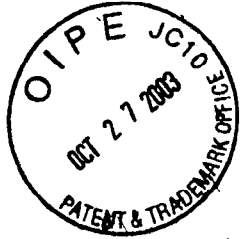


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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Naturally Scientific, Inc.


Serial No.: 76/097189

Filed: September 20, 2000

Mark: STRESS MENDER

Law Office: 105

Trademark Attorney: Brian D. Brown

To: Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513
10-27-2003
U.S. Patent & TMOtc/TM Mail Rcpt Dt. #11

October 22, 2003

BRIEF FOR APPELLANT**Introduction**

Applicant hereby appeals from the Examiner's refusal to register the above-identified mark dated March 7, 2003, and respectfully requests the Trademark Trial and Appeal Board to reverse the Examiner's decision. An oral hearing is not requested.

Applicant's Trademark

Applicant seeks registration on the Principal Register of its mark.

STRESS MENDER

for nutritional and dietary supplements, the word "STRESS" being disclaimed apart from the mark as shown.

Prior Registration Cited By The Examiner

Registration No. 2,494,588 MOOD MENDER for ready-to-eat food bars, chewing gum and tea-based beverages.

The Rejection

The Examiner has refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d) on the ground that Applicant's mark when used on or in connection with the identified goods, nutritional and dietary supplements, so resembles the mark in Registration No. 2,494,588 as to be likely to cause confusion, to cause mistake or to deceive. The cited mark is MOOD MENDER and is used for "health and performance foods, namely, ready-to-eat food bars, chewing gum and tea-based beverages."

The examiner notes "the proposed mark is STRESS MENDER in typed form for nutritional and dietary supplements." The mark in the cited registration is MOOD MENDER in typed form for "ready-to-eat food bars, chewing gum and tea based beverages."

The Examiner's position is that comparing the marks "as both share the term "MENDER", the overall commercial impressions of the marks are similar..." The Examiner expounds on his position by noting that as both marks share the term

“MENDER” they are therefore similar in appearance and meaning. He continues that the term “MENDER” is “strong” in the field of supplements and food bars or teas and then leaps to the conclusion that “similarity in either sound, appearance, meaning or commercial impression alone is sufficient to find a likelihood of confusion.” In this connection, he notes that he has found very few marks with the term MENDER and lists 5 such marks. Of interest is that the applicant has four (4) MENDER applications (only three (3) of which were on his list)

76/130604 ENERGY MENDER

76/097189 STRESS MENDER

76/130605 SLEEP MENDER

In addition the Applicant has an application on file for IMMUNE MENDER.

It is of interest that ENERGY MENDER and IMMUNE MENDER (SN 76/509059) were assigned to another Examiner, William T. Verhosek, who in both applications has issued an office action containing the following statement: “ The Examining attorney has searched the office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C., § 1052(d)...” (underlining ours)

The finding of likelihood of confusion by the instant Examiner is based on his conclusion that both marks share the term “MENDER” and in view, that in his opinion,

the goods are related and/or the conditions surrounding their marketing are such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source.

Argument

The Applicant's mark must be considered in its entirety.

The Examiner has committed error by improperly dissecting Appellants' composite trademark "STRESS MENDER" rather than considering the mark in its entirety for purposes of determining a likelihood of confusion.

In Paper No. 1, the Examiner required disclaimer of the generic word "STRESS" apart from the mark as shown. Accordingly Applicant amended its application and disclaimed "STRESS". Now, it is apparently the Examiner's position that since Applicant had disclaimed the generic word "STRESS", the word "MENDER" is the dominant portion of the mark sought to be registered and is the only word of the mark capable of distinguishing Applicant's goods in commerce. This reasoning overlooks the fact that "STRESS MENDER" is a unitary mark and it is the unit, which creates the commercial impression upon potential customers. They neither know nor care whether or not a part of a mark is disclaimed. Disclaimers have no effect on purchasers. They do not know about "disclaimers", "dominant portions" or "distinguishing features." They are impressed by the mark as they see it or hear it, and they do not ordinarily stop to analyze it. *Ex Parte Maya De Mexico*, 103 U.S.P.Q. (BNA) 158, 1954 WL 5556 (Comm'r Pat. & Trademarks 1954); *Supply Mfg. Co. v. King Trimmings, Inc.*, 220 F. Supp. 947, 139 U.S.P.Q. (BNA) 163 (S. D. N. Y. 1963).

The cited mark is MOOD MENDER.

The Applicant's mark is STRESS MENDER. The term STRESS which is present in Applicant's mark has considerable significance and can not be overlooked in any comparison of the marks in issue.

Thus the proper test is whether Applicant's entire mark is likely to cause confusion as to source with the entire mark of the prior cited registration, not whether confusion is likely between features of marks. *Ex Parte Harzfeld's, Inc.*, 100 U.S.P.Q. (BNA) 31, 1953 WL 5171 (Comm'r Pat. & Trademarks 1953); *The Juvenile Shoe Corporation of America v. Vocational Footwear, Inc.* 99 U.S.P.Q. (BNA) 174, 1953 WL 5125 (Comm'r Pat. & Trademarks 1953).

