

**This Opinion is Not a
Precedent of the TTAB**

Mailed: February 16, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Manpreet S. Wadhwa
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Serial No. 86013037
—

Shawn R. Farmer of Muskin & Farmer LLC,
for Manpreet S. Wadhwa

Brin Anderson Desai, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

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Before Wolfson, Kuczma and Lynch,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Manpreet S. Wadhwa (“Applicant”) seeks registration on the Principal Register
of the mark EMDROPS (in standard characters) for

Dietary and nutritional supplements in liquid form which
do not include effective microorganisms or efficient
microbes

in International Class 5.¹

¹ Application Serial No. 86013037 was filed on July 17, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Section 2(a), 15 U.S.C. § 1052(a), on the ground that the mark comprises deceptive matter and, in the alternative, under Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the mark is deceptively misdescriptive of Applicant's goods.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied Applicant's request for reconsideration, the appeal was resumed. Applicant and the Examining Attorney submitted briefs and Applicant filed a reply brief. We affirm.

I. Applicable Law – Section 2(a) – “Deceptive Matter”

Section 2(a) is an absolute bar to registration of an applied-for mark comprised of deceptive matter. The Examining Attorney has the initial burden of putting forth a *prima facie* case that a trademark falls within the prohibition of Section 2(a). *In re Budge Manufacturing Co.*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988) (LOVEE LAMB deceptive for “automotive seat covers”); *In re E5 LLC*, 103 USPQ2d 1578, 1579 (TTAB 2012) (mark consisting of alpha symbol and the letters “CU” deceptive of dietary supplements not containing copper). A mark is deceptive if the following criteria are met:

- 1) The applied-for mark consists of or contains a term that misdescribes the character, quality, function, composition, or use of the goods and/or services;
- 2) Prospective purchasers are likely to believe that the misdescription actually describes the goods and/or services; and

3) The misdescription is likely to affect the purchasing decision of a significant portion of relevant consumers.

See In re Budge, 8 USPQ2d at 1260; *In re White Jasmine LLC*, 106 USPQ2d 1385, 1391-92 (TTAB 2013); *see also In re Spirits International, N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1492-93, 1495 (Fed. Cir. 2009) (holding that the test for materiality incorporates a requirement that a “significant portion of the relevant consumers be deceived”). A mark is deceptive even if only a portion of the mark is deceptive. *See American Speech-Language-Hearing Association v. National Hearing Aid Society*, 224 USPQ 798, 808 (TTAB 1984). This includes telescoped marks, such as Applicant’s, that are comprised of deceptive matter and a generic term. *Id.* The law is clear; Section 2(a) of the Trademark Act prohibits registration of deceptive matter, not merely deceptive marks. *See In re White Jasmine LLC*, 106 USPQ2d at 1391 (“It is well established that a mark may be found deceptive on the basis of a single deceptive term that is embedded in a larger mark.”).

II. Analysis

A. Does the applied-for mark consist of or contain a term that misdescribes the character, quality, function, composition, or use of the goods?

Applicant seeks registration for the mark EMDROPS for dietary and nutritional supplements in liquid form. Applicant characterizes the product as a “highly concentrated liquid formula” that “must be diluted into a liquid food or beverage.”² In other words, the goods are liquid “drops,” which term is defined as “liquid medicine administered in drops” and “the smallest quantity of liquid heavy enough

² Appeal Brief, 5 TTABVUE 8.

to fall in a spherical mass.”³ Given the generic nature of the term “drops” in connection with the goods, when consumers encounter Applicant’s mark, they will perceive it as a combination of the terms “EM” and “DROPS.” Applicant does not argue otherwise, and the Examining Attorney’s contention that the term “EM” would be viewed as “E-M” does not change this conclusion.⁴ Thus, in determining whether the term “EMDROPS” comprises deceptive matter as used by Applicant, it is necessary to ascertain the meaning that relevant purchasers would ascribe to the term “EM” in the mark.

Applicant asserts that the acronym EM would be perceived as an abbreviation for “essential minerals” or “electrolyte minerals,” which ingredients are present in Applicant’s drops.⁵ On the other hand, the Examining Attorney contends that the acronym EM would be perceived as an abbreviation for “effective microorganisms,” which are not present in the drops.⁶ If the record evidence supports the Examining Attorney’s contention that consumers would perceive the acronym EM as standing

³ The Free Dictionary by Farlex, at <http://www.thefreedictionary.com>; attached to October 31, 2013 Office Action.

