

Response

The following remarks are made in response to the Office Action dated May 28, 2019. Applicant notes the favorable search results that identified no similar registered or pending marks that would bar registration under Lanham Act Section 2(d).

Applicant respectfully submits that the mark ALL9 AMINO FIZZ is inherently distinctive when used in connection with *sports drinks enhanced with amino acids* and is entitled to registration on the Principal Register.

A. Applicant's ALL9 AMINO FIZZ Mark is Coined, Incongruous and Distinctive

The Trademark Office refused registration on grounds that ALL9 AMINO FIZZ “merely describes a feature characteristic, and/or ingredient of applicant’s goods.” Applicant respectfully submits that Applicant’s ALL9 AMINO FIZZ mark as a whole is not merely descriptive, and is instead at least suggestive, when used in connection with Applicant’s applied-for goods, namely, *sports drinks enhanced with amino acids* (“**Applied-for Goods**”).

A mark is not merely descriptive if it does not immediately and directly convey concrete information about an ingredient, quality, characteristic, function, feature, purpose or use of the goods and services in connection with which it is used. *See In re Bright-Crest, Ltd.*, 204 U.S.P.Q. 591 (T.T.A.B. 1979). A descriptive connotation shall not preclude registration when the mark requires the consumer to exercise imagination in order to determine the nature of the goods/services that are offered under the mark. For example, in *Equine Technologies Inc. v. Equitechnology Inc.*, 36 U.S.P.Q.2d 1659 (1st Cir. 1995), the court held that EQUINE TECHNOLOGIES for *horse products* was not merely descriptive of plaintiffs’ goods because the mark required the consumer to exercise imagination to determine what types of horse related

goods were offered; *see also* T.M.E.P. § 1209.01(a) (“a designation does not have to be devoid of all meaning relative to the goods or services to be registrable”).

Suggestive marks are those that require imagination, thought, or perception to reach a conclusion as to the nature of the goods or services. *In re Abcor Development Corp.*, 588 F.2d 811, 200 U.S.P.Q. 215 (C.C.P.A. 1978); T.M.E.P. § 1209.01(a). Thus, a suggestive mark differs from a descriptive mark, which immediately tells something concrete and direct about the goods or services, requiring no imagination, thought, or perception to reach a conclusion as to the nature of the goods or services. TMEP § 1209.01(b).

Applicant submits that ALL9 AMINO FIZZ is a made-up mark which Applicant has arbitrarily created. Here, the record is devoid of evidence that consumers encountering the mark ALL9 AMINO FIZZ, as used in connection with Applicant’s Applied-for Goods, will *immediately* understand the nature of the goods. As detailed in the following sections, (1) the relevant purchasing public, not in the medical or health industry, will not have knowledge about the details of “essential amino acid” as ascribed by the Trademark Office let alone connect such definition to the ALL9 AMINO FIZZ mark and (2) ALL9 AMINO FIZZ, when viewed in its entirety (without a space between the word “ALL” and the numeral “9,” and the cadence and alliteration created by the repeated use of the letter “A”), is unique or at least suggestive. For the forgoing reasons, ALL9 AMINO FIZZ is inherently distinctive in the context of the identified goods.

B. The Office Action Provides Insufficient Evidence to Establish that ALL9 AMINO FIZZ Is Merely Descriptive

When evaluating the distinctiveness of a term or a lack thereof, it is well-established that the hypothetical potential customer should be assumed to have the amount of *basic knowledge* about the product that most people would have from news and advertising. *See 2 McCarthy on*

Trademarks and Unfair Competition § 11:21 (5th ed.); *Nature's Bounty, Inc., v. Super X Drugs Corp.*, 207 USPQ 263, 490 F. Supp. 50 (E.D.N.Y. 1980) (“**KLV6**” not descriptive of food supplement consisting of kelp, lecithin and vitamin B-6); *In re American Standard Inc.*, 223 USPQ 353 (TTAB 1984) (holding **PS-074 for weather stripping not descriptive because the record was devoid of evidence confirming that the relevant purchasers would recognize the meaning of the mark**).

