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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85699749

MARK: ORIGINAL PREMIUM BLACK ENERGY DRINK



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GENERAL TRADEMARK INFORMATION:

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EXAMINING ATTORNEY'S APPEAL BRIEF

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I. INTRODUCTION

Applicant has appealed the final refusal to register Applicant’s mark based on likelihood of confusion grounds under Section 2(d) of the Trademark Act, 15 USC Section 1052(d), between Applicant’s mark and U.S. Registration No. 4680427. The Examining Attorney requests that this Board affirm the refusal on the grounds that the marks of the parties, namely Applicant’s ORIGINAL PREMIUM BLACK ENERGY DRINK (in stylized form) and Registrant’s BLACK COLA ENERGY DRINK (in stylized form),

are confusingly similar in overall commercial impression and that the goods of the parties are either the same or closely related.¹

II. STATEMENT OF FACTS

In the initial office action issued on December 12, 2012, registration was refused under Section 2(d) of the Trademark Act, 15 USC Section 1052(d), based on likelihood of confusion with U.S. Registration No. 3326953.² Applicant was advised of a potential refusal as to prior pending application Serial No. 85222757 which subsequently matured into U.S. Registration No. 4680427 which is the registration cited in the Final Action of February 17, 2016. Applicant was also required in the December 12, 2012 Office Action to resolve issues with its identification of goods, description of the mark, enter a disclaimer of “Original Premium” and “Energy Drink,” and answer an inquiry under Trademark Rule 2.61(b), 37 CFR Section 2.61(b), as to whether the term “Black” had any meaning in the relevant trade or industry and whether the term “Black” referred to the color of Applicant’s beverage. Applicant resolved all of the requirements in its response June 12, 2013. With regard to the information request under Rule 2.61(b), Applicant responded by stating:

BLACK appearing in the mark has no significance nor is it a term of art in the relevant trade or industry or as applied to the goods/services listed in the application or any geographic significance. The word BLACK in the mark does not describe the physical color or appearance of Applicant’s products.

¹ This application is multi-class with goods listed in Classes 32 and 33. The final refusal to register under Section 2(d) of the Trademark Act was limited only to the goods listed by Applicant in Class 32 and did not apply to any of the goods listed by Applicant in Class 33.

² Registration No. 3326953 was cancelled on June 6, 2014 for that Registrant’s failure to file a Declaration of Continued Use under Section 8 of the Trademark Act, 15 USC Section 1058. Therefore, the refusal to register as to Registration No. 3326953 was subsequently withdrawn.

Based on the above representation, which the Examining Attorney deemed satisfactory to the request, Applicant was not required to include the term “Black” in its disclaimer. The initial refusal to register under Section 2(d) of the Trademark Act as to Registration No. 4680427 was made on August 12, 2015. A Final Refusal was issued on February 17, 2016. Both were limited only to the goods listed by Applicant in Class 32. This appeal subsequently followed.

III. ISSUE ON APPEAL

There only issue on appeal is whether consumers are likely to confuse the source of the Applicant’s and Registrant’s goods when encountering Applicant’s mark, “ORIGINAL PREMIUM BLACK ENERGY DRINK (and design)” for use in connection with the goods listed in Class 32 and Registrant’s mark, “BLACK COLA ENERGY DRINK” (and design) for use in connection with “energy drinks” in Class 32 under Section 2(d) of the Trademark Act.

IV. ARGUMENT

The marks at issue in this case are displayed below. Applicant’s mark appears on the left while Registrant’s mark is on the right.



A. COMPARISON OF THE MARKS

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods of the Applicant and Registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 98 USPQ2d 1253, 1260; *In re Majestic Distilling Co.*, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003).

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods, and similarity of the trade channels of the goods. See *In re Viterra Inc.*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

In this case the dominant literal portion of both marks is the wording "ORIGINAL PREMIUM BLACK ENERGY DRINK" and "BLACK COLA ENERGEY DRINK," respectively. For a composite mark containing both words and a design, the word portion may be more likely to be impressed upon a purchaser's memory and to be used when requesting the goods. *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013); *In re Viterra Inc.*, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012); *CBS Inc. v. Morrow*, 218 USPQ 198, 200 (Fed. Cir 1983). Thus, although such marks must be

compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 101 USPQ2d at 1911 (Fed. Cir. 2012); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 218 USPQ2d 390, 395 (Fed. Cir. 1983).

