

**THIS DISPOSITION  
IS NOT A PRECEDENT  
OF THE TTAB**

Mailed: August 15, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Metzeler Schaum GmbH

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Serial No. 79041878

Ralph E. Locher of Lerner Greenberg Stemer LLP for Metzeler Schaum GmbH.

Evelyn Bradley, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Quinn, Holtzman and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Metzeler Schaum GmbH has filed an application to register on the Principal Register the stylized mark

**Tubes**, for goods ultimately identified as "Non-inflatable mattresses for medical purposes and made of polyurethane-foam or latex" in International Class 10; "Upholstery for seats of land vehicles, aircrafts and watercrafts" in International Class 12; and "Non-inflatable

mattresses for non-medical purposes and made of polyurethane-foam or latex" in International Class 20.<sup>1</sup>

The trademark examining attorney finally refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1) on the grounds that applicant's mark TUBES is merely descriptive or, alternatively, deceptively misdescriptive of a feature or characteristic of the goods indentified in Classes 10 and 20.

Applicant appealed and requested reconsideration of the final refusal. On reconsideration, applicant sought to divide the Class 12 goods from the application and argued against the refusals. We note that in the request applicant particularly indicated, with regard to the deceptively misdescriptive refusal, that its mattress "replaces tradition [sic] metal coil springs with a plurality of foam tubes." Req. for recon. unnumbered p. 1 (emphasis supplied). Applicant further explained that "it does not sell a traditional air tube mattress but notes that the limitation is whether Applicant's goods contains [sic] tubes, which it does. ... Clearly Applicant's mattresses have a core formed from a plurality of cylindrical structures (e.g. tubes)." Req. for recon.

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<sup>1</sup> Application Serial No. 79041878 filed August 9, 2007, pursuant to Trademark Act § 66(a), 15 U.S.C. § 1141f.

unnumbered pp. 1-2. In response, the examining attorney issued a non-final action "superseding" the original final action advising applicant on the procedure to divide the application, withdrawing the deceptively misdescriptive refusal and maintaining the mere descriptiveness refusal. The examining attorney ultimately issued a second "final refusal" solely on the ground that the mark is merely descriptive of the identified goods, which was considered as a denial of the request for reconsideration as to that ground.<sup>2</sup> Proceedings were resumed on September 28, 2010 with regard to that issue.

Both applicant and the examining attorney have filed briefs.<sup>3</sup> For the reasons discussed, we affirm the refusal to register.

A term is deemed to be merely descriptive of goods, within the meaning of Trademark Act Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3

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<sup>2</sup> For completeness, we note that the Class 12 goods were divided from the application.

<sup>3</sup> Applicant included two exhibits with its brief. Because the record in an application should be complete prior to the filing of an appeal, to the extent that the materials differ from those previously submitted during the prosecution of the application, they have not been considered. See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); and TBMP § 1203.02(e) (3<sup>rd</sup> ed. 2001).

USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used in connection with those goods, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use; that a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is settled that "the question is not 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 or services are will understand the mark to convey information about them." *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

Applicant, in urging reversal of the refusal, maintains that its mark does not describe mattresses, but

is at worst suggestive of the goods. Applicant, citing to thefreedictionary.com's definition of "tubes"<sup>4</sup>, particularly contends that the term TUBES, with regard to mattresses, does not describe an ingredient, quality, characteristic, function purpose or use of the goods. Applicant goes on to state:

Applicant's foam springs may technically fit the definition of a TUBE but Applicant notes that it is an unorthodox definition as that term is known in the mattress industry. In other words, no other manufacture [sic] uses this type of tube in its mattresses and generally consumers are not aware of foam springs being used in mattresses and therefore [TUBES] cannot be descriptive.

Br. p. 8. Applicant also states that it "purposefully" identified its goods as non-inflatable mattresses to make clear that applicant is not selling a typical water or air bed containing a cavity to be filled with air or water so as to avoid the descriptive term TUBES.

