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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Douglas John Shuntich

Serial No. 85369587

Luke Brean of BreanLaw, LLC for Douglas John Shuntich.

Margaret A. Tierney, Trademark Examining Attorney, Law Office 111 (Robert L. Lorenzo, Managing Attorney).

Before Zervas, Ritchie, and Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

On July 12, 2011, applicant Douglas John Shuntich applied to register the mark SUPERCOOLER, in standard characters, for goods ultimately identified as:

> Countertop and portable, household refrigerator/freezer capable of storing items in the full temperature range "in-between" standard freezer temperatures and standard refrigeration temperatures between 0 - 40 degrees F (-18 to +4 deg. C), excluding freestanding and built-in household refrigerators, freezers and refrigerated wine cabinets, in International Class 11.[1]

[1] Application Serial No. 85369587, filed on the basis of a bona fide intent to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Registration has been finally refused on the ground that the applied-for mark is merely descriptive of applicant's goods pursuant to Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1).

Applicant timely appealed, and both applicant and the examining attorney filed briefs.

Analysis

A mark is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of an ingredient, quality, characteristic, function, feature, purpose, or use of the goods with which it is used. *See, e.g.*, *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular mark is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the possible significance that the mark is likely to have to the average purchaser encountering the goods or services in the marketplace. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Eng'g Sys. Corp.*, 2 USPQ2d 1075, 1076 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

While a combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning, *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968), the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase.

In re Associated Theatre Clubs Co., 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its descriptive significance in relation to the goods or services, the combination results in a composite that is itself descriptive. *See, e.g., In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1341 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Tower Tech, Inc.,* 64 USPQ2d 1314, 1317-18 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.,* 59 USPQ2d 1084, 1088 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs).

The examining attorney has refused registration under Section 2(e)(1) for two reasons. First, she contends that the mark SUPERCOOLER is descriptive of applicant's goods because they employ the process of "supercooling," in which a liquid is chilled below its freezing point while remaining in a liquid, rather than a solid, state – e.g., in the form of water rather than ice.

Applicant denies this assertion, characterizing it as "100% incorrect."[2] Applicant argues that its household devices are neither capable of nor designed to employ the physical phenomenon known as "supercooling," stating that supercooling water at standard air pressure requires a temperature of -55° Fahrenheit, far below the identified temperature range for applicant's goods (0° to 40° Fahrenheit).

[2] Applicant's Brief at unnumbered page 3.

We find the evidence of record to be ambiguous as to whether applicant's goods can function as "supercoolers" in the scientific sense. For example, a Wikipedia article titled "Supercooling" generally supports applicant's argument, stating that pure water normally freezes at 32° Fahrenheit, "but it can also be 'supercooled' at standard pressure down to its crystal homogeneous nucleation at almost" -43.6° Fahrenheit.[3] The article references commercial applications of supercooling in refrigeration, including "freezers that cool drinks to a supercooled level so that when it is opened it slushes over."[4] There is no evidence that applicant's goods offer this function. On the other hand, the examining attorney provided evidence suggesting that supercooling is achievable in the temperature range of applicant's goods: "Supercooling of water is ubiquitous in nature . . . . Water in rivers, lakes, and seas is only supercooled to about 0.01 °C."[5] This temperature is within the range reached by applicant's goods (-18° C to +4° C).

In light of applicant's denial and the ambiguous record evidence, we find that the examining attorney has not met her burden to establish that SUPERCOOLER describes a "supercooling" feature or function of applicant's goods.[6]

[3] November 9, 2011 Office action at 8.

[4] *Id.* at 10.

[5] Reconsideration letter at 11 (from the page faculty.gg.uwyo.edu/kempema/supercool.html, titled "Supercooled Water, Crystallization and Latent Heat Release Demonstration").

[6] Registration was not refused on the ground that the mark was deceptively misdescriptive pursuant to Trademark Act Section 2(e)(1).

