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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Greenleaf, Inc.

Serial No. 74/631,589

Richard M. Moose of Dority & Manning for Greenleaf, Inc.

Tina L. Sapp, Trademark Examining Attorney, Law Office 105
(Thomas Howell, Managing Attorney).

Before Cissel, Hairston and Walters, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Greenleaf, Inc. has applied to register the design shown below as a trademark for "air fresheners."¹ Applicant has provided the following description of the mark: "The mark consists of a rectangular generally flatpack envelope serving as a container for the subject goods."

¹ Ser. No. 74/631,589, filed on February 8, 1995, which alleges dates of first use as early as 1983 and states that "the stippling in the drawing is for shading purposes only."

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Applicant has claimed that the design has become distinctive of its goods due to its long use and public recognition, and applicant therefore seeks registration pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. 1052(f).

Registration has been finally refused on the ground that the design sought to be registered is de jure functional (Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1145) and, in the alternative, should the Board determine that the design is not de jure functional, that the design has not acquired distinctiveness as a trademark.

Applicant has appealed. Briefs have been filed and an oral hearing was held.

We turn first to the issue of de jure functionality. At the outset we think it useful to describe the precise goods for which applicant desires to register its envelope configuration. The application identifies the goods as air fresheners, but it is clear from the record that applicant uses its envelopes as a container for a specific type of air freshener, i.e., scented granulated matter.

As has often been stated in cases involving configurations of the goods, if the design of a product or a container for a product is so utilitarian as to constitute a superior design which others in the field need to be able to copy in order to compete effectively, it is considered to be de jure functional and, as such, is precluded from registration for reasons of public policy. See *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332, 213 USPQ 9, (CCPA 1982). The *Morton-Norwich* case discussed what evidence is useful to show that a configuration of a product or container is functional and pointed to the existence of utility patents; advertising touting the utilitarian advantages of the configuration sought to be registered; the existence of alternative configurations and evidence showing that the configuration sought to be

registered results from a simpler or cheaper method of manufacture as factors which may be helpful in determining whether a particular design is functional.

We recognize that, in this case, there is no utility patent of record covering the design of a rectangular generally flatpack envelope. While the existence of a utility patent disclosing the utilitarian advantages of a design is strong evidence of de jure functionality of that configuration, the absence of a utility patent does not mean that the configuration is not de jure functional. That is especially true here where the utilitarian advantages of a rectangular generally flatpack envelope are patently obvious. For example, it is thin and lightweight. Further, it is common knowledge that this kind of envelope has been in use for many years by others in different commercial fields to package their merchandise. While it appears that applicant has used special paper, glue, ink and carrier materials in manufacturing its envelopes in order to accommodate the scented granular matter, it does not claim any of these "features" as part of its mark. What applicant claims as its mark is simply the configuration of a basic rectangular flatpack envelope. We may take judicial notice of the fact that envelopes are

generally rectangular and are used as containers.²

Applicant's envelope is neither unusual in shape (e.g., it is not an octagonal envelope), nor is it being put to an unusual use. It seems perfectly logical to us that a manufacturer of air fresheners which consist of scented granulated matter would package its goods in a rectangular, generally flatpack envelope. Competitors of applicant seem to share this view since at least seven of them have used this kind of envelope as containers for their air fresheners which consist of scented granular matter.

As to the existence of alternative designs, the record is replete with examples of air fresheners in various other forms and containers (e.g., scented candles, aerosol sprays, fragrance mists, potpourri, and incense). Obviously, it would not be feasible to package many of these air fresheners in rectangular flatpack envelopes. However, with respect to those air fresheners which consist of scented granular matter, it appears that a generally rectangular flatpack envelope is, at the very least, "one

² We note that Webster's Third New International Dictionary (1976), at page 759, defines an "envelope" as, inter alia, "something that envelops: WRAPPER, CONTAINER, RECEPTACLE"; and The American Heritage Dictionary (New College Ed. 1976), at page 438 defines an "envelope" as "a flat, folder paper container for a letter or similar object, usually rectangular and having a gummed sealing flap."

of a few superior designs available." See *Morton-Norwich*, supra, at page 16. Applicant's type of air fresheners can easily be contained in an envelope and a purchaser does not have to open the envelope to experience the fragrance.

