

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: November 22, 2022

Mailed: December 6, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Matosantos Commercial Corporation
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Application Serial No. 88718607
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Samuel F. Pamas of Hogleund & Pamas, PSC,
for Matosantos Commercial Corporation.

Monica L. Beggs, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.¹
—

Before Taylor, Pologorgis, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Matosantos Commercial Corporation (Applicant) seeks registration on the Principal Register of the stylized mark FRUIT & VEGGIE BLENDERS, shown below, for “frozen fruits; frozen vegetables,” in International Class 29.²

¹ While Ms. Beggs was the Examining Attorney during prosecution of the application and submitted the Examining Attorney’s Appeal Brief, Robert Guliano of Law Office 105 appeared at the hearing and argued the appeal for the Office.

² Application Serial No. 88718607 was filed on December 6, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use of its mark anywhere and in commerce since at least as early as August 13, 2014.

*FRUIT & VEGGIE
Blenders*

The application contains the following statements:

The mark consists of the wording “FRUIT & VEGGIE BLENDERS”. The words “FRUIT” and “VEGGIE” are in dark green and the symbol “&” is in light green. Underneath is the wording “BLENDERS” in dark green stylized letters outlined in light green.

The color(s) dark green and light green is/are claimed as a feature of the mark.

No claim is made to the exclusive right to use FRUIT & VEGGIE apart from the mark as shown.

The Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered composite word-and-design mark FRESH BLENDERS, shown below, for “fresh fruit,” in International Class 29, as to be likely to cause confusion.³



³ Registration No. 4781656, registered July 28, 2015; Section 8 declaration of use accepted. The cited registration was originally registered for “fresh fruit and vegetables.” In its June 22, 2021, Section 8 declaration of continued use, Registrant deleted “and vegetables” from the identification of goods. The deletion does not affect the refusal on appeal because the Examining Attorney did not limit the likelihood of confusion analysis to Registrant’s vegetables.

The registration contains the following statements:

The mark consists of the words “Fresh Blenders” with leaves above the words and juice drops at the edge of the words and a stylized partial circle around the left side of the words.

Color is not claimed as a feature of the mark.

No claim is made to the exclusive right to use FRESH apart from the mark as shown.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant attached to its appeal brief more than 130 pages of exhibits including excerpts from the Target website for fresh fruit (target.com/c/fresh-fruit-produce-grocery/),⁴ frozen fruit (no URL or print date),⁵ fresh vegetables (target.com/c/fresh-vegetables-produce-grocery/),⁶ and frozen vegetables (no URL or dated printed);⁷ and from the Kroger website for frozen fruit (no URL or print date)⁸ and frozen vegetables (no URL or print date).⁹ The Examining Attorney objected to the “new internet evidence” on the ground that it was untimely because Applicant did submit it prior to appeal.¹⁰ See Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d). However, the

⁴ 13 TTABVUE 39-44. Citations to briefs refer to the Board’s TTABVUE online docket system. See, e.g., *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, *2 n.1 (TTAB 2020).

⁵ 13 TTABVUE 64-71.

⁶ 13 TTABVUE 45-52.

⁷ 13 TTABVUE 84-95.

⁸ 13 TTABVUE 53-63.

⁹ 13 TTABVUE 74-82.

¹⁰ 16 TTABVUE 3-4.

Examining Attorney did not object separately to those webpages without a URL and print date. *See In re ADCO Indus.-Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020) (citing *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018)); TRADEMARK MANUAL OF EXAMINING PROCEDURE § 710.01(b) (July 2022).

In response to the objection, Applicant filed a request to remand the application to the Examining Attorney for consideration of the evidence attached to Applicant's Brief.¹¹ Noting that the better practice would have been for Applicant to have filed a separately captioned Request for Remand either before it filed its brief or concurrently therewith, *see In re Ox Paperboard*, 2020 USPQ2d 10878, at *2 (TTAB 2020), the Board nevertheless granted Applicant's request for remand.¹²

On remand the Examining Attorney reviewed the late-filed evidence, considered its probative value, and found it unpersuasive. Because the Examining Attorney considered the probative value and did not object on the ground that Applicant failed to include URLs and print dates for certain of the evidence, we find the Examining Attorney waived her objection on that ground, and we will consider the webpages for whatever probative value they may have.¹³ *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.03 (2022).

¹¹ 17 TTABVUE.

¹² 18 TTABVUE.

