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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nature's Rest, Inc.

Serial No. 76572106

Brian M. Mattson, Esq. for Nature's Rest, Inc.

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115 (Tomas V. Vlcek, Managing Attorney).

Before Bucher, Grendel, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On January 20, 2004, Nature's Rest, Inc. (applicant)
applied to register the mark SUPERLOFT (standard character
drawing) on the Principal Register for "latex pillows" in
Class 20. The application (Ser. No. 76572106) contains an
allegation of a date of first use anywhere and in commerce
of January 2003. The examining attorney has finally
refused to register applicant's mark on the ground that,
when the mark is used on or in connection with the
identified goods, it so resembles the registered mark,
SUPRA-LOFT (typed or standard character drawing) for "bed

pillow[s]" in Class 20 as to be likely to cause confusion, to cause mistake or to deceive. 15 U.S.C. § 1052(d).¹ Applicant has appealed this final refusal.

When we are considering a refusal on the ground of likelihood of confusion, we view the evidence as it relates to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In many likelihood of confusion cases, "[t]he 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." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin by comparing the similarities and dissimilarities of the marks in this case. Applicant's mark is SUPERLOFT and registrant's mark is SUPRA-LOFT. The marks differ in that applicant's fourth and fifth letters are "ER" while registrant's letters are "RA." The only other difference is the presence of a hyphen in the

¹ Registration No. 2,051,887, issued April 15, 1997; Section 8 and 15 affidavits accepted or acknowledged.

registrant's mark while applicant spells its mark as one word. Applicant argues that the "marks are not visually similar" and that its "mark, in its entirety, can be differentiated both visually and phonetically from the cited mark in its entirety." Brief at 6. However, the difference between marks spelled as one word or two is minimal. Seaguard Corp. v. Seaward International, Inc., 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are "essentially identical"). See also Stockpot, Inc. v. Stock Pot Restaurant, Inc., 220 USPQ 52, 54 (TTAB 1983), aff'd, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) ("There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical"). Also, the presence of a hyphen in applicant's mark does not significantly change the appearance of the mark. In re General Electric Co., 180 USPQ 542, 544 (TTAB 1973) ("Notwithstanding the hyphen in applicant's mark, it is fair to assume that applicant's insulating material would ordinarily be called for and referred to by the designation 'REX'"). See also Phillips Petroleum Co. v. C.J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) ("The addition of the extra 6 and the hyphen has already been held not to avoid confusion") and In re Champion

International Corp., 196 USPQ 48, 49 (TTAB 1977) (“[N]o distinction, vague or otherwise, can be drawn between ‘CHECK MATE’ with or without a hyphen between the words so that for purposes herein they are identical”). Similarly, in this case, the presence of a hyphen or the absence of a space in the marks does not distinguish the marks’ appearances.

The other difference between the marks is the difference in their fourth and fifth letters. While both marks contain the letter “R,” their positions are reversed and the vowel is different. Concerning the marks’ appearance, the slight difference in spelling might not even be noticed by many prospective purchasers. Certainly, a “[s]ide by side comparison is not the test.” Grandpa Pidgeon’s of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). We must also take into consideration “the fallibility of memory over a period of time and the fact that purchasers normally retain a general rather than a specific recollection of trademarks.” Roffler Industries, Inc. v. KMS Research Laboratories, 213 USPQ 258, 263 (TTAB 1982). To many consumers, the marks SUPRA-LOFT and SUPERLOFT would be hard to remember and distinguish by their slight differences.

Regarding the meanings of the marks, the examining attorney has asked and we take judicial notice of two dictionary definitions of "Super" and "Supra" from *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987).² "Super" is defined as a noun as "an article of a superior quality, grade, size, etc." and as a prefix it "has the basic meaning 'above, beyond.'" "Supra" is similarly defined as a "prefix meaning 'above, over.'" Therefore, both words can have similar meanings of "above." In addition, the examining attorney also included an entry from *The Original Roget's Thesaurus of English Words (Americanized Version)* in which "super-" and "supra-" are listed as synonyms for "Superior." Therefore, the difference in meaning between SUPRA-LOFT and SUPERLOFT would be minimal.³ Many consumers would view them as very similar.

² University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

³ "Loft" is defined as "the thickness of an item, such as a down comforter, that is filled with compressible insulating material." See First Office Action. It is a descriptive term for a feature of pillows. See, e.g., *In Style*, Spring 2004 ("The feathers provide firmness, while the down gives pillows softness and loft") and *New York Times*, May 13, 2004 ("How about the difference between overstuffed low fill-power and understuffed high fill-power? They might seem the same at first, Mr. Shingler said, but the cheaper pillow would lose loft after just a few days").

