

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      DEC. 28, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Nutritional Source, Inc.

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Serial No. 75/294,991

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Edward D. Lanquist, Jr. of Waddy & Patterson for applicant.

Tina L. Snapp, Trademark Examining Attorney, Law Office 105  
(Thomas G. Howell, Managing Attorney).

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Before Cissel, Walters and Wendel, Administrative Trademark  
Judges.

Opinion by Walters, Administrative Trademark Judge:

Nutritional Source, Inc. has filed a trademark  
application to register the mark HEALTH RICH<sup>1</sup> for the  
following goods:

Liquid and powdered dietary food supplements in  
the nature of shakes and puddings; nutritional  
supplements in the nature of food bars, in  
International Class 5;

Puddings; teas; flavored and sweetened gelatin  
desserts; hot chocolate; ready-to-eat cereal

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<sup>1</sup> Serial No. 75/294,991, in International Class 30, filed May 20, 1997,  
based on an allegation of a bona fide intention to use the mark in  
commerce.

derived food bars; salad dressings, namely, pourable salad dressing and dry salad dressing mixes; bakery products, namely, rolls, donuts, cookies, brownies, breads, bread sticks, muffins, biscottis and crackers; dry processed cereals; granola; oatmeal; dried pasta; prepared entrees consisting primarily of pasta, namely, fettuccini alfredo, pasta and chicken, macaroni and cheese, and tomato paste; pretzels; popped popcorn with added spices and coatings; pancake mixes; dry food mixes, namely, spaghetti, curries, and taco fillings, in International Class 30;<sup>2</sup>

Dry unprocessed cereals, in International Class 31; and

Fruit drinks, in International Class 32.

The Trademark Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark HEALTHRICH FARMS, previously registered for "fresh and frozen ostrich meat, processed ostrich in the form of jerky, sausage, ham and ostrich sticks; and processed food containing ostrich meat in the form of soup,"<sup>3</sup> that, if used on or in connection with applicant's

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<sup>2</sup> The Examining Attorney finally refused registration on the ground that applicant's identification of goods in International Class 30 was indefinite. Subsequent to the briefing period, but prior to this decision, applicant submitted an amendment to the identification of goods to adopt the language proposed by the Examining Attorney. Therefore, the issue pertaining to the identification of goods in International Class 30 is moot.

<sup>3</sup> Registration No. 2,036,879 issued February 11, 1997, to Ostrich Producers Coop of the Mid-West, in International Class 29. The registration includes a disclaimer of FARMS apart from the mark as a whole.

goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

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 issue. *See, In re E. I. duPont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion in this case, two key considerations are the similarities or differences between the marks and the similarities or differences between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation and commercial impression. 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 entirety, 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).

In this case, applicant's mark, HEALTH RICH, is identical to the first word of registrant's mark, HEALTHRICH FARMS. The fact that the two words forming applicant's mark are blended into a single word in registrant's mark does not materially alter the appearance, sound or connotation of the term. While registrant's mark includes the word FARMS, it is a merely descriptive (and, accordingly, disclaimed) term that does not significantly distinguish registrant's mark from applicant's mark. Consumers confronting the two marks at different times and in different contexts are likely to remember the dominant HEALTHRICH portion of registrant's mark. Thus, we find the commercial impressions of the two marks to be sufficiently

similar that, if used on the same, similar or related goods, confusion would be likely.

Turning to consider the goods, the Examining Attorney contends that "[t]he goods are related generally in that they are food items for human consumption"; and that "there are numerous entities using individual marks in conjunction with both meat entrees ... and pasta entrees[,] producing sausages ... as well as pastas[,] [and] producing prepared meats and bakery products." In support of her position, the Examining Attorney submitted copies of third-party registrations. At least nine of the third-party registrations included both prepared meat entrees and/or side dishes and prepared pasta entrees and/or side dishes; one registration included both canned meat and pasta; and another registration included both sausage and pasta.

Applicant has made several arguments based upon statements about the exact nature of its goods and applicant's and registrant's channels of trade. However, both applicant's and registrant's goods are broadly identified and the application and registration contain no limitations as to channels of trade. It is a well established principle that "[t]he question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in

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applicant's application vis-à-vis the goods and/or services recited in [the] registration, rather than what the evidence shows the goods and/or services to be." *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

However, even if, as the Examining Attorney contends, the respective goods may broadly be considered as "food items for human consumption," the mere fact that a term may be found which encompasses the parties' products does not mean that customers will view the goods as related in the sense that they will assume that they emanate from or are associated with a common source. *See, e.g., General Electric Co. v. Graham Magnetics Inc.*, 197 USPQ 690, 694 (TTAB 1977) and *Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517, 520 (TTAB 1975). The record is devoid of any evidence indicating any relationship between registrant's goods and applicant's goods identified in International Classes 5, 31 and 32 such that consumers would be likely to believe that these goods emanate from the same source. Therefore, we find no likelihood of confusion with respect to the goods identified in International Classes 5, 31 and 32 of the application.

On the other hand, we find that confusion is likely with respect to the goods identified in the application in

International Class 30. Applicant's goods include prepared pasta entrees, which contain, in part, chicken; and food mixes, namely spaghetti, curries and taco fillings.

Registrant's ostrich meat products include processed food in the form of soup. While it is quite true that the goods are different, it is well-settled that the goods of an applicant and registrant need not be similar or even competitive in order to support a holding of likelihood of confusion, it being sufficient for the purpose if such goods 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 would give rise, because of the marks used thereon, to the mistaken belief that they emanate from or are in some way associated with the same source. See, *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1984), and cases cited therein. In this case, both applicant's entrees and mixes and registrant's soups are prepared meals that, based on the evidence of record, could reasonably emanate from the same source.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, HEALTH RICH, and registrant's mark, HEALTHRICH FARMS, their contemporaneous use on the goods identified in

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International Class 30 is likely to cause confusion as to the source or sponsorship of such goods.

Finally, to the extent that we have any doubt concerning our conclusion that confusion is likely with respect to applicant's goods in International Class 30, we are obligated to resolve such doubt in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed Cir. 1988).

*Decision:* The refusal under Section 2(d) of the Act is affirmed with respect to applicant's identified goods in International Class 30; and reversed with respect to applicant's identified goods in International Classes 5, 31 and 32.

R. F. Cissel

C. E. Walters

H. R. Wendel  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board