Mailed: May 18, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Drip Drop Hydration Inc.

Serial No. 88090507

Jennifer Lee Taylor of Morrison & Foerster LLP
for Drip Drop Hydration Inc.

William T. Verhosek, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

Before Zervas, Heasley, and Lebow,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Drip Drop Hydration Inc. ("Applicant") seeks registration on the Supplemental Register of the proposed mark **DEHYDRATION RELIEF FAST** (in standard characters) for "Electrolyte replacement solutions; oral hydration solutions in flavored powder form, namely, powdered electrolytes, for medical use; dietetic electrolyte substitutes for medical use; medical foods, namely, ingestible powders used in the preparation of electrolyte drinks for use in the treatment of dehydration,

diarrhea, and vomiting" in International Class 5, and "powder for making non-alcoholic, non-carbonated fruit flavored drinks" in International Class 32.[1]

Applicant originally sought registration on the Principal Register, based on its declared intention to use the proposed mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). However, it encountered a mere descriptiveness refusal under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), as **DEHYDRATION RELIEF FAST** merely describes the function or purpose of its goods.[2] So it filed an amendment to allege use of the proposed mark on its goods, and amended its Application to seek registration on the Supplemental Register, thereby mooting the mere descriptiveness refusal.[3]

The Trademark Examining Attorney then refused registration under Sections 23 and 45 of the Trademark Act, 15 U.S.C. §§ 1091 and 1127, on the ground that the proposed mark is merely informational, fails to function as a trademark, and is not registrable on the Supplemental Register.[4] When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. We affirm the refusal to register.

[1] Application Serial No. 88090507 was filed on August 23, 2018.

[2] Sept. 7, 2018 Office Action.

[3] March 7, 2019 amendment to allege use, alleging first use and first use in commerce since at least as early as August 1, 2018. *See also* March 7, 2019 Response to Office Action.

[4] Sept. 30, 2019 Office Action.

I. Discussion

A. Failure to Function as a Trademark

To qualify for registration on the Supplemental Register, a proposed mark must be capable of distinguishing the applicant's goods or services. 15 U.S.C. § 1091. *Matal v. Tam*, 582 U.S.__, 137 S.Ct. 1744, 122 USPQ2d 1757, 1761 (2017); *Real Foods Pty Ltd. v. Frito-Lay North America, Inc.,* 906 F.3d 965, 128 USPQ2d 1370, 1373 n. 3 (Fed. Cir. 2018); *In re Katch, LLC*, 2019 USPQ2d 233842, *2 (TTAB 2019). That is, it must be capable of becoming a trademark, functioning "to identify and distinguish [the applicant's] goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U.S.C. § 1127. "The test is not whether the mark is already distinctive of the applicant's goods, but whether it is capable of becoming so." *In re Bush Bros. & Co*., 884 F.2d 569, 12 USPQ2d 1058, 1059 (Fed. Cir. 1989).

But not every designation adopted with the intention that it perform a trademark function necessarily accomplishes that purpose. *D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016) (granting petition to cancel registration on the Supplemental Register). Certain designations "are inherently incapable of functioning as trademarks to identify and distinguish the source of the products in connection with which they are used." *In re Eagle Crest Inc.,* 96 USPQ2d 1227, 1229 (TTAB 2010). Such designations "may not be registered, regardless of the register on which registration is sought." *In re AC Webconnecting Holding B.V.,* 2020 USPQ2d 11048, *2-3 (TTAB 2020).

A merely informational slogan or phrase is one such unregistrable designation.

"Slogans and other terms that are considered to be merely informational in nature, or to be common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable." *In re Eagle Crest Inc.,* 96 USPQ2d at 1229. As the TRADEMARK EXAMINING MANUAL OF PROCEDURE (TMEP) states:

