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Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Nutro Products, Inc.

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Serial No. 76/017,060

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Donald D. Mon for Nutro Products, Inc.

Dawn J. Feldman, Trademark Examining Attorney, Law Office  
111 (Kevin Peska, Acting Managing Attorney).

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Before Hanak, Quinn and Bottorff, Administrative Trademark  
Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register  
of the mark PUPPY DRUMSTICKS (in typed form; PUPPY  
disclaimed) for "pet food, namely, snacks for dogs."<sup>1</sup>

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<sup>1</sup> Serial No. 76/017,060, filed April 3, 2000. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and November 1996 is alleged in the application as the date of first use anywhere and the date of first use in commerce.

The Trademark Examining Attorney has issued a final refusal to register under Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark, as applied to applicant's goods, so resembles the mark DRUMSTIX WITH REAL CHICKEN & TURKEY (in typed form; WITH REAL CHICKEN & TURKEY disclaimed), previously registered for "cat food,"<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive.<sup>3</sup>

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<sup>2</sup> Reg. No. 2,209,127, issued December 8, 1998.

<sup>3</sup>The Trademark Examining Attorney initially also refused registration under Trademark Act Section 2(e)(1) on the ground that applicant's mark is merely descriptive of the goods, inasmuch as the goods are for puppies and the specimen package shows that the snacks are shaped like chicken drumsticks. Applicant, in its response to the first Office action, traversed the mere descriptiveness refusal by arguing that its dog snacks do not look like actual fowl drumsticks because they have "grooves and pits" which actual fowl drumsticks do not have, that the term DRUMSTICKS therefore is only suggestive of the goods, not merely descriptive, and that the mark as a whole is a humorous, coined term because puppies do not have drumsticks. The Trademark Examining Attorney withdrew the Section 2(e)(1) refusal in her final Office action.

For purposes of the Section 2(d) refusal on appeal, we note that although it appears from applicant's package specimen that applicant's actual dog snacks currently are shaped like chicken or turkey drumsticks, the mark applicant seeks to register is in typed form and includes no design element depicting the shape of the goods. We do not know if registrant's cat food is configured in the shape of chicken or turkey drumsticks (although it is not unreasonable to assume that it is), but whether it is or not so configured, the registered mark is in typed form and includes no depiction of the shape of the goods.

Applicant has appealed. Applicant and the Trademark Examining Attorney filed main briefs, but applicant did not file a reply brief and has not requested an oral hearing.

In support of her Section 2(d) refusal, the Trademark Examining Attorney argues that applicant's mark is similar to the cited registered mark because the dominant feature of both marks is the term DRUMSTICKS or its phonetic equivalent DRUMSTIX. She notes that the remainders of each mark (PUPPY in applicant's mark and WITH REAL CHICKEN & TURKEY in registrant's mark) are descriptive, disclaimed matter, and that purchasers therefore will notice and recall DRUMSTICKS or DRUMSTIX as the dominant source-indicating feature in each mark. The Trademark Examining Attorney further argues that applicant's goods and registrant's goods are closely related in that they both are pet foods which are marketed to the same purchasers (including ordinary consumers) in the same trade channels (including supermarkets). She has submitted evidence in the form of seventeen third-party registrations of marks which include in their respective identifications of goods both dog food and and cat food (seven of which (including one owned by applicant) more specifically include dog treats, dog snacks or dog biscuits, as well as cat food),

and argues based thereon that cat food is within the normal area of expansion for makers of dog snacks, and vice versa.

In opposition to the Section 2(d) refusal, applicant argues that the marks are dissimilar rather than similar. Applicant concedes that both marks share what applicant calls the "strong words" DRUMSTICKS or DRUMSTIX, but argues that the marks in their entireties nonetheless create different commercial impressions. Applicant points out that the remainders of the respective marks i.e., PUPPY and WITH REAL CHICKEN & TURKEY, do not look or sound alike. Applicant contends that registrant's DRUMSTIX WITH REAL CHICKEN & TURKEY mark is a long and detailed description of the contents of registrant's product, and that the mark "alludes to fowl (chicken and turkey) which indeed do have drumsticks, and tends to associate the product with genuine fowl drumsticks." By contrast, applicant argues, applicant's PUPPY DRUMSTICKS mark is a short, coined, humorous mark which alludes to "something that has no possible relationship to anything - puppies simply do not have drumsticks." Applicant has not presented any argument or evidence with respect to the similarity or dissimilarity between applicant's and registrant's respective goods, trade channels and classes of purchasers.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[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).

First, we find that applicant's goods as identified in the application, i.e., "pet food, snacks for dogs," are similar and closely related to the "cat food" identified in the cited registration. Both applicant's and registrant's goods are pet food. The Trademark Examining Attorney's third-party registration evidence suggests that these respective types of goods may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). Applicant has presented no evidence or argument to the contrary.

Neither the registration nor the application contains any limitations or restrictions as to trade channels or classes of purchasers for the respective goods, and we accordingly presume that the goods are sold in all normal trade channels for such goods and to all normal classes of purchasers of such goods. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Given that both applicant's and registrant's goods are pet food, we find that the trade channels and classes of customers for the respective goods are the same. Again, applicant does not contend otherwise.

We also believe that cat food and dog treats generally are relatively inexpensive products which may be purchased on impulse and without a great degree of care, a fact which further supports a finding of likelihood of confusion.

Finally, we turn to a determination of whether applicant's mark and the cited registered mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. 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 overall commercial impression that confusion as to the source of the goods 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 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, where, as in the present case, the marks would appear on highly similar goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ 1698 (Fed. Cir. 1992).

