

This Opinion is not a  
Precedent of the TTAB

Hearing: Feb. 4, 2020

Mailed: March 24, 2020

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Shaklee Corporation*

Serial No. 87528703

Kevin M. Hayes of Klarquist Sparkman, LLP  
for Shaklee Corporation

Andrea B. Cornwell, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

Before Kuhlke, Wellington, and Heasley  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Shaklee Corporation, seeks registration on the Principal Register of the mark PERFORMANCE (in standard characters) for “Energy bars; energy chews; energy gummy; effervescent tablets for making a dietary supplement drink; supplement for boosting energy; supplement for boosting the body’s production of nitric oxide; joint protection supplement; supplement for body fat reduction;

powdered creatine; creatine capsules; creatine tablets; nutritional candy,” in International Class 5.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s proposed mark under Section 2(e)(1) of the Trademark Act on the ground that “PERFORMANCE” is merely descriptive of the identified goods. When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed. During the course of the appeal, the Board granted Applicant’s request to remand the application to the Examining Attorney to consider a registration that recently issued to Applicant.<sup>2</sup> The Examining Attorney maintained and continued the refusal,<sup>3</sup> and the appeal once again resumed. The Applicant and Examining Attorney fully briefed the case and appeared for oral argument. We affirm the refusal to register.

#### I. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act precludes registration of a mark on the Principal Register that, when used on or in connection with the applicant’s goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). “A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith

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<sup>1</sup> Application Serial No. 87528703 was filed on July 14, 2017, based on Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. 15 U.S.C. § 1051(b).

Page references to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

<sup>2</sup> 17, 18 TTABVUE.

<sup>3</sup> 19 TTABVUE.

conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services.” *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018) (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978)). “The major reasons for not protecting such [merely descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.” *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005) (quoting *In re Abcor*, 200 USPQ at 217). Evidence that a term is merely descriptive to the relevant purchasing public may be obtained from any competent source, such as dictionaries, newspapers, or surveys, as well as labels, packages, or advertising material directed to the goods. *In re North Carolina Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709-10 (Fed. Cir. 2017).

A. Arguments of the Examining Attorney and Applicant

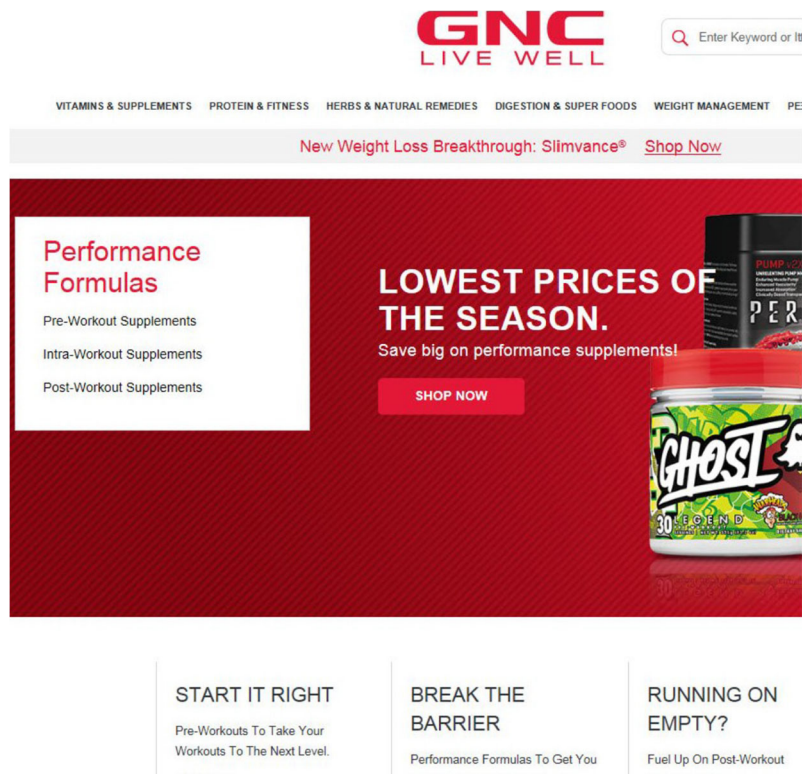
The Examining Attorney contends that “PERFORMANCE” merely describes a feature or purpose of Applicant’s goods, in that its supplements and energy foods are for improving one’s athletic performance.<sup>4</sup> She adduces dictionary definitions

