

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

Mailed: January 13, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Comfort Revolution, LLC
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Serial No. 86527991
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Michael J. Doherty of Doherty IP Law Group LLC
for Comfort Revolution, LLC.

Brian P. Callaghan, Trademark Examining Attorney, Law Office 108,
Andrew Lawrence, Managing Attorney.

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Before Kuhlke, Ritchie and Shaw, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Comfort Revolution LLC (Applicant) seeks registration on the Principal Register of the standard character mark POLYGEL for “polyester fiber material treated with a chemical composition that draws body heat away from a user that is used for making mattresses, mattress toppers, pillows and cushions,” in International Class 22.¹

¹ Application Serial No. 86527991, filed on February 8, 2015, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has refused registration of Applicant's mark on the ground that POLYGEL is merely descriptive of Applicant's goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

When the refusal was made final, Applicant appealed. The Examining Attorney and Applicant filed briefs. We affirm the refusal to register.

Mere Descriptiveness

A mark is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it immediately conveys information of a quality, feature, function, or characteristic of the goods or services in connection with which it is used, or intended to be used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). The determination of whether a mark is merely descriptive must be made "in relation to the goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a "single feature or attribute" of the goods or services. *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987).

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. *In re Phoseon Tech., Inc.*, 103 UPQ2d 1822, 1823 (TTAB 2012); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). 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. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004). However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services. *See generally In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968). *See also In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983).

The Examining Attorney contends that POLYGEL “merely describes an ingredient and a characteristic of Applicant’s goods, namely, that Applicant’s goods feature a polyester gel fiber material used for making mattresses, mattress toppers, pillows and cushions.” Ex. Att. brief, 6 TTABVUE 5.

In support of his position that the term POLYGEL is merely descriptive of the applied-for goods, the Examining Attorney relies on the dictionary definitions of “poly” as being “a polymerized plastic or something made of this; especially: a polyester fiber, fabric, or garment” and “gel” as being “a thick substance that is like jelly and that is used in various products.”² We take judicial notice of another

² MERRIAM-WEBSTER (<http://merriam-webster.com>), May 21, 2015 Office action at 2-6.

dictionary definition of “poly” as being “noun 1. Informal. Polyester: 2. A fabric or garment made of polyester. adjective 2. Made of containing polyester.”³ In addition, the Examining Attorney submitted evidence in the form of third-party webpages showing polyester gel fiber material used for making mattresses, mattress toppers, pillows and cushions. Ex. Att. brief, 6 TTABVUE 6. A few examples are reproduced below:⁴



**Top Loft Mattress Pad From
Innergy by Therapedic**

\$79.95 - \$129.95

★★★★★ [Read Review \(12\)](#) | [Write a review](#)

Add an endless layer of pillow-like tufts to your bed with an overstuffed pad that gives new meaning to softness. It's overfilled by hand with cool, breathable and softly supportive **polyester gel fiber**, while tufted baffle box stitching creates the plump pillows that keep the fill evenly distributed. A durable cotton cover adds to the comfort and breathability, and a stretch skirt (fits mattresses up to 16") holds the pad in place. Machine washable for easy care. Imported.

³ Dictionary.com based on RANDOM HOUSE DICTIONARY (2017) (<http://www.dictionary.com/browse/poly>). 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 regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁴ May 21, 2015 Office action at 10, 11, 16; December 29, 2015 Office action at 22, 23.

Dream Easy Micro-Gel Fiber and Featherbed

Dream Easy Micro-Gel Fiber and Featherbed

\$99.95 - \$139.95

★★★★☆ [Read Review \(7\)](#) | [Write a review](#)

Transform your bed with a dreamy combination of feathers and down-like fiber. This fiber/featherbed combo includes 2" of feathers, for the ultimate of sink-in softness, topped with 1" of **polyester gel fibers**, making it as soft as down without clumping, shifting or flattening over time. Box-stitching keeps all the fill in place. Polyester microfiber cover. Spot clean. Imported.

The Best Gel Memory Foam Pillow Review

We analyzed reviews for the most popular gel memory foam pillows available on the market ([read about our accurate, unbiased method](#)). We compared them side-by-side, and scored them according to a range of factors including comfort, snoring reduction, pain relief potential, durability, initial odor, and heat retention ability.

