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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re GP Global Limited

Serial No. 85345544

James P. Broder of Roeder & Broder LLP,
for GP Global Limited.

Pamela Y. Willis, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

Before Bucher, Zervas and Lykos,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

GP Global Limited ("applicant") seeks registration on the Principal Register of the mark **FRAGRANCE PODS** (*in standard character format*) for "room fresheners," in International Class 5.[1] During *ex parte* prosecution of the application, applicant disclaimed the word "Fragrance" apart from the mark as shown.

The examining attorney has refused registration on the ground that the term is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C.

[1] Application Serial No. 85345544 was filed on June 14, 2011, based upon applicant's allegation of a *bona fide* intention to use the mark in commerce.

§ 1052(e)(1). After the examining attorney made the refusal final, applicant appealed to this Board. We affirm the refusal to register.

A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the products it identifies. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012; and *In re Gyulay,* 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used. *In re Abcor Development Corp.,* 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle,* 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the question is whether someone who knows what the products are will understand the mark immediately to convey information about them. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003).

Applicant argues that this term is suggestive, not descriptive; that the examining attorney failed to prove descriptiveness for this designation as to these goods based on (1) the imagination test, (2) the competitors' need test,[2] and (3) the competitors' use test.[3]

Under the "imagination test," the "more imagination that is required on the customer's part to get some direct description of the product from the term, the more likely the term is suggestive, not descriptive."[4] That is, we are focused on

[2] *See, e.g.*, 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:68 (4th ed. 2012).

[3] *Id*. at § 11:69.

[4] *Id*. at § 11:67.

whether someone who knows what the goods are will understand the mark to convey information about them. *In re Tower Tech, Inc.,* 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *In re Patent & Trademark Services Inc.,* 49 USPQ2d 1537, 1539 (TTAB 1998).

Applying this standard, the examining attorney takes the position that the term "fragrance" immediately describes an ingredient of the room fresheners, and "pods" immediately describes the items in which the room fresheners are housed. She contends that consumers would immediately perceive that the two-word term "Fragrance Pods" describes a significant characteristic of the goods in this case.

It appears from this record that "room fresheners" tend to be sanitizers and/or neutralizers that usually include, in addition, a masking fragrance. Hence, not surprisingly, by way of an examiner's amendment, applicant agreed with the examining attorney that no claim was made to the exclusive right to use the leading word "Fragrance" apart from the mark as shown.

Turning then to the word "pod," the examining attorney made of record a dictionary definition as follows:

pod *noun*

YOURDICTIONARY
THE DICTIONARY YOU CAN UNDERSTAND

1. a dry fruit or seed vessel developed from a single carpel enclosing one or more seeds and usually splitting along two sutures at maturity, as a legume
2. a podlike container, as a cocoon of a locust
3. ☆ ***any of various enclosures***, as a streamlined housing for a jet engine. [5]

We add the following dictionary entry:

[5] http://www.yourdictionary.com/pod

pod *noun*

1. a somewhat elongated, two-valved seed vessel, as that of the pea or bean.
2. a dehiscent fruit or pericarp having several seeds.
3. *Entomology* . **a.** an insect egg case. **b.** a compact mass of insect eggs.
4. a streamlined enclosure, housing, or detachable container of some kind: *an engine pod under the wing of an aircraft.*
5. a protective compartment, as for an automobile's instrument gauges. [6]

The first definition in each of these dictionary entries point out the origins of the word "pod" in the biomorphic world of natural seed vessels (e.g., pea "pods"), where the word "pods" stresses the concept of a round, elongated enclosures where the length/height exceeds any other dimension of the vessel. Later entries suggest that in more recent years, as applied to science and technology, it has become short for a detachable unit having a special function (e.g., space capsules, jet engine "pods," etc.). In the modern vernacular, as within the field of industrial design for consumer products, the word "pod" carries with it the idea of a compact, streamlined enclosure (e.g., protective compartment for an automobile's instrument gauges).

The question then is whether the term "pods" immediately describes a significant feature of room fresheners. In this context, the examining attorney has shown that at least three other manufacturers of odor control products already use the word "pod" in connection with two very different types of room air fresheners, namely, with scented candles and with automatic room fresheners/deodorizers.

First, the examining attorney included screen prints showing almost a hundred

[6] http://dictionary.reference.com/ This Board may *sua sponte* take judicial notice of dictionary definitions. *See 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).

SCENT POD[7] candle warmers and "Scent Pods" from the website of the earlier cited registrant, Gold Canyon International, L.L.C.

