

This Opinion Is Not a
Precedent of the TTAB

Mailed: November 29, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

—————
Trademark Trial and Appeal Board

—————
Frontier Distribution LLC

v.

Mountain View Fruit Sales Inc.

—————
Opposition No. 91275335

Sarah J. Gayer and Jeffrey D. Harty of Nyemaster Goode, P.C. for Frontier Distribution LLC.

Tracy A. Agrall of Wild, Carter & Tipton for Mountain View Fruit Sales Inc.

—————
Before Lykos, Larkin, and Dunn, Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

Mountain View Fruit Sales Inc. (Applicant) applied to register the mark SIMPLY GROWN ORGANIC (standard characters, GROWN ORGANIC disclaimed) on the Principal Register for “organic fresh fruit,” in International Class 31.¹

¹ Application Serial No. 90531178 filed February 16, 2021 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

References to the application are to the downloadable .pdf version of documents available from the USPTO’s TSDR (Trademark Status and Document Retrieval) database. The TTABVUE citations refer to the Board’s electronic docket, with the first number referring to

Frontier Distribution LLC (Opposer) filed a notice of opposition to registration of Applicant’s mark alleging likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with Opposer’s previously used and registered SIMPLY ORGANIC marks (standard characters, ORGANIC disclaimed). USPTO copies of the registrations with status and title information submitted with the notice of opposition² are summarized below:

Reg. No. 2850654 Jun. 08, 2004, 2 nd renewal	spices and seasonings, in Int. Cl. 30
Reg. No. 2883350 Sep. 07, 2004, 2 nd renewal	vanilla, extracts used as flavorings, gravy mixes, and salad dressing, in Int. Cl. 30
Reg. No. 3402333 Mar. 25, 2008, renewed	vanilla, extracts used as flavorings, gravy mixes, sloppy joe seasoning mix, seasonings, and salad dressing, in Int. Cl. 30
Reg. No. 3828585 Aug. 03, 2010, renewed	spices, in Int. Cl. 30
Reg. No. 4086989 Jan. 17, 2012, renewed	on-line retail store services featuring organic products, namely, spices, seasonings, baking mixes, chili mixes, dip mixes, flavors, extracts, gravy mixes, sauce mixes, pasta sauce mixes, and salad dressing mixes, as well as recipes for organic meals and in-store coupons, in Int. Cl. 35

Applicant’s answer admitted that “true and accurate” copies of USPTO information for the pleaded registrations were of record; that Applicant’s SIMPLY GROWN ORGANIC mark contains the entirety of Opposer’s SIMPLY ORGANIC

the docket entry and the second number, if applicable, referring to the page within the entry. In general, the opinion cites to publicly available versions of confidential information.

² 1 TTABVue 14-132.

mark; and that Opposer's goods and Applicant's goods both include food items; and otherwise denied the salient allegations of the notice of opposition.³

The opposition has been fully briefed by the parties. We sustain the opposition.

I. The Record

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b), 37 CFR § 2.122(b), the file of the opposed application.

A. Opposer's evidence:

- Testimony declaration of Laura Kuykendall, Senior Vice President of Marketing (Senior VP Kuykendall) for Frontier Co-op, majority owner of Opposer;⁴
- Notice of reliance with Internet materials, namely excerpts from Opposer's website, Applicant's website, and third-party websites;⁵

³ 4 TTABVUE 2-4, Par. 4-8, 16, 22. With respect to the affirmative defenses (4 TTABVUE 6), Applicant's "affirmative defense" that Opposer has failed to state a claim upon which relief can be granted is not a true affirmative defense because it asserts the insufficiency of the pleading of Opposer's claims rather than a defense to a properly pleaded claim. *See Advance Mag. Publs., Inc. v. Fashion Elecs., Inc.*, 2023 TTAB LEXIS 223, at *3-4 n.4. Because Applicant did not pursue the purported insufficiency in Opposer's pleading by way of motion, or argue it in its brief, Applicant has waived it. *Id.* Another "affirmative defense" refers to dilution, which is not at issue here. The remaining "affirmative defenses" merely amplify Applicant's denials, which is permitted in pleadings, but differ from true affirmative defenses. *Keystone Consol. Indus. v. Franklin Inv. Corp.*, 2024 TTAB LEXIS 290, at *3 n.5. *See also H.D. Lee Co. v. Maidenform, Inc.*, 2008 TTAB LEXIS 21, at *10 ("An affirmative defense is defined as follows: A defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true.") (citation omitted).

As part of an internal Board pilot citation program, the citation form in this opinion follows the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the LEXIS legal database.

⁴ 32 TTABVUE (public version) and 34 TTABVUE (confidential version).

⁵ 28 TTABVUE.

