

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 7, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Biowish Technologies International Inc.*  
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Serial No. 86739178

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April L. Besl and Michael J. Wheeler of Dinsmore & Shohl LLP  
For Biowish Technologies International Inc.

Colleen Dombrow, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

—  
Before Cataldo, Adlin and Hightower,  
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Biowish Technologies International Inc. (“Applicant”) seeks a Principal Register registration of BIEWISH GARD’N FRESH, in standard characters, for “fruit and vegetable wash.”<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Act on the ground that Applicant’s mark so resembles the registered mark GARDEN FRESH, in standard characters, for “cleaning preparations for household purposes”<sup>2</sup> that use of Applicant’s mark in connection with Applicant’s goods is likely

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<sup>1</sup> Application Serial No. 86739178, filed August 27, 2015 without a filing basis and later amended to allege first use dates of November 28, 2016 under Section 1(a) of the Trademark Act.

<sup>2</sup> Registration No. 3999656, issued July 19, 2011 on the Principal Register; Sections 8 and 15 affidavit accepted and acknowledged.

to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“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.”).

Turning first to the goods, the Examining Attorney contends that “registrant’s goods are written broadly enough to encompass the applicant’s goods.” 9 TTABVue 7. We disagree. Registrant’s goods are “cleaning preparations for household purposes,” in other words products used to clean floors, furniture, countertops, etc. By contrast, Applicant offers “fruit and vegetable wash,” in other words products used to wash (and thereby clean) fruits and vegetables. While Applicant’s and Registrant’s goods may perhaps fall within the exceedingly broad and varied category of “cleaning products,” that does not necessarily mean that Registrant’s goods “encompass” Applicant’s. To the contrary, it is clear that they do not because Registrant’s cleaning

products are expressly limited to “household purposes,” meaning they are for cleaning a home. That is a separate activity from washing produce, which is not a home cleaning task, but rather a cooking or perhaps agricultural task which incidentally involves “cleaning.” Registrant’s goods do not encompass Applicant’s and the goods are not legally identical.

Moreover, to the extent Applicant and Registrant both offer “cleaning” products, that is also not enough by itself to establish that the goods are related. Indeed, “a finding that the goods are similar is not based on whether a general term or overarching relationship can be found to encompass them both.” *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010) (citing *Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd.*, 188 USPQ 517, 520 (TTAB 1975)); *In re W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007) (“to demonstrate that goods are related, it is not sufficient that a particular term may be found which may broadly describe the goods”); *see also, Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1310 (Fed. Cir. 2002) (stating, in dicta, that “a broad general market category is not a generally reliable test of relatedness of products”).

For example, our primary reviewing court reversed our finding that gloves are related to barbeque mitts:

The mere fact that “mitt” is defined as a type of glove has no relevance to whether a consumer would believe that the two products emanate from the same source ... First, Shen’s product is not a mitt, it is a *barbeque* mitt. It is designed to protect the hand from heat while cooking. While it covers the hand like a glove, it is better understood as a tool than as an article of clothing. The unrelatedness of RHL’s and Shen’s products is highlighted by comparing

a similar set of goods: hard hats used by construction workers and fedoras. While both are hats that are used to cover the head, they have different purposes. The first is used for protection, just as a barbeque mitt is, while the second functions to keep the head warm in addition to adding an air of style, just as ready made or tailored gloves do. The mere fact that both barbeque mitts and gloves are worn on the hands simply does not support a finding that consumers would associate these products with a common source.

*Shen Mfg. Co. v. Ritz Hotel Ltd.*, 73 USPQ2d 1350, 1357 (Fed. Cir. 2004); *see also In re Mars, Inc.*, 741 F.2d 395, 222 USPQ 938 (Fed. Cir. 1984) (reversing refusal to register CANYON for candy bars based on registration of CANYON for fresh citrus fruits, namely, oranges, lemons and grapefruit); *Curtice-Burns, Inc. v. Northwest Sanitation Products, Inc.*, 185 USPQ 61, 62-63 (TTAB 1975), *aff'd*, 530 F.2d 1396 (CCPA 1976) (“while respondent’s toilet bowl cleaner is sold through the same trade channels as the canned vegetables, fruits and soft drinks of petitioner, the two products are non-competitive, differ significantly in utility, and have nothing in common with respect to their essential characteristics, uses or sales appeal”). This case is analogous, in that while Applicant and Registrant both offer different types of “cleaning” products, they perform different functions, with Applicant’s goods being better understood as a cooking/food/agriculture-related product than as a household cleaning product. While both products “clean,” they have different purposes, Applicant’s to wash food for display or, we assume, consumption, and Registrant’s to clean inside homes. The mere fact that both fruit and vegetable wash and household cleaners can be used to “clean” does not support a finding that consumers would associate them with a common source. *Edwards Lifesciences*, 94 USPQ2d at 1410

