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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re General Hospital Supply Corporation

Serial No. 76210800

Wesley W. Whitmyer, Jr. of St. Onge Steward Johnston &
Reens LLC for General Hospital Supply Corporation.

Karen K. Bush, Trademark Examining Attorney, Law Office 105
(Thomas Howell, Managing Attorney).

Before Seeherman, Hohein and Holtzman, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

General Hospital Supply Corporation has applied to
register the mark SUPER ABSORBENT for goods identified, as
amended, as "plastic lining, separating and dividing
materials for use during sterilization of medical and

surgical implements."¹ Applicant has disclaimed exclusive rights to the word ABSORBENT. Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is merely descriptive of the goods. It is essentially the Examining Attorney's position that SUPER ABSORBENT is merely descriptive of applicant's plastic materials because the mark immediately conveys to consumers that the goods are highly absorbent. Traversing the refusal of registration applicant in the alternative has asserted that its mark has acquired distinctiveness, and has sought registration pursuant to Section 2(f) of the Act. This claim has been rejected by the Examining Attorney. When the refusal to register was made final, applicant filed the subject appeal.

The appeal has been fully briefed.² Applicant did not

¹ Application Serial No. 76210800, filed February 15, 2001, and asserting first use and first use in commerce as of April 2000.

² On September 9, 2003, one day before filing its reply brief, applicant requested that its application be amended to change its mark from SUPER ABSORBENT to SUPER ABSORBENT STEAM-N-LENE. The Board previously issued an action refusing to remand the application for consideration of this amendment because the request was filed at too late a stage of the proceeding. Accordingly, we consider only the registrability of SUPER ABSORBENT. However, we note that even applicant has acknowledged that SUPER ABSORBENT STEAM-N-LENE is a different mark from SUPER ABSORBENT. ("Applicant has used both marks in the sales of the goods...." reply brief, p. 1). See Trademark Rule 2.72(a)(2) (the drawing of the mark may be amended only if the proposed amendment does not materially alter the mark.)

request an oral hearing.

A mark is merely descriptive if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods with which it is used. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). It does not have to describe every one of these. It is sufficient if it describes a single, significant quality, feature, function, etc. In re Venture Lending Associates, 226 USPQ 285 (TTAB 1985). Moreover, the question is not decided in a vacuum but in relation to the goods on which, or the services in connection with which, it is used. Id.

Applicant has explained that:

...implements to be sterilized, such as surgical basins, are stacked with Applicant's "SUPER ABSORBENT" plastic dividing material inserted between each basin and then the entire stack is wrapped in a water repellent paper material. This forms a "pack" whereby the basins are separated from each other within the pack by Applicant's plastic dividing material. The pack is then placed, e.g., into a steam sterilizer where it is subjected to steam and then is treated with heated air in order to dry it. Importantly, by separating the implements with Applicant's SUPER ABSORBENT plastic dividing material, steam and heated air may adequately reach all surfaces for proper sterilization and drying. Also, while Applicant's plastic dividing material absorbs moisture, it must also effectively dry during the heating cycle to prevent contamination such as

the growth of bacteria that arises with
packs that are not completely dried.

Response filed December 26, 2001.

There is no question that one of the characteristics of applicant's goods is that they are absorbent, and that this absorbency feature is used during the sterilization process in which the product is used. Applicant has even acknowledged that "the mark 'SUPER ABSORBENT' ... refers to a characteristic of the product, i.e. its absorbency," although applicant then goes on to say that the mark does not refer "to the name of the goods, which is described above as plastic lining, separating and dividing materials used during sterilization." Brief, p. 6. It is applicant's position that marks containing the word SUPER are merely descriptive only if SUPER is combined with a word or words comprising the name of the goods with which it is used. "Applicant further respectfully submits that where the term 'SUPER' is used in combination with a characteristic or quality of a product, rather than the name of the product, the entire mark is held to be suggestive rather than descriptive." Brief, p. 5.

