

This Opinion is not a  
Precedent of the TTAB

Hearing: November 2, 2022

Mailed: November 29, 2022

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*In re Bowery Farming Inc.*

Serial No. 88873491

Eleanor Lackman and Lindsay Edelstein of Mitchell Silberberg & Knupp LLP  
for Bowery Farming Inc.

Megan Clifford, Trademark Examining Attorney, Law Office 111,<sup>1</sup>  
Chris Doninger, Managing Attorney.

Before Heasley, Larkin, and Hudis,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Bowery Farming Inc., seeks registration on the Principal Register of  
the mark THE MODERN FARMING COMPANY (in standard characters, with

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<sup>1</sup> The initial and final refusals were issued by Examining Attorney Jonathan Falk, Law Office 111. When Applicant filed its notice of appeal, the case was reassigned to Examining Attorney Megan Clifford.

“FARMING COMPANY” disclaimed) for “fresh produce, namely, fresh vegetables, fruits, and unprocessed grains” in International Class 31.<sup>2</sup>

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as used in connection with these identified goods, so resembles the mark MODERN FARMS (in standard characters, with “FARMS” disclaimed), registered on the Principal Register for “fresh, raw and unprocessed mushrooms” in International Class 31, as to be likely to cause confusion, mistake, or deception.<sup>3</sup>

When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney submitted briefs and appeared before the Board for a hearing. Having considered all of the arguments and evidence of record under the applicable law, we affirm the refusal to register.

## I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in

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<sup>2</sup> Application Serial No. 88873491 was filed on April 15, 2020, based on Applicant’s declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify the documents by title, date, and page in the downloadable .pdf version. References to the briefs and other materials in the appeal record refer to the Board’s TTABVUE online docketing system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

<sup>3</sup> The cited Registration No. 3760718 was issued on the Principal Register on March 16, 2010; renewed. The registration also identifies “processed mushrooms” in Class 29, which is not the basis for the refusal to register.

the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when 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).

To determine whether there is a likelihood of confusion under Trademark Act Section 2(d), we analyze the evidence and arguments under the factors recited in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“DuPont”), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). When analyzing these factors, the overriding concerns are to prevent buyer confusion as to the source of the goods, and to protect the registrant from adverse commercial impact due to registration of a newcomer’s similar mark. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995).

We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). “Not all of the *DuPont* factors are necessarily relevant or of equal weight in a given case, and any one of the factors may control a particular case. ....” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 2022 USPQ2d 513, \*7 (Fed. Cir. 2022) (internal citation and punctuation omitted). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, \*29 (TTAB 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944,

1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

#### **A. Similarity of the Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Conopco, Inc. v. Transom Symphony Opco, LLC*, 2022 USPQ2d 504, \*11 (TTAB 2022) (citing *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd*, 777 Fed. Appx. 516 (Fed. Cir. 2019) and *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

In terms of sight and sound, Applicant argues that its mark, THE MODERN FARMING COMPANY, has 23 letters and eight syllables, while the cited registered mark, MODERN FARMS, has only 11 letters and three syllables.<sup>4</sup> The difference is primarily attributable to Applicant's prefix, "THE," and suffix "COMPANY," which flank "MODERN FARMING." Even minor differences of this sort can distinguish two marks, Applicant maintains, citing *Embarcadero Techs., Inc. v. Rstudio, Inc.*, 105 USPQ2d 1825, 1835-1836 (TTAB 2013), which distinguished RSTUDIO from

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<sup>4</sup> Applicant's brief, 6 TTABVUE 12-13 & n. 6; Applicant's reply brief, 9 TTABVUE 9.

ER/STUDIO.<sup>5</sup> Moreover, Applicant maintains, Registrant appears to only use a stylized logo on its packages of mushrooms:<sup>6</sup>



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Registrant's logo is immaterial, though, as its registered mark, like Applicant's mark, is in standard characters, and neither is limited to any particular font style, size, or color. *Shenzhen IVPS Tech. Co. Ltd. v. Fancy Pants Prods., LLC*, 2022 USPQ2d 1035, \*38 (TTAB 2022) (citing Trademark Rule 2.52(a); 37 C.F.R. § 2.52(a)). "[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information." *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018).

