

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Oral Hearing Held: November 9, 2021

Mailed: November 12, 2021

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**Trademark Trial and Appeal Board**

—————  
*In re BFY LLC*

—————  
Serial No. 88190652

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Erik M. Pelton of Erik M. Pelton & Associates, PLLC,  
for BFY LLC.

Michael FitzSimons, Trademark Examining Attorney, Law Office 103,  
Stacey Wahlberg, Managing Attorney.

—————  
Before Cataldo, Greenbaum, and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

BFY LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark SLEEPEEZ for “Homeopathic pharmaceuticals for use in the treatment of children’s sleeping problems; Medicated candies for use in the treatment of children’s sleeping problems” in International Class 5.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of

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<sup>1</sup> Application Serial No. 88190652 was filed on November 12, 2018, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

likelihood of confusion with the standard character mark SLEEPEASE registered on the Principal Register for “Homeopathic preparations in the nature of an oral spray for the treatment of insomnia and symptoms of insomnia such as wakefulness, restlessness, caffeine sensitivity, emotional stress and anxiety” in International Class 5.<sup>2</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal resumed. The appeal is fully briefed. For the reasons explained below, we affirm the refusal to register under Section 2(d) of the Trademark Act.<sup>3</sup>

## **I. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all 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) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v.*

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<sup>2</sup> Registration No. 4123390 was issued on April 10, 2012; renewed.

<sup>3</sup> Trademark Status & Document Retrieval (“TSDR”) citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .pdf version of the documents. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

*Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *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 goods and differences in the marks.”); see also *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

#### **A. Relatedness of the Goods**

We first compare the parties’ respective goods under the second *DuPont* factor. In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant’s application and the goods listed in the cited registration. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on

the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citation omitted); *Hilson Research, Inc. v. Soc’y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1432 (TTAB 1993). The issue here, of course, is not whether consumers would confuse Applicant's goods with Registrant's goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

Moreover, registration must be refused if Applicant's mark for any of its identified goods is likely to cause confusion with the Registrant's mark for any of its listed goods. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or

services in the application).

Applicant's goods are "Homeopathic pharmaceuticals for use in the treatment of children's sleeping problems; Medicated candies for use in the treatment of children's sleeping problems." Registrant's goods are "Homeopathic preparations in the nature of an oral spray for the treatment of insomnia and symptoms of insomnia such as wakefulness, restlessness, caffeine sensitivity, emotional stress and anxiety."

In the present case, Applicant's identified goods encompass or are encompassed by Registrant's identified goods. Specifically, Applicant's goods are broadly worded enough to include homeopathic oral sprays for treatment of children's sleeping problems, including insomnia. Moreover, since Registrant's identification of goods is not limited to any particular type of consumer, Registrant's oral sprays for insomnia could be used for children with sleeping problems. *See, e.g., In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). Thus, Applicant's and Registrant's goods are legally identical in part. *See, e.g., In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018) (citing *Tuxedo Monopoly, Inc.*, 209 USPQ at 988; *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004)).

Accordingly, the second *DuPont* factor strongly favors a finding of likelihood of confusion.

#### **B. Similarity of Trade Channels and Classes of Purchasers**

The third *DuPont* factor considers "[t]he similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 177 USPQ at 567. Because Applicant's

and Registrant's goods are legally identical in part, we must presume that these goods travel through the same channels of trade and are offered to the same or overlapping classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 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).

Thus, the third *DuPont* factor also heavily weighs in favor of finding a likelihood of confusion.

### **C. Strength of the Cited SLEEPEASE Mark**

In determining strength of the cited SLEEPEASE mark, we consider both its “inherent strength, based on the nature of the mark itself, and commercial strength or recognition.” *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017) (citing *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014)); *see also In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”). “[T]he strength of a mark is not a binary factor” and “varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003). “The weaker [the registrant's] mark, the closer an applicant's mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1676 (Fed. Cir.

2015) (internal citations omitted). *See also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 369 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”).

The fifth *DuPont* factor, the fame of the prior mark,<sup>4</sup> and the sixth *DuPont* factor, the number and nature of similar marks in use for similar goods or services, may be considered in tandem to determine the strength of the cited mark and the scope of protection to which it is entitled. *Bell’s Brewery, Inc.*, 125 USPQ2d at 1345; *DuPont*, 177 USPQ at 567; *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016 (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”)).

