

Mark: RAGER TOTAL BODY FUEL
 Serial No.: 88/401,056
 Applicant: Rule Beverage Company LLC
 Class: 32
 Ref.: HANBEV.9827T

REMARKS

Rule Beverage Company LLC (“Applicant”) submits the following remarks in response to the Office Action issued on June 17, 2019 in the matter of U.S. Application Serial No. 88/401,056 (“Subject Application”) for the mark RAGER TOTAL BODY FUEL (“Applicant’s Mark” or the “Mark”).

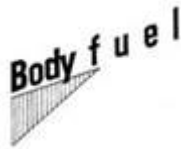
I. CLASS 32 AMENDMENT

Applicant requests the following amendment be entered for its Class 32 goods:

Class 32: Non-alcoholic beverages, **namely, energy drinks, sports drinks, and sports performance drinks**

II. THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN APPLICANT’S MARK AND THE CITED MARKS IN U.S. REGISTRATION NOS. 1454561, 1453428, OR 5107944 OWNED BY PROCAPS LABORATORIES, INC. AND ROBERT ASHLEY GREEN

Registration has been initially refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that there is an alleged likelihood of confusion between Applicant’s RAGER TOTAL BODY FUEL mark for “non-alcoholic beverages, namely, energy drinks, sports drinks, and sports performance drinks” (as amended) in Class 32 and the following marks (collectively, the “Cited Marks”):

Mark	Reg. No. / Reg Date	Class	Owner	Status
BODYFUEL	1454561 08/25/1987	32: thirst quenching soft drink and a concentrate for making the same	PROCAPS LABORATORIES, INC.	Registered
	1453428 08/18/1987	32: thirst quenching soft drink and a concentrate for making the same	PROCAPS LABORATORIES, INC.	Registered
BODYFUEL	5107944 12/27/2016	5: Dietary and nutritional supplements	Robert Ashley Green	Registered

Applicant submits that its Mark would not create a likelihood of confusion with any of the Cited Marks because the Cited Marks are entitled to a narrow scope of protection. The USPTO has allowed multiple marks containing the identical term “BODY FUEL,” to register within the beverage, food, and fitness space. Mr. Robert Ashley Green’s BODYFUEL mark (the third Cited Mark above) is only one example of a mark containing the identical term that has been allowed or registered since Procaps Laboratories registered its BODYFUEL marks in 1987. Furthermore, numerous registrations for marks containing both BODY and FUEL in the same space similarly demonstrate that the Cited Marks are entitled to a narrow scope of

protection given such marks have the same or similar meaning and commercial impression as the Cited Marks.

In addition, Applicant's Mark is distinct from the Cited Marks. Most noticeably, the first word of Applicant's Mark, RAGER, is arbitrary and highly distinctive, and thus, sufficiently differentiates Applicant's Mark from the Cited Marks. Given the crowded landscape of marks inclusive of BODY and FUEL in the relevant space, there is no likelihood of confusion with any of the Cited Marks.

A. Likelihood of Confusion Standard

The controlling standard for determining a likelihood of confusion is whether the purchasing public would mistakenly assume that the Applicant's goods or services originate with, are sponsored by, or are in some way associated with the goods or services offered in connection with the cited registration. FBI v. Societe: "M. Bril & Co.", 172 U.S.P.Q. 310 (T.T.A.B. 1971).

T.M.E.P. §1207.01 sets forth numerous factors that are relevant in making a determination of likelihood of confusion, including (1) the dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression; (2) the dissimilarity and nature of the goods and services as described in the application or registration; (3) the number and nature of similar marks in use on similar goods; (4) the conditions under which and buyers to whom sales are made, i.e., careful, sophisticated purchasing; (5) the similarity or dissimilarity of likely-to-continue trade channels; and (6) any other established fact probative of the effect of use. See T.M.E.P. § 1207.01; In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973) ("DuPont"). These factors are not listed in the order of merit and each may play a dominant role, depending on the case. Id. at 1361–62. Under this standard, registration of Applicant's Mark would not create a likelihood of confusion with the Cited Marks.

