THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: March 21, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Perfect Foods, Inc.
v.
John D. Gullahorn

Opposition No. 91160978
to application Serial No. 78247326
filed on May 8, 2003

Dennis T. Griggs of Griggs Bergen, LLP for Perfect Foods, Inc.

John D. Gullahorn, pro se

Before Hohein, Hairston and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, John D. Gullahorn, seeks registration of the following mark

for goods identified in the application as “cat collars and cat clothes” in International Class 18.[1] Applicant has disclaimed the word “products” apart from the mark as shown.

Opposer, Perfect Foods, Inc., has opposed registration of applicant’s mark, alleging, inter alia, that: opposer “asserts priority of use by virtue of its sale of ‘fresh vegetables, particularly for use as a pet treat,’ namely natural wheatgrass” in interstate commerce at least as early as January 2002; opposer filed an application for registration of its mark “COOL CAT WHEATGRASS PET TREAT” which was suspended in view of a potential conflict with applicant’s prior-filed application; and, as applied to applicant’s goods, applicant’s mark so resembles opposer’s previously used mark as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant filed an answer by which he has denied the salient allegations of the notice of opposition.

The evidence of record consists of the pleadings herein; the file of the opposed application; the testimony depositions (with exhibits) of (1) Harley B. Matsil, opposer’s president and owner, (2) Alyse M. Matsil, opposer’s vice president and secretary-treasurer, (3) John

[1] Serial No. 78247326, filed May 8, 2003, alleging a bona fide intent to use the mark in commerce. Trademark Act Section 1(b), 15 U.S.C. §1051(b).

D. Gullahorn, applicant, and (4) Dr. Jean R. Gullahorn, applicant's "co-owner and co-operator" and expert witness, in her capacity as a veterinarian. In addition, during rebuttal opposer submitted, under a notice of reliance, opposer's requests for admission and the cover sheet of applicant's discovery responses.[2]

Before turning to the merits of this case, we must address two preliminary issues: (1) opposer's motion (filed June 6, 2005) to strike the testimony deposition of applicant, John D. Gullahorn; and (2) the effect of applicant's deemed admissions.[3] Opposer's argument in support of its motion to strike Mr. Gullahorn's testimony is essentially distilled in the following excerpt: "The applicant's deposition was of its own witness, noticed as a testimony deposition on oral examination, but conducted as a

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[2] The letter attached as exhibit B is not proper matter for introduction into the record by way of notice of reliance and has been given no consideration. Trademark Rules 2.120(j) and 2.122(e).

[3] Opposer has also raised objections to specific testimony and exhibits for the first time in its brief. We consider these objections to be waived inasmuch as these specific objections were not made at the deposition and could have been "obviated or removed" at the time of the deposition. Trademark Rule 2.123(k); Fed. R. Civ. P. 32(d)(3)(A). See also Pass & Seymour, Inc. v. Syrelec, 224 USPQ 845 (TTAB 1984). Moreover, we find no merit to opposer's objection; opposer does not specify its reasons for these objections in each case nor are the reasons apparent. Similarly, we consider applicant's objection, raised for the first time in its brief, that opposer's testimony regarding the out of state point-of-sale displays from 1988-2000 and exhibit nos. 5, 6, 7, 8 and 14 are hearsay, to be waived. Applicant's failure to attend opposer's properly noticed deposition does not affect the waiver. Moreover, we find that the testimony in question does not constitute hearsay.

