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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nexagen USA, LLC

Serial No. 78506267

John M. Skeriotis of Brouse McDowell for applicant.

Sue Carruthers, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Hairston, Holtzman, and Mermelstein, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Nexagen USA, LLC, seeks registration of the mark XTRACTS (standard characters) on the Supplemental Register for "nutraceuticals for use as dietary supplements, herbal weight loss supplements, and nutritional and herbal supplements." International Class 5.[1]

The examining attorney issued a final refusal to register under Trademark Act § 23, 15 U.S.C. § 1091, on the ground that applicant's mark "is the generic name for a key ingredient of the goods identified by the proposed mark,"

and therefore ineligible for registration on the Supplemental Register.[2]

Applicant appealed. Both applicant and the examining attorney filed briefs.

We affirm.

I. Record on Appeal

In support of the refusal to register, the examining attorney submitted the following relevant evidence:

- A dictionary definition of "extract" which states in relevant part:
  - **ex tract**
    ....
    2. A concentrated preparation of the essential constituents of a food, a flavoring, or another substance; a concentrate: *maple extract;*
- 14 stories from the Lexis/Nexis database – showing various extracts used as dietary supplements or as an ingredient of dietary supplements; and
- Pages from six websites (including applicant's).

II. Issue on Appeal

At the outset, we note that applicant states the issue on appeal as "whether the mark XTRACTS is generic of [a]pplicant's goods listed in the ... application."

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[1] Filed October 26, 2004, based on first use and use in commerce at least as early as May 1, 2003.

[2] The application was originally filed seeking registration on the Principal Register. Following an initial refusal of registration on the ground of mere descriptiveness, Trademark Act § 2(e)(1), applicant amended to seek registration on the

Applicant's Br. at 4. Nonetheless, throughout its argument, applicant maintains that the mark is not "merely descriptive, much less generic," and cites cases concerning descriptiveness. Applicant's Br. at 7-9.

To be clear, the sole issue on appeal is genericness. Applicant's amendment to seek registration on the Supplemental Register was not made in the alternative, nor was there any indication that applicant wished to preserve the opportunity to argue that its mark was eligible for a Principal Registration. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §§ 816.04; 1212.02(c) (5th ed. 2007). Following the amendment, the examining attorney promptly withdrew her previously-asserted refusal to register on the basis of descriptiveness under Trademark Act § 2(e)(1)[3], and correctly so, because descriptiveness is not a ground for refusal of registration on the Supplemental Register. Trademark Act § 23(a).

Accordingly, we address only whether applicant is entitled to a Supplemental Registration in view of the examining attorney's genericness refusal. Nonetheless, we

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Supplemental Register, at which point registration was refused on the basis that the mark is generic.

[3] Applicant's amendment to the Supplemental Register was made after the first Office action, and the descriptiveness refusal was neither made final nor was it repeated. Therefore, the issue is not even subject to appeal. Trademark Act § 20; 15 U.S.C. § 1070; Trademark Rule 2.141.

have fully considered all of the evidence and applicant's brief, construing them where possible as arguments that XTRACTS is not a generic designation for the identified goods.

III. Applicable Law

A mark is a generic name if it refers to the class, genus, or category of goods or services on or in connection with which it is used. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001), *citing In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987); *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986).

> The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question. *See, e.g., Department of Justice, Federal Bureau of Investigation v. Calspan Corp.*, 578 F.2d 295, 299, 198 USPQ 147, 149 (CCPA 1978); *Maremont Corp. v. Air Lift Co.*, 463 F.2d 1114, 1118, 174 USPQ 395, 398 (CCPA 1972); *In re Automatic Radio Mfg. Co.*, 404 F.2d 1391, 1394-95, 160 USPQ 233, 235-36 (CCPA 1969). Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

