This Opinion is Not a Precedent of the TTAB

Oral Hearing: July 15, 2021 Mailed: August 24, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re L-Nutra, Inc.

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Serial No. 87635652

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Thomas J. Speiss, III, of Buchalter PC,
for L-Nutra, Inc.

Barbara Rutland, Trademark Examining Attorney, Law Office 101,
Zachary R. Sparer, Managing Attorney.

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Before Taylor, Greenbaum and English,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

L-Nutra, Inc. ("Applicant") seeks registration on the Principal Register of the mark FAST DRINK (in standard characters, DRINK disclaimed) for

> Nutritional meal replacement drinks adapted for medical use; herbal teas for medical treatments, in International Class 5.[1]

[1] Application Serial No. 87635652 was filed on October 5, 2017, based upon 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).

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), as 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 was resumed, and an oral hearing was held on July 15, 2021. We reverse the refusal to register.

I. Applicable Law

"A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of the goods or services related to the mark." *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), *quoting*, *Estate of P.D. Beckwith, Inc. v. Comm'r*, 252 U.S. 538, 543 (1920). *See also In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). The determination of whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service with which it is used, or intended to be used. *In re Eng'g Sys. Corp.*, 2 USPQ2d 1075, 1076 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). It is not necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987).

Where a mark consists of multiple words, the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. *In re Associated Theater Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *Oppedahl*, 71 USPQ2d at 1371. However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968); *In re Shutts*, 217 USPQ 363 (TTAB 1983); and TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1209.03(d) (July 2021).

A mark is suggestive if, when the goods or services are encountered under the mark, a multi-stage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. *See, e.g., In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978). As often has been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. *See, e.g., In re Atavio*, 25 USPQ2d 1361, 1362 (TTAB 1992); *In re TMS Corp. of the Ams.*, 200 USPQ 57, 58 (TTAB 1978). The distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. *See In re George Weston Ltd.*, 228 USPQ

57, 58 (TTAB 1985). The examining attorney bears the burden of showing that a mark is merely descriptive of the identified goods or services. *See In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

II. Analysis

The Examining Attorney contends that FAST DRINK merely describes a significant feature of the identified goods, namely, that the goods are "for use during periods when a consumer either completely abstains from food, instead consuming herbal teas or meal replacement drinks such as those described in applicant's application or when a consumer greatly reduces the food for a certain period, instead consuming herbal teas or meal replacement drinks[.]"[2] As support, the Examining Attorney points to dictionary definitions of "fast" as "[t]he act or practice of abstaining from or eating very little food" and "drink" as "liquid suitable for swallowing especially to quench thirst or to provide nourishment or refreshment";[3] Applicant's marketing materials for goods sold under another mark that Applicant explains are "of the same type" as those identified in the application, showing that such goods are

[2] Examining Attorney's Appeal Brief, 9 TTABVUE 12.

[3] Definitions of "fast" from THE AMERICAN HERITAGE DICTIONARY were attached to the January 20, 2018 Office Action, TSDR 7. Definitions of "drink" from MERRIAM-WEBSTER DICTIONARY were attached to the April 9, 2020 Final Office Action, TSDR 2-13.

