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

Proceeding	88757432
Applicant	L-Nutra, Inc.
Applied for Mark	5 DAY FASTING DIET
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Submission	Applicant's brief
Attachments	Appeal Brief.pdf(189409 bytes) Exhibit A.pdf(1256183 bytes)
Appealed class	Class 005. First Use: 0 First Use In Commerce: 0 All goods and services in the class are appealed, namely: Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medicalquestionnaire; nutritional meal replacement drinks, soups and snacks adapted for medical use, sold to the consumer onlyafter a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

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		)	
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INTRODUCTION

L-Nutra, Inc. (the "Applicant"), by counsel Thomas J. Speiss, III of Buchalter, A Professional Corporation, submits this Brief of the Applicant in support of its appeal of the refusal to register the applied-for mark, (hereinafter, the "Applicant's Mark" or the "Mark"), pursuant to Section 2(e)(1) of the Trademark Act.

I. STATEMENT OF THE CASE

On January 13, 2020, Applicant filed the instant application, 5 DAY FASTING DIET, U.S. Trademark App. No. 88/757,432.

In the Office Action dated February 5, 2020, the Examining Attorney issued an initial refusal of registration under Trademark Act Section 2(d), asserting that the Applicant's Mark was confusingly similar to U.S. Registration No. 3,979,773 and under Trademark Act Section 2(e)(1), asserting that the Applicant's Mark "merely describes a feature, purpose or use of applicant's goods." A final Office Action was issued September 8, 2020, making each of the mentioned rejections final.

Applicant's response to the final Office Action filed on March 8, 2021, successfully overcame the rejection under Trademark Act Section 2(d), asserting that the Applicant's Mark was confusingly similar to U.S. Registration No. 3,979,773. However, the merely descriptiveness rejection under Trademark Act Section 2(e)(1) and the Examining Attorney's request for additional information have been maintained.

The Applicant seeks to register a standard character mark containing the literal elements, "5 DAY FASTING DIET." This application recites the goods as, "nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables, sold to the

consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire; nutritional meal replacement drinks, soups and snacks adapted for medical use, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire," in International Class 005.

II. ARGUMENT

A. Applicant's Mark does not *immediately* convey information regarding the Applicant's goods, and therefore cannot be Merely Descriptive.

A term is descriptive if it clearly denotes what goods or services are provided in such a way that the consumer does not have to exercise powers of perception or imagination. *Railroad Salvage of Conn. Inc.* 561 F. Supp. 1014, 1020 (1982). To be regarded as "merely descriptive," a mark must do nothing but describe the goods or services and have no significance other than being descriptive. Suggestive marks, on the other hand, require imagination, thought, or perception to reach a conclusion as to the nature of the goods or services. If the mental leap between the mark and the product's attributes "is not almost instantaneous, this strongly indicates suggestiveness, not descriptiveness." *See Self-Realization Church v. Ananda Church of Self-Realization* 59 F.3d 902, 911 (9th Cir. 1995); *see*, *also*, *In Re George Weston, Ltd.,* 228 USPQ 47 (TTAB 1985) (SPEEDI BAKE for frozen dough found to be suggestive because it only vaguely suggests a desirable characteristic of frozen dough, namely, that it quickly and easily may be baked into bread).

Similarly, a term is considered merely descriptive if it *immediately* describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services. *See In re Dial-A-Mattress,* 240 F.3d 1341, 1346 (Fed. Cir. 2001); *see*, *also*, *In re Colonial Stores, Inc.,* 157 USPQ 382, 385 (CCPA 1968) (SUGAR 'N SPICE held not merely descriptive of bakery goods

because the "mark clearly does not tell the potential purchaser only what the goods are, their function, their characteristics, or their use"). However, it is important to remember that the Courts have found that a mark that conveys some information about the goods and services offered is not fatal to registration. TMEP §1209.01(a); *see also In re Reynolds Metals Co.*, 480 F.2d 902 (CCPA 1973) (finding BROWN-IN-BAG for plastic bags used to brown meats in suggestive and not merely descriptive). Descriptiveness determinations are made only after considering a mark's use, and the mark's likely significance to the average purchaser in the marketplace. *See In re TMS Corp. of the Americas*, 200 USPQ 57, 58 (TTAB 1978).

Here, it is important to understand that the Applicant's goods are "nutritionally balanced prepared meals ***for medical use*** consisting primarily of grains, nuts and vegetables, ***sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire***; nutritional meal replacement drinks, soups and snacks ***adapted for medical use, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire***." (Emphasis added). Applicant's nutritionally balanced prepared meals are only available to consumers ***after*** they have undergone a consultation with a doctor or other medical personnel, or ***after*** completion of a medical questionnaire. Thus, Applicant's goods are not available to the general consuming public but rather are only available to certain consumers in connection with medical guidance. These distinctions are important to remember when considering the descriptiveness of the Applicant's goods.