⁴ There is no record evidence supporting the likely perception of “EM” either as a single unit or as “E-M.” However, such distinction is irrelevant. Regardless of whether “EM” is perceived as a single unit or as “E-M,” the only definition in the record of “em” as an actual word in English (“the width of a piece of type used as a unit of measure of typeset matter”) has no bearing here. Likewise, the possible abbreviations suggested by Applicant (*e.g.*, electromagnetic, end matched, enlisted man) have no relevance to the goods. Whether a term is deceptive is determined in relation to the goods or services as listed in the application. *See In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1695 (TTAB 1992) (“The only issue on appeal therefore is whether the mark is deceptive as applied to the goods in the application.”).

⁵ Brief, 5 TTABVUE 8.

⁶ 7 TTABVUE 6. During prosecution, the Examining Attorney argued that EM could also mean “efficient microbes,” but this alternative meaning was not maintained at briefing and we therefore do not consider it.

for “effective microorganisms,” then the first prong of the Section 2(a) deceptiveness test will have been met.

The Examining Attorney’s evidence consists of Internet excerpts and six registrations of marks containing the term EM registered either with a disclaimer of the term, or with a claim of acquired distinctiveness under Section 2(f). The Internet evidence shows that the term “effective microorganisms” and its abbreviation EM appear to have been coined by Professor Teruo Higa from the University of the Ryukyus in Okinawa, Japan, in connection with research he conducted into the alleged beneficial effects, on soil, of combinations of different microorganisms such as lactic acid bacteria, photosynthetic bacteria, and yeast.⁷ He touted these “EM combinations” as beneficial in a wide range of unrelated fields. EM combinations have been applied in the fields of agriculture,⁸ pest control,⁹ reduction of radioactive contamination¹⁰ and compost and waste management.¹¹

⁷ See, e.g., Wikipedia, “*Effective Microorganism*” at <http://en.wikipedia.org>; attached to June 3, 2014 Office Action. (“An effective microorganism refers to any of the predominantly anaerobic organisms blended in commercial agricultural amendments, medicines and nutritional supplements based on the trademarked product originally marketed as EM-1 Microbial Inoculant, aka Effective Microorganisms and EM Technology. ... The concept of “friendly microorganisms” was developed by Professor Teruo Higa...in the 1980s...”). See also Appropedia, “*Effective Microorganisms*,” at <http://www.appropedia.org>; attached to October 31, 2013 Office Action; Pinto, “*Syntropic Antioxidative Microbes (SAM)*,” at <http://sam.vmicrobial.info>, attached to October 31, 2013 Office Action (“By 1984, ... [Prof. Higa] was calling the brownish liquid culture by the name ‘effective microorganisms’ or by the shorthand term ‘EM’...”); and the website Medicine Bee Herbals, at <http://www.medicinebeeherbals.com>, attached to June 3, 2014 Office Action (“The concept and technology of Effective Microorganism (EM) was developed by Professor Dr. Teruo Higa....[] to improve the efficacy of organic matter utilization by crops.”).

⁸ Medicine Bee Herbals, at <http://www.medicinebeeherbals.com>, attached to June 3, 2014 Office Action.

⁹ *Id.*

¹⁰ *Id.*

There are “EM treatments available...for treating drinking water to maximize good stomach bacteria and [for] improving the cleaning power of water used in washing machines, for example.”¹² The term EM may therefore be relevant in any number of fields, but whether it is deceptive must be determined in relation to the goods for which registration is sought. That a term may have a different meaning in a different context is not controlling. *See In re RiseSmart Inc.*, 104 USPQ2d 1931, 1933 (TTAB 2012). Thus, in considering the Internet evidence provided by the Examining Attorney, we have disregarded those online articles, academic articles and encyclopedia entries (or portions thereof) to the extent they discuss the nature of effective microorganisms in fields other than that of human health.¹³

Turning to those websites that discuss applications of “effective microorganisms” in the human health area, and employ the acronym EM as an abbreviation therefor, we find several articles:

¹¹ Wikipedia, “*Effective Microorganism*” at <http://en.wikipedia.org>, attached to June 3, 2014 Office Action (“EM Technology is purported to support sustainable practices in farming and to improve and support human health and hygiene, compost and waste management, [and] disaster clean-up.”). *See also* Tribe, “*Effective Microorganisms (EM)*,” at <http://tribes.tribe.net>, attached to May 12, 2015 denial of request for reconsideration (“EM technology has now become a major science assisting in the creation of sustainable practices for agriculture, human health and hygiene, animal husbandry, nature farming, environmental stewardship, disaster relief, construction, industrial, community activities and more.”).

