

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Red Mango, LLC
Serial Number: 88470807
Filing Date: March 3, 2020
Mark: SUPERBIOTICS
Examining Attorney: April Roach
Law Office: 115

RESPONSE TO OFFICE ACTION

The office action issued on September 4, 2019 (the “Office Action”) refuses registration to SUPERBIOTICS, Serial No. 88470807 (“Applicant’s Mark”), due to a likelihood of confusion with SUPRABIOTICS, Registration No. 4671362 (the “Registered Mark”). Applicant respectfully submits its arguments in favor of registration below.

Applicant’s Mark does not share a common commercial impression or connotation with the Registered Mark.

1. The Office Action cites dictionary definitions as follows:
 - “SUPRA” defined as “above; over; on top of” and “greater than; transcending.”
 - “SUPER” defined as “above; over; upon: superimpose” and “superior, as in size, quality, degree, or ability.”

In both instances, Registrant and Applicant use the secondary meanings, respectively. This generates different commercial impressions. Registrant describes its product as “far beyond” and “novel,” whereas Applicant uses the term more colloquially, and has even used superhero graphic design in some of its promotional materials. *Evidence File*¹, pp. 1-2.

Though the primary meanings in the dictionary definitions are nearly identical, the Board established that the “modern-day usage of a term... has more significance and probative value than the dictionary meaning in terms of the likely perception of consumers.” *In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1781 (TTAB 2017), TMEP § 1209.03(b). Consumers do not use these terms interchangeably as the dictionary definitions appear to suggest. “Super” has Latin roots; “supra” is Latin. Consumers are not likely to perceive “supra” in the same way that they perceive “super” due to each word’s place in current American language and culture.

¹ Applicant offers evidence of Applicant and Registrant use not to improperly introduce extrinsic evidence of use, but to establish that the primary dictionary definitions cited are not the appropriate touchstone with which to evaluate the marks.

“Supra” as “greater than” or “transcending” connotes innovation in a scientific sense. One generally does not encounter the term “supra,” written or spoken, outside of an academic or legal context. The average consumer does not drop “supra” in everyday conversation. The Registered Mark rolls off the tongue in an entirely different way than Applicant’s Mark. Though they share common letters, “supra” and “super” are not likely to be confused. “Supra” is a rather eccentric choice, from a visual and verbal standpoint, to connote that Registrant’s goods are on the cutting edge of its field.

There are myriad probiotics on the market with varying levels of quality. Applicant uses “super” to connote that its choice of probiotic is superior to other probiotics, whose strains are too unstable to provide any benefit to the consumer. *Evidence file, p. 8.* Many beverages or yogurts containing probiotics are too fragile to withstand “the heat and pressure of manufacturing and the strong acids in your stomach.” Applicant’s goods survive both of these processes, granting them “super” status. *Id.* Applicant’s mark uses the term as consumers perceive it, in the same sense as “superfood” or “superhero.”

“Super” indicates high quality but does not evoke the same commercial impression as “supra” because of its modern-day usage. There are no “supraheroes” in comic books or movies. Talk shows and magazines do not tell consumers what “supra foods” to include on their grocery lists. Because consumers relate to “super” in a substantially different way than they do to “supra,” they will immediately recognize that Applicant’s Mark is not related to Registrant or the Registered Mark.

Registrant’s use and current lack of pluralization also distinguishes the Registered Mark from Applicant’s Mark. Registrant’s singular use makes it an adjective; it is “suprabiotic.” Applicant uses the plural form as a noun, and fortifies its menu items with “SUPERBIOTICS.” *Evidence file, pp. 4, 7-8.* In some instances, such as surnames, pluralization does not distinguish one mark from another. TMEP § 1211.01(b)(v). Here, however, the pluralization changes the meaning and consumer perception of each mark.

Based on the modern-day usage of the terms, Applicant’s Mark and the Registered Mark create entirely different commercial impressions and are not likely to cause confusion.

Applicant amends its description to narrow the channels of trade, thus distinguishing it from the Registered Mark.

2. The Office Action states that the “broad wording to describe the goods as probiotic nutritional supplements without limitation as to the form of the supplements” in the Registered Mark presumes that the Registrant’s rights include the probiotics described in Applicant’s Mark. It also states that “the goods and/or services of the parties have no restrictions as to nature, type, channels of trade, or classes of purchasers and are presumed to travel in the same channels of trade to the same class of purchasers” (internal quotations omitted). Applicant’s modification of the description of goods will eliminate the likelihood of confusion with the Registered Mark.

The Examining Attorney must evaluate the descriptions in the application and registration in order to determine the likelihood of confusion. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1307,

128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1325, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)). As such, Applicant amends its application as follows:

“nutritional supplements in the form of yogurt, smoothies, fruit juices, and vegetable juices containing probiotic formulations, sold and marketed exclusively to Red Mango restaurant customers.”

Applicant owns and operates Red Mango restaurants, and owns numerous federal trademark registrations for its restaurant services and menu items. *Evidence File, pp. 4-5*. Applicant sells these items at Red Mango locations and promotes them to Red Mango diners, primarily through its location menus and on social media. *Evidence File, pp. 3, 5*.

The court rejected the amendment of goods offered by *i.am.symbolic, llc* because it failed to “represent that the goods will be marketed in any particular, limited way, through any particular, limited trade channels, or to any particular class of customers” in “any meaningful way.” *In re i.am.symbolic, llc*, 866 F.3d 1315, 1321, 123 USPQ2d 1744 (Fed. Cir. 2017). Applicant is quite the opposite and affirms that it will market only to Red Mango diners and sell its goods only in Red Mango restaurants. Applicant does not and will not market to Registrant’s customers. Applicant does not and will not sell its goods in the same channels of trade in which Registrant operates.

Applicant believes this amendment meaningfully distinguishes SUPERBIOTICS from the Registered Mark and establishes material limitations on trade channels and customer class.

Based upon the foregoing, Applicant respectfully requests that Applicant’s Mark move forward in the registration process.

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