In the present case, the Examining Attorney has improperly broken the Mark into its individual components rather than examining the mark as a whole. "The commercial impression of a trademark is derived from the mark as a whole, not from its elements separated. For this reason, a trademark must be considered in its entirety . . . ." *Estate of P.D. Beckwith, Inc. v. Comm'r of*

Patents, 252 U.S. 538, 545-46, 40 S. Ct. 414, 64 L. Ed. 705 (1920). When viewed in its entirety, the phrase "5 DAY FASTING DIET" is at most suggestive of the Applicant's goods. It does not immediately convey to one seeing or hearing the trademark, the thought of nutritionally prepared meals for use only after a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire. The Examining Attorney provided proposed definitions for each word. The Examining Attorney provides the following definitions for the terms "DAY," "FASTING," and "DIET":

> "The term 'day' is defined as 'A period of twenty-four hours as a unit of time, reckoned from one midnight to the next, corresponding to a rotation of the earth on its axis.'"
>
> "The term 'fast' means to 'eat sparingly or abstain from some foods' and '[t]he act or practice of abstaining from or eating very little food.'"
>
> "The term 'diet' means 'to cause to eat and drink sparingly or according to prescribed rules' and '[a] special course of food to which one restricts oneself, either to lose weight or for medical reasons.'"

However, this is the Examining Attorney's own perceived idea of the definition of the Mark, rather than a true definition. The Examining Attorney has provided evidence in the form of a dictionary definition for the term "FAST." This dictionary evidence demonstrated that the term "FAST" has 37 different meanings, including:

- Firmly fixed
- Tightly shut
- Adhering firmly
- Not easily freed: stuck
- Stable
- Firmly loyal
- Characterized by quick motion
- Moving or able to move rapidly/quickly
- Taking a comparatively short time
- Imparting quickness of motion
- Accomplished quickly
- Agile of mind

- Conducive to rapidity of play or action
- Of a timepiece or weighing device – your clock is two minutes fast
- Contributing to a shortening of exposure time
- Acquired with unusually little effort and often by shady or dishonest methods
- Securely attached
- Tenacious
- Sound asleep
- Of sleep: not easily disturbed
- Not fading or changing color readily
- Actively seeking excitement and pleasure
- Resistant to change (e.g., holding 'fast' to something)
- In a firm or fixed manner
- In a sound manner: deeply
- In a rapid manner: quickly
- In quick succession
- In a reckless or dissipated manner
- Ahead of a correct time or schedule
- To abstain from food
- To eat sparingly or abstain from some foods
- The practice of fasting
- A time of fasting
- Something that fastens (such as a mooring line) or holds a fastening
- In a quick and intelligent way
- Quickly and in a way that is meant to deceive or persuade someone
- Totally loyal

This long list of various and distinct definitions clearly demonstrates that the term "FAST" has numerous meanings and therefore cannot *immediately* convey any one specific definition; and therefore, cannot immediately convey the Examining Attorney's proposed definition. By definition, it is impossible for a term having multiple definitions to convey *one* specific idea or meaning. While some consumers may interpret the word "fast" to be referring to "fasting," this interpretation requires the consumer to use thought, perception, and imagination to reach this conclusion. On the other hand, many consumers will not come to the same conclusion and may interpret the word "fast" to mean any of the numerous definitions associated with the term. For example, when considering the 37 possible definitions provided by the Examining Attorney, a consumer could interpret "FASTING" to mean "stable" or "in quick succession".

These are reasonable definitions that could be applied to the Applicant's Mark. With this in mind, it is clear that potential consumers will not come to an immediate conclusion either as to the meaning of the Mark or the goods Applicant is actually providing. Rather, consumers will need to take a mental pause and use thought, perception, and imagination in order to come to a conclusion as to the Applicant's goods. Such actions are the exact definition of a suggestive mark. (A suggestive mark requires imagination, thought and perception to reach the conclusion as to the nature of the goods. *See*, TMEP 1209.01(a).)

The Examining Attorney was also required to take a mental pause and use thought and perception to reach the conclusion as to the nature of the Applicant's goods in order to opine that the Applicant's Mark is merely descriptive. Applicant respectfully submits that the fact that the Examining Attorney had to creatively combine various meanings of different words to create a potential definition for the Mark proves that the Mark cannot *immediately* convey anything about the Applicant's goods. A word or phrase that has more than one definition is incapable of immediately conveying a specific definition because it has multiple meanings. Thus, the Mark cannot be merely descriptive, and is at most suggestive of the Applicant's goods.

B. The Mark is at Most Suggestive of the Applicant's Goods.

Applicant respectfully submits that the Mark is at most suggestive of the Applicant's goods. If a consumer must exercise imagination, thought, and perception to reach a conclusion as to the nature of the goods or services the term indicates, the term is suggestive and not merely descriptive. *Equine Technologies, Inc. v. Equitechnology, Inc.,* 68 F.3d 542, 36 U.S.P.Q.2d. 1659 (1st Cir. 1995) (imagination is required to connect EQUINE TECHNOLOGIES to horse hoof care products)*; Dial-A-Mattress Operating Corp. v. Mattress Madness, Inc.*, 841 F. Supp. 1339, 1347, 33 U.S.P.Q.2d 1961, 1966 (E.D.N.Y. 1994) ("The phrase 'dial a

mattress,' while certainly establishing a link between the telephone and bedding products, does not begin to describe the nature, scope or extent of the services that the name has come to represent.); *Elizabeth Taylor Cosmetics Co. v. Annick GoutaL S.A.R.L.*, 673 F.Supp. 1238, 1244, 5 U.S.P.Q.2d 1305, 1309-10 (S.D.N.Y. 1987) (finding "Passion" suggestive as applied to perfume because it describes an emotion the fragrance seeks to induce). *Pacquin-Lester Co. v. Charmaceuticals, Inc.*, 484 F.2d 1384, 179 U.S.P.Q. 45 (C.C.P.A. 1973) (SILK is suggestive of skin care products that are designed to give the user soft or smooth skin); *In re Conti*, 220 U.S.P.Q. 745 (TTAB 1983) (SHEER PERFECTION for makeup for legs and body is suggestive of the sheer appearance of fine hosiery for the legs without the need for hosiery); *Glow Industries, Inc. v. Lopez*, 252 F. Supp. 2d 962, 1001 (C.D. Cal. 2002) (finding the GLOW mark to be suggestive rather than descriptive because the mark does not directly describe the attributes of Glow, Inc.'s perfume, but refers suggestively to the positive feelings one will achieve by using the product).

