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

Proceeding	92062860
Party	Defendant Dr. Tom Miles
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Submission	Motion to Dismiss - Rule 12(b)
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Date	03/21/2016
Attachments	SECOND motion to dismiss petition to cancel 92062860.pdf(275455 bytes)

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

International IP Holdings, LLC

Petitioner,

v.

Tom Miles

Registrant,

For the wordmark: REAL ENERGY (IC 029)

In the matter of Trademark Registration No. 4,534664

Publication Date: October 15th, 2013

Cancellation Proceeding: 92062860

REGISTRANT’S MOTION TO DISMISS AMENDED PETITION TO CANCEL

In accordance with *Fed. R. Civ. P. 12(b)(6)*, Registrant, acting pro se, moves to dismiss International IP Holding’s Amended Petition to Cancel filed on December 15th, 2015. Registrant, Tom Miles, moves, pursuant to *Fed. R. Civ. P. 12(b)(6)*, for entry of an Order granting its Motion to Dismiss (“Motion”), with prejudice and without leave to amend, International IP Holdings, LLC’s, (“Petitioner” or “IIPH” - a subsidiary of 5-Hour Energy), Amended Petition to Cancel for failure to state a claim upon which relief can be granted. Petitioner’s Amended Petition contains no specific allegations that, if proved, would establish that the primary significance of Registrant’s Mark is merely descriptive or deceptively misdescriptive of Registrant’s goods. Therefore, IIPH’s Amended Petition to Cancel must be dismissed with prejudice.

I. INTRODUCTION

IIPH's Amended Petition to Cancel once again fails to allege any factual matter to suggest that a claim of mere descriptiveness or deceptive misdescriptiveness is plausible, if indeed, that is the intended grounds of Plaintiff. The Amended Complaint is more insufficient and ambiguous than the original Petition, filed on February 10th, 2016. Furthermore, Plaintiff's Amended Petition contains no new or additional allegations of factual matter and no other statements which allege either: 1) **how** Applicant's Mark denotes an ingredient, quality, characteristic, function, feature, purpose, or use of Applicant's goods, or **what** that ingredient, quality, characteristic, etc. is; or 2) **how** Applicant's Mark immediately conveys an idea about the goods, but that idea, though plausible, is false. The claim of "deceptively misdescriptive" is once again also fatally flawed in its pleading. There are certainly no facts or allegations supporting how the mark conveys an idea or quality which is false, and there is no explanation as to why that idea (product is "not genuine") is false. Further grounds for this motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, are found in the lack of standing of Plaintiff, due to the fact that Plaintiff does not sell similar goods and does not plead standing sufficiently or with enough clarity. Additional grounds for dismissal under *Fed. R. Civ. P. 12(b)(6)*, are found in the ambiguity of The Amended Complaint, whereby IIPH forces Defendant and the Board to guess as to the grounds for the Petition to Cancel. Therefore, The Board should move to dismiss, with prejudice, the Amended Petition to Cancel on the ground that it fails "to state a claim upon which relief can be granted," FRCP 12(b)(6).

II. STATEMENT OF FACTS

Defendant, Tom Miles of REAL ENERGY, has had a total of five proceedings filed against him by International Intellectual Property Holdings, LLC (a subsidiary of 5-Hour Energy) – three Oppositions, and two Petitions to Cancel, since May 14th, 2014. Plaintiff, 5-Hour Energy, has been in operation since 2004 and currently sells approximately 300 million bottles annually of liquid energy shots. Since 2010, Defendant, has operated a very small company selling a few thousand small bags of granulated health food, called Real Energy, mostly to his patients in his wellness clinic. In addition to the claims of merely descriptive and

deceptively misdescriptive in this Petition, IIPH's other filings within the TTAB also contend what amounts to a claim of exclusive rights to the colors orange/red when blended or the image of a runner on any food or beverage product.

