

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

Oral Hearing:
August 25, 2011

Mailed:
November 22, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Ahold Licensing SA

v.

Premium Nutritional Products, Inc.

Opposition No. 91180170
to application Serial No. 77022302

Harvey Freedenberg of McNees, Wallace & Nurick LLC for Ahold Licensing SA.

Cheryl Burbach of Hovey Williams LLP for Premium Nutritional Products, Inc.

NOTICE OF CORRECTION

By the Board:

On November 7, 2011, the Board mailed a final decision in connection with this opposition.

On page 13, lines 3 and 6 of the decision, the Board incorrectly referred to opposer's mark as NATURAL PROMISE, rather than NATURE'S PROMISE. On page 14, line 18 of the decision, the Board incorrectly referred to applicant's mark as NATURAL PROMISE, rather NATURE'S PROMISE. In view thereof, page 13, lines 3 and 6 of the decision, and page 14, line 18 of the decision, are hereby corrected to

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properly refer to opposer's mark and applicant's mark as NATURE'S PROMISE.

A corrected copy of the Board's final decision is attached.

Applicant's time for filing an appeal or commencing a civil action regarding the Board's decision continues to run from the mailing date of the November 7, 2011 decision. See Trademark Rule 2.145(d)(1), 37 C.F.R. §2.145(d)(1).

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Products, Inc.

Before Grendel, Mermelstein and Bergsman,¹
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Premium Nutritional Products, Inc. ("applicant") filed
an intent-to-use application for the mark NATURE'S PROMISE,
in standard character form, for "food for caged birds, pet
food for small mammals, hay," in Class 31.

Ahold Licensing SA ("opposer") opposed the registration
of applicants' mark on the ground of likelihood of confusion
under Section 2(d) of the Trademark Act of 1946, 15 U.S.C.

¹ Judge Bergsman has been substituted for Judge Walters, who
participated in the August 25, 2011 hearing but who has since
retired from government service.

§1052(d).² Specifically, opposer alleged ownership and prior use of registered trademarks for NATURE'S PROMISE for a wide variety of food products and a grocery store department featuring natural and organic foods and that applicant's mark, if used in connection with the goods identified in the application, so resembles opposer's marks for food products and a grocery store department featuring natural and organic foods as to be likely to cause confusion. For example, opposer pleaded ownership of, *inter alia*, the following registrations for the mark NATURE'S PROMISE, in standard character form:

1. Registration No. 3136604 for the following products:³

Milk, cream, half-and-half, soy milk, eggs, yogurt, butter, peanut butter and other nut butters, fruit preserves, applesauce, frozen berries, frozen vegetables, canned vegetables, canned fish, frozen fish, frozen entrees consisting primarily of meat or vegetables, vegetable-based snack chips, soup broth, in Class 29;

Tea, frozen pizza, cookies, crackers, bread, salsa, mayonnaise, salad dressings, breakfast cereals, granola bars, popped popcorn, corn chips, maple syrup, honey, pancake mix, frozen waffles, pasta, pasta sauce, frozen entrees consisting primarily of pasta, in Class 30;

² Opposer further asserted a dilution claim under Section 43 of the Trademark Act but did not pursue the claim at trial or reference it in its brief. Accordingly, the dilution claim is dismissed. *Cf.* Trademark Rule 2.106(c).

³ Issued August 29, 2006.

Fresh vegetables, in Class 31; and

Fruit juice, in Class 32;

2. Registration No. 3297769 for "retail store services, namely, a grocery store department featuring natural and organic foods," in Class 35;⁴

3. Registration No. 3497318 for the following products:⁵

Applesauce; cream cheese; luncheon meats; meat; olive oil; processed meat; tofu; whipped topping, in Class 29;

Dumplings; flour; honey; maple syrup; pasta; popped popcorn; pretzels; puddings; rice; spaghetti sauce; sugar; tea; vinegar; waffles, in Class 30; and

Soft drinks, in Class 32; and

4. Registration No. 3703391 for "Baby foods," in Class 5.⁶

Applicant, in its answer, denied the salient allegations in the notice of opposition.