Rather, as touted by applicant, its air fresheners, while still contained in the envelope, can be placed in a number of locations "for a distinctively fragrant experience."

Finally, although there is no evidence that envelopes are less expensive than other types of containers, it is common knowledge that envelopes are relatively inexpensive items.

In view of the foregoing, we find that the envelope configuration which applicant seeks to register is de jure functional.

Although a de jure functional design may not be registered regardless of any evidence of distinctiveness, in order to render a complete decision herein, we have considered applicant's 2(f) evidence. Applicant has submitted two declarations from its president, Mr. Caldwell, wherein he states, in relevant part: that the mark was in substantially exclusive and continuous use for almost twelve years preceding the filing of the application; that applicant has sold its air fresheners to over 55,000 gift and specialty shops (83% of the market)

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with sales for the period between 1983 and 1996 totaling more than \$94,000,000; that the principal method by which applicant promotes its goods is through direct mailings of samples of the goods to gift and specialty retailers; that in its direct mailings, applicant uses one of the larger envelopes as a direct mailer and encloses therein an order form, advertising card and product sample; that applicant has sent over 1,000,000 direct mailings to gift and specialty retailers; that applicant is the owner of Registration No. 1,820,94 for the mark SCENTENVELOPE for fragranced paper sachet and Registration No. 1,821,328 for the mark CARDENVELOPE for scented greeting cards; and that these goods, along with applicant's air fresheners, are part of an "envelope theme;" that applicant's air fresheners are leading products in the gift and specialty products field as recognized by surveys which have appeared in the trade publication Giftbeat; that in these surveys applicant's air fresheners are referred to as "envelopes"; that applicant was the first to market air fresheners in a rectangular flatpack envelope, but that since applicant's introduction, several competitors have begun to market air fresheners in rectangular flatpack envelopes; that these competitors have copied applicant's envelope without its authorization; and that these are initial offerings from

companies which are not substantial players in the home fragrance market. Numerous samples of applicant's air fresheners, direct mailers and product catalogs have been made of record. Applicant argues that the foregoing establishes that its envelope design has acquired distinctiveness for its goods.

The Examining Attorney, on the other hand, essentially argues that applicant's evidence fails to establish acquired distinctiveness because there is no evidence to suggest any promotion or perception of the envelope, per se, as a trademark.

After careful consideration of the record, we find that the evidence is not sufficient to establish that the envelope configuration sought to be registered has acquired distinctiveness.

First, there is no evidence in this record as to how the ultimate consumers of applicant's air fresheners, i.e., ordinary purchasers, perceive the envelope design. In this case, we have no affidavits from consumers as to their perception of the envelopes which applicant uses. Purchasers may well regard the envelopes as nothing more than containers for applicant's air fresheners.

At most, applicant's sales figures demonstrate a growing popularity or commercial success for its air

fresheners, but such evidence alone does not demonstrate that the envelope design which applicant seeks to register has become distinctive of its air fresheners and thus functions as a source indicator. See e.g., *In re Bongrain International (American) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990) [growth in sales may be indicative of popularity of product itself rather than recognition of a term as denoting origin].

Further, there is an absence of any advertising or other promotional material that even refers to the envelopes. As we have already noted, it is common for merchants to use rectangular flatpack envelopes as containers for their goods. Thus, purchasers have come to expect goods to be packaged in this kind of envelope. In view of the ordinary nature of the configuration of an envelope, a large amount of evidence would be required to establish that the configuration has acquired distinctiveness and would not be regarded as mere packaging. See for example, *In re Sandberg & Sikorski Diamond Corp.*, 42 USPQ2d 1544 (TTAB 1996) [Because ring designs which applicant seeks to register are ordinary in nature, applicant has heavy burden to establish that designs have acquired distinctiveness and would not be regarded merely as ordinary arrangement of gems].

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Accordingly, even if we had found that the envelope configuration was not de jure functional, advertising showing substantial promotion of the envelope configuration and recognition thereof by ordinary purchasers would be necessary in order to demonstrate that the envelope configuration which applicant seeks to register has in fact acquired distinctiveness for air fresheners.

Decision: The refusal to register is affirmed.

R. F. Cissel

P. T. Hairston

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