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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91182461
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

KEMIN INDUSTRIES, INC., Opposer	)	
v.	)	Opposition No. 91182461
ROBERT GEORGE, JR., Applicant	)	

OPPOSER'S BRIEF

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KEMIN INDUSTRIES, INC., Opposer	)	
v.	)	Opposition No. 91182461
Robert George, Jr., Applicant	)	

OPPOSER'S BRIEF

I. INTRODUCTION

On February 14, 2008 Kemin Industries, Inc. (hereinafter "Opposer") filed the instant Opposition to the registration of the proposed mark "DETOX," by Robert George, Jr. (hereinafter "Applicant") in light of Opposer's mark "PET-OX." PET-OX has clear priority over DETOX, the two marks are highly similar and likely to cause confusion in the marketplace, and the mark DETOX is merely descriptive.

Case law establishes that there is a likelihood of confusion when the relevant goods or services are related, especially if the marks are identical or nearly identical. Both Opposer's and Applicant's mark cover chemical preparations used in animal feeds, which are sold in the same channels of trade to the same consumers.

Opposer seeks an Order from the Board denying registration of Applicant's DETOX mark for chemical preparations for preventing mold and mildew and chemical preparations which kill and inhibit mold and mildew in foods and animal feeds, as the mark is confusingly similar to Opposer's PET-OX mark.

II. STATEMENT OF FACTS

Opposer is a corporation organized and existing under the laws of the State of Iowa with its principal office located at 2100 Maury Street, Des Moines, Iowa 50301. Opposer is a provider of a wide variety of human and animal health and nutrition products, including chemical preparations for preventing mold and mildew and chemical preparations which kill and inhibit mold and mildew in foods and animal feeds, and services related thereto, which are sold under the mark PET-OX. Opposer first used the mark PET-OX in connection with its goods and services at least as early as September 29, 1989, and used the mark in commerce at least as early as September 29, 1989. Opposer applied for registration of PET-OX with the USPTO on May 13, 1997, and registration was granted on May 26, 1998 in Classes 001 and 005.

Applicant filed an Intent-to-Use trademark application on March 21, 2007 for the proposed mark "DETOX." On February 14, 2008 Opposer filed its opposition to the registration of the proposed mark in light of Opposer's mark PET-OX. Opposer argued that its use of the mark in commerce predates Applicant's filing of an intent-to-use application, that the two marks were highly similar and likely to cause confusion, and that the mark DETOX is merely descriptive. Applicant replied to the opposition on March 24, 2008, and thereafter the Opposer and Applicant began settlement negotiations.

On July 20, 2009, the Trademark Trial and Appeal Board granted Opposer time to show cause why the Board should not treat its failure to file a brief as a concession of the case. Applicant subsequently drafted a settlement agreement and presented it to Opposer for execution on August 28, 2008. After further revision, Applicant drafted and presented a final version of the settlement agreement to Opposer on September 11, 2009, which Opposer executed and

returned on September 24, 2009. Applicant failed to file said settlement agreement with the United States Patent and Trademark Office. The instant action followed.

III. ARGUMENT

A. Opposer's Mark PET-OX has Priority over DETOX.

PET-OX has priority over Applicant's DETOX mark. To establish priority, Opposer must show proprietary rights in the mark that produce a likelihood of confusion. Otto Roth & Co v. Universal Foods Corp., 640 F.2d 1317 (CCPA 1981). These rights may arise from a prior registration, prior trademark use, prior use as a trade name, prior use analogous to trademark use, or any other use sufficient to establish proprietary rights. Id. Opposer has shown substantial use of its mark in interstate commerce well in advance of Applicant's filing date.

Opposer first used the mark PET-OX in connection with its goods and services at least as early as September 29, 1989, and used the mark in commerce at least as early as September 29, 1989. Opposer applied for registration of PET-OX with the USPTO on May 13, 1997, and registration was granted on May 26, 1998 in Classes 001 and 005. Applicant filed an Intent-to-Use trademark application on March 21, 2007.

B. Under the DuPont Factors, There is a Likelihood of Confusion Between DETOX and PET-OX.

The registration of DETOX should be denied because the mark is confusingly similar to Opposer's PET-OX mark. Section 2(d) of the Trademark Act provides:

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the Principal Register on account of its nature unless . . . (d) consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion or to cause mistake, or to deceive. . .

