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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Active Medics Inc.

Serial No. 77767314

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Before Seeherman, Quinn and Grendel, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Active Medics Inc. has appealed from the final refusal of the trademark examining attorney to register ACTIVLASH, in standard characters, for "eyelash conditioner."¹ Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that

¹ Application Serial No. 77767314, filed June 24, 2009, asserting first use and first use in commerce as early as April 30, 2009.

applicant's mark so resembles the mark ACTILASH, in standard characters, registered for "cosmetic preparations for eye lashes,"² that, as used on applicant's goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the examining attorney have filed briefs.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant's identified "eyelash conditioner" is encompassed within the "cosmetic preparations for eye lashes" identified in the identified registration. In fact, the specimen submitted in that registration file, and

² Registration No. 3696457, issued October 13, 2009.

made of record by the examining attorney, shows the registrant's mark used on a product identified as "eyelash conditioner." Because the goods are, in part, legally identical, they must be presumed to travel in the same channels of trade. The du Pont factors of the similarity of the goods and the channels of trade favor a finding of likelihood of confusion. Further, the goods, by their very nature, are consumer items sold to the general public, rather than to sophisticated purchasers. The du Pont factor of the conditions of purchase also favors a finding of likelihood of confusion.

Applicant does not appear to disagree with these points; at least it has not argued them in its brief. Rather, it has concentrated its comments on the first du Pont factor, the similarity of the marks. We therefore turn to consider this factor, keeping in mind that when marks would appear on virtually identical goods, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Also, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial

impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. In re Association of the United States Army, 85 USPQ2d 1264, 1268 (TTAB 2007); Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

Applicant's mark is ACTIVLASH, while the cited mark is ACTILASH. The marks are extremely similar in appearance; both begin with the same four letters, ACTI, and end with the same four letters, LASH. The only difference in the marks is the inclusion of the letter "V" in applicant's mark, but this letter is not particularly noticeable because of its location in the center of the mark, and does not serve to distinguish the marks visually. Further, because of the similarities in the beginning and ending of the marks, the marks are also similar, although not identical, in pronunciation. With regard to connotation, consumers are likely to view the prefix ACTI in the cited mark as referring to "active," a meaning reinforced by the registrant's company's name, Active Organics. ACTIV in applicant's mark also has this meaning, again reinforced by the first word of applicant's company name, Active Medics, Inc. As a result of the beginnings of the marks having the

meaning of "active" and the end of the marks having the meaning of "lash," i.e., eyelash, the marks as a whole have the same connotation and convey the same commercial impression.

We note applicant's assertions that the marks are "totally different in overall visual impression and meaning," brief, p. 4, but aside from pointing out that its mark includes the letter "V" and the registrant's mark does not, it provides no support for its position. As we have stated, the presence of the letter "V" in the center of applicant's mark does not stand out in terms of distinguishing the marks visually, and the prefix ACTI and ACTIV are both likely to be viewed as referencing the word "active," such that ACTIVLASH and ACTILASH have the same connotation and commercial impression.

We have considered all of applicant's arguments, including those not specifically discussed here, and we find that the marks are similar, and that this du Pont factor favors a finding of likelihood of confusion. In particular, we consider the present situation to be very different from the cases cited by applicant in which a word is added to an existing mark to form a mark that is different in connotation, such as PEAK and PEAK PERIOD. See Colgate-Palmolive Co. Carter-Wallace, Inc., 432 F.2d

1400, 167 USPQ 529 (CCPA 1970). The *letter* V that appears in the middle of applicant's mark is hardly analogous; both ACTILASH and ACTIVLASH still convey the same meaning.

Neither applicant nor the examining attorney has discussed any other du Pont factors. To the extent that any are relevant, we treat them as being neutral.

In view of the legally identical goods and channels of trade, the fact that these are goods purchased by the general public, and the similarity of the marks, we find that applicant's mark ACTIVLASH for eyelash conditioner is likely to cause confusion with the mark ACTILASH registered for cosmetic preparations for eyelashes.

Decision: The refusal of registration is affirmed.