

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

Mailed: November 7, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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The Pictsweet Company

v.

Moran Foods, LLC
—

Cancellation No. 92078530
—

Tonia A. Sayour, Norman H. Zivin, and Kira-Khanh McCarthy of Wolf Greenfield & Sacks, P.C., for The Pictsweet Company.

Paul J. Kennedy and Sean P. McConnell of Troutman Pepper Hamilton Sanders LLP, for Moran Foods, LLC.

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Before English, Casagrande, and Brock,
Administrative Trademark Judges.

Opinion by Brock, Administrative Trademark Judge:¹

¹ Citations in this opinion to the briefs and other materials in the case docket refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *1-5 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

This opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. The citation form in this opinion is in a form provided in Section 101.03(a) of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") (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). The Board's decisions issued **since 2008** are available in TTABVUE, <https://ttabvue.uspto.gov/ttabvue/>, by entering the proceeding number, application number, registration number, expungement/reexamination

Moran Foods, LLC (“Respondent”) owns a registration on the Principal Register for the mark PICKWELL FARMS in standard characters (“FARMS” disclaimed) for “frozen, canned, and dried fruits and vegetables”, in International Class 29 (“Respondent’s Mark or Respondent’s Registration”).²

The Pictsweet Company (“Petitioner”) seeks to cancel Respondent’s Registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), claiming a likelihood of confusion with its registered standard character mark PICTSWEET FARMS (“FARMS” disclaimed), for “Frozen vegetables; frozen vegetable-based entrees” in International Class 29 (the “PICTSWEET FARMS Mark” or “Petitioner’s Mark”)³ and its common law marks PICTSWEET and PICTSWEET FARMS for “frozen vegetables and frozen meals.”⁴

number, mark, party, or correspondent. Many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading Room, at <https://ttab-reading-room.uspto.gov/efoia/efoia-ui/#/search/decisions>, by entering the same information. Most TTAB decisions that issued prior to 1996 are not available in USPTO databases. For these decisions, this opinion employs citations to the Lexis legal database (“LEXIS”) and, in the initial full citation of a case, also identifies the number of the Board proceeding. Subsequent citations to a decision use a short form omitting the number of the Board proceeding. For decisions of the Board **prior to 2008** that may not be available in the TTAB Reading Room or on TTABVUE, this opinion employs citations to the Bloomberg Law database’s United States Patent Quarterly (“USPQ”) as well as LEXIS. Practitioners should also adhere to the practice set forth in TBMP § 101.03(a).

²Registration No. 5978907 issued February 4, 2020 from an application filed on May 24, 2018, and claims first use and first use in commerce on October 31, 2019.

³Registration No. 5037314 issued September 6, 2016 from an application filed on March 6, 2015. Petitioner attached to its petition for cancellation a printout from the USPTO’s Trademark Electronic Search System (TESS) database showing the current status and its ownership of the pleaded registration. 1 TTABVUE 7-9. A Trademark Act Sections 8 and 15 combined declaration, 15 U.S.C. §§ 1058 and 1065, has been accepted and acknowledged.

⁴ 1 TTABVUE.

Respondent denied the salient allegations in the petition for cancellation and pleaded a combined affirmative defense of “waiver, laches and/or acquiescence” that it pursued at trial and in its brief.⁵

Both parties filed briefs⁶ and Petitioner filed a rebuttal brief. For the reasons discussed herein, we grant the petition to cancel Registration No. 5978907.

⁵ Answer, 5 TTABVUE 4. We construe “waiver” not as a separate affirmative defense but as encompassed within the defenses of laches and acquiescence as argued in Respondent’s brief. *Id.*

Respondent alleged three other “affirmative defenses.” *Id.* at 4-5. Respondent’s first “affirmative defense” of failure to state a claim upon which relief can be granted is not a true affirmative defense and is deemed forfeited because Respondent neither filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) nor argued the defense in its brief. *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *2-4 (TTAB 2022).

As to its estoppel defense, Respondent references estoppel once in its in brief, citing 15 U.S.C. § 1069 (“In all inter partes proceedings equitable principles of laches, estoppel, and acquiescence, where applicable may be considered and applied.”) 34 TTABVUE 8. We have considered the estoppel defense to the extent that acquiescence is a type of estoppel, as we discuss later in this decision. To the extent that Respondent intended its estoppel defense to refer to equitable estoppel, Respondent did not argue it in its brief, so it is deemed forfeited. *Made in Nature*, 2022 TTAB LEXIS 228, at *2-4; *see also Harry Winston, Inc. v. Bruce Winston Gem Corp.*, Opp. No. 91153147, 2014 TTAB LEXIS 284, at *4-5 (TTAB 2014) (pleaded affirmative defenses not pursued in the brief considered waived).

In Respondent’s fourth affirmative defense, it “reserves the right to raise additional affirmative defenses.” 5 TTABVUE 5. This is “improper under the Federal Rules of Civil Procedure, because [it] would not give ... [Petitioner] fair notice of such defenses.” *Made in Nature*, 2022 TTAB LEXIS 228, at *2-4. (Internal citation omitted; cleaned up).

⁶ We do not consider the embedded product descriptions for BIRDS EYE and GREEN GIANT frozen vegetables in Respondent’s brief. 34 TTABVUE 18-19; Zivin Testimony, 26 TTABVUE, Exhibits A-H, *generally*. The product descriptions at 34 TTABVUE 18-19, appear to have been taken from the websites to which the live hyperlinks in Petitioner’s evidence resolved and are new evidence. Respondent’s introduction of new evidence outside of its trial period is untimely. Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2).

I. The Record

The record consists of the pleadings; the file of Respondent's Registration, under Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1); and the parties' evidence discussed below.

Petitioner introduced the following evidence:

1. Petitioner's First Notice of Reliance comprising the registration file histories for its pleaded registration and two unpleaded registrations;⁷
2. Petitioner's Second Notice of Reliance comprising Respondent's responses and objections to Petitioner's Interrogatory Nos. 1, 6, 8, 10 and 11; and portions of the discovery deposition of Timothy J. Brazier, Respondent's witness under Fed. R. Civ. P. Rule 30(b)(6) ("Brazier Deposition");⁸
3. Petitioner's Third Notice of Reliance comprising a website printout of an infographic-style article;⁹

⁷ 22 TTABVUE. We do not consider Petitioner's two unpleaded registrations as bases for the instant proceeding, but only for whatever other probative value they may have. Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2); *see Ricardo Media Inc. v. Inventive Software, LLC*, Opp. No. 91235063, 2019 TTAB LEXIS 283, at *4 n. 5 (TTAB 2019) (unpleaded registration may be considered, like third-party registrations, for whatever probative value it may have under the *DuPont* factors).

⁸ 23 TTABVUE.

