

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

Mailed: July 7, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Innova Agri Bio Park Limited

Serial No. 88489477
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Deborah A. Wilcox of Baker & Hostetler LLP,
for Innova Agri Bio Park Limited

Jeffrey Oakes, Trademark Examining Attorney, Law Office 128,
Travis Wheatley, Managing Attorney.

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Before Taylor, Greenbaum and Pologeorgis,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Innova Agri Bio Park Limited (“Applicant”) seeks registration on the Principal



Register of the mark ELLA FRESH and Design, displayed as _____, for “Fresh fruits and vegetables” in International Class 31.¹ “FRESH” is disclaimed.

¹ Application Serial No. 88489477 was filed on June 26, 2019 based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application includes the following description of the mark: “The mark consists of a light brown circle with a white concentric circular line within the border of the light brown circle; above the white circular line on the top of the outer circle

The Trademark Examining Attorney has refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used on or in connection with the identified goods, so resembles the registered mark ELLA ROSE FARM (in standard characters, ROSE FARM disclaimed) for "rose flowers; dried rose flowers for decoration; natural rose flowers; cut rose flowers; dried rose flowers; fresh edible rose flower; live rose flowers; natural rose flower; seeds for rose flowers; and wreaths of natural rose flowers" in International Class 31 as to be likely to cause confusion, mistake or deception.²

When the refusal was made final, Applicant requested reconsideration, which was denied. Applicant appealed and filed a second request for reconsideration, which the Board treated as a request for remand. 6 TTABVUE.³ After the Examining Attorney denied the second request for reconsideration, the appeal was resumed and Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of

appears dark brown scrollwork; within the light brown circle appears the word 'ELLA' in large dark brown font in lower case letters; under the 'LA' in 'ELLA' appears the word "FRESH" in small dark brown font in uppercase letters." The colors dark brown, light brown and white are claimed as a feature of the mark.

² Registration No. 5135947 issued on February 7, 2017. Section 8 received.

³ Citations to TTABVUE throughout the decision are to the Board's public online database that contains the appeal file, available on the USPTO website, www.USPTO.gov. The first number represents the docket number in the TTABVUE electronic case file and the second represents the page number(s). Citations to the examination record refer to the USPTO's online Trademark Status and Document Retrieval system (TSDR).

confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“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.”).

A. Strength of the Cited Registered Mark

“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace [or commercial] strength (secondary meaning).” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). For likelihood of confusion purposes, “the strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003).

Applicant contends that that “ELLA” is a weak term entitled to a narrow scope of protection or exclusivity of use because of several third-party registrations of ELLA-formative marks for “a number of different goods and services, as well as specifically in connection with different food items” in the “food industry,” all of which “have been allowed to peacefully coexist on the Principal Register and in the marketplace.” App. Br., 10 TTABVUE 13-14. According to Applicant, “[i]f consumers are able to distinguish between different ELLA marks within the food industry, it is clear that consumers will be able to distinguish between and not be confused by a mark containing ELLA in connection with food items and a mark containing ELLA in connection with flowers.” *Id.* at 14.

Evidence of third-party use and registration of a term in the relevant industry is considered in the likelihood of confusion analysis. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015). *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016) (citing *Juice Generation*, 115 USPQ2d at 1674). Here, Applicant submitted no evidence of actual third-party uses, and instead relies solely on nine third-party registered marks that include the term ELLA or variations thereof.⁴ *Id.*, TSDR 37, 39

⁴ Applicant included in its list of third-party registrations two registrations that have expired because their owners did not file the required maintenance documents (Reg. No. 3796969 for ELAFOOD and Reg. No. 3699398 for SOF’ELLA), and an unregistered mark (Serial No. 88516717 for ELA MODERN GREEK KITCHEN). App. Br., 10 TTABVUE 13. As none are live third-party registrations, we do not include them in our tally. In addition, the existence of a cancelled registration—particularly one cancelled for failure to provide a declaration of continued use—does not tend to show that the cited mark is weak due to third-party use. A cancelled registration is only evidence that the registration issued and it does not carry

and 40. The record thus does not demonstrate commercial weakness from third-party use, and fails to show that consumers actually are conditioned to distinguish among marks that include ELLA (or variations thereof). See *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“Applicant’s citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”); *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (“[T]he mere existence of third-party registrations is not evidence that the registered marks are actually in use or that the public is familiar with them.”).

