

This Opinion is Not a  
Precedent of the TTAB

Mailed: November 20, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*In re One Plus Two Inc.*  
—

Serial Nos. 87462239 and 87462270  
—

Melville Owen and Kathleen E. Letourneau of Owen, Wickersham & Ericson, P.C.,  
for One Plus Two Inc.

Curtis French, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

—  
Before Zervas, Kuczma and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

One Plus Two Inc. (“Applicant”) seeks registration on the Principal Register of the  
marks  (“Creamy” disclaimed)<sup>1</sup> and RICH & SPICY (in standard characters,

<sup>1</sup> Application Serial No. 87462239, filed on May 24, 2017 under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as May 9, 2017. The Application contains the following statement describing the mark: “Color is not claimed as a feature of the mark. The mark consists of the words ‘RICH & CREAMY’ in stylized format.”

“Spicy” disclaimed),<sup>2</sup> both for “alcoholic beverages, except beer” in International Class 33.

The Trademark Examining Attorney refused registration under Trademark Act Section 2(e)(1), 15.U.S.C. § 1052(e)(1), on the ground that Applicant’s proposed marks, as applied to the goods identified in the Applications, are merely descriptive. When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed. Applicant and the Examining Attorney filed briefs.

Following the submission of all briefs in both appeals, Applicant sought remand to the Examining Attorney for the limited purpose of amending the Applications to seek, in the alternative, registration on the Supplemental Register in the event we are not persuaded to reverse the Examining Attorney’s mere descriptiveness refusals. After the Board remanded the Applications, the Examining Attorney issued Office Actions stating that the alternative amendments to the Supplemental Register were deemed acceptable, but maintaining and continuing the underlying mere descriptiveness refusals. After the Examining Attorney issued the Office Actions, the appeals were resumed. We affirm the refusals to register Applicant’s proposed marks on the Principal Register.

---

<sup>2</sup> Application Serial No. 87462270 filed on May 24, 2017 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce. Applicant filed an Amendment to Allege Use (“AAU”) under Trademark Act Section 1(c), 15 U.S.C. § 1051(c), on March 4, 2019 based upon Applicant’s claim of first use anywhere and first use in commerce since at least as early as January 24, 2018. Applicant’s AAU was accepted by the Office on March 29, 2019.

## **I. Consolidation**

When an applicant has filed ex parte appeals to the Board in two or more co-pending applications, and the cases involve common issues of law or fact, the Board may order the consolidation of the appeals for purposes of a final decision; and we do so here. *See, e.g., In re S. Malhotra & Co.*, 128 USPQ2d 1100, 1102 (TTAB 2018) (Board sua sponte consolidated two appeals). Because of the virtually identical issues presented in these appeals regarding the two applications, for both appeals we are issuing a single opinion. *In re Vertex Group LLC*, 89 USPQ2d 1694, 1695 (TTAB 2009). However, each proceeding retains its separate character and, at the end of this decision, will result in the entry of a separate judgment for each appealed application; and a copy of this decision shall be placed in each proceeding file. *In re Hudson News Co.*, 39 USPQ2d 1915, 1916 n.5 (TTAB 1996) (Board issued a single opinion in the interest of judicial economy, but each appeal stands on its own merits), *aff'd without opinion* (Fed. Cir. 1997).

## **II. Applicable Law**

In the absence of acquired distinctiveness,<sup>3</sup> Trademark Act Section 2(e)(1) precludes registration of a mark on the Principal Register which, when used in connection with the applicant's goods, is merely descriptive of them. A mark is "merely descriptive" within the meaning of § 2(e)(1) "if it immediately conveys

---

<sup>3</sup> Even though both of Applicant's proposed marks are in use, Applicant did not submit evidence or argument that either mark has acquired distinctiveness; so that issue is not before us.

Serial Nos. 87462239 and 87462270

information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)).

“A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citation and internal quotation omitted). *See also 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,” (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)). Conversely, a mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services.” *In re Franklin Cty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012).

Once the Examining Attorney establishes a prima facie case of mere descriptiveness, the burden of rebuttal shifts to Applicant. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987). The Board resolves doubts as to the mere descriptiveness of a proposed mark in favor of the applicant. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1512 (TTAB 2016).

In the context of descriptiveness “‘merely’ is considered to mean ‘only.’” *In re Quick-Print Copy Shops, Inc.*, 616 F. 2d 523, 205 USPQ 505, 507 n. 7 (CCPA 1980).

Serial Nos. 87462239 and 87462270

To be “merely” (“only”) descriptive does not mean that a term serves no purpose other than to describe the goods or services. Rather, descriptiveness is determined in relation to the goods or services as identified; that a term has different meanings in different contexts is not controlling. *In re Bright-Crest Ltd.*, 204 USPQ 591, 593 (TTAB 1979). So long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)).

Whether a mark is merely descriptive is evaluated “in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer*, 82 USPQ2d at 1831) and “not in the abstract or on the basis of guesswork.” *In re Fat Boys*, 118 USPQ2d at 1513 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask “not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is ‘whether someone who knows what the goods and services are will understand the mark to convey information about them.’” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (citation and internal quotation omitted).