deposition on written questions in the face of opposer’s standing objection. Proper notice with filing and service of written questions as required by TTAB procedural rules was not performed.” Opposer's Br. p. 4 (June 6, 2005). We first note, that in an earlier Board order, issued on May 25, 2005, based on a telephone conference conducted on that same date, the Board granted opposer’s motion to attend applicant’s testimony deposition by telephone. In the order, the Board clarified that applicant is representing himself. In addition, it is clear from the order that opposer was aware of how the pro se applicant would be conducting the deposition: “In response, applicant contends that his wife, who will be reading questions to him during his deposition and who has been designated as a witness for applicant....” Board Order p. 2 (May 25, 2005). Despite this prior knowledge opposer made no objection during the Board telephone conference as to the manner in which the deposition was to proceed. At the deposition, opposer first objected, under Fed. R. Evid. 615, to the presence of applicant’s wife in the room inasmuch as she was also a witness, whereupon she left the room, making this objection moot. Opposer also objected that applicant was conducting an improperly noticed deposition upon written questions because applicant had prepared some notes and questions that

he was using to guide himself during the deposition. What follows is a sampling of the colloquy:

> Mrs. Gullahorn: Very well. Perhaps we should have Mr. Gullahorn ask himself his questions and answer them and at that time I can be out of the room. Would that be satisfactory?
>
> Mr. Griggs: Yes. If he is reading from a list of questions or notes, then we still have the same objection that we have not been provided a list of these questions by – according to the rules of prior notice and given an opportunity to review them. So if he does that, he is going to be subject to the same objection and we still ask that you fax that list of questions to us.
>
> Mr. Gullahorn: Well, we will just proceed with you having noted your objection.
>
> Mrs. Gullahorn: And I will leave the room.
>
> Mr. Gullahorn: And I will make my statement, and you know, we will move forward and let the Board decide; all right?
>
> Mr. Griggs: Okay. Is it my understanding, then, that you are going to go forward with Mrs. Gullahorn asking you questions?
>
> Mr. Gullahorn: No. We're going to let her leave the room.
>
> Mr. Griggs: All right. Then, if you are going forward and if you are reading from a list of prepared questions or notes, we, once again, state our objection as previously noted and ask that you fax those to us and let us read those as you go along.
>
> Mr. Gullahorn: I am not – I am not going to stipulate to that or I am not going to do that, so your objection will just have to stand. (John D. Gullahorn Dep. 16:9-25; 17:1-15)

Taking one's own testimony, is, certainly, somewhat awkward; testimony should be presented in a question and

answer format, Trademark Rule 2.123(e)(2), and each question should be followed by its answer, Trademark Rule 2.123(g). Applicant's deposition was taken before a court reporter and notary public and was transcribed on paper with numbered lines. Applicant, not surprisingly, prepared notes that included some questions that would help guide the progression of the deposition and submission of evidence in an orderly manner. Opposer seems to misapprehend the purpose of Trademark Rule 2.124 which provides for depositions upon written questions. Parties use this onerous procedure when a witness is not available to be present for oral testimony; it is most frequently used for witnesses outside of the United States. The witness here was obviously present to take oral testimony and Mr. Gullahorn's notes to himself that included the questions he wanted to present in oral testimony do not constitute a deposition upon written questions. In view thereof, opposer's motion to strike the testimony deposition of Mr. John D. Gullahorn is denied.

We now turn to the effect of the deemed admissions. Opposer argues that in view of the deemed admissions applicant may only rely on its filing date for priority purposes. The pertinent admission requests read as follows:

> For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark as a trademark in connection with the actual, bona

> fide sale and shipment of a product to a customer located at an address in the State of Florida.
>
> For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark as a trademark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address outside of the State of Florida.
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> For each product identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address in the State of Florida prior to May 8, 2003.
>
> For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant did not use Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address outside of the State of Florida prior to May 8, 2003.
>
> For each product identified by Applicant in its response to Interrogatory No. 3, admit that Applicant has not used Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address in the State of Florida prior to January 1, 2002.
>
> For each product and/or service identified by Applicant in its response to Interrogatory No. 3, admit that Applicant did not use Applicant's mark in connection with the actual, bona fide sale and shipment of a product to a customer located at an address outside of the State of Florida prior to January 1, 2002.

