

This Opinion is not a
Precedent of the TTAB

Mailed: June 18, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Soil Basics Corporation

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Serial No. 97183502

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Mark D. Miller, William K. Nelson, of Sierra IP Law, PC,
for Soil Basics Corporation.

Christopher Nodes, Trademark Examining Attorney, Law Office 116,
Elizabeth Jackson, Managing Attorney.

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Before Greenbaum, Johnson, and Casagrande,
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:¹

¹ As part of an internal Board pilot program exploring the possibility of broadening acceptable forms of legal citations in Board cases, this opinion will use legal citations that vary from the citation form recommended in Trademark Trial And Appeal Board Manual Of Procedure (TBMP) § 101.03 (June 2023). There will be no citation to the United States Patents Quarterly (USPQ). This opinion cites precedential decisions of the Court of Appeals for the Federal Circuit and the Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). Precedential decisions of the Board and the Director will be cited only to WESTLAW (WL). To facilitate broader research, cited Board decisions also list the serial or proceeding number, where available. Cited decisions issued before 2008, however, may not be electronically available in the Board's TTABVUE docket system. Practitioners should continue to adhere to TBMP § 101.03 until further notice from the Board.

Soil Basics Corporation (“Applicant”) seeks registration on the Principal Register of the mark SBC SOBEC CLUTCH (in standard characters) for goods ultimately identified as “Fertilizers for use in the field of commercial agriculture,” in International Class 1.²

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), due to likelihood of confusion in view of the registration of the mark CLUTCH (in standard characters) for goods described as “Insecticides for use in agriculture,” in International Class 5.³

After the Examining Attorney made the refusal final,⁴ Applicant appealed⁵ and requested reconsideration.⁶ The Board suspended the appeal to allow the Examining Attorney to consider the request for reconsideration.⁷ Upon denial of reconsideration,⁸

² Application Serial No. 97183502 was filed on December 21, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as March 31, 2012.

³ Reg. No. 3002190 issued on Sept. 27, 2005 (renewed). *See* June 17, 2022, Nonfinal Office Action, at TSDR 3-4. Please note that citations in this opinion to the application records are to pages in the Trademark Status and Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁴ *See* Jan. 17, 2023, Final Office Action.

⁵ *See* 1 TTABVUE. References to the briefs, other filings in the case, and the record all cite to the Board’s TTABVUE electronic docket system. The number preceding “TTABVUE” represents the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specifically-cited page(s), if any, in the .pdf-format downloaded copy of the document.

⁶ *See* July 17, 2023, Request for Reconsideration.

⁷ *See* 2 TTABVUE.

⁸ *See* Aug. 10, 2023, Denial of Reconsideration (also available at 4 TTABVUE).

the appeal resumed.⁹ Applicant filed a brief,¹⁰ as did the Examining Attorney.¹¹ Applicant then filed a reply brief.¹² For the reasons explained below, we affirm the refusal to register.

I. Section 2(d) refusals generally

Section 2(d) of the Trademark Act prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods [or services] of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). We determine whether confusion is likely by analyzing all probative facts in evidence relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (providing a nonexclusive list of 13 factors potentially relevant to likelihood of confusion). *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). We then weigh together the findings we have made on the relevant likelihood-of-confusion factors to determine if, on balance, they indicate that confusion is likely. *See, e.g., id.* at 1381; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003).

“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.” *In re Shell Oil Co.*, 992 F.2d 1204, 1206 (Fed. Cir. 1993); *see also Charger Ventures*, 64 F.4th at 1381 (“In any given case, different ... factors

⁹ *See* 5 TTABVUE.

¹⁰ *See* 6 TTABVUE.

¹¹ *See* 8 TTABVUE.

¹² *See* 9 TTABVUE.

may play a dominant role and some factors may not be relevant to the analysis.”) (citation omitted). Generally, however, the comparison of the marks and goods are key factors. *See, e.g., Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976); *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 WL 22358, at *1 (TTAB 2010).

