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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Seelect, Inc.

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Serial Nos. 76671619 and 76671623

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Thomas I. Rozsa of Rozsa Law Group for Seelect, Inc.

Scott K. Bibb, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

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Before Seeherman, Quinn and Walsh, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Seelect, Inc. filed applications to register the marks SEELECT TEA ("TEA" disclaimed) and SEELECT TEA & NUTRITION ("TEA" and "NUTRITION" disclaimed) for "dietary and nutritional supplements; herb teas for medicinal purposes" (in International Class 5); and "herb teas" (in International Class 30).[1] Applicant claims ownership of

[1] Application Serial Nos. 76671623 and 76671619, respectively, both filed on January 22, 2007, based on a bona fide intent to use the mark in commerce. Applicant subsequently filed a statement of use in each application. With respect to the mark SEELECT TEA, applicant claims first use anywhere and first use in commerce in both classes on January 2, 1935. With respect to the

Registration No. 3057028 of the mark  for "dietary nutritional supplements and medicated herb teas" (in International Class 5) and "herb teas for beverage use" (in International Class 30).

The trademark examining attorney refused registration under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052 and 1127, on the ground that the applied-for marks, as used on the specimen of record, do not function as trademarks to identify and distinguish applicant's goods from those of others, and to indicate the source of applicant's goods.

When the refusal was made final in each application, applicant appealed. Applicant and the examining attorney filed briefs.

Because the appeals involve common issues of law and fact, and the evidentiary records are identical, we will decide the appeals in this single opinion.

Applicant originally filed a printer's proof of packaging for the goods as a specimen. When the examining attorney declined to accept the proof as a specimen, applicant filed the identical substitute specimen in each

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mark SEELECT TEA & NUTRITION, applicant claims first use anywhere and first use in commerce in both classes on January 2, 2000.

application. The proffered specimen, according to applicant, "consists of the front and back of the packaging in which the goods are sold. Please note that the mark appears above the bar code." (1/21/09 response to Office action). The specimen is reproduced below.


The examining attorney maintains that the use of the marks sought to be registered, as shown above on the

packaging in the form "SEELECT TEA™ and SEELECT TEA & NUTRITION™ are trademarks of SEELECT, Inc.," is merely informational in nature. As such, the applied-for marks SEELECT TEA and SEELECT TEA & NUTRITION do not function as trademarks for applicant's goods. The examining attorney points out that not every word used in the sale of an applicant's goods functions as a trademark, and that the use of "™" by applicant merely shows the intent to claim a trademark, but does not show that the term is actually perceived as a source indicator. The examining attorney also makes the following points with respect to each of the involved marks:

> The applicant's mark does not appear on the front of the package. Nor does the applicant's proposed mark appear on the top, or the sides of the packaging. The applicant's proposed mark appears at the bottom of the packaging in a small font underneath the applicant's URL. Additionally, the URL is also in a larger font than applicant's mark. The average consumer would perceive the applicant's mark to be the stylized "SEELECT" mark. The informational statement does not necessarily even accord [with] applicant's intent to trademark the name for the particular goods at issue here. Since the proposed mark does not appear elsewhere on the packaging for the identified tea products, it is likely that this informational statement could be perceived as the applicant's general assertion of rights in a trademark for other products. The bottom portion of

> the specimen of use, argued by the applicant to be acceptable trademark usage, merely serves to inform the purchasing public of the applicant's intent to trademark the words and/or phrases, and does not function as a trademark, or as an indicator of source. (Brief, p. 4).

Applicant contends that it has complied with the statutory requirement that the trademark be used on the goods by placing the mark "in any manner on the goods or their containers." Applicant asserts that the trademarks are clearly on the packaging in which the goods are sold, and that SEELECT TEA and SEELECT TEA & NUTRITION are clearly designated as trademarks of applicant and are accompanied by a statement to that effect. In applicant's words, "How can it be more clear that this is intended as a source identifier for the Appellant? What more can the Appellant do?" (Reply Brief, pp. 2-3).