“When two or more merely descriptive terms are combined, the determination of whether the composite also has a merely descriptive significance turns on the

Serial Nos. 87462239 and 87462270

question of whether the combination of terms evokes a new and unique commercial impression.” *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012); *See also In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). A mark comprising a combination of merely descriptive components is registrable if the their combination creates a unitary mark with a unique, suggestive, or otherwise non-descriptive meaning, *see In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 384 (CCPA 1968), or if the composite has a bizarre or incongruous meaning as applied to the goods or services. *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983).

However, 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. *See, e.g., In re Oppedahl & Larson*, 71 USPQ2d at 1374 (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet); *see also In re Phoseon Tech.*, 103 USPQ2d at 1823 (“When two or more merely descriptive terms are combined, ... [i]f 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.”).

We are mindful, however, that a mark comprising more than one element must be considered as a whole and should not be dissected. On the other hand, we may consider the significance of each element separately in the course of evaluating the mark as a whole. *See DuoProSS Meditech*, 103 USPQ2d at 1756-57 (noting that “[t]he

Serial Nos. 87462239 and 87462270

Board to be sure, can ascertain the meaning and weight of each of the components that makes up the mark.”).

Evidence that a term is merely descriptive to the relevant purchasing public may be obtained from any competent source, *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001), such as dictionaries, newspapers, or surveys, *In re Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods.” *In re Abcor*, 200 USPQ at 218. It also may be obtained from websites and publications, and an applicant’s own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 123 USPQ2d at 1710.

### **III. Evidence and Argument**

#### **A. The Examining Attorney’s Evidence and Arguments**

The Examining Attorney submitted the following evidence to support the Office’s position that Applicant’s marks are merely descriptive:

Definitions from COLLINS ENGLISH DICTIONARY online –

- RICH: full of strength and flavor; full-bodied.<sup>4</sup>
- CREAMY: Like cream in consistency or color.<sup>5</sup>
- SPICY: having the flavor or aroma of **spice**; fragrant, aromatic, or pungent.<sup>6</sup>

---

<sup>4</sup> First Office Action of August 24, 2017 in Appln. Serial No. 87462239 TSDR 8, and First Office Action of August 24, 2017 in Appln. Serial No. 87462270 TSDR 9. Page references herein to the application records refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if applicable.

<sup>5</sup> First Office Action of August 24, 2017 in Appln. Serial No. 87462239 TSDR 15.

<sup>6</sup> *Id.* at TSDR 16.

The meanings of wine tasting descriptor terms from WIKIPEDIA –

- RICH: A sense of sweetness in the wine that is not excessive.<sup>7</sup>
- SPICY: A wine with aromas and flavors reminiscent of various **spices** such as black pepper and cinnamon. While this can be a characteristic of the grape varietal, many spicy notes are imparted from oak influences.<sup>8</sup>

Glossaries of wine terms –

From THE WINE CELLAR INSIDER website ...

- CREAMY: When [wine] has the **rich** texture of cream.<sup>9</sup>
- RICH: Wines that are **rich** display ample texture, body and flavor, along with a long finish.<sup>10</sup>
- SPICY: Wines often smell like different spices ranging from pepper, to cinnamon, to **5 spice** or cloves.<sup>11</sup>

From the CALIFORNIA WINE CLUB website ...

- RICH: Wines with generous, full, pleasant flavors, usually sweet and round in nature, are described as **rich**. In dry wines, **richness** may be supplied by high alcohol and glycerin, by complex flavors and by an oaky vanilla character. Decidedly sweet wines are also described as **rich** when the sweetness is backed up by fruity, ripe flavors.<sup>12</sup>
- SPICY: A descriptor for many wines, indicating the presence of **spice** flavors such as anise, cinnamon, cloves, mint and pepper which are often present in complex wines.<sup>13</sup>

---

<sup>7</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 27, and Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 28.

<sup>8</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 28.

<sup>9</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 34.

<sup>10</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 43, and Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 44.

<sup>11</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 45

<sup>12</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 52, and Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 53.

<sup>13</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 53.

From the WINE FOLLY website ...

- Full Bodied Red and White Wine Terms: list of terms including **rich**.<sup>14</sup>
- The Fruit Level: “It doesn’t matter if the wine is light, **rich**, sweet or dry, they can all be categorized by the fruit level.”<sup>15</sup>

From the WINE SPECTATOR website ...

- RICH: Describes wines with generous, full, pleasant flavors, usually sweet and round in nature. In dry wines, **richness** may be supplied by high alcohol and glycerin, by complex flavors and by an oaky vanilla character. Decidedly sweet wines are also described as **rich** when the sweetness is backed up by fruity, ripe flavors.<sup>16</sup>

From the HOPWOOD CELLARS WINERY website ...

- RICH: Wines that are high in extract, flavor, and intensity of fruit.<sup>17</sup>

News articles and blogs –

- FORBES online article title: “Châteauneuf-du-Pape: **Rich and Spicy** Wines with a Historical Heritage.”<sup>18</sup>
- From the website of SUNSET PUBLISHING discussing wine and food pairings: “Chardonnay: **Rich** and Complex White - With complex fruit flavors and often a **rich, creamy** texture; the most popular white wine in the U.S. to date.”<sup>19</sup>

---

<sup>14</sup> First Office Action of August 24, 2017 in Appln. Serial No. 87462270 TSDR 36.

