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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Comfort Revolution, LLC

Serial No. 87357126

Amy Sullivan Cahill of Cahill IP PLLC,
for Comfort Revolution, LLC.

Brittany Cogan, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

Before Cataldo, Shaw and Kuczma,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Comfort Revolution, LLC ("Applicant") seeks registration on the Principal Register of the mark ULTIMATE GEL (in standard characters) for

> Beds for household pets; Chair cushions; Mattress toppers; Mattresses; Pillows in International Class 20.[1]

[1] Application Serial No. 87357126 was filed on March 3, 2017, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's mark ULTIMATE GEL under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive

After the refusal was made final, Applicant timely appealed and requested reconsideration. After the Trademark Examining Attorney denied the Request for Reconsideration, the appeal was resumed. The appeal is fully briefed. For the reasons set forth below, we affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. With its Appeal Brief, Applicant submitted copies of screenshots from third-party Internet websites that were not previously introduced into the record during prosecution. (8 TTABVUE 5-9). Because Applicant did not assert differently, we assume that the evidence Applicant seeks to introduce with its brief was available during the prosecution of its application.

Relying on Rule 2.142(d), 37 C.F.R. § 2.142(d), the Examining Attorney objects to such evidence submitted by Applicant with its Appeal Brief. Rule 2.142(d) states:

> The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

As set forth in the Rule, the record should be complete prior to the filing of the appeal. If Applicant desired to introduce additional evidence after the appeal was filed, it

should have submitted a request to the Board to suspend the appeal and to remand the application for further examination. Thus, we sustain the Examining Attorney's objection and the evidence Applicant attempts to submit with its Appeal Brief will not be considered. *See In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147-48 (TTAB 2011); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 1207.01 (June 2018).

II. Descriptiveness Under Section 2(e)(1)

Determining the descriptiveness of a mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), is done in relation to an applicant's goods, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). For a term to be merely descriptive within the meaning of § 2(e)(1), it is not necessary that the term describe each feature of the goods, only that it conveys a single, significant ingredient, quality, characteristic, feature, function, purpose or use of the goods with which it is used. *See, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987).

Marks comprising more than one element, like Applicant's mark, must be considered as a whole and should not be dissected; however, we may consider the significance of each element separately in the course of evaluating the mark as a whole. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). Thus, we look first to the meaning of the components of Applicant's applied-for mark ULTIMATE GEL. The Examining Attorney cites to the Merriam-Webster dictionary which defines "ultimate" as "c: the best or most extreme of its kind" in support of her argument that "ultimate" is merely laudatory.[2]

The Examining Attorney also submits copies of nine third-party registrations for marks comprising "ULTIMATE" together with merely descriptive or generic terms for goods that are the same as or similar to Applicant's goods which further support that the term "ULTIMATE" is merely laudatory. In those registrations, "ULTIMATE" was either considered to be merely descriptive and disclaimed, or the marks containing the term "ULTIMATE" were registered on the Supplemental Register, or were registered on the Principal Register under § 2(f) of the Trademark Act, 15 U.S.C. 1052(f).[3] Third-party registrations featuring goods the same as or similar to

[2] See April 9, 2018 Request for Reconsideration Denied at TSDR 47 citing to Merriam-Webster dictionary at <https://www.merriam-webster.com/dictionary/ultimate>. Page references herein to the application record refer to the downloadable .pdf version of the United States Patent and Trademark Office (USPTO) Trademark Status & Document Retrieval (TSDR) system. References to the briefs refer to the Board's downloadable TTABVUE docket system.

[3] See the registrations cited in the April 9, 2018 Request for Reconsideration Denied at TSDR 4-26: Registration No. 3522097 for SLEEP IN HEAVENLY PEACE THE INN ULTIMATE LUXURY CREATED EXCLUSIVELY FOR AT CHRISTMAS PLACE PIGEON FORGE, TENNESSEE and Design (for beds, mattresses and box springs) "ULTIMATE LUXURY

Applicant's goods are probative evidence on the issue of descriptiveness where the relevant word or term is disclaimed, registered on the Supplemental Register, or registered under § 2(f) of the Trademark Act based on a claim of acquired distinctiveness. *E.g., In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (quoting *Inst. Nat'l des Appellations D'Origine v. Vintners Int'l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992)); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006).