Additionally, the Federal Circuit has held that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, that may indicate that the common element has some non-source identifying significance that undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary

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<sup>4</sup> Because there is no evidence of record regarding the fame of the cited SLEEPEASE mark, the fifth *DuPont* factor is neutral.

parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak”) (quoting *Juice Generation*, 115 USPQ2d at 1674).

Applicant argues that the cited SLEEPEASE mark merits a narrowed scope of protection because of the widespread third-party use of the combination of the words “SLEEP” and “EASE/EZ/EZE/EAZE/EASY” for sleep aid products.<sup>5</sup> In light of such widespread use, Applicant contends that its SLEEPEEZ mark and the cited mark SLEEPEASE can co-exist in that the differences in spelling of the marks and the dissimilarities of the goods at issue will be sufficient to alleviate consumer confusion.<sup>6</sup> In support of its argument, Applicant submitted the following third-party registration and third-party use evidence:

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<sup>5</sup> Applicant’s Appeal Brief, p. 12; 6 TTABVUE 13.

<sup>6</sup> *Id.* As we have already found above, the goods at issue are legally identical in part. Thus, Applicant’s argument that confusion is unlikely because of the differences between the parties’ respective goods is unavailing.

Applicant also argues that confusion is unlikely because it owns a family of “-EEZ” marks that are well known. *Id.* at pg. 6; 6 TTABVUE 7. A family of marks argument, however, is not available to an applicant seeking to overcome a likelihood of confusion refusal in an ex parte proceeding; instead, the focus of the likelihood of confusion analysis must be on the mark applicant seeks to register, not other marks applicant may have used or registered. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009); *In re Ald, Inc.*, 148 USPQ 520, 521 (TTAB 1965) (“[I]n view of the specific prohibition of Section 2(d) . . . , the fact that applicant may possess a ‘family’ of marks characterized by the term ‘ALD’ is of no particular significance herein if the mark for which applicant now seeks registration . . . is confusingly similar to the previously registered mark . . . .”); see also TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(xi) (July 2021). Thus, we have given no consideration to Applicant’s family of marks argument in our analysis.



**Third-Party Registrations**<sup>7</sup>

<b><u>Reg. No.</u></b>	<b><u>Mark</u></b>	<b><u>Goods</u></b>
1921390	SLEEP EASE	Non-medicated bath salts, bath gels and body lotions, in Class 3; and Medicated bath salts, in Class 5.
3827575	SLEEP-EZ AROMATHERAPY  (AROMATHERAPY disclaimed)	Scented linen sprays; Scented room sprays, in Class 3.
4354543	EASY2SLEEP	Dietary supplement beverages for aiding sleep, in Class 5.
4854380	SLEEP COMES EASY	Bath salts; Body lotions; Body sprays; Non- medicated balms for use on skin; Non-medicated body soaks, in Class 3.
4944530	GO SLEEP WITH EZZZ	Dietary and nutritional supplements, in Class 5.
4779942	SLEEP EASY	Dietary supplements for aiding sleep, in Class 5.
5237758	E-Z SLEEP SLEEP SHOT  (SLEEP SHOT disclaimed)	Nutritional supplements for use as a sleep aid, in Class 5.

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<sup>7</sup> June 10, 2019 Response to Office Action, Exh. N, TSDR pp. 47-53; March 10, 2021 Request for Reconsideration, Exh. AH, TSDR pp. 92-94.

Applicant also submitted a copy of Registration No. 1861728 for the mark SLEEP-EASY for “ear plugs for medical use or for use as a sleep aid” in International Class 10. This registration, however, has been cancelled. A cancelled or expired registration has no probative value other than to show that it once issued. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011) (“of course, third-party applications have no probative value except to show that an application has been filed, and “dead” or cancelled registrations have no probative previous value at all.”). Thus, we have given this particular registration no consideration in our analysis.

Applicant also submitted screenshots from various websites purportedly demonstrating twenty-six third-party uses of the wording SLEEPEASE for various sleep aid products. These third-party uses are set forth below:<sup>8</sup>

Edens Garden Sleep Ease 10 ml Synergy Blend 100% Pure Undiluted Therapeutic Grade GC/MS Certified Essential Oil by Edens Garden  
★★★★☆ 122 customer reviews | 10 answered questions  
Amazon's Choice for "eden essential oils"



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## PREMIUM SLEEP EASE FORMULA

Sold Out \$27.89

Simply put, Sleep Ease helps you fall asleep fast, experience satisfying rest throughout the night, and wake up ready to face whatever the new day might bring – without the morning drowsiness or habit forming effects other sleeping pills may have.

