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**THIS DISPOSITION IS NOT
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OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Société des Produits Nestlé S.A.*

Serial No. 76239956

Gary D. Krugman of Sughrue Mion PLLC for *Société des Produits Nestlé S.A.*

Andy Corea, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before *Hohein, Hairston and Walters*, Administrative Trademark Judges.

Opinion by *Hohein*, Administrative Trademark Judge:

Société des Produits Nestlé S.A. has filed an application to register the term "SPA CUISINE" for "prepared entrees consisting primarily of meat, fish or poultry" in International Class 29 and "prepared entrees consisting primarily of pasta or rice" in International Class 30."¹

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the

¹ Ser. No. 76239956, filed on April 16, 2001, which is based on an allegation of a bona fide intention to use such term in commerce.

ground that, when used in connection with applicant's goods, the term "SPA CUISINE" is merely descriptive thereof.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is

not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant contends that the Examining Attorney, in the first instance, has failed to sustain his burden of making a prima facie showing that the term "SPA CUISINE" is merely descriptive of its goods. Specifically, while noting that "the Examining Attorney's evidence consists of a number of excerpts taken from the NEXIS research database ... and excerpts from two web pages presumably downloaded from the internet,"² applicant argues with respect to the references therein to the term "spa cuisine" that "it is unclear exactly what is being referred to." Many of the "NEXIS" excerpts, applicant asserts, fail to provide "any explanation as to what the 'spa cuisine' is or what it might comprise."³ Moreover, applicant insists that in any event:

² Applicant, in its brief, has objected to "[s]everal of the NEXIS excerpts and one of the two internet excerpts ... because they relate to stories and uses of the mark outside of the United States" and thus are "not evidence of how the term is perceived by U.S. consumers." While the Board has held, with respect to uses of a term in foreign publications, that such uses are essentially of no probative value absent other evidence showing that the foreign uses have had a material or significant impact on perception of the term by the relevant purchasing public in the United States, see, e.g., In re Men's International Professional Tennis Council, 1 USPQ2d 1917, 1919-20 (TTAB 1986) and in In re Bel Paese Sales Co., 1 USPQ2d 1233, 1235 (TTAB 1986), the Examining Attorney in his brief correctly points out that, by contrast, "all the evidence from the LEXIS/NEXIS® database comes from United States publications" and thus is presumed to be readily accessible to consumers of prepared entrees in the United States. The extract from a foreign entity's website ("Mountain Trek Retreat & Health Spa Ltd." of "Ainsworth Hot Springs, British Columbia, Canada") is likewise readily accessible, via the Internet, to consumers of prepared entrees in the United States. We agree, therefore, with the Examining Attorney that the evidence objected to by applicant is probative in that it "is relevant to consumers' perception of the wording *spa cuisine*" in the United States. Applicant's objection is accordingly overruled.

³ Although applicant, in its brief, also criticizes the Examining Attorney's "NEXIS" evidence as including "only selective stories that presumably are the most favorable to his position," the Examining

It is clear that none of the "evidence" submitted by the Examining Attorney refers in any way to any of the specific food products identified in Applicant's application. There is no evidence that "SPA CUISINE" merely describes any feature, characteristic or attribute of Applicant's "prepared entrees consisting primarily of meat, fish or poultry" or Applicant's "prepared entrees consisting primarily of pasta or rice." At most, it appears that the term is sparingly used in a vague, non-specific and general way to refer to food or cuisine that is healthy. Such a vague, non-specific and general connotation, however, cannot justify a [mere] descriptiveness refusal of registration to Applicant's mark as applied to specific food products where the mark has not been shown to "merely" describe any feature or characteristic of those specific products. See: In re Remacle, 66 USPQ2d 1222 (TTAB 2002) and cases cited therein.

