

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      MAY 25, 00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Merrick's Inc.  
v.  
Hereford Bi-Products, Inc.

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Cancellation No. 26,297

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**Beth Ermatinger Hanan** of Reinhart, Boerner, Van Deuren,  
Norris & Rieselbach, s.c. for Merrick's Inc.

**Catherine Fancher** of Strasburger & Price, L.L.P. for  
Hereford Bi-Products, Inc.

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Before **Simms**, Cissel and Chapman, Administrative Trademark  
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On May 27, 1997, a petition in to cancel Reg. No.  
1,885,712 was filed by petitioner, Merrick's Inc. The  
registration sought to be canceled is for the mark shown  
below,

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which was registered on the Supplemental Register on March 21, 1995 for "pet foods and treats," in Class 31. The registration was based on applicant's claim of use of the mark in commerce since March 3, 1993.

As grounds for cancellation, petitioner asserted that it had adopted and continuously used the trademark "MERRICK'S" since 1959 in connection with animal feed products; that petitioner sought to register its mark, but was refused registration under Section 2(d) of the Lanham Act based on respondent's registration; and that respondent's mark, as used in connection with the goods set forth in the registration, so resembles petitioner's mark, as used connection with petitioner's goods, that confusion is likely.

Respondent denied the essential allegations set forth in the petition for cancellation.

A trial was conducted in accordance with the Trademark Rules of Practice. Briefs were filed by both parties. No oral hearing before the Board was requested. Along with its brief, respondent simultaneously moved to strike part of the affidavit testimony of Johanna Kuehn, petitioner's director of marketing, and the exhibit attached thereto.

The record before the Board in this proceeding consists of the following: the testimonial deposition of Johanna Kuehn, petitioner's director of marketing; the affidavits of

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Ms. Kuehn and Garth Merrick, respondent's president; and various printed publications, interrogatory responses and other materials made of record by the notices of reliance filed by both parties.

We turn first to respondent's motion to strike part of the affidavit testimony of Johanna Kuehn. Although respondent objects to only paragraph 3 of the affidavit and the exhibit attached to it, the entire two-page affidavit and the exhibit were attached to respondent's motion to strike. Curiously, although Mr. Merrick's affidavit was made of record by stipulation of the parties, the record in this proceeding did not include the affidavit of Ms. Kuehn or its exhibit prior to respondent's motion to strike. In view of the fact that both parties have treated the affidavit as if they had stipulated that it be included in the record, however, we have considered it as such.

The third paragraph of the affidavit is the subject of respondent's objection. In that paragraph, the affiant states that in 1998, one of petitioner's suppliers "invoiced" an ingredient of petitioner's animal feed to respondent. She characterizes petitioner's supplier as "the confused party," and characterizes its action as "confusion." The exhibit to her affidavit is the shipping order and bill. The invoice shows a shipping address of "Merrick Pet Foods" in Hereford, Texas, respondent's

location, and a billing address as "Merrick Pet Foods" in Union Center, Wisconsin, where petitioner is located.

The motion to strike is denied because the statement to which respondent objects is not hearsay. Neither Ms. Kuehn's conclusion that the third party was confused, nor the exhibit, however, is evidence that consumers of either the goods sold by respondent or the goods sold by petitioner were confused by the trademarks used on them into mistakenly assuming that one source was responsible for both products. Whether or not one party's supplier may have confused the parties does not speak to the issue of whether the customers of either party have been, or are likely to be, confused by the trademarks at issue in this case. The witness's statement and the exhibit to her affidavit are therefore irrelevant to the determination of whether confusion is likely between these marks as they are used on the respective goods of the parties.

We turn to the issue of likelihood of confusion. The testimonial deposition and affidavit of Ms. Kuehn clearly establish petitioner's priority by a number of years. Further, there does not appear to be any serious dispute concerning the fact that respondent's mark is very similar to petitioner's mark. In view of these facts, this case essentially boils down to whether the goods in connection with which these marks are used are commercially related in

such a way that the use of the similar marks thereon is likely to cause confusion.

Petitioner, as the party plaintiff in this action, had the burden of proving that its products are related in this way to the goods set forth in the registration. The limited record before us, however, falls short of establishing that petitioner's products are related to respondent's goods, as they are identified in the registration, such that confusion is likely.

Petitioner's products, according to Ms. Kuehn, are medicated and non-medicated animal feeds, animal feed additives and supplements, animal milk replacers, and nutritional supplements for animals. She stated that these goods are sold in farm supply stores. Although petitioner sells ingredients of pet food to pet food manufacturers, it does not sell pet food to consumers. Ms. Kuehn testified specifically that petitioner is not in the business of selling food for dogs or cats. She testified that the only one of petitioner's products which could be used in connection with pets is a milk replacer, which is a product that could be used not just for young cows, pigs, sheep and horses, but also for animals like kittens and puppies. She stated that although not designed for use with domestic animals, the product is "universal," so it could be used as a replacement for milk for these species as well as for

livestock. The record does not explain exactly why or how a milk replacer is used, but there is no evidence or testimony that ordinary consumers of products for pets ever buy milk replacers, or that these products would be sold in pet stores.

Petitioner's witness testified that one of the outlets for its livestock feeds, a company called "Animart," also sells to pet owners, but that petitioner's products which are sold at Animart are the same animal feeds, additives, supplements, and milk replacers that are sold by petitioner to other farm supply stores.

When counsel for respondent asked petitioner's witness what type of retail outlet or part of petitioner's sales distribution network Animart is, she responded that that company would be considered a dealer or distributor. After providing that information, she volunteered that a lot of the farm store outlets have fairly large domestic pet sections and that petitioner's products are sold at those locations. Counsel for respondent properly objected to this statement as being nonresponsive testimony, and counsel for petitioner did not subsequently adduce any other testimony to this effect, so this record contains no admissible evidence or testimony that demonstrates any substantial overlap in the trade channels in which petitioner's and respondent's goods move, nor does the record show that there

is any overlap in the customers who buy the products of the parties. There is no evidence that any farm supply store or livestock feed store, including Animart, sells pet food and treats as well as animal feeds, feed additives, feed supplements or milk replacers under the same trademark.

The record therefore falls short of providing a basis upon which we could conclude that the use of these similar trademarks on both groups of products is likely to cause confusion. In this connection, we note that although the record does not contain testimony or evidence of intentional copying of petitioner's mark by respondent, such evidence would not be necessary in order to hold confusion to be likely if the record had otherwise established that it was. Also, as noted above, there is no evidence that demonstrates that any confusion among consumers for the respective goods of petitioner and respondent has actually occurred.

In summary, because petitioner has not established on this record that its products move in the same trade channels as respondent's goods, or that both are purchased by the same class of customers, we cannot adopt petitioner's position that the goods of petitioner are commercially related to the goods specified in the registration such that confusion is likely.

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DECISION: The petition for cancellation is dismissed.

R. L. Simms

R. F. Cissel

B. A. Chapman  
Administrative Trademark Judges  
Trademark Trial & Appeal Board