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Mailed:
November 18, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Société des Produits Nestlé S.A.

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Serial No. 85509120

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Thomas A. Polcyn of Thompson Coburn LLP for Société des Produits Nestlé S.A.

Jessica Ellinger Fathy, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

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Before Bergsman, Wellington and Hightower, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Société des Produits Nestlé S.A. (“applicant”) filed an intent-to-use application to register the mark KID SELECTS, in standard character form, for the following goods:

Dairy-based beverages; Dairy-based snack foods excluding ice cream, ice milk and frozen yogurt; Dehydrated fruit snacks; Dried fruit and vegetables; Dried fruit-based snacks; Drinking yogurts; Fruit leathers; Fruit purees; Fruit-based snack food; Milk based beverages containing fruit juice; Milk products excluding ice cream, ice milk and frozen yogurt; Prepared and packaged food kits composed of vegetables, soups, fruit salads and/or vegetable salads; Prepared food kits composed of meat, poultry, fish, seafood, and/or vegetables, ready for cooking

and assembly as a meal; Preserved, frozen, dried or cooked vegetables; Processed fruit- and nut-based food bars; Processed vegetables and fruits; Soy-based snack foods; Vegetable puree; Vegetable-based snack foods; Yogurt drinks; Yogurt-based beverages; Yogurts, in Class 29;

Bakery products; Cereal-based snack foods; Cheese flavored puffed corn snacks; Cookies and crackers; Grain-based snack foods; Prepared and packaged meal kits consisting primarily of pasta or rice; Ready to eat, cereal derived food bars; Ready-to-eat cereals, in class 30; and

Bottled drinking water; Fruit drinks and fruit juices; Fruit-based beverages; Vegetable juices; Vegetable-fruit juices, in Class 32.

The Trademark Examining Attorney refused to register applicant's mark on the ground that the mark KID SELECTS for the goods in the application is merely descriptive. *See* Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(1). According to the Trademark Examining Attorney, the mark KID SELECTS directly conveys to the consumer that "[a]pplicant's food and beverage items are for kids and are of a special quality or value."¹

Applicant, on the other hand, argues that "the pairing of the term KID with the term SELECTS creates a unique, non-descriptive commercial impression in the context of such products."² According to applicant, consumers "will have to speculate as to what type of kid-related goods are offered in connection with the KID SELECTS mark, because the term SELECTS doesn't complete the mental

¹ Examining Attorney's Brief, p. 5 (unnumbered).

² Applicant's Brief, p. 2.

picture for them,”³ KID SELECTS is incongruous because consumers do not expect the two terms to be used together,⁴ and the mark is subject to multiple interpretations.⁵

A term is merely descriptive if it “immediately conveys ... knowledge of the ingredients, qualities, or characteristics of the goods ... with which it is used.” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). This requires consideration of the context in which the mark is used or intended to be used in connection with those goods, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *See In re Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Abcor Dev. Corp.*, 200 USPQ at 218; *In re Venture Lending Assocs.*, 226 USPQ 285 (TTAB 1985). The question is not whether someone presented only with the mark could guess the products listed in the description of goods. Rather, the question is whether someone who knows what the products are will understand the mark to convey information about them. *In re*

³ Applicant’s Brief, p. 4.

⁴ *Id.*

⁵ Applicant’s Brief, p. 10.

Tower Tech, Inc., 64 USPQ2d 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 USPQ 365, 366 (TTAB 1985).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on the question of whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, *Estate of P.D. Beckwith, Inc. v. Commissioner*, 252 U.S. 538, 543 (1920). See also *In re Tower Tech, Inc.*, 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooking towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry). However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services. See *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR &

SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). Thus, we must consider the issue of descriptiveness by looking at the mark in its entirety.

“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, 498 (TTAB 1978). *See also, In re Shutts*, 217 USPQ at 364-65; *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980). In this regard, “incongruity is one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark.” *In re Shutts*, 217 USPQ at 365. *See also In re Tennis in the Round, Inc.*, 199 USPQ at 498 (the association of applicant’s mark TENNIS IN THE ROUND with the phrase “theater-in-the-round” creates an incongruity because applicant’s services do not involve a tennis court in the middle of an auditorium).

The following evidence has been made of record.