Second, as applied to automatic room fresheners/deodorizers, it seems that the "DoorPod" room air freshener and Share Corporation's "Pod Fresheners" are both using the term "pod" much as would applicant, to refer to a stationary room freshener housed in a compact enclosure:

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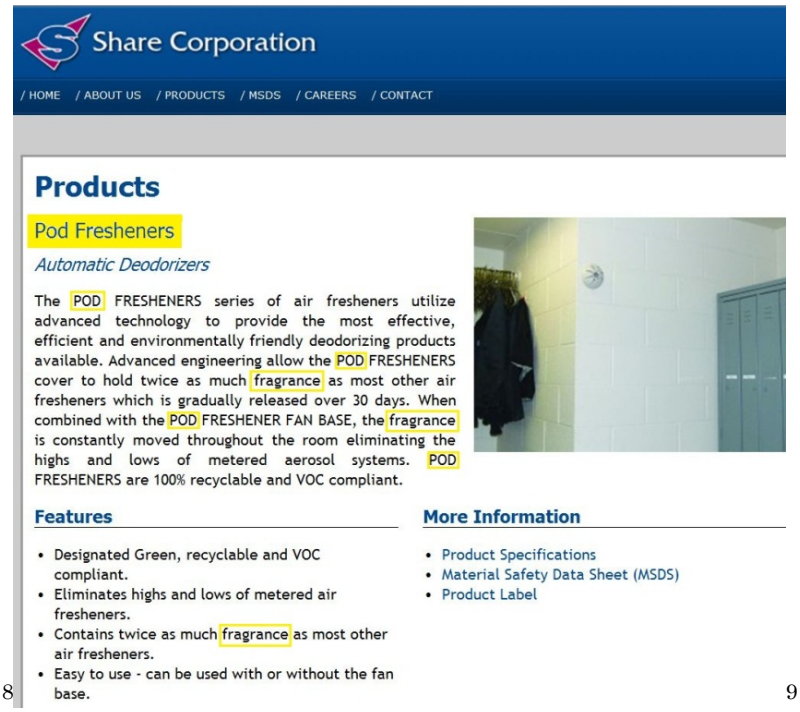

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While scented candles would seem to be decidedly low-tech, and automatic room fresheners/deodorizers a bit higher-tech, in both cases it seems the desired connota-

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[7] Registration No. 3444294 issued on June 10, 2008; No claim is made to the exclusive right to use the word "Scent" apart from the mark as shown.

[8] http://www.cleanfreak.com/Qstore/p002086.htm

[9] http://www.sharecorp.com/products.php?prod=836

tion is the compact or streamlined design of the unit. As with the pictured goods marketed under "DoorPod" and "Pod Fresheners," we presume that applicant's product might well combine some degree of electronic technology with a replaceable source of fragrance.

We are forced to make some presumptions inasmuch as this remains an intent-to-use application. Applicant was not asked, nor did it volunteer, exactly what kind of device its "room fresheners" will be. The record shows examples of a wide variety of household and commercial odor control products. Some are air sanitizers or disinfectants designed to kill bacteria. Some are neutralizers that depend upon chemical reactions. Yet others are "fresheners" that may employ sanitizers and/or neutralizers, and then usually include a masking fragrance. Applicant's identification of goods, "room fresheners," suggests it falls into this general category.

In the broad field of odor control products, we see in this record the relatively low-tech and fairly inexpensive devices such as scented candles, other types of wax melts, and an array of flameless fragrances including for example liquids and gels in twisting cover deodorizers/diffusers and fragrance emitting reeds. On the very top end are sophisticated metered dispensers and electronic purification equipment. In between are air fresheners like aerosol sprays or hand pump devices, small electrical socket sized plug-in devices, electric air fresheners with and without fans, and a variety of other kinds of automatic room fresheners/deodorizers.

In an intent-to-use application, where none of the details of the room fresheners are part of the record, we must presume that a logical option for the design of the product, for example, is that the "room fresheners" might well contain a "pod-like

structure." Under these circumstances, the examining attorney is not compelled to prove that the word "pod" would be immediately descriptive of any conceivable type of room freshener. In this context, it is somewhat disingenuous for applicant, without offering any insights into its proposed product, to argue as follows:

> As one simple alternative example, a "room freshener" could be a scented spray. The Appellant respectfully asserts that an average consumer looking at a scented spray type of room freshener, would not have the immediate understanding, without thought or imagination, between the proposed mark and the identified goods that the Examiner suggests.

