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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058000
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Nash Finch Company)	
)	
Petitioner,	)	Cancellation No. 92058000
)	
v.	)	Registration No. 4,283,988
)	
Ahold Licensing Sàrl,)	Mark: OUR FAMILY FOUNDATION
)	& DESIGN
Registrant.)	

PETITIONER'S REBUTTAL TRIAL BRIEF

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I. INTRODUCTION

Registrant Ahold Licensing, Sàrl (“Ahold”) advances three main theories to support its position that Registration No. 4,283,988 for the OUR FAMILY FOUNDATION and Design mark in connection with charitable fundraising services should not be cancelled. The first is that Petitioner Nash Finch Company (“Nash Finch”) failed to plead that it was going to rely on its broad common law rights in its OUR FAMILY marks. The second is that Nash Finch has not shown use of its OUR FAMILY mark in connection with services associated with charitable fundraising and donation services. The third is that there is no likelihood of confusion.

There is a likelihood of confusion in this case. Ahold does not dispute any of Nash Finch’s evidence of the scope and extent of use of the OUR FAMILY mark. Ahold presents no evidence rebutting the strength of the OUR FAMILY mark. Ahold does not dispute the parties are in the same industry, doing the same thing. Ahold does not dispute its mark is OUR FAMILY, and FOUNDATION is disclaimed. Ahold does not dispute there is geographic overlap in the parties’ use of the OUR FAMILY marks. All of the factors weigh in Nash Finch’s favor, and confusion is inevitable.

Ahold’s contention it is “surprised” by Nash Finch’s reliance on common law rights to OUR FAMILY in connection with charitable services is disingenuous. Ahold was told at every step in this proceeding, and before, that Nash Finch owned common law rights to OUR FAMILY for charitable services. Nash Finch’s Petition for Cancellation is replete with mentions of use of OUR FAMILY for charitable services. Nash Finch raised its common law rights throughout discovery and trial process, without any objection from Ahold, formal or otherwise. Ahold still does not object to evidence of Nash Finch’s use of OUR FAMILY for charitable services—it only attempts to get the Board to ignore it. Nash Finch’s common law rights to OUR FAMILY are squarely and properly within the bounds of this case, and are ripe for Board determination.

Third, Nash Finch presented credible evidence of use of OUR FAMILY as a service mark for charitable services including fundraising and donations. The mark has been consistently used for charity, donations and fundraising, for the benefit of others, long before Ahold adopted the OUR FAMILY FOUNDATION mark or applied for its registration. For the reasons set forth below, as well as those set forth in Nash Finch's opening brief, the Board should cancel Ahold's Registration 4,283,988 for the OUR FAMILY FOUNDATION and Design mark in connection with charitable fundraising services.

II. ARGUMENT

A. Nash Finch's Common Law Rights To The OUR FAMILY Mark Are Properly Pled, Raised During Discovery And Tried By Consent.

Ahold devotes a substantial portion of its brief arguing that Nash Finch failed to plead its common law rights in the OUR FAMILY mark in connection with charitable services and a wide range of grocery products. (49 TTABVue, Ahold Br. at 6-9.) Ahold's "gotcha" strategy pretends that Nash Finch's trial brief is the first time Ahold has heard of Nash Finch's common law rights in the OUR FAMILY mark. But the record shows Ahold has been on notice of Nash Finch's trial strategy for years, as discussed below. Ahold has expressly and impliedly consented to trial based, in part, on Nash Finch's common law rights.

1. Nash Finch's Adequately Pled Its Common Law Rights In The OUR FAMILY Mark In Connection With Charitable Services In Its Petition For Cancellation.

Nash Finch's first position statement in this action—the Petition for Cancellation—told Ahold that Nash Finch used OUR FAMILY in connection with charitable services and a wide variety of grocery items. Nash Finch's Petition for Cancellation (1 TTABVue, Pet. for Cancellation) asserts that Nash Finch first used the OUR FAMILY mark in 1904 (*id.* at ¶ 4), and now sells over 2,000 different products, or SKUs, under the mark (*id.*) and distributes to hundreds of stores. The earliest registration asserted by Nash Finch issued in 1939, some 35

years after the mark was adopted and first used. (*Id.* at ¶ 2.) The three registrations and one pending application that Nash Finch asserts in its Petition, in total, recite approximately 50 items. (*Id.*) The additional 1,950 items Nash Finch sells, and the 35 years of use prior to Nash Finch obtaining its first registration are a clear assertion of the common law rights Nash Finch relies upon in this proceeding. Thus, from the initiation of this proceeding, Ahold has been on notice that Nash Finch would rely on its common law use of the OUR FAMILY mark far beyond, in time and in scope, what is covered by Nash Finch’s registrations.

Nash Finch’s Petition for Cancellation also specifically told Ahold about its common law rights to charitable, fundraising and donation activities. Nash Finch alleged that it “closely associates its OUR FAMILY brand with some of its charitable and fundraising activities[,]” and goes on to highlight several specific examples. (*Id.* at ¶ 7.) The Petition for Cancellation includes several other references to use of the OUR FAMILY mark in connection with charitable services. (*Id.* at ¶¶ 8 & 9.) Moreover, Exhibit A to the Petition for Cancellation shows Nash Finch’s OUR FAMILY brand used in connection with the OUR FAMILY Labels for Learning charitable fundraising and charitable donation program:



(1 TTABVUE, Pet. for Cancellation at Ex. A; *see also* 47 TTABVUE, Nash Finch Br. at 18-20.) The Petition for Cancellation provided a clear road map that Nash Finch intended to rely on its use of the OUR FAMILY mark in connection with charitable services. Ahold had the discovery period and testimonial period to prepare its defense.

Ahold cites no authority stating these pleadings are inadequate to raise common law rights, or that Nash Finch is required to provide greater specificity to adequately plead common law rights. Instead, it simply states without support that Nash Finch's pleading was somehow inadequate. Decisions of the Board demonstrate that Nash Finch sufficiently pled its common law rights. *1047406 Ont. Ltd. v. UVCleaning Sys.*, Opp. No. 91194706, 2014 TTAB LEXIS 142, *9-10 (TTAB Apr. 14, 2014) (finding common law rights sufficiently pled where "the notice of opposition repeatedly asserts prior use of opposer's mark on goods not included in the pleaded registration."); *L-Com, Inc. v. Elecom Co., Ltd.*, Opp. No. 91192293, 2011 TTAB LEXIS 252, at *8-9 (TTAB Aug. 3, 2011) (holding that opposer's statement that it "continuously used its L-com trademark . . . in connection with the sale of computer and general electrical connectivity products' without making reference to its pleaded registrations . . . is sufficient to state common law rights in the mark and to provide applicant with notice of such rights."). Nash Finch's Petition more than put Ahold on notice of Nash Finch's intent to rely on common law rights.

2. Ahold Consented To Trial On Nash Finch's OUR FAMILY Common Law Rights Because Nash Finch Raised Its Common Law Rights Throughout Discovery And During The Testimonial Period, Without Objection From Ahold.

Nash Finch's common law rights to OUR FAMILY are also properly in this case because Nash Finch raised its common law rights throughout discovery and the trial period. Ahold has never objected to the admission of common law evidence and testimony, warranting a finding that Ahold impliedly consented to trial on the issue. Implied consent to the trial of an unpleaded issue occurs where "the nonoffering party (1) raised no objection to the introduction of the evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue." *Productos Laceteos Tocumbo S.A. de C.V. v. Palenteria La Michoacana, Inc.*, 98 USPQ2d 1921, 1925 (TTAB 2011); *see also Nestle Prepared Foods Co. v. V & V Enters. Inc.*, Opp. No. 91167465, 2011 TTAB LEXIS 68, at *8-9 (TTAB Mar. 10, 2011); *Boise Cascade*

Corp. v. Cascade Coach Co., 168 USPQ 795, 797 (TTAB 1970) (“Generally speaking, there is an implied consent to contest an issue if there is no objection to the introduction of evidence on the unpleaded issue, so long as the adverse party was fairly informed that the evidence went to the unpleaded issue.”). Further, where a party fails to object to introduction of certain evidence, it is properly before the Board for use at trial. *Productos Laceteos*, 98 USPQ2d at 1926; *Nestle*, 2011 TTAB LEXIS 68, at *8.

