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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ConSeal International Inc.

Serial No. 85125792

James David Johnson of James David Johnson, P.A. for
ConSeal International Inc.

Jennifer M. Martin, Trademark Examining Attorney, Law
Office 116 (Michael W. Baird, Managing Attorney).

Before Quinn, Zervas and Gorowitz, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

ConSeal International Inc. ("applicant") filed an
application (Serial No. 85125792) to register STOP BUGGING
ME! (in standard character form) on the Principal Register
for "Insecticides; pesticides; pesticides for
exterminating, namely, bed bugs and dust mites" in
International Class 5. Applicant seeks registration under
the provisions of Trademark Act § 1(b), 15 U.S.C.
§ 1051(b).

The examining attorney 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 QUIT BUGGING ME (Registration No. 3243838 in standard character form) for "insect repellents" in International Class 5, as to be likely to cause confusion or mistake or to deceive.

Applicant appealed the final refusal. Both applicant and the examining attorney filed briefs.¹ We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The

¹ The examining attorney objected to two exhibits (Exhibits G and H), mentioned in applicant's brief, as being submitted for the first time with applicant's brief. The Board did not receive either exhibit. The examining attorney's objection is well-taken

fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks"). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that 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 so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD*

and is sustained to the extent that we do not consider applicant's discussion in its brief of these exhibits.

Electronics Components Corp., 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Registrant's mark is QUIT BUGGING ME and applicant's mark is STOP BUGGING ME! Both marks have the same connotation, i.e. "cease bothering me." See definition of "quit" from dictionary.com submitted with the December 18, 2010 Office action, "to stop, cease or discontinue"; and the definition of "stop" from education.yahoo.com submitted with the April 7, 2011 Office action, "to discontinue or cease." We do not accept applicant's argument that because the goods are repellents, and used for temporary relief, a temporary connotation should attach to the term QUIT in applicant's mark, while with registrant's goods, which offer a permanent solution to pests, a permanent connotation attaches to STOP; applicant's argument is without support, we doubt that purchasers would undertake such an analysis, and pesticides are generally used

annually. In addition, both three-word marks share the ending BUGGING ME, and the addition of the exclamation mark in applicant's mark is insignificant because implicit in both marks is the command that the insect or pest cease "bugging" the user. The substitution of STOP for QUIT does not change the meaning or commercial impression of the mark. Further, the marks are similar in appearance and sound in view of the inclusion of BUGGING ME as the last two terms in the marks.

We next consider the *du Pont* factor regarding the similarity or dissimilarity of the goods. The goods need not be identical or directly competitive to find likelihood of confusion under Section 2(d) of the Trademark Act. Rather, they need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from or are associated with the same source. See *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re International Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978).

We must consider the goods as they are identified in the registration and application, and it is improper to import any extraneous limitations. *Paula Payne Prods. v. Johnson Publ. Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA

1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

As evidence that the goods are related, the examining attorney introduced the following third-party registrations, suggesting that the recited goods may emanate from a common source.²

- Registration No. 3297220 for J.T. CHEMICAL for goods including, preparations for destroying vermin; vermin repellents; **insecticides** for domestic and agricultural use; and **insect repellents**.
- Registration No. 3644931 for VERSAPRO for goods including, **insect repellents**, and **insecticides**.
- Registration No. 3320206 for STARPETT and design for mosquito and **insect repellent** in the form of coil, mosquito and **insect repellent** in the form of incense, mosquito repellent in the form of lotion, mosquito repellent in the form of aerosol, **insecticides**, **pesticides**, parasiticides, insect repellent for use on dogs, fungicides, animal washes, namely, medical shampoos for animals, anti-horse-fly oils for use as a horsefly repellent, dog lotions, namely, medical lotions for use on dogs, and germicides.
- Registration No. 3334589 for BLOCK THE BITE for **insect repellents**; anti-insect-sprays; and **insecticides**.
- Registration No. 3326973 for BIOUD for **insect repellents**; anti-insect-sprays; and **insecticides**.

² See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

- Registration No. 3503126 for DON'T GET BIT for goods including **insect repellents**; anti-insect-sprays; and **insecticides**.
- Registration No. 3788829 for NATURALLY INSPIRED for goods including herbicides, **insecticides, pesticides** and fungicides for home, garden and lawn use and for professional use; animal repellents; bird repellents; granular repellent for burrowing pests; and **insect repellent**.

In addition, the examining attorney made of record with her final Office action web pages from (i) Google's cache of epestsolutions.com webpages stating, inter alia, that "Borid Boric Acid Powder" is a natural insecticide-pesticide and insect repellent"; (ii) lowes.com offering "Green Light" and "Cutter" insect repellent adjacent to ORTHO Bug-B-Gon insect killer; (iii) homedepot.com showing "Off!" insect repellent on the same page as "Once & Done" insect killer; and (iv) target.com showing "Repel" insect repellent next to "Safer" insect killer. Thus, in addition to the third-party registrations which suggest that insecticides, pesticides and insect repellents may emanate from a common source, the remaining evidence demonstrates that one product may function both as an insecticide and an insect repellent, and that insecticides and insect repellents are sold side-by-side on the same webpages.

Applicant argues that its insecticides and pesticides are dangerous chemicals that are used to kill insects and

other pests while registrant's goods are used to deter (not kill) insects to discourage them from landing on or otherwise coming in contact with humans; that pesticides are used on plants or other objects (e.g., mattresses) while repellants are applied topically on human skin; that the goods are not interchangeable; and that the fact that both applicant's and registrant's goods relate to insects is not a basis to find a likelihood of confusion. In addition, applicant challenges the examining attorney's evidence from internet merchants because they are from "big box" stores and argues that such goods are sold in different sections of the stores "[b]ecause of the liability involved in the accidental personal injury that could occur through the use of an insecticide or pesticide on the human skin as an insect repellant." Brief at 13.

We are not persuaded that the *du Pont* factor regarding the goods should be resolved in applicant's favor because there are differences in the goods and in the intended uses of the goods. The evidence regarding boric acid indicates that insect repellants are not limited to substances used topically on the body, and that at least one substance may be used as both an insect repellant and an insecticide. The webpages from lowes.com, homedepot.com and target.com each show insect repellants and insecticides marketed on

the same webpages, side-by-side, to the prospective purchaser. Thus, the webpages cannot be readily discounted, as applicant would have us do, because they are from what applicant identifies as "big box" retailers. Further, as noted above, the goods of the parties need not be identical or directly competitive to find a likelihood of confusion; they need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from or are associated with the same source. See *On-Line Careline, supra*; *International Tel. & Tel., supra*.

Thus, when we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, we conclude that, when potential purchasers of applicant's and registrant's goods encounter the applied-for and registered marks for their respective goods, they are likely to believe that the sources of these goods are in some way related or associated with one another. As a result, there is a likelihood of confusion.

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