⁹ 24 TTABVUE. Respondent objects to the admission of Petitioner's Third Notice of Reliance comprising a website printout of an infographic-style article on the bases that (1) the information contained therein is not cited with specificity sufficient to verify source and veracity, and (2) Petitioner did not identify the author as a witness. We construe these arguments as a hearsay objection. When accompanied by the requisite URL and date, as here, Internet materials are admissible under notice of reliance and we consider these materials for what they show on their face, not for the truth of their contents. Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2); *see Coach/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, Can. No. 92051006, 2014 TTAB LEXIS 95, at *26 n. 30 (TTAB 2014) (Internet webpage evidence admissible only to show what has been printed and not for the truth of what has been printed). Accordingly, Respondent's objection is overruled. We accord this evidence whatever probative value is appropriate.

4. Petitioner’s Testimony Declaration of Kevin B. Schwab, Petitioner’s Chief Customer Officer and Executive Vice President of Sales and Marketing, dated September 18, 2023 with accompanying exhibits A-B (“Schwab Declaration”);¹⁰
5. Petitioner’s Testimony Declaration of Norman H. Zivin, one of Petitioner’s attorneys, dated September 20, 2023 with accompanying exhibits A-H (“Zivin Declaration”);¹¹
6. Respondent’s Notice of Reliance comprising additional portions of the Rule 30(b)(6) discovery deposition of Respondent’s witness Timothy J. Brazier;¹² and
7. Respondent’s Testimony Declaration of Timothy Brazier (“Brazier Declaration”), dated December 1, 2023 with accompanying exhibits 1-6.¹³

II. Affirmative Defenses of Laches and Acquiescence

In its rebuttal brief, Petitioner argues that Respondent failed to properly plead its defenses of laches and acquiescence.¹⁴ Petitioner, however, did not file a pretrial motion to strike the affirmative defenses on grounds of insufficient pleading or move for a more definite statement. Petitioner also introduced rebuttal evidence on these defenses and substantive arguments in its brief.¹⁵ For all of these reasons, we consider the merits of the defenses. We will address laches and acquiescence in turn.

A. Laches

The elements of a laches defense are: (1) unreasonable delay in assertion of one’s rights against another, and (2) material prejudice to the latter attributable to the delay. *Lincoln Logs Ltd. v. Lincoln Pre-Cut Logs Homes Inc.*, 971 F.2d 732, 734 (Fed.

¹⁰ 25 TTABVUE.

¹¹ 26 TTABVUE.

¹² 27 TTABVUE.

¹³ 28 TTABVUE; 29 TTABVUE (confidential, Exhibit 5).

¹⁴ 35 TTABVUE 11-13.

¹⁵ *Id.*

Cir. 1992). As the party raising the affirmative defense, Respondent has the burden of proof. *See Bridgestone/Firestone Rsch. Inc. v. Automobile Club de l'Quest de la France*, 245 F.3d 1359, 1361 (Fed. Cir. 2001). “[L]aches begins to run no earlier than the date the involved mark was published for opposition (if there was actual knowledge [of trademark use]), and no later than the issue date of the registration.” *Ava Ruha Corp. v. Mother’s Nutritional Center, Inc.*, Can. No. 92056067, 2015 TTAB LEXIS 10, at *17 (TTAB 2015).

Respondent’s Mark was not in use for the registered goods when Respondent’s underlying application was published for opposition on October 30, 2018.¹⁶ The record does not show that Petitioner had actual knowledge of the publication of Respondent’s intent to use-based application. Therefore, laches does not begin to run on the date of publication of Respondent’s Mark, yet must begin to run no later than the issue date of the registration. *Ava Ruha*, 2015 TTAB LEXIS 10, at *17. As to the period of time between publication and registration, the record does not show that Petitioner had knowledge of Respondent’s Mark during this time. Accordingly, Petitioner had constructive notice of Respondent’s Mark as of its February 4, 2020 registration date, *see* 15 U.S.C. § 1072, and the period for laches begins to run from this date. Petitioner filed the cancellation proceeding against Respondent’s Registration on November 22, 2021—a delay of approximately 21.5 months, less than two years.

¹⁶ Brazier Declaration, 28 TTABVUE 5, ¶ 15. Respondent commenced use of the mark on October 31, 2019. *Id.*

Respondent has not cited any cases where the Board has found laches based on a delay of less than two years. *Cf. Teledyne Techs., Inc. v. W. Skyways, Inc.*, Can. No. 92041265, 2006 TTAB LEXIS 55, at *26 (TTAB) (finding that a delay of three years, eight months supported a laches defense to a cancellation based on Section 2(d) likelihood of confusion), *aff'd*, 208 F. App'x 886 (Fed. Cir. 2006); *Ava Ruha*, 2015 TTAB LEXIS 10, at *18 (finding a laches defense to cancellation supported by a delay of three years and two months); *TPI Holdings, Inc. v. TrailerTrader.com, LLC*, Can. No. 92064976, 2018 TTAB LEXIS 121, at *18 (TTAB 2018) (four years and two months “within the realm of time found to be sufficient for purposes of laches.”). Respondent has not proved that the delay here was unreasonable.

Nor has Respondent proved the element of prejudice. There are two kinds of possible prejudice pertinent to a laches defense: evidentiary prejudice and economic prejudice. *See, e.g., Bridgestone/Firestone*, 245 F.3d at 1362. Respondent does not argue evidentiary prejudice. As to economic prejudice, while Respondent's witness Timothy Brazier, Design Manager for Respondent, testified about how Respondent has advertised its PICKWELL FARMS products, he did not testify as to Respondent's financial investment in and development of the brand since its mark registered. *See Ava Ruha*, 2015 TTAB LEXIS 10, at *26 (“Economic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice”). Indeed, Mr. Brazier's testimony suggests that Respondent's revenue from sales of its PICKWELL FARMS products has been consistent since Respondent

started using the mark on October 31, 2019.¹⁷ We therefore find that Respondent also has failed to prove the necessary element of prejudice.

Based on the record before us, we find Respondent has fallen short of proving laches.

B. Acquiescence

We next consider Respondent’s affirmative defense of acquiescence, which differs from laches and is appropriate in cases “where the trademark owner, by **affirmative** word or deed, conveys its implied consent to another. That is, laches denotes a merely passive consent, while acquiescence implies active consent.” 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 31:41 (5th ed. 2024) (emphasis in italics in original changed to bold). As stated by the Board:

Acquiescence is a type of estoppel that is based upon the plaintiff’s conduct that expressly or by clear implication consents to, encourages, or furthers the activities of the defendant, that is not objected to. . . . A plaintiff will not be permitted to stop conduct that it fostered or tolerated, where the result would be prejudicial to the defendant.