B. Standard Of Review

The courts have held that "[t]here is no likelihood of confusion where the potential for confusion is a *mere possibility, not a probability.*" Castle Oil Corp. v. Castle Energy Corp., 26 U.S.P.Q.2d 1481, (E.D. Pa. 1992) (citing Electronic Data Sales, Inc. v. Electronic Data Sys., 954 F.2d 713, 21 U.S.P.Q.2d 1388, 1393 (Fed. Cir. 1992)) (emphasis added). The Federal Circuit and the CCPA have held: "[w]e are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimus situations but with the practicalities of the commercial world, with which the trademark laws deal." Electronic Data Sales, 954 F.2d at 717 (citing Witco Chem. Co. v. Whitfield Chem. Co., 418 F.2d 1403, 1405, 164 U.S.P.Q. 43, 44-45 (C.C.P.A. 1969), aff'g, 153 U.S.P.Q. 412 (TTAB 1967)). Argument and conclusive assertions do not suffice to establish a likelihood of confusion. In re Consulting Services International Inc., Serial No. 76/376,622 (T.T.A.B. Oct. 3, 2003). Likelihood of confusion "is synonymous with 'probable' confusion – it is not sufficient if confusion is merely 'possible.'" J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §23:3 (4th ed. 2012) (citing American Steel Foundries v. Robertson, 269 U.S. 372, 383 (1926)). Applicant respectfully submits that there is no probability that the Applicant's Mark will create a likelihood of confusion with the Cited Marks.

C. The Cited Marks Are Not Entitled To A Broad Scope Of Protection

The Cited Marks do not warrant a broad scope of protection because the USPTO has already allowed numerous registrations inclusive of the term BODY FUEL and variations thereof for beverages and related goods to co-exist. Third-party registrations may be used to show that a particular term is not entitled to a broad scope of protection. See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). Accordingly, the USPTO has determined these marks can co-exist without confusion despite the common element of BODY and FUEL in each mark. Further, since use of a

mark in commerce was required to obtain a trademark registration (with limited exceptions), these marks are presumably concurrently being used in the marketplace for the goods identified in the registrations. Thus, consumers are well-accustomed to encountering these BODY FUEL variant marks in the beverage and food space and are able to distinguish between them.


Moreover, as the Federal Circuit held in Juice Generation, Inc. v. GS Enterprises LLC, Appeal No. 2014-1853 (Fed. Cir. July 20, 2015), “[t]he weaker the mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” Evidence of third-party use bears on the strength or weakness of a mark. Id.



a. The USPTO Has Permitted Identical Marks And Marks With The Same Or Similar Commercial Impression To Register In The Same Space As The Cited Marks


The common element in Applicant’s Mark and the Cited Marks is BODY FUEL, a descriptive term in the beverage and food space, which means to energize or replenish your body. The term “body” is defined as a noun referring to “the whole physical structure that is a person” according to the Cambridge English Dictionary. Additionally, Merriam-Webster defines “fuel” as a noun for “material used to produce heat or power by burning” as well as a verb meaning “[to] support or stimulate.” See Exhibit “A” for evidence of dictionary definitions for “body” and “fuel”. Thus, the term “body fuel” is descriptive for a substance, such as beverage or food, which sustains and supports a person’s physical body.



The term BODY FUEL is also similar to the term SPORTS FUEL. See e.g., Sportfuel, Inc. v. PepsiCo, Inc., 932 F.3d 589 (7th Cir. 2019). In Sportfuel, Inc. v. PepsiCo, Inc., the Seventh Circuit held that Gatorade’s use of the term “Sports Fuel” in its slogan, “The Sports Fuel Company” to sell a variety of food products designed for athletes, was descriptive. Id. at 599-600.

