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Mailed:
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Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ayurvedic Concepts, Ltd. d/b/a Himalaya USA

Serial No. 78154263

John S. Egbert of Harrison & Egbert for Ayurvedic Concepts,
Ltd. d/b/a Himalaya USA.

Jason F. Turner, Trademark Examining Attorney, Law Office
108 (Andrew Lawrence, Managing Attorney).

Before Walters, Bucher and Grendel, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Ayurvedic Concepts, Ltd. d/b/a Himalaya USA, a Texan
partnership, whose general partner is Concorp Management
Company, a Texas corporation, seeks registration on the
Supplemental Register of the mark **NAIL CARE** (*in standard
character format*) for "nutritional supplements" in
International Class 5.¹

¹ Application Serial No. 78154263 was filed on the Principal Register on August 14, 2002 based upon claims of first use anywhere and first use in commerce at least as early as 2001. On March 3, 2004, applicant amended this application to the Supplemental Register.

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon the ground that this term is generic for the identified goods and is therefore incapable of identifying the goods and distinguishing them from the goods of others, under Section 23 of the Trademark Act, 15 U.S.C. § 1091.

Applicant and the Trademark Examining Attorney submitted briefs. We affirm the refusal to register.

Summary of the arguments

Applicant argues that the proposed mark is not generic for the genus or class of goods at issue and that the Trademark Examining Attorney has failed to sustained his burden of proof with evidence that illustrates that consumers would understand the proposed mark to refer to the genus or class of goods.

The Trademark Examining Attorney contends that "nail care" is a key function or purpose of applicant's supplements, that the correct genus of the identified goods is "nail care supplements," and that the evidence of record clearly establishes that the relevant public would recognize the term "Nail Care" as a reference to the genus of the goods.

The law of genericness

The Trademark Act provides for registration on the Supplemental Register of marks "capable of distinguishing applicant's goods or services and not registrable on the Principal Register." Trademark Act Sections 23(a), 23(c). "Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods or services being sold. They are by definition incapable of indicating a particular source of the goods or services." See In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) [much-publicized, alphanumeric telephone number 1-888-M-A-T-R-E-S-S is not generic inasmuch as there is no evidence that members of the relevant public refers to class of shop-at-home telephone mattress retailers in this manner]; In re Merrill Lynch, Pierce, Fenner, and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) [CASH MANAGEMENT ACCOUNT not shown to meet the rigorous standard to support finding of genericness]; and H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986) [relevant portion of the public does not refer to a class of fire fighting publications as FIRE CHIEF]. Because

they are incapable of identifying source, generic terms are not registrable on the Supplemental Register.

Applicant is correct in that the Office bears the burden of establishing genericness based on clear evidence of generic use. In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999) [The United States Patent and Trademark Office failed to demonstrate that the phrase SOCIETY FOR REPRODUCTIVE MEDICINE is generic term for applicant's services]. The Office cannot rely only on definitions and generic uses of the constituent terms of the phrase, but "must conduct an inquiry into 'the meaning of the disputed phrase as a whole.'" *Id.* at 1836. However, this is not limited to nouns; rather, a term that serves as a common descriptor of the key feature or function of goods can be held to be generic. In re Ricci-Italian Silversmiths, Inc., 16 USPQ2d 1727 (TTAB 1990) (ART DECO generic for flatware); In re Bonni Keller Collections Ltd., 6 USPQ2d 1224 (TTAB 1987) (LA LINGERIE generic for stores that sell lingerie). In the final analysis, applicant contends that the Trademark Examining Attorney has failed to show, by a preponderance of the evidence, that the term "Nail Care" is generic for "nutritional supplements."

According to our primary reviewing Court, the determination of whether the term sought to be registered is generic involves a two-part inquiry:

First, what is the genus of the goods or services at issue? Second, is the term sought to be registered ... understood by the relevant purchasing public primarily to refer to that genus of goods or services?

Marvin Ginn, supra at 530. See also, In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961

(Fed.Cir. 1985) [BUNDT is generic for a ring cake mix].

