

TTAB

496857.0021 (JARR-120)

TRADEMARK

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

Exhibits

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In re Matter of	:	
Applicant/Appellant: Jarrow Formulas, Inc.	:	Examining Attorney:
Trademark: ENTEROGUARD	:	Brian Brown, Esq.
Serial No.: 75/910,166	:	
Int'l. Class: 5	:	Law Office 105
Filed: January 26, 2000	:	
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BOX TTAB/FEE
Commissioner for Trademarks
2900 Crystal Drive, South Tower
Arlington, VA 22202-3513

02-08-2002

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #71

NOTICE OF APPEAL
UNDER 37 C.F.R §§ 2.141 AND 2.142(a)


To the Trademark Trial and Appeal Board:

Applicant hereby appeals to the Trademark Trial and Appeal Board from the decision of the Examiner dated August 6, 2001, finally refusing registration of the above-identified trademark. Please charge the appeal fee required under 37 C.F.R § 2.6(a)(18) to Deposit Account No. 50-1158 and credit any overpayment thereto.

Respectfully submitted,

Jarrow Formulas, Inc.

Date: February 6, 2002

By: 
 Mark D. Ciarratana
 Kelly L. Williams
 Cummings & Lockwood
 Attorneys for Applicant
 P.O. Box 1960
 New Haven, CT 06509
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03/12/2002 JHARLEY 00000135 501158 75910166
01 FC:378 100.00 CH



CERTIFICATE OF MAILING

I hereby certify that the correspondence entitled "Notice of Appeal Under 37 C.F.R. §§ 2.141 and 2.142(a)" including an associate Power of Attorney for the mark ENTEROGUARD, is being deposited with the United States Postal Service as first class mail, addressed to the Commissioner for Trademarks, Box TTAB/FEE, 2900 Crystal Drive, South Tower, Arlington, VA 22202-3513, on the date below.

February 6, 2002

Kelly L. Williams

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK EXAMINING DIVISION

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02-08-2002

U.S. Patent & TMOfo/TM Mail Rcpt Dt. #71

REQUEST FOR RECONSIDERATION AFTER FINAL ACTION
UNDER 37 C.F.R § 2.64

Sir:

This Request for Reconsideration is submitted in response to the Office Action mailed on August 6, 2001. In view of the deadline for response, Applicant is filing concurrently herewith a Notice of Appeal. In response to the final Office Action, Applicant responds as follows:

1. Likelihood of Confusion Refusal under Trademark Act Section 2(d)

The Examining Attorney made final his refusal to register the ENTEROGUARD mark under Trademark Act Section 2(d) (15 U.S.C. § 1052(d)) alleging that the mark when used on "dietary supplement for intestinal health," so resembles the mark in Registration No. 2,012,531 for ENTERIGAR covering "natural and manufactured ingredients sold for use as an integral component of dietary food supplements," as to be likely to cause

confusion, or to cause mistake or to deceive. Applicant respectfully requests that the Examiner reconsider and withdraw his final refusal in light of the new arguments and evidence submitted herewith.

I. ENTEROGUARD and ENTERIGAR are Sufficiently Different to Avoid Any Plausible Likelihood of Confusion

In testing for likelihood of confusion, the similarity or dissimilarity of the marks with regard to appearance, sound, connotation and commercial impression are important considerations. In re E.I. duPont de Nemours & Co., 177 U.S.P.Q. 563 (C.C.P.A. 1973); TMEP Section 1207.01. It is well understood that when determining whether there is a likelihood of confusion, one must consider the marks in their entireties. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

a) Marks Differ in Overall Sight and Sound

In this instance, when ENTEROGUARD and ENTERIGAR are compared in their entireties, they are visually and aurally distinct. The marks are comprised of four syllables, i.e., EN TER O GUARD vs. EN TER I GAR. While Applicant's and Registrant's marks begin with the prefix "enter," the similarity in the marks ends there, and this commonality is not sufficient to find the marks confusingly similar. The suffixes in the marks, "OGUARD" and "IGAR," cannot be dismissed because they materially change the overall appearance and pronunciation of the marks. The pronunciation and appearance of the middle syllable "O" is significantly different than that of the middle syllable "I." Similarly, the last syllable "GUARD" is pronounced and appears significantly different than the last syllable "GAR." Thus, when the marks are considered in their entireties, they differ considerably in overall sight and sound.

b) **Marks Convey Significantly Different Commercial Impressions**

In the final Office Action, the Examiner concluded that "the overall commercial impressions of the marks are quite similar as well." (Final Office Action, pg.2). However, he did not explain why. For the following reasons, Applicant respectfully disagrees with the Examiner's conclusion, and submits that the commercial impressions conveyed by the marks are significantly different.

