

This Opinion is Not a
Precedent of the TTAB

Hearing: February 28, 2018

Mailed: April 18, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Woodbolt Distribution LLC d/b/a Nutrabort

Serial No. 86627384

James R. Muldoon and Brendan M. Palfreyman of Harris Beach PLLC
for Woodbolt Distribution LLC d/b/a Nutrabort.

Carol Spils, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

Before Taylor, Adlin and Masiello,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Woodbolt Distribution LLC d/b/a Nutrabort (“Applicant”) seeks a Principal Register registration for P6 CHROME, in standard characters, for “dietary and nutritional supplements that do not contain chromium.”¹ The Examining Attorney refused registration under Section 2(a) of the Trademark Act on the ground that the mark is deceptive, in that it misdescribes the goods as containing chromium, when they do not. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed

¹ Application Serial No. 86627384, filed May 12, 2015 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce.

briefs.

I. Evidence

Applicant introduced dictionary definitions which establish that the term CHROME means “chromium” and also denotes “compounds or alloys of chromium,” “a chromium pigment” and “something plated with an alloy of chromium.” Office Action response of May 9, 2015 (printouts from “dictionary.com”² and “oxforddictionaries.com”³); Office Action response of February 21, 2017 (printouts from Merriam-Webster dictionary and The Free Dictionary). Other definitions of “chrome” include “chromium-plated or other bright metallic trim, as on an automobile,” and “chromium plate as a decorative or protective finish on motor vehicle fittings and other objects.” Office Action response of May 9, 2015 (printouts from “dictionary.com” and “oxforddictionaries.com”). According to the Urban Dictionary, the “top definition” for chrome is “a handgun,” and the word is “used in reference to firearms, wheels on a car, or the chemical process to make the parts of a motorcycle shiney (sic)”. Office Action response of February 21, 2017.⁴ Applicant also relies on evidence that: a Schlage doorknob is available in a number of finishes, including “Bright Chrome;” Target offers a hamper described as “Chrome/Linen;” and Overstock offers “chrome” and “polished chrome” cabinet pulls. *Id.* (printouts from Schlage, Target and Overstock websites).

The Examining Attorney introduced evidence suggesting that chromium is

² <http://www.dictionary.com/browse/chrome?s=t>.

³ http://www.oxforddictionaries.com/us/definition/american_english/chrome.

⁴ <http://www.urbandictionary.com/define.php?term=chrome>.

believed by some to have nutritional or health benefits. For example, an article in Medical News Today entitled “What are the health benefits of chromium?” states that “Chromium is an essential trace mineral required in the diet for proper protein, carbohydrate and lipid metabolism as well as insulin sensitivity.” Office Action of November 9, 2015 (printout from “medicalnewstoday.com”). The article goes on to point out that chromium is “often marketed to those wanting to build muscle or lose weight,” including bodybuilders and athletes. *Id.* The “Chromium” entry on the “drweil.com” website states that: chromium “is an essential part of metabolic processes that regulate blood sugar, and helps insulin transport glucose into cells;” “[a]n estimated 25-50% of the U.S. population is mildly deficient in chromium;” and “[d]ietary chromium has a low absorption rate.” *Id.* (printout from “drweil.com”). *See also id.* (printouts from “umm.edu,” “webmd.com” and “nutritionexpress.com”) and Office Action of June 9, 2016 (printouts from “livestrong.com” and “optimalwellnesslabs.com”). The “drweil.com” article concludes: “Dr. Weil recommends 200 mcg a day as part of a multi-vitamin multi-mineral, and recommends 1000 mcg of GTF chromium⁵ a day for those with type 2 diabetes or metabolic syndrome.” Office Action of November 9, 2015 (printout from “drweil.com”). Similarly, according to a University of Maryland Medical Center article, “[t]here is some evidence that chromium supplements may help people with diabetes lower blood sugar levels.” *Id.* (printout from “umm.edu”). *See also id.* (printout from

⁵ The article indicates that two forms of chromium are commonly available as supplements: glucose-tolerance factor (GTF) chromium and chromium picolinate.

“nutritionexpress.com”) (“Chromium supplementation is a simple method to improve blood sugar control in some people ... There are several types of chromium supplements available, such as chromium chloride, chromium polynicotinate and chromium picolinate.”).