Applicant also submits twelve third-party registrations for marks containing the term "ULTIMATE," arguing that they have been allowed to register and therefore Applicant's mark should also be registrable. However, four of those registrations are cancelled or abandoned, two of them disclaim "ULTIMATE," and one is registered under § 2(f). Thus, Applicant may rely on only five of the registrations for marks that include the word "ultimate" for the same or related products.

The fact that five third-party registrations exist for marks allegedly similar to Applicant's mark because they contain the word "ultimate" is not conclusive on the

CREATED EXCLUSIVELY FOR" and "PIGEON FORGE, TENNESSEE" disclaimed; Registration No. 3150171 for ULTIMATE TEXTILE BUY THE CASE (for tablecloths, fabric napkins and chair throws and fitted fabric slip covers for chairs) registered on the Supplemental Register; Registration No. 4080815 for ULTIMATE BACK SUPPORTER (for sleep products, namely, mattresses, spring mattresses, box springs and mattress foundations) "ULTIMATE" disclaimed; Registration No. 4039930 for YOUR ULTIMATE PILLOW (for pillows) registered on Supplemental Register; Registration No. 4027203 for ULTIMATE SACK (for bean bag chairs) registered on Supplemental Register; Registration No. 4243780 for THE ULTIMATE TRAVEL PILLOW (for inflatable travel pillow) registered on the Supplemental Register; Registration No. 4384027 for ULTIMATE SACK (for bean bag chairs) entire mark registered under §2(f); Registration No. 4787723 for ULTIMATE FIT (for mattress pads) registered on Supplemental Register; Registration No. 5108279 for THE ULTIMATE DOG BED & Design (for dog beds) "ULTIMATE DOG BED" disclaimed.

issue of descriptiveness. *In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977) (holding SCHOLASTIC merely descriptive of devising, scoring, and validating tests for others despite the presence of other marks on the Register using the word "Scholastic"). Although there are nearly twice as many registered marks containing the word "ULTIMATE" in the record where registration was based on a disclaimer, registered on the Supplemental Register or under §2(f), compared to the registrations which were granted on the Principal Register without the foregoing, it is well settled that each case must be decided on its own facts and the Board is not bound by prior decisions involving different records. See *In re Nett Designs, Inc.*, 236 F. 3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014).

The term "ultimate" is laudatory and thus merely descriptive of the quality of Applicant's goods. "Self-laudatory or puffing marks are regarded as a condensed form of describing the character or quality of the goods." *DuoProSS Meditech v. Inviro Med. Devices*, 103 USPQ2d at 1759 (quoting *In re The Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999)). Thus, wording such as "ultimate," "best," "greatest," and the like are generally considered laudatory and descriptive of an alleged superior quality of the goods and/or services. *See In re Nett Designs*, 57 USPQ2d at 1566; *In re The Boston Beer*, 53 USPQ2d at 1058-59; *In re The Place, Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005).

In support of the merely descriptive nature of the term "GEL," the Examining Attorney submits copies of third-party websites showing the use of the word "gel" to describe a feature of Applicants goods:

> Wayfair – gel foam mattresses with "core construction" comprised of "gel memory foam" . . . ". . . gel foam mattresses are made of the same material that memory foam mattresses are made of; viscoelastic. The difference in the viscoelastic in gel foam mattresses is that it's been infused with gel beads or liquid, hence the name, gel foam. . . . . ." <https://www.wayfair.com/Gel-Foam-Mattresses-C1824098.html>[4]
>
> Doctors Foster and Smith – gel pet bed features "gel cell technology" <http://www.drsfostersmith.com/product/prod_display.cfm?pcatid=33857>[5]
>
> pettherapeutics – gel pet bed comprised of "gel cell technology" <https://pettherapeutics.net/cooling-gel-pet-bed/>[6]
>
> Buddy Beds – gel memory foam dog beds comprised of "gel infused memory foam" <https://www.buddybeds.com/dog-beds/GEL-BEDS.html>[7]
>
> Miracle Cushion – gel seat cushions <https://www.google.com/search?source=hp&q=gel+chair+cushions . . .>[8]
>
> Lane – memory foam gel mattress topper comprised of cool gel memory foam <https://www.walmart.com/ip/Lane-4-Cooling-GelLux-Memory-Foam-Gel-Mattress-Topper-Multiple-Sizes/51211012>[9]
>
> Google search results, showing third-party use of the term "gel" to describe gel mattress toppers – The Big One, Lucid,

[4] March 22, 2017 Office Action at TSDR 5-25.

[5] October 6, 2017 Final Office Action at TSDR 6-8.

[6] *Id*. at TSDR 9-11.