<sup>15</sup> Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462239 TSDR 25, and Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462270 TSDR 19.

<sup>16</sup> *Id.* Appln. Serial No. 87462239 at TSDR 37, and *Id.* Appln. Serial No. 87462270 at TSDR 61.

<sup>17</sup> *Id.* Appln. Serial No. 87462239 at TSDR 48, and *Id.* Appln. Serial No. 87462270 at TSDR 56.

<sup>18</sup> First Office Action of August 24, 2017 TSDR 21, Final Office Action of March 8, 2018 TSDR 67, and Denial of Request for Reconsideration of October 9, 2018 TSDR 41 in Appln. Serial No. 87462270. It appears the Examining Attorney unnecessarily submitted the same article three times.

<sup>19</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 8-9; Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 9-10.

- From the website of HELLO VINO discussing wine-to-wine pairings: “What wine goes with **rich and creamy** white wines?”<sup>20</sup>
- From the VIBES OF THE VINES blog (The Music and Wine Pairings of Corey Evans): “**Rich and Spicy** wine” – paired with Led Zeppelin’s music album Houses of the Holy<sup>21</sup>
- MONTREAL GAZETTE online article title: “Bill Zacharkiw: Steak tartare deserves a **rich and spicy** white wine”<sup>22</sup>

Third party websites advertising wines (and some other alcoholic beverages) for sale:

- From the website of CUPCAKE VINEYARDS describing the attributes of their chardonnay: “We barrel ferment our Chardonnay to achieve a **rich, creamy** wine with flavors of apple, lemon, vanilla and a hint of toasted almond.”<sup>23</sup>
- From the website of HAPPY WINE USA describing the attributes of 2014 Kendall-Jackson Vintner's Reserve Chardonnay: “Style of Wine > White: **Rich & Creamy**”<sup>24</sup>
- From the website of SUTTER HOME Winery describing the attributes of their chardonnay: “Reach for our Chardonnay when you’re in the mood for a **rich and creamy** wine that delights with the fruity flair of pear, apple, and peach” and describing the attributes of their Gewurztraminer wine “Hard to pronounce yet easy to drink, this wine combines lychee fruit and white peach flavors with a hint of **spice**”<sup>25</sup>

---

<sup>20</sup> *Id.* Appln. Serial No. 87462239 at TSDR 20; *Id.* Appln. Serial No. 87462270 at TSDR 21.

<sup>21</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 62.

<sup>22</sup> *Id.* at TSDR 77.

<sup>23</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 6; Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 7.

<sup>24</sup> *Id.* Appln. Serial No. 87462239 at TSDR 13, and *Id.* Appln. Serial No. 87462270 at TSDR 14.

<sup>25</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 17; Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462239 TSDR 9; Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 18; Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462270 TSDR 9.

- From the website of THE SMALL WINE MAKERS COLLECTION describing the attributes of their chardonnay: “**Rich and Creamy** Italian Chardonnay - limited and in 6 packs!”<sup>26</sup>
- From the SNOOTH website describing several of its alcoholic beverage offerings: “Sandeman Fine **Rich** Madeira, Sandeman 20 Year Old Royal Corregidor **Rich** Old Oloroso Sherry (Wine Enthusiast Review **Rich** and Unctuous ...), **Rich** and Rare Canadian Whisky, Veuve Clicquot Rich Champagne (In the history of Champagne wines that were blended for greater sweetness were customarily described as ‘**rich**’), Sandeman Armada Sherry **Rich Cream** Oloroso ...”<sup>27</sup>
- From the website of TOTAL WINE describing the attributes of their chardonnay: “Scotto **Rich & Creamy** Chardonnay”<sup>28</sup>
- From the website of ELLIS WARTON WINES describing their offerings of chardonnay as “**Rich & Creamy**”<sup>29</sup>
- From the VIVINO website describing its red wine for sale: “Hardys Legacy **Rich & Spicy** Red”<sup>30</sup>
- From the VOYAGEURS DU VIN website describing its red wines for sale as “**Rich and Spicy** Red Wines”<sup>31</sup>
- From the DECANTER website describing its red wines for sale as “red wine, full-bodied, **rich and spicy**”<sup>32</sup>
- From the REVERSE WINE SNOB website describing its Trivento Reserve Malbec red wines for sale as “Your New **Rich, Spicy** and Smooth House Red”<sup>33</sup>

---

<sup>26</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462239 TSDR 22; Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 23.

<sup>27</sup> *Id.* Appln. Serial No. 87462239 at TSDR 57-59; *Id.* Appln. Serial No. 87462270 TSDR 58-60.

<sup>28</sup> Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462239 TSDR 5; Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462270 TSDR 5.

<sup>29</sup> Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462239 TSDR 11.

<sup>30</sup> First Office Action of August 24, 2017 in Appln. Serial No. 87462270 TSDR 26.

