

**THIS OPINION IS  
NOT A PRECEDENT  
OF THE TTAB**

*Decision Mailed:  
January 28, 2008  
GDH/gdh*

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Naturally Fresh, Inc.

Serial No. 78662753

Laurence P. Colton of Smith, Gambrell & Russell, LLP for  
Naturally Fresh, Inc.

Dominic R. Fathy, Trademark Examining Attorney, Law Office 108  
(Andrew Lawrence, Managing Attorney).

Before Hohein, Hairston and Walters, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Naturally Fresh, Inc. has filed an application to register on the Principal Register in standard character form the term "NATURALLY FRESH" for "fruit and vegetable salads; garden salads; potato salad; pre-cut vegetable salad; [and] salads except macaroni, rice and pasta salad" in International Class 29 and "macaroni salad, rice salad and pasta salad" in International Class 30.<sup>1</sup>

<sup>1</sup> Ser. No. 78662753, filed on July 1, 2005, which is based on an allegation of a bona fide intention to use such term in commerce.

Registration has been finally refused under 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 term "NATURALLY FRESH" is merely descriptive thereof.

Applicant has appealed and briefs have been filed. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from

consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985).

Applicant, in its main brief, contends that the term "NATURALLY FRESH" is not merely descriptive of its goods because such term, as a whole, does not immediately describe a significant ingredient, quality or characteristic of salads nor otherwise convey information about the goods with particularity and that there is no need by competitors to so describe their salads. Although, among other things, applicant in this regard "acknowledges ... that the words 'naturally' and 'fresh' have significance in the marketplace" for processed or prepared salads, applicant "maintains that the combined term 'naturally fresh' does not have any significance in the marketplace."

Specifically, applicant claims that:

While the terms "natural" (or "naturally") and/or "fresh" may be descriptive on their own, Applicant's Mark NATURALLY FRESH (as a whole) is not descriptive because Applicant's Mark creates a unique commercial impression that is greater than the sum of its parts. .... Tellingly, the Examining Attorney ... has not even proffered a definition for the combined term "naturally fresh" because there is no such definition.

Applicant insists that, instead, "the Examining Attorney was forced to engage in a multi-stage reasoning analysis," by relying on definitions of record of the separate words "naturally" and "fresh," in order to present an argument which "makes Applicant's Mark non-descriptive."

According to applicant, the "main flaw in the Examining Attorney's reasoning is that, while salad can be described as natural and/or fresh, salads grammatically cannot be described as

'naturally fresh.'" Thus, while "salads can be 'fresh' and/or 'natural' in various permutations," applicant asserts that "the term 'naturally fresh' cannot and does not describe any particular aspect of the ingredients connected with salads" with any degree of particularity. Moreover, even if the constituent words are regarded as merely descriptive individually, applicant argues that the "combination of descriptive elements as a composite results in a mark that is non-descriptive, [inasmuch] as the words are inventive and evoke a unique commercial impression and have an incongruous meaning as applied to the goods." In sum, applicant contends that (emphasis in original):

Applicant's Mark as a whole does not describe anything immediately connected with ... salads. The combination of the words "naturally" and "fresh" is essentially so ambiguous that the term cannot immediately describe any aspect of salads. Without the immediacy component, Applicant's Mark cannot be descriptive.

Applicant further maintains that the evidence made of record by the Examining Attorney, which includes excerpts from websites and dictionary definitions, fails to demonstrate that the term "NATURALLY FRESH" is merely descriptive of its goods with the required degree of particularity, arguing that:

Applicant's Mark does not describe or convey a real and unequivocal ideal of the connected goods. Although consumers can be presumed to have some knowledge about the general field relating to foods or, more particularly, salads, consumers are left guessing the particular goods associated with Applicant's Mark. .... The Examining Attorney has not proffered a single descriptive example of a "naturally fresh salad". As Applicant's Mark does not convey the idea of salads (or any characteristic thereof) to the consumer, consumers

encountering Applicant's Mark must use a degree of imagination to arrive at Applicant's goods and therefore Applicant's Mark is not descriptive. ....

Although the Examining Attorney has attached to the 24 August 2008 Office Action exhibits of alleged commercial uses of the phrase "naturally fresh," none of these uses relate[s] to salads. Even with these examples, the Examining Attorney still cannot identify or even isolate what Applicant's Mark is descriptive of. In fact, there is no evidence that shows that the term "naturally fresh" is used in connection with salads. ....

Further compounding the error of the Examining Attorney's position is that the Examining Attorney's definitional evidence is inapposite. While the Examining Attorney alleges reliance on "definitional evidence", the Examining Attorney has failed to proffer a single definition of the term "naturally fresh". Undoubtedly, this shortcoming is because the phrase "naturally fresh" offers no real, independent meaning with respect to a food product or salads, and does not have a definition.

