

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: May 9, 2013

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Zico Beverage LLC

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Serial No. 85284093

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Bruce A. McDonald of Buchanan Ingersoll & Rooney PC for  
Zico Beverage LLC.

Shaila E. Lewis, Trademark Examining Attorney, Law Office  
114 (K. Margaret Le, Managing Attorney).

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Before Holtzman, Cataldo and Gorowitz,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Zico Beverage LLC, has filed an application  
to register as a trademark on the Principal Register the  
standard character mark NATURALLY POWERED for "all-natural  
coconut-based beverages" International Class 32.<sup>1</sup>

The examining attorney refused registration pursuant  
to Section 6(a) of the Trademark Act, 15 U.S.C. §1056(a),

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<sup>1</sup> Application Serial No. 85284093 was filed on April 1, 2011,  
based on an allegation of a bona fide intent to use the mark in  
commerce under Trademark Act Section 1(b), 15 U.S.C. §1051(b).

based on applicant's failure to comply with the requirement to disclaim the descriptive word NATURALLY on the ground that it is merely descriptive of applicant's goods within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1).

We reverse the refusal of registration.

An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a). Merely descriptive terms are unregistrable, under Trademark Act Section 2(e)(1) and, therefore, are subject to disclaimer if the mark is otherwise registrable. 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); and *In re National Presto Industries, Inc.*, 197 USPQ 188 (TTAB 1977).

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor*

*Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

The examining attorney argues that

the word "NATURALLY," as used in applicant's mark, conveys to consumers that applicant's coconut-based beverages are of a superior quality and engender greater health benefits in users than other beverages because they do not contain synthetics, chemicals, preservatives, artificial ingredients, and other non-natural substances.<sup>2</sup>

In support of the refusal, the examining attorney made of record, *inter alia*, the following dictionary definitions for the word NATURALLY: "in a natural or normal manner;"<sup>3</sup> and "without special intervention, in a natural manner"<sup>4</sup>

Applicant argues that the term NATURALLY "does not convey a description of foods or ingredients. Unlike the word "organic," the appearance of the word "natural" on beverage food labels is unregulated by the Food and Drug

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<sup>2</sup> Examining attorney's brief, p. 6.

<sup>3</sup> Dictionary.com, retrieved from The Random House Dictionary (2013).

<sup>4</sup> Oxforddictionaries.com.

Administration precisely because it does not convey such a description.”<sup>5</sup> According to applicant’s evidence of record,

The term ‘natural’ is not regulated except for meat and poultry. It applies broadly to foods that are minimally processed and free of synthetic preservatives, artificial sweeteners, colors, flavors and other artificial additives, hydrogenated oils, stabilizers, and emulsifiers. Most foods labeled natural are not subject to government controls beyond the regulations and health codes that apply to all foods.<sup>6</sup>

The term ‘natural’ adds a premium to food products and makes them appear fresher, minimally processed, and safer. But consumers and the food industry will have to wait to know exactly what natural does - or does not - mean. ... Despite the term’s widespread use, the U.S. Food and Drug Administration (FDA) discourages the food industry from using ‘natural’ on labels because of its ambiguity. ‘Natural may unjustly imply that a food is of superior quality or safety compared to other similar foods,’ says the FDA’s Ritu Naluboia.<sup>7</sup>

We observe, however, that the question of whether the FDA presently regulates the term “natural” on food and beverage products is not dispositive of the issue before us.

In addition, applicant contends that its NATURALLY POWERED mark “is a unitary expression resulting in a commercial impression separate and apart from any otherwise

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<sup>5</sup> Applicant’s brief, p. 3 (emphasis in original).

<sup>6</sup> Natural and Organic Foods, Food Marketing Institute (June 2007).

<sup>7</sup> Is There a Definition for Natural Foods?, Institute of Food Technologies (2012).

descriptive property of the word NATURALLY."<sup>8</sup> Applicant further contends that "the juxtaposition of the two words NATURALLY POWERED results in a double entendre and/or fanciful property that is characteristic of a 'unitary mark,'"<sup>9</sup> registrable without a disclaimer. We find these arguments to have merit.

A unitary mark is a mark with multiple elements that creates a single and distinct commercial impression separate and apart from the meaning of its constituent elements. See *Dena Corp. v. Belvedere Int'l Inc.*, 950 F.2d 1555, 1561, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). See also *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983). A unitary mark could be created "where the words which have been put together function as a unit, with each relating to the other rather than directly to the goods." *Id.* See also *In re EBS Data Processing, Inc.*, 212 USPQ 964, 966 (TTAB 1981).

In this case, the term NATURALLY in applicant's NATURALLY POWERED mark clearly modifies the term POWERED to create a unitary phrase that only suggests a feature of applicant's goods. We note that the examining attorney's evidence does not clearly establish that the term NATURALLY

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<sup>8</sup> Applicant's brief, p. 7.

<sup>9</sup> *Id.* at 6.

clearly and immediately describes a characteristic of food or beverage products containing all-natural ingredients. Thus, we find that the term NATURALLY, in the context of applicant's unitary NATURALLY POWERED mark, does not appear to immediately describe a feature or characteristic of applicant's goods, notwithstanding that they are identified as "all-natural coconut-based beverages." Rather, the term NATURALLY only suggests that the goods identified thereby are "powered by nature" or "powered by natural forces."

We similarly are persuaded that applicant's NATURALLY POWERED mark is a double entendre. As discussed above, NATURALLY is defined as "without special intervention, in a natural manner." Based upon this definition, NATURALLY POWERED connotes, on the one hand, goods that are powered by forces of nature and, on the other, goods that are powered in a natural manner, without special intervention. The latter in particular presents a double entendre as beverages are not generally "powered" by means natural and conventional or otherwise. As a result, we find that consumers will view the NATURALLY POWERED mark as having several connotations. See *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062 (TTAB 2008); *In re Simmons Co.*, 189 USPQ 352 (TTAB 1976); and *In re Del. Punch Co.*, 186 USPQ 63

(TTAB 1975). In short, the nature of the mark suggests that the consuming public would readily perceive multiple associations of NATURALLY POWERED, and that such associations would be apparent from the mark itself.

Finally, we observe that both applicant and the examining attorney submitted third-party registrations to show that the USPTO has alternatively treated terms comprising the mark as well as synonyms for terms comprising the mark as descriptive or not descriptive by sometimes requiring a disclaimer of the term and sometimes not requiring a disclaimer.<sup>10</sup> The most that can be said of this evidence is that it is inconclusive. In fact, these registrations highlight why prior decisions in other applications are not binding on the Board and underscore the need to evaluate each case on its own record. *In re Nett Designs Inc.*, 57 USPQ2d 1564.

**Decision:** The refusal to register based on applicant's failure to disclaim NATURALLY is reversed.

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<sup>10</sup> In addition, the examining attorney submitted internet evidence in support of the refusal to register. However, we agree with applicant that due to the illegible nature of most of these materials, and the truncated nature of those that are presented in legible form, such evidence has no probative value.