Third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that the segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). However, the goods and services covered by the third-party registrations that Applicant relies upon are for restaurant or food preparation services (e.g., Reg. No. 3293263 for ELLA’S for “restaurant

any of the legal presumptions under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). See *Bond v. Taylor*, 119 USPQ2d 1049, 1054-55 (TTAB 2016); *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011) (“‘dead’ or cancelled registrations have no probative value at all.”). And the pending application is not evidence of use; it is evidence only that the application was filed on a certain date. *In re Embiid*, 2021 USPQ2d 577, at *36 (TTAB 2021); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016).

services” in Class 43; Reg. No. 6114210 for ELLA BRASILERIA for, inter alia, “food preparation” and “restaurant” services in Class 43), and processed or prepared foodstuffs (e.g., Reg. No. 5361105 for ELLA’S FLATS for “seed-based snack foods” in Class 29; Reg. No. 4266060 for ELLA’S KITCHEN for “pasta sauce; pasta; breakfast cereal; cereal based snack foods; processed cereals” in Class 30). None of the goods or services identified in the third-party registrations are facially similar or related to “fresh fruits and vegetables” or any form of plants or flowers, including roses, and Applicant has not explained any such relationship. *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 171 (Fed. Cir. 2017) (disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations.”). Put simply, the registrations do not evidence weakness of the term ELLA in connection with flowers (including roses) and seeds therefor and floral wreaths. On this record, the cited registered mark is entitled to a normal scope of protection accorded a mark with an inherently distinctive term.

B. Similarity or Dissimilarity of the Marks

We compare Applicant's mark ELLA FRESH and Design, displayed as



, and the cited registered mark ELLA ROSE FARM “in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (citation omitted); *accord Krim-Ko Corp. v Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted). “The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018). Further, the marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). We focus on the recollection of the average consumer – here, an ordinary consumer of flowers, fruit and produce – who normally retains a general rather than

a specific impression of trademarks. *Id.* at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Applicant argues that the differences in the marks in appearance, sound and connotation due to the design element in Applicant's mark and the different terms "fresh" and "rose farm" are sufficient to distinguish them. The Examining Attorney focuses on the visual, aural and connotative similarities between the marks due to the shared term ELLA, which the Examining Attorney contends is the most distinctive portion, and therefore the strongest source identifying element, of each mark. We agree with the Examining Attorney's assessment of the similarity of the marks.

Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion."). On the other hand, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, as the Federal Circuit has observed, "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly

accepted rationale for giving less weight to a portion of a mark” *Id.*, 224 USPQ at 751.

When considered in their entirety, we find Registrant’s mark ELLA ROSE



FARM and Applicant’s mark to be very similar in appearance, sound, connotation and commercial impression, due to the shared term ELLA, which appears in the first or first literal position in each mark, followed by wording that would be perceived simply as indicating the general category of goods (“fresh” rather than frozen or canned) or the place they are grown (“rose farm”).

As discussed above, there is no evidence that ELLA has any meaning or significance in the context of the “fresh fruits and produce” identified in the application or any type of flowers, plants or seeds, such as the various forms of rose flowers and the rose seeds identified in the cited registration, and there is no evidence of use by third parties of similar marks in association with similar goods that might dilute the source-identifying capacity of ELLA for those goods. On the other hand, the trailing terms FRESH and ROSE FARM are at least descriptive of the identified goods, and they appropriately have been disclaimed in the application and cited registration. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

Descriptive matter typically is less significant or less dominant when comparing marks. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846 (quoting *Nat’l Data*,

224 USPQ at 752 (the “descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion”). We find that to be the case here, where consumers likely will view the terms FRESH and ROSE FARM in their descriptive senses rather than as source-distinguishing elements of either mark.

