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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 Watered Up, LLC
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Serial Nos. 86310513; 86310537; 86310550
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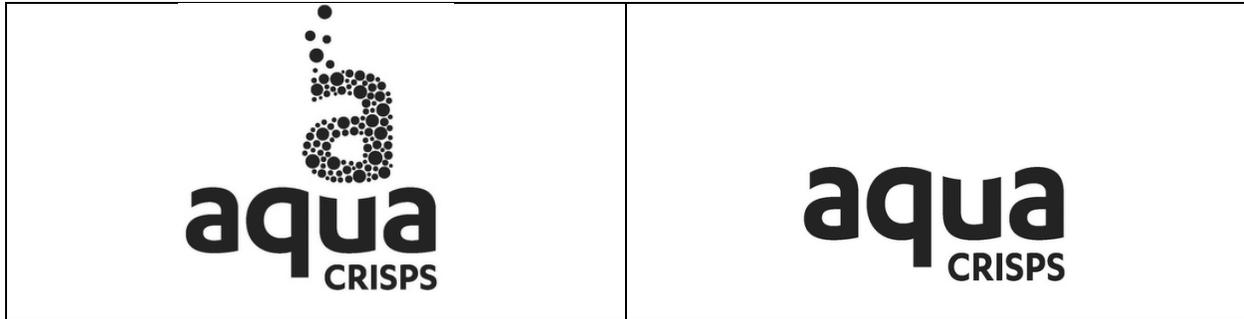
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Before Quinn, Wellington, and Adlin,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Watered Up, LLC (“Applicant”) filed applications to register on the Principal Register the mark AQUA CRISPS, in standard characters,¹ and the forms shown below:²

¹ Application Serial No. 86310513, filed June 16, 2014 pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intention to use the mark in commerce.

² Application Serial Nos. 86310537 and 86310550, respectively, filed June 16, 2014 pursuant to Section 1(b) of the Trademark Act, alleging a bona fide intention to use the mark in commerce. Serial No. 86310537 includes the following description of the mark: “The mark consists of the letter ‘a’ formed of various sized circles, multiple circles above the letter ‘a’ arranged to look like bubbles or droplets, and the wording aqua crisps. Color is not claimed as a feature of the mark.” Serial No. 86310550 includes the following description of the mark:



All of the identifications of goods read “tapioca-based snack foods; tapioca chips” in International Class 30.

In application Serial Nos. 86310513 and 86310550, the Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the wording AQUA CRISPS is merely descriptive of the goods. In application Serial No. 86310537, the Examining Attorney maintained that the wording AQUA CRISPS is merely descriptive, refusing registration under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), due to Applicant’s failure to comply with the requirement to disclaim the wording AQUA CRISPS apart from the mark.

When the refusals to register were made final, Applicant appealed. Applicant and the Examining Attorney filed briefs. The Board, on August 25, 2016, granted the Examining Attorney’s request to consolidate the appeals because they involve common issues of law and fact, and the evidentiary records are the same. Accordingly, we consider the merits in this single opinion.

“The mark consists of the word aqua with the letters arranged to have a curve on an edge of the word, and the word crisps. Color is not claimed as a feature of the mark.”

A term is merely descriptive of goods within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a mark is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). A term need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of them. *See In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the relevant marketplace. *See In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Abcor Dev. Corp.*, 200 USPQ at 218; *In re Venture Lending Assocs.*, 226 USPQ 285 (TTAB 1985). The question is not whether someone presented only with the mark could guess what the goods listed in the identification are. Rather, the question is whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695

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F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012), quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a non-descriptive commercial impression. If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *Duopross Meditech Corp. v. Inviro Med. Devices, Ltd.*, 103 USPQ2d at 1758 (SNAP SIMPLY SAFER merely descriptive for “medical devices, namely, cannulae; medical, hypodermic, aspiration and injection needles; medical, hypodermic, aspiration and injection syringes”); *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (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 Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry). However, a mark comprising a combination of merely descriptive components is registrable if the

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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. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). “If one must exercise mature thought or follow a multi-stage reasoning process in order to determine what characteristics the term identifies, the term is suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978). *See also In re Shutts*, 217 USPQ at 364-365; *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980).

The word “aqua” is defined as “water; used mainly on the labels of food, medicine, and toiletries to show how much water they contain.” (macmillandictionary.com – “American English definition”). The term “crisp means, in relevant part, “a thin, hard, and usually salty piece of food.” (merriam-webster.com). (Office actions, 10/2/14 and 4/24/15).

