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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Fischbein-Inglett Company

Serial No. 78163512

David K. Callahan of Kirkland & Ellis for Fischbein-Inglett Company.

Won T. Oh, Trademark Examining Attorney, Law Office 114
(Margaret Le, Managing Attorney).

Before Simms, Seeherman and Bottorff, Administrative
Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Fischbein-Inglett Company (applicant), a Delaware corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark EZ WEIGH for the amended description of goods: "net-weigh scales for weighing bags of dry products."¹

¹ Application Serial No. 78163512, filed September 12, 2002, based upon allegations of use since April 2002 and use in commerce since April 4, 2002. Because the Office interprets the date of use to be the last day of the month when no date of the

Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

The Examining Attorney has refused registration under Section 2(e)(1) of the Act, 15 USC §1052(e)(1), arguing that "EZ" is an abbreviation for the word easy," and that "WEIGH" identifies a function of applicant's scales, so that applicant's mark merely describes the fact that applicant's goods easily weigh products. According to the Examining Attorney, nothing in the combination of these words creates any ambiguity or incongruity. That is to say, the Examining Attorney argues that applicant's mark consists of the adverb "EZ," which modifies the verb "WEIGH," and which terms together describe a purpose or function of applicant's scales.

Applicant, on the other hand, while admitting that dry products are weighed and bagged in an efficient manner through use of its scales, maintains that the mark EZ WEIGH is only suggestive of a potential or desired result of use of its goods, and does not give purchasers a full and accurate description of its goods, or any distinct knowledge about the characteristics of applicant's scales.

month is specified, this would make applicant's date of first use anywhere subsequent to its date of use in commerce. Should applicant ultimately prevail, applicant would be required to amend the allegations of use of its mark. See TMEP §§903.04, 903.05 and 903.07.

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It is applicant's position that its goods are a bagging system, only part of which is a scale. Because applicant's goods both weigh and bag dry products, purchasers have to use a thoughtful analysis to determine the true nature of applicant's goods from the mark, applicant maintains. That is, nothing in applicant's mark refers to the bagging function of its goods--that applicant's scales allow one both to weigh and to bag on the same line--and consumers, therefore, need to use some imagination in order to conjure up the true nature of applicant's goods. Further, applicant maintains that the abbreviation "EZ" is too ambiguous to be merely descriptive and to impart knowledge as to what it is about applicant's goods that is "easy." Therefore, applicant contends that the combination of terms in its mark creates an ambiguity or incongruity. Finally, applicant argues that there is no competitive need to use the words in its mark, and that any doubt on this issue should be resolved in favor of publication.

In response, the Examining Attorney notes that while the original description of goods in applicant's application was "net-weigh scale system designed to bag dry products," with applicant's response filed September 4, 2003, p. 3, applicant amended the description to "net-weigh scales for weighing bags of dry products." Thus,

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applicant's amended description deletes reference to applicant's goods being designed to bag dry products. Therefore, there is no ambiguity or incongruity in applicant's mark, the Examining Attorney contends. Rather, no imagination or mental pause is needed, and applicant's mark merely describes a purpose or intended use of applicant's scales for easily weighing bags of dry products.

We agree with the Examining Attorney in this regard, and affirm the refusal.

A term is merely descriptive and therefore unregistrable under Section 2(e)(1) of the Trademark Act if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services with which it is used or is intended to be used. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is also well settled that a term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant feature, attribute, function, property, ingredient, quality, characteristic, purpose or use of the

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goods or services. *In re Opryland USA Inc.*, 1 USPQ2d 1409 (TTAB 1986); *In re The Weather Channel, Inc.*, 229 USPQ 854 (TTAB 1985); *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973) and TMEP §1209.01(b)). Further, the question of whether a particular term is merely descriptive must be determined, not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used or is intended to be used, and the possible significance that the mark is likely to have for the average purchaser encountering the goods or services in the marketplace. See *In re Abcor Development Corp.*, *supra*; *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995); *In re Pennzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991); and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). If, however, when the goods or services are encountered under a mark, a multistage reasoning process, or resort to imagination, is required in order to determine the attributes or characteristics of the product or services, the mark is suggestive rather than merely descriptive. See *In re Abcor Development Corp.*, *supra*; and *In re Atavio*, 25 USPQ2d 1361, 1362 (TTAB 1992).

The Examining Attorney bears the burden of establishing a prima facie case in support of a mere descriptiveness refusal. See *In re Gyulay, supra*; and *In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 21567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). In this regard, the Examining Attorney is not required to prove that the public would actually view a proposed mark as merely descriptive, but must at least establish a reasonable predicate for the refusal, based on substantial evidence, i.e., more than a scintilla of evidence. *In re Pacer Technology*, 338 F.3d 1348, 67 USPQ2d 1629 (Fed. Cir. 2003).

Upon careful consideration of this record and the arguments of the attorneys, we agree with the Examining Attorney that applicant's mark EZ WEIGH merely describes the fact that applicant's scales easily weigh the products with which they are used. Nothing requires the exercise of imagination, mental processing or gathering of further information in order for purchasers and prospective users of applicant's goods to readily perceive the merely descriptive significance of the mark as it pertains to applicant's goods. The fact that applicant's mark uses the well-recognized abbreviation for the word "easy" does not lessen the immediacy of the description conveyed by that

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part of the mark. This term unquestionably projects a merely descriptive connotation. It is settled that the use of a phonetically identical word or a simple misspelling does not normally change a descriptive word into a suggestive term. See *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980)(QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'"); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315 (1938)(NU-ENAMEL; NU found equivalent of "new"); *In re Organik Technologies Inc.*, 41 USPQ2d 1690 (TTAB 1997)(ORGANIK); and *Hi-Shear Corp. v. National Automotive Parts Association*, 152 USPQ 341, 343 (TTAB 1966)(HI-TORQUE "is the phonetic equivalent of the words 'HIGH TORQUE'"). Applicant's mark immediately tells purchasers and users of applicant's scales that the goods will easily weigh products used on the scales. See also *In re Serv-A-Portion Inc.*, 1 USPQ2d 1915 (TTAB 1986)(SQUEEZE N SERV held to be merely descriptive of ketchup and thus subject to disclaimer).

Decision: The refusal to register under Section 2(e)(1) is affirmed.