¹⁷ Brazier Declaration, 28 TTABVUE 8, ¶ 28. We further note that Mr. Brazier’s declaration is internally inconsistent with respect to Respondent’s use, calling into question the reliability of his testimony. On the one hand, Mr. Brazier testifies that “[t]he PICKWELL FARMS® line has been continuously marketed and sold in [Respondent’s] stores since October 31, 2019[.]” approximately **four years** before he signed his declaration on December 1, 2023. *Id.* at 5, ¶ 15. On the other hand, he testifies that “[f]or each of the **last five years**, Respondent has sold in excess of 10 million units annually of PICKWELL FARMS® branded products.” *Id.* at 8, ¶ 28 (emphasis added). Testimony “should not be characterized by contradictions, inconsistencies, and indefiniteness but should carry with it conviction of its accuracy and applicability.” *B.R. Baker Co. v. Lebow Bros.*, 150 F.2d 580, 583 (CCPA); see also *Executive Coach Builders, Inc. v. SPV Coach Co.*, Opp. No. 91212312, 2017 TTAB LEXIS 201, at *36 (TTAB 2017).

Christian Broad. Network, Inc. v. ABC-CBN Int'l, Can. No. 92044366, 2007 TTAB LEXIS 72, at *45 (TTAB 2007) (internal citations omitted).

“To establish acquiescence, the Board requires a defendant to prove that the plaintiff’s conduct amounted to an assurance to defendant, either express or implied, that plaintiff would not assert its trademark rights against the defendant.” *Brooklyn Brewery Corp. v. Brooklyn Brew Shop*, 17 F.4th 129, 141-42 (Fed. Cir. 2021) (quoting *CBS, Inc. v. Man’s Day Publ’g Co.*, 205 USPQ 470, 473-74, 1980 TTAB LEXIS 2, at *13 (TTAB 1980)) (cleaned up; further citations omitted). Acquiescence requires proof of three elements, namely that: (1) plaintiff actively represented that it would not assert a right or a claim; (2) the delay between the active representation and assertion of the right or claim was not excusable; and (3) the delay caused defendant undue prejudice. *See Coach House Rest. Inc. v. Coach and Six Rests., Inc.*, 934 F.2d 1551, 1564 (11th Cir. 1991) (acquiescence requires active consent).

Based on the evidence, the earliest date from which acquiescence could begin is April 2021, when Petitioner contacted Respondent to discuss selling Petitioner’s products in Respondent’s Save A Lot stores.¹⁸ Petitioner filed the petition for cancellation seven months later. We find Petitioner’s delay of seven months excusable in the context of acquiescence. *See, e.g., Charrette Corp. v. Bowater Commc’n Papers Inc.*, Can. No. 92016167, 13 USPQ2d 2040, 1989 TTAB LEXIS 52, at *11-12 (TTAB 1989) (finding fourteen month “minimal” delay not unreasonable); *Krause v. Krause Publ’ns, Inc.*, Can. No. 92041171, 2005 TTAB LEXIS 487, at *36 (TTAB 2005) (finding

¹⁸ Brazier Declaration, 28 TTABVUE 8-9, ¶ 29.

six to eight month delay not unreasonable). We previously found that respondent also has failed to prove the necessary element of prejudice. Because the second and third elements of an acquiescence defense are not met, we do not reach the first element of acquiescence. We find that the affirmative defense of acquiescence has not been established.¹⁹

III. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action must be established in every inter partes case. *Austl. Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373-74 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may seek to cancel a registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by continued registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark).

¹⁹ Because we found that Respondent established neither laches nor acquiescence, we do not reach Petitioner's argument that confusion is inevitable. See *Christian Broad. Network*, 2007 TTAB LEXIS 72, at *40 (laches will not preclude a judgment for plaintiff if confusion is inevitable).

Petitioner has shown that it is entitled to seek cancellation of Respondent's Registration on the ground of likelihood of confusion through its pleaded registration and the testimony of Kevin B. Schwab, Petitioner's Chief Customer Officer and Executive Vice President of Sales and Marketing. Specifically, the record shows that both parties list frozen vegetable in their respective trademark registrations and are thus competitors and Petitioner alleges prior use of marks similar to Respondent's Mark. *See, e.g., Look Cycle Int'l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Can. No. 92079409, 2024 TTAB LEXIS 289, at *7-8 (TTAB 2024) (finding entitlement based on pleaded registration of record and plausible claim of likelihood of confusion); *NT-MDT LLC v. Kozodaeva*, Can. No. 92071349, 2021 TTAB LEXIS 112, at *15 (TTAB 2021) ("Petitioner has established ... that it ... is a competitor of Respondent ... [and] uses a mark with the same wording and design as the mark [in Respondent's] ... registration" therefore showing its entitlement to seek cancellation of Respondent's mark on grounds including likelihood of confusion).²⁰

IV. Priority

"In a cancellation proceeding such as this one where both parties own registrations, priority is in issue." *Double Coin Holding Ltd. v. Tru Dev.*, Can. No. 92063808, 2019 TTAB LEXIS 347, at *13 (TTAB 2019) (quoting *Coach/Braunsdorf*, 2014 TTAB LEXIS 95, at *48). In its brief Respondent "states that Petitioner's claim of priority with respect to Petitioner's Mark is irrelevant because Respondent's Mark

²⁰ We further note that Respondent does not dispute Petitioner's entitlement to a statutory cause of action. 34 TTABVUE 13.

is sufficiently distinct and different.”²¹ We do not interpret this as a concession as to priority.

Petitioner is entitled to rely on the March 6, 2015 filing date of the application that matured into its pleaded Registration No. 5037314. *See, e.g., Christian Broad. Network*, 2007 TTAB LEXIS 72, at *15 (where both petitioner and respondent are owners of registrations, petitioner must prove priority of use and may rely on filing date of its application for registration to do so). Petitioner’s filing date is before Respondent started using its mark on October 31, 2019²² and before Respondent filed its application on May 24, 2018. Thus, Petitioner has established priority in its pleaded registered mark PICTSWEET FARMS for the registered goods, namely, “frozen vegetables; frozen vegetable-based entrees.”²³

V. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 144 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences

²¹ 4 TTABVUE 13.

²² Brazier Declaration, 28 TTABVUE 5, ¶ 15.

²³ In view of this finding, we do not reach whether Petitioner has proven prior common law rights in its pleaded marks.

in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976).

We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 1381 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, Opp. No. 91194974, 2015 TTAB LEXIS 67, at *26 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Varying weight, however, may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

A. The similarity or dissimilarity of the goods

Under the second *DuPont* factor we consider “[t]he similarity or dissimilarity and nature of the goods or services.” *DuPont*, 476 F.2d at 1361; *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018); *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 TTAB LEXIS 464, at *20 (TTAB 2021).

The parties’ goods are identical, in part, to the extent that both Respondent’s registration and Petitioner’s registration both identify “frozen vegetables.” It is sufficient for a finding of likelihood of confusion if relatedness is established for any

item encompassed in the identification of goods in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981); *Double Coin*, 2019 TTAB LEXIS 347, at *18; *In re i.am.symbolic, LLC*, Ser. No. 85044494, 2015 TTAB LEXIS 369, at *8 (TTAB 2015), *aff'd*, 866 F.3d 1315 (Fed. Cir. 2017).

