ESTTA Tracking number: **ESTTA476848**
Filing date: **06/07/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77752741
Applicant	Nordic Naturals, Inc.
Applied for Mark	CHILDREN'S DHA
Correspondence Address	MEREDITH M WILKES JONES DAY 901 LAKESIDE AVE, NORTH POINT CLEVELAND, OH 44114-1190 UNITED STATES mwilkes@jonesday.com, pcyngier@jonesday.com, ajott@jonesday.com
Submission	Reply Brief
Attachments	CHILDREN'S DHA (Stylized) - Reply Brief.pdf (17 pages)(64760 bytes)
Filer's Name	Angela R. Gott
Filer's e-mail	agott@jonesday.com,mwilkes@jonesday.com,pcyngier@jonesday.com
Signature	/Angela R. Gott/
Date	06/07/2012

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In Re Application of Nordic Naturals, Inc.		
Application Ser. No.	:	77/752,741
Filed	:	June 5, 2009
Mark	:	CHILDREN'S DHA (Stylized)

Trademark Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1451
Alexandria, Virginia 22313-1451

APPLICANT'S REPLY BRIEF

Meredith M. Wilkes
Angela R. Gott
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: mwilkes@jonesday.com
agott@jonesday.com

TABLE OF AUTHORITIES

Page

CASES

Bd. of Supervisors for La. State Univ. v. Smack Apparel Co.,
550 F.3d 465, 89 USPQ2d 1338 (5th Cir. 2008) 10

Courtenay Commc'ns Corp. v. Hall,
334 F.3d 210, 67 USPQ2d 1210 (2d Cir. 2003) 12

Estate of P.D. Beckwith, Inc. v. Comm'r of Patents,
252 U.S. 538 (1920).....2

H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.,
782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986) 3

In re Aid Labs., Inc.,
221 USPQ 1215 (TTAB 1983) 9

In re Am. Acad. of Facial Plastic and Reconstructive Surgery,
64 USPQ2d 1748 (TTAB 2002) 2

In re Am. Fertility Soc'y,
188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999) 8

In re Carolyn's Candies, Inc.,
206 USPQ 356 (TTAB 1980) 13

In re Greenliant Sys. Ltd.,
97 USPQ2d 1078 (TTAB 2010) 3

In re CyberFinancial.Net Inc.,
65 USPQ2d 1789 (TTAB 2002) 3

In re Jackson Hole Ski Corp.,
190 USPQ 175 (TTAB 1976) 2, 13

In re Merrill Lynch, Pierce, Fenner & Smith Inc.,
828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987) 3, 9

In re Miller Brewing Co.,
226 USPQ 666 (TTAB 1985) 13

In re Steelbuilding.com,
415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005) 2

In re Tennis Indus. Ass'n,
102 USPQ2d 1671 (TTAB 2012) 8

In re Venturi, Inc.,
197 USPQ 714 (TTAB 1977) 2

In re Wella Corp.,
193 USPQ 585 (TTAB 1977) 12, 13

In re Wella Corp.,
565 F.2d 143, 196 USPQ 7 (C.C.P.A. 1977) 2, 3

In re Wm. B. Coleman Co.,
93 USPQ2d 2019 (TTAB 2010) 3, 13

STATUTES

15 U.S.C. § 1053(f) 9

OTHER AUTHORITIES

TMEP § 815 3

TMEP § 816.04 3

TMEP § 1209.01(c)(i) 3

TMEP § 1209.03(d) 2, 7

TMEP § 1212 3

This is an appeal from the final refusal of registration of the trademark CHILDREN'S DHA in stylized form, which is used by Applicant, Nordic Naturals, Inc., as a mark for "nutritional supplements containing DHA" in International Class 5. The Examining Attorney's refusal to register Applicant's mark on the basis of genericness, or, in the alternate, failure to prove acquired distinctiveness, has been maintained erroneously. Accordingly, Applicant respectfully requests that the Board reverse the Examining Attorney's refusal.