- Notice of reliance with Internet materials, namely excerpts from third-party websites, Opposer's website, and Applicant's Facebook page, digital media library, and retail toolbox;⁶
- Notice of reliance with USPTO TSDR copies of third-party registrations;⁷
- Notice of reliance with USPTO copies of oppositions brought by Opposer against third-party applications for SIMPLY marks; excerpts from third-party websites; excerpts from Opposer's and Applicant's websites; excerpts from Applicant's responses to discovery, including its authentication of documents produced in discovery, and documents Applicant produced in discovery;⁸
- Notice of reliance with USPTO copies of Opposer's pleaded registrations;⁹
- Rebuttal notice of reliance with a third-party registration; third-party webpages; and Applicant's webpages.¹⁰

B. Applicant's evidence:¹¹

- Testimony declaration of Michael Thurlow, owner of Applicant (owner Turlow);¹²
- Notice of reliance with USPTO copies of third-party registrations; excerpts from Applicant's website and its account at the Constant Contact email marketing platform; and Opposer's response to an interrogatory;¹³
- Notice of reliance with USPTO copies of Applicant's pending application, and past and current registrations for unrelated marks for various fruit.¹⁴

⁶ 29 TTABVUE.

⁷ 30 TTABVUE.

⁸ 31 TTABVUE.

⁹ 33 TTABVUE. This submission was unnecessary in view of the status and title copies of the pleaded registrations submitted with the notice of opposition. Trademark Rule 2.122(d)(1), 37 CFR 2.122(d)(1).

¹⁰ 37 TTABVUE.

¹¹ Applicant is advised that, rather than filing all of its evidence as a single document, the better practice is to file each testimony declaration and notice of reliance separately.

¹² 36 TTABVUE 125-32.

¹³ 36 TTABVUE 8-69.

¹⁴ 36 TTABVUE 70-111. We give no consideration to Applicant's notice of reliance (36 TTABVUE 112-124) on photographs, an advertising flyer, and proof sheet for labels. See

II. Entitlement to a Statutory Cause of Action

To establish statutory entitlement to oppose under Section 13 of the Act, 15 U.S.C. § 1063, Opposer must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1372 (Fed. Cir. 2020). Opposer’s ownership of the pleaded registrations, and submission of copies showing their current status and title, support its plausible likelihood of confusion claim against the involved application, and show its real interest in this proceeding and a reasonable basis for its belief of damage. *Coach Servs.*, 668 F.3d at 1377.

As discussed in the section on priority, Opposer also has established sales of SIMPLY ORGANIC seasonings since 2012, a separate basis for finding entitlement to its likelihood of confusion claim. See *Monster Energy Co. v. Lo*, 2023 TTAB LEXIS 14, at *16 (entitlement based on common law use of mark alleged to be confusingly similar).

Coach Services Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1363 (Fed. Cir. 2012) (“the Board properly struck the documents [submitted by notice of reliance] from the record because they were not submitted in accordance with the Board’s rules and were not otherwise authenticated”); *Calypso Tech., Inc. v. Calypso Cap. Mgmt., LP*, 2011 TTAB LEXIS 259, at *9 (“A party seeking to make evidence of record by notice of reliance must follow the rules and case law; if material cannot be made of record by notice of reliance it will not be considered even if the adverse party does not specifically object to it, as long as the adverse party does not specifically treat it as of record such that we can say it has been stipulated into the record.”).

As described in the Board’s rules, notices of reliance may be used to submit specific self-authenticating documents, namely trademark registrations (Trademark Rule 2.122(d)(2)), printed publications in general circulation, official records, and Internet evidence (Trademark Rule 2.122(e)), and an adverse parties’ disclosures, discovery responses and depositions (Trademark Rule 2.120(k)). See also Trademark Rule 2.122(g). Because evidence which is not self-authenticating requires identification and foundation necessarily provided by a witness, an offering party cannot use a notice of reliance “for any or all exhibits.” *Wonderbread 5 v. Gilles*, 2015 TTAB LEXIS 261, at *10 (TTAB 2015).

Opposer has established its statutory entitlement to bring this opposition proceeding.

III. Trademark Act Section 2(d) Claim

Under Section 2(d) of the Trademark Act, a mark may not be registered if it “consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion” 15 U.S.C. § 1052(d). “In opposition proceedings, the opposer has the burden of proving a likelihood of confusion by a preponderance of the evidence.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 998 (Fed. Cir. 2020).

A. Priority

Because Opposer’s pleaded registrations are of record, and Applicant has not brought a counterclaim to cancel them, priority is not at issue with respect to the marks and goods covered by the registrations. *See Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 1403 n.6 (CCPA 1974) (“prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation”).