¹² At <http://www.nicoyazoom.com>; attached to October 31, 2013 Office Action.

¹³ *See, e.g., Syomiti, et. al., of the Kenya Agricultural Research Institute, “In sacco probiotic properties of effective microorganisms (EM) in forage degradability,”* discussing an experiment designed to determine “the efficacy of EM as a microbial feed additive...using a Boran steer....” (at <http://www.Irrd.org>), attached to Office Action dated October 31, 2013; “*The Efficacy of Microorganisms*” at <http://www.thisisbiotechnology.com>, attached to June 3, 2014 Office Action (focusing on agricultural applications, but noting that EM microbes are beneficial in wide variety of fields, including “human and animal health”).

An article at the website Aging Parents Authority, called “*Mighty Microbes – Effective Microorganisms*” advises readers of a toll-free number, “or go online,” to order “EM technology” dietary supplements. The website explains that EM technology means effective microorganism technology.¹⁴

An article entitled “*EM The Technology of Effective Microorganisms,*” appearing on the website Medicine Bee Herbals, explains that “EM is a fermented mixed culture of beneficial microorganisms. These are Lactic acid bacteria, phototropic bacteria, and Yeast.... Also, high resolution EM is used for human consumption. For those who fully understand Effective Microorganisms Technology, they see the cross-over between homeopathic, naturopathic, and energized medicine.”¹⁵

An article entitled “*What is EM-X,*” which is embedded within a series of web pages that also contains information about anti-oxidants. EM-X is described as a beverage containing a group of “effective microorganisms which have been proven safe through their long history of use in food processing....”¹⁶

An article entitled “*Uses of Effective Microorganisms,*” which includes a section devoted to “possible medicinal uses” of EM. It concludes by noting that “[a] number of medicinal uses for EM have been verified; however, more research is required until it is ready for practical use.”¹⁷

An article entitled “*Tecnologia EM – Microorganismos Efectivos*” apparently published in Spain (Ibiza) but written in English indicates that EM can promote “natural health in humans.” In particular, the article cites to “EM-X,” a “special version of MS liquid that has been certified for human consumption” to improve the immune

¹⁴ At <http://agingparentsauthority.com>, attached to May 12, 2015 denial of request for reconsideration.

¹⁵ At <http://www.medicinebeeherbals.com>, attached to June 3, 2014 Office Action.

¹⁶ At <http://www.gbs2u.com>, attached to June 3, 2014 Office Action.

¹⁷ From “*Uses of Effective Microorganisms,*” at <http://microbewiki.kenyon.edu>; attached to June 3, 2014 Office Action.

system and reduce “the possibility of occurrence of cancer cells in the body.”¹⁸

An article written by Nobuyuki Sato and Teruo Higa, entitled “*Research on the Antioxidant Components of EM-X and the Mechanisms of Action,*” reporting on a study that allegedly confirms that EM-X removes bad types of free radicals, and stating that the authors “hope to communicate these data to clinicians so that they may use this product with confidence.”¹⁹

A “thread” called “*Effective Microorganism (EM) Cosortium [sic] Brewing*” lists website URL’s where one can go for “information on high-Ormus brewing by means of the EM (Effective Microorganisms) consortium.”²⁰

An “Abstract” of an academic paper entitled “*Apoptotic potential of the concentrated effective microorganism fermentation extract on human cancer cells*” appearing at PubMed.gov, the U.S. National Library of Medicine, National Institutes of Health.²¹

These articles show that the term “EM” has been used as an acronym for the phrase “effective microorganisms” and show that information about the human