Here, Nash Finch has repeatedly referenced, relied on, and asserted its common law rights in the OUR FAMILY mark in connection with charitable services throughout this proceeding. Ahold never objected. At the beginning of discovery in its January 2014 initial disclosures, Nash Finch identified witnesses with knowledge regarding Nash Finch’s use of OUR FAMILY on charitable services, and “documents relating to Nash-Finch’s charitable services, including events, participants, beneficiaries, donors, fundraising efforts and the use of the OUR FAMILY trademarks in connection with Nash-Finch’s charitable services.” (Appendix A.) In its February 24, 2014 interrogatory responses, Nash Finch stated “Nash-Finch offers a variety of charitable services that incorporate the OUR FAMILY Marks or OUR FAMILY branded products.” (Appendix B.) In that same answer, Nash Finch discussed the “Our Family Labels for Learning” program and refers to the program as simply “the Our Family® program.” (*Id.*) Nash Finch continued in that same answer to detail the many additional charitable services it offers under or in connection with its OUR FAMILY mark. (*Id.*)

Ahold has even posed discovery relating to Nash Finch’s common law rights to OUR FAMILY. During the discovery deposition of Mr. John Paul, Nash Finch’s designated Rule 30(b)(6) witness, Ahold’s counsel asked questions about the OUR FAMILY Labels for Learning program. (34 TTABVUE, Paul 30(b)(6) Dep. at 19:25-20:15; 68:11-70:4; 101:4-102:4; 34

TTABVUE, Paul Ex. 29.) Ahold's counsel also questioned Mr. Paul regarding Nash Finch's donations under the OUR FAMILY brand. (34 TTABVUE, Paul 30(b)(6) Dep. at 29:12-24.)

During the trial period, Nash Finch's common law rights were raised repeatedly. In its Pretrial Disclosures, Nash Finch identified witnesses who would testify about "charitable donations of OUR FAMILY branded products by Nash Finch," and "dollars raised by charitable services offered under the OUR FAMILY Marks." (Appendix C.) Nash Finch stated it would rely on "documents relating to the first use and continued use in commerce of the OUR FAMILY Marks in connection with goods and services, including charitable services." (*Id.*) Ahold never objected to the scope of Nash Finch's Pretrial Disclosures.

Consistent with the trial strategy disclosed in the Pretrial Disclosures, a significant portion of the trial testimony of Mr. John Paul, Ms. Michele Murphy and Ms. Paula Docken focused on Nash Finch's use of OUR FAMILY for charitable fundraising and donations. (John Paul Test. 42:21-88:2; 88:4-117:15; Murphy Test. 69:2-71:13, 72:10-73:23, 126:4-136:5, 144:7-147:8.) The entirety of Ms. Docken's testimony was directed at Nash Finch's common law rights to OUR FAMILY. (37 TTABVUE 136-260.) Many of the documents introduced as trial exhibits were about use of OUR FAMILY for Nash Finch's charitable services. (*See, e.g.*, 35 TTABVUE 339, Paul Ex. 48 at NFAH0002217; 39 TTABVUE 438, 440, 441, Paul Ex. 58 at NFAH0002886, 2979, 3053; 39 TTABVUE 450, Paul Ex. 61; 37 TTABVUE 1, Murphy Ex. 214.) Many of the documents attached to Nash Finch's Notice of Reliance demonstrate the use of the OUR FAMILY mark in connection with Nash Finch's charitable endeavors as opposed to its food or grocery products or services. (*See, e.g.*, 28 TTABVUE 352-58.)

Ahold never objected to the introduction of any of this testimony or any of these exhibits. (39 TTABVUE 26-34, 42-45, Paul Dep. at 26:10-34:5, 42:12-45:19 (Ex. 48); 39 TTABVUE 96-102, Paul Dep. at 96:8-102:12 (Ex. 58); 39 TTABVUE 105-106, Paul Dep. at 105:15-106:10

(Ex. 61); 38 TTABVUE 76-77, Murphy Dep. at 76:24-77:19 (Ex. 214).) Indeed, counsel for Ahold even questioned Nash Finch witnesses about these documents during cross examination. (See, e.g., 39 TTABVUE 210, Paul Dep. 210:4-24.) Nash Finch also noted that these exhibits were part of the trial record in its opening brief (47 TTABVUE, Nash Finch Br. at 3) without Ahold making any objections to the introduction of these exhibits into the trial record. The issue of Nash Finch's common law rights to OUR FAMILY for charitable fundraising and donation services is squarely before the Board.

Ahold relies on the *Kohler* case to support its position that the Board should not consider Nash Finch's common law rights in the OUR FAMILY mark in connection with charitable services. *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100 (TTAB 2007). (Ahold Br. 6.) Ahold's reliance is misplaced. The *Kohler* case involved a claim for cancellation based on fraud. *Kohler*, 82 USPQ2d at 1103 n.3. The Board refused to consider the claim because the petitioner's trial brief was "the first time that petitioner has raised such grounds" and "the parties have not tried the claim, either implicitly or explicitly" *Id.* *Kohler* thus presented a substantially different set of considerations than this case. In this case, Nash Finch made clear at every step in this proceeding, such as through its Petition for Cancellation (*supra* at 2-4), its conduct through discovery (*supra* at 4-6), the testimony it introduced in depositions (*supra* at 6), and its notice of reliance, (*supra* at 6), that its position that Ahold's registration should be cancelled was based, in part, on Nash Finch's prior rights in the OUR FAMILY mark in connection with charitable services and a broad range of grocery products.

Nash Finch pled its common law rights and demonstrated its intent to rely on its common law rights in the OUR FAMILY mark in connection with charitable services and a broad range of grocery products. Ahold failed to object. The Board should follow the precedent of

Productos Laceteos, 98 USPQ2d at 1925, *Nestle*, 2011 TTAB LEXIS 68, at *8-9, and *Boise Cascade*, 168 USPQ at 797, and find that Ahold has impliedly consented to trial on this issue.

B. Nash Finch Has Proven Use In Commerce Of OUR FAMILY For Charitable, Donation And Fundraising Services, Long Before Ahold's Date Of First Use.

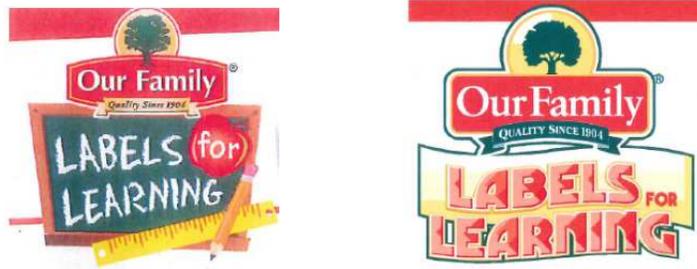
Based on the applicable law, Nash Finch's evidence shows use of OUR FAMILY in connection with charitable, donation and fundraising services, nationwide, for decades. To allege as Ahold does that Nash Finch has not used the OUR FAMILY mark as a service mark flies in the face of the voluminous evidence and case law. Ahold's brief does not present any law on the issue of what establishes use of a service mark in commerce. That is because the law favors Nash Finch, and not Ahold.