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(finding that computer system which monitors adverse drug events and heart monitors have only “superficial similarities” and would not be confused); *In re W.W. Henry*, 82 USPQ2d at 1214 (finding no relationship between cement patches for repairing wall and floor surfaces and chemical filler for cosmetic repair of polyolefin surfaces).

Some of the differences between Applicant’s and Registrant’s products become apparent when examining the specimens submitted in support of registration. Applicant’s specimen is on the left and Registrant’s on the right:



Office Action response of June 14, 2016. In Applicant's specimen, under the BLOWISH GARD'N FRESH mark, the product's purpose is described as "Organic Fruit & Vegetable Shelf Life Extension," and the product's label includes a picture of tomatoes and bananas as they typically appear in store displays. Thus, Applicant's product is intended to wash or "clean" fruits and vegetables.<sup>3</sup> The term GARD'N FRESH apparently references the product's ability to keep fruits and vegetables as fresh as they were in the garden (or wherever they were grown). By contrast, Registrant's specimen makes clear that its product is for cleaning, and Registrant's identification of goods reveals more specifically that it is for cleaning homes or "households," with the term GARDEN FRESH apparently referencing the product's "powerful scent of clean."

The Examining Attorney's finding of a relationship between the products is primarily based on several third party uses of a single mark for general purpose cleaning solution on the one hand and fruit and vegetable wash on the other. For example, the mark FIT ORGANIC & Design is used for both "fruit & vegetable wash" and "cleaner and degreaser":

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<sup>3</sup> We recognize that the wording "shelf life extension" may refer to another purpose of Applicant's product – preserving fruits and vegetables, likely for retail display as well as consumption. This interpretation is strongly supported by Applicant's marketing materials submitted during prosecution. However, in likelihood of confusion cases we focus on the identification of goods ("fruit and vegetable wash"), which in this case connotes cleaning rather than preservation or "shelf life extension." Of course, to the extent Applicant's goods are in fact used for preservation or "shelf life extension," that would further distinguish them from Registrant's goods.



### FIT ORGANIC 12 OZ. SPRAY PRODUCE WASH

\$ 5.99

**FREE SHIPPING** ON ALL U.S. ORDERS \$19 OR MORE

Fit Organic Produce Wash is USDA certified organic and removes 98% more pesticides, waxes, human-handling residues, and other contaminants than water alone. Why use something with chemicals to remove chemicals? Achieve an organic clean with FIT.

- The ONLY Certified Organic and Kosher Produce Wash
- Certified USDA Food product - doesn't use chemicals
- #1 Market Leader (Nielsen Data 2014)
- Removes 98% more pesticides & residues on non-organics
- Leaves no after taste or smell
- Certified Kosher (Orthodox Union)



ADD TO CART



### FIT ORGANIC 32 OZ. SPRAYER CLEANER & DEGREASER

\$ 5.99

**FREE SHIPPING** ON ALL U.S. ORDERS \$19 OR MORE

Fit Organic Cleaner & Degreaser is the ultimate cleaning product! With over 1,001 different uses it cuts through grease, dirt, and grime with ease. Now you can tackle those tough jobs while feeling confident you are not leaving behind ANY harsh chemicals. And the best part is it's USDA certified organic. It gives a whole new meaning to clean!

- Made with Organic SOAP - no synthetics
- Makes up to 4 gallons of cleaning solution
- Superior performance on grease cutting and baked-on residue
- Over 1,001 uses: Ovens, Grills, Counter Tops, Sinks, Tile and many more
- No GMOs
- Not Animal Tested



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Office Action of February 6, 2017 (printouts from “fitorganic.com”). The Examining Attorney submitted similar examples from Friendly Organic, The Honest Co., KD Gold, Rebel Green, Swanson Health Products, Vermont Soap, Better Life and Biokleen. *Id.* (printouts from “friendlyorganic.com,” “honest.com,” “kdgoldrtu.com,” “rebelgreen.com,” “swansonvitamins.com,” “vermontsoap.com,” “cleanhappens.com” and “biokleenhome.com”).<sup>4</sup> This is the type of evidence which often supports a finding that goods are related.

