

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

Oral Hearing: July 22, 2014

Mailed: September 19, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Griffith Laboratories International, Inc.
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Serial No. 85332209 for the mark ZAFRAN and
Serial No. 85332239 for the mark CUSTOM CULINARY ZAFRAN
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Barry W. Sufrin of Drinker Biddle & Reath LLP,
for Griffith Laboratories International, Inc.

Brian Neville, Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

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Before Cataldo, Taylor and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

Griffith Laboratories International, Inc. (“Applicant”) seeks registration on the
Principal Register of the mark ZAFRAN (in standard characters),¹ the subject of

¹ Application Serial No. 85332209 was filed on May 27, 2011, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

application Serial No. 85332209 and the mark CUSTOM CULINARY ZAFRAN (in standard characters),² the subject of application Serial No. 85332239, both for

“Sauces and salsas” in International Class 30.

Both applications include the following translation statement: “The English translation of ZAFRAN in the mark is saffron.”

The Trademark Examining Attorney has refused registration in each case under Section 2(a) of the Trademark Act on the ground that the mark is deceptive and under Section 2(e)(1) on the ground that the mark is deceptively misdescriptive. After the Examining Attorney made the refusals final, Applicant appealed. The proceedings were consolidated for oral hearing, which was held on July 22, 2014. Because the two appeals involve similar issues of law and fact and similar records, we are deciding both appeals in this single decision.³ We affirm both refusals to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusals, we address an evidentiary matter. Applicant submitted the following new evidence with each of its appeal briefs:⁴ an article entitled “Language Use in the United States 2011” and definitions of the term “saffron” from Hamari Web English to Urdu Dictionary (hamariweb.com) and from Webster’s II New Riverside University Dictionary.

² Application Serial No. 85332239 was filed on May 27, 2011, 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 word “CULINARY” has been disclaimed.

³ Unless otherwise noted, all references to Office Actions and Responses thereto are from application Serial No. 85332209.

⁴ With few exceptions, the briefs are identical.

Evidence submitted after an appeal is untimely and ordinarily will not be considered⁵ unless the Examining Attorney, in his or her brief, discusses the exhibits attached to the Applicant's brief without objecting to them. *See In re Development Dimensions International, Inc.*, 219 USPQ 161 (TTAB 1983), and Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1207.03 (2014). The Examining Attorney did not discuss the article in his brief. As such, we have not considered the article in our decision.

However, the Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Accordingly, we have considered the definitions of the term "saffron."⁶

⁵ Trademark Rule 2.142(d), 37 CFR § 2.142(d).

⁶ Saffron is defined in the Hamari Web English to Urdu Dictionary as:

1. (a.) Having the color of the stigmas of saffron flowers; deep orange-yellow; as, a saffron face; a saffron streamer.
2. (n.) An orange or deep yellow color, like that of the stigmas of the *Crocus sativus*.
3. (n.) The aromatic pungent, dried stigmas, usually with part of the style of the *Crocus sativus*. Saffron is used in cookery, and in coloring confectionery, liquors, varnishes, etc. and was formerly much used in medicine.
4. (v. t.) To give color and flavor to, as by means of saffron; to spice.
5. (n.) A bulbous iridaceous plant (*Crocus sativus*) having blue flowers with large yellow stigmas. See *Crocus*.

Saffron is defined in Webster's II New Riverside University Dictionary as:

1. a. An Old World plant, *Crocus sativus*, with purple or white flowers having orange stigmas.

II. Discussion

By way of background, Applicant seeks to register the marks ZAFRAN and CUSTOM CULINARY ZAFRAN, both for goods identified as sauces and salsas. Our discussion pertains to both applications. The mark ZAFRAN, the subject of Serial No. 85332209, is the dominant element in the mark in Serial No. 85332239 (CUSTOM CULINARY ZAFRAN) and is the basis for both refusals. As acknowledged by Applicant, “ZAFRAN” translates into English as “saffron,” and “is believed to be an Indian food term ‘for saffron.’” Responses to Office Actions dated November 9, 2011.

