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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bayer Corporation

Serial No. 75782067

Fred Carl III for Bayer Corporation.

Curtis French, Trademark Examining Attorney, Law Office 115
(Tomas Vlcek, Managing Attorney).

Before Simms, Cissel and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Bayer Corporation seeks registration on the Principal
Register of the mark ORANGE ZEST for its "cold preparation"
in International Class 5.¹

This case is now before the Board on appeal from the
final refusal to register on the ground that the term
ORANGE ZEST is merely descriptive of applicant's goods

¹ Application Serial No. 75782067 was filed on August 24, 1999, based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. On February 12, 2001, applicant submitted an amendment to allege use claiming first use of the mark in commerce as of June 3, 2000.

under Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1).

Both applicant and the Trademark Examining Attorney have fully briefed the case, but applicant did not request an oral hearing.

We affirm the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, if it immediately conveys knowledge of the ingredients, qualities or characteristics of the goods or services with which it is used or is intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality, feature, etc. *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985).

The dictionary definition shows that "orange zest" refers to the outer-most part of the orange rind that is used for flavoring.² Applicant has agreed that while the

² Zest: 1. a. b. The outermost part of the rind of an orange or a lemon, used as flavoring; 2. Spirited enjoyment; gusto... The American Heritage Dictionary of the English Language (3rd ed. 1992).

actual fruit rind may be used in baking (as had been shown by recipes placed into the record by the originally-assigned Trademark Examining Attorney), it would never be used in pharmaceutical preparations. Nonetheless, the LEXIS/NEXIS excerpts clearly establish that "orange zest" is a term that appears in articles with ever-greater frequency to describe a flavor of manufactured goods. As in applicant's tablets, this flavoring is an inactive ingredient derived from industrial chemicals, not from actual citrus rinds. As noted by the Trademark Examining Attorney, applicant's own packaging touts "Orange Zest" as a "new flavor" for its Alka-Seltzer Plus cold medicine.

Applicant's most compelling argument in favor of registration has to do with its contention that this term represents a "double entendre":

... In the first Office Action, the Examining Attorney submitted a dictionary definition of zest which included the following possible definition: "Spirited enjoyment; gusto." As the Applicant previously advised the office, "... applicant intends the trademark ORANGE ZEST to suggest liveliness or spirited enjoyment that one will experience in connection with consuming the product." This is quite plausible considering the very nature of the product itself, which is the famous ALKA-SELTZER effervescent dissolving tablet, now also a cold preparation. Anyone who has consumed an ALKA-SELTZER tablet is well aware of the "zesty" sensation experienced when one

drinks the solution made by dissolving the tablet in water.

If one further considers the other designation Applicant uses for its cold preparation, namely CHERRY BURST, ... it is clear exactly what commercial impression Applicant is trying to engender by this family of marks for its cold preparations... .

(Applicant's appeal brief, unnumbered pages 3 and 4)

This Board has held in appropriate cases that a proposed mark can project such a clear double entendre that it should not be held to be merely descriptive. See In re Delaware Punch Co., 186 USPQ 63 (TTAB 1975) [The mark THE SOFT PUNCH was found not to be descriptive for a non-alcoholic soft drink]. Such is not the case herein.

Given the amount of evidence which the Trademark Examining Attorney has made of record demonstrating that the term "orange zest" is widely used to describe a flavoring for manufactured goods, we have no doubt but that many consumers, upon seeing applicant's mark on cold preparations, would immediately understand an important characteristic of this product, namely that when dissolved in water, the cold medicine has the flavor of orange peels.

It is certainly possible that prospective purchasers, after lengthy consideration and analysis of applicant's mark in connection with the famous ALKA-SELTZER effervescent tablet, and a realization that "fizz," "burst"

and "zest" all connote a sense of "liveliness," might eventually recognize the possibility that a double entendre exists here. However, this conclusion would likely only be reached after a multi-stage reasoning or thought process. Accordingly, when applied to applicant's cold preparation having an orange zest flavoring, this term does not create a significant double entendre. See In re Volvo Cars of North America Inc., 46 USPQ2d 1455, 1460 (TTAB 1998) ["We hasten to add that to the extent that applicant's designation DRIVE SAFELY engenders some minor double entendre, this should not result in registration inasmuch as the primary significance of the phrase remains that of a commonplace safety admonition."] By contrast, the immediate meaning of the proposed mark in connection with these goods is the descriptive one. Hence, the highly descriptive and commonly understood meaning of "orange zest" simply overwhelms the other connotation suggested by applicant.

In conclusion, we find that even if it were clear that some minor double entendre would be engendered by the mark in connection with applicant's goods, the mark would still be unregistrable because the primary significance would remain descriptive. Therefore, applicant's mark ORANGE ZEST is merely descriptive under Section 2(e)(1) of the

Trademark Act of a feature or characteristic of applicant's
"cold preparation" having the flavor of orange zest.

Decision: The refusal to register under Section
2(e)(1) of the Trademark Act is hereby affirmed.