

This Opinion Is Not a  
Precedent of the TTAB

Hearing: October 8, 2019

Mailed: January 30, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re SF Investments, Inc.*  
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Application Serial No. 86793304  
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Matthew P. Frederick and John A Cullis of Reed Smith LLP for SF Investments, Inc.

Angela M. Micheli, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.  
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Before Bergsman, Goodman and Dunn, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

SF Investments, Inc. (Applicant) seeks registration on the Principal Register of the mark SMITHFIELD, in standard characters, for “meat, lard, offals,” in Class 29.<sup>1</sup>

Applicant claimed that its mark SMITHFIELD has acquired distinctiveness in connection with “hams processed, treated, smoked, aged, cured by the long-cure, dry salt method of cure and aged for a minimum period of six months, such six month period to commence when the green pork cut is first introduced to dry salt, all such

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<sup>1</sup> Application Serial No. 86793904 was filed on October 20, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and first use in commerce at least as early as December 31, 1936.

salting, processing, treating, smoking, curing, and aging to be done within the corporate limits of the town of Smithfield, Virginia.”<sup>2</sup>

Applicant also claimed ownership of the registered marks listed below:<sup>3</sup>

1. Registration No. 2624764 for the mark SMITHFIELD, in typed drawing form, for “meat, excluding hams processed, treated, smoked, aged, cured by the long-cure, dry salt method of cure and aged for a minimum period of six months, such six month period to commence when the green pork cut is first introduced to dry salt, all such salting, processing, treating, smoking, curing, and aging to be done within the corporate limits of the town of Smithfield, Virginia.”<sup>4</sup> The mark was registered under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), claiming that SMITHFIELD has acquired distinctiveness in connection with meat excluding specially processed ham.

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<sup>2</sup> “An applicant may claim acquired distinctiveness ... as to only a portion of the goods/services within a single class.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1212.02(j) (October 2018).

The partial 2(f) statement tracks the language of the Virginia State Code definition of a Smithfield ham. June 21, 2016 Response to Office Action (TSDR 9). Subsequently, the Examining Attorney submitted a second copy of the pertinent Virginia State Code in her March 6, 2017 Office Action (TSDR 47). The submission of the same evidence is redundant. Examining Attorneys and applicants should avoid duplicate evidentiary entries. For example, Applicant’s September 6, 2017 response includes as an exhibit both the March 6, 2017 Office Action and all evidence attached to it. *See In re Virtual Paralegals, LLC*, 2019 USPQ2d 111512 \*1 (TTAB 2019); *In re Greenliant Sys., Ltd.*, 97 USPQ2d 1078, 1080 (TTAB 2010) (citing *ITC Entm’t Grp. Ltd. v. Nintendo of Am., Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (submission of duplicative papers is a waste of time and resources, and it is a burden upon the Board)).

Citations to the examination record refer to the Trademark Status and Document Retrieval System (TSDR), by page number, in the downloadable .pdf format.

<sup>3</sup> Applicant owns additional registrations incorporating the name “Smithfield” discussed below.

<sup>4</sup> Registered September 24, 2002; renewed. *See* October 20, 2017 Office Action (TSDR 9).

2. Registration No. 2989997 for the mark SMITHFIELD, in stylized form reproduced below, for a “house mark for a full line of meat, excluding hams processed, treated, smoked, aged, cured by the long-cure, dry salt method of cure and aged for a minimum period of six months, such six month period to commence when the green pork cut is first introduced to dry salt, all such salting, processing, treating, smoking, curing, and aging to be done within the corporate limits of the town of Smithfield, Virginia.”<sup>5</sup>

**Smithfield**

The mark was registered under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), claiming that SMITHFIELD has acquired distinctiveness in connection with a full line of meat excluding specially processed ham.

3. Registration No. 4467457 for the mark SMITHFIELD and design, reproduced below, for “pork.”<sup>6</sup>

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<sup>5</sup> Registered August 30, 2005; renewed. *See* October 20, 2017 Office Action (TSDR 12).