Relying on the information provided in Applicant’s responses to the first Office Actions, in Serial No. 85332209, the Examining Attorney refused registration of the applied-for mark ZAFRAN on the ground that the mark is merely descriptive of Applicant’s sauces and salsa; and in Serial No. 85332239, he required a disclaimer of the word ZAFRAN.⁷ The refusal and requirement were made final in Office Actions dated March 26, 2012. Reconsideration was requested. In both requests, Applicant stated:

Applicant’s goods do not contain saffron. None of Applicant’s ZAFRAN⁸ products contain saffron.

b. The dried stigmas of the saffron, used to color foods and as a cooking spice, and dye-stuff.

2. A moderate or strong orange-yellow to moderate orange.

⁷ Applicant, at the Examining Attorney’s request, had previously disclaimed the term CULINARY.

⁸ In the Request regarding Serial No. 85332239, CUSTOM CULINARY ZAFRAN was substituted for ZAFRAN.

In Office Actions dated August 18, 2012, both applications were refused registration on the ground that the marks were deceptive. Registration was also refused in both applications under Section 2(e)(1) on the ground that the term ZAFRAN is deceptively misdescriptive. With further regard to the mark CUSTOM CULINARY ZAFRAN in Serial No. 85332239, Applicant was required to disclaim the term the term ZAFRAN. In Office Actions dated March 21, 2013, the refusals were made final.

“Marks that are deceptive under §2(a) are unregistrable on either the Principal Register or the Supplemental Register, whereas marks that are deceptively misdescriptive under §2(e)(1) may be registrable on the Principal Register with a showing of acquired distinctiveness under §2(f), 15 U.S.C. §1052(f), or on the Supplemental Register, if appropriate.” Section 2 of the Trademark Act; Trademark Manual of Examining Procedures (TMPEP) § 1203.02(c).

Zafran, as admitted by Applicant during the prosecution of the applications and by the translation statement in the applications, is a term synonymous with the word “saffron.” Saffron is known as the ‘king of spices,’ and is ‘the world’s most expensive spice.’⁹ “Saffron are [sic] the stigmas from the crocus sativus flower.”¹⁰ “Saffron is widely used in Indian, Persian, European, Arab and Turkish cuisines.

⁹ Information regarding saffron from Khana Pakana website, www.shop.khanapakana.com, accessed on March 21, 2012, Exhibit to Office Action dates March 26, 2012.

¹⁰ Article from the Gourmet Sleuth website, www.gourmetsleuth.com, accessed on November 21, 2011, Exhibit to Office Action dated December 2, 2011.

Confectioneries and liquors also often use saffron.”¹¹ It is used for religious purposes in India, and is widely used in cooking many cuisines, ranging from the Milanese risotto of Italy to the bouillabaisse of France to the biryani with various meat accompaniments in South Asia.¹²

Although other substitutes can provide a rich golden color, saffron has a distinctive flavor for which there simply is no substitute.

Most recipes need only a few threads of saffron, so our small one-gram package consisting of several hundred threads will serve for many dishes. The uses of saffron are varied: chicken soup, rice dishes, and saffron bread are probably the most common. Any good bouillabaisse (Fish stew) will feature saffron. Saffron risotto alla Milanese is a wonderful Italian rice dish made with Arborio rice and Italian Parmagiano-Reggiano cheese. Easter is a time of year when saffron sales are especially high, as many Slavic and Scandinavian cultures have traditional bread, roll or Easter cake recipes featuring this spice. These recipes often call for almost a whole packet of saffron, which is why they are reserved for only the very special family occasions. The reason saffron is the highest-priced of spices is because of the intensive hand labor required to cultivate and harvest it. It is the stamen of a small purple crocus flower, it takes about an acre of land and 75,000 flowers to yield one pound of saffron. Each flower blooms for only about one week of the year, during which the stamens must be hand-picked and dried.¹³

The Examining Attorney submitted numerous recipes for dishes that include saffron, examples of which are: “Spring Mackerel with Sour Grapes and Saffron

¹¹ Wikipedia entry for “Saffron,” en.wikipedia.org, accessed on July 30, 2012, Exhibit to Office Action dated August 18, 2012.

¹² *Id.*

¹³ The Spice House website, www.thespicehouse.com, accessed on July 28, 2012, Exhibit to Office Action dated August 18, 2012.