[7] *Id*. at TSDR 12-14.

[8] *Id*. at TSDR 15-17.

[9] *Id*. at TSDR 23-32.

> Serta, Comfort Wave, Beautyrest, Comforpedic, Brookside, Lane, and Linenspa <https://www.houzz.com/product[10]
>
> Houzz – Cool Gel Ultimate 14" Plush Gel Memory Foam Mattress describing a "gel-infused memory foam keeps you cool . . ."[11] <https://houzz.com/product/65707237-cool-gel-ultimate-14-plush-gel-memory-foam-mattress-twin-contemporary-mattresses>
>
> Houzz search results, showing third-party use of the term "gel" to describe gel mattresses and gel pillows – Trinity, Classic Brands, Emerald Home, InnoMax, Lucid, Serenia Sleep, Divano Roma Furniture, Enso Sleep Systems, Malouf, Royal Tradition, Northern Feather, Rio Home Fashions, Remedy, PureCare, SensorPEDIC, and Euro Style Collection[12] <https://www.houzz.com/photos/products/query/gel-mattress> and <https://www.houzz.com/photos/products/query/gel-pillow>
>
> Classic Brands – "Cool Gel Ultimate Gel Memory Foam" to describe a mattress "which consists of breathable ventilated Cool Gel memory foam"[13] https://www.amazon.com/Classic-Brands-Ultimate-14-Inch-Mattress/dp/. . . and
>
> Petco –use of the term "gel" to describe gel pet cooling beds and pads of Pet Therapeutics[14] <https://petco.com/shop/en/petcostore/category/dog/dog-beds-and-bedding/cooling-dog-beds>.

Additionally, Applicant's own website advertises various types of pillows using the term "gel" descriptively:

> Comfort Revolution – gel pillows comprised of "Memory Foam layered with Hydraluxe gel technology" <https://www.comfortrevolution.com/pillows> and <https:www.comfortrevolution.com/about-hydraluxe-technology>.[15]

[10] *Id*. at TSDR 33-37.

[11] *Id*. at TSDR 38-41.

[12] *Id*. at TSDR 42-55.

[13] *Id*. at TSDR 62-73.

[14] *Id*. at TSDR 74-76.

[15] *Id*. at TSDR 56-61.

The evidence above confirms that "GEL" is a term commonly used by businesses selling items such as beds for pets, chair cushions, mattress toppers, mattresses and pillows to identify or describe a feature that includes gel which assists in keeping the user of the device cool; as Applicant explains, the "sleep products [are] made of memory foam that combine the latest in cooling technology with the comfort of tried and true memory foam. [Applicant's] products feature memory foam containing a phase change material that provides for a temperature-regulated sleep experience."[16] Thus, the term "gel" is used descriptively by sellers of such products to describe products having that feature.

The evidence submitted by the Examining Attorney amply supports that the applied-for mark "ULTIMATE GEL" is laudatory and merely descriptive. Not only are the components of the applied-for mark laudatory and descriptive, they retain their laudatory and descriptive meanings in relation to Applicant's goods resulting in a composite mark that is itself descriptive and not registrable. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB (2002)); *see also e.g., Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1851 (TTAB 2017) (holding MEDICAL EXTRUSION TECHNOLOGIES merely descriptive of medical extrusion goods produced by employing medical extrusion technologies); *In re Cannon Safe, Inc.*, 116 USPQ2d 1348, 1351 (TTAB 2015) (holding SMART SERIES merely

[16] Applicant's Appeal Brief p. 2 (8 TTABVUE 3); also see *e.g.*, October 6, 2017 Final Office Action at TSDR 9, 12, 25, 38, 49, 62-63.

descriptive of metal gun safes); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of beds, mattresses, box springs, and pillows).

Upon reviewing the evidence submitted by Applicant, we find it is insufficient to overcome the evidence that the term "ULTIMATE GEL" is laudatory and merely descriptive of the bedding, mattresses, pillows and cushions listed in Applicant's identification of goods. Here, both of the individual components, as well as the composite mark, are descriptive of Applicant's goods and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods. Specifically, each term retains its descriptive meaning. Based on the foregoing evidence, the wording "gel" merely describes or refers to part of the content of Applicant's goods. The record shows that "ultimate" means best. Therefore, adding the term "ultimate" to a descriptive term such as "gel" does not add any source-indicating significance or otherwise affect the overall descriptiveness.