- **SLEEP FASTER & BETTER** – Induce a deeper sleep, helps provide better, more consistent sleep, helps calm the nerve cells in the brain, resulting in a calming effect. Sleep Ease works by blocking brain signals that cause anxiety and that ongoing trickle effect that can come from it. This calming effect has made it a favorite natural remedy for anxiety too.
- **QUALITY SLEEP YOU DESERVE** – Sleep Ease Increases Serotonin levels in the brain, Enhances mood and alleviates stress, Improves sleep and improved ability to induce sleep as well as more restful, deeper sleep throughout the night.
- **SAFE TO TAKE EVERY NIGHT** – Do you suffer from restless leg syndrome? Are you staying up at night with thoughts racing through your head? We formulate Sleep Ease to solve your pain points so that you wake up refreshed and energized ready to take on the day. People will notice your energy levels increased without that groggy sluggish morning routine you

<sup>8</sup> June 10, 2019 Response to Office Action, Exhs. F-M, TSDR pp. 27-46; March 10, 2021 Request for Reconsideration, Exhs. O-AF, TSDR pp. 24-82. We note that four of the twenty-six third-party uses are from a single third-party, namely, AROMAFLORIA.

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Description

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Description

FORMULATED TO IMPROVE QUALITY OF SLEEP AND GET YOU TO SLEEP FASTER

- Directions: Take one capsule at bedtime. If sleep does not improve within 4-5 days increase dose to two capsules at bedtime.
- Active ingredient: Magnesium Glycinate 600mg

\*\*Please note this product only ships to addresses in Oklahoma.

# Sleep Ease Oil

Certified Organic



10 mL roll-on bottle



Price \$10.50

SKU

Quantity  [Add to Cart](#)

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## Information

## Ingredients

### OVERVIEW

This organic oil is a soothing and very relaxing aromatherapy blend to enjoy near the end of your day with its mellow, slightly sweet floral fragrance that has a pleasant bittersweet undertone. Roll onto the temples or neck line, relax, and enjoy the sweet aroma.



[View larger](#)

## Sirius Sleep Ease

**Condition:** New product

This blend of the finest aromatic oils stills those sleepless nights at home and on the road. Stress, slamming motel doors, a greasy road meal and the ice machine all conspire to ruin a good night's sleep on the road. 10 ml. EO41

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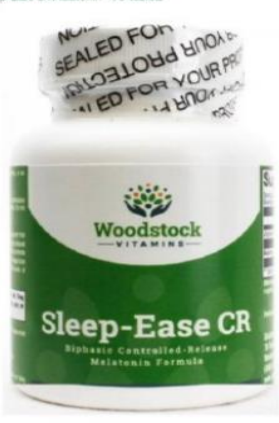
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**From Our Experts**


- Our top pick for melatonin products
- Special release mechanism to give a prolonged dose through the night

**From the Manufacturer**

Sleep-Ease CR is a vegetarian formula with a biphasic delivery system that releases melatonin quickly and then steadily. Melatonin is naturally produced in the pineal gland in response to changes in light exposure; it helps promote healthy sleep patterns as well as antioxidant and immune activities. Sleep-Ease CR can support these functions by helping to maintain normal levels of melatonin in the body.\*

\*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.

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Low Price: \$29.99  
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### Sleep Ease Inhalation Beads

\$10.00

IN STOCK Item Number: 5512

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Soothing vapors of Hops, Lavender and Valerian will relax and restore you as you ready yourself for calm, restful sleep.

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### AromaRemedy Sleep Ease Bag

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Calm your mind and body with powerful aromas of lavender, valerian and hops.

Quantity

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#### Product Information

##### Sleep Ease Inhalation Beads

Let the healing art of aromatherapy use nature's power to bring a good night's sleep back into your routine. Let the soothing essential oils of Lavender, Valerian and Hops relax you. A perfect bedside companion to comfort you in a calm, restful sleep. Let your senses inhale nature's own remedies for mind, body and spirit.

