

THIS DECISION IS NOT
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OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Natural Balance Pet Foods, Inc.

Serial No. 76612180

Serial No. 76612193

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(Ronald R. Sussman, Managing Attorney).

**Before Walters, Mermelstein, and Bergsman, Administrative
Trademark Judges.**

Opinion by Mermelstein, Administrative Trademark Judge:

Natural Balance Pet Foods, Inc. seeks registration on
the Principal Register of the marks REPTILE SAUSAGE¹
(standard characters) and the stylized mark²

REPTILE SAUSAGE

both for "food for animals, namely, for meat eating
reptiles" (as amended) in International Class 31 (as
amended). Because these appeals involve the same applicant

¹ Serial No. 76612193, filed September 13, 2004, alleging a *bona fide* intention to use the mark in commerce.

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and common issues of law and fact, we resolve them in a single opinion.

Registration has been finally refused on the ground that the mark as used on the identified goods is merely descriptive.³ Trademark Act § 2(e)(1); 15 U.S.C.

§ 1052(e)(1). Applicant and the examining attorney have filed briefs. We affirm.

I. Record on Appeal

The record in both applications is identical, and consists of the following evidence submitted by the examining attorney:

- Web pages indicating use of the term "sausage" in connection with reptile food:

² Serial No. 76612180, filed September 15, 2004, alleging a *bona fide* intention to use the mark in commerce.

³ In the first Office action, the examining attorney advised applicant of a prior pending application which, if registered, might be cited as a bar to this registration under Trademark Act § 2(d). See Application No. 76600673 (NEBRASKA BRAND CARNIVORE "CUISINE" SAUSAGES (and design)) for "feed for captive and for domesticated animals, including inter alia for carnivorous birds"). The examining attorney subsequently withdrew the potential refusal without comment, but explained in his brief that he did so because the prior applicant submitted a disclaimer of CARNIVORE "CUISINE" SAUSAGES and proceeded to registration on that basis. By highlighting this point in his brief, the examining attorney implies that this disclaimer should be considered as evidence in support of the § 2(e)(1) refusal in this case.

We disagree. The examining attorney did not make this point prior to appeal, and applicant likely considered all issues with respect to the prior application to be resolved in its favor when the application was withdrawn as a potential bar to registration. The record copy of the prior pending application did not include the disclaimer and the resulting registration was never made of record. Accordingly, we will not consider this registration as evidence of descriptiveness.

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- o A page listing for sale "Trex snake sausage 10 pack."⁴

www.pets-warehouse.com/cart/livefood.htm (April 12, 2005).

- o A page describing "Snake Steak Sausage."

Although developed specifically for snakes, this product contains all the nutrients needed by many snake, lizard, turtle and amphibian species." ... "Snake Steak Sausages are a complete diet with no artificial ingredients...." With Snake Steak, "'power feeding' is possible by offering several sausages linked together. Once the snake takes one sausage, it then must take the others.

www.t-rexproducts.com/Dynamic/product_detail.asp (April 12, 2005).

- A definition of "sausage":
 - o Finely chopped and seasoned meat, especially pork, usually stuffed into a prepared animal intestine or other casing and cooked or cured.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE
(3d ed. 1992) (electronic version).

In its appeal brief, applicant submitted a definition of "reptile":⁵

⁴ This product and the one discussed in the next item may emanate from the same source. One is referred to as "Trex," while the other has a URL including www.t-rexproducts.com. We have conservatively treated these as referring to one, rather than two sources.

⁵ This definition was not in the record prior to appeal. See Trademark Rule 2.142(d) (record should be complete prior to filing an appeal). Nonetheless, the Board may take judicial notice of dictionary definitions, Fed. R. Evid. 201(c); *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including

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- 1. Any of various cold-blooded, usually egg-laying vertebrates of the class Reptila, such as a snake, lizard, crocodile, turtle, or dinosaur, having an external covering of scales or horny plates and breathing by means of lungs.
- 2. A person regarded as despicable or treacherous.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1992) (August 16, 2007) (electronic version).