A party obtains common law service mark rights when it uses that word or phrase to identify the services of the party and distinguish them from those offered by others. 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 16.1 (4th ed. 2013); *see also, e.g., Vt. Teddy Bear Co. v. Build-A-Bear Workshop*, Opp. No. 91115198, 2004 TTAB LEXIS 733, at *14 n.6 (TTAB Dec. 17, 2004) ("A 'service mark' is defined identically as that of a trademark, except that it is used to 'identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of the services, even if that source is unknown.'" (citing 15 U.S.C. § 1127)). A service is an activity that meets three criteria: "(1) a service must be a real activity; (2) a service must be performed to the order of, or for the benefit of, someone other than the [mark's owner]; and (3) the activity performed must be qualitatively different from anything necessarily done in connection with the sale of the [mark owner's] goods or the performance of another service." TMEP 1301.01(a); *see also In re Betz Paperchem, Inc.*, 222 USPQ 89, 90 (TTAB 1982) (citing TMEP 1301.01). Consistent with this law, Nash Finch cited substantial evidence in its opening brief showing the regular and

continual use Nash Finch has made of the OUR FAMILY mark in connection with charitable services. (47 TTABVUE, Nash Finch Br. at 17-23, 32-34.)

1. The OUR FAMILY Labels For Learning Fundraising And Donation Program Is A Service Under The OUR FAMILY Brand.

The evidence shows Nash Finch uses the OUR FAMILY mark as a service mark for fundraising and donations to schools and nonprofits. Advertising promoting the program shows Nash Finch has regularly and consistently called this program “Our Family Labels for Learning” in advertising materials:



(37 TTABVUE 1, Murphy Ex. 214; 39 TTABVUE 438, Paul Ex. 58 at NFAH0002886; *see also*, 47 TTABVUE, Nash Finch Br. at 17-23, 32-34; *see also* 39 TTABVUE 438-447 at Paul Ex. 58; 38 TTABVUE 39-41, 69-70 at Murphy 39:23-41:16, 69:2-70:24; 36 TTABVUE 59 at Murphy Ex. 208.) This advertising is used to market the program to the general public, non-profits that receive donation dollars, and grocery stores. (See 47 TTABVUE, Nash Finch Br. at 18-19.)

Without case law support, Ahold argues the OUR FAMILY Labels for Learning program is not actually a charitable service but rather something akin to a marketing program to increase sales of OUR FAMILY branded products. (49 TTABVUE, Ahold Br. at 12.) To suggest that the OUR FAMILY Labels for Learning program is merely a marketing program and not a charitable service ignores reality. If the program was simply a marketing tool, Nash Finch could, for instance, offer a rebate to customers who sent in labels from OUR FAMILY products. But that is not what Nash Finch does. Instead, the program is qualitatively different from marketing done to sell OUR FAMILY branded food. Nash Finch approaches its suppliers, solicits

donations, and then provides funds to schools, churches, and other nonprofit organizations for the purchase of items such as learning aids and playground equipment. (47 TTABVUE, Nash Finch Br. at 19-20; *see also, e.g.*, 39 TTABVUE 91-92, 113-117 at Paul 91:12-92:3, 113:12-117:15; 38 TTABVUE 126 at Murphy 126:4-17; 39 TTABVUE 522-24, 534-36 at Paul Exs. 67, 70; 38 TTABVUE 3985-4141 at Murphy Ex. 186.) All of these activities are performed for third parties and conducted under the OUR FAMILY banner. Ahold's argument that the OUR FAMILY Labels for Learning program is not a charitable service flies in the face of reality.

Again without legal support, Ahold also argues the OUR FAMILY Labels for Learning program is merely ancillary to the sale of OUR FAMILY products and is not a separate service. (*Id.* at 13-15.) Even if the OUR FAMILY Labels for Learning program were simply ancillary to the sale of OUR FAMILY products, which it is not, Ahold's arguments would be unavailing. The fact that Nash Finch provides any services, even ancillary ones, under the OUR FAMILY mark necessitates the finding that Nash Finch owns common law rights in OUR FAMILY as a service mark, so long as the service is conducted for the benefit of a third party. "A service is an activity engaged in for the benefit of someone other than the one engaging in the activity. The statute makes no distinction between services on the basis of whether they are primary, incidental or ancillary to the sale of goods." *In re Mitsubishi Motor Sales of Am., Inc.*, 11 USPQ2d 1312, 1314 (TTAB 1989) ("It has long been settled that the statute does not distinguish between what is or is not a service on the basis of whether it is a primary service or is merely incidental or ancillary to a primary service."); *In re U.S. Tobacco Co.*, 1 USPQ2d 1502, 1504 (TTAB 1986); *see also Astec Indus, Inc. v. Barber-Greene Co.*, 196 USPQ 578, 582-83 (TTAB 1977) (finding applicant held a rights in term ASTEC as a service mark based on use in connection with services with the primary purpose of promoting the sale of applicant's ASTEC-branded goods). "The fact that a service may be incidental to a principle service or to the sale of

goods does not make it any less of a service mark.” *In re Heavenly Creations, Inc.*, 168 USPQ 317, 318 (TTAB 1971). Here, Nash Finch uses the OUR FAMILY mark to solicit, collect, and donate funds for non-profits. While OUR FAMILY food is sold at the same time, this is nevertheless a service offered for the benefit of others, under the OUR FAMILY mark. *Id.*

2. The OUR FAMILY Mark Is Also A Service Mark For Donations.

Nash Finch also provides charitable services under the OUR FAMILY mark through the donation of food to food banks and other charities. (*See* 47 TTABVUE, Nash Finch Br. at 21.) As with the OUR FAMILY Labels for Learning program, donation of food is an activity that benefits a third party. Numerous cases have recognized that charitable donations are a service. *See In re Woman’s Bar Found.*, No. 85240460, 2014 TTAB LEXIS 356, *3 (TTAB Aug. 29, 2014) (involving application for “foundation services of providing charitable donations”); *In re Fallen Heroes Mem. Found.*, No. 77285616, 2009 TTAB LEXIS 575, *4 (involving application for “philanthropic services concerning monetary donations”).

Here, Nash Finch’s donations are made under the OUR FAMILY banner, and the OUR FAMILY brand receives recognition for the service. That is why Nash Finch requests and receives advertising and public recognition for its donations, such as through signage and press mentions. (39 TTABVUE 46-47, 61-62 at Paul 46:24-47:13, 61:18-62:8; 39 TTABVUE 807.) The fact that the food is also branded OUR FAMILY does not take away the fact that the OUR FAMILY brand also identifies the donation service. *Astec*, 196 USPQ at 582-83. These donations thus also compel the conclusion, under the Board’s precedent, that this donation is a service upon which service mark rights can be based.

In re DSM Pharmaceuticals Inc., 87 USPQ 1623 (TTAB 2008), which Ahold relies on, does not involve a situation analogous to this case and does not justify a finding that Nash Finch does not hold common law rights in the OUR FAMILY mark in connection with charitable

services. In *DSM*, the Board affirmed a refusal to register a service mark because the specimen submitted by the applicant did not “directly associate” the service with the proposed mark. *Id.* at 1626. The refusal to register the mark was caused by a sparse record. *Id.* The Board acknowledged that, if it were provided, it could consider “any other available evidence in the record that shows how the mark is actually used.” *Id.* Here, unlike in *DSM*, Nash-Finch has provided significant evidence that it has used the OUR FAMILY mark in connection with charitable services such that Nash-Finch has obtained common law rights. (*Supra* at 8-11.) These rights predate Ahold’s and support cancelation of Ahold’s registration.

C. The Evidence Of Record Establishes That Confusion Is Likely.

Ahold’s registration should be cancelled due to likelihood of confusion. Nash Finch presented substantial evidence in its opening brief demonstrating the likelihood of confusion if Ahold’s registration is not cancelled. (47 TTABVUE, Nash Finch Br. at 34-49.) These points, and a response to Ahold’s arguments, are provided below.