**How to Use:** Hold bag to nose, sniff and inhale deeply 3 - 4 times. Repeat as needed. Use at bedtime. place on pillow or night table for a whiff of slumber. Reusable pouch lasts 2 weeks.

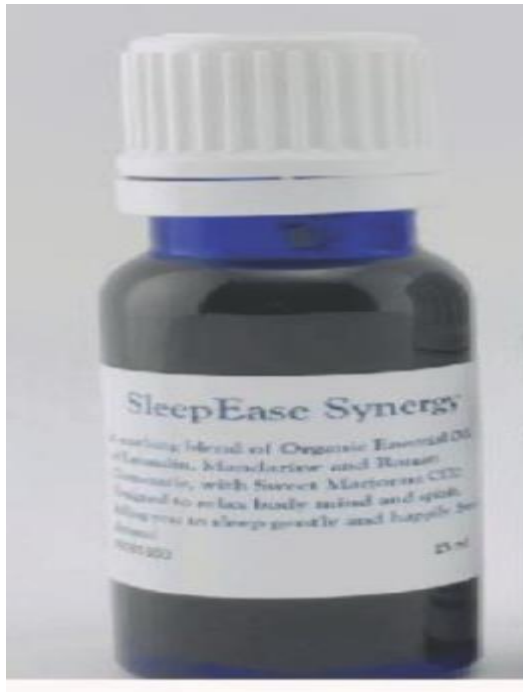
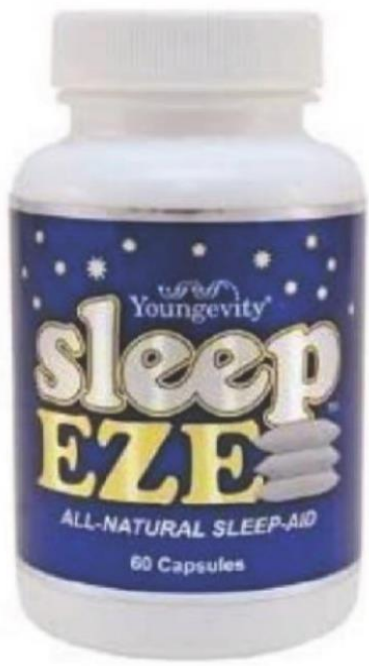
Size: 2.5 oz/71 g





Roll over image to zoom in











The Examining Attorney argues that Applicant's third-party registration evidence is insufficient in quantity and in similarity to show that the cited mark SLEEPEASE is conceptually weak.<sup>9</sup> Specifically, the Examining Attorney contends that, of the seven registrations properly of record, only four identify goods similar to those of the Applicant and Registrant in the present case.<sup>10</sup> As for the remaining three, the

<sup>9</sup> Examining Attorney's Appeal Brief, p. 10; 8 TTABVUE 11.

<sup>10</sup> *Id.* at p. 11; 8 TTABVUE 12.

Examining Attorney notes that the goods identified in Registration Nos. 1921390, 4854380, and 3827575 include goods such as “scented linen spays,” “bath salts,” “body lotions,” and other cosmetic goods for which Applicant has not established a close degree of similarity with the relevant goods of Applicant and Registrant.<sup>11</sup>

In regard to the four third-party registrations covering goods that are similar in kind to the goods identified by Applicant and Registrant in the present case, the Examining Attorney asserts that marks do not contain the wording “SLEEPEASE,” and although similar to Registrant’s mark, are readily distinguishable: EASY2SLEEP, GO SLEEP WITH EZZZ, SLEEP EASY, and E-Z SLEEP SLEEP SHOT.<sup>12</sup> The Examining Attorney further maintains that even the most similar mark, Registration No. 4779942, for SLEEP EASY, covering “Dietary supplements for aiding sleep” is distinguishable from Registrant’s mark because it is not phonetically identical to the cited mark and does not include the wording “EASE” or its phonetic equivalent.<sup>13</sup> Accordingly, the Examining Attorney concludes that the third-party registration evidence submitted by Applicant has little probative value in showing that the cited mark SLEEPEASE is conceptually weak in the context of the relevant goods, especially since the cited mark registered on the Principal Register without a showing of acquired distinctiveness.<sup>14</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