STATEMENT OF THE ISSUES

The issues are stated in Applicant's Appeal Brief.

FACTS

The facts are set forth in Applicant's Appeal Brief.

ARGUMENT

As stated in Applicant's Appeal Brief, the Examining Attorney's refusal to register Applicant's mark should be reversed for three reasons. First, Applicant's mark is not generic, and the Examining Attorney has failed to meet her burden of proving otherwise. Second, to the extent Applicant's mark is merely descriptive of Applicant's goods, Applicant has made a sufficient showing to support its claim of acquired distinctiveness. Third, Applicant's mark is sufficiently stylized such that registration of the mark on the Principal Register is warranted. For these reasons, as fully set forth below and in Applicant's Appeal Brief, Applicant respectfully requests that the Board reverse the Examining Attorney's refusal and order that Applicant's mark, CHILDREN'S DHA (Stylized), be passed for publication.

I. APPLICANT'S MARK IS NOT GENERIC

The Examining Attorney has not met her burden of proving that Applicant's mark, as a whole, is generic for "nutritional supplements containing DHA." Applicant seeks to register a highly stylized mark. A stylized mark is registrable on the Principal Register when the

stylization or design features "create an impression on purchasers separate and apart from the impression made by the words themselves," even if the literal element of a mark is arguably generic or merely descriptive. *In re Am. Acad. of Facial Plastic and Reconstructive Surgery*, 64 USPQ2d 1748, 1753 (TTAB 2002); *see also In re Jackson Hole Ski Corp.*, 190 USPQ 175 (TTAB 1976) and *In re Venturi, Inc.*, 197 USPQ 714 (TTAB 1977). "The commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail." *Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538, 545-46 (1920); *see also In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421-22 (Fed. Cir. 2005).

As a whole, Applicant's mark consists of the stylized depiction of the words CHILDREN'S and DHA. Specifically, the letters of Applicant's mark are in shown in a distinctive and unique stylized, "handwritten" format and font. Further, each letter is presented in distinct, bright, alternating colors as follows: the C is fuchsia; the E, first H, and second D are orange; the I is green; the L is yellow-green; the N and first D are blue; the R is red; the S and second H are yellow; and the A is pink. These colors are claimed as part of the mark as a whole. The rights afforded to a registration of the proposed mark would be associated with the wording as it appears in the application—in large stylized font of bright alternating colors, as opposed to merely the wording itself.

Applicant's mark is, at worst, a combination of descriptive terms and stylization. Thus, Applicant's mark is, at a minimum, descriptive, not generic. *See* TMEP § 1209.03(d); *see also In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7 (C.C.P.A. 1977) (finding mark comprising stylized lettering of BALSAM, with disclaimer of "BALSAM," registrable). A mark that is not inherently distinctive (i.e., one that is descriptive) may be registered on the Principal Register

upon proof of acquired distinctiveness, or "secondary meaning." TMEP § 1212. In the alternative, merely descriptive marks may be registered on the Supplemental Register. TMEP §§ 815, 816.04; *Wella*, 565 F.2d 143, 196 USPQ 7.

A. Application Of The Test For Genericness Proves That Applicant's Mark Is Not Generic

Because Applicant's mark is, at a minimum, descriptive, it is not necessary to apply the two-part test to determine whether the mark is generic. Nonetheless, application of the test for genericness proves that Applicant's mark is not generic. The test for determining whether a mark is generic turns upon its primary significance to the relevant public. TMEP § 1209.01(c)(i) (citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986)). The burden of proving that a term is generic is a high one and can only be met by "clear evidence." *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 1571, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). The Examining Attorney has not met that burden.

1. Class Or Genus Of Goods At Issue

The Examining Attorney concedes that the genus of goods at issue is adequately defined by Applicant's identification of goods, specifically, "nutritional supplements containing DHA." (Examining Attorney's Brief at 3). The goods for which Applicant is using its mark are commonly known and referred to as "nutritional supplements containing DHA."

