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PRECEDENT OF THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Metabolic Balance GmbH

Serial No. 79009729

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Mary Rossman, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Seeherman, Drost and Bergsman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Metabolic Balance GmbH has appealed from the final refusal of the Trademark Examining Attorney to register

Metabolic Balance in standard character form for the

following goods and services:

Computer programs for the compilation of data, in particular that used for the production of lists of foodstuffs and beverages; computers; prerecorded magnetic data carriers featuring

information for obtaining and maintaining good health, nutritional information about foods and recipes that aid in obtaining and maintaining good health; parts of the aforementioned goods, namely computer peripherals (Class 9);

Medical instruments and apparatus for analyzing blood; parts of the aforementioned goods, namely needles and vials (Class 10);

Computerized database management for business and marketing purposes in the field of preparation of food and drink lists; managing food and drink databases for business and marketing purposes (Class 35);

Educational services, namely conducting seminars, workshops and demonstrations in the field of diet and correct alimentation, and about the art of cooking and about food (Class 41);

Rental of computer programs; scientific research services in the field of health, wellness and nutrition; design and development of computer hardware and software; computer programming (Class 42); and

Medical services; services of a physician; cure clinic services, namely medical clinic services; consultancy services in the fields of mental fitness, physical health and food nutrition (Class 44).¹

Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground

¹ Application Serial No. 79009729, filed September 8, 2004, based on Section 66(a) of the Trademark Act.

that applicant's mark is merely descriptive of its identified goods and services.

When the refusal was made final, applicant's prior counsel filed a notice of appeal and a request for reconsideration. The notice of appeal failed to advise the Board that a request for reconsideration had been filed, so the Board, in instituting the appeal, advised applicant that its appeal brief had to be filed within 60 days of the filing of the notice of appeal. Applicant subsequently obtained new counsel, who advised the Board of the filing of the request for reconsideration, and requested that proceedings in the appeal be suspended. Applicant's prior counsel was unaware of these communications, and therefore he filed an appeal brief at the same time that the Board issued an order suspending proceedings. As a result, the Board allowed applicant to file a supplemental brief after the Examining Attorney denied the request for reconsideration, and the Board has considered applicant's appeal brief and supplemental appeal brief, the Examining Attorney's appeal brief, and applicant's reply brief.

It is the Examining Attorney's position that METABOLIC BALANCE describes the subject matter of the prerecorded media and the purposes and uses of the programs,

informational materials, blood analyzing instruments and services identified in applicant's application.

In support of the refusal, the Examining Attorney has made of record evidence consisting of dictionary definitions, excerpts from a number of websites in which the phrase "metabolic balance" is used, and articles taken from the NEXIS database. They include the following:

Dictionary definitions²

Metabolism: 1. The chemical processes occurring within a living cell or organism that are necessary for the maintenance of life. In metabolism some substances are broken down to yield energy for vital processes while other substances, necessary for life, are synthesized. 2. The processing of a specific substance within the living body: *water metabolism; iodine metabolism.*³

Metabolic: pertaining to or of the nature of metabolism.⁴

Metabolism: 1. The sum of all the physical and chemical processes by which living organized substance is

² With her appeal brief the Examining Attorney submitted a number of dictionary definitions, and requested that the Board take judicial notice of them. These definitions indicate that they were taken from on-line dictionaries or reference works, and it is not clear to us that all of these reference works also exist in printed form. Accordingly, we have taken judicial notice only of the definition from The American Heritage Dictionary of the English Language, which appears on the Bartleby.com website.

³ The American Heritage Dictionary of the English Language, 4th ed. © 2000.

⁴ Dorland's Illustrated Medical Dictionary, reported on the Merck Source website, www.mercksource.com.

produced and maintained (anabolism), and also the transformation by which energy is made available for the uses of the organism.⁵

Balance: The harmonious adjustment of parts; the harmonious performance of functions.
Equilibrium.⁶

Third-party websites

Forward

I first began to investigate Metabolic Typing almost 15 years ago... I was intrigued when I learned of this novel nutritional technology....

