

<p>This Opinion is Not a Precedent of the TTAB</p>
--

Hearing: April 20, 2017

Mailed: May 15, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

*In re Monsterops LLC*

---

Serial No. 86295483  
Serial No. 86295490  
(Consolidated)<sup>1</sup>

---

Don D. Cha of Hamilton DeSanctis & Cha, LLP for Monsterops LLC.

Shaila E. Lewis, Trademark Examining Attorney,<sup>2</sup> Law Office 114,  
K. Margaret Le, Managing Attorney.

---

Before Kuhlke, Ritchie, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Monsterops LLC (“Applicant”) seeks registration on the Principal Register of the marks PLAZMA and PLAZMA REACTIVE PUMP, both in standard characters, for

---

<sup>1</sup> Following the briefing in the two appeals, the Board consolidated them at the request of Applicant. Citations to the briefs are to the TTABVUE file in Application Serial No. 86295483 unless otherwise indicated.

<sup>2</sup> Both applications were initially examined by another Trademark Examining Attorney and were reassigned to Ms. Lewis, who filed the Patent and Trademark Office’s briefs on both appeals and appeared at the oral hearing. We will refer to both Examining Attorneys in this opinion in the singular as the “Examining Attorney.”

“dietary and nutritional supplements; dietary and nutritional supplements for endurance sports; dietary supplements,” in International Class 5.<sup>3</sup>

The Examining Attorney has refused registration of both marks under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), on the ground that they consist of or comprise deceptive matter. She has refused registration of PLAZMA on the alternative ground, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), that the mark is deceptively misdescriptive of the identified goods. She has refused registration of PLAZMA REACTIVE PUMP on the alternative ground, under § 2(e)(1) and Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), that PLAZMA is deceptively misdescriptive of the identified goods, and its phonetic equivalent “plasma” must be disclaimed as a condition to registration of the mark.

After the Examining Attorney made the refusals final, Applicant timely appealed in both cases. The appeals are fully briefed, and the Examining Attorney and counsel for Applicant appeared at an oral hearing before the panel on April 20, 2017. We affirm both refusals to register under Section 2(a), and we affirm the alternative refusals to register PLAZMA under Section 2(e)(1) and PLAZMA REACTIVE PUMP without a disclaimer of “plasma” under Sections 2(e)(1) and (6).

## **I. Prosecution Histories and Records on Appeal**

On June 26, 2014, the Examining Attorney issued first Office Actions refusing registration of PLAZMA on the ground that it was merely descriptive of a feature of

---

<sup>3</sup> Application Serial No. 86295483 to register PLAZMA and Application Serial No. 86295490 to register PLAZMA REACTIVE PUMP were both filed on May 29, 2014 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), on the basis of Applicant’s claim of first use of the marks, and first use of the marks in commerce, at least as early as January 1, 2013.

the identified goods and refusing registration of PLAZMA REACTIVE PUMP on the ground that it was confusingly similar to a registered mark.<sup>4</sup> The Examining Attorney also required a disclaimer of word “plasma” (the correct spelling of the misspelled word PLAZMA) in the PLAZMA REACTIVE PUMP mark on the ground that it was merely descriptive of a feature of the goods. The Examining Attorney made of record in both applications pages from Internet websites regarding dietary and nutritional supplements.

Both applications became abandoned on January 22, 2015 when Applicant did not timely respond to the first Office Actions, but were revived on February 3, 2015 when Applicant filed Petitions to Revive and Responses to the Office Actions, in which Applicant traversed the refusals to register. Applicant made of record in the PLAZMA application pages from its website describing the goods sold under the claimed mark.

On February 26, 2015, the Examining Attorney issued second Office Actions in both applications. The Examining Attorney refused registration of both marks on the ground that they were deceptive, refused registration of PLAZMA on the alternative ground that it was deceptively misdescriptive, continued the disclaimer requirement in the PLAZMA REACTIVE PUMP application, and requested in both applications that Applicant provide information regarding the nature of its goods.

---

<sup>4</sup> Although this refusal was continued and maintained through subsequent Office Actions in the PLAZMA REACTIVE PUMP application, it is not before us on appeal because the Examining Attorney did not include it in the Office Action making final the refusal to register, and we presume that the refusal was withdrawn. We will not discuss it further in this opinion.

Applicant responded to the second Office Actions on August 25, 2015 by traversing the refusals to register and the disclaimer requirement in the PLAZMA REACTIVE PUMP application. In its responses to the information requests, Applicant stated, among other things, that “Applicant’s goods and services are directed to increasing electrolytes and nutritional supplements within user’s blood plasma thereby ‘increasing metabolic rate, [driving amino acids], and other key nutrients into the muscle cell to the point of creating a high-performance effect,’” and that “Applicant’s goods and services . . . do NOT contain plasma” and “do not increase ‘plasma in the body.’” August 25, 2015 Responses to Office Actions at 2-3 (emphasis in original). In the PLAZMA REACTIVE PUMP application, Applicant made of record materials describing its product.

On September 30, 2015, the Examining Attorney issued third Office Actions. The Examining Attorney maintained the descriptiveness, deceptiveness, and deceptive misdescriptiveness refusals in the PLAZMA application, maintained the deceptiveness refusal and the disclaimer requirement in the PLAZMA REACTIVE PUMP application, and issued new information requests in both applications requiring Applicant to provide additional information and materials regarding its goods and their composition. The Examining Attorney made of record in both applications definitions of “plasma” and “whey” from dictionary.com, and evidence that there was no dictionary definition of “plazma.” The Examining Attorney also made of record in the PLAZMA application Internet evidence regarding dietary and nutritional supplements.

On February 1, 2016, Applicant responded to the third Office Actions, traversed the refusals to register, and made of record in both applications Applicant's product label and product use instructions. Applicant discussed, but did not make of record, definitions of "plasma" from vocabulary.com.

On February 29, 2016, the Examining Attorney issued fourth Office Actions in both applications. The Examining Attorney made final the deceptiveness refusals in both applications, the deceptively misdescriptive refusal in the PLAZMA application, and the disclaimer requirement in the PLAZMA REACTIVE PUMP application. The Examining Attorney made of record in both applications a definition of "plasma protein" from thefreedictionary.com, a page from www.grammar.cl regarding the pronunciation of the letter "s," and pages from various websites regarding dietary and nutritional supplements.

## **II. Analysis of Deceptiveness Refusals**

Section 2(a) of the Trademark Act prohibits registration of a mark if "it-[c]onsists of or comprises . . . deceptive . . . matter." 15 U.S.C. § 1052(a). The Federal Circuit has held that as used in § 2(a), the word "comprises" means "includes," *In re Fox*, 702 F.3d 633, 105 USPQ2d 1247, 1250 (Fed. Cir. 2012), and "[i]t is well established that a mark may be found deceptive on the basis of a single deceptive term that is embedded in a larger mark . . ." *In re White Jasmine LLC*, 106 USPQ2d 1385, 1391 (TTAB 2013) (citations omitted) (finding composite mark WHITE JASMINE and design deceptive as applied to tea not containing white tea because of deceptiveness of "WHITE" within the mark). Registration of a mark in an application containing

multiple goods in a class may be refused as to the entire class if “the mark is deceptive as applied to any of the goods in the application.” *Id.*

“The test for deceptiveness is whether all three of the following criteria are met:

- (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods?
- (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?
- (3) If so, is the misdescription likely to affect the purchasing decision of a significant portion of relevant consumers?”

