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Mailed:  
March 13, 2006  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nutraceutical Corporation

Serial No. 78975072

Andrea Anderson and Scott S. Havlick of Holland & Hart LLP  
for Nutraceutical Corporation.

Andrea Koyner Nadelman, Trademark Examining Attorney, Law  
Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Walters, Bucher and Kuhlke, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Nutraceutical Corporation seeks registration on the  
Supplemental Register of the term **FRESH ORGANICS** for goods  
and services identified in the application, as amended, as  
follows:

Fresh fruits and vegetables; living natural  
plants and live flowers; unprocessed  
cereals; unprocessed herbs; unprocessed  
beans; unprocessed rice; unprocessed grains  
for eating; pet food; unpopped popcorn; bulk  
fresh nuts; raw nuts" in International Class  
31; and

Retail health food store services; retail bakery shops" in International Class 35.<sup>1</sup>

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this designation based upon the ground that this term is incapable of functioning as a trademark for many of the International Class 31 goods as well as the retail health food store services, set forth above. Section 23 of the Trademark Act, 15 U.S.C. § 1091.

Applicant and the Trademark Examining Attorney have fully briefed the case, but applicant did not request an oral hearing. We affirm the refusal to register.

As a preliminary matter, we note that the Trademark Examining Attorney has objected to a declaration signed by Leslie M. Brown, Jr., which was attached to applicant's

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<sup>1</sup> The underlying application on the Principal Register (assigned Application Serial No. 78108722) was filed on February 14, 2002 based upon applicant's allegation of a *bona fide* intention to use the mark in commerce. The application included goods and services in International Classes 5, 29, 30, 31, 32, 33 and 35. In March 2003, at applicant's request, the goods in International Class 31 and the services in International Class 35 were divided from the original application and were placed into a divisional application, Serial No. 78975072, which is the subject of this appeal. At the same time, applicant submitted an Amendment to Allege Use (AAU) in connection with the divisional application and amended the application to seek registration on the Supplemental Register. The AAU was supported by specimens consisting of photographs of a shopping basket and the side of a delivery truck, and the AAU alleged first use anywhere and use in commerce in both classes of goods and services at least as early as August 31, 2002.

appeal brief. She argues that this declaration represents an untimely attempt by applicant to qualify or negate one of its earlier responses.<sup>2</sup> By contrast, applicant argues that the Board should consider this declaration because it will result in no prejudice to the position of Trademark Examining Attorney, it will assist the Board in its determination on the issue of genericness, and allowing it into the record is consistent with the Board's more permissive stance with regard to evidentiary matters during *ex parte* appeals. See TBMP § 1208.

We agree with the Trademark Examining Attorney, and hence, have not considered this declaration.<sup>3</sup> The record in the application is complete prior to the filing of an

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<sup>2</sup> Responding to specific questions posed by the Trademark Examining Attorney, in its communication of August 26, 2004, applicant offered the following statements:

"1. Some, but not all, of the products supplied by Applicant in its retail health food stores are organic products.

"2. Yes, Applicant features fresh produce in its retail health food stores.

"4. Yes, some of the products identified in International class 31 are organic."

According to the Trademark Examining Attorney, these responses confirm that applicant's services feature the sale of "fresh organics."

<sup>3</sup> We hasten to add that even if we had considered this declaration, it would not have changed the outcome herein. The issue of the genericness of the applied-for term in connection with retail health food store services would not be decided differently were we to find that only 30% of the gross revenues from applicant's stores (rather than some other, indeterminate portion) is attributable to the sale of fresh fruits and vegetables.

appeal, and generally the Trademark Trial and Appeal Board will not consider additional evidence filed with the Board by the appellant or by the Trademark Examining Attorney after the appeal is filed. See 37 C.F.R. § 2.142(2)(d).

We also note at the outset that the Trademark Examining Attorney has conceded that the applied-for term is nothing more than merely descriptive for certain of the listed goods and services, namely the "living natural plants and live flowers," "pet food" and "retail bakery shops" and specifically withdrew the refusal as to those goods and services. Hence, irrespective of the outcome of our decision on the question of the genericness of the applied-for term when used in connection with the majority of the listed goods and services, the term FRESH ORGANICS will issue, in due course, as a registration on the Supplemental Register in connection with "living natural plants and live flowers," "pet food" and "retail bakery shops."

