

11/30/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 51
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

The F.L. Emmert Company
v.
Moorman Manufacturing Company

Opposition No. **109,065**
to application Serial No. **75/210,301**
filed on **December 9, 1996**

**Fred S. Lockwood of Cook, Alex, McFarron et al. for The
F.L. Emmert Company.**

**Michael D. Johns and Lynda E. Roesch of Dinsmore & Shohl
LLP for Moorman Manufacturing Company.**

Before **Simms, Hairston and Bottorff**, Administrative
Trademark Judges.

Opinion by **Bottorff**, Administrative Trademark Judge:

Applicant seeks registration on the Principal
Register of the mark SHOWBOOST (in typed form) for goods
identified in the application as "animal feed," in Class
31. The application is based on use in commerce under
Trademark Act Section 1(a), 15 U.S.C. §1051(a), and
November 25, 1996 is alleged as the date of first use of

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the mark and the date of first use of the mark in commerce.

Opposer filed a timely notice of opposition to registration of applicant's mark, alleging priority of use and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. §1052(d), as the ground of opposition. Specifically, opposer alleges that it is the owner of an incontestable registration of the mark SHOW BLOOM! (stylized) for "protein and vitamin conditioner and supplement in livestock, including horses," in Class 5;¹ that it is the prior user (since April 1983) of the mark SHOW BLOOM for such goods; and that applicant's mark, as applied to applicant's goods, so resembles opposer's mark as to be likely to cause confusion, to cause mistake, or to deceive.

¹ Registration No. 1,385,725, issued March 11, 1986. Opposer did not properly make this registration of record in accordance with the provisions of Trademark Rule 2.122(d), 37 CFR §2.122(d). Applicant, however, in its brief, has treated the registration as being properly of record, having asserted that the likelihood of confusion issue in this case is "as between Applicant's mark SHOWBOOST as sought to be registered in typed generic form and Opposer's show bloom! as used as a trademark and as shown in its registration No. 1,385,725 dated March 11, 1986 and as used in trade literature in the form Show Bloom." (Applicant's Brief at 1.) In view thereof, we too shall treat opposer's pleaded Registration No. 1,385,725 as being of record, and shall give it full effect. See *Local Trademarks Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990); TBMP §703.02(a).

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Applicant filed an answer by which it denied the allegations of the notice of opposition which are essential to opposer's Section 2(d) claim.

The evidence of record consists of: the testimony deposition of opposer's president A. Lawrence Muzzo and the exhibits thereto; certain documents produced by applicant in discovery and submitted as evidence by opposer pursuant to the parties' stipulation; opposer's notices of reliance on certain dictionary definitions and on certain of applicant's interrogatory answers; the complete transcripts of (and exhibits to) the discovery depositions of applicant's product manager James Benz and its marketing manager David Kleiboeker, made of record pursuant to the parties' stipulation; the testimony deposition of applicant's product manager James Benz and the exhibits thereto²; applicant's notice of reliance on certain of opposer's interrogatory answers; and opposer's

² Opposer has moved to strike Exhibit 2 to the testimony deposition of Mr. Benz. That exhibit, a list of applicant's marks, was offered by applicant for the purpose of establishing applicant's use of various other "BOOST" marks, a fact which goes to the issue of applicant's intent in adopting the SHOWBOOST mark at issue here. However, we find that applicant's use of such other "BOOST" marks also has been established by other of applicant's testimony and documentary evidence, and that Exhibit 2 therefore is merely cumulative. In view thereof, and because we find that the exhibit carries little significant probative weight in any event, we deem the motion to strike to be essentially moot. Our decision herein would be the same regardless of whether we consider the exhibit or not.

rebuttal testimony deposition of its third-party witness Roger Kline, Ph.D., and the exhibits thereto.

Opposer and applicant filed main briefs on the case, and opposer filed a reply brief.³ An oral hearing was originally requested and scheduled, but later was canceled pursuant to the parties' stipulation.

Applicant has conceded opposer's standing to bring this opposition proceeding, as well as opposer's Section 2(d) priority.⁴ (Applicant's brief at 1.) Thus, the issue to be determined in this case is whether a likelihood of confusion exists. 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). Based on the evidence of record with respect to these factors, we find as follows.

³ On the cover pages of its main brief and its reply brief, opposer has designated both briefs as "confidential" in their entirety, stating that each brief "contains information which is subject to a Stipulated Protective Order in this action." The Board notes, however, that there is no protective order of record in the Board's proceeding file of this case.

