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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Pinnacle Foods Group Inc.

Serial No. 78572360

Michelle L. Visser of Rader, Fishman & Grauer PLLC for
Pinnacle Foods Group Inc.

S. David Sterkin, Trademark Examining Attorney, Law Office
110 (Chris A. F. Pederson, Managing Attorney).

Before Quinn, Grendel, and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Armour Brands, Inc., predecessor-in-interest to
Pinnacle Foods Group, Inc., filed an intent-to-use
application for the mark ULTIMATE for chili.¹ Registration
was refused on the ground that ULTIMATE, if used in
connection with chili, would be merely descriptive.

¹ Application Serial No. 78572360, filed February 22, 2005.
Armour Brands, Inc. assigned the mark and application to The Dial
Corporation in an assignment recorded in the U.S. Patent and
Trademark Office on February 28, 2006, at reel 3255, frame 0250.
The Dial Corporation assigned the mark and application to
Pinnacle Foods Group, Inc. in an assignment recorded on March 29,
2006, reel 3278, frame, 0609.

Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1).

When the refusal was made final, applicant appealed. Both applicant and the examining attorney filed briefs. We affirm.

The examining attorney contends that ULTIMATE for chili is merely descriptive because the word "Ultimate" is a laudatory term, and that laudatory terms are merely descriptive because they attribute quality or excellence to products: that is, laudatory terms describe characteristics, qualities, or features of products in a condensed form. In this case, the word "Ultimate" means *inter alia* "furthest or highest in degree or order; utmost or extreme" and, therefore, when applied to chili, it denotes the qualities of that product. The examining attorney supports the refusal with the following evidence:

1. Dictionary definitions for the word "Ultimate":

- A. "The best or most extreme of its kind: UTMOST";²
- B. "greatest: greatest, most nearly perfect, or highest in quality";³
- C. "adjective . . . 2 being the best or most extreme example of its kind. . .

noun 1 (the ultimate) the best achievable or imaginable of its kind."⁴

² Merriam-Webster Online Dictionary (www.m-w.com).

³ MSN.Encarta (<http://encarta.msn.com>).

⁴ Compact Oxford English Dictionary (www.askoxford.com).

2. Five articles from the LexisNexis database:
 - A. The February 23, 2005 Bulletin Board from the Pittsburgh Post-Gazette referencing "The Ultimate Chili Cook-Off";
 - B. A June 7, 2004 article entitled "*Dressing up the everyday burger*" from the Copely News Service referencing the "Ultimate Chili Burger";
 - C. A November 7, 2003 article entitled "*Asian eats, chili for charity and more top picks*" in the Chicago Tribune asking readers to "decide who'll be the ultimate chili champion" at the Chili Cook-Off Challenge;
 - D. An October 2, 2003 article entitled "*Chili con blarney: Is there real chili east of the bean line?*" in the Star Tribune from Minneapolis, Minnesota referencing W.C. Jameson's The Ultimate Chili Cookbook;
 - E. A February 1, 2003 article entitled "*Chili Cookoff Guaranteed To Heat Up Taste Buds*" in The Virginian-Pilot from Norfolk, Virginia, explaining that "there exists no ultimate chili recipe because everyone who makes it knows that his or hers is the best"; and,
3. Three websites referencing "Ultimate Chili" found from a search using the "Google" search engine:
 - A. "The Ultimate Chili" recipe on the All Recipes website (www.allrecipes.com);
 - B. "Chef Erik Blauberg's Ultimate Chili" recipe on the That's My Home website (www.thatsmyhome.com); and,
 - C. The posting for The Ultimate Chili Cookbook by W. C. Jameson on Amazon.com. The book description provides the following information: "The Ultimate Chili Cookbook explores every facet of the long history of chili: the geography of chili, different cultural approaches to preparing chili that

have evolved throughout the United States, and fascinating folklore of chili. Also includes more than 135 wonderful mouthwatering chili recipes." The Amazon.com website also references The Ultimate Chili Book: A Connoisseur's Guide to Gourmet Recipes and the Perfect Four-Alarm Bowl by Christopher B. O'Hara.

Applicant argues that ULTIMATE proposed for use in connection with chili is not merely descriptive because the word "Ultimate" does not convey a readily understood meaning to purchasers: that is, the word "Ultimate" does not describe chili with the necessary particularity to support a refusal under Section 2(e)(1). For example, the applicant points out that "Ultimate" has ten possible definitions and, therefore, the meaning of the word when used in connection with chili is not clear. Applicant also contends that because this is an intent-to-use application, there is no evidence that "Ultimate" is used as a laudatory term.

With respect to the LexisNexis articles and references in the websites, applicant argues such evidence does not prove that the word "Ultimate" is merely descriptive because in each instance, the word "Ultimate" modifies or refers to something other than chili. For example, in the Pittsburgh Post-Gazette "Bulletin" referencing "The Ultimate Chili Cook-Off", applicant contends that the word

"Ultimate modifies "cook-off" and, therefore, does not show use of the word "Ultimate" in connection with chili.