<sup>6</sup> Registered February 5, 2013. *See* October 20, 2017 Office Action (TSDR 27). The records in the USPTO electronic database show that Applicant has not filed a Section 8 declaration of continued use. 15 U.S.C. § 1058. We give this registration little weight because the grace period for filing the Section 8 declaration expired August 5, 2019, and the registration will be cancelled in due course.



The description of the mark provides that

Color is not claimed as a feature of the mark. The mark consists of a pig with wings flying over “SMITHFIELD” in a stylized font with a crescent on the left of the pig and “SMITHFIELD”.

Applicant claimed acquired distinctiveness as to “Smithfield.”

The Examining Attorney refused to register SMITHFIELD for “meats, lard, offals” under Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2), on the ground that SMITHFIELD is primarily geographically descriptive of Applicant’s goods.

Applicant contends that SMITHFIELD is not primarily geographically descriptive. Specifically, Applicant argues that “the Examining Attorney failed to: (1) properly define the class of relevant consumers; (2) show that ‘Smithfield’ is ‘generally known’ to the relevant American public as a town in Virginia; and (3) show that purchasers would be likely to believe that the goods originate in the geographic place identified in the mark.”<sup>7</sup>

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<sup>7</sup> Applicant’s Brief, p. 5 (9 TTABVUE 6).

References to the briefs on appeal refer to the Board’s TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if applicable.

At the outset, we find it helpful to define the products referred to in the descriptions of goods in Applicant's application and prior registrations. "Meat" is defined as, inter alia, "the flesh of animals used for food."<sup>8</sup>

"Lard" is defined as "a soft white solid or semisolid fat obtained by rendering fatty pork."<sup>9</sup>

"Offals" is defined, inter alia, as "meat, including internal organs (such as liver, heart, or kidney) and extremities (such as tail or hooves), that has been taken from a part other than skeletal muscles. Also called variety meat."<sup>10</sup>

"Ham" is defined, inter alia, as "a cut of meat from the heavy-muscled part of a hog's rear quarter, between hip and hock, usually cured."<sup>11</sup>

"Pork" is defined as "the flesh of hogs used as food."<sup>12</sup>

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<sup>8</sup> Dictionary.com based on THE RANDOM HOUSE UNABRIDGED DICTIONARY (2019) accessed September 27, 2019. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

<sup>9</sup> MERRIAM-WEBSTER DICTIONARY, Merriam-Webster.com accessed October 5, 2019.

<sup>10</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5<sup>th</sup> ed. 2019) (ahdictionary.com) accessed December 2, 2019.

<sup>11</sup> Dictionary.com based on THE RANDOM HOUSE UNABRIDGED DICTIONARY accessed October 10, 2019. Accordingly, "ham" falls within the broad description of goods for meat.

<sup>12</sup> Dictionary.com based on THE RANDOM HOUSE UNABRIDGED DICTIONARY accessed October 4, 2019. *See also* Pork, ENCYCLOPAEDIA BRITANNICA (britannica.com) accessed October 4, 2019 ("Pork" is defined as the "flesh of hogs, usually slaughtered between the ages of six months and one year. ... About 30 percent of the meat is consumed as cooked fresh meat; the remainder is cured or smoked for bacon and ham, used in sausage, and rendered to produce lard. ... The main cuts of pork are hams, spareribs, loin roasts and chops, bellies, picnic shoulders, and shoulder butts.").

The Board may take judicial notice of information from encyclopedias. *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) ("dictionaries and encyclopedias may be consulted"); *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 n.61 (TTAB 2011); *In re Broyhill Furniture*

A twist in this case is that although the description of goods for the application at issue is “meat, lard, offals,” Applicant claimed that SMITHFIELD has acquired distinctiveness as applied to “hams processed, treated, smoked, aged, cured by the long-cure, dry salt method of cure and aged for a minimum period of six months, such six month period to commence when the green pork cut is first introduced to dry salt, all such salting, processing, treating, smoking, curing, and aging to be done within the corporate limits of the town of Smithfield, Virginia” (hereafter “specially processed hams from Smithfield, Virginia”) but is inherently distinctive as to all other goods encompassed by the identification. At the oral hearing, both Applicant’s counsel and the Examining Attorney agreed that for purposes of analyzing the Section 2(e)(2) primarily geographically descriptive refusal, the goods at issue should be interpreted as meat (including ham except specially processed ham from Smithfield, Virginia), lard, and offal. We agree because it is a logical way to incorporate the partial claim of acquired distinctiveness into the analysis of whether SMITHFIELD is primarily geographically descriptive inasmuch as it focuses the analysis on Smithfield, Virginia and meats other than specially processed ham from Smithfield, Virginia.