Notably, opposer did not make interrogatory no. 3 or applicant's response thereto of record; therefore, we do not know to which products or services these deemed admissions

apply. Therefore, they cannot serve to rebut applicant's testimony and evidence regarding its first use of its mark. In view thereof, we have considered all evidence properly made of record pertaining to applicant's first use of the applied-for mark.

PRIORITY

Turning first to the issue of priority, because opposer has not pleaded any registrations, opposer must rely on its common law use to prove its priority. Opposer's witness, Harley B. Matsil, opposer's president and owner, testified that since 1988 opposer has used the mark COOL CAT WHEATGRASS PET TREAT on point of sale displays and that opposer has sold wheatgrass under COOL CAT WHEATGRASS PET TREAT since 1988:

> Q. When did you develop Cool Cat?
>
> A. In 1988 we simply made a small sign that said Cool Cat Wheat Grass so that consumers could see that there was a tray that was cut up in small pieces for them and thinking that may be they would get it for their cat.
>
> Q. That was a result of the sales that you noticed that these businesses were doing around 1987?
>
> A. That's correct, yes.
>
> Q. How did you identify the Cool Cat product for cats?
>
> A. We simply drew a picture of a cat's face. My wife drew a picture of a cat's face on a piece of cardboard, and we affixed it to the wall just above the tray that was cut up into small pieces, and it said the words Cool Cat above the head.

Q. So that identified the product?

A. Yes.

...

Q. Can you recall who the first customer was?

A. Yes. That was Down-To-Earth.

Q. You had previously stated that your first sale was an in state sale to Down-To-Earth, correct?

A. Yes.

Q. And do you recall what year that sale was made?

A. That was in ’88. (Dep. pp. 7-8)

...

Q. Going back to Opposer’s Exhibit 1 regarding sales to Down-To-Earth; you have previously stated that the sales began also in 1988, correct?

A. That’s correct.

Q. How did you identify that product?

A. Cool Cat Wheat Grass Pet Treat. (Dep. p. 12).

...

Q. What kind of trademark label or insert was used for the out of state buyers?

A. We had a hand drawn cardboard poster that said Cool Cat Wheat Grass Pet Treat. (Dep. p. 14).

...

Opposer’s testimony regarding the sale of wheatgrass is supported by documentary evidence in the form of sales slips dating from 1988. While there is no supporting documentary evidence that shows the mark used in conjunction with the goods prior to 2000, the testimony of a single witness can

be sufficient to prove priority.[4] See 3 J. Thomas McCarthy: McCarthy on Trademarks and Unfair Competition § 16.06(2) (4th ed. 2005). Applicant attempts to undercut this testimony with evidence that "no where on [opposer's] website was the wordage 'Cool Cat' used, no where was a pictorial view of the pet wheat grass product" and further that "A Google Internet search for the wordage 'Cool Cat Wheat Grass' was not found." App. Br. p. 11; Jean Gullahorn Dep. pp. 19, 20 and 29 Ex. Nos. 16 and 18. Applicant also points to opposer's advertising flyer that "calls 'Cool Cat' wheat grass a new treat for pets and uses phrases such as, 'is now available,' 'offered for the first time,' 'time for pet grass to come to New York.'" App. Br. p. 12; Harley Matsil Dep. Ex No. 14. However, the fact that opposer may not have advertised or sold its product on the Internet does not serve to sufficiently rebut uncontradicted testimony regarding its sales of wheatgrass under the COOL CAT mark in the form of hand drawn point-of-sale displays. With regard to the advertising flyer, although the date December 2001 is handwritten on the flier there is no testimony to establish this as the first date opposer used the advertising flier and, in any event, the flier does not contradict the testimony regarding opposer's sales in a somewhat limited