¹⁸ At <http://www.greenheart-guide.com>, attached to June 3, 2013 Office Action. We have accorded lesser weight to the information contained in the non-U.S. articles in the record, although we find the foreign publications, such as this one, to have some probative value in this case because they are directed to the general public and offer non-scientific explanations of the nature of effective microorganisms. *In re Bayer AG*, 488 F.3d 960, 966-69, 82 USPQ2d 1828, 1833-35 (Fed. Cir. 2007). Others, however, do not appear to be directed to the relevant public who would be interested in purchasing dietary or nutritional supplements. *See, e.g.*, “South Asia Pro-Poor Livestock Policy Programme” from New Delhi, India, at <http://sapplpp.org>, attached to October 31, 2013 Office Action (focusing on livestock applications in India); *What is EM?* at “Zoom Nicoya Peninsula” at <http://www.nicoyazoom.com>, attached to October 31, 2013 Office Action (focusing on improving soil quality and plant growth in Costa Rica); and “*Therapy with Antioxidants,*” a summary of a lecture presented in New Delhi in 1996, at <http://www.gbs2u.com>, attached to June 3, 2014 Office Action. We have not given these articles any weight.

¹⁹ At <http://www.gbs2u.com>, attached to June 3, 2014 Office Action.

²⁰ At <http://forum.alchemyforums.com>, attached to December 11, 2014 Final Office Action.

²¹ At <http://www.ncbi.nlm.nih.gov>, attached to December 11, 2014 Final Office Action.

health benefits of EM is available on the Internet. In addition, the following websites submitted by the Examining Attorney offer products that contain effective microorganisms for sale, sometimes referring to them as “probiotics.”²² These websites are:

Emerald Earth, which advertises a “probiotic supplement” containing phototropic bacteria under the brand name “Pro EM•1®”;²³

Organic Choice, which advertises a dietary supplement called “EM HEALTH BOOSTER (Earth Probiotic)” to improve digestion;²⁴ and

Grow Youthful, Health At Any Age, which advertises “The Grow Youthful Recipe Book” that includes information about “EM (essential microorganisms).”²⁵

There are also six third-party registrations of marks including the term EM for dietary supplements that include a disclaimer to EM or that have been registered under Section 2(f). One of them (Reg. No. 3151313) contains the two components,

²² A “probiotic” is defined as “a preparation (as a dietary supplement) containing live bacteria (as lactobacilli) that is taken orally to restore beneficial bacteria to the body; *also* : a bacterium of such a preparation.” At <http://www.merriam-webster.com>. The dictionary further defines “lactobacillus” as “any of a genus (*Lactobacillus*) of bacteria that produce lactic acid.” The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). According to the Medicine Bee Herbs website, *supra*, EM combinations may include lactic acid. Thus, the term probiotic may be used in connection with products that contain EM, or effective microorganisms. Moreover, according to the Zoom website, for “human health problems, EM is used under the name ‘probiotics.’” At <http://www.nicoyazoom.com>; attached to October 31, 2013 Office Action. We have considered this website solely for the limited purpose of noting the interchangeability of “probiotics” with the term EM.

²³ At <http://www.emearth.com>; attached to October 31, 2013 Office Action.

²⁴ At <http://www.organicchoice.com.za>, attached to May 12, 2015 denial of request for reconsideration. We recognize that this reference is of lesser probative value because the product is no longer in stock and the goods appear to have originated in South Africa.

²⁵ *Id.*, at <http://www.growyouthful.com>.

“EM” and “Effective Microorganisms” and is owned (along with four of the other registrations) by EM Research Corp., identified in some of the articles as Professor Higa’s company. The registrations owned by EM Research are:

Reg. No. 3142619 for the mark PRO EM-1 for “Dietary supplements; dietary supplements mainly comprised of lactic acid bacteria and yeast;” disclaimer to “EM” and “1”;²⁶



Reg. No. 3151313 for the mark  **Effective Microorganisms** for “Chemical preservative compositions, namely, antioxidants and antioxidant agents for use in the manufacture of soap and vegetable oils, and for use in the production of a wide variety of chemicals; and antioxidant food preservative compositions; rust inhibitors for industrial use; plant growth regulating and plant growth stimulating and enhancing preparations; soil conditioners; organic fertilizers; fertilizers and compost;” disclaimer to “EM” and “Effective Microorganisms”;²⁷

Reg. No. 3816394 for the mark **EFFECTIVE MICROORGANISMS** for “Antioxidants and proteins used in the manufacture of cosmetics, beverages, food products and food supplements; Chemical preservatives for use in manufacture of soap and vegetable oils; Chemical preservatives for use in the production of a wide variety of chemicals; Chemical products for the fresh-keeping and preserving of food; Chemical soil conditioners; Chemicals for industrial purposes; Compost; Fertilizers; Fertilizers and manures; Fertilizers for agricultural use; Fertilizers for domestic use; Fertilizing preparations; Food preservative compositions; Non-chemical bio-fertilizers; Plant food; Plant growth regulating preparations; Plant growth regulators for agricultural use; Preparations for

²⁶ Registered September 12, 2006; Sections 8 and 15 combined declaration has been accepted and acknowledged.

