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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leiner Health Services Corp.

Serial No. 76490165

Michael A. Painter of Isaacman, Kaufman & Painter for Leiner Health Services Corp.

Linda M. Estrada, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Walters, Bottorff, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Leiner Health Services Corp. (applicant) applied to register the mark OPTIMAL DAILY INTAKE (in typed form) on the Principal Register for "vitamins and dietary food supplements" in Class 5.[1]

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[1] Serial No. 76490165, filed February 14, 2003, is based on applicant's allegation of a bona fide intention to use the mark in commerce.

The examining attorney refused to register the mark on the ground that the mark, when used on or in association with the goods, is merely descriptive. 15 U.S.C. § 1052(e)(1). The examining attorney (Brief at 3) maintains that "the mark conveys to consumers the superiority of the goods as well as their purpose, namely, for daily intake." Applicant (Brief at 3-4), on the other hand, argues that "the words OPTIMAL and INTAKE have no descriptive application to Appellant's goods."

After the examining attorney made the refusal final, applicant appealed to this board.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). See also In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Courts have long held that to be "merely descriptive," a term need only describe a single significant quality or property of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); Meehanite Metal Corp. v. International Nickel Co.,

262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959). We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is merely descriptive. Abcor, 200 USPQ at 218. Furthermore, when the mark involves more than a single term, we must consider whether the mark as a whole is merely descriptive and not just the individual elements. In re Oppedahl & Larson LLP, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) ("PTO may properly consider the meaning of 'patents' and the meaning of '.com' with respect to the goods identified in the application. However, if those two portions individually are merely descriptive of an aspect of appellant's goods, the PTO must also determine whether the mark as a whole, i.e., the combination of the individual parts, conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts").

To support her refusal, the examining attorney relies on the following evidence. First, the examining attorney provided dictionary definitions of the individual terms. "Optimal" is defined as "most favorable or desirable; optimum"; "daily" is defined as "happening or done every

day"; and "intake" as "the act of taking in" and "the quantity taken in."[2]

Second, the examining attorney submitted NEXIS evidence that shows use of the combined term "optimal daily intake" in various articles.

> Daily goals. While there is no recommended daily allowance or **optimal daily intake** for boron, Lieberman says that 3 to 6 grams is the range often recommended by health care professionals.
> *Better Nutrition*, November 1, 1999.

> Certainly, the easiest way to get enough of the B vitamins is to pop a supplement. Some now for sale provide what studies consider the **optimal daily intake.**
> *New York Times*, February 18, 1998.

> On the average, American women consume 500-600 milligrams of calcium daily. That's well below the daily 800 milligrams recommended for "adequate" health and even further below the 1,000 to 1,500 milligrams now recommended by the National Institutes of Health as an **"optimal" daily intake.** That's how much we need to maximize adult bone mass, maintain adult bone[s] and minimize bone loss in later years.
> *Rocky Mountain News*, December 17, 1996.

> The study, published Tuesday in The Proceedings of the National Academy of Sciences found that the **"optimal" daily intake** of vitamin C was more like 200 milligrams, although only about 10 milligrams are needed to prevent vitamin C deficiency.
> *Chicago Tribune*, April 16, 1996.

> Even so, you have to decide how much of the antioxidants you want to consume. Though researchers are finding strong links between high doses of the vitamins and disease prevention, they haven't yet determined **optimal daily intake.** It's clear, though,

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[2] See First Office Action, pp. 2-3. The definitions are from *The American Heritage Dictionary of the English Language*.

> that the amounts needed for diseases fighting are considerably higher that the U.S. Recommended Daily Allowances (U.S. RDAs, soon to become RDIs or Reference Daily Intakes), designed as generous minimums needed to prevent deficiency diseases.
> *Dallas Morning News*, May 26, 1993.

> The panel proposes replacing the calcium RDAs for most age groups with the following "**Optimal Daily Intakes**":
> - 1,200 to 1,500 milligrams for teenagers and young adults.
>
> *San Francisco Chronicle*, October 24, 1994.