With respect to Opposer’s common law priority, Opposer must establish use prior to Applicant’s constructive priority date of February 16, 2021, the filing date of the opposed application.¹⁵ Opposer’s Senior VP Kuykendall averred that Opposer’s mark

¹⁵ Trademark Act Section 7(c) provides, in pertinent part, that “the filing of the application to register [a] mark shall constitute constructive use of the mark, conferring a right of

SIMPLY ORGANIC goods have been sold “for many years” (Pars. 17, 20, 22, 24, 26); that Opposer and its predecessor have “use of the SIMPLY ORGANIC mark for more than two decades;” (Par. 46), and that SIMPLY ORGANIC sales grew from 2012 to 2021 (Par. 50).¹⁶ She authenticated a confidential business record that, among other things, referred to SIMPLY ORGANIC sales of seasonings from 2012 to 2021.¹⁷ We take judicial notice of the definition of “spice” as “a plant product (such as pepper, nutmeg, cinnamon, or ginger) that is used to season or flavor foods and is usually comprised of seeds, fruits, bark, or rhizomes that have been dried and typically ground,” and so find “spices” to be a subcategory of seasonings.¹⁸ While none of the averments name the specific goods listed in the pleaded registrations, we find the combination of testimony and documentary evidence establish Opposer’s sale of SIMPLY ORGANIC spices and seasonings since 2012.

Opposer has established its priority.

B. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du*

priority, nationwide in effect, on or in connection with the goods or services specified...”. 15 U.S.C. § 1057(c).

¹⁶ 32 TTABVUE 5-11. Senior VP Kuykendall also testified to the prices of specific SIMPLY ORGANIC goods on dates subsequent to Applicant’s priority date. 32 TTABVUE 8.

¹⁷ 34 TTABVUE 25.

¹⁸ Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/spice>. Accessed 26 Nov. 2024. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 2014 TTAB LEXIS 94, at *6 n.4, *aff’d*, 823 F.3d 594 (Fed. Cir. 2016).

Pont de Nemours & Co., 476 F.2d 1357, 1361 (CCPA 1973). “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, 1319 (Fed. Cir. 2018). “Not all of the *DuPont* factors are relevant to every case,” and we consider each *DuPont* factor for which there are arguments and evidence. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018).

Because Opposer’s spices and seasonings are more similar to Applicant’s organic fresh fruit than Opposer’s retail services, and Opposer’s evidence largely focuses on its spices and seasonings, we will restrict our analysis to whether Opposer has established a likelihood of confusion with its SIMPLY ORGANIC mark for spices and seasonings.

1. Strength of Opposer’s Mark

Before we compare the marks, we consider the strength of Opposer’s SIMPLY ORGANIC mark and the scope of protection to which it is entitled. *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). The fifth *DuPont* factor enables an opposer to prove that its pleaded mark is entitled to an expanded scope of protection by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use),” and the sixth *DuPont* factor allows an applicant to contract that scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods [or services].” *DuPont*, 476 F.2d at 1361.



We address conceptual strength, or where the mark falls on the distinctiveness spectrum. *In re N.C. Lottery*, 866 F.3d 1363, 1366 (Fed. Cir. 2017) (“there are four

categories of trademarks [generic, merely descriptive, suggestive, and arbitrary (or fanciful)] that lie along a spectrum”) (citation omitted). Opposer’s pleaded registrations for SIMPLY ORGANIC marks are on the Principal Register, without a claim of acquired distinctiveness, so the marks are presumed to be inherently distinctive for the goods for which they are registered. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 17 F.4th 129, 147 n.7 (Fed. Cir. 2021) (noting the presumption that a registered mark is distinctive). We take judicial notice that the term SIMPLY in the mark is an adverb defined as “without ambiguity: clearly,”¹⁹ and so modifies and emphasizes the remaining adjective ORGANIC, which is highly descriptive of the goods and disclaimed in Opposer’s pleaded registrations. See *Quaker State Oil Refining Corp. v. Quaker Oil Corp.*, 453 F.2d 1296, 1299 (CCPA 1972) (“when [appellant] disclaimed said term SUPER BLEND] in applications for registrations of compound marks, it again admitted the merely descriptive nature of the mark”). Accordingly, because the term “simply organic” suggests Opposer’s goods have only organic ingredients, we find the term falls on the highly suggestive side of the distinctiveness spectrum.

Under the sixth *DuPont* factor, “[t]he existence of third-party registrations on similar goods can bear on a mark's conceptual strength.” *Spireon*, 71 F.4th at 1363. Applicant argues that the ordinary protection accorded the inherently distinctive registered SIMPLY ORGANIC mark should be contracted based on third-party

¹⁹ Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/simply>. Accessed 26 Nov. 2024.

registration evidence for similar goods. As shown below Applicant submitted four registrations for marks including the terms SIMPLY and ORGANIC for food items:²⁰

Reg. No. 7081041	SIMPLY ORGANIC	infant formulas and food for infants; food supplements; simulated and substitute breast milk formula in liquid and powder form for infants; milk-based infant formula; all of the foregoing being organic, in Int. Cl. 5.
Reg. No. 6739566		Organic meat sold only at wholesale, or to hotels, restaurants, institutions and other wholesale distributors that sell to retailers, in Int. Cl. 29.
Reg. No. 5220938	SIMPLY FRESH ORGANIC	Salads, namely, packaged vegetable salads with dressing, meat and/or cheese, sold as a unit, in Int. Cl. 29.
Reg. No. 7342159		honey infused with herbs and fruit made in whole or in part from organic ingredients, in Int. Cl. 30.

