

This Opinion is not a
Precedent of the TTAB

Mailed: March 20, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Swiss Tech Biolabs, Inc.
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Serial No. 87332368
—

Jay Stein of Stein & Associates
for Swiss Tech Biolabs, Inc.

Thomas Young, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

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Before Zervas, Shaw and Kuczma,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Swiss Tech Biolabs, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark NEWMERA for “Dietary supplements for the alleviation of edema and pain” in International Class 5.¹

¹ Application Serial No. 87332368, filed on February 10, 2017 pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting first use on March 26, 2013 and first use in commerce on March 1, 2014.

The Examining Attorney refused registration pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to Applicant's goods, is likely to cause confusion with the previously registered mark

Nemera for goods and services including the following International

Class 5 goods:

Pharmaceutical products for the treatment of ophthalmic disorders, respiratory disorders, dermatological disorders, ophthalmologic and inflammatory disorders; Medical products, namely, pharmaceutical preparations for use in the treatment of ophthalmic disorders, respiratory disorders and inflammatory disorders; Sanitary products for medical purposes, namely, sanitary preparations for medical use; Dietetic substances for medical use, namely, meal replacement bars and meal replacement drink mixes.²

After the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration. On remand from the Board, the Examining Attorney denied the request for reconsideration. The appeal resumed and both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) ("*du Pont*"); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005);

² Registration No. 4857255, registered November 24, 2015. The registration states that the mark consists of the stylized wording "NEMERA," in orange, the color orange is claimed as a feature of the mark and "NEMERA" has no meaning in a foreign language.

In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

A. The Marks

We first consider whether Applicant’s and registrant’s marks are similar when viewed in their entirety in terms of appearance, sound, connotation and commercial impression. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1689). The test under this *du Pont* factor is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods under the respective marks is likely to result. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017); *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721. 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). The average purchaser of both Applicant's and registrant's goods is a member of the general public.

Applicant has simply added the letter "W" between the second and third letters of registrant's mark. Because the letter "W" lies within Applicant's mark and it shares all of the remaining lettering in the same order as in registrant's mark, the marks appear similar. Of course, the addition of the letter "W" makes the first syllable of Applicant's mark the English word, "new." The term "new" only slightly changes the appearance and sound of the marks and therefore does not distinguish them.³ The additional letter "W" also does not provide any meaning to the mark considered as a whole; both marks are arbitrary terms with no known meaning. Due to the arbitrary nature of the marks and the similarity – almost identity – in lettering, the marks have a similar commercial impression.

We do not agree with Applicant that the "marks have different meanings and suggestive connotations."⁴ Applicant relies on the webpage located at <http://www.nemera.net/about-us/new-identity>, presumably registrant's webpage,

³ The fact that Applicant's mark is a standard character mark and registrant's mark is stylized is not of any importance; Applicant's standard character mark is not limited to any particular form of display. *Squirco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983), and could be presented, for example, in the same style, color and size of lettering as registrant's mark.

⁴ Applicant's brief at 10, 11 TTABVUE 15.

which states NEMERA is “from the Greek Emera, meaning day, renewal, fresh hope, life” and “from and the Hebrew and Arabic Nemer, meaning leopard: swiftness, efficiency, agility.”⁵ Applicant has not offered evidence that demonstrates recognition by U.S. consumers of these derivations, Applicant has not identified or proven the primary meaning of the term and the translation statement in the registration record provides that that “NEMERA” has no meaning in a foreign language. Further, it has not escaped our attention that the “Think Baby Names” webpage submitted by Applicant states “Nemera is an uncommon given name for women” and “Nemera has yet to be listed in the list thus far. (TOP BABY NAMES, 2016).”⁶ This reinforces the arbitrary nature of registrant’s mark.

The *du Pont* factor regarding the similarity of the marks weighs in favor of finding that confusion is likely.

B. The Goods, Trade Channels and Classes of Purchasers

It is well settled that goods and services need not be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods or services. *See In re*

⁵ *Id.* at 10-11, 11 TTABVUE 15-16; Req. for Recon., TSDR 27.

⁶ Req. for Recon., TSDR 30.

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