We find that this factor weighs strongly in favor of a finding of a likelihood of confusion.

B. The similarity or dissimilarity of established, likely-to-continue trade channels and the conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing

Under the third *DuPont* factor we consider “[t]he similarity or dissimilarity of established, likely-to-continue trade channels” and under the fourth *DuPont* factor we consider the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ v. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361; *Detroit Athletic*, 903 F.3d at 1308.

We must base our comparisons under the third and fourth *DuPont* factors on the goods identified in the involved registrations. *See, e.g., Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323-25 (Fed. Cir. 2014) (Board properly did not read limitations into the identifications for purposes of analysis under the third and fourth factors); *Sabhnani*, 2021 TTAB LEXIS 464, at *25 (“[A]s with the relatedness of the goods, the similarity or dissimilarity of the channels of trade must be determined based on the identifications of goods in the parties’ registrations rather than current real-world conditions”); *Double Coin*, 2019 TTAB LEXIS, at *23-25 (the goods recited in the parties’ registrations determine the scope of the parties’ rights,

not “current [goods sold in the marketplace]”). Moreover, we must “presume that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods ...” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018) (internal quotation marks and citation omitted); see *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012) (“[I]t is well established that, absent restrictions in the application and registration, [identical] goods and services are presumed to travel in the same channels of trade to the same class of purchasers.”) (internal quotation marks and citation omitted)).

The parties’ goods are identical, in part, and Petitioner is entitled to presume that the trade channels and consumers—i.e., purchasers of frozen vegetables, who are members of the general public—for these identical goods also are the same. Nevertheless, Respondent urges us to rely on *In re Shipp*, Ser. No. 73538236, 4 USPQ2d 1174, 1987 TTAB LEXIS 37 (TTAB 1987) for the proposition that, “where evidence shows the trade channels for the respective products and services do not overlap in any meaningful way, potential customers are less likely to associate the parties’ products and services.”^{24, 25}

As we have explained in innumerable decisions, the Board may not consider arguments “about how the parties’ actual goods, services, customers, trade channels, and conditions of sale are narrower or different from the goods and services identified

²⁴ 34 TTABVUE 22.

²⁵ We further note that in Respondent’s Responses and Objections to Petitioner[s] First Set of Interrogatories, it stated that “its goods are not limited to any particular class of consumers or purchasers.” Petitioner’s Second Notice of Reliance, 23 TTABVUE 11, Int. 8.

in the applications and registrations.” *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, at *12 n.18 (TTAB 2018), *aff’d mem.*, 778 F. App’x 962 (Fed. Cir. 2019); *see also, e.g., In re i.am.symbolic*, 866 F.3d 1315, 1327 (Fed. Cir. 2017) (“[T]he Board properly declined to import restrictions into the identification of goods based on alleged real world conditions.”); *Stone Lion*, 746 F.3d at 1321 (the Board must “give full sweep” to an identification of goods regardless of registrant’s actual business); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013) (“The PTO proceedings are ‘based on the content of the registration application’ and not upon any specific use of the challenged mark in commerce.”); *In re Thor Tech, Inc.*, Ser. No. 78634024, 2009 TTAB LEXIS 253, at *15 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

As to purchasing conditions, Petitioner argues that “frozen foods are top impulse buys in the food realm.”²⁶ Although we find the objected-to infographic-style article cited by Petitioner²⁷ of limited probative value because we cannot consider the truth of the article’s contents, there is evidence in the record demonstrating that the parties’ frozen vegetables are low-cost items, selling for only a few dollars per package.²⁸ Purchasers exercise less care in deciding to buy low-cost food items.

²⁶ 33 TTABVUE 23.

²⁷ 24 TTABVUE; *see n. 9 supra*.

²⁸ Respondent sells its frozen vegetables for as low as \$0.99 a bag, as shown in the advertisement embedded in Mr. Brazier’s declaration. Brazier Declaration, 28 TTABVUE 6, ¶ 19. Similarly, Petitioner sells its frozen vegetables for as low as \$1.79. *Id.* at 9 and 83, ¶ 32 and Ex. 6

Specialty Brands, Inc. v. Coffee Bean Distribs., 748 F.2d 669, 672 (Fed. Cir. 1984) (“relatively inexpensive, comestible goods subject to frequent replacement ... have been held to a lesser standard of purchasing care.”); *see also Made in Nature*, 2022 TTAB LEXIS 251, at *64-66 (quoting *Gen. Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, Opp. No. 91118482, 2011 TTAB LEXIS 280, at *43-44 (TTAB 2011), *judgment set aside pursuant to settlement*, 2014 TTAB LEXIS 5 (TTAB 2014)). As elaborated in *General Mills*:

As to the conditions of purchase, groceries are generally purchased on impulse at the shelf and the consumer decision is made fairly quickly ... In addition, the record shows the goods involved are relatively inexpensive.... Generally, purchasers of casual, low-cost ordinary consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods. *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984); and *Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511 (TTAB 2009). Although some of the parties’ more health-conscious consumers may be more careful in their purchase, we must base our decision on the least sophisticated potential purchasers.

Gen. Mills, 2011 TTAB LEXIS 280, at *43-44; *see also Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”). This comports with Respondent’s characterization of its customers, and we are bound to consider the least sophisticated consumer in the class. Brazier Deposition, 27 TTABVUE 14-15 (acknowledging that only “some” of Respondent’s customers “spend[] a lot of time and effort to learn about particular products.”); *see Stone Lion*,

746 F.3d at 1325 (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”). Accordingly, we find that the parties’ identical goods are impulse purchases that travel in the same trade channels to the same class of consumers. These factors weigh strongly in favor of a finding of likely confusion.

C. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression

Under the first *DuPont* factor, we consider the “similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *DuPont*, 476 F.2d at 1361; *see also Stone Lion*, 746 F.3d at 1319. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018) (citing *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *4 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entirety. *Stone Lion*, 746 F.3d at 1321; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression such that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs.*, 668 F.3d at 1368. The focus is on the recollection of an ordinary consumer, who normally retains a general rather than specific

impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007 (CCPA 1971); *L'Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 TTAB LEXIS 77, at *16 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, Opp. No. 91055167, 1975 TTAB LEXIS 236, at *6 (TTAB 1975).

Because the goods are identical in part, “a lesser degree of similarity between the marks is required for confusion to be likely.” *Sabhnani*, 2021 TTAB LEXIS, at *34 (citing *Coach Servs.*, 668 F.3d at 1369); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992); *New Era*, 2020 TTAB LEXIS, at *42.

1. Appearance and Sound

We start with appearance and sound. Respondent’s mark is PICKWELL FARMS and Petitioner’s mark is PICTSWEET FARMS. “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 647 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 1298 (CCPA 1974)). “On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, 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 entirety. Indeed, this type of analysis appears to be unavoidable.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985).