Thus, a mark is descriptive if it clearly and immediately denotes what goods or services are provided in such a way that the consumer does not have to exercise powers of perception or imagination. *See, Purolator, Inc. v. EFRA Distributors, Inc.,* 524 F.Supp. 471, 477 (D.P.R. 1982); *aff'd* 687 F.3d 554, 216 USPQ 457 (1st Cir. 1982). Therefore, the more imagination, thought, and perception that a consumer must use to determine the offered goods and services, the more likely the term is suggestive rather than descriptive. *See, Stix Products, Inc. v. United Merchants & Manufacturers, Inc.,* 160 USPQ 777, 788 (DCNY 1968).

Here the term "FASTING" is not merely descriptive, but rather is suggestive of the goods. The Mark is at most suggestive because the Mark does not provide any information regarding the Applicant's goods. In fact, a potential consumer will not be able to immediately understand the

goods to be nutritionally prepared meals for use only after a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire, simply by viewing the Mark. While a potential consumer may guess that the goods may relate to a diet plan, a consumer is more likely to believe that the goods are related to providing information regarding a type of diet plan rather than actually providing nutritionally prepared meals. Furthermore, nothing about the Mark suggests or even conveys to a consumer that the goods are only available ***after*** a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire. Thus, the consumer is left wondering what the Applicant's goods actually are. The Examining Attorney's own proposed definition of the Mark, along with the multiple meanings of the term "FAST," supports the finding that the Mark is at most suggestive of the Applicant's goods.

As discussed above, the Examining Attorney proposes that the Mark means to "eat sparingly or abstain from some foods" and "the act or practice of abstaining from or eating very little food." The Applicant provides specially prepared meals for individuals to consume during a specific time period. Applicant's specialized nutritionally prepared meals allow the body to mimic the benefits and outcomes of a true and actual fasting diet (*i.e.*, abstaining from most, if not all food), all while consuming Applicant's healthy and nutritious foods.

The Mark is intended to suggest or conjure the image of a fasting meal plan because the body is medically induced (or "tricked") into believing that the individual is fasting when consuming Applicant's nutritionally prepared meals. Thus, the individual receives the medical benefits of fasting without the negative side effects of actually abstaining from food, such as headaches, lethargy, and mood swings. As such, the Mark uses the term "FASTING" in an entirely suggestive manner to invoke or imply that consuming its nutritionally prepared meals

and food products will result in the body believing that the individual is fasting, thus receiving the medical benefits of fasting, when in reality the individual is consuming specially nutritionally prepared meals. Thus, the Mark requires consumers to use their imagination, thought, or perception to attempt to determine the Applicant's goods. Accordingly, the Mark is at most suggestive, and cannot – and does not ─ merely describe the Applicant's goods.

Even if *arguendo* a consumer were able to use his imagination, thought and perception to make an assertion between the Mark and the Applicant's goods and services (which is very unlikely), the Applicant's Mark is still not merely descriptive.

C. Third Party Registrations for Similar Marks Support Registration of Applicant's Mark.

The Trademark Office's own treatment of marks containing the word "FAST" further supports Applicant's position that the Mark is not descriptive of Applicant's goods. Specifically, other marks containing the term "FAST" have been registered. Notably, the following registrations are registered on the Principal Register rather than the Supplemental Register and do not include any disclaimers of the term "FAST" or "FASTING" even when the goods have some connection to food or nutritional products. If the following marks were allowed to register on the Principal Register, Applicant's Mark should be afforded the same treatment. The corresponding trademark records are attached as **Exhibit A**.

Reg./App. No.	Mark	Goods / Services	Status
5,903,366	FAST LYTE	Class 5: Electrolyte drinks for medical purposes; Electrolyte replacement solutions; Electrolytes for medical use; Dietary supplement drink mixes; Dietary supplement for eliminating toxins from the intestinal tract; Dietary supplemental drinks in the nature of vitamin and mineral beverages; Dietary supplements; Dietary supplements for human beings and animals; Dietary supplements for	Registered

