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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 Jrm Nutrasciences LLC

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Serial No. 85165397

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Thomas D. Foster, Esq. of TDFoster Intellectual Property Law for Jrm Nutrasciences LLC.

Lindsey H. Rubin, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

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Before Holtzman, Zervas and Ritchie, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On October 29, 2010, Jrm Nutrasciences LLC ("applicant") filed an application to register MUSCLE SPORT INTERNATIONAL (in standard character form) on the Principal Register for the following International Class 5 goods:

> Dietary and nutritional supplements; Herbal supplements; Nutraceuticals for use as dietary supplements; Weight loss dietary supplements; Pre-workout energy powder drink mixes, namely,

> nutritional supplement in the nature of a nutrient-dense, protein-based drink mix.[1]

Applicant disclaimed the term INTERNATIONAL.

The examining attorney issued a final refusal under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark is merely descriptive of the intended use and characteristic of applicant's goods, as well as the scope of availability of applicant's goods. Specifically, the examining attorney maintains that the proposed mark "immediately identifies to consumers that applicant's goods are used to build, maintain, and aid in the recovery of muscles for people participating in physically exertive activities, with those goods being offered in more than one country." Brief at unnumbered p. 3.

Applicant has appealed the final refusal. We reverse.[2]

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[1] Application Serial No. 85165397, claiming first use and first use in commerce on January 5, 2009.

[2] We have not considered the almost seventy pages of exhibits submitted with applicant's brief, including one exhibit to which the examining attorney has objected. The record closes with the filing of a notice of appeal and the "Board will ordinarily not consider additional evidence filed with the Board by the applicant or by the examiner after the appeal is filed." Trademark Rule 2.142 (d); see generally Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1207 (3d ed. rev. 2012). Also, while a handful of pages which are in the record and which applicant believes are particularly pertinent to its case may by submitted with a brief, applicant's resubmission of approximately seventy pages of material that is already in the record is duplicative and unnecessary.

"A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222 (TTAB 2002). In other words, the question is not whether someone presented only with the mark could guess the products listed in the description of goods. Rather, the question is whether someone who knows what the products are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314 (TTAB 2002); *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on the question of whether the combination of terms evokes a new

and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. See *In re Tower Tech, Inc.*, 64 USPQ2d 1314 (SMARTTOWER merely descriptive of commercial and industrial cooking towers). In this regard, we must consider the issue of descriptiveness by looking at the mark in its entirety. Common words may be descriptive when standing alone, but when used together in a composite mark, they may become a valid trademark. See *Concurrent Technologies Inc. v. Concurrent Technologies Corp.*, 12 USPQ2d 1054 (TTAB 1989) (CONCURRENT TECHNOLOGIES CORPORATION found not merely descriptive of printed electronic circuit boards because, while "concurrent" had meaning in the computer field, "concurrent technologies" had no established meaning in relation to computer hardware or software).

If, on the other hand, a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods, then the mark is suggestive. *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778 (Fed. Cir. 2003); see also *In re Tennis in the Round, Inc.*, 199 USPQ 496 (TTAB 1978).

In support of her refusal, the examining attorney submitted into evidence (i) dictionary definitions of the individual terms in the mark, (ii) numerous registrations in which the terms MUSCLE or SPORT are disclaimed, and (iii) webpages from applicant's website and from third-party websites which offer nutritional supplements for sale with either MUSCLE or SPORT in the description of the product, and (iv) search summaries on the Google search engine for "sport supplement" and "muscle supplement." The examining attorney also relies on applicant's statement in its brief that the applicant's goods "appeal to individuals seeking to diet, obtain a lean physique, increase their muscle growth, enhance their performance in sports, enhance results from their exercise workout routine and enhance[] their recovering from exercise and sporting endeavors." Brief at 1.

In support of its position that the mark is suggestive rather than descriptive, applicant submitted numerous third-party registrations for marks containing the terms MUSCLE or SPORT where the terms are not disclaimed. Of note is Registration No. 1594328 for

(USA and the map of the United States disclaimed) for, *inter alia*, "entertainment services namely, the production, preparation and presentation of television productions in the field of fitness and body building."[3] Applicant also argues that "muscle sport" is nebulous and does not immediately describe a feature, purpose, quality or characteristic of applicant's goods; that it "could refer to almost any type of sport since muscles are used in every facet of a sporting event. Is this term a reference to weightlifting or to table tennis or to racketball?" Brief at 15.