The first or lead words in a mark are often its “dominant portion and are likely to make the greatest impression on consumers.” *Detroit Athletic*, 903 F.3d at 1303. In

Petitioner's PICTSWEET FARMS Mark, which is presented in standard characters and with a disclaimer of "FARMS," we find that the PICTSWEET element is dominant. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 1060 (Fed. Cir. 1985); *accord In re Dixie Rests., Inc.*, 105 F.3d 1405 (Fed. Cir. 1997) (it is proper to find that the dominant part of applicant's mark, THE DELTA CAFE and design, was DELTA because the generic "cafe" was disclaimed). For the same reasons, the dominant element of Respondent's Mark is PICKWELL.

In comparing the parties' standard character marks, both: (a) comprise two terms (b) in which the first term is dominant, (c) the dominant term is a compound word (d) beginning with the verb PICK or a misspelling of its past tense, "picked," and (e) the mark ends with the term FARMS, which is disclaimed in both registrations. Thus, they have many similarities.

The parties' marks are not identical, however. Within the dominant portions of the parties' marks—PICTSWEET and PICKWELL—the differences in the marks lie in the verb tenses (and spelling) of PICT ("picked) and PICK, and in the second portion of the dominant, compound words, i.e., SWEET and WELL. We find that PICT and PICK are similar in appearance and substantially similar in sound. Because of these similarities and the fact that marks end with the identical element FARMS, consumers may not notice the difference in the middle of the marks—SWEET and WELL. *See, e.g., Nike, Inc. v. Maher*, Opp. No. 91188789, 2011 TTAB LEXIS 234, at *11 (TTAB 2011) (finding marks overall similar when the marks start and end with the same or similar words). Indeed, considering both of these differing components,

SWEET and WELL, (a) contain the letter W in the first or second position (a visually wide letter that takes up space) followed by the letter E, (b) both components follow the consonant sound-vowel sound-consonant pattern, and (c) also contain double letters, it would be easy to miss the difference between SWEET and WELL. When considering the marks as a whole, we find these differences in elements of the marks weigh less than the more meaningful similarities in the marks in their entireties.

It is telling that Respondent does not argue the differences of the PICTSWEET FARMS Mark and PICKWELL FARMS Mark. Instead, it argues that the parties' marks are readily distinguishable based on the parties' use, i.e., packaging and marketing.²⁹ It is well-settled, however, that the Board will consider the marks only as they appear in the registrations, not as used in the marketplace. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 950 (Fed. Cir. 2000) (“[I]t is irrelevant that Cunningham has a particular display for his mark in commerce, and the Board was correct to ignore those features.”). Accordingly, Respondent's argument is without merit.

Therefore, in comparing the marks as a whole, we find them similar in appearance and sound.

2. Connotation and Commercial Impression

In considering the marks' connotations and commercial impressions, we first note that “pick” is defined as, inter alia, “to gather by plucking | *pick* apples” and

²⁹ 34 TTABVUE 20-21.

“CHOOSE, SELECT | tried to *pick* the shortest route.”³⁰ Petitioner’s PICTSWEET FARMS Mark employs an intentional misspelling of the past tense of the verb “pick” combined with the term SWEET, a desirable characteristic of vegetables, as emphasized in Petitioner’s early advertisements³¹ and as used in current product and vegetable names and descriptions, i.e., “PICTSWEET FARMS Deluxe Super Sweet Yellow Corn” and “Sweet Potatoes.”³² Thus, Petitioner’s PICTSWEET FARMS Mark for frozen vegetables connotes vegetables that were picked, plucked or chosen for a certain quality—i.e., sweetness—from a farm.

Respondent’s PICKWELL FARMS Mark uses the same verb, PICK, in its present tense, with the same meanings listed above, and combines it with the term WELL. “Well” is defined as “in a good and proper manner” and “with careful or close attention.”³³ Much like words such as “best,” and “good,” WELL is a laudatory term and therefore merely descriptive of Respondent’s goods or the manner in which they are selected or “picked.” “[P]uffing, if anything, is more likely to render a mark merely descriptive, not less so.” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1256 (Fed. Cir. 2012); see *In re Boston Beer Co. L.P.*, 198 F.3d 1370 (Fed. Cir. 1999) (finding THE BEST BEER IN AMERICA so highly laudatory and

³⁰ MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/pick> (accessed September 25, 2024). The Board may take judicial notice of dictionary definitions. *In re Nextgen Mgmt., LLC*, Ser. No. 88098031, 2023 TTAB LEXIS 1, at *10 n.5 (TTAB 2023).

³¹ Petitioner’s advertisement from 1960 states, “It’s PICTSWEET Harvest Hoedown Time for Frozen Food Lovers! It’s been a glorious year! The corn has been so **sweet** ...” Testimony Declaration of Kevin B. Schwab, 25 TTABVUE 5-6 (emphasis added).

³² *Id.* at 17, 19.

³³ MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/well> (accessed September 19, 2024).

descriptive as applied to beer and ale that it is incapable of acquiring distinctiveness). Indeed, Respondent described the PICKWELL FARMS mark meaning as “picking things at harvest then doing a good job at it.”³⁴ Therefore, when viewed in connection with Respondent’s goods, including, inter alia, frozen vegetables, Respondent’s Mark connotes farm foods that are picked, plucked or chosen in a good manner or with careful attention. Although the second element of the parties’ marks have some difference in meaning (SWEET and WELL), the use of nearly identical and identical first and last elements (PICT and PICK, and FARMS) are combined here with a laudatory or similarly descriptive term, that is then, in turn, sandwiched in the same middle position within the marks. These similarities in words, meanings, and structure combine in a manner such that the marks appear as variations on a theme (PICT/PICK + laudatory or descriptive term + FARMS), heightening the likelihood of confusion:

The second elements of the marks are different, and some consumers may notice and recall the difference. But the marks share the same structure, starting with the dominant ‘sage’ element and then add a second word to create a sage-formative mark. This structure results in marks that look like variations on a ‘sage’ theme. The common ‘sage’ element of the marks anchors them in a way to the same theme and creates a risk that consumers will mistakenly assume connections between the services provided under the marks. This type of similarity increases the likelihood of confusion. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1049 (noting that the two compared marks’ identical structure supported the conclusion that confusion was likely).

³⁴ Brazier Deposition, 23 TTABVUE 46.

Sage Therapeutics, Inc. v. SageForth Psychological Servs., LLC, Opp. No. 91270181, 2024 TTAB LEXIS 139, at *15-16 (TTAB 2024). While “some consumers may notice and recall the difference” in the parties’ marks, the average consumer “normally retains a general rather than a specific impression of marks.” *Id.* at *13 (quotation and quotation marks omitted). We find that the parties’ marks have a similar connotation.