II. Analysis

A. Comparison of the marks

The first factor concerns “[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *du Pont*, 476 F.2d at 1361. This is always one of the most important considerations. *See, e.g., Herbko Int’l*, 308 F.3d at 1165 (“the ‘similarity or dissimilarity of the marks in their entireties’ is a predominant inquiry”) (citation omitted). “Marks are compared along the axes of their ‘appearance, sound, connotation and commercial impression.’” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord In re i.am.symbolic, llc*, 866 F.3d 1315, 1324 (Fed. Cir. 2017). We assess the marks in their entireties. But in so doing, “[i]t is not improper for the Board to determine that, for rational reasons, it should give more or less weight to a particular feature of the mark provided that its ultimate conclusion regarding the likelihood of confusion rests on a consideration of the marks in their entireties.” *See, e.g., QuikTrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1035 (Fed. Cir. 2021) (cleaned up; citation omitted).

The cited registration is CLUTCH. Applicant's mark is SBC SOBEC CLUTCH. Applicant contends that the presence of SBC and SOBEC make the marks different enough that confusion is unlikely.¹³ Applicant and the Examining Attorney each cite several cases involving a senior user with a one-word mark and a junior user that adds a house mark to it. The cases, as one would expect, come down differently, depending on the facts and evidence in the case. That is what we do in every case: make our decisions on the facts and evidence before us. No prior decision controls a case with different facts and evidence. *See, e.g., Curtice-Burns, Inc. v. Nw. Sanitation Prods., Inc.*, 530 F.2d 1396, 1399 (CCPA 1976) (“[A]s we shall evidently have to continue saying *ad nauseam*: ... , prior decisions on other marks for other goods are of very little help one way or the other in cases of this type. Each case must be decided on its own facts and the differences are often subtle ones.”) (cleaned up; citation omitted).

There also is no general rule that adding a house mark means confusion is unlikely. *See, e.g., New England Fish Co. v. Hervin Co.*, 511 F.2d 562, 564 (CCPA 1975) (“[T]here is no arbitrary rule of law that if two product marks are confusingly similar, likelihood of confusion is not removed by use of a company or housemark in association with the product mark. Rather, each case requires a consideration of the effect of the entire mark including any term in addition to that which closely resembles the opposing mark.”) (citation omitted); *General Mills, Inc. v. Fage Dairy Processing Indus. S.A.*, Opp. No. 91118482, 2011 WL 6001095, at *15 (TTAB 2011)

¹³ *See* 6 TTABVUE 8, 9.

“In general, use of a house mark does not obviate confusion.” (citation omitted), *judgment altered by settlement*, No. 06:11-CV-01174-(DEP) (N.D.N.Y. Nov. 5, 2013) & 2014 WL 343267 (TTAB 2014). Indeed, where “the common part of the marks is identical, purchasers familiar with the registrant’s mark are likely to assume that the house mark simply identifies what had previously been an anonymous source.” *In re Fiesta Palms, LLC*, 2007 WL 950952, at *4 (TTAB 2007). But adding a house mark may make confusion unlikely “where 1) the marks in their entirety convey significantly different commercial impressions, or 2) the matter common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.” *General Mills*, 2011 WL 6001095, at *15 (citations omitted).

Here, two terms precede the term CLUTCH in Applicant’s mark. Applicant contends that SBC is perceived as a house mark and that SOBEC (and CLUTCH) will be viewed as “product marks.”¹⁴ We see no evidentiary basis that consumers parse the mark this way. It’s certainly possible, but without evidence pointing one way or another, it’s equally plausible that consumers perceive both of the first two terms as house marks, perhaps of two parties (e.g., as in a joint venture), or maybe of one party (e.g., because SBC may be perceived as a shortened form of SOBEC without the two vowels). The point is that, on the record before us, we can’t say for sure.

In any event, the analysis does not change depending on whether we categorize SOBEC as a “product mark” or a “house mark.” *See In re Toshiba Med. Sys. Corp.*,

¹⁴ See 6 TTABVUE 13.

Ser. No. 79046106, 2009 WL 1896059, at *3 (TTAB 2009) (whether the additional term “is or is not a house mark is not conclusive in determining whether there is a likelihood of confusion. ... The addition of a distinctive term, which is not a house mark, does not necessarily result in marks that are dissimilar.”) (citations and paragraph break omitted). Either way, we still assess the overall similarity of the marks, including the sub-inquiry whether the common term “retain[s] its identity as a separately identifiable term in the mark,” notwithstanding the additional term or terms. *See id.* (citation omitted); *see also New England Fish Co.*, 511 F.2d at 564.