At the same time, however, the “medicalnewstoday.com” article’s author opines that the data from scientific studies does not support chromium “supplementation,” and that instead “it is best to obtain chromium through food.” The University of Maryland Medical Center article indicates that “studies have been mixed” about whether chromium is helpful with weight loss and obesity, and that “there is not much evidence that chromium helps people gain strength or build muscle mass.” *Id.* (printouts from “medicalnewstoday.com” and “umm.edu”). Moreover, articles in scientific journals conclude that chromium has “no effect” on glucose or insulin concentrations in nondiabetic subjects and “no significant effect” on lipid or glucose metabolism. Office Action response of May 9, 2016 (printouts from American Journal of Clinical Nutrition and Diabetes Care). One of these articles indicates that chromium has an “inconclusive” effect on diabetics, while the other indicates that it “significantly improved glycemia among patients with diabetes.” *Id.* According to one article, “chromium has been conclusively shown not to have beneficial effects on body mass or composition and should be removed from the list of essential trace elements.” *Id.* (printout from “ncbi.nlm.nih.gov”). In other words, the evidence regarding whether and for whom chromium might be beneficial is mixed.

Nevertheless, a number of supplements offered by third parties contain

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chromium, including CHROME MATE, ULTRACHROME 500, VITACOST GTF CHROMIUM POLYNICOTINATE CHROMEMATE, BLUEBONNET DIET CHROME-CARE, BIO-CHROME (Mbi Nutraceuticals), BIO-CHROME (Progena), NOW CHROMEMATE, ZYCHROME, GLUCO-CHROME, AQUA CHROME and NATROL CHROMEMATE. Office Actions of June 9, 2016 (printouts from “goodhealthtechnology.com,” “swansonvitamins.com,” “fishpond.com,” “iherb.com,” “fernsvitamins.com,” “puritan.com,” “pureformulas.com,” “sourcenaturals.com” and “amazon.com”) and April 21, 2017 (printouts from “professionalsupplementcenter.com” and “thebetterhealthstore.com”).

Applicant claims that its “Chrome Series” line of products has nothing to do with chromium, however. Rather, the product line is “known for its revamped packaging which featured bright metallic trim packaging,” and includes a pre-workout additive offered under the name “NO3 Black Chrome.” Office Action response of May 9, 2015 (multiple printouts from “prweb.com,” as well as from “cellucor.com,” “gnc.com,” “befitsupplements.com,” “vipsupplementwarehouse.com” and “allstarhealth.com”). Applicant owns Registration No. 4777252 for the mark G4 CHROME SERIES for dietary and nutritional supplements, in which the term CHROME is not disclaimed. *Id.* (registration certificate).

Applicant also relies on a number of third-party Principal Register registrations, including for:

allegedly “analogous” terms such as GOLD and SILVER for supplements which do not include those metals, including, *inter alia*: SILVER (Reg. No. 1637376); SOURCE OF LIFE GOLD (Stylized) (Reg. No. 3856781); IT’S A GREAT TIME

TO BE SILVER (Reg. No. 1886901); ULTIMATE GOLD (Reg. No. 4600123); PROBIOTIC ESSENTIALS GOLD (Reg. No. 4719221); WILD GOLD (Reg. No. 4618676); ELITE GOLD (Reg. No. 4290282); PLATINUM (Reg. No. 4887922); PLATINUM RECOVER (Reg. No. 3885913); PLATINUM RENEW (Reg. No. 4377725); and PLATINUM BAR EQ (Reg. No. 3096799); and

marks which contain the term CHROME and are used for dietary or nutritional supplements but in which the term CHROME is not disclaimed, including: DIET CHROME-CARE (Reg. No. 1914485); SUPER CHROMETENE (Reg. No. 2129015); ULTRACHROME 500 (Reg. No. 2266986); ULTRACHROME 200 (Reg. No. 2266987); PHYTOCHROME (Reg. No. 2349423); DIACHROME (Reg. No. 2948444); CARBOCHROME (Reg. No. 3269020); and GLYCHROME (Reg. No. 4688452).

Office Action response of February 21, 2017. Finally, Applicant relies on evidence that the name of Google's CHROME browser may have been intended to evoke fast cars and that Microsoft offers a "Chrome Series" of Xbox 360 controllers. *Id.* (printouts from "thewindowsclub.com" and "xbox.com").

II. Analysis

Under Section 2(a) of the Act, registration must be refused when a mark is deceptive concerning the goods or a feature or ingredient thereof. Specifically, a mark is deceptive when:

- (1) it 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 substantial portion of consumers.