The following evidence has been made of record:

1. The COLUMBIA GAZETTEER OF THE WORLD ([columbiagazetteer.org](http://columbiagazetteer.org)) lists Smithfield as a town in Virginia that processes meat (“Manufacturing (meat processing)”).<sup>13</sup>

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*Indus. Inc.*, 60 USPQ2d 1511, 1514 n.4 (TTAB 2001) (dictionary entries and other standard reference works).

<sup>13</sup> August 2, 2016 Office Action (TSDR 28).

2. FOOD ENCYCLOPEDIA (foodterms.com)

SMITHFIELD HAM

Considered by many to be the premier country-cured ham ... To be accorded the appellation of "Smithfield," the hams must be cured and processed in the area of Smithfield, Virginia.<sup>14</sup>

3. OXFORD DICTIONARIES (oxforddictionaries.com)

Smithfield ham

A dry-cured ham produced near Smithfield, Virginia, from hogs that have fed on hickory nuts, acorns, and peanuts.<sup>15</sup>

4. Wikipedia entry for Smithfield Ham

Smithfield ham is a specific form of country ham finish-cured in the town of Smithfield in the Isle of Wight County in the Hampton Roads region of Virginia.<sup>16</sup>

5. Wikipedia entry for Smithfield, Virginia

Smithfield is a town in Isle of Wight County, in the South Hamptons Roads subregion of the Hampton Roads region of Virginia in the United States. ...

The town is most famous for the curing and production of Smithfield ham. ... [Applicant], based in Smithfield, raises 12 million hogs and processes 20 million pounds of them annually.

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Known as the ham capital of the world, Smithfield currently attracts many tourists. Smithfield's Historic District is a major attraction, with more than 70

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<sup>14</sup> December 21, 2015 Office Action (TSDR 4). The Examining Attorney did not need to submit the entry from the Food Encyclopedia a second time in the August 2, 2016 Office Action (TSDR 26) because it was already in the record.

<sup>15</sup> December 21, 2015 Office Action (TSDR 6).

<sup>16</sup> August 2, 2016 Office Action (TSDR 13).

contributing properties from the Colonial, Federal, and Victorian periods.<sup>17</sup>

6. Smithfield Foods Inc. 10-K Report (January 3, 2016) stating that Applicant spent \$211 million in advertising, generating sales of \$14.4 billion.<sup>18</sup> Applicant also states that it has “become the largest pork processor and hog producer in the world” producing and marketing “a wide variety of fresh meat and packaged meat products both domestically and internationally.”<sup>19</sup> In addition, Applicant states that its Smithfield, Virginia processing plant is part of its “Fresh Pork and Packaged Meats” segment encompassing “slaughtering and cutting hogs; fresh and packaged pork products.”<sup>20</sup>
7. Applicant’s website (smithfieldfoods.com) stating that Applicant is the largest pork processor and hog producer in the world.<sup>21</sup> “Based in Smithfield, Virginia ... [Applicant is] the leader in numerous packaged meats categories.”<sup>22</sup> Further, Applicant states that “[t]he town of Smithfield’s reputation for producing specialty hams and meats dated back to the late 1700s.”<sup>23</sup>

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<sup>17</sup> May 29, 2018 Office Action (TSDR 7).

<sup>18</sup> February 2, 2017 Response to Office Action (TSDR 54, 63, 110).

<sup>19</sup> *Id.* at TSDR 31.

<sup>20</sup> *Id.* at TSDR 49.

<sup>21</sup> February 2, 2017 Response to Office Action (TSDR 166).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at TSDR 167. The Examining Attorney did not need to submit a copy of Applicant’s website in her October 20, 2017 Office Action (TSDR 39) because Applicant had already made it of record.