When we consider each of the three words in the mark together,[4] and in the particular order that they appear, we find that thought or imagination is needed to arrive at the

[3] Another registration submitted by the applicant, Registration No. 2334849 for the word mark MUSCLESPORT USA (USA disclaimed) for "entertainment services, namely, a continuing show featuring body building, health and weight lifting distributed over video media," has been cancelled.

[4] We agree with the examining attorney that the term INTERNATIONAL is merely descriptive of the scope of applicant's goods. In addition, applicant has disclaimed this term. There is no dispute about the descriptiveness of the term INTERNATIONAL.

meaning or significance proposed by the examining attorney. MUSCLE SPORT appears to be a unitary term, with MUSCLE as an adjective modifying SPORT, and the term as a whole evoking the idea of a particular genre of sports. (Applicant offers a comparison with "winter sports" at p. 15 of its brief.) For this reason, we do not agree with the examining attorney that the mark should be viewed a union of three separate terms that each describe a different feature of the goods, one indicating the goods are used to build, maintain and aid in the recovery of muscles, the second indicating that the goods are for people participating in physically exertive activities, and the third indicating that the goods are offered in more than one country.

Further, what "muscle sport" refers to is not immediately apparent. Because "muscle" is within the proposed mark, it appears that "muscle sport" refers to a sport where strength is important, such as body building[5] or

[5] See definition of bodybuilding taken from the online version of *The American Heritage Dictionary of the English Language*, as "The process of developing the musculature of the body through specific types of diet and physical exercise, such as weightlifting, especially for competitive exhibition." (Emphasis added.)

The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet*

strength conditioning. Indeed, applicant's goods are directed to, inter alia, "dietary and nutritional supplements" and "pre-workout energy powder drink mixes, namely, nutritional supplement in the nature of a nutrient-dense, protein-based drink mix." In addition, applicant states at p. 1 of its brief that its goods are suited for increasing muscle growth, and one webpages made of record by the examining attorney from applicant's website states that the MUSCLE SPORT INTERNATIONAL RHINO REVOLUTION product "increases muscular strength," "prevents muscle fatigue" and "extreme muscle pumps." There is no evidence in the record that suggests that "muscle sport" is a commonly understood reference to any particular sport or activity, including body building or strength conditioning. (In fact, other than the registrations noted earlier in this decision for MUSCLESPORT USA, there is no evidence of the use of "muscle sport" as a single term.) As the Board stated in *In re Shutts*, 217 USPQ 363, 365 (TTAB 1983):

> The concept of mere descriptiveness, it seems to us, must relate to general and readily recognizable word formulations and meanings, either in a popular or technical usage context, and should not penalize coinage of hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and "mental pause."

Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

See also, *Tennis in the Round,* 199 USPQ at 498 (the association of applicant's mark TENNIS IN THE ROUND with the phrase "theater-in-the-round" creates an incongruity because applicant's tennis courts are not analogous to a theater-in-the-round).

Turning to the dueling third-party registrations in the record which are more or less equal in number and where MUSCLE or SPORT have been or have not been disclaimed, they are of limited assistance in resolving the issue before us. Further, the examining attorney's website evidence and the Google search results, while they include the individual terms "muscle" and "sport," do not demonstrate use of both "muscle" and "sport," or "muscle" and "sport" juxtaposed next to one another. Thus, we find that a potential purchaser presented with the proposed mark and the goods would require imagination, thought or perception to conclude that the proposed mark describes a feature or characteristic of the goods. See *Concurrent Technologies, supra.*

To the extent we have any doubt as to the mere descriptiveness of the mark as a whole in connection with the identified services, we resolve such doubt in applicant's favor and publish the mark for opposition. *In*

re The Stroh Brewery Co., 34 USPQ2d 1796, 1797 (TTAB 1994) ("When 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.").

We therefore conclude that the mark is not merely descriptive of a feature or characteristic of the goods, as maintained by the examining attorney.

Decision: The refusal to register is reversed.