Deluxe Comfort Supreme Plus Gel Fiber Filled Pillow (Set of 2)



Sleep Connection Fiber Gel Topper by Montgomery Ward

Polyester gel fibers keep you nice and cushiony cool with no clumping or breaking. A dreamy choice for high-performance sleep comfort. Box stitching keeps fill evenly distributed. Elastic around elastic keeps **topper** in place (fits mattresses up to 18" d). Machine wash....

Save up to 30% \$55.95 - \$76.95

\$20.00 per month

on orders by February 20th

Dream Supreme Plus Gel Fiber-Filled Pillows, King (Set of 2)

by Dream Supreme

★★★★☆ 2,870 customer reviews | 41 answered questions

List Price: \$49.99

Price: **\$28.66** & **FREE Shipping** on orders over \$35. [Details](#)

You Save: **\$21.33 (43%)**

Only 10 left in stock (more on the way).

Ships from and sold by Amazon.com in [easy-to-open packaging](#). Gift-wrap available.

Size: **King**

King \$28.66	Standard \$28.99
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- Set of 2 king-size hypoallergenic down-alternative pillows
- **Polyester gel fiber** fill with great loft recovery and no-shift construction
- Provides comfortable support for back, side, and stomach sleepers
- 370-thread-count, 100-percent mercerized cotton shell with jacquard pattern
- Machine wash and dry for easy care; backed by 1-year limited warranty

In response to this evidence, Applicant argues that (1) “its trademark POLYGEL is not merely descriptive because it does not convey an immediate idea of the ingredients, qualities, or characteristics of the identified goods [because] the word POLYGEL does not immediately convey that the polyester fill material is treated with a chemical composition that provides the polyester fill material with the capability to draw body heat away from an outer surface of a sleep product,” and (2) POLYGEL “is susceptible to multiple connotations and requires imagination and the gathering of further information in order for the relevant public to perceive any significance of the terms as they relate to a significant aspect of Applicant’s product.” App. brief, 4 TTABVUE 4. As to the second argument Applicant relies on the “primary definition of the word ‘poly’ as ‘many: several: much: multi.’” *Id.* This definition is not of record but we take judicial notice of it. *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); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). These definitions are for “poly-” as a combining form.

Applicant also submitted 1) a copy of a patent relevant to another of its sleep products and 2) an example of its advertising for one of its pillows incorporating the applied-for goods shown below:⁵

HOW IT WORKS

It's one thing to say you've created the coolest pillow of all time. It's another thing to back it up with science like we do. We've explained the components that make it all come together, but here's what actually happens when night falls and it's time to get some shut-eye.

- 01** Body heat from your head enters the pillow
- 02** Constant ambient air from natural movement comes into the pillow, activating phase change technology
- 03** Phase change materials absorb body heat, keeping your pillow cool longer, while the infused cooling gel helps carry the heat away – cooling you to sleep
- 04** Airflow allows for cool regeneration, continuously circulating fresh air into the pillow

TIP: *Hydraluxe Air™ technology works best with a lightweight, breathable pillow case for the most comfortably cool sleep.*

patent pending

As is well established, the fact that “a term may have other meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012). Applicant’s argument does not take into account the perception of the consumer as to meaning in the context of Applicant’s goods,

⁵ December 1, 2015 Response at 2-29 (published patent) and 31 (advertising brochure).

i.e., what meaning is relevant to polyester fiber material treated with a chemical composition that draws body heat away from a user that is used for making mattresses, mattress toppers, pillows and cushions. *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012); *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984). Applicant's reference to "a chemical composition" encompasses a "cooling gel." As noted above, in our analysis of the proposed term POLYGEL we must consider "the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. Applicant's broad identification encompasses material used for mattress toppers, mattresses and pillows with polyester fiber infused with a cooling gel, as described in Applicant's brochure for its pillow. *See Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219. *See also In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1832 (Internet evidence may be considered for purposes of evaluating a trademark).

This record clearly shows that POLYGEL when used in connection with the applied-for goods immediately, without doubt, describes a feature of the goods, namely, that they consist of polyester fiber and a gel. That POLYGEL does not immediately inform the consumer as to all of the specifics, *i.e.* how the polyester fill material is treated with chemical composition that is a cooling gel, does not obviate the refusal because it is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a "single feature or attribute" of the goods or services. *Chamber of Commerce of the*

U.S., 102 USPQ2d at 1219. The individual components and the composite result are merely descriptive of Applicant's goods and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods.

Decision: The refusal to register Applicant's POLYGEL as merely descriptive under Section 2(e)(1) is affirmed.