Given the similarities in the marks’ appearance, sound, and connotation, and recalling that “[s]imilarity is not a binary factor but is a matter of degree,” *KME Ger. GmbH v. Zhe Jiang Hailiang Co.*, Opp. No. 91267675, 2023 TTAB LEXIS 379, at *25 (TTAB 2023) (quoting *St. Helena Hosp.*, 747 F.3d 747, 752 (Fed. Cir. 2014) (internal quotation omitted)), we find that the marks create a similar commercial impression. For all of these reasons, when we consider Petitioner’s PICTSWEET FARMS Mark and Respondent’s PICKWELL FARMS mark in their entireties, we find them to be similar in overall appearance, sound, connotation, and commercial impression. The first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

D. The fame of the prior mark (sales, advertising, length of use) and the number and nature of similar marks in use on similar goods, and any other established fact probative of the effect of use

“Two of the *DuPont* factors (the fifth and sixth) consider strength.” *Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). The “fifth *DuPont* factor enables [Petitioner] to prove that its pleaded marks are entitled to an expanded scope of protection by adducing evidence of ‘[t]he fame of the prior mark (sales, advertising, length of use),’” while “the sixth *DuPont* factor allows [Respondent] to contract that

scope of protection by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *Made in Nature*, 2022 TTAB LEXIS 228, at *23-24 (quoting *DuPont*, 476 F.2d at 1361). “There are two prongs of analysis for a mark’s strength under the sixth factor: conceptual strength and commercial strength. Conceptual strength is a measure of a mark’s distinctiveness” along the spectrum of distinctiveness from generic terms to fanciful marks, *Spireon*, 71 F.4th at 1362 (citations omitted), while commercial strength “is the marketplace recognition value of the mark.” *Id.* at 1363 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80).

As to the conceptual strength of Petitioner’s PICTSWEET FARMS Mark, we first note that it is registered on the Principal Register without a claim of acquired distinctiveness; therefore the mark is inherently distinctive and thus at least suggestive for Petitioner’s registered goods. 15 U.S.C. § 1057(b) (registration is “prima facie evidence of the validity of the registered mark”); *Made in Nature*, 2022 TTAB LEXIS 228, at *24 (mark registered on Principal Register without a claim of acquired distinctiveness presumed to be inherently distinctive); *Sock it to Me, Inc. v. Fan*, Opp. No. 91230554, 2020 TTAB LEXIS 201, at *30-31 (TTAB 2020) (“We presume the mark is inherently distinctive-at least suggestive-because it is registered on the Principal Register.”).

Petitioner proffered evidence as to the commercial strength of its PICTSWEET mark, in the form of advertising expenses, unit sales, and sales totals per year, from 2018-2019 to 2023, but this evidence is of limited value as to the relevant mark and

goods. That is, first, the evidence is not tied to the registered PICTSWEET FARMS Mark; Petitioner does not distinguish between its various marks comprising PICTSWEET, referring only to “its brand.”³⁵ Second, the evidence does not differentiate between the frozen vegetables advertised or sold under this mark that we have found identical to Respondent’s goods, in part, and other goods. Petitioner’s brief includes embedded images of advertisements displaying the PICTSWEET FARMS mark,³⁶ but testimonial evidence groups together sales figures and advertising expenses for all of Petitioner’s PICTSWEET marks (“PICTSWEET-branded”) and frozen foods (“frozen vegetables and frozen entrees”).³⁷ From 2018 to 2023 (the date of the relevant testimony), Petitioner spent more than \$1,000,000 per year advertising its PICTSWEET brands, including \$8,000,000 in the year 2021-2022.³⁸ For the five years leading up to 2023, Petitioner sold “approximately 90-100 million units of PICTSWEET-branded frozen vegetables and frozen entrees per year in over 40,000 stores ... [with a] sales total close to \$300,000,000 per year.”³⁹ The sales figures and advertising expenses are substantial but, as noted above, of only limited value in assessing the commercial strength of the specific marks asserted and the specific goods sold under those respective marks. *Luxco*, 2017 TTAB LEXIS 6, at

³⁵ 33 TTABVUE 13.

³⁶ 33 TTABVUE 13-14.

³⁷ 25 TTABVUE 5, and 6-9, *generally*.

³⁸ Schwab Declaration, 25 TTABVUE 6, ¶ 16.

³⁹ *Id.* at 5, ¶ 12.

*4 (“[T]he Board is capable of weighing the relevance and strength or weakness of the ... evidence, including any inherent limitations ...”).

Putting all this together, at the time of filing the instant cancellation proceeding, Petitioner had used the PICTSWEET FARMS Mark for five years, beginning on May 2, 2016.⁴⁰ Due to the length of time of use of the PICTSWEET FARMS Mark in connection with frozen vegetables, and the advertising expenses and sales figures during this time at least partially attributable to the PICTSWEET FARMS Mark in connection with frozen vegetables, we find that Petitioner’s PICTSWEET FARMS Mark is at least somewhat commercially strong.

The record also includes website screenshots showing a third-party mark that incorporates the term “PICK” for frozen vegetables, i.e., PICK 5 for frozen foods, including frozen vegetables.⁴¹ On the one hand, we find one third-party PICK mark used on frozen vegetables (the PICK 5 products) is not probative on whether a portion of Petitioner’s PICTSWEET FARMS Mark is commercially weak and entitled to a narrow scope of protection because it is not as similar to Petitioner’s marks as is Respondent’s mark. *See, e.g., Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 675 (Fed. Cir. 1984). In addition, one lone third-party mark does not make much of a splash. *See, e.g., Inn at St. John’s*, 2018 TTAB LEXIS 170, at *12 (four third-party registrations and no third-party uses were “a far cry from the large

⁴⁰ Schwab Declaration, 25 TTABVUE 3, ¶ 6.

⁴¹ Zivin Declaration, 26 TTABVUE 9. To the extent that these products may appear more than once in the exhibits to the Zivin Declaration, we reference only the first apparent occurrence.

quantum of evidence of third-party use and third-party registrations that was held to be significant” in prior decisions). On the other hand, the parties’ marks for frozen vegetables, PICTSWEET FARMS and PICKWELL FARMS, connote vegetables that were chosen or “picked” for certain qualities; it is therefore not surprising to find other instances of the word PICK used in connection with frozen vegetables. Simply put, vegetables are picked, so the PICT/PICK element in both marks has some weakness. On balance, however, this evidence does not establish that the PICTSWEET FARMS Mark as a whole is entitled to a narrowed scope of protection.

Having considered all the relevant evidence and argument, to summarize our findings under the fifth and sixth *DuPont* factors, we find that Petitioner’s mark is at least suggestive and we find that Petitioner has shown that its mark is somewhat commercially strong. Respondent has not shown that use of similar marks in the relevant market decreases the strength we would otherwise attribute to the PICTSWEET FARMS Mark. Accordingly, the fifth factor slightly favors a finding of likely confusion and the and sixth factor is neutral.