*In re Tapco Int’l Corp.*, 122 USPQ2d 1369, 1371 (TTAB 2017) (citing *In re Budge*, 857 F.2d 773, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988)). Section § 2(a) is an absolute bar to registration of marks consisting of or comprising deceptive matter on either the Principal Register or the Supplemental Register. *Id.*<sup>5</sup>

#### **A. Misdescription**

“As the starting point for our analysis, we note that for a term to misdescribe goods, the term must be merely descriptive of a significant aspect of the goods which the goods could plausibly possess but in fact do not.” *White Jasmine*, 106 USPQ2d at

---

<sup>5</sup> As noted above, unlike on the PLAZMA appeal, where the Examining Attorney argues alternatively that if PLAZMA is not found to be deceptive, it is deceptively misdescriptive and should be refused registration on that basis, on the PLAZMA REACTIVE PUMP appeal, the Examining Attorney’s alternative position is that if the mark is not found to be deceptive, the word PLAZMA is deceptively misdescriptive and its equivalent “plasma” must be disclaimed as a condition to registration of the mark.

1392. To make this determination, we must first decide the meaning of the term PLAMZA as it appears in both marks.

The Examining Attorney argues that PLAZMA has no known meaning, and is an intentional misspelling of, and the phonetic equivalent of, the word “plasma.” 7 TTABVUE 6. Applicant admits “that the term PLAZMA is intentionally spelled with a letter ‘Z’ rather than ‘S,’” 8 TTABVUE 4 (Serial No. 86295490), and does not dispute that PLAZMA is the phonetic equipment of “plasma.” Its arguments on both appeals focus primarily on the meaning and significance of the word “plasma” as applied to the identified goods. 4 TTABVUE 6-8; 8 TTABVUE 3-5; 4 TTABVUE 6-8; 8 TTABVUE 4-6 (Serial No. 86295490).<sup>6</sup> Under the circumstances, and in the absence of any record evidence to the contrary, we find that consumers will understand the term “PLAZMA” as it appears in both marks to have the meaning “plasma.” *See Tapco*, 122 USPQ2d at 1372 (finding that “consumers will understand KLEER to have the meaning ‘clear’”). This is significant because “[i]t is settled that the phonetic equivalent of a deceptive term is also deceptive,” *id.* (citations omitted), so if “plasma” is deceptive as applied to the identified goods, PLAZMA is as well.

We must next determine what “plasma” means in the context of the subject goods because the Examining Attorney and Applicant partially disagree on its meaning. The Examining Attorney argues on both appeals that “plasma” means both “whey” and “blood plasma.” 7 TTABVUE 10; 7 TTABVUE 7 (Serial No. 86295490). For the

---

<sup>6</sup> In making these arguments, Applicant does not cite a single case in any of its four briefs and does not organize them within the *Budge* analytical framework, which it never discusses. 4 TTABVUE 8; 8 TTABVUE 3-5; 4 TTABVUE 8-9; 8 TTABVUE 3-6 (Serial No. 86295490).

definition of “plasma” as “whey,” she relies on an entry from Dictionary.com made of record in the September 30, 2015 Office Actions in both applications.<sup>7</sup> Applicant agrees that “the ‘simple definition’ of the term ‘plasma’ means ‘the watery part of blood that contains blood cells,’” but disputes that “plasma” also means “whey.” 4 TTABVUE 6 (Serial Nos. 86295483 and 86295490); 8 TTABVUE 3-4; 8 TTABVUE 4-5 (Serial No. 86295490).<sup>8</sup>

“[D]eceptiveness, or misdescriptiveness, is not considered in the abstract. Instead, it must be determined in relation to the goods for which registration is sought. Therefore, the fact that a term may have different meanings in different contexts is not controlling.” *Tapco*, 122 USPQ2d at 1372. In relation to the dietary and nutritional supplements identified in the applications, we agree with Applicant that “plasma” would not be understood to mean “whey,” in part because the definition of

---

<sup>7</sup> This meaning is the third of five listed meanings of “plasma” in the Dictionary.com entry cited by the Examining Attorney. The first listed meaning, which appears after the words “*Anatomy, Physiology*,” is “the liquid part of blood or lymph, as distinguished from the suspended elements.”

<sup>8</sup> In support of this argument, Applicant cites a definition of “plasma” from the Merriam-Webster online dictionary that does not define the word as “whey.” 4 TTABVUE 6. The definition is attached as Exhibit 2 to its main briefs on both appeals, but was not made of record during prosecution. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed form or regular fixed editions, *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). We judicially notice the referenced Merriam-Webster definition (merriam-webster.com, accessed on May 13, 2017), as well as additional definitions of “plasma” from the Cambridge Dictionary as “the liquid part of blood that carries the blood cells” (dictionary.cambridge.org, accessed on May 13, 2017), from the Oxford Living Dictionaries as “the colourless fluid part of blood, lymph, or milk, in which corpuscles or fat globules are suspended” (en.oxforddictionaries.com, accessed on May 13, 2017), and from vocabulary.com as “the colorless watery fluid of the blood and lymph that contains no cells, but in which the blood cells (erythrocytes, leukocytes, and thrombocytes are suspended” (vocabulary.com, accessed on May 13, 2017).



“plasma” as “whey” proffered by the Examining Attorney appears to be an outlier. As noted above, the first definition of “plasma” in the Dictionary.com entry cited by the Examining Attorney is as “the liquid part of blood or lymph, as distinguished from the suspended elements,” an additional definition of “plasma” from the thefreedictionary.com (Medical Dictionary) of record in both applications defines “plasma” as “the fluid portion of the blood in which corpuscles are suspended,” but not as “whey,” February 29, 2016 Office Actions at 3, and none of the other dictionary definitions of “plasma” that we have noticed defines the word as “whey.”

Accordingly, we find that in the context of the subject goods, the more accepted and generally-known definition of “plasma” is as the liquid portion of blood in which blood cells are suspended, the alternative definition proffered by the Examining Attorney and the definition argued by Applicant. *Cf. In re Jim Crockett Promotions, Inc.*, 5 USPQ2d 1455, 1456 n.5 (TTAB 1987) (rejecting single dictionary definition of word argued by Examining Attorney in favor of alternative definition where six other dictionaries consulted by Board did not define the word in the manner argued by the Examining Attorney). We will assess whether “plasma” is deceptive as applied to Applicant’s goods by reference to that definition.

The Examining Attorney argues that the word PLAMZA in the marks misdescribes the identified goods in both applications because “‘plasma’ is a known ingredient in dietary and nutritional supplements,” and “Applicant has made it clear through its own admission and through the specimens of record that applicant’s goods do not contain plasma.” 7 TTABVue 7 (Serial No. 86295490). The Examining

Attorney cites third-party websites in the record to support her claim that plasma in protein form is a known ingredient in dietary and nutritional supplements.<sup>9</sup> Portions of pages from those websites are reproduced below:

## Super Plasma Protein (Protein Factory)

Like 0 Tweet 0 G+1 0 Pin it 3 Share 3

Be the first to write a review on Protein Factory Super Plasma Protein!

