

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: November 15, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

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In re Tyrrells Administration Pty Ltd

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Serial No. 97002256
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Charles M. Landrum III of Thomas Horstemeyer, LLP,
for Tyrrells Administration Pty Ltd

Anna Oakes, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

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Before Pologeorgis, Cohen, and Lavache,
Administrative Trademark Judges.

Opinion by Lavache, Administrative Trademark Judge:

Tyrrells Administration Pty Ltd (“Applicant”) seeks registration on the Principal Register of the proposed mark displayed below for “First aid kits,” in International Class 5.¹

¹ Application Serial No. 97002256 was filed August 30, 2021, based on Applicant’s allegation of use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), claiming August 30, 2019, as both the date of first use and the date first use in commerce. Applicant has disclaimed the wording “SURVIVAL.” The application includes the following description of the mark: “The mark consists of a white Greek cross inside a green square that is to the left of a red rectangle with the white stylized wording ‘SURVIVAL’ within. The remaining white



Applicant submitted the following specimen of use, described as “[a] first aid kit bearing the mark.”²



and black represent background, outlining, shading, and/or transparent area and are not part of the mark.” The colors red, white, and green are claimed as a feature of the mark.

² August 30, 2021 Application at TSDR 1, 3.

The TTABVUE and Trademark Status and Document Retrieval (“TSDR”) citations in this opinion refer to the docket and electronic file database for the involved application.

The Examining Attorney ultimately refused registration under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052, 1127, on the ground that the proposed mark, when used on or in connection with Applicant's goods, would be perceived by consumers as merely conveying information about Applicant's goods and thus it does not function as a trademark to indicate the source of Applicant's goods and to identify and distinguish them from those of others.³ After the Examining Attorney issued a final refusal, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration and the appeal resumed. The case is fully briefed. We affirm the refusal to register for the reasons explained below.

I. Discussion

The USPTO "is statutorily constrained to register matter on the Principal Register if and only if it functions as a mark." *In re Brunetti*, Ser. No. 88308426, 2022 TTAB LEXIS 297, at *14 (TTAB 2022).⁴ Trademark Act Sections 1, 2, and 45 provide the

³ Earlier during prosecution, the Examining Attorney approved the application for publication. *See* October 12, 2022 Notice of Publication at TSDR 1. However, the Office subsequently restored jurisdiction to the Examining Attorney for consideration of evidence submitted with a post-publication letter of protest in accordance with TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1715.04 (May 2024). *See* November 22, 2022 Letter of Protest Memorandum at TSDR1. Nonetheless, for reasons not explained by the Examining Attorney nor otherwise made clear in the record, the application proceeded to registration on January 17, 2023. *See* January 17, 2023 Notice of Registration at TSDR 1. Two days later, the Examining Attorney requested that the Office cancel the registration as inadvertently issued and added a note to the file indicating that the Examining Attorney had determined that a refusal of registration must issue, but "[d]ue to processing limitations, the USPTO was unable stop the registration from issuing." January 19, 2023 Notation to the File at TSDR 1. The registration was cancelled January 30, 2023, and the application was returned to the Examining Attorney for further examination, resulting in the refusal at issue in this appeal. *See* January 30, 2023 Paper Correspondence Outgoing at TSDR 1.

⁴ As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, case citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites

statutory basis for refusal to register subject matter that does not function as a trademark. 15 U.S.C. §§ 1051, 1052, 1127. Specifically, Trademark Act Section 1 sets forth requirements for requesting registration of a trademark. *See* 15 U.S.C. § 1051. Section 2 provides for registration of, “trademark[s] by which the goods of the applicant may be distinguished from the goods of others.” 15 U.S.C. § 1052. And Section 45 defines a “trademark” in relevant part, as “any word, name, symbol, or device, or any combination thereof. . . used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127.

Thus, “it is a threshold requirement of registrability that the mark ‘identify and distinguish’ the goods and services of the applicant from those of others, as well as ‘indicate the source’ of those goods and services.” *In re GO & Assocs., LLC*, 90 F.4th 1354, 1356 (Fed. Cir. 2024) (quoting 15 U.S.C. § 1127). Accordingly, “[m]atter that does not operate to indicate the source or origin of the identified goods . . . and distinguish them from those of others does not meet the statutory definition of a trademark and may not be registered.” *In re Greenwood*, Ser. No. 87168719, 2020

decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director of the USPTO, this opinion cites to the Lexis legal database and, in the initial full citation of a case, also identifies the number of the Board proceeding. Practitioners should also adhere to the practice set forth in TBMP § 101.03

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TTAB LEXIS 499, at *5 (TTAB 2020) (quoting *In re AC Webconnecting Holding B.V.*, Ser. No. 85635277, 2020 TTAB LEXIS 428, at *8-9 (TTAB 2020)).