While these four registrations do feature similar marks for arguably similar goods to Opposer’s SIMPLY ORGANIC mark for spices and seasonings, four is not such a large number that we believe public perception of the term SIMPLY ORGANIC has been altered from the suggestive connotation the term possesses inherently. The evidence is “a far cry from the large quantum of evidence of third-party use and third-

²⁰ 36 TTABVUE 8, 14, 23, 26. Applicant submitted other third-party registrations covering different goods. Because those goods are not similar on their face to the goods for which Opposer has registered its mark, and Applicant presented no evidence demonstrating that they would be considered similar in the market for Opposer’s goods, we give no consideration to the third-party registrations for unrelated goods (Reg. Nos. 5146694 for organic bed linens, 5239151 for bath oil and essential oils for cosmetic uses, 4902815 for lawn care and pest control services). 36 TTABVUE 11, 17, 20. *See Omaha Steaks*, 908 F.3d at 1325 (assessing strength of the mark, “the Board relied on a diverse range of third-party products, such as ‘popcorn,’ ‘wine,’ ‘oriental foods,’ and ‘alcoholic beverages.’ But these goods bear no relationship to meat or meat-based products.”).

party registrations that was held to be significant in both *Jack Wolfskin [Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.]*, 797 F3d 1363 (Fed. Cir. 2015) and *Juice Generation [Inc. v. GS Enters. LLC]*, 794 F3d 1334 (Fed. Cir. 2014).” *Sabhnani v. Mirage Brands, LLC*, 2021 TTAB LEXIS 464, at *32-33 (quotation and quotation marks omitted).

Commercial or marketplace strength, or fame, is the extent to which the relevant public recognizes a mark as denoting a single source. *Joseph Phelps Vineyards*, 857 F.3d at 1324-1325. Likelihood of confusion fame “varies along a spectrum from very strong to very weak.” *Id.* at 1325 (citation omitted). “[T]he Lanham Act's tolerance for similarity between competing marks varies inversely with the fame of the prior mark. As a mark's fame increases, the Act's tolerance for similarities in competing marks falls.” *Kenner Parker Toys, Inc. v. Rose Art Indus.*, 963 F.2d 350, 353 (Fed. Cir. 1992) (finding the Board erred in discounting the import of Kenner's famous prior mark).

“Fame/commercial strength may be measured not only directly by consumer surveys or declarations but also indirectly by the volume of sales and advertising expenditures in connection with the goods or services sold under the mark, and supported by other indicia such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods or services identified by the marks; the general reputation of the goods or services; and social media presence.” *Heil Co. v. Tripleye GmbH*, 2024 TTAB LEXIS 494, at *50-51 (citations omitted). “[T]he proper legal standard for evaluating the fame of a mark under the fifth *DuPont* factor is the class of customers and potential customers of a product or

service, and not the general public.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1374-75 (Fed. Cir. 2005). In this case, the relevant class of consumers is prospective purchasers of spices and seasonings, and so does comprise the general public.²¹

As discussed, the record demonstrates use of Opposer’s SIMPLY ORGANIC mark on spices and seasonings since 2012. Senior VP Kuykendall averred that more than 50 types of SIMPLY ORGANIC spices and seasonings currently are sold in the United States, including:

adobo seasoning, all-purpose seasoning, all-seasons salt, allspice, Baharat seasoning, black pepper, cardamom, cayenne pepper, chili lime seasoning, chili powder, chipotle powder, cilantro, cinnamon ground, cinnamon sticks, cinnamon sugar, cloves ground, cloves whole, coriander, crushed red pepper, cumin seed ground, curry powder, dill weed, everything blend, fennel seed, five spice powder, garam masala, garlic n’ herb, garlic pepper, garlic powder, garlic salt, ginger root, herbes de Provence, harissa seasoning, Italian seasoning, lemon pepper, minced onion, mustard seed, nutmeg ground, onion powder, oregano, paprika, parsley, peppercorn medley, poppy seed, pumpkin spice, roasted garlic & herb umami blend, rosemary leaf, sage leaf, salt-free citrus seasoning blend, salt-free savory seasoning blend, sesame seed, sweet & smoky umami blend, thyme, turkey brine seasoning, turkey rub, turmeric root ground, white pepper, and whole black peppercorns.²²

²¹ As set forth above, the answer admits that Opposer’s goods and Applicant’s goods both include food items, and Senior VP Kuykendall avers that the consumers of its SIMPLY ORGANIC goods are “ordinary consumers who shop at grocery stores, natural foods stores, food cooperatives, and mass retailers.”⁴ TTABVUE, 32 TTABVUE 9.

²² 32 TTABVUE 5. The testimony is corroborated by webpages from Whole Foods indicating a large number of different SIMPLY ORGANIC products. 31 TTABVUE 42-45.

