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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Old European Brewing Company

Serial No. 75/853,926

Peter H. Kahn of Luce, Forward, Hamilton & Scripps for Old European Brewing Company.

Susan Leslie DuBois, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Cissel, Walters and Drost, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On November 19, 1999, applicant, a California corporation, filed the above-identified application to register the mark "NEDERLAND" on the Principal Register for "beer," in Class 32. The basis for filing the application was applicant's assertion that it possessed a bona fide intention to use the mark in commerce for these goods.

The Examining Attorney refused registration under Section 2(e)(3) of the Lanham Act, 15 U.S.C. Section

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1052(e)(3), on the ground that the proposed mark is primarily geographically deceptively misdescriptive of the goods specified in the application. She noted that "NEDERLAND" is the Dutch word for "Netherlands," and that the Netherlands is well known for the beers that are produced there and exported to the United States. She reasoned that because the primary significance of the term sought to be registered is geographic and applicant's goods will not come from the place named by the mark, the mark is geographically deceptively misdescriptive because the public would believe that applicant's beer originates in the Netherlands.

Applicant responded to the refusal to register with argument that "NEDERLAND" is not geographically deceptively misdescriptive because the primary significance of the term is not geographical and there is no goods/place association between the mark and the goods. Included with its response was a copy of a definition from Merriam-Webster's Collegiate Dictionary for the word "Netherlands." The dictionary notes that the term is used as a geographical name for (1) "low countries—an historical usage"; and (2) "or Holland... or Dutch Ne-der-land... country NW Europe on North Sea; a kingdom, official capital Amsterdam, de facto capital The Hague area 16,033 square miles... population

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15,009,000." Applicant argued that the primary significance of the term it seeks to register is not related to the Netherlands because the term has several meanings, including the name of the city in Southwest Texas between Beaumont and Port Arthur, the name of the city in Colorado, and as a designation for "low countries," as indicated in the dictionary definition applicant supplied.

The Examining Attorney was not persuaded by applicant's argument and, in her second Office Action, she continued and made final the refusal to register based on Section 2(e)(3) of the Act. Submitted as additional support for the refusal were copies of several pages from Michael Jackson's Beer Companion showing that the Netherlands is well known for the beer that is produced there. Additionally, the Examining Attorney attached pages from Internet listings showing that the Netherlands is an established beer-producing country with a number of well-known breweries. She argued that this evidence establishes that the public would believe that the goods identified by the mark "NEDERLAND" originate there. Additionally, she made of record a copy of an entry from a reference work published in the United States, Merriam-Webster's Geographical Dictionary, Third Edition, which lists "Nederland" as "Kingdom, W Europe. See NETHERLANDS." The

second listing under the term refers to the Texas city mentioned by applicant in response to the refusal to register.

Applicant responded to the final refusal with more argument and the statement that its beer will be brewed in the Netherlands. Accordingly, argued applicant, the mark could not be geographically deceptively misdescriptive.

The Examining Attorney then refused registration under Section 2(e)(2) of the Act on the ground that the mark is primarily geographically descriptive of the goods specified in the application because the primary significance of the mark is geographic and the goods will come from that geographic location.

Applicant responded to the refusal to register under Section 2(e)(2) the Act with argument centered around its earlier contention that the primary significance of "NEDERLAND" is not geographic. Examining Attorney was still not persuaded by this argument, and the refusal to register under Section 2(e)(2) the Act was made final. Additional evidence was submitted in support of her contention that beer purchasers would make an association between beer and the place named by the mark.

Applicant timely filed a Notice of Appeal, followed by its appeal brief. The Examining Attorney filed her brief

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on appeal and applicant filed a reply brief, but applicant did not request an oral hearing before the Board.

The sole issue presented by this appeal is whether Section 2(e)(2) the Lanham Act precludes registration of "NEDERLAND" for beer.

The test for registrability under this section of the statute is not disputed by applicant or the Examining Attorney. Registration of a mark must be refused because the mark is primarily geographically descriptive of the goods if (1) the primary significance of the mark to the purchasing public is geographic; (2) the public would make a goods/place association, i.e., would believe that goods of the type specified in the application originate in that place; and (3) applicant's goods actually are produced in the place named in the mark. In re California Pizza Kitchen, Inc., 10 USPQ2d 1704 (TTAB 1988).

We hold that the evidence made of record by the Examining Attorney satisfies the requirements of this test. The geographic dictionary published in the United States demonstrates that the primary significance of "NEDERLAND" in this country is geographic, i.e., that it is synonymous with "the Netherlands." The other evidence submitted by the Examining Attorney establishes that the Netherlands is well known as a source of beer. From this evidence we can

conclude that beer purchasers in this country would associate beer with "NEDERLAND." In that applicant admits that its beer will be produced there, the third prong of the test for geographic descriptiveness is plainly satisfied.

Applicant's arguments to the contrary are not well taken. Applicant contends that because only one exhibit shows that "Nederland" is understood in the United States to be synonymous with "the Netherlands," the Examining Attorney has somehow failed to meet her burden of proof. This argument is not well taken. The Examining Attorney made a prima facie showing that the primary significance of the term sought to be registered is geographic, and applicant introduced no evidence to rebut this showing. While the evidence of record also shows that two relatively obscure cities in Colorado and Texas are also called "Nederland," the first listing in the geographical dictionary as a reference to the country establishes to our satisfaction that the primary significance of this name to most Americans will be that of the well known country in Europe.

In its reply brief, applicant makes the curious argument that because the evidence establishing the primary significance of the term sought to be registered was

submitted by the Examining Attorney in support of the refusal to register under Section 2(e)(3) of the Act, this evidence cannot be relied upon as support for the refusal to register under Section 2(e)(2) of the Act, to which the Examining Attorney switched when applicant finally admitted that the beer on which it intends to use the mark will be produced in the country named by the mark. This argument is not well taken. The evidence submitted by the Examining Attorney was properly made of record in support of the proposition that the primary significance of the mark is geographic. As noted above, it is unrebutted support for that proposition. That this fact is a necessary element of proof for the alternative refusals the Examining Attorney made as the applicant fleshed out its intentions in this case does not change the nature of this evidence, nor does it somehow restrict it to establishing a basis for only the first refusal to register, which applicant made inapplicable when it admitted that its products would, in fact, be produced in the Netherlands.

Because the Examining Attorney has met her burden of proof and applicant has provided no evidence effectively rebutting the prima facie case established by the Examining Attorney that applicant's mark is primarily geographically descriptive, the refusal to register is well taken.

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DECISION: The refusal to register under Section 2(e)(2) of the Lanham Act is affirmed.