

ESTTA Tracking number: **ESTTA519252**

Filing date: **02/01/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85500055
Applicant	MILLER, MICHAEL E
Applied for Mark	MUSCLE SHOT
Correspondence Address	MATTHEW H. SWYERS, 344 MAPLE AVE W STE 151 VIENNA, VA 22180-5612 UNITED STATES admin@thetrademarkcompany.com
Submission	Appeal Brief
Attachments	Muscle Shot.pdf (10 pages)(68841 bytes)
Filer's Name	Matthew H. Swyers
Filer's e-mail	mswyers@thetrademarkcompany.com
Signature	/Matthew H. Swyers/
Date	02/01/2013

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
The Trademark Trial and Appeal Board**

In re Serial No. 85/500,055	:	
	:	
For the mark: MUSCLE SHOT,	:	Law Office 110
	:	
Applicant: Michael E. Miller	:	
Uzendy, LLC	:	
2231 Brimstone Place	:	Exam. Attorney:
Hanover, MD 21076	:	Sani Philippe Khouri
	:	

BRIEF OF THE APPLICANT

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I. INTRODUCTION

COMES NOW the Applicant Michael E. Miller (hereinafter “Applicant”) and through counsel The Trademark Company and provides this Brief of the Applicant in support of its appeal of the examining attorney’s refusal to register the instant mark.

II. STATEMENT OF THE CASE

On December 20, 2011 Applicant filed an intent to use application to register the mark MUSCLE SHOT in standard character format on the Principal Register for use in connection with “Protein supplements” in Class 005. Serial No. 85/500,055.

The examining attorney refused to register applicant’s mark under Section 2(e)(1) of the Trademark Act (15 U.S.C. § 1052(e)(1)) in an Office Action dated April 7, 2012 because, in the eyes of the examining attorney, the trademark for which registration is sought is merely descriptive of the identified goods.

The Applicant filed a response to the refusal to register the mark on May 23, 2012. However, none of the arguments in support of registration were deemed persuasive by the examining attorney.

After the refusal was made final, this appeal followed.

III. ARGUMENT

Cases involving refusals under Section 2(e)(1) require us to consider the facts as they relate to the relevant factors set out by the Court of Customs and Patent Appeals in *In re Abcor Development Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (C.C.P.A. 1978):

The major reasons for not protecting such 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.

To be refused registration on the Principal Register under §2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), a mark must be merely descriptive of the goods or services to which it relates. TMEP § 1209.01(b). A mark is considered merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods or services. *See In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) (APPLE PIE held merely descriptive of potpourri); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986) (BED & BREAKFAST REGISTRY held merely descriptive of lodging reservations services); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984) (MALE-P.A.P. TEST held merely descriptive of clinical pathological immunoassay testing services for detecting and monitoring prostatic cancer); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979) (COASTER-CARDS held merely descriptive of a coaster suitable for direct mailing).

A. Applicant's Mark is Suggestive, Not Descriptive

A mark is merely descriptive only if it “imparts or conveys an immediate idea of the ingredients, qualities or characteristics of the goods.” *See In re George Weston Ltd.*, 228 U.S.P.Q. 57 (T.T.A.B. 1985). A mark is suggestive, however, if, as applied to the goods, the term requires imagination, thought and perception to reach a conclusion as to nature thereof. The greater the imagination required, the more likely the term is suggestive and not merely descriptive. *See Railroad Salvage of Connecticut, Inc. v. Railroad Salvage, Inc.*, 561 Fed. 1014 (D.C.R.I. 1983).

The examining attorney states that “The applicant applied to register the mark MUSCLE SHOT for “Nutritional supplements.” In this case, the mark MUSCLE SHOT would be

immediately understood as describing nutritional supplements for muscles in liquid shot form.”
See Office Action dated April 7, 2012.

The examining attorney also supplies copies of dictionary definitions and representative web pages demonstrating the descriptive significance of the terms MUSCLE and SHOT in relation to the applicant’s identified goods.

While Applicant concedes that the goods offered under Applicant’s mark are used for building muscles, the mark does not create an instant association with the actual goods offered by Applicant: nutritional protein supplements used to increase body mass. Some degree of imagination is required to associate the term MUSCLE SHOT with the Applicant’s goods. And even if that imagination is utilized, we are still left wondering what type of goods MUSCLE SHOT provides and what its functions are. In short, there is no evidence in the record which indicates the instant association between the mark and the goods required to maintain the record, and it is far more likely that the mark is suggestive than descriptive. *See Stix Products, Inc. v United Merchants and Manufacturers, Inc.*, 295 Fed. Supp. 479 (S.D.N.Y. 1968).

Additionally, “MUSCLE” has several different meanings, such as “power or force,” “to make way for,” and “to compel, as by threats.” Likewise, “SHOT” has many different meanings such as “a discharge of a firearm,” “marksman,” “a blow or punch,” “a heavy metal ball that competitors cast as far as possible in shot-putting contests,” “an aimed stroke,” “an attempt or try,” “a remark aimed at some person or thing,” “a guess at something,” or “a photograph.” That being said, the terms “MUSCLE” and “SHOT” are not merely descriptive of Applicant’s goods, but rather suggestive.