In this case, the junior user’s mark adds two terms, not just one, to the shared term. We haven’t been able to find many decisions like it. But that doesn’t matter much, because, as we pointed out earlier, decisions involving other parties, other marks, and other evidence do not control how we decide this case. *See, e.g., Curtice-Burns*, 530 F.2d at 1399. Applicant cites one of these decisions, *Knight Textile Corp. v. Jones Investment Co.*, Opp. No. 91153852, 2005 WL 1691588 (TTAB 2005), and argues that it is “instructive.”¹⁵ We agree that it is instructive. In *Knight Textile*, the junior user’s mark was NORTON MCNAUGHTON ESSENTIALS for women’s clothing and the senior user’s mark was ESSENTIALS for the same goods. Confusion was deemed unlikely in large part because the evidence supported a finding that the common term “ESSENTIALS” was “highly suggestive,” and therefore relatively conceptually weak, in connection with the goods. Thus, the addition of the house mark NORTON MCNAUGHTON rendered the commercial impression of the applicant’s

¹⁵ *See* 6 TTABVUE 12.

mark sufficiently different from the opposer's mark. *See id.* at *4-5; *cf. General Mills*, 2011 WL 6001095, at *15 (noting that the additional of a house mark to the common term takes on more significance when the term “common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted”).

American Thread Co. v. Filatures Des Trois Suisses, S.A., 1964 WL 8028 (TTAB 1964), is also instructive. There, the junior user's mark was FILATURES DES 3 SUISSSES for yarn and the senior's user's was SUISSSES for thread. There was no indication that the additional terms were a house mark, so the issue was simply whether the additional terms sufficiently made the commercial impression of the mark as a whole different enough from SUISSSES to avoid confusion. The Board deemed confusion unlikely in large part because the shared term SUISSSES had a well-known geographic connotation that rendered it relatively conceptually weak. *See* 1964 WL 8028, at *1.

Our takeaway from these two decisions is that, whether we consider SBC and SOBEC house marks or product marks or just added terms, the issue is still whether the mark as a whole differs enough from the registered mark to make confusion unlikely.

As the Examining Attorney points out, in *Knight Textile*, the Board relied on evidence that the common term ESSENTIALS was highly suggestive, but that is not the case with the common term here.¹⁶ Applicant contends that CLUTCH is weaker

¹⁶ *See* 8 TTABVUE 6-14.

than the other two terms in its mark because it's suggestive.¹⁷ There are several dictionary definitions of "clutch,"¹⁸ one of which is "successful is a crucial situation."¹⁹ While that may indicate a degree of suggestiveness to CLUTCH, in that it implies that the product will work when needed most, the implication isn't an obvious one in the context of fertilizers or insecticides. Further, there is no evidence here in the form of third-party registrations of CLUTCH for similar goods—as there was in *Knight Textile* for the term ESSENTIALS—that would support to Applicant's argument that the shared term is **highly** suggestive—or, in *General Mills'* terms, "merely descriptive or diluted." 2011 WL 6001095, at *15. The minimal evidence here simply does not persuade us that the term CLUTCH is highly suggestive (i.e., conceptually on the very weak end of the protectible spectrum) for either party's goods.

In Applicant's mark, CLUTCH is preceded by the terms SBC and SOBEC, in that order. Applicant notes that SBC is one of its registered marks.²⁰ SOBEC apparently is registered to a third party with whom Applicant has entered into a consent agreement.²¹ Although first terms tend to be dominant in creating the commercial

¹⁷ See 6 TTABVUE 10-11.

¹⁸ See Aug. 10, 2023, Denial of Reconsideration, at TSDR 6-14.

¹⁹ See *id.* at 7.

²⁰ See 6 TTABVUE 11. Applicant says it "identified" this registration to the Examining Attorney in its December 19, 2022, Response to Office Action. See 6 TTABVUE n.2. But Applicant did not place a copy of the status and title of the registration in the record during prosecution. It did attach a copy of the registration to its appeal brief, but that was improper because the record should be complete before an appeal is filed. See 37 C.F.R. § 2.142(d). We therefore will not consider it. But it really doesn't matter whether SBC is a separately-registered trademark. What matters is that SBC is a term in the mark in Applicant's current application.

