

TTAB

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Naturally Scientific, Inc.
Serial No.: 76/404,308
Filed: May 6, 2002
Mark: LIQUID POWER SHOTS
Law Office: 105
Examiner: Brian D. Brown



10-16-2003

U.S. Patent & TMOtc/TM Mail Rcpt Dt. #22

Box TTAB Fee
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22201-3514

October 10, 2003

BRIEF FOR APPELANT**Introduction**

Applicant hereby appeals from the Examiner's refusal to register the above-identified mark dated February 10, 2003, and respectfully request 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.

LIQUID POWER SHOTS

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

Prior Registration Cited By The Examiner

Registration No. 1,613,497 LIQUID POWER (LIQUID BEING DISCLAIMED)
for sublingual vitamin and herbal supplements.

The Rejection

The Examiner has refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d) as it is his position that "the mark for which registration is sought so resembles the mark shown in U.S. Registration No. 1613497" as to be likely to cause confusion, to cause mistake or to deceive.

The Examiner has presented his position in the Office Action dated August 27, 2002, contending that on comparing the marks the proposed mark LIQUID POWER SHOTS and the cited registration LIQUID POWER both share two identical terms; the overall commercial impression of the marks are similar; that the goods identify closely related, if not legally identical goods and are likely to be used or offered together in the same trade channels; and that "similarity in either sound, appearance, meaning or commercial impression alone is sufficient to find a likelihood of confusion.

Argument

1. The marks in issue are the following,

LIQUID POWER SHOTS (application)

and the fanciful



(Reg. No. 1,613,497)

The mark is lined for the color yellow or gold.

The fanciful Liquid Power is used for sublingual vitamins and herbal supplements.

The mark for which registration is sought on the other hand is (see original label) to be taken daily in an amount of one and a half caps full or one tablespoon or four tablespoons. It is noted that the product may be taken alone or added to water, juice, or other sports drink.

The labels and different modes of administration and the fact that the applicant's product is intended for purchase and use by "body builders, weight lifters and serious athletes" further decreases any likelihood of confusion. The serious athlete etc. is likely to look carefully before making a purchase and particularly since a "caution" label is present.

2. APPELLANT'S MARK MUST BE CONSIDERED IN ITS ENTIRETY

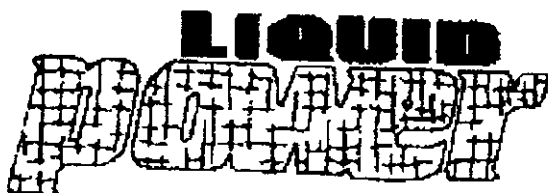
The Examiner has committed error by improperly dissecting Appellants' composite trademark "LIQUID POWER SHOTS" rather than considering the mark in its entirety for purposes of determining a likelihood of confusion.

In Paper No.1, the Examiner required disclaimer of the generic word "LIQUID" apart from the mark as shown. Accordingly Appellant amended its application and disclaimed "LIQUID". Now, it is apparently the Examiner's position that since Appellant had disclaimed the generic word "LIQUID", the word "POWER" is the dominant portion of the mark sought to be registered and is the only word of the mark capable of distinguishing Appellant's goods in commerce. This reasoning overlooks the fact that "LIQUID POWER SHOTS" is a unitary term 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 US.P.Q. (BNA) 163 (S. D. N. Y. 1963).

If not dissected, the commercial impression of

LIQUID POWER SHOTS (application)

and the fanciful



(Reg. No. 1,613,497)

The mark is lined for the color yellow or gold.

is not likely to cause confusion.

Furthermore the Appellant's mark contains the additional term "shots" which connotes a directed forceful discharge, a "shot in the arm", a boost to one's spirits (Webster's II New Collegiate Dictionary). The very presence of the word "shots" would make a great impression on the ordinary consumer so that it would not be likely that the consumer would be likely to be confused.

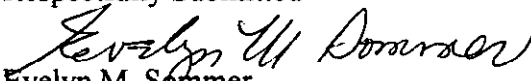
The cited mark is LIQUID POWER, LIQUID having been disclaimed. It is submitted that word SHOTS which is present in Appellant's mark LIQUID POWER SHOTS has considerable significance and can not be overlooked.

In making an evaluation of likelihood of confusion under the "antidissection" rule, (supra) marks are to be considered in their entirety, 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 in detail. *Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538 (1920)

Thus the proper test is whether Appellant's entire mark is likely to cause confusion as to source with the entire mark of the prior cited registrations, 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).

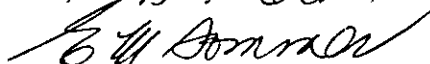
The Board is therefore respectfully requested to reverse the Examiner's decision refusing registration of Appellant's mark.

Respectfully Submitted


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Certificate of Mailing

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NATURALLY SCIENTIFIC™
LIQUID POWER SHOTS™

PROTEIN
LIQUID SUPER BLEND

Guaranteed Potency
No Carbohydrates
Low Calories
No Fat
Great Chocolate Taste

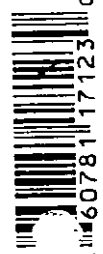
16 FL. OZ. (480 ml)

DIRECTIONS: SHAKE WELL. As a dietary supplement for serious athletes or dieters, take 4 teaspoons full in water, juice, your favorite beverage or shake.

Supplement Facts:	Serving Per Container: 24
Serving Size: 4 Teaspoons (20 ml)	Daily Value Not Established*
Amount Per Serving:	25
Calories	5 Grams (5,000 mg)
Whey Protein Proprietary Blend	Pure Whey Protein
	Amino Acids

Other Ingredients: Bio-enhanced Water, Glycerin, Lecithin, Calcium Propionate, Sodium Benzoate, Potassium Sorbate, Proprietary Flavoring Blend.

Produced and distributed by:
NATURALLY SCIENTIFIC, INC.
PARSHIPPANY, NJ 07054
Patent #5,765,977 and
#5,898,428
www.naturallyscientific.com



Lot No. / Best By

110201

These products are manufactured using a patented Liquid Nutrition Technology™. DOES NOT CONTAIN ARTIFICIAL COLORS, FLAVORS, BINDERS, EXTRACTION SOLVENTS, SUGAR, YEAST, WHEAT, GLUTEN, CORN, DAIRY, SODIUM, STARCH, OR ALCOHOL. **CAUTION:** This product is not intended to treat, cure or prevent any disease. Do not use without consulting a physician if you take prescription drugs or if a medical condition is present. Keep out of reach of children. Do not use if safety seal is missing. *These statements have not been evaluated by the Food and Drug Administration.