Applicant’s website describes the product:

OUR CRISPS

Aqua Crisps – All Natural Smoked Water Crisps

Aqua crisps are a new, original snack with your health in mind. This crunchy chip has the look and texture of a pork rind, but is completely vegetarian and gluten free. The unique recipe uses mostly water, natural smoke flavor and tapioca pearls.

Our goal is to sell the product to restaurants, hotels, schools, institutions and bars: anywhere with a deep fryer.

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We have developed a new snack that will universally be enjoyed. The dried product is nonperishable and takes less than a minute to cook.

(Response, 4/2/15)

The goods are further described on the website as “vegan crisps using smoked water and tapioca pearls.” (Office action, 11/23/15). Applicant’s Facebook page likewise describes its product as “a vegan crisp using smoked water and tapioca pearls.” *Id.*

Applicant apparently filed an application to register a patent to cover the product.

The patent application includes the following “Summary” about Applicant’s “water-based snack products”:

A water-based snack product and method of making the same is disclosed. In one embodiment, a snack product may be made from smoked water and tapioca. Flavoring may also be added to the snack product. In an example, a method of making a snack product may include smoking water and combining the smoked water with tapioca to produce a water-based snack product. In some instances, the mixture is further processed to produce a snack product having a crispy or crunchy, chip-like texture.

(Response, 4/2/15)

Also of record are excerpts from the U.S. Acceptable Identification of Goods and Services Manual showing listings for different types of food “crisps” (*e.g.*, “nut crisps,” “potato crisps”). (Office action, 10/2/14). Similarly, the record includes competing “state of the register” evidence to show how the Office has viewed the term CRISPS in prior registrations.³

³ The Examining Attorney introduced several third-party Principal Register registrations for marks that include the word “CRISPS” as a portion thereof, all covering food items. In each registration, there is a disclaimer of “CRISPS” apart from the mark. (*See, e.g.*, SKINNY CRISPS (Reg. No. 3543290); FIT CRISPS (Reg. No. 4046462)). Other similarly constructed marks issued on the Supplemental Register. (*See, e.g.*, KALE CRISPS (Reg. No. 3690859)). (Office action, 10/2/14). To counter this evidence, Applicant submitted evidence of similarly

Finally, we note that the Examining Attorney also submitted three prior applications (Serial Nos. 85607228; 85607239; 85607245) filed by Applicant, but later abandoned, to register the same AQUA CRISPS marks as those involved in this appeal, for goods identified as “smoked water-based snack foods, namely, crisps in the nature of tapioca-based crisps.” (Office action, 11/23/15). Although the goods are now identified as “tapioca-based snack foods; tapioca chips,” the simple fact remains, as confirmed by the evidentiary record, that the goods are just as accurately described as “water-based,” as was done in the prior applications. So as to be clear, however, we reiterate that we must decide the issue of mere descriptiveness based on the present identification of goods. *See Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[t]he authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application”).

When the terms “aqua” (meaning “water”) and “crisps” are combined “the mark[s] as a whole, i.e., the combination of the individual parts,” do not convey “any distinctive source-identifying impression contrary to the descriptiveness of the

constructed third-party registered marks, all covering food items. The registrations issued on the Principal Register without disclaimers of “CRISPS.” (*See, e.g.*, PITA CRISPS (PITA disclaimed) (Reg. No. 1562411); HARVEST CRISPS (Reg. No. 1584989)). (Response, 4/2/15).

The competing evidence of third-party registrations submitted by Applicant and the Examining Attorney is of minimal probative value in determining whether the wording AQUA CRISPS is merely descriptive. *In re theDot Commc'ns Network LLC*, 101 USPQ2d 1062, 1067 (TTAB 2011). As often stated, each case must stand on its own record and, in any event, the Board is not bound by the actions of prior examining attorneys. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the board or this court.”).

