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October 6, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re KRB Seed Company, LLC¹

Serial No. 76317811

Howard A. MacCord, Jr. of MacCord Mason PLLC for KRB Seed Company, LLC.

Samuel E. Sharper, Jr., Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).²

Before Bucher, Drost and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

KRB Seed Company, LLC has filed an application to register the mark THE REBELS in standard character form for "grass seed."³

¹ United States Patent and Trademark Office (USPTO) assignment records reflect that the current owner of the application is Pennington Seed, Inc., at Reel/Frame No. 3113/0239. According to the records, the assignment was executed on December 9, 2004.

² During the course of prosecution, this application was reassigned to the above-noted examining attorney.

³ Application Serial No. 76317811, filed September 28, 2001, alleging a date of first use anywhere and date of first use in commerce of August 1, 1992.

The examining attorney has refused to register the applied-for mark on the ground that it is a varietal (or cultivar) name for applicant's grass seeds and because varietal or cultivar names are generic designations and cannot be registered as trademarks. Sections 1, 2 and 45 of the Trademark Act. 15 U.S.C. §§ 1051, 1052, and 1127.⁴ When the refusal was made final, applicant appealed to this Board. Applicant and the examining attorney have filed briefs, and applicant waived the scheduled oral hearing.

Examining Attorney's Arguments and Evidence

In maintaining his refusal, the examining attorney argues that "varietal (or cultivar) names are generic designations and cannot be registered as trademarks" (brief p. 3) and that the terms "varietal and cultivar are used to mean the same thing" (brief p. 4). Further, the examining attorney argues and, the record shows, that "the term 'REBEL' is a varietal or cultivar name for grass and grass seed" (brief p. 4) and applicant's mark THE REBELS is merely the plural form of the varietal name (brief p. 8). Specifically, the examining attorney argues that applicant's addition of "a non-registrable term (THE)" and

⁴ The first office action also included a reference to a prior pending application which has been abandoned as acknowledged by the examining attorney in the second office action.

the pluralization "has not changed the commercial impression nor meaning of the mark, i.e., REBEL, a varietal name." Final Office Action pp. 1-2. Finally, the examining attorney argues that applicant's evidence of secondary meaning "does not overcome a varietal refusal." Brief p. 7. However, the examining attorney states in the alternative that if the proposed mark "is determined not to be generic and does function as a mark, the mark should be considered inherently distinctive, because it's not descriptive as a matter of normal semantics." Brief p. 8. The examining attorney also noted and acknowledged the claim of acquired distinctiveness. Brief p. 8.

In support of his refusal, the examining attorney has made of record photocopies of the relevant pages from the following: (1) excerpts of articles from a variety of sources retrieved from the DIALOG database wherein REBEL and REBEL II are used in connection with grass seed; (2) an excerpt from the Germplasm Resources Information Network web server which is maintained by a unit of the United States Department of Agriculture's Agricultural Research Service wherein REBEL is listed as a cultivar name for tall fescue; (3) excerpts from the database maintained by the International Union for the Protection of New Varieties of Plants (UPOV) listing REBEL, REBEL II, REBEL III, REBEL 3D,

REBEL Jr. and REBEL SENTRY, as the "denominations" of a tall fescue variety; (4) an excerpt from a listing on plant varieties kept by the Seed Regulatory and Testing Branch of the United States Department of Agriculture listing REBEL as a varietal name; and (5) excerpts of articles from a variety of sources retrieved from the Google search engine showing use of the terms REBEL, REBEL II and REBEL SENTRY in connection with grass seed.

In view of this evidence, the examining attorney maintains that THE REBELS is a varietal name for grass seed and, thus, generic and unregistrable.

Applicant's Arguments and Evidence

Applicant states in its brief that REBEL is "a varietal name." Brief p. 1. Applicant argues, however, that the USPTO's treatment of varietal names as generic and unregistrable is "inconsistent with modern intellectual property law" (brief p. 2) and that "by ruling that all plant varieties are generic" the USPTO has not correctly applied the case of Dixie Rose Nursery v. Coe, 131 F.2d 446, 55 USPQ 315 (D.C. Cir. 1942), cert. denied 318 U.S. 782, 57 USPQ 568 (1943). In addition, applicant argues that THE REBELS "is not a plant variety" and there is no "rule that marks similar to a plant variety are also per se generic." Brief p. 11. Specifically, applicant argues

that In re Delta and Pine Land Co., 26 USPQ2d 1157 (TTAB 1993) "stands for the proposition that evidence of source indication can overcome a refusal to register a mark because the mark is similar to a plant varietal name." Brief p. 12. Applicant argues that it has submitted sufficient evidence to establish that THE REBELS "is perceived by the public as a source indicator."

In support of its position, applicant submitted: (1) declarations by Gerald Chrisco and Kenneth R. Budd, applicant's members/managers; a listing of third-party applications and registrations from the Trademark Electronic Search System (TESS) for the mark REBEL⁵; and (3) a sample of a magazine advertisement with the term THE REBELS.

