

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: February 14, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Hi-Tech Pharmaceuticals, Inc.
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Serial No. 88291540
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Gregory L. Hillyer of Hillyer Legal, PLLC,
for Hi-Tech Pharmaceuticals, Inc.

Marlene Bell, Trademark Examining Attorney, Law Office 118,
Michael Baird, Managing Attorney.

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Before Goodman, Allard, and Cohen,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Hi-Tech Pharmaceuticals, Inc. (“Applicant”) seeks registration on the Principal Register of the mark EXPERIMENTAL AND APPLIED SCIENCES (in standard characters) for “Dietary and nutritional supplements,” in International Class 5.¹

Registration has been refused under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, on the ground that the proposed mark is used

¹ Application Serial No. 88291540 was filed on February 6, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

solely as a trade name to identify Applicant's business and does not function as a trademark to indicate the source of Applicant's goods.

After the refusal was made final, Applicant appealed. The matter is fully briefed. We affirm the refusal to register.

I. Evidentiary Issue

Applicant attaches two exhibits to its brief,² both of which were made of record during examination.³ Because this evidence was previously made of record, it was unnecessary for Applicant to attach it to its brief. *In re Information Builders Inc.*, 2020 USPQ2d 10444, at *2 n.4 (TTAB 2020) (attaching previously submitted evidence to an appeal brief is unnecessary and impedes efficient disposition of the appeal by the Board).

II. Trade Name Refusal - Analysis

A "trade name" is defined in Section 45 of the Trademark Act as "any name used by a person to identify his or her business or vocation."¹⁵ U.S.C. § 1127. *See also Martahus v. Video Duplication Servs., Inc.*, 3 F.3d 417, 27 USPQ2d 1846, 1850 (Fed. Cir. 1993). A designation used merely as a trade name cannot be registered under the

² 6 TTABVUE 12-21.

Citations to the record throughout the decision include references to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. All citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

³ July 20, 2022 Response to Office Action at TSDR 6-14; July 20, 2022 Specimen at TSDR 1-6.

provisions of the Trademark Act. *See e.g., In re Supply Guys, Inc.*, 86 USPQ2d 1488, 1490-91 (TTAB 2008); *In re Diamond Hill Farms*, 32 USPQ2d 1383, 1383 (TTAB 1994); *In re Letica Corp.*, 226 USPQ 276, 277 (TTAB 1985) (“[T]here was a clear intention by the Congress to draw a line between indicia which perform only trade name functions and indicia which perform or also perform the function of trademarks or service marks.”) (citations omitted).

A designation may function as both a trade name and a trademark. As the Court of Appeals for the Federal Circuit has explained, “[a] trade name which also has significance as either a trademark or service mark may be registered[.]” *Martahus*, 27 USPQ2d at 1850. However, if the term functions solely as a trade name, registration must be refused. *Id.* “The distinction between trade name use and either trademark or service mark use is often a difficult one to make and often is nebulous in character.” *In re Unclaimed Salvage & Freight Co.*, 192 USPQ 165, 167 (TTAB 1976).

“The question of whether a name used as a trade name also functions as a trademark is one of fact, and is determined from the manner in which the name is used and the probable impact on purchasers and prospective purchasers.” *Diamond Hill Farms*, 32 USPQ2d at 1384. Factors to consider include whether Applicant has used its full corporate name or entity designation, capitalized its name, utilized its name in the same lettering style as other matter, used its name in a significantly bolder or larger style of type, or displayed its name in a contrasting color. *In re Univar*

Corp., 20 USPQ2d 1865, 1869 (TTAB 1991); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1202.01 (Nov. 2023) and cases cited therein.

With this in mind, we consider Applicant’s original and substitute specimens, which together constitute the only evidence we have from which we may determine the manner in which the proposed mark may be perceived by potential consumers. We consider each in turn.

Applicant’s original specimen consists of five different pages.⁴ The first page is a screen capture of a web page.⁵ This page displays five different products. The proposed mark is not visible on this first page, but rather Applicant zooms in on two of the labels affixed to two supplement bottles shown on this page: its HMB 1500 and its L-GLUTAMINE supplements.⁶ Applicant then zooms in on the lower back portion of each of these labels, where the proposed mark appears, and provides a “close-up” image of the proposed mark on the packaging.⁷ Because the “close-up” portion of both labels relevant to our discussion is the same, we reproduce only one of them below and choose the one that provides the clearest image of the proposed mark:

⁴ November 24, 2021 at TSDR 1-5.

⁵ *Id.* at TSDR 1.

⁶ *Id.* at TSDR 2-5.

⁷ *Id.* at TSDR 3, 5.