To sustain metabolic balance, these people need foods that burn slowly, such as heavier proteins and fats. On the other hand, slow oxidizers are able to maintain metabolic balance with lighter food (carbohydrates) that burns faster than protein and fat.

...what kinds of foods and nutrients any person would need to establish metabolic balance. In the years since then, he has single-handedly expanded and refined the foundational principles of metabolic typing to an extraordinary degree.

www.metabolictypingdiet.com

Low Carbohydrate Eating Plan for
Metabolic Balance & Weight Loss [title]

By Dr. Susan Bobak

Lose Weight, lose fat, balance your
body's metabolism, blood chemistry and
lower your cholesterol.

"The Messenger," May/June 2003

www.themessenger.info

⁵ Id.

⁶ Id.

Good health and metabolic balance
[title]

A person with disease generally has one or more metabolic imbalances causing the health problems.

I explained the earlier-mentioned concepts and that when you are metabolically balanced, a wonderful series of events takes place. I said that nothing in the way of supplements could help her long term unless she was metabolically balanced. Supplements cannot be properly assimilated and utilized by an unbalanced body.

"Townsend Letter for Doctors and Patients," Feb-March 2005

<http://findarticles.com>

In 1996, nutritionist William Wolcott introduced me to another metabolic balancing protocol, based on the autonomic nervous system (ANS). This Autonomic system, rooted in the early research of Francis M. Pottenger, MD, and further developed by William Donald Kelley, DDS, relies on a different metabolic pathway than the Oxidative system. It looks to the relative dominance of the two divisions of the ANS (sympathetic and parasympathetic) as the primary barometers of metabolic balance.

"Townsend Letter for Doctors and Patients," Feb-March 2003

<https://findarticles.com>

Introduction to:

The Healthexcel Programmes

Dear Reader,

Thank you for your interest in The Healthexcel Metabolic Typing programmes.

From Healthexcel's point of view, building health is a far cry from taking an aspirin for a headache. It

involves consideration of a new metabolic ecological lifestyle and takes time and dedication to reach the worthwhile goal of optimum health.

In addition, it is necessary that periodic metabolic typing reevaluations of your progress be made to determine if any changes have occurred that might require an alteration in your ecological lifestyle program. These periodic reevaluations are intended to assure that metabolic balance is maintained and that new imbalances are not created.

Healthexcel, Inc.

www.healthexcel.com

Metabolic balance of calcium and phosphorus during lactation in Mexican rural women [title]

Abstract

Objective. To compare the balance of calcium (Ca) and phosphorus (P) between lactation and weaning, and to determine the Ca and P milk production in Mexican rural lactating women..

www.imbiomed.com

Metabolic balance studies in premature infants [title]

Many investigators over the past three decades have successfully conducted traditional metabolic balance studies in efforts to determine the retention rates of key nutrients important to the optimal growth of preterm infants. Differences in methodologies discussed in this review may explain the inconsistent results of balance studies reported for some nutrients, particularly calcium.

... This review describes the methods of specimen collection for metabolic balance studies in VLBW preterm infants that demonstrated reproducible data.

www.ncbi.nlm.nih.gov

Lose Weight & Keep It Off [title]

Glucagon, in proper metabolic balance, causes you to burn stored body fat.

When glucagon is "driving the metabolic process" new fat is NOT being made, excess fat is being burned for energy, and blood chemistry is IMPROVING in a number of very beneficial ways.

These are excellent reasons to adopt a diet that shifts your metabolic balance in favor of glucagon production rather than insulin production.

Taking more and more insulin to lower blood sugar results in having far more insulin in your system than normal. This insulin imbalance sets the stage for serious problems and unless metabolic balance is restored, big problems are on the road ahead.

Increased insulin levels results in higher triglyceride and cholesterol levels and MUCH worse if metabolic balance is not restored.

In the 5 Steps to Optimal Health, you learn everything you need to know to lose weight permanently, increase your energy, restore metabolic balance and literally improve your health in every way measurable.

www.totalhealthdynamics.com

A long-term metabolic balance study in young men to assess the nutritional quality of an isolated soy protein and beef proteins [title]

To evaluate the capacity of an isolated soy protein to maintain long-term protein nutritional status in healthy young adult men, an 84-day metabolic balance experiment was conducted....