The meaning or connotation of a mark must be determined in relationship to the named goods. Even marks which 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.

In the marks, the prefix "enter" is derived from the word enteric, which has at least two definitions:

- 1: of or relating to the intestines; *broadly* : ALIMENTARY
- 2: of, relating to, or being a medicinal preparation treated to pass through the stomach unaltered and disintegrate in the intestines. (Exhibit A).

In this instance, Registrant's goods identify a coating ingredient applied to garlic tablets or caplets. According to Registrant's Web site, its preparations are "enterically coated" to "insure safe passage of the volatile allicin-related compounds through the stomach for optimal absorption in the small intestine." (Exhibit B). In Registrant's mark, when the "enter" prefix is considered in relation to "ingredients sold as an integral component of dietary food supplements," it suggests a function of the goods. The coating ingredient insures that the food supplement will pass through the stomach unaltered.

Applicant's use of the prefix "enter," on the other hand, is intended to suggest generally that its dietary supplements are for intestinal purposes, as reflected in the

identification of goods, and thus generates a different meaning than in the Registrant's mark.

Turning to the suffixes in the marks, the clear dissimilarity in their overall commercial impression is apparent. Applicant submits that the letters "GAR" in Registrant's mark suggests another ingredient Registrant provides, garlic. In the vitamin and nutritional supplement industry, competitors commonly use this lettering to suggest that their products contain garlic. Please note the following (Exhibit C):

- Registration No. 2,144,821 for ULTRA-GAR covering "nutritional supplements and vitamins containing **garlic** extract;"
- Application No. 76/269,368 (Published for Opposition 12/25/01) ALL GAR covering "dietary supplements namely **garlic** caps;"
- Application Serial No. 76/044,618 (Published for Opposition 3/27/01) for NUTRA GAR and **garlic** design covering "nutritional supplements;"
- MAXGAR Garlic by Solgar for dietary supplements containing **garlic**; and
- ULTRA GARLITE by Nature's Plus for a dietary supplement containing **garlic**.

In fact, Applicant markets its own garlic dietary supplement in a similar manner under the mark JARRO-GAR 800™. Finally, reference is made again to Exhibit B wherein Registrant discusses not only the benefits of its enteric coating process, but also its meticulous garlic preservation process. Accordingly, when ENTERIGAR is considered in its entirety and in relation to Registrant's goods, it informs consumers that the ingredients enterically coat formulations containing garlic.

On the other hand, the suffix "GUARD" in Applicant's mark expresses a clear and completely different meaning, i.e., to protect. When ENTEROGUARD is considered in a

similar manner, it suggests that the dietary supplements will be intended to protect the intestine.

In sum, when ENTEROGUARD and ENTERIGAR are considered in their entirety and in relation to the respective goods, "the overall commercial impressions of the marks are [not] quite similar as well," but significantly different.

II. "ENTER" May Be Accorded Only a Narrow Scope of Protection

The prefix "enter," as used in the Registrant's mark, is at the weak end of suggestive on the continuum of trademark strength. In *Cybertronics v. Johnson Service Company*, 156 U.S.P.Q. 583, 587 (TTAB 1967), the Board held that CYBER-TRONIC could coexist with CYBERTRONIC, both used in the broad class of electronic equipment and apparatus, because:

"[a] suggestive mark bestows upon its proprietor a narrower orbit of protection that may permit another party to enter the same broad field of trade and use the same or similar mark for goods distinctly different from those of the prior user without giving rise to a likelihood of confusion or mistake as to the origin of the respective goods."

