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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Levlad, Inc.

Serial No. 76185349

Robert Berliner of Fulbright & Jaworski L.L.P. for Levlad, Inc.

Richard A. Straser, Trademark Examining Attorney, Law Office 114 (Margaret Le, Managing Attorney).

Before Seeherman, Hohein and Chapman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On December 23, 2000,¹ Levlad, Inc. (a California corporation) filed an application to register the mark ORGANIC SPA COLLECTION on the Principal Register for goods amended to read as follows:

¹ In applicant's "Response to Final Office Action" filed September 3, 2002 (via certificate of mailing), applicant requested that "the filing date be corrected to December 22, 2000." The Board cannot change the filing date of an application. If applicant chooses to pursue this matter, it may file a petition to the Director pursuant to Trademark Rule 2.146.

"hair shampoo; hair conditioners; hair rinses; suntan lotion; after-bath splash-on; face wash; facial masks; hand and body lotion; moisturizing lotion; skin cream; toothpaste; personal deodorants; non-medicated scalp treatment cream; non-medicated ointment for the treatment of burns, rashes and minor skin disorders" in International Class 3; and

"medicated preparations for scalp care and the treatment of dandruff; dandruff shampoo; medicated ointment for the treatment of burns, rashes and minor skin disorders" in International Class 5.

Applicant disclaimed the word "organic." The application is based on applicant's assertion of a bona fide intention to use the mark in commerce in connection with the identified goods.

The Examining Attorney refused registration for both classes of goods on the ground that applicant's mark, ORGANIC SPA COLLECTION, is merely descriptive of applicant's goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

When the refusal was made final, applicant appealed to this Board. Both applicant and the Examining Attorney have filed briefs;² an oral hearing was not requested.

² Applicant submitted two exhibits with its request for reconsideration filed September 3, 2002 (via certificate of mailing). (Exhibit A consists of papers relating to applicant's request that the filing date of the application be changed, and Exhibit B consists of printouts from the USPTO's Trademark

The Examining Attorney contends that the proposed mark merely describes characteristics and qualities of applicant's goods, namely, a spa collection of various organic products, sold together to consumers; that applicant's proposed mark consists of three words with commonly understood English meanings; that the mark does not create a unique or incongruous mark with a separate, non-descriptive meaning; and that neither imagination nor a multi-stage reasoning process is needed to discern the significant characteristics and features of applicant's goods.

Specifically, the Examining Attorney contends as follows (Final Office action, p. 2):

The terms "organic" and "spa collection" are highly descriptive for a spa collection featuring organic goods Organic products are highly marketed and are recognizable products to consumers. Various "spa collections" feature applicant's products... .

The Examining Attorney concludes that the evidence he submitted into the record -- dictionary definitions of the

Electronic Search System (TESS) of several third-party registrations which include the word "ORGANIC" in the marks.) The Examining Attorney denied applicant's request for reconsideration without comment on either of these issues and/or exhibits. However, in his brief on appeal, the Examining Attorney erroneously objected to these exhibits as being untimely filed. The Examining Attorney's objection is overruled.

three words comprising the mark, evidence retrieved from the Nexis database and the Internet, and third-party registrations with the term "collection" disclaimed -- establishes a prima facie case of mere descriptiveness, which applicant did not successfully rebut.

Applicant argues that the mark ORGANIC SPA COLLECTION, when considered as a whole, and not dissected into its separate parts, requires prospective purchasers to go through a multi-stage reasoning process to understand the connection between applicant's goods and the mark ORGANIC SPA COLLECTION; that because the mark requires "imagination, thought and perception to reach a conclusion as to the nature of the goods" (Response to first Office action, p. 6) it is only suggestive of the goods; that the dictionary definitions of the words "organic" and "spa" include multiple definitions of those words; that there are numerous third-party registrations on the Principal Register of marks which include the word "ORGANIC" and another word or words; that the Examining Attorney has not met the burden of proof to establish the mark is merely descriptive; and that doubt is resolved in applicant's favor.

The test for determining whether a mark is merely descriptive is whether the term or phrase immediately

conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used or is intended to be used. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Eden Foods Inc.* 24 USPQ2d 1757 (TTAB 1992); and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979).

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 term or phrase is being used or is intended to be used on or in connection with those goods or services, and the impact that it is likely to make on the average purchaser of such goods or services. See *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995); and *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991). Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). Rather, the question is whether someone who knows what the goods or services are will understand the term or phrase to convey information

about them. See *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990).

The Examining Attorney has made of record the following definitions from The American Heritage Dictionary of the English Language (Third Edition 1992):

- (1) **organic** adjective ...2. of, relating to, or derived from living organisms: organic matter...
3c. simple, healthful, and close to nature: an organic lifestyle...;
- (2) **spa** noun 1. a resort providing therapeutic baths. 2. a resort area having mineral springs. 3. a fashionable hotel or resort. A health spa. ... [After Spa, a resort town of eastern Belgium.]
Regional Note: The word *spa*, taken from the name of the famous mineral springs in Spa, Belgium, has become a common noun denoting any place with a medicinal or mineral spring.; and
- (3) **collection** noun 2. a group of objects or works to be seen, studied, or kept together... .