Applicant also attached to its brief on appeal a list of 145 USPTO applications and registrations from the TESS database.⁶ A list of applications and registrations is not sufficient to make the listed applications and registrations of record. The examining attorney did not address the substance of this evidence, and instead objected to it, noting that the Board will not take judicial notice of third-party registrations, Ex. Att. Br. at 7, *citing In re Carolina Apparel*, 48 USPQ2d 1542 (TTAB 1998); *In re Wada*, 48 USPQ2d 1689 (TTAB 1998), *aff'd* 194 F.3d 1297, 52 USPQ2d 1539 (Fed. Cir. 1999).

online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). This definition appears uncontroversial, and we consider it a proper subject for judicial notice.

⁶ The list is of the first 145 USPTO records resulting from the search (live)[ld] and (sausage)[comb], in other words, all live records in which the word "sausage" is used in the mark or in a translation of the mark. According to applicant, 100 of these applications and registrations "specifically include the term 'sausage' or 'sausages' in its goods or services," although none of them has been made of record.

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We agree with the examining attorney, and further note that this evidence is untimely:⁷

The record in the application should be complete prior to the filing of an appeal. The ... Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

Trademark Rule 2.142(d).

Accordingly, we have not considered applicant's list of applications and registrations, or those parts of applicant's brief which discuss it.

II. Applicable Law

A term is merely descriptive if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the goods with which it is used. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the products for which registration is sought and the context in which the

⁷ Even if it were timely, such a list would be of no probative value because it omits critical information. For instance, the list does not indicate the goods or services associated with each mark, whether the registrations include a disclaimer or a claim of acquired distinctiveness under Trademark Act § 2(f), or whether they appear on the Principal or the Supplemental

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term is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, the issue is whether someone who knows what the products are will understand the mark to convey information about them. *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *In re Patent & Trademark Serv. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Ass'n of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

"On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978). See also *In re Shutts*, 217 USPQ 363, 364-365 (TTAB 1983); *In re Universal Water Sys., Inc.*, 209 USPQ 165, 166 (TTAB 1980). Even where individual terms are descriptive, combining them together may evoke a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the

Register. Moreover, many of the records appear to be pending applications, which are evidence only of their filing.

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goods, without the combination of terms creating a unique or incongruous meaning, then the resulting combination is also merely descriptive. *In re Tower Tech.*, 64 USPQ2d at 1317-1318.

Finally, we note that our task here is to determine whether the mark is descriptive of the identified goods. As applicant correctly notes, the proper perspective for our inquiry is the viewpoint of the prospective purchaser of such goods. App. Br. at 16-17. However, for our purposes, the nature of the goods themselves and the identity of their purchasers must be determined by looking no further than the application itself. Because it is the application which describes the scope of any registration which would issue, we must consider the goods to include anything within the scope of the goods set out therein, regardless of what the applicant's actual product (or, in this case, intended product) may be. *See, e.g., Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 1 USPQ2d 1813 (Fed. Cir. 1987); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1717 (TTAB 1992); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Further, unless restrictions appear in the application, such goods must be presumed to be sold to the full range of purchasers, and to move in all usual

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channels of trade, for goods of that type. *In re Elbaum*,
211 USPQ at 640.

III. Stylization of Application No. 76612193

As an initial matter, we note that the '180 application seeks registration of the stylized words REPTILE SAUSAGE. The stylization consists of lettering in an italic serif font with the mark displayed in all capital letters. The stylization is not at all out of the ordinary, and there is no other figurative element in the mark.

While we consider the marks in their entirety, and we do not ignore any aspect of them, we find that the minimal stylization of the mark in the '180 application has little, if any, effect on the visual impact of that mark or its overall commercial impression. Such minimal stylization does not remove an otherwise descriptive mark from the ambit of Trademark Act § 2(e)(1). *In re Guilford Mills Inc.*, 33 USPQ2d 1042, 1043-44 (TTAB 1994); *In re Grande Cheese Co.*, 2 USPQ2d 1447, 1449 (TTAB 1986); *In re Behre Indus., Inc.*, 203 USPQ 1030, 1032 (TTAB 1979). For purposes of this decision, we have accordingly focused on the literal (and identical) element of both marks *i.e.*, the words REPTILE SAUSAGE.