Thus, the test for determining whether a term is generic is its primary significance to the relevant public, that is, whether the term is used or understood, by purchasers or potential purchasers of the goods or services at issue, primarily to refer to the class of such goods or services.

See Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551 (Fed.Cir. 1991) [Petitioner failed to show by a

preponderance of the evidence that the primary significance to the relevant public (automobile owners and operators) of the word TOUCHLESS is generic designation for automobile

washing services]; and In re Merrill Lynch, supra; and In re Leatherman Tool Group, Inc., 32 USPQ2d 1443 (TTAB 1994)

[POCKET SURVIVAL TOOL is generic for pocket-sized survival implement]. Evidence of the relevant public's understanding

of a term may be obtained from any competent source, including direct testimony of consumers, consumer surveys, newspapers, magazines, dictionaries, catalogs, trade journals and other publications. See In re Merrill Lynch, *supra*, and In re Northland Aluminum Products, Inc., *supra*.

ANALYSIS

We turn then to an analysis of how the law on genericness applies to the facts of this case. Initially, we find that the members of the relevant public for these goods would be ordinary consumers, as there is no evidence that the consumers of applicant's goods constitute a more limited or specialized group.

In support of his position of genericness for the affected goods, the Trademark Examining Attorney referenced a number of dictionary excerpts for these words individually as well as together. Both the term as defined in a medical dictionary, and combining the dictionary meanings of the two individual words in a common-sense manner, we agree that the term "Nail Care" refers to the proper maintenance / good health of fingernails and/or toenails. Along with the other evidence of record discussed, *infra*, we simply view the dictionary evidence as being corroborative of genericness - not in itself conclusive of genericness.

Thousands of appearances of the combined words "nail care" together that came up in a search of news articles show that the two-word expression is clearly a term of art in the field of skin care and beauty care. The Trademark Examining Attorney contends that selected excerpts he placed into the record (drawn from articles located on the LEXIS/NEXIS automated database) demonstrate that in the fields of skin and beauty care as well as in the nutritional supplement business, the term "nail care" is used to include vitamins and nutritional supplements that are taken to strengthen one's nails:

Nestle SA, plans to set up a company with French cosmetics producer L'Oreal SA to develop **nutritional supplements** that may help skin, hair and **nail care**.²

Glemby [Incorporated] also operates 215 'Shears at Sears' and 35 'Black Hair Is Salons.' It retails its own hair care line, cosmetics and **nail care** products and vitamin and mineral **supplements** in the prestige salons.

Seymour Finkelstein estimated that the company will do in excess of \$200 million for the fiscal year³

"We offer treatments that feed the natural nail, giving it the **nutrition** it needs."⁴

² "The Bloomberg Finance Ticker," The Boston Herald, June 26, 2002.

³ "Glemby forging a salon empire; Four of a Kind - body, bath, hair and sun products supplement," Women's Wear Daily, May 10, 1985.

⁴ "Head for Capelli Salon when you want to look your very best," Lancaster New Era, July 11, 1996.

Also of record are excerpts from a number of Internet websites showing uses of "nail care" as a specific category of skin and beauty care or nutritional supplements. For example, on eVitamins.com, where one can shop by categories, under "Natural Skin Care Products" is the category "Nail Care." Similarly, on NutritionExpress.com, the category are "Hand and Nail Care" below which is "Nail supplements." On iHealthTree.com, the categories are "Beauty and Personal Care" / "Hand & Nail Care" / "Nails Care - Manicure." On NCBuy.com, the categories are "Health" / "Nutrition" / "Nail Care." On DermStore.com, the categories are "Nail Care" / "Supplements." At Health.Yahoo.com, the categories are "Skin and Beauty Center" / "Beauty" / "Nail Care." At SmartBomb.com, the categories are "Personal Care" / "Bath and Body Care" / "Nail Care."

Drugstore.com has a product category known as "Nails Supplements," while WonderLabs.com includes its "SKIN HAIR & NAILS" nutritional supplement under the category of "Nail Care." WhatSheBuys.com advertises Mavala® Nailactan Nutritive Treatment Cream, a product that allegedly nourishes and restores brittle and damaged nails.