**Summary of the arguments**

Applicant argues that: the limited evidence in this record is insufficient to sustain the Trademark Examining Attorney's heavy burden of proving that consumers use and understand the term "Fresh Organics" as a generic name for

fresh fruits and vegetables rather than as a merely descriptive adjective for such goods; the only potentially relevant evidence of generic use of the term "fresh organics" relates solely to fresh fruits and vegetables, and not to any other type of food products; and that the refusal with respect to the retail health food stores services should be reversed inasmuch as fresh fruits and vegetables constitute only a small percentage of the products offered in applicant's retail stores.

By contrast, the Trademark Examining Attorney contends that a wide variety of products can be considered "fresh organics" if they contain certain features, namely that they are fresh, rather than processed foods, and that they are organically grown. She contends that the record shows this term to be sufficiently narrow and comprehensible to delineate a class or genus of goods and services. She takes the position that whenever the combination of two generic terms is such that each term retains its generic significance, then the combined expression is generic, and thus, incapable of denoting source. She concluded that when these two words are combined, they create a unitary term that is recognized in the food industry as a particular genus of goods and retail services. She

disagrees with applicant's criticisms of the record, arguing that there is clear and compelling evidence in the record demonstrating that the public understands "fresh organics" primarily to identify a genus or class of the goods and services identified in the instant application.

**The law of genericness**

Applicant is correct in pointing out that the burden on the Trademark Examining Attorney to demonstrate genericness is quite high. The critical issue in genericness cases is whether members of the relevant public principally use or understand the term sought to be registered to refer to the category or class of goods and services in question. In re Recorded Books, Inc., 42 USPQ2d 1275 (TTAB 1997); and In re Women's Publishing Co. Inc., 23 USPQ2d 1876, 1877 (TTAB 1992). Our primary reviewing court has set forth a two-step inquiry to determine whether a mark is generic: first, what is the genus (category or class) 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 (category or class) of goods or services? H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

With respect to genericness, the Office has the burden of proving genericness by "clear evidence" thereof. In re Merrill Lynch, Pierce, Fenner and Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

To be found generic, a term does not have to specifically name a *narrow* category as long as the goods or services are encompassed within the broad term. For example, the Board held that the term ANALOG DEVICES named a category or class of devices having analog capabilities and was generic for a number of products such as operational amplifiers, power supplies, converters, transducers, switches, etc., some of which were in the nature of analog devices. See In re Analog Devices, Inc., 6 USPQ2d 1808 (TTAB 1988), aff'd in a decision marked non-citable as precedent, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989). In response to applicant's argument that the term ANALOG DEVICES is a nebulous and vague one, the Board stated, in In re Analog Devices at 1810:

However, while we readily concede that the category of products which the term "analog devices" names encompasses a wide range of products in a variety of fields, we do not believe this fact enables such a term to be exclusively appropriated by an entity for products, some of which fall within that category of goods. For example, while terms such as "digital devices," "computer

hardware," "computer software," and "electronic devices," just to name a few, may be broad and even nebulous terms, nevertheless, these terms may not be exclusively appropriated but must be left for all to use in their ordinary generic sense.

### **ANALYSIS**

We turn then to an analysis of how the law on genericness applies to the facts of this case. Initially, we find that the relevant public for these goods and services would be ordinary consumers, as there is no evidence that the consumers of applicant's goods and services constitute a more limited group.

#### **The Trademark Examining Attorney's evidence**

In support of her position of genericness for the affected goods and services,<sup>4</sup> the Trademark Examining Attorney referenced dictionary excerpts for each of these words.<sup>5</sup> In the Office action of February 2, 2003, the

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<sup>4</sup> That is, all the listed goods and services other than "living natural plants and live flowers," "pet foods" and "retail bakery shops."

<sup>5</sup> "Fresh" is defined, *inter alia*, as "adjective ... 3. Recently made, produced or harvested; not stale or spoiled; ..."; and "organic" is defined, *inter alia*, as, "adjective ... 3.a. Using or produced with fertilizers of animals or vegetable matter, using no synthetic fertilizers or pesticides: *organic gardening; organic vegetables*. b. Free from chemical injections or additives, such as antibiotics or hormones: *organic chicken*. c. Simple, healthful, and close to nature: *an organic*

Trademark Examining Attorney also provided evidence of prior disclaimer practice concerning the words "Fresh" and "Organics" as seen in composite marks in third-party registrations on the principal register, on the principal register under Section 2(f) and on the supplemental register of the United States Patent & Trademark Office, which registrations cover food products and services similar to those of applicant. She also submitted excerpts from the LEXIS/NEXIS database and from the Internet.

