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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Robert Kwiatkowski

Serial No. 88367537

Victor J. Baranowski, Schmeiser, Olsen & Watts, for Robert Kwiatkowski.

Wendell S. Phillips III, Trademark Examining Attorney, Law Office 110,
Chris A.F. Pedersen, Managing Attorney.

Before Mermelstein, Wolfson, and Heasley,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Robert Kwiatkowski ("Applicant") seeks registration on the Principal Register of the mark NUB GLOVE[1] (in standard characters) for:

- Bowling gloves and bowling balls, in International Class 28;
- Installation of custom bore inserts in bowling balls, in International Class 37; and

[1] Serial No. 88367537 was filed April 2, 2019, based on Applicant's allegation of his bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

- Custom bowling ball drilling, in International Class 40.

The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that NUB GLOVE is merely descriptive of Applicant's goods and services. Specifically, the Examining Attorney argues that "the applied-for mark NUB GLOVE merely describes that Applicant's bowling gloves feature nubs, and that Applicant's other goods and services interface with, or relate to, such bowling gloves featuring nubs… ." 6 TTABVUE 10.[2]

The Examining Attorney also issued a requirement under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b), for the Applicant to answer several questions about the goods and services. The Examining Attorney contends that Applicant's response is "contradictory on its face," 6 TTABVUE 8, and contradicted by the record.

After the Examining Attorney issued a final refusal on both the descriptiveness refusal and the information requirement, Applicant filed a Request for Reconsideration, which was denied.

I. Request for Information under Trademark Rule 2.61(b)

Trademark Rule 2.61(b) allows an Examining Attorney to request information of an applicant "as may be reasonably necessary to the proper examination of the application." The Examining Attorney requested information about the nature of Applicant's bowling gloves and bowling balls to help him properly examine the application under 15 U.S.C. § 1052(e)(1).

[2] Citations to the briefs refer to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Citations to the examination record refer to the entries in the USPTO Trademark Status and Document Retrieval system (TSDR), by document, date and page number.

In particular, the Examining Attorney posed three questions:

> - Do (or will) any of applicant's goods feature "nubs" as that term is defined in the attached evidence, or any other similar bumps or textured surface? If so, please indicate which goods have this feature and explain the nature and purpose of these nubs.
>
> - Do (or will) any of applicant's services feature the installation of any devices or inserts that feature "nubs" as that term is defined in the attached evidence, or any other similar bumps or textured surface? If so, please indicate which services have this feature and explain the nature and purpose of these nubs.
>
> - Do (or will) applicant's bowling balls include features that make these goods compatible with gloves that feature nubs or any other similar bumps or textured surfaces? If so, explain the nature of these features.

Applicant responded "no" to the first two questions and answered the third as follows: "Applicant's bowling balls will include bore holes that may be custom drilled to interface with protruding nubs of applicant's bowling gloves."

We find that Applicant adequately answered the third question. As to the second question, by answering "no," Applicant appears to be taking the position that he does not literally install "devices or inserts." Giving Applicant the benefit of the doubt, we find the response sufficiently answers the exact wording of the question.

However, Applicant's answer to the first question was decidedly evasive, and contradicted by the record. In response to the first question, Applicant contends that none of the nubs, bumps or textured surfaces referred to in the question could include "nubs on the outside." 4 TTABVUE 20. However, the question clearly went beyond "nubs" as that term was "defined in the attached evidence" to include "any other

similar bumps or textured surface." Indeed, Applicant admits that its gloves "will include a protruding nub that can be received by a bore of a bowling ball," *id.*, and submitted the results of a Google search for "nub glove" showing that "nubs" appear "on the outside" of gloves used for grooming pets, suggesting that Applicant recognized the broader scope of the question.[3]

Applicant's evasive manner of answering the first of the Examining Attorney's questions permits us to draw an adverse evidentiary inference regarding the issue to which the question was directed, namely, whether Applicant's goods feature nubs. *See In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013) (because applicant had failed to comply with the examining attorney's information requirement, "to the extent there is any ambiguity regarding the origin and certification of applicant's goods we address both [merely descriptive and deceptively misdescriptive] refusals in the alternative based on the presumption that had applicant directly and fully responded to the examining attorney's inquiries, the responses would have been unfavorable"); *In re Cheezwhse.com, Inc.*, 85 USPQ2d 1917, 1919 (TTAB 2008) (making factual presumptions unfavorable to applicant in considering alternative statutory refusals under §§ 2(e)(2) and 2(e)(3), in view of applicant's failure to comply with requirement for information as to the geographic origin of the goods).

