

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: September 6, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

—————  
Trademark Trial and Appeal Board  
—————

*In re Physician's Seal, LLC*  
—————

Serial No. 87169253  
—————

Christopher M. Ramsey of Gray Robinson PA,  
for Physician's Seal, LLC.

Alicia Collins Edwards, Trademark Examining Attorney, Law Office 115,  
Daniel Brody, Managing Attorney.

—————  
Before Taylor, Wellington, and Kuczma,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Physician's Seal, LLC ("Applicant") seeks registration on the Principal Register of the standard character mark SLEEP HYGIENE CYCLE (SLEEP HYGIENE disclaimed) for "Dietary supplements; nutritional supplements; pharmaceutical preparations for use in treating sleep disorders; melatonin preparations for pharmaceutical purposes; over-the-counter pharmaceutical preparations for use in treating sleep disorders" in International Class 5.<sup>1</sup>

—————  
<sup>1</sup> Application Serial No. 87169253 was filed on September 13, 2016 based on Applicant's claim of a bona fide intent to use the mark in commerce, under Section 1(b) of the Trademark Act,

The Examining Attorney has refused registration on the ground that the original and substitute specimens are not acceptable because they do not show the applied-for mark in use in commerce on or in connection with the goods identified in the application. Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127.

The refusal was made final. Applicant appealed to this Board and requested reconsideration of the refusal. The Examining Attorney denied Applicant's request for reconsideration and the Board resumed this appeal. The appeal has been fully briefed. For the reasons given herein, we affirm the refusal to register the mark.

#### I. The Specimens and Arguments

With its Statement of Use, Applicant submitted a specimen ("first specimen") comprising three screenshots from its website – the first two appear as follows (with a red arrow provided on the second to highlight location of proposed mark):<sup>2</sup>

---

15 U.S.C. § 1051(b). On November 9, 2017, Applicant filed a Statement of Use under Section 1(d) of the Act, alleging first use of the mark in commerce on November 9, 2017.

<sup>2</sup> Specimen, filed November 9, 2017, TSDR pp. 1-3.

The Science of Sleep | X  
Secure https://www.remfresh.com/the-science-of-sleep#precious  
Apps Suggested Sites Internet Archive Dig Imported From IE Search for Corporat WPO Madrid Moni

Store Locator

# REMfresh

## Why is Sleep Important?

Research shows that a lack of sleep can impact learning, memory, and mood. People who are well rested tend to perform certain tasks quicker and remember better what they've learned.<sup>1</sup>

### How Much Sleep Do I Need?

A recent study in 2014 found that up to 7 hours is the optimal amount for healthy adults to sleep. REMfresh is formulated to release and absorb the body's key sleep ingredient, melatonin, for up to 7 hours.

### The Role of Melatonin

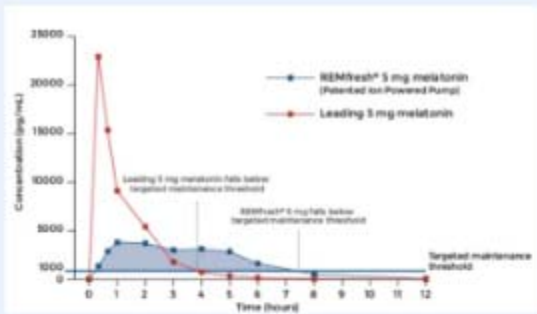
Made by the human body, melatonin is a hormone that plays an important role in regulating sleep. When released in ideal amounts, melatonin makes you feel sleepy. Melatonin release usually begins in the evening after the sun goes down and continues throughout the night. Continuous release is important to prevent levels from dropping below an individual's targeted maintenance threshold.

A graph of REMfresh's release pattern of melatonin throughout the night resembles a mesa - a flat topped hill with steep sides. It's estimated that 33 percent of adults have occasional difficulty falling or staying asleep. This may be because their body is no longer producing this Mesa Wave™ pattern of melatonin release.

Research shows that as the body ages, the amount of melatonin released in the body decreases. This shortage can lead to occasional sleeplessness.

Age (in years)	6-hydroxy melatonin (mcg/mL/7 hrs)	Change (%)
20-39	11.7	
40-59	8.4	-28%
60-79	5.7	-51%

ORDER NOW



### The REMfresh® Difference

REMfresh's melatonin release mimics the body's own release of melatonin during the sleep cycle.† This may help you fall asleep faster, stay asleep longer, and experience better quality sleep.† Through its patented continuous release and absorption system, REMfresh releases melatonin for up to 7 hours during the night.†

REMfresh is an alternative to sleep products that can cause morning drowsiness. REMfresh is not a prescription drug. The primary ingredient in REMfresh is the body's own sleep ingredient: melatonin. REMfresh is non-habit forming and doesn't contain narcotics, hypnotics, barbiturates, sedatives, antihistamines, or alcohol.

