

This Opinion Is Not a  
Precedent of the TTAB

Mailed: May 31, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Trilliant Food and Nutrition, LLC*

Serial No. 86850804

Kyle T. Peterson of Patterson Thuente Pedersen, P.A.,  
for Trilliant Food and Nutrition, LLC.

Maureen Dall Lott, Trademark Examining Attorney, Law Office 105,  
Jennifer Williston, Managing Attorney.

Before Adlin, Hightower, and Coggins,  
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Applicant Trilliant Food and Nutrition, LLC seeks registration on the Principal Register of the mark NRG COFFEE, in standard characters and with COFFEE disclaimed, for “coffee for use in single-serve brewing machines” in International Class 30.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86850804 was filed on December 16, 2015, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark



with ENERGY disclaimed, for “coffee and tea” in International Class 30,<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive. After the Examining Attorney made the refusal final, Applicant requested reconsideration and appealed to this Board. Reconsideration was denied, proceedings resumed, and Applicant filed its appeal brief. 11 TTABVUE.

The Examining Attorney subsequently requested and was granted remand to reinstate a previously withdrawn refusal on the ground that Applicant's mark is merely descriptive, or in the alternative is deceptively misdescriptive, under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1).<sup>3</sup> The Examining Attorney filed her appeal brief after the appeal again resumed. 23 TTABVUE.

We affirm the refusal to register.

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<sup>2</sup> Registration No. 3645852, issued June 30, 2009; Section 8 declaration accepted. The description of the mark states: “The mark consists of the wording ‘ENERG’ and a stylized lightning bolt ‘I.’” Color is not claimed as a feature of the mark.

<sup>3</sup> The Examining Attorney submitted much of the same evidence repeatedly throughout examination, resulting in an excessive record totaling nearly 1,000 pages and rife with duplication. The better practice is to submit evidence once. We have cited duplicative evidence at only one location in the record.

## I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

### A. Similarity of the Goods and Channels of Trade

We first consider the second and third *du Pont* factors, the similarity of the goods, channels of trade, and classes of customers. Registrant’s “coffee” encompasses Applicant’s more narrowly identified goods. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Thus, these goods are legally identical, and the second *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

Because the goods are legally identical, we must presume that the channels of trade and classes of purchasers are also the same. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1518-19 (TTAB 2016); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal

presumption in determining likelihood of confusion). The Examining Attorney, moreover, introduced extensive Internet evidence that third parties offer coffee for use in single-serve brewing machines along with coffee in other types of packaging on the same websites under the same mark. These third-party uses include:

- STARBUCKS<sup>4</sup>
- PEET'S COFFEE<sup>5</sup>
- CARIBOU COFFEE<sup>6</sup>
- THE COFFEE BEAN & TEA LEAF<sup>7</sup>
- NEW ENGLAND COFFEE<sup>8</sup>
- DUNN BROTHERS COFFEE<sup>9</sup>
- TIM HORTONS<sup>10</sup>
- RONNOCO<sup>11</sup>
- DUNKIN' DONUTS<sup>12</sup>
- GLORIA JEAN'S COFFEES<sup>13</sup>
- GEVALIA<sup>14</sup>
- FOLGERS<sup>15</sup>

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<sup>4</sup> November 3, 2016 Final Office Action at TSDR 23-26.

<sup>5</sup> *Id.* at TSDR 27-30.

<sup>6</sup> *Id.* at TSDR 31-33.

<sup>7</sup> *Id.* at TSDR 34-39.

<sup>8</sup> *Id.* at TSDR 40-52.

<sup>9</sup> *Id.* at TSDR 53-61.

<sup>10</sup> *Id.* at TSDR 62-64.

<sup>11</sup> *Id.* at TSDR 65-69.

<sup>12</sup> May 15, 2017 Denial of Request for Reconsideration at TSDR 5-6.

<sup>13</sup> *Id.* at TSDR 7-14.

<sup>14</sup> *Id.* at TSDR 15-23.

<sup>15</sup> *Id.* at TSDR 28-31.

In addition, the Examining Attorney made of record 17 existing, use-based third-party registrations for the kinds of goods identified by both Applicant and Registrant.<sup>16</sup> This evidence of third-party use and registration shows that the goods are of a type that may emanate from a single source under the same mark. *See, e.g., In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1091 (TTAB 2016). The third *du Pont* factor also strongly supports a finding that confusion is likely.

### B. Strength of the Cited Mark

Applicant focuses its appeal brief on two *du Pont* factors: similarity of the marks (factor 1), and the number and nature of similar marks in use on similar goods (factor 6). We begin by assessing the strength of the cited mark, which affects the scope of protection to which it is entitled.

