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

Proceeding	87528703
Applicant	Shaklee Corporation
Applied for Mark	PERFORMANCE
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Submission	APPLICANT'S REQUEST TO SUSPEND AND REMAND
Attachments	Applicants Request to Suspend and Remand.pdf(360814 bytes)
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Signature	/Kevin M. Hayes/
Date	11/06/2019

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

In re Application of SHAKLEE CORPORATION

Filed: July 14, 2017

Application No.: 87/528,703

Mark: PERFORMANCE

International Class(es): 5

Examining Attorney: Andrea B. Cornwell

Law Office: 115

**APPLICANT'S REQUEST TO SUSPEND THE APPEAL AND REMAND THE
APPLICATION**

The sole matter at issue in this Appeal is the alleged descriptiveness of PERFORMANCE for Applicant's identified goods. New evidence has very recently become available that shows even the PTO agrees that Applicant's mark is not descriptive.

Months after Applicant filed its last brief in this case on August 12, 2019, the United States Patent and Trademark Office issued to Applicant Trademark Registration No. 5891922 for SHAKLEE PERFORMANCE (issued October 22, 2019) for virtually identical goods as are identified in the present case with no disclaimer of PERFORMANCE.¹ Exhibit 1. The PTO had requested a disclaimer of PERFORMANCE in that case, but Applicant overcame the request because PERFORMANCE is not descriptive. (See Office action of August 17, 2018, and

¹ Trademark Registration No. 5891922 for SHAKLEE PERFORMANCE identifies "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." The current Application has a virtually identical identification, namely: "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."

Request for Reconsideration of February 15, 2019, in Registration No. 5891922, attached as Exhibits 2-3 (not including attachments to the Office Action and Request for Reconsideration)).

The Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) §1207.02 provides for suspension of an appeal and remand if there is good cause and the request is “filed prior to the rendering of the Board’s final decision on the appeal.” The TBMP lists circumstances “found to constitute good cause for a remand for additional evidence ... [as] (1) The evidence was not previously available.” TBMP §1207.02. Here, Applicant’s Registration No. 5891922 for SHAKLEE PERFORMANCE that does not disclaim PERFORMANCE did not become available until October 22, 2019. That is only a couple weeks ago and months *after* the last brief in this case on August 12, 2019.

That Applicant has been issued a Registration where the issue of alleged descriptiveness of PERFORMANCE (the identical issue in this Appeal) was fully argued and that issue was decided in Applicant’s favor makes the Registration an important piece of evidence. That evidence needs to be considered in this Appeal. The evidence was previously not available because the Registration issued over 2 months after the last brief in this Appeal.

Accordingly, the Board should suspend this Appeal and remand this case to the Examiner to consider the PTO’s agreement that PERFORMANCE did not need to be disclaimed in Registration No. 5891922 for virtually identical goods.

Respectfully submitted November 6, 2019.

By:



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United States of America

United States Patent and Trademark Office

SHAKLEE PERFORMANCE

Reg. No. 5,891,922

Registered Oct. 22, 2019

Int. Cl.: 5

Trademark

Principal Register

Shaklee Corporation (DELAWARE CORPORATION)
4747 Willow Road
Pleasanton, CALIFORNIA 945882740

CLASS 5: 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

FIRST USE 8-12-2019; IN COMMERCE 8-12-2019

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT STYLE, SIZE OR COLOR

SER. NO. 87-713,911, FILED 12-08-2017



Andrei Iancu

Director of the United States
Patent and Trademark Office

To: Shaklee Corporation (ptotmdocket@klarquist.com)

Subject: U.S. TRADEMARK APPLICATION NO. 87713911 - SHAKLEE PERFORMANCE - 659210002401

Sent: 8/17/2018 5:10:34 PM

Sent As: ECOM101@USPTO.GOV

Attachments: [Attachment - 1](#)
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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION
SERIAL NO. 87713911

MARK: SHAKLEE
PERFORMANCE

87713911

CORRESPONDENT
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APPLICANT: Shaklee
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CORRESPONDENT'S
REFERENCE/DOCKET
NO:

659210002401

**CORRESPONDENT E-
MAIL ADDRESS:**

ptotmdocket@klarquist.com

OFFICE ACTION

STRICT DEADLINE TO RESPOND TO THIS LETTER

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER **WITHIN 6 MONTHS** OF THE ISSUE/MAILING DATE BELOW. A RESPONSE TRANSMITTED THROUGH THE TRADEMARK ELECTRONIC APPLICATION SYSTEM (TEAS) MUST BE RECEIVED BEFORE MIDNIGHT **EASTERN TIME** OF THE LAST DAY OF THE RESPONSE PERIOD.

ISSUE/MAILING DATE: 8/17/2018

THIS IS A FINAL ACTION.

TEAS PLUS OR TEAS REDUCED FEE (TEAS RF) APPLICANTS – TO MAINTAIN LOWER FEE, ADDITIONAL REQUIREMENTS MUST BE MET, INCLUDING SUBMITTING DOCUMENTS ONLINE: Applicants who filed their application online using the lower-fee TEAS Plus or TEAS RF application form must (1) file certain documents online using TEAS, including responses to Office actions (see TMEP §§819.02(b), 820.02(b) for a complete list of these documents); (2) maintain a valid e-mail correspondence address; and (3) agree to receive correspondence from the USPTO by e-mail throughout the prosecution of the application. *See* 37 C.F.R. §§2.22(b), 2.23(b); TMEP §§819, 820. TEAS Plus or TEAS RF applicants who do not meet these requirements must submit an additional processing fee of \$125 per class of goods and/or services. 37 C.F.R. §§2.6(a)(1)(v), 2.22(c), 2.23(c); TMEP §§819.04, 820.04. However, in certain situations, TEAS Plus or TEAS RF applicants may respond to an Office action by authorizing an examiner's amendment by telephone or e-mail without incurring this additional fee.

Responsive to applicant's communication received July 23, 2018.