As acknowledged by the Examining Attorney, the word "naturally" is an adverb and the word "fresh" is an adjective. While a "fresh" salad is one whose ingredients were harvested recently and a "natural" salad is one whose ingredients are from nature, the words "naturally fresh salad" evoke no such association. By placing the adverb "naturally" in front of the adjective "fresh", "naturally" can only modify "fresh", rather than the underlying good. This juxtaposition was created by Applicant decades ago to create a unique commercial impression and was not designed to describe a good with particularity.

Accordingly, Applicant's Mark is not descriptive of the goods of salad because it does not describe any characteristic or quality with particularity. The impact of "naturally" on freshness is readily apparent, and obviates any particularity of the term. Without the particularity conveyance, Applicant's Mark cannot be descriptive.

Finally, applicant urges that "[t]he Examining Attorney's position that other competitors need the term 'naturally fresh' to compete is incorrect," noting again its assertion that "the Examining Attorney has not shown a single instance in which the term 'naturally fresh' is being used in connection with salads." Applicant contends, instead, that "[a]t best, the Examining Attorney's evidence shows that a few people may be using the term 'naturally fresh' inappropriately," as "shown [by] some minor use of Applicant's Mark in website printouts ...." Applicant also asserts that (emphasis in original):

In this case, the Examining Attorney has not provided any evidence that anyone, other than Applicant, has registered the combined terms "naturally" and "fresh" in connection with salads (or any food products). This is evidence of lack of use and is strong evidence that Applicant's Mark is not merely descriptive. ....

Applicant consequently "maintains [that] competitors do not need and have not needed to use Applicant's Mark NATURALLY FRESH in order to compete in the marketplace." Applicant adds that in any event, "competitors will not be deprived of the use of the individual words 'naturally' or 'fresh' to describe their goods"; rather, at most, "competitors merely will be precluded from using the combination of [such] words in a manner confusingly similar to that of Applicant."

The Examining Attorney, on the other hand, finds that the term "NATURALLY FRESH" is merely descriptive because, as set forth in his brief, it "describes a specific characteristic of

the goods provided by the applicant, namely naturally fresh foods." Relying, in particular, upon the dictionary definitions of record, which in relevant part show that the "MSN Encarta Dictionary" (2007) defines the word "naturally" as an adverb meaning "without artificial aid or treatment: occurring as a natural feature or quality without artificial aid" and lists the word "fresh" as an adjective connoting "not preserved: not having been preserved, aged, or processed, e.g. by canning or freezing,"<sup>2</sup> the Examining Attorney maintains that the term "NATURALLY FRESH" "is descriptive of a feature of good goods that are without artificial aid and preservation, otherwise known as NATURALLY FRESH."

In addition, relying upon certain "Internet/marketplace evidence" which is of record, the Examining Attorney contends that such evidence "not only shows that the term [NATURALLY FRESH] is commonly use[d] to describe characteristics of fruits and salad, but [it] also rebuts the applicant's argument regarding a lack of competitive need in describing similar goods." Specifically, while the evidence does not pertain to salads *per se*, the following website excerpts all involve or relate to various foods of which some of those, like applicant's salads, also have been processed or otherwise prepared for consumption (emphasis added):

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<sup>2</sup> The record, we observe, also contains the following definitions which show that, similarly, The American Heritage Dictionary of the English Language (2000) sets forth the word "naturally" as an adverb meaning "[i]n a natural manner" while the Oxford English Dictionary (2d ed. 1989) defines the word "fresh" as an adjective signifying "[r]etaining its original qualities; not deteriorated or changed by lapse of time; not stale, musty, or vapid."

"Melissa's Organic Nectarines, are grown **naturally fresh** and juicy without the use of synthetic fertilizers, pesticides, or herbicides." -- [http://www.melissas.com/catalog/index.cfm?info=yes&product\\_ID=2475](http://www.melissas.com/catalog/index.cfm?info=yes&product_ID=2475);

"The finest Northwest Raspberries are combined with Pear Brandy to create a **naturally fresh** raspberry preserve with ruby red color." -- <http://www.oregongourmet.com/French-PrairieRaspberry-Preserves-Brandy.html>;

"As you move from Fresh Fruit Baskets ... to Fruit ... to Pecans ..., be assured that all fruit is **naturally fresh** and wholesome and the other items are of the highest quality." -- <http://www.orchards-bounty.com/site/1511727/page/45031>;

"Naturally fat free. Zapp's salsa is an authentic mexican recipe using only **naturally fresh** ingredients." -- [http://www.crescent-citygifts.com/detail.aspx?product\\_ID=sn002](http://www.crescent-citygifts.com/detail.aspx?product_ID=sn002);  
and

"In summer and even into early fall, the garden is full of organically grown veggies that will most likely show up in your lunch salad or on your dinner plate. All veggies and fruits are prepared to maintain their nutritional integrity and **naturally fresh** flavor." -- [http://www.hiddenhollowretreat.com/About\\_Hidden\\_Hollow.htm](http://www.hiddenhollowretreat.com/About_Hidden_Hollow.htm).

