

ESTTA Tracking number: **ESTTA714061**

Filing date: **12/10/2015**

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

Proceeding	86009795
Applicant	Hinton, Christopher C.
Applied for Mark	THC ENERGY
Correspondence Address	LUKE BREAN BREANLAW, LLC PO BOX 4120 PORTLAND, OR 97208-4120 UNITED STATES tmsupport@breanlaw.com
Submission	Appeal Brief
Attachments	2dAppeal -- 86009795.pdf(134899 bytes)
Filer's Name	Luke Brean
Filer's e-mail	tmsupport@breanlaw.com
Signature	/LB/
Date	12/10/2015

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

In re Application of:

Christopher C. Hinton

Law Office 109

Serial No. 86009795

Trademark Attorney:

Filed: July 14, 2013

Robert J Struck

Trademark: THC ENERGY

Trademark Trial and Appeal Board

U.S. Patent and Trademark Office

P.O. Box 1451

Alexandria, VA 22313-1451

BRIEF FOR APPELLANT

INTRODUCTION

Applicant hereby appeals from the Examiner's final refusal to register the above-identified mark dated April 13, 2015 and respectfully requests the Trademark Trial and Appeal Board to reverse the Examiner's decision.

APPLICANT'S TRADEMARK

Applicant seeks registration on the Principal Register of its mark THC ENERGY for energy drinks in International Class 32.

THE REJECTION

The Examiner refused registration of Appellant's mark, contending that the mark, as applied to Appellant's goods, is deceptively misdescriptive.

ARGUMENT

I. Mark Is Not Deceptive or Deceptively Misdescriptive

The Trademark Office bears the burden of proving that the mark is unregistrable because it is either "deceptively misdescriptive" or "deceptive." *In re Standard Elektrik Lorenz Aktiengesellschaft*, 371 F.2d 870, 152 LLaPJ. 563 (C.C.P.K 1967). Further, it can not be assumed that the reasonable prudent purchaser is not an uninformed or gullible individual. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 227 U.S.P.Q. 138 (7th Cir. 1985) (while EVER-EADY for batteries suggests long life, no one would be fatuous enough to be deceived into thinking that such a battery would never wear out or that its shelf life was infinite); *Donsky v. Bandwagon, Inc.*, 193 U.S.P.Q. 336 (D. Mass. 1976) (100 YEAR NITE- LITE not misde-scriptive); *R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 U.S.P.Q. 169 (T.T.A.B. 1985) (NEW LOOK for ordinary cigarettes is not deceptively misdescriptive, using the treatise test of how gullible is the reasonably prudent purchaser. "New Look" denotes no definite characteristic or ingredient of the goods and cannot be misdescriptive.).

In support of the present refusal, the Examiner cited a multifactor test (set forth below) for use in determining whether a mark is deceptive.

- (1) The applied-for mark consists of or contains a term that misdescribes the character, quality, function, composition, or use of the Energy drinks.
- (2) Prospective purchasers are likely to believe that the misdescription actually describes the Energy drinks.

(3) The misdescription is likely to affect a significant portion of the relevant consumers' decision to purchase the Energy drinks.

See In re Budge Mfg. Co., 857 F.2d at 775, 8 USPQ2d at 1260; *In re White Jasmine LLC*, 106 USPQ2d 1385, 1391-92 (TTAB 2013); TMEP §1203.02(b); see also *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 1353, 1356, 90 USPQ2d 1489, 1492-93, 1495 (Fed. Cir. 2009) (holding that the test for materiality incorporates a requirement that a “significant portion of the relevant consumers be deceived”).

Examiner's argument and evidence do not address all factors required by the above test, thus it does not provide the requisite support for the refusal to register. As a prima facie case has not been established it is respectfully submitted that the refusal to register is not sufficiently supported.

Addressing each factor in turn:

Factor (1) – Applicant's mark does not misdescribe the character, quality, function, composition, or use of the Energy drinks.}

Applicant's mark absolutely does not contain THC – THC is an acronym for “tea honey care.”

Applicant is well aware of the Controlled Substances Act and the fact that the CSA presents a bar to a legal use in commerce required to secure a trademark registration. Moreover, the CSA would prohibit the Applicant from selling energy drinks, or any similar product, containing

Tetrahydrocannabinol.

Factor (2) - Prospective purchasers are not likely to believe that the misdescription actually describes the Energy drinks.

THC, the controlled substance, is not used in any energy drink anywhere as the recreational use of THC is related to its mind altering qualities and calming effects. As noted by Wikipedia:

“effects include relaxation, alteration of visual, auditory, and olfactory senses, fatigue, and appetite stimulation. THC has marked antiemetic properties. It may acutely reduce aggression and increase aggression during withdrawal.” See Exhibit A.

Factor (3) - The misdescription is not likely to affect a significant portion of the relevant consumers’ decision to purchase the Energy drinks.

It can not be assumed that the reasonable prudent purchaser is an uninformed or gullible individual. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 227 U.S.P.Q. 138 (7th Cir. 1985). Given that THC is well known and consumed for the purposes of relaxation, it would be quite the gullible individual that would purchase as THC containing energy drink to improve their levels of energy. When a substance is widely understood to be inducing of fatigue and relaxation, this is precisely the opposite effect of any energy drink on the market.

CONCLUSION

For the reasons set forth hereinabove, Appellant submits that the Appellant's mark, as applied to energy drinks, is not deceptively misdescriptive. Accordingly, Appellant's mark is entitled to registration.

The Board is therefore respectfully requested to reverse the Examiner's decision refusing registration.

Respectfully submitted:

A handwritten signature in blue ink, appearing to read 'L. Brean', with a stylized flourish at the end.

Luke Brean, Esq.

Attorney for Appellant

BREANLAW, LLC
P.O. BOX 4120
ECM #72065
PORTLAND, OR 97208
800-451-5815
luke@breanlaw.com