

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Natural Balance Pet Foods, Inc.

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Serial No. 77534661

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Thomas I. Rozsa of Rozsa Law Group LC for Natural Balance  
Pet Foods, Inc.

Cimmerian Coleman, Trademark Examining Attorney, Law Office  
102 (Karen M. Strzyz, Managing Attorney).

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Before Quinn, Bucher and Grendel, Administrative Trademark  
Judges.

Opinion by Grendel, Administrative Trademark Judge:

Natural Balance Pet Foods, Inc. (applicant) seeks  
registration on the Supplemental Register of the asserted  
mark "KNOW THAT YOUR PET FOOD HAS BEEN TESTED." (in the  
stylized lettering depicted below) for goods identified in  
the application as "dog food and cat food."<sup>1</sup>

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<sup>1</sup> Ser. No. 77534661, filed on July 30, 2008. The application is  
based on use in commerce under Trademark Act Section 1(a), 15  
U.S.C. §1051(a). During prosecution, applicant amended to the  
Supplemental Register to overcome a Section 2(e)(1) mere

# Know that your pet food has been tested.

The Trademark Examining Attorney has issued a final refusal to register applicant's asserted mark on the ground that it is merely informational matter which fails to function as a trademark.<sup>2</sup>

Applicant has appealed the final refusal. The appeal is fully briefed.

After careful consideration of all of the evidence of record and all of the arguments of counsel, we affirm the refusal to register applicant's mark on the Supplemental Register.

Trademark Act Section 23, 15 U.S.C. §1091, permits registration of marks on the Supplemental Register. However, to be registrable on the Supplemental Register,

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descriptiveness refusal, after which the Trademark Examining Attorney withdrew that refusal.

<sup>2</sup> The Trademark Examining Attorney's brief on appeal states that the statutory basis of the refusal is Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051, 1052 and 1127. However, because the application is for registration on the Supplemental Register, the appropriate statutory basis for the refusal is Trademark Act Sections 23 and 45, 15 U.S.C. §§1091 and 1127.

the asserted mark "must be capable of distinguishing the applicant's goods and services."

The issue in this case is whether the asserted mark applicant seeks to register is capable of distinguishing applicant's goods from the goods of others and thus is registrable on the Supplemental Register, or whether instead it is incapable of distinguishing applicant's goods (and thus is unregistrable on the Supplemental Register) because it would be perceived merely as an informational slogan and not as a source-indicating trademark.

Before we reach the ultimate issue of Section 23 capability *per se*, we begin our analysis by finding that applicant's asserted mark, as it appears on applicant's specimen of use, fails to function as a trademark because it would be perceived merely as an informational slogan devoid of source-indicating significance.

Trademark Act Section 45, 15 U.S.C. §1127, defines a "trademark" in pertinent part as "any word, name, symbol, or device, or any combination thereof-- (1) used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."

Not every designation which appears on an applicant's goods functions as a trademark. To be a mark, the designation must be used in such a manner that purchasers or potential purchasers will understand that it is an indication of the source of the goods. See *In re Volvo Cars of North America Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998). If the designation would not be perceived as an indication of source, then it fails to function as a trademark. "The Trademark Act is not an act to register mere words, but rather to register trademarks. Before there can be registration, there must be a trademark, and unless words have been so used they cannot qualify." *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 215 (CCPA 1976).

It is settled that if an applicant's asserted mark would be perceived not as an indication of source but rather merely as conveying a generalized informational message, then the asserted mark fails to function as a mark. For example, the Board found that the asserted mark DRIVE SAFELY failed to function as a trademark for automobiles because it consisted merely of an "everyday, commonplace safety admonition". *In re Volvo Cars of*

*North America Inc., supra*, 46 USPQ2d 1455, 1460.<sup>3</sup>

Similarly, the Board found that the asserted mark WATCH THAT CHILD failed to function as a trademark for construction materials because it merely "conveys the impression of being a familiar safety slogan." *In re Tilcon Warren, Inc.*, 221 USPQ 86, 88 (TTAB 1984). The Board found that the asserted mark THINK GREEN failed to function as a mark for weatherstripping and paper products because it would be perceived merely as "a slogan of environmental awareness and/or ecological consciousness." *In re Manco Inc.*, 24 USPQ2d 1938, 1941 (TTAB 1992).<sup>4</sup>

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<sup>3</sup> In *Volvo Cars*, the Board also found that even if there might be de facto secondary meaning associating the automobile manufacturer with the merely informational slogan DRIVE SAFELY for automobiles, "this is an association that is not entitled to legal recognition resulting in a trademark registration." 46 USPQ2d at 1461.