²⁷ Registered October 3, 2006; Sections 8 and 15 combined declaration has been accepted and acknowledged.

fortifying plants”; registered under Section 2(f) with a claim of acquired distinctiveness to the entire mark;²⁸

Reg. No. 3467947 for the mark EM for “Chemical preservative compositions, namely, antioxidants and antioxidant agents for use in the manufacture of soap and vegetable oils, and for use in the production of a wide variety of chemicals; and antioxidant food preservative compositions; rust inhibitors for industrial use; plant growth regulating and plant growth stimulating and enhancing preparations; soil conditioners; organic fertilizers; fertilizers and compost”; registered under Section 2(f) with a claim of acquired distinctiveness to the entire mark;²⁹

Reg. No. 3485021 for the mark EM TECHNOLOGY for “Chemical preservative compositions, namely, antioxidants and antioxidant agents for use in the manufacture of soap and vegetable oils, and for use in the production of a wide variety of chemicals; and antioxidant food preservative compositions; rust inhibitors for industrial use; plant growth regulating and plant growth stimulating and enhancing preparations; soil conditioners; organic fertilizers; fertilizers and compost”; registered under Section 2(f) with a claim of acquired distinctiveness to the entire mark.³⁰

The registration owned by a different entity (Kisime, LLC) is:



Reg. No. 4224788 for the mark  for “Dietary and nutritional supplements”; disclaimer to “EM”.³¹

Although the registrations are not evidence that the purchasing public has been exposed to the marks in the marketplace and therefore are accorded lesser

²⁸ Registered July 13, 2010.

²⁹ Registered July 15, 2008; Section 8 declaration has been accepted.

³⁰ Registered August 12, 2008; Sections 8 and 15 combined declaration has been accepted and acknowledged.

³¹ Registered October 16, 2012.

probative value, the registrations support the argument that “EM” is an abbreviation for “effective microorganisms.” See *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (third party registrations may show “a normally understood and well-recognized descriptive” meaning); *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011) (although not evidence of the extent to which the mark may be in use on a commercial scale, third-party registrations are probative of the meaning of the mark).

Based on the above evidence, we find that the term EM describes goods that contain effective microorganisms. Because Applicant’s goods do not contain effective microorganisms, the first prong of the Section 2(a) deceptiveness test is satisfied.

B. Are prospective purchasers likely to believe that the misdescription actually describes the goods?

Even though the evidence shows that the term EM is misdescriptive for goods that do not contain effective microorganisms, if the term is not commonly used in connection with nutritional or dietary supplements, consumers will not likely believe the misdescription or recognize that EM has a significance in relation to the goods. Applicant argues that the term “effective microorganisms” is rarely used in the context of dietary supplements, whereas the term “essential minerals” is commonly used in such context (including by Applicant). For these reasons, Applicant asserts that consumers are likely to interpret EM as an abbreviation for “essential minerals” and not “effective microorganisms.”

In support, Applicant submitted copies of its product information literature, which states that the “EMdrops” formula contains “four essential minerals” and that “drinking water with minerals is important for health, hydration, and mineral intake.”³² Applicant’s product packaging displays the tag line “Liquid Electrolyte Minerals” and lists three of the four minerals (calcium, magnesium and potassium) on the back of the packaging as ingredients. While this evidence supports Applicant’s contention, “explanatory statements in advertising or on labels which purchasers may or may not note and which may or may not always be provided” are of little probative value. Applicant’s packaging and product information can change at any time, as could the actual ingredient list that makes up the “EMdrops” formula. *See, In re Budge*, 857 F.2d at 773, 8 USPQ2d at 1261; *In re E5 LLC*, 103 USPQ2d at 1581 (rejecting argument that explanatory matter on applicant’s specimen regarding what “CU” stood for in the mark could overcome deceptiveness); *In re Berman Bros. Harlem Furniture Inc.*, 26 USPQ2d 1514, 1515-16 (TTAB 1993) (not improper for examining attorney to find explanatory statements in applicant’s declaration unpersuasive).