Actions in opposition to registration are adjudicated under the Federal Circuit approach to § 2(d) likelihood of confusion analysis because the T.T.A.B. regards the Federal Circuit as its "primary reviewing court." Carl Karcher Enters., Inc. v. Stars Rests. Corp., 35 U.S.P.Q.2d 1125, 1133 (T.T.A.B. 1995). In Application of E. I. DuPont DeNemours & Co., the Federal Circuit discussed the likelihood of confusion analysis as applied to the registration of a mark:

> Under the statute the Commissioner must refuse registration when convinced that confusion is likely because of concurrent use of the marks of an applicant and a prior user on their respective goods. The phrase 'on account of its nature' in sec. 2 clearly applies to the 'resembles' element of sec. 2(d). But the question of confusion is related not to the nature of the mark but to its effect 'when applied to the goods of the applicant.' The only relevant application is made in the marketplace. The words 'when applied' do not refer to a mental exercise, but to all of the known circumstances surrounding use of the mark.

476 F.2d 1357, 1360 (C.C.P.A. 1973) (emphasis added).

The Federal Circuit's likelihood of confusion analysis of related goods is "a question of law, based on findings of relevant underlying facts, namely findings under the DuPont factors." M2 Software, Inc. v. M2 Communications, Inc., 450 F.3d 1378, 1381 (Fed. Cir. 2006); DuPont 476 F.2d at 1361. The DuPont factors used to determine a likelihood of confusion in a trademark opposition are:

> (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing; (5) the fame of the prior mark (sales, advertising, length of use); (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used (house mark, "family" mark, product mark); (10) the market interface between applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion, *i.e.*, whether

> *de minimis* or substantial; and (13) any other established fact probative of the effect of use.

See also Cunningham v. Laser Golf Corp., 222 F.3d 943, 946 (Fed. Cir. 2000).

The relevant factors are analyzed below. Id. at 947 (Fed. Cir. 2000) (The Board can satisfy the "DuPont test by considering each of the DuPont factors for which evidence was presented in the record."). The basic principle that the Court follows in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used. In re National Data Corp., 753 F.2d 1056, 1058 (Fed. Cir. 1985). The relevant DuPont factors indicate a strong likelihood of confusion between DETOX and PET-OX, particularly under the first, second and tenth DuPont factors, and Applicant's registration should therefore be denied.

(1) *DuPont* Factor One: The similarity or dissimilarity of the marks in their entireties as to appearance, sound connotation and commercial impression.

The first DuPont factor weighs heavily for a finding of likelihood of confusion because PET-OX and DETOX are highly similar in appearance, sound, connotation, and commercial impression. The similarity inquiry examines the relevant features of the marks, including appearance, sound, connotation, and commercial impression. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565 (Fed. Cir. 1983). This examination is done in light of the recollection of the average purchaser, who "normally retains a general, rather than a specific, impression of trademarks." Barbara's Bakery, Inc. v. Barbara Landesman, 82 U.S.P.Q.2d 1283 (T.T.A.B. 2007).

Both marks contain two syllables, share the same dominant syllable, end with the distinctive -ox letter combination, and differ by only one letter. See Sabinsa Corp. v. Creative Compounds, LLC, 609 F.3d 175, 184 (3d Cir. 2010) cert. denied, 131 S. Ct. 960 (U.S. 2011)

(Finding the marks "ForsLean" and "Forsthin" phonetically and visually similar because they "share all but three letters, have the same dominant syllable and end letter, and have the same number of syllables."), and Beer Nuts, Inc. v. Clover Club Foods Co., 805 F.2d 920, 926 (10th Cir.1986) (finding "Beer Nuts" and "Brew Nuts" to be confusingly similar because "beer" and "brew" are both one-syllable words beginning with "b," three of four letters are identical, and because the word "brew," as used, means "beer"). This factor weighs heavily in favor of a § 2(d) rejection, and relates to the second factor, because Applicant's mark DETOX is both highly similar to Opposor's PET-OX, and the two marks are both being used on animal feeds.

(2) Factor Two: The similarity or dissimilarity and nature of the goods or services as described in the application or registration of in connection with which a prior mark is in use.

There is likelihood of confusion between DETOX and PET-OX because the goods described in the DETOX application are substantially similar to those described in the PET-OX registration as to animal feeds. The second, "related goods" DuPont factor "compares the goods and services in the applicant's application with the goods and services in the opposer's registration." Hewlett-Packard Co. v. Packard Press, Inc., 281 F.3d 1261, 1267 (Fed. Cir. 2002). The goods designated by the mark need not be identical to create a likelihood of confusion, because "[e]ven if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services." Id. See also In re Save Venice New York, Inc., 259 F.3d 1346, 1355 (Fed. Cir. 2001) ("The 'related goods' test measures whether a reasonably prudent consumer would believe that non-competitive but related goods sold under similar marks derive from the same source, or are affiliated with, connected with, or sponsored by the same trademark owner.").

