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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85729804
Applicant	Birds Eye Foods LLC
Applied for Mark	SAVORY SKILLETS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

Applicant: Birds Eye Foods LLC

Mark: SAVORY SKILLETTS

Serial No. 85729804

Filed: September 14, 2012

Int'l Class 29, 30

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPLICANT'S APPEAL BRIEF**

Applicant hereby appeals the Examining Attorney's final refusal to register Applicant's SAVORY SKILLETTS mark for "*Frozen entrees consisting primarily of one or more of meat, fish, poultry or vegetables; frozen meals consisting primarily of one or more of meat, fish, poultry or vegetables*" in Class 29, and "*Frozen entrees consisting primarily of one or more of pasta or rice; frozen meals consisting primarily of one or more of pasta or rice*" in Class 30, pursuant to Section 2(e)(1) of the Trademark Act.

**FACTS**

The instant application was filed on September 14, 2012. On January 14, 2013, the Examining Attorney issued a first Office Action refusing registration of the mark for the goods in the application, pursuant to Section 2(e)(1) of the Trademark Act. On July 15, 2013, Applicant submitted a response to the Office Action consisting of arguments that the Examining Attorney failed to meet the burden of proof, and that the mark is not merely descriptive.

In the final Office Action issued August 6, 2013, the Examining Attorney made final the refusal to register pursuant to Section 2(e)(1). In response, on February 6, 2014, Applicant filed the instant appeal to which the Board instituted on February 7, 2014.

### ARGUMENT

**THE EXAMINING ATTORNEY HAS NOT ESTABLISHED THAT THE SAVORY SKILLETS MARK IS MERELY DESCRIPTIVE, AND THEREFORE THE REFUSAL MUST BE REVERSED.**

#### **I. The Standard for Determining Descriptiveness.**

The Examining Attorney refused registration of Applicant's SAVORY SKILLETS mark on the ground the mark is merely descriptive of the goods pursuant to Section 2(e)(1), 15 U.S.C. §1052(e)(1). These goods are "*Frozen entrees consisting primarily of one or more of meat, fish, poultry or vegetables; frozen meals consisting primarily of one or more of meat, fish, poultry or vegetables*" in Class 29, and "*Frozen entrees consisting primarily of one or more of pasta or rice; frozen meals consisting primarily of one or more of pasta or rice*" in Class 30.

15 U.S.C. §1052(e)(1) dictates that:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it ... (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them.

TMEP § 1209 implements this provision, stating:

Matter that "merely describes" the goods or services on or in connection with which it is used is not registrable on the Principal Register. As noted in *In re Abcor Dev. Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (C.C.P.A. 1978):

The major reasons for not protecting such marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.

TMEP § 1209.01(b) further states:

To be refused registration on the Principal Register under §2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), a mark must be merely descriptive or deceptively misdescriptive of the goods or services to which it relates. A mark is considered merely descriptive if it

describes an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods or services. (Citations omitted.)

If the mental leap between the mark and the products' attributes is not almost instantaneous, this strongly indicates suggestiveness, not direct descriptiveness. *Investacorp, Inc. v. Arabian Investment Banking Corp.*, 19 U.S.P.Q.2d 1056 (11<sup>th</sup> Cir. 1991), cert. denied, 502 U.S. 1005 (1991); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 35 U.S.P.Q.2d 1342, 1349 (9<sup>th</sup> Cir. 1995).

Further, not only must a mark immediately impart information about the goods or services, but it must do so with a "degree of particularity." *In re Intelligent Medical Systems, Inc.*, 5 U.S.P.Q. 2d 1674 (TTAB 1987); *see also, Holiday Inns, Inc. v. Monolith Enterprises*, 212 U.S.P.Q. 949 (TTAB 1981). In other words, in refusing registration on the basis of mere descriptiveness, the Examining Attorney must find more than simply some connection between the mark and the goods or services. The relationship must be such that the mark conveys a readily understood meaning of the goods or services to the average purchaser. That is, the mark must literally, and with particularity, "describe" the goods or services. As noted in *In re Colonial Stores, Inc.*, 157 U.S.P.Q. 382 (CCPA 1968) and *In re Quik-Print Copy Shops, Inc.*, 205 U.S.P.Q. 505, n.7 (CCPA 1980), "merely" in "merely descriptive" means "only."

