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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re PopPack LLC

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Serial No. 77544768

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Burt Magen of Vierra Magen Marcus & Deniro LLP for PopPack LLC.

Drew Leaser, Trademark Examining Attorney, Law Office 112  
(Angela Bishop Wilson, Managing Attorney).

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Before Holtzman, Kuhlke and Wellington, Administrative  
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

PopPack LLC has filed an application to register in  
standard characters BUBBLESEAL for goods ultimately  
identified as "non-metal seals for use in opening a  
package, sold as an integral component of plastic packaging  
for commercial use" in International Class 20.<sup>1</sup>

Registration was originally refused under Section  
2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the  
basis that BUBBLESEAL is merely descriptive of applicant's

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<sup>1</sup> Application Serial No. 77544768, filed August 12, 2008.

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goods. Applicant subsequently filed an amendment to allege use and amended the application to seek registration on the Supplemental Register. In response, the examining attorney refused registration on the Supplemental Register under Section 23 of the Trademark Act, 15 U.S.C. §1091, on the ground that BUBBLESEAL is incapable of identifying applicant's goods.

In view of applicant's amendment, the sole issue in the appeal is whether BUBBLESEAL is generic for applicant's goods and, thus, unregistrable on the Supplemental Register.

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence." In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); see also In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987). The critical issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods or services in question. H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); In re Women's Publishing Co. Inc., 23 USPQ2d 1876, 1877 (TTAB

1992). Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?" Ginn, 228 USPQ at 530. Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. Merrill Lynch, 4 USPQ2d at 1143, and In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We find that the genus of goods at issue in this case is adequately defined by applicant's identification of goods, specifically, "non-metal seals for use in opening a package, sold as an integral component of plastic packaging for commercial use."

Turning to the second inquiry, as noted by the examining attorney, "no restrictions have been placed on the consumers to whom the packages incorporating applicant's seals are offered[; therefore,] it is presumed that the relevant purchasing public is the general public." Br. pp. 4-5. The examining attorney argues that the word BUBBLE "refers to the name of a key characteristic or feature of Applicant's packaging seals, namely, 'a bubble-

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seal formed by one or more bubbles along the edge to be opened' ... [and t]he word 'SEAL' is also generic because the class or genus of the goods at issue is non-metal seals for use in opening a package." Br. pp. 5-6. The examining attorney continues asserting that the "mark as a whole maintains its generic nature when these words are combined, as the joining of the individual terms into one compound word lends no additional meaning to 'BUBBLESEAL,' which is a packaging seal that incorporates bubbles." Br. p. 6.

In support of his position that BUBBLESEAL is generic the examining attorney submitted the following dictionary definitions:

Bubble: a small body of gas;

Seal: a closure that must be broken to be opened.

Merriam-Webster Online Dictionary (2010) retrieved at [www.merriam-webster.com](http://www.merriam-webster.com).

In addition, he relies on excerpts from applicant's patent submitted by applicant. The title of the patent is "Bubble-seal apparatus for easily opening a sealed package" and representative excerpts are set forth below:

The package has a bubble-seal formed by one or more bubbles along the edge to be opened;

It is another object of this invention to provide such a bubble-seal which permits the consumer to manually open a tough, hermetically sealed package using only his fingers without tearing

the closure material or employing a separate tool or appliance;

It is a further object of this invention to provide such a bubble-seal which permits a consumer to open a package without employing a sharp instrument or cutting edge.

Based on this evidence the examining attorney concludes that "the relevant purchasing public, when confronted by the term 'BUBBLESEAL' on packages that contain seals that are formed by one or more bubbles along the edge to be opened, would primarily understand the applied-for mark to refer to packaging seals with bubbles as a key feature or characteristic of those seals [and] applicant has provided no evidence of a non-generic meaning created by the term 'BUBBLESEAL' that contradicts this conclusion." Br. p. 11.