Importantly, “[n]ot every word, name, phrase, symbol or design, or combination thereof which appears on a product functions as a trademark.” *In re Peace Love World Live, LLC*, Ser. No. 86705287, 2018 TTAB LEXIS 220, at *10 (TTAB 2018) (citing *In re Pro-Line Corp.*, Ser. No. 74174721, 1993 TTAB LEXIS 24, at *5 (TTAB 1993)); see also *In re Texas with Love*, Ser. No. 87793802, 2020 TTAB LEXIS 466, at *5-6 (TTAB 2020). And “[t]here are many reasons a proposed mark may fail to function.” *In re The Ride, LLC*, Ser. No. 86845550, 2020 TTAB LEXIS 2, at *18 (TTAB 2020); see generally TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §§ 1202, 1202.01-1202.19 (May 2024).

Relevant to our analysis here, one reason a proposed mark may fail to function as a trademark is that it would be perceived as merely informational matter rather than as an indicator of source for the relevant goods or services. See, e.g., *GO & Assocs.*, 90 F.4th at 1357 (affirming the Board’s finding that EVERYBODY VS. RACISM failed to function as a mark because, based on marketplace use of the phrase, consumers would perceive it as merely an informational statement against racism); *D.C. One Wholesaler, Inc. v. Chien*, Opp. No. 91199035, 2016 TTAB LEXIS 536, at *20 (finding I♥DC failed to function as a trademark where the record showed that the designation had “been widely used, over a long period of time and by a large number of merchandisers, as an expression of enthusiasm, affection or affiliation with respect to the city of Washington, D.C.”). Thus, “[t]he critical question in determining

whether [a proposed mark] functions as a trademark is the commercial impression it makes on the relevant public, i.e., whether the term sought to be registered would be perceived as a mark identifying the source of the goods.” *Peace Love World Live*, 2018 TTAB LEXIS 220, at *7; *see also GO & Assocs.*, 90 F.4th at 1359 (noting that the relevant analysis focuses on “how the mark is used in the marketplace and how it is perceived by consumers”).

Here, the relevant public is all potential purchasers of first aid kits. *In re Team Jesus LLC*, Ser. No. 88105154, 2020 TTAB LEXIS 503, at *6 (TTAB 2020) (“In this case, because there are no limitations to the channels of trade or classes of consumers, the relevant consuming public comprises all potential purchasers of the identified goods and services.”). And, in this case, the Examining Attorney asserts that the relevant public will perceive the proposed mark as merely informational, rather than as a source indicator, when applied to first aid kits, because it consists of a universal symbol, a generic term, and a nondistinctive background “carrier.”⁵ Specifically, the Examining Attorney contends that a white Greek cross on a green background is the universal symbol for first aid;⁶ the word SURVIVAL is generic as applied to first aid kits;⁷ and the red rectangle and outlining are nondistinctive shapes that merely serve “as a ‘frame’” for the universal symbol and generic term.⁸ The general implication of these arguments is that, not only do the elements of the proposed mark by themselves

⁵ Examining Attorney’s Brief, 8 TTABVUE 3-8.

⁶ *Id.* at 4.

⁷ *Id.* at 5.

⁸ *Id.* at 8.

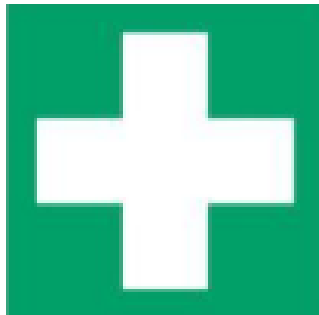
fail to function as indicators of source, but the resulting combination of these elements likewise fails to result in a designation that identifies the source of the identified first aid kits and distinguish them from the goods of others. Therefore, we will consider each of the elements of the mark and then determine whether the combination of these elements, i.e., the mark as a whole, functions as a trademark for the identified first aid kits. *See In re Brunetti*, 2022 TTAB LEXIS 297, at *68 (“[T]he Office examines and makes registrability determinations based on marks as a whole as they relate to the goods and/or services identified in a particular application.”); *cf. DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, (Fed. Cir. 2012) (finding that the combination of the term SNAP and the design of a broken exclamation point, viewed as a whole, would be perceived as depicting the snapping of a syringe plunger).

A. Is the Greek Cross Element a Merely Informational Universal Symbol?

We turn first to the Examining Attorney’s assertion that the Greek cross element is a “universal symbol” that fails to function as an indicator of source. For our purposes, a “universal symbol” is “a design, icon, or image that is commonly used in an informational manner and conveys a widely recognized or readily understood meaning when displayed in its relevant context.” TMEP § 1202.17 (citing WEBSTER’S NEW WORLD DICTIONARY 1356, 1460 (3rd ed. 1997)). “When a universal symbol in a mark is used in its usual context or field, or with relevant goods or services, it will likely impart its generally recognized meaning and thus perform only an informational function, rather than serve to identify any single source of the goods or