Requirement for Acceptable Identification of Goods Continued and Made FINAL

Applicant has argued, in response to the Office requirement for an amendment to its identification of goods, that the identification provided in the initial Office action should be accepted. Applicant's arguments were not found persuasive. Applicant is again required to submit an identification that is accurate and acceptable for both classification and publication purposes. *See* 37 C.F.R. §2.32(a)(6); TMEP §1402.01. For example, "energy bars" could be classified as a food item in Class 29, if they are nut based or in Class 30, if they are cereal based. If the energy bars are intended for use as a meal replacement, they could be classified in Classes 29 to 33 depending on how they are specified. If the energy bars are designed as a meal replacement for medical purposes, they would be classified in Int. Class 5. If they are intended for use as a nutritional or dietary supplement, they would be classified in Class 5.

Applicant may adopt the following wording, if accurate:

Dietary supplements in the nature of energy bars, energy chews and energy gummies; effervescent tablets for making a dietary supplement drink; nutritional (or dietary) supplements for boosting energy; nutritional (or dietary) supplements for boosting the body's production of nitric oxide; nutritional (or dietary) 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; nutritional candy

Applicant's goods may be clarified or limited, but may not be expanded beyond those originally itemized in the application or as acceptably amended. *See* 37 C.F.R. §2.71(a); TMEP §1402.06. Applicant may clarify or limit the identification by inserting qualifying language or deleting items to result in a more specific identification; however, applicant may not substitute different goods and/or services or add goods and/or services not found or encompassed by those in the original application or as acceptably amended. *See* TMEP §1402.06(a)-(b). The scope of the goods sets the outer limit for any changes to the identification and is generally determined by the ordinary meaning of the wording in the identification. TMEP §§1402.06(b), 1402.07(a)-(b). Any acceptable changes to the goods will further limit scope, and once goods are deleted, they are not permitted to be reinserted. TMEP §1402.07(e).

Refusal to Register Made Final Because of Failure to Disclaim

Failure to comply with the Office requirement to disclaim the term "PERFORMANCE" has resulted in a refusal to register applicant's mark. *See In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (C.C.P.A. 1953); *In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395 (Fed. Cir. 2006). *In re Pendleton Tool Industries, Inc.*, 157 USPQ 114 (TTAB 1968). This refusal is made **FINAL**.

Applicant is again required to disclaim the term “PERFORMANCE” in the mark. Applicant’s goods primarily feature energy supplements and other products specifically designed to boost energy. Some of the products are designed to boost the body’s production of nitric oxide, a molecule commonly used by athletes and body builders to enhance performance. *See attached evidence*. Other products feature supplements that contain creatine which is often used as a performance enhancing compound to increase muscle mass and help athletes achieve bursts of strength. *See evidence attached and that previously made of record*. Also attached are third party registrations showing prior Office treatment, i.e., disclaimer, of the term “Performance” on the Trademark Register. *See* 15 U.S.C. §§1052(e)(1), 1056(a); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1251, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); TMEP §§1213, 1213.03(a).

Third-party registrations featuring goods and/or services the same as or similar to applicant’s goods and/or services are probative evidence on the issue of descriptiveness where the relevant word or term is disclaimed, registered under Trademark Act Section 2(f) based on acquired distinctiveness, or registered on the Supplemental Register. *E.g.*, *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (quoting *Inst. Nat’l des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 1581-82, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992)); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006).

The fact that applicant owns a prior registration for the mark “Shaklee Performance” without a disclaimer of the term “performance” is not relevant to the case at hand. The goods in the earlier registration do not feature any “performance” enhancing products. Therefore, a disclaimer requirement which is appropriate for the instant application would not necessarily be appropriate for the applicant’s prior registration.

An applicant may not claim exclusive rights to terms that others may need to use to describe their goods and/or services in the marketplace. *See Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1560, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991); *In re Aug. Storck KG*, 218 USPQ 823, 825 (TTAB 1983). A disclaimer of unregistrable matter does not affect the appearance of the mark; that is, a disclaimer does not physically remove the disclaimed matter from the mark. *See Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 978, 144 USPQ 433, 433 (C.C.P.A. 1965); TMEP §1213.

If applicant does not provide the required disclaimer, the USPTO may refuse to register the entire mark. *See In re Stereotaxis Inc.*, 429 F.3d 1039, 1040-41, 77 USPQ2d 1087, 1088-89 (Fed. Cir. 2005); TMEP §1213.01(b).

Applicant should submit a disclaimer in the following standardized format:

No claim is made to the exclusive right to use “PERFORMANCE” apart from the mark as shown.

For an overview of disclaimers and instructions on how to satisfy this disclaimer requirement online using the Trademark Electronic Application System (TEAS) form, please go to <http://www.uspto.gov/trademarks/law/disclaimer.jsp>.

For the above noted reasons, the refusal to register is continued and made **FINAL**.

Proper Response to a Final

Applicant must respond within six months of the date of issuance of this final Office action or the application will be abandoned. 15 U.S.C. §1062(b); 37 C.F.R. §2.65(a). Applicant may respond by providing one or both of the following:

- (1) a response [filed using the Trademark Electronic Application System \(TEAS\)](#) that fully satisfies all outstanding requirements and/or resolves all outstanding refusals; and/or
- (2) an appeal to the Trademark Trial and Appeal Board [filed using the Electronic System for Trademark Trials and Appeals \(ESTTA\)](#) with the required filing fee of \$200 per class.

37 C.F.R. §2.63(b)(1)-(2); TMEP §714.04; *see* 37 C.F.R. §2.6(a)(18); TBMP ch. 1200.

In certain rare circumstances, an applicant may respond by [filing a petition to the Director](#) pursuant to 37 C.F.R. §2.63(b)(2) to review procedural

issues. TMEP §714.04; *see* 37 C.F.R. §2.146(b); TBMP §1201.05; TMEP §1704 (explaining petitionable matters). There is a fee required for filing a petition. 37 C.F.R. §2.6(a)(15).

/Russ Herman/
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TO RESPOND TO THIS LETTER: Go to http://www.uspto.gov/trademarks/teas/response_forms.jsp. Please wait 48-72 hours from the issue/mailling date before using the Trademark Electronic Application System (TEAS), to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

All informal e-mail communications relevant to this application will be placed in the official application record.

