

IN RE NORDIC NATURALS., Appeal No. 2013-1492 (Fed. Cir. June 23, 2014). Before Reyna, Wallach, Taranto. Appealed from Trademark Trial and Appeal Board (Judge Shaw).

Background:

Nordic sought registration for the mark CHILDREN'S DHA in standard characters, for "nutritional supplements containing DHA." "DHA" is the abbreviation for *docosahexaenoic acid*, an omega-3 fatty acid that assists in brain development. During prosecution, Nordic agreed to disclaim the exclusive use of "DHA" apart from its use in the mark as a whole. It also clarified that the goods in question are "designed for use by children." The examining attorney finally rejected the mark as generic. Nordic then appealed to the Trademark Trial and Appeal Board. The Board affirmed the refusal and Nordic then appealed to the Federal Circuit.

Issue/Holding:

Did the Board err in holding that the CHILDREN'S DHA mark is generic? No, affirmed.

Discussion:

A mark is generic if the relevant public primarily uses or understands the mark to refer to the category or class of goods in question. A generic term cannot acquire distinctiveness and cannot be registered as a trademark. The Board described the relevant category of goods as "nutritional supplements containing DHA" and the relevant public as "parents or other adults seeking nutritional supplements containing DHA for children."

Nordic maintained that while "children's DHA supplements" might be descriptive, CHILDREN'S DHA by itself was not generic. Nordic asserted that it was the first to use CHILDREN'S DHA in 2000 and that, since then, it invested significant money and time in marketing its products with the use of this phrase. Nordic argued that its commercial success is based, in part, on its use of CHILDREN'S DHA to identify its product. For support, Nordic pointed to declarations from its retailers, its own advertising, and use of "children's DHA" by third parties to refer to Nordic's products and thus argued that the record included a "mixture of usages," which could not be clear evidence of genericness.

The Court noted that while Nordic may have been the first to use the phrase "children's DHA" in this market, the relevant question was, in light of Nordic's use and all other relevant uses, what does "children's DHA" primarily mean to the relevant public. The Court found that the relevant public's perception was best evidenced in the prosecution record, which included dictionary definitions of both "child" and "DHA"; twelve third-party websites using "children's DHA" in relation to various DHA products for children; and online articles and book excerpts about nutrition that use "children's DHA" in a general, descriptive sense.

The Court disagreed with Nordic's asserted "mixture of usages" theory and affirmed the refusal based on genericness.