

**THIS OPINION
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THE TTAB**

Mailed: May 25, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michael W. Arlen

Serial Nos. 85135800 and 85180298

Sarah Silbert of Berliner & Associates for applicant.

Suzanne Blane, Trademark Examining Attorney, Law Office 114
(Margaret Le, Managing Attorney).

Before Quinn, Kuhlke, and Shaw, Administrative Trademark
Judges.

Opinion by Shaw, Administrative Trademark Judge:

Michael Arlen has filed applications to register the
following marks, in standard characters, on the Principal
Register:

NEWTRITIOUS for "powdered mixes in the nature of
powdered nutritional supplement drink mix," in
International Class 5; and

INSTANT NEWTRITION for "powdered mixes in the nature of powdered nutritional supplement mix," in International Class 5.¹

The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that, when used on applicant's nutritional supplement mixes, the marks would be merely descriptive of the goods because the terms NEWTRITIOUS and INSTANT NEWTRITION are the phonetic equivalents of the descriptive words "nutritious" and "instant nutrition," respectively. When the refusals were made final, applicant appealed. The cases are fully briefed and applicant filed reply briefs. Because the issues on appeal share common questions of fact and law, we have consolidated the appeals. Reference to the record in this decision is to application Serial No. 85135800 unless otherwise indicated.

Evidentiary Matters

Before turning to the substantive grounds for refusal, we note that applicant submitted several exhibits with its main briefs. These exhibits consist of dictionary definitions, an Office action from an unrelated third-party application file, and declarations from the applicant

¹ Application Serial Nos. 85135800, filed September 22, 2010, and 85180298, filed November 18, 2010, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a *bona fide* intent to use the marks in commerce.

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concerning his reasons for selecting the NEWTRITIOUS and INSTANT NEWTRITION marks. These exhibits were not previously submitted during prosecution of the involved applications. The Examining Attorney did not object to or address the evidence attached with the briefs.

Trademark Rule 2.142(d) addresses the submission of evidence submitted after an appeal is filed: "The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the Examining Attorney after the appeal is filed." Evidence submitted after appeal, without a granted request to suspend and remand for additional evidence, *see* TBMP § 1207.02 (3d ed. 2011), may be considered by the Board, despite its untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record. TBMP § 1207.03. Although the Examining Attorney did not object to the late-filed evidence, she did not discuss it or otherwise treat it as being of record. Accordingly, the Office action from the unrelated third-party application file and applicant's declarations are untimely and we have not considered them. Inasmuch as the Board will take

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judicial notice of dictionary definitions, we have considered the dictionary definitions submitted with applicant's briefs. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

We turn then to the substantive grounds for refusal of registration.

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 Dev. 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

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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). In other words, the question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will immediately understand the mark as directly conveying information about them. *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1317 (TTAB 2002).

Conversely, a mark is not merely descriptive if a portion of the mark "creates a separate commercial impression, such that the mark as a whole has a double entendre, with one meaning that is not merely descriptive." *In re Carlson*, 91 USPQ 1198, 1201 (TTAB 2009); *In re Grand Metro. Foodservice Inc.*, 30 USPQ2d 1974 (TTAB 1994) (holding that the meaning or commercial impression of [MUFFUNS] will be more than that simply of the word "muffins"); *In re Tea and Sympathy Inc.*, 88 USPQ2d 1062 (TTAB 2008) (holding THE FARMACY is more than simply a misspelling of "the pharmacy").

The examining attorney maintains that the proposed marks are merely descriptive because they are phonetic

equivalents of the merely descriptive terms "nutritious" and "instant nutrition" and consumers will perceive the marks as nothing more than an "inventive spelling of a word that describes a characteristic of the goods." Examining Attorney's Br. at 4. The Examining Attorney also maintains that the terms are not double entendres because "applicant's alternative connotations[s] also [are] descriptive of the goods." That is, both meanings of the double entendre are merely descriptive because applicant's goods "are both nourishing and novel." *Id.* at 5. Finally, the Examining Attorney maintains that consumers will perceive the marks to be merely descriptive because variations of "newtritious" and "newtrition" are "already in use [by third parties] in relation to nutritional supplements and related goods and/or services." *Id.* at 6.

Applicant contends that its proposed marks are registrable double entendres "incorporating the term 'new' . . . which projects a dual meaning or suggestiveness—that of a nutritious product and of a product that is different from the foods, beverages or dietary supplements that came before it." Applicant's Br. at 8. Applicant concedes that "nutritious" and "nutrition" describe a characteristic of dietary supplements but argues that that the evidence does not demonstrate that its NEWTRITIOUS and INSTANT NEWTRITION

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marks are merely descriptive. Finally, applicant argues that the examples of third-party use of "newtritious" and "newtrition" identified by the examining attorney are "insufficient to support the conclusion that consumers would fail immediately to notice and grasp the significance of the prefix 'new' in Applicant's mark." *Id.* at 2.

The record includes several dictionary definitions of the generally understood words "nutritious," "nutrition," and "instant." The Examining Attorney also has introduced a number of third-party registrations for marks including the foregoing terms, as well as internet web pages using these terms. These items are of limited value, however, because there is little doubt that "nutritious" and "instant nutrition" are merely descriptive. Rather, the issue is whether NEWTRITIOUS and INSTANT NEWTRITION are merely descriptive when used on the identified goods.