With regard to the design element in Applicant’s mark, although we assess each mark in its entirety, wording often is considered the dominant feature of a mark comprising both literal and design elements because it is most likely to indicate the source of the goods. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). The words are likely to make a greater impression upon purchasers than the designs and would be remembered by them and used by them to request the goods. *See Viterra*, 101 USPQ2d at 1908 and 1911 (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)). This general principle applies here, where the word ELLA is the largest and most visually prominent literal portion of the mark, and the design element, if noticed and remembered, would not be verbalized.

Applicant relies on *In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014) and *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282 (TTAB 2009), to support its argument that the design “strongly differentiates Applicant’s visual mark from the Cited Mark, and creates a different mental impression for the consumer that is unlikely to cause

confusion.” App. Br., 10 TTABVUE 7. Neither decision supports Applicant’s contention.

In *Covalinski*, the Board found no likelihood of confusion between the standard character mark RACEGIRL and REDNECK RACEGIRL and Design, displayed as



, for in part legally identical goods because the RR “graphic devices serve not only to draw attention to the RR letters apart from the wording, but also make the letters that form the ‘a-c-e’ of the word ‘RACEGIRL’ difficult to notice,” especially on retail hang tags or neck labels. 113 USPQ2d at 1168. “In that context, the visual impression of the mark is likely to be more important.” *Id.* at 1168. In *White Rock Distilleries*, the Board found no likelihood of confusion between the applicant’s standard character mark VOLTA for caffeine-infused vodka



and the registered mark TERZA VOLTA and Design, displayed as , for wines, in part due to the large and dominant term TERZA and a prominent design element, neither of which were present in the applicant’s mark. 92 USPQ2d at 1284.

Applicant’s mark shares none of the key characteristics of the word and design marks at issue in *Covalinski* and *White Rock Distilleries*. Unlike in *Covalinski*, the words ELLA FRESH in Applicant’s mark are plainly visible. And unlike in *White Rock Distilleries*, both marks begin with the shared term ELLA, which, in Applicant’s

mark, also is much larger than the term FRESH, and the words are not dominated by the generally circular design feature, which frames the wording.

The prominence of the term ELLA is further enhanced by its placement as the initial or initial literal element in each mark. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”); *see also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

Finally, Registrant’s standard character mark is not limited to any particular depiction. The rights associated with a standard character mark reside in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); Trademark Manual of Examining Procedure (“TMEP”) § 1207.01(c)(iii) (July 2021). We must consider Registrant’s standard character mark “regardless of font style, size, or color” *Citigroup*, 98 USPQ2d at 1259, including iterations displaying the mark in the same font and color as the word ELLA in Applicant’s mark.

Accordingly, we find that ELLA is the dominant element in each mark, and we give that term more weight than the other elements of the marks in our likelihood of confusion analysis. In making this finding, we do not ignore the presence of the additional wording in either mark, or the design element in Applicant’s mark. However, for the reasons discussed above, we believe consumers are more likely to

remember and use the term ELLA than the other elements of either mark. *Nat'l Data*, 224 USPQ at 751.

In sum, we find the sound, appearance, meaning and overall commercial



impression of the marks ELLA ROSE FARM and to be very similar when they are considered in their entirety.

The *DuPont* factor of the similarity of the marks favors a finding of a likelihood of confusion.