<sup>4</sup> See also *In re Eagle Crest Inc.*, 96 USPQ2d 1227 (TTAB 2010) (ONCE A MARINE ALWAYS A MARINE fails to function as a mark for clothing because it merely conveys a message of support for or affiliation with the U.S. Marine Corps); *In re T.S. Designs Inc.*, 95 USPQ2d 1669 (TTAB 2010) (CLOTHING FACTS as used on a label describing the manner in which the applicant's clothing is manufactured fails to function as a mark because it merely conveys a message of the applicant's commitment to social justice and environmental stewardship); *In re Remington Products Inc.*, 3 USPQ2d 1714 (TTAB 1987) (PROUDLY MADE IN USA fails to function as a mark for electric shavers because it merely conveys information regarding the source of the goods and the patriotic spirit in which they are manufactured).

In the present case, applicant's specimen of use is a photograph of a shelf-talker display associated with the goods, reproduced below:



The asserted mark "KNOW THAT YOUR PET FOOD HAS BEEN TESTED." appears at the top of the display sign in large letters. Below this wording, the following text appears:

Log onto [www.naturalbalance.net](http://www.naturalbalance.net) then check your products in 3 easy steps!

- Click on the "Buy With Confidence" Banner
- Type in the "Best By" Date on your pet food bag or can
- Read the actual Testing Results!

We find that, as it appears on this specimen, the asserted mark "KNOW THAT YOUR PET FOOD HAS BEEN TESTED." fails to function as a trademark because it would be perceived by purchasers not as an indication of the source of the goods, but merely as a generalized informational message designed to assure purchasers that applicant's pet food has been tested. The merely informational significance of the asserted mark is reinforced by and integral to the additional wording on the sign, which directly instructs purchasers ("in 3 easy steps!") how to actually access the test results for applicant's pet food, and thereby "know that your pet food has been tested."

Applicant argues that its specimen suffices as evidence that the asserted mark functions as a trademark because the specimen clearly qualifies as a "display associated with the goods" (a shelf-talker sign), upon which the asserted mark appears prominently and

separately from the other (admittedly-informational) wording appearing on the sign. Applicant also argues that when the display sign is considered in its entirety, the asserted mark as it appears on the sign would be understood to be an indication of source because applicant's trade name also appears prominently on the sign.

These arguments are unpersuasive. Applicant's specimen undoubtedly is an acceptable type of specimen, i.e., a display associated with the goods, but that is not the issue here. Moreover, the fact that the asserted mark is depicted prominently on the specimen is not dispositive. "We note that not every word or combination of words which appears on an entity's goods functions as a trademark. *In re Morganroth*, 208 USPQ 284 (TTAB 1980). Thus, the mere fact that an applicant's phrase appears on the specimens, even separate and apart from other indicat[ions] which appear on them, does not make it a trademark." *In re Volvo Cars of North America Inc.*, *supra*, 46 USPQ2d 1455 at 1458. Finally, we find that the fact that applicant's trade name appears on the specimen as an obvious source-indicator actually tends to further diminish the likelihood that purchasers would look to the

informational wording "KNOW THAT YOUR PET FOOD HAS BEEN TESTED." as a means of identifying the source of the goods. See *In re T.S. Designs Inc.*, *supra*, 95 USPQ2d 1669, 1671.

For all of these reasons, we find that the asserted mark "KNOW THAT YOUR PET FOOD HAS BEEN TESTED.", as it appears on applicant's specimen of use, would be perceived merely as an informational message and not as an indication of the source of the goods. That is, we find that it fails to function as a trademark for applicant's goods, as it is used on the specimen.