²¹ See Dec. 19, 2022, Response to Office Action, at TSDR 15 (consent agreement in which third-party signatory Ronald Helland avers that he owns the registration for SOBEC).

impression of marks, *see, e.g., Century 21 Real Est. Corp. v. Century Life of Am.*, 970 F.2d 874, 876 (Fed. Cir. 1992), Applicant contends instead that the second term, SOBEC, plays the dominant role in its mark.²² While it sometimes aids our analysis to rank-order the terms as to “dominance,” there is no legal requirement for us to do so. As we have found, CLUTCH is not a weak term, and it is independent of the first two terms in Applicant’s mark. In other words, the terms SBC and SOBEC, neither of which has any facially discernable meaning, don’t do anything to change the meaning or implication of CLUTCH. They may distract from it a bit simply because they add additional visual stimulation and words to pronounce, but that’s all. So, despite being the third word, the term CLUTCH plays a significant role in creating the commercial impression of Applicant’s mark. And, of course, it comprises the entirety of the registrant’s mark.

Assessing the marks in their entirety, we find that, on balance, this factor tips—but only a little—in favor of a conclusion that confusion is likely.

B. Comparison of the goods

The second likelihood-of-confusion factor assesses “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *du Pont*, 476 F.2d at 1361. In most likelihood-of-confusion cases, the similarity of the goods or services is, along with the similarity of the marks, considered one of the

Applicant appended a copy of the registration to its appeal brief. As we just noted, however, the record should be complete before appeal. We therefore do not consider the registration, but, as with the SBC registration, for present purposes what matters is that SOBEC is a term in the mark at issue.

²² *See* 6 TTABVUE 11, 13.

relatively more important factors. *See, e.g., Federated Foods*, 544 F.2d at 1103 (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *CareFusion 2200, Inc. v. Entrotech Life Sciences, Inc.*, Opp. No. 91206212, 2016 WL 4437726, at *7 (TTAB 2016) (“In any likelihood of confusion analysis, two key considerations are the similarities between the goods and the similarities between the marks”) (citation omitted).



In assessing the second factor, we must consider “the applicant’s goods as set forth in its application, and the [registrant’s] goods as set forth in its registration. Likelihood of confusion must be resolved on the basis of the goods named in the registration” *i.am.symbolic*, 866 F.3d at 1325 (citations omitted). “The marks need not be used on [or in connection with] directly competing goods, any relation likely to lead purchasers into assuming a common source being sufficient.” *Dan Robbins & Assocs., Inc. v. Questor Corp.*, 599 F.2d 1009, 1013 (CCPA 1979) (citation omitted). “[T]he relevant inquiry considers if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 1363 (Fed. Cir. 2022) (cleaned up; citation omitted).

Evidence that other companies offer the goods of both parties under the same mark tends to show that consumers will perceive the goods as related. *See, e.g., Naterra Int’l, Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024); *In re Detroit*

Athletic Co., 903 F.3d 1297, 1306 (Fed. Cir. 2018). So does evidence that other companies list the goods of both parties in one registration. *See, e.g., Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 WL 2188890, at *24 (TTAB 2022); *In re Ox Paperboard, LLC*, Ser. No. 87847482, 2020 WL 4530517, at *6 (TTAB 2020).

Here, the record contains copious evidence that several third parties offer both agricultural fertilizer (as in the application here) and insecticides (as in the registration) under the same marks: BioAdvanced;²³ Corteva;²⁴ SiteOne LESCO (combined in one product);²⁵ The Andersons;²⁶ HELM (“Crop Protection | Protect your crops from ... insects”; “Crop Nutrition | Feed your crops”);²⁷ Brandt;²⁸ Helena;²⁹ INNVICTUS;³⁰ Stoller;³¹ WILBUR-ELLIS;³² and WinField United.³³

The record contains an even greater number of registrations listing both fertilizers

and insecticides:  (Reg. No. 3588151);³⁴  (Reg. No. 5913652);³⁵

²³ *See* June 17, 2022 Nonfinal Office Action, at TSDR 11, 15-16.

²⁴ *See id.* at 21-23, 29.

²⁵ *See id.* at 33-34.

²⁶ *See id.* at 44.

²⁷ *See* Jan. 17, 2023, Final Office Action, at TSDR 40-47.

²⁸ *See* Aug. 10, 2023, Denial of Reconsideration, at TSDR 15-16.

²⁹ *See id.* at 18-21.

³⁰ *See id.* at 22-24.

³¹ *See id.* at 26-29.



³² *See id.* at 30-34.


³³ *See id.* at 38-43.

³⁴ *See* Jan. 17, 2023, Final Office Action, at TSDR 50-51.

³⁵ *See id.* at 51-52.