Applicant also submitted copies of search reports from Alexa.com,³³ purportedly showing that some of the websites submitted by the Examining Attorney are not visited by United States consumers. The information on the Alexa website is likewise inconclusive as it simply indicates there is “no data available” for the two websites Applicant selected. Moreover, the Alexa reports are not properly

³² Attached to April 20, 2015 request for reconsideration.

³³ *Id.*

authenticated, bearing no URL address or date. *See Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (document obtained from the Internet admissible only if it identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL)).

Applicant also submitted copies of TSDR print-outs of seven registrations³⁴ for marks containing EM in the medical field in which the term EM has not been disclaimed. Applicant argues that these registrations indicate that the Office has acknowledged that consumers are not likely to believe that EM indicates the presence of effective microorganisms in dietary supplements. Of the seven registrations submitted, one has been cancelled³⁵ and two issued in unrelated fields.³⁶ Of the remaining four, the first three are owned by a single entity:

Reg. No. 0708341 for the mark EM-EUKAL for “cough drops,”³⁷

³⁴ The two applications for marks using the term EM have no probative value. Third-party applications are evidence only of the fact that they have been filed. *Interpayment Services Ltd. v. Doctors & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003).

³⁵ Reg. No. 1622007.

³⁶ The registrations are: Reg. No. 2166874 for the mark EM-400 for a “tissue specimen embedding medium for in vitro diagnostic use”; registered June 23, 1998; renewed; and Reg. No. 3553132 for the mark EMSURE for “chemicals for use in industry and science, namely, reagents for analysis, quality control, production, sample preparation, sample digestion and extraction, for non-medical purposes” in International Class 1 and “chemicals for use in the pharmaceutical and medical field, namely, reagents for analysis, quality control, sample preparation, sample digestion and extraction, for diagnostic or clinical purposes” in International Class 5, registered December 30, 2008, section 8 declaration accepted. The registrations cover goods that bear no relation to dietary or nutritional supplements.

³⁷ Registered December 13, 1960; renewed.

Reg. No. 4582545 for the mark EM-EUKAL (stylized) for *inter alia*, “diet supplements, namely, dietary supplements,”³⁸ and

Reg. No. 4570673 for the mark EM-EUKAL for *inter alia*, “diet supplements, namely, dietary supplements”³⁹

(owned by Soldan Holding + Bonbonspezialitäten GmbH). A different entity owns:

Reg. No. 3294375 for the mark  for, *inter alia*, “nutritional drink mix meal replacement preparation for use by a patient prior to a colonoscopy.”⁴⁰

These registrations do not shed any light on the possible meaning of EM. On their face, there is nothing to indicate the meaning of the term EM or what it might stand for. Applicant has not made of record copies of the file histories for the cited registrations, and we will not speculate whether there exist any statements contained in the file history of any of the cited registrations which would shed light on the meaning of the term EM. *See Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012) (Board does not take judicial notice of registrations residing in the Patent and Trademark Office); *In re Duofold Inc.*, 184 USPQ 638 640 (TTAB 1974). Accordingly, the registrations are of little probative value.

Applicant further submitted a list of results from the “PubMed” database⁴¹ derived from a search of the terms “essential minerals” and “effective

³⁸ Registered August 12, 2014.

³⁹ Registered July 22, 2014.

⁴⁰ Registered September 18, 2007; Sections 8 and 15 combined declaration accepted and acknowledged.

microorganisms.” According to Applicant, the PubMed database “provides scientific journal citations.”⁴² These lists of journal titles are not evidence of the contents of the journals and thus are not very probative. To the extent the title alone tells us anything, we note that none of the titles reference the term “effective microorganisms” in the context of human supplements. To the extent they reference the term “essential minerals,” they are either not clearly within the context of human supplements or are decidedly outside of it, such as the reference: “Avoiding toxic levels of essential minerals: a forgotten factor in deer diet preferences.” Likewise, Applicant’s submission of search results from “FDA.gov” for “probiotics” and “effective microorganisms” is of limited probative value because it is a mere listing of articles and not their content.⁴³ Moreover, the subject of most of the references cannot be determined. However, we note the search found “about 377 [results] for probiotics in All of FDA” and “about 2 [results] for ‘effective microorganisms’ in All of FDA.” Of these, at least one of the listings for “probiotics” appears to relate to human diet.

