

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

Mailed: August 3, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Gulf Coast Pharmacy, Inc.*  
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Serial No. 86506207  
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Gene Bolmarcich of Law Offices of Gene Bolmarcich,  
for Gulf Coast Pharmacy, Inc.

Allison P. Schrody, Trademark Examining Attorney, Law Office 115,  
John Lincoski, Managing Attorney.

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Before Greenbaum, Hightower and Heasley,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Gulf Coast Pharmacy, Inc. (“Applicant”) seeks registration on the Principal

Register of the mark  for “dietary and nutritional supplements” in

International Class 5.<sup>1</sup> Applicant acknowledges that its goods do not contain vitamin E.<sup>2</sup>

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), on the ground that Applicant's mark comprises deceptive matter. The Examining Attorney alternatively refused registration pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the letter "E" in the mark is deceptively misdescriptive.

After the Examining Attorney made the refusals final, Applicant appealed to this Board. We affirm the refusals to register.

#### I. Section 2(a) - Deceptive

We turn first to the Section 2(a) refusal. Section 2(a) of is an absolute bar to registration of an applied-for mark that consists of or comprises 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 Mfg. 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

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<sup>1</sup> Application Serial No. 86506207 was filed on January 16, 2015, 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 application includes the following description of the mark: "The mark consists of a stylized white letter "E" with an accent over it and an arrow shaped middle horizontal line all in a light blue circle. The white color outside the circle represents transparency and is not part of the mark." The colors white and light blue are claimed as a feature of the mark.

<sup>2</sup> May 4, 2015 Response to Office Action.

consisting of alpha symbol and the letters “CU” deceptive of dietary supplements not containing copper).

A mark is deceptive if (1) the proposed mark consists of or contains a term that misdescribes the character, quality, function, composition, or use of the goods; (2) prospective purchasers are likely to believe that the misdescription actually describes the goods; and (3) the misdescription is likely to affect the purchasing decision of a significant portion of relevant consumers. *See Budge*, 8 USPQ2d at 1260; *In re White Jasmine LLC*, 106 USPQ2d 1385, 1391-92 (TTAB 2013); *E5*, 103 USPQ2d at 1579; *see also In re Spirits Int’l, N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1493 (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 White Jasmine*, 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 ...”); *Am. Speech-Language-Hearing Ass’n v. Nat’l Hearing Aid Society*, 224 USPQ 798, 808 (TTAB 1984).

The Examining Attorney maintains that (1) in the context of the identified dietary and nutritional supplements, consumers would understand the letter E as it appears in the proposed mark to indicate that the goods contain Vitamin E when, in fact, they do not; (2) because Vitamin E is a well-known dietary and nutritional supplement, prospective purchasers likely would believe the misdescription; and (3) because Vitamin E has been widely touted as having numerous health benefits, the

misrepresentation would be likely to materially affect consumers' decisions to purchase the goods.

It is Applicant's position, however, that

The mark is a stylized "E" with an arrow design and accent aigu, on a blue circular design. None of the evidence of how an "E" appears on Vitamin E products comes close to this degree of stylization, nor would it reasonably do so, since producers of such products would want to be sure that consumers understand unambiguously that the product contains Vitamin E. Applicant's mark would simply be seen as a logo (and in fact it is associated with its "Elan" mark that uses an identical "E").<sup>3</sup>

Both Applicant and the Examining Attorney introduced screenshots of third-party websites, and the Examining Attorney submitted a dictionary definition of "vitamin E."

- 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 to register the proposed mark  for "dietary and nutritional supplements." THE AMERICAN HERITAGE DICTIONARY (2014) defines "vitamin E" as "[a]ny of several fat-soluble vitamins consisting of tocopherols, especially alpha-tocopherol, that are found chiefly in vegetable oils, nuts and seeds, wheat germ, leafy green vegetables, and milk and act as antioxidants in the body."<sup>4</sup> The Examining Attorney submitted with the June 9, 2015 Office Action the following evidence to demonstrate that vitamin E is a common dietary and nutritional supplement:

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<sup>3</sup> 4 TTABVUE 4.

<sup>4</sup> www.ahdictionary.com, submitted with April 27, 2015 Office Action.

- A screenshot of the “Facts About Vitamin E” webpage from the “Supplements & Herbs” section of [www.drweil.com](http://www.drweil.com) stating “Dr. Weil recommends supplementing with vitamin E that provides a minimum daily dose of 80 mg of the whole complex, including mixed tocopherols and mixed tocotrienols.”
- A screenshot from [www.mayoclinic.org](http://www.mayoclinic.org) about drugs and supplements available from the Mayo Clinic features general information about vitamin E, stating “Vitamin E supplements are available in natural or man-made forms.”
- A screenshot displaying approximately 25 types of vitamin E supplements for sale using the shopping feature of [www.google.com](http://www.google.com).
- A screenshot from [www.iherb.com](http://www.iherb.com) offering for sale one such supplement, “Solgar Natural Vitamin E,” containing 400 IU of vitamin E per softgel.

Further, as noted above, Applicant confirmed that its goods do not contain vitamin E.<sup>5</sup>

In accordance with Section 2(a), registration must be refused if a proposed mark is deceptive of a feature or an ingredient of the goods. *See E5*, 105 USPQ2d at 1579-81 (consumers would understand CU portion of the mark to indicate chemical symbol for copper, and because applicant’s dietary supplements do not contain copper, mark is deceptive). Inasmuch as Applicant’s goods do not contain vitamin E, the proposed

mark  misdescribes the goods. Accordingly, the first prong of the test has been satisfied.

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<sup>5</sup> May 4, 2015 Response to Office Action.