 (Reg. No. 5720125);³⁶ HELENA AGRI-ENTERPRISES (Reg. No.

5852850);³⁷  (Reg. No. 5838186);³⁸  (Reg. No. 5569336);³⁹ CCPA
(Reg. No. 6186029);⁴⁰ MILLER (Reg. No. 6094401);⁴¹ CROPROTEK (Reg. No.
6296455);⁴² IMplode (Reg. No. 6181503);⁴³ BIOADVANCED 5 IN 1 WEED & FEED

(Reg. No. 6616079);⁴⁴  (Reg. No. 6080209);⁴⁵ OXYCAL (Reg. No. 6270139);⁴⁶



(Reg. No. 6623353);⁴⁷



(Reg. No. 6481944);⁴⁸

BROTSTART (Reg. No. 6442812);⁴⁹ MAMMOTH GARDEN (Reg. No. 6577888);⁵⁰ AG

³⁶ See *id.* at 53-54.

³⁷ See *id.* at 55-56.

³⁸ See *id.* at 57-58.

³⁹ See *id.* at 59-60.

⁴⁰ See *id.* at 61-62.

⁴¹ See *id.* at 63-64.

⁴² See *id.* at 65-66.

⁴³ See *id.* at 67-68.

⁴⁴ See *id.* at 69-70.

⁴⁵ See *id.* at 71-72.

⁴⁶ See *id.* at 73-74.


⁴⁷ See *id.* at 75-76.

⁴⁸ See *id.* at 77-78.

⁴⁹ See *id.* at 79-80.

⁵⁰ See *id.* at 81-82.

FARMACY (Reg. No. 6479174);⁵¹ BIOSUMA (Reg. No. 6842544);⁵² ARBER (Reg. No.

6488071);⁵³ NATURAL CHOICE (Reg. No. 4772620);⁵⁴  (Reg. No.

5449472);⁵⁵ TECNOLOGÍA MICRO CARBONO (Reg.4829280);⁵⁶  (Reg.

No. 5770062);⁵⁷ GOOD HARVEST (Reg. No. 5536105);⁵⁸ ALBIT (Reg. No. 4990005);⁵⁹

ROOTED IN TRADITION, GROWING THROUGH INNOVATION (Reg. No.

5424620);⁶⁰ ADAGE (Reg. No. 6180504);⁶¹ IKE'S (Reg. No. 5671297);⁶² MYCSA AG

(Reg. No. 5849954);⁶³ JOHNNY APPLESEED ORGANIC (Reg. No. 6164407);⁶⁴

GROWN GREEN (Reg. No. 6719086);⁶⁵ THE NUTRIENT USE EFFICIENCY

⁵¹ *See id.* at 83-84.

⁵² *See id.* at 85-86.

⁵³ *See id.* at 87-88.

⁵⁴ *See* Aug. 10, 2023, Denial of Reconsideration, at TSDR 46-47.

⁵⁵ *See id.* at 48-49.

⁵⁶ *See id.* at 50-51.

⁵⁷ *See id.* at 52-53.

⁵⁸ *See id.* at 54-55.

⁵⁹ *See id.* at 56-57.

⁶⁰ *See id.* at 58-59.


⁶¹ *See id.* at 60-61.

⁶² *See id.* at 62-63.


⁶³ *See id.* at 64-65.

⁶⁴ *See id.* at 66-67.

⁶⁵ *See id.* at 68-69.

PEOPLE (Reg. No. 6043046);⁶⁶  (Reg. No. 5934014);⁶⁷ RADIMAX (Reg. No. 6020386);⁶⁸ GET MORE FROM THE BLUE BOTTLE (Reg. No. 6191735);⁶⁹

 (Reg. No. 6732274);⁷⁰ PLATTE PEAK CROP PERFORMANCE (Reg. No.

7056573);⁷¹ MINROCK (Reg. No. 7008914);⁷² and  (Reg. No. 70380880).⁷³

Applicant's first rejoinder to this evidence is to point out that fertilizer and insecticides are not identical products.⁷⁴ This argument does not get Applicant home, however, because it is well settled that "[e]ven if the goods ... in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods" *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (citation omitted); *accord In re Rsch. & Trading Corp.*, 793 F.2d 1276, 1278 (Fed. Cir. 1986); *Dan Robbins & Assocs.*, 599 F.2d at 1013.

⁶⁶ *See id.* at 70-71.

⁶⁷ *See id.* at 72-73.