1. Ahold’s Admissions Establishes Priority, Nationwide Use of Common Law Rights To OUR FAMILY, And A Likelihood Of Confusion.

In its brief, Ahold makes a number of admissions that further support Nash Finch’s position that consumers are likely to be confused based on Ahold’s registration of the OUR FAMILY FOUNDATION and Design mark in a marketplace where Nash Finch has been using OUR FAMILY in connection with both food and grocery products and charitable and fundraising services for years. Ahold does not dispute the following facts:

- Nash Finch has priority of use of OUR FAMILY in connection with charitable and fundraising services
- Nash Finch’s food products and charitable and fundraising services are offered nationwide
- Nash Finch’s OUR FAMILY mark is strong and entitled to a wide scope of protection at least with respect to food (49 TTABVUE, Ahold Br. at 20, 31)
- The OUR FAMILY mark is undiluted, and Nash Finch has a broad right to exclude uses and registrations of OUR FAMILY

- Nash Finch sells over 2,500 items that cover “every category in a grocery store” (49 TTABVUE, Ahold Br. at 21)
- Nash Finch spends millions of dollars promoting the OUR FAMILY brand annually, including to a “broad public audience” (49 TTABVUE, Ahold Br. at 21-22)
- Ahold and Nash Finch have market interface, and are in the same business (49 TTABVUE, Ahold Br. at 4)
- Nash Finch and Ahold seek donations from the same companies (49 TTABVUE, Ahold Br. at 20)
- Nash Finch’s use of OUR FAMILY in connection with charitable and fundraising services occurs in the same states where Ahold either seeks donations or provides charitable services (*Id.*)
- Ahold publicly uses its OUR FAMILY FOUNDATION and Design mark in close proximity to where Nash Finch OUR FAMILY branded food is sold and the OUR FAMILY Labels for Learning program is offered (49 TTABVUE, Ahold Br. at 22-23)

These strong facts weigh in favor of finding Ahold’s registration of OUR FAMILY FOUNDATION is likely to cause confusion amongst the relevant consuming public.

2. *DuPont* Factors 7 and 8: The Absence Of Documented Actual Confusion Is Not Dispositive.

In view of these admissions and the voluminous evidence that Nash Finch has presented demonstrating that consumer and supplier confusion is likely, Ahold argues, contrary to law, that lack of evidence of actual confusion is dispositive in this case. But, the case law consistently explains that lack evidence of actual confusion is not dispositive in Board proceedings. *Herbko Intern., Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002) (“While evidence of actual confusion factors into the *DuPont* analysis, the test under [15 U.S.C.] § 1052(d) is likelihood of confusion, not actual confusion. Hence, a showing of actual confusion is not necessary to establish likelihood of confusion.”). Instead, factors such as similarity of the marks and relatedness of the goods can be dispositive factors. *Id.* at 1164 (“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 *Han Beauty, Inc. v. Albert-Culber Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001)) (omission in original)).

None of the cases cited by Ahold hold that a lack of documented confusion alone is sufficient to find that confusion is unlikely. Indeed, in each of these cases the deciding court or board determined that additional factors necessitated a finding of no likelihood of confusion. In *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344 (Fed. Cir. 2011), the Opposer's mark had been used concurrently with variants of the applicant's marks in the same geographic region for over 30 years. *Id.* at 1354. Despite this long period of overlap of use without any evidence of actual confusion, the lack of actual confusion was not dispositive. The Court also found, based on a lengthy analysis, that the applicant's marks and those of the opposer were "dissimilar in appearance, sound, connotation, and commercial impression" *Id.* at 1349-54. This is markedly different from this case, where the only difference between the marks at issue is that Ahold's mark includes the disclaimed term "FOUNDATION."

Similarly, in *Smith v. Tobacco By-Products & Chemical Corp.*, 243 F.2d 188 (C.C.P.A. 1957), cited by Ahold, the primary issue the court addressed in finding no likelihood of confusion was the lack of similarity in the marks. *Id.* at 189-90. The lack of actual confusion was not dispositive but merely "a factor which may properly be given some weight in determining the issue presented." *Id.* at 190. The remaining cases that Ahold cites in support of its position that a lack of actual confusion is dispositive also involved other reasons for finding that confusion was not likely. *Plus Prods. v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1005-07 (2d Cir. 1983) (other reasons for no likelihood of confusion included weakness of the plaintiff's mark, dissimilarity between the litigant's products, and sophistication of purchasers); *Lever Bros. Co. v. Am. Bakeries Co.*, 693 F.2d 251, 256- (2d Cir. 1982) (weakness of plaintiff's mark and dissimilarity of the litigant's marks; *Sigma-Tau Industrie Farmaceutiche Riunite S.p.A. v. SigmaPharm Labs., LLC*, Opp. Nos. 91196802, 91196807, 2015 TTAB LEXIS 42, at *34-85 (TTAB Feb. 9, 2015) (lack of fame of opposer's mark, the extensive use by third parties of

similar marks on similar products, high degree of care of purchasers; dissimilarities between the parties' marks); *Am. 's Best Franchising, Inc. v. Abbott*, 106 USPQ2d 1540, 1552 (TTAB 2013) (geographic limitations of opposer's mark in view of proposed geographic restriction for registrant and weakness of opposer's mark). There is no board decision holding an absence of likelihood of confusion is a dispositive, determinative factor.

Instead, the case law provides that the *DuPont* factors relating to evidence of actual confusion are of diminished importance where the facts of the case show confusion would be difficult to uncover. *Heart v. Deborah Strange-Browne Inflammatory Breast Cancer Found.*, Opp. No. 91154019, 2004 TTAB LEXIS 662, at *19 (TTAB Oct. 28, 2004). Here, the facts of this case demonstrate that while confusion is likely today, and will become more likely in the future, it would be difficult to uncover. Ahold's public use of the OUR FAMILY FOUNDATION mark is periodic and episodic in nature. REDACTED

REDACTED (27 TTABVUE 450, Notice of Reliance Exhibit 8 at 4.) REDACTED

REDACTED (47 TTABVUE, Nash Finch Br. at 29.) REDACTED

REDACTED (*Id.* at 28.) Consumer-based confusion would need to be expressed to workers at the grocery stores, who would then need to tell their manager, who would then need to report the incident to Ahold or Nash Finch's corporate offices. As in most cases, this confusion is nearly impossible to uncover.

Further, the risk of confusion is increasing because the overlap of geographic area in which Nash Finch and Ahold provide goods and services is expanding. REDACTED

REDACTED

(38 TTABVUE 136 at Murphy Dep. 136:8-17.) As more and more customers encounter both Nash Finch's OUR FAMILY mark and Ahold's OUR FAMILY foundation mark, both in the context of food and grocery products and services, confusion will only become more likely. The appropriate time to cancel this mark is before instances of actual confusion are documented, not before.

3. DuPont Factor 5: The OUR FAMILY Mark Is Strong, And That Strength Extends To The OUR FAMILY Charitable Services.

Ahold admits the OUR FAMILY mark is strong in connection with food products, calling its sales and advertising "impressive," but argues that strength does not benefit the OUR FAMILY branded charitable and fundraising services. (49 TTABVUE, Ahold Br. at 32.) Of course it does. Knowing full well of the OUR FAMILY branded food products, these same customers and vendors are likely to take notice of Nash Finch's OUR FAMILY charitable donations and OUR FAMILY Labels for Learning fundraising and donation services. The strength of the mark does not exist in a vacuum, but extends to services offered by Nash Finch.

