

Registration preliminarily was refused on the ground that SHELLFISH, EVOLVED was considered by the Examining Attorney to be deceptive, under Section 2(a) of the Trademark Act. Applicant respectfully submits that the SHELLFISH, EVOLVED trademark is not deceptive.

As set forth in the Office Action, in order for a term to be deemed “deceptive,” all three of the following criteria must be met:

- (1) the term must be misdescriptive of the character, quality, function, composition or use of the goods;
- (2) *prospective purchasers* must be likely to believe that the misdescription actually describes the goods; and
- (3) the misdescription must be likely to affect the purchasing decision of a *significant* portion of *relevant consumers*.

See In re Tapco Int’l Corp., 122 USPQ2d 1369, 1371 (TTAB 2017) (citing In re Budge Mfg. Co., 857 F.2d 773, 775, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988) (emphasis added)); TMEP §1203.02(b); *see also* In re Spirits Int’l, N.V., 563 F.3d 1347, 1353, 1356, 90 USPQ2d 1489, 1492-93, 1495 (Fed. Cir. 2009).

Here, neither the 2nd nor the 3rd criteria are satisfied.

While it is true that “a mark is deceptive even if only a portion of the mark is deceptive,” it also is the case that the “[m]isdescriptiveness of a term may be negated by its meaning in the context of the whole mark inasmuch as the combination is seen together and makes a unitary impression.” In re Budge Mfg. Co. Inc., 8 USPQ2d 1259, 1261 (Fed. Cir. 1988); *see also* In re The Hyman Companies, Inc., Serial No. 85/483397 (TTAB Jan. 14, 2016) (critical question is whether addition of suffix -ESS provides basis for *not* believing that DIAMONDNESS goods *are* made of real diamonds; not necessary to find that DIAMONDNESS would be understood to in fact refer to simulated diamonds, in order to find mark nondeceptive). Here, the term SHELLFISH *together with* the term EVOLVED suggests a transformed product, namely, a food product, with the flavor and texture of shellfish, made with seaweed and all-natural plant extracts.

The inclusion of a term such as EVOLVED, is particularly significant in the field of food, where plant-based imitation products make up a large and growing industry, and where product names often include the name of the product being simulated, *coupled with* another term or terms evoking that the product has been transformed. Note, for example, Shining Ocean, Inc.’s CRAB SMART imitation crab product, <http://kanimi.com/products-retail/crab-smart>; the Beyond Meat imitation meat products, <https://www.beyondmeat.com/products/> (e.g., BEYOND BEEF; BEYOND SAUSAGE); Light Life’s SMART imitation meat products,

<https://lightlife.com/products/> (e.g., SMART SAUSAGES, SMART BACON, and SMART TENDERS); Hungry Planet, Inc.'s MATCH MEATS imitation meat products, <https://www.matchmeats.com/#new-page>; and Impossible Foods' IMPOSSIBLE BURGERS imitation meat products, <https://impossiblefoods.com/food/>. See also <https://www.wellandgood.com/good-food/plant-based-food-trend/>; <https://www.forbes.com/sites/bernhardschroeder/2019/06/18/plant-based-food-products-started-with-milk-now-taking-on-meat-whats-next/#1aae6f4621da>. Screen prints of the web site pages listed above are attached hereto as Exhibit A.

In the application at hand, the term EVOLVED is akin to terms like BEYOND, SMART, MATCH, and IMPOSSIBLE. See, e.g., Cambridge Dictionary definition of “evolved,” which lists “get beyond” (among others) as a synonym, <https://dictionary.cambridge.org/us/dictionary/english/evolved>; and Lexico.com's definition of “evolved,” which lists “change,” “transform,” and “metamorphose” (among others) as synonyms, <https://www.lexico.com/synonym/evolve>. Screen prints of the dictionary pages referenced above are attached hereto as Exhibit B.