services.” TMEP § 1202.17(c)(i)(A). Thus, “the context in which a universal symbol appears is crucial in determining the symbol’s significance.” TMEP § 1202.17; *cf., e.g., In re Schwauss*, Ser. No. 73244072, 1983 TTAB LEXIS 189, at *3-5 (TTAB 1983) (holding FRAGILE, appearing in a “jarred or broken” stylization, failed to function as a mark for labels and bumper stickers because it only conveys the fragility of the items the labels and bumper stickers are applied to). Accordingly, when assessing whether an element of a mark is a universal symbol that fails to serve as a source indicator, we must consider “the meaning and significance of the symbol, the nature of the use of the symbol in the relevant field or marketplace, and the impression created when the symbol is used in connection with the identified goods or services.” TMEP § 1202.17(c)(i); *cf., e.g., Peace Love World Live*, 2018 TTAB LEXIS 220, at *7.

Here, the Examining Attorney has provided at least 10 examples from various online sources to show that “the white Greek cross over a green background[] is a universal symbol for first aid and is commonly used by those in the first aid field.”⁹ In most of these examples, the symbol appears as reproduced below and is generally described as signifying “first aid.”



⁹ *Id.* at 4.

These examples include:

- A webpage on iso.org, the website of the International Organization for Standardization (ISO), which displays a white Greek cross on a green square background, describes it as a “first aid cross,” states that the symbol’s meaning is “first aid,” and notes that it is used to “indicate the location of first aid equipment or facilities or staff”;¹⁰
- A blog post on the Human Focus website (humanfocus.co.uk), which discusses first aid signs and symbols, displays a white cross on a green rectangular background, and states that “[t]his white cross on a green background is now the worldwide standard first aid sign,” that “[g]reen is the ISO colour for an emergency,” and that “you’ll see it on a first aid kit and emergency exit signs”;¹¹
- An article on the Microbe Notes website (microbenotes.com), which discusses laboratory safety symbols and signs, and includes an entry labeled “First Aid” displaying a white Greek cross on a green square background and noting that the symbol indicates the “place with the first aid box and materials”;¹²
- An entry on safeopedia.com, which indicates that “[a] first aid sign is a visible indicator that emergency first aid assistance is close by or in the direct vicinity of the sign” and “usually takes the form of a red or white plus sign with a white or green background and is a universal symbol”;¹³

¹⁰ March 20, 2024 Denial of Request for Reconsideration at TSDR 47.

¹¹ *Id.* at 41. We acknowledge that this website appears to originate in the United Kingdom. “Evidence from websites located outside the United States may have probative value depending on the circumstances, including whether it is likely that U.S. consumers have been exposed to the foreign website and whether the website is in English (or has an optional English language version).” TBMP § 1208.03; *see In re Bayer AG*, 488 F.3d 960, 969 (Fed. Cir. 2007) (noting that information originating on foreign websites that are accessible to the United States public may be relevant to discern U.S. consumer impression of a proposed mark).

¹² March 20, 2024 Denial of Request for Reconsideration at TSDR 57.

¹³ *Id.* at 64.

- A Wikipedia entry for “first aid,” which shows a white Greek cross appearing on a green square background and describes it as the “universal first aid symbol”;¹⁴
- An article on mysafetysign.com, which labels a white Greek cross on a green circular background as a “First Aid Symbol” and states that “[o]ne of the standard first aid symbols is a white cross on a green background”;¹⁵ and
- A guide to safety signs and symbols in the workplace provided by anbusafety.com, a supplier of safety wear and personal protective equipment, which shows a white Greek cross on a green circular background under the heading “First Aid Signs,” and states that first aid signs “typically feature a white cross on a green background, which is internationally recognized as a symbol for first aid.”¹⁶

This evidence demonstrates that a white Greek cross on a green background is commonly understood to signify first aid generally, or first aid equipment and facilities specifically. In addition, it indicates that in the fields of first aid and safety, this symbol is used in that manner. Thus, consumers, particularly those interested in safety products and procedures, are likely to have been exposed to the use of the white Greek cross on a green field as a symbol for first aid. Applicant’s specimen of use, reproduced below, reinforces this perception, displaying the symbol not only in the proposed mark, but also in between the words “FIRST” and “AID.”

¹⁴ *Id.* at 91. “The Board . . . may consider evidence taken from Wikipedia submitted with a denial of a request for reconsideration. An applicant who wishes to rebut such evidence may request a remand to submit other evidence that may call into question the accuracy of the particular Wikipedia information.” TBMP § 1208.03. In this case, Applicant did not request a remand for this purpose. In any event, consistent with the best practice suggested in TBMP § 1208.03, the Wikipedia evidence here is corroborated by other evidence in the record.

¹⁵ May 18, 2023 Non-Final Office Action at TSDR 141.

¹⁶ March 20, 2024 Denial of Request for Reconsideration at TSDR 18.



