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This Opinion is Not a  
Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Snikiddy LLC

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Serial No. 78870831

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Andrew Hartman of Cooley Godward Kronish LLP for Snikiddy LLC.

Simon Teng, Trademark Examining Attorney, Law Office 105  
(Thomas G. Howell, Managing Attorney).<sup>1</sup>

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Before Hohein, Grendel and Rogers, Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Snikiddy LLC (applicant) has applied to register PIZZA PIE PUFFS, in standard character form, on the Principal Register as a trademark for goods identified as "Cheese flavored puffed corn snacks; Cheese flavored snacks, namely, cheese curls; Cheese flavored snacks, namely, puffed cheese balls." Applicant filed the application for registration based on its stated intention to use the mark

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<sup>1</sup> Examining Attorney Fred Mandir was responsible for the application prior to the briefing of the appeal.

in commerce, but later filed an amendment alleging that the mark was first used on April 26, 2006 and was first used in commerce on September 7, 2006.

The examining attorney has issued a refusal of registration, asserting that the proposed mark merely describes the nature of the goods. The refusal was made final despite arguments applicant advanced in support of registrability. Applicant then retained counsel who filed a request for reconsideration of the final refusal and included a disclaimer of exclusive rights in PUFFS. Notwithstanding the disclaimer, the examining attorney maintained the final refusal, but suggested that applicant seek registration on the Supplemental Register.<sup>2</sup> Applicant expressly declined and in this appeal is only arguing for registration of its proposed mark on the Principal Register.

Applicant advances various arguments, beginning with the assertion, "Consumers would need a good deal of imagination to determine the nature of the goods used with the PIZZA PIE PUFFS mark or that it related to cheese

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<sup>2</sup> Applicant admits that PUFFS is descriptive of the goods. The examining attorney asserts that it is generic and therefore would be appropriate subject matter for a disclaimer even if applicant had amended its application to seek registration on the Supplemental Register. Resolution of that disagreement is not required by the issue presented on appeal.

puffs." Brief p. 2. However, the law is settled and "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); see also *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

Applicant admits that the proposed mark is "suggestive of the flavor for the goods" but maintains that the goods neither "contain any actual pizza" nor "meet the USDA definition of pizza" and therefore neither the mark as a whole nor the PIZZA PIE element is descriptive. Brief, p. 2.<sup>3</sup> Pizza pies being a good deal larger than puffed corn snacks, cheese puffs and cheese curls, we accept applicant's assertion that its goods do not "contain any

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<sup>3</sup> To support the contention that its PIZZA PIE PUFFS product does not contain pizza, applicant has put into the record a reprint of some material that lists the ingredients for the product. Pizza is not listed. To support the contention that its product does not meet the USDA definition for pizza, applicant has put in the record a reprint of the USDA authorized "Commercial Item Description" for "Pizza, Prepared, Frozen." In fact, applicant submitted this evidence twice. With evidence, only one submission is necessary.

Applicant also submitted untimely evidence with its reply brief. None of that has been considered. See Trademark Rule 2.142(d).

actual pizza," and we also accept that prospective consumers of such snack foods would not believe they contained pizza. Nor would consumers likely believe that such snack foods met any definition of pizza, whether that of the USDA or any other authority. Neither of these two assertions of fact, however, precludes PIZZA PIE from being a descriptive term for applicant's snack foods.

Consumers likely would not believe that breakfast cereal or cereal derived ready-to-eat food bars would contain cinnamon toast, since toast is made from sliced bread. Nonetheless, CINNAMON TOAST was the subject of disclaimers in registrations of CINNAMON TOAST CRUNCH for cereal and was registered only on a showing of acquired distinctiveness as to the CINNAMON TOAST element for cereal based food bars. See *Kellogg Co. v. General Mills Inc.*, 82 USPQ2d 1766 (TTAB 2007).<sup>4</sup> Similarly, for consumers of diet soda, "chocolate fudge" was found not to amount to a reference that such soda contained the ingredients of chocolate fudge or possessed the consistency of chocolate fudge but, rather, was found to be descriptive of the

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<sup>4</sup> "Where ... an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of distinctiveness as an established fact." *Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1571, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988)

flavor of the soda. See *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 1 USPQ2d 1364 (3d Cir. 1986).