Separately, Nash Finch has provided ample evidence that its OUR FAMILY charitable and fundraising services have been offered for decades, nationwide, and are seen by many consumers and vendors. REDACTED

(47 TTABVUE, Nash Finch Br. at 19-20.) Nash Finch has donated tons of food products under the OUR FAMILY banner nationwide. (47 TTABVUE, Nash Finch Br. at 20-21.) Nash Finch uses its OUR FAMILY mark at all NFC Foundation events.

Ahold relies on *Checkpoint Systems Inc. v. Check Point Software Technologies, Inc.*, 269 F.3d 270 (3d Cir. 1991) to argue that Nash Finch's OUR FAMILY mark is not strong for

charitable services. But Ahold's reliance is misplaced. *Checkpoint* involves a situation in which the plaintiff attempted to enforce rights in a marketplace segment in which the plaintiff had not been active. *Id.* at 283-84. In contrast, Nash Finch has presented abundant evidence that it has expended considerable time and resources into developing the OUR FAMILY mark in connection with charitable services. Ahold's arguments to the contrary simply ignore these facts. The strength of the OUR FAMILY brand extends beyond food to charitable services, and this factor weighs in favor of Nash Finch.

4. *DuPont* Factors 6 and 11: Ahold Presents No Evidence Of Dilution Of The OUR FAMILY Mark, Either For Food Products Or Charitable Services.

Unlike most cases before the Board, Ahold made no attempt to establish the OUR FAMILY mark is diluted, either for food products or charitable services. Ahold presented no evidence of third party use or registration of OUR FAMILY marks on the same or similar goods or services. Nash Finch has taken great effort to police the OUR FAMILY mark and prohibit registration of confusingly similar marks on similar goods and services. (39 TTABVUE 185, Paul Dep. at 185:17-24; 40 TTABVUE 190-322 at Paul Exs. 162-177.) Ahold should not be the first to be allowed to register OUR FAMILY for confusingly similar services and dilute the Nash Finch OUR FAMILY mark. *DuPont* factors 6 and 7 heavily favor Nash Finch.

5. *DuPont* Factor 2: Ahold's Argument That Ahold and Nash Finch's Charitable Fundraising Services Are Not Similar Or Relatable To Food Products Ignores Realities And Established Case Law.

Ahold's arguments to differentiate the parties' goods and services ignore the evidence of record. Nash Finch has proven ownership of common law rights in the OUR FAMILY mark in connection with a variety of charitable services and grocery products. (*Supra* at 8-11; 47 TTABVUE, Nash Finch Br. at 32-34.) To create distance between the parties, Ahold says its fundraising services are different from Nash Finch's donation services. This argument ignores

the evidence of record proving Nash Finch's broad offering of charitable services are the same as Ahold's. For instance, with the OUR FAMILY Labels for Learning program, REDACTED

REDACTED

REDACTED (47 TTABVUE, Nash Finch Br. at 20.) Ahold, in connection with its OUR FAMILY FOUNDATION branded services, REDACTED

REDACTED (Id. at 24-25.)

REDACTED

REDACTED (Id. at 25-26.) The parties' services are the same and reach the same audience.

Further, even absent Nash Finch's common law service mark rights, the relatedness of the goods and services that Nash Finch and Ahold provide make confusion particularly likely.

Ahold admits the parties are both in the food business. (49 TTABVUE, Ahold Br. at 4.) The undisputed facts show consumers encounter Nash Finch's OUR FAMILY mark on thousands of products in approximately REDACTED

(47 TTABVUE, Nash Finch Br. at 4, 6-7; 28 TTABVUE 878 at Ex. 18; 39 TTABVUE 9-10, 19-20 at Paul 9:3-10:7, 19:13-20:2; 39 TTABVUE 396 at Paul Ex. 51; *see generally* 38 TTABVUE 3044-3499 at Murphy Ex. 184.)

These same consumers, in other grocery stores, encounter Ahold's OUR FAMILY FOUNDATION and Design mark, for instance, in connection with the "Triple Winner" game that is sold at the checkout counters of Ahold's stores and balloon/candle fundraisers where customer donations are made at the checkout for local hospitals. (43 TTABVUE at Pawelski Dep. 23:16-24:11; 30 TTABVUE 74-76 at Pawelski 30(b)(6) 109:19-111:7.) Such consumers

can also encounter the OUR FAMILY FOUNDATION and Design mark REDACTED

REDACTED that Ahold distributes to customers bearing the mark every year. (43 TTABVUE at Ahold Exs. 15, 16; 43 TTABVUE at Pawelski Dep. 52:10-60:1, 62:8-70:18, 71:6-74:2.)

In this case, based on the overlap of the parties industry, Nash Finch's OUR FAMILY branded grocery products and Ahold's OUR FAMILY FOUNDATION charitable fundraising services are related. That consumers can and will encounter the OUR FAMILY and OUR FAMILY FOUNDATION marks in similar contexts only increases the likelihood of confusion. These similar contexts also present a different situation than the numerous examples of trademarks registered for consumer products and charitable services that Ahold presents in its brief at pages 29 and 30. (49 TTABVUE, Ahold Br. at 29-30.) Ahold presents no evidence that these products and charitable services will be presented to consumers in the same context or even that the same individuals will encounter both the marks indicated. One of the examples cited by Ahold is a charitable organization called HALOS and mandarin oranges sold under the brand name HALOS. The HALOS charitable organization advocates and provides resources to abused and neglected children. (45 TTABVUE 29.) The HALOS oranges are not connected to this organization in any way. (45 TTABVUE 32.) Ahold does not attempt to show that there is any connection between HALOS and HALOS. This situation is thus different from the present one, where a grocery store displays Nash Finch's OUR FAMILY mark, including in connection with charitable services, and another grocery store displays the OUR FAMILY FOUNDATION and Design mark. These examples thus do not address the fact that consumers are likely to encounter Nash Finch's OUR FAMILY mark in the same or similar circumstances in which they will encounter Ahold's OUR FAMILY FOUNDATION mark, which promotes confusion.

6. *DuPont* Factor 1: Ahold Provides No Legal Or Factual Arguments That Disprove The Marks Are Sufficiently Similar.

The evidence of record supports the conclusion that the marks at issue in this case are nearly identical. Ahold cannot disagree the dominant words of significance in both marks are the same: OUR FAMILY. Ahold failed to rebut Nash Finch's arguments that the design elements in the mark enhance the impression that OUR FAMILY is the focus of the mark. Ahold's

arguments failed to distinguish Nash Finch’s case law on any points (*see* 47 TTABVUE, Nash Finch Br. at 38-40), and Ahold’s reliance on *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 184 USPQ 34 (CCPA 1974) is misplaced. The *Spice Islands* case actually found that confusion was likely, despite the marks at issue having different words and substantially different designs.

SPICE ISLANDS



Id. at 36-37. The fact that the court found confusion likely in the *Spice Islands* case despite the marked difference in the appearance of the relevant marks actually undermines Ahold’s argument, particularly because the marks at issue in this case are much more similar, with the OUR FAMILY language dominating.



Here, the OUR FAMILY FOUNDATION & Design mark looks like it is simply an extension of Nash Finch’s OUR FAMILY product line and other charitable services. The marks are sufficiently similar to prove a likelihood of confusion as to source, sponsorship, endorsement or affiliation. This factor weighs in favor of Nash Finch.