Senior VP Kuykendall also testified that for many years Opposer's SIMPLY ORGANIC spices and seasonings have prominently displayed the mark on the front of the package as in the following example:²³



Opposer's SIMPLY ORGANIC goods are available at national retailers, including Kroger, Safeway/Albertsons, Wegmans, Wakefern, Stop & Shop, Food Lion, Market Basket, Hy-Vee, The Fresh Market, Whole Foods, Sprouts, Hannaford, and Ingles and online at Amazon.com.²⁴ Opposer advertises its SIMPLY ORGANIC goods at its website and through Facebook (300,00 followers), Instagram (180,000 followers), Pinterest, and Tik Tok.²⁵

Senior VP Kuykendall testified that from 2012 to 2021 sales of Opposer's SIMPLY ORGANIC goods have been substantial, have occurred nationwide in the United

²³ 32 TTABVUE 6-8.

²⁴ 32 TTABVUE 9.

²⁵ 32 TTABVUE 9-10.

States, experienced compound annual growth, and represented a significant market share in the organic and natural products industry.²⁶ In addition, she testified that each year from 2014 to 2020, a SIMPLY ORGANIC product has won an award from a national publication, such as the Clean Eating magazine's 2020 "Clean Choice Award" in the spices and seasonings category for Opposer's SIMPLY ORGANIC spicy curry.²⁷

Considering the record as a whole, we find that Opposer's mark is entitled to somewhat more than the average protection accorded a registered mark. We have reviewed the confidential portions of Opposer's figures regarding sales and advertising and market share, and they support our finding that SIMPLY ORGANIC has some commercial strength. More specifically, notwithstanding the highly suggestive nature of the term SIMPLY ORGANIC as applied to spices and seasonings, Opposer's more than a decade of use and promotion, steady growth and accumulation of market share, and industry recognition combine to show that

²⁶ 34 TTABVUE 11, 25-26.

²⁷ 32 TTABVUE 12-13. Senior VP Kuykendall also testified that Opposer monitors U.S. trademark applications for confusingly similar marks and filed several oppositions against such marks with the Board. The record includes USPTO records comprising the summary page and docket entries for five applications for SIMPLY marks. 31 TTABVUE 11-40. Of the five, the docket entries show one opposition remains pending, two were sustained, and two were dismissed. We give this scant information low probative weight with respect to the strength of Opposer's mark. See *Monster Energy Co.*, 2023 TTAB LEXIS 14, at *64 n. 83 ("Finally, we note that we are not concerned with mere efforts at enforcement, but rather with the context surrounding successful enforcement and how that evidence bears on consumer recognition of any place applicant may have in the market."). See also *Omaha Steaks*, 908 F.3d at 1323 ("But, the mere fact that lawsuits were filed is not reasonably probative of the fame inquiry, which is focused on whether the mark has achieved 'extensive public recognition and renown,' not on enforcement efforts.") (internal citation omitted).

Opposer's SIMPLY ORGANIC is a mark of some strength in connection with spices and seasonings.

We find *Dupont* factor six is neutral and *DuPont* factor five favors a finding of likelihood of confusion.

2. Similarity or Dissimilarity of the Marks

The first *DuPont* factor requires consideration of “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361. The 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.” *Coach Servs.*, 668 F.3d at 1368 (internal quotation marks and citation omitted).

Applicant's mark SIMPLY GROWN ORGANIC merely adds the intervening descriptive term GROWN to Opposer's mark SIMPLY ORGANIC. The first term SIMPLY is identical in both marks, and is the only term in either mark which is not merely descriptive (or generic) and disclaimed. The identical first term and the remaining matter comprising a highly descriptive or generic term support finding the two marks confusingly similar. *Cf. In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (“the dominant portion of Dixie's mark, which disclaims the generic word ‘cafe,’ is ‘Delta’ ... [because] the generic term ‘café’ offers [insufficient] distinctiveness to create a different commercial impression.”).

While the Board may not dissect marks for comparison, finding that the first term in a mark is the most distinctive in both placement and connotation is entirely permissible. See *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985) (“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.”).

We also find that the nature of the additional term present in Applicant’s SIMPLY GROWN ORGANIC for organic fresh fruit mark does not distinguish it from Opposer’s SIMPLY ORGANIC MARK for spices and seasonings, but may be readily perceived as indicating Opposer’s expansion of its product line from prepared to grown foods.²⁸ See *China Healthways Inst. Inc. v. Wang*, 491 F.3d 1337, 1341 (Fed. Cir. 2007) (“Applying the *DuPont* factors to the marks viewed in their entirety, the addition of the word ‘PLUS’ in Wang’s mark is unlikely to avoid the confusion for ‘Plus’ ordinarily connotes a related superior product, not one from a different source.”); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 TTAB LEXIS 199, at *44 (“given the relative commercial strength of Opposer’s NEW ERA mark, consumers are likely to perceive hats and caps sold under Applicant’s PRO ERA mark as an extension of Opposer’s NEW ERA athletic cap product line.”); *Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, 2013 TTAB LEXIS 314, at *32 (“Purchasers of opposer’s

²⁸ Indeed, Applicant agrees that the term GROWN indicates a variation rather than a change in commercial impression, stating (40 TTABVUE 13) “Furthermore, the word ‘grown’ augments the meaning of the mark as it implies that the good were grown organically, rather than processed or non-organic.”