As for Applicant's third-party use evidence, the Examining Attorney similarly argues that this evidence is not sufficient to limit the scope of protection afforded the cited mark.<sup>15</sup> In particular, the Examining Attorney contends that some of the examples of third-party use are for unrelated goods.<sup>16</sup> As for the goods that appear to be related, the Examining Attorney asserts that the extent of consumer exposure to these usages is unclear, and in some cases, clearly diminutive.<sup>17</sup> As an example, the Examining Attorney points to a number of the websites which provide opportunities for customer reviews, but no reviews or a very limited number of reviews are present, and in other cases, information on the websites suggest a limited geographic area where the goods are sold.<sup>18</sup> In view of the foregoing, the Examining Attorney argues that Applicant has failed to demonstrate that the cited mark is either conceptually or commercially weak.

We disagree with the Examining Attorney's assessment of Applicant's third-party registration and use evidence. Turning first to the third-party registration evidence, we note that this evidence goes not to the commercial strength of the cited mark, but rather to its conceptual strength. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) ("Use evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar

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<sup>15</sup> *Id.* at pp. 12-13; 8 TTABVUE 13-14.

<sup>16</sup> *Id.* at p. 13; 8 TTABUVE 14.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

goods or services.”) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976)). Indeed, as previously noted, “third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc.*, 115 USPQ2d at 1675. In addition to the dictionary definition of “ease” made of record,<sup>19</sup> the above-recited registered marks indicate that the terms SLEEP and EASE/EASY/EEZ/EZ are highly suggestive in connection with sleep aid products, i.e., they assist the consumer to fall asleep easier or without difficulty.

We also acknowledge that only one of the registered third-party marks is virtually identical to the cited SLEEPEASE mark, i.e., the registered mark SLEEP EASE. That being said, we note that the constituent components of the cited mark, i.e., the terms SLEEP and EASE (or the phonetic equivalent thereof), have been registered for goods similar to those listed in the cited registration. Moreover, while the goods listed in the third-party registrations are not identical to Registrant’s goods, the goods are nonetheless related since the purpose of these goods is the same, namely, assisting the consumer to fall asleep more easily.

As noted above, the Examining Attorney’s argues that because the extent of consumer exposure or use of the third-party marks is unknown or diminutive, the evidence of third-party uses submitted by Applicant has limited probative value. We

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<sup>19</sup> “Ease” is defined as “the state of being comfortable: such as freedom of labor or difficulty.” [www.merriam-webster.com](http://www.merriam-webster.com) (accessed March 9, 2021). See March 10, 2021 Request for Reconsideration, Exh. AG, TSDR p. 83.

find this argument unpersuasive. The Federal Circuit has held that “extensive evidence of third-party use and registrations is ‘powerful on its face,’ **even where the specific extent and impact of the usage has not been established.**” *Jack Wolfskin*, 116 USPQ2d at 1136 (citing *Juice Generation*, 115 USPQ2d at 1674). (emphasis added).

Under these circumstances, based on the evidence of record, we accord marks consisting, in whole or in part, of the words “sleep” and “EASE/EZ/EZE/EAZE/EASY” in connection with sleep aid products a narrow scope of protection. Such marks, inherently, are highly suggestive of sleep aid products and, in the marketplace, such marks travel in a crowded field.

In sum, when we consider all of the evidence of record, we find that the cited SLEEPEASE mark is conceptually and commercially very weak. This weighs against finding a likelihood of confusion. *See Primrose Ret. Cmtys.*, 122 USPQ2d at 1036 (accorded “significant weight” to “extensive” evidence of third-party use and registration); *see also Juice Generation*, 115 USPQ2d at 1674 (“The weaker [a cited mark], the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.”); *Exxon Corp. v. U.S. Indus., Inc.*, 213 USPQ 393, 396 (TTAB 1982) (“[I]t has often been stated that a party who chooses a weak or suggestive term as its trademark may expect that its competitors will choose marks which are closer to his than would be true if that party had chosen an arbitrary or coined mark.”).

#### **D. Similarity of the Marks**

We finally consider the similarity or dissimilarity of the marks in their entireties

as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc.*, 73 USPQ2d at 1691. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019)).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic, LLC*, 123 USPQ2d at 1748 (quoting *Coach Servs., Inc.*, 101 USPQ2d at 1721 (internal quotation marks omitted)). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). However, “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, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data*, 224 USPQ at 751. Moreover, when the goods at issue are legally identical in part, as is the case here, the degree of similarity of the marks required to find a likelihood of confusion declines. *See Coach Servs., Inc.*, 101 USPQ2d at 1722 (internal quotations omitted).