[4] Although opposer testified that the various point-of-sale displays from 1988-2000 also included a cat design there are no

region. This flier could simply be opposer's attempt to further expand its market for wheatgrass sold to pets. In addition, opposer has submitted examples of product inserts that have been in use since 2002 depicting the mark COOL CAT WHEATGRASS PET TREAT. See, e.g., Matsil Dep. Ex. No. 5. The record also includes other point-of-sale displays that depict use of various COOL CAT marks beginning in 2001, (e.g., COOL CAT PET GRASS and COOL CAT PET TREAT). See, Matsil Dep. Ex. Nos. 6, 7 and 8. We note that the notice of opposition alleges ownership of the mark COOL CAT WHEATGRASS PET TREAT and the record establishes opposer's prior use as to this phrase; however, in view of the highly descriptive if not generic nature of the words WHEATGRASS PET TREAT, opposer's common law trademark rights lie in the term COOL CAT and, as such, the other examples of use in the record that depict COOL CAT in conjunction with other descriptive words are probative as to opposer's common law trademark rights in COOL CAT.

Applicant's testimony and supporting documentary evidence with regard to its sales of cat collars beginning on September 21, 2000 up to the present, for the most part, do not pertain to the applied-for mark,

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examples in the record of the point-of-sale displays from 1988 through 2000.

, rather, the testimony and evidence of record pertains to various uses of the phrase COOL CAT (e.g., COOL CAT FANTASY COLLARS, COOL CAT COLLARS and design, etc.). Applicant must establish prior use of the mark as it is depicted in the application, or establish that it may tack on prior use of a legally equivalent mark. Applicant has made no argument with regard to any tacking rights nor does the record support tacking inasmuch as the applied-for mark is not the legal equivalent of the examples in the record of COOL CAT used in connection with other words or designs. American Paging, Inc. v. American Mobilphone, Inc., 13 USPQ2d 2036 (TTAB 1989), aff'd, 17 USPQ2d 1726 (Fed. Cir. 1990). See also Pro-Cuts v. Schilz-Price Enterprises, Inc., 27 USPQ2d 1224, 1226 (TTAB 1993). The closest example of use of this mark is only found in Exhibit No. 6, a printout of an excerpt from applicant's website, as shown below, and was first used on the website in early 2001. John Gullahorn Dep. p.39.

In any event, opposer's 1988 date of first use is earlier than applicant's May 8, 2003 filing date and alleged

date of first use of September 21, 2000.[5] Thus, opposer has established its priority with respect to its common law rights in the mark COOL CAT for wheatgrass.

LIKELIHOOD OF CONFUSION

We now turn to the question of likelihood of confusion under Section 2(d) and base our analysis on a consideration of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours and 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, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. 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).

We consider first the marks and make our determination in accordance with the following principles. The test, under this du Pont factor, is not whether the marks can be

[5] Applicant's argument that opposer has not shown continuous use of the mark is belied by the evidence of record and, moreover, in order to establish priority, opposer is required only to show prior use, not continuous use of its mark. See West Florida Seafood Inc. v. Jet Restaurants Inc., 31 F.3d 1122, 31 USPQ2d 1660 (Fed. Cir. 1994).

distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions 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 Grandpa's Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Further, while marks must be considered in their entireties, including any descriptive matter, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). As discussed above, opposer has established prior use of the mark COOL CAT. Applicant's mark COOL CAT PRODUCTS and cat head design incorporates the entirety of opposer's mark. The descriptive word PRODUCTS in applicant's mark is not sufficient to distinguish the marks, due to the fact that their shared phrase COOL CAT creates a substantial similarity in sound, appearance, meaning and