¹³ For the same reasons, we will consider the excerpts from the Sam's Club, Wegmans, and Aldi websites Applicant submitted with its May 13, 2021 Request for Reconsideration (TSDR 72-104), as well as the "Fresh vs. Frozen: The Fruit and Vegetable Debate" page from the ISSA website (TSDR 68-71). Citations to the application record refer to the downloadable .pdf versions of documents in the USPTO's Trademark Status and Document Retrieval (TSDR).

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d).

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). We consider each factor for which there is argument and evidence. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods . . . because 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.” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). See also *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

A. Similarity or dissimilarity and nature of the goods

We begin with the second *DuPont* factor which considers “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. We must base our comparison of the goods on the identifications in the cited registration and Applicant’s application. See *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014)

Applicant seeks to register its mark for “frozen fruit; frozen vegetables.” The cited mark is registered for “fresh fruit.” The Examining Attorney argues that the goods are “closely related because they consist of ‘fruits’ and ‘vegetables’, just in different forms, namely fresh and frozen, that are commonly produced and sold by the same

companies and marketed under the same mark.”¹⁴ Applicant argues that the goods “are different in nature” and are not in direct competition.¹⁵




We find the goods are inherently related on the face of the respective identifications, in that “frozen fruit” is simply “fresh fruit” that has been preserved by freezing. Except for the cold temperature treatment, the goods are effectively the same. *See Kellogg Co. v. Gen. Mills Inc.*, 82 USPQ2d 1766, 1770-71 (TTAB 2007) (“[T]he close relationship between the goods is self[-]evident from the respective identifications”). Our finding is confirmed by the third-party registration and use evidence made of record by the Examining Attorney, discussed below.

In support of the argument that fresh fruit is related to frozen fruit and vegetables, the Examining Attorney submitted nine third-party registrations for fresh fruit and frozen fruit and vegetables and excerpts from third-party websites showing those products produced or offered under the same mark. Third-party registrations based on use in commerce that individually cover a number of different goods may have probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *8 (TTAB 2019); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013). The registrations and relevant portions of the identifications are listed below:¹⁶

¹⁴ 16 TTABVUE 9.

¹⁵ 13 TTABVUE 19, 20.

¹⁶ November 13, 2020 Office Action (TSDR 27-55).

Mark	Reg. No.	Goods
HANNAFORD	2010939	Frozen vegetables, frozen fruits, fresh fruits
CROSS VALLEY FARMS	2608929	Frozen fruits and vegetables, fresh fruits
	3661316	Frozen fruits and vegetables, fresh fruits
UNCLE VINNY'S	3965471	Processed fresh fruits, unprocessed fresh fruits, frozen fruits and vegetables
<i>Bashas'</i> Hometown Grocer	4254550	Frozen fruits, frozen vegetables, fresh fruit
	4651231	Frozen fruits and vegetables, fresh fruits
SCHNUCKS	4658642	Frozen fruits and vegetables, fresh fruits
	4644063	Frozen fruits, fresh fruits
EAT PETIT	6137453	Frozen fruits, fresh fruits and vegetables

The third-party websites advertising fresh fruit and frozen fruit under the same mark are listed below:¹⁷

- Blue Fruit Farm (bluefruitfarm.com);¹⁸
- Frank Farms (frankfarms.com);¹⁹
- Johnson Farms (johnsonfarmseugene.com);²⁰
- Dole (dolesunshine.com & dole.com);²¹
- Welch's (welchsfresh.com);²²

¹⁷ As mentioned above at footnote 3, Registrant deleted “and vegetables” from its registration. In view thereof, we need not list the third-party evidence demonstrating use of a single mark for fresh and frozen vegetables.

¹⁸ November 13, 2020 Office Action at TSDR 6.

¹⁹ *Id.* at TSDR 7-9.

²⁰ *Id.* at TSDR 10-15.

²¹ March 3, 2020 Office Action at TSDR 34-37 and 42-44.

²² *Id.* at TSDR 45-48.

- Townsend Farms (townsendfarms.com);²³
- Remlinger Farms (remlingerfarms.com);²⁴
- Murray Family Farms (murrayfamilyfarms.org);²⁵
- Bowerman Blueberries Farm (marketwagon.com);²⁶
- Kirby's Farm Market (kirbysfm.com);²⁷
- Driediger Farms (driedigerfarms.com);²⁸ and
- Triple B Farms (shoptriplebfarms.com).²⁹

To further demonstrate the relationship between fresh and frozen fruit, and particularly that the goods are interchangeable, the Examining Attorney submitted a page from the Vitamix website (vitamix.com) discussing the advantages and disadvantages of using fresh and frozen fruit in a smoothie. The website encourages consumers to use either fresh or frozen fruit because they are both high in vitamins, minerals, fiber, and antioxidants that counteract disease,³⁰ and that “the differences in nutrient levels between fresh and frozen [fruit] are so minor that they would be unlikely to have an impact on overall health, and dieticians generally encourage people to eat as many fruits and vegetables as they can, in whatever form they

²³ *Id.* at TSDR 49.