Reg./App. No.	Mark	Goods / Services	Status
		human consumption; Dietary supplements for urinary health; Dietary supplements in the nature of weight loss powders; Dietary and nutritional supplements; Dietary and nutritional supplements for endurance sports; Dietary and nutritional supplements used for weight loss; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary food supplements; Dietary pet supplements in the form of pet treats; Ketogenic dietary and nutritional supplements used for weight loss; Ketone ester beverages for use as a dietary supplement; Liquid nutritional supplement; Mineral supplements; Mineral food supplements; Mineral nutritional supplements; Natural supplements for treating depression and anxiety; Nutraceuticals for use as a dietary supplement; Nutritional supplement for eliminating toxins from the body; Nutritional supplement for eliminating toxins from the intestinal tract; Nutritional supplements; Powdered fruit-flavored dietary supplement drink mix; Powdered nutritional supplement concentrate; Powdered nutritional supplement drink mix…	
5,869,466	BRAIN FAST	Class 5: Dietary and nutritional supplements; liquid nutritional supplement; powdered nutritional supplement drink mix.	Registered
87/811,095	VITAFAST	Class 5: Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables; nutritional meal replacement drinks, soups and snacks adapted for medical use; herbal teas for medical treatments; dietary supplements; food supplements; nutritional supplements; vitamin and mineral supplements; Nutritional plant-based supplements containing algal oil, vegetable powders, and vitamins and minerals… Class 44: Dietary and nutritional guidance; Providing information about dietary supplements and nutrition; Nutrition, dietary and food nutrition counseling; Food nutrition	Allowed; later expressly abandoned

Reg./App. No.	Mark	Goods / Services	Status
		consultation	
5,488,007	ENDURELITE FUELING FAST	Class 5: Nutritional supplements, namely, pre-workout powders, protein powders, vitamins, minerals, meal replacement bars and weight loss supplements	Registered
5,313,318	FASTBLAST	Class 5: Nutritional and dietary supplements; meal replacement bars, namely, meal replacement bars adapted for weight loss purposes, nutritional supplement energy bars	Registered
5,115,935	PROBIOTIC FASTMELT	Class 5: dietary supplements containing probiotics; nutritional supplements containing probiotics	Registered
4,699,388	FASTCHEWS	Class 5: dietary and nutritional supplements	Registered
5,510,665	FAST TRACK SNACK	Class 5: Protein supplements; Nutritional supplements; Nutritional supplements in the form of powders; Nutritional supplements, namely, probiotic compositions; Vitamins; Dietary and nutritional supplements used for weight loss Class 30: cookies; crackers; pastries; bread	Registered
5,483,365	FAST TRACK NUTRITION	Class 5: Protein supplements; Nutritional supplements; Nutritional supplements in the form of powders; Nutritional supplements, namely, probiotic compositions; Vitamins; Dietary and nutritional supplements used for weight loss Class 30: cookies; crackers; pastries; bread	Registered
5,162,631	FAST STIX	Class 5: dietary and nutritional supplement powder packs	Registered
4,142,139	FAST PACK	Class 5: electrolyte drinks for medical purposes	Registered
1,637,377	MIGHTY FAST	Class 5: powder dietary drink mix	Registered
5,398,689	FASTING STUDIO	Class 5: Pharmaceutical preparation for skin care; dietary supplements for humans consumption; lacteal flour for babies; dietetic beverages adapted for medical purposes; dietetic food adapted for medical purposes; beverages for babies, namely, electrolyte replacement solution; food for babies; dietary supplements for animals	Registered

These third party registrations demonstrate that a mark containing the word "FAST" and variants thereof are capable of acting as an indicator of source. The foregoing chart and attached registration records clearly establish that language similar to Applicant's Mark for anything food and nutritionally related does not automatically render a mark "merely descriptive." These registration records indicate that other Examining Attorneys have found such marks to be registrable. In addition, these registrations establish that consumers have been trained to view similar marks as an indication of source origin, rather than as a description, in certain circumstances.

D. <u>There is Insufficient Evidence to support the Rejection of the Mark based on Mere Descriptiveness.</u>

Furthermore, Applicant respectfully contends that the Office Action does not cite sufficient evidence to support the assertion that a consumer seeing the Mark in its entirety would <u>*immediately*</u> make a determination as to the Applicant's goods, which are nutritionally prepared meals for use only after a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire, and immediately know the intended use, purpose, and/or function of the goods. Specifically, the Examining Attorney has not provided any evidence to demonstrate that consumers would understand that Applicant's nutritionally prepared meals are only for use ***after*** a medical consultation with a doctor or other medical personnel or upon the completion of a medical questionnaire.

- **<u>Fasting Supplements:</u>** This internet evidence discusses a use of multi-vitamins and mineral supplements to provide healthy support for the body. However, this article does not use the Mark in a descriptive fashion in connection with the Applicant's goods. Thus, this evidence is not relevant to show descriptiveness of the Mark.

- **Intermittent Fasting Supplements that Help with Energy & Hunger Suppression:** This article discusses the benefits of intermittent fasting and how supplements can provide additional energy and support. However, this article does not use the Mark in a descriptive fashion in connection with the Applicant's goods. Thus, this evidence is not relevant to show descriptiveness of the Mark.
- **Beginners Guide to Intermittent Fasting: Science and Supplementation:** This article discusses a variety of different types of fasting diets and their benefits. However, once again the provided internet article does not use the Mark in a descriptive fashion in connection with the Applicant's goods, and therefore, is not relevant to demonstrate descriptiveness of the Mark.
- **Can You Take Supplements While Fasting? What you Need to Know:** This article discusses intermittent fasting and the use of supplements to support intermittent fasting. However, this article does not use the Mark in a descriptive fashion in connection with the Applicant's goods. Thus, this evidence is not relevant to show descriptiveness of the Mark.
- **Why Should I Be Careful About Supplements While Fasting?:** This article discusses concerns for taking dietary supplements while fasting. The article notes that some supplements will actually interfere with the positive effects provided from fasting, thus, noting that supplements are not always recommended for individuals who are fasting. Once again though, this article does not use the Mark in a descriptive fashion in connection with the Applicant's goods, and therefore, is not relevant to show descriptiveness of the Mark.