1. The word “kid” is defined, *inter alia*, as “a child.”⁶
2. The word “select” as a verb is defined as “to make a choice or selection.”⁷ “Selects” is also a verb conjugated in present indicative form (*e.g.*, my kid, Nicholas, selects pencils over pens as his writing instrument of choice).⁸

⁶ Yahoo! Education dictionary (yahoo.com) attached to the February 13, 2012 Office action. *See also* the Collins Dictionary (collinsdictionary.com).

3. The word “select” as an adjective is defined as “of special quality of value; choice: *select peaches*.”⁹ (Emphasis in the original).

4. The word “select” as a noun is defined as “one that is chosen in preference to others or because of special value.”¹⁰ It is often used in the plural.¹¹

5. Twenty (20) third-party registrations consisting of the word “select” or “selects” where the registrant disclaimed the exclusive right to use the word “select” or “selects.”¹² The registrations listed below are representative.

MARK	REG. NO.	GOODS
PIERRE SELECT	2437502	Bakery goods, drinking water, meats
SAFEWAY SELECT	3663979	Frozen entrees, bakery goods
FRESH SELECTS (Supplemental)	2911840	Tortilla wraps; salads
SOUTHERN SELECTS	2751076	Fresh fruits and vegetables
ORCHARD SELECT	1930805	Processed fruits
CAROLINA SELECTS	3513265	Meat

⁷ Yahoo! Education dictionary (yahoo.com) attached to the February 13, 2012 Office action.

⁸ *Id.*

⁹ Yahoo! Education dictionary (yahoo.com) attached to the February 13, 2012 Office action. *See also* Merriam-Webster Dictionary (m-w.com).

¹⁰ Yahoo! Education dictionary (yahoo.com) attached to the February 13, 2012 Office action.

¹¹ Merriam-Webster online dictionary (m-w.com). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

¹² February 13, 2012 and September 11, 2012 Office actions. The last three are from applicant’s August 13, 2012 response to Office action.

MARK	REG. NO.	GOODS
BRINEMAKER'S SELECT	3935585	Salt

6. Nine third-party registrations on the Principal Register [no claim of acquired distinctiveness] consisting of the word “select” or “selects” where neither “select” or “selects” is disclaimed.¹³

MARK	REG. NO.	GOODS
TURKEY SELECT	1593213	Fresh and processed turkey
SPICE SELECT	1777350	Spices
CHICKEN SELECTS	2338997	Prepared chicken pieces
BAKER'S SELECT	3648581	Chocolate
HAWAIIAN SELECT	3580074	Seafood
ASIAN SELECTS	3014019	Frozen appetizers, entrees and side dishes
SUB SELECTS	2917395	Sandwiches
FIBER SELECTS	3592551	Crackers
SELECT SLICES	3011105	Cheese

The mark KID SELECTS has at least two meanings. As the Trademark Examining Attorney has noted, KID SELECTS could mean that “[a]pplicant’s food and beverage goods are for kids and are of a special quality or value.”¹⁴ It could also mean the child chooses. We cannot say with certainty that any one meaning would

¹³ August 13, 2012 response to Office action.

¹⁴ Examining Attorney’s Brief, p. 5 (unnumbered).

be clearly understood by consumers over the other meaning. Thus, the mark is a double entendre.

A “double entendre” is a word or expression capable of more than one interpretation. For trademark purposes, a “double entendre” is an expression that has a double connotation or significance *as applied to the goods or services*. The mark that comprises the “double entendre” will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services.

TMEP § 1213.05(c) (October 2012).

When the mark KID SELECTS engenders the commercial impression and meaning that the child chooses, then the mark is not merely descriptive because it possesses a degree of ingenuity that makes it inherently distinctive. *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) (even though the word “Light” is merely descriptive when applied to the goods, a disclaimer of the word “Light” is not required because consumers will not go through the mental process of breaking the mark LIGHT N’ LIVELY into its component parts but regard it as a unitary mark). *See also In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE double entendre for bakery products); and *In re National Tea Co.*, 144 USPQ 286 (TTAB 1965) (NO BONES ABOUT IT double entendre for fresh pre-cooked ham). In other words, given this possible interpretation of the mark, the mark does not immediately convey material information, such as ingredients, qualities or characteristics, of the various food products identified in the application. Under such circumstances, we find that the mark KID SELECTS for the goods in listed in the application is not merely descriptive.

Serial No. 85509120

Decision: The refusal to register is reversed.