Applicant also argues that, for potential customers of applicant's goods "to conclude what specific products or flavors are offered by Applicant requires imagination." Brief, p. 4. And it more specifically asserts that the availability of "many kinds of pizza with a myriad of toppings" would require consumers to exercise imagination to determine the flavor of applicant's goods. *Id.*

We note, however that applicant has provided a description of its company and products for the Organic Trade Association's web site "The Organic Pages Online" ([www.theorganicpages.com](http://www.theorganicpages.com)), which lists among applicant's products and services (emphasis added):

Pizza Pie Puffs<sup>™</sup>: The tang of tomato topped with parmesan cheese and a pinch of oregano hit the spot to finish off **the perfect pizza taste**. Pizza Pie Puffs<sup>™</sup> are the first of **our snacks** made with all gluten free ingredients.

The trade association's web site includes among its disclaimers, "All of the business descriptions, products, services and advertisements have been provided solely by the companies and organizations listed." Corroborating the fact that the above description is applicant's own description of its product is the listing's reference to "our snacks." The examining attorney entered this web page

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into the record with the initial refusal of registration. Applicant did not object or contest its accuracy in any way.

Third parties have echoed applicant's description. The evidence of such provided by the examining attorney includes an article posted on the Natural Food Network web page, on September 18, 2006, by Sarah Muir, Natural Food Network New Products Editor. This article reports on three new organic snack foods from applicant: Pizza Pie Puffs, Chocolate Chippers, and Banana Nibbles. In regard to the first, Ms. Muir wrote, "Pizza Pie Puffs are a corn-puff-style snack that is pizza flavored and sure to appeal to kids." Another third party description appears on the Health e-Lunch Kids web page, which offers home delivery of "healthy snack boxes" featuring various products. The three listed boxes, offered for \$2.99 each, include Health e-Energy, Health e-Morning and Health e-Snacking. The sales pitch for the last of the three states "Get this box for well-rounded flavorful snacking. First, there's pizza, Snikiddy's Pizza Pie Puffs, that is - a huge hit among kids." As with the evidence of its own description of its product, applicant did not object to or contest the accuracy of these third party descriptions, which we therefore accept as accurate.

Based on the above descriptions, consumers would expect applicant's snack food to carry a pizza flavor or taste. See *In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156, 157 (C.C.P.A. 1973) (creme de menthe "is the common descriptive name of a liqueur whose flavor the public expects when it sees the mark"), and *In re American Beverage Corp.*, 184 USPQ 620, 621 (TTAB 1974) ("'COCOA COOLER' is an apt descriptive name for applicant's soft drink and, as such, would immediately indicate to prospective purchasers the nature and characteristics of said beverage").

It would appear from applicant's description of its product that it carries the flavor or taste of a standard cheese and tomato based pizza, as opposed, for example, to a pizza topped with particular types of meat or vegetables. It does not matter that there are other types of pizza whose overall flavors may be somewhat different because of toppings. Toppings may add to the basic pizza taste, but even topped pizzas would retain that basic taste. Moreover, so long as the proposed mark is descriptive of the flavor of a particular type of pizza, in this case a standard cheese and tomato based pizza, the term PIZZA PIE has a descriptive characteristic for consumers and it is

irrelevant that the term does not describe all types of pizza flavors or tastes.