H. Marvin Ginn Corp., 228 USPQ at 530.

As the examining attorney correctly explains, "[a] term that serves as the common descriptor of a key ingredient, characteristic or feature of the goods is also generic.... A term need not relate solely to the name of the goods in order to be held incapable of serving as an indicator of origin." Examining attorney's Br. at 5, *citing, inter alia, Roselux Chem. Co., Inc. v. Parsons Ammonia Co.*, Inc., 299 F.2d 855, 132 USPQ 627 (CCPA 1962)(SUDSY generic for ammonia); *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 161 USPQ 606 (CCPA 1969)(PASTEURIZED generic for face cream); *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970)(CUSTOM BLENDED generic for gasoline); *In re Hask Toiletries*, 223 USPQ 1254 (TTAB 1984)(HENNA 'N' PLACENTA generic for hair conditioner); *cf. In re Nat'l Patent Dev. Corp.*, 231 USPQ 823 (TTAB 1986)(ULTRA PURE incapable of being a trademark for interferons for medical use).

The reason generic terms cannot be trademarks is "plain:"

> To allow trademark protection for generic terms, *i.e.*, names which describe the genus of goods being sold, even when these have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.

Merrill Lynch, 4 USPQ2d at 1142, *quoting CES Publ'g Corp. v. St. Regis Publ'n, Inc.*, 531 F.2d 11, 188 USPQ 612, 615 (2d Cir. 1975).

The examining attorney has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. *Merrill Lynch*, 4 USPQ2d at 1143. Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

IV. Discussion

A. What is the Genus of Goods?

Applicant's goods are identified as "nutraceuticals for use as dietary supplements, herbal weight loss supplements, and nutritional and herbal supplements." We find that the genus of goods is cogently specified by applicant's identification of goods. *See, e.g., In re Reed Elsevier Prop., Inc.*, 77 USPQ2d 1649, 1654 (TTAB 2005)("we consider applicant's identification as largely defining the genus of services involved in this case"), *aff'd* 482 F.3d 1376, 82 USPQ2d 1378 (Fed. Cir. 2007).

In construing this genus, we first start with the term "nutraceuticals," of which applicant's diet, weight loss,

nutritional, and herbal supplements are sub-categories. Neither applicant nor the examining attorney have submitted evidence of the meaning of this term, so we take notice of the following definition:

> **nu·tra·ceu·ti·cal** ...
> n. A food or naturally occurring food supplement thought to have a beneficial effect on human health.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4th ed. 2006)(online version).[4] Thus, applicant's identified supplements will be construed for this purpose to be such supplements which are either "food or naturally occurring food supplement[s]."

B. Does Applicant's Mark Primarily Refer to the Genus?

The examining attorney asserts that XTRACTS is the phonetic equivalent of the word "extracts," and that the phonetic equivalent of a generic term may likewise be found generic. Examining Attorney Br. at 4-5. Applicant does not contest either point, and we fully agree with the examining attorney. *See In re Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987)(MINERAL-LYX generic for "molasses-based dietary feed supplement for livestock animals

[4] The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed

containing minerals"). To hold otherwise would allow the registration of inconsequentially altered generic terms, although they are understood by the relevant purchasers as generic words.

In this case, XTRACTS is a minimal variation of the word "extracts." The words are phonetically identical, and highly similar in appearance, differing only in the absence of the initial letter "e" from applicant's mark. These differences do not change the meaning or overall impression of the mark, and purchasers would immediately recognize XTRACTS to be the equivalent of "extracts." We therefore start with the premise that if "extracts" is generic for the identified goods, applicant's mark is likewise generic.

The examining attorney argues that "extracts" is used as a common descriptor of a significant ingredient of applicant's goods, and is therefore generic.

