

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
December 17, 2013

Hearing:  
November 13, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Trivita, Inc.

Serial No. 77658158

Adam R. Stephenson of Adam R. Stephenson Ltd., for Trivita, Inc.

Samuel Paquin, Trademark Examining Attorney, Law Office 111  
(Ronald Sussman, Managing Attorney).<sup>1</sup>

Before Quinn, Wellington and Ritchie, Administrative  
Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Trivita, Inc., applicant herein ("applicant"), seeks  
registration on the Principal Register of the mark

<sup>1</sup> Examining Attorney Erin Falk handled the prosecution of this application on behalf of the Office; however, subsequent to briefing of this appeal, Mr. Paquin was substituted as the assigned examining attorney and he represented the Office at oral argument.

"NOPALEA,"<sup>2</sup> in standard character format, for goods identified as "Dietary and nutritional supplements sold exclusively through multi-level direct marketing; nutritional supplements sold exclusively through multi-level direct marketing; all of the foregoing containing, in whole or in substantial part, nopal juice," in International Class 5. The trademark examining attorney finally refused registration on the ground that applicant's proposed mark is merely descriptive of the identified goods under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1).

Both applicant and the examining attorney filed briefs, and applicant filed a reply brief. At applicant's request, a hearing was held and presided over by this panel on November 13, 2013.

### **Descriptiveness**

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See, In re Chamber of Commerce*

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<sup>2</sup> Serial No. 77658158, filed on January 28, 2009, amended to filing under Trademark Act Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), with dates of first use and first use in commerce asserted from February 28, 2009, as filed with Statement of Use on April 9, 2011.

*of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012), *citing In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *see also In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

The examining attorney argues that the term "nopalea" is merely descriptive of the goods in the application, in that the goods contain nopal, "which is derived from an abstract of the nopalea plant." (EA's brief at unnumb'd 5 of 14). Applicant admits that nopal juice *may* derive from the nopalea cactus, but argues that 1.) because nopal juice may derive from either the nopalea or the opuntia cactus, it cannot be considered merely descriptive, but rather, at

worst suggestive;<sup>3</sup> and 2.) applicant's specific product, as shown on the label on its specimen, in fact derives from the opuntia rather than the nopalea cactus. We take these arguments in turn and discuss the evidence of record.

The term "nopalea" refers to a genus of cacti:

Nopalea: noun, a genus of the cactus family with scarlet flowers. April 16, 2009 Office Action, p.40.  
*Dictionary.com*.

Nopalea cochenillifera: Family Cactaceae; Genus Nopalea.

Identification: Genus Nopalea; Species: cochenillifera; Variety: Cultivar; Common Names nopal; Family Cactaceae. April 16, 2009 Office Action, p. 37.  
*www.crescentbloom.com*.

Genus Nopalea: (noun) a genus of the cactus family with scarlet flowers. December 13, 2011 Office Action, at 29. <http://www.Elook.org>.

Dictionary definitions of "nopal" refer to both the genus "nopalea" and to the genus "opuntia"<sup>4</sup>:

Nopal: 1. Any of various cacti of the genera *Nopalea* or *Opuntia*, including the prickly pear and similar species. 2. The fleshy, oval, edible pad of such a cactus. April 9, 2011 Response to Office Action, p.2. <http://education.yahoo.com>.

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<sup>3</sup> Applicant stated in its brief and confirmed at oral hearing: "Therefore, based on the usage in the industry, the term 'nopal juice' in the description of the goods could refer to extracts taken from both the genera *Nopalea* and *Opuntea*." (appl's brief at 8). We take this as an admission that the extract could derive from either cactus. These statements are also, as noted, confirmed by the record.

<sup>4</sup> As noted, there is some disagreement in the record as to the relationship of the nopalea, opuntia, and prickly pear cacti. See also discussion in Henderson decl., *infra*.

Nopal: 1. Any of a genus (Nopalea) of cacti of Mexico and Central America that differ from the prickly pears in having erect petals and scarlet flowers with the stamens much longer than the petals; *broadly* prickly pears.; 2. A fleshy young tender stem segment of the prickly pear cactus (especially *opuntia ficus-indica*) or the nopal cactus used as food. April 9, 2011  
Response to Office Action, p.3. [www.merriam-webster.com](http://www.merriam-webster.com) (2011).

