CARD PICK'EM and Design



to be entitled to registration without being merely descriptive.”³⁴

- 3 CARD BLITZ (3 CARD disclaimed) in the name of AGS LLC for “card games; gaming table felt layouts for betting;” and “entertainment services, namely, providing live table games of chance in gaming establishments” (Reg. No. 5,991,242).³⁵

³³ 6 TTABVUE 9.

³⁴ *Id.*

³⁵ *Id.* at 9; August 3, 2023 Request for Reconsideration at TSDR 20.

- 3 CARD BONUS and Design (3 CARD BONUS disclaimed) to Shuffle Master, Inc. for “entertainment services, namely providing a betting feature on a live game of chance” (Reg. No. 3,182,884).³⁶
- 3 CARD BONUS and Design (3 CARD BONUS disclaimed) to Shuffle Master, Inc. for “Gaming equipment, namely, stand alone electronic gaming machines with interactive multiple player platforms having a plurality of wagering options including side bet features” (Reg. No. 3,360,506).³⁷

Notably, however, these registered marks proffered by Applicant are registered on the Principal Register, each with a disclaimer of the pertinent terms 3 CARD. Consequently, this evidence does not support Applicant’s argument because the disclaimers of the terms 3 CARD are concessions by the registrant that the terms are at best merely descriptive of their respective identified goods and services. *In re Pollio Dairy Prods. Corp.*, Ser. No. 5965778, 1988 TTAB LEXIS 45, at *3 n.4 (TTAB 1988) (“By its disclaimer of the word LITE, applicant has conceded that the term is merely descriptive as used in connection with applicant’s goods.”) (citing *Quaker Oil Corp. v. Quaker State Oil Ref. Corp.*, 1969 TTAB LEXIS 48, at *7 (TTAB 1969), *aff’d*, 453 F.2d 1296 (CCPA 1972)).

Applicant contends that, because there is no dictionary definition of PICK’EM or of the literal elements of the proposed mark itself, i.e., 3 CARD PICK’EM, the proposed mark does not merely describe the identified goods.³⁸ This argument lacks merit. The fact that an applicant may be the first and only user of a merely descriptive designation does not justify registration if the only significance conveyed by the terms

³⁶ 6 TTABVUE 9; August 3, 2023 Request for Reconsideration at TSDR 24.

³⁷ 6 TTABVUE 9; August 3, 2023 Request for Reconsideration at TSDR 25.

³⁸ 6 TTABVUE 6.

are, as here, merely descriptive. *See In re Zuma Array Ltd.*, Ser. No. 79288888, 2022 TTAB LEXIS 281, at *21 (TTAB 2022); *In re Fallon*, Ser. No. 86882668, 2020 TTAB LEXIS 464, at *32-33 (TTAB 2020).

We also disagree with Applicant that the evidence of the descriptiveness of the 3 and CARD elements is “on an extremely limited record,” which Applicant characterizes as consisting of “a webpage from three websites that use the term ‘3 card poker.’”³⁹ Here, Applicant fails to denote all the evidence of record, which includes not only six third-party websites using the term 3 CARD descriptively, but also the dictionary definitions of the terms 3 and CARD individually, and Applicant’s use of the term CARD in its own identification. This record is more than sufficient to demonstrate that the elements 3 and CARD, both individually and combined, are merely descriptive of the identified goods.

Applicant argues that there is no evidence that the proposed mark is descriptive of all the goods recited in its identification, such as “gaming tables for gambling”.⁴⁰ This argument is also unavailing. Our case law holds the proposed mark need not describe **all** the goods and services identified in a particular class, as long as it merely describes one of them. *In re Chamber of Commerce*, 675 F.3d at 1300 (“[A] mark need not be merely descriptive of all recited goods or services in an application. A descriptiveness refusal is proper ‘if the mark is descriptive of any of the [goods or services] for which registration is sought.’”) (quoting *In re Stereotaxis*, 429 F.3d at

³⁹ 6 TTABVUE 9-10.

⁴⁰ 6 TTABVUE 10-11.

1041 (citation omitted)). Having found the proposed mark to be merely descriptive of a single good in each class, we need not consider any other identified goods.

Applicant argues in a conclusory manner and without evidentiary support that the wording in its mark is unitary because it has a double meaning, and, as a result, cannot be deemed merely descriptive.⁴¹ Applicant contends that:

The words “3 card pick'em” could describe a number that is one more than 2 playing cards and **not** gaming tables for gambling, wagering games, namely, gaming tables with gaming table layouts, gaming tables for playing wagering games with gaming table layouts for use on a gaming table in a casino, card games, casino card games, and computer hardware and computer display screen and monitor for game results. Due to the double meaning, the mark 3

CARD PICK'EM and Design  does not immediately convey information regarding the goods.⁴²


A double entendre is a word or expression capable of more than one interpretation and is unitary by definition. TMEP § 1213.05(c). We disagree that Applicant's proposed mark would be perceived by ordinary consumers (gamblers, and casino owners and operators) as a double entendre. Rather, for the reasons discussed above, the mark will be perceived as descriptive of the pertinent identified goods.

⁴¹ 6 TTABVUE 8, 13, 15.

⁴² 6 TTABVUE 12 (emphasis in underline in original, bold here).

Serial No. 97065333

Decision:

The refusal to register Applicant's proposed mark , Serial No. 97065333, on the ground of mere descriptiveness under Section 2(e)(1) of the Trademark Act is affirmed as to all classes.