

This Opinion is not a  
Precedent of the TTAB

Mailed: September 13, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re RSRK Inc.*  
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Serial Nos. 86806911 and 86806949<sup>1</sup>  
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Francis John Ciaramella of Rick Ruz PLLC,  
for RSRK Inc.

Siddharth Jagannathan, Trademark Examining Attorney, Law Office 114,  
K. Margaret Le, Managing Attorney.

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Before Mermelstein, Shaw and Hightower,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

RSRK Inc. (“Applicant”) seeks registration on the Principal Register of the marks  
ER SHOT THERAPY and EMERGENCY RELIEF SHOT THERAPY, in standard  
characters, for “Analgesics,” in International Class 5.<sup>2</sup>

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<sup>1</sup> Because the appeals involve the same issues and nearly identical records, we hereby consolidate them and issue a single opinion for both appeals. Citations to the record are to Serial No. 86806911, unless otherwise noted.

<sup>2</sup> Application Serial Nos. 86806911 and 86806949, both filed on November 2, 2015, based upon Applicant’s allegation of a *bona fide* intention to use the marks in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1(b). Applicant has disclaimed SHOT in both applications.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's marks, as used in connection with the identified goods, so resemble the mark FIRST AID SHOT THERAPY, also in standard characters, for, *inter alia*,

[C]linical shots which are clinical and medicinal beverages in nature to address acute and chronic conditions, namely, upset stomach, allergies, pain, migraine, headache, hangover; [and] therapeutic shots in the nature of beverages which are clinical and medicinal in nature to address acute and chronic conditions, namely, upset stomach, allergies, pain, migraine, headache, hangover . . . , in International Class 5,

as to be likely to cause confusion.<sup>3</sup>

The Examining Attorney also refused registration of Applicant's marks pursuant to Section 6(a), 15 U.S.C. § 1056(a), based on Applicant's failure to comply with a requirement to disclaim ER SHOT and EMERGENCY RELIEF SHOT, respectively, because they are merely descriptive of Applicant's goods within the meaning of Trademark Act Section 2(e)(1) and thus unregistrable components of the marks. 15 U.S.C. § 1052(e)(1).

When the refusals were made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the requests for reconsideration, and the appeals resumed. Both Applicant and the Examining Attorney filed briefs.

### **Disclaimer Requirement**

An Examining Attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. 15 U.S.C. § 1056. *In re La. Fish Fry*

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<sup>3</sup> Registration No. 4710506, issued March 31, 2015. Registrant disclaimed SHOT.

*Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262 (Fed. Cir. 2015). Merely descriptive or generic terms are unregistrable under Section 2(e)(1), 15 U.S.C. § 1052(e)(1), and therefore are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *La. Fish Fry*, 116 USPQ2d at 1264 (citing *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087 (Fed. Cir. 2005)) (“The PTO can condition the registration of a larger mark on an applicant’s disclaimer of an ‘unregistrable component of a mark otherwise registrable.’ 15 U.S.C. § 1056(a).”). See also *In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987).

The Examining Attorney has required a disclaimer of the wording ER SHOT and EMERGENCY RELIEF SHOT on the grounds that they are descriptive of Applicant’s goods. Applicant has disclaimed only the term SHOT in both applications.

Regarding EMERGENCY RELIEF SHOT, the Examining Attorney contends that “[t]aken together, the wording ‘EMERGENCY RELIEF SHOT’ readily describes a feature, function, characteristic, purpose, or use of the goods at issue, namely, that the goods are ‘SHOTS’ (small drinks) that are to be used for ‘EMERGENCY RELIEF’ (i.e. immediate easing of pain).”<sup>4</sup> Regarding ER SHOT, the Examining Attorney similarly contends that “[t]aken together, ‘ER SHOT’ readily describes a feature, function, characteristic, purpose or use of the applicant’s goods, namely, the goods are ‘SHOTS’ i.e. small drinks that can be administered in the ‘ER’ or emergency room

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<sup>4</sup> Serial No. 86806949, Examining Attorney’s Br., p. 14, 9 TTABVUE 14.

to relieve a consumer's intense pain.”<sup>5</sup> The Examining Attorney introduced dictionary definitions for each of the foregoing terms. Applicant did not address the disclaimer requirements in its brief.