In traversing the refusal, applicant "does not dispute that the packaging technology described in its patents incorporates one or more bubbles along the edge of a package, and pressing or popping the bubbles opens the package" but contends that the relevant public would not "understand that the term BUBBLESEAL is the generic name for 'non-metal seals for opening a package.'" Br. p. 2. Applicant continues arguing that the examining attorney has improperly parsed the words BUBBLE and SEAL to conclude that the proposed mark is generic. Citing to In re

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American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1831 (Fed. Cir. 1999), applicant asserts that the examining attorney "has not provided substantial evidence that the mark as a whole would be considered generic." Id.

On this point, applicant is incorrect. The appropriate standard to be applied in this case is set forth in *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111-12 (Fed. Cir. 1987) ("[T]he PTO has satisfied its evidentiary burden [with] evidence including dictionary definitions that the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound") and as delineated by *American Fertility*, 51 USPQ2d at 1837 ("Gould is limited, on its facts, language, and holding, to compound terms formed by the union of words.") It is entirely appropriate for the examining attorney to present evidence that the constituent parts of the mark are generic for significant aspects of the goods and when combined do not magically create a term capable of registration. *American Fertility*, 51 USPQ2d at 1836 ("[I]f the compound word would plainly have no different meaning from its constituent words, and dictionaries, or other evidentiary sources, establish the meaning of those words to be generic, then the compound word too has been proved

generic. No additional proof of the genericness of the compound word is required.")

Put simply, applicant's proposed mark precisely names what its goods are as applicant itself has had occasion to experience in writing its patent application where it calls its new invention a "bubbleseal." Applicant's argument that the excerpts from its patent are not relevant is untenable. Applicant's own usage of its mark in a generic manner is certainly relevant to the issue. See Gould, 5 USPQ2d at 1019 ("Gould's own submissions provided the most damaging evidence [that the word is generic]"). Further, the absence of public use of the compound term or dictionary entries is not fatal to the examining attorney's case. See Gould, 5 USPQ2d 1110 (fact that generic designation not found in dictionary not controlling on the question of registrability). Moreover, it is not clear to what extent applicant's type of product has been on the market. Applicant's patent would indicate that this is a new invention and the fact that applicant may be the first and only user of this generic designation is not dispositive on the issue of genericness. See *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983). As noted by the examining attorney, he must show that the relevant public would understand the applied-

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for mark as a whole to have generic significance, not that they use it in that manner. Cf. *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009).

The record establishes that the individual components of applicant's mark are generic for the offered goods, specifically non-metal seals for use in opening a package, sold as an integral component of plastic packaging for commercial use, and their combination lends "no additional meaning to the term." *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001).

Applicant's reference to third-party registrations where the Office allowed registration for marks that contain the word BUBBLE or SEAL are not persuasive. See, e.g., Reg. No. 1247076, issued August 2, 1983, for the mark BUBBLE WRAP for "cellular cushioning packaging material which contains entrapped bubbles of air or other gases"; Reg. No. 1078920, issued December 6, 1977, for the mark BUBBLE PAK for "cushioning material for wrapping and packaging of articles and which contains entrapped bubbles of air or other gases"; and Reg. No. 1913324, issued August 22, 1995, for the mark STEEL SEAL for "adhesive sealant for general use in the heating and ventilating industry; gasket material in the form of extruded elastomers and slit to



width sheets for use in the heating and ventilating industry." First, the third-party registrations with the term SEAL often have it disclaimed or somehow joined to non-descriptive elements in the mark and are, for the most part, registered in connection with somewhat dissimilar goods. With regard to all of the proffered third-party registrations, including the "BUBBLE" registrations owned by one entity, we are not bound by prior decisions, in particular ones made decades ago, and whether a proposed mark is generic must be determined based on the evidence of record at the time registration is sought. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

Based on this record, the examining attorney clearly established that BUBBLESEAL is generic for the identified goods, or more precisely under the language of Section 23, is not "capable of distinguishing the applicant's goods or services." 15 U.S.C. §1091(c).

**Decision:** The refusal to register on the Supplemental Register based on genericness under Section 23 is affirmed.