

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed:
January 29, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Davies Gate LLC

Serial No. 78761852

Marnie Wright Barnhorst of The Trademark Group, APLC for
Davies Gate LLC.

A. D. Saunders, Trademark Examining Attorney, Law Office
109 (Dan Vavonese, Managing Attorney).

Before Hohein, Drost and Bergsman, Administrative Trademark
Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Davies Gate LLC has filed an intent to use application
to register the mark DAVIES GATE SUGAR PLUM, in standard
character form, for "skin soap; liquid soap for hands, face
and body; cream for the hands, face and body; shower and
bath gel; skin lotion, non-medicated bath preparations;
bath and body powders" (Serial No. 78761852). The
Trademark Examining Attorney has issued a final requirement
that applicant disclaim the exclusive right to use "Sugar
Plum" on the ground that the term "Sugar Plum" is merely
descriptive. Section 6 of the Trademark Act of 1946, 15

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U.S.C. §1056. The Examining Attorney contends that "Sugar Plum" identifies the scent of the products.

The record on appeal consists of the following evidence:

1. The definition of the word "sugarplum" from the www.dictionary.com website.¹ The following definitions were provided in that website:

"a small sweetmeat made of sugar with various flavoring and coloring ingredients; a bonbon."

Dictionary.com Unabridged (v 1.01) based on the Random House Unabridged Dictionary (2006).

"a small round piece of sugary candy."

The American Heritage Dictionary of the English Language (4th ed. 2000).

"any various small sugary candies."

WordNet 2.0 (Princeton University 2003).

2. Excerpts from 14 websites submitted by the Examining Attorney purportedly to show that "'sugar plum' is often used to describe the scent of body care products and/or the color of the goods, in hues of dark pinks and purples."² Examples of the excerpts using the term "sugar plum" include the following (emphasis added):

¹ Applicant's November 8, 2006 Response. The Examining Attorney also submitted dictionary definitions attached to her brief. Those definitions are consistent with those submitted by applicant.

² The December 5, 2006 Office Action.

A. JCPenny

'Let It Snow' Butter Treats

Find all the cheer of winter in this assortment of seven body butter treats. Fragrances include maraschino mist, vanilla lattÃ© (sic), **sugarplum**, powdered sugar, peppermint cream, sugar cookie and fudge brownie.

(jcp.com)

B. Etsy

Sugar Plum - Vegan Whipped Body Frosting - Super Moisturizing, Extra Fragrant

Sugarplum - A holiday treat that is sweet, deep and candy like. A unique twist on a classic scent.

(etsy.com)

C. ebay

Mary Kay Signature Eye Color, **Sugarplum**

* * *

Available is a new, unused signature eye color in **sugarplum**.

(URL not provided)

D. Eminence Organic Skin Care

Chocolate Truffle Body Wrap

* * *

Prepare for a massage with either the Pear & Green Apple Massage Soufflé or the **Sugar Plum** Soufflé Massage Cream.

* * *

Sugar Plum Soufflé Massage Cream

(eminenceorganics.com)

E. Yahoo! Shopping

Luscious Personal Care & Hygiene

Nourishing hand cream **sugar plum**

This ultra-moisturizing **sugar plum** hand cream smells wonderful and helps soothe even the driest hands.

(shoppingyahoo.com)

F. Two Palm Soaps
Handcrafted Soaps

Bath & Body

Linen Sprays

Sugar Plum—now this one IS sweet. It's perfect as an air/linen freshener for a child's room or as a child's personal mist. Colored very deep purple, like plums!

(twopalmssoaps.com)

G. The Lipstick Page Forums

Maybelline Moisture Extreme Lipcolor

Posted by Dain, Saturday, July 30, 2005

Maybelline has reformulated its classic lipstick, Moisture Whip, and replaced it with Moisture Extreme. From what I briefly tested, the quality is better, the packaging snazzier, the pigment richer, but beyond that, I cannot say. Many of the most popular shades have been retained, including:

Sugar Plum Ice

(No URL provided)

H. GIRLPAINT

Oprah on E.L.F. Cosmetics . . . for real,
y'all

Check out Oprah's Editor Pick for e.l.f.
cosmetics! Want to know the latest buzz? .
. . the editor at Oprah just choose her Pre
Designed Compact, now you can get it too!
Includes: Compact, Sage, Flushed, **Sugar
Plum**, Guava.

* * *

Sugar Plum and Guava are moisturizing pot
lip colors. **Sugar Plum** is a deep mauve with
a light shimmer.

(girlpaintblogspot.com)

I. makeup.com

100% Pure Natural Lip Gloss **Sugar Plum**
Sheer.

The Advice Sisters

* * *

Prescriptives Glimmer Eye Cones . . . They
are long, lasting, slightly shimmery creams
in intense colors that easily create this
season's dramatic eye looks and easily lined
lids, too. We especially liked "**Sugar Plum**"
a deep plum. . . . For a nice finishing
touch False Eyelashes Plush Mascara \$19.00
coats lashes with coordinating colors:
Sugar Plum and Evergreen.