“To make a *prima facie* showing of what prospective purchasers ‘would be likely to believe’ is an admittedly difficult burden,” one that is on the Examining Attorney. In re The Hyman Companies, Inc., Serial No. 85/483397, p.7 (TTAB January 14, 2016). The conclusion that “consumers would be likely to believe that Applicant’s food products are shellfish” was based on a *Wikipedia* page describing shellfish and on three online articles regarding shellfish, two of which propound the healthfulness of shellfish, and one of which contains a listing of the “10 most expensive seafood items.” Yet, nothing in those materials proves that prospective purchasers of Applicant’s product, much less a significant portion of those particular purchasers, would believe that the SHELLFISH, EVOLVED slogan refers only to actual shellfish, rather than to plant-based products that taste and cook like shellfish.

In assessing whether prospective purchasers would “be likely to believe that the misdescription actually describes the goods,” it is critical to know who the prospective purchasers are. Significantly, Applicant will be selling its products only to foodservice distributors and to foodservice operators, not to the general public. As defined in *Wikipedia*, a foodservice distributor is “a company that provides food and non-food products to restaurants, cafeterias, industrial caterers, hospitals and nursing homes,” and the restaurants, cafeterias, and other entities and institutions responsible for meals prepared outside the home are called foodservice operators. See *Wikipedia* page for Foodservice Distributor, attached hereto as Exhibit C. Foodservice distributors and foodservice operators necessarily must have expertise in food products, and must pay painstakingly close attention to the composition of the food products they are purchasing. In the case of Applicant’s products, foodservice distributors and operators will be purchasing such products specifically *because* they are *not* shellfish, and because they instead *are* plant-based products that taste and cook just like shellfish.

There simply is no chance that any foodservice distributor or foodservice operator will mistakenly believe that Applicant's products are made of shellfish. All of the foodservice distributors and operators to which Applicant's products will be sold require participation in the GS1 Global Data Synchronization Network ("GDSN"). The GDSN is "an internet-based, interconnected network of interoperable data pools and a global registry that enable companies around the globe to exchange standardized and synchronized supply chain data with their trading partners." See GDSN 3.1 Trade Item Implementation Guide, Release 32, Ratified, Nov 2019, p. 21, © 2019 GS1), select pages of which are attached hereto as Exhibit D. (View a complete version of the GDSN 3.1 Trade Implementation Guide, Release 32, at https://www.gs1.org/docs/gdsn/tiig/3_1/GDSN_Trade_Item_Implementation_Guide.pdf.) In order to upload a food product into the GDSN, a detailed listing of *every single* ingredient in the product is required, along with identifications of the product's microbiological and physiochemical characteristics, details regarding preparation of the product, and applicable nutritional and health claims, among other things. *Id.* at pp. 400-401. See Sample GDSN food product ingredient data listing, *Id.* at 402-409.¹

Consequently, as a practical matter, there is no reason to believe that *any* of the prospective purchasers at issue, much less a significant share of them, would ever have cause to believe that Applicant's products contain shellfish. See Electronic Design & Sales Inc., 21 USPQ2d at 1391 (*quoting* Witco Chem. Co. v. Whitfield Chem. Co., 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969)) ("We are not concerned with mere theoretical possibilities of confusion, deception or mistake or with de minimis situations, but with the practicalities of the commercial world, with which the trademark laws deal").

Applicant is amenable to amending its identification of goods, to specifically indicate that it will be selling its products only directly to foodservice distributors and operators, if the Examining Attorney would consider such an amendment helpful. The following amended identification would be acceptable to Applicant: "Sustainable seafood, not live; seafood substitutes; imitation shrimp; imitation crab; imitation lobster; imitation shellfish; plant-based seafood substitutes; plant-based shrimp substitutes; plant-based crab substitutes; plant-based lobster substitutes; plant-based shellfish substitutes; *all of the foregoing sold directly to foodservice distributors and operators,*" in International Class 29 (newly-added wording in italics).

¹ In addition, the SHELLFISH, EVOLVED slogan always will be used by Applicant in conjunction with other trademarks and with other wording from which there will be no question about the makeup of Applicant's products. All packaging and labeling for Applicant's products will make plain -- indeed, highlight -- that the products are plant-based.