We add that, as used in the proposed mark, the first aid symbol is depicted accurately in its typical manner. It does not contain any stylization or incorporate other elements that would create a distinctive commercial impression separate and apart from the symbol's usual significance or otherwise form a source-indicating unitary whole. *See* TMEP § 1202.18(b)(ii); *cf. In re LRC Prods. Ltd.*, Ser. No. 73276141, 1984 TTAB LEXIS 39, at *4-5 (TTAB 1984) (noting that “where designs or representations were more realistic and where the design left no doubt about the depiction of a central feature or characteristic of the goods or services,” the Board has found that such designs and representations are merely descriptive). Therefore, we find that, when this symbol, as depicted in the proposed mark, is used in its usual context and applied to first aid kits, it is likely that the relevant public will perceive it only as informational matter and not as an indicator of source.

Applicant asserts that “the Examining Attorney’s proffered Internet evidence stands for the proposition that there are many symbols that could be used for first aid, not one universal symbol, and that the universally recognized symbol is a red

cross on a white carrier, not a white Greek cross on a green carrier.”¹⁷ Thus, Applicant argues, “if there is no ‘universal symbol’ for first aid, it is not the symbol in Applicant’s Mark.”¹⁸

These arguments, aside from being contradictory, are unpersuasive. In this context, a “universal symbol” is any “design, icon, or image that is commonly used in an informational manner and conveys a widely recognized or readily understood meaning when displayed in its relevant context.” TMEP § 1202.17. Thus, for our purposes, a universal symbol need not be the only symbol used to convey the particular information at issue. So, the fact that there may be other available symbols, or even variations of the white cross/green carrier symbol, that convey a “first aid” meaning does not alter our conclusion that, here, the relevant public will view the white Greek cross symbol in the proposed mark as merely informational.¹⁹

B. Is SURVIVAL Generic for First Aid Kits?

Next, we turn to the word SURVIVAL in the proposed mark. We may presume that the term is at least merely descriptive and thus not inherently distinctive, because Applicant has disclaimed it. *See In re Six Continents Ltd.*, Ser. No. 88430142,

¹⁷ Applicant’s Brief, 6 TTABVUE 8.

¹⁸ *Id.*

¹⁹ We also reject Applicant’s suggestion that the red cross is the only universally recognized symbol for first aid, as the evidence of record plainly contradicts it. Further, it is inaccurate to state that the red cross is a “universal symbol,” at least in the general sense. The red cross symbol composed of a Greek red cross on a white ground is specifically protected as an insignia of the American National Red Cross under 18 U.S.C. § 706. Thus, rather than having a universal application or use, the symbol is intended to designate only the American Red Cross and its duly authorized employees and agents. *See* 18 U.S.C. § 706 (providing criminal penalties for unauthorized use of the red cross symbol).

2022 TTAB LEXIS 35, at *23 (TTAB 2022) (“Applicant’s disclaimer is a concession that [the disclaimed term] is not inherently distinctive.”); *In re DNI Holdings Ltd.*, Ser. No. 76331011, 2005 TTAB LEXIS 515, at *25 (TTAB 2005) (“[I]t has long been held that the disclaimer of a term constitutes an admission of the merely descriptive nature of that term . . . at the time of the disclaimer.”). However, we must consider the Examining Attorney’s argument that the term is generic, because it forms part of the basis for the refusal on the ground that the mark, as a whole, fails to function as a trademark for first aid kits.²⁰

A term is generic if it refers to the class or category of goods on which it is used. *See In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344 (Fed. Cir. 2001) (citing *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90 (Fed. Cir. 1986)); *In re Uman Diagnostics AB*, Ser. No. 88960633, 2023 TTAB LEXIS 77, at *3 (TTAB 2023); *see also USPTO v. Booking.com BV*, 591 U.S. 549, 551 (2020) (“A generic name—the name of a class of products or services—is ineligible for federal trademark registration.”). Genericness also may be found if the term refers to part of the claimed genus of goods or a key aspect of them. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 605 (Fed. Cir. 2016) (“[T]he term ‘pizzeria’ would be generic for restaurant services, even though the public understands the term to refer to a particular subgroup or type of restaurant rather than to all restaurants.”); *Uman Diagnostics*, 2023 TTAB LEXIS 77, at *3-4. Therefore, the relevant question here is whether, to the

²⁰ *See* Examining Attorney’s Brief, 8 TTABVUE 4 (“[T]he additional wording in the mark does not obviate the [failure-to-function] refusal because it is merely generic of applicant’s goods being provided.”).

relevant public, SURVIVAL refers to class or category of first aid kits, to a part of the relevant genus of the goods, or to a key aspect of them. *See id.* at *4 (“The test for determining whether a proposed mark is generic is its primary significance to the relevant public.” (citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 640-41 (Fed. Cir. 1991))).

Answering this question involves a two-part inquiry: “First, what is the genus of goods or services at issue? Second, is the term sought to be registered . . . understood by the relevant public primarily to refer to that genus of goods or services?” *Marvin Ginn*, 782 F.2d at 990.