commercial impression in the marks. As discussed above the record shows use of opposer's mark with descriptive wording, e.g., wheatgrass, pet treat, pet grass, but this wording is also not sufficient to distinguish the marks. With regard to the cat design in applicant's mark, we accord greater weight to the word portion of applicant's mark inasmuch as it is the word portion that purchasers would use to refer to or request the goods. In re Appetito Provisions Co. Inc., 3 USPQ2d 1553, 1554 (TTAB 1987). Moreover, the cat design merely serves to emphasize the common descriptive word "cat." Applicant's argument that the word "Cool is a common slang term used by English speaking persons" and that the remaining portions of the parties' marks "are dissimilar enough as not to create confusion" is not persuasive. Applicant's evidence of third-party use, in the form of an Internet search result summary obtained from the Google search engine, of the phrase COOL CAT COLLARS, and excerpts from websites that merely provide links to other websites has little probative value. In re Fitch IBCA, Inc., 64 USPQ2d 1058, 1060 (TTAB 2002) (search result summary is of limited probative value). Moreover, it appears that many of the references are to applicant's product and websites. Simply put, the record does not support a finding that the word COOL is a weak term in connection with the goods in

issue in this case.[6] Thus, the factor of the similarity of the marks favors a likelihood of confusion.

We next consider the second and third du Pont factors, i.e., the similarities between opposer's and applicant's goods and the similarities between opposer's and applicant's trade channels. We must make our determinations under these factors based on applicant’s goods as they are recited in the application, In re Elbaum, 211 USPQ 639 (TTAB 1981), and opposer’s goods as established by common law use.

The goods need not be identical or directly competitive in order for there to be a likelihood of confusion. Rather, the respective goods need only be related in some manner or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984). However, if the goods are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely.

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[6] Applicant’s reference in his brief to five third-party applications and registrations is of no probative value. These applications and registrations were not made of record and three of the five, according to applicant, are for very different goods (wine, cappuccino and seafood).

Shen Mfg Co. v. Ritz Hotel Ltd., 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004).

The question of registrability of applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed. Octocom Systems, Inc. v. Houston Computer Services, Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

Applicant's identified goods are cat collars and cat clothes. The record shows that opposer's goods are fresh wheat grass for both human and animal use. When sold under the COOL CAT mark opposer's wheatgrass is marketed as a pet treat for a variety of animals, including cats.

One of opposer's advertisements describes opposer's goods as follows: "The same nutritious wheat grass sold at juice bars is now available for pets.... Pet Grass should be refrigerated and stays fresh for 1 week." The goods are obviously not related to one another in kind, and opposer has conceded this point (Br. p. 19); however, different goods that are not related to one another in kind, may be related in the mind of the consuming public as to the origin of the goods. Bose Corp. v. QSC Audio Products, Inc., 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002). Opposer argues

that although the goods are “not identical in kind” they “do belong to the same product category: pet care accessories for pet cats.” Br. p. 19. Opposer elaborates that “the respective goods are related in the sense that both cat collars and pet treats are pet care items that promote pet safety and well being.” Br. p. 20. Opposer notes that its “pet treat products ‘satisfy a cat’s craving for grass, aid digestion and supply natural vitamins, minerals, enzymes and chlorophyll,’ and ‘helps them with fur balls.’” Id. citing Matsil Dep. Ex. No. 7. Further, opposer states that “it is common knowledge that cat collars contain an insect repellant for repelling fleas; that cat collars usually carry identification tags, providing the pet’s name, the owner’s contact information; and that such tags may also include information confirming current rabies vaccination, all of which are important to the pet’s safety and well being.” Id. Opposer concludes that “a pet owner would have an understandable concern about his pet’s safety and well being in mind as he views a pet care product and makes his selection and would reasonably assume that a selected item – the item with a familiar brand – comes from the same source as other similarly marked items that earned his satisfaction in the past.” Br. p. 21.

Applicant argues that the goods are very different; applicant’s “cat collars are designed for safety and

function," (App. Br. 20) in contrast to opposer's live plant which is an emetic when eaten by cats. Jean Gullahorn Dep. p. 24.

The mere fact that the parties' goods are intended for cats is insufficient to warrant a finding that the goods are related. Contrary to opposer's assertion, there is not sufficient evidence to establish that wheatgrass is a pet care accessory. In addition, there is no evidence of record to show that a single company sells the types of goods of both parties, Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000), or that consumers would likely believe such diverse goods, cat collars and clothes, and live wheatgrass, would emanate from the same source. On this record, we find that the goods are not related.