However, in this case, there is less to the Examining Attorney’s evidence than meets the eye. Specifically, the fruit and vegetable wash products are promoted as healthy to ingest, whereas the household cleaning products are promoted as suitable for cleaning various surfaces in the home:

Fit Organic Fruit & Vegetable Wash is promoted as a “Certified USDA Food product,” and “Certified Kosher (Orthodox Union)” while Fit Organic Cleaner & Degreaser is promoted as having “Over 1,001 uses: Ovens, Grills, Counter Tops, Sinks, Tile and many more.”

Friendly Organic Fruit & Vegetable Wash is promoted as “safe as it is made from the very highest quality all natural plant-derived cleaners” which “leav[e] no taste or smell on produce” while the Friendly Organic Furniture Cleaner & Polish is promoted as “powerful.”

The initial description of Honest Co. fruit + veggie wash concludes with “Bon appetit!,” and the more specific description states “No taste or odor left behind” and “Inhibits browning and helps food last up to 200% longer,” while the Honest Co. multi-surface cleaner “tackles dirt, grease, and grime anywhere, anytime!,” and is “Great for

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<sup>4</sup> We have not considered the evidence regarding enviroCare Earth, which appears to be an Australian company, as there is no indication that it markets or sells its products in the United States.



cleaning: kitchen countertops, high chairs, toys, walls, hardwood floors, painted surfaces, furniture, inside ovens, laminate, granite bathroom fixtures, wood, sealed stone, electronics, grills, decks, and more!”

KD Gold Fruit & Vegetable Wash is promoted as “Kosher and Halal Certified,” with “no taste or odor left behind,” while the KD Gold All Purpose Cleaner is promoted as having “the power to fight the toughest grease and grime.”

Rebel Green Fruit & Veggie Clean is promoted as leaving “no residual taste” and “Kosher Certified,” while Rebel Green All Purpose Spray “works hard on any surface” and is “great for countertops, appliances, and tile.”

Swanson Healthy Home Fruit & Vegetable Wash is promoted as having “no odor or aftertaste,” while Swanson Healthy Home All-Purpose Cleaner “cleans, degreases and deodorizes all water safe surfaces.”

Vermont Soap claims that Product Magic Fruit & Veggie Wash “makes food taste better!,” and that Liquid Sunshine Nontoxic Spray & Wipe Surface Cleaner is used “to clean counters, floors, woodwork, tile or other household surfaces.”

*Id.*

Moreover, the fruit and vegetable wash products are typically offered on different sections of the websites than the household cleaning products, or the websites offer a wide variety of products, well beyond those that merely “clean”:

Fit Organic Fruit & Vegetable Wash is sold under the heading/section “Produce Wash,” while Fit Organic home cleaning product is sold under the heading/section “Household Cleaners.” Other headings/sections include “fabric care,” “dish” and “mosquito repellent.”

The Honest Co. website’s product categories include “diapering,” “feeding,” “personal care,” “cleaning,” “vitamins and more” and “gear and more.”

The KD Gold website's product categories include "bathroom cleaner," "garden wash & plant nutrition," "head lice remover" and "pet shampoo & urine remover."

Rebel Green Fruit and Veggie Clean is sold under the heading "fruit & veggie clean" while Rebel Green All Purpose Spray is sold under the heading "household cleaners" and the subheading "all purpose cleaner."

Swanson Healthy Home Fruit & Vegetable Wash is sold under the heading "produce wash" while Swanson Healthy Home All-Purpose Cleaner is sold under the heading "cleaning products."

The Vermont Soap website's product categories include "aromatherapy," "body foam," "camping & gardening," "gifts," "natural oral care," "pet & horse," "shea butter," "travel" and "yoga products."

Biokleen household cleaners are sold under the website's "household" heading and "household cleaners" subheading, while Biokleen Produce Wash is sold under the website's "kitchen" heading and "produce wash" subheading.

*Id.*; Request for Reconsideration (printout from "fitorganic.com"). Based on this evidence, we agree with Applicant that "[a] consumer would not use a product used to clean their floors or furniture to also clean food they will consume." 7 TTABVue 20. On this record, we do not find these goods related.