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III. Descriptiveness under Trademark Act § 2(e)(1)

To determine whether a mark is descriptive of the identified goods, we must first determine what those goods are. As noted, applicant's goods are identified as "food for animals, namely, for meat eating reptiles." Although restricted to food intended for reptiles, the goods identified in the application cover the full range of food eaten by such animals, and in any form those goods may be sold in, including food in the form of sausages.⁸

Applicant argues that

the subject mark is not descriptive when used in connection with the present goods having a myriad of designs, shapes, and applications (i.e. a well researched blend of moisture, crude protein, crude fat, crude fiber, ash, calcium, phosphorus, and vitamins that comprise the dietary foodstuff to be fed by tweezers to crocodiles, alligators, snakes, and lizards). [S]ince the determination of descriptiveness is not made in the abstract, it is the Applicant's goods that require analysis. When viewed in this context, the present mark does not describe the goods to which it relates; but instead, is used to suggest the expansive uses of the goods and the marketability of delicate "food for animals, namely, for meat eating reptiles" to parks, zoos, preserves, aquariums, breeders and zoological caretakers that have been properly classified in Class 31.

⁸ We note that this application was filed based on an intent to use the mark in commerce, and that no allegation of use has yet been filed. There is little or no information in the record as to the nature of the goods applicant actually intends to sell under the mark. Nonetheless, the examining attorney has presumed, and applicant has not directly denied, that applicant's contemplated goods are (or include) chopped meat and other ingredients formed into a shape like a sausage.

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Applicant's argument appears to be that its mark is not descriptive because it could be used on products with a variety of nutritional formulations, shapes, and sizes (that may be fed to reptiles with a tweezer). Applicant is undoubtedly correct about the scope of its identification of goods, but its conclusion is incorrect. It is not necessary that a term be descriptive of every aspect of the goods or every product within the scope of the identified goods in order to support a finding of descriptiveness; descriptiveness as to any one of them is enough. "[T]he mark need not recite each feature of the relevant goods or services in detail to be descriptive." *In re Dial-A-Mattress Operating Corp.*, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001), citing *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982). To the extent that the range of "food ... for meat eating reptiles" includes something that could be descriptively called "reptile sausage," the mark is descriptive. That is to say, if the scope of applicant's goods as identified in the application includes sausages, it makes very little difference that they also may include other shapes, formulations or sizes.

Applicant's mark is REPTILE SAUSAGE for "food for ... meat eating reptiles." It is the examining attorney's

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position that the mark immediately conveys relevant information about the goods, *i.e.*, that they are "sausages" for "reptiles":

[T]he word "REPTILE" in applicant's mark describes a characteristic of the goods, which are consumed by reptiles. Since the goods are for "meat eating reptiles[,"] the goods must include "meat." The evidence of record indicates that "sausage" is defined as "finely chopped and seasoned meat, especially pork, usually stuffed into a prepared animal intestine or other casing and cooked or cured." Therefore the word "sausage," which is a meat, also describes a characteristic of the goods. ... Attached to the Office action mailed April 13, 2005, are advertisements ... that refer to sausages for reptiles. ... This advertisement shows that [food] for snakes includes sausages.

Ex. Att. Br. at 3-4.

Applicant raises a number of arguments in response, variously urging that the mark is fanciful or suggestive of the identified goods. Applicant's major contention appears to be as follows:

The Applicant respectfully submits that the term "SAUSAGE" as used in the ... mark ... and taken in relation to the goods, pet food, is fanciful. By way of example, sausages, in general are not associated with being served to animals. Serving a distinctly human food to an animal is extraordinary. Additionally, the adjective before the word sausage usually denotes the ingredient, maker, or style of the sausage and not the being who consumes the sausage. For example, pork sausage denotes sausage made from pork; beef sausage denotes sausage made from beef; farmer's sausage denotes sausage that has been made on a farm with "farm" seasonings; country sausage denotes sausage made with

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seasoning that evokes a country style; polish sausage denotes sausage made in the style as that in Poland; and smoked sausage denotes sausage that is smoked. None of these are ever referred to on a menu or in a store as "human sausage" because the one who consumes the sausage is naturally assumed to be a human. The placement of an adjective before the word "sausage" that does not denote an ingredient, maker, or style is highly fanciful. The ... mark ... places the word "REPTILE" before the word "SAUSAGE..." but the ... goods do not have reptiles as an ingredient for its pet food, is not made by reptiles, and is not in a "reptile-style," but instead is to be consumed by carnivorous animals of all sizes, from a small lizard to a snake to an alligator. Therefore the ... mark ... is highly fanciful and is not merely descriptive of the goods.