GOTT and JOEL GOTT wines are likely to assume that applicant's [various water beverages], sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer.").²⁹ In short, because the only variation in the marks is a highly descriptive term that reflects the variation in the goods to which the marks are applied, we find the marks SIMPLY ORGANIC and SIMPLY GROWN ORGANIC are highly similar and create the same commercial impression as applied to the respective goods. See *Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 1119 (Fed. Cir. 2024) ("the first two words of [the] BABIES' MAGIC [TEA] mark and the entirety of [the] BABY MAGIC mark look and sound almost the same and have the same connotation and commercial impression").

We find the *DuPont* factor regarding the similarity or dissimilarity of the marks weighs heavily in favor of finding a likelihood of confusion.

3. Relationship Between the Goods and Channels of Trade, and Prospective Purchasers

We next consider *DuPont* factors two, three, and four regarding the similarity or dissimilarity of the parties' respective goods and their trade channels, and "[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 476 F.2d at 1361. Our determination must be based on the identification of goods in the subject application, because the identification of goods defines the scope of any registration that ultimately issues.

²⁹ To be clear, because we find that the commercial impression is the same, and the additional term merely reflects the difference between the goods, we need not address those cases cited by Applicant (40 TTABVUE 12-13) in which third party marks unrelated to SIMPLY ORGANIC or SIMPLY GROWN ORGANIC were found to create different impressions as applied to different goods.

Stone Lion Cap. Partners, LP v. Lion Cap. LLP, 746 F.3d 1317, 1324 (Fed. Cir. 2014).

It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

We begin with the similarity of the respective goods. The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source.³⁰ See *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329 (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.”). It is sufficient that the parties’ goods are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000) (“[A]lthough the services are different, it is reasonable to believe that the general public would likely assume that the origin of the services are the same”).³¹ In assessing the relatedness of the goods, the more

³⁰ Applicant’s contention (40 TTABVUE 15) that the goods are not the same is not in dispute, but mistakes the relevant issue.

³¹ Because our determination must be based on the specific goods listed in the application and pleaded registrations, the cases cited by Applicant (40 TTABVUE 15-16) in which the Board found no likelihood of confusion between different goods than those at issue here are not instructive.

similar the marks at issue, the less similar the goods need to be to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir. 1993).

For convenience, we note that, among other goods, Opposer has registered its mark for spices and seasonings and Applicant seeks registration for organic fresh fruit. Senior VP Kuykendall testified “Several of [Opposer’s] SIMPLY ORGANIC Goods contain organic fruit” and specified that four SIMPLY ORGANIC products, namely turkey brine seasoning, spice right all-purpose blend, and salt-free savory seasoning blend, all contain either organic orange oil or organic orange peel.³² We find that the same fruit sold in its natural form and as an extract or ingredient in other products shows a commercial relationship between the goods for the purposes of likelihood of confusion. *See In re St. Julian Wine Co., Inc.*, 2020 TTAB LEXIS 196, at *11 (“Since apples are a key ingredient in the production of hard cider, Applicant’s hard cider may be made from Registrant’s apples certified to have been grown in the state of Michigan. We therefore find a commercial relationship between Applicant’s ‘hard cider’ and Registrant’s identified goods and that the goods are related, meaning that this *DuPont* factor weighs in favor of finding a likelihood of confusion”); *Merritt Foods v. Associated Citrus Packers, Inc.*, 1984 TTAB LEXIS 144, at *7 (“It would not be at all abnormal, in the Board’s view, for purchasers to assume that a citrus fruit producer would market fruit juices or fruit-ades on the one hand and fruit juice-based or fruit flavored frozen confections on the other”).

³² 32 TTABVUE 17.

Opposer also offered evidence that its and Applicant's goods are complementary. Goods which are "used in combination" are complementary, and "complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567 (Fed. Cir. 1984). Of course, "[m]erely because goods can be used together is not a sufficient basis on which to find them to be complementary. Rather, there must be some showing that customers would seek out both types of goods for the same purpose, for example, making an outfit by matching shoes and clothing, or making a sandwich by combining bread and cheese, to show that the goods are complementary." *N. Face Apparel Corp. v. Sanyang Indus. Co.*, 2015 TTAB LEXIS 328, at *46 (internal citation omitted).

Here, Opposer presented evidence that Applicant's fresh peaches and apples are eaten with Opposer's cinnamon; and that many baked goods such as fruit crisps, fruit breads, and fruit pies require both Applicant's fresh fruit and Opposer's spices and extracts.³³ In fact, both parties feature recipes using fresh fruit and spices on their websites.³⁴ We find the complementary use of the goods in many of the same dishes also establishes an intrinsic commercial relationship of the goods for likelihood of confusion purposes. See *In re Davia*, 2014 TTAB LEXIS 214, at *14-15 ("Pepper sauce and agave sweeteners are also commonly used together, and 'conjoint use is a fact proper to be considered along with other facts present in particular cases.'").³⁵

³³ 32 TTABVUE 18.