Of the wording used by the parties in their respective marks one word in particular dominates both marks, namely, the term "Black." Applicant has disclaimed the words "Original Premium" and "Energy Drink" apart from the mark. This requirement was made in the June 12, 2012 Office Action on the basis that the wording "Original Premium" was laudatory for Applicant's goods. Dictionary definitions from EDUCATION.YAHOO.COM and COLLINSDICTIONARY.COM were attached to that office action which indicated that "Original" means something first in time and "Premium" denotes a high degree of quality to the goods. Wording that is merely laudatory and descriptive of the alleged merit of a product [or service] are . . . regarded as being descriptive" because "[s]elf-laudatory or puffing marks are regarded as a condensed form of describing the character or quality of the goods [or services]." *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 103 USPQ2d 1753, 1759 (Fed. Cir. 2012); *In re The Boston Beer Co.*, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999).

The words "Energy Drink" as used by both parties and the term "Cola" as used by Registrant is essentially generic matter for the goods as both parties have specifically identified "energy drinks" in Class 32. The term "cola" is a type of carbonated soft drink which Registrant also disclaimed. Disclaimed matter that is descriptive of or generic for a party's goods is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); TMEP §1207.01(b)(viii), (c)(ii).

The only word used by both parties that is not generic, descriptive or laudatory for the goods is the term "Black." Its primary meaning is something which lacks hue and brightness and absorbs all light.

See the definition from INFOPLEASE.COM attached to the February 17, 2016 Office Action. Neither party disclaimed this word in their respective marks. In Applicant's case, Applicant has specifically stated that the word "Black" **is not** descriptive of any feature of its goods including the color of the liquid. This makes the term "Black" the dominant element of each party's mark.

Applicant has argued that there is a general rule that the first words in a mark are generally the dominant elements because consumers are inclined to focus on these words. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions). However, this is a **general** rule, not an absolute one. There are exceptions and this case illustrates two significant exceptions. The first two words in Applicant's mark are laudatory descriptive terms indicating in meaning that the goods are the first in time and highest in quality. These words do not indicate source but merely indicate descriptive qualities of the goods. Secondly, the placement and size of the wording in relation to the term "Black" is also a factor to consider. Here size does matter. As can be seen in Applicant's mark, the wording "Original Premium" is in much smaller font than the term "Black" which dominates in the overall appearance of the mark. The word "Black" is centered in the design and features a font size that is big and bold and designed to capture the eye of the consumer from a distance. The generic wording "energy drink" is in smaller size centered beneath the term "Black." There is no question but that of all the words used in Applicant's mark, the word "Black" is intended to be the main source identifying portion of the mark, with the rest of the wording informing consumers about the nature of the goods.

Likewise, in Registrant's mark, the term "Black" is in large stylized lettering. It appears first in the mark, and is only used with other generic words. In Registrant's case, consumers would likely find the first word in the mark as the dominant element because the wording appears prominently, in the larger

or equal size font and stylization, as wording following the term “Black.” Further, the only other wording in the mark is generic, and less likely to create a dominant commercial impression. The size of the wording “Black” in Registrant’s mark is also designed to catch the consumer’s eye. Therefore, in the case of Applicant’s and Registrant’s marks, it is proper to give more weight to the meaning of the term “Black” than to the remainder of the words used in both marks. While marks must be compared in their entireties and should not be dissected, greater weight may be given to individual components of a mark to determine its overall commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

Finally, it is worth noting that while these marks do have some visual differences when compared side by side as shown above, this is not the proper test for determining similarity in the overall commercial impressions of the marks. Unlike the Applicant’s attorney, the Examining Attorney and this Board all who have the benefit of laying the marks together for comparison purposes, consumers in the marketplace do not commonly have this luxury. Therefore, the proper test is whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016).

The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Bay State Brewing Co.*, 117 USPQ2d at 1960; *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015).

Therefore, when one considers the various factors under the *du Pont* test such as the use of the same dominant element (Black) when used in combination with other highly descriptive wording such as “Original Premium,” “Energy Drink” and “Cola,” coupled with the fact that both parties have emphasized

the appearance of the word “Black” in their logos and even use a common black and red color scheme, the marks of the parties present confusingly similar overall commercial impressions.

