

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: July 7, 2011

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Nutraquest, Inc.

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Serial No. 77729645

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Catherine M. Clayton of Gibbons PC for Nutraquest, Inc.

Drew Leaser, Trademark Examining Attorney, Law Office 112  
(Angela Bishop Wilson, Managing Attorney).

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Before Quinn, Grendel and Cataldo,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Nutraquest, Inc., has applied to register on the Principal Register the mark MUSCLE MAIZE in standard characters (MAIZE disclaimed) for "dietary and nutritional supplements" in International Class 5.<sup>1</sup>

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground

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<sup>1</sup> Application Serial No. 77729645 was filed on May 5, 2009, based on applicant's assertion of its bona fide intent to use the mark in commerce in connection with the recited goods.

that applicant's mark is merely descriptive of a feature or quality of applicant's goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal.

**Applicant's Request for Remand**

In its brief, applicant makes the following request for remand, in the event its mark is found to be merely descriptive:

In the alternative, Applicant respectfully submits that the application should be remanded to the Examining Attorney with instructions to permit Applicant to amend the application to the Supplemental Register.<sup>2</sup>

However, applicant filed the involved application based upon its assertion of a bona fide intent to use the mark in commerce, and has not amended its application to allege use as required by Trademark Act Section 23 and Trademark Rule 2.47(d). See 15 U.S.C. §1091; and 27 C.F.R. §2.47(d). As a result, the application at issue presently is not eligible for registration on the Supplemental Register. In addition, an application that has been considered and decided on appeal to the Board will not be reopened except in very limited circumstances not applicable to this case. See Trademark Rule 2.142(g). See also TBMP §1218 (3d ed.

2011). Accordingly, applicant's request for remand is denied.

### Issue on Appeal

As noted above, the issue on appeal in this case is whether applicant's mark, MUSCLE MAIZE, merely describes a function, feature or characteristic of the goods recited in the involved application.

In support of the refusal, the examining attorney has made of record dictionary definitions of "muscle" and "maize." According to these definitions, "muscle" is defined as "a tissue composed of fibers capable of contracting to effect bodily movement"<sup>3</sup> or "a contractible organ consisting of a special bundle of muscle tissue, which moves a particular bone, part, or substance of the body"<sup>4</sup> and "maize" is defined as a synonym for "corn."<sup>5</sup> The examining attorney further has made of record articles and advertisements retrieved from Internet webpages. The following excerpts are considered probative (emphasis added):

If your goal is overall mass and performance, then consuming carbohydrate with N.O. Synthesize may be warranted. High molecular weight carbohydrates like potato starch or plain white

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<sup>2</sup> Applicant's brief, p. 9 footnote 1.

<sup>3</sup> *American Heritage Dictionary of the English Language*, 4<sup>th</sup> ed. Houghton Mifflin Company, 2000.

<sup>4</sup> Id.

<sup>5</sup> Id.

potatoes work best post workout. Think twice about wasting your money on waxy **maize supplements** - they are decent but potato starch works better and is cheaper.  
(buildingbrawn.com);

Monster Maize™

MONSTER MAIZE is an Intra-Workout glycogen replenishing carbohydrate formula. MONSTER MAIZE complex carbohydrates deliver a blend of amylopectin (waxy **maize** starch) and long-chain glucose polymers (maltodextrine). The waxy **maize** starch in MONSTER MAIZE has a very low osmolarity which allows it to quickly and effortlessly cross into the blood stream intact.  
(cytosport.com);

**Dymatize - FLUD - 100% Waxy Maize Supplement!**

Dymatize is proud to reveal the latest in waxy **maize** supplementation to the market, FLUD! FLUD is unique as it contains only pharmaceutical grade blends of waxy **maize** as well as dymamlopetin, a long-chain complex carbohydrate derived from ultra high density waxy **maize** starch.  
(fitflex.com);

Waxy Maize starch is a unique, sugar-free, cross-linked, long-chain complex carbohydrate derived from specially processed, high molecular weight corn. ... Unlike other waxy **maize** supplements, TruBasics Waxy Maize mixes easily and does not clump or form otherwise unpleasant globules.  
(truscience.com); and

Muscle Maize by Bioquest

Muscle Maize Highlights:

Antioxidants

High-glycemic waxy **maize**

Wide-Ranging scope of its anabolic and anti-catabolic properties

Anabolic Carbs & Proteins

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Ultra-fast-acting whey isolate, hydrolyzed casein  
and leucine  
High-potency, all-in-one product for supporting  
rapid muscle recovery and dramatic growth  
(prosource.net).