The Examining Attorney states that, in general, a mark "may be found generic where the identification is broadly worded and encompasses the narrower category of goods named in the mark." (Examining Attorney's Brief at 4 (citing *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1082 (TTAB 2010); *In re Wm. B. Coleman Co.*, 93 USPQ2d 2019, 2024-25 (TTAB 2010); and *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1790 (TTAB 2002)). However, as evidenced

by the cases cited by the Examining Attorney, the Examining Attorney continues to ignore the stylized nature of Applicant's mark—none of those cases deals with stylized marks. Here, Applicant's mark is CHILDREN'S DHA (Stylized), a mark in stylized form.

In the absence of any evidence that Applicant's mark, as a whole, itself refers to the genus or class of "nutritional supplements containing DHA," the Examining Attorney has not carried the substantial burden of proving that Applicant's mark refers to the genus at issue. Furthermore, as explained below, there is no evidence that the relevant public understands Applicant's mark primarily to refer to the class of goods at issue. As such, Applicant's mark is not generic.

2. Relevant Public's Understanding Of Applicant's Mark

The relevant purchasers of nutritional supplements containing DHA consist of both retailers and the general public. In order to find Applicant's mark generic, the Examining Attorney must present clear evidence that these relevant purchasers understand Applicant's mark, CHILDREN'S DHA (Stylized), to refer to the class of goods consisting of "nutritional supplements containing DHA." The Examining Attorney has not met this burden. The record does not demonstrate that the relevant public understands Applicant's mark to refer to the class of goods consisting of "nutritional supplements containing DHA."

The Examining Attorney asserts that the record "indicates that the public views and uses the phrase CHILDREN'S DHA as a generic designation for the identified goods." (Examining Attorney's Brief at 8). However, the excerpts cited by the Examining Attorney from the record generally refer to "children's DHA supplement[s]," and not Applicant's mark. Applicant disagrees that use of the phrase "children's DHA supplement[s]" in standard characters in the text of a sentence, in its primary, descriptive sense, is a generic use of Applicant's mark CHILDREN'S DHA (Stylized). But even if it were, the Examining Attorney still has not met

her burden of proving that Applicant's mark *as a whole* is generic. Applicant asserts that the few references found by the Examining Attorney, over the course of the three years that this application has been pending, to "children's DHA" alone are anomalies that are insufficient in and of themselves to establish the understanding of the relevant consuming public with regard to Applicant's mark as a whole. That is, not one of the excerpts cited by the Examining Attorney reflects any generic use of the mark CHILDREN'S DHA in stylized form.

As to the examples cited by the Examining Attorney of alleged use of the phrase "children's DHA" by Applicant's competitors and others, Applicant responds that of the eight examples listed in the Examining Attorney's Brief (at 12), three refer not to Applicant's mark, but to other designations (e.g., *Dr. Sears* Family Approved *Go Fish Brainy Kidz* Children's Omega-3 DHA Soft Chews (*see* March 13, 2010 Office Action at 14), *Complete Children's* DHA/EPA from *Nutri-West* (*see id.* at 19), *Nature's Plus Animal Parade* Children's Chewable DHA for Kids (*see id.* at 24)). When viewed in context, each of these examples undermines rather than supports the Examining Attorney's position that Applicant's mark is being used to refer to the goods in a generic manner. Furthermore, the BERRY KEEN product cited by the Examining Attorney (*see id.* at 30) is Applicant's own product, which has been discontinued and is now sold under the CHILDREN'S DHA brand. And the "Vitamin Shoppe Children's DHA" product cited by the Examining Attorney (*see id.* at 21) is no longer on the market. The remaining three examples cited by the Examining Attorney are of no moment and can hardly constitute "widespread use." To the extent that third parties are using Applicant's mark as a designation of source for their own goods, as Applicant has previously stated, these are infringing uses of Applicant's mark, not evidence of genericness. The mere fact that Applicant's

mark is being infringed in this manner does not evidence that primary significance to the public is that Applicant's mark, as a whole, is generic.