<sup>31</sup> Final Office Action of March 8, 2018 in Appln. Serial No. 87462270 TSDR 74.

<sup>32</sup> *Id.* Appln. Serial No. 87462270 at TSDR 81.

<sup>33</sup> Denial of Request for Reconsideration of October 9, 2018 in Appln. Serial No. 87462270 TSDR 29.

- From the BEVMAX website describing its Chateau Souverain Merlot 2016 wine for sale as “**Rich and spicy**, with exotic chocolate, black cherry, plum, nutmeg and light, toasty oak.”<sup>34</sup>

Since it is discussed in the Examining Attorney’s brief, we also note the following text from Applicant’s RICH & CREAMY back-of-bottle wine label submitted as a specimen of use:

These **rich**, bright fruit flavors and **creamy** oak spice accents are easy to enjoy and very supple on the palate. This enticing combination, along with the delicate citrus aromas and clean, satisfying finish might make you wish that every Chardonnay could be Rich & Creamy...<sup>35</sup>

Only the front-of-bottle RICH & SPICY wine label was submitted as a specimen of use for that trademark application.<sup>36</sup>

The Examining Attorney argues that: (1) Applicant’s bottle label bearing the RICH & CREAMY mark demonstrates Applicant’s own descriptive use of at least this proposed mark,<sup>37</sup> (2) Applicant’s advertising also makes descriptive use of the proposed RICH & CREAMY mark,<sup>38</sup> (3) Applicant already has disclaimed rights to the terms CREAMY and SPICY in each of the respective applications, and multiple examples have been made of record illustrating that the term RICH is routinely used to describe a quality or characteristic of wine, such as in glossaries of wine-related terms,<sup>39</sup> (4) multiple third party web sites use the terms RICH, RICH and CREAMY,

---

<sup>34</sup> *Id.* Appln. Serial No. 87462270 at TSDR 39.

<sup>35</sup> Appln. Serial No. 87462239 filed on May 24, 2017 TSDR 8.

<sup>36</sup> Appln. Serial No. 87462270 Amendment to Allege Use filed on March 4, 2019 TSDR 5.

<sup>37</sup> Examiner’s brief in Appln. Serial No. 87462239 14 TTABVUE 3.

<sup>38</sup> *Id.* at 14 TTABVUE 5-6.

<sup>39</sup> Examiner’s brief in Appln. Serial No. 87462239 14 TTABVUE 4-5; Examiner’s brief in Appln. Serial No. 87462270 17 TTABVUE 4-5.

or RICH and SPICY to describe the flavor profile of wines,<sup>40</sup> (5) while Applicant claims RICH & CREAMY and RICH & SPICY are each a double entendre, it has not provided the multiple meanings of RICH & CREAMY or RICH & SPICY, or provided any evidence that the expressions RICH & CREAMY or RICH & SPICY would be well recognized by the purchasing public as such,<sup>41</sup> (6) both the individual components (“Rich,” “Creamy,” “Spicy”) and the composite results (“Rich & Creamy” and “Rich & Spicy”) are merely descriptive of Applicant’s goods and each does not create a unique, incongruous, or non-descriptive meaning in relation thereto,<sup>42</sup> (7) the common and ordinary lettering with minimal stylization in the proposed RICH & CREAMY mark is not sufficiently striking, unique, or distinctive as to make an impression on purchasers separate from the wording,<sup>43</sup> (8) the third party “Rich ...” registrations Applicant made of record are distinguishable from the marks Applicant seeks to register, and in any event the Board is not bound by prior decisions to register marks involving different records,<sup>44</sup> and (9) allowing the proposed RICH & CREAMY or RICH & SPICY marks to register would unduly inhibit competition by allowing

---

<sup>40</sup> *Id.* Appln. Serial No. 87462239 at 14 TTABVUE 6-8; *Id.* Appln. Serial No. 87462270 at 17 TTABVUE 6-8.

<sup>41</sup> *Id.* Appln. Serial No. 87462239 at 14 TTABVUE 8; *Id.* Appln. Serial No. 87462270 at 17 TTABVUE 8.

<sup>42</sup> *Id.* Appln. Serial No. 87462239 at 14 TTABVUE 9; *Id.* Appln. Serial No. 87462270 17 TTABVUE 9-10.

<sup>43</sup> Examiner’s brief in Appln. Serial No. 87462239 14 TTABVUE 10.

<sup>44</sup> Examiner’s brief in Appln. Serial No. 87462239 14 TTABVUE 10-11; Examiner’s brief in Appln. Serial No. 87462270 17 TTABVUE 10-11.

