

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 47

Date of Decision: 2021-03-18

IN THE MATTER OF FOUR OPPOSITIONS

10333972 Canada Inc.

Opponent

and

Panagiotis Nikolarakos

Applicant

**1,808,312 for ALPHA DOG
1,843,194 for ALPHA DOG ON!
1,843,195 for ALPHA DOG THRIVE!
1,843,196 for ALPHA DOG BRAWN!**

Applications

OVERVIEW

[1] Panagiotis Nikolarakos (the Applicant) has applied for registration of the trademarks ALPHA DOG, ALPHA DOG ON!, ALPHA DOG THRIVE! and ALPHA DOG BRAWN! (sometimes collectively referred to as the Marks), based on proposed use in Canada, in association with the following goods and services:

- ALPHA DOG

Dietary and nutritional supplements for canine consumption and general well-being, namely, nutraceutical preparations containing a nootropic formulation for the purpose of enhancing memory, cognition, focus, concentration, learning, comprehension and reaction time, and reducing anxiety

Operation of a website featuring information in the field of canine nutritional supplements and nutraceuticals, namely, canine nootropics

- ALPHA DOG ON!

Canine dietary and nutritional supplements for general health and well-being, namely, nutraceutical preparations containing a nootropic and antioxidant formulation for the purpose of enhancing memory, cognition, focus, concentration, learning, comprehension and reaction time, and reducing anxiety

- ALPHA DOG THRIVE!

Nutraceutical preparations for canines, namely, dietary and nutritional supplements for general health and well-being

- ALPHA DOG BRAWN!

Nutraceutical preparations for canines, namely, dietary and nutritional supplements for general health and well-being

[2] 10333972 Canada Inc. (the Opponent) has opposed the applications mainly on the basis that the Marks are confusing with its trademarks ALPHA DOG and ALPHA DOG DISTRIBUTION (sometimes collectively referred to as the Opponent’s Trademarks).

[3] For the reasons that follow, I find that each application ought to be refused.

FILE RECORDS

[4] The table below summarizes some of the particulars for each of the opposed trademark applications, namely the dates that they were respectively filed, advertised for opposition purposes in the *Trademarks Journal*, and opposed.

Application No.	Filed on	Advertised on	Statement of opposition filed on
1,808,312	November 7, 2016	September 13, 2017	November 6, 2017
1,843,194	June 16, 2017	September 6, 2017	November 6, 2017
1,843,195	June 16, 2017	September 6, 2017	November 6, 2017
1,843,196	June 16, 2017	June 13, 2018	November 13, 2018

[5] The oppositions were brought under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act), and raise grounds of opposition based upon sections 30 (non-compliance); 16 (non-

entitlement); and 2 (non-distinctiveness) of the Act. All references herein are to the Act as amended on June 17, 2019, with the exception of references to the grounds of opposition which refer to the Act before it was amended.

[6] The Applicant filed and served counter statements denying the Opponent's allegations.

[7] In each case, the Opponent filed the affidavit of Cédrik Gervais, the Opponent's president and a former partner of the Opponent's predecessor in title, while the Applicant elected not to file any evidence.

[8] Both parties filed written representations in every proceeding with the exception that the Opponent did not file a written argument in respect of its opposition to trademark application No. 1,843,196. Oral hearings were held at which only the Opponent was represented.

PRELIMINARY REMARK

[9] At the hearings, the Opponent raised an objection with respect to the content of the Applicant's written arguments filed in each of the proceedings. In particular, the Opponent submits that these documents comprise several allegations which have not been properly introduced as evidence. I confirm having disregarded any submissions contained in the Applicant's written arguments referring to matters that have not been set out in evidence.

ONUS

[10] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the applications comply with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

[11] I will first consider the Opponent's opposition to application No. 1,808,312 for ALPHA DOG.

Section 30(i)

[12] The Opponent did not file any evidence or make any submissions in support of this ground. Accordingly, the section 30(i) ground of opposition is rejected for the Opponent's failure to meet its initial evidential burden.