Applying these principles to the present case, we find that applicant's and registrant's marks are similar rather than dissimilar, and that confusion is likely to result from use of these marks on the highly similar goods at issue here. We find that the dominant feature in the commercial impression created by each mark is the word DRUMSTICKS or its phonetic and legal equivalent DRUMSTIX, and that this feature accordingly is entitled to relatively

greater weight in our comparison of the marks. Purchasers, with their fallible memories, are likely to rely on the DRUMSTICKS/DRUMSTIX feature as the source indicator in each of the marks. The remaining merely descriptive portions of each mark, i.e., PUPPY in applicant's mark and WITH CHICKEN & TURKEY in registrant's mark, are likely to be perceived and recalled only as a means of distinguishing between the products themselves in terms of flavor or intended user, and not as a means of distinguishing between the sources of the products. That is, purchasers will assume that DRUMSTIX WITH REAL CHICKEN & TURKEY, on the one hand, and PUPPY DRUMSTICKS, on the other, are merely different varieties of DRUMSTICKS/DRUMSTIX brand pet food, one variety being specifically for puppies and the other being specifically a cat food with chicken and turkey flavoring.

In short, any dissimilarities between the marks (in terms of appearance, sound and connotation) which might result from differences between the merely descriptive portions of the respective marks are greatly outweighed, in our comparison of the marks' overall commercial impressions, by the fact that the dominant feature in both marks is what applicant concedes is the "strong" word DRUMSTICKS or DRUMSTIX. The distinctions in connotation for which applicant argues (see *supra* at page 4) are, in

our opinion, too strained and subtle to be noticed or recalled by purchasers encountering these closely related and relatively inexpensive pet food items in the supermarket or pet store. Any doubt on that score must be resolved against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

**Decision:** The refusal to register is affirmed.

Hanak, Administrative Trademark Judge, dissenting:

I respectfully dissent. There is no dispute that "the basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with a particular goods or services for which they are used." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750 (Fed. Cir. 1985).

Considering first the goods, while I acknowledge that they are related, I do not acknowledge that, based upon this record, they are "closely related" as contended by the majority. In this regard, the Examining Attorney has made of record only seven third-party registrations which cover both dog snacks (applicant's goods) and cat food (registrant's goods). More importantly, third-party

registrations by themselves are of virtually no probative value in showing that two types of goods are related merely because they are listed in the same third-party registration. The majority cites but does not quote from In re Mucky Duck Mustard Co., 6 USPQ2d 1467 (TTAB 1988). There the Board stated that third-party registrations "although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that the goods or services are of a type which may emanate from a single source." Mucky Duck, 6 USPQ2d at 1470 n.6 (emphasis added). As the underlined language from Mucky Duck indicates, this Board had been very reluctant to accord even the most minimal evidentiary value to third-party registrations for the purposes of showing that two types of goods are related. This reluctance is quite understandable in that to rely upon third-party registrations to show that two types of goods are related in the minds of the consuming public runs contrary to the teachings of one of the predecessor courts to our primary reviewing Court. That court stated that "in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they [the third-party registrations]

provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion." Smith Bros. Mfg. Co. v. Stone Mfg. Co., 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (original emphasis).

Turning to a consideration of the marks, I note at the outset that marks are compared in terms of visual appearance, pronunciation and meaning. 3 J. McCarthy, McCarthy on Trademarks and Unfair Competition, Section 23:21 at page 23-47 (4<sup>th</sup> ed. 2002). The only words common to applicant's two word mark and registrant's six word mark are DRUMSTICKS and its near phonetic equivalent DRUMSTIX. Thus, in terms of visual appearance and pronunciation, applicant's two word mark is clearly different from registrant's six word mark.

I agree with the majority that DRUMSTICKS is the most distinctive feature of applicant's mark and that its near phonetic equivalent DRUMSTIX is the most distinctive feature of registrant's mark. However, I find that the word DRUMSTICKS as used in applicant's mark has a decidedly different meaning than the word DRUMSTIX as used in registrant's mark. The work "drumstick" is defined as "the meaty leg of a chicken, turkey, or other fowl." Random House Webster's Dictionary (2002). Registrant's mark

includes the words WITH REAL CHICKEN & TURKEY. This would cause consumers to view registrant's mark in its entirety as indicating that registrant's cat food consists of real chicken and turkey meat which has been taken from actual chicken and turkey drumsticks.

In stark contrast, there are no such things as PUPPY DRUMSTICKS. A puppy is simply not a chicken, turkey or other fowl. When consumers see the mark PUPPY DRUMSTICKS on dog snacks, they will readily understand that the snacks do not consist of actual drumsticks, but rather are simply snacks in the shape of drumsticks. Indeed, applicant's dog snacks are in the shape of drumsticks, and applicant's boxes for its PUPPY DRUMSTICKS dog snacks feature numerous pictures of its snacks (dog biscuits) in the shape of drumsticks.

Moreover, applicant's PUPPY DRUMSTICKS dog snacks could not consist of real drumsticks because chicken, turkey and other fowl bones, including drumsticks, are clear hazards for dogs and puppies in that they can splinter and do serious damage to the stomach and intestines. See American Kennel Club, The Complete Dog Book pp. 631-632 (18<sup>th</sup> ed. 1992).

In sum, given the fact that dog snacks and cat food are simply related and not closely related goods, and the

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fact that applicant's mark and registrant's mark differ decidedly in terms of visual appearance, pronunciation and especially meaning, I would find that there exists no likelihood of confusion.