Notably, and consistent with the common use in the food industry of trademarks for substitute/imitation products that include the name of the product being simulated, *together with* one or more other terms suggesting that the product is something other than the product being simulated, is the fact that the USPTO’s Principal Register reflects numerous registrations of such marks.² The chart below provides a sampling of such registrations:

Mark	Reg. No.	Goods	Owner
CRAB SMART	3306367	Imitation crab meat with Omega 3 fatty acids added	Shining Ocean, Inc.
NEAT EGG	4787126	Egg substitute	Atlantic Natural Foods, Llc
REBEL CHEESE	5951474	Cheese substitutes (among other things)	Rebel Cheese LLC
OMNIPORK	5708390	Meat substitutes; formed textured plant-based proteins being foodstuffs for human consumption; formed textured plant-based proteins used as ingredient for foods	Plant A Foods Hong Kong Limited
MATCH MEATS	5761593	Meat substitutes	Hungry Planet Holdings, Inc
MATCH MEAT	5755762	Meat substitutes	Hungry Planet Holdings, Inc
CHEESE-MOR	4230999	Cheese substitutes, namely, an imitation cheese blend for processed cheese products	Allied Blending, L.P.
SMART WINGS	3774383	Vegetable-based meat substitutes	Greenleaf Foods, SPC

² Oftentimes, such registrations include a disclaimer of the product being simulated.

Mark	Reg. No.	Goods	Owner
SMART TENDERS	3744231	Vegetable-based meat substitutes	Greenleaf Foods, SPC
SMART SAUSAGES	3522138	Soy based food products used as sausage substitutes	Greenleaf Foods, SPC
SMART STRIPS	3202543	Meat substitutes	Greenleaf Foods, SPC
SMART BACON	2704274	Soy based bacon substitute	Greenleaf Foods, SPC
SMART DOGS	2686279	Soy based hot dog substitute	Greenleaf Foods, SPC
SMART CUTLETS	2749717	Soy based meat substitutes	Greenleaf Foods, SPC
SMART PATTIES	4827915	Soy-based meat substitute	Greenleaf Foods, SPC
BEYOND BEEF	4654352	Meat substitutes; vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND CHICKEN	4654351	Meat substitutes; vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND SAUSAGE	5504568	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND MEAT	4314689	Meat substitutes; vegetarian meat products; plant-based meat substitutes	Beyond Meat Inc.
THE BEYOND BURGER	5101972	Meat substitutes; vegetarian meat products; plant-based meat substitutes	Beyond Meat Inc.

Mark	Reg. No.	Goods	Owner
BEYOND CHEESE	5675504	cheddar cheese substitutes, mozzarella cheese substitutes, parmesan cheese substitutes, Emmental cheese substitutes, herb cheese substitutes, and smoked cheese substitutes; Cheese substitutes (among other things)	Beyond Cheese Ltd.
A CUT ABOVE MEAT	5878461	meat substitutes	Veje LLC
THE FUTURE OF MILK	5618675	plant-based beverage used as a milk substitute made from peas	Wm. Bolthouse Farms, Inc.
KRABBYCAKES	1938121	Appetizers, namely cakes made from imitation crab meat	King & Prince Seafood Corporation
KROGER CRAB SELECT	3705758	Imitation crab meat	The Kroger Co. of Michigan
RANGE-FREE PORK	5698334	Meat substitutes	Hungry Planet, Inc.
RANGE-FREE SAUSAGE	5698335	Meat substitutes	Hungry Planet, Inc.
RANGE-FREE CHICKEN	5698333	Meat substitutes	Hungry Planet, Inc.
RANGE-FREE BEEF	5698332	Meat substitutes	Hungry Planet, Inc.
EGG WATCHERS	5376396	Egg substitute	Tofutti Brands Inc.
EGG BEATERS	0997653	Cholesterol-free egg substitute	Conagra Foods Rdm, Inc.
BURIED CHEESE	5315654	Cheese substitutes (among other things)	Assyrian Kitchen, Inc DBA Ancient Cooking Inc.
ALPHA BURGER	5064177	Vegetable-based meat substitutes	The Miso Brothers, Inc.
ALPHA DOG	5064176	Vegetable-based meat substitutes	The Miso Brothers, Inc.