- **<u>The Best Supplements if You Are on a Restrictive Diet:</u>** This article discusses fasting and appropriate dietary supplements to consume while fasting. However, this article does not use the Mark in a descriptive fashion in connection with the Applicant's goods, and therefore, is not relevant to show descriptiveness of the Mark.
- **<u>The Beginner's Guide to the 5:2 Diet:</u>** This article discusses the benefits of fasting for two days within a seven day period of time, noting that the fasting days should not be done consecutively. Despite the fact that the article discusses a ratio of fasting and non-fasting days, the article fails to use the Mark in a descriptive fashion in connection with the Applicant's goods. Thus, this internet evidence is not relevant to show descriptiveness of the Mark.
- **<u>What to know about the 500-calorie diet:</u>** This article discusses a diet consisting of consuming just 500 calories a day, including the dangers and concerns for following such a diet. Rather than supporting use of a severely restricted calorie diet, the article actually cautions away from following such a diet. Furthermore, the article fails to use the Mark in a descriptive capacity in connection with Applicant's goods. Thus, this article is not relevant to show descriptiveness of the Mark.
- **<u>Five-day fasting diet could fight disease, slow aging:</u>** This article discusses the benefits of following a fasting diet for a period of 5 days. Despite recommending a fasting diet be followed for a certain amount of time, the article fails to use the Mark in a descriptive capacity in connection with Applicant's goods. Thus, this article is not relevant to show descriptiveness of the Mark.
- **<u>Could a 5-Day Fasting Diet Prolong Your Life?:</u>** This article discusses the benefits of following a fasting diet for a period of 5 days. Despite recommending a fasting

diet be followed for a certain amount of time, the article fails to use the Mark in a descriptive capacity in connection with Applicant's goods. Thus, this article is not relevant to show descriptiveness of the Mark.

- **The 5:2 Diet – Feasts for Fast Days:** This article provides a number of recipes that can be made for days when consuming 500 calories or less. These recipes are unrelated to Applicant's goods and therefore fail to descriptively use the Mark in connection with the Applicant's goods. Thus, this article is not relevant to show descriptiveness of the Mark.

As discussed, the internet evidence provided by the Examining Attorney fails to use the Mark in a descriptive capacity in connection with the Applicant's goods. As such, none of the provided internet evidence is relevant to show descriptiveness of the Mark.

E. Where there is a question of mere descriptiveness or suggestiveness, the Office is to resolve in favor of the Applicant and rely on the publication function.

Because the line between merely descriptive and suggestive marks is "so nebulous," the Board takes the position that doubt is resolved in favor of the Application on the assumption that competitors have the opportunity to oppose registration once published and to present evidence that is usually not present in an *ex parte* examination. *See* J. MCCARTHY, *2 McCarthy on Trademarks and Unfair Competition*, *supra*, at § 11.51, p. 11-189; *see*, *also*, *In re Conductive Systems, Inc.*, 220 U.S.P.Q. 84 (T.T.A.B. 1983) (doubts under §2(e)(1) about the merely descriptive nature of a term are resolved in favor of the Applicant). Accordingly, Applicant's Mark is not merely descriptive but at most could be considered suggestive.

III. REQUEST FOR INFORMATION

In response to the Examining Attorney's request for information, Applicant provides the following answers to the Examining Attorney's questions presented in the Office Action.

(1) Are the goods used as part of a restricted calorie diet?

The Applicant's goods are intended to be consumed while following the Applicant's diet plan only after consultation with a medical doctor or medical personnel or upon completion of a medical questionnaire. Food is being consumed in this plan, in the form of soups, crackers, olives, nut bars and specially-formulated chocolate tasting bars, as well as specially formulated drinks and herbal teas. Through this combination of food products, the body has the "internal belief" that no food is being consumed, when food actually is being consumed, thus suggesting to the body that the body is abstaining from food but in reality the body is consuming food.

(2) Are the goods used as part of a fasting diet?

The Applicant's goods are used by individuals who wish to receive the benefits of a fast without following a strict, "no food" diet. As discussed above, food is being consumed, in the form of soups, crackers, olives, nut bars and specially-formulated chocolate tasting bars, as well as specially formulated drinks and herbal teas. The food is scientifically designed to mimic how the body reacts when undergoing a fast, when in reality the body is consuming food. The term "fast/fasting" is being used to be suggestive of how the body interprets and processes the food.

(3) Are the goods advertised to be used as part of a restricted or fasting diet?

The Applicant's goods are recommended to be consumed while following the restricted diet, which consists of soups, crackers, olives, nut bars and specially-formulated chocolate tasting bars, as well as specially formulated drinks and herbal teas. This meal plan is only followed after consultation with a medical doctor or medical personnel or upon completion of a medical questionnaire.

/ / /

/ / /

(4) Are the goods meant or advertised to be used over a period of time? If so, please specify.

Yes. The Applicant's goods are meant to be used in 5-day increments.

(5) Are the goods meant or advertised to be used over a period of five days?

Yes. The Applicant's goods are meant to be used in 5-day increments.

(6) While on applicant's diet, are users recommended to restrict calories by using the identified goods in lieu of regular food?