Applicant to appropriate common descriptive terms used in the alcoholic beverage industry.<sup>45</sup>

## B. Applicant's Evidence and Arguments

Applicant submitted the following evidence to support its position that Applicant's marks are not merely descriptive:

Definitions from online dictionaries –

- RICH: highly seasoned, fatty, oily, or sweet, **rich** foods; high in some component, cholesterol-**rich** foods; examples when used in a sentence: a **rich and spicy** soup; the food was a little **too rich** for me. (MERRIAM-WEBSTER)<sup>46</sup>
- RICH: (of food) containing a large amount of fat, spices, sugar, etc. (example: dishes with wonderfully **rich** sauces; (of drink) full-bodied (example: a **rich** and hoppy best bitter) (OXFORD ENGLISH DICTIONARY)<sup>47</sup>
- RICH: **Rich** food contains a lot of fat or oil (example: additional cream would make it too **rich**); full of strength and flavor; full-bodied (example: **rich** coffee) (COLLINS ENGLISH DICTIONARY)<sup>48</sup>

Applicant's online advertising –

You'll taste it in every glass of our Rich & Creamy™ Chardonnay and Rich & Spicy™ Cabernet Sauvignon. Our Chardonnay is filled with bright fruit flavors, **creamy** vanilla oak accents and the softer, more elegant flavor profiles that come from malolactic fermentation. Rich & Spicy™ represents the next generation of Cabernet Sauvignon! The dark, deep ruby red color hints at the bourbon barrel aging that complements the dark cherry, black cherry, chocolate cake and vanilla bean **spice** flavors.<sup>49</sup>

---

<sup>45</sup> *Id.* Appln. Serial No. 87462239 at 14 TTABVUE 11; *Id.* Appln. Serial No. 87462270 at 17 TTABVUE 11.

<sup>46</sup> Request for Reconsideration of September 10, 2018 in Appln. Serial No. 87462239 TSDR 71; Request for Reconsideration of September 10, 2018 in Appln. Serial No. 87462270 TSDR 70.

<sup>47</sup> *Id.* Appln. Serial No. 87462239 at TSDR 75; *Id.* Appln. Serial No. 87462270 at TSDR 74.

<sup>48</sup> *Id.* Appln. Serial No. 87462239 at TSDR 75; *Id.* Appln. Serial No. 87462270 at TSDR 77.

<sup>49</sup> *Id.* Appln. Serial No. 87462239 at TSDR 83; *Id.* Appln. Serial No. 87462270 at TSDR 82.

Third party U.S. applications and registrations for marks that include the term “Rich” or its foreign language equivalent –

- Third party applications and registrations for the marks DIRTYRICH (for wine, Madrid registration), DO RICH YOURSELF (for wines and sparkling wines, Madrid registration), NOUVEAUX RICHE (for wines), RICCO (for wines), RICH BOTTLE (for alcoholic beverages except beers, wine, intent-to-use application), RICHBEERY (for alcoholic beverages except beers, wine, intent-to-use application), RICHE (for wine).<sup>50</sup>
- 170 third party applications and registrations<sup>51</sup> for which we note that not many of them are for alcoholic beverages, and almost none are for marks with the same structure or in the same cadence as Applicant’s marks (i.e., RICH & “Descriptive Term” (or equivalents to “&” such as “and” or “N”). Of these 170 third party references, Applicant calls out the following in its brief as representative:<sup>52</sup>
  - RICCO (Reg. No.: 4822286) for wines
  - RICHE (Reg. No.: 5119934) for wine
  - DO RICH YOURSELF (Reg. No.: 5288420) for wines protected by the appellation of origin “Champagne”; sparkling wines
  - DIRTYRICH (Reg. No.: 4924880) for wines protected by the appellation of origin “Champagne”; sparkling wines
  - RICH BANANA CHIPS (and Design) (Reg. No.: 5180894) for dried fruits
  - RICH DRIED GREEN MANGO (and Design) (Reg. No.: 5180893) for dried fruits
  - RICH DRIED MANGO (and Design) (Reg. No.: 5180892) for dried fruits
  - RICH DRIED PINEAPPLE (and Design) (Reg. No.: 5180895) for, dried fruits
  - RICH ‘N EASY (Reg. No.: 2733412) for dessert mixes
  - THICK N RICH (Reg. No.: 4323151) for table syrup

---

<sup>50</sup> Response to First Office Action of February 26, 2018 in Appln. Serial No. 87462239 TSDR 10-22; Response to First Office Action of February 26, 2018 in Appln. Serial No. 87462270 TSDR 10-22.

<sup>51</sup> Request for Reconsideration of September 10, 2018 in Appln. Serial No. 87462239 TSDR 87-696; Request for Reconsideration of September 10, 2018 in Appln. Serial No. 87462270 TSDR 86-695.

<sup>52</sup> Applicant’s brief in Appln. Serial No. 87462239 12 TTABVUE 18-19; Applicant’s brief in Appln. Serial No. 87462270 TSDR 16-17.

