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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 Equity IP Holdings, LLC

Serial No. 88517758

Colin P. Abrahams of the Law Office of Colin P. Abrahams,
for Equity IP Holdings, LLC.

Morgan L. Meyers, Trademark Examining Attorney, Law Office 117,
Cynthia Tripi, Acting Managing Attorney.

Before Kuczma, Pologeorgis, and Hudis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Equity IP Holdings, LLC (“Applicant”) seeks to register on the Principal Register
the standard character mark ZERO MEAT for the following services in International
Class 42:¹

Testing, analysis and evaluation of the goods and services of others to
determine conformity with certification standards; testing, analysis and
evaluation of the food products of others to determine conformity with
certification standards relating to animal, fish or poultry.

¹ Application Serial No. 88517758 was filed on July 16, 2019, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application initially included goods in Class 29, but those goods were divided into child application Serial No. 88980966, and thus are not subject to the refusal at issue.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of the Class 42 services identified in Applicant's application.

When the refusal was made final, Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal was resumed. Both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.²

I. Mere Descriptiveness – Applicable Law

A mark is merely descriptive of goods or services within the meaning of Section 2(e)(1) of the Trademark Act if it conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *see also In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the mark is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). We evaluate whether someone who knows what the goods or services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med.*

² All TTABVue and Trademark Status & Document Retrieval ("TSDR") citations reference the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .PDF version of the documents.

Devices Ltd., 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). A mark need not immediately convey an idea of each and every specific feature of the goods or services in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods or services. *See In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973). Moreover, if a mark is descriptive of some the goods or services identified in a particular class, or even just one of them, then the whole class of goods or services may be refused. *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1171 (TTAB 2013).

When two or more merely descriptive terms are combined, the determination of whether the combined mark is also merely descriptive turns on whether the combination of terms evokes a non-descriptive 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. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (quoting *Estate of P.D. Beckwith, Inc. v. Comm'r.*, 252 U.S. 538, 543 (1920)); *see also In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1318 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs).

On the other hand, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a

non-descriptive meaning, or if the composite has an incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363, 365 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). In this regard, “incongruity is one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark.” *Shutts*, 217 USPQ at 365; *see also In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978) (the association of applicant’s mark TENNIS IN THE ROUND with the phrase “theater-in-the-round” creates an incongruity because applicant’s services do not involve a tennis court in the middle of an auditorium). Thus, we must consider the issue of descriptiveness by looking at Applicant’s mark in its entirety.

In determining how the relevant consuming public perceives Applicant’s mark in connection with its identified services, we may consider any competent source, including websites and webpages, newspaper articles and publications, as well as Applicant’s own advertising material and explanatory text. *See In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709-10 (Fed. Cir. 2017); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (citing *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986)); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1209.01(b) (July 2021).

II. Arguments and Evidence

In support of the Section 2(e)(1) refusal, the Examining Attorney submitted the dictionary definitions of the terms “zero” and “meat,” as set forth below:

- “zero” is defined as “a cardinal number indicating the absence of any or all units under consideration.”³
- “meat” is defined as “the edible flesh of animals, especially that of mammals as opposed to that of fish or poultry.”⁴

The Examining Attorney also submitted the following Internet evidence obtained from various websites purportedly showing that the designation ZERO MEAT is commonly used to describe food products that contain no meat:⁵

- An article excerpt from the website www.vox.com (dated April 1, 2019) titled “Burger King’s New Whopper is **0% beef**. That’s a big deal,” which states, in part, that “Burger King is selling a new kind of Whopper that it claims is identical in taste to its traditional beef patty, with just one difference: it contains **zero beef**.”
- An article excerpt from the website www.meatrealty.com (dated December 18, 2018) titled “**ZERO MEAT**: Japanese firm Otsuka Foods enters plant-based market.....Branded as “**Zero Meat**”, the products are two frozen-chilled burgers with “meat” made from soy beans.”⁶
- An article excerpt from the website www.insider.com (dated February 2, 2019), which states, in part, that “Umami Burger’s ‘Impossible’ veggie burger is made with **zero meat** but it tastes almost exactly like beef.”

In view of the foregoing, the Examining Attorney argues that, when the terms “zero” and “meat” are used together, the resulting compound wording ZERO MEAT,

³ September 20, 2019 Office Action, TSDR p. 4 (accessed from www.ahdictionary.com on September 19, 2019).