On this point, the Examining Attorney introduced Registration No. 3316037 for the mark



(with a disclaimer of "personal nutrition") for the services of "Dietary and nutritional guidance; Food nutrition consultation; Nutrition counseling; Providing a website featuring educational information regarding

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nutrition and genetics; Providing a website that features information on children's nutrition; Providing information about dietary supplements and nutrition," in International Class 44.

The Examining Attorney argues that this registration supports the finding that "newtrition" is merely descriptive. "The wording "PERSONAL NUTRITION" is disclaimed because it is recognized the wording "newtrition" bears a single meaning - nutrition, which is highly descriptive of nutrition-related goods and/or services." Examining Attorney's Br. at 7. We disagree. The disclaimer of the correct spelling of "nutrition" means only that the registrant is not claiming exclusive right to use "nutrition" and nothing more. It does not follow that a disclaimer of "nutrition" means that "newtrition" must also be merely descriptive. *In re Carlson*, 91 USPQ at 1203 ("[D]isclaimer of the words "urban housing," spelled correctly, is the appropriate form of the disclaimer, since applicant is not claiming exclusive rights to use those words; he is claiming exclusive rights to use URBANHOUZING with the letter "Z.").

The Examining Attorney also introduced five third-party websites where the term "newtritious" appeared on the web site:

- stltoday.com - "A **Newtritious** You! . . . at St. Anthony's Medical Center . . . This six-week motivational nutrition and weight management program provides the latest recommendations on weight control, diabetes, the heart and more - with a focus on positive, lifelong change. Participants receive specialized meal plans and exercise guidelines. Taught by St Anthony's Medical Center registered, licensed dieticians." (From a web page with information about activities in the city of St. Louis);
- www.somethingnewtritious.com - "Something **NEWtritious** Nutrition For the HEALTH of it! . . . Something **NEWtritious** is a nutrition consulting service aimed at providing evidence based nutrition counseling to help you achieve your health goals!" (A web site for a nutrition consulting service);
- www.i-men.com - "The **Newtritious** Way To Gain Mass *No pain no gain, no foods also no gain.*" (A web site about body building and nutrition);
- www.organicpastures.com - "Fight holiday stress and feed your guests with our **NEWtritious** NUTS! *Truly Raw Almonds Farm-Direct from McAfee Farms!*" (An organic dairy web site offering organic products for sale);
- www.bergencountybusinesslist.com - "**Newtritious** Teaneck" (A directory listing for a business by the name of "Newtritious Teaneck" among a listing of health food and nutrition stores and nutritionists in Bergen County, New Jersey); and
- Webdraulics.com - (An internet web development site with a link to a client identified as "**Newtritious** Beginning, Inc. - Health and Fitness Training."). Emphasis added.

We find that the foregoing evidence is ambiguous, at best, with regard to mere descriptiveness. That is, the evidence does not necessarily show "newtritious" being used in a way that consumers would necessarily recognize as merely descriptive of the associated goods or services.

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Several of the web sites use the term "newtritious" in a way that could be considered to be trademark or trade name usage. For example, St. Anthony's Medical Center uses the term "A Newtritious You!" as the name of a weight management program. The term "newtritious" is used to modify the term "you" and not the food consumed by the attendees. Similarly, "Something NEWtritious" is used as the name of a nutrition consulting service and suggests clients might get "something new" out of the consulting service. Moreover, the excerpts from Webdraulics.com and www.bergencountybusinesslist.com do not provide any information about the users of the terms and are entitled to little probative weight. *See In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (Google search summaries without context are of lesser probative value than evidence that provides the context within which a term is used.).

Taken as a whole, these web excerpts show—not that "newtritious" and "newtrition" are merely descriptive—but only that the terms may be weak and perhaps entitled to a narrower scope of protection. Accordingly, we find that the terms "newtritious" and "newtrition," as used in connection with applicant's goods, are more than simply a misspelling of "nutritious" or "nutrition." Consumers are

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not likely to perceive "newtritious" as just a misspelling, but rather as a play on the novelty of applicant's nutritional supplements. The marks suggest a dual meaning; that of the nutritious content of the goods sold by applicant and something new or novel in the world of food supplements. Applicant's marks are inventive enough, being a play on "new" and "nutritious," so that the meaning or commercial impression of applicant's mark will be more than simply "nutritious" or "nutrition."

We recognize that these are close cases and that "there is often a thin line of demarcation between a suggestive term and a merely descriptive term, and that the determination of the category into which a particular word falls is frequently a difficult determination, involving some subjective judgment." *In re Grand Metro. Foodservice Inc.*, 30 USPQ2d at 1976. But "[w]hen doubts exist as to whether a term is descriptive as applied to the goods or services for which registration is sought, it is the practice of this Board to resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established." *In re The Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994).

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Accordingly, we find that applicant's marks are not merely descriptive. In view thereof, we accept applicant's disclaimer of the terms "nutritious" and "instant nutrition," and the amendments have been entered in each application. Applicant's Br. at 11, n.3; *In re Carlson*, 91 USPQ2d at 1203.

Decision: The refusals of registration are reversed.