When properly viewed, it is obvious that the only similarity between the marks resides in the word "MENDER." In the nutritional and dietary supplement field, that word normally suggests to make right or correct, to improve in health, to heal...

Accordingly, the word "MENDER" has little significance in and of itself as an indicia of origin in the nutritional and dietary supplement field. It would be expected that the word "MENDER" would be widely adopted in the trade to suggest improvement in health, to make right, etc. and this cannot be ignored in determining the likelihood of confusion. The fact that it hasn't been widely adopted does not detract from Applicant's arguments, bolstered by the Patent and Trademark Office's position in connection with ENERGY MENDER and IMMUNE MENDER.

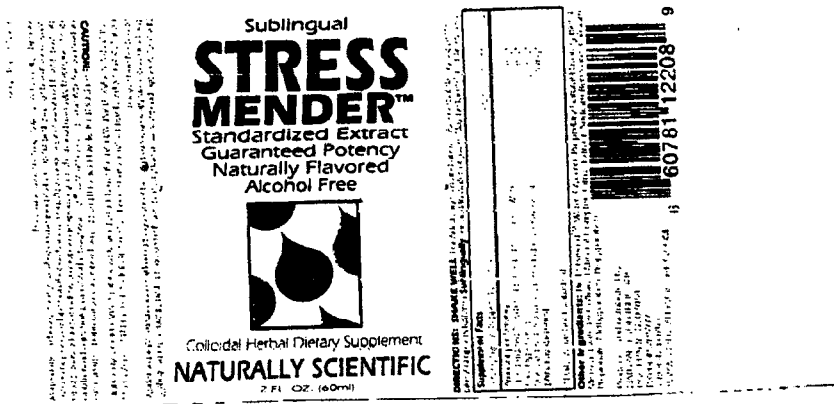
In making an evaluation of likelihood of confusion under the “antidissection” rule, (supra) marks are to be considered in their entireties, not split up into component parts and only parts compared. The commercial impression of a mark is derived from it as a whole, not from its elements separated and considered and considered in detail. *Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538 (1920). However it is not a violation of the antidissection rule to separately view the component parts of a composite as a preliminary step on the way to an ultimate determination of possible customer reaction to the composite mark as a whole. *McCarthy's Desk Encyclopedia of Intellectual Property*, J. Thomas McCarthy; (entry “composite mark.”) In other words, it is appropriate in determining the confusion issue to separately view the component parts of a composite and to further give greater weight to the dominant part of the composite mark, for it is that which make the greatest impression on the ordinary customer. However, the other terms in the composite marks STRESS and MOOD are so different in sound, meaning and appearance that it is not likely that the customer would be confused as to the source of the marks containing these different terms, i.e., STRESS MENDER, MOOD MENDER.

The term “STRESS” is defined in *The American Heritage Dictionary*, Houghton Mifflin Company, as “6. A mentally or emotionally disruptive or disquieting influence; distress.” MOOD is defined by the same dictionary as 1. a temporary state of mind or feeling, as evidenced by the tendency of one’s thoughts [gloomy mood] 2. a pervading impression on the feelings of the observer [the somber mood of the painting] 3. sulking or angry behavior...” Dictionary definitions are relevant evidence of the ordinary

significance of words. *Hancock v. American Steel and Wire Co.*, 203 F.2d 737 (C.C.P.A. 1953).

The goods in fact are very different as can be appreciated from the attached label. STRESS MENDER is administered sublingually from a small bottle provided with an eye dropper and is not likely to be confused with products such as ready-to-eat food bars, chewing gum and tea-based beverages.

A copy of Applicant's label follows:



The average purchaser of Applicant's and other like products might be considered reasonably informed. Typically, he has been informed of the existence and nature of the product before he chooses to purchase or consume. He reads the labels, he makes his purchases from stores that display such goods by their manufacturer, i.e. all of the dietary and nutritional aids of one "brand" are conventionally kept together on one or more shelves. Gums, food bars, cans of tea are not part of the Applicant's product line. The products of the Registrant would be displayed in a separate aisle or on different shelves.

This in itself serves to minimize, if not eliminate source confusion.


Further, the purchasers of nutritional and dietary aids or supplements are a particular type of purchaser. They read the labels, they are in fact well informed, and they can be assumed to know about the products prior to encountering them on the shelf. They are less likely to be confused than the ordinary purchaser.

Conclusion

For the reason set forth hereinabove, Applicant submits that there is no likelihood of confusion, mistake or deception between Applicant's mark and the prior cited registration. Accordingly, Applicant's mark is entitled to registration.

The Board is therefore respectfully requested to reverse the Examiner's decision refusing registration of Applicant's mark.

Respectfully Submitted


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Certificate of Mailing

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513, on the 24 day of Oct, 2003