WHO MUST SIGN THE RESPONSE: It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

PERIODICALLY CHECK THE STATUS OF THE APPLICATION: To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using the Trademark Status and Document Retrieval (TSDR) system at <http://tsdr.uspto.gov/>. Please keep a copy of the TSDR status screen. If the status shows no change for more than six months, contact the Trademark Assistance Center by e-mail at TrademarkAssistanceCenter@uspto.gov or call 1-800-786-9199. For more information on checking status, see <http://www.uspto.gov/trademarks/process/status/>.

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Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	87713911
LAW OFFICE ASSIGNED	LAW OFFICE 101
MARK SECTION	
MARK	https://tmng-al.uspto.gov/resting2/api/img/87713911/large
LITERAL ELEMENT	SHAKLEE PERFORMANCE
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.

ARGUMENT(S)

This is in response to the Office Action dated August 17, 2018, regarding Applicant’s trademark application for SHAKLEE PERFORMANCE 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 Class 5.

Applicant seeks amendment of the goods in the present application, as requested, but traverses the request for applicant to disclaim PERFORMANCE in the mark.

AMENDMENT

Applicant requests that the recitation of goods be amended as follows: (deletions shown in strike through, additions shown in **bold** and underline):

“**Dietary supplements in the nature of** [e]nergy bars~~;~~ **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**~~joint protection supplement~~; **nutritional (or dietary)** supplements for body fat reduction; **dietary and nutritional supplements comprised primarily or exclusively of powdered creatine in the form of powder**~~;~~ **creatine**~~;~~ capsules~~;~~ **creatine or** tablets; nutritional candy”

As amended, the recitation of goods in Applicant’s trademark application SHAKLEE PERFORMANCE in Class 5 now reads as follows:

“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; nutritional candy”

REMARKS

With respect to the Examiner’s request for a disclaimer of PERFORMANCE apart from the mark in its entirety, Applicant disagrees that PERFORMANCE is merely descriptive of its goods. At most, the use of PERFORMANCE in its mark is suggestive. Greater detail is provided below and in the Exhibits, but, briefly, the evidence in the Office action is not sufficient to show that Applicant’s mark is merely descriptive. Further, Applicant’s mark is not merely descriptive as evidenced by the Patent and Trademark Office’s registration of marks including PERFORMANCE in Class 5 without disclaimer; the Patent and Trademark Office’s registration of Applicant’s mark for PERFORMANCE for related goods in Class 32 (which relation is shown by the thousands of registrations for goods in both Classes 5 and 32); and the numerous decisions by the Trademark Trial and Appeal Board finding more suggestive marks not merely descriptive. In more detail:

1. The Examiner has not shown that Applicant’s mark is primarily merely descriptive

The evidence attached to the Office action consists of several web pages that include definitions of “performance,” registrations in which the word PERFORMANCE was disclaimed, and two webpages that use the word “performance” in text.

- A. Regarding the definitions presented by the Examiner - Applicant notes that none of the definitions of “performance” indicate that Applicant’s goods are called “performance.”
- B. Regarding the disclaimers of PERFORMANCE in the seventeen registrations submitted by the Examiner - Applicant notes that the failure of others to traverse an improper disclaimer request does not necessitate a disclaimer of PERFORMANCE in the present application. Indeed, the PTO does not appear to usually require a disclaimer. In that regard, marks that include PERFORMANCE have recently and routinely been registered without such disclaimer (Exhibit A).
- C. With regard to webpages in which the word “performance” appears - Applicant notes that none of the uses of “performance” are for any goods.

The evidence attached to the Office action does not make a *prima facie* case that Applicant's mark is primarily merely descriptive. Indeed, as detailed below, far more evidence indicates that Applicant’s mark should not be considered primarily descriptive.

2. There are numerous recent registrations for recent PERFORMANCE formative marks in Class 5 that do not include a disclaimer

As the Office action places weight on previous registrations, Applicant submits as Exhibit A the following registrations in Class 5 that were registered within the last 3.5 years without the requirement to disclaim the term “performance” within the mark. This shows that PERFORMANCE need not be disclaimed.

MARK	REGISTRATION	CLASS / GOODS
GET PERFORMANCE	5272028, registered August 22, 2017	5 - Dietary and nutritional supplements for endurance sports; Dietary and nutritional supplements used for weight loss; Dietary and nutritional supplements used for weight gain; Health food supplements and mineral food supplements for promoting health and well-being; Herbal supplements for the promotion of healthy liver function and detoxification; Liquid nutritional supplements for human use, namely, liquid nutritional supplements for general health and well-being; Liquid vitamin supplements;

		<p>Powdered nutritional supplement concentrate, namely, whey protein for use as a nutritional supplement in various powdered ready-to-drink beverages;</p> <p>Protein dietary supplements;</p> <p>Protein supplement shakes;</p> <p>Protein supplements for muscle growth and recovery;</p> <p>vitamin and mineral supplements;</p> <p>Vitamin supplements.</p>
PERFORMANCE ON DEMAND	5111325, registered December 27, 2016	<p>5 - Dietary supplements in the form of chewable tablets for boosting physical energy, physical stamina, physical recovery, concentration and mental arousal and sleep; Natural health products and nutritional and dietary supplements, namely, dietary supplements for general health and well-being, relaxation, sleep, energy, focus, memory, concentration, physical and mental performance;</p> <p>Vitamin and mineral supplements;</p> <p>dietary</p>

		supplements providing antioxidants.
PERFORMANCE INSPIRED	5051452, registered September 27, 2016	5 - Dietary supplements; Protein supplements; Nutritional supplements; Nutritional drink mix supplements; Nutritional supplement drink mix for use as meal replacement
SCIENCE DRIVEN. PERFORMANCE PROVEN.	4679156, registered January 27, 2015	5 - Dietary and nutritional supplements for endurance sports; Dietary supplemental drinks; Dietary supplemental drinks in the nature of vitamin and mineral beverages; Powdered nutritional supplement drink mix; Powdered nutritional supplement drink mix and concentrate; Protein dietary supplements; Protein supplements; Whey protein supplements
PERFORMANCE INSPIRED	5433754, registered March 27, 2018	5 - Vitamins
BECAUSE PERFORMANCE MATTERS	5167055, registered on March 21, 2017	5 - Dietary and nutritional supplements
OPTIMUM PERFORMANCE	4842942, registered October 27, 2015	5 - Animal feed additive for use as a nutritional supplement for medical purposes; Animal feed supplements; Feed supplements for horses

3. Applicant's U.S. Trademark Registration No. 1576685 for SHAKLEE PERFORMANCE did not require a disclaimer

Applicant also asserts that the Examiner did not give sufficient weight to the fact that Applicant owns U.S. Trademark Registration No. 1576685 for SHAKLEE PERFORMANCE for nutritionally enhanced products (namely "powdered concentrate for making an electrolytic soft-drink"). This Registration does not disclaim PERFORMANCE and was not registered under section 2(f). (Exhibit B).

