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

Proceeding	88711363
Applicant	DRYPZ, LLC
Applied for Mark	DRYPZ
Correspondence Address	ERIC T. JOHNSON ERIC T. JOHNSON, PC 4390 EARNEY ROAD SUITE 230 WOODSTOCK, GA 30188 UNITED STATES Primary Email: eric@etj-law.com Secondary Email(s): erictjohnson76@gmail.com 770-751-1366
Submission	Applicant's brief
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Appealed class	Class 044. First Use: 0 First Use In Commerce: 0 All goods and services in the class are appealed, namely: Therapeutic services, namely, intravenous hydration therapy, intravenous electrolyte replacement therapy, intravenous vitamin infusion therapy, intravenous hangover alleviation therapy, intravenous amino acid therapy, intravenous micronutrient therapy, intramuscular vitamin therapy, lipotropic injection therapy, oxygen therapy, wellness treatments in the nature of therapeutic intravenous drip services and booster shots
Filer's Name	Eric T. Johnson
Filer's email	eric@etj-law.com
Signature	/Eric T. Johnson/
Date	05/13/2021

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Proceeding	Serial No. 88711363
Applicant	DRYPZ, LLC
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Correspondence Address	Eric T. Johnson Eric T. Johnson, P.C. 4390 Earney Road, Suite 230 Woodstock, Georgia 30188 770/761-1366 (telephone) 770-751-1675 (Facsimile) eric@etj-law.com
Submission	Appeal Brief
Filer's Name	Eric T. Johnson
Filer's Email	eric@etj-law.com
Date	May 13, 2021

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Serial No. **88711363**

Mark **DRYPZ**

Applicant **DRYPZ, LLC**

**Examining
Attorney** **INGRID C. EULIN**

EX PARTE APPEAL

APPLICANT'S BRIEF

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DESCRIPTION OF RECORD

PROSECUTION HISTORY

The identified services for Applicant's DRYPZ mark are "Therapeutic services, namely, intravenous hydration therapy, intravenous electrolyte replacement therapy, intravenous vitamin infusion therapy, intravenous hangover alleviation therapy, intravenous amino acid therapy, intravenous micronutrient therapy, intramuscular vitamin therapy, lipotropic injection therapy, oxygen therapy, wellness treatments in the nature of therapeutic intravenous drip services and booster shots."

Though the Examining Attorney found no conflicting marks that would bar registration under Trademark Act Section 2(d), the DRYPZ application was initially refused registration. *See* March 6, 2020 Office Action, TSDR pg. 1. The Examining Attorney opined that the DRYPZ mark was "merely descriptive" and that the novel spelling did not change the alleged descriptiveness of the mark.¹ *Id.* at pgs. 2-3.

Applicant filed its response on September 4, 2020. However, registration was refused again in a Final Office Action because the Examining Attorney determined that "the applied-for mark merely describes a feature of Applicant's services" per

¹ Applicant acknowledges that distinct or phonetic spellings of words does not change the nature of a term if such a word or phrase is "generic" or "descriptive." However, Applicant contends that DRYPZ is not descriptive of Applicant's services.

Trademark Act Section 2(e)(1), and that the mark DRYPZ is “appears to be generic in connection with the identified services.”² See September 24, 2020 Office Action, pg.1.

Applicant submits that DRYPZ, as applied to the services, should be registered.

EXAMINING ATTORNEY’S EVIDENCE

In the March 6, 2020 Office Action, the Examining Attorney attached evidence which the Examining Attorney contended stood for the proposition that “in the context of the services “drips” is descriptive because it directly and immediately tells consumers that the Applicant’s service provides intravenous drips.” March 6, 2020 Action, TSDR pg. 2.

In the September 24, 2020 Final Office Action, the Examining Attorney attached numerous references to how intravenous drips work. The Examining Attorney concluded that “the wording immediately and directly indicates that

² Applicant respectfully notes that its argument concerning the mark allegedly being “generic” was in direct response to the Examiner’s March 6, 2020 Office Action in which the Examining Attorney *sue sponte* stated that “in addition to being merely descriptive, the applied-for mark appears to be generic in connection with the identified services.” Given that the “generic” issue does not appear to be presently before this Board, the Applicant will not make any arguments on that subject, though is available to do so upon the Board’s request.

