

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 14, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Birds Eye Foods LLC

Serial No. 85729804 for the mark SAVORY SKILLETTS and
Serial No. 85729823 for the mark BIRDS EYE SAVORY SKILLETTS

Michael D. Fishman of Rader Fishman & Grauer PLLC,
for Birds Eye Foods LLC.

Nicole Nguyen, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

Before Kuhlke, Taylor and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Birds Eye Foods LLC (“Applicant”) seeks registration on the Principal Register of the marks SAVORY SKILLETTS (in standard characters), the subject of application Serial No. 85729804, and BIRDS EYE SAVORY SKILLETTS, the subject of application Serial No. 85729823 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.

Both applications were filed on September 14, 2012, and were based upon applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Serial No. 85729804 under Section 2(e)(1) on the ground that the mark is merely descriptive of Applicant's goods and has refused registration of Serial No. 85729823 on the ground that the term "SAVORY SKILLETS" is merely descriptive of Applicant's goods and thus must be disclaimed. After the Examining Attorney made the refusals final, Applicant appealed. Because the two appeals involve similar issues of law and fact and similar records, we are deciding both appeals in this single decision.¹ We affirm both refusals to register.

I. Discussion

- A. The phrase "SAVORY SKILLETS" is merely descriptive of Applicant's frozen entrees.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012); *In re Chamber of Commerce of*

¹ Unless otherwise noted, all references to the record are from application Serial No. 85729804.

the U.S., 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used on or in connection with the goods, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). The burden is on the United States Patent and Trademark Office to make a prima facie showing that the mark in question is merely descriptive. *See In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005) (citing *In re Abcor Development*); *see also In re Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987). The Examining Attorney has met this burden.

The Examining Attorney has submitted the definition of “savory” to establish that the word “savory” is descriptive of a characteristic of Applicant’s goods. Applicant argues that the dictionary definition of “savory” is insufficient to establish the descriptiveness of the word “savory.” Appeal Brief, p. 5, 4 TTABVUE at 6. We disagree. “Evidence that a term is merely descriptive may be obtained from any competent source, such as dictionaries, newspapers, or surveys.” *In re Stereotaxis, Inc.*, 77 USPQ2d at 1089.

“Savory,” which is defined in Merriam-Webster’s Online Dictionary as “pungently flavorful without sweetness,”² immediately conveys a characteristic of Applicant’s frozen entrees, which is that the entrees are flavorful, but not sweet. Accordingly, we find that the dictionary definition is sufficient to establish that the term “savory,” is merely descriptive of applicant’s goods.

With respect to the issue of the nature of the word “skillets,” Applicant admits that “[t]he Examining Attorney did provide a modicum of support for the statement that ‘*skillet meal is commonly used to describe one-pot or one-pan meals.*’” Reply Brief, p. 2, 7 TTABVUE at 3. However, Applicant argues that “the record does not support the assumption that consumers will make the intuitive leap to understand ‘SKILLET’ to mean ‘skillet meal’; [and] [i]f this intuitive leap is not supported by evidence, it is mere supposition.” *Id.* Contrary to Applicant’s assertions, the Examining Attorney has provided more than a modicum of evidence both to establish that “skillet meal” is commonly used to describe one-pot or one-pan meals and that “skillet meals” are referred to as “skillet” or “skillets.” The evidence includes advertisements and articles regarding the sale of “skillet meals,” including

² Merriam-Webster On-line Dictionary (m-w.com), © Merriam-Webster, Incorporated 2013, Exhibit to Office Action dated January 14, 2013.

the following advertisement from Applicant's website:



In the advertisement, Applicant uses the term “skillet meal” as a description of a meal consisting of frozen food cooked in a single pan (a skillet). Examples of the other advertisements and promotional materials for skillet meals, including frozen skillet meals are:

- Annie's “Organic Skillet Meals” (www.annies.com), (Office Action dated January 14, 2013)

ORGANIC SKILLET MEALS



Organic Cheddar & Herb Chicken

(6.5 oz)