Section 45 of the Trademark Act defines "use in commerce" as "the bona fide use of a mark in the ordinary course of trade, and not merely to reserve a right in a mark." For purposes of the Trademark Act, a mark is deemed to be in use in commerce "on goods when it is placed in any manner on the goods or their containers." "[A] showing of the trademark on the normal commercial package for the

particular goods is an acceptable specimen." TMEP §904.03(c) (6th ed. 2009).

There is no question that the marks sought to be registered are "placed in any manner on the goods or their containers." It is the examining attorney's position, however, that the manner of placement on the packaging is not likely to result in a consumer's perception that SEELECT TEA and SEELECT TEA & NUTRITION are functioning as trademarks for applicant's tea. As the examining attorney points out, not everything that a party adopts and uses with the intent that it function as a trademark necessarily achieves this goal. *See In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227 (CCPA 1960). Further, use of the "™" designation on a product or packaging does not make unregistrable matter into a trademark. *See In re Remington Products Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987

At the outset, we readily acknowledge that this is a close case. However, after reviewing the specimen as a whole, we find that applicant's use of SEELECT TEA and SEELECT TEA & NUTRITION, as shown on applicant's packaging, is minimally technically sufficient to establish that they function as trademarks. Given the prominent use of SEELECT on the packaging for applicant's tea, and the fact that the word "tea" is used in both applied-for marks, consumers are

likely to perceive SEELECT TEA and SEELECT TEA & NUTRITION appearing elsewhere on the same packaging as trademarks for applicant's tea. There is no question that SEELECT is the distinctive portion of these marks; in point of fact, as indicated above, applicant claims ownership of a registration of the mark SEELECT and design for tea, and applicant, in the two involved marks, merely has added the generic term "TEA" and the descriptive term "NUTRITION" to SEELECT.

The entire phrase "SEELECT TEA™ and SEELECT TEA & NUTRITION™ are trademarks of SEELECT, Inc.," is not the mark sought to be registered. Rather, SEELECT TEA and SEELECT TEA & NUTRITION are the marks shown in the drawings. In any event, while the entire phrase may be informational in nature, the point of this "information" is that SEELECT TEA and SEELECT TEA & NUTRITION are trademarks of applicant. To assert that "this informational statement could be perceived as the applicant's general assertion of rights in a trademark for *other products*," (emphasis added) as the examining attorney does, is far too speculative and, more importantly, ignores the reality of applicant's use. As observed above, applicant uses SEELECT in a prominent manner on the same packaging for its tea, and the word "tea" is included in both of the applied-for marks. Thus,

it would be reasonable for consumers to perceive SEELECT TEA and SEELECT TEA & NUTRITION as trademarks for applicant's tea, and not "other products."

We also appreciate the examining attorney's other criticisms leveled at applicant's use, namely that the marks appear on the bottom of the packaging, and in small type font. We agree with the examining attorney to the extent that placing a mark on the bottom of packaging, and displaying it in smaller font than, for example, the URL for applicant's website, is not an ideal way to indicate the source of the goods to consumers, and that in other circumstances might not constitute trademark use if we were to find that consumers would not notice the mark. However, in the particular fact situation in this case, which includes applicant's prominent use of the registered mark SEELECT on the same packaging, we find that SEELECT TEA and SEELECT TEA & NUTRITION function as trademarks.

Lastly, the fact that applicant's previously registered mark is more prominently displayed on the packaging does not negate the source-indicating function of the other two marks sought to be registered herein. To the contrary, the prominent use of the registered SEELECT mark on the packaging for applicant's tea buttresses our view that consumers will be likely to view SEELECT TEA and

SEELECT TEA & NUTRITION appearing on the same packaging as source indicators for applicant's tea. *See In re Safariland Hunting Corp.*, 24 USPQ2d 1380 (TTAB 1992). It hardly need be stated that packaging for goods may (and often does) display more than one trademark.

We conclude that SEELECT TEA and SEELECT TEA & NUTRITION, as used on applicant's packaging for tea, function as trademarks and will be recognized as source indicators for applicant's tea.

**Decision:** The refusals to register are reversed.