

THIS OPINION IS NOT
A PRECEDENT OF THE
TTAB

Mailed: 6/29/2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

HEB Grocery Company, LP

Serial No. 85027087

Louis T. Pirkey, Susan J. Hightower and Sheri L. Eastley of
Pirkey Barber for HEB Grocery Company, LP.

Cory Boone, Trademark Examining Attorney, Law Office 104 (Chris
Doninger, Managing Attorney).

Before Quinn, Holtzman and Ritchie,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

HEB Grocery Company, LP filed, on April 30, 2010, an
intent-to-use application to register the mark XTREME HEAT (in
standard characters) for "cheese flavored snacks, namely, cheese
curls."

The trademark examining attorney refused registration under
Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on
the ground that applicant's mark, when used in connection with
the goods, is merely descriptive thereof.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Applicant essentially argues that its mark is just suggestive. Applicant summarizes its arguments into four main points: 1) the mark does not immediately describe with any degree of particularity the characteristics of the goods, but rather there is an ambiguity and vagueness to the mark that requires imagination, thought and perception; 2) the Office has issued on the Principal Register over one hundred third-party registrations of EXTREME (or XTREME) formative marks for food and beverage products in Classes 29, 30 and 32, with no disclaimer or claim of acquired distinctiveness of the term, and no such marks have registered on the Supplemental Register; 3) the Office likewise has recognized on numerous occasions through the issuance of registrations that the term HEAT is distinctive when used in connection with food products; and 4) any doubt on the issue of mere descriptiveness must be resolved in applicant's favor. In making its arguments, applicant points out that the examining attorney bases the refusal strictly on evidence pertaining to "heat," and that there is no evidence of third-party descriptive use of "extreme" or "xtreme" for food products. In support of its arguments, applicant submitted dictionary definitions, and copies of third-party registrations.

The examining attorney maintains that the proposed mark describes the flavor or taste of applicant's product, that is, the cheese curl snacks are very spicy or "extremely hot." The evidence shows, according to the examining attorney, that consumers would understand the proposed mark to describe a food product "as featuring a great degree of hot temperature or spiciness." (Brief, unnumbered p. 5). In the examining attorney's view, "XTRME" modifies "HEAT" in the mark, and the mark indicates "a laudatory or otherwise superlative degree of heat beyond consumers' ordinary expectation." (Brief, unnumbered p. 3). Thus, other entities in the food industry which also produce spicy flavored foods should remain free to use terms such as "extreme" (and variations thereof like "xtreme") and "heat" to convey information about their products. In support of the refusal the examining attorney submitted dictionary definitions, copies of third-party registrations of marks including "HEAT" as a component, and excerpts of third-party websites showing uses of "heat" in connection with food products.

The dictionary definitions of record show, in relevant part, the word "extreme" defined as "existing in a very high degree; exceeding the ordinary, usual or expected; maximum."¹

¹As indicated above, we have relied upon the most relevant definitions in the context of the goods. That the term "extreme" may also mean "unreasonable," "most advanced or thoroughgoing" and "very unusual" is of little relevance.

There is no debate that "extreme" and "xtreme" are legal equivalents, with "xtreme" being a mere misspelling of the commonly understood term "extreme." The term "heat" means "temperature; pungency of flavor; the quality of being hot; spicy hotness." (www.merriam-webster.com; MSN Encarta).

In addition to the dictionary evidence, the examining attorney submitted third-party uses of "heat" in connection with snack food products: "Jalapeno Heat" for potato chips; "medium-heat" for salsa; and "Sweet Chili Heat" for corn chips." In various product reviews of snack foods, including cheese curls, the authors made statements such as follows: "although some may feel a little pain from the heat, it's a tasty pain"; "with a heat level of medium"; "great mix of flavor and heat"; and "the level of heat wasn't so high that I would consider these to be hot cheese curls." The record is devoid of evidence of any third-party use, descriptive or otherwise, of either "extreme" or "xtreme" in connection with food products.

The examining attorney also submitted one third-party registration of a mark that includes the term "extreme": EXTREME ICE BLENDED for coffee and tea beverages (Section 2(f) as to "ICE BLENDED"); and four registrations of marks covering food products showing disclaimers of the term "heat" or a claim of acquired distinctiveness (e.g., BAYOU HEAT and BLAIR Q HEAT).

The bulk of applicant's evidence comprises third-party registrations in support of its "state of the register" argument. As noted earlier, applicant introduced copies of over 100 third-party Principal Register registrations of marks incorporating EXTREME or XTREME for food and beverage products in Classes 29, 30 and 32; not one of the registrations shows either a disclaimer of the term or a claim of acquired distinctiveness of the term. Further, there is not one registration on the Supplemental Register of a mark that incorporates the term EXTREME or XTREME for goods in those classes. Applicant has highlighted several registrations of marks that are similar to the one at issue herein. The examples include the following: EXTREME CREAM for ice cream; EXTREME DARK for candy and chocolate; EXTREME LEMONADE for candy; EXTREME ENERGY SHOT for fruit juice-based soft drinks; EXTREME SAUCE for hot sauce; X-TREME CHERRY for canned fruit cocktail; X-TREME SOUR for candy; XTREME BUTTER for processed unpopped popcorn with butter flavoring; CITRUS XTREME for fruit-flavored drinks; APPLE XTREME for fruit-flavored drinks; BANANA CREAM EXTREME for smoothies; EXTREME HEALTH for canned or bottled fruits; EXTRME PIZZA for gourmet pizza; EXTREME SAUSAGE for sausage sandwiches; EXTREME WATER for bottled water; XTREME FROZEN YOGURT for frozen yogurt; XTREME TASTE for salad dressings; and CHOCOLATE BROWNIE EXTREME for frozen confections.