Applicant’s mark is SLEEPEEZ in standard characters. The cited mark is SLEEPEASE, also in standard characters. The record includes evidence showing that the suffix “EASE” in the cited mark is pronounced identically to the suffix “EEZ” in Applicant’s mark.<sup>20</sup> In view thereof, we find that the parties’ respective marks are aurally identical. Similarity in sound alone may be sufficient to support a finding that the compared marks are confusingly similar. *In re 1st USA Realty Prof’ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007) (citing *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732, 156 USPQ 523, 526 (CCPA 1968)); TMEP §1207.01(b)(iv).

We also find that the marks at issue engender the same meaning and convey the same commercial impression because the combination of the identical term SLEEP with the phonetically identical suffixes would be understood in the same manner by the relevant consumer. This especially holds true where, as here, the marks are used on legally identical in part goods, i.e., homeopathic products that assist the purchasing consumer or those for whom the consumer has purchased the product to fall asleep easier or without difficulty. As to appearance, we find that marks are

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<sup>20</sup> September 10, 2020 Final Office Action, TSDR pp. 9-16.



structurally similar inasmuch as they both begin with the word SLEEP followed by a phonetically identical suffix.

Finally, although we have found that the cited SLEEPEASE mark is conceptually and commercially weak, we nonetheless find that while the limited scope of protection accorded Registrant's SLEEPEASE mark will not bar the registration of every mark comprising, in whole or in part, the words "sleep" or "ease" (or the phonetic equivalent thereof), it will bar the registration of marks "as to which the resemblance to [Registrant's mark] is striking enough to cause one seeing it to assume that there is some connection, association or sponsorship between the two." *Anthony's Pizza & Pasta Int'l Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff'd*, 415 F. App'x 222 (Fed. Cir. 2010) (quoting *Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983)). Here, we find that Applicant's SLEEPEEZ mark is so strikingly similar to the cited SLEEPEASE mark in sound, connotation and overall commercial impression that when used on goods that are legally identical in part, as is the case here, confusion is likely, notwithstanding any weakness of the cited mark.

Thus, the first *DuPont* factor favors a finding of likelihood of confusion.

## **II. Conclusion**

We have considered all of the arguments and evidence of record. We find that (1) the marks at issue are identical in sound, connotation and commercial impression and are otherwise similar in appearance; and (2) Applicant's and Registrant's goods are legally identical in part and, therefore, we must presume the parties' respective goods move in identical trade channels and would be offered to the same classes of purchasers. Further, because the suffix "EEZ" in Applicant's mark would be

pronounced the same as the suffix “EASE” in the cited mark, consumers are unlikely to distinguish the marks on the basis of these differing suffixes.

On the other hand, we also find that the third-party registration and use evidence of record demonstrates that the term SLEEPEASE or SLEEP EASE or the constituent components thereof have been extensively adopted, registered and used as a trademark for sleep-aid products. We therefore find that the cited mark is weak and entitled to only a narrow scope of protection. However, it has “often been emphasized that even weak marks are entitled to protection against confusion.” *Hunt Control Sys. Inc. v. Koninklijke Philips Elecs. N.V.*, 98 USPQ2d 1558, 1567-68 (TTAB 2011) (quoting *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974)); *In re Max Cap. Grp Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010) (“[E]ven suggestive or weak marks are entitled to protection from the use of a very similar mark for legally identical services [or goods]”).

Having carefully considered Applicant’s and Registrant’s marks in their entirety, and in light of the evidence adduced herein, we find that Applicant’s SLEEPEEZ mark so resembles the cited SLEEPEASE mark as to be likely to cause confusion. The evidence of third-party registration and use of SLEEPEASE or SLEEP EASE or the constituent components thereof, although one factor (and a significant one under the facts in this case) to be considered, does not persuade us of a different result, because we believe that this factor is outweighed by the other *DuPont* factors. Accordingly, we conclude that there is a likelihood of confusion.

**Decision:** The refusal to register Applicant’s SLEEPEEZ mark under Section 2(d)

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of the Trademark Act is affirmed.