B. Whether Prospective Purchasers Likely Will Believe That the Misdescription Actually Describes the Goods?

There is no question that the letter “E” is widely used in the dietary and nutritional supplement industry, and by the supplement-consuming public, to refer to vitamin E, or to products that contain vitamin E. Virtually all of the 25 or so examples from the Google search listed above display a prominent capital letter “E” on the packaging for the vitamin E supplements. In addition, the Examining Attorney submitted with the July 27, 2015 Final Office action screenshots demonstrating that stylized versions of the letter “E” also are displayed prominently on packaging for vitamin E supplements. For example, the label for 4 SPECTRUM Natural Vitamin E Complex features a large capital letter “E” in red block font in the middle of a stylized

two-tone blue ring , the packaging for SUPER E natural vitamin E ointment features a large capital letter “E” in a stylized square



, and the packaging for DERMA e, a vitamin E topical cream, features

a prominent stylized (lower case and italicized) letter “e” .

We simply do not agree with Applicant that its proposed mark is so highly stylized that consumers would not believe that the identified supplements actually contain or comprise vitamin E. At best, the proposed mark is only slightly more stylized than the four examples noted above. Further, contrary to Applicant's assertions, Applicant's asserted use of the proposed mark with Applicant's mark "ÉLAN" is not relevant, as the proposed mark does not include the additional wording "ÉLAN." *Cf. Budge*, 8 USPQ2d at 1261 ("The statutory provision bars registration of a mark comprising deceptive matter. Congress has said that the advantages of registration may not be extended to a mark which deceives the public. Thus, the mark standing alone must pass muster, for that is what the applicant seeks to register, not extraneous explanatory statements."); *E5*, 103 USPQ2d at 1581 ("[A]ny clarifying features of an applicant's advertising do not serve to overcome deceptiveness in a mark. Rather, the mark must stand on its own.").

Because consumers are used to seeing the letter "E" prominently displayed on products that contain or comprise vitamin E, consumers who encounter the proposed

mark  likely will believe that Applicant's dietary and nutritional supplements contain or comprise vitamin E. Accordingly, the second prong of the test has been satisfied.

C. Whether the Misdescription is Likely to Affect the Purchasing Decision of a Significant Portion of Relevant Consumers?

The record evidence demonstrates that vitamin E is associated with significant health benefits, such as improved immunity, and healthy skin and eyes. Vitamin E

also is claimed to treat and prevent various health conditions, including vitamin E deficiency, heart disease, cancer, Alzheimer's disease, and diabetes. For example, Dr. Weil describes vitamin E as "a powerful, fat-soluble antioxidant that helps protect cell membranes against damage caused by free radicals and prevents the oxidation of LDL cholesterol."<sup>6</sup> According to Dr. Weil, Vitamin E also is "necessary for structural and functional maintenance of skeletal, cardiac and smooth muscle," and "it may have a positive effect on immune health, protect against the oxidative damage that can lead to heart disease, have preventative effects against cancer, help relieve symptoms of Alzheimer's disease, and may help prevent some diabetes-related damage, particularly to the eyes."<sup>7</sup> The WebMD website lists additional benefits of vitamin E, including "treating and preventing diseases of the heart and blood vessels," "treating diabetes and its complications [and] for preventing cancer," treating "diseases of the brain and nervous system ... and other disorders involving nerves and muscles," "preventing complications in late pregnancy due to high blood pressure (pre-eclampsia)," and "for cataracts, asthma, respiratory infections, skin disorders, aging skin, sunburns, cystic fibrosis, infertility, impotence, chronic fatigue syndrome (CFS), peptic ulcers, for certain inherited diseases and to prevent allergies."<sup>8</sup> And the iHerb website describes "Natural Vitamin E" as "an essential nutrient and [] the body's primary, fat-soluble antioxidant [that] provides nutritional

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<sup>6</sup> www.drweil.com, attached to June 9, 2015 Office Action.

<sup>7</sup> *Id.*

<sup>8</sup> www.webmd.com, attached to June 9, 2015 Office Action.

support for the cardiovascular system, skin, prostate, and the immune system. It helps fight cell-damaging free radicals that cause oxidative stress in the body, which may contribute to the premature aging of cells.”<sup>9</sup>

This evidence shows that vitamin E is widely advertised as having numerous health benefits, and that its presence or absence as an ingredient would be relevant to the decision of consumers to purchase Applicant’s supplements. *See E5*, 103 USPQ2d at 1584. Thus, the third prong of the test has been satisfied.

#### D. Conclusion

In sum, after reviewing the evidence of record, we find that all three prongs of the deceptiveness test have been satisfied: (1) consumers would understand the letter “E”

in Applicant’s proposed mark  in the context of Applicant’s identified supplements to refer to vitamin E, and the goods do not contain this substance; (2) due to the inclusion of vitamin E as an ingredient in dietary and nutritional supplements, or as a stand-alone supplement, consumers likely will believe that

Applicant’s supplements, sold under the  mark, actually contain vitamin E; and (3) due to the widely touted purported health benefits of vitamin E, the misrepresentation will materially affect the decisions of consumers whether to

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<sup>9</sup> www.iherb.com, attached to June 9, 2015 Office Action.

purchase the goods. *See E5*, 103 USPQ2d at 1584. We therefore conclude that the

proposed mark  is deceptive for “dietary and nutritional supplements.”

## II. Section 2(e)(1) – Deceptively Misdescriptive

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. *White Jasmine*, 106 USPQ2d 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 Lyphomed Inc.*, 1 USPQ2d 1430, 1431 (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 proposed 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 refusals to register Applicant’s mark  under Sections 2(a) and 2(e)(1) of the Trademark Act are affirmed.