Serial Nos. 87462239 and 87462270

- RICO FRESH (Reg. No.: 4973933) for fresh fruits and fresh vegetables
- TASTY RICH (Reg. No.: 3239333) for barbecue sauce; salsa
- NOUVEAUX RICHE (Reg. No.: 2005946) for wines
- RICH BOTTLE (Appln. Ser. No.: 87430584) alcoholic beverages except beers; wine
- RICHBERRY (Appln. No. Ser.: 87430513) for alcoholic beverages except beers; wine
- SIMPLE RICH REAL (Reg. No.: 4984593) for food products, namely, pasta sauce, pesto and pizza sauce
- RICHWHIP (Reg. No.: 865842) for, essentially, a whipped cream substance

Applicant argues that: (1) the marks RICH & CREAMY and RICH & SPICY are suggestive, not merely descriptive, because the marks do not immediately and directly convey the characteristics of Applicant's products with a degree of particularity, but rather a multi-stage reasoning process is necessary to determine the attributes of Applicant's products,<sup>53</sup> (2) the term RICH in each mark is too vague and nebulous to be merely descriptive of Applicant's goods,<sup>54</sup> (3) the term RICH in each mark creates a double entendre connotation for Applicant's goods,<sup>55</sup> (4) even assuming that the individual terms RICH and CREAMY, or RICH and SPICY, are both descriptive of Applicant's goods in each mark, the resulting composites RICH &

---

<sup>53</sup> Applicant's brief in Appln. Serial No. 87462239 12 TTABVUE 4-8; Applicant's reply brief in Appln. Serial No. 87462239, 15 TTABVUE 6-7; Applicant's brief in Appln. Serial No. 87462270 15 TTABVUE 4-8.

<sup>54</sup> Applicant's brief in Appln. Serial No. 87462239 12 TTABVUE 8-14; Applicant's reply brief in Appln. Serial No. 87462239, 15 TTABVUE 5-7, 8-9; Applicant's brief in Appln. Serial No. 87462270 15 TTABVUE 8-14; Applicant's reply brief in Appln. Serial No. 87462270, 18 TTABVUE 3-6, 8.

<sup>55</sup> Applicant's brief in Appln. Serial No. 87462239 12 TTABVUE 14-15; Applicant's brief in Appln. Serial No. 87462270 15 TTABVUE 14.

Serial Nos. 87462239 and 87462270

CREAMY and RICH & SPICY in their entirety are suggestive,<sup>56</sup> (5) the stylization of Applicant's RICH & CREAMY mark is a recognizable and distinctive design feature in its own right, regardless of any literal meaning of the word portion of the mark,<sup>57</sup> (6) the third party "Rich ..." applications and registrations Applicant made of record are evidence that RICH is not merely descriptive of Applicant's goods,<sup>58</sup> (7) any doubt as to whether Applicant's RICH & CREAMY and RICH & SPICY marks are suggestive or merely descriptive should be resolved in Applicant's favor by finding the proposed marks to be suggestive,<sup>59</sup> (8) Applicant disputes the Examining Attorney's contention that Applicant uses RICH descriptively in its advertising, but rather in a non-descriptive metaphorical manner.<sup>60</sup>

#### **IV. Discussion and Analysis**

In determining whether the Examining Attorney properly refused registration of the proposed RICH & CREAMY and RICH & SPICY marks on mere descriptiveness grounds, we begin by considering the significance of each element of each proposed

---

<sup>56</sup> *Id.* Appln. Serial No. 87462239 at 12 TTABVUE 15-16; *Id.* Appln. Serial No. 87462270 at 15 TTABVUE 15-16.

<sup>57</sup> Applicant's brief in Appln. Serial No. 87462239 12 TTABVUE 16-17.

<sup>58</sup> Applicant's brief in Appln. Serial No. 87462239 12 TTABVUE 17-20; Applicant's reply brief in Appln. Serial No. 87462239, 15 TTABVUE 8; Applicant's brief in Appln. Serial No. 87462270 15 TTABVUE 16-20; Applicant's reply brief in Appln. Serial No. 87462270, 18 TTABVUE 7.

<sup>59</sup> Applicant's brief in Appln. Serial No. 87462239 12 TTABVUE 21-22; Applicant's reply brief in Appln. Serial No. 87462239, 15 TTABVUE 7; Applicant's brief in Appln. Serial No. 87462270 15 TTABVUE 20-21; Applicant's reply brief in Appln. Serial No. 87462270, 18 TTABVUE 2, 4, 7.

<sup>60</sup> Applicant's reply brief in Appln. Serial No. 87462239, 15 TTABVUE 3-4.

Serial Nos. 87462239 and 87462270

mark separately in the course of evaluating the marks as a whole. *See DuoProSS Meditech*, 103 USPQ2d at 1756-57.

“Merely descriptive terms are unregistrable under Trademark Act Section 2(e)(1) and, therefore, are subject to disclaimer if the mark is otherwise registrable.” *In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012). “[T]he disclaimer is appropriate to indicate that [the applicant] ... claims no proprietary right in the disclaimed words.” *Am. Speech-Language-Hearing Ass’n v. Nat’l Hearing Aid Soc’y*, 224 USPQ 798, 808 (TTAB 1984). This is what happened here with respect to Applicant’s disclaimer of “CREAMY” and “SPICY” in each application, with Applicant conceding that – consistent with the definitions and third-party uses of these terms discussed above – each disclaimed term is merely descriptive.<sup>61</sup>

This brings us to our consideration of the term “RICH,” which comprises the primary point of disagreement between the Examining Attorney and Applicant. As noted, the Examining Attorney argues that RICH is routinely used to describe a quality or characteristic of wine, such as in glossaries of wine-related terms – and multiple third party web sites use the terms RICH, RICH and CREAMY, or RICH and SPICY to describe the flavor profile of wines. Applicant argues that RICH is too vague and nebulous to be merely descriptive of Applicant’s goods: “alcoholic

---

<sup>61</sup> Applicant’s reply brief in Appln. Serial No. 87462239, 15 TTABVUE 7; Applicant’s reply brief in Appln. Serial No. 87462270, 18 TTABVUE 6-7. 6-7. *See* Trademark Act Section 6(a), 15 U.S.C. § 1056(a) regarding use of disclaimers of descriptive terms in otherwise registrable marks.

