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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hawaiian Organics, L.L.C.

Serial No. 85505232

Seth M. Reiss of Seth M. Reiss AAL ALLLC, for Hawaiian Organics, L.L.C.

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Before Quinn, Bucher, and Ritchie, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Hawaiian Organics, L.L.C. (“applicant”) filed an application to register on the Principal Register the following mark:



BODY
MINT

for “body deodorant in pill form; personal deodorants,” in International Class 3, and “dietary supplements; dietary supplements for promoting personal hygiene,” in International Class 5.¹ The examining attorney refused registration of the mark for the Class 5 goods only under Section 2(a) of the Trademark Act of 1946, 15 U.S.C. § 1052(a), on the ground that the mark sought to be registered consists of deceptive matter in relation to the identified goods. When the refusal was made final, applicant filed an appeal. Applicant and the examining attorney each filed briefs, and applicant filed a reply brief.

Evidentiary Issues

We first address some evidentiary issues raised by applicant. In particular, applicant argued in its brief that its Constitutional due process rights were violated by the manner in which the examining attorney submitted evidence for three reasons: (i) some of the evidence submitted was illegible; (ii) the searches performed were biased; and (iii) the examining attorney submitted new evidence with the final Office action as well as with the denial of request for reconsideration. Regarding the first of these, while some of the evidence submitted is difficult if not impossible to read in the form shown on the TSDR Case Viewer, these documents are quite readable when downloaded as a PDF document. If this process proved problematic for

¹ Application Serial No. 85505232 was filed on December 28, 2011, pursuant to 15 U.S.C. § 1051(a), alleging dates of first use and first use in commerce on December 1, 2011, in both classes, and claiming acquired distinctiveness “in part” as to “BODY MINT.”

applicant, this issue could and should have been brought to the examining attorney's attention at the time each of the subject Office actions was issued so that the examining attorney could address these challenges at that time. As to the second issue, it is of course the responsibility of examining attorneys to examine applications that are assigned to them pursuant to the laws and rules governing examination. *See* 15 U.S.C. § 1051, *et. seq.* Accordingly, viewing the examining attorney's search for evidence in light of our adversarial legal system, we find no untoward bias in the examining attorney's searches or evidence. Finally, we note that evidence may be introduced during examination, including with the final Office action, or with a denial of a request for reconsideration. *See* TMEP § 714.04, and TBMP § 1207.04. As such, we do not find any due process violations.

Deceptiveness Refusal

In accordance with Section 2(a) of the Trademark Act, registration must be refused if a mark is deceptive of a feature or an ingredient of a mark. *In re Budge*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988) (LOVEE LAMB deceptive for "automotive seat covers"). The test is: 1) whether the mark misdescribes the goods; 2) if so, whether consumers would be likely to believe the misrepresentation; and 3) whether the misrepresentation would materially affect potential purchasers' decisions to purchase the product. *Id.* at 1260. *See also In re E5 LLC*, 103 USPQ2d 1578 (TTAB 2012); *In re White Jasmine LLC*, 106 USPQ2d 1385 (TTAB 2013).

Regarding the first element, the examining attorney argues that applicant's mark misdescribes its goods because they do not contain actual mint, as admitted by applicant. *See* October 11, 2012 Response to Office Action ("Applicant's goods do not contain mint. Instead, Applicant's pill form deodorant/dietary supplement contains the chlorophyll derivative chorphyllin.").

Applicant, on the other hand, argues that the mark is not misdescriptive because (i) the definition of "mint" is broader than simply referring to the contents of the plant; and (ii) applicant owns prior registrations that contain the term for legally-identical goods.

Applicant submitted the following definition of mint:

Mint: 1. Any of a family (Labiatae, the mint family) of aromatic plants with a square stem and a 4-lobed ovary which produces four one-seeded nutlets in fruit; 2. A confection flavored with mint. *Merriam-Webster; www.merriam-webster.com.*

Applicant asserts that its goods fit within this definition, stating "Applicant's mark BODY MINT is, in fact, intended to reference a breath mint." (January 28, 2013 Response to Office Action). We also reference the specimen, which appears to refer to scent:



In this regard, Applicant argued that breath mints, similar to applicant's goods, do not necessarily contain actual mint, although they are referred to, and may be labeled as, "mints." Applicant provided no evidence to support this argument. However, we do note that the definition of "mint" includes flavoring.

Applicant also argued that its mark should not be considered misdescriptive since it already owns two existing registrations for marks containing the term BODY MINT, for legally identical goods, Registration No. 2406787² and 3183018.³ We note that there is no time limitation on contestability for § 2(a) claims, and therefore, prior registrations are not availing to overcome this refusal. 15 U.S.C. § 1056. We note further, however,

² Issued November 21, 2000. Sections 8 and 15 affidavits acknowledged and accepted. Renewed.

that the examining attorney has accepted applicant's prior existing registrations⁴ as evidence of acquired distinctiveness of the term "BODY MINT," which strengthens applicant's argument that the word "mint" would not be misdescriptive of applicant's applied-for goods.

Regarding the second prong of the deceptiveness analysis, we ask whether consumers are likely to believe that the misdescription actually describes the goods. In this regard, the examining attorney submitted the following evidence that mint is perceived as providing health benefits.