⁴ In any event, priority is not an issue in this case in view of the evidence establishing the status and title of opposer's pleaded Registration No. 1,385,725 (see *supra* at footnote 1). *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

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We find that applicant's goods as identified in the application, "animal feed," encompass and therefore are legally identical to opposer's goods as identified in its registration, "protein and vitamin conditioner and supplement in livestock, including horses." Applicant concedes as much. (Applicant's brief at 1.) The record shows that both parties are using their respective marks on animal feed supplements designed to be added to the normal feed ration of animals being prepared or fitted for livestock shows; that such show animals can include dairy and beef cattle, sheep, goats, swine, horses, and rabbits; that the feed supplements are designed, *inter alia*, to enhance the palatability of the animal's normal feed so as to maintain the animal's appetite and feed intake in the stressful periods prior to and during livestock shows, and to enhance the healthy and shiny appearance of the animal's coat; and that applicant and opposer are competitors in the market for show feed supplements.

We also find that the classes of purchasers and the trade channels for the parties' respective goods are legally identical. Again, applicant concedes such overlap. (Applicant's brief at 1.) The record shows

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that the normal classes of purchasers for these goods include the classes which opposer and applicant especially target, namely, county fair juniors (young people involved in showing animals as 4-H or FFA projects), and professional breeders (purebred producers). The record also shows that the normal trade channels for the goods include direct sales from the manufacturer to the individual livestock producers, sales through distributors, sales through retail dealers (feed lots and farm supply dealers, for example, as well as "farmer-dealers" in more remote areas), catalog and mail order sales, and sales by "show vendors" at livestock shows.

The methods by which the goods may be promoted and marketed include those which the record shows are utilized by opposer, such as: product brochures (distributed, e.g., via mass mailings to 4-H and FFA members, at trade shows, by distributors, or in response to 800-number telephone requests); magazine advertisements (in publications and mail order catalogs directed to persons involved in breeding and/or showing animals); livestock trade shows (by use of exhibition booths or other means of personal interaction with potential purchasers, and by distribution and posting of

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advertising brochures and posters at prominent locations around the show's facilities); by retail point-of-sale displays; and by word-of-mouth advertising among purchasers.

The next factor we consider is the sophistication of purchasers and the level of care taken in making the purchasing decision. The evidence of record shows that opposer commonly sells its feed supplement in a fifty-pound bag which retails for \$35 to \$45.⁵ A fifty-pound bag of an animal's base feed retails for seven to ten dollars. A typical steer's daily feed ration would be ten to twelve pounds of base feed, topped with eight ounces of the feed supplement. (Muzzo Testimony Depo. at 14-16.) Although it may be true, as opposer argues, that the cost of opposer's feed supplement is minimal (i.e., less than one dollar) when computed on a per diem basis, we find that the initial required outlay of \$35 to \$45 is sufficiently substantial to preclude a finding that these goods are an "impulse" purchase.

It appears from the record that at least some of the prospective purchasers of these goods (e.g., the

⁵ It appears from the record that opposer also sells its product in twenty-five pound bags, but the retail price therefor is not of record. It also appears that applicant's product is sold at retail in fifty-pound bags, but the retail price of applicant's goods is not readily ascertainable.

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professional breeders and experienced exhibitors) are knowledgeable and sophisticated in their fields. Applicant's president presented unrebutted testimony that, based on his experience, purchasers of these goods "would be quite discriminating. Show people want to have a competitive edge since their animals are going to be entered into competition, and they are usually fairly careful in the type of product that they use and what they want to feed that animal." (Benz Testimony Depo. at 10-11.)⁶ Furthermore, opposer's product brochures (such as opposer's Exhibit No. 48, from which the following quotation is taken) include the following statements which tend to suggest that these purchasers of the products are knowledgeable and careful:

Show Bloom, the nutritionally complete supplement and conditioner, has been specifically formulated to meet the needs of the serious show animal breeder and exhibitor. For years, dedicated animal farmers, 4-H members, FFA members, and others have invested significant time and money in the preparation of animals of high standards for a variety of competitive trials held throughout the nation and throughout the world. Now, Show Bloom, a complete nutritional supplement and

⁶Opposer objected to this testimony during the deposition, but has not maintained the objection in its brief. Rather, opposer has treated the testimony as being properly of record. See opposer's main brief at 24, and reply brief at 17. Accordingly, we deem opposer to have waived its objection, and we shall treat the testimony as being of record. See generally TBMP §718.04.

