

THIS DISPOSITION IS NOT
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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Herbal Dynasty LLC

Serial No. 78058457

Sharon Blinkoff of Buchanan Ingersoll for Herbal Dynasty LLC.

Ann E. Sappenfield, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Simms, Quinn and Hohein, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Herbal Dynasty LLC (applicant), a Delaware limited liability company, has appealed from the final refusal of the Trademark Examining Attorney to register the mark HERB AND ROOTS for dietary and nutritional supplements and medicinal herbal teas, in Class 5, and herbal teas, in

Class 30.¹ Applicant and the Examining Attorney have filed briefs and an oral hearing was held.

The Examining Attorney has refused registration under Section 2(e)(1) of the Act, 15 USC §1052(e)(1), arguing that applicant's mark is merely descriptive of the ingredients of its supplements and teas. While applicant and the Examining Attorney agree that we must consider the issue of mere descriptiveness in relation to the relevant goods and not in the abstract, they come to different conclusions on this issue.

The Examining Attorney has made of record evidence from the Nexis database and from the Internet showing that herbs and roots are relatively common ingredients of nutritional and dietary supplements as well as teas. For example, evidence from *Drug Store News* (April 2001) mentions herbal supplements being made from buttercup roots; an article from *Better Nutrition* (October 2000) refers to dandelion roots as an ingredient in nutritional supplements; an article from the *Asheville Citizen-Times* (September 2000) discusses ginseng roots as an ingredient in food supplements; an article in *Vegetarian Times* (September 2000) mentions licorice root as an ingredient in

¹ Application Serial No. 78058457, filed April 14, 2001, based on applicant's allegation of a bona fide intention to use the mark in commerce.

nutritional supplements; and an article from *The Tennessean* (August 2000) discusses valerian root as an ingredient in herbal supplements. A Web site advertisement promotes various nutritional supplements containing various roots including goldenseal root, dong quai root, glucomannan root, kava root, sassafras root and marshmallow root. The Examining Attorney has also made of record a dictionary definition of the word "roots": "Any of various other underground plant parts."²

Upon careful consideration of the record and the arguments of the attorneys, we agree with the Examining Attorney that applicant's mark HERB AND ROOTS merely describes its dietary and nutritional supplements and its herbal teas.

Applicant argues that its mark does not identify any specific ingredient of its dietary supplements and herbal teas, and that its mark does not constitute adequate disclosure as required by Food and Drug Administration regulations pertaining to the listing of specific ingredients on the basis of the plants from which the dietary supplements (and teas) are derived. Applicant maintains, therefore, that its mark is suggestive inasmuch

² *The American Heritage Dictionary of the English Language* (Third Edition 1992).

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as it does not describe its goods with the requisite degree of particularity.

We believe, however, that the elements of applicant's mark HERB AND ROOTS broadly describe the ingredients without specifically naming the particular plants from which the individual supplements or teas are derived. See, for example, *In re Entenmann's Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990), *aff'd unpublished*, 928 F.2d 411 (Fed. Cir. 1991)(OATNUT held merely descriptive of bread containing oats and hazelnuts, the Board stating, "[w]hile it is true that in order to be held merely descriptive, a term must describe with some particularity a quality or ingredient of the product in question, it need not describe it exactly"); and *In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd unpublished*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989)("However, while we readily concede that the category of products which the term 'analog devices' names encompasses a wide range of products in a variety of fields, we do not believe this fact enables such a term to be exclusively appropriated by an entity for products, some of which fall within that category of goods").

Furthermore, the fact that FDA labeling regulations require a specific listing of ingredients on the basis of the plant from which a supplement is derived is simply irrelevant to

the question of whether applicant's mark is merely descriptive of its goods.

Applicant also argues that the Examining Attorney has not submitted evidence to show the meaning of the mark as a whole, and that the fact that a component is descriptive does not mean that the composite is also descriptive where the combination changes the overall commercial impression to something that is catchy, fanciful and capable of making a distinctive commercial impression. Here, too, we agree with the Examining Attorney that, while a combination of words may be registrable if it creates a unitary mark with a unique, nondescriptive or incongruous meaning, in this case each component of applicant's mark HERB AND ROOTS retains its descriptive significance when used in the combination, and the combination is also merely descriptive of the ingredients of applicant's goods. That is, applicant's dietary and nutritional supplements and teas contain herbs and roots. See, for example, *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001)(AGENTBEANS merely descriptive of computer software); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996)(FOOD & BEVERAGE ONLINE merely descriptive of a news and information service for the food processing industry); *In re Copytele Inc.*, 31 USPQ2d 1540 (TTAB 1994)(SCREEN FAX PHONE merely descriptive

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of facsimile terminals with electrophoretic displays); *In re Entenmann's Inc., supra* (OATNUT merely descriptive of bread containing oats and hazelnuts); *In re Serv-A-Portion Inc.*, 1 USPQ2d 1915 (TTAB 1986)(SQUEEZE N SERV merely descriptive of ketchup); and *In re Uniroyal, Inc.*, 215 USPQ2d 716 (TTAB 1982)(STEELGLAS BELTED RADIAL merely descriptive of vehicle tires containing steel and glass belts). See also *In re Hask Toiletries, Inc.*, 223 USPQ 1254 (TTAB 1984)(HENNA 'N' PLACENTA held unregistrable on the Supplemental Register for hair conditioner); and *In re Harcourt Brace Jovanovich, Inc.*, 222 USPQ 820 (TTAB 1984) (LAW & BUSINESS held unregistrable on the Supplemental Register for arranging and conducting seminars).

Applicant's other arguments, several of which are discussed below, are also not persuasive. The fact that a term may have a different meaning in another context, such as "root" meaning a person's ancestry or a reference to a type of dental procedure (root canal), is not controlling where the readily perceived significance in relation to applicant's goods is merely descriptive of the ingredients of the applicant's products. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979).

The third-party registrations which applicant has mentioned, containing either the word "HERB" (or "HERBS")

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or "ROOTS" (or "ROOT"), such as PLANET HERBS, HERB'N RENEWAL, BLESSED HERBS, TRINITY HERB, WORLD HERBS GOURMET, ROOTS MAN, ROOTS & LEGENDS, ROOTS TO HEALTH and ROOT OF LIGHT, for similar goods are not persuasive of a different result. The fact that elements of applicant's mark have been registered to others does not mean that applicant's mark is not merely descriptive of its goods. That is to say, a mark which is merely descriptive of applicant's goods is not registrable merely because other somewhat similar marks have been registered. See *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001) ("The Board must decide each case on its own merits...[citation omitted] Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court.")

Furthermore, the fact that a mark may not describe all aspects of applicant's goods, including all of the numerous ingredients of the supplements and teas, or that they may be intended for weight loss or appetite suppression (not revealed in applicant's identification of goods) does not detract from the mark's mere descriptiveness. A mark need not describe all of the purposes, characteristics or

features of the goods in order to be merely descriptive. Rather, it is sufficient if the term describe a significant attribute or feature of the goods. See *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985); and *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982). Thus, it is not necessary, in this instance, that a prospective purchaser of applicant's goods be informed of other ingredients of the products or the fact that applicant's goods are for weight reduction, for example.

We conclude that applicant's mark is merely descriptive of its goods, and that no imagination is required to conclude that the words HERB AND ROOTS immediately describe the ingredients of applicant's supplements and teas.

Decision: The refusal of registration is affirmed.