B. COMPARISON OF THE GOODS

The goods of the Registrant are identified simply as “energy drinks.” Applicant has listed numerous beverages in Class 32 which include the following:

Fizzy non-alcoholic drinks containing tannins, namely, energy drinks; Non-alcoholic beverages being fruit based; Non-alcoholic beverages having a fruit juice base; Non-alcoholic beverages with tea flavor; Non-alcoholic beverages, namely, soft drinks that are cherry flavored and contain cola extract; Non-alcoholic cherry flavored beverages, namely, energy drinks, soft drinks, bottled water, sparkling water, colas; Non-alcoholic beverages consisting of mixtures of fruit juices; Soft drinks consisting of non-fermented fruit juices; Non-alcoholic drinks made from water from the ground, namely, sparkling water, flavored mineral water, isotonic drinks, sports drinks; vitamin enriched non-alcoholic beverages vitamins not predominating, namely, drinking water with vitamins, energy drinks enhanced with vitamins, sports drinks enhanced with vitamins; Non-alcoholic soft drinks made from natural extracts; Non-alcoholic soft drinks made from artificial extracts; Non-alcoholic beverages containing fruit juices; Non-alcoholic beverages containing mineral water, namely, fruit drinks, isotonic drinks, energy drinks; Soft drinks; non-alcoholic sparkling drinks, namely, sparkling water, sparkling fruit juices; Colas being soft drinks; Non-fizzy non-alcoholic drinks containing tannins, namely, energy drinks, energy shots, sports drinks, soft drinks; Fruit-based soft drinks flavored with tea; non-alcoholic Cordials; isotonic non-alcoholic drinks containing caffeine; Mineral and aerated waters; Non-alcoholic drinks containing pineapple, namely, juices and pineapple juice based beverages; Soya bean based carbonated non-alcoholic beverages not being milk substitutes; Peanut milk being a soft drink; Non-alcoholic beverages made from syrups, namely, soft drinks, fruit drinks, energy drinks, sports drinks; Non-alcoholic beverages, namely, soft drinks, sports drinks, isotonic drinks, energy drinks containing milk ferments; Squashes being non-alcoholic soft drinks; Soya bean based non-carbonated non-alcoholic drinks not being milk substitutes; Mineral waters.³

³In the Office Action of August 12, 2015, the examining attorney highlighted certain portions of Applicant’s identification in boldface. Applicant may have interpreted the boldfacing to indicate that the refusal was limited only to the boldfaced goods. However, that was not the Examining Attorney’s intent and if the highlighting caused any

The goods of the parties need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

The respective goods need only be “related in some manner and/or if the circumstances surrounding their marketing be such that they could give rise to the mistaken belief that the goods emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007).

Absent restrictions in an application and/or registration, the identified goods are “presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Additionally, unrestricted and broad identifications are presumed to encompass all goods of the type described. See *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Applicant has specifically listed the following types of energy drinks:

Fizzy non-alcoholic drinks containing tannins, namely, energy drinks; Non-alcoholic cherry flavored beverages, namely, energy drinks; Non-alcoholic beverages containing mineral water, namely, fruit drinks, isotonic drinks, energy drinks; vitamin enriched non-alcoholic beverages vitamins not predominating, namely, drinking water with vitamins, energy drinks enhanced with vitamins; Non-fizzy non-alcoholic drinks

confusion on Applicant’s part, the Examining Attorney apologizes. The purpose of the highlighting was to indicate where Applicant has identified specific types of energy drinks which fall under the broader listing of “energy drinks” by the Registrant.

containing tannins, namely, energy drinks, energy shots; Non-alcoholic beverages made from syrups, namely, energy drinks.

All of the above mentioned goods are specific types of energy drinks and clearly fall within the broader language used by Registrant. Therefore, it must be presumed that the reference to “energy drinks” in Registrant’s identification encompasses all of the more specific types of energy drinks identified by Applicant.

With regard to much of the rest of the Applicant’s identification in Class 32, the goods are closely related to the energy drinks identified by Registrant. More specifically, Applicant has identified a variety of soft drinks, fruit juice and fruit based beverages, waters enhanced with vitamins and minerals, colas, sports drinks and isotonic drinks.

