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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Atico International USA Inc.

Serial No. 76/045,182

Peter T. Cobrin of Cobrin & Gittes for Atico International USA Inc.

James M. Marcus, Trademark Examining Attorney, Law Office 109 (Ronald R. Sussman, Managing Attorney).

Before Walters, Rogers and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Atico International USA Inc. (applicant) filed an application to register SUPER ALKALINE (in typed form) on the Principal Register for goods identified as "batteries" in International Class 9.¹

The examining attorney refused registration under Section 2(e)(1) on the ground that applicant's term is

¹ Serial No. 76/045,182, filed June 10, 2000. The application contains an allegation of a bona fide intention to use the mark in commerce.

merely descriptive of the goods. 15 U.S.C. § 1052(2)(e)(1). When the examining attorney made the refusal to register final, applicant filed a notice of appeal. Both applicant and the examining attorney have submitted briefs, but no oral argument was requested.

The examining attorney submitted the following evidence to show that "the term ALKALINE refers to a type of battery." Examining Attorney's Br. at 4.

The authorities found that when they allowed inmates to have alkaline batteries, the men peeled the metal jackets off and made shanks to stab one another. *New York Times*, October 15, 2000, p. 76.

A California consumer's NiCad recharger burst into flames after he put a rechargeable alkaline battery into it. *Atlanta Constitution*, October 5, 2000, p. 10BE.

The examining attorney also submitted definitions of "alkali" and "alkaline"² and copies of registrations for batteries in which the term "alkaline" was disclaimed. For the term "super," the examining attorney introduced a definition from the same dictionary of "super" as describing "a product of superior, size, quality, or grade" or meaning "excellent; first rate." When these terms are combined, the examining attorney found that the resulting term would be merely descriptive because the term SUPER

²*American Heritage Dictionary of the English Language, Third Edition* (1992).

ALKALINE merely describes that the "goods are alkaline batteries of superior grade or quality." Examining Attorney's Br. at 6. As further support for this position, the examining attorney provided evidence that shows that the term "super alkaline" is used descriptively in relation to batteries.

A camera based on a chip can run on a nine-volt **super alkaline** battery for 24 hours.
Investor's Business Daily, October 16, 1996, p. A6.

Minamoto AA **super alkaline** batteries are the best choice for digital cameras and any other electronic item that needs exceptional performance from it's [sic] power source.
Batteryhouse.com.

Fuginovelbatteries.com: **super alkaline** batteries.

Supported by this evidence, the examining attorney submits that term SUPER ALKALINE is merely descriptive for applicant's batteries.

In response to the examining attorney's refusal to register, applicant pointed out that the Office has issued registrations for other allegedly laudatory terms for batteries ("plus" and "ultra").³ Applicant, in reply to the

³ In its appeal brief, applicant for the first time refers to 13 marks containing the word "super." The examining attorney properly objected to this evidence. Applicant cannot introduce new evidence on appeal. 37 CFR § 2.142(d). In addition, we do not take judicial notice of registrations and applications in the Office nor, even if timely submitted, is it sufficient to simply include a list of marks with registration and application numbers to prove that a mark is weak. In re Hub Distributing, Inc., 218 USPQ 284, 285 (TTAB 1983) ("[W]e do not consider a copy of a

examining attorney's citation of case law to support his argument that "super" was descriptive for applicant's goods, cited additional case law for the opposite proposition. Applicant maintains that its mark is no more descriptive than other marks the Office has registered and case law supports the proposition that SUPER ALKALINE is not merely descriptive for batteries.

We agree with the examining attorney that the term SUPER ALKALINE is merely descriptive and, therefore, we affirm the refusal to register under Section 2(e)(1) of the Trademark Act.

A term is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). See also In re Nett Designs,

search report to be credible evidence of the existence of the registrations and the uses listed therein"); See also In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994); In re Duofold, Inc., 184 USPQ 638, 640 (TTAB 1974). In regard to this policy of not considering lists of trademark registrations, this case amply demonstrates why these registrations should not be considered. Applicant's list does not indicate that half of the registrations are registered under the provisions of Section 2(f), on the Supplemental Register, or with a disclaimer of the "super" term. Most of the remaining marks are for telescoped or unitary terms or the words contain a significant design. Therefore, these registrations would provide little, if any, support for registering applicant's term.

236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). We look at the term in relation to the goods or services, and not in the abstract, when we consider whether the term is descriptive. Abcor, 588 F.2d at 814, 200 USPQ at 218. Courts have long held that to be "merely descriptive," a term need only describe a single significant quality or property of the goods. In re Gyulay, 820 F.2d 1216, 1217, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); Meehanite Metal Corp. v. International Nickel Co., 262 F.2d 806, 807, 120 USPQ 293, 294 (CCPA 1959).