We also note that several Internet websites of record contain discussions of the relationship of nutritional supplements to the care of nails. These articles are more

extensive than the abbreviated excerpts drawn from the LEXIS/NEXIS entries. For example, the website SmartSkinCare.com has a "quick tips" article with the headline, "*Nail Care Tip: Eat your way to better nails,*" that discusses a vitamin supplement called "biotin." Similarly, an online publication called "ALIVE" contained the following article on the importance of nutritional supplements for healthy nails:

Nutritional Supplements

All kinds of nutritional deficiencies make themselves known through nail problems. Protein is absolutely vital for nail health. There are many different protein supplements available that can be added to your food. All nutrients are essential for healthy nails, hence the importance of a healthy diet. Silicon is a vital mineral for strengthening the nails and hair. It is available in capsules called silica in an organic form, and in a gel in a mineral form. Lack of vitamin A or calcium will cause dry, brittle nails. If ridges develop on the nails as well, a B-vitamin deficiency is likely the cause. B vitamins should be supplemented. Vitamin C is also vital for healthy nails because it supports the immune system against infection.

Hangnails are more likely to occur when vitamin C or the B vitamin folic acid are inadequate. White spots are often a sign of a zinc deficiency. Nail problems due to fungal infection should be supplemented with an *Lactobacillus acidophilus* complex, which is a friendly bacteria needed by the body to maintain normal flora and prevent the growth of micro-organisms that cause disease.

Brittleness and horizontal peeling may also be the result of B-vitamin deficiencies, a lack of hydrochloric acid (HCl) in the stomach or iron deficiency. Calcium deficiency may also contribute to this problem, especially if there is a low stomach

acid output. Stomach acid is essential for digesting protein and absorbing vitamins and minerals.

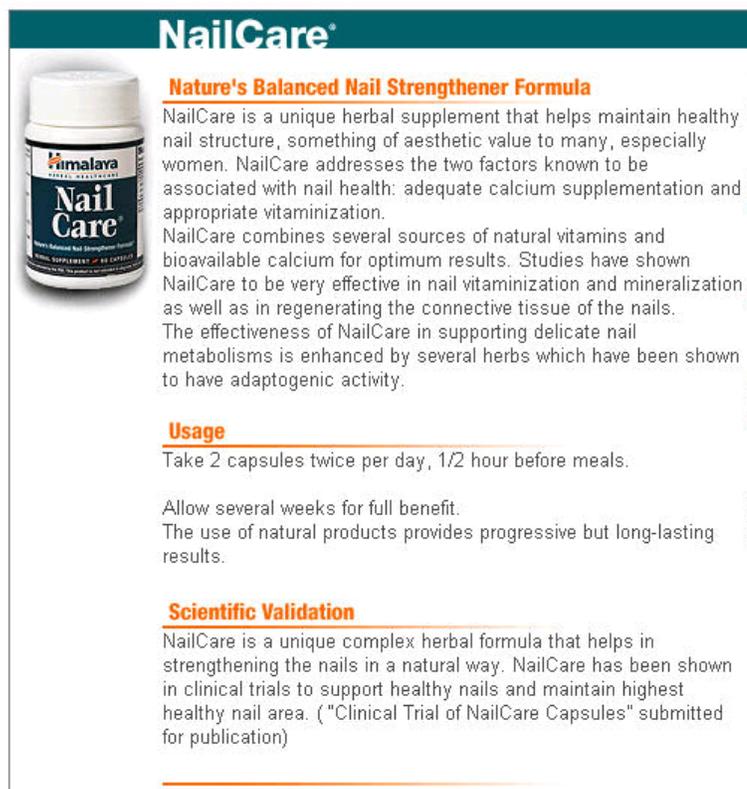
The older the person, the greater the likelihood of having low stomach acid. Vitamin and mineral supplementation will not be of much help unless stomach acidity is increased at the same time. Supplements such as betaine and pepsin HCl and glutamine HCl, all help to increase stomach acidity.