1. The Genus of the Goods

The Examining Attorney seems to suggest that the relevant genus of the goods here is “survival first aid kits.”²¹ Applicant, on the other hand, contends that the relevant genus is “first aid kits,” as specified in the application’s identification of goods.²²

Where an identification of goods “is simple and clear enough . . . it may be used verbatim as the ‘genus.’” *In re ActiveVideo Networks, Inc.*, Ser. No. 77967395, 2014 TTAB LEXIS 283, at *55 n.77 (TTAB 2014); *see also In re Empire Tech. Dev. LLC*, Ser. No. 85876688, 2017 TTAB LEXIS 232, at *13 (TTAB 2017). Here, “first aid kits”

²¹ Examining Attorney’s Brief, 8 TTABVUE 7 (arguing that “the totality of evidence demonstrates that the relevant public would understand the wording ‘SURVIVAL’ to refer primarily to survival first aid kits and the relevant public would understand this designation to refer primarily to that genus of goods because applicant’s goods are survival products in the nature of first aid kits”).

²² Applicant’s Brief, 6 TTABVUE 11.

in Applicant's identification of goods is sufficiently simple and clear, so we agree with Applicant that the genus is appropriately defined by this wording. *See Uman Diagnostics*, 2023 TTAB LEXIS 77, at *5-6 (citing *Magic Wand*, 940 F.2d at 640 (“[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.”)).

2. The Relevant Public's Understanding of SURVIVAL

Having determined that the genus is “first aid kits,” we must consider whether the relevant public understands SURVIVAL to primarily refer to that genus. *Marvin Ginn*, 782 F.2d at 990. Neither Applicant nor the Examining Attorney has directly addressed who the relevant public is here. But, as already indicated above, we may presume that the relevant public consists of all potential purchasers of first aid kits given that the identification of goods contains no limitations as to channels of trade or classes of consumers. *See In re Team Jesus LLC*, 2020 TTAB LEXIS 503, at *6.

To determine the relevant public's understanding of a term, we may consider evidence “obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications.” *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 1570 (Fed. Cir. 1987); *see also Booking.com*, 591 U.S. at 561 n.6 (“Evidence informing [a genericness] inquiry can include not only consumer surveys, but also dictionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning.”); *Uman Diagnostics*, 2023 TTAB LEXIS 77, at *11-12.

In this case, the Examining Attorney has made of record dictionary entries defining “survival” as “[t]he act or process of surviving”²³ and “the continuation of life or existence.”²⁴ In addition, the Examining Attorney has provided marketplace evidence in the form of excerpts from various online retailers and other online sources showing the term “survival” being used to refer to or identify first aid kits.

For example:

- Breakwater Supply (breakwatersupply.com) offers a “Waterproof Survival First Aid Kit” that is stored in a red bag featuring the word “SURVIVAL” directly under the wording “FIRST AID KIT.”²⁵ Advertising copy notes that the kit contains “comprehensive first aid supplies and emergency survival equipment.”²⁶
- Echo-Sigma (echo-sigma.com) includes a page for “Survival First Aid Kits,” which notes that “[w]hether addressing minor scrapes or more severe injuries, a survival first aid kit is a must-have for any journey.”²⁷
- Ecotrader Company (ecotradercompany.com) offers a 500-piece “Survival First Aid Kit” featuring, inter alia, first aid supplies, a knife, rope, fish hooks, a flashlight, glow sticks, a bracelet with a compass, and a poncho.²⁸
- Everlit Survival (everlitsurvival.com) offers a 250-piece “Tactical Survival First Aid Kit,”²⁹ along with the following advertising copy: “WHY CHOOSE EVERLIT SURVIVAL FIRST AID KIT? A truly MUST-HAVE EDC First

²³ May 18, 2023 Nonfinal Office Action at TSDR 7 (excerpt from the online version of AMERICAN HERITAGE DICTIONARY).

²⁴ *Id.* at 8 (excerpt from the online version of MERRIAM-WEBSTER DICTIONARY).

²⁵ *Id.* at 24.

²⁶ *Id.* at 26.

²⁷ *Id.* at 31.

²⁸ *Id.* at 34.

²⁹ *Id.* at 35.

Aid Survival Kit that [sic] customized by U.S. Military veterans and field tested by ex-Army Sergeant [sic]. Perfect for any outdoor activities and emergencies. . . . An amazing high-quality survival emergency first-aid ALL-IN-ONE kit.”³⁰ The kit contains first aid supplies and, inter alia, a fire starter, a paracord bracelet, a poncho, glow sticks, a flashlight, and a knife.³¹

- First Aid Only (firstaidonly.com) offers a “Deluxe Survival First Aid Kit In Ballistic Nylon Black Carry Case, 223 Pieces”³² and indicates that “Our first aid supplies are combined with basic survival components in this truly comprehensive kit.”³³
- Protect Life (firstaidkitsurvival.com) offers an “Emergency Survival Kit | Tactical First Aid Kit,”³⁴ describing it as “our most comprehensive survival kit, by having the perfect selection of emergency and survival supplies.”³⁵
- Supology (supology.com) offers an “Emergency Survival First Aid Kit” containing, inter alia, bandages, medical tape, scissors, a flashlight, and a bracelet with a compass.³⁶
- Survivewear (survivewear.com) offers a “Survival First Aid Kit” that includes, inter alia, shears, tweezers, an emergency blanket, a whistle, bandages, tape, cotton swabs, safety pins, and gloves.³⁷
- USA Medical and Surgical Supplies (usamedicalsurgical.com) offers a “Wise Five-Day Emergency Survival First Aid Kit With Food & Water For

³⁰ *Id.* at 36.