As further evidence to support his position, the Examining Attorney has made of record and relies upon copies of three active registrations owned by applicant for marks which consist of or include the term "NATURALLY FRESH"<sup>3</sup> and which

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<sup>3</sup> Applicant, in its main brief, has objected to consideration of two of such registrations (as well as a third registration which it also allegedly owns, namely, "Registration No. 2,143,769 for, *inter alia*, water," but which is not of record) on the basis that while "the previous registrations were filed under Section 2(f)," "none of the ... marks is for salads." Contending that "prior registration records are not of record and are not relevant, [and that] this case must be decided on its own facts and merits," applicant "requests that the Board ... place no weight on Applicant's prior registrations cited by the Examining Attorney," notwithstanding its own reliance thereon with

issued on either (i) the Supplemental Register for "salad dressing and an egg and dairy based mix to be used as a filling for quiche" in International Class 29 and "sauces, excluding apple sauce and cranberry sauce," in International Class 30<sup>4</sup> or (ii) the Principal Register pursuant to a claim of acquired distinctiveness for "salad dressings and an egg and dairy based mix to be used as a filling for quiche and as an omelette [sic] mix" in International Class 29 and "sauces excluding apple sauce and cranberry sauce" in International Class 30.<sup>5</sup> The Examining Attorney argues that "applicant's prior registrations, while not binding ..., illustrate consistency as to the applicant's prior acts regarding the descriptiveness of the mark in relation to related goods."

Based upon the foregoing evidence, the Examining Attorney maintains that "no significant imagination is needed to understand" that the term "NATURALLY FRESH" merely describes "a characteristic or feature of the applicant's goods, namely [that] the applicant's fruit, vegetable and salad goods are naturally fresh or otherwise without artificial aid and preservation."

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respect to its previously mentioned argument that it is the only entity to have used the term "NATURALLY FRESH" as a mark and that there is no need by competitors to use such term descriptively in connection with their goods. Suffice it to say, however, that to the extent to which the registrations owned by applicant and made of record by the Examining Attorney arguably have a bearing on the asserted mere descriptiveness of the term "NATURALLY FRESH" in connection with processed or prepared foods, applicant's objection is overruled and such registrations have been considered.

<sup>4</sup> Reg. No. 1,254,865, issued on October 18, 1983, which sets forth a date of first use anywhere and in commerce of March 21, 1980; renewed.

<sup>5</sup> Reg. Nos. 1,398,682 and 1,398,683, both of which issued on June 24, 1986, setting forth in each instance a date of first use anywhere and in commerce of March 21, 1980; both renewed.

Rather than impermissibly dissecting applicant's asserted mark, the Examining Attorney insists that "combining the terms NATURALLY and FRESH creates no separate [or incongruous] meaning" and that "no imagination [or multi-stage reasoning] is required to understand the nature of the goods" as merely described by the term "NATURALLY FRESH." The Examining Attorney, in this regard, correctly points out that:

The fact that a term is not found in the dictionary is not controlling on the question of registrability. *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977); TMEP §1209.03(b).

Thus, contrary to applicant's argument, the Examining Attorney contends that the immediacy requirement for a mark to be considered to be merely descriptive of the associated goods is satisfied in this instance.

Similarly, the Examining Attorney urges that the term "NATURALLY FRESH" merely describes applicant's goods with the requisite particularity, properly noting that:

For the purpose of a Section 2(e)(1) analysis, a term need not describe all of the purposes, functions, characteristics or features of the goods to be merely descriptive. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, ... 57 USPQ2d 1807 (Fed. Cir. 2001). It is enough if the term describes only one significant function, attribute or property. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1371, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004). ....

Because the term "NATURALLY FRESH" readily conveys that applicant's goods are processed or prepared without the use of

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synthetic fertilizers, pesticides or herbicides, the Examining Attorney urges that "applicant's mark describes the applicant's goods with sufficient particularity whereby no imagination is required by consumers to understand the descriptiveness of the mark as applied to the goods."