Applicant respectfully takes exception with the use of the term "regular food." The use of this term provides an assumption that Applicant's soups, crackers, olives, nut bars and specially-formulated chocolate tasting bars, as well as specially formulated drinks and herbal teas, are somehow "irregular." This is not the case. Rather, it is the consumption of a unique combination of these specially formulated food products, in their recommended order of consumption (without the consumption of food products not part of the food program), that provides the benefit to consumers.

(7) While on applicant's diet, are users recommended to restrict calories by using the identified goods in addition to regular food?

As discussed above, Applicant takes exception with the term "regular food." The use of this term provides an assumption that Applicant's soups, crackers, olives, nut bars and specially-formulated chocolate tasting bars, as well as specially formulated drinks and herbal teas, are somehow "irregular." This is not the case. Rather, it is the consumption of a unique combination of these specially formulated food products, in their recommended order of consumption (without the consumption of food products not part of the food program), that provides the benefit to consumers.

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/ / /

CONCLUSION

In view of the above remarks, the Applicant respectfully requests that the Board reverse the refusal under Section 2(e)(1) of the Trademark Act and that the Applicant's Mark be approved for publication and registration on the Principal Register.

Respectfully submitted,

DATED: June 1, 2021

By:

Thomas J. Speiss, III
Attorney for Applicant,
L-Nutra, Inc.
C: (310) 490-3373
E: TSpeiss@buchalter.com

EXHIBIT A

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

FAST LYTE

Word Mark	FAST LYTE
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Electrolyte drinks for medical purposes; Electrolyte replacement solutions; Electrolytes for medical use; Dietary supplement drink mixes; Dietary supplement for eliminating toxins from the intestinal tract; Dietary supplemental drinks in the nature of vitamin and mineral beverages; Dietary supplements; Dietary supplements for human beings and animals; Dietary supplements for human consumption; Dietary supplements for urinary health; Dietary supplements in the nature of weight loss powders; Dietary and nutritional supplements; Dietary and nutritional supplements for endurance sports; Dietary and nutritional supplements used for weight loss; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary food supplements; Dietary pet supplements in the form of pet treats; Ketogenic dietary and nutritional supplements used for weight loss; Ketone ester beverages for use as a dietary supplement; Liquid nutritional supplement; Mineral supplements; Mineral food supplements; Mineral nutritional supplements; Natural supplements for treating depression and anxiety; Nutraceuticals for use as a dietary supplement; Nutritional supplement for eliminating toxins from the body; Nutritional supplement for eliminating toxins from the intestinal tract; Nutritional supplements; Powdered fruit-flavored dietary supplement drink mix; Powdered nutritional supplement concentrate; Powdered nutritional supplement drink mix; Powdered nutritional supplement drink mix and concentrate. FIRST USE: 20190502. FIRST USE IN COMMERCE: 20190502
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	88488151
Filing Date	June 25, 2019
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	August 20, 2019
Registration	**5903366**

Number	
Registration Date	November 5, 2019
Owner	(REGISTRANT) Hanaggo Inc. CORPORATION CALIFORNIA #15 5333 Baltimore Dr La Mesa CALIFORNIA 91942
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

Brain Fast

Word Mark	BRAIN FAST
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Dietary and nutritional supplements; liquid nutritional supplement; powdered nutritional supplement drink mix. FIRST USE: 20180625. FIRST USE IN COMMERCE: 20190601
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	88014159
Filing Date	June 25, 2018
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	December 11, 2018
Registration Number	**5869466**
Registration Date	September 24, 2019
Owner	(REGISTRANT) Epic Net Ventures LIMITED LIABILITY COMPANY IOWA 124 11th St NE Mason City IOWA 50401
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BRAIN" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

VITAFAST

Word Mark	VITAFAST
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables; nutritional meal replacement drinks, soups and snacks adapted for medical use; herbal teas for medical treatments; dietary supplements; food supplements; nutritional supplements; vitamin and mineral supplements; Nutritional plant-based supplements containing algal oil, vegetable powders, and vitamins and minerals IC 044. US 100 101. G & S: Dietary and nutritional guidance; Providing information about dietary supplements and nutrition; Nutrition, dietary and food nutrition counseling; Food nutrition consultation
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	**87811095**
Filing Date	February 26, 2018
Current Basis	1B
Original Filing Basis	1B
Published for Opposition	February 12, 2019
Owner	(APPLICANT) L-NUTRA, Inc. CORPORATION CALIFORNIA 8000 Beverly Blvd. Los Angeles CALIFORNIA 90048
Attorney of Record	Thomas J. Speiss, III
Type of Mark	TRADEMARK. SERVICE MARK
Register	PRINCIPAL

Live/Dead Indicator LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

Word Mark	E ENDURELITE FUELING FAST
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Nutritional supplements, namely, pre-workout powders, protein powders, vitamins, minerals, meal replacement bars and weight loss supplements. FIRST USE: 20170601. FIRST USE IN COMMERCE: 20171101
Mark Drawing Code	(5) WORDS, LETTERS, AND/OR NUMBERS IN STYLIZED FORM
Serial Number	87478503
Filing Date	June 7, 2017
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	September 26, 2017
Registration Number	**5488007**
Registration Date	June 5, 2018
Owner	(REGISTRANT) Mosman, Matthew INDIVIDUAL UNITED STATES 1322 East Woodland Dr Spearfish SOUTH DAKOTA 57783 (REGISTRANT) Joy, Jordan INDIVIDUAL UNITED STATES 1322 East Woodland Dr Spearfish SOUTH DAKOTA 57783
Description of Mark	Color is not claimed as a feature of the mark. The mark consists of the stylized letter "E" with the term "ENDURELITE" to the right of it and the slogan "FUELING FAST" below the word "ENDURELITE".
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead	LIVE