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<sup>4</sup> Examining Attorney’s brief, 9 TTABVUE 3-4.

showing that “PERFORMANCE” means “the action or process of carrying out or accomplishing an action, task, or function,”<sup>5</sup> “the way in which someone or something functions,”<sup>6</sup> or “the ability to perform.”<sup>7</sup> She also cites seventeen website examples showing that third parties commonly use “PERFORMANCE” to describe supplements and energy foods that purport to improve athletic performance.<sup>8</sup> Some websites describe a **category** of “performance” supplements:

- GNC describes a category of supplements as “performance formulas,” including pre-, intra-, and post-workout supplements



<sup>5</sup> Oxford Living Dictionaries, March 5, 2018 Office Action at TSDR 5.

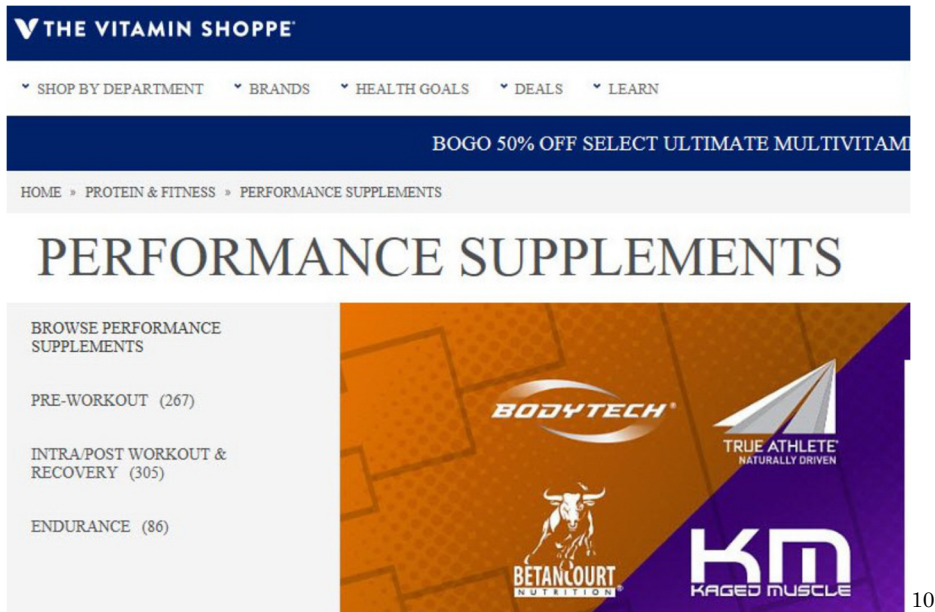
<sup>6</sup> American Heritage Dictionary, Sept. 24, 2018 Office Action at 5.

<sup>7</sup> Merriam-Webster Dictionary, *id.* at 6.

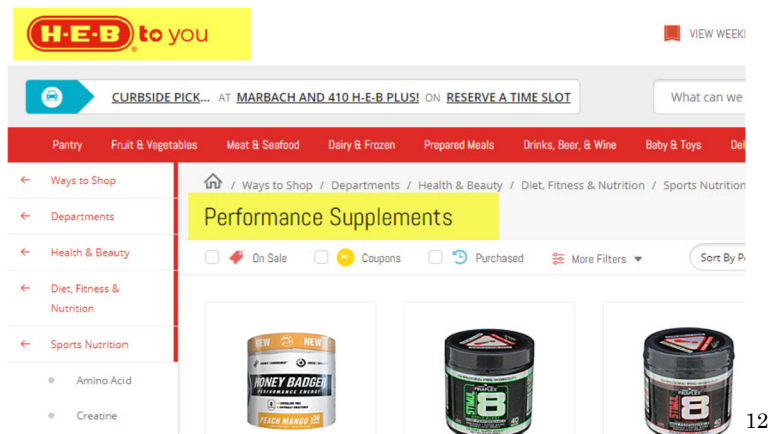
<sup>8</sup> Examining Attorney’s brief, 9 TTABVUE 4-6.

<sup>9</sup> March 5, 2018 Office Action at 8.