Evidence was attached to the February 17, 2016 Office Action which contained commercial examples of several “energy drinks,” many of which are primarily water based, fruit or vegetable juice based, carbonated and/or enhanced with vitamins. For example the attachment from ENERGYDRINKS.US.REDBULL.COM indicated that its drink contained Alpine spring water (as well as vitamins, caffeine, taurine, sucrose and glucose). It also had a variety of fruit juice based and/or fruit flavored drinks with many of the same ingredients. The attachment from ACUTEFRUITENERGY.COM showed a fruit juiced based drink billed to consumers as being an energy drink ideal for use after sports workouts. The attachment from WALMART.COM displayed V8 and VFUSION fruit and vegetable juice based energy drinks as well as SoBe citrus energy fruit drinks. The attachments from HYDRIVEENERGY.COM and BLINKENERGYWATER.COM presented a variety of fruit flavored “energy waters.” The attachment from HIBALLER.COM showed various energy drinks billed as “energy drinks,” “sparkling energy water,” chocolate flavored “energy shake” and an “energy coffee-based beverage.”

With regard to Applicant's identification which includes generally broad language such as "non-alcoholic beverages being fruit based, Non-alcoholic beverages having a fruit juice base, Non-alcoholic beverages, namely, soft drinks that are cherry flavored and contain cola extract; Soft drinks consisting of non-fermented fruit juices; Non-alcoholic drinks made from water from the ground, namely, sparkling water, flavored mineral water, isotonic drinks, sports drinks; vitamin enriched non-alcoholic beverages vitamins not predominating, namely, drinking water with vitamins; sports drinks enhanced with vitamins; Non-alcoholic soft drinks made from natural extracts; Non-alcoholic soft drinks made from artificial extracts; Non-alcoholic beverages containing fruit juices; Non-alcoholic beverages containing mineral water, namely, fruit drinks, isotonic drinks, energy drinks; isotonic non-alcoholic drinks containing caffeine; Mineral and aerated waters, Soft drinks; non-alcoholic sparkling drinks, namely, sparkling water, sparkling fruit juices; Colas being soft drinks" all of this wording is broad enough to include energy drinks.

The evidence of record shows that fruit juice and fruit flavored drinks, vitamin enhanced water drinks, soft drinks, colas or sports drinks can also be considered an "energy drink" especially where such drinks are enhanced with ingredients to boost energy and marketed to consumers for that purpose. In other words, a "cola" can be both a cola and an energy drink especially where the goods include cola extracts and other ingredients commonly found in "energy drinks." A fruit drink does not cease to be a fruit drink because it also contains caffeine, guarana or taurine.⁴ Such goods, as the evidence in the record shows, are sold to the same potential consumers through similar trade channels. Thus, the additional goods in Class 32 other than those specifically identified by Applicant as "energy drinks" are closely related to the energy drinks identified by the Registrant.

C. THIRD PARTY REGISTRATIONS

⁴ See the article attached to the February 17, 2016 Office Action from CAFFEINEINFORMER.COM (Energy Drink Ingredients and What They Do).

Applicant submitted with its January 19, 2016 Response a few printed or electronic copies of third-party registrations for marks containing the wording “Black”⁵ to support the argument that this wording is weak, diluted, or so widely used that it should not be afforded a broad scope of protection.

The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods. *See Nat’l Cable Tel. Ass’n, Inc. v. Am. Cinema Editors, Inc.*, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 177 USPQ 563, 567 (C.C.P.A. 1973). Evidence of widespread third-party use of similar marks with similar goods “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection” in that industry or field. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); *see In re Coors Brewing Co.*, 68 USPQ2d 1059, 1062-63 (Fed. Cir. 2003).

However, evidence comprising only a small number of third-party registrations for similar marks with similar goods, as in the present case, is generally entitled to little weight in determining the strength of a mark. *See AMF Inc. v. Am. Leisure Products, Inc.*, 177 USPQ 268, 269 (C.C.P.A. 1973); *Richardson-Vicks Inc. v. Franklin Mint Corp.*, 216 USPQ 989, 992 (TTAB 1982).