At issue is whether the use of the goods as applied to animal feed additives will confuse the public as to the source of the goods, not whether the goods will be confused with each other. Safety-Kleen Corp. v. Dresser Indus., Inc., 518 F.2d 1399, 1404 (C.C.P.A. 1975). Where the marks under consideration have similar appearance, sound, connotation, and commercial impression, as in the instant case, the relationship between the goods or services need not be as close to support a finding of likelihood of confusion as would be required in a case where there are differences between the marks. Amcor, Inc. v. Amcor Industries, Inc., 210 U.S.P.Q. 70, 78 (TTAB 1981). Applicant is attempting to register the mark DETOX for use on the same type of goods being sold by Opposer: as additives to animal feeds.

There is likelihood of confusion because Applicant seeks to register DETOX to be used as an additive to animal feed, and thus the nature of the goods sought to be registered in the application are highly similar to those in the PET-OX registration. The Federal Circuit has determined that where the opposer owns a registration, one only compares the goods as listed in opposer's registration with the goods listed in the applicant's application. See CBS, Inc. v. Morrow, 708 F.2d 1579 (Fed. Cir. 1983). PET-OX is registered on the principle register for additive "antioxidants for use in the manufacture of companion *animal foods.*" (emphasis added). The application for DETOX described the goods under Class 001 as "[c]hemical preparations for preventing mold and mildew in residential, commercial, industrial, agricultural, institutional, medical, military and construction applications namely for treating mold growth in and around buildings, in foods, in *animal feeds*, in textiles, in pharmaceuticals and on various surfaces. . ." and under Class 005 as "[c]hemical preparations which kill mold and mildew in foods, *animal feed*, textiles, pharmaceuticals, and on various surfaces; Mold inhibitors for foods, *animal feed*, textiles, pharmaceuticals, and on various surfaces; Mold inhibitors for use in residential,

commercial, industrial, agricultural, institutional, medical, military and construction applications, namely, mold inhibitors for treating mold growth in and around buildings, in foods, in *animal feeds*, in textiles, in pharmaceuticals and on various surfaces; Chemical preparations for killing mold and mildew in residential, commercial, industrial, agricultural, institutional, medical, military and construction applications; Chemical preparations which kill mold and mildew; Chemical preparations which inhibit mold and mildew growth, namely, mold inhibitors for treating mold growth in and around buildings, in foods, in *animal feeds*, in textiles, in pharmaceuticals and on various surfaces." (emphasis added).

Applicant's proposed use of DETOX for animal feeds is thus extremely similar to the established use of PET-OX for animal food additives and creates a strong likelihood of confusion as to the source of the goods. Coupled with the similarity of the marks, this weighs heavily in favor of a finding of likelihood of confusion under DuPont analysis. In re SL&E Training Stable, Inc., 88 U.S.P.Q.2d 1216 (T.T.A.B. 2008) ("In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods.").

(3) Factor Three: The similarity or dissimilarity of established, likely-to-continue trade channels.

There is a strong likelihood of confusion under the third DuPont factor: the similarity of the trade channels for DETOX and PET-OX because they are presumed to move in the same channels of trade. Without an express limitation in Applicant's identification of the goods or services, the Board will presume that the goods move through all reasonable trade channels for such goods to all reasonable classes of consumers for such goods. 3 McCarthy on Trademarks and Unfair Competition § 20:15 (4th ed.) (hereinafter "McCarthy"), Glamorene Products Corp.

v. Procter & Gamble Co., 538 F.2d 894, 896 (C.C.P.A. 1976) ("The issue of likelihood of confusion must be resolved on the basis of the goods as broadly stated in [the] application for registration."). Applicant provides no limitation in the application as to the trade channels for DETOX, and thus it is presumed to coexist with PET-OX in the marketplace for companion animal food additives. There is thus a strong likelihood of confusion under the third DuPont factor.

(4) Factor Four: The conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful sophisticated purchasing.