We agree with the Examining Attorney that the two marks appear more similar

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<sup>5</sup> Applicant's brief, 6 TTABVUE 12, Applicant's reply brief, 9 TTABVUE 9 n.5.

<sup>6</sup> Applicant's brief, 6 TTABVUE 13.

<sup>7</sup> Logo from Registrant's website, ModernMush.com, 3/24/2021, Applicant's March 25, 2021 Response to Office Action, ex. 4, TSDR 70.

than dissimilar. The marks share the identical wording MODERN preceding variations on FARM, creating a similar structure and cadence. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 1060 (Fed. Cir. 1985) (finding similarity between CASH MANAGEMENT ACCOUNT and THE CASH MANAGEMENT EXCHANGE because they “are, in large part, identical in sound and appearance and have a general similarity in cadence”)).

Applicant adds the words “THE” and “COMPANY,” but “THE” is an article that generally adds little or no source-identifying significance, *Pierce-Arrow Soc’y v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, \*5 (TTAB 2019), and “COMPANY” merely describes the business form of the entity that owns the marks. *In re Detroit Athletic*, 128 USPQ2d at 1049. Even though this empty verbiage adds words, syllables and letters to Applicant’s mark, purchasers cannot be expected to focus on such minutia to distinguish the marks. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers ... do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.”).

Moreover, the disclaimed words—“FARMING COMPANY” in Applicant’s mark and “FARMS” in Registrant’s mark—merely describe the agricultural provenance of their produce, and thus contribute less to the marks’ commercial impression on consumers. *See In re Dare Foods Inc.*, 2022 USPQ2d 291, \*9 (TTAB 2022) (disclaimed descriptive matter has less significance in likelihood of confusion determinations). The dominant, core similarity remains the respective marks’ identical wording

MODERN in combination with variations of the word FARM. 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. *Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, \*2-3 (Fed. Cir. 2021). “Thus, if 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).

Applicant’s reliance on *Embarcadero Techs. v. Rstudio* is misplaced because there, despite the slight difference in spelling, RSTUDIO was the name of the applicant’s software programming language, whereas the letters “ER” in ER/STUDIO were a recognized acronym for “entity relationship,” conveying a “distinctively different commercial impression and connotation.” *Embarcadero Techs. v. Rstudio*, 105 USPQ2d at 1835-37. Here there is no such difference in connotation or commercial impression.

Applicant notes Registrant uses a plural noun, “FARMS,” while Applicant uses the verb “FARMING.”<sup>8</sup> The words evoke differing concepts, Applicant argues, with MODERN FARMS conjuring up images of an actual farm and MODERN FARMING suggesting innovative farming techniques.<sup>9</sup> There is no evidence, however, that the purchasing public would draw such a distinction, as both marks could convey the

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<sup>8</sup> Applicant’s reply brief, 9 TTABVUE 7.

<sup>9</sup> Applicant’s brief, 6 TTABVUE 14; Applicant’s reply brief, 9 TTABVUE 7, 9.

same concept. Applicant admits that “‘Modern,’ when used in conjunction with certain agricultural goods (such as its use **in the Cited Mark**), is **suggestive** of innovative farming techniques and healthy living.”<sup>10</sup>

If anything, THE MODERN FARMING COMPANY looks and sounds like the trade name of the entity operating MODERN FARMS. *See Weldon Farm Prods., Inc. v. Packaging Ents., Inc.*, 197 USPQ 584, 589 (TTAB 1977) (trade name serves to identify commercial entity that is the source of products bearing trademark). So even if the marks appeared near each other on goods in the produce section of a supermarket, they could be taken as related. Moreover “[t]he proper test regarding similarity ‘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) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) *quoted in In re St. Julian Wine Co., Inc.*, 2020 USPQ2d 10595, \*4 (TTAB 2020)).

The focus is on the recollection of the average purchaser—here, a typical consumer of fresh produce—who normally retains a general rather than a specific impression of trademarks. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, \*4 (TTAB 2020). The slight differences between Applicant’s and Registrant’s marks are “not likely to be

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<sup>10</sup> Applicant’s reply brief, 9 TTABVUE 7 (emphasis added to “in the Cited Mark”; emphasis to “suggestive” was in italics in the reply brief).



recalled by purchasers seeing the marks at spaced intervals. Purchasers of retail [goods or] services do not engage in trademark dissection.” *Grandpa Pidgeon’s of Mo., Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973) *quoted in Hylete LLC v. Hybrid Athletics, LLC*, 931 F.3d 1170, 2019 USPQ2d 285253, \*2 (Fed. Cir. 2019).