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conditioner, has been developed for the needs of the person dedicated to show animals.

The record also shows that a significant number of the relevant purchasers of the goods are county fair juniors, i.e., young people who are raising and exhibiting animals as 4-H Club or FFA projects. Opposer argues that this group of purchasers, which purportedly always will include novices or first-time participants, "may lack sophistication." (Reply brief at 17.) Opposer has presented no direct evidence to support this contention. Moreover, there is evidence which suggests that there is at least some degree of parental involvement and support in the purchase and use of these goods. See, e.g., opposer's Exhibit Nos. 8-9, comprising young exhibitors' letters to opposer which actually were written by the youngsters' parents.

Nonetheless, on balance we find that applicant has failed to establish that this *du Pont* factor, i.e., the sophistication of purchasers, is entitled to significant weight in our likelihood of confusion analysis. That is, although we are not persuaded that these goods are purchased on impulse or that the purchasers thereof are unsophisticated, we cannot conclude on this record that the purchasers of these goods necessarily are so

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sophisticated and so careful, or that the goods are so expensive and the purchasing process so controlled, that any likelihood of confusion that otherwise would exist is eliminated or decreased as a result. Accordingly, we find that this *du Pont* factor is essentially neutral in this case.

The next *du Pont* factor we consider is "the nature and extent of any actual confusion." Applicant's product manager, James Benz, testified that he is not aware of any instances of actual confusion. However, he also admitted that applicant does not have a formal procedure for reporting or recording instances of actual confusion. (Benz Testimony Depo. at 5-6 and 53-54.) Opposer, for its part, has identified one instance of what it contends was actual confusion between its mark and applicant's mark. Specifically, opposer's president testified that he was present at a meeting with one of opposer's representatives (identified as Gary Martin) and a potential new distributor (identified as James Welgiehousan) at which the following transpired:

So Gary introduced me to Welgiehousan as the guy who makes Show Bloom. And Welgiehousan looked at me and said, well, tell me about this Showboost product. And I said no, not Showboost, Show Bloom. Oh, yeah, I know what you're talking about, what's Showboost then,

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because I've heard of that. And I told him all I know is that it's a product similar to Show Bloom that MoorMan's has come out with and, you know, was trying to sell. I don't think I said anything else. ... And then, you know, the conversation moved ahead from there. I - if you're asking me about confusion, I think he was - if he wasn't confused he wasn't exactly clear.

(Muzzo Testimony Depo. at 148-49.)

Immediately after this testimony was given at the deposition, applicant's counsel objected as follows: "I object to the witness saying what somebody else thinks." In its brief, applicant has maintained the objection:

Even assuming Mr. Muzzo's 'story' was accurate, it does not show that Mr. Welgiehousan was confused between SHOWBOOST and SHOW BLOOM. Mr. Welgiehousan could have already known about the SHOWBOOST product and wanted Mr. Muzzo to tell him more about that product. Clearly, it was pure speculation on Mr. Muzzo's part, and speculation on Opposer's part, to represent that Mr. Welgiehousan was confused. Mr. Welgiehousan was already set up as a Show Bloom distributor. He certainly knew what product he was going to distribute. He didn't need to be told about that product. It is more likely that he had run into SHOWBOOST and wanted information on it as a product competing with SHOW BLOOM. In any event, Mr. Muzzo's story testimony was timely objected to as hearsay.

(Applicant's brief at 14-15.) In opposer's reply brief, opposer counters as follows:

Mr. Muzzo's testimony was not merely speculation nor was it hearsay. The testimony indicated that based on the conversation Mr. Muzzo had with Mr. Welgiehousan, Mr. Muzzo believed that Mr. Welgiehousan was confused. The statements that [he] attributed to Mr. Welgiehousan are not being offered for their truth; rather, from the out of court statements made by Mr. Welgiehousan, Mr. Muzzo concluded that the man was confused.

We overrule applicant's hearsay objection to the admissibility of Mr. Muzzo's testimony. The testimony either is not hearsay, to the extent that it is offered as evidence of Mr. Muzzo's opinion as to whether Mr. Welgiehousan was confused, or else it is admissible under the "state of mind" exception to the hearsay rule, to the extent that it is offered to show what opposer contends was Mr. Welgiehousan's state of mind, i.e., confusion. See Fed. R. Evid. 803(3); see also *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ 340, 345-46 (TTAB 1983).