Peppermint Oil: Peppermint oil (*Mentha x piperita*) is extracted from the peppermint plant). Peppermint is a cross between spearmint and water mint and grows on the American and European continents. With a variety of health and beauty applications, peppermint oil is a versatile extract with many applications. Attached to November 13, 2012 Office Action, p.2. <http://topics.info.com/peppermint-oil>.

Organic Facts: Health Benefits of Herbs:
Peppermint: Peppermint is rich in phosphorus, niacin, potassium, copper, magnesium, manganese, riboflavin, folate, calcium, iron, zinc, and is a rich source of vitamin A, vitamin C, and dietary fiber. Attached to November 13, 2012 Office Action, p4. www.organicfacts.net.

Herb Fact Sheet: Mint:
Properties: Pleasant smell and taste; Has antiseptic qualities – used as a mouth freshener.
Uses: Tonic, cough mixtures, bronchial trouble, asthma; cleaning wounds; gargles and mouth washes. Attached to November 13, 2012 Office Action, p.6. www.herbsociety.org.

³ Issued December 12, 2006. Sections 8 and 15 acknowledged and accepted.

⁴ Applicant also noted that it owned a third registration, now expired, Registration No. 2766095.

Popular herbal remedies and plants that heal: We all know about herbal supplements and herbal remedies that heal, cure and help fight many common diseases, many of these herbs can be found in our garden or pantry and used for various ailments.

Mint plant:

Mint has been used for many years as a medicinal herb to soothe a stomach ache and treat chest pains, it is usually used in tea form in the old days mint was used to whiten teeth, mint tea is also a strong diuretic and is used to aide digestion helping to break down fats. [punctuation per original]. Attached to

February 21, 2013, p.4.

www.e-natureguide.com.

10 Refreshing Health Benefits of Peppermint: Peppermint is commonly used as a flavoring for gum, mouthwash and candy, but has also been used for medicinal purposes for centuries. It has been used to treat several different types of physical ailments with varied degrees of success. Peppermint as an alternative treatment comes in different forms including leaves, oils, teas, extract and pills. Peppermint is also an ingredient in ointments. Below are some of the health benefits of peppermint. Attached to February 21, 2013 Office Action, p.5.

www.symptomfind.com.

Regarding the third prong of the deceptiveness analysis, we ask whether the misdescription is material to consumers' decisions to purchase the goods. *See In re Budge*, 8 USPQ2d at 1260. The examining attorney submitted one article showing that mint is sold as a dietary supplement as well as one product advertisement for deodorant that contains mint. The examining attorney also submitted advertisements for two other deodorants labeled as "mint," although they do not state whether or not they contain actual mint or are simply scented or are otherwise suggestive rather than merely descriptive of mint contents.

WebMD: Find a Vitamin or Supplement: Peppermint Overview
Information: Peppermint is used for the common cold, cough,

inflammation of the mouth and throat, sinus infections, and respiratory infections. . . . Today, peppermint is sold as a dietary supplement. Attached to May 22, 2012 Office Action, at p6. *www.webmd.com*; May 15, 2012

Business Wire: July 2, 2012 Arbonne Introduces New Health and Wellness Products: Product Details: Arbonne Pure Mint Deodorant: Arbonne's new Pure Mint Deodorant is aluminum-free and paraben-free. It is infused with mint and extracts from white tea, ginger, lemongrass, sage, and tea tree that fights bad odor and helps you feel fresh all day. Attached to November 13, 2012 Office Action, p.3. *Businesswire.com*

Axe Stimulating Mint Deodorant, advertised by Wal-Mart Attached to November 13, 2012 Office Action, p.5. *www.walmart.com*.

Petaluma California Aromaguard Mountain Mint Deodorants -- by Pure Essential Oils by Young Living Attached to November 13, 2012 Office Action, p7. *www.young-living-essential-oils.purehealingessentialoils.com*.

Applicant, on the other hand, submitted a declaration from its Member Manager, Rona A. Yim, dated August 2, 2013, attesting that applicant has used the mark BODY MINT with dietary supplements “since at least April 2000” and has sold “at least two million units” of that product “throughout the United States.” *See* Yim decl. at paras. 3-4. The declaration further testifies that despite these extensive sales, “[a]pplicant is not aware of a single incident in which a consumer has complained regarding the presence or absence of the mint plant in its BODY MINT branded dietary supplement.” *Id.* at para. 5.

Overall, in considering the three prongs, we find that applicant has rebutted the examining attorney's evidence of misdescriptiveness by showing

that the definition of “mint” may be interpreted broadly to include not just content but flavoring or suggestiveness of mint as used on applicant’s dietary supplements. Accordingly, we do not find that there is a misrepresentation under prong one, and the analysis under prongs two and three is therefore moot. Moreover, we find that although the examining attorney has shown that consumers expect mint to provide health benefits, there is scant evidence that mint is often taken in the form of a dietary supplement, or that when advertised with deodorant “mint” refers to actual mint content as opposed to mint “flavoring” or suggestiveness as would fit within the dictionary definition, nor that this is likely to affect consumers’ decisions. Accordingly, on this record, we do not find applicant’s BODY MINT and design mark to be deceptive of its applied-for Class 5 goods, “dietary supplements; dietary supplements for promoting personal hygiene.”

Decision: The § 2(a) refusal to register is reversed.