Another argument applicant advances in support of registration is that the combination of PIZZA PIE and PUFFS, even if separately descriptive, somehow creates a non-descriptive whole. We disagree and see no incongruity, double entendre, or other characteristic that might attach to the whole that would cast off the descriptiveness of the two elements.<sup>5</sup> In *In re E. J. Brach & Sons*, 143 USPQ 155-56 (TTAB 1964) the combination of FRUIT and CRYSTALS did not result in a registrable composite:

Registration has been refused on the ground that "FRUIT CRYSTALS" is merely descriptive of the goods because it indicates the nature or flavor of the candy and the form or shape thereof, and therefore it is not registrable on the Principal Register in view of Section 2(e)(1) of the Trademark Act.

... we agree with the examiner on the record presented that "FRUIT CRYSTALS" is merely descriptive of applicant's candy and, as such, unregistrable on the Principal Register.

Applicant also contends that PIZZA PIE PUFFS is not descriptive because competitors need not use PIZZA PIE to

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<sup>5</sup> Nor does the alliterative effect of combining three words that begin with the consonant "P" automatically result in a non-descriptive whole. Compare *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 352 (CCPA 1968) (SUGAR & SPICE, although a combination of two descriptive words, registrable because it evoked a nursery rhyme) with *American Beverage Corp.*, supra (COCOA COOLER descriptive) and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979) (COASTER-CARDS descriptive).

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describe flavored cheese puffs, cheese curls and cheese balls and, in fact, no competitors actually use PIZZA PIE to describe such snacks. The argument is unavailing. See *Andes Candies, supra*, 178 USPQ at 157-58:

That other candy makers may not have employed "creme de menthe" so widely as to make it a common flavor designation for candy is not material where appellant itself has so employed the mark.

... In the present case, candy manufacturers have a right to employ "creme de menthe" precisely as appellant does, i.e. to designate a flavor similar to the liqueur...

See also *Yoo-Hoo Chocolate Beverage Corp. v. A.J. Canfield Co.*, 229 USPQ 653, 653-54 (D.N.J. 1986):

Despite the unique success of [defendant's] product, the catalyst for which was a newspaper article, Chocolate Fudge Soda describes a taste or a flavor and no person or company should be permitted to acquire the exclusive rights to such a common term with such an accepted meaning.

*Id.* at 229 USPQ 662-63:

While the idea to market a carbonated beverage which is both dietetic and contained a "chocolate fudge" flavor, may have originated with Canfield, Canfield may not thereby appropriate exclusive rights to a well known flavor newly applied to a diet carbonated beverage.

If the law were otherwise, a rich manufacturer could foreclose competitors from marketing under a descriptive name by inundating the consumer with massive advertising and thereby, arrogating the common name unto itself merely through its spending power. The rule should be no different simply because Canfield was fortunate enough to obtain most of this publicity free. Uniqueness, even if joined with great amounts of advertising

and sales, will not remove a common descriptive term from the public domain and bar use of the term to describe similar goods.

Competitors, applicant also contends (brief, p. 8), have alternative designations they could use to designate similar flavors for their snack goods, specifically, "They could be described as 'Italian', 'tomato', 'chili' or by a myriad of other terms." The existence of alternative descriptive terms does not, however, create any doubt as to the descriptiveness of PIZZA PIE in this case or insulate applicant from a refusal of registration on that ground, for a descriptive term is not rendered registrable merely because there may be alternative descriptive terms also available for use. *Cf. Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 43 USPQ2d 1734, 1743 n.15 (2nd Cir. 1997) (possible alternatives may not be as effective in communicating information to prospective purchasers). Thus, as is often said in cases involving a refusal on the ground of descriptiveness, when the lack of competitive uses is relied on by the applicant:

The fact that an applicant may be the first and only user of a merely descriptive or generic designation does not justify registration if the only significance conveyed by the term is merely descriptive. *See In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983) (SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE held apt descriptive name for conducting and arranging trade shows in the

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hunting, shooting and outdoor sports products  
field).  
Trademark Manual of Examining Procedure, Section 1209.03(c)  
(5th ed. September 2007).

Decision: The refusal of registration under  
Section 2(e)(1) is affirmed.