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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nutro Products Inc.

Serial No. 76/029,089

Donald D. Mon, Esq. for Nutro Products Inc.

Nora Buchanan Will, Trademark Examining Attorney, Law
Office 116 (Meryl Hershkowitz, Managing Attorney).

Before Seeherman, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On April 18, 2000, Nutro Products Inc. (a California corporation) filed an application to register the mark ODOR CONTROL on the Principal Register for "pet food" in International Class 31. The application is based on applicant's assertion of a bona fide intention to use the mark in commerce.

The Examining Attorney refused registration on the ground that applicant's mark, ODOR CONTROL, is merely

descriptive of applicant's goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

When the refusal was made final, applicant appealed to this Board. Both applicant and the Examining Attorney have filed briefs; an oral hearing was not requested.

The test for determining whether a mark is merely descriptive is whether the term or phrase immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used or is intended to be used. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Eden Foods Inc.* 24 USPQ2d 1757 (TTAB 1992); and *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the term or phrase is being used or is intended to be used on or in connection with those goods or services, and the impact that it is likely to make on the average purchaser of such goods or services. See *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995); and *In re Penzoil Products Co.*, 20 USPQ2d 1753 (TTAB 1991).

Consequently, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985). Rather, the question is whether someone who knows what the goods or services are will understand the term or phrase to convey information about them. See In re Home Builders Association of Greenville, 18 USPQ2d 1313 (TTAB 1990).

Applicant contends as follows¹:

The goods are pet foods. Its principal purpose is to nourish a cat, which it does. In the bag and in the bowl, the biscuit product itself does not control odors. It just sits there to be eaten. After it is consumed it loses its identity in the digestive processes. Its ingredients go their way.

...

Odor Control does not merely describe the goods. In fact these pet foods do not control odor at all. Leave a dish of them in a smelly room and the room will continue to smell, together with some aroma from the pet food itself. (Brief, p. 2.)

Applicant concludes that the mark is suggestive, requiring imagination, thought or perception to reach a

¹ Applicant's submission (on November 20, 2002) of a correction to the word "say" on page three of its brief is noted.

conclusion about the specific odor that is controlled and how it is controlled in relation to applicant's goods.²

The Examining Attorney's position is that the mark ODOR CONTROL is merely descriptive of pet food "because it merely describes a significant purpose of the goods which is to control odor in the animal who ingests it" (Brief, p. 2); that the evidence of record shows that applicant touts the "odor control" function of the goods, and that purchasers will recognize the descriptiveness of the mark in relation to the goods; and that the two merely descriptive words together do not form a unique or incongruous phrase that creates a separate non-descriptive meaning.

The Examining Attorney relies on (i) The American Heritage Dictionary (Third Edition 1992) definitions of "odor" as "1. The property or quality of a thing that affects, stimulates, or is perceived by the sense of smell. 2. A sensation, stimulation, or perception of the sense of smell....," and "control" as "2. To hold in restraint, check"; and (ii) printouts of stories retrieved from the Nexis database and from a search of the Internet showing

² While acknowledging that the mark had not been refused under any other Section of the Trademark Act, applicant nonetheless, argued that the mark is neither misdescriptive under Section 2(e)(1) nor functional under Section 2(e)(5).

that applicant's goods are specifically designed to control odor in a cat's stools. The Examining Attorney contends these printouts show that applicant markets the goods in a manner highlighting "ODOR CONTROL" as a primary purpose or feature of its goods. And there are printouts which include reviews of the product presented as being written by actual purchasers of the goods, all referring to the "odor control" function of the goods. Some examples follow:

Headline: Nutro Introduces Natural Choice Odor Control, New Cat Food That Reduces Stool Odor 50 Percent-Plus
...a revolutionary new product that reduces cat odor by 50 percent or more... The marked reduction in stool odor is made possible by Nutro's new OdorCheck System, utilizing a special formulation of natural premium ingredients, said Kelly Donohue, Nutro's cat food product manger. Nutro has applied for a patent on OdorCheck. Donohue said the OdorCheck System is a scientifically balanced blend of nutrients that work in a cat's lower intestine to reduce stool odors. "More and more cats are living indoors, where stool odor is highly noticeable," Donahue said. "By reducing stool odor 50 percent or more, Natural Choice Odor Control will make life with an indoor cat much more pleasurable." "Business Wire,"³ May 10, 2000;