Applicant's disclaimer of "organic" confirms what the evidence of record shows, i.e., this word is at least merely descriptive in relation to applicant's various cosmetic products and medicated products. See *In re K-T Zoe Furniture Inc.*, 16 F.3d 390, 29 USPQ2d 1787 (Fed. Cir. 1994); *Quaker State Oil Refining Corporation v. Quaker Oil*

Corporation, 453 F.2d 1296, 172 USPQ 361 (CCPA 1972); and
In re Ampco Foods, Inc., 227 USPQ 331 (TTAB 1985).

Further, the Nexis and Internet evidence, examples of which are reproduced below, demonstrates that the terms "organic" and "spa collection" immediately convey information about the major characteristics of applicant's goods:

Headline: Finding a Bluebird of
Happiness

...The result, Bluebird Herb Farm, is home to more than 150 herb varieties that are put to many uses: culinary, medicinal, potpourri, meditation and butterfly attractors; a line of uniquely formulated fine organic herbals including shampoos and hair treatments, skin care lotions and oils, bath salts and soaks, teas, pet care (including an herbal dog biscuit mix), household products and aromatherapy treatments. "Albuquerque Journal," September 25, 2000;

Headline: Restaurants; A Great Escape
...walls are paintings of local scenes by local artists. Wooden shelves hold a library of well-used cookbooks and even a few items for sale (if you happen to need wax paper or organic toothpaste). ... "The New York Times," July 16, 2000;

Headline: Blocking the Rays; Sun
Protection First; Put Sunscreens in Your
Plans for Summer Fun
...For those who prefer a holistic approach to skin care, Dr. Hauschka's sunscreen lotions and creams are made from organic, "biodynamically" grown plants and pure essential oils said to be good for sensitive skin. The collection is

available at Sephora, Beechwood Place. ...
"The Plain Dealer," May 25, 2000;

Headline: Brown Cow Adds a Store
...Wooley's mohair, cotton and wool saddle
blankets used to be the only goods, but
the inventory now includes beaded
halters, hardwood rocking horses, chaps,
hats, medicines and organic shampoos.
Leasing retail space at the Mall of
America was no mean feat. ... "Albuquerque
Journal," September 20, 2001;

Headline: Killer Looks
...And yet he remarks in a voice-over one
morning while peeling off his organic
facial mask, "I simply am not here." ...
"The Oregonian," April 4, 2000;

Headline: Were All the Pillows There to
Sleep On or Just Used to Cushion the
Fall?
...include a multi-colored flower make-up
bag containing nail polish in Tropical
Orchid and a copper color; a small bottle
of Revitalizing perfume; and a bottle of
Revitalizing Moisture Lotion by Mary Kay
Private Spa Collection. ... "The
Commercial Appeal (Memphis, TN),"
November 14, 2001;

Headline: Spa Treatments Come Home
...Photo: State of Mind's home spa
collection includes a myriad of shampoos,
conditioners, exfoliators, tub teas, body
muds, candles and incense. ... "St. Louis
Post Dispatch," February 13, 1999;

Headline: Shipyards Vie to Raise the
Titanic (clone)
...Selling Soap
Princess Cruises has begun selling its
own line of bath and shower products.
The Grand Spa Collection includes,
shampoo, conditioner, bath and shower
gel, moisturizer, body silk, bath and
body oil, soap and bath sea salts in four

fragrances. ... "The San Francisco Examiner," April 19, 1998;

Gaylord Opryland Resort
Gilchrist & Soames English Spa Collection
Ultimate Spa Collection Basket...included
are ... body lotion and mineral bath,...
shampoo, conditioner and mineral bath,
large loofah scrubber..., ... soap
Spa Collection Basket...included are ... body
lotion, mineral bath, shampoo,
conditioner, small loofah scrubber ...
soap...,
www.gaylordopryland.com;

Botanical Bath & Body Essentials
Private Spa Collection.
...makes it possible for spa treatment in
your bath or shower...
www.geocities.com;

Exuviance Spa Collection
This collection contains:
Purifying body wash..., hand & body
lotion... The Spa Collection comes in a
clear plastic drawstring bag and is
excellent for [a] holiday gift
suggestion...
www.skin-beauty.com;

Atlantis Herbs "For All Your Natural
Health and Wellness Needs"
Body Care Herbs Homeopathic
Aromatherapy Pet Care Videos
...Gift Baskets and kits are a great way to
say "thank you" to that special person!
Avalon Lavender Spa Collection Tote Bags
4 pc A walk through a lush lavender
field on a pristine organic farm inspired
the creation of Avalon Organic
Botanicals. This unique line of
therapeutic body care products is derived
from certified, organic aromatic flowers
and herbal botanicals for a remarkable
spectrum of therapeutic, life enhancing

benefits for a healthy body, mind and spirit.