4. The goods recited in Applicant's application for SHAKLEE PERFORMANCE are a natural continuation of Applicant's nutritional product line established in 1988 under Applicant's registration for SHAKLEE PERFORMANCE

Applicant's Registration for SHAKLEE PERFORMANCE recites "[p]owdered concentrate for making an electrolytic soft-drink" in class 32. Applicant's current application identifies goods in class 5. Those goods are highly related as evidenced by the number of registrations that identify goods in both classes. As can be seen in Exhibit C, there are 4334 such registrations. Further, as shown in Exhibit D, "electrolytes" are vital nutrients which help support maintenance of the human body's vital organs and systems. Electrolytes are commonly sold as nutritional supplements and would be known to relevant consumers as a complement to their nutrition regime. Applicant actively markets its powdered electrolyte concentrate as a nutritionally enhanced product, intended to promote health and endurance in physical activity, and has done so since the inception of its PERFORMANCE branded products in 1989. (Exhibit E). The goods listed in the present application are simply a continuation of its nutritionally enhanced SHAKLEE PERFORMANCE branded product line, offering nutritional supplements in alternative food mediums such as candy, energy bars, capsules, etc.

The goods provided under Applicant's SHAKLEE PERFORMANCE Registration, and its present application for SHAKLEE PERFORMANCE, both include nutritionally enriched products designed to promote health, well-being and endurance of the human body, their inherent nature is the same. It follows that the relevant purchaser of Applicant's goods would view Applicant's present application for SHAKLEE PERFORMANCE as a natural extension of Applicant's existing SHAKLEE PERFORMANCE branded nutritional product line. [1] In fact, Applicant actively markets some of these expanded products as part of its existing SHAKLEE PERFORMANCE product line to its consumers. (Exhibit F). This provides further evidence of a "strong likelihood that the mark's established trademark function will transfer to these related goods when use in commerce occurs." See *In Re Rogers*, 53 USPQ2d 1741, 1745 (TTAB 1999).

5. PERFORMANCE is at most suggestive

Applicant respectfully asserts that its mark PERFORMANCE is at most suggestive, not primarily merely descriptive.

The Examiner alleges that Applicant's PERFORMANCE mark is primarily merely descriptive of "*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; nutritional candy*" because the word "Performance" allegedly describes the fact that Applicant's nutritional supplements are designed primarily for athletic performance enhancement.

However, as in Applicant's U.S. Trademark Registration No. 1576685 for SHAKLEE PERFORMANCE (that did not include a disclaimer of PERFORMANCE), use of PERFORMANCE in the present application is also not merely descriptive. Rather, it requires a consumer to make a mental leap between Shaklee's goods and the trademark that would not be instantaneous. "If the mental leap between the word and the product's attribute is not almost instantaneous, this strongly indicates suggestiveness, not direct descriptiveness." *Nautilus Grp., Inc. v. ICON Health Fitness, Inc.*, 372 F.3d at 1340 (Fed. Cir. 2004).

As shown in Exhibit G, Applicant's goods include nutritional and dietary supplements which include ingredients such as protein, electrolytes, B vitamins, vitamin D, creatine, nitric oxide, all of which are nutrient components that are vital to the health and well-being of the human body. In the Office action the Examiner has specifically cited "creatine" and "nitric oxide" as ingredients whose primary function is to enhance athletic performance. Exhibit H provides evidence that creatine is not a "performance" enhancing substance, but rather is "essential for a range of body functions" including proper muscle function, neurological and cognitive health.

Regarding "nitric oxide," Exhibit I notes that this nutrient plays a role in cardiovascular health, regulation of blood pressure and the health of the body's immune and nervous systems. It is also not a "Performance" enhancer.

The present case is similar to *In re C. J. Webb*, where the TTAB considered whether the BRAKLEEN component of the mark CRC BRAKLEEN was merely descriptive of the goods, namely a "[c]hemical composition for cleaning and degreasing automotive brake parts," and should be disclaimed. In that case the Board reasoned that the phonetically identical words "brake clean" and "brakleen" were only suggestive of a desired result of a brake cleaner and held that a disclaimer of BRAKLEEN in the mark was not required. See *In re C. J. Webb, Inc.*, 182 U.S.P.Q. 63 (T.T.A.B. 1974).

Another similar case involved the TTAB's determination that VERI-CLEAN, which identified "[c]hemical anti-fouling additives for use in refineries," was not descriptive. *In re Nalco Chemical Company*, 228 U.S.P.Q. 972 (T.T.A.B. 1986). Citing the reasoning above for BRAKLEEN, and quoting the Board in that case that: "The fact that a term is capable of being analyzed does not render said term merely descriptive. Certainly, if a term necessitates 'mature thought,' then said term must be denominated suggestive rather than 'merely descriptive,'" the Board went on to state:

We are of the opinion that the term "VERI-CLEAN", as applied to applicant's chemical anti-fouling additives for use in refineries, is suggestive of the desired end result of the use of applicant's additives, but does not serve to describe the goods themselves. *In re Nalco Chemical Company*,

The same is true here. Applicant's goods are not described by the word PERFORMANCE. That the word might be suggestive of an end result of using Applicant's identified goods does not render the mark descriptive. Consumers would not have an immediate or instantaneous belief that Applicant's goods are primarily for enhancing athletic performance.