Turning to the channels of trade, in view of the absence of specific limitations in the application, it is assumed that applicant's goods move through the normal and usual channels of trade and methods of distribution. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ2d 198 (Fed. Cir. 1983). That would include pet supply stores, the pet supply section of a supermarket and, of course, the ubiquitous Internet. The record shows that opposer's goods are sold primarily to health food stores and juice bars. The examples of sales to one individual pet owner and one kennel are inconsequential and insufficient to establish a normal

or usual channel of trade on this record.[7] Opposer's advertisement notes that "Pet Grass products are a hot item in fruit and vegetable stores, gourmet shops, and health food stores ..." Further, opposer's goods are highly perishable, lasting approximately one week, and should be refrigerated. The excerpt from opposer's website also indicates that it sells wheatgrass to florists, interior designers, photographers and department stores for use in displays. In addition, opposer's website includes the statements that opposer sells "fresh wheatgrass throughout the New York Metropolitan area" and "can ship frozen wheatgrass juice right to your door." John Gullahorn Dep. Ex. No. 16. While opposer refers to one of its customers as a "supermarket," it appears from the record that Adams Fairacres Farms is a local grocery with three stores. In any event, merely because both products may be sold in a supermarket does not, alone, make them related goods. Hi-Country Foods Corp. v. Hi Country Beef Jerky, 4 USPQ2d 1169 (TTAB 1987). See also, Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000), on remand, 56 USPQ2d 1859 (TTAB 2000); Federated Foods, Inc. v. Ft. Howard Paper

[7] We further note that during 17 years of sales opposer has only sold its wheatgrass to one kennel and the record only shows two sales in November and December 2000. Jean Gullahorn's testimony, as a veterinarian, would indicate that kennels typically would not offer wheatgrass inasmuch as kenneling is stressful for an animal and "it wouldn't make too much sense to feed either a dog

Co., supra. Moreover, given the nature of opposer's goods they would, by necessity, be sold in the produce or refrigerated section of a supermarket as opposed to applicant's cat collars which would be sold in the pet supplies section. Health food stores and juice bars are not the normal and usual channels of trade for cat collars and clothes, and there is no evidence of record to support such a finding. Thus, the factors of the relatedness of the goods and their respective channels of trade heavily favors applicant.

Turning to the last two relevant factors in this case, the parties' respective goods are ordinary consumer items which would be purchased without a great deal of care, by ordinary consumers. The price range of opposer's pet treat wheatgrass product is $1.12 per pot wholesale and $1.99 per pot retail. Matsil Dep. 33:5-19. Applicant's cat collars range in price from $2.00 to $15.00. John Gullahorn Dep. Ex. No. 6. To the extent opposer's goods may be purchased with more care, inasmuch as they appear to be a specialty health food product, there is nothing in the record to establish that consumers of such items purchase them with a higher level of care. Thus, this factor weighs in favor of opposer.

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or a cat...wheatgrass since we know it is an emetic." Jean Gullahorn Dep. p. 24.

As to the lack of evidence of actual confusion, we cannot determine on this record that there has been any meaningful opportunity for actual confusion to have occurred in the marketplace, and accordingly we cannot conclude that the alleged absence of actual confusion is entitled to significant weight in our likelihood of confusion analysis in this case. See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768 (TTAB 1992). Moreover, evidence of actual confusion is not a prerequisite to finding likelihood of confusion and this factor is neutral as to both parties.

After a thorough review of this record and considering the relevant du Pont factors, we find that, despite the similarities in the marks, in view of the diverse nature of the goods and the difference in trade channels and marketing, confusion is not likely. Shen Mfg Co. v. Ritz Hotel Ltd., supra; Kellogg Co. v. Pack’em Enterprises Inc., 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (any single factor may play a dominant role in a confusion analysis).

Decision: The opposition is dismissed.