0 forum posts

**Super Plasma Protein** is > 90% **protein** isolate and made from hydrolyzed beef **plasma**. The **powder** is spray dried and concentrated into edible bovine **plasma** and is then made into bovine serum and concentrated to have an immunoglobulin content of 40% minimum. Unlike traditional sources of **protein** such as casein or whey, **Super Plasma Protein** is rich in naturally occurring, bioactive **proteins** and peptides. The bioactivity of the **proteins** offers the athlete **benefits** beyond an excellent amino acid profile.

### Bodybuilding and Athletic Supplementation

The first new **protein** source to hit the market since whey **protein** 10 years ago, **Super Plasma** is a concentrate of serum, the gold-standard of all natural substances in supporting cell growth and proliferation. **Super Plasma Protein** works harder for you than any other **protein** source. It has three times the level of anabolic growth factors as whey! It goes to work the minute it becomes soluble to promote **protein** synthesis, reduce **protein** turnover and enhance **protein** retention! This will help you absorb amino acids more efficiently and increase the body's nitrogen balance. It will also help users gain lean muscle mass by breaking the catabolic cycle with immunoglobulin and mitogenic growth factors such as IGF-1 and the immunomodulatory cytokine. The main ingredient in Bovine Serum is immunoglobulin G.

Recent studies have opened up a new opportunity towards maximizing **protein** retention and lean body mass in the athlete. Cytokines also elicit potent catabolic effects on skeletal muscle which affects growth. Cytokine management, because of its potential to affect the catabolic component of physiological state, has tremendous promise towards increasing lean body mass and reducing muscle soreness.

Below is a list of **benefits** proven with research with the use of Bovine Serum:

Bioactive Hormones, growth factors and cytokines promote cell growth  
Activation of immune system thereby preventing **protein** and energy loss....

### Price comparisons

If you are looking to purchase several items, add all the formats that interest you to your favourites, then go to Favourites on the menu to see which stores carry all the items you're interested in at the best prices.

Format	Serving size	Servings per container
1 lb	1 Tsp (5 g)	90

Support this site, buy **Super Plasma Protein** from affiliate retailers:

Format	Store	Notes	Price/serving	Price
--------	-------	-------	---------------	-------



September 30, 2015 Office Actions at 4 (supplementarium.com).

<sup>9</sup> The Examining Attorney also made of record webpages regarding the use of plasma protein to treat various medical conditions. These therapeutic uses have little probative value on these appeals because, as Applicant's specimen of use states, dietary and nutritional supplements are "not intended to diagnose, treat, cure, or prevent any disease."

This is Google's cache of <http://www.ultimatefatburner.com/bodybuilding/plasma-protein-review.html>. It is a snapshot of the page as it appeared on Sep 24, 2015 03:25:10 GMT. The current page could have changed in the meantime. [Learn more](#)

[Full version](#) [Text-only version](#) [View source](#)

Tip: To quickly find your search term on this page, press **Ctrl+F** or **⌘-F** (Mac) and use the find bar.



UltimateFatBurner.com - Supplement Reviews Since 1999!

cache:3Zqlkowoe1oJ:www.ultimatefatburner.com/bodybuilding/plasma-protein-review.html

Search

[Main](#) [Fat Burners](#) [Bodybuilding](#) [Vitamins](#) [More »](#)



[Home](#)

[Protein and Amino Acids](#)

[Review: Colostrum/Bovine Plasma Protein](#)

[Search UltimateFatBurner.com](#)

## Review: Colostrum/Bovine Plasma Protein

Posted By elissa on Aug 8, 2008 | 1 comment



Muscles are made of protein, so it's easy to understand why protein supplements are popular in the bodybuilding world. And when it comes to protein supplements, whey protein reigns supreme, due to its content of essential amino acids, unique digestion profile, and biological activity.

This last property is important to many people, who are interested in the health benefits of whey protein beyond its basic, nutritive functions. They understand that bodybuilding is about more than just building muscle. This is why processing methods that preserve the protein subfractions in their native (i.e., undenatured) states are valued.

This is also the reason why other, related specialty proteins—bovine colostrum and bovine plasma protein—have gained a toehold in the market. Like whey, these protein sources are more than just sources of protein.

cache:3Zqlkowoe1oJ Search

Hey! Would You Mind Sharing?



**FREE REPORT:**  
Stop spending  
\$30, \$50, even \$70  
per month for products  
that don't work!

This amazing

What's in bovine plasma protein? Well, the word "plasma" says it all.

Blood appears to be a dark red liquid, but that's not how it looks under a microscope. Under high magnification, what appears to be a homogenous fluid turns out to be an array of donut-shaped red cells, suspended in a clear fluid. That fluid is plasma. Plasma is mostly water, but also contains minerals (electrolytes and buffer salts), glucose, hormones, dissolved gases...and proteins. Albumin is the dominant protein type, but—similar to colostrum—plasma is also rich in immunoglobulins. Likewise, there are also small amounts of other specialized proteins, such as clotting factors, binding/transport proteins and enzymes.

There are several animal experiments that demonstrate dietary plasma protein can [reduce the symptoms of intestinal infections](#) and improve recovery. Human studies are limited, but it lowered "bad" [LDL cholesterol](#) in one, and [helped improve nitrogen retention and nutritional status](#) in another. Finally, there is some evidence that it [may improve gut barrier function](#). So, plasma protein appears to be promising stuff.

Like colostrum, plasma protein also has its downsides. Unlike colostrum, however, the biggest one may be aesthetic. For example, [one prominent "guru" I know](#) gave it an immediate thumbs down, sight unseen ("Can't speak for anyone else, but I draw the line at spray dried cow's blood!").

His name for this knee-jerk reaction is the "Yuck Factor."

If he feels this way, others may too. One plasma protein product, Body Genie's Protein Serum, was recently discontinued, while another, Ergopharm's GF Pro, was reformulated as a pure whey protein product.

Was the "Yuck Factor" to blame? I don't know for sure, but I think it's a likely explanation. Although it's easy to find in caps, Protein Factory's Super Plasma Protein seems to be the only bulk powder version left on the bodybuilding market.

I have a hard time seeing what the problem is. I tried the original GF Pro, and thought it was just fine. I've also used Super Plasma Protein. Admittedly, the latter is unflavored and has a faint odor—which put me off the idea of drinking it straight.

When blended into a smoothie, however, I barely noticed it...there was no perceptible flavor and only a slight "musty" mouthfeel. It wasn't ambrosial, perhaps, but compared to some other things I've swallowed, it seemed perfectly fine (ever tried hydrolyzed whey? Bleaaaauuugggh ☹️). I'd use it again.