REMfresh helps you wake up refreshed without a drug hangover effect.†

#### Benefits

- Continuous Release and Absorption Technology that Mimics the Body's Own Release of Melatonin During the Sleep Cycle.†
- Improved Melatonin Release and Absorption to Deliver up to 7 hours of Deep and Restorative REM sleep as part of a full sleep cycle.†
- Non-Habit Forming
- No Morning Drowsiness
- Clinically Shown to Result in 7-Hour Melatonin Absorption.†
- Wake Up Refreshed.†
- No Drug Hangover Effect

[Read more about the REMfresh® Advantage.](#)

ORDER NOW

## Sleep Hygiene Cycle™



Go to bed the same time every night



Make sure bedroom is quiet, dark, and cool



Avoid looking at blue screen devices in bed (TV, laptops, Smartphones, tablet)



Enjoy a 2-hour period of calm activity to reduce restlessness and circular thoughts before bedtime.



Avoid exercise, alcohol, and large meals before bedtime



Avoid caffeine after noon



Take REMfresh nightly, 30-60 minutes before bedtime

### Specific Tips for Getting a Better Night's Sleep<sup>2</sup>

You're not alone. Occasional sleeplessness impacts millions of people every day.

The Examining Attorney rejected the specimen asserting that the “mark is shown on a website but not in connection with the actual sale of the goods specified in the statement use. Rather, the specimen appears to show use of the mark REMfresh in relation to the goods specified in the statement of use.”<sup>3</sup> The Examining Attorney elaborated:

[A]lthough the specimen consisting of Applicant’s web page does include a textual description of the goods and a means for ordering the goods, the mark is not displayed in a manner in which consumers would associate the applied-for mark with the goods. Rather, the consumer is likely to associate the wording REMFRESH with the specified goods. The wording REMFRESH appears prominently at the top of the web page and in numerous instances throughout the content of the web page in direct association to the goods, including within a shaded section containing a textual description of the goods along with an “ORDER NOW” button.

In response, Applicant requested that the Examining Attorney reconsider the refusal as to the first specimen, arguing that specimen shows the proposed mark “functions like that of a tagline that consumers relate to the source of the goods.”<sup>4</sup> Applicant attached an “annotated copy of the [first] specimen” to show that “a consumer who visits the webpage would see it as one continuous page that can be viewed by scrolling up and down.”<sup>5</sup>

---

<sup>3</sup> Office Action issued December 14, 2017, TSDR p. 1.

<sup>4</sup> Response filed June 14, 2018, TSDR p. 1.

<sup>5</sup> *Id.*

In the same response, and “out of an abundance of caution,” Applicant submitted a substitute (“second”) specimen – comprising photographs of product packaging, including the following of the front and back of the box, and “the insert that is packaged inside the box.”<sup>6</sup> The photographs appear, in the aforementioned order, as follows:

FRONT:



BACK:

**Trouble Sleeping?**  
Don't worry, you are not alone. 1 in 3 Americans suffer from occasional sleeplessness.

As we age and lead busier lives, our bodies produce less melatonin, the key ingredient we need to fall asleep and stay asleep. REMfresh helps supplement natural levels of the body's own sleep ingredient and helps to maintain those levels for up to 7 hours.\*†

**The REMfresh Advantage**  
Only REMfresh has the breakthrough melatonin IPP™ (Ion-Powered Pump) technology. This helps you sleep soundly and wake up refreshed to conquer the new day.†

**REMfresh's 7 hour absorption, known as the MESA WAVE™, has been shown in a clinical trial.\***

Fall asleep fast\* Stay asleep longer\* Improve sleep quality\* Wake up REfreshed!\*

For illustrative purposes only.

**Directions for use:** Take 1 - 2 caplets 30 to 60 minutes before intended bedtime. Do not exceed 5 caplets per day.

**Supplement Facts**  
Serving Size 2 Caplets

Amount Per Serving	
Melatonin (Ultramel™)	4mg**

\*\*Daily Value (DV) not established.