³⁴ 28 TTABVUE 143-167 (Opposer) and 169-190 (Applicant).

³⁵ See also *McDonald's Corp. v. McSweet, LLC*, 2013 TTAB LEXIS 351, at *36 ("The evidence establishes [the complementary nature of the goods, namely] that Applicant's identified pickled vegetables can be used as toppings in connection with sandwiches"); *Knorr-*

In addition, Opposer presented evidence of third-party use and registrations showing that fresh fruit such as that sold by Applicant may come from the same source as, and be identified by the same mark as, spices and seasonings such as that sold by Opposer. Website excerpts of record show that Target offers apples, limes, and garlic powder under the same GOOD & GATHER mark; Safeway offers apples and pumpkin pie spice under the same O ORGANICS mark; HyVee offers bananas, crushed red pepper, and cinnamon under the same THAT'S SMART! Mark; Walmart offers apples and cardamon under the same ORGANIC MARKETSIDE mark; Kroger offers peaches, apples, apple pie spice, cinnamon, garlic powder, and pumpkin pie spice under the same KROGER mark; Lunds & Byerlys offers cantaloupe, pineapple, grapes, melon, Italian seasoning, pizza seasoning, taco seasoning under the same L & B mark; and Trader Joe offers kiwis and pumpkin pie spice under the same TRADER JOE mark.³⁶ Evidence that consumers encounter one mark designating a single source for the goods of both parties supports a finding that the goods are related. See *Detroit Athletic Co.*, 903 F.3d at 1306 (“This evidence [of third-party use]

Nahrungsmittel AG v. Havland Int'l, Inc., 1980 TTAB LEXIS 9, at *28 (“Likewise, opposer’s sauces, soups, and spices could be used in preparing applicant’s fish products or in making dishes with which cheeses might also be used”); *Mccormick & Co. v. Granny Goose Foods*, 1964 TTAB LEXIS 167, at *4-5 (“We also note from applicant’s specimens that it recommends use of ‘GOLDEN WEST’ potato chips with cheese dips. The recipes given for that dish include as ingredients seasonings such as celery salt, horseradish, and onion or onion juice. It thus appears that applicant’s product and some of opposer’s products have characteristics of conjoint use which may result in their being purchased at the same time to be used together.”).

³⁶ 28 TTABVUE 16-140. The evidence showing that Opposer’s SIMPLY ORGANIC goods are in the same grocery stores as fruit with no mark or a different mark, or that each party advertises its goods through its website, is not probative of the relationship between the parties’ goods. To the extent the fruit is designated as organic, the evidence has been considered as showing similar trade channels and sales conditions. 29 TTABVUE 15-137.

suggests that consumers are accustomed to seeing a single mark associated with a source that sells both its own branded clothing (as does the Detroit Athletic Club) as well as sports-teams-branded clothing (as does DACo).”).

Opposer submitted 44 use-based third-party registrations listing fresh fruit (which includes organic fresh fruit) and spices or seasonings.³⁷

“Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.”

In re Mucky Duck Mustard Co., 1988 TTAB LEXIS 11, at *9 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988) (unpublished table decision). *Accord In re I-Coat Co., LLC*, 2018 TTAB LEXIS 171, at *28.

In sum, Opposer’s spices and seasonings and Applicant’s “organic fresh fruits” are related because one may be incorporated in another, they complement each other as desserts, in baked goods, and as ingredients in many recipes, and significant third-party use and registration shows that the relevant consumers encounter goods such as Opposer’s and Applicant’s under the same mark and emanating from the same source.

³⁷ 30 TTABVUE 14-454 (Reg. Nos. 6050786, 6576897, 6612087, 6223004, 5824027, 4143500, 3552603, 6829926, 5915380, 2280669, 6828313, 6421258, 1500088, 5907222, 6162339, 6102569, 5900683, 4597632, 5908843, 6612085, 2431510, 5617749, 6646646, 6674219, 6063363, 5880335, 6296476, 1953055, 3342460, 6133141, 6021407, 4260842, 4754798, 4754798, 6106033, 3600900, 5283673, 5947774, 3134755, 6694916, 6381350, 6381350, 3794234, 6181223). In many instances the evidence includes multiple variations of the same mark – stylized, in standard characters, or including a house mark. We list just one version.