What's more, in assessing the relevant public's understanding of Applicant's mark, the Examining Attorney continues to ignore Applicant's affirmative evidence that its mark, CHILDREN'S DHA (Stylized), is understood by the relevant public to refer specifically to Applicant's goods. It is undisputed that Applicant developed an omega-3 fatty acid supplement that was palatable to children and began selling it under the CHILDREN'S DHA mark on or around July 1, 2000. (March 9, 2010 Response to Office Action, Ex. 1 ¶ 3). Applicant's use of the CHILDREN'S DHA (Stylized) mark in commerce has been substantially exclusive and continuous for more than 8 years, i.e., since its first use in October 2003. Applicant's evidence of record includes a declaration by Joar Opheim, the Chief Executive Officer of Nordic Naturals. In the declaration, Mr. Opheim states that the mark CHILDREN'S DHA was introduced and used exclusively by Applicant for five years (*see id.*, Ex. 1). Submitted with his declaration are excerpts from trade journals depicting the mark CHILDREN'S DHA and referring specifically to Applicant's goods (*see id.*, Ex. 2) and declarations from retailers (i.e., members of the relevant purchasing public) and industry professionals stating that Applicant's mark CHILDREN'S DHA is associated exclusively with Applicant's goods (*see id.*, Ex. 4).

It is also undisputed that the phrase "children's DHA" does not appear in dictionary listings. Moreover, as stated in Applicant's Appeal Brief, no federal registrations, or applications for that matter, other than its own, appear in a search of the U.S. Patent and Trademark Office's online records for "children's DHA." In fact, neither the phrase "children's DHA" nor the phrase "children's DHA supplement" appear in any identification of goods or services in any of the U.S. Patent and Trademark Office's online records.

At the very least, Applicant's affirmative evidence and the relevant considerations in this inquiry rebut any seemingly contradictory evidence presented by the Examining Attorney—supporting Applicant's position that the relevant public understands CHILDREN'S DHA (Stylized) to refer not to a general class of goods, but to Applicant's specific goods.

In the absence of "clear evidence" that the relevant public understands Applicant's mark as a whole to refer primarily to the genus or class of "nutritional supplements containing DHA," the Examining Attorney has not carried the substantial burden of proving that Applicant's mark is generic. Accordingly, the Examining Attorney's refusal to register the mark on this basis should be reversed.

B. Applicant's Mark Is Capable Of Distinguishing Source

Marks that include words or terms that are names of key ingredients, characteristics, or features of the marks can be descriptive or even suggestive of those goods, that is, not generic. (*See, e.g.*, Applicant's Appeal Brief at 13-14 (citing cases)).

Each of the composite literal elements of the mark is descriptive. (*See* September 9, 2009 Office Action (stating that Applicant's mark "merely describes an ingredient and user of the goods/services")). As a combination of descriptive terms, Applicant's mark is not generic. *See* TMEP § 1209.03(d) ("When two descriptive terms are combined, the determination of whether the composite mark also has a descriptive significance turns upon the question of whether the combination of terms evokes a new and unique commercial impression. If each component retains its descriptive significance in relation to the goods or services, the combination results in a composite that is itself descriptive.").

The Examining Attorney asserts that CHILDREN'S is more than merely descriptive because it identifies a specific category or genus of supplements, citing five LexisNexis excerpts. (Examining Attorney's Brief at 6-7). However, three of the five excerpts are from specialty

business publications and one is simply a platform for marketing communications. Together, these excerpts fall far short of the "clear evidence" required to establish that the term "CHILDREN'S" is generic in connection with nutritional supplements containing DHA.

