

This Opinion is Not a
Precedent of the TTAB

Mailed: August 25, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Sound Sleep Products, Inc.
—

Application Serial No. 85646871
—

Mary M. Lee of Mary M. Lee PC for Sound Sleep Products, Inc.

Anne C. Gustason, Trademark Examining Attorney, Law Office 117,
Hellen Bryan-Johnson, Managing Attorney.
—

Before Taylor, Bergsman, and Wellington,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Sound Sleep Products, Inc. (“Applicant”) seeks a Principal Register registration for the mark **GEL TECH**, in standard characters, for “mattresses” in International Class 20.¹

¹ Application Serial No. 85646871 was filed on June 8, 2012, and is based on an allegation of first use anywhere and in commerce in May 2012, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

The Examining Attorney has refused registration of Applicant's proposed mark on the ground that it is merely descriptive of the goods under Section 2(e)(1) of the Trademark Act ("the Act"), 15 U.S.C. § 1052(e)(1).

After the refusal became final, Applicant filed a request for reconsideration that was denied by the Examining Attorney.² Applicant then appealed. The appeal has been briefed.

The Record

The Examining Attorney submitted the following materials during the prosecution of the application to support of her contention that GEL TECH is merely descriptive of mattresses:

- Definition for the term "gel" meaning "1. A jelly-like substance, especially one used in cosmetic or medicinal products ... a semi-solid colloidal suspension of a solid dispersed in a liquid ... 2. A semi-rigid slab or cylinder of an organic polymer used as a medium for the separation of macromolecules."³
- Definitions for the terms "tech" meaning "abbreviation for 1. technical 2. technology," and "technology" meaning "the application of practical sciences to industry or commerce."⁴
- Printouts from a website (www.nicholascase.net) offering a "Lady Americana ... Gel Tech" collection of mattresses and mattresses with a "Sta-Cool Gel" feature.⁵

² With its request for reconsideration (filed on September 11, 2015), Applicant "acknowledges the descriptive nature of the term 'gel,'" and provided a disclaimer of the term GEL, but argued that the mark, considered as a whole, is not merely descriptive. We further note that Applicant filed a second request for reconsideration on October 29, 2015.

³ Attached to Office Action issued on September 25, 2012. The provided definition was obtained from the website *Oxford Dictionaries* (www.oxforddictionaries.com).

⁴ Attached to Office Action issued on September 25, 2012. The provided definitions were obtained from the website *Collins Dictionaries* (www.oxforddictionaries.com).

⁵ Attached to Office Action issued on May 25, 2015.

- Printouts from The Mattress Store website (www.coronamattressstore.com) advertising a “MBC Gel-Tech” mattress with “Gel Vicomemory foam.”⁶
- Printouts from Amazon website (www.amazon.com) featuring a “Memory Foam with Cool Gel Full Size Mattress and Box Spring Set.”⁷ The mattress is also described as having “3” gel memory foam sleep cool technology ... made with advanced memory foam technology and new generation memory foam cooling gel.” Other mattresses advertised at the bottom of the printouts describe mattresses with “Memory Foam Gel.”
- Printouts from Mattress Ranch website (www.mattressranch.com) listing “Gel Memory Foam” as a feature of mattresses and “Gel Tech” mattresses with “cooling gel” and “Gel infused memory foam.”⁸ The website also offers an “AGT” mattress with “Advanced Gel Technology, the newest and most advanced materials and manufacturing techniques are used to craft the AGT collection.”
- Printouts from Maui Bed Store website (www.mauibedstore.com) listing a “Lady Americana Gel-Tech Mattress,” described as having “Liquid Gel infused memory foam.”⁹
- Printouts from Furniture Helpers website (www.furniturehelpers.com) offering a “Gel Tech Mattress/Set” with “Gel Visco Memory Foam” and “Active Support Technology®.”¹⁰
- Printouts from Barrs Furniture Riverside website (www.barrsfurnitureriverside.com) offering a “Gel Tech Mattress” with “Exceptional hybrid technology” and “Active Support Technology®.”¹¹
- Printouts from H&H Furniture website (www.hhfurnitureerto.com) listing a “QUEEN Gel Tech Memory Foam Mattress.”¹²

⁶ *Id.* Printouts were also attached to the October 5, 2015 Office action.

⁷ *Id.*

⁸ *Id.* Printouts were also attached to the October 5, 2015 Office action.

⁹ Attached to October 5, 2015 Office action.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Applicant, for its part and in rebuttal to the Examining Attorney's evidence, submitted the declaration of Tom Anderson, Applicant's Director of Marketing, with attachments.¹³ Mr. Anderson avers that the "Gel Tech" mattresses identified in the website evidence submitted by the Examining Attorney and associated with Lady Americana, Maui Bed Store and Mattress Ranch are actually Applicant's products being sold by these retailers. With respect to the "Gel Tech" mattresses identified in The Mattress Store and Furniture Helpers websites, Mr. Anderson states that these are mattresses manufactured by an unrelated third party, MBC Mattress Company, and without the consent of Applicant. Although Applicant acknowledges that a competitor also uses the term "Gel Tech" for mattresses without its permission, Applicant asserts the competitor is "clearly using the term as a trademark and not descriptively, as the Examiner contends."¹⁴ Applicant also relies on the existence of four third-party registrations for the marks: GEL TEK for fish food (Reg. No. 3657809, GEL is disclaimed), GEL-TECH for footwear (Reg. No. 2741510), GEL-TECH for batteries (Reg. No. 2041305), and GELTECH for bicycle saddles (Reg. No. 1559743).¹⁵ Applicant notes that these registrations issued without a claim of

¹³ Submitted with Applicant's (second) request for reconsideration filed on October 29, 2015.