The commonly understood meanings of these terms support the arguments of the Examining Attorney. When used in connection with “analgesics,” the wording EMERGENCY RELIEF SHOT and ER SHOT in the marks will likely be understood by consumers to indicate that the goods provide pain relief quickly, as in an emergency. Accordingly, the requirements that Applicant disclaim EMERGENCY RELIEF SHOT and ER SHOT, respectively, are affirmed.

### **Likelihood of Confusion**

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence 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.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the goods and the similarities between the marks. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the differences in the marks.”).

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<sup>5</sup> Examining Attorney's Br., p. 13, 9 TTABVUE 13.

*A. The nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of purchasers.*

We begin with the similarity of the respective goods. Applicant's goods are "analgesics." An "analgesic" is defined as "a drug that relieves pain."<sup>6</sup> Further, Applicant admits that its goods "will be offered in 'SHOT' form" (i.e., a small drink).<sup>7</sup> Registrant's goods include "clinical and medicinal beverages in nature to address acute and chronic conditions, namely, . . . pain. . . ." Applicant does not argue that the goods are not identical or otherwise unrelated. Accordingly, we find that the respective goods are legally identical inasmuch as they are pain relievers.

Because the goods are legally identical, and without restriction, we must presume that they are sold in all normal trade channels and to all normal classes of purchasers for such goods, and thus the channels of trade and classes of purchasers are the same as well. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *In re Yawata Iron & Steel Co., Ltd.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

The *du Pont* factors regarding the similarity of the goods, channels of trade, and classes of purchasers favor a finding of a likelihood of confusion.

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<sup>6</sup> [Http://www.merriam-webster.com/dictionary/analgesic](http://www.merriam-webster.com/dictionary/analgesic), Examining Attorney's Office Action of February 24, 2016, TSDR p. 17.

<sup>7</sup> Applicant's response of August 24, 2016, TSDR p. 4.

*B. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression.*

Next, we consider the *du Pont* factor relating to the similarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

Moreover, the emphasis of our analysis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant’s marks are ER SHOT THERAPY and EMERGENCY RELIEF SHOT THERAPY in standard characters, whereas Registrant’s mark is FIRST AID SHOT THERAPY, also in standard characters.

The Examining Attorney argues that “FIRST AID” in Registrant’s mark is understood to mean “emergency treatment that is given to an injured or sick person.” Thus, Applicant’s and Registrant’s marks

[A]re confusingly similar because [they] readily impart to a consumer that the goods offered will be therapeutic agents administered as “SHOTS” during emergencies or serious medical situations. As such a consumer will likely view Applicant’s mark[s] as an extension of the Registrant’s brand or vice versa i.e. that the same source in the marketplace offers both product lines.<sup>8</sup>

With respect to the SHOT THERAPY portions of the marks, the terms are identical in appearance, sound, and meaning, suggesting a small therapeutic drink.<sup>9</sup>

With respect to the ER, EMERGENCY RELIEF, and FIRST AID portions of the marks, the terms are similar in connotation and commercial impression, suggesting emergency care or assistance. Indeed, as the Examining Attorney notes, “first aid” is defined as “emergency treatment that is given to an injured or sick person.”<sup>10</sup>

Applicant, nevertheless, argues that “FIRST AID and EMERGENCY/ER have completely different meanings in common usage. Specifically, FIRST AID is typically rendered by the average person . . . Emergency care, however, is generally provided by a trained professional or physician . . . .”

Applicant’s argument is unpersuasive. The definition of “first aid” makes no such distinction between provision of treatment rendered by average persons versus physicians. When we consider the marks in their entirety, as we must, we find ER SHOT THERAPY and EMERGENCY RELIEF SHOT THERAPY to be similar in connotation and commercial impression to FIRST AID SHOT THERAPY. That is, all

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<sup>8</sup> Examining Attorney’s br., p. 7, 9 TTABVue 7.

<sup>9</sup> <https://ahdictionary.com/word/search.html?q=shot>, Office Action of February 24, 2016, TSDR p. 25.