Salsa,”¹⁴ “Saffron Sauce,”¹⁵ “Scallops in Saffron Sauce,”¹⁶ and “Chicken Scallopine with Saffron Cream Sauce.”¹⁷

Saffron also has medicinal uses. As discussed in the Wikipedia entry,

Saffron has a long medicinal history as part of traditional healing; several modern research studies have hinted that the spice has possible anticarcinogenic (cancer-suppressing), anti-mutagenic (mutation preventing), immunomodulating and antioxidant-like properties. Saffron stigmas, and even petals, may be helpful for depression. Early studies show that saffron may protect the eyes from the direct effects of bright light and retinal stress apart from slowing down macular degeneration and retinitis pigmentosa.¹⁸

The Examining Attorney also submitted evidence of uses in the United States of the word “zafran,” meaning “saffron.” Examples of these uses include:

- Foursquare.com menu for Ala Al-deen’s restaurant – menu item: Chicken Kabob (charbroiled strip of chicken breast, marinated in a tasty garlic lemon zafran sauce, rolled in pita with garlic and tomatoes (www.foursquare.com));
- FoodieBytes listing for Risotto Reale, a New York City restaurant serving “farinacel, aborio rice cooked with asparagus, shrimps, prosciutto, and zafran sauce (www.foodiebytes.com);

¹⁴ Recipe from Jewish News Daily.com, www.jewishnewsdaily.com, accessed on November 9, 2011, Exhibit to Office Action dated December 2, 2011.

¹⁵ Recipe from My Recipes, www.myrecipes.com, accessed on November 17, 2011, Exhibit to Office Action dated December 2, 2011.

¹⁶ Recipe from Food.com, www.food.com, accessed on November 17, 2011, Exhibit to Office Action dated December 2, 2011.

¹⁷ Recipe from Foodnetwork.com, accessed on July 30, 2012, Exhibit to Office Action dated August 18, 2012.

¹⁸ Wikipedia entry for “Saffron,” en.wikipedia.org, accessed on July 30, 2012, Exhibit to Office Action dated August 18, 2012.

- Khana Pakana website, offering Saffron Zafran Spanish Marosa Best Quality Brand and Saffron Zafran Pure Spanish Gathering Brand – Shipment Details: USA/Canada; Local Delivery: NewYork (shop.khanapakana.com); and
- Khana Pakana website recipes for Zafran Chicken Korma (Saffron Chicken Qorma) and Varqu Parantha, Zafrani Shami Kebab, Zafrani Stuffed Murgh Musallam (Chicken Keema, Pulao and Pickled Potato), and Zafrani Shahi Tukray (www.khanapakana.com).

Office Action dated March 26, 2012.

Applicant argues that the evidence of use by Khana Pakana is not reliable because “KhanaPaKana, the apparent sponsor of the website, directs its goods to Urdu speakers¹⁹ ... the KhanaPaKana website gives no business address and could as well originate from a foreign site (like Pakistan) as from a business located in the United States.” Reply Brief, pp 2-3. None of these arguments are supported by evidence. Moreover, assuming arguendo that the location of the website is outside of the United States, the site is clearly intended for U.S. consumers since “[a]ll prices are in USD.”²⁰ Further, at least one product, the “Saffron Zafran Spanish Marosa Best Quality Brand,” is shipped to the United States and is distributed locally in New York.²¹ As such, the Khana Pakana website establishes both the availability of “zafran” in the United States and its local distribution in New York.

¹⁹ Applicant argues that “Urdu [] the National Language of Pakistan [] is spoken in some Indian states,” [but] is not spoken by many people in the United States. Appeal Brief, p .2. Applicant has submitted no admissible evidence supporting this argument.

²⁰ shop.khanapakana.com, accessed on March 21, 2012, Exhibit to Office Action dated March 26, 2012.

²¹ *Id.*

Applicant also argues that the admissibility of the Ala Al-deen's restaurant menu, offering a Chicken Kabob sandwich made with zafran sauce that appears on Foursquare.com, is questionable because "Ala Al-deen's business location is not apparent." We disagree. The failure of the menu to disclose the specific location of the Ala Al-deen restaurant does not in and of itself render this evidence inadmissible. The menu clearly appears on a U.S. based website (foursquare.com, on which is stated "lovingly made in NYC & SF"), is in English, and the prices on the menu are in U.S. dollars. In addition, Applicant's assertion that "the offerings are all Middle Eastern fare, presumably directed to Urdu speakers" is unsupported by any evidence. Further, the statement is speculative in its presumption that only Urdu speakers eat in restaurants featuring Middle Eastern fare.