Preliminary Issues

A. Applicant's objection to the discovery deposition of David Morris, applicant's President and CEO.

During its testimony period, opposer filed a copy of the discovery deposition of David R. Morris, applicant's President and CEO, with accompanying exhibits. Opposer

⁴ Issued September 25, 2007.

⁵ Issued January 15, 2008.

⁶ Issued October 27, 2009.

filed the discovery deposition with a cover letter, "via first class mail," identifying the attachment as the deposition with the designation "c:[sic] Cheryl L. Burbach, Esquire" at the bottom of the letter.⁷ In its brief, applicant objected to the introduction of the Morris deposition on the ground that it had not been submitted through a notice of reliance and, therefore, applicant did not know why it was filed.

In fact, until [applicant] had received Opposer's Trial Brief, its counsel was completely unaware that Opposer had 'filed' the Non-Confidential and Confidential deposition transcripts on June 29, 2010. [Applicant] did not stipulate to that filing. That filing occurred with out any notice to [applicant] from Opposer. ... As such, it was just put on notice upon receipt of Opposer's trial brief."⁸

In its reply brief, opposer argued that it complied with the requirements of Trademark Rule 2.120(j)(3).

Trademark Rule 2.120(j)(1) provides that the discovery deposition of an officer of a party may be introduced into evidence by the adverse party. A discovery deposition, or any part thereof, may be offered into evidence with a notice

⁷ Ms. Burbach's name appears as counsel on many of applicant's papers filed in this matter, and service copies of many of opposer's filings have been addressed to her.

⁸ Applicant's Brief, pp. 20-21. Applicant also argued that it did not receive an electronic filing receipt from ESTTA, the Board's filing system, when opposer filed the deposition. ESTTA does not generate electronic filing receipts for the opposing party, and in any event, the Morris deposition was not filed electronically.

of reliance. Trademark Rule 2.120(j)(3)(i). While a notice of reliance under 2.120(j)(3)(i) need not indicate the relevance of the deposition, or of the parts relied on, it is preferable that it does indicate the relevant parts.⁹

TBMP §704.09 (3rd ed. 2011), *citing Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1787 (TTAB 2001) (noting that it is more effective to file only those portions of a discovery deposition that are relevant and explain their relevancy in the notice of reliance). In order to avoid creating an overly large record of irrelevant evidence, parties, should where appropriate, file only those portions of a discovery deposition transcript that are relevant to the pleaded claims.¹⁰ TBMP §704.09.

Opposer's failure to include a notice of reliance is a procedural objection that should have been raised promptly, preferably by a motion to strike, since it was a defect that could have been cured. TBMP §707.02(b). If the objection is one that could have been cured promptly, and was not timely raised, the objection is waived. *Id.* Because opposer's failure to include a notice of reliance could have been cured had applicant promptly raised an objection,

⁹ We note, however, that a notice of reliance under Trademark Rule 2.122(e) ("Printed publications and official records") must, *inter alia*, "specify the printed publication ... or the official record and the pages to be read[and] indicate generally the relevance of the material being offered...."

¹⁰ By contrast, transcripts of trial testimony must be filed in their entirety.

applicant's objection in its brief is not timely, and its objection is deemed waived. In this regard, if applicant truly had no idea why opposer sent a copy of the Morris 30(b)(6) discovery deposition during opposer's testimony period to applicant, it was incumbent upon applicant to inquire. Thus, the requirement to timely make a procedural objection removes the opportunity for the defending party to claim studied ignorance.¹¹

In view of the foregoing, applicant's objection to the introduction of the discovery deposition of David Morris is overruled.

