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Mailed: February 21, 2017

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re BPI Sports, LLC*

Serial No. 86584732

Ernesto M. Rubi and Adam C. Underwood of Carey Rodriguez  
O’Keefe Milian Gonya LLP for BPI Sports, LLC.

Obieze Mmeje, Trademark Examining Attorney, Law Office 122  
(John Lincoski, Managing Attorney).

Before Cataldo, Adlin and Pologeorgis, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

BPI Sports, LLC (“Applicant”) seeks a Principal Register registration for the proposed mark BEST WORKOUT, in standard characters and with WORKOUT disclaimed, for “dietary and nutritional supplements.”<sup>1</sup> The Examining Attorney refused registration on the ground that Applicant’s proposed mark is merely descriptive of the identified goods under Section 2(e)(1) of the Act. After the refusal

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<sup>1</sup> Application Serial No. 86584732, filed April 1, 2015 under Section 1(b) of the Trademark Act, alleging a bona fide intent to use the mark in commerce.

became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

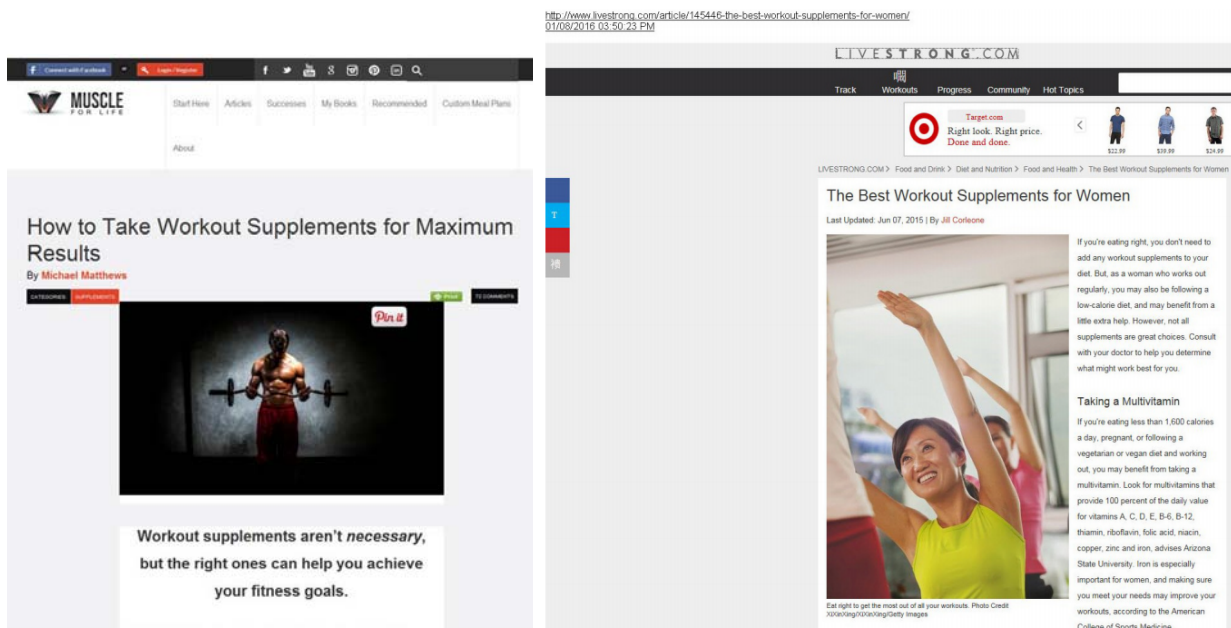
### The Record

In support of the refusal, the Examining Attorney relies on the following dictionary definitions of the proposed mark's constituent terms:

**BEST**—"of the most excellent sort, surpassing all others"

**WORKOUT**—"a training session of exercises to maintain or improve one's physical or athletic skill"

Office Action of July 2, 2015 at 2-10.<sup>2</sup> The Examining Attorney also relies on evidence, reproduced below, that the terms "workout," "pre workout" and "post workout" describe categories of dietary and nutritional supplements:



<sup>2</sup> Applicant essentially concedes the accuracy of these definitions. Applicant's Request for Reconsideration of July 8, 2016 at 3.