It is of note that Applicant did not comment on the dish containing "zafran sauce" that is sold at an Italian restaurant, Risotto Reale, which is located in New York City.

A. Deceptiveness Refusal.

We must first determine whether the term "Zafran" is deceptive as applied to sauces and salsas that do not contain "saffron." "The Court of Appeals for the Federal Circuit, our primary reviewing court, has articulated the following test for determining whether a mark consists of or comprises deceptive matter:

- (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods?
- (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?

(3) If so, is the misdescription likely to affect a significant portion of the relevant consumers' decision to purchase?

In re Budge Mfg. Co., 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988), *aff'g* 8 USPQ2d 1790 (TTAB 1987). “A deceptive mark may be comprised of (1) a single deceptive term; (2) a deceptive term embedded in a composite mark that includes additional non-deceptive wording and/or design elements (*see In re White Jasmine LLC*, 106 USPQ2d 1385, 1391 (TTAB 2013)); (3) a term or a portion of a term that alludes to a deceptive quality, characteristic, function, composition, or use (*see Am. Speech-Language-Hearing Ass'n v. Nat'l Hearing Aid Society*, 224 USPQ 798, 808 (TTAB 1984)); (4) the phonetic equivalent of a deceptive term (*see In re Organik Technologies, Inc.*, 41 USPQ2d 1690, 1694 (TTAB 1997); *Tanners' Council of Am., Inc. v. Samsonite Corp.*, 204 USPQ 150, 154 (TTAB 1979); or (5) the foreign equivalent of [either] of the above (*see, e.g., Palm Bay Imps., v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005).” TMEP § 1203.02(a). As acknowledged by Applicant in its translation statement and based upon the evidence discussed above, “zafran” is a synonym for “saffron” or an alternate spelling thereof.²² As such, if “saffron” is deceptive when used in connection with sauces and salsas, then “zafran” is also deceptive.²³

²² As discussed, *supra*, the evidence made of record by the Examining Attorney clearly establishes that the term “zafran” is used in the United States with or in place of the term “saffron.”

²³ Applicant argues that the doctrine of foreign equivalents should not be applied in this case because “[i]t is undisputed that the term ZAFRAN does not refer in any way to “saffron” in English. Rather, ZAFRAN is a term coined by Applicant that incidentally corresponds to the Urdu word for ‘saffron.’” Appeal Brief, p. 2. Contrary to Applicant’s

Further, as discussed, supra, the evidence made of record by the Examining Attorney clearly establishes that the term “zafran” is used in the United States with or in place of the term “saffron.”

1. Is Zafran misdescriptive of the character, quality, function, composition or use of the goods?

“[F]or a term to misdescribe goods, the term must be merely descriptive of a significant aspect of the goods which the goods could plausibly possess but in fact do not.” *White Jasmine*, 106 USPQ2d at 1392. Applicant’s goods are sauces and salsas. As set forth in the applications, “[t]he English translation of ZAFRAN in the mark[s] is saffron.” Saffron is used in numerous recipes for sauces and salsas.²⁴ Thus, saffron can be an ingredient or feature of sauces and salsas. Applicant’s sauces and salsas do not contain saffron. Request for Reconsideration dated June 29, 2012. Thus, the term “zafran” (which is known in the U.S. to mean “saffron”) is misdescriptive when used in connection with applicant’s sauces and salsas.

2. Are prospective purchasers likely to believe that the misdescription actually describes Applicant’s sauces and salsas?

The record establishes that “saffron,” known as the “king of spices,” is “the world’s most expensive spice” and is used in many cuisines.²⁵ “Saffron has a

assertion, if “zafran” is a term from a common modern language, then the doctrine of foreign equivalents would apply. *See Palm Bay Imps., Id.* However, the burden would be on the Examining Attorney to establish that the foreign language is a common, modern language and not a dead, obscure, or unusual language. TMEP § 1207.01(b)(vi)(B). Notably, the Examining Attorney did not argue the doctrine and, in any case, the record is devoid of any admissible evidence relating to whether Urdu, the language in which Applicant asserts the term “zafran” is used, is a common modern language.

²⁴ See footnotes 13 - 16.