Finally, although the results of Applicant’s searches of “essential minerals” and “effective microorganisms” on the Walmart and Amazon.com websites show that dietary supplements contain essential minerals and agricultural probiotic products contain effective microorganisms, we decline to draw the conclusion, based on this evidence, that dietary supplements could not contain effective microorganisms.

⁴¹ At <http://www.ncbi.nlm.nih.gov>, attached to April 20, 2015 request for reconsideration.

⁴² Request for reconsideration.

⁴³ Submitted with Applicant’s November 12, 2014 response.

Overall, based on the evidence of record we find that the Office has met its initial burden to show that prospective purchasers are likely to believe that Applicant's goods contain effective microorganisms. Applicant's evidence does not sufficiently refute this showing. Thus, the second prong of the Section 2(a) deceptiveness test is satisfied.⁴⁴

C. Is the misdescription likely to affect the purchasing decision of a significant portion of relevant consumers?

The evidence shows that the health benefits of consuming effective microorganisms have been touted not only in scientific journals and online news articles, but also in connection with the sale of dietary supplements. For example, the article from the Home'nStead website entitled "*EM Probiotics for Inexpensive Natural Health on the Homestead*" touts the benefits of using "EM probiotics."⁴⁵ See also the Emerald Earth website ("Use [Pro EM•1] as a dietary supplement to promote the restoration of beneficial intestinal microflora that helps to build a

⁴⁴ We note that there are two articles that use EM to refer to slightly different phrases. An article about "Probiotics" on the website "Grow Youthful Health At Any Age" promotes a recipe book that includes recipes for "EM (essential microorganisms)." At <http://www.growyouthful.com>, attached to May 12, 2015 denial of request for reconsideration. "That Family Shop" advertises "Home'nStead EM Probiotic Soap" as having been made with "probiotic EM's (efficient microbes)." At <http://thatfamilyshop.com>, attached to May 12, 2015 denial of request for reconsideration." This evidence is *de minimus*. Moreover, Applicant admits that its goods do not contain efficient microbes, and the phrase "essential microorganisms" is synonymous with "effective microorganisms."

⁴⁵ At <http://home-n-stead.com>, attached to December 11, 2014 Final Office Action.

healthy immune system.”)⁴⁶ and the Grow Youthful website (listing “EM (essential microorganisms)” as a source of “good probiotic bacteria”).⁴⁷

Consumers are likely to believe that dietary and nutritional supplements that contain EM bestow unique health benefits to those who consume them. The greater marketability or desirability of the product is thus likely to induce prospective buyers to purchase the goods. *See In re White Jasmine*, 106 USPQ2d at 1392. Thus, the third prong of the Section 2(a) test for deceptiveness has been satisfied.

III. Conclusion

Mindful that the USPTO has limited facilities for acquiring evidence--it cannot, for example, be expected to conduct a survey of the marketplace or obtain consumer affidavits--we conclude that the evidence of record here is sufficient to establish a *prima facie* case of deceptiveness under Section 2(a). Applicant has not introduced evidence sufficient to rebut this *prima facie* showing. Accordingly, we find that Applicant’s mark EMDROPS is deceptive of a feature or ingredient of the identified goods.

The test for determining whether a term is deceptively misdescriptive involves a determination of (1) whether the matter sought to be registered misdescribes the goods and, if so, (2) whether anyone is likely to believe the misrepresentation. *Id.* at 1394 (citing *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984)); *In re Shniberg*, 79 USPQ2d 1309, 1311 (TTAB 2006). *See also In Re Lymphomed Inc.*, 1

⁴⁶ At <http://www.emearth.com>; attached to October 31, 2013 Office Action.

⁴⁷ At <http://www.growyouthful.com>, attached to May 12, 2015 denial of request for reconsideration.

USPQ2d 1430 (TTAB 1986) (“If the answer to these two questions is in the affirmative, the term is at least deceptively misdescriptive within the meaning of Section 2(e)(1).”). Our findings that the mark is misdescriptive and that consumers are likely to believe the misdescription require us to also find that the mark is deceptively misdescriptive under Section 2(e)(1) of the Act.

Decision: The refusal to register Applicant’s mark EMDROPS under Trademark Act Sections 2(a) and 2(e)(1) is affirmed.