Actually, under our precedent, given that applicant's named product might well be a stationary room freshener housed in, or incorporating in some way, a compact enclosure, it should not be necessary for the examining attorney to prove in the alternative, that the term "pod" would be merely descriptive of something as unlikely as a scented aerosol spray.

Furthermore, if this determination as to mere descriptiveness under Section 2(e)(1) of the Trademark Act were being made after the point where applicant had made use in commerce, submitted an affidavit of use supported by a specimen, and perhaps provided additional documentation demonstrating for the examining attorney exactly how the involved room freshener worked, the same determination would still need to be made, employing the very same standard.

In such a case, applicant is correct in pointing out that the determination of whether a mark is merely descriptive must be made in relation to the named goods for which registration is sought. Additionally, the proper test for descriptiveness also considers the context in which the mark is used and the significance that the mark is likely to have on the average purchaser encountering the goods in

the marketplace. *In re Omaha National Corp.,* 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); and *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986).

However, we do disagree with applicant's further suggestion that the test is whether a blindfolded person (or an examining attorney having no specimen or other information about applicant's goods) could guess correctly exactly what applicant's goods are after being prompted only with applicant's proposed mark. *See In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) [**GAS-BADGE** merely descriptive of a "gas monitoring badge"; "Appellant's abstract test is deficient – not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by statute."]. Rather, the correct question is whether someone who knows what the goods are will understand the mark to convey information about them. *Tower Tech,* 64 USPQ2d at 1316-1317; *Patent & Trademark Services,* 49 USPQ2d at 1539. Applied to the case at bar, it is not a requirement of the case law that the prospective customer herein, upon seeing or hearing the alleged mark for the first time, knows immediately the exact technology that the "room freshener" employs in order to create the desired fragrance.

Hence, based on this entire record, we conclude that the word "pods" in the context of the named goods is merely descriptive.

Having determined that both of the individual words are merely descriptive, we turn then to the question of the combination of these two terms. When two or more merely descriptive terms are combined, the determination of whether the composite

mark also has a merely descriptive significance turns on the question of whether the combination of terms evokes a new and unique commercial impression. 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 Petroglyph Games Inc.*, 91 USPQ2d 1332 (TTAB 2009) (**BATTLECAM** merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (**URBANHOUZING** merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech, Inc.,* 64 USPQ2d 1314 (**SMARTTOWER** merely descriptive of commercial and industrial cooking towers); *In re Sun Microsystems Inc.,* 59 USPQ2d 1084 (TTAB 2001) (**AGENTBEANS** merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.,* 39 USPQ2d 2021 (TTAB 1996) (**FOOD & BEVERAGE ONLINE** merely descriptive of news and information services in the food processing industry).

On the other hand, a mark consisting of a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, non-descriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods. In other words, we must consider the issue of descriptiveness by looking at the mark in its entirety. Common words may be descriptive when standing alone, but when used together in a composite mark, they may become a valid trademark. *See Concurrent Technologies Inc. v. Concurrent Technologies Corp.,* 12 USPQ2d 1054, 1057 (TTAB 1989) (**CONCURRENT TECHNOLOGIES CORPORATION** found not merely descriptive of printed electronic circuit boards be-

cause, while "concurrent" had meaning in the computer field, "concurrent technologies" had no established meaning in relation to computer hardware or software).

Applying this test, we find no new, unique or incongruous meaning with the combination of "Fragrance" and "Pods." Fragrance is a highly descriptive, if not generic term for the involved goods. Here it is used as an adjective describing the term "pods," a noun. We have seen that "pods" is not an unusual name for room fresheners. Hence, no imagination is required to determine the significant characteristics of the named goods.

Finally, applicant argues that the examining attorney has failed to discover any usage by competitors of this exact terminology, or to demonstrate that competitors need to use this combination of words. However, the fact that applicant may be the first and only user of a merely descriptive designation does not justify registration if the only significance conveyed by the term is merely descriptive. *See In re Nat'l Shooting Sports Found., Inc.,* 219 USPQ 1018 (TTAB 1983) (**SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE** held descriptive for conducting and arranging trade shows in the hunting, shooting, and outdoor sports products field).

In conclusion, we agree with the examining attorney that prospective consumers would immediately perceive the term "Fragrance Pods" as describing a significant characteristic of the goods in this case.

Decision: The refusal to register applicant's term **FRAGRANCE PODS** under Section 2(e)(1) of the Lanham Act is hereby affirmed.