The fourth DuPont factor does not weigh against a finding of likelihood of confusion. This factor normally attempts to determine the likelihood of confusion for a "reasonably prudent consumer." In re Save Venice New York, Inc., 259 F.3d 1346, 1355 (Fed. Cir. 2001) ("The related goods test measures whether a reasonably prudent consumer would believe that non-competitive but related goods sold under similar marks derive from the same source, or are affiliated with, connected with, or sponsored by the same trademark owner."). Opposer markets and sells PET-OX to manufacturers of companion animal feed to prevent oxidation in the animal foods. Based on Applicant's registration, Applicant presumably seeks to market DETOX for use in preventing mold and mildew in animal feeds: the same market. Therefore, the reasonably prudent consumer in the instant case is a purchaser of additives for use in the manufacture of animal foods that may become confused as to the source of DETOX, and assume that it is either a substantially similar or complimentary animal food additive product manufactured by Opposer.

There is no evidence in the record to indicate the particular level of sophistication required to elevate these consumers to "discriminating purchasers" utilizing an enhanced level of care. Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964 (10th Cir. 2002) ("A sophisticated

§consumer is more likely to exercise a high level of care and less likely to be confused."); McCarthy § 23:96 ("In making purchasing decisions regarding 'expensive' goods, the reasonably prudent person standard is elevated to the standard of the 'discriminating purchaser.'"). This lack of evidence (from either party) on the degree of care exercised by the purchasers thus does not favor either party in a determination of likelihood of confusion under the fourth DuPont factor.

6. Factor Ten: The market interface between applicant and the owner of a prior mark.

The tenth DuPont factor strongly favors the denial of registration for DETOX because Applicant offered a settlement to Opposer acknowledging the likelihood of confusion, which Opposer accepted. The tenth factor looks to evidence of, in relevant part "(b) agreement provisions designed to preclude confusion, i.e., limitations on continued use of the marks by each party," to determine if the parties' conduct indicates a likelihood of confusion. When Applicant drafted and offered a settlement to Opposer which Opposer accepted, this agreement to preclude confusion strongly indicates that a likelihood of confusion exists between the marks, and that the Applicant's subsequent attempts to use the DETOX mark should not be allowed.

DETOX is confusingly similar to PET-OX under the tenth DuPont factor because Applicant's settlement offer was drafted to preclude confusion with the PET-OX mark. Applicant agreed to cease use of DETOX in the market for companion animal food additives in its own settlement offer. After Applicant filed an Intent-to-Use application for the proposed mark "DETOX," Opposer filed opposition to the registration, and thereafter entered into settlement negotiations with Applicant. Applicant subsequently drafted a settlement agreement and presented it to Opposer on September 11, 2009, which Opposer executed and returned on September 24, 2009. Applicant failed to return an executed copy to Opposer or file the

settlement agreement with the United States Patent and Trademark Office, and the present action ensued.

Applicant made a clear offer to Opposer, and Opposer accepted that offer. The terms of the executed settlement agreement, as drafted by Applicant, conceded a likelihood of confusion. Applicant agreed to remove any and all references to "chemicals or chemical preparations used in animal feed, pet food, or any other similar language" in the listing of goods in any Statement of Use filed with respect to the DETOX application. The agreement also provided that Applicant would not seek any registrations in the future for an "-ETOX" or similar mark for chemicals or chemical preparations used in animal feed or pet food, and "refrain from selling any animal feed, pet food, or any other similar product bearing any form of the DETOX mark." Finally, Applicant agreed to acknowledge the validity of the PET-OX trademark as applied, and Opposer agreed to withdraw opposition.

The tenth DuPont factor thus strongly weighs in favor of a finding of likelihood of confusion because Applicant's own conduct indicates efforts to preclude confusion. When the DETOX mark is applied to goods similar or identical to those sold by Opposer, it so nearly resembles Opposer's mark as to be likely to be confused with and mistaken for Opposer's mark. Applicant's mark is deceptively similar to Opposer's mark so as to cause confusion and lead to deception as to the origin of Applicant's goods displaying the mark. Through widespread, continuous, and substantially exclusive use, Opposer has developed valuable goodwill in respect to the PET-OX mark among purchasers of animal feed additives. In determining likelihood of confusion, Opposer's logical zone of expansion into Applicant's goods may also be considered. CPG Products Corp. v. Perceptual Play, Inc., 221 U.S.P.Q. 88 (TTAB 1983). Should Applicant now be allowed to successfully register the mark DETOX, there is a possibility that a likelihood of confusion would arise amongst prospective purchasers of additives for use in the manufacture of

animal foods, in that they would assume that PET-OX and DETOX are members of a family of additives from the same source.

