

**THIS OPINION IS NOT CITABLE
AS PRECEDENT OF
THE T.T.A.B.**

Mailed: August 28, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ross Global, Inc.

Serial No. 78376654

Jeffrey J. Morgan of Carr LLP for Ross Global, Inc.

Jill C. Alt, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Quinn, Bucher and Cataldo, Administrative Trademark
Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Ross Global, Inc., a Nevada corporation, has applied to register the mark PURE OXYGEN FROM POWDER in standard character form on the Principal Register for "medical devices, namely, oxygen generating apparatus, parts and fittings for such apparatus, oxygen masks and refill packs or refill cartridges," in International Class 10.¹

¹ Application Serial No. 78376654, filed March 1, 2004, asserting May 1, 2002 as the date of first use of the mark anywhere and August 1, 2003 as the date of first use of the mark in commerce. In response to the examining attorney's first Office action, applicant, *inter alia*, amended the basis of its application to

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of a feature or quality of applicant's goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed main briefs on the issue under appeal. An oral hearing was not requested.

Applicant contends that the terms comprising its mark are not merely descriptive of its goods; that even if some of the terms comprising its mark are descriptive, the combination thereof in applicant's mark is not descriptive of applicant's goods; that, rather, applicant's mark "has a novel, incongruous meaning as applied to the cited goods because 'oxygen,' a gas, is generally not considered to be related to or derived from a 'powder'" (brief, p. 5).

Applicant argues that the examining attorney submitted no evidence that consumers are likely to recognize the nature of its goods when encountering its mark; and that the mental leap required making the connection between its mark and goods indicates that its mark is suggestive, rather than descriptive, thereof. Applicant argues in addition that the examining attorney failed to meet her burden of

assert a bona fide intent to use the mark in commerce on the goods.

establishing that applicant's mark is merely descriptive of its goods; and that any doubt with regard to descriptiveness must be resolved in applicant's favor.

The Examining Attorney maintains that the mark merely describes a central feature or quality of the goods, namely, that "applicant's apparatus makes pure oxygen from inert powders;" (brief p. 2) that according to its own literature, applicant's goods include a device that stores two inert powders in a cartridge which, when activated, create medically pure oxygen for emergency use; and that because applicant's goods make oxygen from inert powders, the mark is not incongruous, but rather describes an innovative feature of its goods. In support of the refusal, the examining attorney has relied upon dictionary definitions of the words "pure," "oxygen" and "powder." According to these definitions, "pure" may be defined, *inter alia*, as "having a homogenous or uniform composition; not mixed: *pure oxygen*" or "free from adulterants or impurities" (emphasis in original); "oxygen" may be defined, *inter alia*, as "a non-metallic element constituting 21 percent of the atmosphere by volume...is essential for plant and animal respiration, and is required for nearly all combustion;" and "powder" may be defined,

inter alia, as "a substance consisting of ground, pulverized, or otherwise finely dispersed solid particles."²

In addition, applicant submitted as an exhibit to its response to the examining attorney's first Office action a printed copy of a page from its Internet website.³ Excerpts from this exhibit are reproduced below:

OxySure™ products provide immediate access to oxygen during a medical emergency between the onset of the emergency and the arrival of fire/rescue personnel...

In addition to medical emergencies OxySure™ products are designed for use in a number of industries where the rapid application of oxygen can improve safety, aid an escape from a hazardous environment and provide instant relief from toxic exposure situations.

The OxySure™ product is a thermoplastic device which stores two proprietary compounds in a cartridge. The powders are dry and inert until activated with a simple, single step, instantly creating medically pure (USP) oxygen. The patents provide OxySure™ with first-to-market protection on a safe way for individuals to store, carry and administer a source of on-demand, medically pure (USP) oxygen without the hazards associated with oxygen storage.

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the

² The examining attorney cites to The American Heritage Dictionary of the English Language, Third Edition (1992) for her definitions. We note that copies of the proffered definitions were submitted with the examining attorney's first Office action.

³ Applicant submitted this material in response to the examining attorney's request for information regarding the nature and purpose of the goods recited in its application.

meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/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 feature about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

Before turning to the substantive ground for refusal, we note that the examining attorney has submitted an exhibit with her brief on the case. This exhibit consists of printouts from applicant's Internet website. We find that this exhibit is manifestly untimely, and it has not

been considered.⁴ See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). We note, however, that had we considered this exhibit in our determination of the issue on appeal, the result would be the same.

We turn now to our determination of whether the mark PURE OXYGEN FROM POWDER merely describes the goods identified thereby. As noted above, the examining attorney has made of record dictionary definitions of the salient terms comprising the applied-for mark. Based upon these dictionary definitions, we find that applicant's mark merely describes oxygen, an atmospheric element essential for respiration, that is free from impurities and created or derived from ground solid particles, i.e., pure oxygen created from powder. It is settled that "evidence [that a term is merely descriptive] may be obtained from any competent source, such as dictionaries, newspapers, or surveys." See *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, (Fed. Cir. 2005); and *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986). We note that applicant does not dispute these definitions of

⁴ It is noted that one page of the examining attorney's proffered exhibit is identical to the above-referenced exhibit made of record by applicant with its response to the examining attorney's first Office action.

the wording comprising its mark, but argues that neither the words themselves nor the combination thereof in its mark are descriptive of its goods. However, applicant's argument is contradicted by its own previously submitted page from its Internet website. It is settled that material obtained from the Internet is acceptable in ex parte proceedings as evidence of potential public exposure to a term. See *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002). As indicated above, applicant's website describes applicant's goods as "a thermoplastic device which stores two proprietary compounds in a single cartridge. The powders are dry and inert until activated in a simple, single step, instantly creating medically pure (USP) oxygen." Thus, according to information supplied by applicant, its goods include a cartridge containing two powders which, when activated, create pure oxygen. Applicant's goods are identified in its application as "medical devices, namely, oxygen generating apparatus; parts and fittings for such apparatus; oxygen masks and refill packs or refill cartridges." As explained on its website, applicant's apparatus generates medically pure oxygen by combining two powders in a cartridge. Thus, the evidence made of record by the examining attorney and the information supplied by applicant support a finding that,

as applied to applicant's goods, the term PURE OXYGEN FROM POWDER would immediately describe, without conjecture or speculation, a significant characteristic or feature of the goods. Prospective purchasers, upon confronting the term PURE OXYGEN FROM POWDER for applicant's goods, would immediately perceive that the goods are used to generate pure oxygen from powder for medical purposes.

We note applicant's argument that its mark is incongruous because oxygen is a gas and not generally derived from a powder. However, from the evidence of record, it appears that applicant's goods do indeed create oxygen gas from powder. Thus, as applied to applicant's goods, the mark PURE OXYGEN FROM POWDER is not incongruous, but rather descriptive of an important and innovative feature of applicant's goods.

Accordingly, we find that applicant's mark is merely descriptive as contemplated by Section 2(e)(1) of the Act.

Decision: The refusal to register is affirmed.