The Examining Attorney also asserts that the term "DHA" is a generic name for an ingredient of the goods, and thus is unregisterable on either the Principal or Supplemental Register as a source identifier for "nutritional supplements containing DHA." (Examining Attorney's Brief at 8). Even if that is true, however, it does not mean that a source identifier for "nutritional supplements containing DHA" cannot contain the term DHA; it simply means that "DHA" is merely descriptive or generic standing alone. In other words, Applicant's mark CHILDREN'S DHA (Stylized) can function as a source identifier, even though it includes the term DHA, because Applicant is not claiming exclusive rights to the term DHA apart from the mark as a whole.

Notwithstanding the foregoing, the Examining Attorney cannot rely only on definitions and generic uses of the constituent terms of the phrase, but must conduct "an inquiry into the meaning of the disputed phrase as a whole." *In re Am. Fertility Soc'y*, 188 F.3d 1341, 1347, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999). The Examining Attorney has not established by "clear evidence" that Applicant's mark, which consists of the phrase "CHILDREN'S DHA," in stylized form, is a generic name for a class or genus of nutritional supplements. *See also In re Tennis Indus. Ass'n*, 102 USPQ2d 1671, 1681 (TTAB 2012) (holding that TENNIS INDUSTRY ASSOCIATION is a phrase and that the Board cannot base its genericness determination on the meanings of the constituent terms TENNIS INDUSTRY and ASSOCIATION). As the Board noted in *Tennis Industry Association*, "the Federal Circuit has drawn a clear distinction between an apt name and a generic one." *Id.* CHILDREN'S DHA (Stylized) may be aptly named and

stylized for nutritional supplements containing DHA, particularly those that were designed for use by children; however, aptness is not genericness.

Applicant maintains that its mark, as a whole, is descriptive, not generic. In other words, Applicant's mark is capable of distinguishing source. Any doubt as to whether a mark is generic must be resolved in Applicant's favor. *See In re Aid Labs., Inc.*, 221 USPQ 1215, 1216 (TTAB 1983); *Merrill Lynch*, 828 F.2d at 1571, 4 USPQ2d at 1144.

For all of the foregoing reasons, Applicant respectfully requests that the Board reverse the Examining Attorney's refusal to register the mark on the basis of genericness.

II. APPLICANT'S MARK HAS ACQUIRED DISTINCTIVENESS

Even "highly descriptive" marks may be registered if they have acquired secondary meaning. *See* 15 U.S.C. § 1053(f). Applicant does not dispute it has the burden of proving that its mark has acquired secondary meaning or distinctiveness. Applicant submits, however, that it has met that burden. Accordingly, Applicant's mark should be passed for publication.

In the Examining Attorney's Brief, the Examining Attorney continues to dismiss Applicant's plenary evidence of record claiming it to be insufficient to show acquired distinctiveness. But the Examining Attorney is wrong. In particular, the Examining Attorney improperly discounts the retailer declarations submitted by Applicant with the Response to Office Action on March 9, 2010 in that they "are from retailers only and are not from any consumers." (Examining Attorney's Brief at 14). Retailers comprise the vast majority of Applicant's buyers and they are part of the relevant purchasing public for Applicant's goods. These retailers have encountered numerous nutritional supplement products, including those containing DHA and those intended for use by children—and specifically including the products produced by Applicant and those produced by Applicant's competitors. Although there are not declarations from any ultimate consumers, the fact that consumers also appreciate the

significance of Applicant's mark is supported by the unsolicited consumer recommendations and testimonials appearing on blogs and bulletin boards wherein the consumers refer and discuss Applicant's CHILDREN'S DHA nutritional supplements, recognizing the mark CHILDREN'S DHA as Applicant's mark. (*See* March 9, 2010 Response to Office Action, Ex. 5). Furthermore, in their declarations, the retailers of Applicant's products state that, in their opinion, the ultimate end-user consumers of the goods recognize CHILDREN'S DHA as a mark, i.e., referring specifically to Applicant's nutritional supplement goods. (*Id.*, Ex. 4 ¶ 5). Accordingly, this evidence strongly supports Applicant's 2(f) claim.