Nopalea is used in food and recipes, and sometimes medicinally. We note that some of these sites appear to be from affiliates of applicant, touting the benefits of nopalea:

Nopalea: *A genus of the cactus family with scarlet flowers.* Plants of Nopalea are pollinated by hummingbirds, and their winter flowering coincides with hummingbird migration. The stems and flowers are edible and used as forage. The plants are used medicinally as a tea to relieve kidney-stone pain and as a poultice on wounds and Diabetes.  
Nopal is often used to relieve the symptoms of overindulgence in alcohol, including dry mouth and nausea. It is also thought to lower fats and cholesterol in the blood and is becoming increasingly popular as a means to decrease blood sugar levels and control diabetes. April 16, 2009 Office Action, at 31-32.  
[www.nopalea.org](http://www.nopalea.org).

Natural Benefits from Nopalea Health Products:  
To begin, it is important to highlight where the ingredients to these miracle juices are formed. The fruits used for these health drinks come from the cactus plants that grow in arid areas of the Southwestern United States. Once harvested, these fruits are turned into juices which are

then bottled and sent directly to customers. . .  
.

The effects that these Nopalea products give off are varied and unmistakable after someone ingests these products. January 7, 2011 Office Action, at 2-3.  
[www.healthhubarticles.com](http://www.healthhubarticles.com).

Nopalea Cactus Fruit Health Gives Benefits and Protection from Obesity and Other Diseases: The power of Nopal cactus is Remarkable with Nopalea Sonoran Bloom by Trivita Wellness. Trivita is a World Class Direct Selling Company offering exclusively this Unique Miracle Formula of Nopalea by Trivita. Trivita's Nopalea Cactus Fruit has been featured on Tv. Read More Here or See The Product. [sic]

Nopalea (No-pah lay uh) blends antioxidant-rich Nopal cactus superfruit with naturally sweet Agave nectar to bring you a deliciously unique concentrated wellness drink. . . .

The Nopal or Nopalea Cactus Fruit Contains Betalains.  
January 7, 2011 Office Action, at 5. Press Release. [www.1888pressrelease.com](http://www.1888pressrelease.com).

Nopalea: Nopalea juice can help relieve pain and inflammation in your body! Do you or anyone you know suffer from arthritis, heart disease, diabetes or any of the many autoimmune disorders like lupus or fibromyalgia? Medical research shows these health conditions and many more are associated with inflamed tissues in the body. The nopalea cactus is one of the most nutrient rich cactus species known to science. This desert plant has proven anti-inflammatory properties. Clinical studies show that the opuntia cactus is effective in fighting chronic inflammation. Nopal cactus juice is made from this plant's magenta colored fruit. . . . Nopalea fruit is low in calories, as well as sodium. . . .  
What is Nopalea Cactus Juice?

Nopalea cactus juice is now available as a tasty nutrition drink! . . .

Nopalea cactus supplements can also help improve immune system function in your body. January 7, 2011 Office Action, at 16-17.

<http://www.sonoranbloom.com/content/products/nopalea/researchandscience>.

Commercially, the ingredients from the nopalea cactus fruit are used in the food industry as red food dyes to improve the color of tomato paste, sauces, desserts, jams and jellies, ice cream, sweets and breakfast cereals.

Health Benefits: Due to its harsh arid environment, the nopalea cactus fruit of the Sonoran Desert has the highest concentration of betalains of any plant on earth! This includes other nopalea cactus from other regions of the world. These health promoting substances are now available in a specially formulated cactus juice drink called Nopalea. December 13, 2011 Office Action, at 18.

<http://www.best-natural-health-supplements.com>.

Rivenrock Gardens sells as it's [sic] premier variety the cactus called Nopalea Grande. This is a nearly spineless cactus that is easy to prepare, and has a delightful taste both raw and cooked. One should harvest the nopal cactus when the individual leaf is young and fresh.