²⁴ July 6, 2021 Denial of Request for Reconsideration at TSDR 5-11.

²⁵ *Id.* at TSDR 17-21.

²⁶ *Id.* at TSDR 22-23.

²⁷ *Id.* at TSDR 24-29.

²⁸ *Id.* at TSDR 30-36.

²⁹ *Id.* at TSDR 37-38.

³⁰ *Id.* at TSDR 73.

enjoy.”³¹ Vitamix concludes that, ultimately, the difference between fresh and frozen fruit is simply a matter of “whether [consumers] want to eat seasonally, cut costs, or enjoy a fruit’s flavor to the fullest.”³²

The BBC’s Good Food blog (bbcgoodfood.com) reached the same conclusion:

Should you use fresh or frozen fruit?

Studies suggest that certain nutrients, including vitamin C, are comparable and occasionally higher in fruit (and vegetables) that have been frozen at harvest, compared to their fresh equivalent. Although, beta-carotene, which the body converts to vitamin A, may reduce on freezing. That said, it will depend on the fruit or vegetable in question.

Overall, whether you choose fresh or frozen produce for your smoothie, it doesn’t really matter. Both count towards your five-a-day and, if by using frozen produce, you’re increasing your child’s daily intake, then that has to be a good thing. Frozen product may also help keep your weekly food bills down, allows you to enjoy out of season crops and are a useful stand-by when you can’t get to the shops.³³

This was confirmed again by the article “Fresh vs. Frozen: The Fruit and Vegetable Debate” from the International Sports Sciences Association website (no URL) submitted by Applicant:

At the end of the day, the biggest issue is that people don’t eat enough fruits and vegetables. Not that they are eating the wrong fruits and vegetables. Fresh vs frozen lends to a bigger question: How do you get your clients eating more fruits and vegetables?

If your client has access to fresh produce and they enjoy preparing it, awesome. If they prefer to purchase frozen vegetables and steam them in the microwave while

³¹ *Id.* at TSDR 74 (quoting the NEW YORK TIMES).

³² *Id.* at TSDR 75.

³³ *Id.* at TSDR 80.

working on another project, great! At the end of the day, the nutritional value of fresh vs frozen is closely comparable. Encourage your clients to find what works best for them and their lifestyle.³⁴

“Material obtained through the Internet or from websites is acceptable as evidence in ex parte proceedings. *** Material obtained from . . . a third party, may provide information about, for example, products or services, customers, and channels of trade, although their probative value will vary depending on the facts of the particular case.” TBMP § 1208.03. We find the internet material highly probative because it directly discusses the parties’ goods. Moreover, as Applicant’s specimens reveal, Applicant’s identified frozen fruits and vegetables are specifically sold as ingredients for smoothies and tout the pre-portioned packaging as containing “full serving[s]” of vegetables and fruit.³⁵

The above-noted evidence demonstrates that fresh fruit and frozen fruit are closely related products that may be used interchangeably. Under the second *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each product listed in the descriptions of goods. It is sufficient that we focus on the relatedness of fresh and frozen fruit. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion

³⁴ May 13, 2021 Request for Reconsideration at TSDR 70.

³⁵ December 6, 2016 Specimen at TSDR 1-4 (“Makes Healthy & Delicious Smoothies!” “Just add water, juice or milk. Blend and serve!” “EACH 12 OZ BAG CONTAINS 1 FULL SERVING OF VEGETABLES [AND] 1 FULL SERVING OF FRUIT.”)

must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in each class of goods or services in the application); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

Addressing Applicant's argument that the goods "are different in nature" and not in direct competition,³⁶ we remind Applicant that the respective goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). "It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same [source]." *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). As discussed above, the internet evidence of record demonstrates that the goods (fresh fruit and frozen fruit) are interchangeable.

Applicant also argues "[t]he mere fact that both marks are related to fruits and vegetables does not mean that prospective consumers are likely to confuse their respective source of origin."³⁷ Applicant continues:

When a prospective consumer looks for frozen fruits or vegetables, they immediately think about products prepared and preserved for a longer duration for further consumption. Since frozen fruits and vegetables maintain their nutritional value because they are picked at their

³⁶ 13 TTABVUE 19, 20.