As for channels of trade, the mere fact that Applicant's and Registrant's goods are offered on some of the same specialized third party websites is not enough by itself to establish that the channels of trade overlap, any more than supermarkets constitute the same channel of trade for all goods they sell.

Appellant urges, we think correctly, that the only link opposer has established between these goods is that they might be expected to be found in the same area of a

supermarket. We hold that this evidence is not sufficient to sustain the opposition in classes 2, 14 and 29.

A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the customer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on *any* goods so displayed.

*Federated Foods*, 192 USPQ at 29 (citation omitted); *see also Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169 (TTAB 1987) (“There is no question but that applicant’s beef snacks and opposer’s fruit juices could very well be found in grocery stores, convenience stores, supermarkets and the like ... it has often been stated that there can be no ‘per se’ rule that all food products are related goods by nature or by virtue of the capability of being sold in the same food markets (i.e. the modern supermarket environment with its enormous variety of food, cleaning, paper and other products.”); *Nestle Co. v. Nash-Finch Co.*, 4 USPQ2d 1085, 1090 (TTAB 1987) (“the same availability of different food products in the same stores carrying a wide variety of food items in (sic) insufficient, in and of itself, to warrant a finding of likelihood of confusion”).

Moreover, in this case, the evidence that certain websites offer both types of goods is if anything less persuasive than evidence that two types of goods are offered in the same supermarkets or grocery stores. Here, all of the websites which offer both produce wash and household cleaning products are focused not on any specific type of product, but instead on offering organic or environmentally friendly products. Specifically, as the names imply, the FIT ORGANIC and FRIENDLY ORGANIC

marks are used for organic products; Honest Co. promotes its goods as meeting certain standards, such as being “cruelty free” and “green;” KD Gold promotes its goods as “green,” “designed for the environment,” and not containing genetically modified organisms; Rebel Green promotes its goods as “all natural” and “plant based;” Swanson Health Products claims its goods are “eco-friendly,” “biodegradable,” “non-toxic,” and “phosphate, formaldehyde and petrochemical free;” Vermont Soap promotes its products as “organic” and “non-toxic;” Better Life claims its products are “non-toxic,” “biodegradable” and “never tested on animals;” and Biokleen touts its products as environmentally friendly. In other words, the record reveals that to the extent the goods are offered on the same websites, it is not because of the type of product (i.e. that both products can be used to “clean”), but because the products share extraneous characteristics, so much so that the websites feature not only “cleaning” products but also completely unrelated goods such as insect repellent, diapers, vitamins and pet, yoga and camping products. Accordingly, while the channels of trade could be argued to technically “overlap” to the extent that a certain type of website offers both types of goods in distinct categories, under the circumstances of this case, this evidence is not sufficient to support a finding of likelihood of confusion.

Turning next to the similarity of the marks and the strength of the cited mark, we compare Applicant’s and Registrant’s marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). Obviously, the marks in this

case are partially similar because they both contain variations of the phrase “garden fresh.”

The marks are different, however, in that Applicant’s mark begins with the distinctive term BLOWISH, which is absent from Registrant’s mark. Oftentimes the addition of a house mark such as BLOWISH at the beginning of a registered mark (or, as in this case, a variation of a registered mark) is found to be an “aggravation rather than a justification,” and insufficient to avoid confusion. *See, e.g., In re Sien Equipment Co.*, 189 USPQ 586, 588 (TTAB 1975) (citation omitted). *See also In re Toshiba Medical Systems Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1367 (TTAB 2007); *In re Riddle* 225 USPQ 630 (TTAB 1985). Other times, however, such as where the registered term is weak, the addition of a house mark may be sufficient to avoid a likelihood of confusion. *See, e.g., Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005).