8. Washington Post article (July 20, 2018)

A sad day in Hamtown: Smithfield Foods close the one smokehouse making genuine Smithfield ham

SMITHFIELD, Va. – The local charity run is the Hog Jog.  
...

You could say that Smithfield is a little obsessed with pork products, but that would understate how deeply hogs are woven into the history and life of this town of about 8,300 on a hill over the Pagan River. So it has come as a shock that Smithfield Foods is shuttering the last smokehouse that produces the area’s signature product, the genuine Smithfield ham.

\* \* \*

The salty, long-cured ham has been an area staple since the English colonists and their hogs arrived at nearby Jamestown in the early 1600s. There is a whole section of the Virginia State Code – Title 3.2, Chapter 54, Article 4 – entitled “Smithfield Hams.”<sup>24</sup> Just as the French define Champagne and the European Union protects Greek Feta cheese, the Virginia law dictates that genuine Smithfield ham is cured in Smithfield.

“Anybody can make a ham,” said Jennifer England, Director of the local museum, where pig fanciers can keep tabs on a ham cured in 1902 via the online “Ham Cam.” “But a Smithfield ham can only come from within the town itself.”

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The huge meatpacking plants on the edge of town slaughter more than 10,000 hogs per day.

\* \* \*

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<sup>24</sup> See also June 21, 2016 Response to Office Action (TSDR 9) and March 6, 2017 Office Action (TSDR 47) (Virginia State Code definition of Smithfield hams requires that that ham be processed in Smithfield, Virginia). The Examining Attorney did not need to submit the pertinent section of the Virginia State Code because Applicant had already made it of record.

“The tourists come in looking for it specifically,” said Leigh Abbott, general manager of the Smithfield Inn, which dates to 1752.<sup>25</sup>

9. Yelp! (yelp.com) review for the Taste of Smithfield restaurant in Smithfield, Virginia (April 25, 2018)

While visiting Virginia Beach, I made the drive to Smithfield with the purpose of having a meal of famous Virginia ham at the Taste of Smithfield.<sup>26</sup>

10. Cook’s Info website (cooksinfo.com)

#### Smithfield Ham

Smithfield Ham is a version of American a [sic] Country Ham. It also happens to be a Virginia Ham. It must be made in the city of Smithfield, Virginia, between the Suffolk and the James River.

A lot of hams produced in Smithfield aren’t “Smithfield” hams. Smithfield-style is not the same thing. They don’t meet the qualifications to call themselves that (or they are making styles of ham that aren’t meant to be Smithfield Hams.) Real ones will say “genuine Smithfield ham.”<sup>27</sup>

11. What’s Cooking America website (whatscookingamerica.net)

#### Country Ham and Red Eye Gravy History and Recipe

Virginia hams or Smithfield hams are universally recognized to be the country’s finest, and serving these hams with red eye gravy is a regional specialty.<sup>28</sup>

12. Recreation News website (recreationnews.com) (Frederick, Maryland)

#### Genuine Smithfield Ham is backed by law and tradition

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<sup>25</sup> February 4, 2019 Denial of Request for Reconsideration (5 TTABVUE 5-10).

<sup>26</sup> February 4, 2019 Denial of Request for Reconsideration (5 TTABVUE 7).

<sup>27</sup> March 6, 2017 Office Action (TSDR 7).

<sup>28</sup> March 6, 2017 Office Action (TSDR 11).

In an ornate dresser in the Pembroke Decatur Suite of the venerable Smithfield Inn, a video featuring the world's largest ham biscuit shares the top drawer with a Gideon Bible. Ham is that important in Smithfield, Va. and Smithfield hams are amongst the world's best. ... Connoisseurs now recognize that Smithfield country ham as one of the world's culinary delicacies on par with Spain's jamón serrano and Italy's parmas and proscuittos. ... Incorporated into the laws of the Virginia Commonwealth, a genuine Smithfield ham originally required a Virginia – or North Carolina – raised, peanut – fed razorback hog, cured within the city limits of Smithfield.<sup>29</sup>

13. Applicant owns the following registrations incorporating the name “Smithfield” where Applicant disclaimed the exclusive right to use the name “Smithfield” (Registration Nos. 1104410 and 2011672) or claimed that the name “SMITHFIELD” had acquired distinctiveness:<sup>30</sup>
- a. Registration No. 1104410 for the mark SMITHFIELD BY LUTER and design, reproduced below, for “hams,” in Class 29.<sup>31</sup>



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<sup>29</sup> March 6, 2017 Office Action (TSDR 20).