³¹ *Id.* at 37.

³² *Id.* at 40.

³³ *Id.*

³⁴ *Id.* at 46.

³⁵ *Id.* at 47.

³⁶ *Id.* at 51.

³⁷ *Id.* at 53-54.

One Person,” described as a “[c]omplete survival kit” that “provides everything needed for one person to survive for 5 days.”³⁸

- Emergency Prep Gear (emergencyprepgear.com) lists “Survival First Aid Supplies,” including dressings, bandages, splints, tapes, gloves, tweezers, shears, tourniquets, and safety pins.³⁹
- Mpora (mpora.com) provides a guide to “Survival First Aid,” which explains what should be in a “Survival First Aid Kit,”⁴⁰ states that survival first aid kits are “filled with supplies for a medical emergency,”⁴¹ and notes that “you can buy survival first aid kits on the market.”⁴²
- Persurvive (persurvive.com) provides its “Top 8 Picks” for the “Best Survival First Aid Kit” and notes that “[h]aving the best survival first aid kit will be the difference between comfort and infection, disease, and even death.”⁴³
- Primal Survivor (primalsurvivor.com) provides a “Survival First Aid Kit Checklist,” which lists items such as bandages, gauze, medical tape, burn gel, tourniquets, saline solution, antiseptic wipes, cotton swabs, tweezers, scissors, gloves, iodine, and an emergency blanket.⁴⁴
- TRUEPREPPER (trueprepper.com) provides a “Survival First Aid Kit Checklist,” which lists, inter alia, bandages, antiseptic spray, antibacterial ointment, scissors, tweezers, safety pins, finger splints, antibiotics, mylar blankets, gauze, and bandages.⁴⁵

³⁸ *Id.* at 61.

³⁹ *Id.* at 71-74.

⁴⁰ *Id.* at 79.

⁴¹ *Id.* at 80.

⁴² *Id.* at 81.

⁴³ *Id.* at 97.

⁴⁴ *Id.* at 112-115.

⁴⁵ *Id.* at 132.

Based on this evidence, we conclude that third parties in the field of first aid kits, some of whom are presumably Applicant's competitors, commonly use the term SURVIVAL to refer to first aid kits that contain materials and components for supporting the continuation of life, i.e., for survival. *See Uman Diagnostics*, 2023 TTAB LEXIS 77, at *21 ("Use by competitors in the field is strong evidence of genericness." (citing *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 1570 (Fed. Cir. 1995))). Thus, we find that potential purchasers of first aid kits will recognize the term SURVIVAL as identifying a category of first aid kits or a key aspect of them. *See In re Cordua Rests., Inc.*, 823 F.3d at 605 ("[A] term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole. Thus, the term 'pizzeria' would be generic for restaurant services, even though the public understands the term to refer to a particular sub-group or type of restaurant rather than to all restaurants."); *Uman Diagnostics*, 2023 TTAB LEXIS 77, at *4; *In re Cent. Sprinkler Co.*, Ser. No. 74505190, 1998 TTAB LEXIS 386, at *10 (TTAB 1998) (finding ATTIC generic for the "narrower category of sprinklers for fire protection of attics"); *see also Otokoyama Co. v. Wine of Japan Imp., Inc.*, 175 F.3d 266, 271 (2d Cir.1999) ("Generic words for sub-classifications or varieties of a good are . . . ineligible for trademark protection.").

In reaching this conclusion, we reject Applicant's argument that "[t]he Examining Attorney does not cite a single example of a third party using a mark for first aid kits

even remotely similar to Applicant's Mark."⁴⁶ This argument seems to suggest that we should not find the term SURVIVAL generic unless there is evidence that third parties are also using the term as it is displayed in the proposed mark. However, Applicant has offered no case law to support this proposition, nor are we aware of any. The Examining Attorney's position is that the term SURVIVAL is generic and thus its inclusion in the proposed mark does not obviate the refusal on the ground that the mark, as a whole, fails to function as a source indicator for first aid kits. And the evidence of record suffices to show that SURVIVAL is used generically by third parties to refer to first aid kits.

