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THIS DISPOSITION IS NOT  
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Paper No. 39  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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The Synergy Company of Utah, LLC  
v.  
IVC Industries, Inc.  
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Cancellation No. 26,899  
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Harold V. Stotland, J. Terry Stratman and Daniel P. Lanciloti of Seyfarth Shaw for The Synergy Company of Utah, LLC.

John M. Rannells and Stephen L. Baker of Baker & Rannells for IVC Industries, Inc.

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Before Hanak, Bucher and Drost, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

The Synergy Company of Utah, LLC (petitioner) seeks to cancel a registration owned by IVC Industries, Inc. (respondent). The registration is for the mark SYNERGY as applied to "Dietary Food Supplement - Namely, Chewable Wafers and Tablets Containing Honeybee Pollen," in International Class 5.<sup>1</sup>

The original petition for cancellation set out several grounds for cancellation. In response to

petitioner's motion for summary judgment on the ground that respondent had abandoned its mark, respondent admitted that its predecessor-in-title, C.C. Pollen, had abandoned the mark through non-use, and hence, that respondent could not have gotten any rights as a result of the assignment. This also makes moot the question of whether C.C. Pollen, the original registrant herein, abandoned its rights in the mark as a result of uncontrolled licensing. Accordingly, on December 31, 1998, the Board granted the petition to cancel in part. However, despite the fact that the mark was to be cancelled on the ground of abandonment, petitioner elected to proceed, and on July 3, 2000, this Board denied petitioner's motion for summary judgment as well as respondent's cross-motion for summary judgment on the issue of genericness. Hence, the sole issue remaining before us at final judgment herein is whether or not the term SYNERGY, respondent's mark as currently registered on the Principal Register, is capable of identifying and distinguishing the source of respondent's dietary food supplement.

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<sup>1</sup> Reg. No. 1,297,341 issued to C.C. Pollen Company on September 25, 1984; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

The record consists of a copy of respondent's registration, the testimony of petitioner's witness, Nancy Faust, with the exhibits thereto, and petitioner's notice of reliance under Rule 2.122(e) with the materials submitted thereunder.

Petitioner argues that the word SYNERGY is generic as designating a class of dietary or nutritional supplements with ingredients which work cooperatively. Petitioner argues that the term SYNERGY does not serve as a trademark to distinguish IVC's nutritional supplements and vitamins from nutritional supplements and vitamins sold by others. Rather, petitioner argues that members of the relevant public, i.e. purchasers and potential purchasers of nutritional supplements and vitamins, understand the term SYNERGY to have its ordinary generic meaning when used in connection with nutritional supplements and vitamins. As further proof that the term has lost its trademark significance when it is used in connection with dietary supplements, petitioner points to widespread use by third-party competitors of the term "synergy" in the precise sense of its common dictionary meaning.

Respondent, on the other hand, argues that petitioner has failed to meet its challenging burden in

demonstrating that the term "synergy" is generic for the involved goods based upon the evidence in the record considered in the context of existing case law dealing with genericness.

In its reply brief, petitioner clarifies that it is not its position that the term "synergy" has become a generic name for a class of vitamins/supplements. Rather, petitioner argues that the common dictionary definition of the term "synergy" is consistent with the contextual connotations of this word as widely used by third parties, and that the term "synergy" is often used to describe the central aspect or characteristic of certain vitamins/supplements, and that, hence, under existing case law, it has become generic. In this regard, petitioner argues that respondent has applied much too narrow a view of genericness.

As our principal reviewing court has stated:

...[D]etermining whether a mark is generic ... involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?

