

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE
TTAB

SEPT 25, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Enersyst Development Center, Inc.

Serial No. 75/023,135

John A. Dondrea and V. Bryan Medlock, Jr. of Sidley &
Austin for applicant.

Vivian Micznik First, Trademark Examining Attorney, Law
Office 104 (Sidney I. Moskowitz, Managing Attorney).

Before Seeherman, Hanak and Walters, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Enersyst Development Center, Inc. has filed a
trademark application to register the mark AIR FRYER for
"ovens, namely, commercial cooking impingement and
convection ovens."¹

¹ Serial No. 75/023,135, in International Class 11, filed November 21,
1995, based on an allegation of a bona fide intention to use the mark
in commerce.

The Trademark Examining Attorney has finally refused registration under 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 its goods.

Applicant has appealed. Both the applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The Examining Attorney contends that "the term 'air fryer' is the name of a relatively new type of oven which cooks foods using hot air in a manner that mimics the effect of frying foods with oil or grease"; that "'air fries' describes a feature of ovens, *i.e.*, cooking foods with air to mimic the effect of frying foods with oil or grease"; and that "applicant's product is a commercial cooking oven which uses heated gas/air to rapidly cook food products which are typically cooked by deep fat frying."

In support of her position, the Examining Attorney has submitted excerpts of articles from the NEXIS/LEXIS database. Following are examples from several of the excerpts submitted by the Examining Attorney:

The potatoes were full of flavor and, though they weren't particularly crisp, they did taste as if they'd been immersed in fat.
The secret is something called an air fryer.
It's a relatively new invention that cooks the potatoes with ultrahot air. [*The Orange County Register*, September 29, 1995.]

"Restaurant Show Offers a Glimpse Behind the Kitchen Door" - Super-cool kitchen hardware innovations include an air fryer that makes fat-free french fries. [*The Orange County Register*, September 1, 1995.]

Dillon, a subsidiary of Kroger, offers in-store seafood cooking ... The ovens are air fryers, which is an advantage for people who want to reduce fat and cholesterol intake. "People come to us because we're using a non-grease fried product," he said. [*Supermarket News*, August 22, 1988.]

D. B. Kaplan's manager John Emde solved a problem that has plagued the restaurant since opening: the inability to serve french fries that are often requested by customers because of a lack of adequate ventilation in the restaurants. Emde purchased an "air fryer" he discovered at a recent trade show, and D. B. Kaplan can now offer french fries. [*Restaurant Business Magazine*, May 1, 1985.]

"Source for Solutions. Preview of 1995 North American Association of Food Equipment Manufacturers Conference" - The on-board computer determines the weight and temperature of the load, uses the moisture content of the product to steam heat the food and finally air fries the product. Finally you have a means of serving fried foods without the grease to your increasingly health-conscious customers. [*Restaurant Business Magazine*, September 1, 1995.]

Items from the dinner and lunch menu will be made in a greaseless kitchen utilizing a hot air fryer that cooks food faster and without oil. [*Idaho Business Review*, November 9, 1992.]

... faster than a microwave and more versatile. The manufacturer, American Harvest, says the appliance can roast, broil, grill, bake and "air fry." It can cook turkeys, boil eggs and make practically grease-free french fries. [*The Courier-Journal*, January 13, 1992.]

Applicant's principal argument is that the ordinary meaning of the terms "air" and "fryer" contradict any notion that its mark AIR FRYER is merely descriptive. Applicant notes the definition of "fry" in *Webster's Ninth New Collegiate Dictionary* (1988) as "cook[ing] in a pan or on a griddle over a fire esp. with the use of fat," and the definition of "fryer" as a "deep utensil for frying food." Applicant contends that its goods "are not pans or griddles or any other apparatus containing heated oil or fat"; and that "[w]hile one may attempt to simulate the taste and characteristics of fried foods using air instead of heated oil or fat, by definition one cannot 'fry' a food product with air."

Applicant argues that the evidence submitted by the Examining Attorney "shows only sporadic and mixed use of the term AIR FRYER over a 13 year period"; that the NEXIS articles "demonstrate that ovens designed to cook traditionally deep fat fried foods with air existed and were available no later than 1985 and that very rarely over the last twelve years did anyone refer to this oven type as an 'air fryer'"; that the evidence spans a significant period of time and, thus, does not support the Examining Attorney's contention that an AIR FRYER is a relatively new

invention; and that, rather than using the term AIR FRYER, "many of the articles use the phrase 'air fries' to describe a food product, namely french fries cooked with heated air."

The test for determining whether a mark is merely descriptive is whether the involved term immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods, only that it describe a single, significant quality, feature, etc. *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985). Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. *In re Recovery*, 196 USPQ 830 (TTAB 1977).

We believe that the evidence establishes that, since at least 1985, there have been products on the market that

have been referred to as "air fryers"; that these products cook foods using hot air so that the resulting cooked item tastes like a fried food but is much lower in fat and cholesterol because it is not fried in fat or grease. We agree with applicant that the ordinary meaning of the term "fry" refers to a method of cooking using fat or grease and, clearly, these products do not "fry" the foods in the traditional sense. Nonetheless, the evidence of record demonstrates that the term AIR FRYER is used to describe products within the scope of goods identified herein, *i.e.*, products which cook foods that are traditionally fried using a hot air method so that the food "tastes" fried and is healthier.

We disagree with applicant's argument that the NEXIS articles show "only sporadic mixed use of the term AIR FRYER over a thirteen year period." The excerpts of record do not evidence a "mixed" use of the term AIR FRYER; rather, all such uses in the excerpts of record are descriptive in nature. Further, considering the fact that the goods involved are commercial equipment, we find the evidence submitted by the Examining Attorney sufficient to show that the term AIR FRYER is used to describe a product encompassed by the identification of goods herein. We also note that applicant has neither denied that such products

Serial No. 75/023,135

are encompassed by its identification of goods, nor provided any evidence to contradict the Examining Attorney's showing.

In conclusion, we find that the applied-for mark, AIR FRYER, is merely descriptive in connection with the identified goods.

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

E. J. Seeherman

E. W. Hanak

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board

We believe that the evidence establishes that, since at least 1985, there have been products on the market that cook foods using hot air so that the resulting cooked item tastes like a fried food but is much lower in fat and cholesterol because it is not fried in fat or grease. We agree with applicant that the ordinary meaning of the term "fry" refers to a method of cooking using fat or grease and, clearly, these products do not "fry" the foods in the traditional sense. Nonetheless, the applied-for mark, AIR FRYER, directly conveys the fact that products within the scope of goods identified herein can be used to cook foods that are traditionally fried using a hot air method so that the food "tastes" fried and is healthier. Moreover, there is some evidence indicating that at least some of these products have been referred to as "air fryers."

In conclusion, we find that the applied-for mark, AIR FRYER, is merely descriptive in connection with the identified goods.²

² There are a limited number of references in the record to "air fryers." Applicant contends that this indicates that the applied-for mark is not merely descriptive, whereas the Examining Attorney contends the same evidence indicates that the product is a new innovation. We agree with applicant that the product does not appear to be new; however, this fact does not alter our determination that AIR FRYER is merely descriptive in connection with the identified goods.