C. Similarity or Dissimilarity of the Goods and Channels of Trade

With regard to the goods, channels of trade and classes of consumers, we must make our determination under these factors based on the goods as they are identified in the application and cited registration. *See Detroit Athletic Co.*, 128 USPQ2d at 1052; *Dixie Rests.*, 41 USPQ2d at 1534; *see also Stone Lion*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004-05 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

1. Similarity or Dissimilarity of the Goods

This *DuPont* factor “considers whether ‘the consuming public may perceive [the respective goods ... of the parties] as related enough to cause confusion about the source or origin of the goods ...’” *St. Helena Hosp.*, 113 USPQ2d at 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard*, 62 USPQ2d at 1004). “It is sufficient for a finding on

likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in the application.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at *11 (TTAB 2020) (citing *Tuxedo Monopoly, Inc. v. Gen Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

To recap, the goods identified in the application comprise “fresh fruits and vegetables,” and the goods identified in the cited registration are “rose flowers; dried rose flowers for decoration; natural rose flowers; cut rose flowers; dried rose flowers; fresh edible rose flower; live rose flowers; natural rose flower; seeds for rose flowers; and wreaths of natural rose flowers.”

Applicant argues that confusion is unlikely because the goods “are different, do not perform the same functions, are not alternatives for each other, and do not operate in the same way.” App. Br., 10 TTABVUE 8. However, the goods do not have to be identical or even competitive in order to find that they are related to support a finding of likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). Likelihood of confusion can be found if the respective goods are “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted). *See also In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). The issue is whether there is a likelihood of confusion as to the source of the goods, not whether

purchasers would confuse the goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

As evidence that the goods identified in the application and cited registration are related, the Examining Attorney submitted printouts from a dozen third-party farms, garden centers, greenhouses and nurseries who offer fresh fruit, produce and live roses and other flowers or flower seeds under the same mark:

- Four Seasons offers fresh organic produce and live flowers including roses (April 8, 2020 Office Action, TSDR 55-60);
- Pope Farms offers “Fresh Colorado Produce” and live plants including “a rainbow of roses” (*Id.*, TSDR 61-63);
- Rorabecks offers fresh fruits and vegetables, and fresh flowers including live roses (*Id.*, TSDR 64-70);
- Burpee offers fresh vegetables, fruits and flowers, including live roses (February 15, 2021 Final Office Action, TSDR 2-19);
- Garden’s Alive! Offers fresh vegetables, fruits and live roses (*Id.*, TSDR 20-33);
- Gurney’s offers fresh vegetables, fruits and live roses (*Id.*, TSDR 34-53);
- Park Seed offers fresh vegetables, fruits and live roses (*Id.*, TSDR 54-68);
- Urban Farmer offers fresh vegetables, fruits and rose seeds (*Id.*, TSDR 69-81);
- Eddy Farm offers fresh vegetables and flowers (November 18, 2021 Request for Reconsideration Denied, TSDR 2-7);

- Scheeringa Farm offers fresh fruit, vegetables and flowers (*Id.*, TSDR 8-15);
- Sweet Green Farm offers fresh fruit, vegetables and flowers (*Id.*, TSDR 16-23); and
- Seeley Farm offers fresh vegetables and flowers, including roses (*Id.*, TSDR 24-31).

This type of evidence is probative because it demonstrates that the involved goods may emanate from a common source under the same mark, and consumers will encounter the goods in the same channels of trade (e.g., farms, garden centers, nurseries, greenhouses). *See, e.g., Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both.”); *On-line Careline*, 56 USPQ2d at 1475; *In re C.H. Hanson Co.*, 115 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009).

The Examining Attorney also made of record approximately ten use-based, third-party registrations of marks identifying fresh fruits and vegetables as well as live flowers (e.g., Reg. No. 2647826 for DANCING HORSE RANCH, Reg. No. 2668160 for AGROS, Reg. No. 3456107 for LYMAN ORCHARDS and Reg. No. 3726346 for CANCUN). May 10, 2021 Request for Reconsideration Denied, TSDR 2-11.⁵ While third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, such registrations that

⁵ The other registrations are located at *Id.*, TSDR 15-28.

individually cover a number of different items and are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type which may emanate from a single source. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *see also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). This evidence further supports a finding that the goods identified in the application and registration are related for purposes of our likelihood of confusion analysis.