Turning to the channels of trade, neither Opposer's pleaded registrations nor the opposed application include any restrictions on the channels of trade for the goods. Applicant's brief concedes "Applicant's fruit and Opposer's spices, soup mixes, and salad dressings are sold in grocery stores."³⁸ We find the evidence of record shows the ordinary channels of trade for Applicant's and Opposer's goods overlap.³⁹

As to the conditions of purchase, "[p]urchaser sophistication may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect." *Palm Bay Imps.* 396 F.3d at 1376. Applicant argues⁴⁰ that owner Turlow's testimony shows Applicant's organic fresh fruit is not sold to the end consumer but to distributors and grocery chains, and these consumers should be considered more sophisticated purchasers than the end consumers. We again are unconvinced because these conditions of purchase are not reflected in the identification of goods. *Stone Lion*, 746 F.3d at 1323 ("Although recognizing that Stone Lion and Lion in fact require large minimum investments and target sophisticated investors, the Board focused on the sophistication of all *potential*

³⁸ 36 TTABVUE 18. The testimony of Applicant's owner Turlow that Applicant's fruit typically is sold to distributors and grocery chains, and not directly to consumers, does not alter the admission that consumers encounter Applicant's goods in grocery stores. 36 TTABVUE 129. In fact, Applicant's discovery responses state that Applicant imposes no limitation on its customers' ability to use Applicant's SIMPLY GROWN ORGANIC packaging visible to the consumers in retail stores and Applicant intends to use the SIMPLY GROWN ORGANIC mark on grower posters, recipe posters, themed posters, signature posters, displays, plumcot playing cards, and/or playbook posters visible to the ultimate consumer. 31 TTABVUE 78-80.

³⁹ 28 TTABVUE 16-140.

⁴⁰ 40 TTABVUE 20-21.

customers of ‘the parties’ services as they are recited in the application and registrations, respectively.”).

Conversely, Opposer contends that the conditions of sale create a likelihood of confusion based on the evidence that both parties offer low-priced goods subject to impulse purchase. More specifically, Senior VP Kuykendall testified that the majority of Opposer’s SIMPLY ORGANIC goods “cost consumers less than \$10 at retail” and that in her experience, “organic fresh fruit is a low-cost item.”⁴¹ The record confirms that organic fresh fruit is relatively inexpensive, and includes webpages advertising organic apples at \$4.49 per 2lb bag, \$3.00 per 2 lb. bag, and \$6.18 per 3 lb. bag; organic oranges at \$6.28 per 4 lb. bag and \$5.99 per 2 lb. bag; and organic bananas at 32 cents each.⁴² Applicant does not argue for any particular sophistication of its end consumers, and we agree that the likelihood of confusion increases with respect to low-priced goods that may be purchased without much consideration, such as the goods at issue here. *See McDonald’s Corp. v. McSweet, LLC*, 2013 TTAB LEXIS 351, at *41 (“Applicant provided the prices for each of its [pickled gourmet vegetables, namely, pickled cocktail onions, pickled garlic, pickled, marinated olive medley and pickled asparagus], which range from \$ 4.99 -\$ 10.99. Such goods may be subject to impulse buying.”).

DuPont factors two, three, and four weigh in favor of finding a likelihood of confusion.

⁴¹ 32 TTABVUE 8, 16.

⁴² 28 TTABVUE 26, 54, 60, 84, 85, 102. See also 28 TTABVUE 105, 137.

4. Actual Confusion

Under the seventh, eighth, and twelfth *DuPont* factors, we consider “the nature and extent of any actual confusion,” “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” and “the extent of potential confusion, i.e., whether de minimis or substantial.” *DuPont*, 476 F.2d at 1361. “A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however.” *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003).

Notwithstanding the intent-to-use basis of the opposed application, Applicant’s owner Thurlow avers that Applicant began using the mark SIMPLY GROWN ORGANIC on its organically grown fruit in 2021, and is unaware of any instances of actual confusion.⁴³ Opposer’s response to an interrogatory similarly states that Opposer has no evidence of actual confusion.⁴⁴ “The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks.” *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 2010 TTAB LEXIS 40, *50, *aff’d*, 637 F.3d 1344 (Fed. Cir. 2011). Because the parties have at most three years of concurrent use, we find that the lack of actual confusion is not probative in this case.

⁴³36 TTABVUE 129, 131. The testimony is corroborated by Applicant’s interrogatory response. 31 TTABVUE 60.

⁴⁴ 36 TTABVUE 68.

With respect to the extent of potential confusion, Applicant's arguments⁴⁵ "essentially repeat arguments under the other *DuPont* factors, and have been duly considered." *Heil Co.*, 2024 TTAB LEXIS 494, at *94.

The seventh, eighth, and twelfth *DuPont* factors are neutral.

5. Balancing the Factors

In conclusion, we have considered all of the arguments and evidence of record, and all relevant *DuPont* factors. Notwithstanding its conceptual weakness, Opposer's mark SIMPLY ORGANIC has some strength on the commercial strength spectrum, and Applicant's mark SIMPLY GROWN ORGANIC is highly similar to Opposer's SIMPLY ORGANIC mark. Moreover, Applicant's fruit is related to Opposer's spices and seasonings, and the goods of both parties travel in overlapping channels of commerce to overlapping consumers, and include low-priced items subject to impulse purchase. All relevant *DuPont* factors either weigh in favor of finding a likelihood of confusion, or are neutral.

Decision: The opposition is sustained.

⁴⁵ 40 TTABVUE 22-23.