- The Vitamin Shoppe describes a category of “performance supplements” for pre-, intra-, and post workout and recovery:



- Bare Performance Nutrition describes a category of “Performance Supplements for Discerning Athletes”<sup>11</sup>
- HEB describes a category of supplements as “performance supplements”:

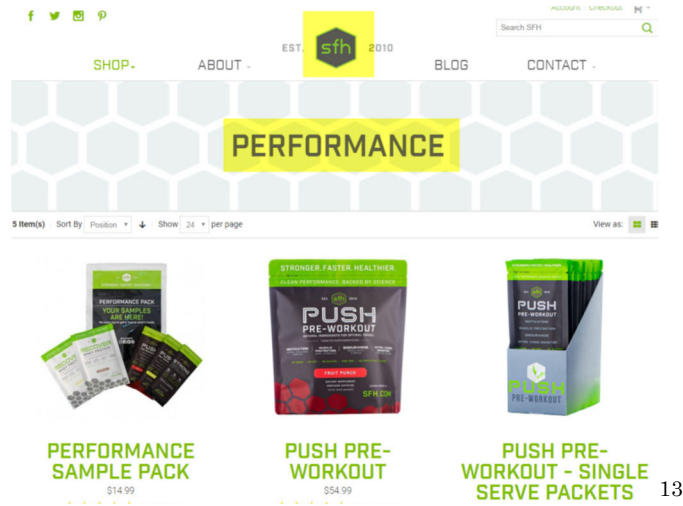


<sup>10</sup> *Id.* at 7.

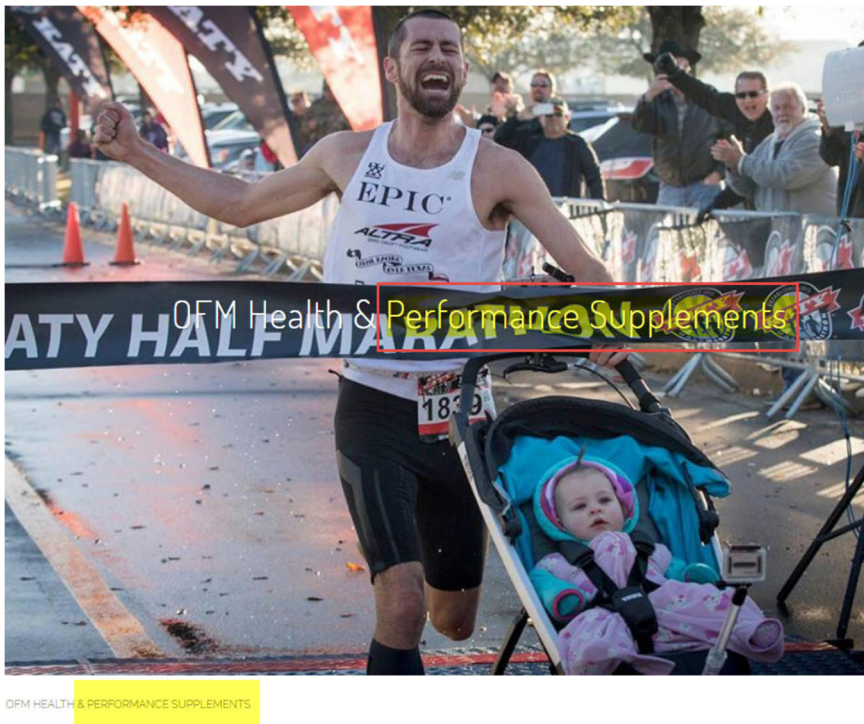
<sup>11</sup> *Id.* at 6.

<sup>12</sup> April 15, 2019 Office Action at 97.

- SFH describes a category of supplements as “performance”:



- VESPA describes a category of “health & performance supplements:”



- GOWILD describes a category of “performance supplements”<sup>15</sup>

<sup>13</sup> *Id.* at 95.

<sup>14</sup> *Id.* at 94.

<sup>15</sup> *Id.* at 93.

Other websites describe the **function or purpose** of supplements as improving athletic performance:

- GATORADE describes its energy drink powders and chews as an endurance “performance pack” that helps the user achieve “peak performance”<sup>16</sup>
- KAGED MUSCLE advertises that its supplements “improve[] athletic performance” and “boost your performance even faster”<sup>17</sup>
- NLA FOR HER workout supplements tout “improved athletic performance”<sup>18</sup>

Other websites describe their **energy foods** as “performance” enhancing:

- OLLY gummy packs contain ingredients that it claims “increase your performance and productivity”<sup>19</sup>
- POWER BAR advertises its PERFORMANCE ENERGY BAR:

### Performance Energy Bar

As your mind clears and the rush of the game begins, Performance Energy is there, featuring a dual-source energy blend to deliver more energy to your muscles.