According to the Trademark Examining Attorney, a search on January 31, 2003 of the Lexis/Nexis database for the term "FRESH ORGANICS" resulted in 2,187 hits. Several newspaper excerpts she submitted for the record used the term "fresh organics":

HEADLINE: ***Organics 101***

"Among 30 or so ***fresh organics***, there were nine individual peaches (\$1.26 a pound), four peppers (\$2.04 a pound), and four cucumbers (\$1.77 a pound). Organic red potatoes (97 cents a pound) and onions (\$1.10 a pound for yellow; \$1.13 for red) are sold from cartons.

"Prices for ***organics*** often were more than double those of the conventional crops, in

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*lifestyle.* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1992).

part because the conventional items were so inexpensive."<sup>6</sup>

HEADLINE: "**Beetz in tha Hood: Nonprofit peddles cheap, fresh organics where supermarkets fear to tread.**"<sup>7</sup>

Several of the stories excerpted by the Trademark Examining Attorney but not reproduced herein also refer to applicant and its organic foods markets.

The majority of the excerpts from the LEXIS/NEXIS database introduced into the record with the Trademark Examining Attorney's Office actions of February 3, 2003, February 25, 2004, and October 18, 2004, use the term "fresh organic" (singular) as a modifier, in expressions such as "fresh organic produce" (Akron Beacon Journal, Philadelphia Inquirer, The Providence (RI) Journal-Bulletin), "fresh organic products" (Albuquerque Journal (New Mexico)), "fresh organic food" (The Seattle Times, Bangor Daily News, The Columbian (Vancouver, Washington)), "fresh organic food market" (Press Enterprise (Riverside, CA)), "fresh organic items" (Supermarket News, The Columbian (Vancouver, Washington)), "fresh organic fruits and vegetables" (The Californian (Salinas, CA)), "fresh

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<sup>6</sup> Philadelphia Inquirer, September 13, 2004, article by Marilyn Marter.

<sup>7</sup> East Bay Express, Mar 12, 2003, article by Jonathan Kauffman, discussing small food stands set up outside schoolyards in South and West Berkeley selling at cost "beautiful organic edibles."

organic vegetables" (The Boston Herald), "fresh organic herbs" (The New York Times), "fresh organic broccoli" (San Antonio Express News), "fresh organic greens, onions, sweet potatoes, leeks, and herbs" (The Atlanta Journal-Constitution), "the FDA's fresh organic labeling laws" (Rocky Mountain News), etc.

The excerpts the Trademark Examining Attorney placed into the record from her Internet searches demonstrate use of the phrase "fresh organics," where "organics" is a noun modified by "fresh," including the following:

SOUTHWEST MICHIGAN

**"Going Organic:** Nutritional Choices for Kids," by Elizabeth K. Johnson, appearing in September/October 1998 issue of Great Lakes Family Magazine:

...

**Benefits of organics**

The first year for a child is so important nutritionally, and I believe in eating as much organic food as possible," said Susan Stuart, a registered nurse and certified health education specialist and wellness consultant at The Fetzer Institute in Kalamazoo. She advocates feeding children of all ages organic foods as often as possible. In cases where **fresh organics** aren't available, Stuart said that by thoroughly washing and scrubbing fruits and vegetables, most of the outside waxy residue and some of the pesticides can be removed ...

<http://www.glfamily.com/html/so-98/so-98-expect.html>

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NEW YORK CITY

Candle Café has wonderful food and service. Has delicious, **fresh organics** from local farmers. Cozy warm atmosphere.

CD  
New York, NY  
USA

<http://www.veg dining.com/GetRest.cfm?rk=US-NY-NY-CANDL>

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SOUTH FLORIDA

Glaser Organic Farms: *South Florida's own certified organic grower, shipper, and wholesaler, specializing in dehydrated and organic raw and living foods*

... You can select from our retail catalog and from our large variety of our **fresh organics** produce ...

<http://www.thinkholistic.com/comdir/cditem.cfm?NID=59>

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FLORIDA

James Jul 27 2001  
Glad to see Global Organics listed!! They are a truly amazing company. I used to be a produce buyer for a large Florida Health Food Chain. They were honest, knowledgeable, personable and ALWAYS took the extra step. Once, I told them that my son was a freshmen in college in Georgia and missed the **fresh organics** I would bring home. Would you believe they set up regular "care" packages for my son (I don't believe they normally offer this service)? Global Organics is run by its owners Mitch and Dennis. Everyone needs to get their **organics** from them ...