Section 16(3)(a)

[13] The Opponent alleges that the Applicant is not the person entitled to registration pursuant to section 16(3)(a) of the Act, because the Mark is confusing with its trademarks ALPHA DOG and ALPHA DOG DISTRIBUTION previously used in Canada by the Opponent or its predecessor in title, Distribution Alpha Dog S.E.N.C., in association with raw meat for pets, pet food, the operation of a retail and wholesale pet food and accessories store, and retail and wholesale sale of pet food and accessories.

[14] To succeed with respect to this ground, the Opponent has to show that its relied upon trademarks had been used in Canada as of November 7, 2016, and had not been abandoned as of September 13, 2017 [section 16(5) of the Act].

[15] In that regard, following a fair review of the whole of Mr. Gervais' evidence, I am satisfied that it establishes that the Opponent's trademark ALPHA DOG DISTRIBUTION has been used in association with pet food, including raw meat formulas for dogs and the operation of a store that sells pet food since January 23, 2016 (see, for instance, how this trademark and/or design variations thereof such as the ones reproduced in Schedule A below appear on labels and product packaging for pet food sold by the Opponent [para 12, Exhibit 4], on the Opponent's Facebook page [paras 9 and 13, Exhibits 1, 2, 4 and 5], as well as on the Opponent's storefront signage [para 10, Exhibit 2]).

[16] As for the Opponent's trademark ALPHA DOG, I accept that use of ALPHA DOG DISTRIBUTION also constitutes use of the trademark ALPHA DOG, but only as far as the Opponent's sale of pet food is concerned. In the design variation reproduced as Logo 3 in Schedule A below, predominantly used by the Opponent on its Facebook page to promote its store and the pet food that it sells [paras 9, 13-14, Exhibits 1, 2, 4 and 5], I note that the terms "alpha dog" appear in much larger font and are positioned above the descriptive term "distribution". As such, in my view, use of the design in question would be recognized by consumers, as a matter of first impression, as use of the mark ALPHA DOG [on this point, see *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)].

[17] I would add that use of a trademark in standard characters can be supported by use of said trademark in stylized form [*Stikeman, Elliott v Wm Wrigley Jr Co* (2001), 14 CPR (4th) 393 (TMOB)] and that nothing prevents the Opponent from using more than one trademark at the same time [*AW Allen Ltd v Warner Lambert Canada Inc* (1985), 6 CPR (3d) 270 at 272 (FCTD)].

[18] As the Opponent has met its evidential burden under this ground, I have to determine if the Applicant has met its onus of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion.

Test for confusion

[19] The test to determine the issue of confusion is one of first impression and imperfect recollection. Section 6(2) of the Act stipulates that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification. Therefore, section 6(2) of the Act does not concern confusion of the trademarks themselves, but confusion of the goods or services from one source as being from another.

[20] In applying the test for confusion, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act, namely: (a) the

inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time they have been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context-specific assessment [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis. In the present case, I will therefore consider the degree of resemblance factor first.

Degree of resemblance

[21] This factor strongly favours the Opponent. With respect to the Opponent's trademark ALPHA DOG, the parties' marks are identical. With respect to the Opponent's trademark ALPHA DOG DISTRIBUTION, they are decidedly similar given that the dominant element in both marks is "alpha dog" which is more striking or unique than the descriptive term "distribution" included in the Opponent's trademark.

[22] To support his argument that the parties' marks differ, the Applicant compares his ALPHA DOG trademark to the design appearing as Logo 2 in Schedule A below. As discussed in the *Masterpiece* decision and in light of my comments above in paragraphs 15-17 regarding the evidenced use of the Opponent's Trademarks and Logo 3 in particular, this approach is skewed. Further, the Applicant is seeking to obtain registered exclusive rights to a word mark which could be used in a variety of ways, including in design forms similar to those used by the Opponent.