We agree with applicant, however, that Mr. Muzzo's testimony recounting his conversation with Mr. Welgiehousan falls far short as evidence that Mr. Welgiehousan actually was confused as to the existence of a source connection between the parties' respective products. See *Toys "R" Us, Inc. v. Lamps R Us, supra*. At best, the testimony establishes that Mr. Muzzo is of the opinion that Mr. Welgiehousan was confused, an

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opinion we find to be based solely on speculation which is not necessarily borne out by the actual statements attributed to Mr. Welgiehousan by Mr. Muzzo. Mr. Welgiehousan's state of mind cannot readily be determined from Mr. Muzzo's testimony; we find that applicant's above-quoted speculation, i.e., that Mr. Welgiehousan simply was asking for information about Showboost as a competing product, is at least as plausible as Mr. Muzzo's speculation that Mr. Welgiehousan was confused.

In short, we find that Mr. Muzzo's testimony is too anecdotal and too tenuous to support a finding of actual confusion. No other evidence of actual confusion having been made of record, we find that this *du Pont* factor is neutral in our likelihood of confusion analysis.

The next, and related, *du Pont* factor is "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion." The evidence of record shows that, as of the close of the testimony periods in this case, the parties had been concurrently using their marks for three years and three months. The parties share one common distributor (and have done so since approximately October 1997), but there is no evidence as to the volume (if any) of applicant's SHOWBOOST product distributed by that distributor. (Benz

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Discovery Depo. at 117.) The parties appear to have focused their efforts in different marketing and distribution channels to date, with applicant primarily using its own sales force to sell directly to farmer-producers, and opposer primarily using distributors and retailers. Applicant does not advertise or promote its SHOWBOOST product separately, but only as part of its "New Generation Nutrition" specialty product line of approximately thirty separate products. (Benz Discovery Depo. at 30, 33, and 99.)

On this record, we are not persuaded by applicant's argument that the absence of evidence of actual confusion in this case is entitled to significant probative weight in our likelihood of confusion analysis. That is, we cannot conclude from this record that the length of time and the circumstances under which the parties have concurrently marketed their products are such that the absence of actual confusion is factually surprising or legally significant. There is no evidence as to the degree of either party's market penetration or as to the extent of the parties' market overlap, and we accordingly cannot conclude that there has been any significant opportunity for actual confusion to have occurred. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB

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1992). In these circumstances, we find that this *du Pont* factor is neutral, or that it at best weighs only slightly in applicant's favor in this case.

The next factor to consider is the fame of opposer's mark. The record shows that, for the years 1990-1997, opposer's sales of goods bearing the mark totaled between \$150,000 per year and \$350,000 per year, and its advertising and promotional expenditures totaled \$30,000 to \$40,000 per year. Opposer argues that these figures are significant in view of opposer's relatively small size and given the "niche" nature of the market for show feed supplements. Opposer also argues that its customers have had notable success using opposer's product in competitions, and the record shows that they have provided opposer with testimonials to that effect which opposer has used in its marketing materials. Opposer also has obtained testimonials from well-known and successful professional breeders and exhibitors in the show animal field, and has used those testimonials in its advertisements.

After careful consideration of all of the evidence on this issue, we find that opposer has failed to establish that its mark is a famous mark. Opposer's sales and advertising figures do not rise to the levels

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normally found in connection with famous marks.

Moreover, there is no clear evidence in the record as to the size of the relevant market or as to opposer's share of or prominence in that market;⁷ absent such evidence, we cannot conclude that opposer's sales and advertising figures, in themselves, are sufficient to establish fame. See, e.g., *Fossil Inc. v. Fossil Group*, 49 USPQ2d 1451 (TTAB 1998). Opposer's evidence regarding customer testimonials, although sufficient to show that opposer has developed a degree of goodwill in its mark, fails to establish that the mark is a famous mark for purposes of this *du Pont* factor, or that the mark should be accorded the wider scope of protection generally accorded to famous marks. We conclude that this *du Pont* factor is neutral in this case.

The next *du Pont* factor to consider is "the number and nature of similar marks in use on similar goods."

⁷ We note, however, that opposer's president testified as follows with respect to opposer's penetration of the feed supplement market:

And I commented earlier that everything that we've done since we started has been with an eye toward making that trademark, that logo, recognizable, making it - I mean our goal obviously, I don't think we've gotten there yet, but our goal is to make it household, make it easily identifiable by anybody in that market.

(Muzzo Testimony Depo. at 121. Emphasis added.)