Applicant argues that ENERGY and variations of that word are weak because third parties have registered marks incorporating the term for coffee. *See* Appeal Brief at 6-9, 11 TTABVUE 7-10. Applicant submitted printouts from the Office's Trademark Status & Document Retrieval (TSDR) database of the following six use-based registrations for coffee-related goods registered to third parties on the Principal or Supplemental Register:<sup>17</sup>

Registration No.	Mark	Selected Goods (in Class 30)
4971631	SPILL-PROOF ENERGY ("energy" disclaimed)	Coffee-based snack foods


<sup>16</sup> These registrations identify, for example, coffee, whole bean coffee, or ground coffee as well as coffee pods or coffee sold in single serve cup containers. *See id.* at TSDR 41-87.

<sup>17</sup> April 22, 2017 Request for Reconsideration, 4 TTABVUE 14-40. Only use-based registrations are included in the chart.

Registration No.	Mark	Selected Goods (in Class 30)
4220726	GO COFFEE ENERGY ("coffee energy" disclaimed)	Coffee; coffee beans; ground coffee beans; roasted coffee beans; sugar-coated coffee beans
3061835	ENERJAVA	Coffee and coffee products, namely, caffeine enhanced ground coffee
4398031	ENERGY BEANS ("beans" disclaimed)	Chocolate covered roasted coffee beans
4350152	EARTHLY ENERGY ENJOY	Beverages made of coffee; beverages with a coffee base; coffee; coffee-based beverages; etc.
5002895	BALANCED ENERGY	Coffee-based beverages

Our primary reviewing court, the Court of Appeals for the Federal Circuit, has instructed that evidence of extensive use and registration of a term by others as a mark can be “powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). But in this case, Applicant did not submit “voluminous” evidence as in *Jack Wolfskin*, 116 USPQ2d at 1136; *cf. Gen. Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1277 (TTAB 1992) (finding field of “fiber” marks for foods crowded based on 171 third-party registrations and applications and “numerous” uses).

In considering the descriptiveness refusal *infra*, we address the meaning of the term “energy” for coffee. The description of goods for the cited mark, as well as for Applicant’s mark, is broad enough to include such goods. We find the inherent

strength of Registrant's mark  to be somewhat limited and the mark entitled to a relatively narrow scope of protection. The *du Pont* factors assessing the strength of the mark thus weigh in Applicant's favor.

### C. Similarity of the Marks

Last, we assess the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

Because the similarity of the marks is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015). On the other hand, “there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). When, as here, marks would appear on goods that are legally identical in part, “the degree of similarity

necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016).

Applicant’s mark is NRG COFFEE, in standard characters and with COFFEE disclaimed. The Examining Attorney submitted evidence that NRG is an abbreviation for “energy,”<sup>18</sup> which Applicant does not dispute. While there is no correct pronunciation of a mark, we find that consumers would be highly likely to view and verbalize both NRG, the lead term in Applicant’s mark, and the cited mark



identically to the phonetically equivalent term “energy.” Indeed, as explained below, coffee is often associated with “energy” and in the context of coffee, the intended pronunciation and meaning of NRG and EnerGi will be apparent to many. The first element in Applicant’s mark thus is similar to the entirety of Registrant’s mark in sound, meaning, and connotation.

As we have often said, the lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and so to play a dominant role in the mark. *See, e.g., Palm Bay*, 73 USPQ2d at 1692 (stating that VEUVE is a prominent feature of the mark VEUVE CLICQUOT because it is the first word in the mark); *Century 21*, 23 USPQ2d at 1700 (stating that consumers will first notice the identical lead word on encountering the marks); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (stating that dominance of BARR in BARR GROUP

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<sup>18</sup> *See, e.g.*, September 10, 2017 Subsequent Final Office Action at TSDR 81-99.



is reinforced by its location as the first word in the mark). Because it is the first and only distinctive element in Applicant's mark, we find NRG to be its dominant portion. The trailing word in the applied-for mark, COFFEE, is obviously generic for both Applicant's and Registrant's goods. Although we consider Applicant's mark as a whole, the latter term thus does little to distinguish it from Registrant's mark.

Applicant argues that its mark is not confusingly similar to the cited mark not only because it contains the additional word COFFEE, but also because the spellings are different and the cited mark "incorporates a unique design element." Appeal Brief at 9-10, 11 TTABVue 10-11. We agree that the marks are visually distinguishable, but do not agree that the differences in appearance outweigh the marks' similarities in sound and meaning when used for identical goods suggested by the marks' dominant, literal terms. First, the lightning bolt design at the end of Registrant's mark is recognizable as the letter "i" and underscores rather than alters the overall commercial impression of the cited mark as a stylized and misspelled version of the word "energy." Second, although we consider each mark on a case-by-case basis, we normally accord the wording in composite word and design marks greater weight in a likelihood of confusion analysis because the verbal portion is more likely to indicate the origin of the goods and be used by purchasers to request or refer to the goods. *Viterra*, 101 USPQ2d at 1908; *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018). We likewise find it appropriate here to give more weight to the literal, verbal portion of the cited mark. Finally, although different spellings may diminish the similarity between marks in some circumstances, we do not find that to

be the case here, where both marks feature readily recognizable variations of the term “energy” and are used for coffee.