**Other Ingredients:** Silicified Microcrystalline Cellulose, Citric Acid, Hydroxypropyl Methylcellulose, Starch. **Less than 2% of:** FD&C Blue #1 Lake, FD&C Yellow #5 Lake, Sodium Carboxymethyl Cellulose, Mica Based Pearlescent Pigment, Dextrose Monohydrate, Titanium Dioxide, Magnesium Stearate.

Manufactured for Physician's Seal®, LLC, Boca Raton, FL 33487

†These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

and

<sup>6</sup> *Id.*



INSERT (placed in box):

**WHY DO MANY PEOPLE HAVE TROUBLE FALLING AND STAYING ASLEEP?**  
 Sleep is an essential part of every individual's life. Sleep is an active process involving a complex and choreographed series of biological events. There are many reasons so many people have occasional trouble falling asleep and staying asleep. These include a shortage of melatonin, especially as people progress in age.

**WHAT IS MELATONIN, AND WHY IS IT SO IMPORTANT?**  
 Melatonin is the body's own sleep ingredient which is produced by the pineal gland in the brain. Usually, melatonin release starts in the evening when the sun goes down, and then it continues to be released throughout the night. If one were to look at a typical release pattern of melatonin throughout the night on a graph, its shape would resemble a mesa, a flat topped hill with steep sides. This pattern can be referred to as the Mesa Wave™. As people age their bodies may no longer produce enough melatonin for an adequate Mesa Wave required for quality sleep.

**WHAT IS REM SLEEP AND WHY IS IT SO IMPORTANT?**  
 The body requires a certain amount of sleep in order to properly rest, repair, and renew itself. Sleep is customarily divided into five different stages, with each stage having a different effect. These five stages are N1, N2, N3, deep sleep, and REM sleep. The body moves among these five stages several times while asleep. If your sleep is disrupted for any reason, your body may not have a chance to properly restore itself, especially if it is struggling to get to the later stages, called "deep sleep" and "REM sleep." Studies have shown that sound and sufficient sleep is important for learning, memory, and a healthy immune system. A regular pattern of deep sleep and REM sleep, will help you to begin the next day feeling refreshed and ready to go.

**WHAT IS REMFRESH™?**  
 REMfresh™ is a unique, continuous release and absorption formulation of UltraMel™ melatonin. REMfresh™ uses the patented, scientifically advanced Ion Powered Pump (IPP)™ Technology to release and absorb premium melatonin for up to 7 hours.\* This may help you fall asleep faster, stay asleep longer and experience quality sleep (i.e. deep sleep and REM sleep).\*

**WHAT IS ULTRAMEL™ MELATONIN AND WHY IS IT BETTER?**  
 UltraMel™ melatonin is a high quality, 99.9% ultra pure melatonin sourced from Western Europe. UltraMel™ melatonin is produced exclusively for Physician's Seal to conform to the company's high standards. The sources of many other melatonin products on the market are often undisclosed or shipped from China or India.

**WHAT IS ION-POWERED PUMP (IPP)™ TECHNOLOGY AND HOW IS IT DIFFERENT FROM "TIME-RELEASED" OR "BI-LAYER" MELATONIN PRODUCTS?**  
 Recent research has shown that conventional melatonin products have challenges being absorbed beyond the stomach, which may explain why other melatonins (including time released) have difficulties with continuous absorption through the night. The REMfresh™ special patented Ion-Powered Pump (IPP)™ technology, is a continuous release system. This allows REMfresh™ to mimic the way your body naturally produces and absorbs melatonin. This release and absorption profile can be called the Mesa Wave™. This means an initial start of release around bedtime and then continuous release and absorption throughout the night.\* This helps the body achieve its natural, full sleep cycle.\* This cycle may include the deep sleep and REM sleep you need to wake refreshed. Since REMfresh™ is not a drug, it should not produce a drug hangover in the morning.

**HOW IS REMFRESH™ DIFFERENT FROM OTHER NON-MELATONIN SLEEP PRODUCTS?**  
 REMfresh™ is different from non-melatonin sleep products because it delivers the body's own natural sleep ingredient, melatonin.\* Melatonin has not been shown to cause memory problems, morning dysfunction, drowsiness, or unusual night occurrences such as sleep walking. REMfresh™ is non-habit forming. REMfresh™ does not contain narcotics, hypnotics, barbiturates, sedatives, antihistamines, alcohol or other harsh or additive chemicals.