Applicant should further be denied registration because in the settlement agreement, it concedes the validity of Opposer's mark, which is well known amongst purchasers of additives for use in the manufacture of animal foods. Opposer has been using PET-OX in connection with its goods and services in commerce for more than 20 years, beginning at least as early as September 29, 1989. Through Opposer's efforts and the expenditure of money, advertising, and promoting its goods identified by its PET-OX mark, and through the high quality of such goods, Opposer has gained an excellent and valuable reputation amongst these consumers. If Applicant is permitted to use and register its mark for its goods as set out in the subject application, confusion in the marketplace will occur and result in damage and injury to Opposer due to the similarity between Applicant's mark and Opposer's mark. Persons familiar with Opposer's mark would be likely to purchase Applicant's goods as, and for, a product made and sold by Opposer. Any such confusion in the marketplace would inevitable result in loss of sales to Opposer. Moreover, any defect, objection, or fault found with Applicant's products marketed under the subject trademark would necessarily reflect upon and seriously injure the reputation which Opposer has established for its products promoted and identified under its mark.

If Applicant is granted the registration herein opposed, it would thereby obtain at least a prima facie exclusive right to the use of its mark and such registration would be a source of damage and injury to Opposer. Applicant's mark must not be registered as it is likely to cause confusion with Opposer's mark.

C. **DETOX is Merely Descriptive.**

Applicant should be denied registration because "DETOX" is merely descriptive and has not acquired secondary meaning. Without proof of acquired secondary meaning, a mark must be inherently distinctive to qualify for registration under §2(e), and may not be "merely descriptive." Because DETOX is a merely descriptive mark to prospective purchasers, Applicant's registration should be denied.

A descriptive mark is one that directly and accurately gives distinct information about a characteristic of a product or service to the relevant consumers. McCarthy §11:19. Descriptive marks are more likely to be weak marks, because a "descriptive mark . . . immediately conveys the nature or function of the product[.]" Duluth News-Tribune, 84 F.3d at 1096. A "mark is merely descriptive if it immediately conveys to one seeing or hearing it knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is use."

The test devised to determine whether a mark is descriptive originated with the U.S. Circuit Courts of Appeal and was later adopted by the Court of Appeal for the Federal Circuit and its predecessor. See In re Abcor Development Corp., 200 USPQ 215 (CCPA 1978) (citing with approval Union Carbide Corp. v. Ever-Ready, Inc., 188 USPQ 623, 635 (7th Cir. 1976) and Abercrombie & Fitch Co. v. Hunting World, Inc., 189 USPQ 759, 765 (2nd Cir. 1976)). "A term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of the goods. . . . [a] term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods." In re Abcor, 200 USPQ at 218 (citing Abercrombie & Fitch Co., 189 USPQ at 765); See McCarthy § 11:19 (4th ed.), and Application of Quik-Print Copy Shops, Inc., 616 F.2d 523, 525, 205 U.S.P.Q. 505 (C.C.P.A. 1980) (QUIK-PRINT for services of printing and photocopying was merely descriptive.). Furthermore, the test

requires that the descriptiveness of a mark, when applied to the goods involved, be determined from the standpoint of an average prospective purchaser." In re Abcor, 200 USPQ at 218 (citations omitted).

DETOX is merely descriptive to the average prospective purchaser of additives for use in the manufacture of companion animal foods. See In re Northland Aluminum Products, Inc., 777 F.2d 1556, 1559, 227 U.S.P.Q. 961 (Fed. Cir. 1985) (Evidence of "understanding of the term may be obtained from any competent source, such as consumer surveys, dictionaries, newspapers and other publications."). The following definitions for "detox" and "detoxify" were taken from the Random House dictionary:

Main Entry: **de·tox**

1. detoxification.

2. to detoxify.

Main Entry: **de·tox·i·fi·ca·tion**

1. *Biochemistry*. the metabolic process by which toxins are changed into less toxic or more readily excretable substances.

2. the act of detoxifying.

Main Entry: **de·tox·i·fy**

1. to rid of poison or the effect of poison.

"Detox" plainly means to remove toxins or rid of poison. To the relevent purchaser, "DETOX" for additives to companion animal foods thus immediately conveys the nature or function of the product—a chemical preparation that kills mold and mildew—removing toxins from animal food. Therefore, the mark is merely descriptive to the average prospective

purchaser of companion animal food additives and should not be registered absent a showing of secondary meaning.

IV. Conclusion

Based on the foregoing, Opposer respectfully submits that there is a likelihood of confusion in the present matter. It is likely that customers purchasing Applicant's goods will believe that they are buying Opposer's animal feed additives, or that Opposer has expanded their animal feed product line and would be confused as to the source of the goods in the marketplace.

Accordingly, Opposer respectfully urges that the opposition be granted and the registration of Applicant's mark be denied.

Respectfully submitted,

KEMIN INDUSTRIES, INC.

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