456 U.S.P.Q. at 586.

With this principle in mind, the Applicant respectfully submits that too much emphasis is placed on the lettering "enter" in reaching judgments concerning a likelihood of confusion between the marks. "Enter" appears in numerous other third party marks for related goods. For example,

- Registration No. 1,408,185 for ENTERO-DOPHILUS covering "vitamin, mineral and dietary supplements containing lactobacillus acidophilus microorganisms," owned by Nature's Way Products, Inc., of Utah;
- Registration No. 1,764,017 for ENTER ENERGY covering "dietary food supplements," owned by Reyman Drug Company of Baltimore, Maryland;

- Registration No. 1,998,334 for ENTER MEMORY covering "food supplements," owned by Reyman Drug Company of Baltimore, Maryland;
- Registration No. 2,228,045 for ENTEREX covering "balanced nutritional supplement in a lactose free, liquid form providing essential vitamins and minerals for low cholesterol and sodium restricted diets," Registrants of record are Enrique Lopez and Mariano Marcia, both of Miami, Florida;
- U.S. Registration Nos. 2,418,463; 2,418,464 and 2,420,137 for ENTEROGEL, ENTEROSULE and ENTEROTAB, respectively, all covering "nutritional supplements," and all owned by Tishcon Corporation of Westbury, New York; and
- Application Serial No. 76/296,463 for ENTEREX DIABETIC covering "a no-sugar added balanced nutritional supplement in liquid form providing essential vitamins and minerals for persons requiring controlled glucose intake" owned by Victus, Inc. of Miami, Florida, date of first use in commerce 02/28/01.

Such third party registration and/or use demonstrate three important points: (1) that the Office considers the term "enter" entitled to a limited scope of protection vis-à-vis other marks which contain the term for related goods; (2) that these registrations are able to co-exist on the Principal Register without causing a likelihood of confusion; and (3) consumers are conditioned to seeing the term used on dietary and nutritional supplements, and can distinguish between sources of these goods by considering the marks in their entirety. Accordingly, it is the suffixes and other features in the "enter" marks that distinguish one from the other. In the present application, the suffixes "OGUARD" and "IGAR" sufficiently distinguish Applicant's and Registrant's marks to avoid any reasonable likelihood of confusion.

Based on the above, Applicant respectfully submits that ENTEROGUARD and ENTERIGAR are sufficiently different in overall sight, sound and commercial impression that there is no reasonable likelihood of confusion. For the foregoing reasons, Applicant

earnestly requests that the Examiner reconsider and withdraw his final refusal and allow this application to proceed to publication.

2. Associate Power of Attorney

Applicant submits herewith an Associate Power of Attorney requesting recognition of Sean Merrill, Carrie Webb Olson and Graceann Pisano, members of the Bar of the State of Connecticut, and Kelly L. Williams, a member of the Bar of the State of Maryland, as additional authorized representatives in this case.

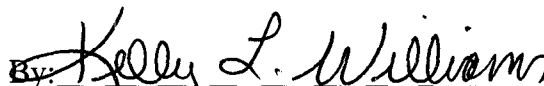
CONCLUSION

Applicant believes that it has responded fully and cogently to the Examiner's points of objection and earnestly requests early passage to publication. If he has any questions or if it would otherwise facilitate this application, he is requested to contact the undersigned at the telephone number below.

Respectfully submitted,

Jarrow Formulas, Inc.

Date: February 6, 2002

By: 
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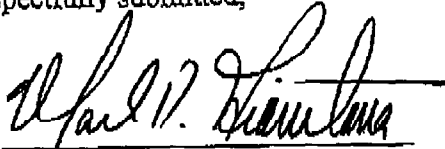
ASSOCIATE POWER OF ATTORNEY (37 C.F.R. § 1.34)

Madam:

Please recognize Sean Merrill, Carrie Webb Olson, Graceann Pisano, members of the Bar of the State of Connecticut, and Kelly L. Williams, a member of the Bar of the State of Maryland, all whose post office address is Cummings & Lockwood, P.O. Box 1960, New Haven, Connecticut 06509-1960, as associate attorneys authorized to transact all business in the United States Patent and Trademark Office in connection with this application. Please correspond with Kelly L. Williams, Esq.

Respectfully submitted,

Dated: February 6, 2002

By: 
 Mark D. Giarratana
 Authorized Representative
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