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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Dioptics Medical Products, Inc.

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Serial No. 78453049

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Derek J. Westberg of Westberg Law Offices for Dipotics Medical Products, Inc.

Justine Parker, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Holtzman, Zervas and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Dioptics Medical Products, Inc. seeks registration on the Principal Register of the mark H2OVERX (standard character claimed) for goods identified as "sunglasses, clip-on sunglasses, protective eyewear, eyeglass cases, eyeglass chains, eyeglass cords, and eyeglass cleaning kits

comprised of eyeglass cleaning cloths" in International Class 9.[1]

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the registered mark H2OPTIX (in typed form) for "sunglasses, sunglass cases and related sunglass products, namely, retainers and head-straps" in International Class 9 as to be likely to cause confusion, mistake or deception.[2]

When the refusal was made final, applicant appealed and briefs have been filed. We affirm the refusal to register.

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

[1] Application Serial No. 78453049, filed July 19, 2004, alleging a bona fide intention to use the mark in commerce under Trademark Act Section 1(b). 15 U.S.C. §1051(b).

[2] Registration No. 2085815, issued August 5, 1997; Section 8 and 15 affidavit accepted and acknowledged.

(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 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).

As to the goods identified in the application and the cited registration, they are identical (sunglasses) or otherwise related (applicant's goods, eyeglass cases, sunglass cases, eyeglass chains, eyeglass cords, on the one hand, and registrant's goods, sunglass cases and sunglass retainers and head-straps, on the other). Applicant concedes that the "goods are identical at least in part since both are for sunglasses." Br. p. 3. Further, with regard, at least, to the identical goods, we must presume that they will be sold in the same channels of trade and will be bought by the same classes of purchasers, while the related goods will be sold in some of the same channels of trade, and will be bought by some of the same purchasers. See Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994). In view of the above, the du Pont factors of the similarity of the goods

and the channels of trade favor a finding of likelihood of confusion as to the cited registration.

With regard to the conditions of sale, we note that these goods are general consumer items and may be purchased without a great deal of care.

We now consider whether applicant's mark, H2OVERX, and the mark in the cited registration, H2OPTIX, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. In making this determination we recognize that where the goods are identical, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert. denied 506 U.S. 1034 (1992).

Examining the marks in terms of their appearance, sound, meaning, and commercial impression, we find the marks to be similar. The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. Visual Information Inst., Inc. v. Vicon Indus. Inc., 209 USPQ 179 (TTAB 1980). We must determine whether the marks are sufficiently similar that there is a likelihood of

confusion as to source and, in making this determination, we must consider the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

Both marks begin with H2O and end with X and they have the same number of letters. The only distinguishing features are the different letters in the middle, VER and PTI. Trademarks may be confusingly similar in appearance despite the addition, deletion or substitution of letters. Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 81 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In addition, it is undisputed that the marks share the same meaning in that H2O in both marks connotes water and suggests some relevance of water to the goods, i.e., that they are used in or near water. Both marks also telescope the O in H2O with terms that begin with O, OPTIX and OVERX. OPTIX is a slight misspelling of the word OPTIC which is defined as "of or relating to the eye or vision" and "any of the lenses, prisms, or mirrors of an optical instrument." The American Heritage Dictionary of the

English Language (4th ed. 2000).[3] Thus, this term in registrant's mark is, at least, somewhat suggestive. We find that because the marks begin with same prefix H2O and the other elements share some similarities in that they both begin with O and end with X, the marks have a similar overall commercial impression and the H2O connotation overshadows any distinction that may be drawn from the difference in OPTIX and OVERX.

We are not persuaded by applicant's argument that the marks differ in sound because H2OVERX has five syllables and H2OPTIX has four syllables. There is no correct pronunciation of a trademark and applicant's mark also could be pronounced in four syllables. Kabushiki Kaisha Hattori Tokeiten v. Scuotto, 228 USPQ 461 (TTAB 1985).

Applicant also argues, based on the meaning of H2O and OPTIX, that the mark in the cited registration is weak. There is no evidence of third-party use or registration of the mark H2O for these or any types of goods. While H2OPTIX may be somewhat suggestive, and, thus, not afforded a broad scope of protection, given that we have identical general consumer goods which may be purchased without a

[3] The examining attorney's request that the Board take judicial notice of this dictionary definition is granted. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

great deal of care, the protection afforded this mark certainly encompasses these circumstances. King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services).

In conclusion, we find that because of the identical and closely related goods, identical and/or overlapping overlap in trade channels, the conditions of sale of a general consumer item, and the close similarities in the marks, confusion is likely between applicant's mark and the mark in the cited registration. To the extent there are any doubts, we resolve them, as we must, in registrant's favor. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

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