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Subject: U.S. TRADEMARK APPLICATION NO. 77534661 - KNOW THAT YOUR
PET FOOD HAS BEEN - 34990.083 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77534661

MARK: KNOW THAT YOUR PET FOOD HAS BEEN



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/main/trademarks.htm>

TTAB INFORMATION:

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

APPLICANT: Natural Balance Pet Foods, Inc.

CORRESPONDENT'S REFERENCE/DOCKET NO:

34990.083

CORRESPONDENT E-MAIL ADDRESS:

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the examining attorney's final refusal to register the proposed mark **KNOW THAT YOUR PET FOOD HAS BEEN TESTED.**, in stylized form, for use in connection with dog food and cat food. Registration was refused on the Principal Register pursuant to Trademark Act Sections 1, 2 and 45 on the ground that the applicant's mark as it appears on applicant's submitted specimens of record, functions as merely informational matter. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127; *see In re Remington Prods., Inc.*, 3 USPQ2d 1714 (TTAB 1987); TMEP §§904.07(b); 1202 *et seq.*

It is respectfully requested that this refusal be affirmed.

FACTS

On July 30, 2008, the applicant filed an application to register the mark **KNOW THAT YOUR PET FOOD HAS BEEN TESTED.**, in stylized form, for use in connection with dog food and cat food. In an Office Action dated October 16, 2008, the examining attorney refused registration based upon Sections 1, 2 and 45 of the Trademark Act, stating that the mark as it appeared on the specimen was merely informational matter informing the consumer that the applicant's pet food had been tested. The examining attorney also refused registration based upon Section 2(e)(1) of the Trademark Act because the proposed mark described a feature of the goods, namely, the applicant's pet food had been tested for contamination. The examining attorney attached Internet evidence pointing to the extensive number of pet food recalls in 2007 due to potential melamine contamination. The examining attorney also issued a requirement for the submission of an acceptable specimen to match the applicant's drawing. The applicant responded on April 10, 2009, addressing the Section 2(e)(1) refusal by amending the application to the Supplemental Register. The applicant addressed the refusal based on Sections 1, 2 and 45 by arguing the specimen consisted of a product display containing the proposed mark adjacent to the company name and appearing in close proximity to applicant's dog food bags on a store shelf. Additionally, the applicant submitted a substitute drawing to match the specimen.

The examining attorney responded to the applicant's arguments by issuing an Office Action on May 7, 2009. In the Office Action, the examining attorney withdrew the Section 2(e)(1) refusal based on the applicant's amendment to the Supplemental Register and informed the applicant that the drawing requirement had been satisfied. However, the examining attorney raised a new issue, refusing to register the mark on the

Supplemental Register based on Sections 1, 2 and 45 because the mark was merely informational matter. The applicant responded on November 4, 2009 continuing its arguments with regard to the informational nature of the display of the mark. The examining attorney issued a Final Action dated December 1, 2009. The applicant's discussion of the informational matter refusal was found to be unpersuasive. The examining attorney explained the mere fact that the applicant's proposed mark appears on a product display does not make it a trademark. The proposed mark does not signify source but merely informs the consumer the applicant's pet food has been tested.

The applicant filed the present appeal with the Trademark Trial and Appeal Board. The applicant's brief was noted and forwarded to the examining attorney for brief in response.

ARGUMENTS

I. THE PROPOSED MARK AS IT APPEARS ON THE SPECIMEN OF RECORD FUNCTIONS AS INFORMATIONAL MATTER AND IS NOT A SOURCE IDENTIFYING TRADEMARK UNDER SECTIONS 1, 2 AND 45 OF THE TRADEMARK ACT.

Trademark Act Sections 1, 2 and 45 bar registration where an applied-for mark, as used on the specimen of record, is merely informational matter. A mark in this instance does not function as a trademark to identify and distinguish applicant's goods from those of others and to indicate the source of applicant's goods. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127; *see* TMEP §§904.07(b), 1202.04; *see, e.g., In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455, 1460-61 (TTAB 1998) (holding the

wording DRIVE SAFELY not registrable because it would be perceived only as an everyday, commonplace safety admonition and not as a trademark for “automobiles and structural parts therefor”); *In re Manco, Inc.*, 24 USPQ2d 1938, 1942 (TTAB 1992) (holding the wording THINK GREEN and design not registrable because it would be perceived only as an informational slogan encouraging environmental awareness and not as a trademark for weather stripping and paper products).

The specimen of record, along with any other relevant evidence of record, is reviewed to determine whether an applied-for mark is being used as a trademark. *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213 (C.C.P.A. 1976); *In re Volvo Cars of N. Am., Inc.*, 46 USPQ2d 1455 (TTAB 1998). Not every word, design, symbol or slogan used in the sale or advertising of goods and/or services functions as a mark, even though it may have been adopted with the intent to do so. A designation cannot be registered unless purchasers would be likely to regard it as a source-indicator for the goods. *In re Manco, Inc.*, 24 USPQ2d 1938 (TTAB 1992); TMEP §1202.

Applicant argues that the specimen of use is a product display positioned adjacent to the products which clearly contains the proposed mark on the display. However, applicant’s use cannot overcome the overwhelming informational significance of the term. In *In re Aerospace Optics, Inc.*, the Trademark Trial and Appeal Board found that, “The use of the TM symbol on the inner flap location of one specimen does not change the commercial impression of the applied-for mark, which as used in the specimen only informs the consumer of the features of the pushbutton switches.” See *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861 (TTAB 2006). Using an informational slogan in a

trademark manner does not convert it into a source indicator. The mere fact that the applicant's proposed mark appears on a product display does not make it a trademark.

The proposed mark, as displayed on the specimen, is accompanied by additional informational material. The specimen comprises a tag with the following wording, in part: **Know that your pet food has been tested. Log onto 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.**

In this case, the proposed mark is shown as part of information regarding how to log onto the applicant's website to check the testing results of pet food products owned by the applicant. In the Office Action dated October 16, 2008 in TICRS pgs. 2-13, the examining attorney attached Internet articles regarding a widely publicized and extensive number of pet food recalls in 2007 due to potential melamine contamination. The contaminated pet food caused renal failure in pets and led to an unknown number of pet deaths and illnesses. In fact, according to the evidence, applicant's Natural Balance pet food products were recalled due to potential contamination. See Office Action dated October 18, 2008 in TICRS pgs. 2-3, 8. The facts presented by the applicant in its specimens merely provide the consumer with information necessary to make an informed purchasing decision regarding pet food products. This type of labeling conveys the information necessary to identify safe pet food products and does not act as a source identifier, but as merely informational matter.

CONCLUSION

In conclusion, the examining attorney asserts that based on the evidence presented, the submitted specimens, and likely consumer impressions, the applicant has failed to show proper trademark use. Consumers would regard **KNOW THAT YOUR PET FOOD HAS BEEN TESTED.** as merely informational matter with regard to the manufacture of applicant's pet foods. For these reasons, the refusal to register the term **KNOW THAT YOUR PET FOOD HAS BEEN TESTED.** on the ground that it does not function as a trademark based under the provisions of Sections 1, 2 and 45 of the Trademark Act should be affirmed.

Respectfully submitted,

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