The examining attorney's Internet and Lexis/Nexis evidence demonstrates that extracts of herbs and similar materials are widely used in the nutraceuticals market as a key ingredient or the only ingredient of dietary, weight loss, and nutritional supplements. A few examples follow:

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format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

- "Astragalus Plus Extract" is advertised for use "as an herbal dietary supplement,"[5]

- VirtuVites advertises "a complete line of herbs and herbal extracts to support a healthy lifestyle. .... Please enjoy these all-natural additions to our extensive selection of supplements.[6]

- "Pure Herbal Extracts™ has established itself as one of the World leaders in producing premium herbal extract products. You might be unfamiliar with our brand name, but we supply many of the World's herbal extracts brands with their own label products. ... [W]e are using the latest research to create in demand health supplements to cater for [sic] the widest markets possible."[7]

- "Did you know? Extracts of miatake mushrooms (sold as supplements) may be helpful in reducing the side effects of chemotherapy, boosting immune system function and fighting cancer.[8]

- "Brewers yeast ... is sold as a dietary supplement and can be a source of B. Vitamins. There are also nutritional yeasts, ... which are cultivated for use as supplements. Vegemite and Marmite are yeast extracts sold as nutrient-rich dietary supplements."[9]

- "Supplement makers have promoted artichoke extract for a variety of ills...."[10]

- "The company agreed in October to pay a $2 million civil penalty to settle federal allegations that it made false claims about two

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[5] http://healthpricer.com/supplements/now_foods/astragalus_plus-_extract/product_info_153213.html (11/22/06).
[6] www.firtuvites.com/Categories/herbs/herbs&extracts.htm (1/22/2006).
[7] http://pureherbalextracts.com (11/22/2006).
[8] The Times Union, p. D2 (Albany, New York 3/28/2006)
[9] The San Diego Union-Tribune, p. E2 (3/22/06).
[10] North Jersey Media Group, Inc., p. C1 (1/31/06).

dietary supplements: a seaweed extract and a weight-loss product."[11]

- "The supplements use extracts from animal products[,] glucosamine from crab and shrimp shells, chondroitin from cow windpipes."[12]

- "In the vitamin and supplement industry, some companies already have permission from the FDA to make 'function' claims about cherry juice extract. Enzymatic Therapy Inc., ... has permission to say its cherry fruit extract supplements 'supports the integrity or health of capillaries...'"[13]

It is clear from these excerpts (and others in the record) that natural extracts are a key – or sole – ingredient of many dietary, nutritional, and weight-loss supplements, and that the term "extracts" refers to the genus defined above.

Moreover, the evidenced generic use by competitors is strong evidence of the generic use of the term as applied to applicant's goods. It is likewise apparent that the ultimate purchasers of supplements are widely exposed to such generic use, and would view applicant's mark as another example of such use. Indeed, applicant admits that its products contain "one or more types of extracts,"

[11] Akron Beacon Journal Sec. D, p. 3 (1/28/2006).
[12] Los Angeles Times, Part F, p. 3 (12/26/2006).
[13] The Washington Post, Financial, D02 (10/28/2005).

Applicant's Br. at 7, as is clear from applicant's web site.[14]

Applicant does not dispute this evidence, but argues instead that "the mark XTRACTS does not immediately convey the identity of the type of extract with the degree of particularity to render the mark descriptive, much less generic." Applicant's Br. at 7. Applicant argues, quoting *RJR Foods, Inc. v. Ocean Spray Cranberries, Inc.*, 174 USPQ 244 (TTAB 1972)(GRAPE-BERRY not descriptive of beverages including of grape juice, cranberry juice, and water),[15] that "'A mark that tells consumers that Applicant's goods

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[14] Applicant's XTRACTS line of supplements includes several products, at least several of which comprise extracts: "**Xceed Multi™ Next Generation** ... is enriched with ... herbal extracts ... to build health and ensure adequate nutrition, especially during dieting." "**Carotene-Curcumin Complex:** Fat-soluble vegetable and herb extracts aid in protecting cell membranes." **Mood Harmonix™ Next Generation** is our all-natural mood elevator and brain tonic.... It contains nutrients and herbal extracts that boost mental functions and mood." www.nexagenusa.com/guest-/en_US/m_prod_xtracts_water.aspx (11/22/2006); www.nexagenusa-.com/guest/en_US/m_prod_xtracts_sky.aspx (11/22/2006).