For these reasons, the marks, taken in their entirety, are more similar than dissimilar. Therefore, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

## **B. Strength of the Cited Registered Mark**

Under the fifth and sixth *DuPont* factors, we consider the strength of the cited registered mark, and the extent to which that strength may be attenuated by “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567; *In re Embiid*, 2021 USPQ2d 577, \*33 (TTAB 2021). In determining the strength of a mark, we consider both its commercial strength, based on its marketplace recognition, and its inherent strength, based on its nature. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010).

### **1. Commercial Strength**

The commercial strength of a cited registered mark varies along a spectrum from very strong to very weak. *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017); *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, \*30 (TTAB 2022). The proper standard is the mark’s “renown within a specific product market,” and “is determined from the

viewpoint of consumers of like products,” ..., and not from the viewpoint of the general public. *Chutter v. Great Mgmt.*, 2021 USPQ2d 1001, at \*30-31 (quoting *Joseph Phelps Vineyards v. Fairmont Holdings*, 122 USPQ2d at 1734-35).

In an ex parte appeal such as this one, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate consumers’ exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). So the mark’s commercial strength is usually treated as neutral. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(ix) (2022).

Still, Applicant contends that under the sixth *DuPont* factor, that “the registry is so ‘crowded’ with similar ‘MODERN FARM’-formative marks that the Cited Mark is entitled only to a narrow scope of protection[.]”<sup>11</sup> It cites in support the following MODERN FARM-formative third-party registrations and applications:

- MODERN FARM BUSINESS (U.S. Reg. No. 5,521,431, Supplemental Register) for downloadable podcasts in the field of the business of farming, in Class 9;
- MODERN FARMER (Reg. No. 4,653,405) for website featuring articles in the fields of food, health, and wellness, in Class 41;
- MODERN MARKET FARM FRESH EATERY (Reg. No. 5,205,590) for restaurant, bar and catering services, in Class 43;
- MODERN FARMHOUSE (U.S. Reg. No. 4,450,163) for, inter alia, organic farms for fruits and vegetables, in Class 44;
- MODERN FARM word mark (U.S. Reg. No. 1,175,505, cancelled) and design mark (U.S. Reg. No. 1,175,504, cancelled) for mail-order store services specializing in farm and ranch clothing and equipment, in Class 42;

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<sup>11</sup> Applicant’s brief, 6 TTABVUE 5.

- MODERN FARMILY (Application Ser. No. 90/504,663, Intent-To-Use, abandoned) for, inter alia, livestock, fresh fruits and vegetables in Class 31;
- MODERN FARMS (Application Ser. No. 88/453,005, Intent-To-Use, abandoned) for, inter alia, herbal body products and plant-infused beverages in Classes 3, 5, 32, and 35.
- MVF MODERN VEG FARMS, stylized (Application Ser. No. 88204008, Intent-To-Use, abandoned) for fresh fruits and vegetables, fresh herbs in Class 31.<sup>12</sup>

“Because of the existence of these other ‘MODERN FARM’-formative marks for related goods and services,” Applicant argues, “it becomes clear that the Cited Mark, MODERN FARMS, exists in a crowded field, and even the slightest addition or modification to it is sufficient to distinguish one ‘MODERN FARMS’-formative mark from the next.”<sup>13</sup>

We agree with the Examining Attorney, however, that these third-party registrations and applications fail to show that the cited registered mark MODERN FARMS is **commercially** weak. To begin with, third-party **registrations** do not weaken the commercial strength of a cited mark:

The third-party registrations, with no evidence of the extent of the use of the marks in commerce, do not diminish the commercial strength of Registrant’s mark. “We have frequently said that little weight is to be given such [third-party] registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them . . .” [*Sock It to Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at \*9 (TTAB 2020)] (quoting *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973), *quoted in Inn at St. John’s*, 126 USPQ2d at 1746). Applicant’s citation of third-party registrations as evidence of

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<sup>12</sup> *Id.* 6 TTABVUE 8, 11; Applicant’s reply brief, 9 TTABVUE 5; March 25, 2021 Response to Office Action ex. 1-2, TSDR 14-63.