³⁷ 13 TTABVUE 20.

peak ripeness and frozen. Thus, consumers looking for more durable fruits and vegetables will prefer them frozen rather than fresh. ***

Whereas, when a prospective consumer searches for fresh products, they are looking for a product that contains its original qualities, which have been “recently made or obtained; not tinned, frozen or otherwise preserved”. . . . For example, the nutritional value of a fruit or vegetable will diminish more rapidly than those frozen. Likewise, the time gap between consuming fresh fruits or vegetables is shorter than consuming a preserved frozen fruit or vegetable. . . .³⁸

As noted by Applicant in its brief, the issue is not whether purchasers would confuse the parties’ goods, but rather whether there is a likelihood of confusion as to the source of these goods.³⁹ See *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); *In re I-Coat Co., LLC*, 126 USPQ2d at 1737 (“the test is not whether consumers would be likely to confuse these goods, but rather whether they would be likely to be confused as to their source.”); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). The evidence discussed above establishes that the same entities often sell fresh and frozen fruit under the same mark.

Applicant’s argument that “consumers looking for more durable fruits and vegetables will prefer them frozen rather than fresh,” effectively admits that fresh

³⁸ *Id.*

³⁹ *Id.* at 19.

and frozen fruit are alternatives depending on the consumers' specific needs at the time of purchase. This supports our finding that the goods are inherently related on their face in that frozen fruit is an alternative to fresh fruit and may be purchased and consumed for the same purposes.

Applicant submitted several sets of registrations for the same or similar marks for different food items that Applicant claims "serve as conclusive evidence to support Applicant's position that the [BLENDERS] marks at issue may co-exist[] as there is no likelihood of confusion between them, in spite of having a similar element."⁴⁰ By way of example, some of Applicant's cites include:

- Registration No. 2259673 for the mark FOUR SEASONS for "frozen and refrigerated gourmet bakery goods, namely, cakes, pies, breads, croissants, rolls and muffins;" Registration No. 3275980 for the mark FOUR SEASONS for "tea and herb tea for beverage use;" and Registration No. 3921064 for the composite word-and-design mark FOUR SEASONS GRANOLA for "granola, granola snacks, granola-based snack bars."⁴¹
- Registration No. 2431506 for the mark FORT SIMON for "wines," and Registration No. 1507453 for the composite word-and-design mark DON SIMON for "wine and sangria";⁴² and
- Registration No. 4002667 for the mark JOSEPH CELLARS for "wine," and Registration No. 2897939 for the composite word-and-design mark JOSEPH for "olive oil" and "wines."⁴³

The third-party registrations do not support Applicant's contention because none one of the registration pairs are for fruits or vegetables. *See In re Thor Tech Inc.*, 90

⁴⁰ September 3, 2020 Response to Office Action at 3 and 8. *See also id.* at TSDR 18; 13 TTABVUE 21-22.

⁴¹ September 3, 2020 Response to Office Action at TSDR 23, 25, 27.

⁴² *Id.* at TSDR 37, 39.

⁴³ *Id.* at TSDR 41, 43.

USPQ2d 1634, 1637 (TTAB 2009); *Helene Curtis Indus. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). Because the goods in the examples submitted by Applicant do not cover fruit and vegetables, the registrations do not demonstrate a pattern of long-standing beliefs of business people in the relevant industry. *See Keebler Co. v. Associated Biscuits Ltd.*, 207 USPQ 1034 (TTAB 1980).

We find that Applicant's goods and Registrant's goods are inherently and otherwise closely related, and this *DuPont* factor weighs in favor of finding a likelihood of confusion.

B. Established, likely-to-continue channels of trade and classes of consumers

We next turn to the third *DuPont* factor which considers “[t]he similarity or dissimilarity of established, likely-to-continue channels of trade.” *DuPont*, 177 USPQ at 567.

Because neither the application nor the cited registration includes any restriction regarding channels of trade, consumer, or price, we must 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 limitations as to price. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000). The excerpts from the third-party websites discussed above demonstrate that consumers encounter fresh fruit and frozen fruit sold at individual farms at their farm locations and farmers markets, as well as by larger companies such as Dole and Welch's. Applicant's own internet excerpts from the Sam's Club and Target grocery department websites demonstrate the sale of fresh and frozen fruit in the grocery

department of large stores,⁴⁴ and the Wegmans and Aldi grocery store websites show the goods are sold in grocery stores.⁴⁵ The excerpts also demonstrate that the goods are sold to ordinary members of the general public who purchase, use, and consume the goods for some of the same purposes.