In its March 9, 2010 Response to Office Action, Applicant submitted evidence addressing each of the factors laid out by the Fifth Circuit in *Board of Supervisors for Louisiana State University v. Smack Apparel Co.*, 550 F.3d 465, 476, 89 USPQ2d 1338, 1343 (5th Cir. 2008). The evidence of record submitted by Applicant demonstrates that all of the *Smack Apparel* factors weigh in favor of a finding of secondary meaning in this case.

Applicant coined the term CHILDREN'S DHA in 2000 and has enjoyed substantially exclusive use of its CHILDREN'S DHA (Stylized) mark for more than 8 years. Applicant's 2(f) claim is based, in part, on its substantially exclusive and continuous use of the mark in commerce since at least as early as November, 2003. (*See* March 9, 2010 Response to Office Action).

The record reflects that Applicant has had great commercial success with its CHILDREN'S DHA (Stylized) brand and the products for which the mark is used. Applicant has devoted "many years and many thousands of dollars to educate parents" about the importance of Omega-3 fatty acids from pure and fresh fish oils for children's development and to build their awareness of Applicant's CHILDREN'S DHA and CHILDREN'S DHA (Stylized) marks. (March 9, 2010 Response to Office Action, Ex. 1 ¶ 4). Between 2005 and 2009 alone,

Applicant spent nearly $200,000 in direct advertising to promote the CHILDREN'S DHA brand. (*Id.* ¶ 6). Applicant's advertising methods have included, among other things, creating educational campaigns around its goods sold under the CHILDREN'S DHA (Stylized) mark, sending representatives into stores, training doctors, and creating and disseminating educational materials, including audio recordings and movies. (*Id.* ¶ 4). In that same period, Applicant also conducted more than 19,000 live demonstrations of its products, each of which included its CHILDREN'S DHA brand nutritional supplements, and participated in more than 900 health fairs with presentations featuring its CHILDREN'S DHA brand nutritional supplements. (*Id.* ¶ 7). In addition, between 2007 and 2009, Applicant distributed more than 40,000 sample packs containing its CHILDREN'S DHA brand nutritional supplements and promotional materials. (*Id.* ¶ 8).

Applicant's advertising and promotional efforts have yielded tremendous success: steadily increasing sales of its CHILDREN'S DHA brand nutritional supplement product, which sales totaled well over $10 million from 2003 to 2008. (*Id.*, Ex. 3). As a direct result, Applicant has succeeded in creating in the minds of consumers an association between the mark CHILDREN'S DHA (Stylized) and Applicant as the origin of those goods.

The length of use of the CHILDREN'S DHA (Stylized) mark by Applicant, Applicant's sales and advertising expenditures and efforts, and the other evidence of record supporting Applicant's Section 2(f) claim must be given appropriate weight. Applicant's sales and advertising have succeeded in educating the public to associate the CHILDREN'S DHA brand with Applicant, as the single source of goods sold under the mark. When this information is combined with the other evidence of record provided by Applicant, there can be little question that Applicant's mark has acquired distinctiveness.

In view of Applicant's more than 8 years of continuous use and the substantial evidence of secondary meaning, including sales, promotional efforts, advertising expenditures, retailer declarations, and unsolicited end-user comments associating the product with the source, Applicant has met its burden of showing that Applicant's mark has acquired distinctiveness. Accordingly, Applicant's mark should be passed for publication.