<sup>13</sup> Applicant’s reply brief, 9 TTABVUE 7.

marketplace 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.” *Id.* (quoting *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (also citing *AMF v. Am. Leisure Prods.*, 177 USPQ 268).

*In re Embiid*, 2021 USPQ2d 577, at \*34.

Similarly, the three third-party applications—all filed on an intent-to-use basis and all abandoned—fail to show public exposure to their applied-for marks. *In re Inn at St. John’s*, 126 USPQ2d at 1745 (“pending applications are evidence only that the applications were filed on a certain date; they are not evidence of use of the marks”).

So too with the two cancelled registrations: “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....” *Id.* Applicant argues that the two cancelled registrations for MODERN FARM, in standard character and composite forms, coexisted with the cited registered mark for almost seven years.<sup>14</sup> But they coexisted only on the Principal Register, which does not prove their coexistence in the marketplace. *See In re Embiid*, 2021 USPQ2d 577, at \*34, 39-41. There is, in consequence, no reason to believe that the consuming public—ordinary purchasers of produce—has been so frequently exposed to similar MODERN FARM-formative marks that it has been educated to distinguish between

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<sup>14</sup> Applicant’s brief, 6 TTABVUE 8.

or among them on the bases of minute distinctions. *See In re Davia*, 110 USPQ2d at 1815.

## 2. Conceptual Strength

Third-party registration evidence goes solely to the cited mark's **conceptual** strength or weakness. “[T]hird-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) *quoted in Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, \*22 (TTAB 2021). “Third-party registrations used in this manner are not evidence that customers are accustomed to seeing the use of other, similar, marks in the marketplace, but rather evidence that a term is suggestive or descriptive of the relevant goods or services. Such terms may be conceptually weak because the more descriptive a term is, the less likely prospective purchasers are to attach source-identifying significance to it.” *In re Morinaga*, 120 USPQ2d at 1745-46. “Accordingly, if the common element of two marks is ‘weak’ in that it is generic, descriptive, or highly suggestive of the named goods or services, other matter in the marks may be sufficient to avoid confusion.” *Shenzhen v. Fancy Pants*, 2022 USPQ2d 1035, at \*39.

Applicant accordingly argues that Registrant’s mark, MODERN FARMS, is suggestive of its identified goods, “fresh, raw and unprocessed mushrooms.”<sup>15</sup>

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<sup>15</sup> Applicant’s brief, 6 TTABVUE 10.

Registrant disclaimed “FARMS,” conceding its descriptiveness,<sup>16</sup> Applicant notes. Further, Registrant prefaced “FARMS” with “MODERN,” an adjective that, in Applicant’s view, “suggests to consumers that Registrant provides food products grown at a farm that might use innovative techniques, i.e., ‘modern farms.’”<sup>17</sup> Consequently, Applicant argues, the cited registered mark is suggestive or so commonly used that the public will look to other elements to distinguish the sources of the respective goods.<sup>18</sup> Applicant further argues, “as all of these examples involved offerings related to, at the very least, the food industry. MODERN FARMHOUSE, for example, is even more closely related, and specifically covers ‘organic farms for fruits and vegetables.’”<sup>19</sup> Applicant concludes that these third-party registrations are probative, “given the relatedness of the goods offered by the Registrant and the goods and services offered in connection with the marks above.”<sup>20</sup>

The Examining Attorney counters that third-party registrations for unrelated goods or services have no bearing on the strength of the cited registered MODERN FARMS mark.<sup>21</sup> *See Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (under the sixth *DuPont* factor, “the controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or

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<sup>16</sup> *Id.* See, e.g., *In re Info. Builders Inc.*, 2020 USPQ2d 10444, \*7 (TTAB 2020) (disclaimer concedes descriptiveness).

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.*

<sup>19</sup> Applicant’s reply brief, 9 TTABVUE 5.

<sup>20</sup> *Id.*

<sup>21</sup> Examining Attorney’s brief, 8 TTABVUE 7.

services. . . . ‘It is less relevant that [the mark] is used on unrelated goods or services....’”) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)). Of the remaining four live registrations for MODERN FARM-formative marks, three are for such disparate services as podcasts in the field of the business of farming, website articles on food, health and wellness, and restaurant, bar and catering services, and the fourth, for the mark MODERN FARMHOUSE, is for organic farms for fruits and vegetables.

