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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dakota Natural Foods, Inc.

Serial No. 78326818

Garrett M. Weber of Lindquist & Vennum P.L.L.P. for Dakota Natural Foods, Inc.

Martha L. Fromm, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

Before Bucher, Grendel and Holtzman, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Dakota Natural Foods, Inc., applicant herein, seeks registration on the Supplemental Register of the term **JUMBOZ** (in standard character form) for goods identified in the application as "processed sunflower seeds."<sup>1</sup>

<sup>1</sup> Serial No. 78326818, filed on November 12, 2003. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a). May 31, 2003 is alleged in the application as the date of first use of the mark anywhere and the date of first use of the mark in commerce. In the application as

At issue in this appeal is the Trademark Examining Attorney's final refusal of registration on the ground that the term JUMBOZ is generic for and incapable of distinguishing applicant's goods, and that it therefore is not registrable on the Supplemental Register. Trademark Act Section 23(c), 15 U.S.C. §1091(c).

Applicant and the Trademark Examining Attorney have filed appeal briefs. After careful consideration of the evidence of record and the arguments of counsel, we affirm the refusal to register.

To be registrable on the Supplemental Register, the matter sought to be registered must be "capable of distinguishing the applicant's goods or services." Trademark Act Section 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." *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (citations omitted). Because they are

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originally filed, applicant sought registration on the Principal Register. After the Trademark Examining Attorney issued a final refusal of registration on the Principal Register on the ground of mere descriptiveness, applicant amended the application to one seeking registration on the Supplemental Register.

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

Our primary reviewing court has stated:

The determination of whether a mark is generic is made according to 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?"

*In re Dial-A-Mattress Operating Corp.*, *supra*, 57 USPQ2d at 1810, quoting from *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986). 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). "Any competent source suffices to show the relevant purchasing public's understanding of a contested term, including purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications." *In re Dial-A-Mattress Operating Corp.*, *supra*, 57 USPQ2d at 1810.

Our analysis begins with a determination of the genus of the services at issue. See *H. Marvin Ginn*, *supra*. We find in this case that the genus of services is commensurate with applicant's identification of goods in the application, i.e., "processed sunflower seeds."

We next must determine whether the purchasing public understands JUMBOZ to refer to the genus of goods at issue. *See H. Marvin Ginn, supra.*

Initially, it is settled that a mere misspelling of a generic term does not negate its genericness. *See, e.g., In re Stanbel Inc.*, 16 USPQ2d 1469 (TTAB 1990), *aff'd*, 20 USPQ2d 1319 (Fed. Cir. 1991) (ICE PAK held generic for ice packs); *In re Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987) (MINERAL-LYX held generic for mineral licks for feeding livestock). In this case, we find that JUMBOZ is the legal equivalent of "jumbos"; applicant does not contend otherwise. Thus, if "jumbos" is found to be generic for applicant's goods, so also will JUMBOZ.

The Trademark Examining Attorney has made of record several dictionary definitions of the word "jumbo." The American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000) defines it as "n: An unusually large person, animal or thing; adj: Unusually large: jumbo shrimp; a jumbo jet." The Merriam-Webster Online Dictionary defines it as "n: a very large specimen of its kind." The MSN Encarta Dictionary defines it as "n: large thing; something or somebody that is extra large (often used before a noun)." We reject applicant's argument that because sunflower seeds are inherently small, they cannot

be considered "jumbo." Something is jumbo if it is "a very large specimen of its kind"; the comparison to be made is between relative sizes of sunflower seeds, not between sunflower seeds in general and inherently large items such as jumbo jets (in the example given in one of the above-quoted dictionary definitions).