The American Journal of Clinical
Nutrition, Vo. 39, 8-15 © 1984
www.ajcn.org

NEXIS articles

A weight-loss program that included one fish meal a day helped 69 obese men and women with high blood pressure slim down and improve their basic metabolic balance as well, says a report in the American Journal of Clinical Nutrition. "San Antonio Express-News," December 8, 1999
[also reported in "The Washington Post," November 16, 1999]

In spite of the advances in controlling insulin and blood sugar levels, we still can't match the human body for intricacy of metabolic balance and precision. For this reason, most of the treatment for diabetes still hinges on diet and nutrition.
"Food Processing," April 1, 2005

In the 1970s, nutritionists and biochemists began to elucidate the relationship between the consumption of essential fatty acids and very potent metabolic regulators called eicosanoids. Eicosanoids mediate a wide variety of metabolic processes, ranging from blood clotting to immune activities. Healthy metabolic balance depends upon a delicate interplay between different eicosanoids.
"Food Processing," June 1, 2000

Juvenile Diabetes [headline]
Testimony by: Mary Tyler Moore,
International Chairman
Affiliation: Juvenile Diabetes Research
Foundation
Body:

That means I have struggled every day
of every one of those years to achieve
metabolic balance between what I eat,
what I do, and how I feel.

It means that even with day-in, day-
out, round-the-clock vigilance, I have
often been unable to achieve good
metabolic balance, my blood sugar
levels going dangerously high or low.
"CQ Congressional Testimony," June 21,
2005

In addition, the Examining Attorney has submitted
certain third-party registrations⁷ for marks containing the
word METABOLIC, in which this word has been disclaimed.
See, e.g., Registration No. 1513581 for METABOLIC CURRENTS
for newsletter relating to metabolism; Registration No.
2361138 for ICMT INTERNATIONAL CENTER FOR METABOLIC TESTING
for "operation of a scientific research and testing
facility in the field of oxidative stress and damage and
the prevention thereof through nutritional
supplementation"; and Registration No. 2367639 for
METABOLIC EDGE NUTRITION TECHNOLOGY THAT WORKS for
"counseling in the fields of health, nutrition and
exercise." Third-party registrations that include
disclaimers of a term can show that a term has been

⁷ The Examining Attorney has also submitted third-party
applications for "METABOLIC" marks. These applications are
probative only of the fact that the applications were filed, and
therefore have no value in showing the descriptiveness of
"metabolic."

regarded as merely descriptive. See *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006). The Examining Attorney also made of record a now-cancelled registration, No. 2133382, in which "metabolic balance" is used in the identification of goods ("over-the-counter homeopathic medicine for the assimilation of essential nutrients for optimal growth and development and for maintenance of metabolic balance"), thereby indicating that this is an understood term for such goods.

Finally, the Examining Attorney has submitted excerpts from applicant's website. The website is in German, and the excerpts were "automatically translated" by the Google website. Applicant, in its reply brief, states that it is "a very rough translation of a German website into the English language and is, therefore, not reliable evidence in the instant proceeding." P. 3. We agree that the translation uses, to say the least, awkward wording. However, applicant had ample opportunity to provide a better translation or to correct mistranslations of any phrases during the course of examination, since the Examining Attorney made the excerpt of record with the first Office action. By waiting until the submission of its reply brief applicant has unduly delayed in raising its objection to the translation. Nevertheless, we have not

treated the references to "metabolic balance," shown in lower case in the translation, as being non-trademark use, since we cannot ascertain whether this is how the term appears in the original version.⁸ The translation indicates that METABOLIC BALANCE is used in connection with healthy, balanced nutrition, and that applicant's program is based on a special computer program developed in co-operation with physicians, "nourishing scientists" and computer specialists to provide a balanced nourishing plan, a plan through which nutrition is converted to energize the metabolism. The website states that re-establishing natural equilibrium in nutrition results in various health improvements, including weight reduction and improvement of efficiency and appearance. The Examining Attorney also submitted excerpts from the UK website www.helpinghands-uk.com, which applicant acknowledges refers to applicant's own goods and services. Reply brief, p. 4. This website, which is in clear and understandable English, explains that applicant's products and services are designed for "holistic metabolism & weight adjustment" that "offers you a solution to eat healthy, improve your metabolism and

