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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Blossom Disposable Products

Serial No. 78498758

David A. Payne of Medlen & Carroll, LLP for Blossom Disposable Products.

Maureen L. Dall, Trademark Examining Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).

Before Walsh, Taylor, and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Blossom Disposable Products filed an intent-to-use application for the mark shown below for "gloves, caps, gowns, masks, scrub suits, and shoe covers for medical, surgical, and dental use."¹



¹ Application Serial No. 78498758, filed October 12, 2004.

Registration has been refused under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney contends that applicant's mark so resembles the mark **A1 Scrubs** (standard character format) for "mail order and online retailing services featuring medical scrubs and nursing uniforms" as to be likely to cause confusion, to cause mistake, or to deceive.² When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs.

We affirm.

The record consists of the application and the following evidence submitted by the Examining Attorney:

1. Copies of thirty-three (33) use based, third-party registrations for a wide variety of medical apparel, including scrubs, gowns, gloves, and other medical supplies. The following four (4) registrations were for both medical apparel and services relating to the sale of those products:
 - A. Registration No. 1,800,406 for the mark STANDARD TEXTILE for "scrub apparel for men and women" and "mail order catalog services via telephone, in the field of medical personnel clothing";
 - B. Registration No. 2,005,836 for the mark AT WORK UNIFORMS and Design for "surgical scrubs, patient gowns" and "wholesale distributorship services in the field of uniforms related and related work apparel";
 - C. Registration No. 2,558,145 for the mark SCRUBS & BEYOND and Design for "medical

² Registration No. 2,946,164, issued May 3, 2005. Registrant disclaimed the exclusive right to use "Scrubs."

scrub apparel and related products, namely, scrub suits, scrub tops, scrub bottoms, and scrub jackets" and "retail stores featuring medical scrub apparel and related products, namely, scrub suits, scrub tops, scrub bottoms, and scrub jackets"; and,

- D. Registration No. 3,033,136 for the mark TREAT YOUR HANDS WELL for "medical gloves and surgical gloves" and "distributorship in the field of gloves"; and,
- 2. Excerpts from approximately twenty-four websites for medical apparel of which four use the same mark or trade name in connection with medical apparel and online sales (*i.e.*, cloward.com, medicalsupreme.com, nizamcanvas.com, and preceptmed.com).

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 UPSQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 UPSQ2d 1557, 1559 (Fed. Cir. 2001); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

A. The similarity or dissimilarity of the marks.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. *In re E.I. du Pont de Nemours & Co., supra.* While marks must be compared in their entireties, it is not improper to accord more or less weight to a particular feature of a mark. *In re National Data Corp.,* 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1983). That a particular feature of a mark is descriptive with respect to the goods and services at issue (*i.e.*, the word "scrubs" in connection with medical scrubs) is one reason for giving less weight to that portion of the mark. *Id.* Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to source of the goods and services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975); *Winnebago*

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Industries, Inc. v. Oliver & Winston, Inc., 207 USPQ 335, 344 (TTAB 1980).

In analyzing a composite mark comprising words and a design, the word portion of the mark (*i.e.*, A1) is usually considered the dominant part of a mark because it is more easily remembered and used in communications. Consumers will not reference the stylized font or square background design of applicant's mark when asking for or discussing applicant's medical apparel. *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

Because the registered mark **A1 Scrubs** is in standard character form (*i.e.*, standard typed letters), its rights reside in the term "A1 Scrubs" and not in any particular depiction of it. Therefore, in our evaluation of registrant's mark, the protection to be given the mark must include the display of "A1 Scrubs" in the same stylized font in which applicant's mark is depicted. *In re Melville Corp.*, 18 USPQ2d 1386, 1387 (TTAB 1991); *Sunnen Products Co. v. Sunex International Inc.*, 1 UPSQ2d 1744, 1747 (TTAB 1987).

Moreover, the background design of applicant's mark is a relatively common square shape and, therefore, the background design is unlikely to be remembered when

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consumers are confronted with a substantially similar word mark. *In re Decombe*, 9 USPQ2d 1813, 1814 (TTAB 1988).

Applicant's mark is not so highly stylized that the design itself functions as a trademark. Because the letter and number "A1" is readily recognizable, the marks have the character of a word mark that can be spoken. As indicated above, under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255, 259 (TTAB 1980). Because both marks contain the same letter and number, A1, that can and are likely to be articulated when referring to the marks, consumers are likely to remember the letter and number elements. Even if they note that applicant's mark contains a design element, they are likely to view the marks as variations of each other, one mark identifying medical wearing apparel and one mark identifying services for selling medical wearing apparel. Accordingly, the dominant element of applicant's mark is the term A1.

We find that applicant's mark and registrant's mark are similar in appearance. Although there are clearly some visual differences in the marks, including applicant's stylized font and square background, and the presence of

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the descriptive word "Scrubs" in the registered mark, the overall similarities of **A1 Scrubs** and  outweigh the dissimilarities.

As for the sound of the marks, they are likely to have similar, if not identical, pronunciations. Although registrant's mark includes the descriptive word "Scrubs," that word would not be regarded as having source-indicating significance. The inclusion or absence of "Scrubs" when the marks are spoken would not cause consumers to view the marks as different. Therefore, the overall sound of the marks will be the same.