⁴ *Id.*, TSDR p. 6 (accessed from www.ahdictionary.com on September 19, 2019).

⁵ April 10, 2020 Final Office Action, TSDR pp. 4-23.

⁶ Although it appears that this particular third party is using the wording ZERO MEAT as a source indicator for its food product, we nonetheless find that the article supports the proposition that the wording merely describes a characteristic of the third party’s burgers, i.e., they do not contain meat.

when viewed in the context of Applicant's services, will immediately convey to the average, relative consumer that a purpose, use or feature of the services is to determine, ensure or certify that that certain food products contain no – or “zero” meat.⁷

In challenging the refusal, Applicant argues that its proposed ZERO MEAT mark is a coined phrase and one which would not normally be used to describe a food comprised of non-animal content or substitute foodstuffs.⁸ Instead, Applicant asserts that “the normal and common way of indicating the absence of animal, fish or poultry content in foods would typically be language such as ‘contains no ...’, or ‘free of ...’, or ‘vegan’ or ‘vegetarian’ or other common English terms for such products”.⁹ Additionally, Applicant maintains that there are numerous existing registrations of marks comprised of the term “zero” with another word that are registered trademarks.¹⁰ As such, Applicant argues that its proposed mark is similar to these previously registered marks and, therefore, its proposed mark should be allowed to proceed to registration.¹¹

Applicant also contends that the Examining Attorney improperly dissected its proposed mark by providing evidence of the meaning of the terms “zero” and “meat” separately and not the mark as a whole. Moreover, in addition to asserting that its

⁷ Examining Attorney's Brief, p. 7; 8 TTABVUE 7.

⁸ Applicant's Appeal Brief p. 3; 6 TTABVUE 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

proposed mark is coined, Applicant argues, apparently in the alternative, that its proposed mark is at best suggestive in nature and “requires imagination and conjecture” when viewed in the context of its identified Class 42 services.¹² More specifically, Applicant asserts that “[e]ven though the mark may tell something which is amorphous and just a general observation about the services in this application, it is even more likely to conjure up some other, purely arbitrary connotation.”¹³

Finally, Applicant requests that the Board resolve any doubt as to whether Applicant’s ZERO MEAT mark is descriptive in Applicant’s favor and allow the application to proceed to publication.¹⁴

III. Analysis

We are not persuaded by Applicant’s arguments. Applicant argues that the wording ZERO MEAT is amorphous in nature and may have multiple meanings. However, that fact alone is not controlling on the issue of whether Applicant’s mark is merely descriptive of Applicant’s identified services. *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)); TMEP § 1209.03(e). “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259

¹² *Id.* at p. 4; 6 TTABVUE 5.

¹³ *Id.* at pp. 5-6; 6 TTABVUE 6-7.

¹⁴ *Id.* at p. 4; 6 TTABVUE 5.

(TTAB 1984)). Here, the evidence of record clearly shows that the wording ZERO MEAT is used to refer to food products that do not contain meat. As such, the wording is merely descriptive of Applicant's services of certifying that a food product does not contain any meat.¹⁵

Applicant's arguments that its proposed mark is a "coined" term or one which would not normally be used to describe a food comprised of non-animal content is belied by the evidence of record that shows that third parties employ the identical or very similar wording to describe foods that do not contain meat. Moreover, even if Applicant were the first or only user of a merely descriptive designation does not necessarily render a word or term incongruous or distinctive; as in this case, the evidence shows that ZERO MEAT is merely descriptive of the Applicant's Class 42 services. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016); *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); TMEP §1209.03(c).