H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986). The critical issue (both

before and after the 1984 Trademark Clarification Act) in genericness cases such as this one is whether members of the relevant public primarily use or understand the term sought to be registered to refer to the genus or category of goods in question. In re Montrachet S.A., 878 F.2d 375, 376, 11 USPQ2d 1393, 1394 (Fed. Cir. 1989); In re Merrill Lynch, Pierce, Fenner, & Smith, Inc., 828 F.2d 1567, 1570, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); Dan Robbins & Assocs., Inc. v. Questor Corp., 599 F.2d 1009, 1014, 202 USPQ 100, 105 (CCPA 1979); and In re Recorded Books, Inc., 42 USPQ2d 1275 (TTAB 1997). Evidence of the relevant public's perception of a term may be obtained from any competent source, including newspapers, magazines, dictionaries, trade journals, catalogs and other publications. In re Leatherman Tool Group, Inc., 32 USPQ2d 1443, 1449 (TTAB 1994), citing In re Northland Aluminum Products, Inc., 777 F.2d 1566, 227 USPQ 961, 963 (Fed. Cir. 1985). Finally, we note that in the context of this *inter partes* proceeding, it is petitioner's burden to prove the genericness of this matter by a preponderance of the evidence. Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551, 1554 (Fed. Cir. 1991)

We turn then to the first question posed by Marvin Ginn: what is the genus of goods at issue? Respondent's identification of goods is "Dietary Food Supplement - Namely, Chewable Wafers and Tablets Containing Honeybee Pollen." In the language of Marvin Ginn, the legal genus of applicant's goods herein is merely "dietary food supplements," or perhaps giving petitioner the benefit of the doubt, "dietary or nutritional food supplements having ingredients which work cooperatively."<sup>2</sup>

We turn next to the second question posed by Marvin Ginn: the question of how the term "synergy" will be understood by members of the relevant public, primarily with regard to this class or genus of goods?

When seeking out evidence on genericness, dictionaries are a good beginning source. Mil-Mar Shoe Co. v. Shonac Corp., 75 F.3d 1153, 37 USPQ2d 1633, 1637 (7<sup>th</sup> Cir. 1996). The parties have agreed on the dictionary definition of "Synergy" as "combined action or operation." Petitioner argues that based upon thousands of Internet hits in connection with nutritional supplements and vitamins using the word "synergy" in the

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<sup>2</sup> This seems analogous to finding within the broad category of "sprinklers for fire protection" a narrower category of "sprinklers for fire protection of attics." In re Central Sprinkler Co., 49 USPQ2d 1194 (TTAB 1998).

ordinary dictionary sense of the word, we should conclude that members of the relevant public understand this to refer to dietary or nutritional supplements having ingredients which work cooperatively.

Respondent claims one cannot draw such a conclusion from the dictionary definition:

The fact that the word has a dictionary meaning does not make it generic ... especially so here where the dictionary definition does not equate the term "synergy" with dietary food supplements and does not even imply that the word "synergy" means or denotes a class of goods generally referred to as dietary food supplements.

We take judicial notice of several other unabridged dictionary listings of various forms of the words "synergism," "synergist," "synergy," etc., as follows:

**synergism:** ... 2: cooperative action of discrete agencies (as drugs...) such that the total effect is greater than the sum of the two or more effects taken independently...

**synergist:** ... 2: an agent that increases the effectiveness of another agent when combined with it: as a: a drug that acts in synergism with another ...

**synergistic:** ... 2 a: having the capacity to act in synergism (~ drug)...

**synergy:** combined action or operation<sup>3</sup>

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<sup>3</sup> Previous four entries are taken from Webster's Third New International Dictionary of the English Language, Unabridged, 2320 (1993).

**synergism:** ... 2: the joint action of agents, as drugs, that when taken together increase each other's effectiveness...

**synergist:** ... 2: *Chem., Pharm.* Any admixture to a substance for increasing the effectiveness of one or more of its properties...