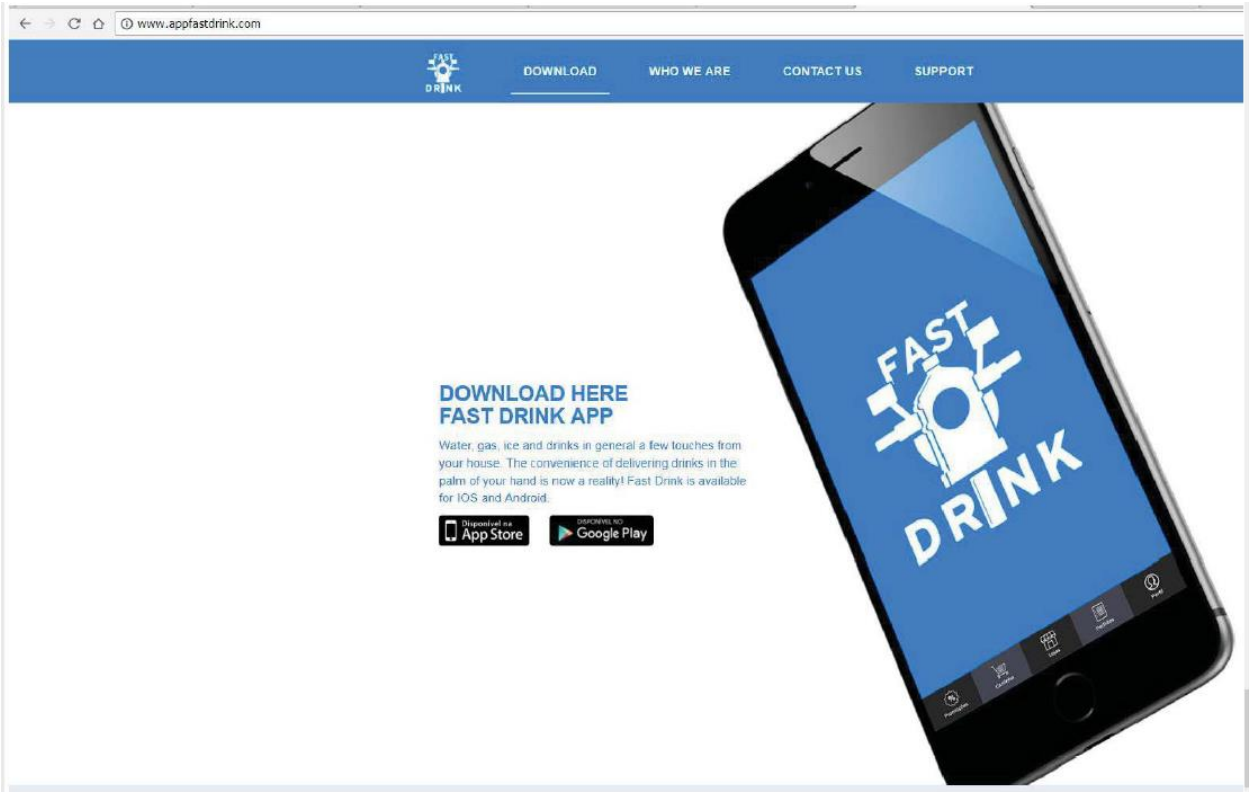
used to provide nourishment to someone who is fasting;[4] and excerpts from several articles and blogs discussing drinks for use while, or in preparation for, fasting.[5]

However, while the words "fast" and "drink" retain their individual meanings, we initially note the lack of evidence of the term FAST DRINK as a unitary expression referring to a drink that is consumed during, or in preparation for, a fast. We may affirm a Section 2(e)(1) refusal with no evidence of the exact term if other evidence in the record supports the finding. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1756-57 (Fed. Cir. 2012). Here, however, the lack of evidence suggests that the term FAST DRINK is not a grammatically correct expression or a term of art identifying a type of drink used during a fast, and it is unclear whether consumers would understand it as a merely descriptive term when applied to the identified goods.

[4] July 19, 2018 Response to Office Action, TSDR 29, submitted in response to a Request for Information under Trademark Rule 2.61, 37 C.F.R. § 2.61, in the January 20, 2018 Office Action. (Applicant particularly stated: "In response to the above request, because the covered goods under the applied-for mark are still under development, Applicant provides as Exs. 3 and 4 copies of similar documentation for L-Nutra's PROLON FASTING MIMICKING DIET products showing goods of the same type which are contemplated to be offered under the applied-for FAST DRINK mark." *Id.*, TSDR 7).