<http://www.greenpeople.org/viewcoms.cfm?memid=2860>

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WASHINGTON STATE

The Wild Iris Inn ...  
Savory delights extend to Le Jardin, the Inn's intimate and elegant dining room where chef Drew Jackson appeases the most discerning palate with his fresh bounty of Northwest fare. He attributes his culinary magic to the use of **fresh organics** that he handpicks from neighboring farms....

[http://honeymoons.about.com/cs/washington/a/washington\\_2.htm](http://honeymoons.about.com/cs/washington/a/washington_2.htm)

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SAN FRANCISCO BAY AREA

*Radical History* by Carly Earnshaw

What he told me about the Black Panthers held true for many groups involved in 1960s and '70s Bay Area food politics. The buying clubs, consumer co-ops, and food giveaways provided people access to healthy and affordable food, which was a political necessity in an era when grocery stores preferred to stock Cheese Whiz and TV dinners instead of tofu and **fresh organics**. But people invested in the food projects also wanted to strengthen their communities and set the stage for revolution.

[http://www.bestofthebay.com/2003/e\\_classics.php](http://www.bestofthebay.com/2003/e_classics.php)

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VANCOUVER, BRITISH COLUMBIA, CANADA

"Geo [Green Earth Organics] will be providing organic fruits and veggies to all the actors in 'This City Of Angels'; as well as provide **fresh organics** for the opening night party..."

<http://www.greenearthorganics.com/>

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VANCOUVER AND TORONTO, CANADA

From the Pacific to the Maritimes, Pro Organics is Canada's largest distributor of **fresh organics** foods, shipping daily from distribution centers in Vancouver and Toronto. Pro Organics represents over 500 certified organic farms worldwide, from Canada to the USA, Central and South America, Mexico, Europe, Australia and New Zealand. It serves over 1,000 accounts, from supermarket chains to independent retailers, natural food stores, home delivery companies, co-operatives and foodservice providers.

<http://www.vancitycapital.com/clients/commercial/proorganics/>

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VANCOUVER ISLAND, BRITISH COLUMBIA, CANADA

Green House Market ... offers fresh fish market, sushi and **fresh organics**.

<http://www.uclueletinfo.com/>

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PRINCE EDWARD COUNTY, ONTARIO, CANADA

What to do in October: TASTE! A celebration of regional cuisine

Come and enjoy sample-sized portions of delicious gourmet dishes, wines, beers and ciders, **fresh organics** and mouthwatering sweets all prepared from our regional produce.

<http://www.pec.on.ca/>

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CARIBBEAN COAST OF MEXICO

The Centro Ecológico Akumal, "Cooperativa Orgánica is going into gear with increased **fresh organics**, more than 1,000 kilos per week ..."

<http://ceakumal.org/>

We note that the excerpts of the term FRESH ORGANIC(S) from the Internet and the NEXIS database that the Trademark Examining Attorney Examining Attorney placed into the record are a mixed bag. As noted by applicant, some of the evidence placed into the record by the Trademark Examining Attorney does not point unquestionably toward genericness. Several of the pluralized examples of the combined term appear to be references to applicant. A meaningful percentage of the occurrences of the term "Fresh Organics" on the Internet would seem to represent English language sites reflecting usages outside the United States, for example, in the UK, New Zealand, Australia, and particularly, in Canada. Apart from the issues surrounding the probative value of foreign websites, these do serve to

show that the usage of this term seems fairly widespread among English-speaking countries. In context, substantially all the U.S. and foreign references have exactly the same connotation - namely, healthy foods not conventionally grown and not processed.

### **“Fresh Organics” used on foreign websites**

One of applicant's arguments against the Trademark Examining Attorney's evidence of genericness is that there is no probative value in any of these latter uses (shown above) drawn from foreign websites. See In re Organik Techs, Inc., 41 USPQ2d 1690, 1692 at n.3 (TTAB 1997) [refusing to consider excerpts from foreign news sources absent evidence of circulation or readership in the United States]. Applicant argues that these obscure websites are “discrete, foreign Internet websites originating in Canada, Mexico, Australia, the United Kingdom and New Zealand,” and that the record contains no evidence that any consumer in the United States has ever viewed any of these sites, or that the information contained on these sites was “broadcast” and picked up by any U.S.-based websites that might be viewed by U.S. consumers. See In re Cell Therapeutics, 67 USPQ 2d 1795 (TTAB 2003) [Board considered newswire stories as evidence of genericness, reasoning that

these stories are often "broadcast" on the Internet, and that many U.S. consumers consult Internet-based news media on a daily basis].