App. Br. at 10-11.

The problem with applicant's argument is that it is not supported by the record. For example, applicant states that serving sausages or any human food to animals is "extraordinary," implying that the relevant consumers would thus not understand the mark to describe the identified goods. We do not find the notion of giving a pet "human" food (or food that is similar to human food) to be an inherently unusual concept. But more importantly, there is no evidence that "human" food (or human-style food) is never given to animals. In fact, the evidence supplied by the examining attorney proves the contrary; at least one other producer ("T-Rex") makes "sausages" intended as food

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for snakes. Applicant's brief fails to address this evidence.

Likewise, applicant contends that the word before "sausage" usually refers to the type of sausage or the maker of the sausage, and that its product is not made by or of reptiles. Applicant's major premise is not supported by the record or by common sense. The problem is that applicant focuses only on food which is intended as food for people, not animals. As applicant itself notes, the determination of whether a mark is descriptive is not made in the abstract, but with reference to the identified goods. We therefore start off knowing that applicant's goods are food for carnivorous reptiles, and not food for humans.

It is common knowledge that when speaking of animal food, it is not unusual to distinguish it from "human food," even though the corresponding "human food" is not designated as such. Thus, even if applicant is correct in its contention about the structure of terms used to describe sausages (for humans), its examples focusing strictly on the "human" food market are not particularly relevant to how terms are perceived in the animal food market.

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For instance, we cannot ignore the fact that large categories of animal food are called "pet food," "dog food," or "cat food," even though the phrase "human food" would not usually be used in conversation, and it is unlikely that pets, dogs, or cats are ingredients. We doubt that anyone would believe that "dog biscuits" are made by dogs (or made out of dogs), although one does not ask for a "human biscuit" to go with an order of fried chicken.

It is quite apparent that, contrary to applicant's assertion, at least some items in the animal food industry are commonly called by a phrase consisting of the name or category of the animal for which the food is intended, followed by a word describing the product itself. Because this structure is rarely, if ever, used when speaking of food for human consumption, applicant's examples of descriptive terms applied to sausages for human consumption is entitled to little or no weight.

Applicant argues further that the combination of words in its mark is "fanciful, if not cute," Reply Br. at 5, apparently on the premise that "sausage" is a distinctly human food, and is incongruous when juxtaposed with the word "reptile" and applied to food for reptiles. But again, we see nothing inherently unusual about calling a

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mixture of meat, fat, and other nutrients in a sausage-like form a "sausage," even if intended for animals, rather than for people.

It is not clear from this record whether it is *common* practice in the relevant industry to call animal food (or reptile food) a "sausage." But the record contains evidence of at least one purveyor of similar goods which is doing just that. But even if applicant were the only user of the term "sausage" in connection with food for reptiles, that fact would not require reversal of the refusal to register. "[A] word need not be in common use in an industry to be descriptive, and the mere fact that an applicant is the first to use a descriptive term in connection with its goods, does not imbue the term with source-identifying significance. *In re Hunter Fan Co.*, 78 USPQ2d 1474, 1476 (TTAB 2006); *see also In re Ruffin Gaming LLC*, 66 USPQ2d 1924, 1932 (TTAB 2002); *In re National Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983).

Applicant raises a number of other arguments. Suffice it to say that we have carefully considered all of them, but they do not convince us of a different result.

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V. Conclusion

After careful consideration of the evidence of record and of the parties' arguments, we conclude that applicant's mark, REPTILE SAUSAGE, is merely descriptive of a feature or characteristic of "food for animals, namely, for meat eating reptiles," and that registration is accordingly barred under Trademark Act § 2(e)(1).

Decision: The refusal to register is accordingly affirmed.