¹⁴ Applicant's brief, p. 4 (4 TTABVUE 8).

¹⁵ Applicant merely referenced these registrations in its response to an Office action, filed on March 22, 2013 and only provided actual copies of the registrations with its appeal brief. Applicant argues that the Examining Attorney "did not advise Applicant that this listing was insufficient to make the registrations of record. Thus, the Examiner has waived any objection to the Board's consideration of the prior registrations here on appeal." 4 TTABVUE 10 (note 2). In her appeal brief, the Examining Attorney did not object to the introduction and consideration of the registrations, but argues the relevance of their existence. Under these circumstances, we have considered the registrations to be of record.

acquired distinctiveness and asserts that its mark is “no more descriptive of mattresses than any of these of these registered marks is descriptive of their respective goods.”¹⁶

Applicable Law

A mark is deemed to be merely descriptive, within the meaning of Section 2(e)(1), if it immediately conveys knowledge of a quality, feature, function, characteristic or purpose of the goods for which it is used. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the goods or services. *In re Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re H.U.D.D.L.E.*, 216 USPQ 358, 359 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought and the context in which it is being used on or in connection with the goods. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new, non-descriptive commercial

¹⁶ *Id.* at p. 6 (4 TTABVUE 10).

impression. If each component retains its merely descriptive significance in relation to the goods, the combination results in a composite that is itself merely descriptive. *See e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech*, 64 USPQ2d 1314 (TTAB 2002) (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

Analysis

As discussed further below, we find that Applicant's mark, GEL TECH, is composed of two merely descriptive terms and their combination does not result in new, non-descriptive meaning.

There is little question that "gel" is a descriptive term in the context of mattresses. Indeed, Applicant admits this much and has offered to disclaim the term (see footnote 2 *supra*). In any event, the evidence clearly shows that "gel" padding or "gel" memory

foam may be used as a component and touted as a feature of mattresses by increasing comfort (*e.g.*, “contours to the body and relieves pressure points ... reduces heat by pulling it away from the body, so you stay cooler at night”).¹⁷

With respect to the term “tech,” it is a recognized abbreviation for “technology” and is also merely descriptive of mattresses. Mattress retailers and manufacturers advertise the use of technology in the composition of their mattresses to make them more comfortable. For example, the Mattress Ranch website references a mattress with “Advanced Gel Technology, the newest and most advanced materials and manufacturing techniques are used to craft the AGT collection.”¹⁸ Likewise, the Furniture Helpers website describes a mattress with “Active Support Technology® [that] relaxes your muscles during natural sleep movements ...”¹⁹ and the Barrs Furniture Riverside sells a mattress advertised as having “Exceptional hybrid technology ... foam encased innerspring and two types of memory foam work together with body aligning ‘pocketed nano coils to combine for superior comfort.”²⁰ This evidence shows that “tech” or “technology,” meaning “the application of practical sciences to industry or commerce,” is used in the manufacture of mattresses and that third parties need to use this term to describe the composition or features of mattresses.

¹⁷ The Mattress Store website, page 3 of Office action issued on May 25, 2015.

¹⁸ Page 7 of Office action issued on October 5, 2015.

¹⁹ *Id.* at p. 10.

²⁰ *Id.* at p. 14.

In sum, the record establishes that GEL TECH, when considered in relation to mattresses, immediately informs consumers that the mattresses have a gel component and involve the use of technology, either a gel-based technology or some other technological feature. Moreover, the combination of the two terms, GEL and TECH, does not create a new non-descriptive meaning nor does it diminish the descriptive nature of the individual terms. While Applicant and one other party may be the only users of GEL TECH in connection with mattresses, other competitors in this field should be free to use the descriptive language GEL TECH. As noted in the seminal case of *In re Abcor*, 200 USPQ at 217:

The major reasons for not protecting such marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.

Applicant's reliance on the third-party registrations for the same or very similar marks on goods that are quite different from mattresses is misplaced. Whether or not registered trademarks are merely descriptive in connection with goods such as fish food, batteries and footwear is not relevant, let alone determinative, in this case. Rather, our focus is on whether GEL TECH is merely descriptive of mattresses and we make this determination of registrability on its own merits, based upon the record before us. Likewise, previous decisions cited by Applicant that involve very different marks that were found not merely descriptive have no bearing in this matter.

Finally, Applicant is correct that, to the extent that there is any doubt whether the term GEL TECH is merely descriptive of involved goods, we should resolve the

Serial Nos. 85646871

matter in favor of Applicant. However, in this case and contrary to Applicant's contention, the record supports our aforementioned findings and we have no doubt in this regard.

Decision: The refusal to register the mark is affirmed