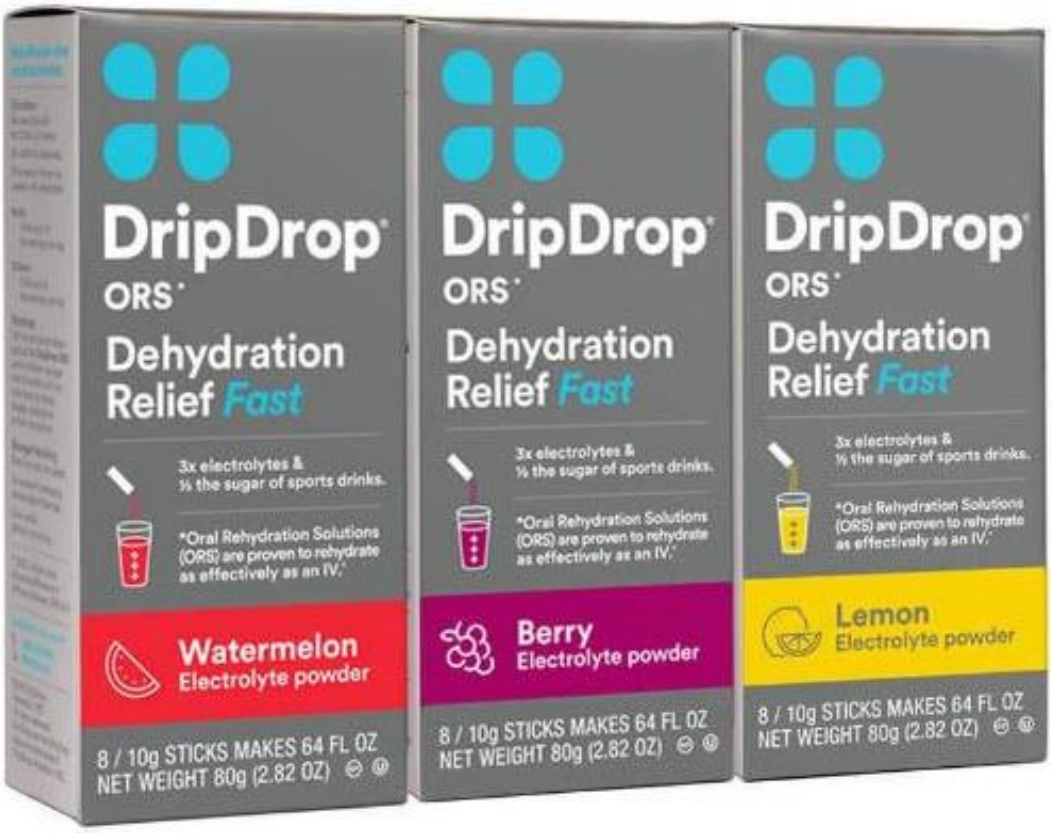
> Matter is merely informational and does not function as a mark when, based on its nature and the context of its use by the applicant and/or others in the marketplace, consumers would perceive it as merely conveying general information about the goods or services or an informational message, and not as a means to identify and distinguish the applicant's goods/services from those of others.

TMEP § 1202.04 (Oct. 2018).

The determination of whether a designation is capable of functioning as a mark focuses on consumer perception. *In re Vox Populi Registry Ltd*., 2020 USPQ2d 11289, *4 (TTAB 2020) (citing *In re AC Webconnecting,* 2020 USPQ2d 11048 at *3). "Where the evidence suggests that the ordinary consumer would take the words at their ordinary meaning rather than read into them some special meaning distinguishing the goods from similar goods of others, then the words fail to function as a mark." *In re Ocean Tech., Inc.,* 2019 USPQ2d 450686, *3 (TTAB 2019) (internal punctuation omitted). To make this determination, we look at the specimens of use and other evidence of record showing how the designation is used, both in general parlance and on the goods at issue. *Univ. of Kentucky v. 40-0, LLC,* 2021 USPQ2d 253, *25 (TTAB 2021).

B. Application to the Present Case

Applicant's specimen depicts the proposed mark **DEHYDRATION RELIEF FAST** appearing on its packages as follows:



[5]

Applicant indicates that this packaging is provided "both to medical professionals for medical use and to the general public for commercial use."[6] Since there are no limitations on channels of trade in the identification of goods in the Application, we find this description of the classes of consumers acceptable. *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *3 (TTAB 2020).

The Examining Attorney, relying on dictionary definitions, points out that

[5] March 7, 2019 specimen accompanying amendment to allege use.

[6] Sept. 23, 3019 Response to Office Action at 13.