<sup>10</sup> <https://ahdictionary.com/word/search.html?q=first%20aid>, Office Action of February 24, 2016, TSDR p. 28.

of the marks suggest a small therapeutic drink given to provide emergency relief from pain or suffering.

This *du Pont* factor favors a finding of likelihood of confusion.

*C. The number and nature of similar marks in use on similar goods*

We next consider the strength of the cited mark under the sixth *du Pont* factor. *Du Pont*, 177 USPQ at 567. If the evidence establishes that the consuming public is exposed to third-party use of similar marks used in connection with similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay*, 73 USPQ2d at 1693. “Third party registrations are relevant to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks omitted). *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

Citing sixteen registrations for marks containing the terms FIRST AID, EMERGENCY, or ER, Applicant argues that the terms “are weak, and entitled to a limited scope of protection,” and therefore, use and registration of its marks “is not likely to lead to confusion, mistake or deception.”<sup>11</sup> The sixteen marks appear below:

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<sup>11</sup> Applicant’s Br., p. 7, 7 TTABVUE 8.



Trademark	Registration	Class
FIRST AID RESPONSE	5144100	005
FIRST AID INSIDE	4947133	005
FIRST AID ONLY	4781929	005
MY FIRST AID	4327506	005
MY FIRST AID COMPANY	4327501	005
ELITE FIRST AID	4322859	005
FIRSTAID EXCHANGE	3259101	005
INTELLIGENT FIRST AID	4255657	005
FIRST AID ONLY	3177591	005
FIRST AID TO GO!	2240644	005
EMERGEN-ZZZZ	4773815	005
ER TO GO	4189395	005
EMERGEN-C	2616360	005
ER EMERGENCY RATION	3803107	005
EMERGENCY ESSENCE	2769605	005
ER 911	2290161	005

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We do not find these registrations to be particularly probative. None of the marks listed include the terms “shot” or “therapy,” or “emergency relief.” That is, these marks include only a portion of the marks at issue, and not the portion that is common to the marks. Additionally, all of the FIRST AID-formative marks have disclaimed “first aid” which suggests that the wording is less dominant than the SHOT THERAPY portion of Registrant’s mark which is entitled to greater weight. *See Nat’l Data Corp.*, 224 USPQ at 751. Finally, none of these third-party marks create similar commercial impressions as compared to Applicant’s and Registrant’s marks, thus the registrations do not establish that Registrant’s mark is “relatively weak and entitled to only a narrow scope of protection.” *Palm Bay*, 73 USPQ2d at 1693.

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<sup>12</sup> Applicant’s response of March 14, 2017, TSDR pp. 7, 13-28.

*D. Fame and lack of actual confusion*

Applicant argues that Registrant's mark is not famous, and also that "[t]here has been no documented evidence that shows that any consumers have confused the respective marks in commerce." Neither of these arguments are relevant. No evidence regarding the fame of Registrant's mark has been made of record and it is not necessary that a mark be famous to find a likelihood of confusion. *See du Pont*, 177 USPQ at 567. Evidence showing that the senior mark is famous suggests a finding that confusion is likely, but the *lack* of such evidence does not indicate that confusion is unlikely. *Majestic Distilling*, 65 USPQ2d at 1205. This *du Pont* factor is neutral.

Nor is the absence of any actual confusion relevant. First, the involved applications are not based on use in commerce so it is not clear that there has been an opportunity for any confusion to occur. Second, although a showing of actual confusion would be highly probative of a likelihood of confusion, the opposite is not true. The lack of evidence of actual confusion carries little weight, especially in an *ex parte* context. *Majestic Distilling*, 65 USPQ2d at 1205. This *du Pont* factor is neutral as well.

*E. Conclusion*

Having considered all the evidence and arguments on the relevant *du Pont* factors, we conclude that there is a likelihood of confusion between Applicant's marks, ER SHOT THERAPY and EMERGENCY RELIEF SHOT THERAPY, and Registrant's mark, FIRST AID SHOT THERAPY, for identical goods, namely pain relievers.

**Decision:** The refusals to register under Sections 2(d) and 6(a) are affirmed.