[www.rivenrock.com/recipes](http://www.rivenrock.com/recipes). [images follow]

December 13, 2011 Office Action, p8-11:

<p><b>Ingredients:</b>  <b>two pounds of cactus prepared and diced</b>  <b>a couple cans of diced tomatoes</b>  <b>three or four pickled jalapeno peppers (or to taste)</b>  <b>three cloves or more (to taste) of garlic</b>  <b>one-half medium onion</b>  <b>a can each of red kidney, black bean, and pinto beans</b>  <b>pinch of basil</b>  <b>a bunch of cilantro</b>  <b>quarter cup of olive oil</b>  <b>couple dashes of salt and some ground black pepper will add flavor</b>  <b>A handful of sunflower seeds, shelled pumpkin seeds, or pine nuts, or any mix of them</b></p> <p>For a real crowd pleaser at a picnic or party make this cactus salsa ahead of time and allow to blend its flavors in the refrigerator for a few hours or more. Just mix all the ingredients above that you can obtain. Some hot peppers are always in favor here in the SouthWest, but other folks may need it tamed down on the hot peppers some. One can use this as a dip for tortilla chips, or a relish and garnish on burritos (see breakfast burritos to the right), meat dishes or a general spicy condiment.</p>	<p><b>Victoria's cactus breakfast burrito</b></p> <p>This is one of my favorite recipes, the cactus mixes very well with these ingredients and tastes very good.</p> <p>Take the prepared and diced cactus and add to some potatoes that are already pretty well cooked with your favorite spices including garlic and onions. After a minute or so add a couple of fresh eggs to the mix and scramble all together well. Heat some tortilla shells and spoon the mixture into the shells, add salsa roll up and enjoy.</p>
<p><b>Victoria's French fried Cactus</b></p> <p>In this recipe the freshly cut and cleaned cactus pads are cut into french fry style strips 3/8" wide and rolled in a batter of milk and eggs then rolled through flour, cornmeal or a combination of both. Frying in a skillet or deep fryer will give a deep gold/green color. They are really great fresh out of the oil.</p>	<p><b>Fava Bean and Nopales soup</b></p> <p>1/2 lb Fava beans, washed well and drained  1/2 cup Olive Oil  1/2 Onion cut into large pieces  1 and 1/2 quarts of water  2 cloves of garlic  4 to 5 cactus pads  1/2 diced onion</p> <p>Combine the Favas, oil, onion and two cloves garlic. Cook in a covered pot bringing to a slow boil and continue to cook until the Favas are soft and the liquid is thick. Do not salt. This takes about 2 and 1/2 hours. Stir frequently. Meanwhile clean the cactus pads and cut them into 1/4 inch cubes. Boil them with salt garlic and onion for about 15 minutes. Before serving add the cactus to the soup and stir well. Makes approximately 6 servings. Baby Lima or Haba beans can be substituted for the Fava beans.</p>
<p><b>Cactus and Bean Salad</b></p>	



<p>1 16 oz. can of drained kidney, wax, garbanzo and green beans 1 cup of chopped bell pepper 1/2 cup chopped onion 1/2 lb of fresh cleaned and diced cactus</p> <p>Mix all ingredients and salt and pepper to taste, marinate overnight in refrigerator to blend flavors. Makes about 8 servings.</p>	<p><b>Cactus tuna Salad</b></p> <p>1 Can Tuna Fish 1 head lettuce, chopped, (may substitute two heads leaf lettuce) 1 cup chopped diced nopales 1/2 onion, minced</p> <p>Mix all ingredients, chill and serve.</p>
<p><b>Raw Cactus</b></p> <p>Yeah, I know that this sounds kinda odd, it did to me also, eating the raw pads of the plants. But there are some varieties (like Nopalea Grande) that are actually really tasty when harvested young tender and succulent. They have an interesting snap and crunch to them, much more than one would expect. Sliced into one inch strips they are an intriguing item on the dinner plate. These must be freshly harvested leaves for this, not canned.</p>	<p><b>NOPALITOS CON CHILE (Cactus Chile)</b></p> <p>2 lbs cleaned Nopales 1 Onion -- sliced 1/8" thick 1/8 cup Corn Oil or Olive Oil 2 jalapeno chills 2 Chili Serrano 1/2 bulb garlic 1 Cup Cilantro Salt to taste</p> <p>Clean and dice nopales. Chop onion into similar sized pieces and place in a large oiled skillet and begin to fry. Add garlic and chilis and salt. Cover and simmer until tender. Serve over diced and toasted tortillas or bed of rice.</p>
<p><b>NOPALES SALAD</b></p> <p>1 lb cleaned and diced Nopalitos, cooked and drained (changing the cooking water a couple of times will reduce the slime) Mix with chopped onion, tomatoes, serrano peppers (or substitute jalapenos) and cilantro. Add a few drops of lime juice. Serve as a side dish or with corn tortillas to make tacos.</p> <p>sent to us by Victor M. Martinez, Jr.</p>	<p><b>Cactus Stew</b></p> <p>1 lb beef or pork... browned and simmered for one hour covered Add in one onion, diced carrots, corn and what else ya got garlic, peppers and salt to taste... cook for one more hour add Cilantro, cumin and peppers and black pepper to taste... Add in a half pound of prepared diced cactus</p> <p>Cook for another half hour.... serve over rice</p>