Third, the examining attorney also included Internet web pages that show the term "optimal daily intake" used in association with the marketing of vitamins and nutritional supplements.

> 600 mcg of Folic Acid. This dose helps women meet the **optimal daily intake** for Folic Acid. Many women are deficient in their Folic Acid intake, especially if they are taking birth control pills or have taken them in the past.
> Athena Labs, LLC.[3]

> Although proline is produced by the body in limited quantities, lysine is not. The stability of the connective tissue depends on the **optimal daily intake** of these two amino acids.
> www.affordable-dr-rath-vitamins.com.

> Vitamin E and Selenium are also reported to be important in helping to maintain optimum skin health as well as being beneficial to people with liver disorders. With this new formulation, one easy-to-take capsule assures **optimal daily intake** of these 2 essential, protective nutrients.

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[3] The web addresses of several of the articles that the examining attorney has put in the record are difficult to determine. While this undercuts their weight somewhat, it is apparent that the articles are in English and directed toward customers in the United States. For example, the Athena article refers to the Levine Health Products Booth at the National Association of Naturopathic Physicians Convention in Portland, Oregon.

Carefreenutrition.com

Optimal daily intake calcium requirements.
Imaginis.com

When we consider the dictionary definitions along with the NEXIS and Internet evidence, it is clear that the term "Optimal Daily Intake," when used in association with vitamins and nutritional supplements, describes vitamins that contain the best or optimal daily dose of the relevant vitamin or nutritional supplement. This term leaves nothing to the imagination of prospective purchasers.

In response to the evidence of descriptiveness, applicant argues (Brief at 3-4) that the words "'Optimal' and 'Intake' have no descriptive application to Appellant's goods." However, the evidence shows that the term "optimal" and "intake" are used to describe the most advantageous daily intake or dose of a vitamin or nutritional supplement.[4] See Athena Labs, LLC ("Vitality includes optimal doses of the following key vitamins"); Imaginis.com ("Optimal daily intake calcium requirements"); and *Chicago Tribune* ("'[O]ptimal' daily intake of vitamin C

[4] Applicant does not contest the descriptiveness of the term "daily," which obviously is descriptive of a product designed to provide a daily dose of a vitamin or supplement. See *Dallas Morning News*. May 26, 1993 ("Recommended Daily Allowance," "Recommended Daily Intake," and "optimal daily intake" used to describe vitamin levels). In its paper filed September 29, 1999 at 2, applicant submitted a disclaimer of the term "daily."

was more like 200 milligram" and "[f]or E, the optimal level may be 100 to 800 International Units"). Moreover, the examining attorney's evidence shows that not only are the individual terms descriptive of the goods but applicant's combined term is used to describe vitamins and nutritional supplements.

Applicant has also provided a list of four registrations for different marks (OPTIMAL LIFE FACTORS, OPTIMAL RESULTS, OPTIMAL HEALTH, and OPTIMAL NUTRIENTS[5]) that it asserts were registered without a disclaimer of the word "optimal." Normally, we would not consider a list of registrations without copies of the registrations. In re Duofold, Inc., 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record"). However, applicant introduced the list early in the prosecution of the case and the examining attorney has treated the list as being of record. Therefore, we will consider the information in the list regarding the four registrations for whatever value it may have. Certainly, the fact that these registrations issued does not bind the board. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("Even if some

[5] The examining attorney points out that this registration has expired.

prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court"). Furthermore, the registration of different marks does not demonstrate that applicant's mark is suggestive. Finally, in this case, there is significant evidence that applicant's combined term "Optimal Daily Intake" is used in articles and by competitors to describe vitamins and nutritional supplements having the optimal daily dosage. The fact that the Office has registered a few marks containing one of these terms hardly rebuts the examining attorney's evidence of descriptiveness.

The evidence leads to the conclusion that applicant's mark OPTIMAL DAILY INTAKE is merely descriptive for vitamins and nutritional supplements.

Decision: The examining attorney's refusal to register applicant's mark on the ground that the term is merely descriptive is affirmed.