Below is a sample of registered or allowed marks in the relevant space that include the identical term BODY FUEL or contain “BODY” and “FUEL”, and thus have the same or a highly similar commercial impression as that of the Cited Marks (collectively referred to herein as the “Body Fuel Marks”). Aside from the first two marks owned by Procaps Laboratories, the rest of the marks are owned by different entities and were allowed or permitted to register after Procaps Laboratories’ marks registered.

Mark	Goods and Services	Reg. or App. No./Date	Owner	Status
BODYFUEL	INT. CL. 32 THIRST QUENCHING SOFT DRINK AND A CONCENTRATE FOR MAKING THE SAME	Reg. 1454561 Reg. 25-AUG-1987	PROCAPS LABORATORIES, INC.	Registered
	INT. CL. 32 THIRST QUENCHING SOFT DRINK AND A CONCENTRATE FOR MAKING THE SAME	Reg. 1453428 Reg. 18-AUG-1987	PROCAPS LABORATORIES, INC.	Registered
BODYFUEL	INT. CL. 5 DIETARY AND NUTRITION SUPPLEMENTS	Reg. 5107944 Reg. 27-AUG-2016	ROBERT ASHLEY GREEN	Registered
MOXIFIT BODY FUEL	INT. CL. 29 PREPACKAGED FOODS HAVING A PROTOCOL FOR WEIGHT LOSS USING LCHP	App 87872999 App 11-APR-2018	SUSAN RADWAY	Allowed

	<p>(LOW-CARB HIGH PROTEIN) BASED DIET, NAMELY, READY-TO-EAT ENTREE MEALS CONSISTING PRIMARILY OF MEAT, FISH, POULTRY OR VEGETABLES; SOUP, OMELETS, POTATO CHIPS, POTATO PUFFS, UNFLAVORED AND UNSWEETENED GELATINS, NUT-, FRUIT-, SOY- AND VEGETABLE-BASED FOOD BARS</p> <p>INT. CL. 30 PREPACKAGED FOODS HAVING A PROTOCOL FOR WEIGHT LOSS USING LCHP (LOW-CARB HIGH PROTEIN) BASED DIET, NAMELY, READY-TO-EAT MEALS CONSISTING PRIMARILY OF PASTA AND RICE; OATMEAL, PANCAKES, BREAKFAST CEREALS, CORN CHIPS, CORN PUFFS, PUDDINGS, CAKES, MUFFINS, FLAVORED AND SWEETENED GELATINS, WAFERS, GRAIN- AND CEREAL-BASED FOOD BARS, TEAS, COCOA</p>			
<p>BODY FUEL BISTRO</p> 	<p>INT. CL. 43 FAST CASUAL BISTRO STYLE RESTAURANT THAT SERVES NUTRITIONALLY BALANCES MEALS</p>	<p>Reg. 5553639 Reg. 04-SEP-2018</p>	<p>BODY FUEL BISTRO LLC</p>	<p>Registered</p>
<p>REAL BODY FUEL</p>	<p>INT. CL. 044 NUTRITION COUNSELING; CONSULTING SERVICES IN THE FIELDS OF HEALTH AND NUTRITION</p>	<p>Reg. 4947995 Reg. 06-JUL-2015</p>	<p>EVANS, RANDY</p>	<p>Registered</p>
<p>FUEL YOUR BODY</p>	<p>INT. CL. 32 COLAS; ENERGY DRINKS; POP; SOFT DRINKS; SOFT DRINKS, NAMELY, CARBONATED SOFT DRINKS AND SPORTS DRINKS</p>	<p>Reg 3464227 Reg 08-JUL-2008</p>	<p>UNIQUE BEVERAGE COMPANY, LLC</p>	<p>Renewed (Registered)</p>
<p>FUEL REFUEL YOUR BODY & MIND ENERGY DRINK</p> 	<p>INT. CL. 32 ENERGY DRINKS</p>	<p>Reg 4040229 Reg 18-OCT-2011</p>	<p>BIG BRANDS, LLC</p>	<p>Registered</p>
<p>FUEL YOUR BODY RIGHT!</p>	<p>INT. CL. 32 SMOOTHIES</p>	<p>Reg 4624940</p>	<p>ISMOOTHIES</p>	<p>Registered</p>