Mark	Reg. No.	Goods	Owner
ALPHA BAGEL DOG	5064174	Vegetable-based meat substitutes	The Miso Brothers, Inc.
MEAT WITHOUT THE MIDDLE MAN	5082927	Vegetarian food products in the nature of plant-based protein meat substitutes	Greenleaf Foods, Spc
EGGS DONE RIGHT	4410096	Egg substitute (among other things)	eFoods Direct, LLC
BIG FRANKS	5122393	Vegetable-based meat substitutes	Atlantic Natural Foods, LLC
BEYOND EGGS	4777500	Vegetable-based egg substitute	Just, Inc.
BURIED CHEESE	5315654	Cheese substitutes (among other things)	Assyrian Kitchen, Inc.
RIGHTEOUS MEATS	4740134	Meat substitutes; Vegetable-based meat substitutes	Societe Des Produits Nestle S.A.
BEYOND SUGAR	4789032	Sugar substitutes (among other things)	John R. Schindler DBA Omega Creamery
NOBODY DOES IT BUTTER	2096027	Butter substitutes	Shurfine International, Inc.
BUTTER 2.0	4495617	Butter substitutes (among other things)	Prosperity Organic Foods, Inc.
MACRO MEATS (and design)	5377388	Meat substitutes prepared from vegetables as textured vegetable protein; Vegetable based meat substitutes (among other things)	Macro Investments Pty. Ltd.
THE AMAZING EGG	2222050	Egg substitutes	Supervalu Licensing LLC
ELZAN SUGAR	4597226	Sugar substitutes (among other things)	Corim Industries

Mark	Reg. No.	Goods	Owner
HEAVENLY ICE CREAM	4613149	Frozen dessert consisting of fruit and cream or cream substitute (among other things)	Ambrocio Acorda
ALMOND CRÈME	5097536	Ice cream substitute	Willow Wood Partners One, LLC
GRASS FED COFFEE	5261483	Artificial coffee; coffee substitutes (among other things)	John Hee-Jong Park
SIN-FREE SUGAR BY UBB	4910173	Sugar substitutes (among other things)	Baxco Pharmaceutical, Inc.
MIRACLE RICE	4486880	rice substitute made from processed shirataki noodles.	Carp Media LLC
SUGAR TWIN (and design)	4342677	Sugar substitutes (among other things)	B&G Foods North America, Inc.
DAIRY COMPLETE	4897136	dairy substitutes, namely, artificial cream; dairy substitute based fillings for cakes and desserts, namely, artificial cream; skimmed milk substitutes in powdered form; whole milk substitutes in powdered form (among other things)	Kerry Luxembourg S.À.R.L.
GRATEFUL SPOON GELATO (and design)	3889596	soy based gelato substitute (among other things)	Robert A. Lynee
SALT ANSWER	4091313	salt substitute mixed seasoning; salt substitutes for use in food (among other things)	Ajinomoto Co., Inc.

Mark	Reg. No.	Goods	Owner
SAFESALT	4580891	Salt substitute for use in food	Health & Science, LLC
PERFECT BURGER	5971890	Meat substitutes; vegan and vegetarian meats; plant-based meat substitutes	Dr. Praeger's Sensible Foods, Inc.

Screen prints of the respective TSDR page for each registration included in the chart above are attached as Exhibit E.