Further, failure to comply with a legitimate requirement is sufficient grounds for refusal of registration. *In re Carlton Cellars, LLC*, 2020 BL 96278, 5 (TTAB 2020)

[3] *See, e.g.*, August 15, 2019 Response, TSDR 22, showing results of Applicant's Google search for "nub glove," including the "Milliard Rubba-nub Glove Blue Rubber Grooming Glove." *Id.* at 34.

(citing *Cheezwhse.com*, 85 USPQ2d at 1919); *In re DTI P'ship LLP*, 67 USPQ2d 1699, 1701 (TTAB 2003). In view of Applicant's evasive responses to the Examining Attorney's first question, we affirm the Examining Attorney's requirement for more specific information. *In re AOP LLC*, 107 USPQ2d at 1650-51, *cited in In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, 2 (TTAB 2019) (noting that the Board in *AOP* affirmed a Rule 2.61(b) refusal based on an evasive response to the information requirement). *See generally* Trademark Manual of Examining Procedure (TMEP) § 814 (Oct. 2018).

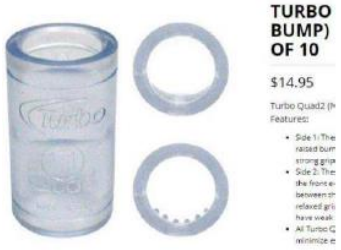
II. Mere Descriptiveness Refusal

A mark 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." *In re Positec Group Ltd.*, 108 USPQ2d 1161, 1162 (TTAB 2013) (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)). *See also In re Finisar Corp.* 78 USPQ2d 1618, 1619 (TTAB 2006) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)).

The determination of whether a mark is merely descriptive is made in relation to the goods or services with which it is used, and "not in the abstract or on the basis of guesswork." *In re Fat Boys Water Sports,* LLC, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). This requires consideration of the context in which the mark is used or intended to be used in connection with those goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services in the marketplace. *See*

Chamber of Commerce, 102 USPQ2d at 1219. We do not ask "whether someone presented with only the mark could guess what the goods or services are. Rather, the question is 'whether someone who knows what the goods and services are will understand the mark to convey information about them.'" *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (citation and internal quotation marks omitted).

The American Heritage Dictionary defines "nub" as "a protuberance or knob, a small lump." June 13, 2019 Office Action, TSDR 2. Applicant contends that the record evidence shows that with respect to bowlers' accessories, the term "nub" refers to "rows of small, raised bumps" that protrude from the inside of a finger insert, which is worn by a bowler to improve his or her grip. This type of finger insert fits into the smooth finger holes bored into a bowling ball. Two examples are:[4]



Applicant contrasts these goods with his bowling gloves, which, he argues, "will not receive or interface with a bowler's fingers, or be inserted into any bowling ball bore to increase grip by a bowler's fingers in a bowling ball bore." 7 TTABVUE 7.

[4] June 13, 2019 Office Action, TSDR 4-5.

Applicant's arguments are belied by his statements describing the nature of the gloves he intends to sell under the mark NUB GLOVE. First, we infer from Applicant's failure to directly answer the Examining Attorney's question regarding the gloves that Applicant's gloves will include nubs. In addition, Applicant states that his gloves "will include a protruding nub that can be received by a bore of a bowling ball." *Id.* Thus, the word "NUB" in the mark describes a significant feature or characteristic of the gloves, namely, that they contain nubs, or protrusions.