In regard to the proceeding at hand, on December 15th, 2015, Petitioner claimed two grounds for its original Petition to Cancel (as stated on the ESTTA cover page), 1.) The term and registered mark, REAL ENERGY, is Merely Descriptive, 2e(1). 2.) The term and registered mark, REAL ENERGY, is Deceptively Misdescriptive, 2e(1). On January 30th, 2016 Registrant filed a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, showing both claims of Petitioner were clearly improperly pleaded. Defendant showed these original claims lacked any foundation in fact or in law, as petitioner failed to allege sufficient facts to raise the requisite plausibility or materiality. Defendant showed that any additional relevant claims contained in the original Petition, if there were any, were invalid. Inasmuch as Petitioner did not include any headers to separate or delineate the claims within the complaint, the Board could only presume that the only grounds relied upon by Petitioner are those grounds listed on the ESTTA cover sheet. On February 10th, 2016, IIPH filed an Amended Complaint, which failed to include any headers to separate or delineate the claims within the complaint, and failed to rely on the ESTTA cover sheet to state any grounds for the Amended Petition to Cancel.

III. ARGUMENT

A. Standard For Dismissal

The TTAB may dismiss a Petition to Cancel on the ground that it fails "to state a claim upon which relief can be granted," *FRCP 12(b)(6)*. Where the Petitioner has failed to plead sufficient facts "to state a claim to relief that is plausible on its face," the Board should grant the motion, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff must allege "enough factual matter ... to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level." *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (*Fed. Cir.* 2010).

B. Petitioner Lacks Standing In This Petition

Petitioner claims to be "engaged in offering goods related to those identified" in the Petition to Cancel, but petitioner hasn't identified any registrations or any specific goods. This

claim does not identify how petitioner is a competitor sufficiently or definitively. Petitioner does not sell similar goods to registrant and never has. 5-Hour Energy has one product, a 2 oz liquid energy shot of synthetic caffeine, synthetic vitamins, artificial flavorings, artificial colorings, etc. Whereas, Registrant markets only granulated health food in four flavors or formulas, with ingredients such as chia, hemp, cocoa bean, mango, coconut, macadamia, pine nuts, pecans, banana, etc. Petitioner's attempt to prove standing, see paragraph #4, falls short of the requisite requirements under Trademark law. Petitioner merely states:

"IIPH is, and for many years has been, engaged in offering goods related to those identified in Registration '664."

This is not a fact, it is a conclusion. Petitioner has not pleaded any registrations. Petitioner has no presumptions to rely on. Petitioner has not alleged any facts that if true would give it standing. On its face the Amended Petition to Cancel does not plead standing sufficiently or with enough clarity. A plaintiff must allege "enough factual matter ... to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level." *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). Therefore, The Board should move to dismiss the Amended Petition to Cancel on the ground that it fails "to state a claim upon which relief can be granted," FRCP 12(b)(6), due to lack of standing, in addition to the other legally insufficient pleadings of the Amended Complaint, (see C, D, E below).

C. Petitioner Fails To Sufficiently And Clearly State A Claim For Cancellation

Additional grounds for dismissal under *Fed. R. Civ. P. 12(b)(6)*, are found in the ambiguity of The Amended Complaint, whereby IIPH forces Defendant and The Board to guess as to the grounds for the Cancellation. Unless one is viewing the Original Complaint and the Amended Complaint together, it is unclear what the grounds for the Petition to Cancel are. The vagueness of the Amended Complaint leads one to question if the Complaint is actually claiming "merely descriptive" or "deceptively misdescriptive" under provision §2(e)(1) of Trademark Law. Plaintiff fails to come even close to the threshold of pleading necessary to meet the requirements of provision §2(e)(1) of Trademark Law for merely descriptive or deceptively misdescriptive. The following seven flaws are evidence of the insufficiency and ambiguity of the pleading, in accordance with *Fed. R. Civ. P. 12(b)(6)*: The Amended Complaint, 1.)

declines to list the grounds of the complaint in the ESTTA cover sheet, 2.) fails to include any headers to delineate the claims within the complaint, 3.) fails to reference the provision §2(e)(1) of Trademark Law in regard to the subject mark being “merely descriptive,” 4.) fails to reference “merely descriptive” in regard to subjective mark, (¶ 9 references “REAL” only), 5.) fails to reference the common pleading, “*describe an ingredient, quality, characteristic, function, feature, purpose or use of goods,*” except for reference to third party marks, (see ¶ 8), 6.) fails to link the provision, [§2(e)(1)], with the grounds, [“merely descriptive”] anywhere in the Complaint, and 7.) fails to use the statutory provisions, §2(e)(1), for “deceptively misdescriptive” - only in reference to “misdescriptive,” (see ¶ 12). Accordingly, Petitioner's amended claims of merely descriptive and deceptively misdescriptive must be dismissed, in accordance with *Fed. R. Civ. P. 12(b)(6)*.