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- EBARS states that its bars offer “a new era in organic performance enhancing nutrition”<sup>21</sup>

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<sup>16</sup> Sept. 24, 2018 Office Action at 15.

<sup>17</sup> *Id.* at 18-19.

<sup>18</sup> *Id.* at 25.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> *Id.* at 35.

<sup>21</sup> *Id.* at 10.

Still other websites describe **creatine supplements**<sup>22</sup> as performance enhancing:

- BUCKED UP advertises that its creatine supplements “may improve high intensity muscle performance”<sup>23</sup>
- PERFORMIX states that “[f]atigue is the enemy of peak performance,” so its creatine supplement offers “rapid increases in muscle performance, size and strength.”<sup>24</sup>

As additional proof that “PERFORMANCE” is descriptive of Applicant’s goods, the Examining Attorney adds evidence of 34 third-party registrations in which “PERFORMANCE” is disclaimed as descriptive of dietary and nutritional supplements, foods, or beverages.<sup>25</sup> For example:

- ABB PERFORMANCE & Design (Reg. No. 4016543) for “dietary and nutritional supplements” includes a disclaimer of “PERFORMANCE”.<sup>26</sup>
- RECREATIONAL HEALTH AND PERFORMANCE (Reg. No. 4846207) for a variety of dietary and nutritional supplements includes a disclaimer of “HEALTH” and “PERFORMANCE”.<sup>27</sup>

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<sup>22</sup> “Creatine is an amino acid located mostly in your body’s muscles, as well as in the brain. Though it can be made synthetically, most people get creatine through seafood and meat. The body’s liver, pancreas and kidneys also make creatine. Your body converts creatine to phosphocreatine and stores it in your muscles, where it’s used for energy. **As a result, people take creatine orally to improve athletic performance and increase muscle mass.**” MayoClinic.org at Sept. 5, 2018 Response to Office Action at 25 (emphasis added).

<sup>23</sup> Sept. 24, 2018 Office Action at 9.

<sup>24</sup> *Id.* at 30.

<sup>25</sup> Examining Attorney’s brief, 9 TTABVUE 6-10.

<sup>26</sup> April 15, 2019 Office Action at 11-13.

<sup>27</sup> *Id.* at 14-16.



- XP2 XCELERATED PERFORMANCE PRODUCTS & Design (Reg. No. 4358666) for a variety of dietary and nutritional supplements includes a disclaimer of “PERFORMANCE PRODUCTS”.<sup>28</sup>
- CHAMPION PERFORMANCE (Reg. No. 4664263) for a variety of dietary and nutritional supplements includes a disclaimer of “PERFORMANCE”.<sup>29</sup>
- REBEL PERFORMANCE (Reg. No. 5087168) for “dietary and nutritional supplements” includes a disclaimer of “PERFORMANCE”.<sup>30</sup>
- UNRIVALED PERFORMANCE (Reg. No. 5059555) for “dietary and nutritional supplements” includes a disclaimer of “PERFORMANCE”.<sup>31</sup>
- X2 PERFORMANCE (Reg. No. 5274497) for “dietary supplements, nutrition supplements and vitamin supplements” includes a disclaimer of “PERFORMANCE”.<sup>32</sup>
- PRIMED PERFORMANCE (Reg. No. 5708782) for “nutritional supplements for athletic performance” includes a disclaimer of “PERFORMANCE”.<sup>33</sup>

Based on this dictionary, third-party Internet and registration evidence, the Examining Attorney concludes that Applicant’s proposed PERFORMANCE mark is merely descriptive of its goods.<sup>34</sup>

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<sup>28</sup> *Id.* at 22-24.

<sup>29</sup> *Id.* at 30-32.

<sup>30</sup> *Id.* at 44-45.

<sup>31</sup> *Id.* at 57-58.

<sup>32</sup> *Id.* at 57-58.

<sup>33</sup> *Id.* at 91-92.

<sup>34</sup> Examining Attorney’s brief, 9 TTABVUE 10.