Although we have overruled applicant's objection, we must comment on opposer's failure to point out what portions of the David Morris discovery deposition opposer thought was relevant. The David Morris discovery deposition is 224 pages with 15 exhibits, including insights such as "people who are buying our products are also buying groceries."¹² In its brief, opposer referenced testimony from the deposition on pages 20, 39, 49, 124, 128-129, 132, 189 and 213 and Exhibit 11. Although opposer relied on only 9 pages of testimony and one exhibit, it filed the entire transcript

¹¹ It appears that applicant in fact received a copy of the Morris deposition consistent with the notation on opposer's cover letter. Any potential objection relating to the method of service is also procedural in nature and if timely raised could have been corrected. Accordingly, any objection to the means of the service of the Morris deposition is waived.

¹² Morris Discovery Dep., p. 213.

with all the exhibits apparently in the hope that the Board will wade through it and find something probative. Because opposer saw fit to reference only 9 pages of testimony from the Morris discovery deposition in its brief, we only considered those portions of the discovery deposition referenced by opposer.

B. Over-designation of confidential testimony.

All the deposition testimony introduced into evidence was designated confidential and filed under seal. Suffice it to say, most of the testimony was not confidential. For example, in the third-party depositions, the names of the witnesses, their educational and work experience, and the third-party uses of the marks were deemed confidential. Oppositions before the Board are public proceedings and the improper designation of materials as confidential thwarts the right of public access to testimony and evidence that form the basis of our decision. It is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts in evidence may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and a reviewing court will know the basis of the Board's decision. Therefore, in this opinion, we will treat as confidential only testimony and evidence we deem to have been appropriately designated

as confidential. See *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399, 1402-1403 (TTAB 2010). We will not be bound by all of the unnecessary confidential designations made by the parties.

The Record

By rule, the record includes applicant's application file and the pleadings. Trademark Rule 2.122(b), 37 CFR §2.122(b). In addition, the parties introduced the testimony and evidence identified below.

A. Opposer's testimony and evidence.

1. Notice of reliance on opposer's pleaded registrations printed from the electronic records of the USPTO showing the current status of and title to the registrations;

2. Discovery deposition of David Morris, applicant's President and CEO, with one exhibit. See the discussion *supra*; and

3. Testimony deposition of Erik Keptner, Senior Vice President of Marketing and Consumer Insights for Ahold USA, a company related to opposer,¹³ with attached exhibits.

B. Applicant's testimony and evidence.

1. Applicant's notice of reliance on the following items:

¹³ Keptner Dep., p. 8. Mr. Keptner did not explain the precise relationship between opposer and Ahold USA.

- a. Opposer's responses to applicant's interrogatories;
- b. Photocopy of a package of one of opposer's NATURE'S PROMISE products;
- c. Some documents from the prosecution of one of opposer's registrations;
- d. An advertisement from one of opposer's grocery stores; and
- e. Copies of four third-party registrations for NATURE'S PROMISE or variations thereof.¹⁴

2. Testimony deposition of David Morris with attached exhibits;

3. Testimony deposition of Paul Otim, a purported third-party user of the mark NATURE'S PROMISE, with attached exhibits;

4. Testimony deposition of Derrik Kassebaum, a purported third-party user of the mark NATURE'S PROMISE, with attached exhibits; and

5. Testimony deposition of George Atkinson, the Director of Marketing for Zelenka Nursery, Inc., a purported third-party user of the mark NATURE'S PROMISE, with attached exhibits.

¹⁴ Applicant also submitted a copy of an application for NATURAL PROMISE printed from the USPTO electronic database. A pending application is not competent to prove anything other than the fact that it was filed. *Merritt Foods Co. v. Americana Submarine*, 209 USPQ 591, 594 (TTAB 1980).

Standing

Because opposer has properly made its pleaded registrations of record, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Priority

Because opposer's pleaded registrations are of record, Section 2(d) priority is not an issue in this case as to the marks and the products and services covered by the registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. The fame of opposer's marks.

This *du Pont* factor requires us to consider the fame of opposer's mark. Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks

enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Fame may be measured indirectly by the volume of sales and advertising expenditures of the goods and services identified by the marks at issue, "by the length of time those indicia of commercial awareness have been evident," widespread critical assessments and through notice by independent sources of the products identified by the marks, as well as the general reputation of the products and services. *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1305-1306 and 1309. Although raw numbers of product sales and advertising expenses may have sufficed in the past to prove fame of a mark, raw numbers alone may be misleading. Some context in which to place raw statistics may be necessary (e.g., the substantiality of the sales or advertising figures for comparable types of products or services). *Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1309.