The Examining Attorney has the burden of establishing a *prima facie* case of mere descriptiveness. *In re Gyulay*, 3 U.S.P.Q.2d 1009 (Fed. Cir. 1987). For example, the Federal Circuit found an examining attorney met his burden when he provided four online dictionary definitions, online evidence showing the descriptive nature of the mark, and numerous story excerpts from the LEXIS NEXIS database. *In re Bayer*, 82 U.S.P.Q. 2d 1828, 1831 (Fed. Cir. 2007); *see also, In re Zanova Inc.*, 59 U.S.P.Q. 2d 1300, 1302 (TTAB 2001) (finding the examining attorney met his burden by setting forth dictionary definitions, LEXIS NEXIS articles showing descriptiveness of the mark, press releases from Applicant's website showing use of the mark in a descriptive manner, and online news articles); *In re Richard Joseph Couture*, 60 U.S.P.Q. 2d 1317, 1319-20 (TTAB 1999) (finding the examining attorney met his burden by submitting numerous stories from the LEXIS NEXIS database, and two dictionary definitions).

The Board has consistently reversed the decisions of examining attorneys who refuse registration under Section 2(e)(1) in the absence of actual evidence linking the recognized meaning of the mark sought to be registered to the goods or services of the Applicant. *See, e.g., In re Intelligent Medical Systems Inc.*, 5 U.S.P.Q.2d 1674 (TTAB 1987) (reversing examining attorney's refusal to register "INTELLIGENT MEDICAL SYSTEMS").

**II. The Examining Attorney's Evidence in Support of the Refusal is Insufficient to Demonstrate that the SAVORY SKILLETS Mark is Merely Descriptive.**

In the first Office Action, in refusing registration, the Examining Attorney stated:

In this case, applicant's mark is SAVORY SKILLETS for various frozen entrees. The word "SAVORY" merely indicates the type of flavoring used in the entrees. Note from the attached dictionary evidence that "savory" refers to being "pungently flavorful without sweetness." Finally, the word "SKILLET" will merely indicate the type of meal to be provided. Note from the attached third-party websites that the word "SKILLET" is used to describe a type of frozen entrée that is prepared in a skillet, or frying pan. Note also from the attached third-party registration evidence that the Office routinely disclaims the word "SKILLETS" in conjunction with prepared foods/meals/entrees. In conclusion, applicant's mark immediately indicates features of its goods – savory meals for preparation in skillets. Therefore, registration must be refused under Section 2(e)(1) (Citations omitted).

In support of these statements in the first Office Action, the Examining Attorney provided dictionary definitions for "SAVORY" and "SKILLET" from the [www.merriam-webster.com](http://www.merriam-webster.com) website, and three third-party websites that show use of the term "skillet meals." The Examining Attorney also provided four third-party registrations for marks incorporating the term "SKILLETS," for which "SKILLETS" was disclaimed. However, with the exception of one dictionary definition, no evidence to support the contention that "SAVORY" is descriptive was provided.

In the final Office Action, the Examining Attorney stated:

Finally, note from several of the attachments that the word "savory" is used to describe such meals. This wording will indicate to consumers that applicant's one-dish meals contain seasoning, and are not sweet. Indeed, two restaurant menus contain the heading "savory skillets." In short, consumers will recognize from the proposed mark that applicant provides meals that are one dish, or combination meals, that are intended to be cooked in a skillet or frying pan and that such meals will be savory, or pungently-flavored.

In support of the final refusal, the Examining Attorney provided 14 third-party registrations for “SKILLET” or “SKILLETS” marks, which contain a disclaimer of “SKILLET,” are on the Supplemental Register, or are registered on the Principal Register pursuant to a claim of acquired distinctiveness. The Examining Attorney also provided 16 third-party websites (one of which is Applicant’s website), that show use of the term “SKILLETS” and/or “SAVORY.”

Even if these excerpts demonstrated what the Examining Attorney says they demonstrate, they are insufficient to demonstrate that the mark is merely descriptive of Applicant’s frozen entrees. In particular, the evidence relating to the term “SAVORY” and the connotation resulting from the combination of the terms “SAVORY” and “SKILLETS” is minimal, at best. If the Examining Attorney will deny registration of Applicant’s mark, such a refusal must be supported by sufficient evidence to establish a prima facie case of mere descriptiveness. In light of the substantial amounts of evidence the examining attorneys provided in *In re Bayer*, *In re Zanova*, and *In re Richard Joseph Couture* to meet their burden, the quantity and quality of evidence in this case is entirely insufficient to demonstrate that the SAVORY SKILLETS mark is merely descriptive.