Applicant's "processed sunflower seeds" are "jumbo" sunflower seeds, under these dictionary definitions. That is, the seeds are "unusually large," and each is "a very large specimen of its kind." Applicant's packaging, submitted as applicant's specimen of use, includes the following text: "When size matters! JUMBOZ BIG Salted Sunflower Seeds." The record also includes excerpts from two websites which appear to refer directly to applicant's JUMBOZ sunflower seeds, as follows (emphasis added):

Dakota Kid "Jumboz" 16 oz (1 case) "Buy a case and save!" A case is 12-16 oz packages of these **larger**, 100% natural **jumbo sunflower seeds**, roasted in their shells and lightly salted.

(www.care2.com); and

"Jumboz" are **bigger than regular sunflower seeds**. The **jumbo seeds** are the only difference from the original Dakota Kid Sunflower Seeds ...

(www.dakotafree.com).

This evidence of applicant's own generic usage of "jumbo" in relation to its sunflower seeds is strong evidence of

genericness. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987).

In addition to this evidence of applicant's own use of "jumbo" to refer to its sunflower seeds, the record includes printouts from numerous additional websites which clearly show that "jumbo" identifies a particular type or size of sunflower seed. For example (emphasis added):

What's behind such a concerted effort to produce large seed? One of the answers lies in Spain, where demand is strong for **jumbo-sized seeds**.

([www.sunflowernsa.com/magazine](http://www.sunflowernsa.com/magazine));

Blackstripes Sunflower seeds are produced in two types, the Long and the Round type. Sizes are: **Jumbo** ... Large ... Medium ... Small ...

([www.guillermo.cl](http://www.guillermo.cl));

INSHELL SUNFLOWER SEEDS - **Jumbo**, large and medium inshell confectionery sunflower seeds.

([www.ait.org](http://www.ait.org));

Jumbo snacks by Klein Bros., Ltd. offers **jumbo sized sunflower seeds**, arroyo seco nuts, walnuts ...

([www.dmoz.org](http://www.dmoz.org));

White millet, red millet, oat groats, **sunflower seeds (jumbo**, stripes and black) ...

([www.go4worldbusiness.com](http://www.go4worldbusiness.com));

Dakota Style also makes pretzels, **jumbo sunflower seeds** (regular and barbecue), popcorn and salsa.

([www.godserver.com](http://www.godserver.com));

1 lb. Roasted, salted, **jumbo sunflower seeds** in their shells.

(www.sierranuthouse.com);

Ronnie's Original Jumbo Seeds - Offers **jumbo roasted sunflower seeds**, peanuts, soy nuts, pumpkin seeds and pistachios.

(www.skaffe.com);

I made up some Christmas gift packets of the **jumbo sunflower seeds** to share with family members.

(www.bluebirdmeadows.com); and

But not all of the sunflower seeds rolling into the company's plant on 18-wheelers are **jumbo**. Of the four sizes of sunflower seeds, **jumbos** are exported.

(www.bizjournals.com).

This evidence clearly establishes that "jumbo" is used to refer to a particular type of sunflower seed. It is used as a noun in the last excerpt quoted above - "... jumbos are exported." The dictionary evidence set forth above likewise makes it clear that "jumbo" (and its plural, "jumbos") can be used as a noun. In any event, and contrary to applicant's argument, it is settled that adjectives, not just nouns, can be deemed to be generic. Adjectives are generic if they name a key characteristic or feature of the goods. See, e.g., *Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc.*, 299 F.2d 855, 132 USPQ 627 (CCPA 1962) (SUDSY generic for ammonia); *In re Central*

*Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC generic for attic sprinklers). See also *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 1 USPQ2d 1364 (3d Cir. 1986) (CHOCOLATE FUDGE generic for diet sodas); *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 195 USPQ 281 (7<sup>th</sup> Cir. 1977) (LITE generic for beer).

In summary, we find that the evidence of record clearly establishes that "jumbos" is a term used to refer to extra-large or jumbo sunflower seeds. Based on this evidence, we conclude that JUMBOZ, the legal equivalent of JUMBOS, is generic for applicant's "processed sunflower seeds." As such, it is incapable of distinguishing applicant's goods, and therefore is unregistrable on the Supplemental Register.

Decision: The refusal to register is affirmed.