Applicant submitted into evidence a thesis on prickly pear cacti to show the difference between nopalea and opuntia cacti. However, information contained therein appears to state that while the blooming times are different, "One new combination has been made, transferring *Nopalea hondurensis* from *Opuntia*." Puente-Martinez, Taxonomic Revision and Phylogeny of the Genus *Nopalea*, Salm-Dyck (Cactaceae Opuntioideae) (Thesis 2006 at Abstract iii). The thesis further discusses how both genuses refer to, or are referred to as "nopal":

Etymology: The genus name is derived of the Spanish word 'nopal', used in Mexico for all

flat-stemmed prickly pears in *Nopalea* and *Opuntia*.  
[sic]  
*Id.* at 51.

Applicant admits to being "familiar with the word 'nopal' as it refers generically to a number of different prickly pear cactus species." (Henderson decl., at para. 5). However, Mr. Henderson attested that he is "unaware that any extract or compound of a nopal plant, nopal cactus, or prickly pear cactus is referred to or known by the word 'nopal' in the industry." *Id.* He further stated that "In the industry, the prickly pear cactus is referred to as a 'nopal plant' or 'nopal cactus' but not as a 'nopalea plant.'" *Id.* at para. 6. He further added, "I declare that the applied for goods do contain extracts of the nopal plant or nopal cactus." *Id.* at para. 5.

Finally, applicant argues that while "nopal" may refer to both or either genus, applicant's product "[p]resently contains juice from the fruit of the *Opuntia ficus-indica* prickly pear cactus, also known as the Indian fig prickly pear." (Henderson decl. at para. 6). However, we note that applicant's identification of goods is not so limited. We are bound to make a determination not by applicant's current use or labeling, but rather by applicant's identification of goods in its application. *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d

937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("[t]he authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed." [Citations omitted]). There is no indication in applicant's identification of goods that the "nopal juice" in its goods derives from opuntia rather than nopalea cacti. The record indicates that nopalea is indeed a genus of cacti which is used for food and medicine, and which is commonly referred to as "nopal."<sup>5</sup> Consumers may well assume, (as apparently do some of applicant's affiliates) that, as a characteristic of nopal juice, applicant's goods derive from genus nopalea. In this regard, applicant helpfully pointed us to the case *Amer. Aloe Corp. v. Aloe Crème Laboratories, Inc.*,<sup>6</sup> 420 F.2d 1248, 164 USPQ 266 (7<sup>th</sup> Cir. 1970) (ALOE as generic or descriptive because identical to plant genus name). As the

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<sup>5</sup> Although Mr. Henderson's declaration attests that it is not so known in the industry, the record indicates that dictionary and web evidence associates "nopal" with "nopalea."

<sup>6</sup> The case was subsequently cited by the Board in *Aloe Crème Laboratories, Inc. v. Aloe 99, Inc.*, 188 USPQ 316 (TTAB 1975).

court there noted, where the alleged mark holder sought to register variants of a plant genus "aloe," the terms were found to be generic not only for pharmaceuticals but for cosmetics as well, stating:

Defendant cannot appropriate for its own trademark use the generic name of the distinguishing and effective ingredient in its product.  
(at 268).

Accordingly, we are left with no doubt that a consumer would understand the term "nopalea" used in connection with applicant's goods as conveying information about them. See *In re Tower Tech Inc.*, 64 USPQ2d at 1316-17; see also *In re Conductive Services, Inc.*, 220 USPQ 84, 86 (TTAB 1983). Therefore we find that the applied-for mark is merely descriptive of the identified goods.

**Decision:** The refusal to register under Trademark Act Section 2(e)(1) is affirmed.