Applicant argues that even if fresh and frozen fruits are sold in the same stores or other establishments, its frozen “goods must be kept [i]n freezers at very low temperatures. Therefore, inevitably Applicant’s identified goods would be sold in different sections or shelving locations than fresh fruits”⁴⁶ Even if we accept this argument about grocery stores, we nonetheless note that “[i]f [goods] are found to be complementary in that they are sold in the same stores to the same consumers for the same, related or complementary end use, consumers are likely to be confused upon encountering the goods under the same or similar marks even though the goods may be found in different areas within a store.” *In re Davia*, 110 USPQ2d 1810, 1816 (TTAB 2014), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). The Vitamix, BBC Good Food Blog, and International Sports Sciences Association websites discussed above demonstrate that fresh and frozen fruit are food items that are used interchangeably. “Thus, they are functionally related. . . . Such complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.” *Id.* at 1815.

⁴⁴ May 13, 2021 Request for Reconsideration at TSDR 72-85; 13 TTABVUE 39-41, 64-68.

⁴⁵ May 13, 2021 Request for Reconsideration at TSDR 86-104.

⁴⁶ 13 TTABVUE 21.

As shown by all of the website evidence, and as argued by the Examining Attorney, many farms and grocery stores offer fresh and frozen fruit, and prospective consumers will be accustomed to seeing these goods offered by the same farms and stores under the same marks. Therefore, the evidence represents a relationship stronger than Applicant suggests to those of unrelated goods offered within a large department store, and shows that grocery store websites feature the goods of both Applicant and Registrant under the same designations and links on the same web page, even if the sub-pages are different (i.e., frozen and produce). *See Recot Inc. v. Becton*, 54 USPQ2d at 1898 (in considering whether pet and human food are related, the Board erred in not considering evidence that “several large [third-party] companies produce and sell both pet and human food”).


The record establishes that the consumers and channels of trade for fresh and frozen fruit overlap, even if the goods may be sold on different shelves or in different sections of the same brick-and-mortar grocery stores. While it has not been shown from the evidence that fresh and frozen fruit would necessarily be sold at a “competitive distance” in a brick-and-mortar grocery market (Applicant’s position⁴⁷), it is clear that the goods are discussed side-by-side, move through the same general channels of trade, and are seen as alternatives during the same shopping trip when the average consumer may be looking for fruit. Accordingly, we find that the goods are offered in overlapping channels of trade to overlapping classes of consumers. The third *DuPont* factor also weighs in favor of a likelihood of confusion.

⁴⁷ 13 TTABVUE 21.

C. The strength of the mark in the cited registration

The fifth and sixth *DuPont* factors are relevant to Applicant's arguments that the cited mark is weak because they involve, respectively, the strength of the prior mark and the number and nature of similar marks in use on similar goods. *See DuPont*, 177 USPQ at 567. The strength of Registrant's mark affects the scope of protection to which it is entitled. We therefore consider the inherent or conceptual strength of the cited mark, or a portion thereof, based on the nature of the mark itself, and its commercial strength based on marketplace recognition if there is any evidence regarding commercial strength. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength."); *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. Dec. 2022 update) ("The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another's use.").

In assessing the inherent or conceptual strength of the term BLENDERS in

Registrant's composite mark  we start with the definition of the word "blender." The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) (accessed December 4, 2022) defines "blender" as "one that blends." It defines "blend," inter alia, as "mix," "to combine into an integrated whole," and "something produced by blending: such as . . . a product prepared by blending."⁴⁸



Applicant contends that the term BLENDERS in Registrant's mark is weak because there are multiple registrations for marks that include the term "blenders" in singular and plural form.⁴⁹ Evidence that a mark, or an element of a mark, was adopted or at some time appropriated by many different third-party registrants may undermine the common element's conceptual or inherent strength as an indicator of a single source. *Jack Wolfskin Austrang Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) ("[E]vidence of third-party registrations is relevant to 'show the sense in which a mark is used in ordinary parlance,' ... that is, some segment that is common to both parties' marks may have 'a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.") (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671,

⁴⁸ "The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions." *In re tapio GmbH*, 2020 USPQ2d 11387, at *3 n.10 (TTAB 2020).





⁴⁹ 13 TTABVUE 16.

1675 (Fed. Cir. 2015) (the extent of third-party use or registrations may indicate that a term carries a suggestive or descriptive connotation and is weak for that reason)).