We start by noting that there appears to be little serious dispute that "alkaline" describes a type of battery. The only question then is whether the addition of the term "super" creates a mark that is no longer merely descriptive of the goods. Both applicant and the examining attorney cite many cases that discuss the term "super" and whether marks containing that word are suggestive or descriptive. Applicant argues that "the proposed mark is not merely a combination of the superlative SUPER with the name of the identified goods." Applicant's Reply Br. at 3. Applicant relies specifically on In re Occidental Petroleum Corp., 167 USPQ 128 (TTAB 1970) (SUPER IRON not merely descriptive for a soil supplement) and In re Ralston Purina Co., 191 USPQ 237 (TTAB 1976) (RALSTON SUPER SLUSH not

merely descriptive for a slush type drink). On the other hand, the examining attorney relies on, inter alia, In re United States Steel Corp., 225 USPQ 750 (TTAB 1985) (SUPEROPE descriptive for wire rope); In re Carter-Wallace, Inc., 222 USPQ 729 (TTAB 1984) (SUPER GEL is an apt descriptive name for lathering gel for shaving); In re Samuel Moore & Co., 195 USPQ 237 (TTAB 1977) (SUPERHOSE! merely descriptive for hydraulic hose made of synthetic resin); and In re Diamond National Corp., 133 USPQ 344 (TTAB 1962) (SUPER CUSHION merely descriptive for egg cartons).

It is clear that "the term 'SUPER' has been held to be both descriptive and suggestive." Ralston, 191 USPQ at 238. "[T]he context within which the 'SUPER' is used has a great influence on which side of the vague and hazy, but legally determinative, suggestive boundary the word falls in any particular case." In re General Tire & Rubber Co., 194 USPQ 491, 494 (TTAB 1977). In General Tire, the Board explained that in Ralston there was no indication that slush was sold in different grades of quality and "the reach of 'SUPER,' as rights therein might impinge on competitors, was limited by its position in relation to the primary mark 'RALSTON.'" Id. Therefore, we reject applicant's argument that "Super" is merely descriptive

only when it is used in connection with the name of the goods. See General Tire, 194 USPQ at 494 ("‘SUPER,’ in this context [SUPER STEEL RADIAL for tires] reinforces the descriptive connotation of the whole expression"); In re Consolidated Cigar Co., 35 USPQ2d 1290, 1295 (TTAB 1995) ("[T]he expression ‘SUPER BUY’ immediately describes an essential characteristic or feature, namely, the superior worth or high value of the products").

Next, we look at the record in this particular case. While it is clear that there are "alkaline batteries," there is also evidence that there are "super alkaline batteries."

A camera based on a chip can run on a nine-volt **super alkaline** battery for 24 hours.
Investor's Business Daily, October 16, 1996, p. A6.

Minamoto AA **super alkaline** batteries are the best choice for digital cameras and any other electronic item that needs exceptional performance from its power source.
Batteryhouse.com.

Fuginovelbatteries.com: **super alkaline** batteries.

In addition as also shown by the record, batteries are distinguished by whether they are "super alkaline" or simply "alkaline" batteries.

See batteryhouse.com:

Alkaline

- AAA **super alkaline**
- AA **super alkaline**

- AAA alkaline
- AA alkaline
- 9 volt alkaline

Unlike the slush in Ralston, this is a case where "super" is used in relation to batteries to describe different types or grades of alkaline batteries and, therefore, applicant's term SUPER ALKALINE is merely descriptive of particular batteries.

Applicant also argues that there are three registrations for other registrations for different marks (ALKALINE PLUS, ULTRA ALKALINE and PLUS ALKALINE) that support its argument that its mark is not merely descriptive. First, the mere fact that an applicant can point to three registrations (two apparently owned by the same party for the same mark in reverse order) hardly demonstrates that the applicant's mark for different words is not descriptive. See Nett Designs, 57 USPQ2d at 1566 ("Even if some 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"). Each case must be decided on its own merits and we do not have the files of those cases in front of us to explain why those marks issued. It is particularly inappropriate to attempt to make a determination about descriptiveness by comparing the word to different terms.

Accord In re Seats, Inc., 757 F.2d 274, 225 USPQ 364, 368 (Fed. Cir. 1985) ("Whether terms not sought to be registered could or could not acquire distinctiveness is irrelevant"); In re Belanger, Inc., 218 USPQ 742, 744 (TTAB 1983) ("The notion ... would lead to the absurd result of automatically rendering as weak, for example, terms such as 'choice,' 'select,' 'elite,' 'tops' just because 'BEST' has been held to be laudatory. Such simplistic formulae have no place in our trademark jurisprudence").⁴ Therefore, the fact that the Office may have issued registrations to two other parties for different marks does not provide any compelling reason to find that applicant's term is not descriptive of its goods.

The examining attorney's evidence supports the conclusion that the term SUPER ALKALINE merely describes applicant's batteries, and the examining attorney's refusal to register is appropriate.

Decision: The examining attorney's refusal to register the term SUPER ALKALINE on the ground that it is merely descriptive of the identified goods is affirmed.

⁴ We note that the terms "plus" and "ultra" have not necessarily been treated the same as "super" in prior decisions. Plus Products v. Star-Kist Foods, Inc., 220 USPQ 541, 544 (TTAB 1983) ("The term 'PLUS' is, in our view, a highly suggestive term as applied to most classes of goods"); In re Sunmarks Inc., 32 USPQ2d 1470, 1472 (TTAB 1994) ("We also recognize that 'ultra' is a laudatorily suggestive word").