Finally, as to applicant's assertion that competitors do not need to use the term "NATURALLY FRESH" in order to compete in the prepared salad business as demonstrated by the absence of any evidence in the record of use thereof by a third party in connection with such goods, the Examining Attorney again properly points out that:

The fact that an applicant may be the first and sole user of a merely descriptive ... designation does not justify registration where the evidence shows that the term is merely descriptive of the identified goods. *In re Acuson*, 225 USPQ 790 (TTAB 1985) (COMPUTED SONOGRAPHY descriptive of ultrasonic imaging instruments); *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983) (SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE held ... descriptive ... for conducting and arranging trade shows in the hunting, shooting and outdoor sports products field); TMEP §1209.03(c). ....

Furthermore, and in any event, the Examining Attorney submits that he "has shown[,] through third party evidence, use in the marketplace for the particular phrasing at issue here for similar goods." Such evidence, the Examining Attorney accordingly insists, demonstrates that the term "NATURALLY FRESH immediately conveys a specific impression as to the applicant's goods and creates a competitive need as to the use of the descriptive language."

Upon consideration of the evidence and arguments presented, we agree with the Examining Attorney that, when considered in its entirety, the term "NATURALLY FRESH" is merely descriptive of applicant's fruit and vegetable salads, garden salads, potato salad, pre-cut vegetable salad and various other prepared salads including macaroni salad, rice salad and pasta salad. The Internet excerpts noted above and the dictionary definitions demonstrate that the term "NATURALLY FRESH" immediately and particularly conveys, without the need for speculation or conjecture, that a significant characteristic or feature of applicant's salads is that they are naturally fresh in the sense of not having been preserved or processed through artificial aid or treatment such as by canning or freezing. In the context of applicant's goods, there is nothing in the term "NATURALLY FRESH" which, to consumers for prepared salads, is incongruous, ambiguous or even suggestive, nor is there anything which would require the exercise of imagination, cogitation or mental processing, or necessitate the gathering of further information, in order for the merely descriptive significance thereof to be readily apparent to such customers. Instead, the term "NATURALLY FRESH" conveys forthwith, and with the requisite particularity, that a significant characteristic or feature of applicant's prepared salads is they are fresh through natural means rather than artificial aids or preservatives and, therefore, would obviously be considered by purchasers to be more desirable and wholesome than prepared salads which have been

frozen, canned or otherwise processed to extend their shelf-life in grocery stores, supermarkets and convenience stores.

Moreover, as to applicant's argument that its competitors do not have any need to use the term "NATURALLY FRESH," and have not done so, to describe a desirable aspect of their prepared salads, suffice it to say that even if competitors are able to advertise or market their goods through the use of other language, that does not mean that such term is not merely descriptive of applicant's prepared salads. See, e.g., *Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). Here, just as the term "NATURALLY FRESH" has been shown by the record to have a merely descriptive significance in connection with other foods, ranging from third-party use thereof for nectarines and other fruits and vegetables to prepared foods like raspberry preserves and salsa, it is plain from the meanings of the words "NATURALLY" and "FRESH" that, contrary to applicant's assertion, those words have a meaning when combined into the term "NATURALLY FRESH" which ordinary usage would ascribe to those terms in combination, irrespective of the apparent absence of such term from any dictionary. See *In re Gould Paper Corp.*, supra at 5 USPQ2d 1112 and *In re Orleans Wines, Ltd.*, supra at 517. Clearly, no new and unique commercial impression is created, and tellingly applicant has not even attempted to indicate what such might be, inasmuch as nothing in the combination results in a unitary mark with a unique, bizarre or otherwise nondescriptive meaning as applied to applicant's various salads. Rather, the constituent elements retain their

descriptive significance and their combination is itself merely descriptive of applicant's prepared salads, just as the term "NATURALLY FRESH" likewise has been demonstrated to be unregistrable on the Principal Register, in the absence of a showing of acquired distinctiveness, in the case of other goods of applicant's, namely, salad dressings, an egg and dairy based mix to be used as a filling for quiche and as an omelet mix, and sauces other than apple sauce and cranberry sauce. See, e.g., In re Entenmann's Inc., 15 USPQ2d 1750, 1751 (TTAB 1990), *aff'd per curiam*, 928 F.2d 411 (Fed. Cir. 1991) (OATNUT held to be merely descriptive of bread containing oats and hazelnuts). Thus, even if applicant intends to be the sole user of the term "NATURALLY FRESH" in connection with various prepared salads, that does not entitle it to the registration thereof where, as here, the term has been shown to immediately and particularly convey only a merely descriptive significance in the context of applicant's goods. See, e.g., In re National Shooting Sports Foundation, Inc., supra at 1020 and In re Mark A. Gould, M.D., 173 USPQ 243, 245 (TTAB 1972).

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