Inherent distinctiveness and extent known

[23] This factor does not significantly favour either party. The trademarks at hand possess a similar degree of inherent distinctiveness in association with the goods and services that they respectively cover. Both parties' marks are composed of ordinary dictionary words. The term "dog" is descriptive in the context of the parties' goods and services, as is the term "distribution" in the Opponent's trademark ALPHA DOG DISTRIBUTION, and as such it adds little to the inherent distinctiveness of this mark as a whole. In my view, the unitary term "alpha dog" can also suggest leading or highly ranked dog food/supplements and/or arguably ones which could impact a dog's health, strength or performance.

[24] The strength of a trademark may be increased by it becoming known through promotion or use. However, the Applicant has not presented any evidence that his ALPHA DOG mark has been used or become known to any extent in Canada. Further, while I agree with the Opponent that there is nothing in the evidence which would lend credence to the Applicant's submissions that the Opponent's sales are not genuine, that the submitted invoices were deliberately contrived or that they demonstrate mere token use – considering that the bulk of Mr. Gervais' statements deal with the Opponent's trademarks ALPHA DOG and ALPHA DOG DISTRIBUTION collectively rather than individually, that the Opponent's sales figures contain no breakdown per mark, and given the lack of advertising expenditures and of specifics on the number of Canadian consumers that have accessed the Opponent's Facebook page and were exposed to its advertising – I find that the extent to which each of the Opponent's marks has been promoted and used in Canada remains unclear.

Length of time in use

[25] This factor favours the Opponent as it has evidenced use of its relied-upon trademarks in Canada since January 23, 2016, while the Applicant has not demonstrated any use of his ALPHA DOG mark.

Nature of the goods, services, businesses and trade

[26] These factors also favour the Opponent as, contrary to the Applicant's submissions, I find that there is a close and direct connection between the parties' goods and services. As illustrated above, application No. 1,808,312 essentially covers nutraceutical preparations for dogs, as well as services for the operation of a related website. At the hearing, the Opponent referred me to the *Collins Dictionary* available online at www.collinsdictionary.com which defines the term "nutraceutical" as follows:

nutraceutical

"another name for functional food"

[...]

"... a food or a substance in food, which is used in healthcare"

"You can get vitamin C in a fresh orange or in a pill - both are nutraceuticals."

[27] I also note that some of the raw meat-based dog food sold by the Opponent contains fish oil and vitamin E and has multiple benefits including to help with a softer and healthier coat, digestion, food allergies, weight control, oral hygiene and strengthen the immune system [Gervais affidavit, para 8, Exhibits 1 and 4]. As such, the Opponent's dog food fits the above definition of a nutraceutical. Similarly, I cannot exclude that the Applicant's nutraceutical preparations could take the form of dog food. Some of the Applicant's submissions on this point (including those regarding the composition, benefits, price and manufacturing of the Applicant's goods) refer to facts that are not in evidence, which I have already mentioned will be disregarded. As for the jurisprudence relied upon by the Applicant in support of his position that the goods and channels of trade differ, the Opponent submits that it is distinguishable because the cases in question predate the *Masterpiece* decision and because their facts differ from those of the instant case. I agree. All in all, both parties' marks are associated with substances for animal consumption meant to impact either the animal's mental or physical health or well-being. Both parties also arguably target animal owners as a consumer base. As for the channels of trade, in the absence of evidence to the contrary and given the connection between the parties' goods and services, there is no reason to conclude that they could not also potentially overlap.

Conclusion regarding the likelihood of confusion

[28] Taking all of the above into consideration, particularly considering the degree of resemblance between the trademarks, the close connection between the parties' goods and services and the potential for overlap in their channels of trade, I find that the Applicant has failed to establish, on a balance of probabilities, that there is no likelihood of confusion between its trademark ALPHA DOG and the Opponent's trademarks ALPHA DOG and ALPHA DOG DISTRIBUTION. Accordingly, the section 16(3)(a) ground of opposition succeeds.