**synergy:** 1: combined action or functioning; synergism; 2: the cooperative action of two or more muscles, nerves, or the like. 3: the cooperative action of two or more stimuli or drugs.<sup>4</sup>

It is clear from these dictionary entries that in addition to the general meaning of "combined action," the term "synergy" has particular connotations specific to chemical, herbal or pharmaceutical agents, with repeated references to "drugs" in particular. From these dictionary entries alone, we can conclude that "synergy" appears to be a merely descriptive term for these goods. However, one could hardly examine these dictionary entries alone and conclude that the term "synergy" is generic for these products. Hence, we turn next to examine the actual uses from the Internet that petitioner's counsel had properly made of record. In helping us to determine the relevant public's perception of the term "synergy," petitioner has provided evidence of widespread use by third parties. These Internet "hits" include newspapers articles, journal articles,

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<sup>4</sup> Previous three entries are taken from The Random House Dictionary of the English Language, 2<sup>nd</sup> Ed. Unabridged.

magazines, product advertisements, research articles and other written publications.<sup>5</sup> Examples of these uses include entries such as:

2001 FORMULA: "... 2001's properly balanced formula ... guarantees the greatest **synergy** between the nutrients. This **synergy** assures that you will receive greater benefits and optimum protection."  
(petitioner's Ex. 1)

SYNERGY PAK: "... The four Life Plus products contained in the SYNERGY PAK work together **synergistically** to help you start your nutritional support program... TVM-49: ... The herbs and associated **synergistic** nutrients it contains helps (sic) ensure a broad spectrum nutritional base...  
(petitioner's Ex. 2)

SYNERPRO NUTRITION: Dr. James Scala's SynerPro nutritional products have two distinct advantages compared to similar products: harmony and **synergy**. With SynerPro, you receive nutrients in correct proportion with each other. Balanced formulas allow the body to obtain maximum nutrition. Equally important is the resultant **synergy** when essential vitamins are combined with the nutritious antioxidant SynerPro concentrate.  
(petitioner's Ex. 4)

SELENIUM: ... In **synergy** with vitamin E, selenium promotes normal growth and fertility, and improves the function of certain energy producing cells.  
(petitioner's Ex. 6)

SKALI - SPIRULINA: ... Our bodies will not metabolise synthetic vitamins as completely and properly as whole foods. Furthermore,

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<sup>5</sup> Consistent with respondent's reservations, these trial exhibits drawn from the Internet are not being used to prove the truth of the statements made therein.

whole foods allow the **synergy** of the multiple natural supplements that refined and isolated vitamins cannot... (petitioner's Ex. 7)

Nutrition - Beta carotene: ... A well-nourished body should have a daily supply of many anti-oxidant nutrients, including vitamin C, E, beta carotene and a host of others found in fruits and vegetables. They each do different things, but together they produce a powerful **synergy**... (petitioner's Ex. 12)

Fort Lauderdale - Around town: [Dr. Shirley J. Robinson will] share research findings related to **synergy**, bioavailability and who food nutrition and differentiate between whole food procedures and fragmented nutritional supplements. (petitioner's Ex. 14)

Ayurvedic herbal food supplements: Ayurveda is equally rigorous about **synergy**, combining specific herbs into complex formulas for greatest potency, assimilation and overall results. Single-ingredient formulas like vitamins or single herbs balance only one area of life while they unbalance others... (petitioner's Ex. 15)

Of the more than one-hundred Web sites that petitioner has drawn from Internet searches and placed into the record, there are examples showing uses of the term "Synergy" in connection with nutritional supplements and vitamins where the use is: as a trademark; within the corporate trade names of various companies operating in the field of vitamins and dietary food supplements; uses of the term in text in a most suggestive or descriptive sense (the majority of those shown above fit

this category); and yet others where the exact nature of the use of the term remains somewhat ambiguous.

The somewhat different contexts in which these discussions of synergy take place include the helpful interaction of two or more separate ingredients in dietary supplements, the healthy advantages of eating plant-foods over taking mega-vitamins and nutritional supplements, as well as relationships between related fields of endeavor (e.g., nutrition and culinary science, nutrition and weight training, etc.).

Given the many different contexts in which the term "synergy" appears in relationship to dietary food supplements, we find the record does indeed reflect widespread use of this term by competitors in connection with dietary and nutritional products that contain cooperatively acting ingredients, exactly as petitioner alleges.