In addition, applicant maintains that there is evidence in the record which supports registrability. In particular, applicant states that as evidence in its behalf it "relies on the existence of prior Registration No. 1,322,388 for the mark SPA CUISINE for 'restaurant prepared fish, fowl, meat and vegetable based appetizers and entrees for consumption on or off the premises.'" Such registration, applicant correctly observes, was originally cited and thereby made of record by the Examining Attorney as a bar to registration of applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), although

Attorney properly notes in response that his "search strategy is in the record" and that, while "applicant was free to replicate the search and place evidence that contradicts the examining attorney's position in the record," applicant did not avail itself of such option. See, e.g., In re Boulevard Entertainment Inc., 334 F.3d 1336, 67 USPQ2d 1475, 1479 (Fed. Cir. 2003) ["the Examining Attorney's description of the search was sufficient to enable Boulevard to replicate it, and if the Lexis/Nexis database for the search period contained any relevant evidence other than the evidence that the

he subsequently withdrew the citation thereof as a basis for the refusal to register (in view of a consent agreement between applicant and the registrant). "That registration," as applicant further points out, "is on the Principal Register and, by virtue of the fact that it issued on [February 26,] 1985, is immune from any challenge or attack on [mere] descriptiveness grounds."⁴

Applicant, while recognizing that "the descriptiveness determination in this case must of course be made on an analysis of the mark and goods presented in Applicant's application and that the [United States] Patent and Trademark Office is not bound by past determinations of registrability of other marks, nevertheless urges that in view of the above:

[T]he TTAB cannot ignore the fact that the United States Patent and Trademark Office has at least on one occasion had an opportunity to consider the registrability of the term SPA CUISINE for prepared food products and has made a determination that the mark was not merely descriptive of those products and was entitled to registration on the Principal Register. While not determinative, in and of itself, it is submitted that the existence of the prior registration should be entitled to some probative value in support of Applicant's position herein.

examining attorney reported, Boulevard's attorneys were free to raise it"].

⁴ It is nonetheless pointed out that such registration, like any other, is still subject to possible cancellation on genericness grounds. Compare Section 14(3) of the Trademark Act, 15 U.S.C. §1064(3) with Section 14(1) of the Trademark Act, 15 U.S.C. §1064(1). In addition, as applicant acknowledges in its brief, the "SPA CUISINE" registration contains a disclaimer of the word "CUISINE." Applicant, however, has not amended its application to include a disclaimer of "CUISINE" even though, as it accurately notes in its brief, it has expressed its willingness to do so: "Applicant, in its ... response to the March 12, 2002 Office Action, offered to disclaim CUISINE apart from the mark as a whole. Applicant reiterates that offer to disclaim CUISINE."

Applicant also notes that it has "submitted a number of [other] third[-]party registrations ... for marks which incorporate the component CUISINE for various food products" and which evidence, according to applicant, that the United States Patent and Trademark Office "does not consider these various CUISINE formative marks, when taken in their entirety, to be [merely] descriptive of the various food products." Any doubt, applicant adds, as to whether a CUISINE-formative mark, such as its "SPA CUISINE" mark, should be regarded as merely descriptive or suggestive should be resolved, in accordance with the Board's practice,⁵ in applicant's favor by allowing publication of its mark so that any third party which believes itself to be damaged by registration thereof can file an opposition.

The Examining Attorney, on the other hand, argues that the term "SPA CUISINE" is merely descriptive of applicant's goods because it "is commonly used to identify a style of food and food preparation." In support of his position, the Examining Attorney relies on excerpts of articles retrieved from his searches of the "NEXIS" database. Representative examples of such excerpts include the following (emphasis added):

"Braised John Dory in a lemon-thyme consomme has all the healthful appeal of **spa cuisine**, and all the flavor, too" -- N.Y. Times, September 18, 2002;

"**Spa cuisine** is beginning to reflect reality and is focused more on quality, and there is an emphasis on portion control"

⁵ See, e.g., In re Rank Organization, Ltd., 222 USPQ 324, 326 (TTAB 1984); In re Conductive Systems, Inc., 220 USPQ 84, 86 (TTAB 1983); In re Morton-Norwich Products, Inc., 209 USPQ 791 (TTAB 1981); and In re Gourmet Bakers, Inc., 173 USPQ 565 (TTAB 1972).