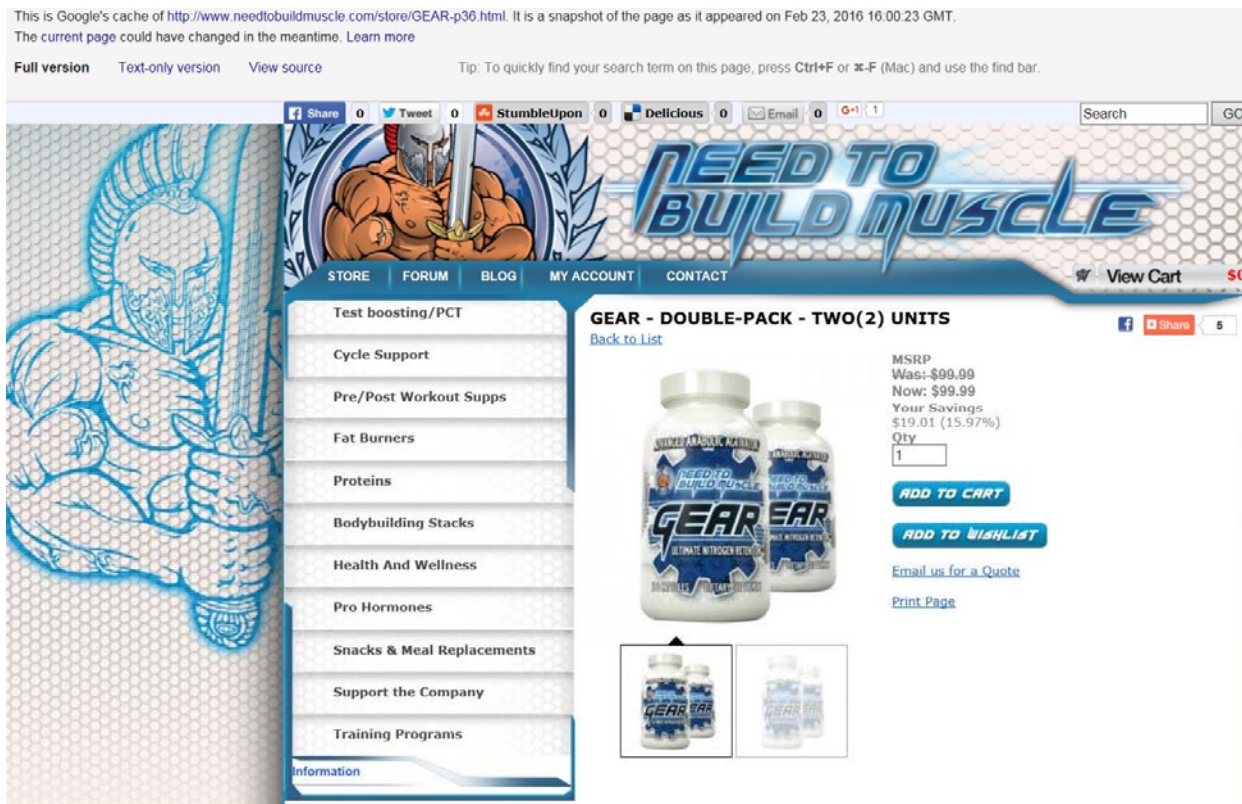
Other users agree. While I haven't seen a large number of reviews for plasma protein, the ones I have seen have been pretty positive.

Although it's not as expensive as colostrum, bovine plasma protein still isn't cheap—which may be another reason it's not more widely used. As such, it might be better used as part of a protein blend, rather than a sole source. Nonetheless, I think it deserves some consideration, as it appears to have potential.

Looking at the evidence, I don't consider either colostrum or bovine serum protein to be "must haves" for either strength, recovery or body composition. I do, however, think they clearly have merit from a general health/wellness perspective. They're certainly worth a look.



September 30, 2015 Office Actions at 3 (ultimatefatburner.com) (reproduced in part).



**Gear is an advanced protein delivery system and nutrition octane booster!**

When you take 2-4 capsules of Gear with your meals, it not only provides you with valuable, high quality aminos, serum proteins, and fractionated whey; it also provides you with the bioactive enzymes your body needs to convert that protein into muscle. It's like taking a pill that turns every meal into a high-quality protein shake!

Once in the body, protein is broken back down into smaller peptides (dipeptides, tripeptides, etc...) and individual amino acids in the gastrointestinal tract, after which they're sent to the liver, kidney and eventually the blood, thereby raising blood plasma levels of amino acids. When those get high enough, we see increased protein synthesis, which results in the accrual of muscle tissue. This is an anabolic effect - an increase in muscle mass. As you can see, the processing and digestion (breaking down) of proteins back into aminos is very important! If you're not digesting your protein, then your body isn't going to use it, which is exactly why we at Need To Build Muscle formulated Gear with loads of high quality digestive enzymes, like **Aminogen** and **Bromelein**.

GEAR uses a concentrated form of protein that is both ENLARGED and FRACTIONED. In other words, each amino molecule not only encompasses more space - it is split into "micro molecules" which essentially increases the bio. How can that be? Because Super Plasma Serum is the protein that already exists in the blood plasma. It's instantly recognized as "useable". It's like adding blood to your blood - there is no conversion! Whatever you add is "more". That's what happens with Super Plasma Serum. It's essentially instant muscle! Since the actual amino molecule of SPS is FOUR TIMES LARGER than that of meat, egg or whey protein it can be dispersed over a greater area of the intestines, allowing for maximum nitrogen dispersion. The extraordinary growth potential from Super Plasma Serum may also be due to the fact that it contains the highest IGF-1 level of any natural food source. **This is the closest thing to actual "injectable aminos", which is what the pros have been using for years, BUT AT A FRACTION OF THE COST!**

Super Plasma Protein is protein isolate and made from hydrolyzed animal plasma. Because of its high concentration of bioactive proteins, peptides, and potent amino acid profile, this protein has been used to increase growth in multiple animal studies.

When we look at proteins, we want to make sure the chains are made from as many high quality links as possible, because once the protein is in your body, your body breaks it back down into those same links, and uses it to produce more muscle. Proteins are in a constant state of synthesis, being built up and broken down. If you're breaking them down at an accelerated rate, with intense weight training, you need to replenish them at an increased rate as well. When you go to the local hardware store to buy a chain, you can ask them how strong it is (its tensile strength). This tells you how much pressure the chain can take before it snaps. Try going to a restaurant and asking about the amino acid chains in their chicken cordon blue. They'll look at you like you're crazy! Most bodybuilders can rattle off the exact amount of protein in a glass of milk or a 6 oz. steak, but they have no idea about the quality of that protein or the rate at which their body will absorb this protein. That's a huge mistake, and it's like buying a chain without knowing what it's made of. Who cares if it is 50 feet long, if it's made of paper?



February 29, 2016 Office Actions at 4 (needtobuildmuscle.com) (reproduced in part).

### **Best Bodybuilding Supplement - What is GEAR and How Does it Help in Bodybuilding?**

GEAR is the name that is used for denoting the most effective bodybuilding supplement to have been formulated for building lean muscle mass at warp speed. Leading bodybuilders from across the globe are always looking for ways and means for increasing their existing muscle size using the best supplements. One of the main reasons why bodybuilding enthusiasts stop gaining muscle mass after a certain stage is because they are unable to feed their muscles with the required nutrients that would enable quick muscle growth. Well, here is why GEAR is ideal for building lean muscle mass at warp speed:


#### **1. You Are Missing Nutrients**

In order to build muscles, you need to use a supplement which has the potential to allow the nitrogen to remain within your muscle groups for a longer duration. In order to develop the muscles of a human body, you need to try and take amino acids on a regular basis. You can increase your muscles by using a supplement which has the ability to retain the nitrogen levels in your muscle groups. The proteins which we eat pass through the large intestines and then the small intestines before being absorbed into our blood stream.