Applicant's services involve IV drips." See September 20, 2020 Final Office Action, TSDR pg. 2.

APPLICANT'S EVIDENCE

In response to the March 6, 2020 Office Action the Applicant attached several Federal registrations for various derivatives of the word "drip" in similar services, i.e., VITADRIP, VITADRIP IV, OASISDRIP, and GETADRIP. (September 4, 2020 Response to Office Action, pgs. 10-17.) Applicant also provided internet web pages for DRIPS PLUMBING (*id.* at pg. 6), DRIP COFFEE SHOP (*id.* at pg. 7) and "Drips" as a recent slang vernacular associated with fashion, i.e., in the Bruno Mars/Cardi B song "Finesse." (*id.* at pgs. 8-9).

ARGUMENT AND CITATIONS OF AUTHORITIES

The TMEP states that "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 TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574 (Fed. Cir. 2015). The issue is whether the mark conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1514 (TTAB 2016). Stated another way, a descriptive mark "is very similar to an adjective." *Leelanau Wine Cellars*, 502 F.3d 504, 513 n.5 (6th Cir. 2007) (quoting *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 761 n.8 (6th Cir. 2005)) (internal alteration omitted).

The Examining Attorney bears the burden of showing that a mark is merely descriptive of the relevant goods and services. *In re Merrill, Lynch, Pierce, Fenner, and Smith, Inc.*, 828 F.2d 1567, 4 U.S.P.Q. 1141, 1143 (Fed. Cir. 1987). Such burden has not been met. In particular, the Examining Attorney has provided no evidence as to the common understanding of Applicant's mark as being exclusively used in the field of intravenous therapy.

Each case determining whether a proposed mark is “descriptive” must be decided on its own merits. *See In re Ampco Foods, Inc.*, 227 USPQ 331 (TTAB 1985); *In re Venturi, Inc.*, 197 USPQ 714 (TTAB 1977). Whether DRYPZ as applied to the services is “descriptive” requires consideration of the context in which DRYPZ is used, and the possible significance that DRYPZ would have to the average purchaser of the goods or services in the marketplace.

DRYPZ is not descriptive of Applicant's services; rather, DRYPZ is suggestive. *See Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 233 (5th Cir. 2009) (“A suggestive term suggests, but does not describe, an attribute of the good; it requires the consumer to exercise his imagination to apply the trademark to the good.”). A suggestive mark thus “requires the observer or listener to use imagination and perception to determine the nature of the goods.” *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, supra at 513 n.3 (6th Cir. 2007) (emphasis added).

See also In re Quik-Print Shops, Inc. 616 F.2d 523, 525, 205 U.S.P.Q. 505, 507 (C.C.P.A. 1980).

The Second Circuit Court of Appeals in *Playtex Products v. Georgia-Pacific Corp.*, 390 F.3d 158 (2d Cir. 2004), held that the mark “Wet Ones” was suggestive when used in the context of a moist towelette: “the term ‘Wet Ones,’ without more, does not itself conjure up the image of a towelette . . . Wet Ones . . . could plausibly describe a wide variety of products.” *Id.* at 164.

DRYPZ likewise could involve several different products or services, such as plumbing, coffee shops, irrigation systems, and fashion. As for use of “drip” in fashion, slangit.com states that:

“Drip is a slang term that refers to a person's sense of style that is considered sexy or cool. It is a variation of "Swag" and was made popular by hip-hop culture.

Drip gained mainstream popularity in 2018 as its use in Rap/Hip-hop songs spread to listeners who adopted the term as a way to describe a person's, often a guy's, impressive appearance. Typically, the term refers to fashion, like clothes and shoes, but it may also refer to how one carries himself. It is commonly used online, especially on social sites like Twitter, Instagram, and Facebook.”

Similarly, *BIC Corp. v. Far Eastern Source Corp.*, No. 99 Civ. 11385, 2000 U.S. Dist. LEXIS 18226, at *8 (S.D.N.Y. Dec. 19, 2000) held that that “Wite-Out” is suggestive, explaining, “The name WITE-OUT could be descriptive of correction products in that most of the WITE-OUT products are white in color and used to take

'out' a mistake. However, although the name WITE-OUT is logically related to its use, the phrase without more does not imply a correction product."