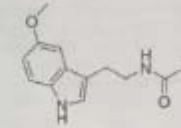
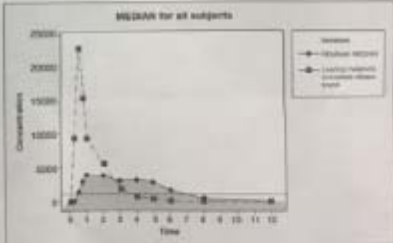
**HOW IS REMFRESH™ DIFFERENT THAN OTHER MELATONIN PRODUCTS?**  
 Unlike conventional melatonin sleep products, REMfresh™'s continuous release and absorption technology is scientifically designed to mimic the body's own sleep cycle with the same ingredient that the body naturally makes and uses to induce and maintain sleep.\* The REMfresh™ patented IPP™ technology sets it apart, as it helps to maintain melatonin levels for up to 7 hours, allowing for deep and restorative REM sleep as part of a full sleep cycle.\* REMfresh™'s 7 hour absorption has been demonstrated in a well-designed clinical trial, REMAKT™ (REM Sleep Absorption Kinetics Trial), versus the leading conventional melatonin brand. REMfresh™ has been granted two patents by the US Patent office which acknowledges the uniqueness and novelty of how REMfresh works.

**WHAT IS THE BEST WAY TO SUPPORT MY SLEEP?**  
 If you want to help manage occasional sleeplessness, you should include the following in your individualized Sleep Hygiene Cycle™:

- Try to go to bed the same time every night.
- Enjoy a 2-hour period of calm activity to reduce restlessness and circular thoughts before bedtime. Try to avoid television and computer/cell phone blue screens.
- Take REMfresh™ 30 to 60 minutes before bedtime to help you fall asleep, stay asleep, obtain high quality sleep (deep and REM) and to wake up replenished and refreshed.\*

**IS REMFRESH™ APPROVED BY THE FDA AND IS IT SAFE?**  
 REMfresh™ is a dietary supplement. REMfresh™ is regulated under the Federal Dietary Supplement Health and Education Act which does not require pre-approval. Melatonin has been in common use for over two decades. The U.S. Food and Drug Administration (FDA) at all times has authority to investigate and monitor such products for safety and compliance. Melatonin being the body's own sleep ingredient has a well-established profile of safe use by millions of people around the world. Reading and following the label directions is essential for the proper use of supplements.

FREQUENTLY ASKED QUESTIONS **REMfresh**™ ADVANCED SLEEP FORMULATION

MARK

\*This information is for educational purposes only and is not meant to be a substitute for the advice of a physician or other healthcare professional. It has not been reviewed by the FDA. You should not use this information for diagnosing a health problem or disease. Individual results may vary. The company will strive to keep information current and accurate, but may not be able to do so at any specific time.

(with Applicant's supplied arrow directing to its "mark.")<sup>7</sup>

The Examining Attorney rejected the second specimen asserting that "the average consumer viewing the mark as shown on the [second] specimen would view it as information about good sleep habits being provided . . . rather than attributing

thereto the special significance of a trademark to distinguish the applicant's goods from the goods of others.”<sup>8</sup> The Examining Attorney points out that “information inserts are generally not acceptable to show trademark use” and, in this case, the specimen “shows the applied-for mark on a packaging insert containing answers to Frequently Asked Questions about the REMfresh product.”<sup>9</sup>

## II. Applicable Law - Analysis

Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a trademark is used in commerce when “it is placed in any manner on the goods or their containers or the displays associated therewith ....” *See also* Trademark Rule 2.56(b)(2), 37 C.F.R. § 2.56(b)(1). An applicant's statement of use is essentially an allegation that the mark has been used in commerce being made in order to obtain registration, and it must be accompanied by one specimen per class showing the mark as used on or in connection with its identified goods and/or services. 15 U.S.C. § 1051(d)(1); 37 C.F.R. §§ 2.56, 2.88(b)(2). The specimens provide the USPTO with support for the applicant's verified statements regarding trademark use. In this regard, the manner in which an applicant has employed its asserted mark, as evidenced by the specimens of record, must be carefully considered in determining whether the asserted mark has been used as a trademark with respect to the goods identified in the application. *In re Minerva Assocs., Inc.*, 125 USPQ2d 1634, 1636 (TTAB 2018) (citing *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976)). If the specimens fail to

---

<sup>8</sup> Office Action issued July 11, 2018, TSDR p. 1.

<sup>9</sup> 9 TTABVUE 8.



indicate use in commerce, as defined in 15 U.S.C. § 1127, registration may be refused on that basis.

With respect to both the first and second specimens, the key issue is not so much the format of the specimens which are comprised of screenshots from Applicant's website and a product packaging insert. Rather, it is the manner in which the proposed mark SLEEP HYGIENE CYCLE, as shown in the specimens, is used and whether it will be directly associated with the identified goods, namely, Applicant's supplements and pharmaceutical preparations.