⁸ Applicant states, at footnote 1 of its reply brief, that the English version of its website shows no descriptive use of the mark. That version is not of record, and applicant's comments in this regard have not been considered.

adjust your weight gently," and that this plan "balances the metabolism and hormones." This is a nutritional program which claims to provide improvements for various health disorders. The health benefits include:

Fast Results: Women average 5 lbs/week, men 7 lbs/week weight loss

Long Term Weight Loss: European Studies show that 70% of participants maintain weight loss after 2 years.

Balanced: The metabolism change in achieved with a personalized precise and balanced nutritional plan. No low carbs. No protein only. The new type of nutrition stimulates the release of insulin, a key metabolism hormone, with consequences for our body, weight and health.

Applicant acknowledges that "the terms 'metabolic' and 'balance' may be terms used alone or together in the healthcare field." Response filed November 22, 2005. See also request for reconsideration filed June 29, 2006 ("While the phrase 'metabolic balance' may be a phrase that has been used in the healthcare field..."; "The phrase 'metabolic balance' refers to a condition, usually a beneficial condition, of health or of the human body."). However, applicant disputes that METABOLIC BALANCE is descriptive of the particular goods and services identified in applicant's application. Rather, applicant asserts that it takes imagination or multistage reasoning to associate

the attributes of a healthy body to the particular goods and services in the identification.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered to be merely descriptive; rather, it is sufficient that the term describes one significant attribute, function or property of the goods or services. In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); In re MBAssociates, 180 USPQ 338 (TTAB 1973). 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 the 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). Moreover, if the mark is descriptive of any of the goods or services for which registration is sought, it is proper to refuse registration as to the entire class. In re Analog Devices Inc., 6 USPQ2d 1808 (TTAB 1988), aff'd without pub. op., 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

Applicant has acknowledged that its goods and services "are intended to promote a healthy body through healthy and balanced nutrition." Reply brief, p. 3. The website evidence for applicant's own product/program shows that it offers a personalized balanced nutritional plan that releases insulin, a key metabolism hormone. The third-party website evidence, as well as the NEXIS articles, show that the term "metabolic balance" is used to refer to healthful nutrition and the interrelationship between nutrition and how the body functions. When this term is used in connection with applicant's identified goods and services, it immediately and directly conveys to prospective consumers that a major characteristic of the goods and services is to create and/or maintain metabolic balance. In fact, the term "metabolic balance" so perfectly captures the concept of nutrition that results in the correct proportions of hormones, etc. for correct body processes that it is difficult to find other terms that

convey this thought as clearly, such that it would be a hardship for competitors if they were unable to use this term to describe their own goods and services.

Applicant asserts that, as used in the various articles and websites, the term "metabolic balance" "is imprecisely and inconsistently used when used descriptively by third parties and either refers to a type of scientific study, a balance of a particular substance in the body, or an undefined condition in the human body." Brief, p. 8. As a result, applicant claims that when METABOLIC BALANCE is used in connection with applicant's various goods and services, it takes imagination or multistage reasoning to associate the term with the goods or services, or the term does not immediately, directly and with particularity describe any attribute, purpose and/or characteristic of applicant's identified goods or services.