These registrations do not justify the registration of Applicant’s mark in the present case. In each of the registrations cited by the Applicant, the term “Black” is subsumed into the meaning of other distinctive wording thereby making the marks distinguishable from both Registrant’s and Applicant’s marks. For example, “Black Dog,” connotes a black colored dog; “Black Mamba” is type of poisonous snake;⁶ “28Black” conjures up the image of a roulette wheel; “Black Steel” creates an image of black

⁵ The registrations submitted were for the following: Reg. No. 3294381 (Black Dog); Reg. No. 3851986 (Big Black M Java Monster and Design); Reg. No. 3528857 (Black Mamba); Reg. No. 3822775 (Power in Black); Reg. No. 3924894 (28Black); Reg. No. 4277150 (Black Steel and design); Reg. No. 4366034 (Bruiser Blackberry); Reg. No. 4018064 (Black Death); Reg. No. 4371218 (Black Sun); Reg. No. 4685465 (Black Max and design); Reg. No. 4385185 (Black Label); and Reg. No. 4716820 (New Black Gold).

⁶ See the attached dictionary definition from OXFORDDICTIONARIES.COM.

colored steel; “Black Death” creates an impression of the plague⁷; “New Black Gold” creates an image of crude oil or petroleum which is often referred to as “black gold;”⁸ “Big Black Java Monster” creates the image of a black monster who like coffee; “Black Sun” is incongruous and creates the image of a black colored sun; “Black Max” with its bird design creates an image of a World War I flying ace; “Black label” implies just what it says, a black colored label; and “Bruiser Blackberry” is not really a “Black” formative mark but is highly descriptive of the flavor of the beverage.

Here there is no evidence that the term “Black” is merely descriptive of any feature or characteristic of Applicant’s or Registrant’s goods. The dominant element is simply the name of a color “Black.” There is no other suggestive term to change the image as in the list of registrations submitted by the Applicant. The only wording used by both parties in their respective marks is either generic or laudatory. Therefore, the primary connotation for both marks is the color “Black.” While there are some differences in the visual elements of the marks, the overall commercial impressions are similar in meaning. When combined with the fact that the goods of the parties are either the same or closely related, consumers who encounter the Registrant’s “BLACK COLA ENERGY DRINK” and Applicant’s “ORIGINAL PREMIUM BLACK ENERGY DRINK,” could likely confuse the source of the goods.

Applicant also contends that Registrant’s mark is weak and, therefore should be given a limited scope of protection. However, that does not mean that Registrant should be given no protection. In this case, the scope of protection afforded the registration was limited and did not extend to any of the

⁷ See the attached dictionary definition from OXFORDDICTIONARIES.COM

⁸ See the attached dictionary definition from OXFORDDICTIONARIES.COM. The Trademark Trial and Appeal Board may take judicial notice of dictionary definitions that (1) are available in a printed format, (2) are the electronic equivalent of a print reference work, or (3) have regular fixed editions. TBMP §1208.04; *see In re Driven Innovations, Inc.*, 115 USPQ2d 1261, 1266 n.18 (TTAB 2015) (taking judicial notice of definition from *Merriam-Webster Online Dictionary* at www.merriam-webster.com); *see also* Fed. R. Evid. 201; 37 C.F.R. §2.122(a).

alcoholic beverages in Class 33.⁹ The refusal to register was limited only to the goods in Class 32 because the goods identified by the parties are specifically identical or closely related in kind as discussed above. This is not a case where Applicant's mark was refused registration based on a similar mark for energy food bars in Class 30 or dietary and nutritional supplements in Class 5.

Applicant has relied primarily on two cases to support its contention that Registrant's mark is weak and should be given a limited scope of protection. The first is *AMF Inc., v. American Leisure Products, Inc.*, 177 USPQ 268 (CAFC 1973) where the Federal Circuit reversed a finding by the TTAB of no likelihood of confusion between the marks GOLDFISH and SUNFISH, SAILFISH and FLYING FISH for small sail boats. This case actually concerned confusion with a "family" of "fish" marks which is not at issue in the present case. However, the Federal Circuit observed that the question to be decided in a likelihood of confusion case is not whether consumers will confuse the marks but whether the marks will likely cause confusion, mistake or deception. *AMF Inc. v. American Leisure Products, Inc.* at 270.