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There is no evidence that any third party uses or has used opposer's exact mark SHOW BLOOM, or any mark substantially similar thereto, on animal feed supplements. However, there appear to be several third-party marks in use which include the word SHOW. See, e.g., the third-party advertisements for Purina SHOW CHOW and for SHOWMASTER FEEDS. (Applicant's Exhibit Nos. 18-24.) We are not persuaded by opposer's contention that these third-party products are not competitive with or in the same product category as opposer's SHOW BLOOM product. This evidence leads us to conclude that the word SHOW, at least, is relatively diluted as applied to these goods.⁸

Finally, we turn to a determination of what we find to be the key likelihood of confusion factor in this case, i.e., whether applicant's mark and opposer's mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test for confusing similarity 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

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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). The marks at issue may not be dissected but rather must be considered in their entireties. However, it is not improper to consider the component parts of the respective marks as a preliminary step in the analysis of the similarity of the marks as a whole. See 3 J.T. McCarthy, McCarthy on Trademarks and Unfair Competition §23:41 (4th ed. 2001). Likewise, 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 identical goods, the degree of similarity between the marks which is necessary to support a finding of likely confusion declines. *Century*

⁸ Also, as discussed below, the evidence of record reveals that the word SHOW is an inherently weak term as applied to show

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21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ 1698 (Fed. Cir. 1992).

We begin our analysis of the marks by noting, again, that applicant seeks registration of the mark SHOWBOOST, in typed form. Opposer's registered mark is depicted in special form as "show bloom!", i.e., as two words, in all lower case letters, with an exclamation point at the end. This is also the format in which opposer presents its mark on its packaging and in much of its literature. However, opposer also claims common law rights in various other depictions of its mark. For purposes of our determination of the similarity or dissimilarity of the parties' marks, especially in terms of appearance and overall commercial impression, we find that the slightly stylized depiction of opposer's mark, as registered, is inconsequential. That is, whether opposer's mark is considered as two words or as one compound word, in lower case or upper case, and with or without an exclamation point, purchasers readily would perceive the mark as consisting essentially of the two common words SHOW and BLOOM. Likewise, despite its depiction in the application drawing as a compound word, applicant's mark

feeds such as those involved in this case.

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readily would be perceived as consisting essentially of the two common words SHOW and BOOST.

Comparing the two marks first in terms of their respective meanings or connotations, we find that the marks are identical to the extent that they both begin with the word SHOW. However, the evidence of record demonstrates that SHOW is a weak, highly suggestive term as used in the parties' respective marks and as applied to the parties' feed supplement products. These goods are designed to be fed to "show animals," and they have been referred to generically by opposer's president (among others) as a species of "show feeds." See, e.g., Muzzo Testimony Depo. at 10 and 76. Also, as noted above, there appear to be several third-party marks which include the word SHOW in use on similar goods, such as Purina SHOW CHOW and SHOWMASTER FEEDS. Applicant also has made of record numerous third-party registrations of marks which include some variation of the word SHOW for animal feed products. (Applicant's Exhibit Nos. 25-40.) Based on this evidence, we find that SHOW is not a dominant feature of either of the parties' marks, and that the mere presence of the word in both marks is

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insufficient, without more, to warrant a finding that the marks are confusingly similar in their entireties.⁹

As for the rest of the respective marks, opposer argues that BLOOM and BOOST are similar in meaning, in that the definition of BLOOM includes "to flourish, esp. in youthful beauty, freshness, or excellence..." "to come out like a bloom on a plant," and "to make glowing or radiant," while the definition of BOOST includes "to aid or assist esp. towards progress or increase," "assistance or commendation that betters position or enhances reputation," and "an uplift or encouragement."

(Opposer's main brief at 34, citing to and quoting from the dictionary excerpts from Webster's Third New International Dictionary (1968) made of record as opposer's Exhibit No. 110.) Opposer further argues that "[w]hen combined with the term SHOW, both of the terms BLOOM and BOOST evoke an extremely similar overall commercial impression of a supplement product designed to help an animal improve, grow and flourish." (Opposer's main brief at 34-35.) Similarly, in its reply brief at 12, opposer contends that

⁹ Opposer essentially concedes as much at page 9 of its reply brief: "Thus, while SHOW may not be an overly strong term in the feed market, its incorporation with a term which creates an overall similar impression still creates an impermissible likelihood of confusion."