Section 2

[29] The non-distinctiveness ground of opposition is two-pronged. The Opponent alleges (i) that the trademark ALPHA DOG does not actually distinguish and is not adapted to distinguish the Applicant's goods and services from those of the Opponent; and (ii) that this trademark is not related to a single source in view of it also being the property of Paolo Medrano or ALPHA DOG TECHNOLOGIES, INC.

[30] As per my comments above in paragraph 24, the Opponent's evidence does not allow me to draw any meaningful conclusion regarding the extent of use, advertising or reputation of its relied upon trademarks in Canada [for a discussion on what an opponent is required to provide in order to meet its burden with respect to distinctiveness, see *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657 at paras 25-34; *Scott Paper Ltd v Georgia-Pacific Consumer Products LP*, 2010 FC 478; and *1648074 Ontario Inc v Akbar Brothers (PVT) Ltd*, 2019 FC 1305]. Accordingly, the first prong of the section 2 ground of opposition is rejected for the Opponent's failure to meet its initial evidential burden.

[31] The second prong of this ground is also rejected as the Opponent did not file any evidence or make any submissions in its support.

[32] Accordingly, the section 2 ground of opposition is rejected in its entirety.

APPLICATION NOS. 1,843,194; 1,843,195; AND 1, 843,196

[33] As illustrated above, applications Nos. 1,843,194, 1,843,195 and 1,843,196 were simultaneously filed approximately seven months after the filing of application No. 1,808,312 and cover virtually the same goods. The statements of opposition submitted against these three later-filed applications raise the same grounds of opposition as those which were pleaded with respect to application No. 1,808,312, with the exception that the Opponent also alleges non-entitlement pursuant to section 16(3)(c) based on confusion with its previously-used trade names ALPHA DOG and ALPHA DOG DITRIBUTION in respect of its opposition to trademark application No. 1,843,196. All in all, the issues, evidence and submissions regarding application Nos. 1,843,194, 1,843,195 and 1,843,196 are analogous to those discussed with respect to application No. 1,808,312 and the difference in material dates here has no significant impact on the assessment of the grounds of opposition.

[34] Consequently, my findings above regarding the grounds of opposition based upon non-compliance with section 30 and non-distinctiveness apply *mutatis mutandis*. The same goes with respect to the section 16(3)(a) ground of opposition based upon non-entitlement, where for reasons similar to those discussed above, I reach the same conclusion with respect to the likelihood of confusion as for application No. 1,808,312. In my view, the presence of the additional wording in these applied-for marks does not significantly increase their inherent distinctiveness, nor does it meaningfully diminish their resemblance to the Opponent's Trademarks. The terms "thrive!" and "brawn!" are suggestive in the context of the parties' goods. As for the term "on!", it can arguably confer the connotation of a phrasal verb to the trademark ALPHA DOG ON! (such as in the sense of "putting on" or "getting on") thus further accentuating "alpha dog" as its more striking and unique component. Also, when respectively combined with "alpha dog", "on!", "thrive!" and "brawn!" are all terms which, in my view, reinforce the ideas of health, strength and performance conveyed by each of the marks at issue as a whole.

[35] In view of the foregoing, the section 16(3)(a) ground of opposition succeeds with respect to each application.

[36] With respect to the section 16(3)(c) ground of opposition, I find that the Opponent has met its initial evidential burden to show use of its trade name ALPHA DOG DISTRIBUTION prior to June 16, 2017, as well as non-abandonment of same as of June 13, 2018 (see, for instance, how this trade name is used on the Opponent's invoices [Exhibit 7] and its Facebook page [Exhibits 1, 2 and 4]). Accordingly, this ground partially succeeds with respect to application No. 1,843,196 for reasons of confusion, similar to those set out above in my discussion of the section 16(3)(a) ground of opposition.




DISPOSITION

[37] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the applications pursuant to section 38(12) of the Act.

Iana Alexova
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Design variations of the Opponent's Trademarks

Logo 1	Logo 2	Logo 3
		

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE 2021-01-26 for application Nos. 1,808,312; 1,843,194; and 1,843,195

HEARING DATE 2021-02-15 for application No. 1,843,196

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