<sup>30</sup> This list does not include the three registrations listed above that Applicant claimed ownership of in its application. In addition, we do not consider Registration No. 4176860 for the mark SMITHFIELD POUCH PACK and design for “meat, bacon,” in Class 29, because it was cancelled effective February 22, 2019 (October 20, 2017 Office Action (TSDR 24)).

<sup>31</sup> Registered October 17, 1978; third renewal (October 20, 2017 Office Action (TSDR 5)).

- b. Registration No. 2011672 for the mark SMITHFIELD LEADING GENERATION PORK, in typed drawing form, for “pork,” in Class 29;<sup>32</sup>
- c. Registration No. 3861401 for the mark TSC THE SMITHFIELD COLLECTION and design, reproduced below, for “mail order catalog services featuring meat, seafood, poultry, sauces and marinades, peanuts, soups, cheese, pet treats, cookbooks, candy and desserts, gift baskets, nuts, and grilling accessories; computerized on-line retail store services in the fields of meat, seafood, poultry, sauces and marinades, peanuts, soups, cheese, pet treats, cookbooks, candy and desserts, gift baskets, nuts, and grilling accessories,” in Class 35.<sup>33</sup>



- d. Registration No. 3772565 for the mark THE SMITHFIELD COLLECTION, in standard character form, for “mail order catalog services featuring meat, seafood, poultry, sauces and marinades, peanuts, soups, cheese, pet treats, cookbooks, candy and desserts, gift baskets, nuts, and grilling accessories; computerized on-line retail store services in the fields of meat, seafood, poultry, sauces and marinades,

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<sup>32</sup> Registered October 29, 1996; renewed (October 20, 2017 Office Action (TSDR 8)).

<sup>33</sup> Registered October 12, 2010; Sections 8 and 15 declarations accepted and acknowledged (October 20, 2017 Office Action (TSDR 15)).

peanuts, soups, cheese, pet treats, cookbooks, candy and desserts, gift baskets, nuts, and grilling accessories,” in Class 35.<sup>34</sup>

- e. Registration No. 3059618 for the mark SMITHFIELD PREFERRED STOCK, in standard character form, for “meat, excluding” specially processed hams from Smithfield, Virginia, in Class 29.<sup>35</sup>
- f. Registration No. 4581664 for the mark SMITHFIELD FARMLAND and design, reproduced below, for “meat,” in Class 29.<sup>36</sup>

The logo for Smithfield Farmland features the word "Smithfield" in a bold, black, serif font, with a horizontal line underneath it. Below the line, the word "Farmland" is written in a larger, bold, black, serif font.

- g. Registration No. 4778928 for the mark SMITHFIELD PRIME, in standard character form, for “meat, pork,” in Class 29.<sup>37</sup>
- h. Registration No. 4921482 for the mark SMITHFIELD RECIPE READY and design, reproduced below, for “lard; pork,” in Class 29.<sup>38</sup>

The logo for Smithfield RECIPE READY features the word "Smithfield" in a bold, black, serif font at the top. Below it, the words "RECIPE" and "READY" are written in a large, bold, red, serif font, separated by a yellow wooden spoon with a white handle.

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<sup>34</sup> Registered April 6, 2010; Sections 8 and 15 declarations accepted and acknowledged (October 20, 2017 Office Action (TSDR 18)).

<sup>35</sup> Registered February 14, 2006; renewed (October 20, 2017 Office Action (TSDR 21)).

<sup>36</sup> Registered August 5, 2014 (October 20, 2017 Office Action (TSDR 30)).

<sup>37</sup> Registered July 21, 2015 (October 20, 2017 Office Action (TSDR 33)).

<sup>38</sup> Registered March 22, 2016 (October 20, 2017 Office Action (TSDR 36)).