In addition, the following pending applications for registration of trademarks that include the name of the food product being simulated, *together with* another term or terms suggesting that the product is something other than the product being simulated, all have been approved for registration on the Principal Register (oftentimes with a disclaimer of the product being simulated):

Mark	Serial. No.	Goods	Owner
SEAFOOD WITHOUT SACRIFICE	88/250643	Plant-based vegan processed food, namely, canned textured plant proteins for use as a meat substitute, meat and seafood alternatives and other meat substitutes made from beans, grains, vegetables and sea vegetables; plant-based vegan processed frozen food, namely, textured plant proteins for use as a meat substitute, meat and seafood alternatives and other meat substitutes made from beans, grains, vegetables and sea vegetables; plant-based vegan processed shelf-stable packaged food, namely, textured plant proteins for use as a meat substitute, meat and seafood alternatives and other meat substitutes made from beans, grains, vegetables and sea vegetables; plant-based vegan processed frozen prepared meals consisting primarily of meat and seafood alternatives and other meat substitutes made from vegetables, grains, beans, and sea vegetables; plant-based vegan processed refrigerated prepared meals consisting primarily of meat and seafood alternatives, and other meat substitutes made from vegetables, grains, beans, and sea vegetables; plant-based vegan processed shelf-stable packaged dips and soups made from vegetables, grains, beans, sea vegetables and fruit	SeaCo Foods International, Inc.
SEAFOOD IS AWESOME. EXTINCTION IS NOT.	87/441033	Vegetable-based alternatives to seafood, namely, vegetable-based seafood substitutes	Ocean Hugger Foods, Inc.

Mark	Serial. No.	Goods	Owner
FISH, FOR COMPLIMENTS	86/884270	Imitation seafood (among other things)	Trident Seafoods Corporation
C' SHRIMP	88/444099	shrimp substitute made from textured vegetable protein	Atlantic Natural Foods, LLC
FEEL BETTER BACON	88/514986	Vegetable-based or plant-based meat substitutes; eggplant-based meat substitute (among other things)	Comarco Quality Pork Products, Inc.
INCREDIBLE BURGER	88/554395	Plant-based food products, namely, plant-based meat substitutes	Incredible Brands, LLC
INCREDIBLE NUGGETS	88/554377	Plant-based food products, namely, plant-based meat substitutes	Incredible Brands, LLC
PERFECT TURK'Y BURGER	88/697877	Meat substitutes; vegan and vegetarian meats; plant-based meat substitutes	Dr. Praeger's Sensible Foods, Inc.
ZEN MEAT	87/804962	Soy-based meat substitutes; Plant-based meat substitutes; Meat substitutes (among other things)	Morinaga & Co., Ltd.
WICKED MEATY	88/341675	Vegetable-based meat substitutes (among other things)	Wicked Healthy, LLC
FUTURE BURGER	88/500039	Veggie burger patties in the nature of patties of soybeans, peas and chickpeas; Vegetable-based minced meat; Vegetable-based meatballs (among other things)	Fazenda Futuro Produtos Alimentícios SA
BEYOND FISH	87/512309	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND CRAB	87/512304	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.

Mark	Serial. No.	Goods	Owner
BEYOND SHRIMP	87/512310	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND TUNA	87/512314	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND LAMB	87/512318	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND HAM	87/512298	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND PORK	87/512293	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND TURKEY	87/512291	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND FRIED CHICKEN	88/592176	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND MEATBALL	88/441678	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND MEAT BALLS	88/468210	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND BONELESS WINGS	88/571277	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.

Mark	Serial. No.	Goods	Owner
BEYOND BREAKFAST SAUSAGE	88/441689	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND SPLIT SAUSAGE	87/899827	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND HOT DOGS	87/512332	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND CHILI	88/441693	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND BURRITO	88/337055	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
BEYOND GROUND	87/512323	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Beyond Meat, Inc.
SHAMELESSLY MEATY	88/510977	Vegan meat substitutes; vegan vegetable-based meat substitute (among other things)	Thrive Nutrition Inc
PRIMORDIAL BURGER	88/011725	Meat substitutes; vegan and vegetarian meat products; plant-based meat substitutes	Paul Stamets
IMPOSSIBLE BURGER	87/924475	Substitutes for food, namely, plant-based meat substitutes, plant-based fish substitutes, and plant-based chicken substitutes	Impossible Foods Inc.
IMPOSSIBLE SAUSAGE	88/391621	Substitutes for food, namely, plant-based meat substitutes, plant-based fish substitutes, and plant-based chicken substitutes	Impossible Foods Inc.