-- Fort Worth Star-Telegram, September 17, 2002 (article headlined: "Guilt and pounds melt away as chefs serve cuisine meant to be fabulous, not just slimming");

"Guests will dine together on healthy **spa cuisine** and receive a 'personal wellness plan of action' that includes take-home exercises, meal plans and recipes." -- Orlando Sentinel, September 15, 2002 and Plain Dealer, September 8, 2002;

"Participating guests will receive four-night deluxe accommodations, award-winning **spa cuisine** (three meals per day for each night stayed), \$100 in spa services per night" -- Record (Bergen County, NJ), September 15, 2002;

"Creative Cooking Taught by Sheri Castle at 4112 Stemmons court, Raleigh. **Spa Cuisine**, Sunday. Classes at 1 p.m." -- News & Observer (Raleigh, NC), August 28, 2002;

"7th year. Demonstration/participation in student's homes. Classes include: **Spa Cuisine**; Spanish Dinner Party," -- Washington Post, August 28, 2002;

"While the on-site restaurants don't limit the menus to **spa cuisine** (they're known to be among the best on the island), the lower-calorie and vegetarian options are available on request." -- San Diego Union-Tribune, August 4, 2002;

"... corner spa is like the corner store, and the noun is also used as an adjective, as in spa wear and the Four Season's **spa cuisine**." -- N.Y. Times, July 21, 2002;

"**Spa Cuisine**: Virginia Evans shows how to prepare artichoke onion cheese tart, grilled tuna green bean potato salad" -- L.A. Times, July 17, 2002;

"... 50 different prepared salads, meats and vegetables in an array of international selections, including a new line of **spa cuisine**. Everything is made on the premises. The spa line offers low-fat preparations such as Chinese chicken salad" --

Providence Journal-Bulletin (Providence, RI),
July 10, 2002;

"Don't miss out on the **spa cuisine** lunch
at the Spa Cafe, set in an inviting room
...." -- Boston Herald, June 30, 2002
(article headlined: "Berkshires resort adds
Northeast's biggest spa");

"[T]he Cranwell staff won't look at you
funny if you pass over the **spa cuisine** and
order wine or a cheeseburger or even a
caffeinated [sic] beverage." -- Boston Globe,
June 30, 2002;

"The menu will pair the **spa cuisine** of
Executive Chef Daniel Chong-Jimenez and wines
from Robert Mondavi vineyards in both
California and Italy." -- Providence Journal-
Bulletin (Providence, RI), June 12, 2002; and

"... an expansion project last year that
included a pool for aqua-aerobics and a
restaurant specializing in **spa cuisine**...."
-- Columbus Dispatch, June 10, 2001.

In addition, the Examining Attorney relies on printouts
of pages from the following websites: (i) www.spacuisine.com,
which sets forth, under the caption of "Spa Cuisine at Mountain
Trek: Recipes and more...", the statement "Mountain Trek serves
'Spa Cuisine', an approach to eating that offers a comprehensive
healthy balanced meal plan each day in the guise of delicious and
satisfying entrees and snacks" and refers to both a "Sample Spa
Cuisine Menu" and a "Sample Spa Cuisine Weight Loss Menu"; and
(ii) www.oakspa.com, which contains, under the heading "Cuisine
at The Oaks, the statement "Prepared by experienced chefs, our
Spa Cuisine is a delicious reward for your efforts" and suggests,
under the caption "Bring Spa Cuisine home with you!," that
patrons "take advantage of this opportunity to experience some
new dishes and then take the recipes home with you and start

cooking Spa Cuisine for your very good health." While conceding that the evidence which he has made of record does not explicitly identify what the terminology "spa cuisine" means, the Examining Attorney asserts that it shows that such term is nonetheless sufficiently definite in that it identifies a particular style of food and food preparation. According to the Examining Attorney (*italics in original*):

Most of the evidence attached to the initial and final [Office] actions in this case very clearly refers to spa cuisine as a type of food. For example, when an article refers to "spa cuisine" as a chapter of a cookbook or a series of entrees in a restaurant, it is clear from the context that it is referring to a style of food. Explanatory references in the articles are not provided because it is clear to readers that the stories refer to food. It would be equally unnecessary to define *French cuisine*, but the wording *French cuisine* would be no less descriptive for prepared foods.