Next, Applicant states, "Likewise, Applicant's services will be directed to the custom drilling of bowling balls to receive protruding nubs of Applicant's bowling gloves, and installation services related to custom bore inserts such as these protruding nubs into bowling balls." 7 TTABVUE 7. Thus, the word "NUB" in the mark describes a function or purpose of the services, namely that Applicant installs custom bore inserts and drills holes in bowling balls to make them compatible with gloves that feature nubs. *See In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953 (TTAB 2018) (MECHANICALLY FLOOR-MALTED describes a characteristic of applicant's services because it is "an adverbial phrase that immediately conveys how the '[p]rocessing of agricultural grain' is performed."); *In re IP Carrier Consulting Grp*. 84 USPQ2d 1028, 1033 (TTAB 2007) (the term "ipPICS" is merely descriptive of "the purpose or function of applicant's services for transmitting images and video through the Internet"); *cf. In re Emergency Alert Sols. Grp., LLC*, 122 USPQ2d 1088, 1091-93 (TTAB 2017) (finding LOCKDOWN ALARM generic because relevant customers would readily understand it to refer to a type of safety, security, and crisis

preparedness training, noting that "[t]he subject matter of any training is not an insignificant 'facet' of the training," but "is quite literally the focus of the training"). The word "GLOVE" is generic for bowling gloves, and merely descriptive for bowling balls adapted for use with bowling gloves and the related services of making or adapting bowling balls to accommodate Applicant's gloves.[5]

Applicant argues that his mark is incongruous. Applicant cites to a dictionary definition of "glove" as "a covering for the hand having separate sections for each of the fingers and the thumb often extending part way up the arm."[6] Applicant argues that gloves are designed to cover one's hands, but in contrast, "the protruding nubs on Applicant's bowling gloves will not be covered by the bowling gloves as a hand would be." 4 TTABVUE 17. We do not believe that consumers, upon encountering Applicant's goods, would find an incongruity in the use of the term "NUB GLOVE" to describe a glove with nubs on the outside that are not covered by the glove.

Applicant further argues that consumers would have to engage in a multi-step reasoning process to understand that the "nubs" referred to in connection with Applicant's goods are not the same as the "nubs" referred to in connection with the finger inserts shown in the record. We find the distinction between nubs "on the inside" of finger inserts and nubs "on the outside" of a glove to be immaterial. Consumers need not engage in a multi-step reasoning process to discern that NUB

[5] The Examining Attorney initially required Applicant to disclaim the term "GLOVE." The requirement was not maintained in the Final Office Action, nor mentioned in either Applicant's or the Examining Attorney's briefs. In light of our decision herein, we consider the requirement moot.

[6] At www.merriam-webster.com, August 15, 2019 Office Action, TSDR 60-67.

GLOVE refers to a glove that contains protruding nubs, a bowling ball containing bore inserts designed to receive those nubs, and the services of installing or drilling such bore inserts into a bowling ball to make the ball compatible with gloves that contain nubs.

Even if Applicant is the first or only user of NUB GLOVE for bowling gloves and related goods and services, that "does not render that term distinctive" where, as here, the evidence shows that "NUB GLOVE" is merely descriptive. *In re Fat Boys*, 118 USPQ2d at 1514-15. *See also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (trademark law does not countenance someone obtaining "a complete monopoly on use of a descriptive term simply by grabbing it first") (citation omitted); *Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) (even novel ways of referring to a product may nonetheless be merely descriptive); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012).

We find that the term NUB GLOVE is merely descriptive of a type of glove that contains nubs, as well as bowling balls that accommodate such gloves, and the services of making custom bowling balls or adapting standard bowling balls to accommodate such gloves.

III. Conclusion

Upon seeing NUB GLOVE in connection with Applicant's bowling gloves, bowling balls, and related services, consumers will immediately understand that Applicant offers a glove with protruding nubs thereon to improve a bowler's grip, a specially designed bowling ball to accommodate the protruding nubs, and installation and

drilling services to produce such bowling balls. The mark therefore is merely descriptive of bowling gloves and bowling balls, and of the installation of custom bore inserts and custom drilling in and of bowling balls.

Moreover, inasmuch as Applicant's gloves contain nubs, and Applicant's bowling balls will be made to accommodate such nubs, Applicant's response to question one of the Examining Attorney's request for information under Trademark Rule 2.61(b) was disingenuous.

Decision: Refusal under Section 2(e)(1) is affirmed. Refusal for failure to comply with the Examining Attorney's request for information under Trademark Rule 2.61(b) is affirmed.