⁶⁸ *See id.* at 74-75.

⁶⁹ *See id.* at 76-77.

⁷⁰ *See id.* at 78-79.

⁷¹ *See id.* at 80-81.

⁷² *See id.* at 82-83.

⁷³ *See id.* at 84-85.

⁷⁴ *See* 6 TTABVUE 13-14.

Applicant next argues that, while it may be true that many companies offer both products, more offer just one or the other.⁷⁵ The implication is that consumers won't see them as related because, according to Applicant, they're far more used to seeing them emanating from different sources. We are not persuaded. Applicant's evidence is simply not up to the task of rebutting the Examining Attorney's third-party relatedness evidence. It consists of lists of "hits" from searches Applicant performed in the USPTO's electronic database of applications and registrations. Applicant offered the following:

- A summary list of the first 100 "hits" out of 902 listings resulting from a search of applications and registrations identifying both fertilizer and insecticide, only five of which appeared to have been registrations;⁷⁶
- A summary list of the first 100 "hits" out of 3422 listings resulting from a search of applications and registrations identifying insecticides but not fertilizers, only three of which appeared to have been registrations;⁷⁷ and
- A summary list of the first 100 "hits" out of 6719 listings resulting from a search of applications and registrations identifying fertilizer but not insecticide, none of which appear to have been registrations.⁷⁸

There are several serious problems with this purported evidence. First, it is well settled that offering mere lists of applications and registrations is not an acceptable way to make those applications and registrations of record. These summary lists have no probative value. We therefore sustain the Examining Attorney's objection⁷⁹ on that

⁷⁵ See 6 TTABVUE

⁷⁶ See July 17, 2023 Request for Reconsideration, at TSDR 19-21.

⁷⁷ See *id.* at 23-25.

⁷⁸ See *id.* at 27-29.

⁷⁹ See 8 TTABVUE 12.

basis. *See, e.g., Black & Decker Corp. v. Emerson Elec. Co.*, Opp. No. 91158891, 2007 WL 894416, at *10 (TTAB 2007); *In re Promo Ink*, Ser. No. 76541018, 2006 WL 478994, at *3 (TTAB 2006). Moreover, these lists are overwhelmingly populated by applications. Applications are not evidence of use or anything else, other than that the applications were filed. *See, e.g., Edom Lab'ys, Inc. v. Llichter*, Opp. No. 91193427, 2012 WL 1267961, at *4 (TTAB 2012); *Interpayment Servs. Ltd. v. Docters & Thiede*, Opp. No. 91119852, 2003 WL 880552, at *5 n.6 (TTAB 2003).

In sum, based on the probative evidence in the record, we find that the respective goods are closely related, a fact that weighs in favor of a conclusion that confusion is likely.

C. Comparing the channels of trade and the classes and characteristics of the relevant customers

The third *du Pont* factor considers “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” 476 F.2d at 1361. The fourth factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *Id.* As with the second likelihood-of-confusion factor, we base our comparison of the trade channels and classes of customers on what is set forth in the application and registration at issue. *See, e.g., Detroit Athletic*, 903 F.3d at 1308. Where an application or registration is unrestricted, the identified goods are “presumed to be sold in all normal trade channels to all the normal classes of purchasers.” *Id.* (citation omitted). That is the case with the cited registration.

During prosecution, Applicant, in an attempt to overcome the likelihood-of-confusion refusal, amended its identification of goods to read “Fertilizers for use in

the field of commercial agriculture.”⁸⁰ We note, however, that Applicant’s brief implicitly accepts that persons engaged in commercial agriculture buy both fertilizer and insecticide and that sales to persons and entities engaged in commercial agriculture represents an “overlap” between the trade channels and customers for Applicant’s and the registrant’s goods.⁸¹ *See, e.g., Sundure Paint Corp. v. Maas & Waldstein Co.*, 267 F.2d 943, 944 (CCPA 1959) (where one party used particular trade channels but the other’s were unrestricted, there was overlap); *Narita Export LLC v. Adaptrend, Inc.*, Canc. No. 92074784, 2022 WL 15328960, at *10 (TTAB 2022) (same); *Orange Bang, Inc. v. Ole Mexican Foods, Inc.*, Opp. No. 91189001, 2015 WL 5675641, at *12 (TTAB 2015) (same).