²⁵ See footnotes 8 -10.

distinctive flavor for which there simply is no substitute.”²⁶ Most recipes need only few threads of saffron, so a small one-gram package consisting of several hundred threads will serve for many dishes.²⁷

Saffron can be an ingredient in sauces and salsas.²⁸ Moreover, the record establishes that when saffron is an ingredient, it may also be used in the name of the dish, for example, Linguine with Saffron Sauce,²⁹ Spring Mackerel with Sour Grapes and Saffron Salsa,³⁰ Roasted Pineapple, Basil, Serrano and Saffron Salsa,³¹ Saffron Curry Marinade,³² and Chicken Scallopine with Saffron Cream Sauce.³³ Accordingly, we find that prospective purchasers are likely to believe that “saffron” or “zafran” is an ingredient in Applicant’s sauces and salsas, and thus are likely to believe that the misdescription actually describes Applicant’s sauces and salsas.

3. Is the misdescription likely to affect a significant portion of the relevant consumers’ decision to purchase?

To establish that the misdescriptive quality or characteristic would be a material factor in the purchasing decision of a significant portion of the relevant consumers, the examining attorney must provide evidence that the misdescription

²⁶ See footnote 12.

²⁷ *Id.*

²⁸ See footnotes 13 – 16.

²⁹ Recipe from Seattle Times - www.seattletimes.nwsourc.com, accessed on March 11, 2012) – Exhibit to Office Action dated March 26, 2012.

³⁰ Recipe from Yummly - www.yummly.com, accessed on March 1, 2012– Exhibit to Office Action dated March 26, 2012.

³¹ *Id.*

³² *Id.*

³³ Recipe from Food Network – www.foodnetwork.com.com, accessed on July 30, 2012 - Exhibit to Office Action dated August 18, 2012.

would make the product or service more appealing or desirable to prospective purchasers. *White Jasmine*, 106 USPQ2d at 1392; *See also In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1698-99 (TTAB 1992). As discussed *supra*, evidence submitted by the Examining Attorney establishes that saffron:

1. is known as the “king of spices,”
2. is the world’s most expensive spice,
3. is used in many cuisines, has a distinctive flavor for which there simply is no substitute, and
4. has medicinal benefits.³⁴

This evidence establishes that the misdescription would make the goods more appealing or desirable to prospective purchasers and thus that the misdescription is a material factor in the purchasing decision of a significant portion of the relevant consumers.

Conclusion.

The term “ZAFRAN,” which constitutes the mark ZAFRAN in its entirety, and is embedded in the composite mark CUSTOM CULINARY ZAFRAN is deceptive within the meaning of Section 2(a) of the Trademark Act.

Having determined that both marks are deceptive, it is not necessary for us to determine whether the marks are deceptively misdescriptive. However, for the sake of completeness, we will also decide this issue.

³⁴ See footnote 17.

B. Deceptively Misdescriptive Refusal.

The test for determining whether a term is deceptively misdescriptive as applied to the goods involves a determination of (1) whether the matter sought to registered misdescribes the goods and, if so, (2) then whether anyone is likely to believe the misrepresentation. *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). In other words, a term is deceptively misdescriptive when the idea conveyed by the mark is false, although plausible. *In re Ox-Yoke Originals, Inc.*, 222 USPQ 352, 354 (TTAB 1983). *See also In re Woodward & Lothrop*, 4 USPQ2d 1412 (TTAB 1987).

This test essentially consists of the first two element of the deceptiveness refusal discussed, *supra*. As established above, based upon the evidence of record the term “ZAFRAN” misdescribes an ingredient or feature of Applicant’s sauces and salsas, which do not contain saffron. Moreover, it is plausible that consumers will believe the misrepresentation. Accordingly, the term “ZAFRAN,” which constitutes the mark ZAFRAN in its entirety, and is an element of the composite mark CUSTOM CULINARY ZAFRAN, is deceptively misdescriptive within the meaning of Section 2(e)(1) of the Trademark Act.

While registration of a deceptively misdescriptive mark is permissible either on the Supplemental Register, upon a showing of acquired distinctiveness under Section 2(f) or with an appropriate disclaimer, because we also find the marks to be deceptive under Section 2(a), they are unregistrable.

Decision: The refusals to register Applicant's marks ZAFRAN and CUSTOM CULINARY ZAFRAN in application Serial Nos. 85332209 and 85332239 are affirmed.