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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Friendly Fruit, Inc.**

Serial No. 75/029,843

Michael Greenbaum and Lisa N. Kaufman of Blank Rome Comisky & McCauley LLP for **Friendly Fruit, Inc.**

Raul Cordova, Trademark Examining Attorney, Law Office 114 (**Margaret Le**, Managing Attorney).

Before **Simms**, **Hanak** and **Hairston**, Administrative Trademark Judges.

Opinion by **Hairston**, Administrative Trademark Judge:

Friendly Fruit, Inc. has appealed the final refusal of the Trademark Examining Attorney to register THE GOURMET OUTLET on the Supplemental Register for "retail food store services and distribution services for food."¹ Registration has been refused pursuant to Section 23 of the Trademark Act on the ground that the term applicant seeks to register

¹ Serial No. 75/029,843 filed on December 6, 1995, and asserting first use and first use in commerce on December 6, 1995. Applicant has disclaimed the word "Outlet" apart from the mark.

is incapable of distinguishing applicant's services from those of others. In particular, the Examining Attorney contends that THE GOURMET OUTLET is simply a generic name for retail food store services.

Applicant and the Examining Attorney have filed appeal briefs. An oral hearing was not requested.

Section 23 of the Trademark Act provides that a mark is registrable on the Supplemental Register if it is capable of distinguishing applicant's goods or services. Thus, the issue on appeal is whether THE GOURMET OUTLET is capable of distinguishing applicant's retail food store services.

The Examining Attorney maintains that the term "gourmet outlet" is the generic name for food specialty stores, that the word "the" has no source indicating function, and thus THE GOURMET OUTLET is incapable of distinguishing applicant's services. In support of his position, the Examining Attorney made of record an excerpt from Random House Word Menu (1992) wherein "gourmet" is defined as "food for connoisseur with sophisticated tastes."

The Examining Attorney has also made of record the results of his search of the NEXIS data base for references to "gourmet outlet." The search retrieved ninety-nine

excerpts of articles dated April 1982 through April 1999. We note that twenty of the excerpts are not particularly probative of the public's understanding of the term inasmuch as they from wire services or foreign publications. Also, we should point out that thirteen of the excerpts are references to applicant's retail food store services. The following are representative samples of the excerpts:

There is even innovation: Safeway has a growing number of successful discount Liquor Barns and an experiment with pricey ***gourmet outlets***.
(Forbes, April 12, 1982);

"Customers are concerned we are closing the store, but we have got to make a good business decision," McDermott said. In its announcement, Publix did not set a date for the ***gourmet outlet's*** last day of business.
(Orlando Sentinel Tribune, January 11, 1991);

You don't have to send away in mail order for dried cherries; you can get them here at Williams-Sonoma in Tampa. Yes, and at other fancy ***gourmet outlets*** . . .
(St. Petersburg Times, February 18, 1993);

While Unique Cuisine is no longer accepting holiday orders, Bouanchaud notes that her small, to-go ***gourmet outlet***, Margo's, located in Goodwill Village, sells hand-painted cookies . . .
(The Advocate, December 15, 1994);

Sold mostly through natural food stores and ***gourmet outlets***, the teas are made from spring water . . .

(Beverage Industry, September 1, 1998);

Wainer is primarily a wholesale distributor acting as middleman between food growers and chefs. But about three years ago, he opened part of his warehouse as the ***Gourmet Outlet***, a retail food store, where regular people "can shop where the chefs shop."

(The Providence Journal Bulletin, February 18, 1998); and

As a safe alternative, you can buy exotic mushrooms. Supermarkets, such as Bread & Circus, stock some varieties. ***The Gourmet Outlet*** at Sid Wainer & Son Specialty Produce in New Bedford, (800) 423-8333, sells fresh wild mushrooms to restaurants and the general public.

(The Providence Journal Bulletin, October 15, 1997).

Applicant, in urging reversal of the refusal to register, argues that THE GOURMET OUTLET is incongruous because the primary meaning of "gourmet" is "a connoisseur in eating and drinking" (Webster's Third New International Dictionary). According to applicant, if it were seeking to register THE GOURMET FOOD OUTLET, the refusal to register would be appropriate, but in the absence of the word "FOOD", THE GOURMET OUTLET makes no sense as used in connection with applicant's services.

Citing *In re American Fertility Society*, 51 USPQ2d 1832, 1834 (Fed. Cir. 1999), applicant argues that the Examining Attorney has not shown that the whole phrase THE

GOURMET OUTLET is generic. Applicant contends that the Examining Attorney has improperly dissected the mark into THE and GOURMET OUTLET in an attempt to find that the entire mark is generic. According to applicant, the public recognizes the distinction between the descriptive words "gourmet outlet" and applicant's retail store services THE GOURMET OUTLET.

Also, applicant argues that the NEXIS excerpts submitted by the Examining Attorney which refer to applicant's THE GOURMET OUTLET retail food store services demonstrate that the public associates THE GOURMET OUTLET with applicant.

In this case, we are not persuaded by the evidence submitted by the Examining Attorney that THE GOURMET OUTLET is generic for retail food store services. While THE GOURMET OUTLET is certainly descriptive of applicant's services, it nonetheless leaves something to the imagination. This is not a case where the term "outlet" is modified by a specific generic designation, such as wine outlet or jeans outlet. As to the NEXIS excerpts, there are only about seventy stories which refer to "gourmet outlet(s)" over a seventeen-year period. This is a small number for such a long period. Also, in a number of the stories, "gourmet outlet" appears to be used in a

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descriptive, rather than generic manner. In short, the evidence of record falls short of establishing that "gourmet outlet," and thus THE GOURMET OUTLET is the generic name for a type of retail food store services.

Decision: The refusal to register is reversed.

R. L. Simms

E. W. Hanak

P. T. Hairston
Administrative Trademark Judges
Trademark Trial and Appeal Board

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