#### **2. The Advantage Of Super Plasma Serum**

Supplements which contain a high quantity of super plasma serum have a greater chance of helping people develop muscles as this ingredient is already present in the blood plasma of a human body. Hence, supplements such as GEAR, which contain super plasma serum, can help your muscles grow by more than 20%. As this can be disbursed all across the intestinal tract of the human body, the chances of an individual gaining lean muscle mass increases four folds as greater dispersion leads to greater nitrogen retention in the human body. At the same time, super plasma serum contains four times the proteins which are present in eggs, weigh and meat.


February 29, 2016 Office Actions at 8 (legalsteroidstore.com) (reproduced in part).



Who's EMP

EMP (formerly Proliant Health) is the world's largest manufacturer of pharmaceutical grade bovine **plasma**, serums and beef proteins used in everything from vaccines and diagnostic kits to providing the performance nutrition that elite athletes need to excel.

[Read more about EMP](#)




Built on quality


We are always aiming for the highest possible food safety standards and quality levels

[Read more about our Quality Assurance systems](#)

...





Products About us Blog




# SuperSerum™

The ultimate bio-valuable protein! This new bovine protein source is rich on naturally occurring, bio-valuable proteins, growth factors and peptides.

 EU  
✉ Send Mail  
☎ +46 435462160

 US  
✉ Send Mail  
☎ +1 708 334 14 15



## WHAT IS SERUM ALBUMIN CONCENTRATE?

It's an entirely new bovine protein source, sometimes called "serum protein concentrate". Rich in naturally occurring, bio-valuable protein proteins, growth factors and peptides, but more on that in a minute...

Serum Albumin Concentrate (SAC) is a bovine **plasma** fraction extract that's nothing short of amazing! This fast absorbing protein will become the new "Gold Standard" in the protein world which all others will be compared to!

It literally takes huge tankers full of **plasma** to yield just a small fraction of the potent SuperSerum!

The proprietary manufacturing technique is a closely guarded secret and the envy of the pharmaceutical world...

Multiple centrifuges, ultra-filtrations and cold process spray dryers all used for one single purpose -to make the "Ultimate Bio-Valuable Protein" that delivers results!

With over 50 human and animal studies supporting that supplementation of **plasma** proteins promotes growth, particularly lean tissue growth, its no wonder why its sending shockwaves through the industry!

February 29, 2016 Office Actions at 5-6 (essentiaproteins.com) (reproduced in part).

Applicant makes several arguments that the Examining Attorney's reliance on this evidence to show midescriptiveness is misplaced. First, Applicant argues that the evidence does not show that plasma (or plasma protein) is an ingredient in dietary or nutritional supplements, claiming that the word "plasma" is instead used in the evidence of record "to refer to the liquid portion of blood." 4 TTABVue 7. We disagree.

The webpage regarding the Super Plasma Protein supplement states that it "is >90% protein isolate and *made from hydrolyzed beef plasma. The powder is spray dried and concentrated into edible bovine plasma and is then made into bovine serum and concentrated* to have an immunoglobulin content of 40% minimum." (Emphasis added). The webpage for Essentia Metabolic Proteins' SuperSerum supplement identifies EMP as "*the world's largest manufacturer of pharmaceutical grade bovine plasma, serums and beef proteins used in everything from vaccines and diagnostic kits to providing the performance nutrition that elite athletes need to excel.*" (Emphasis added). The SuperSerum supplement is described as an "entirely new bovine protein source, sometimes called 'serum protein concentrate'" that requires "*huge tankers full of plasma* to yield just a small fraction of the potent SuperSerum!" (Emphasis added). The needtobuildmuscle.com webpage states that the Gear supplement "uses the power of Super Plasma Blood Serum Protein," which is described as "protein isolate and *made from hydrolyzed animal plasma.*" (Emphasis added.) Finally, the product review entitled "Colostrum and Bovine Plasma Protein," which Applicant does not address, answers the question "What's in bovine plasma protein?" by stating that "the word 'plasma' says it all," and describes the proteins that exist in bovine plasma. The

reviewer states that she has tried several plasma protein products and has seen some other reviews “for plasma protein.”<sup>10</sup>

As used on these webpages, “plasma” refers to a protein in supplements that is derived from animal blood plasma. This evidence shows that consumers would understand the word in that manner when it is used in connection with supplements, rather than as blood plasma *per se*, as Applicant argues. Applicant effectively concedes this by arguing in its reply brief on the PLAZMA REACTIVE PUMP appeal that “no consumer of an over the counter nutritional supplement will mistake goods associated with the applied for mark to actually contain [blood] plasma” and that “with consumers being very aware of blood born [sic] diseases, it would be extremely unlikely that prospective purchasers would expect goods associated with the applied for mark to actually contain blood plasma given the goods associated with the applied for mark is [sic] not subject to FDA approval.” 8 TTABVUE 5 (Serial No. 86295490).

Second, Applicant appears to argue that there is a distinction, for purposes of consumer perception of the applied-for marks, between the word “plasma” alone and the words “plasma protein.” Applicant claims that “none of the evidences cited by the Examining Attorney equates the term ‘plasma’ with a ‘special protein.’” 4 TTABVUE 7. In its reply brief on the PLAZMA REACTIVE PUMP appeal, Applicant argues that “all of the cited references explicitly recites [sic] proteins when referencing proteins in blood plasma or whey.” 8 TTABVUE 6-7 (Serial No. 86295490) (emphasis

---

<sup>10</sup> An entry from freedictionary.com made of record by the Examining Attorney in the February 29, 2016 Office Actions in both applications defines “plasma protein” as “a protein present in blood plasma, such as albumin or globulin.”



in original), and that “[n]o one uses the term ‘plasma’ to refer to ‘animal protein . . .’” 8 TTABVUE 7 (Serial No. 86295490).

The record does not support Applicant’s apparent claim that consumers of dietary or nutritional supplements would not understand PLAZMA, as it is used in Applicant’s marks, to describe protein derived from animal blood plasma simply because it appears in the marks without the word “protein.” The third-party uses of “plasma” in the record, including the use of “Super Plasma” to identify “[t]he first new protein source to hit the market since whey protein 10 years ago” and the use of “Super Plasma Serum” to refer to “the protein that already exists in the blood plasma,” as well as the review of plasma protein on the website of ultimatefatburner.com, which states that “the word ‘plasma’ says it all” in defining what is in bovine plasma protein, establish that it is more likely that when PLAZMA appears in the marks, it will be understood as a shorthand reference to plasma protein derived from animal plasma. *Tapco*, 122 USPQ2d at 1372 (finding that consumers would understand the mark KLEER, the phonetic equivalent of “clear,” to have that meaning in the absence of rebuttal evidence showing another meaning).

Third, Applicant argues that its misspelling of “plasma” as PLAZMA was intended “to clearly indicate that the goods and services associated with Applicant’s product does [sic] not contain any plasma,” 8 TTABVUE 4 (Serial No. 86295490), and that “the mark PLAZMA is intended to imply or merely suggest the mechanism of the goods and services associated with the applied for mark.” 8 TTABVUE 3 (Serial No. 86295483). There is no evidence in the record to support these claims, or to show that

the purchasing public would understand PLAMZA in this manner when it appears in the marks. Given the Examining Attorney's evidence that "plasma" has a descriptive meaning as applied to supplements, the unsupported arguments of Applicant's counsel regarding the claimed intended and perceived meaning of PLAZMA are insufficient in rebuttal. *Budge*, 8 USPQ2d at 1261 (rejecting argument of counsel regarding industry practices in the absence of supporting evidence); *In re Hinton*, 116 USPQ2d 1051, 1052 n.4 (TTAB 2015) (rejecting applicant's argument regarding manner of consumer recognition of mark where it was "unsupported by any objective evidence" because "[o]nce a *prima facie* case is established, the burden of coming forward with competent evidence in rebuttal shifts to Applicant.").