See In re Budge Mfg. Co., Inc., 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988)

and *In re E5 LLC*, 103 USPQ2d 1578, 1579 (TTAB 2012). *See also In re Spirits Int'l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1493 (Fed. Cir. 2009) (finding in the context of Section 2(e)(3) that “the appropriate inquiry for materiality purposes is whether a substantial portion of the relevant consumers is likely to be deceived, not whether any absolute number or particular segment of the relevant consumers ... is likely to be deceived”). “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” *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 (TTAB 2013).

A. “Chrome” Misdescribes the Goods

Here, multiple dictionaries, which Applicant itself introduced into the record, establish that “chrome” means “chromium.”⁶ *See In re Budge Mfg.*, 8 USPQ2d at 1261 (“The board properly equated sheepskin and lambskin based on the dictionary definition which indicates that the terms may be used interchangeably.”).⁷ *See generally In re E5*, 103 USPQ2d at 1579-80 (finding that consumers will understand “CU” as referring to copper, based on evidence that the term is commonly used to refer to copper, even though copper is identified as “Cu,” with a lower-cased “u,” in the periodic table). However, Applicant’s identification of goods and assertions during prosecution establish that Applicant’s supplements do not contain chromium.

⁶ In several of the dictionary definitions, the first definition of chrome is “chromium.”

⁷ As our primary reviewing court found in a case involving a different provision of Section 2(a), dictionary definitions “represent an effort to distill the collective understanding of the community with respect to language and thus clearly constitute more than a reflection of the individual views of either the examining attorney or the dictionary editors.” *In re Boulevard Entm’t Inc.*, 334 F.3d 1336, 67 USPQ2d 1475, 1478 (Fed. Cir. 2003).

Therefore, because the term CHROME in Applicant's mark misdescribes the composition of Applicant's goods, this part of the test is satisfied. *In re ALP of South Beach, Inc.*, 79 USPQ2d 1009, 1010 (TTAB 2006) ("We find that the word CAFETERIA used in connection with restaurant services that explicitly exclude cafeteria-style restaurants does *misdescribe* the services.>").

Applicant's strenuous argument that a term is not misdescriptive if it has more than one meaning, and that in this case "the at least equally understood meaning of the word 'chrome' is the color chrome," as opposed to chromium, 7 TTABVUE 9-10, is not well-taken. *In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1034 (TTAB 2007) ("So long as any one of the meanings of a word is descriptive, the word may be merely descriptive."); *In re Chopper Industries*, 222 USPQ 258, 259 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Similarly, as long as one meaning is misdescriptive of the goods, the term is misdescriptive.

In fact, we must consider misdescriptiveness in the context of the goods, in this case dietary and nutritional supplements. *See In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). The record includes extensive evidence that many dietary and nutritional supplements contain chromium and are sold under marks which contain the term "CHROME." Office Actions of June 9, 2016 (printouts from "goodhealthtechnology.com," "swansonvitamins.com," "fishpond.com," "iherb.com," "puritan.com," "pureformulas.com," "sourcenaturals.com" and "amazon.com") and April 21, 2017 (printouts from "professionalsupplimentcenter.com" and "thebetterhealthstore.com"). In a commercial environment in which many

supplements contain chromium, many consumers, some of whom will be exposed only to Applicant's mark, as opposed to its "bright metallic trim packaging," will misperceive the term CHROME as a description of an ingredient in Applicant's goods. *See In re White Jasmine*, 106 USPQ2d at 1392 ("tea purchasers will clearly understand that because white tea is a type of tea, the word 'White' in the term WHITE JASMINE designates that the tea is white tea or at least contains white tea"). Indeed, the record establishes that many of Applicant's competitors also use the term CHROME, but for supplements containing chromium; many of these competitive supplements which include chromium are not offered in "chrome" colored packaging.⁸

B. Prospective Purchasers Are Likely to Believe the Misdescription

The evidence that many third-party dietary and nutritional supplements contain chromium also establishes this prong of the test. *See generally id.* ("Given the various types of teas (*e.g.* black, green, white and oolong), their popularity and specific attributes, it is quite likely that customers of applicant's products would believe that applicant's tea is white tea when it could be any of the above-noted teas."); *In re E5*, 103 USPQ2d at 1581 (finding that consumers would be likely to believe that goods contain copper because "copper is a common ingredient in dietary supplements or itself a supplement").

