

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 31, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Blue Buffalo Company, Ltd.
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Serial No. 85935706
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Edmund J. Ferdinand, III of Ferdinand IP, LLC
for Blue Buffalo Company, Ltd.

Mary J. Rossman, Trademark Examining Attorney, Law Office 109,
Dan Vavonese, Managing Attorney.

—
Before Quinn, Wellington, and Lykos,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Blue Buffalo Company, Ltd. (“Applicant”) seeks registration on the Principal
Register of the mark:



for “Cat food; Dog food; Pet beverages; Pet food” in International Class 31.¹ The terms “Stew” and “Co.” have been disclaimed.

The Trademark Examining Attorney has refused registration of Applicant’s mark based on a likelihood of confusion, under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the registered mark **HOLIDAY FEAST** (in standard characters) for “pet food” in International Class 31.²

Applicant has appealed and both Applicant and the Examining Attorney have filed briefs. We affirm the likelihood of confusion refusal.

Evidentiary Objection

The Examining Attorney has objected to Applicant’s submission, for the first time with its brief, of evidence consisting of a specimen of use for the cited registered mark, a printout from Applicant’s website, and copies of third-party registrations.³

¹ Application Serial No. 85935706 was filed on May 17, 2013, based upon an allegation of a bona fide intent to use the mark in commerce, under Section 1(b) of the Trademark Act. The application contains the following description of the mark:

The mark consists of a series of diamonds the outer most diamond having scalloped edges and being incomplete and contains the wording THE BLUE BUFFALO CO. (twice), a design of a buffalo, the word BLUE, and the wording THE and CO. on the lower sides of the diamond; the wording SANTA STEW and HOLIDAY FEAST appears upon a banner and wreath with a garland around the words SANTA STEW and HOLIDAY FEAST; there are bells, ribbon and leaves appearing below the words HOLIDAY FEAST; there is a Santa cap above the letter "E" in the word STEW.

² Registration No. 4299323 issued on March 5, 2013.

³ Applicant labelled these “Exhibits B, C, and D,” respectively. Applicant also submitted (as “Exhibit A”) copies of dictionary definitions for the terms “Holiday” and “Feast” from Webster’s Third New International Dictionary, and the Examining Attorney did not object to the introduction of these definitions. In any event, the Board may take judicial notice of dictionary definitions obtained from printed reference materials. *See*, in general, TBMP Section 1208.04 (Judicial Notice) (2014).

The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board. Rule 2.142(d). Because the objected-to materials were not filed prior to the appeal, they will be given no further consideration by the Board.

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 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Similarity of the Goods Described in the Application and Registration

We turn first to the *du Pont* factors involving the relatedness of the goods and, in this case, note that they are in part legally identical. That is, Applicant's goods and those identified in the cited registration include "pet food" and, of course, Applicant's "cat food" and "dog food" is encompassed by Registrant's "pet food." Accordingly, this factor strongly favors a finding of a likelihood of confusion.

Trade Channels, Care in Purchasing and Classes of Consumers for the Goods

Because the goods of Applicant and Registrant are in part identical, without any limitations on the trade channels or the purchasers to whom they are sold, we must assume those goods will travel in all of the same, normal channels of trade for pet food and will be offered to the same classes of purchasers, namely, pet owners. *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”). *See also, In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

We further note that pet food is generally not an expensive item, but is a general consumer good for pet owners. Thus, we cannot conclude that pet food consumers will exercise a higher level of care in their selection; to the contrary, we must consider the possibility that these goods will be purchased on impulse. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

Accordingly, the *du Pont* factors involving trade channels for pet food and classes of consumers to whom they are sold favor finding a likelihood of confusion. Because pet food is subject to impulse purchase, and nothing more than ordinary care would

be exercised by ordinary consumers, this factor weighs slightly in favor of the same conclusion.

Similarity of the Marks

In comparing the marks, we must consider them in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In making this determination, we note that where, as here, the parties' goods are in part legally identical, less similarity is needed between the marks at issue for a likelihood of confusion to be found than when the goods are somewhat different. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010) (less similarity needed when marks are used in connection with virtually identical goods).

Initially, we note the similarity in the marks stemming from Applicant's incorporation of the entirety of the registered mark, HOLIDAY FEAST. Applicant argues that any similarity based on this common portion has minimal importance because "HOLIDAY FEAST is descriptive of the goods at issue."⁴ However, as pointed out by the Examining Attorney, the registered mark is on the Principal Register, without a disclaimer, and thus any argument that the registered mark is descriptive is improper and unavailing in the context of an *ex parte* proceeding such as this. *See, e.g., In re Dixie Restaurants*, 41 USPQ2d at 1534, *citing Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 165 USPQ 515, 517 (CCPA 1970) and *In re*

⁴ Brief at p. 6.

Calgon Corp., 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971). Rather, the mark is presumed to be distinctive and Registrant is presumed to be exclusive right holder to use the term “Holiday Feast” in commerce on pet food. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b).