DEHYDRATION is "a dangerous lack of water in the body resulting from not drinking enough or by sweating, vomiting, or having diarrhea," **RELIEF** is "the reduction of pain or the effects of an illness" and **FAST** means "done quickly."[7]

The Examining Attorney also submits third-party website evidence showing that the phrase "**RELIEF FAST**" is commonly used in the marketplace and in common parlance to indicate that various maladies can be remedied quickly. For example: PAIN RELIEF FAST, SUNBURN RELIEF FAST, SENSITIVE TEETH RELIEF FAST, HEARTBURN RELIEF FAST, SINUS RELIEF FAST, HANGOVER RELIEF FAST, KNEE PAIN RELIEF FAST, and ALLERGY RELIEF FAST.[8]

From this evidence, the Examining Attorney concludes that "the phrase 'relief fast' in the applied-for mark is widely used in the marketplace to merely convey information, including laudatory claims of superiority, about applicant's type of goods."[9] He continues: "Since consumers are accustomed to seeing these similar phrases used to indicate that certain goods are often touted to provide quick relief from certain ills or conditions, they are more likely to understand the wording in the proposed mark to have the same informational significance."[10] As he points out:

> Who wouldn't want to be relieved of dehydration, pain, heartburns, sinuses or hangovers as quickly as possible. The opposite phrasing and probable ensuing reaction is certainly not true, e.g., "sunburn relief slowly," "pain relief later," "hangover relief just not now," and "dehydration relief

[7] AHDictionary.com, MacMillanDictionary.com, Sept. 7, 2018 Office Action at 3, 5, 10, 17.

[8] DjoGlobal.com, SimpliciteAndCo.com, Sensodyne.com, Pepto-bismol.com, Sept. 30, 2019 Office Action at 2, 5, 7-20; NirschlOrthopaedic.com, Khou.com, TheGoPatch.com, MilwaukeeCourierOnline.com, CopperJoint.com, April 13, 2020 Office Action at 3, 5-12, 15, 21. *See* Examining Attorney's brief, 8 TTABVUE 5-6.

[9] Examining Attorney's brief, 8 TTABVUE 5.

[10] Examining Attorney's brief, 8 TTABVUE 6.

> tomorrow." It is more likely that consumers would look favorably on a product that touts fast relief.[11]

Applicant admits that **DEHYDRATION RELIEF FAST** is descriptive of its "hydration solution products," but maintains that the slogan is "a far cry from merely informational wording."[12] After all, it argues, the Examining Attorney "proffered a mere six examples of third-party use of phrases with "relief fast" in them for a variety of different goods and services. Indeed, the only common element of these examples is that each product or service appears to provide some type of "relief" of something, and to do so 'fast.'"[13] Three of those examples were "in disparate contexts, namely, an article with tips for relieving sunburn pain, a caption for a video discussing sinus treatments, and an article about finding a particular product quickly at Walgreens."[14] Applicant concludes: "While others use variations of phrases including "relief fast" in a variety of circumstances and for disparate products, the examples in the record do not show that consumers view the applied-for mark as merely informational matter for the goods at issue."[15]

We find, however, that the Examining Attorney's dictionary and third-party examples demonstrate the merely informational nature of **DEHYDRATION RELIEF FAST**. All of the third-party examples (nine, not six) use the words "RELIEF FAST" consistently with their dictionary definitions: to indicate that a

[11] Examining Attorney's brief, 8 TTABVUE 9.

[12] Applicant's brief, 6 TTABVUE 6, March 27, 2020 Response to Office Action at 5.

[13] Applicant's brief, 6 TTABVUE 11.

[14] Applicant's brief, 6 TTABVUE 11 n.2.

[15] Applicant's brief, 6 TTABVUE 13.

malady will be remedied quickly. All of the examples preface "RELIEF FAST" with the ailment to be relieved. The fact that they describe a range of different ailments, from sunburn to sinus pain, is beside the point; they all convey the same sort of information as Applicant's slogan. "The fact that applicant may convey similar information in a slightly different way than others is not determinative." *In re Melville Corp.*, 228 USPQ 970, 971 (TTAB 1986) *cited in In re Texas With Love, LLC*, 2020 USPQ2d 11290, *5 (TTAB 2020). If anything, as the Examining Attorney notes, the broad range of products touting "RELIEF FAST" for ailments that can be relieved quickly reflects the broad audience of consumers exposed to that commonplace message.[16] This common use "merely for the purpose of imparting information makes it less likely that the public will perceive it as identifying a single commercial source and less likely that it will be recognized by purchasers as a trademark." *In re Wal-Mart Stores, Inc.*, 129 USPQ2d 1148, 1153 (TTAB 2019).