All supplements should be taken over an extended period of time. It will take several weeks before a change is noticeable.⁵

The Examining Attorney included in the record the following screenprint of applicant's website from May 2006, one paragraph of which contains the text on the left below:

NailCare is a unique herbal supplement that **helps maintain healthy nail structure**, something of aesthetic value to many, especially women. **NailCare addresses the two factors known to be associated with nail health:** adequate calcium supplementation and appropriate vitaminization.

NailCare combines several sources of natural vitamins and bioavailable calcium for optimum results. **Studies have shown NailCare to be very effective in nail vitaminization and**



NailCare

Nature's Balanced Nail Strengthening Formula

NailCare is a unique herbal supplement that helps maintain healthy nail structure, something of aesthetic value to many, especially women. NailCare addresses the two factors known to be associated with nail health: adequate calcium supplementation and appropriate vitaminization.

NailCare combines several sources of natural vitamins and bioavailable calcium for optimum results. Studies have shown NailCare to be very effective in nail vitaminization and mineralization as well as in regenerating the connective tissue of the nails. The effectiveness of NailCare in supporting delicate nail metabolisms is enhanced by several herbs which have been shown to have adaptogenic activity.

Usage

Take 2 capsules twice per day, 1/2 hour before meals.

Allow several weeks for full benefit. The use of natural products provides progressive but long-lasting results.

Scientific Validation

NailCare is a unique complex herbal formula that helps in strengthening the nails in a natural way. NailCare has been shown in clinical trials to support healthy nails and maintain highest healthy nail area. ("Clinical Trial of NailCare Capsules" submitted for publication)

⁵ <http://www.alive.com/2879a9a2.php?subject-bread-cramb=74>

mineralization as well as in regenerating the connective tissue of the nails.

The effectiveness of NailCare in supporting delicate nail metabolisms is enhanced by several herbs which have been shown to have adaptogenic activity.

(**emphasis** supplied by the Trademark Examining Attorney)

Our analysis begins with a determination of the crucial inquiry as to the genus of the goods at issue. See Marvin Ginn, *supra*; and In re Rodale Inc. 80 USPQ2d 1696 (TTAB 2006) [NUTRITION BULLETIN is generic for services of providing information in the field of health and diet via an Internet website].

We find in this case that the proper genus of goods is consistent with applicant's identification of goods, if not necessarily as broadly defined as the "nutritional supplements" named in the application. Applicant argues that its listed identification must determine the genus of goods. However, in the scheme of things, we would place applicant's suggested category of "nutritional supplements" at a much higher and more inclusive level than "genus." We find that the term "nutritional supplements" comprises a very broad range of vitamins and nutrients that are well beyond applicant's field, as revealed in this application, and includes items having little or nothing in common with applicant's goods.

The evidence of record shows that there is a distinct commercial market for supplements designed specifically to deal with ensuring the optimal condition of one's fingernails and/or toenails. In the context of applicant's goods, as shown in this record, we find "nutritional supplements" to be too broad and inclusive a category properly to be deemed a "genus." Cf. Marvin Ginn, *supra*, in which the court found the applicable genus of goods to be not merely "magazines," but rather the defendant's particular class of magazines, i.e., "magazines directed to the field of firefighting." See also In re A La Vieille Russie Inc., 60 USPQ2d 1895, 1897 n. 3 (TTAB 2001) [RUSSIANART generic for dealership services in the field of fine art, antiques, furniture and jewelry].

Although the two-word identification of goods does not mention nutritional supplements specifically designed to assist consumers maintain healthy nails, the information in the record shows that "nail care supplements" must be presumed to be included within the broader category of nutritional supplements.

Next, we must determine whether the purchasing public understands "Nail Care" to refer to the genus of goods at issue herein. See Marvin Ginn, *supra*; In re Recorded Books,

Inc., 42 USPQ2d 1275 (TTAB 1997) [RECORDED BOOKS generic for for pre-recorded audio tape cassettes featuring literary works]; and In re Women's Publishing Co. Inc., 23 USPQ2d 1876, 1877 (TTAB 1992) [DECORATING DIGEST not shown to be generic for a magazine featuring articles on decorating].