As to the sophistication of the relevant customers, Applicant emphasizes that those engaged in commercial agriculture are very careful in their purchases of fertilizer and insecticides for their crops.⁸² Applicant submitted a declaration of its President averring that commercial growers need permits for insecticides that are deemed toxic.⁸³ But registrant’s insecticides are limited neither to commercial growers nor to toxic insecticides for which governmental permits may be needed for application to crops. And Applicant does not aver that the same toxicity concerns and permit requirements apply to the product identified in its application, fertilizer.

⁸⁰ *See* July 17, 2023, Request for Reconsideration, at TSDR 7. The Examining Attorney accepted this amendment. *See* 4 TTABVUE 2.

⁸¹ *See* 6 TTABVUE 13-14.

⁸² *See* 6 TTABVUE 14-15; 9 TTABVUE 5-6.

⁸³ *See* July 17, 2023, Request for Reconsideration, at TSDR 16.

In assessing purchaser sophistication, our analysis must take into account “the least sophisticated purchasers” within the classes of purchasers. *See, e.g., Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014) (citing, *inter alia*, *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 293 (3d Cir.1991) (“when a buyer class is mixed, the standard of care to be exercised by the reasonably prudent purchaser will be equal to that of the least sophisticated consumer in the class”). Moreover, “[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods.” *In re Rsch. and Trading Corp.*, 793 F.2d 1276, 1279 (Fed. Cir. 1986) (citation omitted); *see also Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 1406 (CCPA 1970) (“It is true that in most instances technicians would use the products of either party and they are a discriminating group of people but that does not eliminate the likelihood of purchaser confusion here. Being skilled in their own art does not necessarily preclude their mistaking one trademark for another when the marks are as similar as those here in issue, and cover merchandise in the same general field.”) (citation omitted).

Applicant cites *In re Miller Chem. & Fertilizer Corp.*, Ser. No. 76470083, 2006 WL 2303361 (TTAB 2006) (nonprecedential) as an example of a case where the sophistication of commercial agriculture buyers “obviates any likelihood of confusion.”⁸⁴ We agree, however, with the Examining Attorney, that while sophistication may have been a factor in that case, it was amplified by the differences

⁸⁴ *See* 6 TTABVUE 18.

in the goods. In *Miller*, the registration identified “organic” fertilizers and the applicant’s goods were a chemical adjuvants for making pesticides stick better to the plants on which they were sprayed. The Board found that, since organic farmers generally eschew chemical treatments, it was “highly unlikely that a [commercial] farmer or grower would purchase and/or use applicant’s adjuvants for pesticides and registrant’s natural organic fertilizer together.” *Id.* at *3. This case lacks the “organic vs. chemical” difference that was significant in *Miller*.

Still, we think there is a kernel of truth as Applicant’s argument about the level of care associated with purchases of types of products here. People who grow plants, whether for themselves or as a business, exhibit more care in selecting fertilizers and insecticides than they do for, say, everyday household items. And that may reduce the likelihood of confusion somewhat.

We find that the overlap in the channels of trade and classes of customers support a conclusion that confusion is likely, while customer care weighs somewhat in the other direction.

D. Weighing the findings on the relevant factors together.

Having made findings on all the relevant *du Pont* factors, our final step is to assess these findings together to determine if, on balance, confusion is likely. *See, e.g., Charger Ventures*, 64 F.4th at 1384. Generally, the similarities or dissimilarities in the marks are always an important factor. But here, there is a key similarity, but also some dissimilarities. The closeness of this factor means that its total weight does not tip solely one way of the other. But we think that the similarity of the marks—they

share a strong term, CLUTCH—is relatively more important in the comparison than the two preceding terms. On balance, this factor tips slightly in favor of a conclusion that confusion is likely.

The relatedness of the goods is an easier and more one-sided call. This factor, which is an important one, weighs strongly in favor of a conclusion that confusion is likely. The overlap in the channels of trade and classes of customers are not as central to the analysis. *See, e.g., Federated Foods*, 544 F.2d at 1103. But they, too, favor a conclusion that confusion is likely.

Weighing against a conclusion that confusion is likely is the fact that consumers of the products at issue—especially commercial growers—in question exhibit a somewhat elevated degree of care in purchasing the goods at issue. But as we pointed out, that doesn't necessarily translate to a heightened ability to distinguish between similar trademarks.

We think that, on balance, our findings on these factors together indicate that confusion is likely.

Decision: The refusal to register Applicant's mark is affirmed.