Indicator

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

FastBlast

Word Mark	FASTBLAST
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Nutritional and dietary supplements; meal replacement bars, namely, meal replacement bars adapted for weight loss purposes, nutritional supplement energy bars. FIRST USE: 20160110. FIRST USE IN COMMERCE: 20170223 IC 041. US 100 101 107. G & S: Providing a website featuring on-line non-downloadable exercise and fitness information and instruction; providing a website featuring blogs and non-downloadable audio clips, video clips, musical performances, musical videos, film clips, photographs, and other multimedia materials and information, all the foregoing in the field of exercise; physical fitness training services and consultancy; providing information in the field of exercise training; educational services, namely, providing instruction on tracking progress of exercise workouts for others; providing a website featuring on-line non-downloadable dietary instruction in the form of online articles, online videos, online courses; providing a website featuring blogs and non-downloadable audio clips, video clips, musical performances, musical videos, shakes film clips, photographs, all the foregoing in the field of dietary instruction; providing a website featuring blogs in the field of diet; Providing a website featuring on-line non-downloadable dietary information in the form of online articles, online videos, online courses. FIRST USE: 20160110. FIRST USE IN COMMERCE: 20170223 IC 044. US 100 101. G & S: Providing weight loss program services; Providing wellness services, namely, weight loss programs offered at a wellness center; Weight management services, namely, providing weight loss and/or weight maintenance program; Providing a website featuring information in the fields of diet, weight loss and diet planning. FIRST USE: 20160110. FIRST USE IN COMMERCE: 20170223
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	87197705
Filing Date	October 10, 2016
Current Basis	1A
Original Filing Basis	1B

Published for Opposition	May 23, 2017
Registration Number	**5313318**
Registration Date	October 17, 2017
Owner	(REGISTRANT) King, William INDIVIDUAL UNITED STATES 211 Challenge Rd Raleigh NORTH CAROLINA 27603
Attorney of Record	JungJin Lee
Type of Mark	TRADEMARK. SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

TSDR | ASSIGN Status | TTAB Status *(Use the "Back" button of the Internet Browser to return to TESS)*

PROBIOTIC FASTMELT

Word Mark	PROBIOTIC FASTMELT
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Dietary supplements containing probiotics; Nutritional supplements containing probiotics. FIRST USE: 20160808. FIRST USE IN COMMERCE: 20160808
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86899072
Filing Date	February 5, 2016
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	May 31, 2016
Registration Number	**5115935**
Registration Date	January 3, 2017
Owner	(REGISTRANT) AdvoCare International, L.P. AdvoCare GP, LLC, a Delaware limited liability company LIMITED PARTNERSHIP DELAWARE 2801 Summit Ave. Plano TEXAS 75074 (LAST LISTED OWNER) ADVOCARE INTERNATIONAL, LLC LIMITED LIABILITY COMPANY DELAWARE 2800 TELECOM PKWY RICHARDSON TEXAS 75082
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	Joel R. Feldman, , Jacquelynne J. Regan, , Jamie N. Shipp, ,
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PROBIOTIC" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

Fastchews

Word Mark	FASTCHEWS
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Dietary and nutritional supplements. FIRST USE: 20140421. FIRST USE IN COMMERCE: 20140725
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86349270
Filing Date	July 27, 2014
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	December 23, 2014
Registration Number	**4699388**
Registration Date	March 10, 2015
Owner	(REGISTRANT) Toker, Jonathan David INDIVIDUAL CANADA PO Box 4456 Thousand Oaks CALIFORNIA 91359
	(LAST LISTED OWNER) TOKER ENGINEERING LLC LIMITED LIABILITY COMPANY CALIFORNIA PO BOX 4456 THOUSAND OAKS CALIFORNIA 91359
Assignment Recorded	ASSIGNMENT RECORDED
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

FAST TRACK SNACK

Word Mark	FAST TRACK SNACK
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Protein supplements; Nutritional supplements; Nutritional supplements in the form of powders; Nutritional supplements, namely, probiotic compositions; Vitamins; Dietary and nutritional supplements used for weight loss. FIRST USE: 20131031. FIRST USE IN COMMERCE: 20131031 IC 030. US 046. G & S: Cookies; Crackers; Pastries; Bread. FIRST USE: 20131031. FIRST USE IN COMMERCE: 20131031
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86768295
Filing Date	September 25, 2015
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	April 24, 2018
Registration Number	**5510665**
Registration Date	July 10, 2018
Owner	(REGISTRANT) Clerrke, Jason INDIVIDUAL UNITED STATES 11 Lake Avuenue Danbury CONNECTICUT 06811
Attorney of Record	Raj Abhyanker
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SNACK" APART FROM THE MARK AS SHOWN
Type of	TRADEMARK