Applicant's argument that consumers would not believe that "chrome" refers to

⁸ Applicant's reliance on *Anheuser-Busch Inv. v. Molson Breweries*, 58 USPQ2d 1477 (TTAB 1999) is misplaced. In that case, there were genuine disputes of material fact precluding summary judgment, including whether BLACK ICE was a unitary mark. Here, there is no argument that P6 CHROME is unitary, and in fact Applicant effectively argues to the contrary in claiming that the term "chrome" refers to the color of Applicant's packaging.

chromium is belied by the evidence that supplements that contain chromium are commonly sold under marks containing the term CHROME, including CHROME MATE, ULTRACHROME 500, VITACOST GTF CHROMIUM POLYNICOTINATE CHROMEMATE, BLUEBONNET DIET CHROME-CARE, BIO-CHROME (Mbi Nutraceuticals), BIO-CHROME (Progena), NOW CHROMEMATE, ZYCHROME, GLUCO-CHROME, AQUA CHROME and NATROL CHROMEMATE.⁹ Here, the dictionary definitions leave no doubt that the “collective understanding” is that “chrome” can mean chromium, and the other evidence reveals that is how the term is commonly used in connection with dietary and nutritional supplements.

We agree with Applicant that dietary and nutritional supplements “are not impulse purchases.” 7 TTABVUE 12. However, this does not mean that supplement buyers will not believe that Applicant’s goods contain chromium. To the contrary, sophisticated purchasers of dietary and nutritional supplements are if anything *more* likely than average consumers to know that chromium is believed by some to have potential health benefits and that many supplements include chromium and are sold under marks containing the term CHROME. And while Applicant is correct that sophisticated consumers “are more than capable of reading the ingredient list to determine for themselves whether Applicant’s goods contain chromium,” *id.* at 13, any ingredient list is irrelevant to the question of deceptiveness under Section 2(a), which is determined based on the mark itself, not extraneous material such as

⁹ This is one reason why Applicant’s reliance on *In re Econoheat, Inc.*, 218 USPQ 381 (TTAB 1983) is misplaced.

ingredient lists. *In re Budge Mfg.*, 8 USPQ2d at 1261-62 (citing cases); *In re E5*, 103 USPQ2d at 1581. This part of the test is also satisfied.

C. The Misdescription is Likely to Affect Purchasing Decisions

Finally, in determining whether the misdescription is material, we consider whether “the misdescription would make the product or service more appealing or desirable to prospective purchasers.” *In re White Jasmine*, 106 USPQ2d at 1392; *In re E5*, 103 USPQ2d at 1584 (“Since the evidence shows that copper has important and desirable health benefits, we find that its presence as an ingredient ... would be material to the decision of consumers to purchase applicant’s dietary supplements.”); *In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1698-99 (TTAB 1992). Here, it clearly would, as there is evidence from multiple sources, including some medical sources, that chromium is at least believed to have health benefits, as well as evidence that many third-party supplements are promoted as containing chromium. Therefore, this part of the test is satisfied as well.

Applicant may very well be correct that *some* consumers “would not necessarily believe that chromium would be a beneficial ingredient,” because “[m]uch of the evidence cited by the Examining Attorney is neutral or even negative with regard to whether chromium has appreciable health benefits.” 7 TTABVUE 14. Nevertheless, given the evidence from several sources that chromium *may* have health and other benefits, that consumers purchase chromium supplements for this reason, and that there are many dietary and nutritional supplements which contain chromium, we have no hesitation in finding that the requisite “substantial portion” of prospective supplement consumers would find Applicant’s supplements more desirable because

of the perceived representation that they contain chromium. Indeed, were it otherwise, the market would be unlikely to support so many chromium supplements, let alone so many which are sold under marks that include the terms CHROME or CHROMIUM, which identify one of the products' ingredients and thus their claimed potential benefits.¹⁰

III. Conclusion

Many dietary and nutritional supplements contain chromium, which some believe to have health benefits. Accordingly, Applicant's dietary and nutritional supplements could, like its competitors' products, plausibly contain chromium. Even though they do not, a substantial portion of consumers would nevertheless believe that they do, because of the number of chromium supplements on the market, including many sold under marks containing CHROME or CHROMIUM. These consumers would be more likely to purchase them as a result of this incorrect belief, because of chromium's perceived benefits.

Decision: The Section 2(a) refusal to register Applicant's mark because it is deceptive is affirmed.

¹⁰ Applicant's reliance on third-party registrations of marks containing CHROME, SILVER, GOLD or PLATINUM for dietary or nutritional supplements in which the terms are not disclaimed is misplaced. As Applicant recognizes, "prior actions by the USPTO are of course not binding and each application must be examined on its own merits." 7 TTABVUE 15; *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) ("The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement ... even if the PTO earlier mistakenly registered a similar or identical mark suffering the same defect.").