Here, the term BLOWISH is the dominant portion of Applicant’s mark, both because it is significantly more distinctive than GARD’N FRESH and because it appears first. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also, Palm Bay Imps., Inc.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In fact, the remaining portion of Applicant’s mark, which is similar to Registrant’s mark, is quite weak. Indeed, it is laudatory, describing the produce wash’s ability to

keep produce fresh or to make it appear fresh, such as it was in the garden where it was grown. *See generally In re Boston Beer Co., L.P.*, 198 F.2d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999)) (finding THE BEST BEER IN AMERICA for beer to be “a common, laudatory advertising phrase which is merely descriptive of Boston Beer’s goods. Indeed, it is so highly laudatory and descriptive of the qualities of its product that the slogan does not and could not function as a trademark to distinguish Boston Beer’s goods and serve as an indication of origin.”). Similarly, the term GARDEN FRESH is laudatory of Registrant’s goods, suggesting Registrant’s household cleaner’s “fresh” smell (or, as Registrant otherwise refers to it, the “powerful scent of clean”). *See Faultless Starch Co. v. Sales Producers Associates, Inc.*, 530 F.2d 1400, 189 USPQ 141, 142 (CCPA 1976) (finding FAULTLESS laudatory and weak); *David Crystal, Inc. v. Soo Valley Co.*, 471 F.2d 1245, 176 USPQ 326, (CCPA 1973) (finding no likelihood of confusion between WONDERTHREAD for industrial thread and WONDERCORD for clothing, in part because the marks are both “laudatory in nature”); *Nestle Co.*, 4 USPQ2d at 1090 (finding no likelihood of confusion between DELI QUIK for salads, sandwiches and the like and QUIK or NESTLE QUIK for cocoa and fruit flavored preparations for making milk drinks, in part because DELI QUIK suggests “products designed for fast or quick preparation and consumption”).

In this case, we find that because Registrant’s mark consists *only* of the laudatory term GARDEN FRESH, which is so similar to GARD’N FRESH in sight and sound, the marks are more similar than dissimilar in their entireties, notwithstanding that BLOWISH is the dominant portion of Applicant’s mark. However, the similarity is

minimal given Applicant's significant addition of its distinctive house mark BLOWISH and the conceptual weakness of the term GARDEN FRESH and variations thereof. *Cf. New England Fish Co. v. Herwin Co.*, 511 F.2d 562, 184 USPQ 817 (CCPA 1975) (finding no likelihood of confusion between KITTY and BLUE MOUNTAIN kitty O's (stylized), both for cat food, based on BLUE MOUNTAIN house mark and descriptiveness of "kitty"); *Knight Textile*, 75 USPQ2d at 1315-16 (finding no likelihood of confusion between ESSENTIALS and NORTON MCNAUGHTON ESSENTIALS for identical goods due to "highly suggestive" nature of ESSENTIALS, and that "applicant's addition of its house mark therefore suffices to distinguish the two marks").

In addition to being laudatory and, at best, highly suggestive of the goods for the reasons stated, Applicant's modification of the term to GARD'N FRESH makes it conceptually weak for another reason. By displaying the term as GARD'N FRESH, Applicant has apparently created a double entendre, with one meaning being "garden fresh" and the other being "guard *and* fresh." See *In re W.W. Henry*, 82 USPQ2d at 1214 (finding that PATCH & GO and PATCH 'N GO "would appear to have the same connotation"). That is, according to the printout from Applicant's website reproduced below on the left, Applicant's produce wash is used for "food quality & pathogen control." And according to Applicant's promotional material reproduced below on the right, Applicant's produce wash extends the shelf life of produce. Therefore, one meaning of GARD'N FRESH could be that it "guards" the quality of the food, including by "guarding" it from pathogens, thus keeping the food "fresh":

<p><b>ANIMAL AGRICULTURE</b></p> <ul style="list-style-type: none"> <li>• AquaFarm</li> <li>• Manure &amp; Odor Treatment: Beef &amp; Dairy</li> <li>• Manure &amp; Odor Treatment: Swine</li> <li>• MultiBio 3P</li> <li>• MultiBio 3PS</li> </ul> <p><b>FOOD QUALITY &amp; PATHOGEN CONTROL</b></p> <ul style="list-style-type: none"> <li>• Fruit &amp; Vegetable Wash</li> </ul> <p><b>COMMERCIAL PRODUCTS</b></p> <p><b>ODOR &amp; EMISSIONS CONTROL</b></p> <ul style="list-style-type: none"> <li>• Odor</li> </ul> <p><b>HYDROCARBON REMEDIATION</b></p> <ul style="list-style-type: none"> <li>• Remediate</li> </ul> <p><b>WASTE MANAGEMENT</b></p> <ul style="list-style-type: none"> <li>• Odor</li> </ul>
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Office Action responses of June 14, 2016 and January 13, 2017.