Rather, Applicant's mark is at least as distinctive as other marks found not to be descriptive. See *In re Aid Labs., Inc.*, 221 U.S.P.Q. 1215, 1216 (T.T.A.B. 1983) (PEST PRUF for animal shampoo with insecticide held merely suggestive of a possible end result of the use of Applicant's goods); *In re WSI Corporation*, 1 U.S.P.Q.2d 1570, 1572 (T.T.A.B. 1986) ("Where such imagination or forethought is required to reach a conclusion as to the nature of a key characteristic of goods or services, a mark must be determined to be suggestive and not descriptive"); *In re Nobile Co.*, 225 U.S.P.Q. 749, 750 (T.T.A.B. 1985) (NOBURST held suggestive as the Board did not "believe this conclusion is readily arrived at by merely observing the mark on the goods but that it requires interpretation by the viewer"); *In re Atavio Inc.*, 25 U.S.P.Q.2d 1361, 1362 (T.T.A.B. 1992) ("One which is only suggestive requires some imagination, thought or perception to determine its meaning in relation to the goods"); *In re Shutts*, 217 U.S.P.Q. 363 (T.T.A.B.1983) (SNO-RAKE held not merely descriptive of snow removal hand tool); *In re Recovery, Inc.*, 196 USPQ 830 (TTAB 1977) (RECOVERY not merely descriptive of services of, inter alia, providing group therapy in the form of self-help aftercare to follow [*974] psychiatric or other professional counseling and/or treatment, and training lay leaders to provide such therapy); *In re Frank J. Curran Co.*, 189 USPQ 560 (TTAB 1975) (CLOTHES FRESH not merely descriptive as applied to clothes and shoe spray deodorant); and *In re Realistic Co.*, 440 F.2d 1393, 169 USPQ 610 (CCPA 1971) ("CURV" not merely descriptive as applied to permanent wave curling solutions).

Moreover, it is illogical for Shaklee's use of PERFORMANCE in SHAKLEE PERFORMANCE to be incontestably not descriptive for nutritionally enhanced drinks, but for the Examiner to find the word descriptive for its currently identified nutritionally enhanced products. Such an illogical result cannot be the correct result. Rather, this case is like the cases where PURITY for, *inter alia*, water filtering units and DRI-FOOT for an antiperspirant deodorant for feet were found not to be merely descriptive.[2]

PERFORMANCE used in the context of Applicant's goods is obviously at most merely suggestive. Therefore, Applicant requests that any existing doubt be resolved in its favor and that its application be published for opposition. See *In re Intelligent Medical Systems Inc.*, 5 U.S.P.Q.2d 1674, 1676 (T.T.A.B. 1987) ("there is a thin line between a suggestive and a merely descriptive designation, and where reasonable men may differ, it is the Board's practice to resolve the doubt in Applicant's favor and publish the mark for opposition"); *In re Gourmet Bakers, Inc.*, 173 U.S.P.Q. 565, 565 (T.T.A.B. 1972) (the determination of whether a mark is merely descriptive or suggestive is more often than not "determined largely on a subjective basis with any doubt in the matter being resolved in Applicant's behalf on the theory that any person believed damaged by the registration would have the opportunity...to oppose registration of the mark and to present evidence, usually not present in the ex parte application").

For at least the reasons explained above, the term PERFORMANCE in Applicant's application is not merely descriptive and should not be disclaimed. Applicant submits that its application for SHAKLEE PERFORMANCE is now in a condition for publication and such action is respectfully requested.

[1] *Kellogg Co. v. Gen. Mills, Inc.*, 82 USPQ2d 1766, 1771 (T.T.A.B. 2007) provides guidance regarding relatedness, noting that the requirement for intrinsic evidence is not required "in cases where the identifications of goods alone reveal sufficient facts about the respective goods from which a conclusion, not based on mere conjecture, as to the relationship between the goods may be made."

[2] *In Re Universal Water Sys., Inc.*, 209 U.S.P.Q. (BNA) ¶ 165 (T.T.A.B. Apr. 30, 1980) ("As to the present case, we are of the opinion that the mark "PURITY", although somewhat suggestive of the function of applicant's goods, cannot be considered to be merely descriptive of such products within the meaning of Section 2(e) (1) of the Trademark Act"); *In re Pennwalt Corp.*, 173 USPQ 317 (T.T.A.B. 1972) (DRI-FOOT not merely descriptive of "Anti-Perspirant Deodorant for Feet").

EVIDENCE SECTION

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DESCRIPTION OF EVIDENCE FILE	Exhibits A - I
GOODS AND/OR SERVICES SECTION (current)	
INTERNATIONAL CLASS	005
DESCRIPTION	
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	
FILING BASIS	Section 1(b)
GOODS AND/OR SERVICES SECTION (proposed)	
INTERNATIONAL CLASS	005
TRACKED TEXT DESCRIPTION	
Energy bars; Dietary supplements in the nature of energy bars, energy chews, and energy gummies; energy chews; effervescent tablets for making a dietary supplement drink; energy gummy; nutritional supplements for boosting energy; nutritional supplements for boosting the body's production of nitric oxide; supplement for boosting energy; nutritional supplements for protection of articular joints; supplement for boosting the body's production of nitric oxide; nutritional (or dietary) supplements for body fat reduction; joint protection supplement; dietary and nutritional supplements comprised primarily or exclusively of creatine in the form of powder, capsules or tablets; supplement for body fat reduction; nutritional candy; powdered creatine; creatine capsules; creatine tablets	
FINAL DESCRIPTION	
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; nutritional candy	

FILING BASIS	Section 1(b)
SIGNATURE SECTION	
RESPONSE SIGNATURE	/kevin hayes/
SIGNATORY'S NAME	Kevin M. Hayes
SIGNATORY'S POSITION	Attorney of Record, Oregon State Bar Member
SIGNATORY'S PHONE NUMBER	000-000-0000
DATE SIGNED	02/15/2019
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Fri Feb 15 19:59:02 EST 2019
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OMB No. 0651-0050 (Exp 09/20/2020)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **87713911** SHAKLEE PERFORMANCE(Standard Characters, see <https://tmng-al.uspto.gov/resting2/api/img/87713911/large>) has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

This is in response to the Office Action dated August 17, 2018, regarding Applicant's trademark application for SHAKLEE PERFORMANCE 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 or tablets; nutritional candy*" in Class 5.