Having given careful consideration to both specimens, we agree with the Examining Attorney. That is, consumers viewing the proposed mark in the specimens will not directly associate the proposed mark with the involved goods in a manner that would indicate the source of the goods. *See In re Sones*, 590 F.3d 1282, 93 USPQ2d 1118, 1123 (Fed. Cir. 2009) ("the test for an acceptable . . . specimen, is simply that it must in some way evince that the mark is 'associated' with the goods and serves as an indicator of source"). *See also In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973) (term must have "direct association" with applied-for services); *see also In re Safariland Hunting Corp.*, 24 USPQ2d 1380, 1381 (TTAB 1992) (specimen must show "direct association" with goods). In both specimens, the proposed mark appears as a caption before bulleted points of advice for obtaining better sleep. Although the last point of advice is to "Take REMfresh nightly 30-60 minutes before bedtime," the proposed mark conjures an overall routine or program for better sleep.

Furthermore, with respect to the second specimen, the proposed mark is found in the middle of the packaging insert's "Frequently Asked Questions" – embedded into the response to the question "What is the best way to support my sleep?" This is far from the prominent use needed to clearly associate the proposed mark with the identified goods. More importantly, the proposed mark only points to a suggested program for getting better sleep, not the underlying goods.

In arguing that the first specimen should be acceptable for demonstrating use of the proposed mark on the goods, Applicant relies heavily on the Board's decision in *In re Dell, Inc.*, 71 USPQ2d 1725 (TTAB 2004). Indeed, Applicant states that the *Dell* decision "is more pertinent to the present circumstances because the web page specimen being refused in that case only sold one product, displayed other marks associated with the same goods, and the mark in question (QUIETCASE) was not the primary mark displayed on the web page."<sup>10</sup> While Applicant is correct that the involved specimen at issue in the *Dell* decision contained multiple marks in connection with a single computer product, we note the manner in which the QUIETCASE mark was presented in the specimen is not analogous to Applicant's use of SLEEP HYGIENE CYCLE. The website page specimen in *Dell* appeared as follows:

---

<sup>10</sup> 10 TTABVUE 4.

**DELL** MEDIUM & LARGE BUSINESS

Computers | Software & Peripherals | Parts & Upgrades | Services

Buy Online or Contact Your Sales Rep | Main | Desktops | Notebooks | Workstations | Servers | Storage |

**DELL PRECISION™ WORKSTATION 530 DETAILS**

Precision 530  
Fastest Intel® Xeon™ Processor Available.

400 MHz System Bus and Dual Channel RDRAM® memory for outstanding performance.

360 Flash Demo Plug-in Required

Product Views | Product Highlights | Tech Specs | Service & Support

Next Generation Intel® Xeon® Performance in a Highly Scalable Workstation

- \*Outstanding dual-processor performance with Intel® Xeon™ processors up to 2.40GHz.
- \*Up to 4GB<sup>1</sup> dual channel RDRAM memory.
- \*400MHz system bus.
- \*Up to 292GB<sup>2</sup> U160 internal storage
- \*Ideal system for CPU and graphics intensive applications such as MCAD, AEC, GIS and DCC
- \*Innovative new clamshell chassis with Dell's QuietCase™ acoustic environment, provides easy access to system interior and supports tool-less upgrades and maintenance of key internal components
- \*Available in tower chassis.

Free E-mail Updates  
Enter your e-mail address:

Get the latest product info and special offers from Dell.

Back to Dell Precision Workstation series

*Id.* at 1728. The involved mark, QUIETCASE, is described in the specimen in the following manner: “Innovative new clamshell chassis with Dell’s QuietCase™ acoustic environment, provides easy access to system interior ...” It is unambiguous from this specimen that QUIETCASE is identifying the “internal cases for computer hardware” goods and thus the Board found the specimen was acceptable.

In contrast to the circumstances in *Dell*, there is no such direct association of Applicant’s mark with the goods identified in the application. At most, consumers will perceive the proposed mark as being used in connection with the offering of advice for obtaining better sleep which is given in conjunction with Applicant’s REMfresh-brand supplements.

Ultimately, the first and second specimens do not demonstrate use of the mark on or in connection with the goods in commerce because they do not directly associate the mark with the goods. Because the requirement to submit an acceptable specimen showing use of the mark in commerce has not been met, registration must be refused under Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127.

**Decision:** The refusal to register Applicant's proposed mark is affirmed.