We agree with the Examining Attorney that three of Applicant’s cited third-party registrations venture far afield into disparate, remote services, so far removed from Registrant’s goods as to have little or no bearing on the conceptual strength of Registrant’s mark. *See Made in Nature v. Pharmavite*, 2022 USPQ2d 557, at \*24 (“The third-party registrations of NATURE or MADE marks that Applicant submitted for products other than Opposer’s identified goods have little or no probative value in showing the conceptual weakness of the terms NATURE or MADE in Opposer’s marks.”) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (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)).<sup>22</sup>

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<sup>22</sup> The same can be said of the five additional third-party registrations and three third-party applications Applicant submits containing the word MODERN without FARM. These range even farther afield, from MODERN HERB (Reg. No. 5689722) for pet grooming products and organic pet treats in Classes 3 and 31 to MODERN SPROUT (Reg. No. 5743312) for flowers and/or herb seeds sold as part of a hydroponic seed growing kits in Class 31 to THE MODERN VEGAN (Ser. No. 90523776) in Class 43 for restaurant services. Applicant’s brief, 6 TTABVUE 11; March 25, 2021 Response to Office Action ex. 2, TSDR 23-63. Their differing wording “reduces their potency as evidence of conceptual weakness.” *In re Embiid*, 2021

On the other hand, we agree with Applicant that MODERN FARMHOUSE, covering *inter alia* “organic farms for fruits and vegetables,” involves goods that are related to those in the cited registered mark. A single registration, however, with no proof regarding the extent to which the registered mark has been used in the marketplace, does not weaken MODERN FARMS’ conceptual strength, much less its commercial strength. “Manifestly, one registration whether the mark covered thereby is in use or not, is insufficient to indicate lack of distinctiveness of the [mark] and/or that customers have been so exposed to different [goods] sold under marks containing this numeral that they have learned to live with and distinguish the source of the goods sold thereunder by any slight difference in the marks....” *American “76” Co., v. Nat’l Brewing Co.*, 158 USPQ 417, 420 (TTAB 1968). *See also Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*24 (single third-party use insufficient to show weakness of senior mark).

At bottom, the cited registered mark MODERN FARMS is registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and it is therefore entitled to all Section 7(b) presumptions, including that the mark is inherently distinctive. 15 U.S.C. § 1057(c); *New Era Cap Co. v. Pro Era LLC*, 2020 USPQ2d 10596, \*10 (TTAB 2020). “[I]nasmuch as the cited mark is registered on the Principal Register, we must assume that it is at least suggestive....” *In re Fiesta Palms LLC*, 85 USPQ2d 1360,

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USPQ2d 577, at \*38 n. 86. And their disparate goods and services “have no bearing on the strength of the term in the context relevant to this case.” *Tao v. Bender*, 125 USPQ2d at 1058-59.



1363 (TTAB 2007) (citing *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997)). And even if the mark is somewhat suggestive of Registrant's mushroom goods, it is still entitled to protection against registration of a similar mark for related goods. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("the fact that a mark may be somewhat suggestive does not mean that it is a 'weak' mark entitled to a limited scope of protection"). As noted, Applicant's mark, with its core terms MODERN FARMING, conveys the same suggestive connotation and commercial impression as Registrant's mark, and the other words in Applicant's mark, "THE" and "COMPANY" are insufficiently distinctive to avoid confusion. *See Shenzhen v. Fancy Pants*, 2022 USPQ2d 1035, at \*39.

The fifth and sixth *DuPont* factors regarding the strength of the cited mark (or its lack thereof) are therefore neutral.

### **C. Relatedness of the Goods, Channels of Trade, and Classes of Customers**

The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration..." and the third *DuPont* factor concerns the "similarity or dissimilarity of established, likely-to-continue trade channels." *DuPont*, 177 USPQ at 567; *Stone Lion Cap. v. Lion Cap.*, 110 USPQ2d at 1161.