www.atlantisherbs.com;

Sea Enzyme...The Balancer

Wellness Spa Collection for Face, Body, Hands & Feet

Sea Enzyme puts balance back in your hands, feet and body with botanical sea algae, and sea minerals. For centuries, plants, sea plants and minerals have been used for their therapeutic benefits, combined with natural vitamins and infusions of essential oils. ... High substances of anti-oxidants. Such as vitamins, chamomile, lemon grass, lavender and marine minerals are building blocks that help to protect cell membranes from the damage of free radicals. Pure, botanical skin care can be your best source for healthy, beautiful skin.

www.skineffects.com;

Spa Collection in Star Basket

Aromatherapy Spa Collection by Spa Renaissance includes... bath and body oil,... hand and body lotion,... salt rub,...

www.romanticgiftsforher.com;

Ladies Echo Spa Collection

This Ladies Echo Spa Collection Includes: Sea salts, shower gel, bath foam and body lotion... .

www.greenparrotgifts.com; and

Mason James Salon

Repechage

The spa has served as a place of pilgrimage since the times of the ancient Romans for its natural means of healing and rejuvenation. The Repechage® Sea Spa Collection recreates these incredible benefits in products specifically designed to provide maximum results in minimum time.

Skin Care Information Skin Care Kits
www.masonjamessalon.com.

We agree with the Examining Attorney that the mark ORGANIC SPA COLLECTION, when considered as a whole, and in the context of applicant's goods (various cosmetic and medicinal products such as hair shampoo, skin cream, hand and body lotion, moisturizing lotion, and dandruff shampoo), is merely descriptive. The phrase immediately informs consumers that applicant's goods are made of "organic" or natural and not synthetic or artificial ingredients, and that they are a collection of "spa" products, i.e., they are products that are generally available at a spa. The purchasing public would immediately understand that the significant characteristics of applicant's goods are that they are made of "organic" ingredients and that they are collections of products typically available at a spa.

The combination of the words in applicant's mark does not create an incongruous, creative or unique mark. Rather, applicant's mark, ORGANIC SPA COLLECTION, when used in connection with applicant's identified goods, immediately describes, without need of conjecture or speculation, the primary characteristics of applicant's goods, as discussed above. Nothing requires the exercise

of imagination or mental processing or gathering of further information in order for purchasers of and prospective customers for applicant's goods to readily perceive the merely descriptive significance of the phrase ORGANIC SPA COLLECTION as it pertains to applicant's goods. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Intelligent Instrumentation Inc.*, 40 USPQ2d 1792 (TTAB 1996); and *In re Time Solutions, Inc.*, 33 USPQ2d 1156 (TTAB 1994).

While we acknowledge that the record is perhaps stronger with regard to the merely descriptive nature of the mark in connection with the goods identified in Class 3, nonetheless, there is sufficient evidence (dictionary definition of "spa," and Nexis/Internet stories referring to medicinal uses of organic products and the healing nature of spa products) to make a prima facie case that the mark is merely descriptive with regard to the goods identified in Class 5.

Applicant's argument that the words "organic" and "spa" have several non-descriptive dictionary meanings is unpersuasive because the other meanings are irrelevant in the context of applicant's goods. It is the significance of the mark as used in connection with applicant's goods

that we must consider, and in this context the dictionary meanings we have set forth above would be the ones consumers would attribute to the mark.

Applicant's argument that "the term 'ORGANIC' is registrable when used in conjunction with another term as evidenced by the numerous registrations on the Principal Register containing 'ORGANIC' and another term" (Response to Final Office action, p. 6) is also unpersuasive. Some of the third-party registrations issued under Section 2(f) of the Trademark Act, thus indicating the descriptive nature of the entire mark, including the term "ORGANIC." Also, several of the third-party registrations are distinguishable on their face such as marks in which "organic" describes a non-descriptive term, such as THE ORGANIC WAY and leaf design, and ORGANIC GIANT, as a result of which "ORGANIC" would not be viewed as describing the goods; or the goods are not related to those involved herein, such as cleaning compounds for commercial and industrial use, furniture polish, oven cleaner, and air fresheners.

In any event, while uniform treatment under the Trademark Act is an administrative goal, the Board's task in this ex parte appeal is to determine, based on the record before us, whether applicant's mark is merely

descriptive. As often noted by the Board, each case must be decided on its own merits. We are not privy to the records of the third-party registration files, and moreover, the determination of registrability of those particular marks by the Trademark Examining Attorneys cannot control the merits in the case now before us. See *In re Nett Designs Inc.*, supra, 57 USPQ2d at 1566 ("Even if some prior registrations had some characteristics similar to [applicant's application], the PTO's allowance of such prior registrations does not bind the Board or this court.")

Decision: The refusal to register on the ground that the mark is merely descriptive under Section 2(e)(1) of the Trademark Act is affirmed as to both classes of goods.