Applicant argues that its mark is suggestive, not descriptive, of its goods. “[P]erformance’ is not a characteristic of Applicant’s products. The Examiner asserted that ‘performance’ is defined as ‘the action or process of carrying out or accomplishing a task, or function.’ ... Applicant’s products are not characterized by ‘the action or process of carrying out or accomplishing a task, or function.’”<sup>35</sup> Rather, Applicant continues, thought, imagination, and speculation would be required to arrive at “PERFORMANCE” being related to Applicant’s products:

In that regard, a consumer viewing Applicant’s trademark PERFORMANCE on Applicant’s products would be required to think about what the products are, realize that the products are a nutritional supplement of some sort, then realize that the consumer, if he/she ingests the products and combines that with some exercise, might at some point in the future (if the products are continued to be ingested and the exercise continued) build muscle or endurance that might assist the consumer in executing the exercise. A consumer would not immediately believe that the product would result in “performance” - i.e., “the action or process of carrying out or accomplishing a task, or function.”<sup>36</sup>

Applicant likens this case to decisions finding that marks suggested desired end results of identified goods or services, but did not describe the goods or services themselves. *E.g.*, *In re Recovery, Inc.*, 196 USPQ 830, 832 (TTAB 1977) (finding RECOVERY suggestive of desired end result of Applicant’s services providing group therapy in the form of self-help aftercare following psychiatric or other professional counseling. “[T]o articulate the manner in which the term ‘RECOVERY’ describes those services, one cannot come up with an immediate response, but rather must engage in a mental process involving imagination, speculation, and possibly

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<sup>35</sup> Applicant’s brief, 7 TTABVUE 8.

<sup>36</sup> *Id.*

stretching the meaning of the word to fit the situation.”); *In re Nalco Chem. Co.*, 228 USPQ 972 (TTAB 1986) (finding VERI-CLEAN suggestive of end result of using chemical anti-fouling additives in refineries); *In re C.J. Webb, Inc.*, 182 USPQ 63, 64 (TTAB 1974) (finding CRC BRAKLEEN & Design suggestive of end result of using a chemical for cleaning and degreasing automotive brake parts. “The term ‘brake clean’ is but a laconic means of saying this product will get your brake clean. ... ‘brake clean’ is suggestive of a desired result of a brake cleaner and therefore the asserted phonetic equivalent ‘Brakleen’ must be considered to be suggestive rather than merely descriptive when applied to applicant’s goods.”); *In re Realistic Co.*, 440 F.2d 1393, 169 USPQ 610 (CCPA 1971) (finding CURV suggestive of a permanent wave curling solution).

In fact, Applicant argues, PERFORMANCE “evokes an array of products, ranging from car parts to sports equipment. ... Applicant’s mark is at most suggestive as it evokes a range of different products and not merely those identified in the identification of goods.”<sup>37</sup>

In this vein, Applicant contends, the Examining Attorney’s evidence “that 17 Internet websites allegedly identify ‘performance’ as an alleged purpose of a supplement or allegedly as a category of supplements does not prove that the term is descriptive. Rather, 17 Internet websites is an insignificant number that should be discounted as *de minimus*.”<sup>38</sup> Aside from POWERBAR PERFORMANCE ENERGY

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<sup>37</sup> Applicant’s brief, 7 TTABVUE 9.

<sup>38</sup> Applicant’s reply brief, 10 TTABVUE 3.

BAR, “the Examiner can point to no evidence that competitor called its product, ‘performance.’ The Examiner’s additional evidence consists of 3 websites that include a page headed by the categories: ‘Performance Supplements for Discerning Athletes,’ ‘Performance Supplements,’ ‘Performance Formulas’ ... and other websites that use the word ‘performance’ not as the name of a product or as a characteristic of a product.”<sup>39</sup>

As for the Examining Attorney’s evidence of 34 registrations in which “PERFORMANCE” is disclaimed, Applicant argues that there is no discussion of whether those applicants disputed the claim of alleged descriptiveness or entered the disclaimers voluntarily for purposes of expediency, simply to obtain a registration.<sup>40</sup> Furthermore, Applicant notes, in the last several years, seven registrations have issued for supplements that did not disclaim “PERFORMANCE”:

<b>Mark and Registration No.</b>	<b>Pertinent Goods</b>
GET PERFORMANCE Reg. No. 5272028	Dietary and nutritional supplements
PERFORMANCE ON DEMAND Reg. No. 5111325	Dietary supplements in the form of chewable tablets for boosting physical energy, physical stamina, physical recovery, concentration and mental arousal and sleep
PERFORMANCE INSPIRED Reg. No. 5051452	Dietary, protein, and nutritional supplements
SCIENCE DRIVEN, PERFORMANCE PROVEN Reg. No. 4679156	Dietary and nutritional supplements

<sup>39</sup> Applicant’s brief, 7 TTABVUE 12-13.