To the extent that Applicant argues that the wording “holiday feast” is used by others and thus is diluted, or that it is otherwise so suggestive that it is weak, the record does not support these contentions. There is no evidence of third-party use of the wording “Holiday Feast” in connection with pet food or that others have sought to adopt this wording in their marks for similar goods.⁵ While the plain meaning of these words suggests an extravagant meal in connection with a holiday, these words only have a playful meaning in the context of pet food. In this regard, we agree with Applicant to the extent that “holiday feast” may be perceived by consumers as being suggestive of a grandiose meal for their pets or pet food that has a seasonal flavoring. To this point, however, we reiterate that it has not been shown that others use or have adopted marks with that same suggestive meaning. Because the wording “holiday feast” will be understood in the same manner, it is likely consumers encountering both Applicant’s and Registrant’s pet food will perceive the

⁵ In this regard, we note the Examining Attorney submitted a copy of her USPTO “XSearch” database search summary reflecting no other registered or applied-for marks containing both terms, “holiday” and “feast,” for goods in International Class 31, *i.e.*, the class that covers the relevant goods. Attached to Office Action March 5, 2013. We further note, however, that this type of evidence does not prove the negative with respect to use in commerce, *i.e.*, the fact that others have not registered or even applied for marks containing the wording does not mean that the term is not actually being used in commerce for pet food.

same playful suggestion that their pets will be enjoying a holiday-themed or fancier meal. This creates more similarity in the marks rather than distinguishing them.

Our finding that “Holiday Feast” has no demonstrated weakness in connection with pet food also distinguishes the circumstances of this proceeding from many of the Board’s previous decisions that Applicant seeks to rely upon. That is, in Board proceedings where we have found that additional matter was sufficient to distinguish marks, the evidence generally showed the common element to have some weakness based on it being either descriptive or highly suggestive or frequently used and/or registered by others in the same or related fields. *See, e.g., Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011) (dictionary definition of term ELEMENT, as well as third-party registrations and evidence of use of same term in other marks on clothing); and *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005) (highly suggestive nature of ESSENTIALS based on its defined meaning was corroborated by numerous third-party registered marks containing the same term for clothing).

We have considered the marks in their entirety and do not ignore the presence of additional elements in Applicant’s mark; however, we find the overall commercial impressions of the marks are not so different to avoid a likelihood of confusion. Both marks engender a holiday-themed fancy meal, albeit in a playful manner inasmuch as it is for pet food. Applicant’s mark accentuates the Christmas season with the wording SANTA STEW that is prominently displayed in larger letters in the center of the mark. This is further enhanced with Christmas holiday design elements, *e.g.*,

a Santa cap, a wreath-like border, etc. However, Christmas is but one holiday, and we can envision consumers familiar with Registrant's HOLIDAY FEAST mark for pet food, encountering Applicant's mark on pet food, and mistakenly believing that the latter is merely a Christmas-themed variation ("Santa Stew") in a line of Registrant's HOLIDAY FEAST pet food. Again, while we must consider the marks in their entirety, we also bear in mind that they will be used on identical goods, and the entirety of the registered mark, having no demonstrated weakness, is found in Applicant's mark.

Applicant also points to the diamond-shaped border (containing the buffalo design and word "Blue") in its mark, describing this as its "BLUE house mark" or "famous SHIELD house mark."⁶ Applicant asserts that this house mark has "acquired extensive goodwill, has developed a high degree of distinctiveness and is well known as identifying high quality pet food that has its origin with [Applicant]."⁷ Applicant argues that it is therefore a "key point of differentiation between" the marks.

There is no *per se* rule that the addition of a house mark is insufficient to differentiate confusingly similar marks; however, the Board has long held that a likelihood of confusion is not avoided merely by adding trade names and house marks to otherwise identical terms. Indeed, "such addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in distinguishing the marks so as to avoid source confusion." *In re Christian Dior, S.A.*, 225 USPQ 533,

⁶ Brief at pp. 4 and 18, respectively.

⁷ *Id.* at 5.

534 (TTAB 1985). Here, the record does not reflect that consumers are aware of the aforementioned diamond-shaped design element being a house mark. Even if consumers are aware of this design element being a house mark, and we agree it does have the appearance thereof, this does not mitigate the likelihood of confusion. As suggested in *Christian Dior*, consumers already familiar with Registrant's mark HOLIDAY FEAST may view Applicant's mark and mistakenly believe that both marks are from a single source, and that the addition of what Applicant refers to as its house mark merely further identifies that single source. *See also In re Apparel Ventures, Inc.*, 229 USPQ 225, 226 (TTAB 1986) (SPARKS BY SASSAFRAS is similar to SPARKS).

Conclusion

In summary, we have carefully considered all of the evidence and arguments of record relevant to pertinent *du Pont* likelihood of confusion factors. As our precedent dictates, we resolve doubt in favor of the prior registrant. *See In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). We conclude that with identical goods traveling in the same channels of trade, and being offered to the same consumers exercising only an ordinary level of care in their purchases that may include impulse shopping, there is sufficient similarity between the marks to cause a likelihood of confusion.

Decision: The likelihood of confusion refusal to register Applicant's mark is affirmed.