Moreover, Applicant has introduced a number of third-party registrations which establish that GARDEN FRESH is commonly registered for food products including produce and related goods and services:

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods/Services</b>
GARDEN FRESH (standard characters)	3664075	“mesh produce bags for washing or draining vegetables, fruits or salad”
GARDEN FRESH & Design	4556163	“cooking oil; edible oils; margarine; shortening” and “mayonnaise; mustard; vinegars; salad dressings”
GARDEN FRESH (typed)	2862656	“restaurant, carry out and catering services”
GARDEN FRESH FARMS <b>Disclaimers of “GARDEN FRESH” for Class 31 goods and “GARDEN” and “FARMS” for Class 11 goods</b>	5084566	“agricultural equipment, namely indoor plant growing systems ...” (Class 11) “fresh produce, in particular vegetables and herbs” (Class 31)



GARDEN FRESH VEGETABLES & Design <b>Disclaimer of “GARDEN FRESH VEGETABLES”</b>	4188390	“fresh fruit and unprocessed vegetables”
BLUE RIBBON GARDEN FRESH (standard characters) <b>Disclaimer of “GARDEN FRESH”</b>	3909300	“cut fresh beans; vegetables, namely, packaged fresh beans, peppers, and eggplant” and “fresh vegetables; raw vegetables; unprocessed vegetables; fresh beans; fresh peppers; fresh eggplant”
FRESH GARDEN V-E-G-E-T-A-B-L-E-S & Design <b>Disclaimer of “FRESH GARDEN VEGETABLES”</b>	4789136	“fresh fruit and vegetables” <sup>5</sup>

These third-party registrations “show the meaning of a mark in the same way that dictionaries are used.” *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95; *Couch/Braunsdorf*, 110 USPQ2d at 1471. Here, they establish that GARDEN FRESH and variations thereof, such as Applicant’s GARD’N FRESH, has a particular meaning when used in connection with produce, namely that the produce is as fresh as when it was in the garden.

Thus, while Applicant’s and Registrant’s marks are similar in appearance and sound because they share variations of the term GARDEN FRESH, they convey different meanings. Applicant’s mark conveys that its product keeps produce fresh (or “garden fresh”), while Registrant’s mark conveys that its household cleaners have a “powerful scent of clean,” or otherwise leave household surfaces “garden fresh,” in reference to a smell rather than a biological state. This is an important difference

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<sup>5</sup> While this registration issued under section 44(e) and there is no assertion of use in United States commerce, it is relevant for the disclaimer of “FRESH GARDEN VEGETABLES.”

between the marks which reduces the degree of similarity between them. Accordingly, the marks are only slightly more similar than dissimilar in their entireties.<sup>6</sup>

On balance, we find there is no likelihood of confusion. While the marks are slightly similar overall, the goods have not been shown to be related. To the extent that they can be referred to broadly as “cleaning” products, this is simply not enough.<sup>7</sup> In fact, the record demonstrates that this superficial “relationship” will not result in consumer confusion because in reality Applicant’s goods are for agricultural and food preparation purposes, while Registrant’s are for household cleaning, and the websites which offer a wide variety of environmentally friendly products and offer both types of goods categorize and promote those goods differently. The question we are faced with here is whether consumers “would consider the goods to emanate from the same

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<sup>6</sup> As Applicant points out, the cited registration already coexists on the Principal Register with the third-party *identical* mark in Registration No. 3664075 (GARDEN FRESH in standard characters) for “mesh produce bags for washing or draining vegetables, fruits or salad.”

<sup>7</sup> The mere fact that some consumers of Registrant’s household cleaning products might at some point also purchase Applicant’s produce wash, or *vice versa*, is not a basis upon which to find that the channels of trade or classes of consumers are the same. *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012); *Sports Authority Michigan Inc. v. PC Authority Inc.*, 63 USPQ2d 1782, 1794 (TTAB 2002) (“We think it a fit subject for judicial notice that purchasers of computer hardware and software also would be purchasers of, at least, footwear and apparel, and perhaps sporting goods and equipment. There is nothing in the record, however, to suggest that merely because the same consumer may purchase these items, such consumer would consider the goods as likely to emanate from the same source or have the same sponsorship.”).

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source.” *Coach Services*, 101 USPQ2d at 1723; *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). The evidence reveals they would not.

***Decision:*** The Section 2(d) refusal to register Applicant’s mark is reversed.