...the SHOW portion of the mark provides the context and helps shape the meaning for the other term in the marks. The SHOW term brings the meaning of the BLOOM and BOOST terms even closer together. Both terms generally have to do with improvement in the appearance of something and SHOW focuses that improvement on the show environment. Thus, SHOW BLOOM suggests a product that helps an animal's health and appearance flourish for show while SHOWBOOST suggests a product that aids or assists in increasing the overall healthful appearance of an animal for show. (Emphasis in original.)

We are not persuaded that BLOOM and BOOST are as similar in meaning as opposer contends. Even in terms of the generalized definitions cited by opposer, the two words are readily distinguishable. More importantly, however, we find that BLOOM, as used in opposer's mark and as applied to opposer's goods, would not have the generalized meaning (i.e., "flourish") that opposer attributes to it. Rather, the evidence of record leads us to conclude that BLOOM has a more specific, readily-recognized meaning when used in the context of animals being prepared for show, a meaning which purchasers of the goods would not ascribe to the word BOOST.

In particular, we note that the above-referenced dictionary excerpt made of record by opposer (opposer's Exhibit No. 110) includes the following highly relevant

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definition of the noun "bloom": "1: a healthy well-kept appearance of the coat and skin of a domestic animal." Additionally, the record is replete with instances wherein opposer's customers, opposer's competitors, and opposer itself clearly are using the word "bloom" as a term of art having that same specific meaning:

Even at a young age, the lambs have more bloom than ever before;¹⁰

... we noticed an overnight excelerated [sic] creep consupition [sic] and overall bloom;¹¹

... [Show Bloom] had an edge on some others for more aggressiveness at the feed bunk, more bloom and just an overall fresher and better tone appearance;¹²

Show Bloom's exclusive formula ... is specially blended to provide the show animal the extra bloom expected of winners;¹³

It also is great for baby lambs getting ready to sell as they stay healthier and bloom quicker;¹⁴

We use [Show Bloom] for a source of protein, minerals, and vitamins but most of all for the

¹⁰ Opposer's Exhibit No. 13 (customer letter).

¹¹ Opposer's Exhibit No. 14 (customer letter).

¹² Opposer's Exhibit No. 19 (letter from customer Bobby May).

¹³ Opposer's Exhibit No. 48 (opposer's brochure text).

¹⁴ Opposer's Exhibit Nos. 48, 67 and 68 (testimonial from customer Joe Calhoun, reprinted in opposer's brochures).

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extra added bloom to give you the edge in the show and sale ring;¹⁵

The hair has a fresher, deeper bloom than in the past;¹⁶

... has also given us the extra hair and bloom to make them champions;¹⁷

I saw results in a hurry, lambs showed more bloom and vigor during the growing period";¹⁸

[Show Bloom] provides just what the name implies - bloom;¹⁹

Show Bloom is a nutritionally complete supplement and conditioner designed to give show animals the extra bloom judges notice - and reward!;²⁰

... and give them the extra bloom to be winners in the show ring;²¹

... we find that by using show bloom! there is a different bloom to the muscle and firmness to the finish;²²

¹⁵ Opposer's Exhibit Nos. 48, 56, 58 and 71 (testimonial from customer Shane Lindsey, reprinted in opposer's brochures).

¹⁶ Opposer's Exhibit No. 56 (testimonial from customer Bobby May, reprinted in opposer's brochure).

¹⁷ Opposer's Exhibit Nos. 57 and 60 (testimonial from customer Troy Thomas, reprinted in opposer's brochures).

¹⁸ Opposer's Exhibit Nos. 67 and 68 (testimonial from customer Guy Reinarz, reprinted in opposer's brochures).

¹⁹ Opposer's Exhibit Nos. 67 and 68 (testimonial from customer J.B. Massey, reprinted in opposer's brochures).

²⁰ Opposer's Exhibit No. 73 (opposer's advertisement text in Countrymark Co-op brochure).

²¹ Opposer's Exhibit No. 73 (additional advertisement text in Countrymark Co-op brochure).

Adds shine and bloom to the hair ...;²³

Rinse cattle daily. Treat their hair like human hair. Keep conditioners and oils in hair. Simply rinsing tends to dry the hair and scalp out. When this occurs, hair will not grow and have the bloom you want it to have;²⁴

You will love how STAR-GLO gives your animal better hair growth, healthier skin and an increased appetite to achieve ultimate show bloom;²⁵ and

Keeps show hogs fresh and keeps their bloom during stress of show season.²⁶

Based on the above-quoted dictionary definition and on this evidence of how opposer and others commonly use the term, we find that BLOOM, unlike BOOST, is a term of art which has a specific, readily-recognized meaning as applied to show animals and as used in connection with the goods involved in this case; it refers specifically

²² Opposer's Exhibit No. 83 (testimonial from Jimmy Strube, reprinted in opposer's advertisement in The National Livestock Exhibitor magazine).