A mark may be merely descriptive even if it does not describe the "full scope and extent" of Applicant's goods. *In re Oppedahl & Larson*, 71 USPQ2d at 1371 (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)). It is enough that the term describes only one significant function, attribute, or property of the goods. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re H.U.D.D.L.E.*, 216 USPQ 216 USPQ 358, 359 (TTAB 1982). The question is not whether someone presented only with the proposed mark ULTIMATE GEL could guess the products listed in the identification of goods. Rather, the question is

"whether someone who knows what the goods are will understand the mark to convey information about them." *DuoProSS Meditech v. Inviro Med. Devices*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d at 1316-17); *In re Swatch Grp. Mgmt. Servs. AG*, 110 USPQ2d 1751, 1762 n.54 (TTAB 2014). Therefore, the wording "Ultimate Gel" is merely descriptive of Applicant's goods because, at the very least, it describes a significant feature.

Applicant contends that ULTIMATE GEL could be used to sell a wide variety of totally unrelated products including hair styling, hair care products and boat sealants.[17] When used in connection with its goods, Applicant argues that ULTIMATE GEL is suggestive because it is susceptible to multiple connotations requiring imagination and a gathering of further information in order for the relevant public to perceive of any significance of the term.[18]

Only where the combination of descriptive terms creates a unitary mark with a unique, incongruous, or otherwise nondescriptive meaning in relation to the goods is the combined mark registrable. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (SUGAR & SPICE, along with the favorable suggestion which it may evoke, seems to clearly function in the trademark sense and not as a term merely descriptive of goods); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1162-63 (TTAB 2013) (whether a composite mark formed of two or more merely descriptive terms has a merely descriptive significance turns on whether the combination of

[17] Applicant's Appeal Brief p. 2 (8 TTABVUE 3).

[18] *Id.* at pp. 2-3 (8 TTABVUE 3-4).

terms evokes a new and unique commercial impression; if each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is merely descriptive); *In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1341 (TTAB 2009) ("[B]ecause the combination of the terms does not result in a composite that alters the meaning of either of the elements, refusal on the ground of descriptiveness is appropriate"). "That a term may have other meanings in different contexts is not controlling." *In re Franklin County Historical Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)). The determination of whether a mark is merely descriptive is made in relation to an applicant's goods, not in the abstract. *DuoProSS Meditech v. Inviro Med. Devices*, 103 USPQ2d at 1757; *In re Chamber of Commerce*, 102 USPQ2d at 1219; *see, e.g.*, *In re Polo Int'l Inc.*, 51 USPQ2d 1061, 1062-63 (TTAB 1999) (finding DOC in DOC-CONTROL would refer to the "documents" managed by applicant's software rather than the term "doctor" shown in a dictionary definition); *In re Digital Research Inc.*, 4 USPQ2d 1242, 1243-44 (TTAB 1987) (finding CONCURRENT PC-DOS and CONCURRENT DOS merely descriptive of "computer programs recorded on disk" where the relevant trade used the denomination "concurrent" as a descriptor of a particular type of operating system). Here, Applicant's goods are pet beds, chair cushions, mattresses and mattress toppers and pillows. That Applicant's applied-for mark may have different meanings in other contexts or for other products has no bearing on whether it is descriptive of the identified goods.

Generally, if the individual components of a mark retain their descriptive meaning in relation to the goods, the combination results in a composite mark that is itself descriptive and not registrable. *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012). Here, the laudatory term "ultimate" is combined with a merely descriptive term, "gel," resulting in both the individual components and a composite that is merely descriptive of Applicant's goods and does not create a unique, incongruous, or nondescriptive meaning in relation to the goods. *See In re Nett Designs*, 57 USPQ2d at 1566 (holding THE ULTIMATE BIKE RACK merely laudatory and descriptive of applicant's bicycle racks being of superior quality).

III. Conclusion

While we agree with Applicant's contention that any doubt regarding the mark's descriptiveness should be resolved on Applicant's behalf,[19] *In re Gourmet Bakers, Inc.*, 173 USPQ 565, 566 (TTAB 1972); *In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1605 (TTAB 2014), here there is no doubt. As supported by the evidence, the proposed mark, ULTIMATE GEL, is laudatory and merely describes a feature of Applicant's goods. Thus, Applicant's applied-for mark ULTIMATE GEL is not entitled to registration.

Decision: The refusal to register Applicant's mark ULTIMATE GEL under § 2(e)(1) of the Trademark Act is affirmed.

[19] Applicant's Appeal Brief p. 2 (8 TTABVUE 3).