

From: Buongiorno, Christopher

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Subject: U.S. TRADEMARK APPLICATION NO. 77707978 - HANSEN'S NATURAL  
PRIMAL ENERGY TEA - HANBEV.508T - Request for Reconsideration Denied -  
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Attachment Information:

Count: 3

Files: energy-1.jpg, energy-2.jpg, 77707978.doc

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**APPLICATION SERIAL NO.** 77707978

**MARK:** HANSEN'S NATURAL PRIMAL ENERGY TEA



**CORRESPONDENT ADDRESS:**

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KNOBBE MARTENS OLSON & BEAR LLP  
2040 MAIN ST FL 14  
IRVINE, CA 92614-7216

**GENERAL TRADEMARK INFORMATION:**  
<http://www.uspto.gov/main/trademarks.htm>

**APPLICANT:** Hansen Beverage Company

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

HANBEV.508T

**CORRESPONDENT E-MAIL ADDRESS:**

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**REQUEST FOR RECONSIDERATION DENIED**

**ISSUE/MAILING DATE: 12/30/2010**

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. *See* 37 C.F.R. §2.64(b); TMEP §§715.03(a), 715.04(a). The requirement and refusal made final in the Office action dated June 23, 2010, are maintained and continue to be final. *See* TMEP §§715.03(a), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue, nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue in the final Office action. Again, applicant relies on the Dietary Supplement Health and Education Act of 1994 (DSHEA). Let the record be clear that it was applicant who introduced the Act into evidence and not the examining attorney. Applicant's analysis and arguments are not persuasive nor do they shed new light on the issue.

Applicant specifically references 21 U.S.C. §7(a)(B) of the Act as support for its claim that its specimen shows a dietary supplement. Applicant also submitted what it claims are "additional specimens"; although they appear to be photos of the same can filed with the amendment to allege use on December 10, 2009. However, the photos of the "additional" specimens do not show the placement of the wording "pomegranate green tea" that appears on the can under the wording "Primal Energy Tea". That specimen,

which consists of different photo angles, was filed with the amendment to allege use. The letters “pom” from the term “pomegranate” can be seen from the angle depicting the wording “Energy Supplement” in the “additional” specimen. So it appears applicant has simply submitted photos of different angles of the same can of pomegranate green tea that was filed with the amendment to allege use.

Turning to 21 U.S.C. §7(a)(B), applicant claims its pomegranate green tea is a nutritional supplement under the Act. Specifically, under the referenced section, applicant contends that the labeling of the can using the wording “Energy Supplement” is sufficient to comply with the Act and therefore its goods are dietary supplements. An examination of the language of 21 U.S.C. §7(a)(B) reveals applicant’s interpretation is wrong.

Under §7(a)(B), it states the following “If it is a dietary supplement; and the label or labeling of the dietary supplement fails to identify the product by using the term ‘dietary supplement’, which term may be modified with the name of such an ingredient”.

Applicant also provided the FDA’s guidance for the industry on dietary supplement labeling. According to applicant, Chapter I of the FDA’s “Dietary Supplement Labeling Guide,” the FDA states that “the containers of dietary supplements must include the ‘statement of identity’ (name of the dietary supplement)”. Also according to applicant, Chapter II is clear that in the statement of identity, “you may delete the word ‘dietary’ and replace it with the name of the dietary ingredient(s) in the product (e.g. calcium supplement) or an appropriately descriptive term indicating the type of dietary ingredient(s) in the dietary supplement product (e.g. herbal supplement with vitamins).”

Applicant contends that the term “energy” appearing before the term “supplement” complies with §7(a)(B) and the FDA’s “Dietary Supplement Labeling Guide”. However, the term “energy” does not identify a dietary ingredient.<sup>1</sup> Consequently, applicant’s interpretation of §7(a)(B) of the Act is misplaced. Accordingly, the request is denied.

The Board will be notified to resume the appeal when the time for responding to the final Office action has expired. *See* TMEP §715.04(a).

/Christopher L. Buongiorno/  
Law Office 102  
(571) 272-9251

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<sup>1</sup> *See* attached dictionary definition of the term “energy” retrieved from <http://www.macmillandictionary.com/dictionary/american/energy> on December 30, 2010.



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1 [UNCOUNTABLE] a supply of physical power that you have for doing things that need physical effort

*As children we seemed to have endless energy.  
She didn't even have the energy to get out of bed.*

[Thesaurus entry for this meaning of energy](#)

a. [COUNTABLE/UNCOUNTABLE] enthusiasm and determination

*She could offer youthful energy and talent in abundance.*

**put/devote/throw your energy/energies into something:** *Christine threw her energies into her teaching.*

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2 [UNCOUNTABLE] a form of power such as electricity, heat, or light that is used for making things work

*Insulating your home is a good way to save energy.  
Environmentally friendly energy sources include water and wind power.*

[Thesaurus entry for this meaning of energy](#)

a. SCIENCE the power that is present in all physical things and that can be changed into something such as heat, movement, or light

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