Applicant seeks amendment of the goods in the present application, as requested, but traverses the request for applicant to disclaim PERFORMANCE in the mark.

AMENDMENT

Applicant requests that the recitation of goods be amended as follows: (deletions shown in strike through, additions shown in **bold** and underline):

“Dietary supplements in the nature of [e]nergy 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 joint protection supplement; nutritional (or dietary) supplements for body fat reduction; dietary and nutritional supplements comprised primarily or exclusively of powdered creatine in the form of powder; creatine capsules; creatine or tablets; nutritional candy”

As amended, the recitation of goods in Applicant's trademark application SHAKLEE PERFORMANCE in Class 5 now reads as follows:

“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; nutritional candy”

REMARKS

With respect to the Examiner's request for a disclaimer of PERFORMANCE apart from the mark in its entirety, Applicant disagrees that PERFORMANCE is merely descriptive of its goods. At most, the use of PERFORMANCE in its mark is suggestive. Greater detail is provided below and in the Exhibits, but, briefly, the evidence in the Office action is not sufficient to show that Applicant's mark is merely descriptive. Further, Applicant's mark is not merely descriptive as evidenced by the Patent and Trademark Office's registration of marks including PERFORMANCE in Class 5 without disclaimer; the Patent and Trademark Office's registration of Applicant's mark for PERFORMANCE for related goods in Class 32 (which relation is shown by the thousands of registrations for goods in both Classes 5 and 32); and the numerous decisions by the Trademark Trial and Appeal Board finding more suggestive marks not merely descriptive. In more detail:

1. The Examiner has not shown that Applicant's mark is primarily merely descriptive

The evidence attached to the Office action consists of several web pages that include definitions of “performance,” registrations in which the word PERFORMANCE was disclaimed, and two webpages that use the word “performance” in text.

- A. Regarding the definitions presented by the Examiner - Applicant notes that none of the definitions of “performance” indicate that Applicant's goods are called “performance.”
- B. Regarding the disclaimers of PERFORMANCE in the seventeen registrations submitted by the Examiner - Applicant notes that the failure of others to traverse an improper disclaimer request does not necessitate a disclaimer of PERFORMANCE in the present application. Indeed, the PTO does not appear to usually require a disclaimer. In that regard, marks that include PERFORMANCE have recently and routinely been registered without such disclaimer (Exhibit A).
- C. With regard to webpages in which the word “performance” appears - Applicant notes that none of the uses of “performance” are for any goods.

The evidence attached to the Office action does not make a *prima facie* case that Applicant's mark is primarily merely descriptive. Indeed, as detailed below, far more evidence indicates that Applicant's mark should not be considered primarily descriptive.

2. There are numerous recent registrations for recent PERFORMANCE formative marks in Class 5 that do not include a disclaimer

As the Office action places weight on previous registrations, Applicant submits as Exhibit A the following registrations in Class 5 that were registered within the last 3.5 years without the requirement to disclaim the term “performance” within the mark. This shows that PERFORMANCE need not be disclaimed.

MARK	REGISTRATION	CLASS / GOODS
GET PERFORMANCE	5272028, registered August 22, 2017	5 - Dietary and nutritional supplements for endurance sports; Dietary and nutritional supplements used for weight loss; Dietary and nutritional supplements used for weight gain; Health food supplements and mineral food supplements for promoting health and well-being; Herbal supplements for the promotion of healthy liver

		<p>function and detoxification; Liquid nutritional supplements for human use, namely, liquid nutritional supplements for general health and well-being; Liquid vitamin supplements; Powdered nutritional supplement concentrate, namely, whey protein for use as a nutritional supplement in various powdered ready-to-drink beverages; Protein dietary supplements; Protein supplement shakes; Protein supplements for muscle growth and recovery; vitamin and mineral supplements; Vitamin supplements.</p>
PERFORMANCE ON DEMAND	5111325, registered December 27, 2016	<p>5 - Dietary supplements in the form of chewable tablets for boosting physical energy, physical stamina, physical recovery, concentration and mental arousal and sleep; Natural health products and nutritional and dietary supplements, namely, dietary</p>

		<p>supplements for general health and well-being, relaxation, sleep, energy, focus, memory, concentration, physical and mental performance; Vitamin and mineral supplements; dietary supplements providing antioxidants.</p>
PERFORMANCE INSPIRED	5051452, registered September 27, 2016	<p>5 - Dietary supplements; Protein supplements; Nutritional supplements; Nutritional drink mix supplements; Nutritional supplement drink mix for use as meal replacement</p>
SCIENCE DRIVEN. PERFORMANCE PROVEN.	4679156, registered January 27, 2015	<p>5 - Dietary and nutritional supplements for endurance sports; Dietary supplemental drinks; Dietary supplemental drinks in the nature of vitamin and mineral beverages; Powdered nutritional supplement drink mix; Powdered nutritional supplement drink mix and concentrate; Protein dietary supplements; Protein supplements; Whey protein supplements</p>
PERFORMANCE INSPIRED	5433754, registered March 27, 2018	5 - Vitamins

BECAUSE PERFORMANCE MATTERS	5167055, registered on March 21, 2017	5 - Dietary and nutritional supplements
OPTIMUM PERFORMANCE	4842942, registered October 27, 2015	5 - Animal feed additive for use as a nutritional supplement for medical purposes; Animal feed supplements; Feed supplements for horses

3. Applicant's U.S. Trademark Registration No. 1576685 for SHAKLEE PERFORMANCE did not require a disclaimer

Applicant also asserts that the Examiner did not give sufficient weight to the fact that Applicant owns U.S. Trademark Registration No. 1576685 for SHAKLEE PERFORMANCE for nutritionally enhanced products (namely "powdered concentrate for making an electrolytic soft-drink"). This Registration does not disclaim PERFORMANCE and was not registered under section 2(f). (Exhibit B).