Fourth, Applicant argues, on the basis of its product label and related materials, that PLAZMA, as it appears in the marks "is merely **suggestive of a possible route of action**," namely, that "the goods and services associated with the applied for mark provides [sic] increased nutrients in blood, in particular in blood plasma or the liquid portion of blood." 4 TTABVUE 8 (emphasis in original). In its reply brief on the PLAZMA appeal, Applicant argues as follows:

Specifically, the goods and services of [sic] associated with PLAZMA provides [sic] enhanced nutrient uptake into muscle, via "enriched" circulating blood plasma. Specifically, the nutrients in the goods and services associated with PLAZMA are designed for rapid absorption into blood plasma and enhanced uptake into working muscle. . . . The supplement industry has consistently used various marks to imply this effect, such as the term "pump," which relates specifically to a muscle that is engaged with blood plasma. The term "pump" does not mean it actually contains a mechanical apparatus or it

actually performs such an action, but merely to describe a muscle that is engorged with blood plasma.

8 TTABVUE 3 (Serial No. 86295490).

In its reply brief on the PLAZMA REACTIVE PUMP appeal, Applicant further argues that its mark “should be considered in its entirety [and] should not be broken into isolated elements,” 8 TTABVUE 3 (Serial No. 86295490), supporting this argument with a similar claim based on its product label and related materials that “the applied for mark PLAZMA REACTIVE PUMP merely suggests a mode of action of the goods associated with the applied for mark.” 8 TTABVUE 3. Applicant also argues that “[s]imply parsing out the term PLAZMA ignores the concept provided by the entirety of the applied for mark.” 8 TTABVUE 3. These arguments are unavailing.<sup>11</sup>

We must assess the misdescriptiveness of the PLAZMA and PLAZMA REACTIVE PUMP marks on the basis of the marks themselves, not on the basis of extrinsic materials used by Applicant. As the Federal Circuit held in *Budge*,

Misdescriptiveness of a term may be negated by its meaning in the context of the whole mark inasmuch as the combination is seen together and makes a unitary

---

<sup>11</sup> With respect to Applicant’s argument regarding the meaning of its PLAZMA REACTIVE PUMP mark as a whole, a mark containing a term that identifies a product ingredient is not deceptive within the meaning of § 2(a) if the mark, in its entirety, would not be perceived as indicating that the goods contained that ingredient. *Compare Budge*, 8 USPQ2d at 1261 (LOVEE LAMB deceptive on its face as applied to synthetic automotive seat covers) *with A.F. Gallow & Sons Corp. v. Aristocrat Leather Prods., Inc.*, 135 USPQ 459, 460 (TTAB 1962) (COPY CALF not deceptive on its face as applied to synthetic wallets and billfolds because the mark as a whole was an obvious play on the expression “copy cat” and suggested to purchasers that the goods were imitations of items made of calf skin). Unlike the word “COPY” in the COPY CALF mark in *A.F. Gallow*, the words REACTIVE PUMP in Applicant’s PLAZMA REACTIVE PUMP mark do not negate the perception arising from the presence of PLAZMA in the mark that Applicant’s supplements contain plasma protein.

impression. . . . The same is not true with respect to explanatory statements in advertising or on labels which purchasers may or may not note and which may or may not always be provided. The statutory provision bars registration of *a mark* comprising deceptive matter. Congress has said that the advantages of registration may not be extended to a mark which deceives the public. Thus, the mark standing alone must pass muster, for that is what the applicant seeks to register, not extraneous explanatory statements.

*Budge*, 8 USPQ2d at 1261 (citations omitted); *see also Hinton*, 116 USPQ2d at 1053-54 (rejecting applicant’s argument regarding the meaning of its mark based on examples of its advertising).<sup>12</sup>

Finally, Applicant argues in its reply brief on the PLAZMA appeal that the “supplements that contain extracts of bovine plasma are very rare and only contain the albumin that has to be extracted from plasma.” 8 TTABVue 4. Only the first portion of this statement is relevant to the misdescriptiveness issue, and Applicant again offers no evidence to support it.<sup>13</sup>

The record as a whole shows that plasma protein derived from animal plasma is a known ingredient in dietary and nutritional supplements. As discussed above,

---

<sup>12</sup> Applicant made of record no evidence to support its arguments regarding the alleged practices of the supplement industry, and the argument of its counsel is again no substitute for such proof. *Budge*, 8 USPQ2d at 1261; *Hinton*, 116 USPQ2d at 1052 n.4.

<sup>13</sup> In that regard, we note that in the August 2008 review of plasma protein downloaded from the website at ultimatefatburner.com, and made of record by the Examining Attorney, in September 2015, the reviewer stated that two plasma protein products had recently been discontinued or reformulated, and that she was aware of only one “bulk powder version left on the bodybuilding market.” She also stated, however, that plasma protein products were then “easy to find in caps[ules].” Applicant’s identifications of goods in its applications contain no limitations or restrictions on Applicant’s supplements to their current bulk powder form, and, in any event, the record shows that supplements containing plasma protein derived from animal plasma are available in both powder and capsule form.

Applicant admitted during prosecution of both applications that its goods do not contain plasma protein. August 25, 2015 Responses to Office Action at 3. The evidence is sufficient to establish that the marks PLAZMA and PLAZMA REACTIVE PUMP misdescribe the composition of Applicant's supplements because they describe an ingredient, plasma protein derived from animal plasma, that Applicant's goods could plausibly contain, but do not in fact contain. *See Budge*, 8 USPQ2d at 1260-61; *Tapco*, 122 USPQ2d at 1372; *White Jasmine*, 106 USPQ2d at 1392. We find that the Examining Attorney has shown that Applicant's marks are misdescriptive for purposes of the first element of the *Budge* test, and that Applicant has failed to rebut that showing.

**B. Likelihood of Consumer Belief That the Misdescription Actually Describes the Goods**

The second element of the *Budge* test focuses on whether consumers are likely to believe the misdescription. "The Board has applied the reasonably prudent consumer test in assessing whether a proposed mark determined to be misdescriptive involves a misrepresentation consumers would be likely to believe." *Hinton*, 116 USPQ2d at 1052. We may infer that purchasers of Applicant's supplements are likely to believe the misdescription from the evidence of record, including third-party uses of the term plasma. *Budge*, 8 USPQ2d at 1261.

The evidence made of record by the Examining Attorney, and Applicant's specimen of use in both applications (reproduced below)

Fueling High-Performance Muscle™



1300 g  
20 (65 g) servings

**Plazma™**  
Be Unbreakable™

- Preloads highly anabolic nutrients.
- Induces supra-maximal pump volume.
- Stimulates rapid-rate recovery.

View Product View Label

Main Category: Workout Support  
Key Ingredient: Structured Di-/Tripeptides

In Stock

40% Off

**\$115.95**

**\$69.95**

**\$64.95**  
2 or More

Select Flavor



Details

Supplement Facts

**plazma REACTIVE PUMP™**

Plazma™ is designed for elite high-performance athletes and serious bodybuilders. At this level, even "average" training sessions are brutally hard. As such, the Recommended Use guidelines are for the typical elite-level (hard) workout. However, if training is extreme enough and long enough, it's possible to require additional doses. Those guidelines are provided in the Dosing Options chart below.