DRYPZ is logically related to the Applicant's services, but the phrase without more does not necessarily imply Applicant's services. DRYPZ, to use the phrase in *Playtex Products, supra*, "could plausibly describe a wide variety of products." There is even an advertised irrigation products business in Arizona called THE DRIP STORE (website page is attached as Exhibit "A"). That business obviously has nothing to do with IV treatments.

There is also the issue of other registrations using the word "drip" in connection with IV treatment businesses. Applicant acknowledges that third party marks are not conclusive; however, the long list of similar marks (See September 4, 2020 Response to Office Action at pgs. 10-17.) which have been accepted makes it perplexing why DRYPZ has been denied registration. *See, e.g.:*

1. **VITADRIP** (Registration No. 5956774) for "Amino acids for medical purposes; **Intravenous fluids used for rehydration, nutrition and the delivery of pharmaceutical preparations**; Liquid protein supplements; Liquid vitamin supplements; Nutritional supplement for eliminating toxins from the body; Nutritional supplement for eliminating toxins from the intestinal tract; Nutritional supplements; Nutritional supplements for

intravenous therapy; Nutritional supplements in the form of liquid saline solution; Nutritional supplements, namely, probiotic compositions; Amino acids for nutritional purposes; Delivery agents in the form of injectable liquids that facilitate the delivery of nutritional supplements; Dietary and nutritional supplements; Dietary and nutritional supplements for endurance sports; Liquid nutritional supplement; Mineral nutritional supplements.” (Emphasis supplied.)

2. **VITADRIP IV** (Registration No. 5945406) for “Amino acid preparations for medical purposes; Amino acids for medical purposes; **Intravenous bags sold filled with alpha glycerylphosphorylcholine**; Dietary supplement for eliminating toxins from the intestinal tract; Dietary supplements; Dietary supplements for controlling cholesterol; Dietary supplements for human consumption; Dietary supplements for treatment of claustrophobia; Dietary supplements for urinary health; Enzyme dietary supplements; Glucose dietary supplements; Herbal supplements; Herbal supplements for sleeping problems; Liquid herbal supplements; Liquid protein supplements; Mineral supplements; Natural supplements for treating depression and anxiety; Natural supplements for treating erectile dysfunction; Natural dietary supplements; Natural dietary supplements for treatment of claustrophobia; Natural herbal supplements;

Vegan liquid protein supplements; Vitamin supplements; Vitamin and mineral supplements.” (Emphasis supplied.)

3. **OASISDRIP** (Registration No. 5953565) for “Health care services, namely, wellness programs; Health care services, namely, **injecting vitamin shots and intravenous drips**; Health spa services for health and wellness of the body and spirit; Health spa services for health and wellness of the body and spirit offered at a health club facility; Health spa services for health and wellness of the body and spirit offered at a health resort; Health spa services, namely, providing weight loss programs; **Hydrotherapy services; Hydrotherapy services for injecting fluids, vitamins, antioxidants, electrolytes, amino acids, and medications for symptomatic relief of dehydration, exhaustion, nausea, hangovers, and pain**; Vitamin therapy; Bodywork therapy; Nutritional therapy services; Stress reduction therapy; Wellness and health-related consulting services.” (Emphasis supplied.)

4. **GET A DRIP** (Registration No. 6045895) for “**Medical services, namely, administering intravenous vitamins; Therapeutic services, namely, intravenous vitamin infusion therapy; Medical services, namely,**

providing vitamins via booster shots; Wellness treatments in the nature of therapeutic booster shots.”

CONCLUSION

The relevant factors strongly favor a finding that Applicant’s DRYPZ mark is not merely descriptive simply because the word “drips” applies to several industries such as fashion, plumbing, and coffee. Without more, the average consumer will not know what the DRYPZ business is.

In light of the above, Applicant respectfully requests that the Board grant this Appeal and allow for the registration of the DRYPZ mark.

Dated this 13th day of May, 2021.

Respectfully submitted,



Eric T. Johnson, P.C.

Attorney for Applicant

Georgia State Bar No. 393414

4390 Earney Road, Suite 230

Woodstock, Georgia 30188

770-751-1366

770-751-1675 (fax)

eric@etj-law.com

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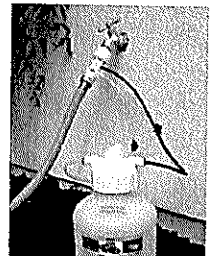


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