Finally, because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal

protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

NATURE'S PROMISE is a corporate brand used to identify a wide variety of natural and organic products sold by opposer. NATURE'S PROMISE is used to identify approximately 550 different products. Because opposer's sales figures have been designated as confidential, we can only refer to them in general terms but they are substantial.¹⁵

In 2007, opposer compiled a brand awareness study "based on our customer frequent shopper card data on the customer usage of various corporate brand products."¹⁶ The study "indicates that a very significant portion of [opposer's] customer base are users of Nature's Promise or purchasers of Nature's Promise."¹⁷

In 2008, opposer authorized a "consumer research study on awareness and attitudes of [opposer's] customers towards private label or corporate brands."¹⁸ According to the study, "71 percent of consumers that [opposer] surveyed were

¹⁵ Keptner Dep., pp. 8-9.

¹⁶ Keptner Dep., p. 22 and Exhibit 9.

¹⁷ Keptner Dep., p. 23.

¹⁸ Keptner Dep., p. 25 and Exhibit 10.

aware of the Nature's Promise brand" suggesting a "very high awareness of the Nature's Promise brand."¹⁹

While opposer's NATURE'S PROMISE product line has achieved commercial success and brand awareness among opposer's customers, the evidence of record is not sufficient to establish that opposer's NATURE'S PROMISE mark is famous for purposes of likelihood of confusion. For example, a study demonstrating that a significant percentage of opposer's own customers recognize opposer's corporate brand is derived from such a narrow universe of consumers that it is not sufficient to establish the fame of the mark especially because there is no evidence regarding opposer's market share and the renown of the mark among all consumers in the market for organic and natural foods. Furthermore, opposer did not introduce any evidence recognizing the renown of the NATURE'S PROMISE mark in any media. Finally, we note that opposer argues that "the consuming public consists of consumers exposed to [opposer's] advertising. As a result of [opposer's] advertising efforts and extensive use of its mark, [opposer's] NATURE'S PROMISE mark is its most recognized brand."²⁰ The problem with this argument is that the consuming public is not limited to consumers exposed to opposer's advertising and opposer did

¹⁹ Keptner Dep., p. 26.

²⁰ Opposer's Brief, p. 6.

not introduce testimony or evidence regarding the extent of its advertising, including its advertising expenditures. Moreover, as indicated above, opposer did not introduce any evidence regarding its market share and, therefore, we cannot draw any conclusions regarding the renown of the mark even if it is opposer's "most recognized brand."

- B. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

The marks are identical.

- C. The similarity or dissimilarity and nature of the products described in the application and registrations, the likely-to-continue trade channels and classes of consumers.

Applicant is seeking to register its NATURE'S PROMISE mark for, *inter alia*, pet food for small mammals.²¹

"Mammals" are "any vertebrate of the class Mammalia, having the body more or less covered with hair, nourishing the young with milk from the mammary glands, and, with the exception of the egg-laying monotremes [*i.e.*, echidnas and the platypus], giving birth to live young."²² Dogs and cats

²¹ It is sufficient for a finding of likelihood of confusion if the relatedness is established for any item encompassed by the identification of goods or services in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

²² American Heritage Dictionary of the English Language (Unabridged) p. 1165 (2nd ed. 1987). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

are mammals.²³ There is no testimony or evidence that the term "small mammals" is a term of art or has any special meaning in the pet food industry. Accordingly, the term "small mammals" in the applicant's description of goods could include cats and dogs.

Opposer, on the other hand, has registered the mark NATURE'S PROMISE for natural and organic food and a grocery store department featuring natural and organic foods.