		Reg 21-OCT-2014	CAFE	
FUEL THE BODY, SUPPORT THE MIND	INT. CL. 5 DIETARY SUPPLEMENTS; NUTRITIONAL SUPPLEMENTS	Reg 5427944 Reg 20-MAR-2018	ZENWISE HEALTH LLC	Registered
FOS FUEL YOUR BODY 	INT. CL. 32 NON-ALCOHOLIC DRINKS, NAMELY, NUTRIENT DENSE ENERGY DRINKS FOR EVERYDAY USE SWEETENED WITH YACON (SMALLANTHUS SONCHIFOLIUS); NON-ALCOHOLIC COCKTAILS MIXES SWEETENED WITH YACON (SMALLANTHUS SONCHIFOLIUS); POWDERS USED IN THE PREPARATION OF NON-ALCOHOLIC DRINKS SWEETENED WITH YACON (SMALLANTHUS SONCHIFOLIUS); POWDER MIXTURE FOR THE PRODUCTION OF NON-ALCOHOLIC DRINKS BASED ON NATURAL AND NUTRITIONAL PRODUCTS, NAMELY, MACA, CAMU CAMU, AND PURPLE CORN, ALL SWEETENED WITH YACON (SMALLANTHUS SONCHIFOLIUS); NON-ALCOHOLIC DRINKS BASED ON NATURAL AND NUTRITIONAL PRODUCTS, NAMELY, MACA, CAMU CAMU, AND PURPLE CORN, ALL SWEETENED WITH YACON SYRUP (SMALLANTHUS SONCHIFOLIUS); WHEREIN YACON CONTAINS FRUCTOOLIGOSACCHARIDE (FOS) IN ITS NATURAL FORM	Reg 5324136 Reg 31-OCT-2017	UHTCO CORPORATION (Canada)	Registered
FUEL FOR THE MIND, BODY AND SOUL	INT. CL. 32 ENERGY DRINKS	Reg 4716545 Reg 07-APR-2015	HEALTHY BEVERAGE, LLC	Registered
FUEL YOUR BODY. ACTIVATE YOUR MIND.	INT. CL. 5 CAFFEINE PREPARATIONS FOR STIMULATIVE USE IN THE FORM OF CHEWING GUM; VITAMIN ENRICHED CHEWING GUM FOR MEDICAL PURPOSES	Reg 5301110 Reg 03-OCT-2017	NEUROGUM, INC.	Registered
RAW NATURE'S FUEL FUEL THE BODY..CALM THE	INT. CL. 30 GLUTEN-FREE WAFFLE MIXES, PANCAKE	Reg 5483658 Reg 05-JUN-2018	NATUREGIRL INDUSTRIES	Registered