C. Is the Red Rectangle a Nondistinctive Carrier?

The Examining Attorney identifies "white and blue outlining" and "a red rectangle" as additional elements of the proposed mark, and contends that these elements "are not distinct because their commercial impact is similar to a background 'carrier' and acts as a 'frame' for the universal symbol and word portion."⁴⁷ As to the "white and blue outlining," we note that Applicant's description of the proposed mark states that it "consists of a white Greek cross inside a green square that is to the left of a red rectangle with the white stylized wording 'SURVIVAL' within," and indicates that the remaining elements and colors "represent background, outlining, shading, and/or transparent area and are not part of the mark."⁴⁸ Accordingly, "white and blue outlining" are not part of the mark. In addition, the Examining Attorney appears to

⁴⁶ Appeal Brief, 6 TTABVUE 12.

⁴⁷ Examining Attorney's Brief, 8 TTABVUE 8.

⁴⁸ September 27, 2022 Response to Office Action at TSDR 1 (amended mark description).

consider the green background of the Greek cross element to be part of the universal first aid symbol and thus has not treated it as a separate element or “carrier.” In view of our universal symbol discussion above, we agree. Thus we focus our analysis here on the red rectangle.

As the Examining Attorney notes, “[i]n order for a term which is otherwise unregistrable to be capable of distinguishing the goods or services in connection with which it is used, the presentation thereof must be so striking, unique or distinctive in character as to overcome its inherent incapacity and render the mark capable of serving as an indicium of origin.” *In re Carolyn’s Candies, Inc.*, Ser. No. 73089777, 1980 TTAB LEXIS 8, at *13 (TTAB 1980) (quoting *In re Wella Corp.*, Ser. No. 73024249, 1976 TTAB LEXIS 137, at *3 (TTAB 1976)).

In this case, there is nothing striking, unique, or distinctive about the color or shape of the rectangle that contains the word SURVIVAL, or the manner in which that word is placed or stylized within the rectangle. Further, we find that the color red actually renders the rectangle less distinctive, as the record contains numerous examples showing that red is commonly used on first aid kits or in connection with first aid generally.⁴⁹ Therefore, we agree with the Examining Attorney that the red rectangle is a nondistinctive carrier and it does not lend the word SURVIVAL or the proposed mark, as a whole, any source-indicating significance. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (finding a diamond shape to be “an ordinary

⁴⁹ *See, e.g.*, May 18, 2023 Nonfinal Office Action at TSDR 24, 46, 49, 52, 61, 80, 90, 98-99, and 101-104.

geometric shape that serves as a background for the word mark” that did not “offer sufficient distinctiveness to create a different commercial impression”); *In re Kysela Pere et Fils Ltd.*, Ser. No. 77686637, 2011 TTABLEXIS 70, at *19 (TTAB 2011) (“[T]he oval designs in the marks are merely background or ‘carrier’ elements, and do not make a strong commercial impression”); *cf. In re Benetton Grp. S.p.A.*, Ser. No. 74325713, 1998 TTAB LEXIS 219, at *5-6 (TTAB 1998) (“In particular, common geometric shapes such as circles, squares, rectangles, triangles and ovals, when used as backgrounds for the display of word marks, are not regarded as trademarks for the goods to which they are applied absent evidence of distinctiveness of the background design alone.”).⁵⁰

D. Does the Combination of the Elements Result in a Distinctive Source Indicator?

Having found that each of the proposed mark’s elements is nondistinctive, we now turn to whether their combination results in a mark with a distinctive sum greater than its nondistinctive parts. We find, as the Examining Attorney did, that there is nothing in the combination such that the mark, as a whole, serves indicate the source of Applicant’s first aid kits and distinguish them from those of others. *See DuoProSS*, 695 F.2d at 1252 (holding that the Board must consider the commercial impression of a mark as a whole).

⁵⁰ Applicant argues that *Benetton* and other cases cited by the Examining Attorney are inapposite here, because, in those cases, the applicants were seeking registration of background designs alone. Appeal Brief, 6 TTABVUE 12-13. However, we consider *Benetton* and others like it relevant here because they stand for the general proposition that geometric carriers are rarely distinctive on their own and thus are unlikely to lend distinctiveness to an otherwise nondistinctive mark.

Applicant asserts that the Examining Attorney erred by considering only the individual elements of the mark without addressing whether the mark in its entirety functions as an indicator of source for first aid kits.⁵¹ We disagree. As the Examining Attorney notes, “a trademark examining attorney may consider the significance of each element separately in the course of evaluating the mark as a whole,”⁵² which is what the Examining Attorney did here. *Cf. In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1174 (Fed. Cir. 2004) (“In considering a mark as a whole, the Board may weigh the individual components of the mark to determine the overall impression . . . of the mark and its various components.”).

The thrust of Applicant’s criticism appears to be that the Examining Attorney did not state with sufficient explicitness that the proposed mark, as a whole, fails to function. However, the Examining Attorney’s consideration of the mark’s commercial impression as a whole is clearly reflected in her stated conclusions that the proposed mark consists of a merely informational universal symbol that is not rendered distinctive by the addition of the generic term SURVIVAL within a nondistinctive rectangular carrier.⁵³ In other words, the universal first aid symbol retains its nondistinctive, merely informational nature when combined with the other nondistinctive matter in the manner depicted in the proposed mark. *Cf. In re Hotels.com, L.P.*, 573 F.3d 1300, 1306 (Fed. Cir. 2009) (“[T]he Board satisfied its

⁵¹ *Id.* at 4-6.