Applicant argues that the goods of the parties are different: "Opposer's goods ... are solely for human consumption, while [applicant's] goods are for consumption by a very narrow category of animals, including rabbits, hamsters, chinchillas and other small mammals,"²⁴ "and not for traditional pets like cats and dogs."²⁵ Applicant further contends that "Opposer's natural or organic human food products marked with NATURE'S PROMISE are sold only in its own stores in segmented sections of the store marked with the NATURE'S PROMISE trademark."²⁶

With respect to applicant's argument, this proceeding concerns applicant's right to registration of a trademark,

²³ Encyclopedia Britannica (Academic Edition) (2011). The Board may also take judicial notice of standard reference works. *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) (encyclopedias may be consulted); *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1514 n.4 (TTAB 2001); *Sprague Electric Co. v. Electrical Utilities Co.*, 209 USPQ 88, 96 n.3 (TTAB 1980).

²⁴ Applicant's Brief, p. 11.

²⁵ Applicant's Brief, p. 12.

²⁶ Applicant's Brief, p. 13.

not applicant's actual trademark use. Because the scope of the registration applicant seeks is defined by its application (and not by its actual use) it is the application (and not actual use) that we must look to in determining applicant's right to register:

The authority is legion that the question of registrability of an 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 Syst. Inc. v. Houston Computers Svcs. Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Likewise, in considering the scope of opposer's registrations, we look to the description of goods and services in the registrations, and not to extrinsic evidence about opposer's actual goods and services, customers, or channels of trade. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), *citing Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958). Accordingly, in analyzing the similarity of the goods and services, channels of trade and classes of consumers, there are no restrictions or limitations in the descriptions of goods and services in the application or opposer's registrations and, therefore, applicant's arguments regarding the how the marks are actually used cannot be given any consideration.

With that premise in mind, we note that because opposer's food products are on their face different from applicant's pet food, it is incumbent upon opposer to show that the goods of the parties are related in some manner and/or the conditions surrounding the marketing of the products are such that they would be likely to be encountered by the same person under circumstances that could give rise (because of the similarity of the marks) to the mistaken belief that the products originate from or are in some way associated with the same producer. *Autac Inc. v. Walco Systems, Inc.*, 195 USPQ 11, 15 (TTAB 1977). In this case, the testimony and evidence establishes that the channels of trade and classes of consumers are the same, at least in part. That testimony and evidence is summarized below.

Opposer uses NATURE'S PROMISE to identify "a broad assortment of natural and organic products."²⁷ Opposer sells pet food, but not under the NATURE'S PROMISE mark. Opposer sells pet food through national brands or its COMPANION house or corporate brand.²⁸ Opposer's COMPANION pet food generates substantial revenues.²⁹ Opposer competes with pet food stores.³⁰

²⁷ Keptner Dep., p. 8.

²⁸ Keptner Dep., p. 28.

²⁹ Keptner Dep., p. 28.

³⁰ Keptner Dep., pp. 29-30.

Applicant sells its NATURE'S PROMISE pet food through independent pet stores, pet superstores, veterinarians, and mail order and internet sales through third-parties.³¹ Applicant, through Mr. Morris, testified that it competes with mass merchandisers for the sale of pet food³² because mass merchandisers, such as Wal-Mart and Target, sell as much as 60% of all pet food.³³ The testimony and evidence establishes that pet food is sold through grocery stores, mass merchandisers, pet stores, pet superstores, veterinarians, and mail order and internet sales. Since there are no restrictions as to the channels of trade in applicant's description of goods, we must presume that applicant's pet foods move in all channels of trade normal for those goods, including those indicated above. See *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

Finally, pet owners who purchase pet food also purchase groceries. "I would think that people who are buying [applicant's] products are also buying groceries."³⁴

Although, opposer introduced testimony and evidence regarding the channels of trade and classes of consumers, there was no testimony or evidence regarding the similarity or dissimilarity of the goods and services. The fact that

³¹ Morris Discovery Dep., p. 132; Morris Testimony Dep., pp. 19 and 22.

³² Morris Testimony Dep., pp. 93-94.

³³ Morris Testimony Dep., pp. 50-51, and 95 and Exhibit 20.

