

**THIS DISPOSITION IS  
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TTAB**

Mailed:  
September 13, 2006

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Absorption Corporation

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Serial No. 78392555

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Michael Hughes of Hughes Law Firm, PLLC for Absorption Corporation.

Brian Pino, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Walters, Bucher and Zervas, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

On March 29, 2004, Absorption Corporation filed an application to register on the Principal Register the mark HEALTHY PET (in standard character form) for goods identified as "animal litter" in International Class 31.<sup>1</sup> Applicant has disclaimed the word PET.

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<sup>1</sup> Application Serial No. 78392555 was filed on March 29, 2004, based on applicant's assertion of its bona fide intention to use the mark in commerce under Trademark Act 1(b), 15 U.S.C. § 1051(b).

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of (a) Registration No. 1460583 for the mark HEALTHY PET (in typed or standard character form) for "vitamins, minerals and other food supplements for pet animals" in International Class 5, registered to Healthy Pet Products Ltd. (hereinafter "the '583 registration"),<sup>2</sup> and (b) Registration No. 2513869 for the mark HEALTHYPETS (in typed or standard character form) for "retail shops featuring health supplies for pets" in International Class 35, registered to HealthyPets, Inc. (hereinafter "the '869 registration").<sup>3</sup>

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs.

We first consider an evidentiary objection raised by the examining attorney. Applicant has submitted certain evidence, including copies of numerous registrations, for the first time with its appeal brief. Because the record on appeal must be complete prior to the filing of the notice of appeal, see Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and because the examining attorney has objected

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<sup>2</sup> Registration No. 1460583, issued October 13, 1987. Section 8 affidavit accepted and Section 15 affidavit acknowledged. A disclaimer of term PET has been entered.

<sup>3</sup> Registration No. 2513869, issued December 4, 2001.

to the late submission of applicant's evidence, see brief at p. 2, we sustain the examining attorney's objection to the late-filed evidence and give such evidence no further consideration. See also TBMP §§ 1203.02(e) and 1207.03 (2d ed. rev. 2004).

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The mark of the '583 registration is identical to applicant's mark, and the mark of the '869 registration is highly similar to applicant's mark, differing only by (i) the spacing or lack of a space between HEALTH and PET; and (ii) the plural versus the singular form of the word

PET. Applicant's and registrants' marks, therefore, are identical or highly similar in sound, meaning, appearance and commercial impression.

Applicant argues that HEALTHY "is not particularly distinctive within the pet industry, and therefore the marks cited against the Applicant by the Examiner should be limited in scope as to the extent of the protection and degree of potential likelihood of confusion between the marks." Brief at p. 12. Applicant relies on the registrations filed with its appeal brief, which, as discussed above, we do not consider because they were not filed on a timely basis and because the examining attorney has objected to their submission. The record does contain, however, a partial listing of Internet search results for "healthy pet" from the Google search engine, submitted with applicant's response to the first Office action. This evidence does not assist applicant because the partial Google listing is not particularly probative. The excerpts that appear in the Google listing are extremely truncated with brief bits of text, and we do not have the web pages themselves from which to examine the context within which the search terms are used or to even determine whether the linked websites are active. Further, some of the entries are just irrelevant to the issues in this appeal and do not

involve trade name or trademark use. See, e.g., "WCBS 880; Happy and Healthy Pet[,] The Home of Traffic and Weather Together and the New York Yankees." Also, to the extent that applicant's Google listing contains trademarks and trade names, and to the extent that we can determine what the underlying goods or services are for such trademarks and trade names, the listing does not reflect that the goods or services are necessarily similar to those involved in this appeal. See, e.g., "Healthy Pet Insurance Find more information on Healthy Pet Insurance - Compare rates and offers by visiting the 5 ...."

Applicant has also noted that registrants' marks are "weak"; and that "there is already precedent of allowing similar marks with the term 'HEALTHY' within the pet industry, given that there are two cited marks against [the] pending mark, both within the pet industry ...." Brief at p. 16. We are not persuaded by these registrations because they are only two in number, and, moreover, prior decisions of examining attorneys "are not binding on the agency or the Board. Each case must be decided on its own merits." *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984). Because there is little, if any, evidence in support of applicant's contention that the marks are weak, we accord registrants' marks the normal

scope of protection otherwise afforded to registered marks. Further, we note that even if the marks are weak, weak marks are entitled to protection against registration by a subsequent applicant of the same or similar mark for the same or closely related goods or services. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); *In re Colonial Stores*, 216 USPQ 793 (TTAB 1982).