We disagree. While the term "metabolic balance" is used in various articles, the meaning remains essentially the same. That is, "metabolic balance" scientific studies relate to the balance of a particular substance in the body, and the condition of the human body refers to whether substances are in balance. It is not necessary that the mark METABOLIC BALANCE provide information about what specific substance may or may not be in balance for the

term to be merely descriptive. Thus, with respect to the goods in Class 9, METABOLIC BALANCE describes that the information provided by the "prerecorded magnetic data carriers featuring information for obtaining and maintaining good health" and the "nutritional information about foods and recipes that aid in obtaining and maintaining good health" relate to the general subject of metabolic balance. Similarly, with respect to the goods in Class 10, METABOLIC BALANCE describes the purpose of the medical instruments and apparatus for analyzing blood, i.e., to check the metabolic balance of substances in the person whose blood is being tested. METABOLIC BALANCE also describes the characteristic or purpose of the "computerized database management for business and marketing purposes in the field of preparation of food and drink lists" in Class 35, i.e., to maintain metabolic balance, while METABOLIC BALANCE directly conveys the subject matter of the "seminars, workshops and demonstrations in the field of diet and correct alimentation" in Class 41. Similarly, METABOLIC BALANCE tells consumers what the subject matter of the "scientific research services in the field of health, wellness and nutrition" in Class 42 is, and also tells consumers the subject matter and/or focus of the "medical clinic

services" and "consultancy services in the fields of mental fitness, physical health and food nutrition" in Class 44. As we previously pointed out, if METABOLIC BALANCE is merely descriptive of any of the goods or services in a class in the application, it is appropriate to refuse registration as to the entire class. In re Analog Devices Inc., supra.

Applicant makes the argument that prospective purchasers are not likely to come into contact with the Internet article "Lose Weight and Keep it Off" or with the abstracts of medical texts that the Examining Attorney has made of record. As a result, applicant contends that consumers would not be influenced by them or would use them as a basis for considering the mark METABOLIC to be merely descriptive of applicant's goods and services. There are several problems with applicant's position. First, the evidence of record shows that term "metabolic balance" is used in articles that are designed to reach the general public. See, for example, the articles in "The Washington Post" and the "San Antonio Express-News." Several of the Internet websites are also clearly directed to the general public, e.g., www.metabolictypingdiet.com, www.healthexcel.com and the various Townsend Letters for Doctors and Patients. Second, the articles show that the

authors and speakers quoted therein regard "metabolic balance" as an appropriate term to convey to non-medical personnel information about nutrition and its effects on body processes. Third, applicant itself acknowledges that many of the articles and websites would be seen by doctors and the like, and such individuals must be considered to be among the consumers of applicant's goods and services. For example, the "medical instruments and apparatus for analyzing blood" may well be used by medical personnel, and such individuals could also use the computer programs for the compilation of data and the computerized database management services, attend applicant's educational seminars and workshops, rent applicant's computer programs, and use applicant's consultancy services in connection with treating their patients.

Applicant also argues that the evidence submitted by the Examining Attorney "fails to show that the words METABOLIC BALANCE form the descriptive name for computer programs, informational materials, medical instruments, databases or educational services, rental of computer programs, or medical services, or any other of the goods or services listed in Applicant's application." Supplemental brief, p. 4. To the extent that applicant is asserting that it is the Office's burden to show that the mark is the

name of the goods or services, that is an incorrect statement of the law. To be properly refused registration under Section 2(e)(1) of the Trademark Act, a mark need only describe a significant characteristic or quality or purpose of the goods or services. It is not necessary that the Office show that the mark is a generic term. Nor are we persuaded by applicant's assertion that the Office has failed "to show that the words METABOLIC BALANCE are in common usage by anyone as a descriptive name for computer programs, informational materials, medical instruments, databases or educational services, rental of computer programs, or medical services, or any other of the goods or services listed in Applicant's application." Supplemental brief, p. 5. It is not necessary that the Office show that others are using the term for the specific goods and services listed in the application, only that the Office show that the term, if used for those goods and services, would be understood as directly conveying information about them. Otherwise an applicant that was the first to adopt a descriptive term for particular goods or services would be able to obtain exclusive rights to it, to the detriment of competitors. As we have previously stated, the evidence made of record by the Examining Attorney is sufficient to show that METABOLIC BALANCE used in connection with

applicant's various identified goods and services directly conveys information about a characteristic or purpose of the goods or services.

Accordingly, we find that the Office has met its burden of demonstrating that METABOLIC BALANCE is merely descriptive of applicant's goods and services in each class of the application.

Decision: The refusal of registration is affirmed.