14. Fifteen Internet websites referring to Smithfield, Virginia (e.g., TripAdvisor.com, Virginia.org (twice), TripBuzz.com, Expedia.com).<sup>39</sup>
15. The Johnston County Hams Inc. website (countrycuredhams.com) located in Smithfield, North Carolina, refers to its products as “country hams” or “cured” country hams.<sup>40</sup>
16. The Old Virginia Ham Shop (oldvirginiahamshop.com) advertises the sale of SMITHFIELD country ham referring to the product as a “famous delicacy.”<sup>41</sup>

In addition, we take judicial notice of the following information from the ENCYCLOPAEDIA BRITANNICA (britannica.com):

Ham

Meat

... Virginia hams, prized for their sweetness, are cut from razorback hogs fed on peanuts and peaches. They are cured, then smoked over apple and hickory wood fires, and hung to age in the smokehouse. Perhaps the most widely known country hams of the United States are those of Smithfield, Virginia, which are processed from hogs fattened on acorns, nuts, and corn. The hams are cured in a dry mixture for 30–37 days, then spiced with black pepper, and cold smoked (at 70–90 °F [21–27 °C]) for another 10–15 days. Afterward, the ham is aged and mellowed for a minimum of one year. Queen Victoria of

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<sup>39</sup> May 29, 2018 Office Action (TSDR 39-122). In its November 29, 2018 Request for Reconsideration (TSDR 37-121), Applicant submitted excerpts from Internet websites, including sites previously submitted by the Examining Attorney to show that there are numerous cities named “Smithfield” throughout the United States.

<sup>40</sup> August 2, 2016 Office Action (TSDR 15). The Examining Attorney did not need to submit a copy of Applicant’s website in her March 6, 2017 Office Action (TSDR 18) because she had already made it of record.

<sup>41</sup> August 2, 2016 Office Action (TSDR 17).

England was a regular and celebrated customer of a noted Smithfield concern.<sup>42</sup>

The U.S. Department of Agriculture Food Safety and Inspection Service website ([https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/meat-preparation/ham-and-food-safety/CT\\_Index](https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/meat-preparation/ham-and-food-safety/CT_Index)) (accessed October 4, 2019) defines a “Smithfield Ham” as “an aged, dry-cured ham made exclusively in Smithfield, Virginia. The use of the words ‘brand’ or ‘style,’ e.g., ‘Smithfield Brand Ham,’ ‘Smithfield Style Ham,’ does not eliminate this requirement.”<sup>43</sup>

Applicant submitted evidence showing (i) that there are other cities named Smithfield, (ii) that there are other cities or locations that are self-proclaimed capitals of something, and (iii) that the Internet is full of websites providing information regarding cities smaller than Smithfield, Virginia. Based on this evidence, Applicant contends that “[i]f the Examining Attorney’s reasoning is followed to its logical

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<sup>42</sup> Ham, ENCYCLOPAEDIA BRITANNICA (britannica.com) accessed October 4, 2019.

<sup>43</sup> We may take judicial notice of the food safety sheet titled “Ham and Food Safety” at the U.S. Department of Agriculture Food Safety and Inspection Service website because it is the equivalent of a “government publication.” See *M/S R.M. Dhariwal (HUF) 100% EOU v. Zarda King Ltd. and Global Tech. & Trade Marks Ltd.*, 2019 USPQ2d 149090, \*1 n.7 (TTAB 2019) (“The Board may take judicial notice of official United States government publications” citing *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015)); see also *Blackhorse v. Pro-Football, Inc.*, 111 USPQ2d 1080, 1098 n.114 (TTAB 2014) (census data), *aff’d*, 112 F. Supp. 3d 439, 115 USPQ2d 1524 (E.D. Va. 2015), *vacated and remanded*, *Pro Football, Inc. v. Blackhorse*, 709 F. App’x 183 (*per curiam*) (4th Cir. 2018) (mem.); *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1688 (Fed. Cir. 2010) (taking judicial notice of a trademark registration); *In re Spirits Int’l N.V.*, 86 USPQ2d 1078, 1085 n. 11 (TTAB 2008), *vacated and remanded on other grounds*, 563 F.3d 1347, 90 USPQ2d 1489 (Fed. Cir. 2009); *Grp. One, Ltd. v. Hallmark Cards, Inc.*, 407 F.3d 1297, 74 USPQ2d 1759, 1766 (Fed. Cir. 2005) (upholding district court’s taking of judicial notice of the fact of a patent’s reinstatement).

