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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shenandoah Growers, Inc.

Serial No. 76620753

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Before, Hairston, Zervas and Kuhlke, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Shenandoah Growers, Inc. filed an application (Serial No. 76620753) on November 16, 2004 to register FRESHHERBS.COM (in standard character form) for "unprocessed culinary herbs" in International Class 31. Applicant has claimed dates of first use anywhere and first use in commerce on June 7, 1997.

The examining attorney has finally refused registration under (i) Section 2(e)(1) of the Trademark

Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's proposed mark, if applied to applicant's goods, would be merely descriptive of them, and (ii) Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. Sections 1051, 1052 and 1127, on the ground that applicant's proposed mark does not function as a trademark.

Applicant has appealed the final refusals. Both applicant and the examining attorney have filed briefs.

Before addressing the merits of the examining attorney's refusals, we consider one evidentiary matter. Applicant has submitted additional material with its brief, in contravention of Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), which provides that the record should be complete prior to the filing of a notice of appeal. Because the examining attorney has not objected to the late submission of this evidence, and in fact has considered some of applicant's submissions, we deem the examining attorney to have waived any objection to this late-filed evidence and have considered it in arriving at our decision.

We now turn to the merits of each refusal to register, beginning with the Section 1, 2 and 45 refusal. The specimen of use in the application consists of packaging inserts and is duplicated below:



The examining attorney maintains "the proposed mark 'FRESHHERBS.COM' is not prominently placed on the front of the packaging as an indicator of source for the goods (as is the Applicant's ... mark KATERI'S). Instead, consumers will view the proposed mark 'FRESHHERBS.COM' as merely the web site address that they may 'visit' in order [to] get information about using the Applicant's goods." Brief at p. 7.

"The question whether the subject matter of an application for registration functions as a mark is determined by examining the specimens along with any other relevant material submitted by applicant during prosecution of the application." *In re The Signal Companies, Inc.*, 228 USPQ 956, 957 (TTAB 1986). Also,

An important function of specimens in a trademark application is, manifestly, to enable the PTO to verify the statements made in the application regarding trademark use. In this regard, the manner in which an applicant has employed the asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used as a trademark with respect to the goods named in the application.

In re Bose Corp., 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976) (emphasis in original, footnote omitted).

We agree with the examining attorney that the specimen does not display FRESHHERBS.COM in a manner that indicates the source of the goods. The phrase "For more great Freshherb ideas, visit freshherbs.com" appears at the bottom of the front of the packaging insert and at the bottom of the back of the insert, just above the UPC barcode. The inclusion of the word "visit" just before "freshherbs.com," and the suggestion that "great Freshherb ideas" can be found on the website, creates the impression that "freshherbs.com" is a web address, and not a

trademark. Additionally, KATERI'S is the only trademark identified in the informative statement at the bottom of the back of the label, "Kateri's is a brand of Shenandoah Growers Inc."; "freshherbs.com" is not included in the statement. Thus, the overall impression of the phrase "For more great Freshherb ideas, visit fresherbs.com" on the specimen is of an invitation to visit a website for ideas on how to use fresh herbs. As such, "freshherbs.com" does not function as a source indicator. Applicant itself has acknowledged, "FRESHHERBS.COM is the address of Applicant's site for information on herbs and cooking with herbs in addition to providing background on Applicant's company, which grows and then sells herbs through retail grocery stores." Brief at p. 4.

We now address the examining attorney's Section 2(e)(1) refusal under the assumption that FRESHHERBS.COM actually functions as a mark.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). See also *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001). To be merely

descriptive, a term need only describe a single significant quality or property of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Also, "[t]he perception of the relevant purchasing public sets the standard for determining descriptiveness. Thus, a mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service. On the other hand, if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods or services, then the mark is suggestive." *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (citations and internal quotation marks omitted).

The examining attorney has located the following definitions of "fresh" in *The American Heritage Dictionary of the English Language* (3d ed. 1992): "3. Recently made, produced, or harvested; not stale or spoiled: *fresh bread*. 4. Not preserved, as by canning, smoking, or freezing: *fresh vegetables*." (Italics in the original.) She also located the following definitions of "herb" from the same dictionary: "1. A plant whose stem does not produce woody, persistent tissue and generally dies back at the end of each growing season. 2. Any of various often aromatic plants used especially in medicine or as seasoning."

Applicant's goods are described in its specimen of use as "Fresh Basil." Basil certainly is an herb, and applicant itself promotes its goods as being fresh.

Additionally, the examining attorney has made of record several excerpts she has retrieved from the Internet, including from applicant's website, which show use of "fresh" as related to herbs. See:

Fresh herbs are a healthy and natural way to make food taste better Since 1989 Shenandoah Growers has been dedicated to providing our customers with the finest fresh-cut culinary herbs available Our outdoor, certified organic garden produces an abundance of pure, fresh culinary herbs under the ideal conditions provided by the Shenandoah Valley Celebrate Flavor with fresh herbs from Shenandoah Growers! (www.freshherbs.com)

Cooking with fresh herbs really enhances the flavors of food without adding fat or calories content. There are hundreds of varieties of fresh herbs available for the common cook and growers continue to push the envelope in creating new varieties I have listed many of the most popular fresh herbs here. (www.awesome-chef-recipes.com)

Healthy Cooking with Fresh Herbs. (www.lancaster.unl.edu)

The squash delicacy makes an ideal substitute for eggplant or carrots in recipes. Enhance flavor with fresh herbs, such as dill, basil, marjoram, mint, tarragon or parsley. (www.specialtyproduce.com)

Enjoyed fresh, the tender shoot tips and leaves are excellent lightly sautéed in a light cooking oil. Enhance flavor with fresh herbs and spices. (www.specialtyproduce.com)

Shenandoah Growers was founded in 1989 to bring fresh culinary herbs to the East Coast marketplace as a healthy and natural way to make food taste better. The company is now one of the top providers of fresh herbs in the United States. (www.freshherbs.com)

(Emphasis added.) This evidence, together with the dictionary definitions and applicant's specimen of use (reproduced *infra*), establish that "fresh" as used in conjunction with "herbs" identifies the condition of applicant's unprocessed culinary herbs.

Applicant's mark also includes a Top-level Domain name (TLD), ".COM". The Federal Circuit has stated as follows regarding TDLs:

When examining domain name marks, the PTO must evaluate the commercial impression of the mark as a whole, including the TLD indicator. The addition of a TLD such as ".com" or ".org" to an otherwise unregistrable mark will typically not add any source-identifying significance ... This, however, is not a bright-line, per se rule. In exceptional circumstances, a TLD may render an otherwise descriptive term sufficiently distinctive for trademark registration.

In re Oppedahl & Larson LLP, 71 USPQ2d 1370, 1374 (Fed. Cir. 2004). This is not a case where exceptional circumstances exist so that the addition of the TDL to FRESHHERBS renders the mark suggestive. In the context of applicant's mark, the TDL suffix serves merely to suggest that potential customers can transact business with

registrant via the Internet, and therefore has no source identifying function.

Additionally, the combination of "fresh," "herbs" and ".com" does not evoke a unique commercial impression. It also is not incongruous or bizarre as applied to the goods. See *In re Shutts*, 217 USPQ 363 (TTAB 1983). We therefore find that the examining attorney has established prima facie that applicant's mark is at least descriptive and that applicant has not rebutted the prima facie case. Accordingly, we find that applicant's mark is a merely descriptive mark and unregistrable under Section 2(e)(1).

Decision: The refusals to register under Section 2(e)(1) and under Sections 1, 2 and 45 of the Trademark Act are affirmed.