³⁴ Morris Discovery Dep., p. 213.

the particular products are sold through the same channels of trade to the same classes of consumers does not, *ipso facto*, establish that such products are related. *Autac Inc. v. Walco Systems, Inc.*, 195 USPQ at 15. See also *Canada Dry Corp. v. American Home Products Corp.*, 468 F.2d 207, 175 USPQ 557, 557 (CCPA 1972) (despite fact that laundry detergent and soft drinks are sold in the same channels of trade to the same classes of consumers, they are not related products). In this regard, we note that human food and pet food are not competitive or complementary products. Based on the record before us, the only similarity between pet food and human food is that they are both sold in grocery stores. This contention for finding that the goods are related has been rejected by the Court of Customs and Patent Appeals, the predecessor of our primary reviewing court.

A wide variety of products not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the customer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed. See: *Canada Dry Corp. v. American Home Products Corp.*, 468 F.2d 207, 175 USPQ 557 (CCPA, 1972). The means of distribution and sale, although certainly relevant, are areas of peripheral inquiry. The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the

essential characteristics of the goods
and differences in the marks.

Federated Foods, Inc. v. Fort Howard Paper Company, 544 F.2d
1098, 192 USPQ 24, 29 (CCPA 1976).

Pet food and human food are specifically different items of merchandise, a fact which would not be lost on average purchasers; they are different in appearance, general purpose and manner of use. While the products are sold in the same stores, this fact is not conclusive because as discussed above, supermarkets carry a vast assortment of goods.

Regardless, opposer contends that "it remains relevant that human and pet foods can and do emanate from the same source."³⁵

Other courts have decided there exists a likelihood of confusion between marks for human and pet foods. See *Recot, Inc. v. Becton*, [214 F.3d 1322] 54 USPQ2d 1894, 1898 (Fed. Cir. 2000); [sic] In *Recot* [sic] the court observed "several large companies produce and sell both human and pet food." *Id.* The court in *Recot* found such evidence, which the Board had ignored, extremely pertinent to the issue of whether consumers might believe that a trademark used on human food might be licensed for use on pet foods, or whether that trademark owner might produce or sponsor pet foods under its mark. *Id.*³⁶

³⁵ Opposer's Brief, p. 7.

³⁶ Opposer's Brief, p. 7. In *Recot*, the court noted that witnesses of both parties testified that several companies produce and sell both pet and human foods. 54 USPQ2d at 1898.

However, unlike the case in *Recot*, the evidence in this case does not support opposer's argument.³⁷ With exception of opposer itself, there is no evidence that other companies produce and sell both human and pet food. In fact, opposer is the only company identified in this record that produces and sells both human and pet food and, in that regard, opposer's pet food has a different trademark (*i.e.*, COMPANION).

Moreover, as noted by the Court of Appeals in *Federated Foods*, the "modern supermarket" sells "[a] wide variety of products" from many producers and industries. Absent evidence, there is no reason to assume that opposer's customers would believe that its NATURE'S PROMISE organic and natural foods and its COMPANION pet food - different in kind and sold under different marks - would share a common source merely because they are sold under the same roof. Here, opposer has produced no evidence that opposer's customers are aware that COMPANION pet foods come from the same source as opposer's NATURE'S PROMISE (human) food and related services. Thus, while opposer's own sale of COMPANION pet food makes opposer a competitor of applicant, that fact provides little or no support for the argument that relevant consumers would be confused as to the source

³⁷ We must decide this case based on the facts placed in evidence by the parties. Findings in other cases based on other records do not establish those factual matters in this proceeding.

of the goods and services at issue, sold here under a different mark.

Another reason opposer's reliance on *Recot* is misplaced is because the court found that *Recot*'s FRITO-LAY mark was famous and that the Board erred when it limited the weight accorded to the fame of the FRITO-LAY mark. 54 USPQ2d at 1897. The court reasoned that the fame of a mark may also affect the likelihood that consumers will be confused when purchasing products even when they are not closely related. *Id.* As discussed above, opposer failed to prove that its mark was famous.