Mark	Serial. No.	Goods	Owner
IMPOSSIBLE CHEESESTEAK	88/226582	Substitutes for food, namely, plant-based meat substitutes, plant-based fish substitutes, and plant-based chicken substitutes; substitutes for foods made from animals or animal products, namely, meat substitutes in the nature of plant-based burger patties, plant-based snack foods in the nature of vegetable and seed based snack foods; meat substitutes; fish substitutes; plant-based fish substitutes comprised of grains and vegetables (among other things)	Impossible Foods Inc.
NEXT LEVEL BURGER	88/560401	Veggie burger patties; plant-based burger patties	Next Level Burger Company, Inc.
UNREAL CORNED BEEF	88/699872	Vegetable-based meat substitutes (among other things)	Unreal Deli
EGG POP!	88/422470	Egg Substitutes (among other things)	Luberski, Inc.
GARDENCHICKEN	88/113455	Meatless chicken breast composed of meat substitutes	Paul Wener
BETTER BUTCHER	88/514897	Veggie food products, namely, vegetable based meat and fish substitutes; textured vegetable protein for use as a meat substitute; sausages made with meat substitutes; vegetarian sausages; jerky made with meat substitutes and vegetables; meat substitutes; vegetable based meat substitutes; meat substitute based charcuterie; food package combinations consisting of vegan cheese and meat substitutes (among other things)	Kellogg North America Company

Mark	Serial. No.	Goods	Owner
GREENER WEINER	88/537192	Vegetable-based meat substitutes, vegetable-based sausage substitutes, vegetable-based kielbasa substitutes (among other things)	Bacik Company of N.Y., Inc.
SMART BUTTER	88/393742	Butter substitutes (among other things)	American Health Foods, Inc.
GENIUS BUTTER	88/393452	Butter substitutes (among other things)	American Health Foods, Inc.
CIVIL JERKY	87/811634	Meat substitutes	Societe Des Produits Nestle S.A.
QUESTLOVE'S CHEESESTEAK	88/640261	Sandwiches, including plant-based cheesesteaks and plant-based burger sandwiches	Ahmir Thompson

Screen prints of the respective TSDR page for each application included in the chart above are attached as Exhibit F.³

For all of the marks in the above 2 charts, evidence could readily be found that: (1) words, such as SHRIMP, CRAB, BACON, SAUSAGE, EGG, CHICKEN, TURKEY, BUTTER, and SUGAR, have a defined meaning and (2) articles have been written regarding whether that item of food is healthy. Yet, the above marks all are either registered or approved for registration, on the Principal Register, for substitute/imitation versions of the products. In fact, Applicant was unable to find more than one Section 2(a) refusal for any mark filed in Int'l Class 29, for use in connection with products identified as being an imitation or substitute product, that include the name of the food product being substituted/imitated, and, the subject mark in that single instance

³ In addition, there are several pending applications for trademarks for substitute/imitation food products that include the name of the product being simulated together with another term suggesting that the product is a transformed version of the product being simulated, for which Office Actions have issued, but with no 2(a) refusal. *See, e.g.*, IMAGINE MEATS, Serial No. 88/559568; WONDERMEAT, Serial No. 88/523507; RED RIVER EGG, Serial No. 88/422481; BETTER BURGER (and design), Serial No. 88/509322; BABY JACK RIBS, Serial No. 88/601239; BLACK SHEEP BURGER, Serial No. 88/618708; FUTURE CHEESE, Serial No. 88/603954; BIOHACKING BURGER, 88/599180, BETTER DAIRY, BETTER WORLD, 87/618890, KRAB 'N GO, Serial No. 88/216888, MOSA MEAT (and design), Serial No. 79/269891, THE BETTER SUGAR, Serial No. 88/455187, NET0CHICKEN, Serial No. 88/661448, NET0PORK, Serial No. 88/661447, and NET0BEEF, Serial No. 88/661446. Screen prints of the respective TSDR page for each of these applications are attached as Exhibit G.