The Trademark Examining Attorney argues that:

... the Internet has created a global community, and consumers in the United States have access to websites created nearly everywhere on the planet. For this reason, evidence of use of a term in an English language website clearly illustrates the significance of a term to United States consumers. Computer users will not summarily dismiss a website simply because the top-level domain does not reference an [Internet] address in the United States.

As noted by the Trademark Examining Attorney, in some circumstances, web pages posted abroad may be considered probative evidence on how a term will be perceived. See In re Remacle, 66 USPQ2d 1222 (TTAB 2002) [Board found that professionals in certain fields, such as medicine, engineering, computers and telecommunications would be likely to monitor developments in their fields without regard to national boundaries, and that the Internet facilitates such distribution of knowledge, so evidence from an English language website in the UK held admissible]. However, applicant argues that in this case, the foreign websites are of no probative value because there is no evidence that U.S. consumers of groceries

regularly consult any foreign websites in making their grocery purchasing decisions.

We find that average consumers in the United States may well link to foreign websites for informational purposes when researching products they intend to purchase, as was the case in In re King Koil Licensing Company, Inc., \_\_\_ USPQ2d \_\_\_ (Serial No. 76565486, TTAB March 2, 2006). However, while we do not discount entirely the impact of the foreign websites in this case, we find them of much more limited probative value than was true in the Remacle case because the foreign websites excerpted herein are primarily articles of local interest about the availability of fresh, organic food items rather than informational resources for the general consumer researching organic food.

Applicant also argues that the Trademark Examining Attorney cannot assume that English language terms are uniformly understood "across the continents of Africa, Australia, Europe, and North America, as the English language has developed differently in each English-speaking country." Inasmuch as the Trademark Examining Attorney placed copies of these foreign websites into the record during examination, applicant had an opportunity to

demonstrate, if indeed it is the case, that the combined term, "Fresh Organics," or the individual words, have different meanings in foreign countries than the plain English language meaning we would attribute to them in the United States. That was not done.

### **Categories of Goods and Services**

The evidence submitted by the Trademark Examining Attorney supports the conclusion that the principal category of goods involved herein is organic foods and the principal category of services involved herein is organic food markets. Further, while clearly not all fresh foods are organic foods and not all organic foods are fresh (e.g., packaged foods containing organic ingredients), the evidence establishes that there is, nonetheless, significant overlap between "fresh" foods and "organic" foods such that there is a sub-category of organic foods that consists of fresh, organic foods, and a sub-category of organic food market services that consists of food markets specializing in fresh, organic foods. Applicant's own identification of goods supports the conclusion that "fresh" has a readily understood meaning in connection with organic foods inasmuch as applicant uses phrases like

"fresh fruits and vegetables" and "fresh nuts," which would encompass organic fruits, vegetables and nuts.

**FRESH ORGANICS as understood by the relevant public**

Turning to the second part of the test for genericness, we weigh carefully the evidence submitted by both applicant and by the Trademark Examining Attorney. As stated previously, the genus of the involved goods and services is fresh, organic foods, and food markets specializing in fresh, organic foods, respectively.

Starting with the dictionary definitions of the individual terms, we are not persuaded by applicant's arguments that each of these words has other definitions unrelated to its goods and/or services, as we must consider the mark in the context of the goods and it is only the definitions of these terms discussed above that are relevant to our analysis. The word "fresh" in the context of "fresh foods," and the word "organic" in the context of "organic foods" are both generic adjectives. Each term directly names a most important aspect of applicant's goods and services. See *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998). Then considering the relevant definitions of "fresh" and "organic" as they pertain to applicant's goods and services, when combined, the

individual words retain their dictionary meanings and we find nothing incongruous in applicant's combination of these common words in the applied-for term. Applicant has done no more than combine terms that are individually generic in relation to its goods and services. Thus, the composite designation is likewise generic. See In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987).