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**BY PRODUCT FORM**

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- Liquid (1)
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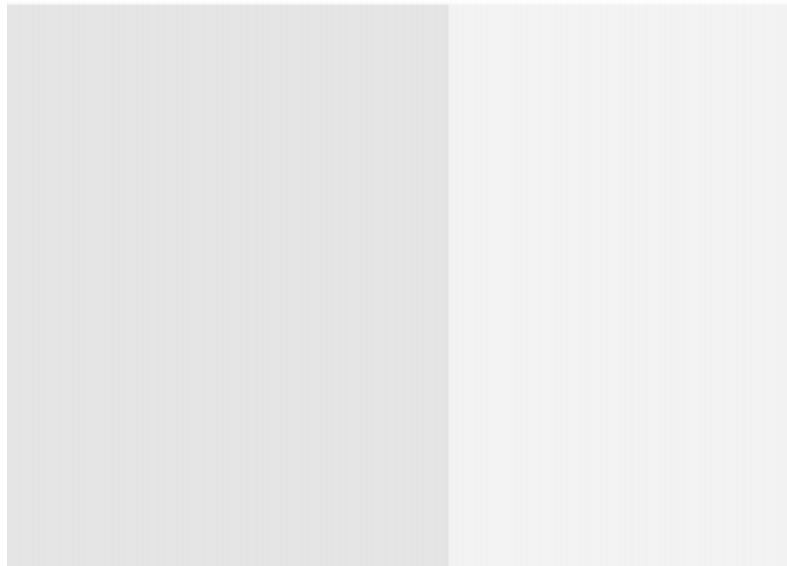
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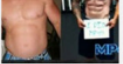
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Let's take a look at some of the best supplements out there for men in each category.




MP15 – The Best Gym Workout




TOP 5 Testosterone Boosters




Best Pre Workout Supplements For Men



Best Fat Burners For Men




Top 5 Creatine Supplements



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By Mike Matthews

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Office Actions of July 2, 2015 at 11-15 and January 8, 2016 at 2-10.

Finally, Applicant and the Examining Attorney each contend that certain third-party registrations are relevant. Specifically, the Examining Attorney relies on more than 20 registrations containing the terms WORKOUT (or a form thereof) or BEST for dietary or nutritional supplements or related products or services, in which the terms BEST or WORKOUT are disclaimed, or registered on the Supplemental Register, or registered on the Principal Register with a claim of acquired distinctiveness. Applicant relies on five Principal Register registrations which: (1) contain the term WORKOUT or a form thereof; (2) are registered for dietary or nutritional supplements; and (3) do not include a claim of acquired distinctiveness. Office Action Response of December 30, 2015 at 5-11. However, in three of the five

registrations Applicant relies upon, the terms WORKOUT, PREWORKOUT or PRE WORKOUT are disclaimed.<sup>3</sup>

### Analysis

A mark is merely descriptive, within the meaning of Section 2(e)(1), if it immediately conveys knowledge of a quality, feature, function, characteristic or purpose of the goods for which it is used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (quoting *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009)); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods. *In re Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which it is being used on or in connection with the goods, and the possible significance that the mark would have to the average purchaser of the goods because of the manner of its use. *In re Bright-Crest, Ltd.*, 204

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<sup>3</sup> Applicant also relies on a mere list of registrations (a few of which are “dead”) which has been given little consideration because, *inter alia*, it is impossible to determine from the list whether the registrations include disclaimers or claims of acquired distinctiveness *Cf. Edom Laboratories Inc. v. Licher*, 102 USPQ2d 1546, 1550 (TTAB 2012) (explaining reasons for not relying on mere lists in a likelihood of confusion case). We have also not considered the third-party registration for WORKOUT for “veterinary preparations, namely, nutritional and dietary supplements” because those goods are different than the supplements for humans involved in this case, and because there is no evidence that pets work out.

USPQ 591, 593 (TTAB 1979). It is settled that “[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them.” *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech*, 64 USPQ2d at 1314 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021

(TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

Here, the evidence leaves no doubt that BEST WORKOUT is merely descriptive of dietary and nutritional supplements. It is settled that laudatory terms, such as “best,” are generally merely descriptive. *See In re Boston Beer Co., L.P.*, 198 F.2d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (finding THE BEST BEER IN AMERICA for beer to be “a common, laudatory advertising phrase which is merely descriptive of Boston Beer’s goods. Indeed, it is so highly laudatory and descriptive of the qualities of its product that the slogan does not and could not function as a trademark to distinguish Boston Beer’s goods and serve as an indication of origin.”); *In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001) (finding, in connection with application to register BEST! SUPPORTPLUS PREMIER and BEST! SUPPORTPLUS for computer consultation services, “that the words ‘BEST’ and ‘PREMIER’ are merely descriptive laudatory words which should be disclaimed”); *Taylor Bros., Inc. v. The Pinkerton Tobacco Co.*, 231 USPQ 412 (TTAB 1986) (observing that AMERICA’S BEST CHEW for chewing tobacco is merely descriptive); *In re Wileswood, Inc.*, 201 USPQ 400, 402 (TTAB 1978) (finding AMERICA’S BEST POPCORN and AMERICA’S FAVORITE POPCORN merely descriptive of popcorn, stating that “the two expressions in question amount to nothing more than trade puffery or self-laudatory expressions of applicant’s product and would be so understood”).

As for the term WORKOUT, the evidence makes clear that “workout supplements” (including “pre-workout supplements” and “post-workout supplements”) are types of dietary and nutritional supplements. The proposed mark BEST WORKOUT merely describes the purpose of Applicant’s workout supplements – to increase the benefits of, and assist in, working out. In fact, it describes to consumers that Applicant’s supplements are the “best” in the category of “workout” supplements.<sup>4</sup> The proposed mark may also immediately convey to some consumers that Applicant’s supplements will enable them to have an excellent workout, better than a workout unaided by Applicant’s supplements. Where, as here, each of the proposed mark’s possible meanings is merely descriptive in relation to the goods, the proposed mark is merely descriptive. *In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1934 (TTAB 2012); TMEP § 1213.05(c) (2015).

While Applicant contends that the combination of the terms BEST and WORKOUT results in a composite which is merely suggestive and which creates “a distinct commercial impression that the relevant public perceives,” this argument is conclusory, and without any indication of the nature of the “distinct commercial

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<sup>4</sup> Applicant cites several likelihood of confusion cases for the proposition that the “Examining Attorney has improperly and in clear legal error, modified the identification of goods set forth in the application” to be “workout supplements.” Applicant’s Reply Brief at 4. The argument is misplaced because the issue here is descriptiveness, and Applicant’s identification of goods – “dietary and nutritional supplements” – encompasses workout supplements, which the evidence shows to be a type of dietary and nutritional supplements. *In re Fitch Ibcu, Inc.*, 64 USPQ2d 1058, 1061 (TTAB 2002) (“there is no need to determine whether the common usage of the term ‘portfolio update’ is limited to numerical information or value data because applicant’s recitation of services, which broadly states that applicant provides ‘information on securities,’ encompasses numerical information and value data”). *See also In re Greenliant Systems, Ltd.*, 97 USPQ2d 1078, 1082 (TTAB 2010); *In re Wm. B. Coleman Co., Inc.*, 93 USPQ2d 2019, 2024-25 (TTAB 2010); and *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1790 (TTAB 2002).

impression” allegedly created by the mark. We discern none. Applicant’s claim that the proposed mark “merely *suggests* a superior quality workout than the workout a consumer would experience without these dietary supplements” (emphasis added) is belied by the fact that there are few, if any, ways to more directly and immediately *describe* “a superior quality workout” than BEST WORKOUT. In fact, when the terms “best” and “workout” are combined “the mark as a whole, i.e., the combination of the individual parts,” does not convey “any distinctive source-identifying impression contrary to the descriptiveness of the individual parts.” *In re Oppedahl & Larson*, 71 USPQ2d at 1372. To the contrary, from “the perspective of a prospective purchaser or user” of Applicant’s supplements, “because ... the combination of the terms does not result in a composite that alters the meaning of [any] of the elements ... refusal on the ground of descriptiveness is appropriate.” *In re Petroglyph Games*, 91 USPQ2d at 1341.

Finally, the evidence makes clear that consumers who know that the goods are supplements will understand the proposed mark to convey information about them, specifically that they are superior to other workout supplements. Indeed, third-party websites include articles which use BEST WORKOUT descriptively, entitled “The **Best Workout** Supplements for Women” [and men], “**Best Post Workout** Supplement,” “**Best Pre-Workout** Supplement for Men” and “The Ultimate Guide to the **Best (and Worst) Workout** Supplements” (emphasis supplied).

**Decision:** The refusal to register Applicant’s proposed mark under Section 2(e)(1) of the Trademark Act is affirmed.