We bear in mind both the relatively narrow scope of protection for the cited mark on the one hand and, on the other, that the identified goods are identical. Considered in its entirety, we find that Applicant’s mark creates an overall commercial impression similar to the cited mark. The first *du Pont* factor thus weighs in favor of a finding that confusion is likely.

#### D. Conclusion as to Likelihood of Confusion

We have considered all arguments and evidence of record as they pertain to the relevant *du Pont* likelihood of confusion factors. To the extent that any other *du Pont* factors for which no evidence was presented by Applicant or the Examining Attorney may nonetheless be applicable, we treat them as neutral. We have found that the first, second, and third *du Pont* factors weigh in favor of a finding that confusion is likely. The strength of the cited mark weighs in Applicant’s favor, but even a “weak” mark is entitled to protection against a confusingly similar mark for legally identical goods. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974). We therefore find that Applicant’s mark is likely to cause confusion with the mark in Registration No. 3645852 when used on the identified goods.

## II. Descriptiveness

Though Applicant did not file a supplemental brief addressing the descriptiveness refusals, the Examining Attorney has the burden to establish that the mark is merely descriptive. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2052 (TTAB 2012).

### A. Whether NRG COFFEE Is Merely Descriptive

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought, the context in which the mark is used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use. *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219.

When the Examining Attorney issued the Office Action reinstating the descriptiveness refusal, she also required Applicant to provide the following information, with Applicant's responses included below:<sup>19</sup>

1. A written statement explaining whether the goods contain/will contain energy-boosting ingredients such as guarana or ginseng (or others), and if so, a list of such ingredients.

Applicant's Response: "The goods may contain energy-boosting ingredients such as guarana and ginseng."

2. A sample of advertisements or promotional materials for the goods or if such materials are not available, applicant must submit samples of advertisements or promotional materials of *similar* goods.

Applicant's Response: "A sample of advertisements or promotional materials for the goods are not currently available. Attached are advertisements or promotional materials of similar goods." Applicant submitted the following materials:<sup>20</sup>

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<sup>19</sup> August 11, 2017 Office Action and Response to Office Action submitted the same day.

<sup>20</sup> August 11, 2017 Response to Office Action at TSDR 11-12.

## Starbucks Doubleshot® Energy Coffee Drink



A powerful brew of espresso, B vitamins, guarana, ginseng and natural milk proteins.

### We're Sorry

The nutritional data for this product is not available online.

See ingredient and allergen information below.

Nutrition information is calculated based on our standardized recipes. Because our beverages are handcrafted and may be customized, exact information may vary.

[See more about nutrition information](#)

We cannot guarantee that any of our products are free from allergens (including dairy, eggs, soy, tree nuts, wheat and others) as we use shared equipment to store, prepare and serve them.

### Currently Available

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Grocery > Beverages > Sports & Energy Drinks



### Description

Java Kick is the evolution of the original coffee drink. At a time when energy drinks have become predictable, Java Kick has emerged as a refreshing and functional drink alternative. Java Kick is a natural and flavorful alternative to both energy and coffee beverages.

Derived from natural caffeine and infused with ginseng and vitamins, Java Kick is a flavorful way to get a "kick." Offering the dual advantage of a caffeine pick-me-up in regular or sugar free options, plus natural vitamins, Java Kick is a natural boost when

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**\$35.13/ea**

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**\$34.51/ea**



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This evidence demonstrates that third parties offer coffee with added caffeine or other energy-boosting ingredients and use the term “energy” descriptively in association with their enhanced coffee goods. The Examining Attorney introduced additional examples of such use, including the following:

- “Big Energy” coffee by 7-Eleven with the herbs guarana, yerba mate, and ginseng;<sup>21</sup>
- “Energy + Mind” coffee by Javita with the herb Bacopa Monnieri, described as having “a long history of use as a popular brain tonic to increased mental clarity, improved mental and brain functions, enhance clear thinking and support learning and memory”;<sup>22</sup>
- “Shock Coffee,” an “energy coffee” with a high caffeine content;<sup>23</sup>
- “GO! Coffee Energy,” “a combination of coffee beans and natural sugars designed to delivery energy quickly and maintain it”;<sup>24</sup>
- “VitaPerk Energy,” a “nutrient coffee enhancer”;<sup>25</sup>
- “Gourmet Energy Coffee” containing ganoderma, maca, ginseng, and guarana extract, offered by Rejuva Cafe;<sup>26</sup>
- “Energy Coffee” with Asian ginseng and guaraná from JoyAmaze;<sup>27</sup>
- “Overcaf Coffee” with double caffeine, described as “The Strongest High Energy Coffee”;<sup>28</sup> and
- “Hiball Energy” coffee with sugar, guarana, ginseng, and B vitamins.<sup>29</sup>

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<sup>21</sup> April 20, 2016 Suspension Notice at TSDR 45-48; *see also* September 10, 2017 Subsequent Final Office Action at TSDR 126-31 (discussing the same product).