Finally, with respect to applicant's reliance on various third-party registrations for CUISINE-formative marks, including the much earlier issued "SPA CUISINE" registration formerly cited as a bar herein, the Examining Attorney properly points out that:

Third-party registrations are not conclusive on the question of descriptiveness. The examining attorney must consider each case on its own merits. A mark which is merely descriptive is not registrable merely because other similar marks appear on the register. *In re Scholastic Testing Service, Inc.*, 196 USPQ 517 (TTAB 1977). TMEP §1209.03(a).

Moreover, accurately observing that "most of the registrations cited by the applicant in support of registration are not

analogous to the mark at issue in this application, the Examining Attorney notes that:

The marks in the ... registrations combine the wording "cuisine" with arbitrary or suggestive terms [e.g. U.S. Registration No. 2167010 for PEAK CUISINE]. The applicant's mark is [merely] descriptive because the wording SPA CUISINE as a whole identifies a characteristic of the goods--not merely because the component parts are descriptive. The evidence in this case establishes that consumers use and encounter the phrase SPA CUISINE to identify a style or variety of food preparation. There is no such evidence for wording such as PEAK CUISINE, SUPREME CUISINE, LEAN CUISINE or any of the other "cuisine" marks previously registered on the Principal Register.

Upon consideration of the evidence and arguments presented, we agree with the Examining Attorney that, when considered in its entirety, the term "SPA CUISINE" is merely descriptive of applicant's "prepared entrees consisting primarily of meat, fish or poultry" and its "prepared entrees consisting primarily of pasta or rice" because such term immediately conveys, without speculation or conjecture, that the goods are of the style or category of prepared food which has come to be known as "spa cuisine." Nothing in the term "SPA CUISINE" is incongruous, ambiguous or suggestive, nor is there anything in such term which would require the exercise of imagination, cogitation or mental processing or necessitate the gathering of further information in order for the merely descriptive significance thereof to be readily apparent to purchasers and other consumers of applicant's goods. Plainly, such term currently designates a style or category of food preparation as well as particular foods prepared in that manner, just as the

terminology "French cuisine," "Italian cuisine" or "Mexican cuisine," for example, has each come over time to describe certain a characteristic manner or style of preparing food and the wide variety of foods so prepared. Therefore, while not subject to precise delineation, the record nonetheless shows that the term "SPA CUISINE" is commonly used, as applicant concedes in its brief, as a general designation for "food or cuisine that is healthy" and that such merely descriptive meaning would be conveyed forthwith when used in connection with applicant's prepared entrees.

None of the third-party registrations of record are persuasive of a contrary finding, nor do they singly or collectively serve to create any doubt as to the mere descriptiveness of the term "SPA CUISINE" when used in connection with applicant's intended goods. In particular, as to the much earlier issued registration for the mark "SPA CUISINE" for "restaurant prepared fish, fowl, meat and vegetable based appetizers and entrees for consumption on or off the premises," suffice it to say whatever may have been the meaning or significance thereof in 1985, it is clear that in the relatively recent intervening years such term has become the name for a new style or manner of food preparation, encompassing a variety of influences, and the food so prepared is now commonly known by that term. Each case, as the Examining Attorney has properly noted, must be determined on its own merits. See, e.g., *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics

Ser. No. 76239956

similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court"]; In re Broyhill Furniture Industries Inc., 60 USPQ2d 1511, 1514 (TTAB 2001); and In re Pennzoil Products Co., 20 USQP2d 1753, 1758 (TTAB 1991). On this record, the evidence clearly demonstrates that the term "SPA CUISINE" is merely descriptive of applicant's prepared entrees within the meaning of the statute.

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