Mark	
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

FAST TRACK NUTRITION

Word Mark	FAST TRACK NUTRITION
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Protein supplements; Nutritional supplements; Nutritional supplements in the form of powders; Nutritional supplements, namely, probiotic compositions; Vitamins; Dietary and nutritional supplements used for weight loss. FIRST USE: 20131031. FIRST USE IN COMMERCE: 20131031 IC 030. US 046. G & S: Cookies; Crackers; Pastries; Bread. FIRST USE: 20131031. FIRST USE IN COMMERCE: 20131031
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86551045
Filing Date	March 3, 2015
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	March 20, 2018
Registration Number	**5483365**
Registration Date	June 5, 2018
Owner	(REGISTRANT) Clerke, Jason INDIVIDUAL UNITED STATES 11 Lake Avenue Extension Suite 1B Danbury CONNECTICUT 06811
Attorney of Record	Raj Abhyanker
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "NUTRITION" APART FROM THE MARK AS SHOWN

Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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| HOME | SITE INDEX| SEARCH | eBUSINESS | HELP | PRIVACY POLICY

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

FAST STIX

Word Mark	FAST STIX
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Dietary and nutritional supplement powder packs. FIRST USE: 20160919. FIRST USE IN COMMERCE: 20160919
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	86927487
Filing Date	March 3, 2016
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	May 24, 2016
Registration Number	**5162631**
Registration Date	March 14, 2017
Owner	(REGISTRANT) General Nutrition Investment Company CORPORATION ARIZONA Suite 322 1011 Centre Road Wilmington DELAWARE 19805
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	John W. McIlvaine
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "STICKS" APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

FAST PACK

Word Mark	FAST PACK
Goods and Services	IC 005. US 006 018 044 046 051 052. G & S: Electrolyte drinks for medical purposes; Electrolytes. FIRST USE: 19930601. FIRST USE IN COMMERCE: 19930601
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	85421837
Filing Date	September 13, 2011
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	February 28, 2012
Registration Number	4142139
Registration Date	May 15, 2012
Owner	(REGISTRANT) The Sqwincher Corporation CORPORATION MISSISSIPPI 1409 Highway 45 South Columbus MISSISSIPPI 39701
	(LAST LISTED OWNER) KENT PRECISION FOODS GROUP, INC. CORPORATION IOWA 2905 U.S. HIGHWAY 61 N. MUSCATINE IOWA 52761
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	Glenn S. Bacal
Prior Registrations	1830870
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PACK" APART FROM THE MARK AS

	SHOWN
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR).
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

Record 1 out of 1

Typed Drawing

Word Mark	MIGHTY FAST
Goods and Services	IC 005. US 018. G & S: powder dietary drink mix. FIRST USE: 19900501. FIRST USE IN COMMERCE: 19900501
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	74061629
Filing Date	May 22, 1990
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	December 18, 1990
Registration Number	**1637377**
Registration Date	March 12, 1991
Owner	(REGISTRANT) Natural Organics, Inc. CORPORATION NEW YORK 548 BROADHOLLOW ROAD MELVILLE NEW YORK 11747-370
Attorney of Record	Ross Q. Panko
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20110913.
Renewal	2ND RENEWAL 20110913
Live/Dead Indicator	LIVE

TESS was last updated on Fri Jun 5 03:22:22 EDT 2020

FASTING STUDIO

Word Mark	FASTING STUDIO
Goods and Services	IC 003. US 001 004 006 050 051 052. G & S: Cosmetics; non-medicated soaps and detergents; dentifrices; fragrances and perfumery; incense; abrasive paper sandpaper; abrasive cloth; abrasive sand; artificial pumice stone for personal use; polishing paper; false nails; false eyelashes IC 005. US 006 018 044 046 051 052. G & S: Pharmaceutical preparation for skin care; dietary supplements for humans consumption; lacteal flour for babies; dietetic beverages adapted for medical purposes; dietetic food adapted for medical purposes; beverages for babies, namely, electrolyte replacement solution; food for babies; dietary supplements for animals IC 041. US 100 101 107. G & S: Beauty arts instruction; educational services, namely, conducting classes in the field of health; educational services in the nature of beauty schools; education services, namely, providing classes and instruction in the field of arts, crafts, sports; arranging, conducting and organization of seminars on beauty arts; arranging, conducting and organization of health seminars; providing sports facilities; providing facilities for movies, shows, plays, music or educational training; rental of sports equipment, except vehicles; rental of records or sound-recorded magnetic tapes; rental of image recorded magnetic tapes IC 044. US 100 101. G & S: Genetic testing for medical purposes; beauty salons; barbershops; providing bath houses; massage and therapeutic shiatsu massage; chiropractic; moxibustion; treatment for dislocated joints, sprains, bone fractures or the like judo-seifuku; acupuncture; providing medical information; physical examination; dietary and nutritional guidance
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	79209701
Filing Date	February 6, 2017
Current Basis	66A
Original Filing Basis	66A
Published for Opposition	November 28, 2017

Registration Number	5398689
International Registration Number	1349345
Registration Date	February 13, 2018
Owner	(REGISTRANT) TAKE WISE CORPORATION Co., LTD. Limited Company JAPAN 6-18, Nanrinji-cho Kagoshima-shi Kagoshima 892-0834 JAPAN
Attorney of Record	Max Vern
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "STUDIO" FOR INTERNATIONAL CLASSES 041 AND 044 APART FROM THE MARK AS SHOWN
Type of Mark	TRADEMARK. SERVICE MARK
Register	**PRINCIPAL**
Live/Dead Indicator	**LIVE**