

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
May 10, 2011  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Health Fusion Brands, Inc.

Serial No. 77691724

Molly B. Markley of Young Basile Hanlon & MacFarlane P.C.  
for Health Fusion Brands, Inc.

Kyle Christopher Peete, Trademark Examining Attorney, Law  
Office 112 (Angela Bishop Wilson, Managing Attorney).

Before Seeherman, Bucher and Lykos, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Health Fusion Brands, Inc. seeks registration on the  
Principal Register of the mark **EPIC MISSION** (*in standard  
character format*) for services recited in the application as  
"distributorship services in the field of nutritional  
beverages" in International Class 35.<sup>1</sup>

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<sup>1</sup> Application Serial No. 77691724 was filed by RWI Resources, LLC on March 16, 2009, based upon allegations of first use anywhere and first use in commerce at least as early as March 11, 2009. The application was assigned from RWI Resources LLC, a limited liability company of Michigan, to Health Fusion Brands, Inc., a Georgia corporation, on December 31, 2010. United States Patent and Trademark Office Assignment Branch, Reel 4482/ Frame 0758.

The Trademark Examining Attorney refused registration on the ground that the substitute specimen submitted by applicant on December 7, 2009 does not show use of the applied-for mark in connection with the distributorship services, as recited. Sections 1, 2, 3 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, 1053 and 1127; 37 C.F.R. §§ 2.56(a) and (b)(2).

After the Trademark Examining Attorney made the refusal final, applicant appealed to this Board.

We affirm the refusal to register.

Trademark Rule 2.56 provides, *inter alia*, that:

(a) An application under section 1(a) of the Act, an amendment to allege use under § 2.76, and a statement of use under § 2.88 must each include one specimen showing the mark as used on or in connection with the goods, or in the sale or advertising of the services in commerce.

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(b)(2) A service mark specimen must show the mark as actually used in the sale or advertising of the services.

Section 45 of the Trademark Act, 15 U.S.C. § 1127, defines "use in commerce" as follows:

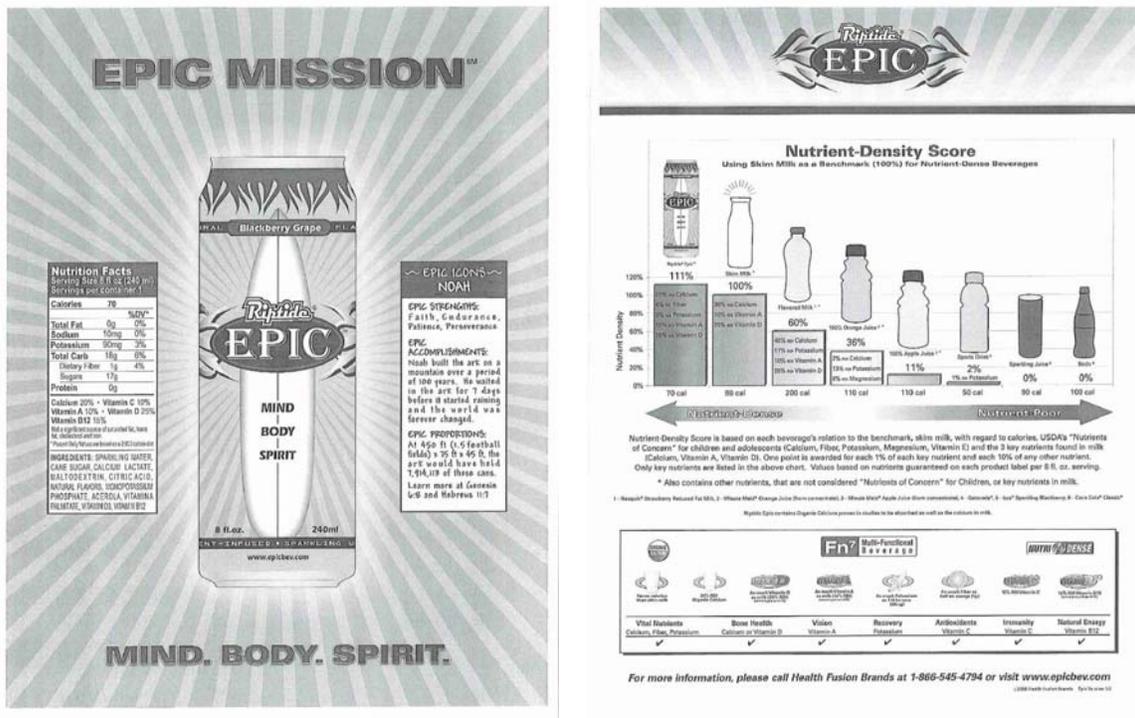
*Use in commerce.* The term "use in commerce" means the *bona fide* use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this Act, a mark shall be deemed to be in use in commerce --

