Mailed: April 29, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Zinpro Corp.

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Serial Nos. 85316592 and 85317092

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Edmund J. Sease of McKee Voorhees & Seese PLC for Zinpro Corp.

Brian Pino, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Cataldo, Adlin and Gorowitz, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Zinpro Corp., filed applications to register in standard characters on the Principal Register the marks shown below:

PROCARE 4

with "4" disclaimed,[1] and

[1] Application Serial No. 85316592 was filed on May 10, 2011, and amended to assert July 25, 2011 as the date of first use of the mark in commerce.

PROCARE ZN

with "ZN" disclaimed,[2] both for "loose mineral supplement packaged product feed nutrient/additive for non-pet livestock animals such as chickens, llamas, goats and rabbits" in International Class 5.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's marks, as used in connection with its goods, so resemble the mark, PROCARE, previously registered by two different entities on the Principal Register in typed or standard characters for

"dietary and nutritional supplements for pets" in International Class 5;[3] and

"veterinary pharmaceutical medicated pet products, namely, pesticidal flea and tick shampoo; medicated liquid bandage skin sealer; caloric food supplements; and deodorizer for pets and for carpet and upholstery" in International Class 5,[4] as to be likely to cause confusion.

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[2] Application Serial No. 85317092 was filed on May 10, 2011, and amended to assert July 25, 2011 as the date of first use of the mark in commerce.

[3] Registration No. 1859092 issued to Melaleuca, Inc. on October 18, 1994. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

[4] Registration No. 2803220 issued to Professional Pet Products, Inc. on January 17, 2009. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

When the refusals were made final, applicant appealed. Applicant and the examining attorney filed briefs on the issues under appeal.

Proceedings Consolidated

The appeals involve common issues of law and fact. Further, the records are essentially identical. Accordingly, we decide both appeals in this single opinion. *See, for example, In re Binion*, 93 USPQ2d 1531, 1533 (TTAB 2009). *See also* TBMP § 1214 (3d ed. 2011) and authorities cited therein.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

Registration No. 1859092

For purposes of the *du Pont* factors that are relevant to these appeals we will consider applicant's involved marks and the mark that is the subject of cited Registration No. 1859092. If likelihood of confusion is found as to the mark and goods in this registration, it is unnecessary to consider the other cited registration because it too identifies food supplement for pets.[5] Conversely, if likelihood of confusion is not found as to the mark and goods in this registration, we would not find likelihood of confusion as to the mark and goods in the other cited registration.

The Goods

Turning to our consideration of the recited goods, we must determine whether consumers are likely to mistakenly believe that they emanate from a common source. It is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods are related in some manner, and/or that the conditions and activities

[5] We observe that the two cited registrations are owned by different entities. However, we are not privy to the facts surrounding the registration of these marks, including any agreements that may exist between the owners thereof.

surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same producer. *See In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In *ex parte* cases, we must compare applicant's goods as set forth in its applications with the goods as set forth in the cited registration. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). In the present case, applicant's goods are identified as "loose mineral supplement packaged product feed nutrient/additive for non-pet livestock animals such as chickens, llamas, goats and rabbits," and registrant's goods are identified as "dietary and nutritional supplements for pets." We observe initially that applicant's goods appear to be related on their face to those of registrant inasmuch as applicant's goods are mineral supplements for livestock animals and registrant's goods are dietary and nutritional supplements for animals, namely pets.

In addition, the examining attorney submitted with his Office actions copies of approximately 30 use-based, third-party registrations reciting goods of a similar type to

those identified in the involved applications and cited registration. The following examples are illustrative:

> Registration No. 1772770 for "vitamin and mineral dietary feed supplements for livestock, domestic pets, and exotic animals";
>
> Registration No. 2270184 for goods including "nutritional additives for animal and livestock feed; feed supplements for livestock and pets";
>
> Registration No. 2262136 for goods including "feed for animals, including pets, livestock and farm animals"; and
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> Registration No. 2461025 for goods including "vitamin and mineral livestock feed supplements; vitamin and mineral feed supplements for animals; pet food supplements consisting of vitamins, proteins, and minerals".

These registrations suggest, in general, that applicant's mineral supplements for livestock are related to registrant's dietary and nutritional supplements for pets. *See In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001). Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source. *See, e.g., In re Albert Trestle & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

The examining attorney also made of record evidence from commercial internet websites showing that mineral, dietary and nutritional supplements for livestock and pets are offered under the same marks by third parties as well as applicant. These websites include cylex-usa.com, entirelypets.com, petag.com, americanlivestock.com, tscpets.com, karbostore.com and healthypets.com. Such evidence serves to demonstrate that third parties, as well as applicant, are using a single mark to identify applicant's types of goods as well as those of registrant.