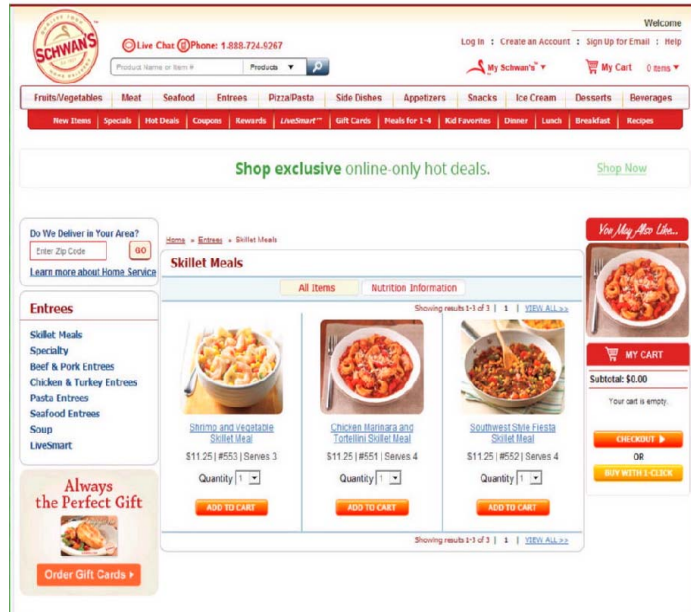
Annie's has created an easy way to spice up your chicken! Annie's Cheddar and Herb Chicken is made with organic penne pasta and a cheesy herb sauce that adds a little umph to your chicken entrée. Just add chicken or your favorite vegetarian alternative, water, milk and butter and you have a tasty organic meal ready in under 20 minutes.

[+ View this product's ingredients](#)

[View nutritional information](#)

[BUY NOW](#)

- Schwans’ “skillet meals” (www.schwans.com), (Office Action dated January 14, 2013)



- Newman’s Own “Complete Skillet Meals” (www.newmansown.com), (Office Action dated August 6, 2013)



and

- Fred Meyer - Kroger brand frozen skillet meals (www.fredmeyer.com), (Office Action dated August 6, 2013).



The evidence also establishes that “skillet meals” are known as “skillets.” For example, an article dated May 1, 2005 from Food and Drink, entitled “*Best taste in skillets: Gourmet Express Co. explains how it has grown in the past eight years by listening to customers and taking advantage of opportunities in the market,*”³ provides a company profile of Gourmet Express, a Texas based company specializing in frozen skillet meals.⁴ “Skillets” is also discussed in an excerpt from 7-DAY MENU PLANNER FOR DUMMIES, which states that combination meals in which “all the ingredients end up in one vessel,” are also known as “casseroles,” “bakes,” and “skillets.”⁵ “Skillets” is also listed as a “one dish” meal on the

³ Obtained from the Highbeam Business website (business.highbeam.com), Exhibit to Office Action dated August 6, 2013.

⁴ Web page from Gourmet Dining website, located at www.gourmetdining.com, Exhibit to Office Action dated January 14, 2013.

⁵ Google Books excerpt from Nicholson, Susan, 7-DAY MENU PLANNER FOR DUMMIES, accessed at book.google.com, Exhibit to Office Action dated August 6, 2013.

Tablespoon Blog (www.tablespoon.com/recipe-categories/cuisine/one-dish), Exhibit to Office Action dated August 6, 2013. Further, the term “skillets” is frequently used in restaurants to describe a “one dish” meal. As exhibits to the Office Action dated August 6, 2013, the Examining Attorney attached a number of menus for skillets, including:

- Denny’s Breakfast Menu obtained from the Eat24 website (Orlando.eat24hours.com), which includes “Omelets and Skillets”;
- Egg’lectic Café Menu (www.egglecticcafe.net) which includes “Frittatas and Skillets”;
- Northern Queen Inn Breakfast Menu (www.northernqueeninn.com), which includes “Omelets & Skillets” and;
- “Margie’s Dream Diner Breakfast Menu,” (www.margiesdreamdiner.com), which states: “Come to see us at Margie’s for breakfast. From eggs and skillets to kielbasa and waffles, we’ve got a breakfast food for your morning craving.”

Despite this evidence, Applicant, relying on *Silver Skillet Food Prod. Co. v. Carnation Co.*, 159 USPQ 47 (TTAB 1968), argues that 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’.⁶ Applicant’s reliance on this decision is misplaced. “[A]lthough a term at its inception or adoption may have been arbitrary or even suggestive in character, it may thereafter through use in a descriptive sense over a period of time lose its distinguishing and origin denoting characteristics and be regarded by the relevant

⁶ Appeal Brief, p. 9, 4 TTABVUE at 10.

section of the purchasing public as nothing more than a descriptive designation describing rather than identifying the goods on which it has been used.” *In re Digital Research, Inc.*, 4 USPQ2d 1242, 1243 (TTAB 1987), citing *In re Int’l Spike, Inc.*, 190 USPQ 505, 507 (TTAB 1976). While “SKILLETS” may have been deemed arbitrary with respect to canned and frozen prepared foods in 1968, the evidence establishes that it is at least highly descriptive of these foods at this time.

Moreover, the evidence establishes the term, SAVORY SKILLETS, viewed in its entirety, is merely descriptive. The Examining Attorney submitted evidence of use of the term “Savory Skillets” by two restaurants, Margie’s Dream Diner and Sunfield Restaurant. Applicant argues that both restaurants use of the term have “all the hallmarks of trademark usage – in bold, stylized font, set off from other wording.” Appeal Brief, p. 5, 4 TTABVUE at 6. We disagree.