**RECOMMENDED USE:** Each Plazma™ dose consists of 1 serving (65 g) mixed in 500 ml (17 fl oz) of cold water. For most workouts, consume 3 servings (195 g) mixed in 1,500 ml of cold water. For maximum effect, always pre-load the formula by drinking 1 dose (500 ml) 15 minutes prior to training. Consume the remaining doses over the duration of the entire workout.

**MIXING AND FLAVORING 3 DOSES:**

1. Pour 750 ml of cold water into a 2,000 ml bottle. Pour 195 g of the Plazma™ formula into the cold water, secure the cap on the bottle, and shake vigorously for about 20 seconds, or until thoroughly mixed. If done correctly, the shaking will foam the contents of the bottle.
2. While the mixture is still foamed, pour in 1/4 to 1/2 teaspoon of Biotest® Intensified Liquid Flavoring and gently swirl the contents until thoroughly mixed. Allow the flavored mixture to clear the foam and form a semi-transparent liquid. The foam should clear within 60 seconds.
3. Add enough cold water to increase the fill volume to 1,500 ml and gently swirl the contents to thoroughly mix.

DOSING OPTIONS:	3 Doses	4 Doses	5 Doses
Plazma™ Formula	195 g	260 g	325 g
Water	1,500 ml	2,000 ml	2,500 ml
Calories	630	840	1,050
Protein	45 g	60	75
Carbohydrates	113 g	150 g	188 g

**STORING AFTER MIXING:** You can prepare Plazma™ mixtures up to 24 hours in advance of use, as long as you keep the prepared liquid refrigerated until ready to use.

**POST-WORKOUT RECOVERY:** To substantially enhance recovery, consume one dose of Mag-10® (35 g) one hour after training. For the most intense workouts, consume a second dose of Mag-10® an hour after the first dose.

**Supplement Facts**

Serving Size 65 g  
Servings Per Container 20

Amount Per Serving	% Daily Value*
<b>Calories</b> 210	
<b>Sodium</b> 465 mg	19%
<b>Total Carbohydrates</b> 38 g	13%
Sugars 13 g	
<b>Protein</b> 15 g	30%
Calcium 40 mg	4%
Potassium 140 mg	4%
Magnesium 16 mg	4%

**Plazma™ Formula** 65 g

Nutrient-Partitioning Functional Carbohydrates (Highly Branched Cyclic Dextrin, Isomaltulose), Highly Structurized Di-/Tripeptides (Hydrolyzed from Bioactive Casein), Citrulline Malate, Betaine Anhydrous, Potassium (Potassium Bicarbonate, Potassium Succinate, Potassium Phosphate Dibasic, Potassium Phosphate Dibasic), Sodium (Sodium Chloride, Sodium Citrate, Sodium Phosphate Dibasic), Magnesium (Magnesium Citrate Tribasic)

\*Percent Daily Value based on a 2000 calorie diet.  
†Daily Value not established.

**Contains Milk Ingredients.**

**IMPORTANT:** This formula is unflavored and requires the addition of Biotest® Intensified Liquid Flavoring.

**WARNING:** This product is intended to be consumed by healthy individuals 18 years of age and older. Do not use if you are pregnant or nursing. KEEP OUT OF REACH OF CHILDREN.

Store away from heat, light, and moisture.

T-NATION.com 800-525-1940

Distributed by  
**BIOTEST LLC**  
Colorado Springs, CO  
80900-0010, USA

12-2819  
© 2012

4 833 07 00255

show that the consumers of the “dietary and nutritional supplements” and “dietary and nutritional supplements for endurance sports” identified in the applications include bodybuilders, endurance athletes, and other elite athletes, in addition to ordinary consumers.<sup>14</sup> Cf. *Tapco*, 122 USPQ2d at 1374 (presuming that purchasers of identified adhesives included both homeowners and professional builders on the basis of identification of goods in application alone).

<sup>14</sup> A page from Applicant’s website made of record in its February 3, 2015 response to the first Office Action in the PLAZMA application states that the product is “Designed for High-Performance Athletes [and] Serious Bodybuilders & Lifters.”

The Examining Attorney argues that these “[p]rospective purchasers are likely to believe the misdescription actually describes the goods because ‘plasma,’ both in the form of whey and in the form of blood plasma, is widely marketed as a highly beneficial ingredient in dietary and nutritional supplements, particularly for the class of consumers targeted by applicant, namely, athletes and bodybuilders.” 7 TTABVUE 15 (Serial No. 86295490).<sup>15</sup> She also argues that the “evidence of record shows multiple entities using the term plasma on dietary and nutritional supplements that actually contain plasma, and many of these products explain how plasma builds muscle and is beneficial for athletes, the same class of consumer being targeted by applicant.” 7 TTABVUE 12 (Serial No. 86295483). Applicant does not expressly address this element of the *Budge* test.

The evidence of record depicted and discussed above shows that Protein Factory’s Super Plasma Protein supplement, Need to Build Muscle’s Gear supplement, and EMP’s Super Serum supplement all tout protein derived from animal plasma as a key ingredient in their products. In the absence of any contrary evidence, this evidence of third-party use of plasma protein derived from animal plasma as a component of supplements is a sufficient factual basis from which to infer that bodybuilders and athletes are likely to believe that Applicant’s supplements sold under the PLAZMA and PLAZMA REACTIVE PUMP marks also contain plasma protein derived from animal plasma. *See Tapco*, 122 USPQ2d at 1373 (evidence that

---

<sup>15</sup> As discussed above, we have rejected the Examining Attorney’s claim that “plasma” means “whey” in the context of these goods, and we have thus given no consideration to the whey-specific evidence of record.

“some adhesives are, in fact, clear and that this feature is touted to consumers” sufficient to satisfy burden under second element of *Budge* test); *Budge*, 8 USPQ2d at 1261; *White Jasmine*, 106 USPQ2d at 1392. We find that the Examining Attorney has shown that consumers are likely to believe the misdescription for purposes of the second element of the *Budge* test, and that Applicant has failed to rebut that showing.

### C. Materiality

The test for materiality under the third element of the *Budge* test under Section 2(a) incorporates a requirement that “a significant portion of the relevant consuming public be deceived.” *In re Spirits Int’l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1495 (Fed. Cir. 2009). “To establish that the misdescriptive quality or characteristic would be a material factor in the purchasing decision of a significant portion of the relevant consumers, the examining attorney must provide evidence that the misdescription would make the product or service more appealing or desirable to prospective purchasers.” *White Jasmine*, 106 USPQ2d at 1392.

The Examining Attorney again relies on the record evidence regarding third-party supplements to show that “plasma is a preferred ingredient in dietary and nutritional supplements.” 7 TTABVUE 12 (Serial No. 86295483); 7 TTABVUE 9 (Serial No. 86295490). Applicant once again does not expressly address this element of the *Budge* test.

The third-party evidence of record, as well as Applicant’s own specimen and website, show that bodybuilders and high-performance athletes look to dietary and nutritional supplements for an “edge” that will enable them to train harder, longer,



and more efficiently, to recover more rapidly, and to achieve greater muscle mass and endurance.<sup>16</sup> In the materials in the record depicted and discussed above, plasma protein derived from animal plasma is touted as providing such an “edge.”