8

The Examining Attorney refused to accept the original specimen, shown above, determining that the proposed mark functions merely as a trade name and does not function as a trademark.⁹

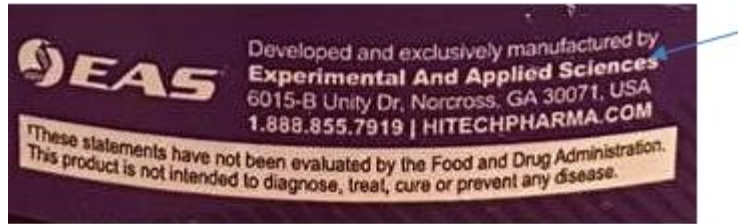
Applicant responded by submitting a substitute specimen consisting of clearer images of the previously-submitted labels for its L-GLUTAMINE and HMB 1500 supplements,¹⁰ and it added an image of its label for its MYOPLEX supplement.¹¹ However, the MYOPLEX label is no different from the other specimens as it shows the proposed mark in an identical manner. In any event, as the image of the MYOPLEX label is clearer than the other images of the proposed mark, we reproduce it below:

⁸ *Id.* at TSDR 3 (arrow added).

⁹ January 20, 2022 Office Action at TSDR 1.

¹⁰ July 20, 2022 Specimen at TSDR 1-4.

¹¹ *Id.* at TSDR 5-6.



12

Each of the specimens shows the proposed mark EXPERIMENTAL AND APPLIED SCIENCES displayed in only one location—on one line of a four-line group, all sharing the same color, identical or at least nearly identical font size and style, and left-hand and right-hand justification. As a result of its position in the second line, the proposed mark ends the sentence: “Developed and exclusively manufactured by Experimental And Applied Sciences”. This is immediately followed by Applicant’s address, which is itself followed by Applicant’s phone number and website address. Here, the proposed mark’s close proximity to a physical address, phone number and web address, is one factor indicative of trade name usage. *See e.g., Univar Corp.*, 20 USPQ2d at 1867 (“[I]ts use of a partial address is a factor indicative of trade name usage”).

While it is true that the proposed mark appears in bold and on a separate line, this is not enough to cause the designation to be perceived as more than a mere trade name because the designation also appears in the same color, identical or at least nearly identical font size and style, and justification as all of the surrounding lines of text. Moreover, the graphic scheme employed by Applicant does not serve to set off the proposed mark from the other words around it and therefore it does not create a

¹² *Id.* at TSDR 1 (arrow added).

separate and distinct commercial impression. *Cf., Book Craft, Inc. v. BookCrafters USA, Inc.*, 222 USPQ 724, 727 (TTAB 1984) (“[t]hat the invoices ... plainly show ... service mark use is apparent from the fact that ... the words ‘BookCrafters, Inc.’ appear in larger letters and a different style of print than the address”); *see also* TMEP § 1202.01 and cases cited therein. We agree with the Examining Attorney that “[i]ndeed, applicant would be hard-put to present the term in a **less** prominent manner.”¹³ Because the proposed mark appears in a four-line stack, i.e., with the lines sharing the same left- and right-hand justification, these lines form a visual unit which reinforces the impression that the proposed mark EXPERIMENTAL AND APPLIED SCIENCES should be read in conjunction with the line above it (indicating that the manufacturer is being introduced) and the lines below (providing contact information).

The fact that Applicant does not include a corporate designation, such as “Inc.”, does not detract from its perception as a trade name, particularly where, as here, the designation immediately follows the introduction “Developed and exclusively manufactured by”, which explicitly informs the consumer that what follows is the name of an entity.

Based on the foregoing discussion, we find that Applicant’s designation EXPERIMENTAL AND APPLIED SCIENCES functions solely as a trade name. Use of the notation EXPERIMENTAL AND APPLIED SCIENCES in the manner shown

¹³ 8 TTABVUE 3 (emphasis in original).

in the specimen and substitute specimen does not constitute trademark use and, consequently, the proposed mark is not eligible for registration with the USPTO.

Applicant argues that its EAS mark (shown on each label discussed above) is an acronym for EXPERIMENTAL AND APPLIED SCIENCES.¹⁴ Applicant contends that “[t]he cooperation between Applicant’s [involved mark] and its acronym (which also functions as a trademark) provides a unique connection to [Applicant] and its well-known products.”¹⁵ Applicant contends that this context, i.e., the use of the proposed mark on the back of the label, “implies that the EAS goods [are] connected to EXPERIMENTAL AND APPLIED SCIENCES, which is owned by [Applicant].”¹⁶

We disagree. The designation at issue in the present appeal is EXPERIMENTAL AND APPLIED SCIENCES, not EAS. Applicant’s attempt to rely on a different mark to establish evidence of acceptable trademark use of its involved mark is not persuasive. Moreover, as the Examining Attorney points out, Applicant’s own specimen shows that EAS is an initialism for “Energy Athletics Strength,” as shown below, which is inconsistent with Applicant’s argument and, therefore, casts doubt on it:

¹⁴ 6 TTABVUE 9-10; 9 TTABVUE 4.

¹⁵ 6 TTABVUE 10.

¹⁶ *Id.*



For the reasons discussed above, we find that as used by Applicant on its original and substitute specimens, the proposed mark would be perceived by purchasers and prospective purchasers as a trade name serving to identify the entity developing and manufacturing the supplements rather than as a mark which identifies and distinguishes Applicant's goods from those of others. As the Trademark Act does not provide for the registration of a trade name, *see e.g., Letica Corp.*, 226 USPQ at 277, we affirm the refusal to register. 15 U.S.C. §§1051, 1052, and 1127.

III. Decision

The refusal to register Applicant's mark is affirmed.

¹⁷ July 20, 2022 Specimen at TSDR 1.