E. The nature and extent of any actual confusion and the length of time during and conditions under which there has been concurrent use without evidence of actual confusion

Respondent argues that there is no evidence of actual confusion in the record and this lack of evidence of actual confusion weighs against a finding of likely confusion.⁴² Under the seventh and eighth *DuPont* factors, we consider the parties’ respective uses “such that we could make a finding as to the ‘length of time during and conditions

⁴² 34 TTABVUE 23.

under which there has been concurrent use without evidence of actual confusion.” *Guild Mortg. Co.*, Ser. No. 86709944, 2020 TTAB LEXIS 17, at *25 (TTAB 2020); *see also DuPont*, 476 F.2d at 1361 (identifying seventh and eighth *DuPont* factors as “[t]he nature and extent of any actual confusion,” and “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion”). Unlike the second, third, and fourth *DuPont* factors, the eighth *DuPont* factor “requires us to look at actual market conditions, **to the extent there is evidence of such conditions in the record.**” *In re Guild Mort. Co.*, 2020 TTAB LEXIS 17, at *19 (emphasis added).

In this regard, we note certain background facts as to the actual market conditions of the parties’ businesses. Petitioner The Pictsweet Company offers frozen vegetables and meals⁴³ in over 40,000 stores nationwide,⁴⁴ including at least some of Respondent’s stores.⁴⁵ Respondent Moran Foods, LLC DBA Save-A-Lot,⁴⁶ operates⁴⁷ the Save A Lot (“SAL”) “small-format” grocery store chain,⁴⁸ offering both private label products⁴⁹ as well as national brands at a discounted price.⁵⁰ Most products sold

⁴³ Schwab Declaration, 25 TTABVUE 4, ¶ 4.

⁴⁴ *Id.* at 5, ¶ 12.

⁴⁵ *Id.* at 9, ¶ 22; Brazier Declaration, 28 TTABVUE 9, ¶ 30.

⁴⁶ *Id.* at 2, ¶ 1.

⁴⁷ *Id.* at 4, ¶ 5.

⁴⁸ Brazier Deposition, 23 TTABVUE 19.

⁴⁹ *Id.* at 21.

⁵⁰ Brazier Declaration, 28 TTABVUE 3, ¶ 6.

in SAL stores are Respondent's own private label products,⁵¹ including those sold under Respondent's PICKWELL FARMS Mark for, inter alia, frozen vegetables. There are over 800 SAL stores throughout the U.S. ("we're all over ... it's easier to [list] which states we're not in"),⁵² but located in "[m]ostly the East Coast and Midwest."⁵³ Although Respondent uses the word "operates" in connection with the entire chain of SAL stores ("Respondent operates the Save A Lot® ... grocery store chain"),⁵⁴ in fact it only "owns and operates a small number of these grocery stores (less than 1%). The overwhelming majority of SAL grocery stores are owned and operated by independent, licensed, companies called 'Retail Partners.' Respondent maintains ownership of all the intellectual property rights associated with the SAL stores and the private label products sold in those stores."⁵⁵ Although Respondent acts as a wholesaler to its network of Retail Partners⁵⁶ and makes product recommendations,⁵⁷ these Retail Partner SAL stores decide which products are offered in their stores.⁵⁸ Respondent markets "all the product offerings that appear in SAL stores ... through the SAL website (<http://www.savealot.com>), through

⁵¹ *Id.* at 4, ¶ 10.

⁵² Brazier Deposition, 23 TTABVUE 32.

⁵³ *Id.*

⁵⁴ Brazier Declaration, 28 TTABVUE 3, ¶ 5.

⁵⁵ *Id.* at 3, ¶ 8.

⁵⁶ *Id.* at 4, ¶ 9.

⁵⁷ *Id.* at 4, ¶ 12.

⁵⁸ *Id.*

Respondent's social media webpages, through weekly circulars, and in its retail store locations.”⁵⁹

Set against this background, the record contains evidence of market conditions reflecting an opportunity for actual confusion. “The lack of evidence of actual confusion occurring over a significant period takes on greater weight if it can be shown that there have been meaningful opportunities for such confusion to occur.” *Gen. Mills*, 2011 TTAB LEXIS 280, at *56. We find that there have been some meaningful opportunities for confusion to occur. First, the parties' products have been offered for sale “side-by-side” in Respondent's SAL stores, as Petitioner's witness, Mr. Schwab, testified.⁶⁰ Second, the declaration of Petitioner's counsel, Mr. Zivin, reinforces these “side-by-side” sales within the same stores, with screenshots of the Instacart website showing the parties' products offered “side-by-side” on screen in SAL stores in Arkansas (Texarkana), Florida (Bradenton), Louisiana (Hammond), New Jersey (Newark), New York (Albion and Syracuse), Ohio (Cincinnati), and Texas (Sherman).⁶¹ Third, there is evidence that Respondent advertises Petitioner's products in the same marketing materials or channels in which it advertises its own PICKWELL FARMS products, namely, Respondent's weekly online and in-store circulars⁶² and at least one social media account.⁶³ Fourth, in addition to side-by-side

⁵⁹ *Id.* at 6, ¶ 18. It is unclear, however, if “its [i.e., Respondent's] retail store locations” refers to all SAL stores or only those owned by Respondent.

⁶⁰ Schwab Declaration, 25 TTABVUE 9, ¶ 22.

⁶¹ Zivin Declaration, 26 TTABVUE, *generally*.

⁶² Brazier Declaration, 28 TTABVUE 6, ¶¶ 18-19, at 9, ¶ 32, and at Ex. 6.

⁶³ Schwab Declaration, 25 TTABVUE 9-10, ¶ 22.

sales in Respondent's SAL stores as discussed above, it is likely that there are geographic locations—especially in the East Coast and Midwest where Respondent's stores are “mostly” located⁶⁴—in which the parties' goods are offered not side-by-side in the same SAL store but in different stores within the same localities, such that shoppers in that area may visit multiple stores and encounter both parties' products in this manner. That is, because Petitioner's products are sold in so many stores—40,000 nationwide—and Respondent sells its products in 800 SAL stores—concentrated mainly in the East Coast and Midwest—there is likely some geographic overlap of the parties' products in these regions or portions thereof, at least.

Our finding that there are some meaningful opportunities for confusion is tempered, however, by the various caveats necessary to our review and understanding of the evidence. The evidentiary record is vague and incomplete as to important quantitative factors needed to assess the scope of these opportunities for confusion. Specifically, the record does not indicate how many SAL stores sell both parties' products,⁶⁵ the volume of products sold, and for how long the parties' products were offered together in the same stores. And for those areas where there may be geographic overlap of separate stores offering the parties' products (which itself is not clear), the record does not detail or allow us to fully infer the actual geographic overlap, the volume of products sold, and the length of time for such overlapping sales. *See Gen Mills*, 2011 TTAB LEXIS 280 at *56-57 (“Applicant relies on certain

⁶⁴ Brazier Deposition, 23 TTABVUE 32.