Applicant points to Registrant's website as evidence that the goods are not related because Registrant provides roses for floral design. App. Br., 10 TTABVUE 8 (referencing Exhibit B to Applicant's April 5, 2021 Request for Reconsideration, TSDR 39-41). We remind Applicant that our determination under this *DuPont* factor is based on the description of goods in the application and cited registration, not on extrinsic evidence of actual use. *i.am.symbolic, llc*, 123 USPQ2d at 1749-1750. In other words, an applicant may not restrict the scope of the goods covered in its application or the cited registration by argument or extrinsic evidence. *Stone Lion*, 110 USPQ2d at 1162 ("It was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions"); *Octocom*, 16 USPQ2d at 1787 ("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.”).

The evidentiary record amply supports a finding that Applicant's and Registrant's goods are related. Applicant's conclusory argument to the contrary (App. Br., 10 TTABVUE 8-9) is not persuasive.

2. Similarity or Dissimilarity of Trade Channels

Turning to the channels of trade, we initially note that neither identification of goods in the application or cited registration includes any restriction regarding channels of trade, consumer or price; we must therefore presume that the identified goods are sold in the ordinary or normal trade channels for such goods, to all consumers for such goods and without any limitation as to price. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). The Internet evidence demonstrating that the goods identified in the application and cited registration are related also supports a finding that such goods move in the same channels of trade, such as farms, garden centers, greenhouses and nurseries, and they are sold to the same classes of consumers, namely, members of the general public. Thus, the channels of trade and classes of purchasers for the goods overlap.

These *DuPont* factors also favor a finding of likelihood of confusion.

D. Lack of Actual Confusion

Finally, Applicant argues under the eighth *DuPont* factor that the marks have “peacefully coexisted” for more than five years without any instances of actual confusion. *See In re Guild Mtg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020) (“The eighth *du Pont* factor ... – ‘[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion,’ *see du Pont*, 177 USPQ at 567—requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.”). In support, Applicant points to invoices for fresh mangoes submitted as Exhibit A to the August 16, 2021 Request for Reconsideration, TSDR 4-25. However, as the Examining Attorney correctly notes (Ex. Atty. Br., 12 TTABVUE 18), the invoices do not show Applicant’s mark. There is no other evidence to support Applicant’s argument.

Applicant’s “uncorroborated statements of no known instances of actual confusion are of little evidentiary value.” *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed Cir. 2003). Moreover, “in this *ex parte* context, there has been no opportunity to hear from Registrant about whether it is aware of any reported instances of confusion. We therefore are getting only half the story.” *In re Guild Mtg.*, 2020 USPQ2d 10279, at *23. Nor can we assess whether there has been any significant opportunity for actual confusion to have occurred, as we have little or no evidence as to the nature and extent of use by Applicant and Registrant. *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *9 (TTAB 2019) (explaining that “for the absence of actual confusion to be probative, there must have been a

substantial 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 on there being a significant opportunity for actual confusion to have occurred).

In any event, “the relevant test is likelihood of confusion, not actual confusion.” *Detroit Ath. Co.*, 128 USPQ2d at 1053. And, as often stated, “a showing of actual confusion is not necessary to establish a likelihood of confusion.” *i.am.symbolic, llc*, 123 USPQ2d at 1747 (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

This *DuPont* factor is neutral.

II. Conclusion

In view of the very similar marks and related goods, which move through overlapping channels of trade to the same class of purchasers, confusion is likely



between Applicant’s mark and the cited registered mark ELLA ROSE FARM. The record shows no weakness of the ELLA component of the cited registered mark, and the purported lack of actual confusion is neutral.

Decision: The refusal to register Applicant’s mark under Trademark Act Section 2(d) is affirmed.