As with the dictionary entries, it is clear from these Internet entries that "synergy" is indeed a highly descriptive term for these goods.<sup>6</sup> On the other hand, we are still unable to conclude from the nature of these

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<sup>6</sup> Respondent appears to concede descriptiveness on this record: "At best, the term "synergy" refers to a desired effect within a system while not identifying how the combined action of operation works or what its actual effect is..." (Respondent's brief, p. 5).

uses that the term "synergy" is generic for these products.

Although petitioner cites repeatedly to the holding in Mil-Mar Shoe, for support that the term herein "is being used in a common or generic sense," (37 USPQ2d at 1638), the evidence in that case involved more than 8000 retail stores that actually used the word "warehouse" in their trade names. The court found that:

The union of "shoe(s)" with "warehouse" in the names of the Mil-Mar and Shonac stores signifies a specific type of retail store and distinguishes that store from two other categories of stores: other shoe stores and other warehouse stores.

Similarly, respondent points out that the instant record does not have evidence as persuasive as that in Stromgren Supports Inc. v. Bike Athletic Co., 43 USPQ2d 1100 (TTAB 1997) [the term "compression" in connection with compression (or support) shorts, as used by respondent, petitioner, third-party competitors and as used in the trade press demonstrate this to be a class of product]. We agree with respondent that the evidence in the current record is not similarly compelling.

We agree with petitioner that the word "synergy" is used frequently in connection with nutritional supplements. In the text of Web pages, the word

"synergy" is overworked with repeated references to a varying and amorphous collection of effects desired from nutritional supplements. To the extent the record suggests that the word "synergy" appears in this field within a variety of common law trade names and trademarks, it may well appear that this has to be seen as a relatively weak source-identifier in this field. However, finding that a term is overused, diluted or weak in a particular field is quite different from concluding that the term is being used in a "common or generic sense."

Petitioner also argues that the term is used in these Internet excerpts to describe the central or most important feature of respondent's product. Petitioner analogizes to the use of ATTIC as a category of sprinklers for fire protection of attics. In re Central Sprinkler Co., 49 USPQ2d 1194 (TTAB 1998). Yet Central Sprinkler stresses the need to focus on "whether members of the relevant public primarily use or understand the term sought to be registered to refer to the genus (category or class) of goods in question" and warns that such determinations "must be made on a case-by-case basis in light of the particular designation ... and the record

in the application which is under consideration." 49  
USPQ2d at 1196-1197.

As was the case with "**compression** shorts," so it is clear from Central Sprinkler that "**attic** sprinklers" make up a definitive class of sprinklers. A much earlier decision found "sudsy" to be generic because it was "an adjective, half of a common descriptive name [**sudsy ammonia**]." Roselux Chemical Co., Inc., et al. v. Parsons Ammonia Company, Inc., 132 USPQ 627 (CCPA 1962). See also Ethicon, Inc. v. Deknatel Inc., 183 USPQ 503, 505 (TTAB 1974) [the term COTTONY is used (on non-cotton sutures which are treated to have the characteristics of cotton sutures) by respondent in such manner that it will be considered a part of the name of the product "**cottony sutures**"].

When comparing or contrasting reported decisions in this area, it is often instructive to note the specific part of speech of any allegedly generic term. Most of the cases reported above dealing with allegations of generic matter involve adjectives modifying nouns, which generic nouns themselves are not part of the mark. By contrast, the instant case involves a noun form (synergy) that alone does not appear to be a common descriptive term, and that does not combine logically or easily with

broad categories like "vitamins" or "supplements" to create a new, combined, common descriptive term or name (e.g., "Synergy vitamins" or "Synergy Supplements"). In fact, despite the widespread usage of the word "synergy" throughout this record in newspaper articles, in medical reviews and in advertisements in connection with dietary supplements, were "Synergy" to be used in the context of "Synergy vitamins" or "Synergy dietary supplements," the word SYNERGY in such a context maintains the look and feel of a source indicator.