Turning to the merits of the Examining Attorney’s evidence, the record is virtually devoid of evidence that demonstrates the term “SAVORY” is descriptive with respect to Applicant’s goods, consisting of one dictionary definition and three website excerpts. The two website excerpts show use of “SAVORY SKILLETS” in an apparent trademark manner, having all the hallmarks of trademark usage – in bold, stylized font, set off from other wording. One excerpt also shows use of “SAVORY” in connection with “SANDWICHES,” again in an apparent trademark manner. These excerpts do not show that “SAVORY” is descriptive for Applicant’s goods or for any goods, because the usage appears to be a trademark usage, and the significance of “SAVORY SKILLETS” in this context is unclear. Accordingly, the only evidence relating to the significance of “SAVORY” is the dictionary definition for “SAVORY.” Such evidence is insufficient to establish the descriptiveness of “SAVORY.”

Moreover, of the 18 third-party registrations for “SKILLET” or “SKILLETS” marks provided by the Examining Attorney, in 11 of the registrations, the term “SKILLET” functions as an adjective (i.e.,

SKILLET BREAKFASTS, SKILLET HASH BROWNS, SKILLET MASTERS, SKILLET MEDLEYS, SKILLET CREATIONS, SKILLET BISTRO, SKILLET STARTERS, ASIAN SKILLET CLASSICS, MEIJER SKILLET BASICS), whereas Applicant's mark depicts the term "SKILLETS" as a noun. Accordingly, in the majority of registrations for which a disclaimer of "SKILLET" has been required, "SKILLET" has been used as an adjective. The Examining Attorney has not established that a disclaimer of "SKILLET" as an adjective is analogous to the instant situation. Moreover, as Applicant noted, the Office did not require a disclaimer of the term "SKILLET" or "SKILLETS" used as a noun, in numerous third-party registrations:

1. No. 4265398 for the mark DIXIE SKILLETS for "*meat; sausage; processed pork products*";
2. No. 3124868 for the mark BIG SKILLET for "*fish, namely, ((fish fillets)) both breaded and ((plain))*";
3. No. 2156910 for the mark SUNSHINE SKILLET for "*prepared entree consisting primarily of eggs, potatoes, meat, gravy and cheese*";
4. No. 1650247 for the mark FIESTA SKILLET for "*prepared breakfast entree composed primarily of eggs, hash brown potatoes and cheese*"; and,
5. No. 1469899 for the mark THE FARM SKILLET for "*prepared breakfast consisting of hash brown potatoes, eggs, sausage, onion and green pepper for consumption on or off the premises*".

The Examining Attorney has also not provided sufficient evidence to establish that there is a recognized meaning for Applicant's SAVORY SKILLETS mark as a whole. Analyzing the significance of "SAVORY" and "SKILLET" individually is only the first part of the analysis. The mark must then be analyzed as a whole, to ascertain the meaning of the mark as a whole in relation to the goods in the application. As TMEP § 1209.03(d) dictates, "when two descriptive terms are combined, the determination of whether the composite mark also has a descriptive significance turns upon the question of whether the combination of terms evokes a new and unique commercial impression." While the Examining Attorney provided two website excerpts showing use of "SAVORY SKILLETS," those excerpts showed apparent trademark use of the phrase. They do not demonstrate that "SAVORY SKILLETS" has a recognized, descriptive meaning to consumers, which is the key issue in this case.

In support of the contention that the SAVORY SKILLETS mark is descriptive, the Examining Attorney provided excerpts from two online restaurant menus. With the millions of websites available,

the Examining Attorney has only submitted two restaurant menus to demonstrate the descriptive nature of “SAVORY SKILLETTS” with respect to food products. These two excerpts are of little probative value because they are isolated uses of “SAVORY SKILLETTS” and relate to restaurant items and services, which are not goods or services that are the subject of the instant application. Aside from these two restaurant excerpts, the Examining Attorney has provided no additional evidence demonstrating that the phrase SAVORY SKILLETTS has been adopted into the vernacular of the trade or that it has a readily understood meaning to the average purchaser.

Simply because the two words individually may have some descriptive meaning as applied to the goods does not mean that the resulting combination will also have descriptive connotation. There is no evidence to even suggest what the meaning of the mark as a whole is. The Examining Attorney has not established what the significance of the phrase “SAVORY SKILLETTS” is, how it would be perceived by consumers, and how the phrase is descriptive of Applicant’s goods. In view of the foregoing, Applicant submits that the Examining Attorney has not established a prima facie case that Applicant’s mark in its entirety is merely descriptive.