conclusion, every city or town for which there are multiple websites (either about the city or town generally, or its attractions) would be ‘generally known,’ but this result is both nonsensical and inconsistent with the evidentiary benchmark that Examining Attorneys must satisfy to establish geographic descriptiveness.”<sup>44</sup> While Applicant’s evidence provides a contextual basis for comparing evidence regarding Smithfield, Virginia, vis-à-vis other Smithfield locations and other locations of comparable size, its probative value is limited because it is overcome by the evidence of the renown of Smithfield, Virginia for hams, which are called Smithfield Hams. Nevertheless, we have considered it for whatever probative value it provides.

The elements for proving that a mark is primarily geographically descriptive under Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2), are

- (1) The mark is the name of a place known generally to the public;
- (2) The goods for which applicant seeks registration originate in the geographic place identified in the mark; and
- (3) Purchasers would be likely to believe that the goods originate in the geographic place identified in the mark.

*See In re Newbridge Cutlery Co.*, 776 F.3d 854, 113 USPQ2d 1445, 1448-49 (Fed. Cir. 2015); *In re Societe Generale des Eaux Minerales de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450, 1452 (Fed. Cir. 1987); *In re Broken Arrow Beef & Provision, LLC*, 129 USPQ2d 1431, 1432 (TTAB 2019); *In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1853 (TTAB 2014).

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<sup>44</sup> Applicant’s Brief, p. 12 (9 TTABVUE 13).

Because there are no limitations or restrictions as to channels of trade or classes of consumers in Applicant's description of goods (i.e., meat, lard, and offals), the public includes ordinary purchasers (i.e., the general, meat-eating public). *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *In re Integrated Embedded*, 120 USPQ2d 1504, 1515 (TTAB 2016). Applicant agrees: "the relevant public ... are ordinary purchasers of meat, lard, and offals throughout the United States."<sup>45</sup>

Applicant analyzes the evidence and concludes that each piece of evidence individually fails to establish that SMITHFIELD is the name of a place known generally to the public.<sup>46</sup> However, we find an analogy to trademark priority disputes, in which the Federal Circuit requires that we look at the evidence as a whole.

However, whether a particular piece of evidence by itself establishes prior use is not necessarily dispositive as to whether a party has established prior use by a preponderance. Rather, one should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use. The TTAB failed to appreciate this. Instead, the TTAB dissected the evidence to the point that it refused to recognize, or at least it overlooked, the clear interrelationships existing between the several pieces of evidence submitted. When each piece of evidence is considered in light of the rest of the evidence, rather than individually, the evidence as a whole establishes by a preponderance that West used the "FAST EDDIE'S" mark prior to Jet's admitted first use of the mark.

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<sup>45</sup> Applicant's Brief, p. 6 (9 TTABVUE 7); Applicant's Reply Brief, pp 1-2 (12 TTABVUE 3). Neither the Examining Attorney, nor Applicant, discuss ordinary consumers for offal.

<sup>46</sup> We agree with Applicant that it is the USPTO's burden to prove that SMITHFIELD is a geographic location generally known to the public, rather than Applicant's burden to prove that SMITHFIELD has any other meaning. Applicant's Reply Brief, p. 1 (12 TTABVUE 3).

*West Fla. Seafood, Inc. v. Jet Rests., Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994). The same holds true in determining whether “Smithfield” is the name of a place known generally to the public; we must analyze each piece of evidence in light of all the evidence.