Applicant does argue that the cited mark "is not phonetically the same as the present mark 'SUPERLOFT.' Namely, 'Supra' is pronounced 'sü-pra' and "Super" is phonetically pronounced 'soo-pîr.' These terms do not provide substantial phonetic similarity." Brief at 6. We note that "Supra" can also be pronounced with an initial "soo" sound. *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). While the marks SUPRA-LOFT and SUPERLOFT might not be pronounced identically, their pronunciations would be similar. Indeed, it might take some effort to distinguish the two marks if they were being pronounced in the same context. Finally, the commercial impressions of the marks SUPRA-LOFT and SUPERLOFT would not be significantly different because the differences between the marks are so minor.

Ultimately, we conclude that the marks are similar. We emphasize that while we have discussed the marks' individual differences, we have based our conclusion on the marks as a whole. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("[T]here 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. Indeed,

this type of analysis appears to be unavoidable"). In this case, the similarities of the marks' pronunciations, appearances, meanings, and commercial impressions outweigh the relatively minor differences between the marks.

The next important factor that we consider is the relatedness of the goods. Applicant's goods are "latex pillows" while registrant's goods are "bed pillows." Obviously, both goods are pillows. The examining attorney has included evidence to demonstrate that "latex pillows" include "bed pillows." See, e.g., www.abed.com ("Superior Latex Foam Bed Pillow"); www.foamsweetfoam.com (Bed Pillows - The Latex Pillow is a natural, biodegradable material..."); and www.greenfeet.com ("Natural Latex Pillow ... this Natural Latex Pillow will provide years of comfort for rejuvenating nights sleep"). Registrant's bed pillows and applicant's latex pillows would overlap to the extent that both would include latex bed pillows. When goods are identical, marks do not have to be as close to support a conclusion that confusion is likely. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines").

We now address applicant's remaining arguments. First, with its reply brief, applicant attaches a dictionary definition of the term "Super" from *The American Heritage® Dictionary of the English Language, Fourth Edition* (2000). We will take judicial notice of this definition. Applicant also includes printouts that show the prices for some pillows are significantly less than its latex pillows. We will not consider this untimely evidence. 37 CFR 2.142(d). We also add that neither applicant's nor registrant's identification limits the goods to any particular price range so we must assume that applicant and registrant are sources of both expensive and inexpensive pillows. Octocom Systems, Inc. v. Houston Computers Services 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"). Therefore, the actual price of applicant's and registrant's goods does not support an argument that there is no likelihood of confusion in this case.

Also attached to applicant's reply brief was a list of registration and application numbers with the identified mark. Again, the submission of this evidence is untimely. In addition, a list of marks without additional information is of little probative value. In re Carolina Apparel, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998) ("The Board does not take judicial notice of third-party registrations, and the mere listing of them is insufficient to make them of record"). See also In re First Draft Inc., 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence") and In re Duofold, Inc., 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record"). Furthermore, even if actual copies of the registrations were attached, these registrations would not be "evidence of what happens in the market place or that customers are familiar with them." AMF Inc. v. American Leisure Prods., Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). However, we do add that the other evidence of record does show that both marks would have some suggestive or laudatory significance.

Applicant also argues that the "purchasers of 'latex pillows' are reasonably sophisticated purchasers. The purchase of 'latex pillows is not an impulse purchase...

Accordingly, the purchasers would not be confused nor would consumers assume that 'SUPERLOFT' for latex pillows and 'SUPRA-LOFT' for bed pillows derive from the same source." Brief at 6. The examining attorney points out that latex pillows can be purchased for well less than \$100 (examples range from \$45 to \$79). There is no significant evidence of the sophistication of these purchasers. Indeed, in view of the fact that the goods overlap, even sophisticated purchasers would have difficulty distinguishing applicant's and registrant's marks. In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting, Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible"). See also In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999) ("[E]ven careful purchasers are not immune from source confusion").

We conclude by determining that confusion is likely here. The marks SUPERLOFT and SUPRA-LOFT are very similar and the goods overlap to the extent that they both would include latex bed pillows and are otherwise closely related. Under these circumstances, even considering that the marks have suggestive qualities, consumers are likely

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to believe that the goods sold under these marks originate from the same source.

Decision: The examining attorney's refusal to register applicant's mark SUPERLOFT for latex pillows under Section 2(d) of the Trademark Act is affirmed.