

ESTTA Tracking number: **ESTTA660914**

Filing date: **03/13/2015**

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

Proceeding	79975353
Applicant	SUS Corporation
Applied for Mark	SUS
Correspondence Address	Leigh Ann Lindquist Sughrue Mion, PLLC 2100 Pennsylvania Avenue NW Washington, DC 20037 UNITED STATES tm@sughrue.com
Submission	Appeal Brief
Attachments	S21151AppealBriefMarch132015.pdf(58822 bytes )
Filer's Name	Leigh Ann Lindquist
Filer's e-mail	tm@sughrue.com, jcummings@sughrue.com
Signature	/Leigh Ann Lindquist/
Date	03/13/2015

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

In re the matter of:

SUS Corporation

U.S. Serial No.: 79/975,353

Mark: SUS

Filed: November 9, 2012

**APPLICANT'S BRIEF ON APPEAL**

Applicant, by its Attorneys, hereby submits this Brief on Appeal pursuant to Trademark Rules 2.141 and 2.142.

1. **BACKGROUND**

On July 19, 1999, Applicant filed an application to register the mark SUS for goods in International Classes 6 and 7 under Section 66(a) of the Trademark Act.

A first Office Action was sent to the IB on March 13, 2013. The issues raised in that office action were resolved during prosecution.

On December 9, 2013, a second Office Action issued in which the Examining Attorney refused registration under Trademark Act Sections 2(a) and 2(e)(1). Additional issues were raised in that Office Action and those issues were resolved during prosecution of the application.

With respect to the 2(a) refusal in the December 9, 2013 Office Action, the Examining Attorney took the position that the applied for mark was deceptive for the goods listed in the

application. The 2(e)(1) refusals were grounded in refusals on misdescriptive and merely descriptive grounds.

Applicant filed a response to the second Office Action on June 5, 2014 arguing against those refusals.

A final Office Action issued on July 15, 2014 in which the Examining Attorney continued and made final her refusals of registration under Sections 2(a) and 2(e)(1) of the Trademark Act.

On November 18, 2014, Applicant filed a Request for Reconsideration. That Request for Reconsideration was denied to as the class 6 goods listed in the application on January 7, 2015.

This appeal followed for the class 6 goods listed in the application.<sup>1</sup>

## II. ISSUE

There are three issues on appeal.

Whether Applicant's applied for mark, SUS, for:

Metal materials for building or construction, namely, metal pipes and tubes, metal pipe connectors, metal partitions; prefabricated building assembly kids of metal; metal hardware, namely, metal screws, nuts, bolts, metal brackets for use in the construction and assembly of decking; metal joinery fittings, in International Class 6<sup>2</sup>

is

(1) deceptive under Trademark Act Section 2(a);

(2) deceptively misdescriptive under Trademark Act Section 2(e)(1); and

(3) merely descriptive under Trademark Act Section 2(e)(1).

---

<sup>1</sup> The class 7 goods have proceeded to publication in another application.

<sup>2</sup> Applicant notes that the International Class 6 goods include "prefabricated building assembly kids of metal". This is a typographical error. The wording should read " prefabricated building assembly kits of metal" as "prefabricated building assembly kids of metal" does not identify an actual product.

### III. ARGUMENT

#### A. SUS for the Identified Class 6 Goods is Not Deceptive.

The Federal Circuit has developed a three-part test to determine deceptiveness:

- (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods?
- (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods?
- (3) If so, is the misdescription likely to affect a significant portion of the relevant consumers' decision to purchase?

*In re Spirits Int'l, N.V.*, 563 F.3d 1347, 90 USPQ2d 1589 (Fed. Cir. 2009); *In re Budge Mfg. Co.*, 857 F.2d 773, 775, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988), *aff'g* 8 USPQ2d 1790 (TTAB 1987).

The Examining Attorney takes the position that SUS indicates that the goods contain stainless steel. In support of her position, she attached a number of printouts from the Internet. None of these materials evidence that SUS in the United States refers to stainless steel.

The December 9, 2013 Office Action had the following evidence which Applicant addresses<sup>3</sup>:

- Printout from Wikipedia which discusses stainless steel. ***There is no reference to SUS in that Wikipedia entry.***
- A printout from The Engineering Toolbox website. This attachment appears to evidence that SUS may be an indication in Japan for stainless steel. This information does not evidence how consumers in the United States would view

---

<sup>3</sup> Applicant notes that many of the attachments to the two Office Actions were provided in very small print. The small nature of the print is time consuming to review. Applicant requests that the Board ask Examining Attorneys to include attachments to office actions that are easier to review and consider.

SUS as applied to the goods listed in the application. In the United States, the AISI standard is used and not the SUS standard.

- A printout from Acronymfinder.com for "What does SUS stand for"? This is not a list of acronyms but an answer to a specific question. In its response dated June 5, 2014, Applicant submitted the search results for SUS from the Acronymfinder.com. "Stainless steel" does not appear out of 38 references that are in rank order, not alphabetical order. The examining attorney's evidence does not show that SUS is commonly known and used as an acronym for stainless steel.
- Search results from Alibaba.com for "sus 904 stainless steel pipe". These are merely lists of results. No printout for any one of the results is included. This material has little probative value. TMEP §710.01(b),
- Information from the website *marinesupplygroup.com*. This is a Thai-based business. This does not show how consumers in the United States view SUS.
- Information about Williams Refrigeration. This information is from Australia and again does not show how SUS is viewed in the United States.
- Information from IMO. There is one reference to Type 316 stainless steel. Type 316 is how stainless steel of this type is referred to in the United States based on the information from *engineeringtoolbox.com*. The reference to SUS 316 is for international Internet users, not Internet users in the United States.
- Information from the British Stainless Steel Association. This information is from Britain and does not show how consumers in the United States view SUS.