To support its contention, Applicant submitted the following registrations consisting of some variation of the term “blender”:⁵⁰

Mark	Reg. No.	Goods
 BLENDER BOMBS (BLENDER disclaimed)	5843779 5468169	Nut-based snack foods Nut and seed-based snack bars
ARTIC BLENDERS	3473413	Ice cream drinks featuring candy, cookies, brownies, syrup, sauces, nuts, crushed ice, whipped cream, or fruit toppings sold together as a unit
BLENDER MOCHA BLENDER LATTE (Supplemental Register)	2153235 2155875	Dry mixes for coffee based beverages containing milk
BLENDER PROJECT	5732732	Beer
BLENDER BUDDIES (BLENDER disclaimed)	4672675	Mixes consisting of powders used to prepare fruit-flavored smoothies
BLENDERFULLS	4250944	Non-alcoholic cocktail mixes
 MR. BLENDER	4117272	Flavorings for beverages in the nature of concentrates, syrups, or powders
LIEUTENANT BLENDER'S	3749447	Non-alcoholic powdered cocktail mixes
LIEUTENANT BLENDER	3749446	Non-alcoholic powdered cocktail mixes
THINK OUTSIDE THE BLENDER	3628604	Non-alcoholic cocktail mixes
LT. BLENDER	2570168	Dry mixes for frozen confections
BLENDERZ	5464734 5413052 5410065	Applesauce and fruit-based snacks

⁵⁰ May 13, 2021 Request for Reconsideration at TSDR 16-63. Trademarks in the same cell are owned by the same entity.

Mark	Reg. No.	Goods
	4902420	Combination meal of meat or vegetable-based entree and soup or salad; entrees consisting of fruit drinks, fruit juices, vegetable juices, smoothies
	4725251 4577662	Coffee
BACKYARD BLENDER	4713461	Liquid flavors for electronic cigarettes
THE FRESH BLENDER	5257118	Smoothies, fruit juices, vegetable juices, fruit or vegetable-based drinks, coffee, ice cream
BIGELOW AMERICA'S CLASSIC FAMILY TEA BLENDERS SINCE 1945	4393449	Tea
	4036264	Ice cream drinks, smoothies
	4332405	Frozen coffee bases, fruit smoothie bases
BLENDERS	3140420	Breakfast cereal

Applicant does not explain how the third-party registrations consisting of some variation of the word “blender” establish the inherent or conceptual weakness of BLENDERS when it is used to identify fresh fruit. Instead, Applicant merely jumps to the conclusion that because there are 23 third-party registrations for marks comprising “blender” or a variation thereof belonging to multiple different registrants in Classes 29 (meats and processed foods), 30 (staple foods), and 32 (light beverages), that fact alone establishes a “crowded field” such that BLENDERS is inherently weak.⁵¹

⁵¹ 13 TTABVue 17.

The main problem with Applicant's contention is that third-party evidence is probative only if the registrations are for the same or similar goods. *See e.g., Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 128 USPQ2d at 1693-94 (mere fact that registrations were for food and beverage products insufficient to show that they were for "similar" goods); *i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration). There are no third-party registrations for fresh fruit, and the evidence does not demonstrate that the word "blenders" describes or suggests any feature or characteristic of fresh fruit.

In its appeal brief, Applicant emphasizes that the third-party registration THE FRESH BLENDER (in the list above, which identifies, inter alia, fruit juices and fruit-based drinks) coexists with the cited mark and argues that this "shows that the USPTO has recognized that marks that include these terms are diluted and entitled to a very narrow scope of protection."⁵² In its reply brief, Applicant shifts and



emphasizes that if the third-party registration for the composite mark (also in the list above, which identifies, inter alia, combination meals of meat or vegetable-based entrees with soup or salad, prepared entrees consisting of fruit drinks and fruit juices, and fruit-based beverages) can coexist with the cited mark,

⁵² *Id.*

“then surely Applicant’s mark can[, too.]”⁵³ In jumping to its conclusion, Applicant fails to address the differences between the cited mark and THE DANCING BLENDER mark. Further, the file histories of these registrations singled out by Applicant are not in the record, and we are not privy to the circumstances resulting in the approval of the underlying applications for registration. More importantly, we are not bound by the prior decisions of examining attorneys in cases involving unrelated third-party marks. The Board must make its own findings of fact, and need not adopt the conclusions reached by an examining attorney in an unrelated case. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017); *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994); *In re BankAmerica Corp.*, 231 USPQ 873, 876 (TTAB 1986). “It has been said many times that each case must be decided on its own facts.” *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010) (internal citation omitted). At any rate, two registrations standing alone are insufficient to show that the cited mark, or the term BLENDERS, is conceptually weak.⁵⁴

⁵³ 24 TTABVUE 8-9.