Here, the Trademark Office submitted medical definitions of the term “essential amino acids,” not ALL9 AMINO, from the U.S. National Library of Medicine of the National Institutes of Health and Merriam-Webster Dictionary to explain that “essential amino acids” are *histidine, isoleucine, leucine, lysine, methionine, phenylalanine, threonine, tryptophan, and valine*. A medical expert may know such facts; however, Applicant’s potential customer is not a medical expert but an ordinary shopper who will not have such detailed medical knowledge about amino acids, even if they are familiar with the meaning of the term “amino.” Indeed, the U.S. National Library of Medicine of the National Institutes of Health is the world’s largest biomedical library that plays a pivotal role in translating biomedical research into practice. In addition, the Merriam-Wester Dictionary reference submitted by the Trademark Office notes that **the phrase “essential amino acid” is classified in the bottom 10% of words in look-up popularity**. Applicant respectfully submits that the number of people with knowledge of the breakdown of essential amino acid and can successfully link such definition to the term ALL9 AMINO FIZZ are likely even lower.

Moreover, the ALL9 AMINO FIZZ mark is a made-up phrase that cannot be found in the dictionary. Courts have repeatedly categorized marks that are not found in a dictionary to be distinctive marks and allowed such marks to register on the Principal Register. *See In re Warner*

Electric Brake & Clutch Co., 154 U.S.P.Q. 328, 329 (T.T.A.B. 1967) (“[t]here is no reference to ‘ELECTRO-MODULE’ in any of the unabridged dictionaries and technical dictionaries available to us or in the trade publication relied on by the examiner”); *Firestone Tire & Rubber Co. v. Goodyear Tire & Rubber Co.*, 189 U.S.P.Q. 348, 350 (C.C.P.A. 1976) (“[t]he proposed mark is a coined word, not to be found in a dictionary”); and *Minnesota Min. & Mfg. Co. v. Johnson & Johnson*, 172 USPQ 491, 492 (C.C.P.A. 1972) (noting that SKINVISIBLE “is not a ‘dictionary word,’ nor is it . . . a word which had any existence in the vernacular before appellant coined it”). Neither ALL9 nor ALL9 AMINO FIZZ is a word or phrase which can be found in any dictionary. If the mark were, in fact, merely descriptive as applied to the goods, we would expect to see many instances of clearly descriptive usage of the phrase ALL9 AMINO FIZZ in the press and literature. *See, e.g., In re L. Vad Tech., Inc.*, 2006 WL 1258852 (TTAB April 28, 2006). However, that is not the case here.

In view of the foregoing, as was the case in *Equine Technologies Inc. v. Equitechnology Inc.*, consumers will not *immediately* understand the significance of the coined term ALL9 or the nature of the goods that are offered in connection with the ALL9 AMINO FIZZ mark, and they will need additional information to complete the mental picture. This type of “mental hiccup” is the hallmark of suggestive marks. *See In re Tennis in the Round Inc.*, 199 U.S.P.Q. 496, 498 (T.T.A.B. 1978). Applicant respectfully submits that such “mental hiccup” is sufficient to make the mark eligible for registration. *See In Re Tcl Govideo*, Serial No. 78395320, 2006 WL 2558017, at *4 (T.T.A.B. Aug. 2, 2006).

C. **ALL9 AMINO FIZZ Should Be Viewed as a Whole and Not Dissected Into Its Component Parts**

Regardless of any descriptive meaning ascribed by the Office Action, in considering Applicant’s mark ALL9 AMINO FIZZ, the Trademark Office impermissibly analyzed the terms

ALL, 9, AMINO, and FIZZ individually, rather than considering the mark ALL9 AMINO FIZZ as a whole. It is well settled that descriptiveness of a phrase should be evaluated in its entirety. *See, e.g., Estate of P.D. Beckwith, Inc. v. Comm'r of Patents*, 252 U.S. 538 (1920); *In re Wisconsin Tissue Mills*, 173 U.S.P.Q. 319 (T.T.A.B. 1972) (noting a mark must be considered in its entirety and the question then is whether the entirety is merely descriptive). The case law makes clear that, even where the component words of a mark are descriptive, this does not render the mark as a whole merely descriptive; even a combination of the descriptive terms may create a suggestive mark. *See In re Bed-Check Corp.*, 226 U.S.P.Q. 946, 947 (T.T.A.B. 1985). For example, finding that the mark SENSORMAT was not merely descriptive of the applicant's pressure-sensitive mats for monitoring patients in hospital beds, the Board stated:

[E]ven assuming that applicant's current goods can be characterized as mats ..., we do not believe that applicant's mark as a whole is merely descriptive but rather believe it falls into the category of highly suggestive marks. While it may be said that each of the component parts of application's mark has some descriptive significance as applied to applicant's pressure-sensitive pads, it seems to us that applicant's mark comprises two nouns which when combined form a highly suggestive but non-descriptive whole.