7. DuPont Factor 4: The Customers And Scenarios Of Encounter Are Not Sophisticated.

Ahold’s argument that confusion is unlikely because all customers are sophisticated ignores key categories of people at risk for confusion in this case—grocery store customers and recipients of Ahold’s OUR FAMILY FOUNDATION charitable donations. (47 TTABVUE, Nash Finch Br. at 47-49.) The case law is clear that grocery store shopping is an unsophisticated purchasing situation. *Friesland Brands B.V. v. Vietnam Nat’l Milk Co.*, 228 F. Supp. 2d 399, 411 (S.D.N.Y. 2002) (“[P]urchasers of relatively inexpensive goods such as ordinary grocery

store foods are held to a lesser standard of purchasing care.” (internal quotation omitted)); *see also In re Marti’s Famous Pastry Shoppe, Inc.*, 784 F.2d 1565, 1567 (Fed. Cir. 1984) (“Bread and cheese are staple, relatively inexpensive comestibles, subject to frequent replacement. Purchasers of such products have long been held to a lesser standard of purchasing care.”). These customers are familiar with the OUR FAMILY food products, which have “impressive” sales and advertising figures according to Ahold. (49 TTABVUE, Ahold Br. at 32.) These same customers are REDACTED (47 TTABVUE, Nash Finch Br. at 26.) They also see promotions for the Our Family Foundation in Ahold store newsletters, encouraging those customers to buy more groceries at Ahold stores. (*Id.* at 29-30.) They are asked to attend, for example, the Hunter Hayes concert series. (*Id.* at 28.) Or, these customers may have received donation dollars from the Our Family Foundation. These people could readily be confused, and this factor weighs in favor of Nash Finch.

Ahold overstates the “sophistication” of the vendors targeted for donations by Ahold and Nash Finch under the OUR FAMILY mark. Ahold presents no legal authority that its vendors are sophisticated purchasers. REDACTED

REDACTED (38 TTABVUE 134-136 at Murphy 134:11-136:6; 37 TTABVUE 178-180 at Docken 43:14-45:8.) This category of consumers is likely to be confused in this scenario, and this factor weighs in favor of Nash Finch.

III. CONCLUSION

Nash Finch respectfully requests cancellation of Registration No. 4,283,988.

Respectfully submitted,

NASH FINCH COMPANY

By its attorneys



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Heather J. Kliebenstein

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80 South Eighth Street

Minneapolis, MN 55402

Tel: 612.332.5300

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Attorneys for Petitioner

Date: November 17, 2015

CERTIFICATE OF SERVICE

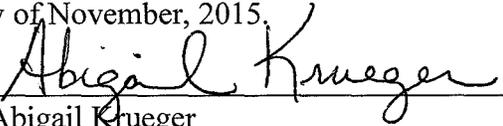
I hereby certify that a true and correct copy of the foregoing PETITIONER'S REBUTTAL TRIAL BRIEF was served via first class mail, postage prepaid, this 17th day of November, 2015, on:

Harvey Freedenberg
Brian P. Gregg
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
HFreedenberg@mwn.com
BGregg@mwn.com


Abigail Krueger

CERTIFICATE OF FILING

I hereby certify that PETITIONER'S REBUTTAL TRIAL BRIEF was filed electronically with the United States Patent and Trademark Office's Electronic System for Trademark Trial & Appeals (ESTTA) on this 17th day of November, 2015.


Abigail Krueger

APPENDIX A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Nash-Finch Company)	
)	
Petitioner,	)	Cancellation No. 92058000
)	
v.	)	Registration No. 4,283,988
	)	Mark: OUR FAMILY FOUNDATION
Ahold Licensing Sarl,	)	& DESIGN
)	
Respondent.)	
)	
)	

PETITIONER NASH-FINCH'S INITIAL DISCLOSURES

Pursuant to Fed. R. Civ. P. 26(a)(1) and 37 C.F.R. §2.120, counsel for Opposer, Nash-Finch Company ("Nash-Finch" or "Opposer"), makes the following initial disclosures, reserving the right to supplement this information at a later time, either through direct supplementation of this disclosure, through other discovery responses and deposition testimony, or to introduce facts not contained herein if it should appear that omissions or errors were made or if Nash-Finch obtains additional or more accurate information.

The following disclosures are made based on the information reasonably available to Nash-Finch as of this date. By making these disclosures, Nash-Finch does not represent that it is identifying every document, tangible thing, or witness possibly relevant to this opposition. Nor does Nash-Finch waive its rights to object to the production of any document or tangible thing disclosed herein on the basis of privilege, the work product doctrine, relevancy, undue burden or any other valid objection. Rather, Nash-Finch's disclosures represent a good faith effort to identify information it reasonably believes may support its claims or defenses as required by Fed. R. Civ. Proc. 26(a)(1) and 37 C.F.R. §2.120.

Further, Nash-Finch notes that persons who are not now associated with Nash-Finch may have relevant information. Nash-Finch is not purporting in the following disclosures to make disclosures on behalf of, or based on the information available to, all such persons.

Finally, Nash-Finch's disclosures are made without in any way waiving: (1) the right to object to the use of any such information on the grounds of competency, privilege, relevancy and materiality, hearsay, or any other ground, for any purpose, in whole or in part, in this action or any other action; and (2) the right to object on any and all grounds, at any time, to any other discovery request or proceeding involving or relating to the subject matter of these disclosures.

Nash-Finch provides these disclosures subject to those objections and qualifications.

A) Individuals Likely to have Discoverable Information

At this time, Nash-Finch believes the following individuals are likely to have discoverable information that Nash-Finch may use to support its claims and/or defenses.

<u>NAME</u>	<u>SUBJECT</u>
<p>John Paul VP Category Management and Private Brands Nash-Finch Company 7600 France Avenue South Minneapolis, MN 55435</p>	<p>Nash-Finch's ownership and use of the OUR FAMILY trademarks.</p> <p>The development and financial investment in the OUR FAMILY trademarks, including duration of use and registration of the same with the United States Patent and Trademark Office.</p> <p>The goods and services Nash-Finch offers in connection with the OUR FAMILY trademarks</p> <p>Nash-Finch's customers and the sophistication of Nash-Finch's customers and consumers of the OUR FAMILY food products.</p> <p>The fame and value of the OUR FAMILY trademarks.</p> <p>The channels of trade through which OUR FAMILY branded goods and services are</p>

	<p>marketed, offered and sold.</p> <p>Nash-Finch's marketing, advertising and promotion of the OUR FAMILY trademarks and charitable services.</p> <p>The likelihood of confusion between the parties' marks.</p>
<p>Lauren R. Hunter V.P. Finance Nash-Finch Company 7600 France Avenue South Minneapolis, MN 55435</p>	<p>Nash Finch's charitable services, including the geographic scope of those services, Nash Finch's charitable events and the type of attendees at those charitable events, Nash Finch's fundraising efforts, the nature of Nash Finch's target donors, the beneficiaries of Nash Finch's charitable services, and the use of the OUR FAMILY brand in connection with Nash Finch's charitable services.</p>

B) Categories of Relevant Documents

Documents relating to Nash-Finch's registration of the trademarks at issue in this case are located on the USPTO website. Further, the following categories of documents are being collected and delivered to the law offices of Merchant & Gould P.C., 3200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402.

1. Documents relating to the development, design, marketing, advertising, promotion and use of the OUR FAMILY trademarks.
2. Documents relating to Nash-Finch's use of the OUR FAMILY trademarks.
3. Documents relating to the registration of the OUR FAMILY trademarks with the United States Patent and Trademark Office and enforcement and policing of the OUR FAMILY trademarks.
4. Documents relating to Nash-Finch's sales of goods and services under its OUR FAMILY trademarks.

5. Documents relating to the type of goods and services sold under the OUR FAMILY trademarks by Nash-Finch.
6. Documents relating to third party recognition of the OUR FAMILY trademarks.
7. Documents relating to the financial investments made by Nash-Finch in the OUR FAMILY trademarks.
8. Documents relating to the distribution of OUR FAMILY branded goods and services and the types of vendors and customers that distribute, purchase, and consume Nash-Finch's OUR FAMILY branded goods and services.
9. Documents relating to Nash-Finch's charitable services, including events, participants, beneficiaries, donors, fundraising efforts and the use of the OUR FAMILY trademarks in connection with Nash-Finch's charitable services.