individual parts.” *In re Oppedahl & Larson*, 71 USPQ2d at 1372. To the contrary, from “the perspective of a prospective purchaser or user” of Applicant’s goods, “because ... the combination of the terms does not result in a composite that alters the meaning of [any] of the elements ... refusal on the ground of descriptiveness is appropriate.” *In re Petroglyph Games*, 91 USPQ2d 1332, 1341 (TTAB 2009). The term “crisp” identifies the specific type or kind of snack, and the use of the term “aqua” meaning “water” in connection therewith is not all that unusual. In this connection we take judicial notice of the dictionary definition of the similarly constructed term “water biscuit,” which is defined as “a biscuit made of flour and water.” American Heritage Dictionary of the English Language (5th ed. 2016).⁴ Accordingly, contrary to Applicant’s arguments, the proposed mark is not incongruous; rather, the mark as a whole immediately describes a significant characteristic or quality of the goods, that is, the tapioca crisps are water-based. In point of fact, on its website, as cited above, Applicant refers to its product as “water crisps.” See *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 103 USPQ2d at 1757; *Remington Prods. Inc. v. North American Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1448 (Fed. Cir. 1990) (evidence showed purported trademark owner itself used TRAVEL CARE in descriptive manner); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1663 (TTAB 1988) (GROUP SALES BOX OFFICE is nothing more than a combination of the two

⁴ The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). See *In re Thomas White Int’l Ltd.*, 106 USPQ2d 1158, 1160 n.1 (TTAB 2013).

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common descriptive terms most applicable to applicant's services which in combination achieve no different status but remain a common descriptive compound expression). The terminology in Applicant's patent application covering "water-based snack products" also supports our conclusion.

In sum, on this record, we conclude that consumers familiar with Applicant's goods would immediately understand, upon seeing the wording AQUA CRISPS, that the goods are water-based crisps. No imagination or thought is required by a prospective purchaser to discern that a significant characteristic or quality of Applicant's snack food products is that the crisps are water-based. Furthermore, Applicant's competitors who also might offer similar goods should have the opportunity to use wording such as "aqua crisps," "water crisps," or variations thereof to explain a significant characteristic or quality of their goods. *See In re Boston Beer Co. L.P.*, 47 USPQ2d 1914, 1920-21 (TTAB 1998), *aff'd*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *In re Abcor Development*, 200 USPQ at 217 ("The major reasons for not protecting [merely descriptive] marks are ... 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."). 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 term is merely descriptive. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012).

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We conclude that the wording AQUA CRISPS, when used in connection with Applicant's snack products, is merely descriptive thereof. Thus, the marks shown in Application Serial Nos. 86310513 and 86310550 are merely descriptive in their entireties.

That brings us to the logo mark shown in Application Serial No. 86310537. Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), reads, in relevant part, as follows: "The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable." A disclaimer is a statement that the applicant or registrant does not claim the exclusive right to use a specified element or elements of the mark in a trademark application or registration. "The effect of a disclaimer is to disavow any exclusive right to the use of a specified word, phrase, or design outside of its use within a composite mark." *In re Franklin Press, Inc.*, 597 F.2d 270, 201 USPQ 662, 665 (CCPA 1979). *See In re Wada*, 194 F.3d 1297, 52 USPQ2d 1539 (Fed. Cir. 1999); *Sprague Electric Co. v. Erie Resistor Corp.*, 101 USPQ 486, 486-87 (Comm'r Pats. 1954) ("As used in trade mark registrations, a disclaimer of a component of a composite mark amounts merely to a statement that, insofar as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.").

"[I]t is within the discretion of an Examining Attorney to require the disclaimer of an unregistrable component (such as a common descriptive, or generic, name) of a

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composite mark sought to be registered on the Principal Register.” *In re Creative Goldsmiths of Wash., Inc.*, 229 USPQ 766, 768 (TTAB 1986). Failure to comply with a requirement for a disclaimer is a basis on which to refuse registration. *See In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399-1400 (Fed. Cir. 2006); *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 47 (CCPA 1975); *In re Nat'l Presto Indus., Inc.*, 197 USPQ 188, 190 (TTAB 1977); *In re Pendleton Tool Indus., Inc.*, 157 USPQ 114, 115 (TTAB 1968).

Because we have determined that the wording AQUA CRISPS is merely descriptive of Applicant's goods, the disclaimer requirement in application Serial No. 86310537 is proper. In order to comply with this portion of the present decision, a properly worded disclaimer should be submitted as follows in the application: “No claim is made to the exclusive right to use AQUA CRISPS apart from the mark as shown.”

Decision: The refusal to register is affirmed in each of the applications. In application Serial No. 86310537, Applicant is allowed 30 days to submit a disclaimer of AQUA CRISPS, in which case the decision in that application only will be set aside.