³ We note that this story retrieved from the Nexis database is from a newswire service, and newswire stories are generally of minimal evidentiary value because it is not clear whether the stories appeared in any newspaper or magazine available to the consuming public. See *In re Urbano*, 51 USPQ2d 1776, footnote 3 (TTAB 1999); and *In re Manco Inc.*, 24 USPQ2d 1938, footnote 4

Headline: New Odor-Control Cat Food Available

...Reduce your cat's stool odor by at least 50 percent - guaranteed. No matter how much you love your cat, wouldn't you like to live with less litter box odor? Natural Choice Odor Control cat food can help. It's the only food specifically formulated to decrease your cat's stool odor. "50 Plus Lifestyles (Vero Beach, FL)," June 1, 2000;

Nutro Natural Choice Odor Control Formula Cat Food

75% Recommended Based on 4 member reviews... (emphasis in original), by Miz Jezebel Aug 22 '01

Pros: Cat likes the tastes; seems to actually work

Cons: It's a bit costly; I don't know about the 50% guarantee

The Bottom Line: If your cat smells like mine, this might not help, but I think it does reduce stool output and odor.

...

by xtaceecwc Nov 28 '00

Less stool--Less odor--Great stuff!!!

Pros: Great result! Cats love it!

Cons: more expensive than grocery store brands, but worth it!

...

by orangetabbie Oct 11 '00

Odor control? Don't waste your money!

Pros: cute package, good taste (at least my cats think so)

Cons: doesn't work, expensive

...

"www.epinions.com"; and

(TTAB 1992). Nevertheless, we have considered this story because it includes information and quotes from applicant's product manager regarding applicant's "ODOR CONTROL" cat food.

America's Pet Store on the Web!
Nutro Natural Choice Complete Care
Complete care is a great tasting cat
food that offers the optimum combination
of premium ingredients, and scientific
research to provide complete care for
your cat. It can help reduce your cat's
hairballs and stool odor, while also
benefiting the dental health, digestive
and immune systems, and skin and coat of
your cat.

...

Nutro Natural Choice Complete Care Adult
Cat Food more...

...Reduces, shedding, hairballs,
vomiting and stool odor....

"www.petfooddirect.com."

We agree with the Examining Attorney that the asserted mark ODOR CONTROL immediately describes a purpose or feature of the goods on which applicant intends to use (or currently uses, as reflected in this record) its mark. The Nexis articles and the Internet websites indicate that one characteristic of pet food is to reduce the odor of the animal's stool. The record also establishes that consumers recognize one characteristic or purpose of pet food is reduction of the animal's stool odor. Therefore, when consumers see "ODOR CONTROL" on pet food, they will immediately understand the pet food is formulated to reduce or control the odor of the stool.

Applicant's argument that the product simply sitting in a bowl in a room does not control odor misses the point. Inasmuch as the goods are identified as "pet food," it is

obvious to consumers that "odor control" relates to the animal eating this particular product, which will presumably result in reduced odor in the animal's stool.

Moreover, the phrase does not create an incongruous or creative or unique mark. Consumers will readily understand the plain English meaning of the words "odor control," and they will understand specifically that applicant's pet food will help reduce or control the animal's stool odor.

Applicant's mark when used on applicant's identified goods immediately describes, without need of conjecture or speculation, the purpose of applicant's goods. No exercise of imagination or mental processing or gathering of further information is necessary in order for purchasers of and prospective customers for applicant's goods to readily perceive the merely descriptive significance of the phrase ODOR CONTROL as it pertains to applicant's goods. See *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Omaha National Corporation*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Intelligent Instrumentation Inc.*, 40 USPQ2d 1792 (TTAB 1996); and *In re Time Solutions, Inc.*, 33 USPQ2d 1156 (TTAB 1994).

Finally, even if applicant was the first (and/or only) entity to use the phrase "ODOR CONTROL" in relation to "pet food," such is not dispositive where, as here, the phrase

unquestionably projects a merely descriptive connotation. See *In re Tekdyne Inc.*, 33 USPQ2d 1949, 1953 (TTAB 1994), and cases cited therein. We believe that competitors would have a competitive need to use this term. See 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §11:18 (4th ed. 2000).

Decision: The refusal to register on the ground that the mark is merely descriptive under Section 2(e)(1) of the Trademark Act is affirmed.