²³ Opposer's Exhibit No. 84 (testimonial from Chad Bush, reprinted in opposer's advertisement in The National Livestock Exhibitor magazine).

²⁴ Opposer's Exhibit No. 86 (article/promotional piece by Dan Leddy in Purple Circle magazine; see Muzzo Testimony Depo. at 99-101).

²⁵ Opposer's Exhibit No. 90 (advertisement in Sullivan Supply catalog for feed supplement called Star*Glo).

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to the condition of an animal's coat. Purchasers encountering opposer's mark on opposer's goods will ascribe this specific meaning to BLOOM, rather than the more generalized meaning for which opposer argues. BOOST, by contrast, has no such specific meaning as applied to these goods, but carries instead the more generalized connotation of "assistance" or "increase." Nor are the two terms brought any closer together in meaning by virtue of their being combined with the highly suggestive term SHOW. Opposer's mark SHOW BLOOM will be readily understood by purchasers to refer specifically to the bloom on the coat of a show animal which will result from use of opposer's product. Applicant's mark SHOWBOOST carries no such specific meaning, connoting more generally that applicant's product will help improve the overall condition of an animal being prepared for show.

For these reasons, and especially due to the presence in opposer's mark of the term of art BLOOM and the absence of that term of art from applicant's mark, we find that applicant's mark and opposer's mark are more dissimilar than similar in terms of meaning.

²⁶ Opposer's Exhibit No. 91 (advertisement in Valley Vet Supply catalog for feed supplement product called Barrow Booster).

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We also find that the marks are more dissimilar than similar when compared in terms of appearance. Opposer argues that the marks look similar because they both consist of nine letters, seven of which are identical including the first five letters and two of the last four letters, and because both marks begin with the word SHOW followed by a second, five-letter word beginning with the letter "B" and including a double "O." Although opposer's observations certainly are correct, we are not persuaded that purchasers would engage in this sort of letter-by-letter analysis and comparison when viewing the marks. Rather, in viewing the marks, purchasers will read the words comprising the marks. The marks obviously look similar to the extent that they both start with the highly suggestive²⁷ word SHOW, but BLOOM and BOOST are common words which would be readily recognized as such and which are readily distinguishable from each other in terms of appearance, notwithstanding their shared letters. We find that when the marks are viewed in their entirety in terms of appearance, their dissimilarities outweigh their similarities.

Comparing the marks next in terms of sound, we find that the marks are similar to the extent that (1) they

²⁷ See discussion *supra* at pp. 18-19.

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both are comprised of two syllables, (2) the first syllable in applicant's mark (sho) sounds identical to the first syllable in opposer's mark, and (3) the second syllable of each mark begins with "b" and has the identical-sounding "ü" vowel sound. We further find that the marks are dissimilar to the extent that (1) the "b" in opposer's mark is followed by an "l" which gives opposer's mark, but not applicant's mark, a "bl" sound at the beginning of the second syllable, and (2) applicant's mark ends in an "st" sound while opposer's mark ends in an "m" sound. We also note, again, that each of the marks is comprised of, and would be heard as, two readily-recognizable words. SHOW sounds the same in both marks, but BLOOM and BOOST, despite their shared "b" and "ü" sounds, are two different-sounding words when considered in their entireties. We find that the differences in sound between the words BLOOM and BOOST suffice to render the marks, as a whole, dissimilar rather than similar in terms of sound.

We are not persuaded by opposer's argument that the similarity in the sound of the two marks is increased or exacerbated by the fact that the goods often are marketed by means of word-of-mouth recommendations, without accompanying visual depictions of the marks, at livestock

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shows which by their nature are very noisy. First, there is no clear evidence of record from which we can find that the ambient noise at livestock shows typically is so great that normal conversation would be hindered to the extent that purchasers would not be able to aurally distinguish SHOW BLOOM from SHOWBOOST. The sole evidence cited by opposer on this question is the following testimony of opposer's president Mr. Muzzo:

And one of the things we talked about when we first saw this Showboost product - in fact, I think it was - well, I forget who said something, you know, he said, you know, if you're standing in a barn and if there is cattle or if there is whatever and there is people talking, and they usually have forklifts or, you know, mechanized, they pick up all the old hay and whatever, and you're talking and there is a kind of this din, and you talk about Show Bloom or Showboost, it would be real easy to mishear it, I guess, if that's such a thing, or misunderstand it.