4. The goods recited in Applicant's application for SHAKLEE PERFORMANCE are a natural continuation of Applicant's nutritional product line established in 1988 under Applicant's registration for SHAKLEE PERFORMANCE

Applicant's Registration for SHAKLEE PERFORMANCE recites "[p]owdered concentrate for making an electrolytic soft-drink" in class 32. Applicant's current application identifies goods in class 5. Those goods are highly related as evidenced by the number of registrations that identify goods in both classes. As can be seen in Exhibit C, there are 4334 such registrations. Further, as shown in Exhibit D, "electrolytes" are vital nutrients which help support maintenance of the human body's vital organs and systems. Electrolytes are commonly sold as nutritional supplements and would be known to relevant consumers as a complement to their nutrition regime. Applicant actively markets its powdered electrolyte concentrate as a nutritionally enhanced product, intended to promote health and endurance in physical activity, and has done so since the inception of its PERFORMANCE branded products in 1989. (Exhibit E). The goods listed in the present application are simply a continuation of its nutritionally enhanced SHAKLEE PERFORMANCE branded product line, offering nutritional supplements in alternative food mediums such as candy, energy bars, capsules, etc.

The goods provided under Applicant's SHAKLEE PERFORMANCE Registration, and its present application for SHAKLEE PERFORMANCE, both include nutritionally enriched products designed to promote health, well-being and endurance of the human body, their inherent nature is the same. It follows that the relevant purchaser of Applicant's goods would view Applicant's present application for SHAKLEE PERFORMANCE as a natural extension of Applicant's exiting SHAKLEE PERFORMANCE branded nutritional product line. [1] In fact, Applicant actively markets some of these expanded products as part of its existing SHAKLEE PERFORMANCE product line to its consumers. (Exhibit F). This provides further evidence of a "strong likelihood that the mark's established trademark function will transfer to these related goods when use in commerce occurs." *See In Re Rogers*, 53 USPQ2d 1741, 1745 (TTAB 1999).

5. PERFORMANCE is at most suggestive

Applicant respectfully asserts that its mark PERFORMANCE is at most suggestive, not primarily merely descriptive.

The Examiner alleges that Applicant's PERFORMANCE mark is primarily merely descriptive of "*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; nutritional candy*" because the word "Performance" allegedly describes the fact that Applicant's nutritional supplements are designed primarily for athletic performance enhancement.

However, as in Applicant's U.S. Trademark Registration No. 1576685 for SHAKLEE PERFORMANCE (that did not include a disclaimer of PERFORMANCE), use of PERFORMANCE in the present application is also not merely descriptive. Rather, it requires a consumer to make a mental leap between Shaklee's goods and the trademark that would not be instantaneous. "If the mental leap between the word and the product's attribute is not almost instantaneous, this strongly indicates suggestiveness, not direct descriptiveness." *Nautilus Grp., Inc. v. ICON Health Fitness, Inc.*, 372 F.3d at 1340 (Fed. Cir. 2004).

As shown in Exhibit G, Applicant's goods include nutritional and dietary supplements which include ingredients such as protein, electrolytes, B vitamins, vitamin D, creatine, nitric oxide, all of which are nutrient components that are vital to the health and well-being of the human body. In the Office action the Examiner has specifically cited "creatine" and "nitric oxide" as ingredients whose primary function is to enhance athletic performance. Exhibit H provides evidence that creatine is not a "performance" enhancing substance, but rather is "essential for a range of body functions" including proper muscle function, neurological and cognitive health.

Regarding "nitric oxide," Exhibit I notes that this nutrient plays a role in cardiovascular health, regulation of blood pressure and the health of the

body's immune and nervous systems. It is also not a "Performance" enhancer.

The present case is similar to *In re C. J. Webb*, where the TTAB considered whether the BRAKLEEN component of the mark CRC BRAKLEEN was merely descriptive of the goods, namely a "[c]hemical composition for cleaning and degreasing automotive brake parts," and should be disclaimed. In that case the Board reasoned that the phonetically identical words "brake clean" and "brakleen" were only suggestive of a desired result of a brake cleaner and held that a disclaimer of BRAKLEEN in the mark was not required. See *In re C. J. Webb, Inc.*, 182 U.S.P.Q. 63 (T.T.A.B. 1974).

Another similar case involved the TTAB's determination that VERI-CLEAN, which identified "[c]hemical anti-fouling additives for use in refineries," was not descriptive. *In re Nalco Chemical Company*, 228 U.S.P.Q. 972 (T.T.A.B. 1986). Citing the reasoning above for BRAKLEEN, and quoting the Board in that case that: "The fact that a term is capable of being analyzed does not render said term merely descriptive. Certainly, if a term necessitates 'mature thought,' then said term must be denominated suggestive rather than 'merely descriptive,'" the Board went on to state:

We are of the opinion that the term "VERI-CLEAN", as applied to applicant's chemical anti-fouling additives for use in refineries, is suggestive of the desired end result of the use of applicant's additives, but does not serve to describe the goods themselves. *In re Nalco Chemical Company*, 228 U.S.P.Q. 972 (TTAB 1986).

The same is true here. Applicant's goods are not described by the word PERFORMANCE. That the word might be suggestive of an end result of using Applicant's identified goods does not render the mark descriptive. Consumers would not have an immediate or instantaneous belief that Applicant's goods are primarily for enhancing athletic performance.

Rather, Applicant's mark is at least as distinctive as other marks found not to be descriptive. See *In re Aid Labs., Inc.*, 221 U.S.P.Q. 1215, 1216 (T.T.A.B. 1983) (PEST PRUF for animal shampoo with insecticide held merely suggestive of a possible end result of the use of Applicant's goods); *In re WSI Corporation*, 1 U.S.P.Q.2d 1570, 1572 (T.T.A.B. 1986) ("Where such imagination or forethought is required to reach a conclusion as to the nature of a key characteristic of goods or services, a mark must be determined to be suggestive and not descriptive"); *In re Nobile Co.*, 225 U.S.P.Q. 749, 750 (T.T.A.B. 1985) (NOBURST held suggestive as the Board did not "believe this conclusion is readily arrived at by merely observing the mark on the goods but that it requires interpretation by the viewer"); *In re Atavio Inc.*, 25 U.S.P.Q.2d 1361, 1362 (T.T.A.B. 1992) ("One which is only suggestive requires some imagination, thought or perception to determine its meaning in relation to the goods"); *In re Shutts*, 217 U.S.P.Q. 363 (T.T.A.B.1983) (SNO-RAKE held not merely descriptive of snow removal hand tool); *In re Recovery, Inc.*, 196 USPQ 830 (TTAB 1977) (RECOVERY not merely descriptive of services of, inter alia, providing group therapy in the form of self-help aftercare to follow [*974] psychiatric or other professional counseling and/or treatment, and training lay leaders to provide such therapy); *In re Frank J. Curran Co.*, 189 USPQ 560 (TTAB 1975) (CLOTHES FRESH not merely descriptive as applied to clothes and shoe spray deodorant); and *In re Realistic Co.*, 440 F.2d 1393, 169 USPQ 610 (CCPA 1971) ("CURV" not merely descriptive as applied to permanent wave curling solutions).