In short, petitioner's primary argument from this record is that "synergy" describes a "central aspect" of the goods. Let us assume *arguendo* that the textual evidence put forward by petitioner demonstrates that the synergistic effect of supplements/vitamins is a central or critical feature of these products. Nonetheless, in making a determination as to "incapability," our primary reviewing court reversed this Board for finding that a descriptor for a "central characteristic" of services was incapable. See *In re Seats, Inc.*, 225 USPQ 364, 367-368 (Fed. Cir. 1985).

The Board did not find that SEATS was generic. Nor could it have so found. The term "seats" may be generic in relation to chairs or couches or bleachers. It is clearly not generic to reservation

services. Contrary to the Board's statements, Seats is not selling seats, as would for example a furniture merchant, but is selling a reservation service... It is equally clear that SEATS is not "the common descriptive name" of reservation services ... That is true when purchasers of the services will be seated and when "standing room" is involved. Nor did the Board find that SEATS was the common descriptive name of the services involved ... On the contrary, the Board recognized that issuance of the registration here sought would not deprive others of the use of "seats" in connection with such services. Competitors would remain free to advertise, "seats are available," "balcony seats -- \$12.00," "reserve your seats through us," etc, and theatres may employ "SEATS" in advertisements and on box offices and ticket windows.

The instant case is also analogous to use of the descriptive term "Tasty" for salad dressing - a term that in this context may well be capable of acquiring distinctiveness over a period of time. See Henri's Food Products Inc. v. Tasty Snacks Inc., 2 USPQ2d 1856 (7<sup>th</sup> Cir. 1987).

[U]nlike "light beer," "tasty salad dressing" is not a kind, sort, genus or subcategory of salad dressing. Rather, "tasty" ... describes a quality found in many genres of salad dressing. It is not an adjective which in any way serves to classify the noun to which it is attached ... The term "tasty" describes the quality of the salad dressing. There really can be no suggestion that "tasty dressing" is a kind or type or subcategory of dressings, such as, for example, French dressing.

We have concluded that "synergy" is an overworked concept in the field of nutritional supplements, based solely upon the frequent occurrences on the Internet. However, by contrast, the actual number of subsisting federal registrations containing this term are relatively few, and in many cases appear to have been registered correctly on an individual basis and should arguably be able peacefully to coexist on the register.<sup>7</sup>

Finally, we also agree with respondent who points out that there seems to be an obvious contradiction inherent in petitioner's argument which points to repeated uses of the word "synergy" in the trademarks of third-party competitors. Respondent queries how is it that the use of the term "Synergy" as a trademark is evidence of generic usage? To the contrary, to the extent third-party registrations appear to employ this term in composite marks, it appears to be functioning as a source indicator.<sup>8</sup> We find that registrations such as

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<sup>7</sup> The third-party registrations suggest that the addition of different wording to individual SYNERGY roots are sufficient to distinguish such marks from each other, especially where the additional wording forms a unitary expression that creates a commercial impact readily distinguishable from SYNERGY alone and from other SYNERGY registered marks. Cf. Borden, Inc. v. York Wallcoverings, Inc., 207 USPQ 792 (TTAB 1980).

<sup>8</sup> Reg. No. 2,250,542, **TRIBULUS SYNERGY**, for nutritional supplements containing tribulus terrestris, TRIBULUS disclaimed apart from the mark as shown

these corroborate the fact that members of the relevant public consider the term SYNERGY to be capable of achieving trademark significance.

Decision: While we find that petitioner has not shown by a preponderance of the evidence that the term SYNERGY is generic for respondent's goods, the petition for cancellation is granted inasmuch as respondent's purported predecessor-in-interest had abandoned the mark through non-use, and hence, respondent received no property rights as a result of the assignment. Accordingly, Registration No. 1,297,341 will be canceled in due course.

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Reg. No. 2,480,439, **AJUNE THE CENTER FOR BEAUTY SYNERGY**, for *inter alia*, nutritional supplements, having a disclaimer of THE CENTER FOR BEAUTY  
Reg. No. 2,209,950, **SYNERGY PLUS**, for vitamins and food supplements [no disclaimer].