Applicant apparently bases its position on language in *In re Occidental Petroleum Corp.*, 167 USPQ 128 (TTAB 1970), a four-paragraph decision (the first two paragraphs simply

indicating the mark and goods in the application, and the ground for refusal) in which the Examining Attorney relied solely on dictionary definitions to prove the descriptiveness of SUPER IRON for a soil supplement. The Board's entire analysis was:

The difficulty with the above approach, however, is that it takes some roundabout reasoning to make a determination of what the mark actually describes. In our opinion, "SUPER IRON" merely suggests that the product contains a larger amount of iron than most soil supplements or that this iron, again an ingredient, is superior in quality to iron found in other soil supplements. This, in our opinion, is distinguishable from the situation where the superlative term "super" is combined with the name of an applicant's goods.

In other words, the Board found that a two-step process was required to determine the nature of the applicant's goods, and as a result the mark was suggestive.

Applicant has not discussed this point in the analysis, but has focused on the last sentence which distinguishes the situation where the term SUPER is combined with the name of the goods, and has assumed from this statement a rule as to when a SUPER mark will be found to be merely descriptive, and when it will be found to be distinctive.

Although in many cases marks which consist of SUPER and the name of the goods have been found to be merely descriptive, that does not mean that the converse is true, i.e., that marks which combine SUPER and a characteristic of the goods are not merely descriptive. On the contrary, there are several decisions which have found such marks to be merely descriptive. See, for example, Quaker State Oil Refining Corp. v. Quaker Oil Corp., 453 F.2d 1296, 172 USPQ 361 (CCPA 1972) (SUPER BLEND held merely descriptive of motor oils); In re Consolidated Cigar Co., 35 USPQ2d 1290 (TTAB 1995) (SUPER BUY found laudatory and hence merely descriptive of cigars, pipe tobacco, chewing tobacco and snuff); In re General Tire & Rubber Co., 194 USPQ 491 (TTAB 1977) (SUPER STEEL RADIAL merely descriptive of tires).

Applicant has also argued that, because its plastic material must be dry at the end of the sterilization process, the fact that it is absorbent is not a significant characteristic of the goods. We are not persuaded by this argument. As noted above, it is not necessary, in order to find a mark to be merely descriptive, that it describe each characteristic of the goods. In this case, applicant has acknowledged that its goods function to absorb moisture during the sterilization process.

The Examining Attorney has submitted excerpts taken from various websites which use the term "super absorbent" to describe goods ranging from incontinent pads to litter pan liners to moss plant basket liners:

Dignity Plus Super Absorbent Liners
www.aarp-pharmacy.com

[listed under "Cage & Pan Liners"]
Techboard Ultra
An improved, super-absorbent cage board
for less frequent changings
www.ssponline.com

Duro-Med Super-Absorbent Disposable
Liners
Designed with 500cc capacity to reduce
urine odor and skin irritation
Can be used with reusable incontinent
pant or regular underwear
www.clorders.com

The freshly picked moss is dried and
compressed for ease of use. Add water
and the moss will literally expand
before your eyes, like magic, into a
super absorbent basket liner. In fact
Just Moss liners are the only basket
liners that absorb so much water and
retain that water, helping maintain
your plants in top condition.
www.justmoss.net

These references, along with the dictionary definitions of "super" ("especially, extremely: a super accurate missile; was super careful"),³ demonstrate that

³ We grant the Examining Attorney's request that we take judicial notice of this definition from the American Heritage Dictionary of the English Language, 4th ed. The Board may take judicial notice of dictionary definitions. University of Notre

"super absorbent" is a recognized phrase to indicate a product that has a high degree of absorbency. Although in other contexts "super" may have a connotation of "puffery," a vague, desirable characteristic or quality, this is not the case when it is used as part of the phrase "super absorbent." See *In re Consolidated Cigar Co.*, supra (the evidence demonstrates that the expression "SUPER BUY" "has been widely adopted in common language as referring to bargains of exceptional note).

Applicant attempts to distinguish the usages of "super absorbent" in the website evidence by asserting that those products are designed to absorb as much fluid as possible and then be disposed of, while applicant's liners do not retain the fluid they absorb, but instead are dry at the end of the sterilization process. It is not clear to us that all of the products referenced in the Internet evidence act as applicant contends. See, for example, the moss plant liners. In any event, this is a distinction without a difference. It is the absorbency of the product to which "super absorbent" refers, not whether the product is disposable after fluid is absorbed. Consumers, including consumers of medical products such as

Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

applicant's, will understand, upon viewing applicant's mark in connection with its goods, that SUPER ABSORBENT describes a characteristic of the product, namely, that during the point in the sterilization process that the goods absorb fluid, they do this extremely well, i.e., they are SUPER ABSORBANT.