"Accordingly, not a single excerpt provided by the Examining Attorney supports the Examining Attorney's contention that 'ultimate' is descriptive of chili."⁵

Finally, applicant submitted copies of numerous third-party registrations for the mark ULTIMATE registered on the Principal Register for a wide variety of consumer products. "The fact that so many marks incorporating 'ULTIMATE' have been registered on the Principal Register over a period of so many years, not pursuant to a claim of acquired distinctiveness and not subject to a disclaimer of 'ULTIMATE,' is evidence that the Office has consistently found, on numerous occasions that ULTIMATE is inherently distinctive and registrable on the Principal Register."⁶

A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods or services with which it is used, or intended to be used. *In re Gyulay*, 820 F.2d 1216, 3 USPQ 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is

⁵ Applicant's Brief, p. 8.

⁶ Applicant's Brief, p. 11.

sought and the context in which the term is used, or is intended to be 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 USPQ 1222, 1224 (TTAB 2002). In other words, the issue is whether someone who knows what the goods or services are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ 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 UPSQ 365, 366 (TTAB 1985).

"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.*, 199 USPQ 496, 497 (TTAB 1978). See also, *In re Shutts*, 217 USPQ 363, 364-365 (TTAB 1983); *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980).

The fact that the word "Ultimate" has more than one meaning is not controlling because descriptiveness is determined in relation to the goods for which registration is sought. *In re Chopper Industries*, 222 USPQ 258, 259

(TTAB 1984); *In re Bright-Crest, Ltd.*, 205 USPQ 591, 593 (TTAB 1979). So long as any one of the meanings of a word is descriptive for an item listed in the identification of goods, the word may be considered to be merely descriptive. *In re Chopper Industries, supra.* Thus, we start our analysis by inquiring whether the mark describes chili, not whether we can guess the product by looking at the mark.

In the context of the mark sought to be registered, "Ultimate" is a laudatory term. Laudatory or "puffing" marks are regarded as a condensed form of describing the character or quality of the goods. 2 McCarthy On Trademarks and Unfair Competition §11:17 (4th ed. 2006). *See also, Burmel Handkerchief Corp. v. Cluett, Peabody & Co., Inc.*, 127 F.2d 318, 53 USPQ 369, 372 (CCPA 1942) ("Such expressions are a condensed form of describing in detail the outstanding character or quality of the objects to which they are applied"). As applied to ULTIMATE brand chili, the word "Ultimate" describes, in a condensed fashion, the characteristics, qualities, or features such as flavor, aroma, and ingredients that the best chili should have.

Contrary to applicant's arguments, there is nothing of record to support applicant's contention that the word "Ultimate" has any meaning other than one that would

describe the characteristics of chili. In fact, the LexisNexis and Internet evidence demonstrates that consumers would perceive "Ultimate" as meaning the best or highest quality (e.g., "there exists no ultimate chili recipe," "The Ultimate Chili" recipe, and "Chef Erik Blauberg's Ultimate Chili"). Even assuming applicant's argument regarding the meaning of the word "Ultimate" as used in the LexisNexis and Internet references was correct, "Ultimate" would still be perceived by consumers as a laudatory term. For example, according to applicant "The Ultimate Chili Cook-Off" refers to "the best chili cooking competition," the "Ultimate Chili Burger" refers to "the best chili burger," "the ultimate chili champion" refers to "the greatest champion," and The Ultimate Chili Cookbook refers to "the best cookbook about chili." In each example, the commercial impression engendered by the word "Ultimate" is "the best" or "the highest quality" albeit, at least according to applicant, in connection with something other than chili. Applicant has failed to make of record any examples of the word "Ultimate" used as anything other than a laudatory term.

As stated in *In re Nett Designs, Inc.*, 236 F3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001), the word "Ultimate" may be suggestive or descriptive depending upon context and

other factors affecting public perception. In *Nett*, the Federal Circuit affirmed the Board's finding that the phrase the THE ULTIMATE BIKE RACK for bike racks is merely descriptive because the evidence showed that consumers regard THE ULTIMATE BIKE RACK as a laudatory descriptive term that touts the superiority of the bike racks. In its decision, the Court explained that the Board "has the duty to place this term ["Ultimate"] in its proper context within the mark and to determine the public's perception." *Id.* As in *Nett*, we find that the record before us supports the finding that the mark ULTIMATE, proposed for use in connection with chili, is an expression of preeminence that immediately describes a high quality food product without the need for any imagination, conjecture, or speculation.

Finally, applicant's reliance on third-party registrations is not determinative, or even probative, of the question of registrability. The problem with the third-party registrations is that we are not privy to the records in those applications for registration. Moreover, we are responsible for determining whether applicant's mark is merely descriptive based on the record before us. We cannot forego our responsibility in this case because "Ultimate" has previously been registered. Accordingly, it is well settled that each case must be decided on its own

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facts. *In re Pennzoil Products Co.*, 220 USPQ2d 1753, 1758 (TTAB 1991). *See also, In re Nett Designs, Inc., supra* ("Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court").

In view of the foregoing, we find that the mark ULTIMATE, if used in connection with chili, is merely descriptive.

Decision: The refusal to register is affirmed.