- Information about the JIS system which explains how SUS is used in Japan, not the United States.
- Information from Smith Bearings website. There is no mention of SUS on the website.
- Information from *globalindustrial.com* website. There is no mention of SUS on the website.

The July 15, 2014 Office Action had the following information attached:

- An unidentified document with "Stainless Steel" on the left-hand side. This document has no date and no place of origin. It has no relevance on appeal.
- Website printouts from *dynaon.com*. This is not information for the United States. On the fifth page of the printouts, there is a listing of industrial standards for stainless steel in each country. In the United States, the ASTM standard is used, not the SUS standard.
- Website material from *teckleonmetals.com*. This company is based in Singapore. There is no indication as to how US consumers view this information.
- Materials from Alaskan Copper. There is no reference to SUS in these materials.
- Website material from *tjcstainless.com*. The tagline for these materials states: "One Stop Shop in China". The ASTM standard is referenced, as is the SUS standard. The reference is for a Chinese company and does not reflect how US consumers view SUS.
- Search results from *thomasnet.com*. There is no reference to SUS in these search results.

- Appears to a screenshot from website for Vertex FD. There is no reference to SUS.
- Search results pages from Amazon with two printouts for two of the listings. The search results page of course is of limited value. TMEP §710.01(b).
- Printout from *assda.asn.au*. There is no mention of SUS.
- Printout from *ssina.com*. There is no mention of SUS.

These materials show that SUS is a designation used in *Japan*. In the United States, based on the evidence of record, stainless steel is referenced using either the AISI or ASTM standard. The fact that a designation is used in another country where the language in that country uses an alphabet completely unrelated to the Roman alphabet does not evidence that such designation is known and used in the United States. The examining attorney's evidence does not show that SUS is understood to mean stainless steel in the United States. Accordingly, the examining attorney is unable to establish the first prong of the deceptiveness test: Is the term misdescriptive of the character, quality, function, composition or use of the goods? SUS is not a misdescriptive term for Applicant's Class 6 goods.

Even if SUS was considered a misdescriptive term, the two remaining prongs of the test are not met. Consumers of the type of goods Applicant offers are very sophisticated. Based on the information attached to the office action, consumers deliberate over the type of steel or non-steel product needed. The different grades of steel indicate that consumers of steel are very sophisticated consumers. Consumers looking to purchase steel products would never purchase Applicant's SUS goods. These sophisticated consumers would need to investigate the nature of Applicant's goods. Different metals are used for different purposes and have different applications. In fact, some metals are completely unsuited for applications that other metals are

best suited for. Applicant has attached evidence to its responses that evidence these facts. Consumers would simply never purchase Applicant's SUS goods believing they were made of steel. This is simply improbable.

SUS is not deceptive of the goods listed in the application.

**B. SUS for the Identified Class 6 Goods is Deceptively Misdescriptive.**

The test for deceptively misdescriptive marks involves a two factor analysis:

First we must determine if the matter sought to be registered misdescribes the goods. If so, then we must ask if it is also deceptive, that is, if anyone is likely to believe the misrepresentation. *Gold Seal Co. v. Weeks*, 129 F. Supp. 928 (D.D.C. 1955), *aff'd sub nom. S.C. Johnson & Son v. Gold Seal Co.*, 230 F.2d 832 (D.C. Cir.) (*per curiam*), *cert. denied*, 352 U.S. 829 (1956), *superseded by statute on other grounds as stated in Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 86 USPQ2d 1527, 1532 (D.C. Cir. 2008). A third question, used to distinguish between marks that are deceptive under Section 2(a) and marks that are deceptively misdescriptive under Section 2(e)(1), is whether the misrepresentation would materially affect the decision to purchase the goods. *Cf. In re House of Windsor, Inc.*, 221 USPQ 53 (TTAB 1983).

TMEP §1209.04. Thus, this two part test is identical to the first two prongs of the test to determine deception under Trademark Act Section 2(a). For the reasons noted above, the applied for SUS mark is not deceptively misdescriptive.

**C. SUS for the Identified Class 6 Goods is Merely Descriptive.**

A mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services.

SUS does not have any meaning in the United States, as seen above and as seen from the Examining Attorney's attachments. Therefore, SUS cannot describe an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods

IV. Conclusion

In short, SUS is not known in the United States as a term associated with stainless steel. The examining attorney's "evidence" consists overwhelmingly of references not from the United States. Refusing registration of Applicant's applied for SUS mark on references that do not originate from the United States is not reflective of use of the term SUS in the United States. The examining attorney could essentially only find international references to support her position.

SUS is not deceptive, deceptively misdescriptive or merely descriptive as applied to the goods in the application. It is accordingly respectfully requested that this Appeal be granted, and Applicant's mark be published for opposition.

Respectfully Submitted,



---

Leigh Ann Lindquist  
Attorney for Applicant  
SUGHRUE, MION PLLC  
2100 Pennsylvania Avenue, NW  
Washington, DC 20037-3202  
Tel.: (202) 663-7409  
Fax: (202) 331-4308

Date: March 13, 2015