Finally, the examining attorney made of record copies of third-party registrations in which the term MUSCLE is disclaimed in marks on the Principal Register or registered on the Supplemental Register as applied to goods similar to those recited in the involved application. These registrations include:

Registration No. 2606122 on the Supplemental Register for the mark HUMAN MUSCLE PROTEIN with PROTEIN disclaimed for "vitamins and nutritional supplements";

Registration No. 3773771 on the Supplemental Register for the mark CREATINE MUSCLE STACK with CREATINE disclaimed for "dietary and nutritional supplements containing creatine";

Registration No. 3305067 the Principal Register for the mark MUSCLE SYNERGY for "nutritional supplements";

Registration No. 2830412 on the Principal Register for the mark MUSCLE ZONE with MUSCLE disclaimed for, inter alia, "sports nutrition supplements";

Registration No. 2809666 on the Principal Register for the mark MUSCLE MILK with MUSCLE disclaimed for

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"nutritional supplements"; and

Registration No. 1485887 on the Principal Register for the mark MUSCLE MASTERS with MASTERS disclaimed for "dietary food supplements."

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, feature or characteristic thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test." *In re American Greetings*

Corp., 226 USPQ 365 (TTAB 1985).

In the instant case, the evidence made of record by the examining attorney supports a finding that, as applied to applicant's "dietary and nutritional supplements," the term MUSCLE MAIZE would immediately describe, without conjecture or speculation, a significant characteristic or feature of such goods, namely, that they are dietary or nutritional supplements that contain maize starch intended to promote muscle growth and recovery. The dictionary definitions and third-party registrations establish that MUSCLE is, at best, highly descriptive of dietary and nutritional supplements. Third-party registrations can be used as a form of a dictionary definition to illustrate how the term is perceived in the trade or industry. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) ("[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this proper, limited manner, 'third party registrations are similar to dictionaries showing how language is generally used.' 1 McCarthy, Trademarks and Unfair Competition, § 11:26 at p. 516 (2d ed. 1984)"). These third-party registrations tend to provide support for the examining attorney's position

that MUSCLE MAIZE is merely descriptive in the context of applicant's goods.

The Internet articles and advertisements submitted by the examining attorney establish that MAIZE is recognized as a term for dietary and nutritional supplements used by weight lifters and body builders to promote faster muscle growth and recovery. Material obtained from the Internet is acceptable in ex parte proceedings as evidence of potential public exposure to a term. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002).

We are not persuaded by applicant's argument that consumers encountering MUSCLE MAIZE must engage in a multi-step analysis to understand that such designation merely describes dietary and nutritional supplements. Essentially, applicant argues that because the terms comprising its mark have a number of meanings, MUSCLE MAIZE "might suggest that Applicant is particularly effective at transmitting the nutritional benefits of corn to the user;"<sup>6</sup> "that the corn-based ingredient(s) have 'muscle' and are especially effective or beneficial;"<sup>7</sup> or that "Applicant's product contains only the 'muscle,' or the fundamental and

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<sup>6</sup> Applicant's brief, p. 6.

<sup>7</sup> Id.

most beneficial nutritional element(s) of corn.”<sup>8</sup> However, we are unpersuaded that because the terms comprising applicant’s mark have other meanings that are only tangentially related to its goods, MUSCLE MAIZE is not merely descriptive of its “dietary and nutritional supplements.” As noted above, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, supra*.

Finally, the third-party registrations submitted by applicant for various MUSCLE-formative marks for dietary supplements and related goods are of little help in determining the registrability of the mark at issue in this case. As often noted by the Board, each case must be decided on its own set of facts, and we are not privy to the facts involved with these registrations. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) [“Even if prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”] See also *In re Best Software*

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<sup>8</sup> Id.

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*Inc.*, 58 USPQ2d 1314 (TTAB 2001). While uniform treatment under the Trademark Act is highly desirable, our task here is to determine, based upon the record before us, whether applicant's mark is registrable.

Accordingly, we find that applicant's mark is merely descriptive as contemplated by Section 2(e)(1) of the Act.

Decision: The refusal to register is affirmed.