Moreover, Applicant's reference to third-party registrations that include the term "ZERO" is likewise unpersuasive since Applicant did not submit the third-party registrations upon which it relies. Nevertheless, it is well settled that we must make our decision in each case on its own merits. "Even if some prior

¹⁵ While we acknowledge that Applicant's identification of services does not specifically provide that the purpose of its services is to ensure or to certify that certain food products do not contain meat, the identification is nonetheless broad enough to encompass such services. Where services are broadly identified, as is the case here, they are deemed to encompass all of the services of the nature and type described. *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015).

registrations had some characteristics similar to [Applicant's] application, the PTO's allowance of such prior registrations does not bind the Board. . . ." *In re Nett Designs Inc*, 57 USPQ2d at 1566. Further, while the designation "ZERO MEAT," as a whole, may not appear in the dictionary, the evidence provided by the Examining Attorney demonstrates that the combination of the terms "ZERO" and "MEAT" is used by third parties to describe goods that do not contain meat. Therefore, the evidence demonstrates that the designation ZERO MEAT, in its entirety, is merely descriptive of Applicant's services. *In re Fat Boys Water Sports LLC*, 118 USPQ2d at 1516.

Finally, we do not find persuasive Applicant's arguments that its proposed mark is suggestive, rather than descriptive, because it is likely that relevant consumers will conjure up some purely arbitrary connotation of the mark. First, Applicant has failed to identify what "arbitrary connotation" relevant consumers would attach to its proposed mark. Second, as stated above, we must consider the meaning of a term in relation to the identified goods and services, not in the abstract. *See In re Abcor Dev. Corp.*, 200 USPQ at 218; *In re Remacle*, 66 USPQ2d at 1224. The evidence supports a finding that consumers who encounter the wording ZERO MEAT in connection with Applicant's services would immediately understand that the services rendered by Applicant ensure or certify that certain food products do not contain any meat.

IV. Conclusion on Mere Descriptiveness

We have carefully considered all arguments and evidence of record. Based on this evidence, we conclude that the designation ZERO MEAT, when viewed in its entirety,

is merely descriptive of Applicant's identified services since the mark merely describes a primary function or characteristic of Applicant's identified services, namely, determining, ensuring or certifying that certain food products contain no – or “zero” meat. We further find that the combination of the descriptive term “zero” with the descriptive word “meat” does not create a non-descriptive or incongruous meaning. Instead, we find that each component retains the merely descriptive significance of the proposed mark's component parts in relation to Applicant's identified services, the combination of which results in a composite mark that is itself merely descriptive. In other words, we do not find, based on the evidence of record, that the mark ZERO MEAT, when viewed in its entirety, is more than the sum of its parts. Moreover, while Applicant correctly states the general principle that any doubt as to descriptiveness must be resolved in its favor, *In re Fat Boys*, 118 USPQ2d at 1513, in this case, we have no doubt that ZERO MEAT is merely descriptive of Applicant's identified services.

V. Request to Amend Application to Seek Registration on the Supplemental Register

Applicant requests in the alternative, in the event the mark is found to be ineligible for registration on the Principal Register because it is merely descriptive under Section 2(e)(1), that the Board remand the application to the Examining Attorney so that Applicant “may possibly” amend the application to proceed on the Supplemental Register “upon commencement of use of the trademark.”¹⁶ Such a

¹⁶ Applicant's Appeal Brief, p. 6; 6 TTABVue 7.

remand request is improper.

Applicant never requested an amendment to the Supplemental Register in this application for its identified Class 42 services at any point during the prosecution of its involved application. The Examining Attorney advised Applicant of the option of amending to the Supplemental Register during prosecution. Applicant thus was afforded an opportunity to seek such an amendment during prosecution of its application. Applicant chose not to do so, however.

Further, after decision, an application may be amended, if at all, only in accordance with Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g), which states, “[a]n application which has been considered and decided on appeal will not be reopened except for the entry of a disclaimer ... or upon order of the Director”. Moreover, once the Board has rendered a final decision, a request to amend to the Supplemental Register is not possible. *See In re Integrated Embedded*, 120 USPQ2d 1504 (TTAB. 2016) (denying request to amend to Supplemental Register after finding that involved mark is primarily merely a surname); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1047 n.2 (TTAB 2002) (denying request in applicant's brief that if the refusals are maintained the application be amended to the Supplemental Register because application which has been decided on appeal will not be reopened); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1218 (2021) and authorities cited therein.

In view of the foregoing, Applicant’s request that we remand the involved application to the Examining Attorney for amendment to the Supplemental Register

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is denied.

Decision: The refusal to register Applicant's ZERO MEAT mark on the Principal Register under Section 2(e)(1) of the Trademark Act on the ground that the designation, in its entirety, is merely descriptive of Applicant's identified Class 42 services is affirmed.