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PRECEDENT OF THE TTAB

Hearing:
May 1, 2007

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Johnson & Johnson, Inc.

Serial No. 78518703

Laurence S. Rickles of Johnson & Johnson, Inc. and Norm D. St. Landau and Mary Beth Walker of Drinker Biddle & Reath LLP for applicant.

Melissa Vallillo, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Hairston, Taylor and Mermelstein, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Johnson & Johnson, Inc. has filed an application to register on the Principal Register, in standard character form, the mark POWDER-GEL for "vaginal skin preparations, namely, skin protectant creams" in International Class 5."¹

¹ Serial No. 78518703, filed on November 17, 2004, which is based on an allegation of a bona fide intention to use such mark in commerce.

Registration has been finally refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that, when used in connection with applicant's goods, the mark POWDER-GEL is merely descriptive thereof.

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

The examining attorney contends that the terms "powder gel" and "gel powder" are commonly used in the skin care industry to describe products that are in the nature of a gel and dry like a powder; that applicant's goods feature a gel-to-powder formulation; and therefore the term POWDER-GEL immediately conveys a significant characteristic or feature of applicant's goods. In support of the refusal, the examining attorney made of record Internet printouts that contain references to "powder gel" and "gel powder" in connection with skin care preparations. In particular, the examining attorney relies on the following evidence: (1) an online beauty information website recommending Smashbox Anti-Shine skin preparation described as a "powder-gel formula"; (2) an online beauty information website discussing Lancome T-Controle Instant Matifying Gel and indicating that the product has a "powder-gel consistency"; (3) an online retail store website featuring Lancome T-

Controle Gel described as a "smooth gel powder"; (4) an online retail store website featuring Lancome Pure Focus T-Zone Instant Matifying Powder-Gel described as a "unique oil free texture that transforms into a powder gel on contact with the skin," and applicant's own product described as a formula "that combines the protective benefits of lotion and powder;" (5) an online retail store website featuring information about Lancome Pure Focus T-Zone Matifier described as a "light gel-powder"; (6) an online retail store website featuring T-Mat Express Oil Free Gel Powder; (7) an online retail store website featuring an instant matification gel described as a "gel-powder"; (8) an online retail store website featuring cosmetics with a "gel-powder formula"; and (9) an online women's health discussion group website featuring consumer recommendations of applicant's product with one consumer describing the product as a "chaffing [sic] gel/powder."

In addition, the examining attorney submitted an excerpt from the Encarta online dictionary wherein the word "powder" is defined as, inter alia, "[l]oose dry particles: a substance in the form of a mass of very small, loose dry grains;" an excerpt from the Compact Oxford English Dictionary wherein the word "gel" is defined as, inter alia, "[j]elly-like substance containing a cosmetic,

medicinal, or other preparation," and "a semi solid colloidal suspension of solid dispersed in a liquid;" and a copy of Registration No. 2282120 (cancelled) issued to a third-party for the mark MATITEX for goods identified as "skin care preparations, namely, powder-gel facial treatment preparations that control shine; silicon for use as an ingredient in powder-gel facial treatment that controls shine."

Applicant, in urging reversal of the refusal to register, maintains that the examining attorney's evidence fails to establish that the term POWDER-GEL is merely descriptive of applicant's goods. Applicant argues that the term POWDER-GEL is only suggestive of its goods and that thought is required to reach a conclusion as to the nature of such goods. Further, applicant maintains that there is no evidence that the term POWDER-GEL is used in connection with goods similar to those of applicant; that the term is not found in the dictionary; and that competitors do not need to use the term. With respect to the specific evidence submitted by the examining attorney, applicant argues that apart from the fact that two of the Internet printouts are from foreign websites, none of the evidence shows use of the term "powder gel" in connection with goods that are similar to those of applicant.

Applicant itself submitted excerpts from the Merriam Webster Online Dictionary to show the absence of entries for the terms "powder-gel" and "powdergel"; definitions of the terms "powder" and "gel" taken from the same dictionary and which are very similar to the definitions submitted by the examining attorney; the first fifty "hits" from a search of the ALLNEWS database of LEXIS/NEXIS for "powder w/1 gel" which shows only a single reference to "powder gel" for goods that are far removed from applicant's goods, namely, explosives; an Internet advertisement for applicant's product; and the results of a GOOGLE search for "POWDER-GEL" which shows that seven of the first ten references are to applicant's product. In view of this evidence, applicant argues that the term POWDER-GEL is not merely descriptive of its goods, but rather, the primary significance of the term is a trademark for its goods.

