

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
Sept. 24, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Signal Investment & Management Co.

Serial No. 78443991

Douglas T. Johnson of Miller & Martin PLLC.

Gina Hayes, Trademark Examining Attorney, Law Office 112
(Angela Bishop Wilson, Managing Attorney).

Before Hairston, Grendel and Bergsman, Administrative
Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

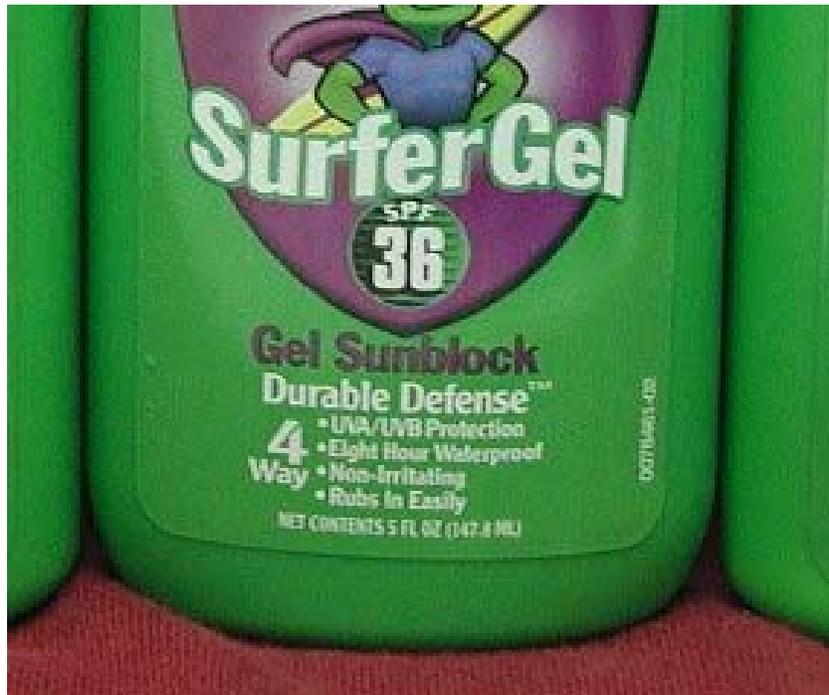
Applicant seeks registration on the Principal Register
of the mark DURABLE DEFENSE 4 WAY (in standard character
form) for "sunscreens and sunblocks" in Class 3.¹

At issue in this appeal is the Trademark Examining
Attorney's final refusal to register applicant's mark due
to applicant's asserted failure to submit an acceptable

¹ Serial No. 78443991, filed on June 30, 2004.

specimen of use. Citing Trademark Rule 2.51(b), 37 C.F.R. §2.51(b), the Trademark Examining Attorney contends that the specimen submitted with applicant's Statement of Use is unacceptable because the mark as depicted thereon is not a substantially exact representation of the mark depicted in the application drawing.²

The specimen of record is a photograph of the product label, the pertinent portion of which is reproduced below.



² The Trademark Examining Attorney also cites Trademark Rule 2.72(b)(1) as a basis of the refusal. However, Rule 2.72 in general pertains to the requirements for amending the drawing of the mark. Rule 2.72(b)(1) in particular requires that, in an intent-to-use application, any proposed amendment to the drawing of the mark must be supported by the specimen of use. In this case, applicant is not seeking to amend the drawing of its mark, and Rule 2.72 therefore is inapposite.

To clarify what may be difficult to read on this reproduction, we note that there is a "tm" symbol following the words "Durable Defense." The four bullet points to the right of "4 Way" read "UVA/UVB Protection," "Eight Hour Waterproof," "Non-Irritating," and "Rubs In Easily."³

The issue on appeal is whether the standard character mark depicted on applicant's drawing page is a substantially exact representation of the mark as actually used on the goods as shown by the specimen submitted with applicant's statement of use, as required by Trademark Rule 2.51(b). See generally TMEP §807.12(a). We find that it is not.

Specifically, we find that it is the designation DURABLE DEFENSE that will be perceived as the mark. The designation "4 Way" would not be perceived as part of the DURABLE DEFENSE mark, but rather as a direct reference to the four bullet points and the accompanying informational text appearing immediately to its right. The informational text sets out four features or characteristics of the

³ The specimen photograph actually is a photograph of three bottles of the product, with three different labels reflecting different versions of the product. For our purposes, the labels on the three bottles are the same as the bottle depicted above except that the text to the right of some of the bullet points is different on each bottle. On the bottles not pictured above, the various bullet points display wording such as "Hypoallergenic," "Dries Instantly," and "Titanium Dioxide."

goods, and purchasers will readily understand the designation "4 Way" as referring to or describing those four characteristics, not as part of the DURABLE DEFENSE trademark.

"4 Way" and "Durable Defense" appear in a similar type font and size as compared to other text on the label. That fact supports applicant's argument, but it clearly is countered and outweighed by the fact that the two designations appear on two separate lines. Moreover, while applicant is free to place the "TM" symbol where it chooses, the fact that the symbol appears on the first line immediately adjacent to DURABLE DEFENSE enhances the likelihood that purchasers will view DURABLE DEFENSE as the mark, not DURABLE DEFENSE 4 WAY.

Applicant also is correct in noting that the text accompanying the four bullet points is merely informational and without trademark significance, and that it therefore need not be (and indeed should not be) included in the drawing of the mark. However, the issue in this case is not whether applicant has "mutilated" the mark by omitting the informational text. Rather, the issue is whether the designation "4 Way" would be perceived as part of the mark in the first place. The four bullet points and accompanying informational text are not part of the mark as

depicted in the drawing, but their presence and location on the label nonetheless is highly relevant to our determination of what purchasers are likely to understand to be the significance of the designation "4 Way" as it appears on the label. "4 Way," appearing on the label immediately adjacent to the four bullet points, would be viewed as referring to, and as shorthand for, the four characteristics or features of the goods listed with the four bullet points.

Further supporting a finding that "4 Way" would be viewed as being tied to the four bullet points, rather than to DURABLE DEFENSE, is the fact that "4 Way" is presented vertically, with the "4" stacked on top of the "Way" and the composite being horizontally centered on and essentially the same height as the four bullet points. Applicant is correct in noting that "4 Way" is adjacent to "Durable," but we find that it is even more adjacent to and visually connected to the four bullet points.

Finally, applicant notes that it seeks to register its mark in standard character form, which entitles applicant to some leeway in the manner in which it displays the mark on the specimen. We find, however, that leeway is not so extensive as to encompass the visual and contextual

disconnect between 4 WAY and DURABLE DEFENSE as they appear on applicant's label.

For these reasons, we find that the mark as it appears in applicant's drawing, DURABLE DEFENSE 4 WAY, is not a substantially exact representation of the mark as it appears and would be perceived by purchasers viewing applicant's specimen label, which is DURABLE DEFENSE. Therefore, the Trademark Examining Attorney's requirement for an acceptable specimen is proper, and the refusal to register based on applicant's failure to comply with such requirement must be affirmed.

Decision: The refusal to register is affirmed.