We note from the LEXIS/NEXIS excerpts and the Internet pages referenced above that the field of human "nail care" (similar to terms like "hair care" or "skin care") includes a wide range of goods and services directed to ensuring that consumers will have attractive and healthy nails. Given the manner in which the term "nail care" is used, it would have to be considered to be generic, and hence unregistrable, on all of these goods and services - from nail clippers, scissors and files, to topical lotions, oral nutritional supplements and manicure treatments for one's fingernails. At the very least, the record demonstrates that one essential element of good care of one's nails is proper nutrition. Hence, it is most unlikely that relevant consumers who are aware of this category of products would view the designation, "Nail Care," primarily as an indication of a single source of such goods.

The Trademark Examining Attorney points out that applicant's website, as quoted above, touts applicant's

product as being an " ... herbal supplement that helps maintain healthy nail structure." Based on this record, we agree with the Trademark Examining Attorney that "Nail Care" is a generic term as applied to the identified goods. If a prospective purchaser - a member of the general purchasing public - were seeking to buy a nutritional supplement for strengthening her nails, it would be reasonable for her to refer to such a product as a "nail care" supplement. See In re Central Sprinkler Co., 49 USPQ2d 1194 (TTAB 1998) [ATTIC is generic because it would be understood by relevant public as referring to a narrow category of automatic sprinklers for fire protection of attics].

Having found that the quoted evidence suffices to establish that the term "Nail Care," when considered as a whole and in connection with applicant's identified goods, is and would be understood by purchasers in its generic sense as a type of nutritional supplement for the maintenance and care of nails, we must turn to the question of whether applicant has managed to rebut Trademark Examining Attorney's *prima facie* case. In re International Business Machines Corp., 81 USPQ2d 1677 (TTAB 2006) [ESERVER is generic for computer hardware and operating software that

allow network connectivity and administration and processing of information].

Applicant argues that "consumers would understand the term 'NAIL CARE' to refer to physical maintenance of a person's nails, not an oral nutritional supplement."

(Applicant's brief, p. 9). We are not convinced by applicant's arguments. The overall structure of more than a dozen websites, as reflected in the hierarchies of their respective pull-down menus, demonstrates that a person looking for an oral nutritional supplement designed to help maintain nail health would find just such a product under the category of goods known as "Nail Care."

Applicant also argues in its brief as follows:

All of the relevant documents supplied by the Examiner refer to NAIL CARE as the physical act of grooming or maintenance of a person's nails, except for the inclusion of the Applicant's actual product at Himalaya Herbal Healthcare.

(Applicant's appeal brief, p. 7). We disagree with this characterization. As seen on pp. 6 - 10 of this opinion, *supra*, the LEXIS/NEXIS entries and the Internet websites use the term "Nail Care" repeatedly in the context of nutritional supplements. Moreover, as seen on at least a dozen websites, the term "Nail Care" clearly appears as a category of goods that includes nutritional supplements -

not merely as keywords strategically buried in metatags for searching purposes, as applicant argues.

Finally, another of applicant's arguments is that, as was the case in Merrill Lynch, *supra*, the instant record contains a "mixed evidentiary record on the question of genericness." (Applicant's brief, p. 6). However, in Merrill Lynch the "mixed" record reflected the fact that a substantial number of the excerpts from publications comprising the overall evidence before the Board showed recognition that the appellant, Merrill Lynch, was indeed the source of the CASH MANAGEMENT ACCOUNT brokerage services. That is clearly not the situation herein.

Hence, we find that applicant has introduced no evidence that contradicts the conclusion that "nail care" is a generic descriptor of the nature of applicant's goods.

While it is clear that any doubt on the issue of genericness should be resolved in applicant's favor, we have no such doubt in this case.

In conclusion, we find that the term NAIL CARE is incapable of distinguishing applicant's goods, and that it therefore is not registrable on the Supplemental Register.

Serial No. 78154263

Decision: The refusal under Section 23 of the Act on the ground that the subject matter of this application is generic is hereby affirmed.