did not contain a term that provided as strong a connotation of transformation as the word EVOLVED in the application at hand.⁴

Further to the point of consistent examination is the fact that Applicant's applications for registration of NEW WAVE CRAB, Serial No. 88/428316, NEW WAVE LOBSTER, 88/428315, and NEW WAVE SHRIMP, 88/428312, each containing the exact same identification of goods as the application at issue here, all were approved for registration on the Principal Register (and all three applications passed through the opposition period without challenge). Screen prints of the respective TSDR page for Applicant's three applications referenced above are attached hereto as Exhibit H. Refusal of the instant application as deceptive would be counter to the Office's Consistency Initiative. *See also In re LAMB-GRS, LLC*, Serial No. 77/756492, pp. 16-17 (TTAB September 30, 2014) ("although we appreciate that the Board must decide each case on its facts and record, it is telling that the trademark significance of Applicant's L.A.M.B. acronym previously has been recognized by the USPTO on four separate occasions through the registration of applicant's four other L.A.M.B marks, all for clothing and other items that could be made of lamb or lambskin" (but in fact are not made of lamb or lambskin)).

While an Examining Attorney is not bound by the individual determination of another Examining Attorney, a strong, consistent pattern of treatment by the USPTO of similar marks should not be ignored. *See, e.g., In re Omega SA*, 494 F.3d 1362, 83 USPQ2d 1541, 1544 (Fed. Cir. 2007) ("consistency is highly desirable"). Here, the evidence shows overwhelming approval by the USPTO – and an absence of 2(a) refusals -- of applications for registration, on the Principal Register, of food trademarks, like the mark at issue here, that include the name of a food product being imitated together with one or more terms connoting that the product has been transformed.

If there remains any doubt about whether the SHELLFISH, EVOLVED is deceptive, that doubt should be resolved in Applicant's favor. *See, e.g., In re Woolrich Woolen Mills Inc.*, 13 USPQ2d 1235, 1239 (TTAB 1989) ("In view of the closeness of the case, we think it permissible to consider the equities in resolving any doubts we may have in favor of applicant").

For the reasons stated above, Applicant respectfully requests that its application for registration of SHELLFISH, EVOLVED be approved for publication. Please contact Applicant's counsel of record, Leslie Smith, (215) 241-5303, lsmith@liacouraslaw.com, if any additional information is needed to approve this application for publication.

⁴ To the extent additional 2(a) refusals have issued (but did not turn up in our searches), for marks containing the name of a food product being imitated, along with one or more terms evoking that the product has been transformed, such refusals still would be the exception, not the norm.

Additional Information Requested by Examining Attorney

1. Does SHELLFISH have any significance as applied to the goods and/or services other than trademark and/or service mark significance?

Response: Applicant is not clear on what is meant by “significance as applied to the goods and/or services other than trademark and/or service mark significance,” but seeks to respond to this request to the best of its ability. The significance of the term SHELLFISH as used in Applicant’s SHELLFISH, EVOLVED slogan, which will be applied to packaging and labeling for Applicant’s goods, is to suggest a transformed product, namely, a food product, with the flavor and texture of shellfish, that is made with seaweed and all-natural plant extracts, just as trademarks such as SEAFOOD WITHOUT SACRIFICE, CRAB SMART, IMPOSSIBLE MEAT, BEYOND CHICKEN, SMART BACON, MIRACLE RICE, and BUTTER 2.0, are applied to goods to suggest that they resemble the product being referenced (respectively, SEAFOOD, CRAB, MEAT, CHICKEN, BACON, RICE, and BUTTER).

2. Does SHELLFISH have any significance in the relevant trade or industry other than trademark and/or service mark significance?