[5] Printouts from a blog posted on the amlagreen.com website, titled "Liquids to Drink While Fasting," and from an article posted on the wikihow.com website, titled "Fast for a Day," were attached to the August 30, 2019 Office Action, TSDR 14-20 and 21-36, respectively. Printouts from an article posted on centenoschultz.com titled "Fasting Mimicking Diet: Healthy Lifestyle and Nutrition Series" (about Applicant), an article posted on Applicant's website prolonfast.com titled "What is ProLon" (about Applicant's "ProLon Fasting Mimicking Diet"), and a blog about the "ProLon Fasting Diet," posted on statnews.com titled "Kale crackers and hibiscus tea: My five days on a 'fasting diet,'" were attached to the November 12, 2020 Request for Reconsideration Denied, TSDR 2-7, 8-13, and 14-27, respectively.

Nonetheless, even if consumers were to perceive FAST DRINK in that manner, given that "fast" is also defined as "acting, moving, or capable of acting or moving quickly; swift," and "accomplished in relatively little time,"[6] we believe consumers also would perceive FAST DRINK as referring to a product that they can prepare quickly, or that they may use as a quick snack or as an on-the-go meal replacement while they are fasting. This finding is supported by Applicant's marketing materials, which describe the "same type" of goods as "drinks … that are either ready to eat or are easy to prepare,"[7] and the printout from a third party website, www.appfastdrink.com, which touts the "FAST DRINK APP" as a way for users to quickly and conveniently have drinks delivered to their homes. This printout appears as follows:[8]



It is well established by Board precedent that marks which create a double entendre or double meaning are not merely descriptive. *See., e.g., In re Tea and Sympathy Inc.*, 88 USPQ2d 1062, 1064 (TTAB 2008) (THE FARMACY not merely descriptive because it is a play on the "farm-fresh" characteristics of applicant's herbs and organic products used for medicinal purposes.); *Colonial Stores*, 157 USPQ at 385 (SUGAR & SPICE not merely descriptive for bakery products because it immediately calls to mind "sugar and spice and everything nice" from the well-known nursery rhyme); *In re Del. Punch Co.*, 186 USPQ 63, 63-64 (TTAB 1975) (THE SOFT PUNCH for noncarbonated soft drink not merely descriptive because it projects a double entendre of a non-alcoholic drink as well as having a pleasing hit or soft impact); *In re Priefert Mfg. Co. Inc.*, 222 USPQ 731, 733 (TTAB 1974) (HAY DOLLY not merely descriptive of self-loading trailers for hauling bales; "phonetically the term is equivalent to the expression 'Hey Dolly,' giving the mark a commercial impression which transcends that which emerges as a result of legal analysis").

Because we find FAST DRINK equally as likely to be perceived as indicating a drink that will be used while fasting, as a drink that can be made quickly, or as a drink that can be consumed as a quick snack or as an on-the-go meal replacement, FAST DRINK is, at most, suggestive of the identified goods. *See In re The Place Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005) (defining a "double entendre" as an "ambiguity

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[6] AMERICAN HERITAGE DICTIONARY, attached to the January 20, 2018 Office Action, TSDR 3.

[7] July 19, 2018 Response to Office Action, TSDR 29.

[8] Attached to the July 19, 2018 Response to Office Action, TSDR 22.

of meaning arising from language that lends itself to more than one interpretation"). As in *The Place,* multiple meanings of FAST DRINK are readily apparent from the mark itself without reference to other indicia. *See also In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017) ("The multiple interpretations that mark an expression a 'double entendre' must be associations that the public would make fairly readily, and **must be readily apparent from the mark itself**.") (emphasis in original).

III. Conclusion

The mark FAST DRINK is a double entendre when considered in connection with "nutritional meal replacement drinks adapted for medical use; herbal teas for medical treatments." We therefore find the Examining Attorney has not established that the mark as a whole is merely descriptive in connection with the identified goods.[9] *See Atavio*, 25 USPQ2d 1361, 1363; *In re Gourmet Bakers Inc.*, 173 USPQ 565, 565 (TTAB 1972).

Decision: The refusal to register Applicant's mark FAST DRINK under Trademark Act Section 2(e)(1) is reversed.

[9] This is not to say that we might not reach a different result on a different record, such as one that might be adduced in an inter partes proceeding or when Applicant files a Statement of Use.