<sup>40</sup> Applicant’s reply brief, 10 TTABVUE 4.

PERFORMANCE INSPIRED Reg. No. 5433754	Vitamins
BECAUSE PERFORMANCE MATTERS Reg. No. 5167055	Dietary and nutritional supplements
OPTIMUM PERFORMANCE Reg. No. 4842942	Animal feed additive as a nutritional supplement for medical purposes <sup>41</sup>

To this, Applicant adds evidence of its own registrations:

- PERFORMANCE (typed drawing, Reg. no. 2694345, issued March 11, 2003) for “powdered concentrate for making an electrolytic soft drink” in International Class 32, based on Section 2(f). 15 U.S.C. § 1052(f);
- SHAKLEE PERFORMANCE (stylized, Reg. no. 1576685, issued Jan. 9, 1990) for the same goods in International Class 32;
- SHAKLEE PERFORMANCE (standard characters, Reg. no. 5891922, issued Oct. 22, 2019) for “Dietary supplements in the nature of energy bars, energy chews, and energy gummies; effervescent tablets for making a dietary supplement drink; nutritional supplements for boosting energy; nutritional supplements for boosting the body’s production of nitric oxide; nutritional supplements for protection of articular joints; nutritional (or dietary) supplements for body fat reduction; dietary and nutritional supplements comprised primarily or exclusively of creatine in the form of powder, capsules or tablets” in International Class 5.<sup>42</sup>

Applicant maintains that its registrations should inform this appeal, as they identify nutritional products under marks consisting of or containing “PERFORMANCE.” Applicant maintains that its registrations and its present application “include nutritionally enriched food products designed to promote health, well-being and endurance of the human body.”<sup>43</sup> Indeed, the most recent registration

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<sup>41</sup> Applicant’s March 25, 2019 Response to Office Action at 2-4, 20-30.

<sup>42</sup> See Applicant’s request to suspend and remand, 17 TTABVUE.

<sup>43</sup> Applicant’s reply brief, 10 TTABVUE 5.

for SHAKLEE PERFORMANCE, issued six months ago, identifies the same sort of nutritional products as those in the present application (with different wording); even though the Office had requested a disclaimer of “PERFORMANCE” in that mark, that request was withdrawn, and SHAKLEE PERFORMANCE proceeded to registration without a disclaimer.<sup>44</sup> Applicant concludes that PERFORMANCE is not merely descriptive of its nutritional products.

### B. Analysis

On consideration of all the relevant evidence and arguments, we agree with the Examining Attorney that the proposed mark is merely descriptive of Applicant’s goods within the meaning of Section 2(e)(1). Applicant obtained its first registration for PERFORMANCE, Registration no. 2694345, on the basis of acquired distinctiveness under Section 2(f). 15 U.S.C. § 1052(f). Where “an applicant seeks registration on the basis of Section 2(f), the mark’s descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive.” *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) *quoted in In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1198-99 (TTAB 2016). As Applicant states, “[t]he nutritionally enhanced goods listed in the present application are simply a continuation of Applicant’s nutritionally enhanced PERFORMANCE branded product line, offering nutritional supplements in alternative food mediums such as candy, energy bars,

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<sup>44</sup> Applicant’s request to suspend and remand, 17 TTABVUE.

capsules, etc.”<sup>45</sup>

Applicant’s goods fall under the category of “performance” supplements. As the third-party website evidence shows, relevant consumers—those seeking nutritional supplements designed to improve athletic performance—would encounter the goods in the same online “Performance” category or aisle of large retailers such as GNC, The Vitamin Shoppe, or HEB. Descriptiveness must be evaluated “in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 Fed. Cir. 2007)) *quoted in RXD Media v. IP Application Development LLC*, 125 USPQ2d 1801, 1810-11 (TTAB 2018). Applicant derides this website evidence as *de minimis*, but provides no countervailing third-party use evidence, so we accept the Examining Attorney’s examples as representative of descriptive terms used in the marketplace.