Moving on now to the ultimate issue in this appeal, we also find that applicant's asserted mark not only fails to function as a trademark as it is used on applicant's specimen, but that it also is so obviously and merely an informational message that it is inherently incapable of functioning as a trademark, and that it therefore is unregistrable on the Supplemental Register. "Informational expressions may likewise, in appropriate cases, be found to be unregistrable even upon the Supplemental Register because of their informational nature." *In re Brock Residence Inns, Inc.*, 222 USPQ 920, 922 (TTAB 1984).

Specifically, we find that the slogan "KNOW THAT YOUR PET FOOD HAS BEEN TESTED.", when used in connection with pet food, is unlikely to ever be perceived as an indication of source, but merely as a commonplace informational message which encourages purchasers to ensure that the pet food they purchase has been tested.

The record shows that in the marketing of pet foods, the fact that the pet food has been "tested" is touted as a reason to purchase a particular pet food. For example, a company called Rep-Cal advertises its pet reptile food as "The Most Tested and Researched Reptile Food," assuring potential purchasers that "each diet has been tested in feeding trials on our animals ... this food has been tested successfully for tortoises by reptile veterinarians." (May 7, 2009 Office Action.)

Likewise, an online article from VeterinaryPartner.com entitled "Good Nutrition for Healthy Growth for Kittens" informs purchasers that "the best foods have been tested in actual feeding trials, not just by nutritional analysis. For kittens, look for the words 'Complete and Balanced Nutrition' and a statement that the food has been tested for all life stages." (May 7, 2009 Office Action.)

On its own website and on the website of a third-party retailer (West Coast Pet Supply), applicant's pet food is specifically described and touted as having been "tested in a variety of different environments and situations to ensure outstanding results." (May 7, 2009 Office Action.)

Based on this evidence of the commercial context of pet food marketing, where the fact that a pet food has been tested is so obviously a significant factor in one's decision to purchase a particular pet food, and based on the inherently informational nature of applicant's asserted mark itself, we find that purchasers encountering the wording "KNOW THAT YOUR PET FOOD HAS BEEN TESTED." in connection with pet food are unlikely to ever perceive it to be more than a mere informational message; they are unlikely to ever perceive it to be an indication of the source of the goods. See *In re Brock Residence Inns, Inc.*, *supra*, 222 USPQ 920, 922 (finding the designation "FOR A DAY, A WEEK, A MONTH OR MORE!" to be unregistrable on the Supplemental Register for hotel services because it is "so highly descriptive and informational in nature that purchasers are unlikely, either now or in the future, to perceive it as an indication of the origin of

applicant's services"). See also *In re O.F. Mossberg & Sons, Inc.*, 175 USPQ 191, 192 (TTAB 1972) (finding MORE GUN FOR THE MONEY for guns to be incapable of distinguishing source and therefore unregistrable on the Supplemental Register because it "is a merely informational phrase which is completely devoid of imagination").<sup>5</sup>

In short, and for all of the reasons discussed above, we find that applicant's asserted mark "KNOW THAT YOUR PET FOOD HAS BEEN TESTED." is incapable of distinguishing applicant's goods, and that it therefore is not registrable on the Supplemental Register.

**Decision:** The refusal to register on the Supplemental Register is affirmed.

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<sup>5</sup> We find that applicant's asserted mark "KNOW THAT YOUR PET FOOD HAS BEEN TESTED." is even less capable of distinguishing source (and thus even less eligible for registration on the Supplemental Register) than the informational slogans FOR A DAY, A WEEK, A MONTH OR MORE! and MORE GUN FOR THE MONEY at issue in *Brock Residence Inns* and *Mossberg*. It certainly is more obviously and merely informational (and has less source-indicating capability) than the asserted marks in the cases noted above which were found to be merely informational slogans that were unregistrable on the Principal Register, such as DRIVE SAFELY, WATCH THAT CHILD, and THINK GREEN.