B. The Terms ‘MUSCLE’ and ‘SHOT’ and Variations Thereof Have Been Allowed to Register.

A thorough examination of registered marks on the Principal Register reveals that the terms “MUSCLE” and “SHOT” in relation to goods like those of the Applicant have consistently been treated as suggestive of the respective registrants’ goods (*See Exhibit A*):

Mark	Reg No.	Disclaimer	Goods
THE MUSCLE COMPANY	4476	Company	Class 5: Dietary and nutritional supplements
BURN FAT, NOT MUSCLE	3950910	None	Class 5: Dietary and nutritional supplements; Dietary food supplements; Dietary supplements; Dietary supplements for human consumption; Weight management supplements
MUSCLE BOUND	3623051	None	Class 5: Dietary and nutritional supplements, namely, creatine monohydrate, creatine citrate, whey concentrates, protein concentrates, amino acids, glycerine inflammation recovery compounds, namely, herbs with therapeutic properties in powder and capsule form; energy replacement compounds, namely, natural source herbs with therapeutic properties in powder and capsule form
MUSCLE ARMOR	3163824	None	Class 5: Dietary and nutritional supplements
MUSCLE MILK	3352	None	Class 5: Meal replacement drinks; meal replacement and dietary supplement drink mixes; protein based, nutrient-dense meal replacement bars; and pre-mixed nutritionally fortified beverages

			Class 29: Protein based, nutrient-dense snack bars
MUSCLE MILK PUDDING	311490	Pudding	Class 5: Dietary and nutritional supplement Class 30: Fortified food, namely, protein based, nutrient-dense pudding
MUSCLE MILK N' OATS	3311489	Oats	Class 5: Dietary and nutritional supplement Class 30: Fortified food, namely, protein based, nutrient-dense oatmeal
MUSCLE JUICE	2942790	None	Class 5: Nutritional products, namely dietary food supplements
SOLID MUSCLE	3000304	None	Class 5: Sports nutritional supplements and nutritional supplements, namely, whey, whey flavored with vanilla, whey flavored with chocolate, creatine and glutamine
THE MUSCLE FACTORY	2531614	None	Class 5: Dietary, herbal, mineral, nutritional supplements
AMERICAN MUSCLE	1962898	None	Class 5: Vitamin supplements
HEALTHY SHOT	3664727	Healthy	Class 5: Nutritionally fortified protein beverage; nutritionally fortified beverage
VITAMIN SHOT	3771989	Vitamin	Class 5: Vitamins, dietary and nutritional supplements delivered in a vitamin concentrate; nutritionally fortified protein drinks; nutritionally fortified water Class 32: Carbonated drinking waters, flavored waters, and other non-alcoholic beverages, namely, sports drinks, energy drinks, fruit

			drinks, and vegetable drinks
IMMUNE SHOT	648842	None	Class 5: Non-alcoholic beverages, namely, a beverage drink containing dietary supplements
CLIF SHOT	3339509	None	Class 5: Powdered fruit-flavored dietary supplement drink mix Class 32: Powders used in the preparation of isotonic sports drinks
BOOSTER SHOTZ	4039347	None	Class 5: Nutritional supplements
SHOT TABS	4112645	None	Class 5: Orally taken dietary supplements
COOTIE SHOT	4061486	None	Class 5: Nutritional supplements, namely, liquid and powder probiotics compositions
MONEY SHOT	3256115	None	Class 5: Dietary and nutritional supplements; Food supplements; Herbal supplements; Nutritional supplements
TASTI SHOTS	3825705	Tasty	Class 1: Antioxidants used in the manufacture of beverages; chemical additives for use in the manufacture of beverages, namely, phyto-nutrients Class 5: Vitamin additives and vitamin supplements for beverages; natural herbal supplements for use in beverages

Therefore, it is respectfully submitted that it would be inconsistent for the Office to deny registration of the Applicant's mark by concluding that the mark MUSCLE SHOT is merely descriptive of the Applicant's goods where the above-referenced marks have been permitted to register on the Principal Register under similar circumstances.

In sum, applying the Trademark Trial and Appeal Board's test to the refusal at hand as well as in deference to the treatment of the term MUSCLE SHOT by the Office application of the degree of imagination test indicates that the relevant consuming public would not form an immediate impression of the features, functions, qualities or characteristics of the goods offered by Applicant by mere sight of the mark.

In view of the above arguments, Applicant believes that the proposed mark is entitled to registration on the Principal Register.

CONCLUSION

WHEREFORE the Applicant INC International Company, by counsel, respectfully requests that the refusal under Section 2(e)(1) of the Trademark Act of 1946 be withdrawn and the mark be allowed for publication on the Principal Register.

Respectfully submitted this 1st day of February 2013,

/Matthew H. Swyers/
Matthew H. Swyers, Esq.
The Swyers Law Firm, PLLC
344 Maple Ave. West, Suite 389
Vienna, VA 22180
Tel. (866) 455-8800 x704
Fax. (270) 477-4574
mswyers@TheTrademarkCompany.com
Attorney for Applicant