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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Poly-Gel L.L.C.

Serial No. 77850772

Edwin D. Schindler for Poly-Gel L.L.C.

Charisma Hampton, Trademark Examining Attorney, Law Office
112 (Angela Wilson, Managing Attorney).

Before Seeherman, Ritchie and Shaw, Administrative Trademark
Judges.

Opinion by Shaw, Administrative Trademark Judge:

Poly-Gel L.L.C. has filed an application to register
the mark ARCTIC HEAT (in standard character form) on the
Principal Register for "therapeutic hot and cold compression
wraps for cooling or warming parts of the human body;
shoulder supports, ankle supports, back supports, knee
supports, wrist supports, elbow supports and orthopedic
supports with compression and without compression for
reducing pain and increasing circulation and mobility to

areas of the human body to which the supports are applied," in International Class 10.¹

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the mark ARCTIC HEAT. COOL DOWN AND FIRE UP and design, shown below, previously registered for "human and veterinary medical devices, namely cooling and heating rehabilitation packs; temperature regulating devices for medical purposes, namely cooling and heating jackets and vests," in International Class 10, that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.²



Applicant has appealed. Both applicant and the examining attorney have filed briefs, and applicant has filed a reply brief.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

¹ Serial No. 77850772, filed October 16, 2009, based on an allegation of a bona fide intention to use the mark in commerce.

² Registration No. 2944243, issued on April 26, 2005; Section 8 affidavit accepted, Section 15 affidavit acknowledged. Although there is no space between the words "arctic" and "heat," there is a line between the words which causes them to be viewed as two words. Therefore, in this opinion we will refer to this term as "ARCTIC HEAT."

relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209, 1210 (TTAB 1999) and the cases cited therein.

We turn first to a determination of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

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 impressions that confusion as to the source of the goods or services 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. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See National Data* at 752.

Applicant's mark consists entirely of the term ARCTIC HEAT in standard character form. Registrant's mark consists of the term ARCTIC HEAT in large letters, with the words COOL DOWN AND FIRE UP shown below this term, in smaller letters. ARCTIC HEAT appears in a white box, and all the literal elements are enclosed in a rectangle design.

We find that the term ARCTIC HEAT is the dominant feature of both marks. It is the only term in the applicant's mark and it is visually the most prominent element of the registrant's mark, because of its placement, size and the highlighting in a white box. The phrase COOL DOWN AND FIRE UP is less dominant because it appears below

ARCTIC HEAT and merely reinforces the suggestion of cold and hot conveyed by ARCTIC HEAT. The simple rectangle "carrier" design would not be viewed as having any source-identifying value and does not distinguish the marks. Because of the prominence of the term ARCTIC HEAT and the tendency of consumers to shorten marks, ARCTIC HEAT is the portion of the registered mark that consumers are likely to note and remember, and even use when referring to it. See *In re Abcor Development Corp.*, 588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (J. Rich, concurring). In short, applicant's mark consists of the dominant element of the registrant's mark.

Applicant argues that the "stylized nature" of registrant's mark reduces any likelihood of confusion with applicant's mark. Br. at 7. This argument is unpersuasive. As noted, the rectangular carrier design has no source-indicating value. As for the stylized typeface of the registrant's mark, applicant has applied for its mark in standard character form, and therefore a registration for that mark would give applicant the right to use its mark in the same typeface as registrant's mark. Marks in typed or standard character form may be used in any typeface. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) ("[A] registrant

is entitled to depictions of [its] standard character mark regardless of font style, size, or color.").

We conclude that, although the presence of additional matter in the registrant's mark necessarily creates differences in pronunciation if the entire mark is spoken, the dominant features of the marks are identical in pronunciation and, when the marks are viewed in their entireties, they are similar in terms of appearance, connotation and commercial impression.

Despite the similar commercial impression conveyed by the marks, applicant argues that confusion is unlikely nevertheless because "terms such as 'ARCTIC' and 'HEAT' should be viewed as quite weak when intended to signify coolness and warmth" and, therefore, registrant's mark is entitled to a narrower scope of protection than would be given to fanciful or arbitrary marks. Br. at 5. This argument also is unpersuasive.

Although the individual words ARCTIC and HEAT may have a suggestive or even descriptive connotation when used, respectively, for cold or heat packs, there is no evidence that the combination ARCTIC HEAT is weak or commonly used in connection with any of the goods at issue. On the contrary, the juxtaposition of the seemingly opposite terms ARCTIC and HEAT create a noticeable and arbitrary mark.

We turn next to consider the similarity of the goods involved in this case. It is a generally accepted principle that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein; and *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002).

We find that the "therapeutic hot and cold compression wraps for cooling or warming parts of the human body" identified in applicant's application are closely related to the "cooling and heating rehabilitation packs" in the cited registration. Both goods are used to provide localized heat or cold to treat parts of the human body. The examining attorney submitted evidence from a number of websites to show that heat or cold packs are often used in wraps to heat or cool body parts. That is, therapeutic wraps often contain removable heat or cold packs that can be cooled or

heated as needed and then put into the wrap to be worn. For example, one website (www.pro-teconline.com/ptotec-ptgel.html) describes a "universal hot or cold gel pack wrap" which comes in two sizes and "contains" one or two gel pack inserts. Another web site (<http://coolbandanas.com/heated/heated-neckback.htm>) describes a therapeutic back wrap containing four removable heat packs. And finally, registrant's own website (www.arcticheatusa.com) describes a number of wraps under the heading "Cold/Hot Rehab Packs" each containing heat or cold packs which can be worn over various parts of the body. These websites show that wraps and packs are closely related because the packs constitute the heating or cooling element used in the wraps. Thus, wraps and packs will often be purchased together by consumers seeking therapeutic relief.

Further, the examining attorney has submitted copies of use-based, third-party registrations demonstrating that heating or cooling wraps and packs emanate from a single source. Examples are Registration No. 920296 ("heat packs, ice packs," and "post-operative heat and ice wraps"); Registration No. 1792490 ("heat compress packs" and "heat compress wraps"); Registration No. 1936563 ("heating wraps" with "cold packs"); Registration No. 2825539 ("ice and heat packs" and "compression wraps including heat wraps"); and Registration No. 3585481 ("hot and cold gel wraps" and "gel

packs for medical and therapeutic use"). Copies of use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993). Accordingly, we find applicant's cooling or warming wraps to be closely related to registrant's heating and cooling packs. We also note that applicant has not contested the examining attorney's contention that these goods are closely related.

The examining attorney has also submitted website evidence showing the relatedness of applicant's supports and the goods in the cited registration, but in view of the closely related nature of heating or cooling wraps and packs, there is no need for us to discuss this additional evidence. See *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is a likelihood of confusion with respect to any item that comes within the identification of goods or services in the application).

We conclude that in view of the substantial similarity of the marks and the closely related nature of the goods, their contemporaneous use on the identified goods is likely to cause confusion as to the source or sponsorship of such goods.

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Decision: The refusal under Section 2(d) of the Act is affirmed.