(advicesisters.net)

3. An excerpt from the Smallflower website advertising applicant's products (emphasis added):³

DAVIES GATE

Sugar Plum Purse Essentials Kit

Includes a convenient travel size of **Sugar Plum** Nourishing Hand Cream to condition and hydrate hands, and a full size **Sugar Plum** Lip Gloss that's long-lasting, never sticky, and makes lips look fuller. Fragrant with the blend of ripe plums with light notes of luscious peach and hints of sugar sweet vanilla.

(No URL provided)

4. Excerpts from beautyexclusive.com advertising applicant's products (emphasis added):⁴

Davies Gate **Sugar Plum** Bath Fizz Pop

* * *

Skin will be soft and infused with the scent of ripe Plums blended with notes of luscious Peach and sugar-sweet Vanilla.

Davies Gate **Sugar Plum** Sheer Color Gloss (New!)

* * *

A triple wonder that softens lips, makes them extra full with light color and deliciously flavors them with **Sugar Plum**.

Davies Gate **Sugar Plum** Warming Shave Cream (New!)

* * *

. . . leaving your skin velvet soft and **Sugar Plum** sweet.

³ The March 19, 2007 Office Action.

⁴ The March 19, 2007 Office Action.

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A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the products it identifies. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the products 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 Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the issue is whether someone who knows what the products are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *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).

A "sugar plum" is a candy, and candy is a sweet confection. Thus, when "sugar plum" is used in connection with something other than candy, it is likely to convey the image of sugar plum candy. Thus, it is not surprising that the commercial references to "sugar plum" made of record, including the references to applicant's products, use

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"sugar plum" as a scent or color calling to mind the candy.

For example:

A triple wonder that softens lips,
makes them extra full with light color
and deliciously flavors them with **Sugar
Plum.**⁵

. . . leaving your skin velvet soft and
Sugar Plum sweet.⁶

Fragrances include maraschino mist,
vanilla lattÃ© (sic), **sugarplum**,
powdered Sugar, peppermint cream, sugar
cookie and fudge brownie.⁷

The evidence clearly shows that "sugar plum" is readily used by applicant, as well as others, and understood by consumers to refer to products with a specific scent (plum) or color (purple). However, "[a]pplicant contends that it is a non-sequiter to conclude that because the goods are fragrant with plums, peach and vanilla, they can be described as having the scent of a sugar plum candy. There is simply no basis in the record for this conclusion. Candies do not have a known scent that is used in the cosmetic industry and they do not have a known specific color. Sugar plum candies do not smell like ripe plums or

⁵ beautyexclusive.com attached to the March 19, 2007 Office Action.

⁶ beautyexclusive.com attached to the March 19, 2007 Office Action.

⁷ JCPenny at the JCP.com website attached to the December 5, 2006 Office Action.

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sugar sweet vanilla.”⁸ Whether the public is aware that candies do not have known scent or color when used in connection with cosmetics, the term “sugar plum” clearly connotes a sweet, fruity scent such as a plum. “While it is true that in order to be held descriptive, a term must describe with some particularity a quality or ingredient of the product in question, it need not describe it exactly.” *In re Entenmann’s Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990) (OATNUT is merely descriptive of bread containing oats and hazelnuts). Of course, the purchaser knows that the product is a soap, lotion, or cream, and not a candy, but the average consumer would expect that the product would have a sweet, fruity scent similar to plum. In similar factual situations, when the term sought to be registered described the scent of a product, the term was found to be merely descriptive. *In re Gyulay, supra* (“Apple Pie” for potpourri mixture is merely descriptive); *In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156 (CCPA 1973) (“Creme De Menthe” is merely descriptive of chocolate wafers); *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985) (“Apricot” for dolls whose key characteristic is an apricot scent is merely descriptive).

⁸ Applicant’s Brief, p. 2.

Applicant argues that because a "sugar plum" is a candy, it is not descriptive of skin products: rather, it is suggestive.⁹ We think, however, that the commercial impression conjured up by applicant's use of "sugar plum" in its mark immediately conveys the notion of a product with a sweet, fruity scent, such as plum, and one that is colored purple. A disclaimer of the term "sugar plum" is therefore appropriate.

Decision: The refusal to register the mark DAVIES GATE SUGAR PLUM based on applicant's refusal to disclaim the exclusive right to use "sugar plum" is affirmed. However, if applicant submits the required disclaimer of "sugar plum" to the Board within thirty days of the mailing date of this decision, this decision will be set aside as to the affirmance of the disclaimer requirement.¹⁰ See Trademark Rule 2.142(g).

⁹ Applicant's Brief, p. 2.

¹⁰ The standard printing format for the required disclaimer text in this application is as follows: "No claim is made to the exclusive right to use 'sugar plum' apart from the mark as shown." TMEP §1213.08(a)(i) (5th ed. 2007).