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the goods in connection with which it is used, or intended to be used. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); In re Abcor Dev. Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and

every specific feature of the applicant's goods in order to be considered merely descriptive; it is enough that the term describes one significant attribute or function of the goods. Furthermore, descriptiveness is not determined in the abstract, but in relation to the goods identified in the application, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods. In re Polo International Inc., 51 USPQ2d 1061, 1062 (TTAB 1999); and In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). In other words, the issue is whether someone who knows what the goods are will understand the mark to convey information about them. In re Tower Tech, Inc., 64 USPQ2d 1314, 1316-1317 (TTAB 2002); In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998); In re Home Builders Association of Greenville, 18 USPQ2d 1313, 1317 (TTAB 1990); In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applying these principles in this case, we find that the term POWDER-GEL is merely descriptive of a feature or characteristic of applicant's vaginal skin protectant creams. Specifically, it immediately and directly informs purchasers that applicant's creams are in the nature of a gel which, when applied to the skin, dries like a powder. In this regard, we note applicant's Internet advertisement

which states, in relevant part, that: "The formula is unique: an easy to apply gel, it dries to form a silky, breathable barrier that calms the skin" In view of this statement, it is clear that applicant's goods are in the nature of a gel and applicant does not dispute that its goods dry like a powder.

Additionally, the examining attorney has made of record a third-party registration and several Internet printouts where the term "powder gel" and the highly similar term "gel powder" are used in a descriptive manner in connection with skin care preparations that are in the nature of a gel which, when applied to the skin, dries like a powder. While two of the Internet printouts are from foreign sources, we will not exclude them from consideration, particularly where as here, they corroborate the uses of the terms in Internet printouts from U.S. sources. The Board has relaxed its earlier rulings limiting the use of foreign publications. See *In re Remacle*, 66 USPQ2d 1222 (TTAB 2002). In addition, the Federal Circuit has stated that foreign Internet publications may have probative value in certain cases. See *In re Bayer*, 82 USPQ2d 1828 (Fed. Cir. 2007). We recognize that the Internet printouts, as well as the third-party registration, show descriptive use of the terms

"powder gel" and "gel powder" in connection with facial skin care preparations rather than the specific goods involved herein, namely, vaginal skin protectant creams. The fact that applicant's creams are applied to a different area of the body than the creams described in the evidence does not alter our view of the probative value of this evidence. The issue in this case is whether the term POWDER-GEL is merely descriptive of a type of cream, i.e., a cream which is in the nature of a gel, which when applied to the skin, dries like a powder. The descriptive significance of the term "powder gel" as used in these articles and registration is equally applicable to applicant's vaginal skin protectant creams. The feature or characteristic of the goods which is described by the term POWDER-GEL applies equally to applicant's type of goods and facial skin care preparations. In other words, consumers would understand the term "powder gel" to have the same meaning in both contexts.

In view of the foregoing, we conclude that, when applied to applicant's goods, the term POWDER-GEL immediately describes, without conjecture or speculation, a significant feature or characteristic of applicant's goods, namely, that applicant's vaginal skin protectant creams are in the nature of a gel, which when applied to the skin,

dries like a powder. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for purchasers of and prospective customers for applicant's goods to readily perceive the merely descriptive significance of the term POWDER-GEL as it pertains to applicant's goods. See, e.g., In re International Game Technology, Inc., 1 USPQ2d 1587 (TTAB 1986) [ON-LINE, ON-DEMAND held merely descriptive of computer lottery terminals] and In re Copperloy Corp., 182 USPQ 384 (TTAB 1974) [CONTAINERAMP is a mere misspelling of the term CONTAINER RAMP and held merely descriptive of mobile loading ramps for moving containers].

We are not persuaded by applicant's arguments to the contrary. Although as applicant points out, the examining attorney has not introduced any evidence, such as excerpts from articles appearing in the NEXIS database or on the Internet, of a need among applicant's competitors to use the term POWDER-GEL to describe vaginal skin protectant creams, we note that neither has applicant submitted any evidence demonstrating the lack of such a need in the trade. There is nothing in the record, one way or the other, regarding a possible competitive need to use the term POWDER-GEL in the marketing of such goods. However, even if potential competitors of applicant may be able to

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describe and advertise the same or similar goods by terms other than POWDER-GEL, that does not mean that such term is not merely descriptive of applicant's goods. See, e.g., *Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc.*, 299 F.2d 855, 132 USPQ 627 (CCPA 1962).

Further, it is not dispositive that the term POWDER-GEL does not appear in the dictionary, or that applicant may be the first or only user of the term in connection with vaginal skin protectant creams. See, e.g. *In re Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983).

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