In view of the foregoing, we find that applicant's mark is merely descriptive of its goods.

Applicant has also asserted that, if its mark is found to be merely descriptive, it has acquired distinctiveness. In support of this claim, applicant has submitted two declarations by Phillip Davis, its president. Mr. Davis has asserted that as of December 13, 2000, applicant spent approximately \$17,500 in advertising and promoting its goods under the mark SUPER ABSORBENT. A close look at the breakdown of these expenditures shows that much of it (over \$14,000) was spent to mount a booth at a trade show in August 2001, including \$954 on an "upgrade" for the booth and \$784 for booth furnishings (e.g., a carpet, counter drapings, a side chair and a bar stool). \$4,100 was spent to procure a graphic mural for the booth, although it is not clear how or whether the mark appeared on the mural. Brochures bearing the mark SUPER ABSORBENT were distributed at the booth; an invoice shows that \$3,150 was spent to

produce 3,000 brochures. In the second quarter of 2001 sales of SUPER ABSORBENT products amounted to \$98,595, and from March 1, 2002 through May 31, 2002, sales were \$86,742.⁴ Applicant has also submitted form statements from four of applicant's customers (hospitals) and two of its manufacturers' representatives.

The customer statements consist of the following paragraph:

I have been a customer of General Hospital Supply Corporation for ____ years and have purchased from them such products as Trayliners and Basin Dividers for steam and gas sterilization which bore the trademark "SUPER ABSORBENT" and I have come to look upon this trademark as a symbol identifying the products of General Hospital Supply Corp. only, and not for any other company in this field.

In each form, the declarant stated that the party was a customer for three years, and the forms were signed between August 28, 2001 and October 3, 2001. Interestingly, applicant does not claim use of its mark prior to April 2000, so although the parties had been customers of applicant for three years at the time the statements were signed, they would have been purchasing the SUPER ABSORBENT

⁴ In its reply brief applicant has provided gross sales figures for 2001, 2002 and the first half of 2003. This evidence was not properly made of record, and has not been considered. See Trademark Rule 2.142(d).

products for only 16-17 months. The sales made to three of these customers between March 1, 2002 and May 31, 2002 were in the amounts of \$7,780 to one customer, \$3,164 to another and \$252 to a third.

The manufacturers representatives' statements include the following two paragraphs:⁵

It is my understanding that the mark SUPER ABSORBENT has acquired in the trade the meaning of Trayliners and Basin Dividers for steam and gas sterilization products produced only by General Hospital Supply Corporation.

Many of my customers ask for Trayliners and Basin Dividers for steam and gas sterilization products by the mark SUPER ABSORBENT and expect that all products marked with the SUPER ABSORBENT mark will come from the same source and are of equal quality with all other products from that source.

Both of these statements were signed at the end of August 2001, so at that time the representatives could not have been selling SUPER ABSORBENT products for more than 16 months.

The burden is on applicant to demonstrate acquired distinctiveness. *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 101 (Fed. Cir.

⁵ The statements also say that the signer understands the mark SUPER ABSORBENT on the products to indicate products produced by General Hospital Supply Corporation. However, since the declarant is a representative of applicant, that would not be surprising.

1988). We find the evidence submitted by applicant to be inadequate. Applicant has used its mark for a relatively short period of time, not even the five years of substantially exclusive and continuous use in commerce which may constitute prima facie evidence of distinctiveness. Its evidence of advertising and promotion is extremely limited, being confined to an exhibit at a single trade show and the production of 3,000 brochures. Nor do we find the form statements by only four customers and two manufacturers representatives to be persuasive. Given the widespread use of the term "super absorbent" to describe materials which are very absorbent, the evidence submitted by applicant is simply inadequate to demonstrate that SUPER ABSORBENT has acquired distinctiveness as a trademark for applicant's identified goods.

Decision: The refusal to register SUPER ABSORBENT on the ground that the mark is merely descriptive is affirmed.