(Muzzo Testimony Depo. at 125-26.) This testimony fails to support the factual proposition for which opposer cites it. These statements regarding the amount of noise in the barns are the hearsay statements of an unidentified person which are, in any event, too conditional and conjectural to merit significant probative value.

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Second, the record as a whole does not support opposer's contention that these conversations at livestock shows are likely to take place without the aid of any visual depictions of the marks. Mr. Muzzo testified: "And one of the things that we do at every show that has animals is we go through the barns, at best we talk to the people, and at worst we leave them literature on their show box or in their stall." (Muzzo Testimony Depo. at 81.) Likewise:

So what we do is we'll take literature and we'll take posters and we'll tape them to walls and to columns. Generally we like to put them by doors so people see them. And we're not the only ones that do that. In some of the bigger shows there will be literature and posters and handouts and everything else that you can stick on a wall all over the place. I mean we obviously try to get our name out. And it's real important to us, and we've tried to make - we've tried to get out as much tangible literature and just tangible property, tangible stuff so that we imprinted that logo on people's minds.

(Id. at 82.) Mr. Muzzo also testified that in every row of the barn there might be a half-dozen stalls in which could be seen a bag or bucket of opposer's product in its original packaging. (Id. at 83-86.)

Finally, if we put aside the problems with opposer's proof and assume that the barns in fact are loud and that the verbal exchanges which constitute opposer's word-of-

mouth marketing are accompanied by few or no visual depictions of the marks, we nonetheless find that, even in the circumstances posited by opposer, SHOW BLOOM and SHOWBOOST are sufficiently dissimilar in terms of sound that they would not be aurally confused.

When we compare the marks in their entirety as to appearance, sound and meaning, we find that their dissimilarities outweigh their similarities, and that the marks likewise are dissimilar rather than similar in terms of their overall commercial impressions.

In summary, after careful consideration of the evidence of record with respect to the relevant *du Pont* factors and the parties' arguments with respect thereto,²⁸

²⁸ Opposer also has argued that applicant adopted its mark either in bad faith or with reckless disregard of opposer's prior rights in opposer's mark, inasmuch as applicant had actual knowledge of opposer's mark prior to applicant's adoption of its own mark, and because, despite such knowledge and despite applicant's status as a "trademark-savvy" company, applicant failed to conduct a complete trademark search prior to adopting its mark and applying for registration. The defendant's alleged bad faith adoption of its mark is not expressly included among the *du Pont* likelihood of confusion evidentiary factors, but if evidence of such bad faith is present in the record, we certainly may consider it. In this case, we find no such bad faith on applicant's part. Even assuming that opposer is correct in contending that applicant had actual knowledge of opposer's mark prior to applicant's adoption of its own mark (an assumption which is by no means mandated by the evidence of record), there is absolutely no evidence that applicant adopted its mark with the intention of trading on opposer's goodwill. Likewise, even assuming (without so finding) that applicant failed to conduct a complete trademark search, we find that such failure is irrelevant to our likelihood of confusion analysis in this case. The case cited by opposer, *International Star Class*

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we conclude that there is no likelihood of confusion in this case. That is, notwithstanding the fact that the parties are using their respective marks on identical goods which are marketed in the same trade channels and to the same purchasers, we find that the marks are too dissimilar, especially in terms of their meanings and their overall commercial impressions, to support a determination that confusion is likely. We find that opposer's mark has a rather specific connotation and commercial impression as applied to the goods, neither of which are shared by applicant's mark. Moreover, we find that opposer's mark is somewhat suggestive, and that it is not entitled to a scope of protection which is so wide as to preclude registration of applicant's dissimilar mark. See generally *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Decision: The opposition is dismissed.

Yacht Racing Association v. Tommy Hilfiger U.S.A. Inc., 146 F.3d 66, 46 USPQ2d 1492 (2d. Cir. 1998), is a civil infringement and unfair competition case which is inapposite to this opposition proceeding both as to its facts and as to the applicable legal standards. In short, to the extent that the applicant's intent in adopting its mark is a factor to be considered in our likelihood of confusion analysis, we deem that factor to be neutral in this case.