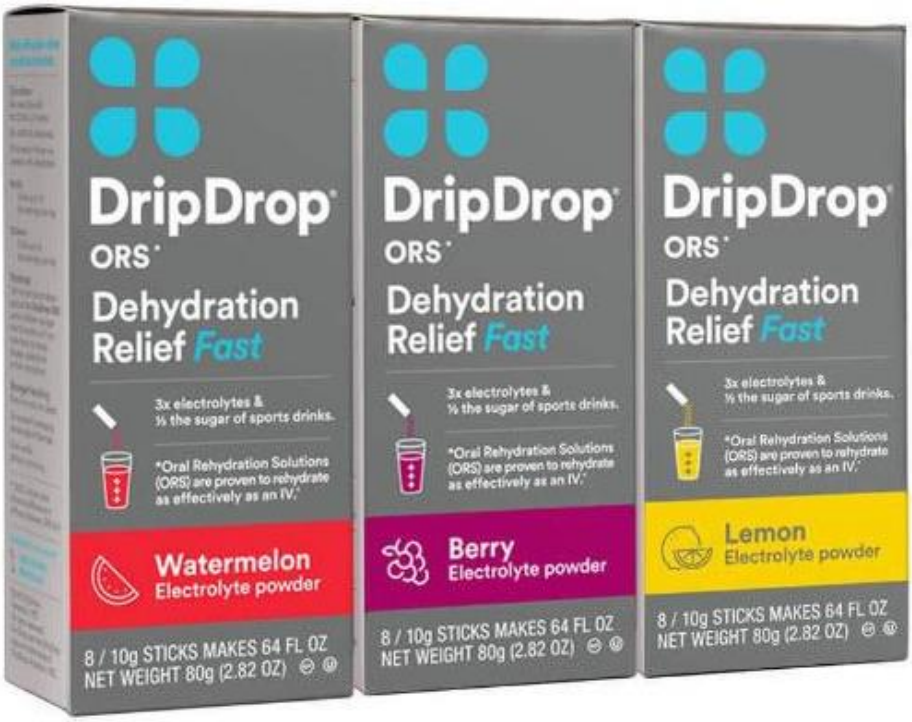
The fact that the third-party examples include two informative articles and a video about fast pain relief, which are not commercial advertising, does not weaken their probative value. If anything, it underscores how "relief fast" is informational, not source-identifying. *See In re Manco Inc.,* 24 USPQ2d 1938 (TTAB 1992) (affirming a refusal for THINK GREEN marks for a variety of goods, where the evidence consisted solely of news articles showing THINK GREEN used to express concern for the environment, with no evidence of third-party use of the term in commerce) *cited in In re DePorter*, 129 USPQ2d 1298, 1302 (TTAB 2019). *See generally* TMEP

[16] Examining Attorney's brief, 8 TTABVUE 9.

§ 1202.04(a) ("Any evidence demonstrating that the public perception of the matter is merely to convey general information about the goods or services supports this refusal.").

Applicant does not refute the dictionary definitions of "DEHYDRATION," "RELIEF," and "FAST." It uses the words together in a slogan that conveys the same sort of information as the third-party examples: that use of its product will alleviate symptoms quickly. Its application bears some resemblance to the application in *In re Gilbert Eiseman, P. C.*, 220 USPQ 89 (TTAB 1983), where the applicant, touting its quick plastic surgery services, sought to register "IN ONE DAY." The Board, affirming the refusal to register the term, stated "It is established that when a designation or slogan imparts an impression of conveying advertising or promotional information rather than of distinguishing or identifying the source of goods or services, it cannot be the basis for registration." *Id.* at 90. Here, as there, the primary purpose of **DEHYDRATION RELIEF FAST** is to impart information about the product's speed and efficacy. That does not identify and distinguish a single source. All consumers want their treatments to be fast-acting, and all purveyors of such treatments are free to advertise truthfully that their medications provide quick alleviation of symptoms. "As a matter of competitive policy, it should be close to impossible for one competitor to achieve exclusive rights in such common advertising slogans…." 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:23 (5th ed. March 2021 update).