Serial Nos. 87462239 and 87462270

beverages, except beer”. Based upon Applicant’s specimens of use, however, it is clear that Applicant’s goods are wine products.

It is true, as Applicant asserts, that there are many different definitions of the term “RICH.” However, the majority of these definitions are outside the alcoholic beverage context. Descriptiveness is determined in relation to Applicant’s identified goods, alcoholic beverages except beer; that RICH has different meanings in different contexts is not controlling. *In re Bright-Crest*, 204 USPQ at 593. In the context of wine tasting profiles, therefore, the following definition provided by the Examining Attorney from the WINE SPECTATOR website is most apt:

RICH: Describes wines with generous, full, pleasant flavors, usually sweet and round in nature. In dry wines, **richness** may be supplied by high alcohol and glycerin, by complex flavors and by an oaky vanilla character. Decidedly sweet wines are also described as **rich** when the sweetness is backed up by fruity, ripe flavors.

This definition is consistent with the other meanings and uses of “RICH” provided by Applicant and the Examining Attorney, including the news articles, blogs, third party wine websites made of record, Applicant’s RICH & CREAMY bottle label, and Applicant’s advertising copy for both the proposed RICH & CREAMY and RICH & SPICY marks making descriptive use of the term. We therefore find that “RICH” in each mark is not so vague or nebulous in connection with alcoholic beverages as to be suggestive.

Applicant also contends that the term RICH in each mark creates a double entendre connotation for Applicant’s goods – with the alternative meaning being

Serial Nos. 87462239 and 87462270

“suggestive of wealth.”<sup>62</sup> As already noted, the Examining Attorney counters that Applicant has not provided the multiple meanings “of the proposed marks” (as a whole) to constitute double entendres or supplied any evidence that the expressions comprising the marks would be well recognized by the public as such.

“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.**” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 1213.05(c) (October 2018) (emphasis original).

A true double entendre is unitary by definition. An expression that is a double entendre should not be broken up for purposes of requiring a disclaimer. *See In re Kraft, Inc.*, 218 USPQ 571 (TTAB 1983), where the Board found inappropriate a requirement for a disclaimer of “LIGHT” apart from the mark “LIGHT N’ LIVELY” for reduced calorie mayonnaise, stating as follows:

The mark “LIGHT N’ LIVELY” as a whole has a suggestive significance which is distinctly different from the merely descriptive significance of the term “LIGHT” per se. That is, the merely descriptive significance of the term “LIGHT” is lost in the mark as a whole. Moreover, the expression as a whole has an alliterative lilting cadence which encourages persons encountering it to perceive it as a whole.

*In re Kraft*, 218 USPQ at 573.

---

<sup>62</sup> Applicant’s brief in Appln. Serial No. 87462239 12 TTABVUE 14; Applicant’s brief in Appln. Serial No. 87462270 15 TTABVUE 14.

Moreover, the multiple interpretations that make an expression a double entendre must be associations that the public would make fairly readily, and must be readily apparent from the mark itself. See *In re RiseSmart*, 104 USPQ2d at 1934 (finding that TALENT ASSURANCE does not present a double entendre such that “the merely descriptive significance of the term [TALENT] is lost in the mark as a whole”).

Here, the term RICH has not lost its merely descriptive significance from the proposed marks RICH & CREAMY or RICH & SPICY as a whole. Applicant’s own usage on the RICH & CREAMY bottle label and the advertising copy for the products bearing the RICH & CREAMY and RICH & SPICY marks confirms this. Also, neither expression as a whole has an alliterative lilting cadence encouraging persons encountering the proposed marks to perceive either one as a whole (as in the *In re Kraft* case). Moreover, Applicant’s consent to a disclaimer of “CREAMY” and “SPICY” in each mark is the antithesis of considering either mark to be one unitary double entendre. Rather, the marks as a whole convey the commercial impressions of taste profiles as applied to Applicant’s goods. Therefore, we find neither the term “RICH” alone nor the expressions RICH & CREAMY or RICH & SPICY as a whole to be a double entendre.

The third party “RICH ...” applications and registrations Applicant made of record also do not persuade us that “RICH ...,” as a formative of each proposed mark, is suggestive. To begin, “pending applications are evidence only that they were filed on a certain date ... not evidence of use of the marks.” *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *Interpayment Servs. Ltd. v. Doctors &*

Serial Nos. 87462239 and 87462270

*Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003) (“third-party applications ... have no other probative value”). “Third-party registrations are not conclusive on the question of descriptiveness ... [e]ach case must stand on its own merits.” *In re theDot Commc’ns Network LLC*, 101 USPQ2d 1062, 1067 (TTAB 2011) (citing *In re Nett Designs*, 57 USPQ2d at 1566 and *In re Scholastic Testing Serv., Inc.*, 196 USPQ 517, 519 (TTAB 1977)).