Moreover, “performance” describes the **function** and **purpose** of Applicant’s goods. A mark is merely descriptive if it “conveys information regarding a function, or purpose, or use of the goods.’ *In re Abcor*, [200 USPQ2d at 217] (citations omitted).” *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012). In *In re Stereotaxis*, 77 USPQ2d 1087, for example, the Federal Circuit affirmed a Board finding that “STEREOTAXIS was descriptive of

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<sup>45</sup> Applicant’s reply brief, 10 TTABVUE 5.

certain magnetic medical devices and services because it described their functions and purposes....” *In re Chamber of Commerce*, 102 USPQ2d at 1220.

The decisions on which Applicant relies are consistent with the proposition that a proposed mark can be found merely descriptive of a function or purpose. *See In re Realistic Co.*, 169 USPQ at 610 (“As the board pointed out, a mark is descriptive if it describes the **purpose** for which the goods are to be used.”); *In re Nalco Chem.*, 228 USPQ at 973 (“It has been held that a term is merely descriptive within the meaning of Section 2(e)(1) if it describes, i.e., immediately conveys information about, an ingredient, quality, characteristic, **function, purpose**, use, feature, property, or part of the goods or services in connection with which it is used.”) (emphasis added). In those cases, it was determined that the marks fell on the “suggestive” rather than “descriptive” side of the line because they did not immediately or directly convey the function or purpose of the goods. *See Bellsouth Corp. v. Planum Tech. Corp.*, 14 USPQ2d 1555, 1556 (TTAB 1988) (citing line of “intended result” cases). And there was no evidence of competitors’ use of the words. *Id.*

In this case, however, the proposed mark falls on the other side of the line. A consumer might not believe that Applicant’s nutritional supplements will immediately improve his performance; but he would immediately perceive that nutritional supplements bearing the mark PERFORMANCE are intended to improve athletic performance. That is why third-party competitors such as Gatorade and Kaged Muscle use the term “performance” descriptively: nutritional supplements are perceived as performance-enhancing. And that is why 34 third parties have



registered marks for nutritional supplements with “performance” disclaimed.<sup>46</sup> Even if the disclaimers were voluntary, “it has long been held that the disclaimer of a term is an admission of the merely descriptive nature of that term, as applied to the goods or services in connection with which it is registered.” *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005). *See also Quaker State Oil Ref. Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972) (“when it disclaimed said term in applications for registrations of compound marks, it again admitted the merely descriptive nature of the mark and acknowledged that it did not have an exclusive right therein at that time.”). Applicant’s citation to seven third-party registrations without such disclaimers pales by comparison to the Examining Attorney’s 34 examples.

As for Applicant’s own registrations, we have noted that its prior application to register PERFORMANCE on the basis of Section 2(f) acquired distinctiveness conceded the term’s descriptiveness in the context of its goods.<sup>47</sup> *See In re LC Trademarks*, 121 USPQ2d at 1198-99. That the term “may have other meanings in different contexts is not controlling,” *In re Canine Caviar Pet Foods*, 126 USPQ2d at 1597. “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered as merely descriptive.” *In re Mueller Sports Med., Inc.*,

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<sup>46</sup> Examining Attorney’s brief, 9 TTABVUE 6-10.

<sup>47</sup> Applicant’s present application, based on Section 1(b), does not claim acquired distinctiveness. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1479 (TTAB 2016) (“A claim of acquired distinctiveness under Section 2(f) is normally not filed in a Section 1(b) application before the applicant files an allegation of use, because a claim of acquired distinctiveness, by definition, requires prior use.”).

126 USPQ2d 1584, 1590 (TTAB 2018). Applicant's two registrations for SHAKLEE PERFORMANCE may have issued without disclaimers on the assumption that its SHAKLEE house mark suffices to distinguish its particular performance supplements from those of others. Whatever rationale may have prompted registration in those cases, we must evaluate the evidence in the present record to determine whether the proposed PERFORMANCE mark is eligible for registration, and are not bound by the decisions of examining attorneys in other applications. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635, (Fed. Cir. 2016) *cited in DeVivo v. Ortiz*, 2020 USPQ2d 10153, \* 9 (TTAB 2020).

## II. Conclusion

“[D]escriptive terms are in the public domain and should be free for use by all who can truthfully employ them to describe their goods.” *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (citing *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543-44 (1920)). For the foregoing reasons, we find that Applicant's proposed mark, PERFORMANCE, is merely descriptive of its goods under Section 2(e)(1).

**Decision:** The refusal to register Applicant's proposed mark is affirmed.