Moreover, it is illogical for Shaklee's use of PERFORMANCE in SHAKLEE PERFORMANCE to be incontestably not descriptive for nutritionally enhanced drinks, but for the Examiner to find the word descriptive for its currently identified nutritionally enhanced products. Such an illogical result cannot be the correct result. Rather, this case is like the cases where PURITY for, *inter alia*, water filtering units and DRI-FOOT for an antiperspirant deodorant for feet were found not to be merely descriptive.[2]

PERFORMANCE used in the context of Applicant's goods is obviously at most merely suggestive. Therefore, Applicant requests that any existing doubt be resolved in its favor and that its application be published for opposition. See *In re Intelligent Medical Systems Inc.*, 5 U.S.P.Q.2d 1674, 1676 (T.T.A.B. 1987) ("there is a thin line between a suggestive and a merely descriptive designation, and where reasonable men may differ, it is the Board's practice to resolve the doubt in Applicant's favor and publish the mark for opposition"); *In re Gourmet Bakers, Inc.*, 173 U.S.P.Q. 565, 565 (T.T.A.B. 1972) (the determination of whether a mark is merely descriptive or suggestive is more often than not "determined largely on a subjective basis with any doubt in the matter being resolved in Applicant's behalf on the theory that any person believed damaged by the registration would have the opportunity...to oppose registration of the mark and to present evidence, usually not present in the ex parte application").

For at least the reasons explained above, the term PERFORMANCE in Applicant's application is not merely descriptive and should not be disclaimed. Applicant submits that its application for SHAKLEE PERFORMANCE is now in a condition for publication and such action is respectfully requested.

[1] *Kellogg Co. v. Gen. Mills, Inc.*, 82 USPQ2d 1766, 1771 (T.T.A.B. 2007) provides guidance regarding relatedness, noting that the requirement for intrinsic evidence is not required "in cases where the identifications of goods alone reveal sufficient facts about the respective goods from which a conclusion, not based on mere conjecture, as to the relationship between the goods may be made."

[2] *In Re Universal Water Sys., Inc.*, 209 U.S.P.Q. (BNA) ¶ 165 (T.T.A.B. Apr. 30, 1980) ("As to the present case, we are of the opinion that the mark "PURITY", although somewhat suggestive of the function of applicant's goods, cannot be considered to be merely descriptive of such products within the meaning of Section 2(e) (1) of the Trademark Act"); *In re Pennwalt Corp.*, 173 USPQ 317 (T.T.A.B. 1972) (DRI-FOOT not merely descriptive of "Anti-Perspirant Deodorant for Feet").

EVIDENCE

Evidence in the nature of Exhibits A - I has been attached.

Original PDF file:

[evi_19836189130-20190215192929337595_EXHIBIT_A.pdf](#)

Converted PDF file(s) (12 pages)

[Evidence-1](#)

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Original PDF file:

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CLASSIFICATION AND LISTING OF GOODS/SERVICES

Applicant proposes to amend the following class of goods/services in the application:

Current: Class 005 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

Original Filing Basis:

Filing Basis: Section 1(b), Intent to Use: For a trademark or service mark application: As of the application filing date, the applicant had a bona fide intention, and was entitled, to use the mark in commerce on or in connection with the identified goods/services in the application. **For a collective trademark, collective service mark, or collective membership mark application:** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by members on or in connection with the identified goods/services/collective membership organization. **For a certification mark application:** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by authorized users in connection with the identified goods/services, and the applicant will not engage in the production or marketing of the goods/services to which the mark is applied, except to advertise or promote recognition of the certification program or of the goods/services that meet the certification standards of the applicant.

Proposed:

Tracked Text Description: ~~Energy bars; Dietary supplements in the nature of energy bars, energy chews, and energy gummies; energy chews; effervescent tablets for making a dietary supplement drink; energy gummy; nutritional supplements for boosting energy; nutritional supplements for boosting the body's production of nitric oxide; supplement for boosting energy; nutritional supplements for protection of articular joints; supplement for boosting the body's production of nitric oxide; nutritional (or dietary) supplements for body fat reduction; joint protection supplement; dietary and nutritional supplements comprised primarily or exclusively of creatine in the form of powder, capsules or tablets; supplement for body fat reduction; nutritional candy; powdered creatine; creatine capsules; creatine tablets~~

Class 005 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; nutritional candy

Filing Basis: Section 1(b), Intent to Use: For a trademark or service mark application: As of the application filing date, the applicant had a bona fide intention, and was entitled, to use the mark in commerce on or in connection with the identified goods/services in the application. **For a collective trademark, collective service mark, or collective membership mark application:** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by members on or in connection with the identified goods/services/collective membership organization. **For a certification mark application:** As of the application filing date, the applicant had a bona fide intention, and was entitled, to exercise legitimate control over the use of the mark in commerce by authorized users in connection with the identified goods/services, and the applicant will not engage in the production or marketing of the goods/services to which the mark is applied, except to advertise or promote recognition of the certification program or of the goods/services that meet the certification standards of the applicant.

SIGNATURE(S)

Request for Reconsideration Signature

Signature: /kevin hayes/ Date: 02/15/2019

Signatory's Name: Kevin M. Hayes

Signatory's Position: Attorney of Record, Oregon State Bar Member

Signatory's Phone Number: 000-000-0000

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 87713911

Internet Transmission Date: Fri Feb 15 19:59:02 EST 2019

TEAS Stamp: USPTO/RFR-XXX.XX.XXX.XXX-201902151959021

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