⁵⁴ By way of comparison, in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, 115 USPQ2d at 1672 n. 1, and in *Jack Wolfskin*, there were at least fourteen, 116 USPQ2d at 1136 n.2.

We acknowledge that when used in connection with fresh fruit the word “blenders” may suggest at least one use for the goods (i.e., as an ingredient to be blended), and this may make that term suggestive. Suggestive marks are inherently distinctive and should be accorded the scope of protection to which inherently distinctive marks are entitled. *See Maytag Co. v. Luskin’s, Inc.*, 228 USPQ 747, 750 (TTAB 1986); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) (“[T]he fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.”).

Applicant did not introduce any evidence of third-party uses that would establish any diminished commercial strength of Registrant’s mark, the sixth *DuPont* factor.⁵⁵ *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”); *see also Jack Wolfskin*, 116 USPQ2d at 1136; *Juice Generation*, 115 USPQ2d at 1675-76.

⁵⁵ Applicant’s repeated reliance on *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565-1566 (TTAB 1996), in support of its argument that the shared term BLENDERS is weak, *see* 13 TTABVUE 18 and 24 TTABVUE 7-8, is misplaced because, unlike the applicant in that case, Applicant here has not introduced any evidence of third-party use. Third-party registrations are “not evidence of what happens in the market place or that customers are familiar with them.” *See AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *In re Embiid*, 2021 USPQ2d 577, at *34; *In re Morinaga Nyugyo K.K.*, 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.”).

Because the cited registration is “prima facie evidence of the validity of the registered mark,” *see* Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), we must assume that the mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act. *See Tea Bd. of India*, 80 USPQ2d at 1889. *See also New Era Cap Co.*, 2020 USPQ2d 10596, at *10. Thus, we afford Registrant’s composite mark FRESH BLENDERS “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery*, 125 USPQ2d at 1347.

D. The similarity or dissimilarity of the marks

We now turn to the first *DuPont* factor, the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567. “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) (quoting *In re Davia*, 110 USPQ2d at 1812).

In comparing the marks, we are mindful that where, as here, the goods are closely related, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

“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*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

We reproduce below the marks at issue:

Applicant’s Mark:

The Applicant's Mark consists of the words "FRUIT & VEGGIE" in a green, sans-serif, all-caps font, positioned above the word "Blenders" in a larger, green, cursive script font.

Registrant’s Mark:



We find that literal portion of each mark is the dominant part thereof. Applicant’s mark is FRUIT & VEGGIE BLENDERS in a lightly stylized, green format that is not so distinctive as to form a commercial impression separate and apart from the words. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1639-40 (Fed. Cir. 2016) (slight stylization did not create separate commercial impression apart from the literal term of the mark). Likewise, the design element of Registrant’s composite word-and-design FRESH BLENDERS mark does not detract from the significance of

the word portion of the mark which remains easily recognizable; rather, it tends to emphasize the wording by partially encircling it and conveying a connotation and commercial impression supporting the idea of freshness with plant leaves and juicy drops of liquid. Similarly, the stylization in the cited mark does not form a separate impression from the mark as a whole. While we do not ignore the stylization of the literal elements of the respective marks, the dominant impression of Applicant's and Registrant's marks are clearly the words FRUIT & VEGGIE BLENDERS and FRESH BLENDERS, respectively.

In the case of marks such as we have before us, consisting of stylized words and words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). That is because “[t]he word portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers.’” *Aquitane Wine USA*, 126 USPQ2d at 1184 (quoting *Viterra*, 101 USPQ2d at 1911).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

With respect to Applicant's stylized mark FRUIT & VEGGIE BLENDERS, the word BLENDERS is the most dominant part of the mark because it is in the largest font, the term FRUIT & VEGGIE modifies the word "blenders," informing consumers as to the type of "blenders" (i.e., fruit and vegetable), and the term FRUIT & VEGGIE is descriptive, if not generic, when used in connection with frozen fruit and vegetables and has accordingly been disclaimed by Applicant. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations because consumers will tend to focus on the more distinctive parts of marks. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *Nat'l Data Corp.*, 224 USPQ at 752); *Aquitaine Wine USA*, 126 USPQ2d at 1185 (disclaimed matter "entitled to less weight in the likelihood of confusion analysis"); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression.").