The second reason for refusal is that the mark is "laudatory" in connection with the identified goods under Trademark Act Section 2(e)(1).[7] It is well established that laudatory terms – those that attribute quality or excellence to goods or services – are merely descriptive under Section 2(e)(1). *See DuoProSS Meditech Corp.*, 103 USPQ2d at 1759 (finding SNAP SIMPLY SAFER merely descriptive for "medical devices, namely, cannulae; medical, hypodermic, aspiration and injection needles; medical, hypodermic, aspiration and injection syringes"); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (holding THE ULTIMATE BIKE RACK a laudatory descriptive phrase that touts the superiority of applicant's bike racks); *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (finding THE BEST BEER IN AMERICA so highly laudatory and descriptive that it is incapable of acquiring distinctiveness); *Target Brands Inc.* v. *Hughes*, 85 USPQ2d 1676, 1680 (TTAB 2007) (ULTIMATE POLO consists of laudatory term "ultimate" and generic term "polo" describing best possible shirts); *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1862 (TTAB 1998) (QUESO QUESADILLA SUPREME merely descriptive of cheese).

Of particular relevance here, we concluded in *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1052 (TTAB 2002), that

> if the word "super" is combined with a word which names the goods or services, or a principal component, grade or size thereof, then the composite term is considered merely descriptive of the goods or services, but if such is not strictly true, then the composite mark is regarded as suggestive of the products or services.

[7] Examiner's brief at unnumbered pages 10-15.

Applicant's mark is SUPERCOOLER. The examining attorney has made of record dictionary definitions of "cooler" that include "refrigerator."[8] The evidence thus shows that "cooler" is a noun naming applicant's refrigerator/freezer. Applying the *Phillips-Van Heusen* test, we find SUPERCOOLER to be laudatory and merely descriptive of applicant's goods.

Applicant makes several additional arguments for registration, but we do not find them to be persuasive. First, applicant urges that its mark "is both suggestive and descriptive," stating that SUPERCOOLER "does not directly describe the product and requires a substantial amount of imagination to ascertain the full range of abilities of the device."[9] A term need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one single, significant feature or attribute. *See In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Oppedahl & Larson LLP,* 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) ("A mark may be merely descriptive even if it does not describe the full scope and extent of the applicant's goods or services.") (quotation omitted).

Applicant next argues that competitors do not need to use the term SUPERCOOLER to describe their goods because "[t]here is no inherent relationship between the term SUPERCOOLER and a device that through precision temperature and humidity control prolongs freshness of perishable contents. There are innumerable other marks that a competitor could use to describe such a

[8] November 9, 2011 Office action at 5 (from Merriam-Webster.com).

[9] Applicant's Brief at unnumbered page 7.

device."[10] But the fact that other words or phrases exist for competitors to use does not redeem an otherwise merely descriptive word or phrase. *See Roselux Chem. Co. v. Parson Ammonia Co.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962).

Finally, and in a related argument, applicant contends that competitors do not use SUPERCOOLER to describe their products. Indeed, applicant asserts that it has no competitors:

> Given the unique nature of the cooling and humidity control capabilities of the SUPERCOOLER to the applicant's knowledge there are no directly competing products on the market. As the SUPERCOOLER does not directly compete with traditional refrigerators and freezers, but is in a unique class of its own, no other competitor is using SUPERCOOLER to describe their products.[11]

It is well-established, however, that the fact that an applicant may be the first and only user of a merely descriptive designation does not justify registration if, as here, the only significance conveyed by the term is merely descriptive. *See In re Nat'l Shooting Sports Found., Inc.,* 219 USPQ 1018, 1020 (TTAB 1983).

We find that SUPERCOOLER is a laudatory descriptive term within the meaning of Section 2(e)(1) in association with applicant's goods.

Decision: The refusal to register applicant's mark under Section 2(e)(1) of the Trademark Act is affirmed.

[10] *Id.* at unnumbered page 8.

[11] *Id.*