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<sup>4</sup> "Tube" is defined as:

- a. A hollow cylinder, especially one that conveys a fluid or functions as a passage
- b. An organic structure having the shape or function of a tube; a duct; a bronchial tube.
- c. A small flexible cylindrical container sealed at one end and having a screw cap at the other, for pigments, toothpaste, or other pastelike substances (emphasis added).

Applicant, with its request for reconsideration, made of record the following additional definition of "tube" from Webster's Online Dictionary: "1: any of various usu. cylindrical structures or devices: as a: a hollow elongated cylinder."

The examining attorney, on the other hand, maintains that the designation TUBE immediately conveys information about the nature of applicant's non-inflatable mattresses made of polyurethane-foam or latex and, is therefore, merely descriptive of them.

In support of the refusal, the examining attorney cites to applicant's admission that its mattresses contain tubes,<sup>5</sup> and has submitted:

1. Documents retrieved from a search of the Google search engine for "foam tube mattresses." Some of the results (emphasis supplied) follow:

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<sup>5</sup> The examining attorney at unnumbered page 3 of its brief points to the following statements made by applicant during the course of the prosecution of the application: "[the] foam springs [in applicant's mattress] may technically fit the definition of a tube" (br. p. 7); "[applicant's mattress] is formed from a plurality of foam cylinders or tubes replacing the function of metal springs," "the tubes in applicant's mattresses are not visible to the consumer" and "[applicant's] use of foam tubes to replace metal springs is not believed to be in use by other traditional mattress manufacturers" (applicant's December 8, 2008 response, unnumbered pp. 1 and 2).

a. a webpage from the website of Onlinestoreinc (www.onlinestoreinc.com) showing a specialty mattress from Boyd Specialty Sleep comprised of foam tubes. The web page identifies the mattress as "Boyd Shallow fill 145 (Essex) w/Foam Tubes";

b. a webpage showing the Interzum award (<http://www.interzum-award.com/47.html>) awarded to applicant for the "Tubes 126 Prestige Mattress." The mattress is described as follows: "The heart of the Metzeler Mattress Line **Tubes** 126 Prestige is the newly developed Rubex-**Tubes** System. The 126 cold-**foam tubes** in the mattress form a vertical tube system for perfect air circulation. The **tubes**, which differ in colour according to their degree of hardness, are integrated into the complete surface..."<sup>6</sup>

2. Documents retrieved from a search of the Google search engine for "tube mattresses." Some of the results (emphasis supplied) follow:

a. a patent excerpt from US Patent Reference 4720807 issued June 4, 1991 (retrieved from the website Patent Storm on November 23, 2007) discussing an invention described to "generally relate[] to fluid filled beds, such as water beds, or inflated **tube mattresses**..."; and

b. a product listing from the website of Mr. Mattress (<http://mrmattressnj.com/productsservices/>) listing Cylinder & **Tube Mattresses** as products.<sup>7</sup>

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<sup>6</sup> Final Office Action issued January 23, 2009. The search also included web pages from the websites www.sortprice.com and www.justmyofficefurniture.com, but these sites also featured the previously referenced Boyd Foam mattress. As such, their submission is superfluous.

<sup>7</sup> Also of record is a copy of a webpage from the website of Accelant.com, but the website does not include a reference to tube mattresses. As such it will not be considered further.

We find the record sufficiently demonstrates that the designation TUBES immediately conveys a salient feature or attribute of applicant's non-inflatable mattresses made of polyurethane-foam or latex, namely that the mattresses contain cylindrical structures or tubes.