“While we recognize that ‘consistency is highly desirable,’ ... consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules.” *In re Am. Furniture Warehouse CO*, 126 USPQ2d 1400, 1407 (TTAB 2018) (quoting *In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007)).

We thus “must assess each mark on its own facts and record,” *id.*, and “a mark that is merely descriptive should not be registered on the Principal Register simply because other such marks appear on the register.” *theDot Commc’ns Network*, 101 USPQ2d at 1067. “Neither the Board nor any Trademark Examining Attorney is bound by decisions of Examining Attorneys to register prior marks.” *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017).

What particularly makes the third party “RICH ...” applications and registrations Applicant made of record unpersuasive is that the vast majority of them were not for alcoholic beverages, and only very few of them were for marks having a similar

Serial Nos. 87462239 and 87462270

structure and cadence as Applicant's proposed marks (that is, "RICH AND [Descriptive Term]," "RICH & [Descriptive Term]" or "RICH 'N [Descriptive Term]").

We also disagree with Applicant's argument that the stylization of Applicant's RICH & CREAMY mark is a recognizable and distinctive design feature in its own right, regardless of any literal meaning of the word portion of the mark. Stylized descriptive or generic wording is registrable only if the stylization creates a commercial impression separate and apart from the impression made by the wording itself. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1639-40 (Fed. Cir. 2016); *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 964 (Fed. Cir. 1985). Common and ordinary lettering with minimal stylization, as shown on the drawing page for the RICH & CREAMY application, does not create such a separate and inherently distinctive commercial impression apart from the words themselves so as to convert a merely descriptive mark into one that is registrable. *See In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1489 (TTAB 2012).

Two major reasons for not protecting descriptive marks are: (1) to prevent the owner of a descriptive mark from inhibiting competition in the marketplace, and (2) to avoid the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). Applicant's competitors should be free to use descriptive language when describing their own alcoholic beverage products to the public in advertising and marketing materials. *See In re Styleclick.com Inc.*, 58 USPQ2d 1523, 1527 (TTAB 2001).

This brings us, finally, to considering the proposed marks, RICH & CREAMY and RICH & SPICY, as a whole – both of which comprise a combination of merely descriptive components. We find that neither combination of terms creates a unitary mark with a unique, suggestive, bizarre, incongruous or otherwise non-descriptive meaning as applied to Applicant’s goods. *In re Colonial Stores*, 157 USPQ at 384; *In re Shutts*, 217 USPQ at 364-65. Rather, each component of each mark retains its merely descriptive significance in relation to Applicant’s goods, with the combinations resulting in composites that are themselves merely descriptive. *In re Oppedahl & Larson*, 71 USPQ2d at 1374; *In re Phoseon Tech.*, 103 USPQ2d at 1823.

While the Board resolves doubts as to the mere descriptiveness of a proposed mark in favor of the applicant, *In re Fat Boys*, 118 USPQ2d at 1512, here we have no doubt. We find that each of Applicant’s proposed marks as a whole is merely descriptive of Applicant’s goods.

## **V. Decision**

We affirm the refusal to register Applicant’s proposed RICH & CREAMY and RICH & SPICY marks on the Principal Register under Trademark Act Section 2(e)(1) on the ground that the designations, in their entirety, are merely descriptive of Applicant’s goods. In light of this affirmance, we grant Applicant’s request, in the alternative, to amend its applications to seek registration of its proposed marks on

Serial Nos. 87462239 and 87462270

the Supplemental Register with the disclaimers of “CREAMY” and “SPICY,” respectively.<sup>63</sup>

Accordingly, Applicant’s RICH & CREAMY application (Serial No. 87462239) is hereby amended pursuant to Applicant’s alternative request and will proceed to issuance of a registration on the Supplemental Register with a disclaimer of the term CREAMY apart from the mark as shown. Applicant’s RICH & SPICY application (Serial No. 87462270) is hereby amended pursuant to Applicant’s alternative request and will proceed to issuance of a registration on the Supplemental Register with a disclaimer of the term SPICY apart from the mark as shown.

---

<sup>63</sup> Regarding disclaimers of unregistrable components in applications to register marks on the Supplemental Register, as stated in *In re Water Gremlin Co.*, 635 F.2d 841, 208 USPQ 89, 91 n.6 (CCPA 1980) (citing *In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7 (CCPA 1977)), “Section 6 is equally applicable to the Supplemental Register.” See *Wella*, 196 USPQ at 7 (finding mark comprising stylized lettering of BALSAM, with disclaimer of “BALSAM,” registrable on Supplemental Register for hair conditioner and hair shampoo); *In re Carolyn’s Candies, Inc.*, 206 USPQ 356, 360 (TTAB 1980) (“Section 6 of the Trademark Act of 1946, which provides for the disclaimer of ‘unregistrable matter’, does not limit the disclaimer practice to marks upon the Principal Register.”).