⁶⁵ Brazier Declaration, 28 TTABVUE 4, ¶ 12 (Retail Partner SAL stores decide which products are offered in their stores).

testimony to show that ample opportunity for actual confusion has existed, however, this testimony, at best, is vague as to where and when applicant's products were sold [...]”). This imprecision or lack of data in the record does not create a full picture of market conditions:

The record contains no evidence of actual confusion. The record does show that Han Beauty’s products and Alberto-Culver’s products were both sold in Han Beauty’s salons. While extended periods of side-by-side sales without actual confusion may tend to refute a likelihood of confusion, the Board did not err in failing to address the lack of actual confusion in this case. After all, **Han Beauty submitted no evidence of the length of time both marks appeared in its salons or the circumstances under which the salons marketed both marks.** While the apparent lack of actual confusion evidence in the record may marginally favor Han Beauty even without full explanation of the circumstances of the marks appearing in the same salons, the Board did not err in focusing on other more dominant factors.

Han Beauty, Inc. v. Alberto-Culver Co., 236 F.3d 1333, 1338 (Fed. Cir. 2001) (emphasis added); *see also Salem Commodities, Inc. v. Miami Margarine Co.*, 244 F.2d 729, 731 (CCPA 1957) (lack of evidence of actual confusion not highly probative due to lack of evidence showing extent of sales of parties’ goods in same localities).

In summary, upon consideration of the evidence of record, we find that there has been some meaningful opportunity for actual confusion but there is insufficient evidence for us to conclude that this opportunity for actual confusion has been so significant such that the seventh and eighth *DuPont* factors would weigh heavily against a finding of likelihood of confusion. *See Han Beauty*, 236 F.3d at 1338. We further recognize that “evidence of actual confusion is notoriously difficult to come by and, in particular, where relatively inexpensive items such as food products are

involved, confusion about sponsorship or affiliation would not necessarily be brought to the attention of either [party],” *Gen. Mills*, 2011 TTAB LEXIS 280, at *55. We find that the seventh and eighth *DuPont* factors slightly weigh against a finding of likelihood of confusion.

F. Any other established fact probative of the effect of use

Under the thirteenth *DuPont* factor, we consider “any other established fact probative of the effect of use.” *DuPont*, 476 F.2d at 1361. Petitioner argues that Respondent adopted and used its PICKWELL FARMS Mark in bad faith,⁶⁶ which Respondent denies.⁶⁷ An inference of bad faith “requires something more than mere knowledge of a prior similar mark.” *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1565 (Fed. Cir. 1987) (awareness of plaintiff’s mark through trademark search and opinion of counsel that the mark was available notwithstanding Plaintiff’s marks was not sufficient for an inference of bad faith).

Petitioner alleges that Respondent had actual knowledge of Petitioner’s PICTSWEET FARMS Mark and its other PICTSWEET-formative marks prior to Respondent’s selection of its PICKWELL FARMS Mark, and in bad faith Respondent adopted and continued to use “a mark that contains overlapping elements to Pictsweet’s well-known and profitable PICTSWEET and PICTSWEET FARMS marks.”⁶⁸ In support of this contention, Petitioner points briefly to a “Competitive

⁶⁶ 33 TTABVUE 27-28.

⁶⁷ 34 TTABVUE 17-19.

⁶⁸ *Id.* at 28.

Landscape” report prepared for Respondent by the advertising agency assisting Respondent in selecting a new trademark⁶⁹ and to the results of searches for the parties’ marks on the Instacart website.⁷⁰

Regarding the “Competitive Landscape” report, Respondent’s Design Manager, Mr. Brazier, stated that he was aware of Petitioner’s PICTSWEET FARMS Mark at the time Respondent selected its PICKWELL FARMS Mark.⁷¹ We find that the inclusion of Petitioner’s PICTSWEET mark (and/or its PICTSWEET FARMS Mark) in a competitive landscape report⁷² and Respondent’s actual knowledge of Petitioner at the time it adopted its mark are not the “something more” required to infer bad faith on the part of Respondent. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d at 1565.

Petitioner also argues that Respondent “continues to use” its mark in bad faith, pointing to evidence that searches it conducted for “pictsweet” and “pickwell” on a third party, grocery delivery website yielded results that include Respondent’s products and vice versa.⁷³ This search, which was undertaken after this proceeding was commenced, is not evidence of Respondent’s intent at the time it adopted or sought to register its mark. *See, e.g., QuikTrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d

⁶⁹ 33 TTABVUE 28-29, 23 TTABVUE 35-40.

⁷⁰ 33 TTABVUE 28.

⁷¹ Brazier Deposition, 23 TTABVUE 47.

⁷² Respondent did not request that Petitioner appear in this report; the advertising agency included Petitioner. Brazier Declaration, 28 TTABVUE 17, 21.

⁷³ 33 TTABVUE 28.

1031, 1036 (Fed. Cir. 2021) (“A party’s bad faith in **adopting** a mark is relevant to the thirteenth *DuPont* factor”) (emphasis added; citations omitted).

Based on the evidence and arguments, we find that Petitioner has not demonstrated that Respondent acted in bad faith in its adoption and use of the PICKWELL FARMS Mark. This factor does not weigh for or against a finding of likelihood of confusion.

G. Balancing the Factors

Weighing the *DuPont* factors for which there has been evidence and argument, we find confusion likely. *In re Charger Ventures LLC*, 64 F.4th 1375, 1383-84 (Fed. Cir. 2023). The parties’ marks are similar in overall appearance, sound, connotation, and commercial impression; this factor weighs in favor of a finding of likely confusion. The parties’ goods are identical in part; this factor weighs strongly in favor of a finding of likely confusion. The parties’ goods presumptively travel in the same trade channels to the same consumers; this factor weighs strongly in favor of a finding of a likelihood of confusion. The relevant goods are impulse purchases; this factor weighs strongly in favor of a finding of likely confusion. Petitioner’s mark is somewhat commercially strong; this factor slightly favors a finding of likely confusion. Respondent has not shown that use of similar marks in the relevant market decreases the strength of Petitioner’s mark; this factor is neutral. There has been some opportunity for actual confusion to have occurred, but the record is missing important evidence regarding geographic extent of overlap, time of overlap, and relevant sales volume; factors seven and eight slightly favor a finding of no likelihood of confusion

but do not outweigh the other relevant *DuPont* factors. See *Gen Mills*, 2011 TTAB LEXIS 280, at *58. Respondent's bad faith has not been shown; this factor is neutral.

Because most of the relevant *DuPont* factors weigh in favor of finding a likelihood of confusion or are otherwise neutral, and two factors weigh only slightly against a finding of likely confusion and do not outweigh the other relevant factors, Respondent's PICKWELL FARMS Mark presents a likelihood of confusion.

Decision: The petition to cancel Registration No. 5978907 on the basis of likelihood of confusion is granted.