Applicant nonetheless argues that the average consumer is not aware of the internal construction of a mattress (including box and spring or shaped memory foam) and, therefore, the consumer's perspective of whether a mattress has box springs or cylindrical foam spring elements is irrelevant. Thus, applicant essentially contends that the "hidden TUBE content" of its mattresses is not a significant attribute. We not only find this argument unsupported and unpersuasive, but it is severely undercut by evidence of industry and public recognition of the "tubes" feature. Indeed, as evidenced by the description of applicant's Interzum Award winning "Tubes 126 Prestige Mattress," the purchasing public would perceive the designation TUBES as descriptive of a significant attribute of applicant's non-inflatable mattresses. The copy includes the following (emphasis supplied):

The heart of the Metzeler Mattress Line **Tubes** 126 Prestige is the newly developed Rubex-**Tubes** System. The 126 cold-**foam tubes** in the mattress form a vertical tube system for perfect air circulation. ...



(<http://www.interzum-award.com/47.html>).<sup>8</sup>

It is apparent by this copy that the "tubes" feature of applicant's mattresses is a significant attribute that applicant want consumers to be aware of. Indeed, applicant's advertising materials prominently show the inner "tubes" construction of applicant's mattresses.<sup>9</sup>

We also are not persuaded by applicant's contention that because the term "tube" can refer to many different aspects of a mattress, i.e., its shape, its spring type, and its construction, the term cannot be considered merely descriptive of applicant's "non-inflatable" mattresses. As noted previously, descriptiveness is determined in relation to the goods sought to be registered. See *In re Bright-Crest, supra*. Here, the record clearly demonstrates the descriptive significance of the term "Tubes" in relation to applicant's identified non-inflatable mattresses which, by applicant's admission, feature "a plurality of foam tubes." Simply because the record additionally shows that the term "Tubes" may be descriptive in relation to other types of

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<sup>8</sup> Exhibits to the Final Office issued January 23, 2009.

<sup>9</sup> The record also shows that other mattress companies display the inner construction of mattresses in their advertising. See exhibits to the Final Office Action issued January 23, 2009, e.g., the Boyd shallow fill 145 (Essex) w/Foam Tubes mattress ([www.onlinestoresinc.com](http://www.onlinestoresinc.com)) and The Savannah Box Double Sixe Waterbed F4 Bladder Set With Memory Foam ([www.sortprice.com](http://www.sortprice.com)).

mattresses does not obviate its descriptive significance in relation to applicant's mattresses.

Applicant also argues of the previously referenced "Boyd shallow fill 145 (Essex) w/foam tubes" memory foam mattress, that the advertising improperly refers to the foam members as tubes, as they are "simply rectangular foam members ... and are believed to not be the commonly accepted term for TUBES." Br. p. 10. We find this argument unavailing. Notwithstanding applicant's opinion regarding this advertising language, it is clear that at least one other mattress manufacturer refers to the internal construction of its mattresses as containing "foam tubes." Further, even if applicant were the only user of the term, that fact does not mean that its mark is not descriptive. In re Sun Microsystems, Inc. 59 USPQ2d 1084, 1087 (TTAB 2001) ("The fact that AGENTBEANS does not appear in the dictionary is not determinative. Likewise, the fact that applicant may be the first and/or only entity using the phrase AGENTBEANS is not dispositive where, as here, the term unequivocally projects a merely descriptive connotation" (citation omitted); In re Acuson, 225 USPQ 790, 792 (TTAB 1985) ("A descriptive term used first or even only by applicant is not registrable as long as the relevant purchasing public perceives of the term as

describing the good"); and *In re Gould*, 173 USPQ 243, 245 (TTAB 1972) ("The fact that applicant may be the first and possibly the only one to utilize this notation in connection with its services cannot alone alter the basic descriptive significance of the term and bestow trademark rights therein").

Here, based on the evidence of record, we conclude that the designation TUBES immediately describes, without any kind of mental gymnastics or the need for additional information, a feature of applicant's identified non-inflatable mattresses for medical and non-medical purposes made of polyurethane foam or latex, namely that they feature foam cylinders or tubes.

**Decision:** The refusal to register under Section 2(e)(1) of the Trademark Act in Classes 10 and 20 is affirmed.