<sup>22</sup> April 20, 2016 Suspension Notice at TSDR 49-50.

<sup>23</sup> November 3, 2016 Final Office Action at TSDR 98-99.

<sup>24</sup> *Id.* at TSDR 100-01.

<sup>25</sup> July 14, 2017 Motion to Remand at TSDR 2-4.

<sup>26</sup> *Id.* at TSDR 13-14.

<sup>27</sup> *Id.* at TSDR 15-20.

<sup>28</sup> *Id.* at TSDR 69-75.

<sup>29</sup> September 10, 2017 Subsequent Final Office Action at TSDR 132-34.

The Examining Attorney also submitted online discussions of “energy coffees” that, like the examples immediately *supra*, appear to contain ingredients intended to boost energy.<sup>30</sup> For example, an online article on the Convenience Store News website discusses a coffee island featuring eight brewed options, five types of cappuccino, “and three energy coffees.”<sup>31</sup> Similarly, a blog about running displays a post titled “Best Energy Coffee for Runners” listing the author’s 18 “favorite energy coffees.”<sup>32</sup> The record thus shows that “energy coffee” is understood to designate coffee with energy-boosting ingredients.

Applicant stated, in response to the request for information, that its coffee goods “may contain energy-boosting ingredients such as guarana and ginseng.” As noted *supra*, the record shows that NRG is an abbreviation for “energy,” and COFFEE is generic in association with Applicant’s goods. Thus, to the extent that Applicant’s “coffee for use in single-serve brewing machines” contains energy-boosting ingredients, each term constituting Applicant’s mark is descriptive and retains its descriptive significance in combination. NRG COFFEE, considered as a whole, thus forms a composite that is itself merely descriptive of coffee with energy-boosting ingredients. *See, e.g., DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1759 (Fed. Cir. 2012) (finding SNAP SIMPLY SAFER merely descriptive for cannulae, needles, and syringes); *In re Positec Grp. Ltd.*, 108

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<sup>30</sup> *See, e.g., id.* at TSDR 145-64 and 173-77.

<sup>31</sup> *Id.* at TSDR 159.

<sup>32</sup> *Id.* at TSDR 173-77.

USPQ2d 1161, 1173 (TTAB 2013) (holding SUPERJAWS merely descriptive for tools). The refusal to register Applicant's mark as merely descriptive under Trademark Act Section 2(e)(1) is affirmed.

**B. Whether NRG COFFEE Is Deceptively Misdescriptive in the Alternative**

As for the alternative refusal that Applicant's mark is deceptively misdescriptive, the test for deceptive misdescriptiveness under Section 2(e)(1) has two parts. First, we must determine whether the matter sought to be registered misdescribes the goods or services. In order for a term to misdescribe goods or services, "the term must be merely descriptive, rather than suggestive, of a significant aspect of the goods or services which the goods or services plausibly possess but in fact do not." *In re Hinton*, 116 USPQ2d 1051, 1052 (TTAB 2015) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002)). Second, if the term misdescribes the goods, we must ask whether consumers are likely to believe the misrepresentation. *Id.* 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. *Id.*

Applicant's identified goods are broad enough to include coffee with energy-boosting ingredients. *Cf. Chamber of Commerce of the U.S.*, 102 USPQ2d at 1220 (stating that a mark is descriptive if it conveys information about one designated service). To the extent Applicant's goods do not feature energy-boosting ingredients,<sup>33</sup>

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<sup>33</sup> As noted, Applicant stated that its "goods may contain energy-boosting ingredients such as guarana and ginseng"; Applicant did not confirm that its goods definitely would contain energy-boosting ingredients.

NRG COFFEE misdescribes those goods. The record establishes that NRG COFFEE describes a significant aspect of coffee with energy-boosting ingredients, and that it is plausible for coffee to contain such ingredients. With respect to the second prong of the misdescriptiveness test, given the numerous examples of such enhanced coffees, we find that a prudent consumer would be likely to believe that NRG COFFEE contains energy-boosting ingredients. The alternative refusal to register Applicant's mark as deceptively misdescriptive under Trademark Act Section 2(e)(1) is affirmed.

**Decision:** The refusal to register is affirmed as to each ground.