While opposer failed to introduce any testimony or evidence to show that pet food and human food are related for purposes of likelihood of confusion, it likewise failed to introduce any testimony or evidence regarding the similarity or dissimilarity of pet food and a grocery store department featuring natural and organic foods. For example, there is no evidence that such a department in a grocery store would normally feature pet food or that pet food manufacturers promote their products as being natural and/or organic such that they might be found within a department within a grocery store featuring natural or organic products. Without any evidence supporting the relationship between pet foods and a department in a grocery store featuring natural and organic food, we cannot find

that the goods and services are related merely because they may both be found within a grocery store.

In view of the foregoing, we find that the goods and services at issue move in the same channels of trade and are sold to the same classes of consumers, there is no evidence demonstrating the goods and services are related.

D. The conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.

Applicant contends that its customers are focused on the nutritional quality of their pet food. "They understand the ingredients or the nutritional requirements of their pets."³⁸ By the same token, we assume that consumers for organic and natural foods are focused on the nutritional quality of their own food. However, applicant's description of goods is pet food for small mammals and it is not limited to an expensive or highly-specialized product line and, thus, average consumers may include those products among the ordinary items found on their weekly shopping list.

Likewise, there is nothing inherent in opposer's products and services that would demand that consumers exercise a heightened degree of care although they may be more concerned about their health than the average consumer. We must presume that both applicant's goods and opposer's goods

³⁸ Morris Discovery Dep., p. 129. See also Morris Testimony Dep., p. 24.

and services would be sold to all nature of customers. In this regard, there is no evidence in this record establishing that the customers for pet food and organic and natural foods inherently exercise a high degree of care when making their purchasing decisions. See *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

E. Instances of actual confusion.

Opposer first began using the mark NATURE'S PROMISE in May 2004.³⁹ Opposer's NATURE'S PROMISE is a corporate brand, or private label, for a broad assortment of natural and organic products.⁴⁰ The products are sold through opposer's grocery stores (e.g., GIANT, STOP & SHOP, PEAPOD and TOPS MARKET).⁴¹

Applicant first began using its NATURE'S PROMISE mark for pet foods in February, 2007. As indicated above, applicant sells its NATURE'S PROMISE pet food through independent pet stores, pet superstores, veterinarians, mail

³⁹ Keptner Dep., p. 9.

⁴⁰ Keptner Dep., pp. 8 and 20.

⁴¹ Opposer's response to Interrogatory No. 10.

order and over the internet through applicant's distributors.⁴²

Applicant argues that neither applicant nor opposer are aware of any reported instances of confusion. The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks. *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to have occurred. *Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. North American Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) ("the absence of actual confusion over a reasonable period of time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring"). The record shows that applicant's pet foods actually move in different markets than those served by opposer under its

⁴² Morris Discovery Dep., p. 132; Morris Testimony Dep., p. 19.

marks, and the period of the parties' concurrent use of the mark has been relatively brief. Under the circumstances, we find that there has not been a significant opportunity for actual confusion to have occurred, and so we give the absence of such confusion little weight.

F. Balancing the factors.

Although the marks are identical and the goods and services move in same channels of trade and are sold to the same classes of consumers, there is simply no evidence that consumers would expect that pet food and organic or natural food and a department in a grocery store featuring organic or natural food are related. In other words, opposer has failed to meet its burden of proving that consumers would mistakenly believe that pet food and organic or natural food emanate from the same source because of the similarity of the marks. Accordingly, applicant's registration of the mark NATURE'S PROMSISE for "food for caged birds, pet food for small mammals, hay" is not likely to cause confusion with opposer's mark NATURE'S PROMISE for organic and natural food and "a grocery store department featuring natural and organic foods."

In reaching this conclusion, we have carefully considered all of the evidence pertaining to the relevant *du Pont* factors, as well as all of the parties' arguments with

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respect thereto (including any evidence and arguments not specifically discussed in this opinion).

Decision: The opposition is dismissed and a notice of allowance will be issued in due course.