Both marks have the same connotation. The term "A1" means "number one" or "first-class; excellent; superior."³ As a result, both marks engender the same commercial

impression. Applicant's mark  creates the commercial impression of first-class or superior medical apparel and the registrant's mark **A1 Scrubs** creates the commercial impression of a first-class or superior mail order and online retail service.

We find, therefore, that the marks are similar.

³ Dictionary.com Unabridged (v.1.1) based on the Random House Unabridged Dictionary (2006). We may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

B. The similarity or dissimilarity of the goods.

The thrust of applicant's argument is that registrant's mark is for services ("mail order and online retailing services featuring medical scrubs and nursing uniforms") and not for any products covered in the application. Therefore, applicant's products are not related to the registrant's services.

In analyzing the similarity or dissimilarity of the goods and services, we start with the well-settled proposition that it is not necessary that the goods of the applicant and the services of the registrant be similar or even competitive to support a finding of likelihood of confusion. Likelihood of confusion may be found if the respective goods and services are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that could give rise to the mistaken belief that they emanate from the same source. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988); *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-596 (TTAB 1978.

In this regard, we have previously held that store services and the products that may be sold in that store are related goods and services for the purpose of

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determining likelihood of confusion. *In re Peebles, Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992), *citing In re Best Products Co., Inc.*, 23 USPQ2d 988, 989 (TTAB 1988). Moreover, in the past, we have specifically found that clothing and services related to the sale of clothing are related for purposes of the likelihood of confusion analysis. *In re Peebles, Inc., supra* (MOUNTAINHIGH for clothing, namely coats sold in applicant's store is likely to cause confusion with MOUNTAIN HIGH for retail outlet stores services for camping and mountain climbing equipment); *In re Envoys U.S.A., Inc.*, 221 USPQ 646 (TTAB 1984) (DOWN UNDER for an athletic shoe having a pocket applied to its quarter portion is likely to cause confusion with DOWNUNDER for department store services); *In re Gerhard Horn Investments, Ltd.*, 217 USPQ 1181 (TTAB 1983) (MARIPOSA for retail women's clothing store services is likely to cause confusion with MARIPOSA for woven and knit fabrics of cotton, acrylic and polyester);

In addition, the third-party registrations and the internet websites suggest that medical apparel and services related to selling medical apparel may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1983); *In re Mucky Duck Mustard Co., Inc.*, 6 UPSQ2d 1467, 1470 n.6 (TTAB 1988).

Based on the foregoing, purchasers who are familiar with the mark **A1 Scrubs** used in connection with "mail order and online retailing services featuring medical scrubs and nursing uniforms" would, upon encountering  on "gloves, caps, gowns, masks, scrub suits, and shoe covers for medical, surgical, and dental use," be likely to believe that the goods originated from the source of the services. Accordingly, we find that the applicant's goods and the registrant's services are similar.

C. The similarity of the channels of trade and classes of consumers.

Applicant argues, in essence, the channels of trade are different because the registrant's services are limited to mail order and online retail services while applicant's products are expected to move in "brick and mortar" stores.

Applicant's argument is not well taken. Our determination of the likelihood of confusion issue is based on the identification of goods and services as they are recited in the application and registration, and we do not read limitations into those descriptions. *See, Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed.

Cir. 1987); *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

Applicant's identification of goods is for "gloves, caps, gowns, masks, scrub suits, and shoe covers for medical, surgical, and dental use." Since there is no restriction as to channels of trade or classes of purchasers, it is presumed that applicant's medical apparel moves in all channels of trade normal for these products, including mail order and online retail services, and that they are available to all medical, surgical, and dental personnel.⁴ Therefore, we do not consider applicant's products to be limited to medical apparel sold through "brick and mortar" establishments.

In view of the foregoing, applicant's products and registrant's services move in the same channels of trade and are sold to the same class of purchasers.

D. The degree of consumer care.

Applicant argues that health care professionals exercise a high degree of care in connection with healthcare products. Specifically, applicant asserts that healthcare professionals are trained to distinguish between

⁴ We note that in the "Sophisticated Purchaser" section of applicant's brief, applicant states that "Consumers of both Applicant's goods and Registrant's services are health care professionals." (Applicant's Brief, p. 2).

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different goods and services and to select appropriate products for particular needs. However, the goods and services at issue involve medical apparel, not technical medical equipment or pharmaceuticals. Being an expert or skilled in the medical, surgical, or dental field and being able to observe minute differences in the physical and functional characteristics of different devices, pharmaceuticals, or patients' symptoms does not mean that the person purchasing the medical apparel is equally skilled or concerned with the trademarks that the medical apparel is marketed under. *Medtronic, Inc. v. Medical Devices, Inc.*, 204 USPQ 3317, 326 (TTAB 1979); *Burroughs Wellcome Co. v. Warner-Lambert Co.*, 203 USPQ 201, 210 (TTAB 1979). "The fact is that this tribunal has long since given flight to the illogical and unsupported conclusion that physician care equals trademark care and that physicians, because of their skill and training, are immune from mistake." *Medtronic, Inc. v. Medical Devices, Inc.*, *supra*. Accordingly, whereas here, the marks are so similar and the goods and services are so closely related, even "sophisticated" consumers are likely to be confused.

In view of the foregoing, we find that applicant's mark , if used on "gloves, caps, gowns, masks, scrub

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suits, and shoe covers for medical, surgical, and dental use," would be likely to cause confusion with **A1 Scrubs** used in connection with "mail order and online retailing services featuring medical scrubs and nursing uniforms."

Decision: The refusal to register is affirmed.