Applicant also introduced several third-party Principal Register registrations of marks incorporating the term HEAT for food products and beverages in Classes 29, 30 and 32, all without a claim of acquired distinctiveness or a disclaimer of the term. Applicant highlighted some of the registrations, including the following examples: SWEET HEAT for spices and seasoning; NORTHERN HEAT for pepper sauce; HEAT for processed nuts; HEAT FACTOR for hot sauce; FLAVORFUL HEAT for spice blends; HEAVENLY HEAT for hot sauce; EAT THE HEAT for potato chips; GREET THE HEET for cheese flavored puffed corn snacks; DON'T FEAR THE HEAT for flavored sauces; BLEU HEAT for dipping sauces; and CAJUN HEAT for hot sauce.

The examining attorney bears the burden of showing that a term is merely descriptive of the relevant goods. *In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). A term is descriptive if it "forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods." *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 765 (2d Cir. 1976) (emphasis added). See *In re Abcor Development Corp.*, 616 F.2d 525, 200 USPQ 215 (CCPA 1978). Moreover, in order to be descriptive, the term must immediately convey information as to the qualities, features or characteristics of the goods with a "degree of particularity." *Plus Products v. Medical*

Modalities Associates, Inc., 211 USPQ 1199, 1204-1205 (TTAB 1981). See *In re Diet Tabs, Inc.*, 231 USPQ 587, 588 (TTAB 1986); *Holiday Inns, Inc. v. Monolith Enterprises*, 212 USPQ 949, 952 (TTAB 1981); *In re TMS Corp. of the Americas*, 200 USPQ 57, 59 (TTAB 1978); and *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972).

The Board has noted on a number of prior occasions that there is a thin line of demarcation between a suggestive and a merely descriptive designation. These determinations are often subjective, this case being no exception. To the extent that any of the evidence and arguments based thereon raise doubts about the merely descriptive character of applicant's mark, such doubts are to be resolved in applicant's favor and the mark should be published, thus allowing a third party to file an opposition and develop a more comprehensive record. See e.g., *In re Box Solutions Corp*, 79 USPQ2d 1953, 1955 (TTAB 2006); *In re Atavio*, 25 USPQ2d 1361 (TTAB 1992); and *In re Morton-Norwich Products, Inc.*, 209 USPQ 791 (TTAB 1981).

We find that applicant's mark XTREME HEAT falls on the suggestive side of the line. The mark does not immediately describe any specific characteristic or feature of applicant's snack foods with any degree of particularity. At most, the mark is highly suggestive that the snack foods are very spicy, but falls short of being merely descriptive as a flavor

characteristic or taste. *Cf. In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156 (CCPA 1973) (finding CRÈME DE MENTHE merely descriptive of candy).

It is not fatal that a mark is informational. One may be informed by suggestion as well as by description. *In re Reynolds Metals Company*, 480 F.2d 902, 178 USPQ 296 (CCPA 1973). That is to say, the terms "descriptive" and "suggestive" are not mutually exclusive. There is some description in any suggestion or the suggestive process does not occur. Applicant's mark fits this mold.

Applicant's mark is typical of many marks that consumers encounter in the marketplace, a point shown by the third-party registration evidence: a suggestive mark that tells consumers something general about the snack foods, without being specific or immediately telling consumers anything with a degree of particularity. The information given is somewhat vague and indirect. *See In re George Weston Ltd.*, 228 USPQ 57, 58 (TTAB 1985) ("'SPEEDI BAKE' only vaguely suggests a desirable characteristic of frozen dough, namely, that it quickly and easily may be baked into bread").

A few additional points need to be made. The record is devoid of any third-party uses of "extreme" or "xtreme," let alone "extreme (or xtreme) heat," in a merely descriptive manner for food products. As to the third-party uses of "heat,"

several of the uses highlighted by the examining attorney are used more in the nature of a trademark. We agree with applicant's assessment that "[w]hile heat may *suggest* a sharp flavor, it does not *merely describe* flavor. Rather, it describes a temperature, which *suggests* a sharp flavor."

(emphasis in original). (Brief, p. 8). We recognize that there are limited instances showing the use of "heat" in an arguably descriptive manner, but, in the context of the entire record, we view these uses as insufficient to demonstrate consumers' understanding of the term "heat" as a merely descriptive term when used in connection with food products.

As stated earlier, the third-party registrations comprise the bulk of the evidentiary record. Case law recognizes that registrations can be used as a form of a dictionary definition to illustrate how a term is perceived in the trade or industry. See *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) ("Said third-party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods...Used in this limited manner, 'third-party registrations are similar to dictionaries showing how language is generally used.'"). While third-party registrations are not conclusive on the question of mere descriptiveness, we view this registration evidence as decidedly in favor of applicant's position that XTREME HEAT is suggestive

or, at the very least, as contributing in this particular case to raising a doubt about mere descriptiveness. See *In re Waverly Inc.*, 27 USPQ2d 1620, 1623 (TTAB 1993), quoting *In re Women's Publishing Co., Inc.*, 23 USPQ2d 1876, 1878 (TTAB 1992) ("While superficially it may be easy to dismiss these [similar third-party] registrations, as we often do, on the basis that the records of these registrations are not before us and that each case must be decided on its own merits, it certainly does appear that the Office has in the past taken a different position with respect to marks of the nature of applicant's.").

In view of the above, we conclude that applicant's mark is suggestive. Lastly, any doubt has been resolved in applicant's favor. See *In re Box Solutions Corp.*, 79 USPQ2d at 1955.

Decision: The refusal to register is reversed.