We next consider the similarities between applicant's goods and registrants' goods and services, their trade channels and the conditions under which and buyers to whom sales are made. It is well settled that goods and services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the goods or services. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

Of course, the goods and services are related because they all would likely be required by the pet owner for the same pet. They are also related, however, because the conditions surrounding the marketing of animal litter and vitamins for pets, and animal litter and retail sales of health supplies for pets, are such that they would be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from, or are associated with, the same source. The evidence submitted by the examining attorney with the May 13, 2005 Office action shows that animal litter and animal vitamins may be purchased on the same web sites (see, e.g., [www.flamingoworld.com](http://www.flamingoworld.com)) and that retail pet stores that sell health supplies also offer animal litter for sale (see, e.g., [www.spartanburghumanesociety.com](http://www.spartanburghumanesociety.com), offering litter and "Oral Care Chews"). Any of these goods and services may be obtained by any ordinary pet owner.<sup>4</sup>

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<sup>4</sup> Applicant has argued too that pet owners are sophisticated purchasers because they "are very loving of their pets." Brief at p. 13. We disagree. There is no basis to conclude from the record before us that pet owners are discriminating or sophisticated consumers. No education or special knowledge is required for the ownership of common household pets, and it is hard to believe that the ordinary pet owner would spend much time researching what brand of animal litter or animal vitamins to purchase. Rather, we find that pet owners would likely purchase applicant's and registrants' goods and services on impulse at any pet store. Also, if pet owners are sophisticated purchasers, we note that even sophisticated purchasers are not immune from

Further, applicant's arguments that the goods and services are not related and that the trade channels are not similar are not well taken. Applicant has argued that the "nature of the goods in the cited marks ... are not typical as to having a source of goods that would expand or be related to" animal litter. Brief at p. 6. However, applicant has offered no support for its argument, and the examining attorney's evidence shows that the marketing conditions are such that applicant's goods, and registrants' goods and services, would be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from, or are associated with, the same source. Applicant also argues that "there is little carryover of brand-names from one pet category to another"; and that "there is a tendency [to have] many discrete, different providers in the pet industry." Brief at pp. 7 and 8. Again, applicant has no evidence, or no evidence that we may consider, in support of its arguments. Also, we point out that there are no restrictions in the identifications of goods and services of the application and registrations that limit the recited goods and services to a particular "pet category," such as

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trademark confusion. *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983).

cats, dogs or gerbils.<sup>5</sup> Clearly, a determination of the issue of likelihood of confusion between the applied-for and registered marks must be made on the basis of the goods as they are identified in the involved application and registrations. In such circumstances, if there are no limitations in the identifications, we must presume that the "registration encompasses all goods of the nature and type described, [and] that the identified goods move in all channels of trade that would be normal for such goods." *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Thus, we must presume that the involved goods and services are directed to all pets, including cats, dogs and gerbils, and that the involved goods may be purchased in all trade channels normal for such goods, including on the Internet, in retail stores, and even in grocery and drug stores.<sup>6</sup>

In view thereof, and because it is well established that in cases where the marks are nearly identical, the relationship between the goods on which the parties use their marks need not be as great or as close as in the

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<sup>5</sup> We note too that pet owners may have more than one pet, such as a cat and a gerbil, and may require litter and vitamins for both the cat and the gerbil.

<sup>6</sup> Such stores need not be large or cater to many different types of pets. Thus, applicant's argument at p. 7 of its brief regarding the size of stores such as PETSMAART and the "various different areas therein related to different classifications of pets" is of no avail.

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situation where the marks are identical or strikingly similar, we find that applicant's goods and registrants' goods and services, the trade channel of such goods and services, and the purchasers of such goods and services, to be highly similar and/or identical. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source"); *Ancor, Inc. v. Ancor Industries, Inc.*, 210 USPQ 70 (TTAB 1981).

Thus, we find that applicant's mark HEALTHY PET for "animal litter" is likely to cause source confusion among purchasers with the identical registered mark HEALTHY PET for "vitamins, minerals, and other food supplements for pet animals," and the nearly identical registered mark HEALTHYPETS for "retail shops featuring health supplies for pets." On a different record, such as one in which the late-filed evidence is timely submitted, however, we might well reach a different conclusion.

**Decision:** The refusal to register under Section 2(d) in view of Registration No. 1460583 and Registration No. 2513869 is affirmed.