### **III. The SAVORY SKILLETTS Mark is Inherently Distinctive.**

In the first Office Action, the Examining Attorney stated that the SAVORY SKILLETTS mark “immediately indicates the features of the goods – savory meals for preparation in skillets.” In the final office action, the Examining Attorney maintained the refusal and in doing so, reasoned that “consumers will recognize from the proposed mark that applicant provides meals that are one dish, or combination meals, that are intended to be cooked in a skillet or frying pan and that such meals will be savory, or pungently-flavored.”

TMEP § 1209.01(a) sets forth the relevant criteria by which a mark or term may be deemed suggestive of an applicant’s goods or services as opposed to being merely descriptive, stating:

Suggestive marks are those that, when applied to the goods or services at issue, require imagination, thought or perception to reach a conclusion as to the nature of those goods or services. Thus, a suggestive term differs from a descriptive term, which immediately tells something about the goods or services ... Therefore, a designation does not have to be devoid of all meaning in relation to the goods and services to be registrable.



As stated in *Minnesota Mining & Mfg. Co. v. Johnson & Johnson*, 172 U.S.P.Q. 491 (CCPA 1972): “It seems to be well established that ... words which would be merely descriptive by themselves can be joined together in a single term in such a way that the resulting term is a technical trademark.” *Id.* at 493. As an elaboration of this rule, the Board explained in *In re Calspan Technology Products, Inc.*, 197 U.S.P.Q. 647 (TTAB 1977), that:

Descriptiveness of the components in the unitary term may be lost, or in combination, be so incongruous or unusual as to create a term that, while projecting some undefined suggestive connotation, possess no definite meaning or significance other than that as a mark to identify and distinguish in commerce the goods in connection with which it is used.

*Id.* at 649.

It is well established that the juxtaposition of two descriptive terms can form a mark which is not descriptive:

Combinations of merely descriptive components have been found registrable if the juxtaposition of the words is inventive or evokes a unique commercial impression. *See, e.g., In re Colonial Stores, Inc.*, 157 U.S.P.Q. 382 (CCPA 1968) (SUGAR & SPICE for bakery products) ... or if the term has a bizarre or incongruous meaning as applied to the goods. *See, e.g., In re Econoheat, Inc.*, 218 U.S.P.Q. 381 (TTAB 1983) (SOLAR QUARTZ for electrically operated space heaters) ... In those cases and others the descriptiveness of the components was either lost in the combination or the composite was so incongruous or unusual that it possessed only suggestive significance.

*In re National Shooting Sports Foundation, Inc.*, 219 U.S.P.Q. 1018, 1020 (TTAB 1983).

In *In re Shutts*, the Board explained that the concept of mere descriptiveness “must relate to general and readily recognizable word formulations and meanings, either in a popular or technical use context, and should not penalize coinage of hitherto unused and somewhat incongruous word combinations, whose import would not be grasped without some measure of imagination and ‘mental pause’.” *In re Shutts*, 217 U.S.P.Q. 363, 364-365 (TTAB 1983). Accordingly, incongruity has become one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark. *In re Tennis in the Round Inc.*, 199 U.S.P.Q. 496, 498 (TTAB 1978). Courts have repeatedly held that if a mark is incongruous and requires effort, thought or imagination on the part of the observer, the mark is suggestive rather than descriptive. *Id.* at 497-498.

Further, the Board's analysis in *In re Wisconsin in Tissue Mills*, 173 U.S.P.Q. 319 (TTAB 1972) finding that the mark POLYTISSUE was not merely descriptive is relevant to the instant situation. "Arguendo, accepting that to the purchasing public for table covers "poly" means polyethylene, nevertheless, it seems apparent that a term such as "polyethylene tissue" is somewhat incongruous. What is a polyethylene tissue? Can such a product exist?" *Id.* at 320-321.

As an initial matter, Applicant notes that the Board has already found the term "SKILLETS" is arbitrary with respect to "canned and *frozen prepared foods*" and a "wide variety of canned prepared food products, including canned sauces for casseroles..." See *Silver Skillet Food Prod. Co. v. Carnation Co.*, 159 U.S.P.Q. 47, 47-48 (TTAB 1968). Following *Silver Skillet Food Prod.*, SKILLETS is also arbitrary for Applicant's goods since "frozen prepared goods" encompasses Applicant's "frozen entrees."