⁵² Examining Attorney’s Brief, 8 TTABVUE 7.

⁵³ *See id.* at 3, 5, 8.

evidentiary burden, by demonstrating that the separate terms ‘hotel’ and ‘.com’ in combination have a meaning identical to the common meaning of the separate components.”). And Applicant has not presented any compelling arguments to the contrary.

E. Third-Party Registrations for Marks with Cross Elements

Lastly, we address the third-party registrations submitted by Applicant with its request for reconsideration.⁵⁴ Applicant contends that these registrations show that the USPTO has previously registered a Greek cross for first aid kits and thus “a Greek cross as merely one component of Applicant’s Mark cannot cause it to fail to function as a trademark.”⁵⁵

First, Applicant’s characterization of the refusal is inaccurate. It is not that the inclusion of the Greek cross causes the proposed mark’s failure to function. It is that the mark consists of a universal symbol, a generic term, and a rectangular carrier, none of which, either alone or in combination, serves to indicate source.

Second, almost none of the submitted third-party registrations show the universal first aid symbol at issue here, and some of the registrations are for goods or services other than first aid kits. For instance, in one registration, the mark consists of a green Greek cross and the goods are hand sanitizers and alcohol-based microbial preparations.⁵⁶ Applicant claims that another of these registrations is for a mark that consists of a Greek cross with no color claimed and thus could encompass a white

⁵⁴ See February 8, 2024 Request for Reconsideration at TSDR 13-65.

⁵⁵ Appeal Brief, 6 TTABVUE 7.

⁵⁶ Registration No. 6312282, issued on April 6, 2021.

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Greek cross on a green background.⁵⁷ However, the drawing of the mark subject to that registration is actually lined for the color red,⁵⁸ meaning that the registration is limited to a red Greek cross.⁵⁹ Other registrations are for marks that contain a Greek cross, but also include other elements or stylization that render them irrelevant here.⁶⁰

Reproduced below are the two third-party registered marks that are perhaps most relevant to Applicant's contention that the USPTO has previously registered marks with an element similar to the universal first aid symbol in Applicant's mark.⁶¹



⁵⁷ Appeal Brief, 6 TTABVUE 6.

⁵⁸ Registration No. 1889576, issued on April 18, 1995, and renewed on January 29, 2015.

⁵⁹ "Prior to November 2, 2003, the USPTO did not accept color drawings. An applicant who wanted to show color in a mark was required to submit a black-and-white drawing, with a statement describing the color(s) and where they appeared on the mark. Alternatively, the applicant could use a color lining system that previously appeared in 37 C.F.R. §2.52 but was deleted from the rule effective October 30, 1999." TMEP § 807.07(g).

⁶⁰ See, e.g., Registration No. 5803926, issued on July 16, 2019; Registration No. 5713700, issued on April 2, 2019; Registration No. 5195174, issued on May 2, 2017, and renewed on November 6, 2023; Registration No. 3386385, issued on February 19, 2008, and renewed April 15, 2017; Registration No. 3179508, issued on December 5, 2006, and renewed on February 29, 2016.

⁶¹ Registration No. 6688622, issued on April 5, 2022; Registration No. 6305072, issued on March 20, 2021 ("2-IN-1 FIRST AID KIT" disclaimed)

While both of these registrations cover first aid kits, their existence on the register does not justify registration of Applicant's proposed mark where the evidence of record shows that the relevant public would perceive the Greek cross, and the mark as a whole, as something other than an indicator of source. We reiterate here, as many prior Board decisions have, that "[e]ach application for registration must be considered on its own merits." *Merrill Lynch*, 828 F.2d at 1569 (Fed. Cir. 1987); *see also Cordua Rests.*, 823 F.3d at 600 (Fed. Cir. 2016) ("The [USPTO] is required to examine all trademark applications for compliance with each and every eligibility requirement."); *In re Eagle Crest, Inc.*, Ser. No. 77114518, 2010 TTAB LEXIS 346, at *5 (TTAB 2010) ("It has been said many times that each case must be decided on its own facts."). Furthermore, we are not bound by prior decisions of examining attorneys to register other marks. *In re Nett Designs Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) ("Even if some prior registrations had some characteristics similar to [Applicant's] application, the [USPTO's] allowance of such prior registrations does not bind the Board or this court.").

II. Conclusion

We have carefully considered all of the arguments and evidence of record and find that Applicant's proposed mark, as a whole, would be perceived as merely informational matter and thus fails to function as a trademark for the identified first aid kits in International Class 5.

Decision: We affirm the refusal to register Applicant's proposed mark



under Sections 1, 2 and 45 of the Trademark Act.