Likewise, the word BLENDERS is the dominant part of Registrant's composite mark FRESH BLENDERS because the word FRESH modifies the word "blenders"

informing consumers that Registrant's product is not altered by processing.⁵⁶ The word "fresh" is descriptive when used in connection with fresh fruit and has accordingly been disclaimed by Registrant.

In addition to the literal portions of both marks having the same structure: a descriptive term beginning with the letter "F" and modifying the word "blenders" informing consumers as to the characteristics of the "blenders" products (i.e., fruit and veggie BLENDERS or fresh BLENDERS), we find that the common term BLENDERS in the marks has the same meaning and conveys the same commercial impression to consumers when used with the respective closely related and interchangeable goods. Given the similarities between the marks and close relatedness of the goods, consumers familiar with the composite mark FRESH BLENDERS are likely to perceive Applicant's mark as a variant mark denoting a product line extension into frozen fruits and vegetables. *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product."); *cf. In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN "more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices.").

⁵⁶ *See* definition of "fresh" from MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) at 13 TTABVUE 26-27.

Keeping in mind that the marks “must be considered ... in light of the fallibility of memory,” *In re St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)), we focus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). In this case, because the products at issue are frozen fruit and vegetables and fresh fruit, the average purchaser is anyone in the general public shopping for groceries – and, in particular, fresh or frozen fruit that the record shows may be alternative and interchangeable goods.

“[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985). We find that the peripheral differences in this case fail to distinguish the marks. Accordingly, we disagree with Applicant’s contention that “the textual elements of Applicant’s mark differ substantially from the registered mark[].”⁵⁷ As Applicant explains:

[Its] mark is composed of three (3) words, “FRUIT”, “VEGGIE” and “BLENDERS”, with a total of nineteen (19) characters, five (5) syllables. Also, Applicant’s mark includes the symbol “&”. On the other hand, the cited registered mark is shorter, composed of two (2) words, “FRESH” and “BLENDERS”, with a total of thirteen (13) letters and three (3) syllables. Moreover, the cited registered trademark additionally includes a partial circle

⁵⁷ 13 TTABVUE 12.

with leaves above the term[] “FRESH” and juice drops at the edge of both “FRESH” and “BLENDERS”.⁵⁸

Applicant’s argument assumes, without supporting evidence, a level of subtlety of consumer perception that is inconsistent with our working understanding, in the absence of evidence to the contrary, that the average customer of the involved goods “retains a general rather than specific impressions of the marks.” *Embiid*, 2021 USPQ2d 577, at *11. Consumers do not focus on minutia such as the counting of letters the number of syllables in each mark. *See Fuji Jyukogyo K.K v. Toyota Jidosha K.K.*, 228 USPQ 672, 674 (TTAB 1985) (“Purchasers do not count letters when reacting to trademarks in the marketplace.”); *Am. B.D. Co. v. N.P. Beverages, Inc.*, 213 USPQ 387, 388 (TTAB 1981) (“Purchasers are not expected to, and do not, count the number of letters which marks have in common.”). The public does not scrutinize marks. *See B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ 1719, 1721 (Fed. Cir. 1988) (“The purchasing public, we believe, does not indulge in such recognitional contortions but sees things as they are.”); *In re Johnson Prods. Co., Inc.*, 22 USPQ 539, 540 (TTAB 1983) (“[T]his sort of studied analysis of the mark is unlikely to occur in the marketplace where these products are sold.”).

In sum, although we have pointed to the identical dominant BLENDERS portions of the marks, we acknowledge the fundamental rule that we must consider the marks in their entireties. *See Jack Wolfskin*, 116 USPQ2d at 1134; *Massey Junior Coll., Inc.*

⁵⁸ *Id.*

v. Fashion Inst. of Tech., 492 F.2d 1399, 181 USPQ 272, 273-74 (CCPA 1974). We note the specific differences pointed out by Applicant. These differences, however, are outweighed by the similarities of the marks. Thus, when comparing the marks overall, they are similar in appearance, sound, connotation, and commercial impression. Accordingly, the first *DuPont* factor also weighs in favor of finding a likelihood of confusion.

E. Conclusion as to the Likelihood of Confusion

Because the marks are similar, the goods are closely related and are offered in some of the same channels of trade to some of the same classes of consumers, and Applicant has not demonstrated that the cited mark is conceptually or commercially weak, we find that Applicant's stylized mark FRUIT & VEGGIE BLENDERS for "frozen fruit; frozen vegetables" is likely to cause confusion with the registered composite word-and-design mark FRESH BLENDERS for "fresh fruit."

III. Decision

We affirm the refusal to register Applicant's mark under Section 2(d) of the Trademark Act.