The other case relied upon by Applicant is *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541 (TTAB 1983). In this case the issue was whether there would be likelihood of confusion between MEAT PLUS for pet food in Class 31 and PLUS for dietary and nutritional supplements for pets in Class 5. This Board held that "Plus" was highly suggestive for a variety of products and found no likelihood of confusion based on widespread third party use of a highly suggestive term. Nevertheless, this Board held that the Registrant's "Plus" mark is entitled to protection against marks which are either substantially identical or to the subsequent use on substantially similar goods. *Plus Products v. Star-Kist Foods, Inc.* at 544. In the present case, the goods of the parties in Class 32 are substantially similar goods, namely, energy drinks or they are within the scope of energy drinks such as fruit drinks, fruit

⁹ An energy drink, by its very definition is a "soft drink containing ingredients designed to boost the drinker's energy esp. after exercise." See the definition attached to the December 12, 2012 Office Action from COLLINSDICTIONARY.COM

juices, waters, soft drinks, colas, sports drinks and isotonic drinks which contain energy enhancements and could be marketed to consumers as energy drinks. There is no evidence in this case that the term “Black” as used by either Applicant or Registrant is descriptive or even suggestive of the color of the beverage. Therefore, the additional laudatory or generic wording used by both parties in their respective marks is insufficient to avoid a finding of likelihood of confusion as to the source of the respective goods of the parties.

V. CONCLUSION

When one considers the various factors under the *du Pont* test, the overall commercial impression of both marks is confusingly similar. Both marks emphasize the dominant element “Black” and the additional wording in each mark is either merely descriptive or generic. Consumers who encounter these marks will place source identifying emphasis on the word “Black.” The goods of the parties in Class 32 are either identical or within the scope of what an “energy drink” is. The evidence of record shows that energy drinks are soft drinks which can be primarily water based or primarily juice based. Such goods are sold to the same potential consumers through similar retail channels and are marketed to consumers as being suitable for boosting energy.

While there are some visual differences between the marks, these differences are not sufficient to outweigh the primary connotation of the literal elements as used in the labeling for the goods. Even if there is an inkling of doubt about whether consumer confusion is likely based on a close side-by-side inspection of the marks, any doubt regarding a likelihood of confusion determination is resolved in favor of the Registrant. *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Therefore, for the reasons stated above, the Examining Attorney urges this Board to affirm the refusal to register under Section 2(d) of the Trademark Act, 15 USC Section 1052(d), as to the goods identified by Applicant in Class 32.

Respectfully submitted,

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Home > North American English > black gold

Definition of *black gold* in English:

black gold

NOUN

North American informal

Petroleum.

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Pronunciation: ⓘ
black gold /ˈblæk ˈɡɔːld/

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Words for Places

Words for Places

What does fjord mean?

- a long mountain ridge with steep sides
- a deep inlet between high cliffs

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Most popular in the world

1. bilbo
2. racism
3. baratheia
4. pp
5. stand

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Home > North American English > black mamba

Definition of *black mamba* in English:

black mamba

NOUN

A highly venomous, slender, olive-brown to dark gray snake that moves with great speed and agility. Native to eastern and southern Africa, it is the largest poisonous snake on the continent.

→ [mamba](#)

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Which Roald Dahl character are you?



What do they call French toast in France? (And other similar questions)

Types of Dance

Which of the following is a type of dance?

bourrée

boudon

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1. bilbo
2. racism
3. baratheia
4. pp
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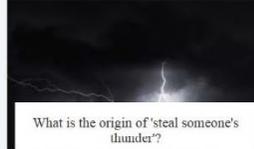
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Home > North American English > Black Death

Definition of *Black Death* in English:

Black Death



PROPER NOUN

The great epidemic of bubonic plague that killed a large part of the population of Europe in the mid 14th century. It originated in central Asia and China and spread rapidly through Europe, carried by the fleas of black rats, reaching England in 1348 and killing between one third and one half of the population in a matter of months.

Origin

A modern term (compare with earlier the (great) pestilence, great death, the plague), said to have been introduced into English history by Mrs. Markham (pseudonym of Mrs. Penrose) in 1823, and into medical literature by a translation of German *der Schwarze Tod* (1833). The epithet *Black* is of uncertain origin; its equivalent was first found in Swedish and Danish chronicles.

Pronunciation:

Black Death /ˈblæk ˈdeɪθ/

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Rhyming Slang

What is British rhyming slang for feet?

plates of meat

strands of wheat

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1. bilbo
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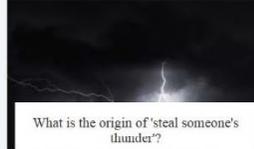
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