<p>CRAVE!</p> 	<p>MIXES, OATMEAL, MUFFINS, AND HIGH-PROTEIN CEREAL BARS AND BITES</p>			
<p>FUELING BODIES FUNDING MINDS</p>	<p>INT. CL. 29 SNACK BARS, NAMELY, NUT-BASED SNACK BARS, NUT AND SEED-BASED SNACK BARS, FRUIT-BASED SNACK BARS, AND FRUIT-BASED SNACK BARS ALSO CONTAINING GRAIN; FOOD BARS, NAMELY, FRUIT-BASED FOOD BARS, FRUIT-BASED FOOD BARS ALSO CONTAINING GRAIN, NUT-BASED FOOD BARS, AND NUT AND SEED-BASED FOOD BARS</p>	<p>Reg 4347443 Reg 04-JUN-2013</p>	<p>LIN-MAR PARTNERS INCORPORATED</p>	<p>Registered</p>
<p>FUELING BODIES FUNDING MINDS</p>	<p>INT. CL. 30 SNACK BARS, NAMELY, SNACK BARS MADE FROM BROWN RICE SYRUP, CHOCOLATE-BASED SNACK BARS, GRAIN-BASED SNACK BARS, AND GRAIN-BASED SNACK BARS ALSO CONTAINING NUTS OR FRUIT; FOOD BARS, NAMELY, FOOD BARS MADE FROM BROWN RICE SYRUP, CHOCOLATE-BASED FOOD BARS, GRAIN-BASED FOOD BARS, AND GRAIN-BASED FOOD BARS ALSO CONTAINING NUTS OR FRUIT</p>	<p>Reg 4347444 Reg 04-JUN-2013</p>	<p>LIN-MAR PARTNERS INCORPORATED</p>	<p>Registered</p>
<p>V FASTEST BODY FUEL SAME DAY RECOVERY NO BLOATING NO CRASHING</p> 	<p>INT. CL. 5 DIETARY AND NUTRITIONAL SUPPLEMENTS</p>	<p>App 88275490 App 24-JAN-2019</p>	<p>VITARGO, INC.</p>	<p>Pending (Approved for publication)</p>
<p>I AM THE ENGINE OF MY OWN DESTINY, WHY SHOULD MY BODY NOT</p>	<p>INT. CL. 5 DIETETIC PREPARATIONS AND SUPPLEMENTS, NAMELY,</p>	<p>Reg 4830245 Reg 13-OCT-2015</p>	<p>GOODWIN, PAUL (New Zealand)</p>	<p>Registered</p>

HAVE THE BEST FUEL	DIETARY AND NUTRITIONAL SUPPLEMENTS; HEALTH FOOD SUPPLEMENTS MADE PRINCIPALLY OF VITAMINS; HEALTH FOOD SUPPLEMENTS MADE PRINCIPALLY OF MINERALS; PREPARATIONS OF VITAMINS; VITAMIN PREPARATIONS FOR HUMAN CONSUMPTION; VITAMIN PREPARATIONS IN THE NATURE OF FOOD SUPPLEMENTS; DIETETIC DRINKS, NAMELY, DIETARY BEVERAGE SUPPLEMENTS FOR HUMAN CONSUMPTION IN LIQUID AND DRY MIX FORM FOR THERAPEUTIC PURPOSES, DIETARY SUPPLEMENT DRINK MIXES, DIETARY SUPPLEMENTAL DRINKS ADAPTED FOR MEDICAL PURPOSES; DIETETIC FOOD, NAMELY, DIETARY FOOD SUPPLEMENTS FOR MEDICAL PURPOSES; MULTI-VITAMIN FORTIFIED FRUIT JUICE BEVERAGES FOR MEDICAL USE; VITAMIN FORTIFIED DRINKS; MINERAL PREPARATIONS FOR MEDICAL PURPOSES FOR USE AS SUPPLEMENTS TO DRINKING WATER INT. CL. 32 NON-ALCOHOLIC BEVERAGES, NAMELY, FRUIT DRINKS, ISOTONIC DRINKS, POP, SOFT DRINKS; NON-ALCOHOLIC CARBONATED DRINKS; ENERGY DRINKS; SPORTS DRINKS			
--------------------	---	--	--	--

Attached hereto as **Exhibit B** are screenshots serving as marketplace evidence of some of the above Body Fuel Marks which are concurrently in use. The fact that so many identical and similar marks coexist in the beverage and food space confirms that the Cited Marks are not entitled to broad protection. The attached **Exhibit C** contains printouts of the above marks from Trademark Status and Document Retrieval (“TSDR”).

Given the differences in Applicant’s Mark and the Cited Marks, and in light of the current landscape of Body Fuel Marks in the relevant space, it would be inconsistent for the USPTO to take the position that Applicant’s Mark is not allowed to similarly coexist. Thus, the USPTO should permit Applicant’s Mark to proceed to publication.