[15] *RJR Foods* was a descriptiveness case arising under Trademark Act § 2(e)(1). Nonetheless, to the extent that the Board found applicant's mark to be not descriptive, that mark was also not generic. We agree with the examining attorney that *RJR Foods* is of little relevance because the marks at issue in *RJR Foods* and in this case are very different in kind. "'GRAPE-BERRY' is a composite term which has no specific meaning; there is no such thing as a 'grape-berry.'" Examining Attorney Br. at 6. The same is not true of "extracts." Further, *RJR Foods* must be read together with our more recent statement that "[t]o the extent ... *RJR Foods* sets forth a rule ... that in order to be held merely descriptive, a term must describe with absolute exactness an ingredient of the product, we decline to follow that rule." *In re Entenmann's, Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990), *aff'd*, 90-1495 (Fed. Cir. 1991).

include[] one or more ingredients falling in a class of ingredients, but fails to convey any information about the particular member of that class included in the composition is not' generic." Applicant's Br. at 8. It is thus applicant's position that the mark is not generic because it does not inform the consumer what *kind* of extract is in its supplements. We disagree. By focusing on its actual goods, rather than the goods identified in the application and the genus of goods to which they belong, applicant misses the point.

We acknowledge that most of the evidence submitted by the examining attorney shows the word "extract" with a modifier to indicate the precise type of extract that is being referred to. As applicant suggests, its proposed mark does not name any particular kind of extract. The evidence of record indicates that applicant uses its mark on a line of supplements, each of which may incorporate a different extract, although the current formulae may change. But the use of the word "extract" – without naming a specific extract – is not so vague as to remove the word from its generic meaning. The meaning of "extract" is clear as it is used widely through the relevant market, and in connection with many different modifiers. Even though the mark may not tell the consumer everything about the

supplement, or even everything about the extract which is an ingredient thereof, it is nonetheless clear that prospective purchasers would immediately understand that the supplement in question contained an extract, a fact which is widely advertised.

This case is similar to *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988), *aff'd* 10 USPQ2d 1879 (Fed. Cir. 1989)(unpublished)(holding ANALOG DEVICES generic for a variety of electronic equipment):

> Applicant argues that [ANALOG DEVICES] is too nebulous and vague to be commercially useful for competitors of applicant to use to describe any products. 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. For example, while terms such as "digital devices," "computer hardware," "computer software" and "electronic devices," just to name a few, may be broad and even nebulous terms, nevertheless, these terms may not be exclusively appropriated but must be left for all to use in their ordinary generic sense.

Id. at 1810.

With respect to the case at bar, we know that an "herbal extract," is an extract prepared from herbs. But the term "extract" does not lose any of its meaning if the word "herbal" is deleted. While we may not know everything about the specific extract involved, "extract" alone is

just as relevant to the genus whether it is modified by the name of what is extracted or not. At least to the extent applicant's identified goods include "herbal supplements," it is clear that such goods encompass herbal extracts. Moreover, the evidence of record clearly indicates that herbal extracts are in fact commonly used as the main – if not only – ingredient of "herbal supplements."

For a given good, there may be a number of terms which are generic. *Clairol, Inc. v. Roux Distrib. Co., Inc.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960). Generic terms may exist at different levels of specificity. For example, for automobiles, "sports car," and "car" are likely to be found generic terms, although one is certainly more specific than the other. The broader term "car" is no less generic for an automobile than is "sports car," even though "car" names – with less specificity – a larger class of things than "sports car." Likewise, the fact that "extracts" (or its equivalent XTRACTS) is a broader term than "herbal extracts" or the name of a particular extract does not prevent it from being generic. Indeed, the injury to competition from registration of "extracts" is potentially broader than the injury which would result from registration of, for instance, "astragalus extract" (a specific herbal extract mentioned in the evidence), because

it could preempt descriptive use by others of the term as applied to <u>any</u> extract, not merely a specific one.

V. Conclusion

After careful consideration of the evidence and argument of record, we conclude that XTRACTS is a generic term for "nutraceuticals for use as dietary supplements, herbal weight loss supplements, and nutritional and herbal supplements," and that the mark is therefore ineligible for registration on the Supplemental Register.

Decision: The refusal under Trademark Act § 23 is affirmed.