"A proper comparison of the goods considers whether 'the consuming public may perceive [the respective goods of an applicant and registrant] as related enough to cause confusion about the source or origin of the goods or services.'" *In re Dare Foods Inc.*, 2022 USPQ2d 291, at \*5 (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*,

281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). Therefore, to support a finding of likelihood of confusion, “it is not necessary that the goods be identical or even competitive. It is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of similarity of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the goods.” *Id.*, at \*5-6 (citation omitted).

In this case, we find consumers are likely to perceive Applicant’s goods, “fresh produce, namely fresh vegetables, fruits, and unprocessed grains,” as sufficiently related to Registrant’s goods, “fresh, raw and unprocessed mushrooms,” to cause confusion about their source or origin when promoted or sold under similar marks. The respective goods are both produce, defined as “food or any other substance or material that is grown or obtained through farming.”<sup>23</sup> Notably, Applicant acknowledges that fruits, vegetables and mushrooms are related forms of produce, stating:

- “the registry is so ‘crowded’ with similar “MODERN FARM”-formative marks, including for goods and services relating to produce, that the Cited Mark is entitled only to a narrow scope of protection”<sup>24</sup>

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<sup>23</sup> dictionary.cambridge.org 11/9/2022. We take judicial notice of this dictionary definition. See *Shenzhen. v. Fancy Pants*, 2022 USPQ2d 1035, at \*46. “[T]he ‘Board may take judicial notice of dictionary definitions, including online dictionaries, definitions in technical dictionaries and translation dictionaries that exist in printed form,’ *In re Omniome*, 2020 USPQ2d 3222, at \*2 n.17 [(TTAB 2019)].” *In re Zuma Array Ltd.*, 2022 USPQ2d 736, \* 12 (TTAB 2022).

<sup>24</sup> Applicant’s reply brief, 9 TTABVue 3.

- “MODERN FARMHOUSE, for example, is even more closely related, and specifically covers ‘organic farms for fruits and vegetables’”<sup>25</sup>
- “given the relatedness of the goods offered by the Registrant and the goods and services offered in connection with the marks above...”<sup>26</sup>

The Board also has found these types of fresh produce to be related, stating, “fresh vegetables, at least, and fresh mushrooms are closely related food products which can be found in close proximity to one another in the produce sections of food stores and are generally purchased at the same time by [shoppers] in the normal course of their daily or weekly shopping tours.” *In re Giorgio Foods, Inc.*, 165 USPQ 729, 731 (TTAB 1970).

Applicant’s sole substantive argument against relatedness is that it “produces a wide variety of different food products, which are widely distributed. Registrant, on the other hand, solely produces mushrooms, which it then sells primarily to a particular supplier.”<sup>27</sup> But Registrant’s identification of goods does not restrict its channels of trade, which can change and expand at any time. *Merritt Foods v. Associated Citrus Packers, Inc.*, 222 USPQ 255, 257 (TTAB 1984).

Given the breadth of Applicant’s identification of goods, its fresh fruits and vegetables—be they tomatoes, kale, cucumbers, carrots, apples, or potatoes—could appear in various parts of a supermarket produce section, surrounding Registrant’s fresh mushrooms. If respective fresh produce items appeared close to each other, their

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<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.*

<sup>27</sup> Applicant’s brief, 6 TTABVUE 15; Applicant’s reply brief, 9 TTABVUE 10; Applicant’s March 25, 2021 Response to Office Action, ex. 4, TSDR 70.

similar marks would suggest (as noted above) that Registrant's produce emanated from Applicant. *See In re Martin's Famous Pastry Shoppe*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (that the respective products may well be sold in "close proximity" to one another supports conclusion that confusion is likely) *cited in In re Davia*, 110 USPQ2d at 1816-17. But even if the goods appeared in more separate parts of the produce section, shoppers would not be able to make a side-by-side comparison of the marks, and would have to rely on their general, fallible recollections. *Id.* at 1813; *In re St. Julian Wine Co., Inc.*, 2020 USPQ2d 10595, \*4 (TTAB 2020). Whether Applicant's fresh fruits and vegetables are near Registrant's fresh mushrooms or farther away in the produce section, they are still likely to be confused as to source when sold under similar marks.

Here, as in *Georgio Foods*, shoppers would tend to purchase the respective goods at the same time in the normal course of their daily or weekly shopping tours for dishes such as salads.