D. Petitioner’s Claim That Registrant’s Mark Is Descriptive Is Legally Insufficient

A review of Petitioner’s Amended Petition to Cancel demonstrates that there are no specific allegations that, if proved, would establish that the primary significance of Applicant’s Mark is merely descriptive of Applicant’s goods. Just as with Petitioner’s originally filed Petition to Cancel, the Amended Petition to Cancel, is at best, an example of an incomplete and insufficient reference to the statutory provision of the Trademark Act regarding descriptiveness, and therefore does not otherwise make the pleading proper. Petitioner has not alleged any factual matter to suggest that a claim of mere descriptiveness is plausible. The Amended Petition to Cancel again merely restates in regards to the incomplete claim of merely descriptive:

5: “The REAL ENERGY mark immediately informs consumers about its goods; namely, that Registrant’s goods provide genuine, non-artificial energy.”

9: “Registrant’s Mark is the mere combination of the merely descriptive term REAL and the disclaimed, generic term ENERGY.”

11: “Registration ‘664 is not registrable per Section 2(e)(1) of the Trademark Act as it is a merely informational and descriptive phrase that would ordinarily be used in business or in the particular industry.”

[Paragraphs 5, 9, 11] Petitioner’s vague allegations that the subject mark is merely descriptive or informational are conclusory and are not supported by other allegations of factual matter. The above three paragraphs, taken separately or even together, still fail to suggest that a claim of merely descriptive is plausible. “A complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’” (Iqbal, quoting Twombly, 550 U.S. at 570); it is essential for a plaintiff to allege “enough factual matter ... to suggest that [a claim is plausible]” and “raise a right to relief above the speculative level” (Totes-Isotoner Corp., 594 F.3d at 1354).

[Paragraphs 8, 10] Petitioner’s reference to third-parties’ use of the phrase “REAL ENERGY” is certainly not valid grounds for a claim of merely descriptive. IIPH’s allegation (see paragraph 8) that, “*numerous third parties use the phrase “real energy” in the relevant industry to describe an ingredient, quality, characteristic, function, feature, purpose or use of goods identical and similar to Registration ‘664,’*” is irrelevant for the purpose of pleading “merely descriptiveness.” Not only does IIPH fail to give any third party examples, but once again Petitioner has failed to allege either how the subject mark denotes an ingredient, quality, characteristic, function, feature, purpose, or use of Applicant’s goods, or what that ingredient, quality, characteristic, etc. is. Furthermore, nowhere in the amended complaint does IIPH suggest Defendant is using its mark, REAL ENERGY, to describe an ingredient, quality, characteristic, function, feature, purpose, or use of his goods. IIPH merely suggest that undisclosed THIRD PARTIES are using the term REAL ENERGY to describe an undisclosed ingredient, quality, characteristic, function, feature, purpose or use of goods, (see paragraph 8).

This matter is analogous to *Walt Disney Co. v. Team Stick, Inc., 2000 TTAB LEXIS 195 (TTAB 2000)*. In *Walt Disney*, the opposer moved for leave to file an amended notice of opposition, in order to properly plead its claim that the applicant's mark was merely descriptive within the meaning of Section 2(e)(1) of the Act. *Id.* The applicant filed a brief in opposition to the opposer's motion, “in effect, a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for which relief may be granted,” asserting that the amended complaint remained insufficient and that the opposition should therefore be dismissed. *Id.* The TTAB stated:

The amended notice of opposition includes three counts. In the first count, paragraphs 14 and 15, opposer asserts that applicant's mark describes a significant quality or characteristic of the goods and services recited in the application because it "describes the successful but carefree attitude of the running team" which provides the goods and services. We agree with applicant that the claim set forth in the first count of the amended complaint is legally insufficient. The only difference between the original version of this pleading, which the Board earlier found insufficient, and the amended version is the added language claiming that because the mark describes an "attitude," it therefore describes a significant quality or characteristic of applicant's goods and services. This pleading is deficient for the same reason that opposer's original pleading in this regard was deficient. Opposer has not provided a credible explanation of how the mark could be merely descriptive of applicant's goods and services simply because it describes the attitude of applicant. Accordingly, this count of opposer's amended pleading is dismissed because it is insufficient under Rule 12(b)(6). *Id.*

