

This Opinion is not a  
Precedent of the TTAB

Mailed: September 24, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re First Quality Hygienic, Inc.*  
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Serial No. 87197883  
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Holly Pekowsky of Amster, Rothstein & Ebenstein LLP  
for First Quality Hygienic, Inc.

Christopher Buongiorno, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

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Before Zervas, Ritchie and Adlin,  
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

First Quality Hygienic, Inc. (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark PURSE SIZED for “tampons” in International Class 5.<sup>1</sup>

The Examining Attorney determined that PURSE SIZED is merely descriptive of a characteristic or feature of Applicant’s identified goods, and refused registration of

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<sup>1</sup> Application Serial No. 87197883 was filed on October 10, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon an allegation of a *bona fide* intention to use the proposed mark in commerce.

Applicant's proposed mark pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).

After the Examining Attorney made the refusal final, Applicant appealed to this Board and requested reconsideration. The Examining Attorney denied the request for reconsideration, the appeal was resumed and both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1). A term is "merely descriptive" within the meaning of Section 2(e)(1) if it "immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). "On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980).

Whether a mark is merely descriptive is determined in relation to the goods for which registration is sought, not in the abstract or on the basis of guesswork. Descriptiveness must be evaluated "in relation to the particular goods for which

registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). In other words, we evaluate whether someone who knows what the goods 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); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

The Examining Attorney relies on the following evidence:

- Applicant’s answers to the following questions:
  - (1) Will the tampons fit inside of a purse? Yes.
  - (2) Will the tampons be marketed or promoted as fitting inside of a purse? Yes<sup>2</sup>
- Examples of “purse sized” used in a descriptive manner to identify the size of tampons and other items that fit inside of a purse, all made of record with the First Office Action<sup>3</sup>:
  - [www.wisegeek.com](http://www.wisegeek.com)  
“Rotergirl” comment stating, “I don’t know-- purse sized tampons are very common these days.”
  - [www.reddit.com/TheGirlSurvivalGuide](http://www.reddit.com/TheGirlSurvivalGuide)  
“Can anyone recommend a good ‘purse-sized’ water bottle?”
  - [www.amazon.com/Winter-Wonderland-Purse-Sized-Coloring-Book](http://www.amazon.com/Winter-Wonderland-Purse-Sized-Coloring-Book)  
“Winter Wonderland: A Purse-Sized Coloring Book.”
  - [www.donnayoung.org/household/purse-size/](http://www.donnayoung.org/household/purse-size/)  
“Purse Sized Booklet.”

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<sup>2</sup> July 19, 2017 Resp., TSDR 3.

<sup>3</sup> January 19, 2017 Office Action, TSDR 4-19.

- “The Diva Diaries”  
Florida Weekly (2016)  
www.advance.lexis.com  
“Get a purse-sized one [pump spritzer] and fill it with spring water and a drop of peppermint or eucalyptus oil.”
- “Plenty of deals for dollars”  
Chillicothe Gazette  
www.advance.lexis.com  
“My recent sundries include a laundry hamper, small trash can, plastic cake server, Princess Sophia and Minnie Mouse nightlights (which have held up for two months) and purse-sized notebook.”
- “Baseball imitates life ...”  
St. Paul Pioneer Press (2013)  
www.advance.lexis.com  
“I remember my ‘far away grandma’ once sent me what we would now call a purse-sized packet of Kleenex as a gift.”

The Examining Attorney finds that “[t]he use of the wording ‘purse sized’ or ‘purse-sized’ to identify items that fit inside of a purse is not restricted to tampons. Consumers and sellers use the wording to describe the size of certain products that fit inside of a purse”; and “[u]pon viewing the wording PURSE SIZED used with tampons, female consumers will not need to mentally process or gather further information in order for them to understand the descriptive significance of the wording - especially when applicant’s tampons fit inside of a purse and are marketed and promoted as fitting inside of a purse ....”<sup>4</sup>

Applicant argues that the proposed mark is suggestive and not merely descriptive for the following reasons:

- Applicant's mark is not descriptive because it does not identify tampons with any degree of particularity.

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<sup>4</sup> 11 TTABVUE 4-5.

- Tampons are small enough to fit into most purses, so indicating that tampons fit inside a purse does not provide any specific information about the tampons.
- There is no evidence of others using Applicant's mark in connection with tampons.
- The web pages submitted by the Examining Attorney relate to water bottles and notebooks, not tampons, and therefore, cannot be used to establish that Applicant's mark is descriptive.
- Any doubt as to whether a mark is suggestive or merely descriptive should be resolved in favor of Applicant since there is only a thin line of demarcation between a suggestive mark and one that is descriptive.<sup>5</sup>

Applicant also submitted third-party registrations for marks containing the term SIZED to demonstrate that the USPTO has not considered such marks as merely descriptive marks, including LUXURY ... POCKET-SIZED (for baskets for domestic use, not of metal), SIZED JUST RIGHT (for bathroom tissue; paper towels; toilet paper; toilet tissue); BITE SIZED, RIGHT SIZED (for unprocessed apples; packaged unprocessed apples; fresh fruit; unprocessed fruit; packaged fresh fruit; fresh vegetables; unprocessed vegetables; and packaged fresh vegetables); and MAN-SIZED (for personal care products, namely, skin cleansing preparations).<sup>6</sup>

Applicant's answers to the Examining Attorney's questions make clear that Applicant's goods will fit and will be marketed as fitting inside of a purse. Further, the webpages submitted by the Examining Attorney demonstrate that the general public refers to a variety of items as "purse-sized," all with the same meaning, i.e., as

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<sup>5</sup> 7 TTABVUE 3-7.

<sup>6</sup> Req. for Recon., TSDR 10-19.

fitting inside of a purse. The Rotergirl website uses the term with specific reference to tampons. Although the remaining web evidence is not specific to tampons, it establishes that consumers understand the term “purse sized” to refer to the size or feature of a product.

We are not persuaded by Applicant’s argument that “[t]ampons are small enough to fit into most purses, so indicating that Applicant's tampons fit inside a purse does not provide any specific information about the tampons”;<sup>7</sup> the test under Section 2(e)(1) addresses whether a term describes a feature or characteristic of a good and the feature identified here is that the goods fit in purses. The test is satisfied. As far as Applicant’s alternative observation regarding the lack of evidence that others are using PURSE SIZED descriptively for tampons, being the first or only user of a merely descriptive designation does not make the designation distinctive. *See In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016) (“The fact that Applicant may be the first or only user of a term does not render that term distinctive ...”). *See also In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001).

Turning to the third-party registrations, they are not relevant to whether Applicant’s proposed mark is merely descriptive for tampons. *See, e.g.,* TENNISIZED and Design (for various articles of clothing and balls) and SIZED 4-SPILLS (for paper towels). Moreover, neither the Examining Attorney nor the Board is bound by the decisions of other Examining Attorneys in other applications. *See In re Nett Designs*,

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<sup>7</sup> 7 TTABVUE 4-5.

*Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.”).

As far as Applicant's contention that any doubts in our conclusion should be resolved in its favor, the record in the present case leaves us with no doubt that the proposed mark is merely descriptive.

Upon consideration of all of the Examining Attorney's and Applicant's arguments and evidence in the record, including the arguments and evidence not specifically discussed in our opinion, we affirm the Examining Attorney's refusal to register Applicant's proposed mark under Section 2(e)(1) of the Trademark Act.

***Decision:*** The refusal to register Applicant's proposed mark is affirmed.