In fact, if one is referring to non-processed food items grown organically, it is difficult to imagine a more succinct expression to describe such goods and services than "fresh, organic foods," or simply "fresh organics." Based on these dictionary definitions and our common parlance of the English language, we find that the relevant purchasing public would readily understand that "Fresh Organics" indicates that a variety of fresh, unprocessed and/or raw food items have been grown organically. Thus, we conclude that the term FRESH ORGANICS is incapable of functioning as a trademark or service mark in connection with fresh, organic foods.

The majority of generic uses in this record of the term "Fresh Organics" appear to identify goods. Other than the frequent uses of the word "Organics" within composite trade names, there are admittedly fewer examples of

occasions where the combined term "Fresh Organics" stands alone as the name for retail store services. However, in any case where a term is deemed to be generic for a class of products, it is equally generic when used in connection with the services of a retailer of such:

These third-party registrations, article excerpts and web pages show that "blinds and drapery" is used as the name or designation for a class of products used in homes and businesses and is the term used by many businesses to indicate that they make or sell blinds, drapery and other "window treatments." Both types of evidence, i.e., the evidence that shows there is a class of products known as "blinds and drapery," and the evidence that shows businesses refer to themselves as, or are referred to by others as, a "blinds and drapery" business, are probative evidence of the genericness of BLINDSANDDRAPERY.COM for applicant's services. See, e.g., In re Half Price Books, Records, Magazines, Incorporated, 225 USPQ 219, 221 (TTAB 1984) (generic terms for products equally generic for a retailer of such products).

In re Eddie Z's Blinds and Drapery Inc., 74 USPQ2d 1037, 1041 (TTAB 2005) [BLINDSANDDRAPERY.COM is a generic term for selling of blinds, draperies, and related items].

Many times the Internet and NEXIS excerpts reflected usage of "fresh organic" as an adjectival term modifying another noun. Accordingly, in its reply brief, applicant draws a sharp line between the many appearances of the term "fresh organic" (in the singular form) as comprising "a

descriptive adjective, rather than a generic noun.”

However, we note initially that when conducting a genericness inquiry under the Lanham Act, determining the part of speech of a word is not the end of the query.<sup>8</sup> It is well-settled that generic terms may function as adjectives or as nouns. Secondly, we agree with the position of the Trademark Examining Attorney that applicant’s adaptation from “fresh organic \_\_\_\_\_” to “fresh organics” moves the expression undeniably in the direction of a generic noun. Specifically, the Trademark Examining Attorney argues that this “absence of a letter ‘S’” in these usages certainly does not undermine the genericness of applicant’s mark. “In fact,” she argues, “the addition of the letter ‘S’ creates a type of goods [a noun], namely ‘organics’” rather than merely identifying a feature of the goods in an adjectival form. Similarly, we find it most relevant that the term “fresh organic” frequently appears as an adjective modifying generic nouns such as “food,” “vegetables,” “products,” “produce,” etc. As applied to any food products edible by humans,

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<sup>8</sup> 2 J.T. McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, Section 12:10 (4<sup>th</sup> ed. 1997) [“A rule of thumb sometimes forwarded as distinguishing a generic name from a descriptive term is that generic names are nouns and descriptive terms are adjectives. However, this ‘part of speech’ test does not accurately describe the case law results.”].

expressions such as "organic vegetables" or "fresh, organic food" will be shortened in the common parlance to simply "organics" or "fresh organics" without losing any meaning. Otherwise, the logical result of applicant's argument would seem to be that even if it is clear, for example, that an expression like "low carb foods" represents a category within the healthy foods market, one manufacturer should still be able to claim the term "low carbs" as its source identifier, or if "functional foods" is a category within the healthy foods market, one manufacturer should still be able to claim the term "functionals." We find this counterintuitive in practice and wrong under the Lanham Act.

In conclusion, we find that there is a category of fresh, organic foods, often marketed through food markets specializing in healthy foods, where a meaningful portion of the products are neither processed nor conventionally grown, and that consumers use and understand the term "Fresh Organics" as a generic name for this category of goods and services.

*Decision:* The refusal to register on the ground that the applied-for mark is generic in connection with "fresh fruits and vegetables; unprocessed cereals; unprocessed

herbs; unprocessed beans; unprocessed rice; unprocessed grains for eating; unpopped popcorn; bulk fresh nuts; raw nuts, and retail health food store services" is hereby affirmed. Nonetheless, a registration will issue on the Supplemental Register for only the following goods:

"living natural plants and live flowers, and pet food" in International Class 31, and for "retail bakery shops" in International Class 35.