The same is true in the present matter. Petitioner's Amended Petition to Cancel is deficient for the same reason that Petitioner's original pleading in this regard was deficient. Petitioner has not provided a credible explanation of how Applicant's Mark could be merely descriptive of Applicant's goods, just as *Team Stick, Inc.* did not provide a credible explanation as to how Applicant's mark was descriptive. Here IIPH has not remedied its original complaint, just as *Team Stick, Inc.* failed to sufficiently improve its original complain, therefore there are parallels between the respective cases.

In another nearly identical case, *N.E.V. vs IIPH* (#91224925), the board ruled through interlocutory, Robert Coggins, to STRIKE the claim merely descriptive, as stated here (#6 TTABVUE p4-5 of 10):

(i) The mark is merely descriptive

"In order to properly state a claim that the mark is merely descriptive, Opposer must sufficiently allege that the subject mark THE BIG SHOT serves merely to denote an ingredient, quality, characteristic, function, feature, purpose, or use of specific goods. Opposer's allegations that the subject mark is merely descriptive (see paras. 5 and 9) are conclusory and are not supported by other allegations of factual matter. Although Opposer's reference to its and third-parties' use of the mark is sufficient to allege standing, such allegations are not sufficient to allege that the mark is merely descriptive. As stated earlier, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (*Iqbal*, quoting *Twombly*, 550 U.S. at 570); it is essential for a plaintiff to allege "enough factual matter ... to suggest that

[a claim is plausible]” and “raise a right to relief above the speculative level” (Totes-Isotoner Corp., 594 F.3d at 1354). Opposer failed to include any allegations that would support (or otherwise explain) its conclusory statement that the mark is merely descriptive. That is, Opposer failed to allege either how the subject mark denotes an ingredient, quality, characteristic, function, feature, purpose, or use of Applicant’s goods, or what that ingredient, quality, characteristic, etc. is (emphasis added). Having reviewed the ESTTA form and the ten numbered paragraphs of the Notice of Opposition, the Board concludes that, as pleaded, there are no specific allegations that, if proved, would establish that the primary significance of the subject mark is merely descriptive of Applicant’s goods. Although the ESTTA form and paragraph 9 point to §2(e)(1), merely referencing the statutory provision of the Trademark Act does not otherwise make the pleading proper. Opposer has not alleged any factual matter to suggest that a claim of mere descriptiveness is plausible. In view thereof, this ground is stricken from the Notice of Opposition, and Petitioner’s motion to strike the first affirmative defense from the Answer is denied as to this ground.”

The same is true in the present matter. Petitioner’s Amended Petition is deficient for the same reason that Petitioner’s original pleading in this regard was deficient. Petitioner has not provided a credible explanation of how Registrant’s Mark could be merely descriptive of Applicant's goods. That is, Petitioner not only failed to allege either how the subject mark denotes an ingredient, quality, characteristic, function, feature, purpose, or use of Registrant’s goods, or what that ingredient, quality, characteristic, etc. is; petitioner failed to even make a claim that the Registrants mark denotes an ingredient, quality, characteristic, function, feature, purpose, or use of Registrant’s goods. Accordingly, Petitioner's amended claims of merely descriptive must be dismissed, in accordance with *Fed. R. Civ. P. 12(b)(6)*.

E. Petitioner’s Claim That Registrant’s Mark Is Deceptively Misdescriptive Is Also Legally Insufficient

Petitioner once again falls significantly short of the requisite pleading here. There is no mention as to the plausibility of the “deceptively misdescription.” There are certainly no facts or allegations supporting how the mark conveys an idea or quality which is false, and there is no explanation as to why that idea (product is “not genuine”) is false. A review of Petitioner’s Amended Petition to Cancel demonstrates that there are no specific allegations that, if proved,

would establish that Applicant's Mark is deceptively misdescriptive. According to Trademark Law, Petitioner must sufficiently allege that Registrant's Mark immediately conveys an idea about the goods, but that idea, though plausible, is false. See *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412 (TTAB 1987). As with the ground of mere descriptiveness, Petitioner's allegations that the subject mark is deceptively misdescriptive are conclusory, speculative, and not supported by other allegations of factual matter. Petitioner's Amended Petition to Cancel does not include any allegations to support or otherwise explain Petitioner's conclusory statements that the mark is deceptively misdescriptive. The Amended Petition to Cancel again merely states: (see paragraph #12)

12: "Alternatively, Registration '664 is misdescriptive under Section 2(e)(1) in that it does not provide "real energy" as consumers understand the phrase because its goods are artificial or not genuine."