Response: Applicant is not clear on what is meant by “significance in the relevant trade industry other than trademark and/or service mark significance,” but seeks to respond to this request to the best of its ability. In the food industry (and elsewhere), the term shellfish refers to an aquatic animal having a shell, such as an oyster, lobster, and other crustaceans. *See* <https://www.dictionary.com/browse/shellfish>. Applicant’s SHELLFISH, EVOLVED slogan is intended to suggest a transformed product, namely, a food product, with all the flavor and texture of shellfish, that is made with seaweed and all-natural plant extracts, just as trademarks such as SEAFOOD WITHOUT SACRIFICE, CRAB SMART, IMPOSSIBLE MEAT, BEYOND CHICKEN, SMART BACON, MIRACLE RICE, and BUTTER 2.0 are applied to goods to suggest that they resemble the product being referenced (respectively, SEAFOOD, CRAB, MEAT, CHICKEN, BACON, RICE, and BUTTER).

3. The applicant must provide a written statement explaining whether the goods do or will consist of natural seafood (as opposed to seafood substitutes of any type).

Response: Applicant’s goods are made from sustainably sourced seaweed, along with all-natural plant extracts. Seaweed is a natural seafood. *See, e.g.,* The Monterey Bay Aquarium Seafood Watch, <https://www.seafoodwatch.org/seafood-recommendations/groups/seaweed/overview> (identifying seaweed as a “sustainable seafood superstar”); The Seafood Nutrition Partnership, <https://www.seafoodnutrition.org/seafood-101/healthy-living/seafood-for-vegans-a-dive-into-seaweed-and-algae/> (“our definition of seafood includes any form of food from the waters, including fish, shellfish, mollusks and crustaceans, and even sea vegetables like seaweed and algae”); The University of Maine’s Sea Grant "[Seafood Guide](#);

<https://seagrant.umaine.edu/maine-seafood-guide/seaweed/> (including an entry for seaweed in the Maine Seafood Guide); [Wikipedia](https://en.wikipedia.org/wiki/Seafood) page on Seafood, <https://en.wikipedia.org/wiki/Seafood> (“in the United States, . . . , the term "seafood" is extended to fresh water organisms eaten by humans, so all edible aquatic life may be referred to as ‘seafood’”); and The Marine Stewardship Counsel, <https://www.msc.org/media-centre/news-opinion/2019/01/23/why-we-are-excited-about-seaweed> (“seaweed is generally considered to be a sustainable seafood choice”). Screen prints of the web site pages listed above are attached as Exhibit I.

4. The applicant must provide a sample of advertisements or promotional materials featuring the goods and/or a photograph of the identified goods, or if such materials are not available, applicant must submit samples of advertisements or promotional materials and a photograph of similar goods.

Response: Attached as Exhibit J is a copy of a brochure (tri-fold) describing Applicant’s products; this brochure was prepared for/distributed at the National Restaurant Association Show (May 2019). Applicant is not currently selling/distributing its product, and Applicant has not yet finalized the packaging and labels for its products, but also attached, as part of Exhibit J, are images showing the latest mockups of labeling for, respectively, Applicant’s products and the shipping boxes/containers for Applicant’s products.

5. The applicant must provide a written statement describing in detail the nature, purpose, and channels of trade of the goods.

Response: As described above, Applicant will be selling its plant-based products only directly to foodservice distributors and to foodservice operators, which are entities and institutions responsible for preparing meals outside the home, such as restaurants, cafeterias, schools, and hospitals. *See* Exhibit C. Any foodservice distributor or operator purchasing Applicant’s products will be making the purchase specifically *because* Applicant’s products are *not* shellfish, and because they are plant-based products that have the taste and texture of shellfish. All of the foodservice distributors and operators to which Applicant’s products will be sold require participation in the GS1 Global Data Synchronization Network (“GDSN”), and such participation necessarily requires a detailed identification of each and every ingredient in the products, *see* Exhibit D. There is no possibility that any purchaser of Applicant’s products ever will believe that Applicant’s products are anything other than a plant-based product that tastes and cooks like shellfish, and that is not shellfish.