Margie’s Dream Diner’s menu categorizes the breakfast foods available and lists the foods by heading. Margie’s Dream Diner Breakfast Menu,” (www.margiesdreamdiner.com), Exhibit to Office Action dated August 6, 2013. After the first heading, “Early Bird Special,” the diner offers, “Savory Skillets.” *Id.* “All skillets are topped with 2 eggs your way and served with toast of your choice or an English muffin.” *Id.* The phrase is used in the following type font:

SAVORY SKILLETS . Applicant’s argument that this form of use constitutes trademark use ignores the use of the same type font and coloring for every other heading on the menu, including the generic phrases, e.g.,

EARLY BIRD SPECIAL , **BREAKFAST SPECIALTIES** and

HEARTY 3 EGG OMELETS

. While some of the headings contain wording that may not be considered descriptive, in each of these headings, a portion of the name is set forth in quotation marks. See for example, **"HANDS ON" STUFF** , **"EGGS" STRODRINARY** , and **MORNING "SIDE SHOW"** . *Id.* As such, we find the use of SAVORY SKILLETS on the Margie's Dream Diner Breakfast Menu to be a descriptive use rather than a trademark use.

Similarly, on the Sunfield Restaurant's Breakfast Menu, all of the headings are in yellow. In addition to **Savory Skillets** the headings include: **Awesome Omelettes** , **Country Egg** , **Steak & Eggs** , **Hot Off the Griddle** and **The Benedicts** . These headings classify and describe the type of food offered. For example, the list of meals under the heading "Savory Skillets" includes "Sausage Lover's Skillet" ("A sausage lover's dream breakfast! Our own unique recipe of polish sausage, smoked sausage, and pork sausage topping a skillet of breakfast potatoes. Finished with two farm fresh eggs & three cheeses"); and the meals listed under the heading "Steak and Eggs, include New York Strip Steak & Eggs (two eggs and a New York Strip steak)." We do not consider these headings to be trademarks, but rather, descriptions of the food offered under the headings.

Applicant also argues that

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**.”⁷

Applicant’s argument is not well-taken. As discussed, *supra*, the context in which it is being used on or in connection with the goods, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (citing *In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1831); *In re Bright-Crest, Ltd.*, 204 USPQ 593.

Based on the evidence of record, we find that the average purchaser of Applicant’s frozen entrees will immediately interpret the term SAVORY SKILLETS as a frozen skillet meal that is not sweet. Accordingly find the mark SAVORY SKILLETS (in standard characters), which is the subject of application Serial No. 85729804 to be merely descriptive of Applicant’s goods under Section 2(e)(1) of the Trademark Act.

B. The term “SAVORY SKILLETS” must be disclaimed in application Serial No. 85729823.

“The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” Section 6 of the Trademark Act. Trademark Manual of Examining Procedures (TMEP) § 1213.03(a).“A mark or component is unregistrable if, when used on or in connection with the goods of the

⁷ Appeal Brief, p. 3, 4 TTABVUE at 4.

applicant's, it is merely descriptive --- of them." *In re Stereotaxis Inc.*, 77 USPQ2d at 1089. Failure to comply with a disclaimer requirement is grounds for refusal of registration. See *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46 (CCPA 1975); *In re Ginc UK Ltd.*, 90 USPQ2d 1472 (TTAB 2007); *In re National Presto Industries, Inc.*, 197 USPQ 188 (TTAB 1977); and *In re Pendleton Tool Industries, Inc.*, 157 USPQ 114 (TTAB 1968). As discussed, *supra*, the term "SAVORY SKILLETTS" is merely descriptive of Applicant's frozen food entrees and thus is an unregistrable component of Applicant's mark. Accordingly the mark BIRDS EYE SAVORY SKILLETTS is not registrable in the absence of a disclaimer of the wording "SAVORY SKILLETTS."

Decision: The refusals to register Applicant's marks SAVORY SKILLETTS and BIRDS EYE SAVORY SKILLETTS in application Serial Nos. 85729804 and 85729823 are affirmed. However, if applicant submits the required disclaimer of SAVORY SKILLETTS in application Serial No. 85729823 to the Board within thirty days, this decision will be set aside as to the affirmance of the disclaimer requirement.⁸ See Trademark Rule 2.142(g), 37 C.F.R. § 2.142.

⁸ The standardized printing format for the required disclaimer text is as follows: "No claim is made to the exclusive right to use SAVORY SKILLETTS apart from the mark as shown." TMEP 1213.08(a) (i).