Petitioner offers no factual allegations, beyond mere speculation, as to whether the alleged meaning of the mark is plausible, and, if so, how or why that alleged meaning is false. Accordingly, Petitioner's amended claims of deceptive misdescriptiveness must be dismissed.

This matter is analogous to Proceeding 91216399, *IIPH vs Real Energy* filed 5/14/14, where the claim of deceptively misdescriptive was found to be insufficiently pleaded and was subsequently STRICKEN by Interlocutory Attorney Yong Oh (Richard) Kim, (#10 TTABVue p4 of 5), where he states:

*"As to ¶ 20 relating to opposer's claim of deceptive misdescriptiveness under Section 2(e)(1), while the Board does not find any of applicant's contentions to be well-taken, the Board nevertheless finds opposer's claim of deceptive misdescriptiveness to be insufficiently pleaded. A claim of deceptive misdescriptiveness under Section 2(e)(1) requires a plaintiff to allege that the term in question is misdescriptive of the character, quality, function, composition or use of the goods, and that prospective purchasers are likely to believe that the misdescription actually describes the goods. See *Bureau National Interprofessionnel Du Cognac v. International Better Drinks Corp.*, 6 USPQ2d 1610, 1615 (TTAB 1988). Here, opposer has failed to allege any of the elements of a deceptive misdescriptiveness claim or of the facts upon which the claim is grounded. In view thereof, opposer's claim of deceptive misdescriptiveness is hereby STRICKEN from the notice of opposition as insufficient."*

The same is true in the present matter. Petitioner has failed to allege any facts as to how Registrant's Mark immediately conveys an idea about the goods in the application (i.e., what the idea, ingredient, quality, characteristic, etc. is), whether that idea is plausible (i.e., if anyone would believe it), and, if so, how or why that idea is false. Accordingly, Petitioner's amended claims of deceptively misdescriptive must be dismissed.

This matter is also analogous to *N.E.V. vs IIPH*, proceeding 91224925, in which the Board ruled through interlocutory, Robert Coggins, to STRIKE the claim of deceptively misdescriptive, as stated here (#6 TTABVUE p5-6 of 10):

(ii) The mark is deceptively misdescriptive

“In order to properly state a claim that the mark is deceptively misdescriptive, Opposer must sufficiently allege that the subject mark THE BIG SHOT immediately conveys an idea about the goods, but that idea, though plausible, is false. See *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412 (TTAB 1987).² As with the ground of mere descriptiveness, Opposer's allegations that the subject mark is deceptively misdescriptive (see paras. 5 and 10) are conclusory and are not supported by other allegations of factual matter. The Notice of Opposition does not include any allegations to support (or otherwise explain) Opposer's conclusory statements that the mark is deceptively misdescriptive. That is, Opposer failed to allege any facts as to how the subject mark immediately conveys an idea about the goods in the application (i.e., what the idea, ingredient, quality, characteristic, etc. is), whether that idea is plausible (i.e., if anyone would believe it), and, if so, how or why that idea is false. In view thereof, this ground is stricken from the Notice of Opposition, and Petitioner's motion to strike the first affirmative defense from the Answer is also denied as to this ground.”

The same is true in the present matter. Petitioner's Amended Petition is deficient for the same reason that Petitioner's original pleading in this regard was deficient. Petitioner has not provided a credible explanation of how Applicant's Mark could be deceptively misdescriptive of Applicant's goods. Petitioner has failed to allege any facts as to how Registrant's Mark immediately conveys an idea about the goods in the application (i.e., what the idea, ingredient, quality, characteristic, etc. is), whether that idea is plausible (i.e., if anyone would believe it), and, if so, how or why that idea is false. Accordingly, Petitioner's amended claims of deceptively misdescriptive must be dismissed, in accordance with *Fed. R. Civ. P. 12(b)(6)*.