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(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State

or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

Implicit in this statutory definition is a requirement that there be a direct association between the mark and the services, i.e., that the mark be used in such a manner that it would readily be perceived as identifying the source of the services. Applicant has concentrated its arguments on the acceptability of its substitute specimen (a two-page brochure reproduced below), so we will do likewise.



Applicant argues that the mark is used prominently on the first page of the brochure followed by the informal service mark indicator ("SM"). On the bottom of the second page, after detailed nutritional information about the

beverages, the brochure supplies applicant's contact information.

While the exact nature of applicant's proffered services does not need to be specified in the specimen, there must be something which creates in the mind of the prospective purchaser an association between the mark and the service activity. It is not enough that applicant has simply used the term **EPIC MISSION** in some type of literature which it may distribute. Rather, it is well settled that an applicant must use the alleged service mark in connection with the sale or advertising of the services for which registration is sought, and in a manner which will identify to consumers that this is a service mark for the named distributorship services. *In re Advertising & Marketing*, 821 F.2d 614, 2 USPQ2d 2010 (Fed. Cir. 1987), citing *In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456 (CCPA 1973). Whether a mark sought to be registered as a service mark has been used "to identify" the services specified in the application is a question of fact to be determined on the basis of the specimens submitted by applicant, together with any other evidence of record. See *In re Duratech Industries Inc.*, 13 USPQ2d 2052 (TTAB 1989).

In the case at hand, applicant's use of **EPIC MISSION**, as shown in the identified specimen, is not in connection with the sale or advertising of distributorship services. There is absolutely no reference to the alleged distributorship services that might create an association, direct or otherwise, between the words **EPIC MISSION** and the *services* set forth in the application. See *In re DSM Pharmaceuticals Inc.*, 87 USPQ2d 1623 (TTAB 2008)

(**LIQUIDADVANTAGE** as shown on brochure does not function as service mark to indicate source of applicant's custom manufacturing services inasmuch as the specimen nowhere shows direct association between use of the proposed mark and the services for which registration is sought); *In re wTe Corp.*, 87 USPQ2d 1536 (TTAB 2008) (specimen comprising a packaging label affixed to boxes being mailed to customers, on which the **SPECTRAMET** mark was used on a return address found unacceptable because it did not show a connection between the mark and the recited contract processing of metals); and *In re Johnson Controls, Inc.*, 33 USPQ2d 1318 (TTAB 1994) (labels affixed to packaging of valves do not show use of **IRON VALVE EXPRESS** mark for custom manufacture of valves).



Moreover, the record contains no other evidence, including applicant's original specimen, that the mark sought to be registered is used in advertising or rendering the distributorship service of applicant. In fact, as noted by the Trademark Examining Attorney, to the extent that applicant is selling its own **Riptide Epic** beverages, it is not even clear from this record that applicant is engaged in distributorship services for the benefit of others.

*Decision:* Inasmuch as the file contains no specimens showing the proposed mark used to identify and distinguish applicant's distributorship services, the refusal of registration under Section 1, 2, 3 and 45 of the Lanham Act is hereby *affirmed*.