Respectfully submitted,

NASH-FINCH

By its attorneys,

Date: January 16, 2014

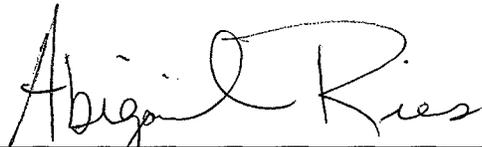


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MERCHANT & GOULD P.C.
P.O. Box 2910
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Tel. 612.336.4616
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONER'S INITIAL DISCLOSURES was served, via first-class mail, postage prepaid on this 16th day of January 2014.

Brian P. Gregg
Harvey Freedenberg
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Counsel for Ahold Licensing Sarl



Abigail Ries

APPENDIX B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

_____)	
Nash-Finch Company)	
	Petitioner,	)	Cancellation No. 92058000
)	
	v.	)	Registration No. 4,283,988
		)	Mark: OUR FAMILY FOUNDATION
Ahold Licensing Sàrl,		)	& DESIGN
)	
	Registrant.)	
_____)	

PETITIONER’S RESPONSES TO REGISTRANT’S FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. P. 36, Petitioner Nash Finch Company (“Petitioner” or “Nash Finch”) hereby states its responses and objections to Ahold Licensing Sàrl’s (“Registrant” or “Ahold”) First Set of Interrogatories to Petitioner as follows:

GENERAL OBJECTIONS

1. Nash-Finch objects to each discovery request to the extent that it seeks information subject to and protected by privilege or immunity from discovery, including, but not limited to, the attorney-client privilege and the attorney work product immunity. To the extent Registrant’s discovery requests can be construed to seek such information, Nash-Finch objects and will provide only non-privileged and non-immune information.

2. Nash-Finch objects to each discovery request to the extent that it seeks information already known to Registrant or its counsel, already in the possession of Registrant or its counsel, or available to Registrant from documents in its own files, testing, or from public sources, on the ground that the discovery request is unnecessary, unduly burdensome and expensive, and constitutes annoyance, harassment, and oppression of Registrant.

3. Nash-Finch objects to providing any information that cannot reasonably be

specify a time period. Nash-Finch will presume this Interrogatory seeks present information, and not historical, as the Interrogatory is drafted in the present tense.

Subject to these objections and the General Objections, Nash-Finch responds as follows. Pursuant to Federal Rule of Civil Procedure 33(d), Nash-Finch will identify documents as responsive to this Interrogatory, as the burden of deriving or ascertaining the answer from these documents will be substantially the same for either party.

6. Describe any charitable fundraising services with which any of Nash-Finch's Marks are used and the nature and geographic territory of such use of Nash-Finch's Marks with such charitable fundraising services.

ANSWER: Nash-Finch objects to this Interrogatory as overly broad and unduly burdensome because the Interrogatory does not specify a time period. Nash-Finch has been providing charitable services in connection with the OUR FAMILY brand since the early 1900's, and records dating back to that period are not available due to the passage of time. Nash-Finch objects to this Interrogatory as seeking information that is not relevant to any claims or defenses. Ahold's charitable services are related to Nash-Finch's grocery products and retail grocery services regardless of Nash-Finch's use of the OUR FAMILY Marks directly in connection with charitable services.

Subject to these objections and the General Objections, Nash-Finch responds as follows. Nash-Finch offers a variety of charitable services that incorporate the OUR FAMILY Marks or OUR FAMILY branded products. Nash-Finch also provides fundraising events that feature the OUR FAMILY marks and products and are attended by individuals who are aware of the OUR FAMILY Marks and products. Non-exhaustive examples are provided below.

Nash-Finch operates the "Our Family Labels for Learning" charitable program that raises funds for education. The Labels for Learning website, <http://ourfamilyfoods.com/labels-for-learning>, states the following:

CONFIDENTIAL—ATTORNEYS' EYES ONLY

With the Our Family® program, you can raise money for education — for your school, church or other educational organization. It's easy to do — just save the UPC barcodes from Our Family products. Fill out our simple registration card and get started.

Your school, church or organization is free to spend the money any way they want. From new textbooks, band uniforms to computer programs and art supplies there are many ways to support.

The Labels for Learning program has been offered nationwide since 2006 to any school, church or any other educational organization wishing to participate.

Nash-Finch and its customers donate OUR FAMILY branded products to food shelves and other charitable causes nationwide. These donations occur anywhere OUR FAMILY food products are warehoused, distributed, sold or used, such as from Nash-Finch's distribution centers, Nash-Finch supplied secondary wholesalers and their customers, Nash-Finch owned retail grocery stores and independent grocery stores that buy, distribute, sell or use the OUR FAMILY brand products.

Nash-Finch's employees and associates volunteer with charities, and use OUR FAMILY brand products as refreshments at volunteer events. For example, at Nash Finch's annual Helping Hands Day, all employees volunteer at select charities for one business day. These employees are supplied with OUR FAMILY food products as refreshments during these volunteer events.

Since 1922, Nash-Finch has operated its own foundation that raises money for and promotes charitable causes. Today, the NFC Foundation hosts fundraising events, such as golf tournaments and bowling events. The OUR FAMILY brand is present at these events in multiple ways. OUR FAMILY brand food products are used as refreshments and are used as prizes or in gift bags for participants. By way of an additional, non-exhaustive example, Nash-Finch's annual charity golf event includes an "OUR FAMILY" hole where the brand is advertised. The OUR FAMILY brand is one of Nash-Finch's flagship brands, and is used throughout all of Nash-

Finch's activities, including fundraising and charitable services. Charitable donations to the NFC Foundation come from individuals and businesses located around the country, including from Nash-Finch associates, vendors and supplied customers.

Providing the geographic scope of these services and use of the flagship OUR FAMILY brand since 1922 is overly burdensome and records do not exist due to the passage of time.

Pursuant to Federal Rule of Civil Procedure 33(d), Nash-Finch will identify documents responsive to this interrogatory, as the burden of deriving or ascertaining the answer from these documents will be substantially the same for either party.

7. Identify the customers or potential customers of any charitable services offered in connection with Nash-Finch's Marks, including whether such customer is a wholesaler, distributor, retailer, consumer, end user, reseller, or other buyer.

ANSWER: Nash-Finch objects to the phrase "customer" as undefined and therefore vague and ambiguous. Nash-Finch interprets "customer" of charitable services as businesses or Persons needing monetary contributions, volunteer hours or food, such as food banks, schools, and other charities. Nash-Finch objects to this Interrogatory as overly broad and unduly burdensome because the Interrogatory does not specify a time period. Nash-Finch has been providing charitable services in connection with the OUR FAMILY brand since the early 1900's, and records dating back to that period are not available due to the passage of time. Nash-Finch objects to this Interrogatory as information responsive to this request is in the custody, possession and control of other third parties who donate OUR FAMILY brand products, such as independent retail grocery stores and secondary wholesalers supplied by Nash-Finch.

REDACTED

[REDACTED]

[REDACTED]

[REDACTED]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing **Petitioner's Responses to Registrant's First Set of Interrogatories** was served via email on this 24th day of February 2014 on counsel identified below:

Brian P. Gregg
Harvey Freedenberg
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Counsel for Ahold Licensing Sarl



Heather J. Kliebenstein

APPENDIX C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Nash Finch Company

Petitioner,

v.

Ahold Licensing Sarl,

Respondent.

)
)
) Cancellation No. 92058000
)
)

) Registration No. 4,283,988
)

) Mark: **OUR FAMILY FOUNDATION**
) **& DESIGN**
)
)
)
)

PETITIONER'S PRETRIAL DISCLOSURES

Pursuant to Trademark Rule § 2.121(e), Petitioner Nash Finch Company hereby provides the following pretrial disclosures.