In the event the Board chooses not to follow this decision, the SAVORY SKILLETS mark is at least suggestive because there is no recognized meaning of SAVORY SKILLETS as a whole, in part because these terms are not ordinarily used in conjunction with one another. The SAVORY SKILLETS mark is not descriptive because both "SAVORY" and "SKILLET" have several definitions that could be applicable in context of Applicant's goods, therefore precluding consumers from immediately identifying Applicant's goods with the degree of particularity required for a mark to be merely descriptive. As the Examining Attorney's evidence shows, "SAVORY" is defined as a (1) piquantly pleasant to the mind; (2) morally exemplary; (3) pleasing to the sense of taste especially by reason of effective seasoning; and (4) pungently flavorful without sweetness. Further, the Examining Attorney's evidence shows that "SKILLET" is defined as (1) a frying pan, or (2) a small kettle or pot usually having three or four often long feet and used for cooking on the hearth.

In all of the definitions in the Examining Attorney's dictionary evidence, "SAVORY" is an adjective and "SKILLET" is a noun. Therefore, in the mark, "SAVORY" modifies "SKILLET." Using the Examining Attorney's definitions, the literal meaning of SAVORY SKILLETS is a set of pungently flavorful, tasty or seasoned frying pans or kettles. But how can a frying pan or a small kettle or pot be "pungently flavorful without sweetness," or "piquantly pleasant to the mind" when it is a metal object?

Metal objects are neither flavorful nor piquantly pleasant because they are neither eaten nor do they have such an effect on one's mind. As such, Applicant has created an incongruous expression by juxtaposing words that describe flavors and states of mind with metal, iron, or steel objects. Accordingly, consumers would generally not associate the term "SAVORY" with "SKILLETS." As such, consumers, in encountering Applicant's products, will ask themselves "What is a savory skillet? Can such a product exist?" as did the Board in *In re Wisconsin in Tissue Mills*.

In order to connect the term SAVORY SKILLETS with Applicant's goods, numerous intuitive leaps are required, which shows that Applicant's mark is suggestive, not descriptive. First, a consumer must consider the multiple definitions of "SAVORY" and "SKILLETS." A consumer would have to determine that "SAVORY" refers to "pungently flavored without sweetness," to the exclusion of the other meanings. Moreover, consumers would have to understand that "SKILLETS" is not used in its ordinary dictionary definition as a frying pan or kettle, but rather refers to a meal that can be prepared in a skillet. Finally, consumers would have to recognize that "SAVORY" in this context refers to the food products, not the cooking vessel. Accordingly, consumers have to follow a multi-stage reasoning process in order to determine the characteristics of Applicant's goods, and in such cases, the Board has held marks are suggestive. See *In re Tennis in the Round, Inc.*, 199 U.S.P.Q. at 498. Despite any descriptiveness of "SAVORY" and "SKILLETS" individually, the use of "SAVORY" as a modifier of "SKILLETS" renders the resulting combination an incongruous juxtaposition whose individual significances are lost in the mark as a whole. The result is an inherently distinctive mark. To assume that consumers would ascribe the particular definitions that the Examining Attorney has assigned to the terms in Applicant's mark, to the exclusion of the other definitions that each term has, would only be speculation.

Finally, in stating that the term "SKILLETS" "merely describes that applicant's meals are intended to be prepared in a skillet," the Examining Attorney erroneously assumes Applicant's products can only be prepared in a skillet. In fact, Applicant's goods can be prepared in non-cast iron frying pans, pots, sauce pans, woks and in any number of types of cookware on a stove-top or in a microwave.

Accordingly, “SKILLETS” is a suggestive term because it alludes to the idea of preparing food on a stove top or microwave using cookware.

**IV. All Doubts regarding Registrability of the Mark must be Resolved in Favor of Applicant.**

Finally, it is respectfully noted that the Examining Attorney has the burden of establishing a *prima facie* case of mere descriptiveness. *In re Gyulay*, 3 U.S.P.Q.2d 1009 (Fed. Cir. 1987). The Board stated in *In re Shutts*, 217 U.S.P.Q. 363 (TTAB 1983), regarding the mark SNO-RAKE, “[a]t the very least, however, we have doubts about the ‘merely descriptive’ character of the mark before us and, unlike the situation in determining likelihood of confusion under Section 2(d) of the Trademark Act, it is clear that such doubts are to be resolved in favor of applicants. *Id.* at 365 (citations omitted); *see also In re Gracious Lady Service, Inc.*, 175 U.S.P.Q. 380 (TTAB 1972).

**CONCLUSION**

The Examining Attorney has not established that the SAVORY SKILLETS mark is merely descriptive. The refusal is unsupported by evidence, and the mark as a whole is inherently distinctive. Accordingly, Applicant requests that the Board reverse the Examining Attorney’s refusal to register.

Respectfully submitted,

Date: April 7, 2014

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