⁵ Although this mere listing of registrations and applications is not sufficient to make the registrations and applications of record, In re Duofold Inc., 184 USPQ 638 (TTAB 1974), the examining attorney did not object to applicant's submissions as being improper at the time they were submitted, and at a point that applicant could have cured the evidentiary problem. Accordingly, this evidence has been treated as if properly of record and considered for whatever probative value it may have. That said, the probative value of this evidence is very limited. Applications are not probative of anything except that they were filed in the Office. In addition, because the lists do not provide any information about the goods or services for which the marks are registered, their probative value is very limited. We further note that applicant has submitted this listing in support of its argument based on its interpretation of the Dixie Rose case, which the Board has rejected, see *infra*.

Analysis and Decision

Applicant admits that REBEL is a varietal name for a type of grass seed that is the subject of a plant variety protection certificate. In any event, the evidence submitted by the examining attorney establishes that REBEL, REBEL II, REBEL III, REBEL 3D, REBEL Jr., and REBEL SENTRY are varietal names for grass seed. (See Excerpts from UPOV-ROM database made of record by the examining attorney.) Therefore, the two issues before this Board are (1) whether the USPTO's application of prior case law and resulting policy treating varietal names as generic terms is valid and, if so, (2) whether THE REBELS, the plural form of a varietal name, is likewise unregistrable.

In In re KRB Seed Company LLC, Ser. No. 76289621, ___USPQ2d___ (TTAB, September 19, 2005), the Board reiterated the correctness of prior case law and the USPTO's application of the case law that "varietal names are generic designations and cannot be registered as trademarks." Delta and Pine, 26 USPQ2d at 1158 n. 4. Therefore, what remains for determination is whether the plural form, THE REBELS, of applicant's varietal name, REBEL, can be registered.

As noted above, applicant argues that Delta and Pine, "stands for the proposition that evidence of source

indication can overcome a refusal to register a mark because the mark is similar to a plant varietal name." Brief p. 12. Applicant asserts that it "has submitted the evidence requested in Delta and Pine" and because "THE REBELS is perceived by the public as a source indicator, it should not be rejected as generic under the no-varietal-names-as-trademarks rule." Brief p. 13. In response, the examining attorney argues that THE REBELS "does not function as a source indication because it is the plural form of a varietal designation." Brief p. 3.

In Delta and Pine, the examining attorney brought the refusal under Section 2(e)(1) of the Trademark Act and refused registration because the proposed mark was *merely descriptive* of, at least, *some* of applicant's goods. The examining attorney argued, and the Board agreed, that because the proposed mark DELTAPINE consisted of the prominent part of several varietal names (DELTAPINE 20, DELTAPINE 50, etc.) purchasers would view the proposed mark as indicating that applicant's goods include various DELTAPINE seed varieties and, thus, the proposed mark is merely descriptive of the goods. The Board went on to note that the case was decided on a "rather scant record" and suggested that evidence of consumer perception "showing how the asserted mark is actually perceived and that it is

distinguished from the varietal names by the relevant public would have been helpful to applicant's case." Delta and Pine, at 1159.

By contrast, the examining attorney in the case before us has refused registration under Sections 1, 2 and 45 of the Trademark Act on the grounds that THE REBELS fails to function as a mark and is generic. In addition, applicant's mark in this case is not a component of a varietal name, it is simply the plural form of the varietal or generic name of grass seed and, as such, remains generic in connection with the identified goods, grass seed. Moreover, the definite article "the" in the proposed mark is devoid of any trademark significance. In re G.D. Searle & Co., 360 F.2d 650, 149 USPQ 619 (CCPA 1966); GMT Productions, L.P. v. Cablevision of New York, 816 F.Supp. 207, 211 (S.D.N.Y. 1993) (use of the word "the" before an unprotectable mark does not convert an otherwise generic term into a descriptive one); In re The Computer Store, Inc., 211 USPQ 72 (TTAB 1981). Therefore, the discussion in Delta and Pine that alludes to a possibility of the acquisition of secondary meaning is not applicable to the case before us. However, even if it were applicable, the evidence of record does not support a finding that purchasers would distinguish THE REBELS from applicant's

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series of varietal names REBEL, REBEL II, REBEL III, REBEL 3D, REBEL Jr. and REBEL SENTRY. To the contrary, THE REBELS is directly linked to the varietal names as illustrated by applicant's specimen of use wherein the following statement appears underneath THE REBELS: A blend containing a variety from the Rebel family of (turf-type) tall fescues. In addition, the magazine advertisement submitted by applicant compares THE REBELS to another varietal, KENTUCKY 31, and displays a picture of the packaging of grass seed with the varietal name REBEL III on one package and THE REBELS on another package.

Accordingly, inasmuch as we reiterate the correctness of the case law that varietal names are generic designations and inasmuch as applicant's proposed mark is simply the plural form of a varietal name, we find that it is generic and unregistrable; and applicant's arguments and evidence of acquired distinctiveness cannot overcome such a finding. See In re Farmer Seed & Nursery Company, 137 USPQ 231.

Decision: The refusal to register is affirmed.