Applicant insists, however, that the Examining Attorney must examine its specimen of record to determine how consumers would likely perceive the applied-for mark:[17]



Applicant argues:

> On each version of the packaging, "Dehydration Relief Fast" is featured in large, bold type directly below Applicant's logo and DRIPDROP house mark. The mark appears above the rest of the informational material on the packaging, separated by a horizontal line, and in much larger type than the informational material. The word "Fast" is further emphasized, appearing in striking blue, italicized type, even replicating the blue used in Applicant's logo so that the DEHYDRATION RELIEF FAST mark is tied intentionally and closely to Applicant's registered logo. These stylistic elements stand out to consumers viewing Applicant's packaging, and make a strong commercial impression. Due to the emphasis placed on "Dehydration Relief Fast," consumers will recognize it and use it to identify Applicant's products.[18]

[17] Applicant's brief, 6 TTABVUE 5.

[18] Applicant's brief, 6 TTABVUE 10-11, Applicant's reply brief, 9 TTABVUE 5 n.1 (citing *In re Post Properties, Inc.*, 227 USPQ 334, 335 (TTAB 1985) and *In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1488 (TTAB 2012)).

Applicant's argument fails for several reasons. First, Applicant has applied to register its proposed mark in standard characters. "The specific shape and look of the letters as they appear on the goods are not features of the mark that Applicant seeks to register. Standard character marks are limited to the words themselves and not to any particular font style, size or color. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)…." *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1404 (TTAB 2018) (quoting *In re Calphalon Corp.,* 122 USPQ2d 1153, 1160 (TTAB 2017) ("Having elected to seek registration of its proposed mark as a standard character mark," an applicant must have "the mark assessed without limitation to any particular depiction of that term.").

Second, "[r]efusal is proper if the words of the proposed mark are used only in their ordinary sense as part of the advertising statement…." *In re Post Properties, Inc.*, 227 USPQ 334, 335 (TTAB 1985). Although the failure-to-function refusal is normally a specimen-based refusal, a refusal must be issued, regardless of the filing basis, if the evidence supports a determination that a proposed mark is merely informational and thus would not be perceived as an indicator of source. TMEP § 1202.04. This holds true even if the words are displayed in a conventional trademark manner. *Cf. Univ. of Kentucky v. 40-0,* 2021 USPQ2d 253, at *32 ("Where purchasers buy goods based on the common message they display, that message fails to function as a trademark, even if it is displayed in a conventional trademark manner.").

And third, the proposed mark as shown on the specimen, with its slightly stylized script—"Dehydration Relief" in sans-serif white block letters and "Fast" in blue

italics—"does not possess the degree of stylization that would warrant allowance on the Supplemental Register." *In re AC Webconnecting,* 2020 USPQ2d 11048 at *14. The stylization does not and cannot create an impression on purchasers separate and apart from the unregistrable informational phrase itself. *See In re Cordua Rests.*, 823 F.3d 594, 118 USPQ2d 1632, 1638-39 (Fed. Cir. 2016) (affirming Board's refusal of registration of stylized mark CHURRASCOS based on finding that the stylization "does not create a separate commercial impression over and above that made by the generic term.") *cited in In re Vox Populi*, 2020 USPQ2d 11289, at*8.

In short, the way Applicant displays its proposed standard character mark **DEHYDRATION RELIEF FAST** on its specimen does not overcome the refusal to register based on its informational nature.

II. Conclusion

Because the proposed mark would be perceived as merely informing consumers about the fast-acting quality of the product, and not identifying its source of origin, it is incapable of functioning as a trademark. *In re Brock Residence Inns, Inc.,* 222 USPQ 920, 922 (TTAB 1984) ("Informational expressions may likewise, in appropriate cases, be found to be unregistrable even upon the Supplemental Register because of their informational nature.").

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