The Super Plasma Protein supplement containing plasma protein, described as “a concentrate of serum, the gold-standard of all natural substances in supporting cell growth and proliferation,” claims that it works “harder for you than any other protein source,” “goes to work the minute it becomes soluble to promote protein synthesis, reduce protein turnover, and enhance protein retention,” and “has three times the level of anabolic growth factors than whey!” The webpage contains “a list of benefits proven with research with the use of Bovine Serum,” including promoting cell growth and activating the immune system, “thereby preventing protein and energy loss.”

The Gear supplement containing plasma protein claims to enable the bodybuilder or athlete user to convert protein into muscle more efficiently and to increase muscle mass. According to the webpage at needtobuildmuscle.com, that is because “Super Plasma Serum is the protein that already exists in the blood plasma. It’s instantly recognized as ‘useable’. It’s like adding blood to your blood – there is no conversion. Whatever you add is ‘more.’ That’s what happens with Super Plasma Serum. It’s essentially instant muscle!” The webpage contains a discussion of the physiology behind these claimed benefits, and concludes by claiming that “**Blood serum**

---

<sup>16</sup> For example, Applicant’s product label states that “Plazma™ enables you to perform at and beyond your limits while recovering and gaining so fast that you’ll be itching to get back to the gym and do it again,” while its website states that “[f]or rapid recovery from intense training and competition – while gaining size and strength at record rates - Plazma™ will not only make you feel unbreakable, you’ll be unbreakable.”

**proteins have a Digestibility above 90% and a protein efficiency ratio (PER) of 2.8! THE HIGHEST SCORE EVER!** In fact off the charts.” (Emphasis in original.) The webpage at legalsteroidstore.com characterizes Gear as “the most effective bodybuilding supplement to have been formulated for building lean muscle mass at warp speed.” It claims more broadly that “supplements such as GEAR, which contain super plasma serum, can help your muscles grow by more than 20%.”

The EMP webpage claims that the company provides “the performance nutrition that elite athletes need to excel.” The description of its SuperSerum product, “a bovine plasma fraction extract that’s nothing short of amazing!,” claims that “[t]his fast absorbing protein will become the next ‘Gold Standard’ in the protein world which all others will be compared to!” on the basis of “over 50 human and animal studies supporting that supplementation of plasma proteins promotes growth, particularly lean tissue growth,” and states that “its [sic] no wonder why its [sic] sending shockwaves through the industry.” A portion of the webpage not reproduced above promotes a sense of urgency and exclusivity associated with the SuperSerum product when it states:

Even though we’re running at full capacity, we still can only produce a small amount of the **SuperSerum**. It really is **one of the rarest protein sources on the planet!** Bottom-line **SuperSerum** is not for everyone. Some people won’t “understand it” or refuse to pay the extra few bucks because they don’t know the real deal when they see it and that’s fine... But if your [sic] knowledgeable, take what you put into your body seriously, then you better find yourself some **SuperSerum** and **get ready for people pulling you aside in the gym and asking “What’re you on?”**

February 29, 2016 Office Actions at 6 (emphasis in original).

The evidence of record is sufficient to establish that the misdescription that Applicant's PLAZMA and PLAZMA REACTIVE PUMP supplements contain plasma protein is "likely to affect the purchasing decisions of a significant portion of relevant consumers," *Budge*, 8 USPQ2d at 1260, by making Applicant's supplements desirable to bodybuilders and athletes who want the performance benefits that are touted by supplements containing plasma protein, and more desirable to those consumers than supplements that do not contain plasma protein. *Tapco*, 122 USPQ2d at 1375. We find that the Examining Attorney has shown that the misdescription is material for purposes of the third element of the *Budge* test, and that Applicant has failed to rebut that showing.

#### **D. Summary**

The record as a whole shows that the marks PLAZMA and PLAZMA REACTIVE PUMP, as applied to dietary and nutritional supplements that do not contain plasma protein, consist of or comprise deceptive matter within the meaning of Section 2(a) of the Trademark Act.

### **III. Analysis of Section 2(e)(1) Refusals and Disclaimer Requirement on PLAZMA REACTIVE PUMP Application**

Because of our determination on the Section 2(a) refusals, we need not reach the refusals under section 2(e)(1) and (6); however, for completeness we address them. *White Jasmine*, 106 USPQ2d at 1394.

### **A. Deceptive Misdescriptiveness**

Section 2(e)(1) of the Trademark Act prohibits registration of “a mark which, (1) when used on or in connection with the goods of the applicant is . . . deceptively misdescriptive of them.” 15 U.S.C. § 1052(e)(1). The test for whether a mark is deceptively misdescriptive consists of the first two parts of the *Budge* test for deceptiveness. *Hinton*, 116 USPQ2d at 1052. “The key difference between ‘deceptively misdescriptive’ marks under § 2(e)(1) and ‘deceptive’ marks absolutely barred under § 2(a) is that a ‘deceptive’ mark is one in which the mis-description or falsity is ‘material’ in that it is likely to significantly induce a purchaser’s decision to buy.” *Id.* at 1055 n.24 (quoting 2. J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:55 (4<sup>th</sup> ed. September 2015)).<sup>17</sup> In view of our findings above as to the first two *Budge* factors, the mark PLAZMA in application Serial No. 86295483 is deceptively misdescriptive of the goods under Section 2(e)(1).

### **B. Disclaimer**

Turning to the disclaimer requirement in the PLAZMA REACTIVE PUMP application, under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), the Patent and Trademark Office “may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” If a mark comprises a word that is misspelled but nonetheless must be disclaimed, the Examining Attorney must

---

<sup>17</sup> The practical difference between these types of marks is that unlike a deceptive mark, a deceptively misdescriptive mark is eligible for immediate registration on the Supplemental Register, or registration on the Principal Register upon a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). Applicant does not seek registration of PLAZMA on either of these bases, however, if that mark is found to be deceptively misdescriptive rather than deceptive.

require a disclaimer of the word in the correct spelling. *See, e.g., In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009). Failure to comply with a requirement of a disclaimer of an unregistrable component of a mark is a basis for refusing registration of the entire mark. *In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399-1400 (Fed. Cir. 2006); *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005).

“As a component part of our prior conclusion that [PLAZMA] is deceptive in the context of [the PLAZMA REACTIVE PUMP] mark, we found [PLAZMA] misdescriptive of applicant’s goods.” *White Jasmine*, 106 USPQ2d at 1394. PLAZMA is an admitted intentional misspelling of “plasma,” and its phonetic equivalent. Our subsidiary findings within our *Budge* analysis above that PLAZMA is misdescriptive and that prospective purchasers are likely to believe that misdescription are a sufficient basis upon which to affirm the alternative requirement of a disclaimer of “plasma” apart from the PLAZMA REACTIVE PUMP mark in application Serial No. 86295490 in the event that the entire mark is not deceptive under Section 2(a). *Id.*

**Decision:** The refusals to register under Section 2(a) of the Trademark Act are affirmed in both applications, the refusal to register under Section 2(e)(1) of the Trademark Act is affirmed in application Serial No. 86295483, and the refusal to register PLAZMA REACTIVE PUMP without a disclaimer of “plasma” is affirmed in application Serial No. 86295490.