Further Registrant's packaging which is part of the record, recommends:



“Use with salads, sautes and sauces.”



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“—great for stir fry”

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<sup>28</sup> Applicant’s March 25, 2021 Response to Office Action ex. 3, TSDR 67-68.

“Such complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.” *Martin’s Famous Pastry*, 223 USPQ at 1290, *quoted in Davia*, 110 USPQ2d at 1815.<sup>29</sup> The respective fresh produce products here “may be purchased ... in the normal course of weekly or daily shopping forays. There is, therefore, a relationship between these products sufficient to set the scene for confusion to arise.” *Plus Prods. v. Sterling Food Co., Inc.*, 188 USPQ 586, 589 (TTAB 1975).

We acknowledge mushrooms and vegetables are not biologically classified the same. “Mushrooms are fungi that you can eat” and “[v]egetables are plants such as cabbages, potatoes, and onions which you can cook and eat”—Collins Dictionary.<sup>30</sup> The issue, though, is not whether consumers will confuse the goods, but rather whether they will confuse the source of those goods. *In re Ox Paperboard*, 2020 USPQ2d 10878, at \*5. “Even 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.” *Recot, Inc. v. Becton*, 214 F.3d 1322,

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<sup>29</sup> In *In re Davia*, the involved goods, agave sweetener and pepper sauce, were more disparate than here, so additional evidence of relatedness was required. The Board found those goods related because they performed the same complementary function as condiments and were commonly used together. 110 USPQ2d at 1815. The record in that case included recipes for both ingredients, *id.* at 1815-16, registrant’s website, which suggested using its sweetener with “sauces, such as BBQ, stews and meat glaze,” a menu using the two ingredients in a margarita cocktail, pepper sauces listing agave as an ingredient, and two third-party registrations showing that a single mark has been registered for pepper sauce and natural sweeteners. *Id.* at 1817. *Davia* also cites a line of decisions finding different foods related, such as *In re Decombe*, 9 USPQ2d 1812, 1815 (TTAB 1988), finding fresh produce complementary to biscuits, cookies, wafers and candy because they are served and eaten together.

<sup>30</sup> CollinsDictionary.com 6/9/2022, Examining Attorney’s brief, 8 TTABVUE 13-14. We take judicial notice of these definitions.

54 USPQ2d 1894, 1898 (Fed. Cir. 2000) *quoted in Shenzhen v. Fancy Pants*, 2022 USPQ2d 1035, at \*44-45. Given Applicant’s potentially wide variety of “fresh produce, namely, fresh vegetables, fruits, and unprocessed grains,” average shoppers, unaware of the taxonomic differences between fungi and vegetables, could easily regard Registrant’s mushrooms as a line of Applicant’s fresh foods offered in the same produce section. *See Conopco, Inc. v. Transom Symphony*, 2022 USPQ2d 504, at \*13 (consumers likely to believe respective marks identify companion products emanating from the same source).

The evidence here, taken as a whole and considered against the backdrop of Applicant’s half-hearted argument that “The Services [sic] Offered in Conjunction with Applicant’s Mark and the Cited Mark Are Distinguishable,” Applicant’s brief, 6 TTABVUE 14, suffices to show that fresh fruits and vegetables and fresh mushrooms are related forms of produce. Applicant acknowledges above that the goods are related. This position is corroborated by a third-party registration, by Registrant’s mushroom packaging, which suggests using its mushrooms in salads and stir-fries, where they would complement fruits and vegetables, by *Giorgio Foods*, 165 USPQ at 731, finding fresh vegetables and fresh mushrooms closely related food products, displayed close to one another in the produce sections of food stores, and by common knowledge that fresh produce appears together in the produce section.

Thus, Applicant’s and Registrant’s fresh produce goods are related, and would travel through the same channels of trade to the same classes of consumers—ordinary

purchasers of produce. The second and third *DuPont* factors weigh in favor of finding a likelihood of confusion.

## **II. Conclusion**

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. The similarities of the marks coupled with the related and complementary nature of the goods sold in the same trade channels to the same prospective consumers leads us to the conclusion that confusion is likely as to the source of the involved goods. The other *DuPont* factors are neutral.

**Decision:** The refusal to register Applicant's mark under Trademark Act Section 2(d) is affirmed. 15 U.S.C. § 1052(d).