D. The Marks Are Dissimilar In Appearance

In making a determination of a likelihood of confusion, the marks must be compared in their entireties and should not be dissected and their parts compared separately. In other words, splitting a mark into its various components and comparing only certain portions of one mark with another mark is not proper. Massey Junior College, Inc. v. Fashion Institute of Technology, 492 F.2d 1399, 181 U.S.P.Q. 272 (C.C.P.A. 1974). A proper comparison of Applicant's Mark to the Cited Marks, and in light of the wide spread use of "BODY FUEL" in the relevant space, shows that Applicant's Mark and the Cited Marks are sufficiently dissimilar. See Little Caesar Enters., Inc. v. Pizza Caesar, Inc., 834 F.2d 568, 571 (6th Cir. 1987) (holding that, despite prominent component shared by PIZZA CAESAR USA and LITTLE CAESARS, differences in sound and appearance made them dissimilar).

The mere fact that Applicant's Mark and the Cited Marks contain the term BODY FUEL is not sufficient to cause a likelihood of confusion per se. See Armstrong Cork Company v. World Carpets, Inc., 590 F.2d 496 (5th Cir. 1979) (finding no likelihood of confusion between ARMSTRONG WORLD INDUSTRIES, INC. and WORLD both for carpets sold in "similar sales and distribution methods . . . through the same retail stores" and advertised "in the same magazines, often on adjacent pages," and stating that "[t]he mere fact that Armstrong's proposed corporate name contains the word World does not, of itself, make the name 'substantially similar' to World's trademark."); Citigroup Inc. v. Capital City Bank Group, Inc., 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (affirming TTAB's holding that contemporaneous use of applicant's CAPITAL CITY BANK marks for banking and financial services, and opposer's CITIBANK marks for banking and financial services, is not likely to cause confusion, based, in part, on findings that the phrase "City Bank" is frequently used in the banking industry and that "CAPITAL" is the dominant element of applicant's marks, which gives the marks a geographic connotation as well as a look and sound distinct from opposer's marks); In re Farm Fresh Catfish Co., 231 USPQ 495, 495-96 (TTAB 1986) (holding CATFISH BOBBERS (with "CATFISH" disclaimed) for fish, and BOBBER for restaurant services, not likely to cause confusion, because the word "BOBBER" has different connotation when used in connection with the respective goods and services).

Applicant submits that its mark, RAGER TOTAL BODY FUEL, is sufficiently different from the Cited Marks. The differing elements, "RAGER" and "TOTAL," are the first two words in Applicant's Mark. RAGER, being the first word, is arbitrary and the most significant word in Applicant's Mark, particularly since consumers will naturally pause after the word RAGER and view it as the dominant term in the Mark. See T.M.E.P. § 1207.01(b)(viii) ("When assessing the likelihood of confusion between compound word marks, although each mark must be considered as a whole, it is appropriate to consider whether a portion of the mark is dominant in creating the mark's commercial impression."). Consumers are more likely to perceive a fanciful or arbitrary term, such as RAGER, as the dominant source-identifying feature of a mark. See Id.

Further, if the common element of two marks is "weak" in that it is highly suggestive, such as BODY FUEL, of the named goods, it is unlikely that consumers will be confused unless the overall combinations have other commonality. See Id.; Juice Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, 1338-40, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015) (remanded for consideration of whether and to what degree the phrase PEACE & LOVE was suggestive or descriptive in the food-service industry); In re FabFitFun, Inc., 127 USPQ2d 1670, 1675 (TTAB 2018) (holding I'M SMOKING HOT for cosmetics and related non-medical personal care items and SMOKIN' HOT SHOW TIME for cosmetics not likely to cause confusion based on a totality of the evidence showing that the shared wording is somewhat weak in view of its suggestiveness and that the marks overall convey different commercial impressions).