Based upon the evidence made of record by the examining attorney and the nature of the goods themselves, we find that registrant's goods are related to those provided by applicant. The relatedness of the goods is a factor that weighs in favor of a finding of likelihood of confusion.

Channels of Trade and Classes of Consumers

Furthermore, it is settled that in making our determination regarding the relatedness of the parties' goods, we must look to the goods as identified in the involved applications and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("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 the sales of goods are directed"). *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods").

In this case, there are no restrictions in either applicant's or registrant's recitation of goods as to the channels of trade in which the goods may be encountered, or the type or class of customer to which the goods are marketed. Thus, the goods must be presumed to move in all normal channels of trade for pet and livestock supplements and be available to all classes of potential consumers. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). As a result, even though applicant's goods specify that they are for livestock and registrant's are for pets, there are no recited restrictions as to the trade channels in which these goods may move and, indeed, the evidence of record shows that they move in the same channels of trade.

Accordingly, this factor also supports a finding of likelihood of confusion.

The Marks

We turn to the first *du Pont* factor, i.e., whether applicant's marks and registrant's mark are similar or dissimilar when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result.

We discuss the similarity between the marks in applicant's involved applications and the cited registration below. For the reasons discussed *infra*, we find in both cases that the similarities between the marks favor a finding of likelihood of confusion.

Application Serial No. 85316592

Applicant's mark, PROCARE 4, is highly similar in appearance and sound to registrant's mark, PROCARE, in that

applicant's mark wholly incorporates the registered mark. In cases such as this, a likelihood of confusion has frequently been found. "When one incorporates the entire arbitrary mark of another into a composite mark, the inclusion of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion. [Internal citations omitted]. An inclusion of a merely suggestive or descriptive element, of course, is of much less significance in avoiding a likelihood of confusion." *See The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design is similar to the mark CONCEPT). *See also Coca-Cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER and Bengal Lancer soldier design is similar to the mark BENGAL); *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (E-CELL is similar to the mark E). Thus, the importance of applicant's incorporation of opposer's mark depends greatly on the degree of suggestiveness of that mark as well as elements of the marks that are not shared.

In this regard, we note that applicant has disclaimed "4" as merely describing its goods. As a result, the number 4 possesses comparatively less source identifying

significance than the term PROCARE. Applicant argues that PROCARE is a weak formative as a result of numerous third-party registrations for marks incorporating the term. In support of its argument, applicant has made of record copies of 20 third-party registrations consisting in whole or in part of the term PROCARE for largely medical and computer related goods and services in addition to other goods and services completely unrelated to those at issue herein. As a result, we do not find such evidence to support applicant's contention that PROCARE is a weak mark or otherwise should be accorded a narrow scope of protection as applied to the goods recited in the registration. We observe, nonetheless, that PROCARE appears to suggest on its face goods that provide a professional level of care in their formulation or effect. However, even allowing for any suggestive nature of the term PROCARE, the fact that applicant has incorporated the registered mark in its PROCARE 4 mark greatly increases the level of similarity between them.

In sum, we conclude that applicant's mark and the registered mark are substantially similar in terms of sound and appearance. Furthermore, to the extent the term PROCARE suggests that the goods identified thereby provide a professional level of care, such connotation is equally

likely to be attributed to both applicant's goods and those of registrant under their respective PROCARE 4 and PROCARE marks. As a result, we find that, overall, the marks convey highly similar commercial impressions. That is to say, the marks are likely to be viewed as variations of each other, but pointing to the same source. Accordingly, this *du Pont* factor weighs in favor of finding a likelihood of confusion.

Application Serial No. 85317092

For the reasons discussed above in our consideration of the similarity of registrant's mark with the mark in application Serial No. 85316592, we find that registrant's mark, PROCARE, is also highly similar to the mark, PROCARE ZN, in application Serial No. 85317092.

The wording PROCARE is identical in appearance, sound and meaning or connotation in both marks. The addition of the descriptive, disclaimed term "ZN" to applicant's mark is not sufficient to create a commercial impression that is distinct from that engendered by registrant's mark. In short, even with the addition of ZN, the similarities between applicant's mark and registrant's mark in appearance, sound, meaning and commercial impression far outweigh the differences.

Summary

In our determination of the refusal to register, we have considered all of the arguments and evidence submitted by applicant and the examining attorney, including any arguments and evidence not specifically discussed in this decision. In these cases, the similarity of the goods and their channels of trade, and the similarities between the marks, favor a finding of likelihood of confusion. It is well established that one who adopts a mark similar to the mark of another for the same or closely related goods or services does so at his own peril. *See J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed Cir. 1988); and *W.R. Grace & Co. v. Herbert J. Meyer Industries, Inc.*, 190 USPQ 308 (TTAB 1976).

Decision: The refusal of registration is affirmed in both cases.