III. THE STYLIZATION OF APPLICANT'S MARK RENDERS IT REGISTRABLE

Applicant's mark consists of a highly stylized version of the wording CHILDREN'S DHA. As explained above and in Applicant's Appeal Brief, the letters of Applicant's mark are in shown in a unique stylized, "handwritten" format and font. Further, each letter is presented in distinctive, bright, alternating colors, which colors are claimed as part of the mark as a whole. Distinctive lettering, coloring, or other design elements are capable of rendering a mark registrable, even when combined with generic words. *Courtenay Commc'ns Corp. v. Hall*, 334 F.3d 210, 216, 67 USPQ2d 1210, 1214 (2d Cir. 2003); *In re Wella Corp.*, 193 USPQ 585, 586 (TTAB 1977) (noting that a disclaimer of literal terms renders the descriptiveness of those terms moot).

The Examining Attorney provides no evidence to support her assertion that the non-literal elements of Applicant's mark are commonly used for children's supplements and medications. A review of what is submitted reveals that the alleged evidence misses the mark. Some of the Examining Attorney's cited examples do not appear to contain any of the non-literal elements of Applicant's mark (*see, e.g.*, September 9, 2009 Office Action at 4; March 13, 2010 Office Action at 21; January 20, 2012 Denial of Request for Reconsideration at 24). Others appear to contain only some portion of the non-literal elements (*see, e.g.*, June 29, 2011 Office Action at 57; January 20, 2012 Denial of Request for Reconsideration at 2-5, 7-11, 13, and 50). Furthermore, to the extent any of the Examining Attorney's examples do contain the non-literal elements of

Applicant's mark and are used for the same goods, they are likely infringing uses of Applicant's mark. The record simply does not demonstrate that the stylization and coloration of Applicant's mark for nutritional supplements containing DHA is not distinctive, much less that it is entirely incapable of registration.

Applicant's mark is at least as stylized as the marks in *Jackson Hole* and *Miller Brewing Co.*, and should likewise be permitted registration on the Principal Register. *See Jackson Hole Ski Corp.*, 190 USPQ at 176 (finding mark "Jackson Hole," with a stylized design of the letters "J" and "H," registrable with a disclaimer of "JACKSON HOLE"); *In re Miller Brewing Co.*, 226 USPQ 666, 667-68 (TTAB 1985) (holding that the script rendition of "LITE" on beer labels was registrable with a disclaimer of "LITE"). The Examining Attorney notes that Applicant has not submitted a disclaimer of both words in its mark and that Applicant has applied to register its mark on the Principal Register and not on the Supplemental Register (as in *Wella*, 193 USPQ 585, and *In re Carolyn's Candies, Inc.*, 206 USPQ 356 (TTAB 1980)). But these arguments are irrelevant. Applicant has disclaimed the term DHA. Moreover, registration is sought on the Principal Register because the overall combination of the wording and stylization of Applicant's mark makes a distinctive impression on purchasers over and above the impression made by the words themselves. On this basis alone, the mark should proceed to registration on the Principal Register.

CONCLUSION

For all of the foregoing reasons, and based on the evidence and arguments already of record, Applicant requests that the Board reverse the Examining Attorney's refusal to register Applicant's CHILDREN'S DHA (Stylized) mark. The Examining Attorney has not met her burden to establish by clear evidence that CHILDREN'S DHA (Stylized) is generic for the

identified goods. To the contrary, the evidence of record establishes that: (1) Applicant's mark is not generic, as (a) CHILDREN'S DHA (Stylized) does not refer to the class or genus of goods consisting of "nutritional supplements containing DHA" and (b) the evidence shows that the public understands Applicant's mark CHILDREN'S DHA (Stylized) to refer specifically to Applicant's goods. Moreover, Applicant has met its burden of proof, by substantial and conclusive evidence, that Applicant's mark has acquired distinctiveness under Section 2(f). Accordingly, Applicant submits that its mark is entitled to registration and requests that the refusal to register be reversed and that its mark be passed to publication.

Respectfully submitted,

Dated: June 7, 2012

By: /Meredith M. Wilkes/

Meredith M. Wilkes
Angela R. Gott
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: mwilkes@jonesday.com
agott@jonesday.com