A. Witnesses

Petitioner may take testimony from the following witnesses:

John Paul
Vice President Private Brands
SpartanNash
850 76th Street SW
Byron Center, Michigan 49315-8510

Mr. Paul is expected to testify regarding the development of and financial investment in the OUR FAMILY Marks, including duration of use and registration of the same with the United States Patent and Trademark Office; efforts to enforce the OUR FAMILY Marks against third party use; the strength, fame and value of the OUR FAMILY Marks; Nash Finch's marketing, advertising and promotion of the OUR FAMILY Marks in connection with goods and services; sales of OUR FAMILY branded products and dollars raised by charitable services offered under the OUR FAMILY Marks; the goods and services Nash Finch offers in connection with the OUR FAMILY Marks; Nash Finch's customers, vendors and suppliers, and the sophistication of the

same; the channels of trade through which OUR FAMILY branded goods and services are marketed, offered and sold; charitable donations of OUR FAMILY branded products by Nash Finch; the channels of trade through which OUR FAMILY branded goods and services are marketed, promoted, offered or sold; the likelihood of confusion between the parties' marks; the nature of the grocery industry, including channels of trade and the interaction between retail grocery stores, vendors, suppliers, manufacturers, distributors and end users; identification of Nash Finch's business records.

Michele Murphy
Senior Business Analyst
SpartanNash
7600 France Avenue South
Minneapolis, MN 55435

Ms. Murphy is expected to testify regarding the use of the OUR FAMILY brand, and the goods and services Nash Finch offers in connection with the OUR FAMILY Marks; Nash Finch's marketing, advertising and promotion of the OUR FAMILY Marks in connection with goods and services; sales of OUR FAMILY products and dollars raised by charitable services offered under the OUR FAMILY brand; Nash Finch's customers, vendors and suppliers, and the sophistication of the same; the channels of trade through which OUR FAMILY branded goods and services are marketed, offered and sold; the channels of trade through which OUR FAMILY branded goods and services are marketed, promoted, offered or sold; the likelihood of confusion between the parties' marks; the nature of the grocery industry, including channels of trade and the interaction between retail grocery stores, vendors, suppliers, manufacturers, distributors and end users; identification of Nash Finch's business records.

**Paula Docken
Business Analyst Specialist
SpartanNash
7600 France Avenue South
Minneapolis, MN 55435**

Ms. Docken is expected to testify regarding Nash Finch's charitable services, including the geographic scope of those services; donations of OUR FAMILY branded products for charitable uses; Nash Finch's charitable events and the type of attendees at those charitable events; Nash Finch's fundraising efforts; identification of Nash Finch's target donors; the beneficiaries of Nash Finch's charitable services; the use of the OUR FAMILY Marks in connection with Nash Finch's charitable services; future plans for Nash Finch's charitable services programs; the likelihood of confusion between the parties' marks; identification of Nash Finch's business records.

**Tom Swanson
SpartanNash
7600 France Avenue South
Minneapolis, MN 55435**

Mr. Swanson is expected to testify regarding Nash Finch's charitable services, including the geographic scope of those services; donations of OUR FAMILY branded products for charitable uses; Nash Finch's charitable events and the type of attendees at those charitable events; Nash Finch's fundraising efforts; identification of Nash Finch's target donors; the beneficiaries of Nash Finch's charitable services; the use of the OUR FAMILY Marks in connection with Nash Finch's charitable services; future plans for Nash Finch's charitable services programs; the likelihood of confusion between the parties' marks; identification of Nash Finch's business records.

Lauren Hunter
V.P. Finance
Nash-Finch Company
7600 France Avenue South
Minneapolis, MN 55435

Ms. Hunter is expected to testify regarding Nash Finch's charitable services, including the geographic scope of those services; donations of OUR FAMILY branded products for charitable uses; Nash Finch's charitable events and the type of attendees at those charitable events; Nash Finch's fundraising efforts; identification of Nash Finch's target donors; the beneficiaries of Nash Finch's charitable services; the use of the OUR FAMILY Marks in connection with Nash Finch's charitable services; future plans for Nash Finch's charitable services programs; the likelihood of confusion between the parties' marks; identification of Nash Finch's business records.

Tracey Pawelski
Vice President of External Communications and Community Relations
Ahold U.S.A., Inc.
1149 Harrisburg Pike
Carlisle, Pennsylvania 17013

Ms. Pawelski is expected to testify about documents produced by Ahold during discovery, including an identification of the documents, the authenticity of the documents, the truth of the matter asserted in the documents, and explanation regarding the information contained in said documents. The parties have agreed the trial deposition of Ms. Pawelski will occur during Registrant's testimony period for convenience and efficiency.

Deborah Hill
Manager of Public and Community Relations
Ahold U.S.A., Inc.
1149 Harrisburg Pike
Carlisle, Pennsylvania 17013

Ms. Hill is expected to testify about documents produced by Ahold during discovery, including an identification of the documents, the authenticity of the documents, the truth of the

matter asserted in the documents, and explanation regarding the information contained in said documents. The parties have agreed the trial deposition of Ms. Hill will occur during Registrant's testimony period for convenience and efficiency.

B. Documents

Applicant may introduce the following documents through the above-listed witnesses:

1. Documents relating to registration of the OUR FAMILY Marks.
2. Documents relating to the first use and continued use in commerce of the OUR FAMILY Marks in connection with goods and services, including charitable services.
3. Specimens of use of the OUR FAMILY Marks.
4. Documents and things relating to the goods and services offered in connection with the OUR FAMILY Marks.
5. Documents relating to enforcement of the OUR FAMILY Marks, including agreements relating to the same.
6. Documents showing the strength of the OUR FAMILY Marks.
7. Documents relating to the advertising, promotion and marketing of the OUR FAMILY Marks, and the expenses associated with the same.
8. Documents and things relating to the sales of goods and dollars associated with charitable or foundation services under the OUR FAMILY Marks.
9. Documents and things showing the channels of trade used by Applicant for provision of its goods and services offered under the OUR FAMILY Marks.
10. Documents concerning Nash Finch's customers, vendors, suppliers and manufacturers that are exposed to the OUR FAMILY Marks in connection with goods and services.
11. Documents and things showing the relationship between Ahold's services and Nash Finch's goods and services; including how the parties' goods and services are promoted, sold and offered and the overlap in individuals exposed to use of OUR FAMILY.
12. Documents and things relating to how the parties' products and services are typically promoted and sold.
13. Documents and things relating to media coverage of Ahold's OUR FAMILY FOUNDATION and Nash Finch's goods or services sold or offered under the OUR FAMILY Marks.
14. Documents and things related to the food industry and the nature of food distribution and sale.
15. Discovery materials, documents and discovery responses produced by Ahold or Nash Finch during this proceeding.
16. Deposition transcripts from discovery depositions.
17. Documents and things related to the likelihood of confusion with the OUR FAMILY Marks.

NASH FINCH COMPANY

By its Attorneys,

Date: February 2, 2015

s/Heather J. Kliebenstein

John A. Clifford

Heather J. Kliebenstein

MERCHANT & GOULD P.C.

P.O. Box 2910

Minneapolis, MN 55402-0910

Tel. 612.336.4616

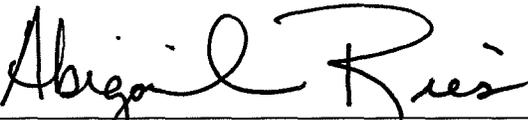
Fax 612.332.9081

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Petitioner's Pretrial Disclosures** has been served by email and First Class Mail, postage prepaid, on this 2nd day of February, 2015 as follows:

Brian P. Gregg
Harvey Freedenberg
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
HFreedenberg@mwn.com
BGregg@mwn.com

Date: February 2, 2015


Abigail Ries