In re Bed-Check, 226 U.S.P.Q. 946, 947 (TTAB 1985).

Also instructive is the Board's decision in *In re Warner Electric Brake & Clutch Co.*, 154 U.S.P.Q. 328, 329 (TTAB 1967), wherein it found that the mark ELECTRO-MODULE was not merely descriptive of electromagnetic friction clutches and brakes, stating as follows:

[T]he fact that "ELECTRO-MODULE" is composed of two terms which separately have a descriptive significance does not militate against the registration of the unitary mark as a whole unless the combination, as applied to friction clutches and brakes, is a term of art or description. There is no reference to the term "ELECTRO-MODULE" in any of the unabridged dictionaries and technical dictionaries available to us . . . nor are we persuaded on what has been made of record herein that the designation "ELECTRO-MODULE" is generally known and used in the trade by anyone other than applicant or that it has a readily understood significance in the field. There is nothing to support the examiner's statement that "ELECTRO-MODULE" is "a natural product name for the

goods.” While “ELECTRO-MODULE” suggests or even indicates that applicant’s friction clutches and brakes possess electrical and modular characteristics, it does not with any degree of particularity describe the nature, character, function or use of the goods.

As was the case with the terms SENSOR and MAT, and with the terms ELECTRO and MODULE, ALL, 9, AMINO, and FIZZ combine to form a distinctive mark. The three word mark “ALL9 AMINO FIZZ” should not be dissected into four separate parts. The letter string ALL9 with **no space** (as opposed to “all 9”) is unique, distinctive, and not in common usage. Thus, when viewed as a whole, ALL9 AMINO FIZZ creates an incongruous combination of terms with the structure and appearance of a trademark.

Mover, the mark ALL9 AMINO FIZZ is unique and playful due to the cadence and alliteration created by the repeated use of the letter “A” making the mark capable of serving as a distinctive source identifier. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (C.C.P.A. 1968) (SUGAR & SPICE held not merely descriptive of bakery products); *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983) (finding LIGHT N’ LIVELY utilizing alliterative wording to be a unitary term).

D. Any Doubt as to Descriptiveness Must Be Resolved In Favor of Applicant

The Trademark Trial and Appeal Board has recognized that “there is often a thin line of demarcation between a suggestive term and a merely descriptive term, and that the determination of the category into which a particular word falls is frequently a difficult determination, involving some subjective judgment.” *In re Grand Metro. Foodservice Inc.*, 30 U.S.P.Q.2d 1974, 1976 (T.T.A.B. 1994). Any doubt with respect to the issue of descriptiveness should be resolved in Applicant’s behalf. *See id*; *see also In re Gourmet Bakers, Inc.*, 173 USPQ 565 (T.T.A.B. 1972) (any doubt in determining registrability of a mark should be resolved in favor of applicant “on the theory that any person who believes that he would be damaged by the

registration will have an opportunity . . . to oppose to the registration of the mark and to present evidence, usually not present in the ex parte application, to that effect”). Considering that the relevant purchasing public are not medical experts, and given the lack of any evidence produced by the Trademark Office showing that the term “ALL9” or the phrase “ALL9 AMINO FIZZ” *as a whole* is descriptive as applied to *sports drinks enhanced with amino acids*, Applicant believes there is no doubt that the mark is suggestive and not merely descriptive. But to the extent that there is any doubt on the issue, it should be resolved in Applicant’s favor, and the Trademark Office should permit registration of the mark ALL9 AMINO FIZZ on the Principal Register.

Suspension Request

The Trademark Office cited U.S. Application Serial No. 88061242 as a potential bar to registration of Applicant’s ALL9 AMINO FIZZ application on grounds of a likelihood of confusion. Applicant requests that the Trademark Office suspend this application pending final disposition of the earlier-filed referenced application.