While the above four Board decisions referenced above are not precedential, they are helpful to illustrate what the Board deems ill-pleaded merely descriptive or deceptively

misdescriptive claims. Although three of the four cited Board rulings above involve the Plaintiff here, Defendant is certainly not referencing the merits of these cases, but merely referencing pleading insufficiencies. Defense is permitted to cite any relevant case in support of its arguments, regardless of the parties involved, so long as it does not attempt to compare or connect the merits of such separate cases. It is ironic that three of the four rulings involve errors of the Plaintiff (IIPH) in other case, nonetheless, these cases prove to be highly applicable to this procedure at hand. Defense is confident that the Board will see that IIPH's First Amended Petition to Cancel has the same or worse fatally flawed deficiencies as the above examples.

CONCLUSION

In conclusion, IIPH's second improper pleading of this Petition rather than having any legal merits, represents nothing more than harassment, intimidation, retaliatory action, and misdirected trademark law. To summarize, Plaintiff has filed two complaints both of which are legally insufficient and improperly pleaded, in accordance with *Fed. R. Civ. P. 12(b)(6)*. The Amended Petition, which is more legally insufficient than the original, has failed to plead legal standing, has failed to clearly state ground for cancellation, and its pleading are legally insufficient regarding claims for merely descriptiveness and deceptively misdescriptiveness - if in fact those are the intended claims. To add insult to injury, it is respectfully submitted that the Board consider that Petitioner, is at best, chronically overreaching its IP rights, and at worst, routinely using this forum as a tool to apply intimidation in an attempt to eliminate fair competition in the marketplace, which would represent an abuse of the Trademark Trial and Appeals Board's valuable resources. Defendant is not surprised that IIPH has had such difficulty pleading its case in this Proceeding, given the lack of descriptiveness of the subjective mark. Nonetheless, the success of this motion hinges entirely on the fatally flawed amended pleading of IIPH's complaint, not on the descriptiveness of REAL ENERGY, or why Plaintiff has had such difficulty with plausibility. Hence, Registrant prays that the Petition to Cancel Registration No. 4,534664 be dismissed with prejudice, without leave to amend, and further apply whatever fair, just, and equitable relief this Honorable Board deems appropriate.

Respectfully submitted Pro Se,

Date: March 21, 2016

By Registrant: /Thos. I. Miles/

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, the foregoing was served upon Petitioner by first class mail:

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By: /Thos. I Miles/

Date: March 21, 2016

Registrant, Tom Miles

Exhibit #1

Below is a listing of the only fifteen marks in the history of the USPTO to apply for the phrase REAL ENERGY (or a translation of such) in any combination. All applications, without exception, were clearly found to not be merely descriptive or deceptively misdescriptive by any of the examiners, regardless of registration difficulties, such as infringement. Registrant happens to have two such live applications (86049631, 85938514) and two live registrations (85528823, 85898317) comprising these 15 applications.

(Please note, the live/dead status of all these marks is wholly insignificant here, in that this chart is only a demonstration of the consistent opinion of the USPTO that REAL ENERGY is not a merely descriptive phrase regarding Registrants four marks (in bold) or the other 11 marks ever applied for).

Mark Number	Serial Number and registration No. where applicable	Mark	Examiner's Office Action claim of merely descriptive or deceptively misdescriptive 2(e)(1)	Live or Dead
1	8552882 4419225	REAL ENERGY	NO	LIVE
2	85898317 4534664	REAL ENERGY	NO	LIVE
3	85938514	RE	NO	LIVE
4	86049631	RE REAL ENERGY REAL FOOD...FOR REALLY BUSY	NO	LIVE
5	85241754	VERO ENERGY	NO	DEAD
6	85038518	REAL ENERGY	NO	DEAD
7	78491049	REAL ENERGY FOR REAL PEOPLE	NO	DEAD
8	78208171	REAL ENERGY	NO	DEAD
9	77769087 3744454	REAL FOOD, REAL ENERGY	NO	LIVE
10	76146141	REAL ENERGY	NO	DEAD
11	76118415 2573061	REAL ENERGY	NO	DEAD
12	75432706	REAL ENERGY	NO	DEAD
13	75038954 2060720	REAL ENERGY	NO	DEAD
14	73713764	REAL ENERGY	NO	DEAD
15	77046257 1509892	REAL NRG	NO	DEAD