Again, the following third party registrations co-exist with the Cited Marks:

- BODY FUEL BISTRO (U.S. Reg. No. 5553639) owned by Body Fuel Bistro LLC.
- REAL BODY FUEL (U.S. Reg. No. 4947995) owned by Randy Evans.
- FUEL YOUR BODY (U.S. Reg. No. 3464227) owned by the Unique Beverage Company, LLC.
- FUEL YOUR BODY RIGHT! (U.S. Reg. No. 4624940) owned by ISMOOTHIES CAFE.
- FUEL THE BODY, SUPPORT THE MIND (U.S. Reg. No. 5427944) owned by Zenwise Health LLC.
- FOS FUEL YOUR BODY (U.S. Reg. No. 5324136) owned by UHTCO Corporation.
- FUEL REFUEL YOUR BODY & MIND ENERGY DRINK (U.S. Reg. No. 4040229) owned by Big Brands, LLC.

Since Applicant's Mark RAGER TOTAL BODY FUEL is more distinct, if not equally as distinct, as the above third party registered marks, this factor weighs heavily for a finding of no likelihood of confusion.

E. The Marks Are Distinct In Sound When Spoken

In addition to their differences in appearance, Applicant's Mark and the Cited Marks are dissimilar in sound when spoken. Applicant's Mark is comprised of four words and seven syllables. Additionally, when spoken, consumers are likely to naturally pause after the first word RAGER before saying TOTAL BODY FUEL given the arbitrary nature of the Mark in its entirety, for the goods at issue. By contrast, the Cited Marks are comprised of one word and three syllables. The Cited Marks would likely be pronounced without any pause, given that the Cited Marks contain only one word.

The fact that both Applicant's Mark and the Cited Marks contain similar terms is not sufficient to support a finding of a likelihood of confusion. Even if the marks are phonetically similar, for example, "V-8 and VA", other elements of difference may lead to a final finding of no likely confusion. 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:22 (5th ed. 2017). In Textronix v. Daktronics, Inc., the court noted that "[b]ecause marks, including any suggestive portions thereof, must be considered in their entireties, the mere presence of a common, highly suggestive portion is usually insufficient to support a finding of a likelihood of confusion." 534 F.2d 915, 916–17 (2d Cir. 1976) (citations omitted). In the subject case, Applicant's Mark and the Cited Marks are easily distinguishable when spoken. Therefore, there is no likelihood of confusion.

F. The Marks Have Different Meanings And Commercial Impressions

Consumers will recognize the differences between Applicant's Mark and the Cited Marks, and will be able to distinguish between the meanings and commercial impressions of the marks. "Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods so that there is no likelihood of confusion." T.M.E.P. § 1207.01(b)(v).

Here, there is a clear difference in the meaning and commercial impression of the marks. The appearance and pronunciation of the first word in Applicant's Mark, RAGER, when combined with TOTAL BODY FUEL is arbitrary and gives a highly distinct commercial impression. Lexico, powered by the Oxford Dictionary, defines "rager" as a noun meaning a "person or thing that rages". See Exhibit D.

When properly considered in its entirety, Applicant's Mark gives an overall commercial impression of power, independence, and dominance, which is unique when considering the goods covered by Applicant's Mark. By contrast, the Cited Marks have no arbitrary meaning and the commercial impressions of the marks are entirely distinct. The Cited Marks' lack of distinctiveness is further demonstrated by the numerous Body Fuel Marks which coexist in the marketplace in the food and beverage space.

Since the marks have different meanings and distinct commercial impressions, their simultaneous use on their respective goods will not lead to a likelihood of confusion.

III. CONCLUSION

In view of the foregoing remarks, Applicant respectfully requests that confusion based on likelihood of confusion be withdrawn, and that the Examining Attorney approve the Subject Application for publication. Should the Examining Attorney have any questions or require any additional information, the Examining Attorney is encouraged to contact the undersigned.

31834635

Exhibits Attached Separately