The record shows that “Smithfield” is a generally known place (i.e., the name of a town in Virginia). See THE COLUMBIA GAZETTEER OF THE WORLD; FOOD ENCYCLOPEDIA; OXFORD DICTIONARIES; Wikipedia (“Known as the ham capital of the world, Smithfield currently attracts many tourists.”);<sup>47</sup> Applicant’s website (“[t]he town of Smithfield’s reputation for producing specialty hams and meats dated back to the late 1700s.”);<sup>48</sup> and ENCYCLOPAEDIA BRITANNICA (“Perhaps the most widely known country hams of the United States are those of Smithfield, Virginia, which are processed from hogs fattened on acorns, nuts, and corn.”).<sup>49</sup> The Internet website evidence shows that Smithfield has attractions for tourists. For example, the July 20, 2018 Washington Post article quoted a business owner as saying, “The tourists come in looking for it [Smithfield ham] specifically.”<sup>50</sup>

Further, by previously registering SMITHFIELD under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), claiming that SMITHFIELD has acquired distinctiveness for lard and meats other than the specially cured ham from Smithfield, Virginia, Applicant has effectively admitted in those registrations that

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<sup>47</sup> May 29, 2018 Office Action (TSDR 9).

<sup>48</sup> February 2, 2017 Response to Office Action (TSDR 167).

<sup>49</sup> Ham, ENCYCLOPAEDIA BRITANNICA (britannica.com).

<sup>50</sup> February 4, 2019 Denial of Request for Reconsideration (5 TTABVUE 5-10).

SMITHFIELD is not inherently distinctive as of the registration dates. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) (“Where an applicant seeks registration on the basis of Section 2(f), the mark’s descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive.”); *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (“Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the *statute* accepts a lack of inherent distinctiveness as an established fact. ... Similarly, in cases where registration was initially sought on the basis of distinctiveness, subsequent reliance by the applicant on Section 2(f) assumes that the mark has been shown or conceded to be merely descriptive.”); *In re Am. Furniture Warehouse CO*, 126 USPQ2d 1400, 1403 (TTAB 2018) (noting that a claim of acquired distinctiveness by applicant to overcome a refusal in a prior registration for the same wording in connection with same services “can be viewed as a concession by Applicant that the wording itself is not inherently distinctive for those services”).<sup>51</sup> In the application at issue, Applicant claimed SMITHFIELD has acquired distinctiveness in connection with specially processed ham from Smithfield, Virginia. In Registration Nos. 2624764, 2989997, 3059618, 4581664, and 4778928, Applicant claimed that

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<sup>51</sup> Claiming, in the alternative, that a mark has acquired distinctiveness is not an admission that the proposed mark is not inherently distinctive. *See In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1713 (TTAB 2011); *In re E S Robbins Corp.*, 30 USPQ2d 1540, 1542 (TTAB 1992); *In re Prof'l Learning Ctrs., Inc.*, 230 USPQ 70, 71 n.2 (TTAB 1986). To the extent this extends to a registration, Applicant did not argue that it claimed that its SMITHFIELD marks acquired distinctiveness in the alternative.

SMITHFIELD acquired distinctiveness in connection with meat, including ham but excluding specially processed ham from Smithfield, Virginia. In Registration No. 4921482, Applicant claimed that SMITHFIELD has acquired distinctiveness in connection with lard.<sup>52</sup>

We take Applicant's prior claims that SMITHFIELD has acquired distinctiveness for meat and lard as admissions that SMITHFIELD is not inherently distinctive for those goods as of the registration dates.<sup>53</sup> While not conclusive, these are facts to be considered in our analysis.

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<sup>52</sup> As noted above, the identification of goods covers meat, lard, and offals and Applicant's claim of inherent distinctiveness extends to lard, offals and any meat excluding the specially cured ham from Smithfield, Virginia, for which Applicant has asserted acquired distinctiveness. A refusal based on the ground that the applied-for mark is primarily geographically descriptive is proper if it is primarily geographically descriptive of any of the products for which registration is sought. *Cf. In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). Therefore, to the extent the record establishes primary geographic descriptiveness for any of the goods not covered by the existing 2(f) claim, such refusal is established for all remaining goods.

<sup>53</sup> Because the histories of the other registrations were not made of record, there is no evidence as to why Applicant disclaimed "Smithfield" or claimed that it acquired distinctiveness. However, the evidence of record distinguishes "Smithfield" from a "Smithfield ham." According to the record, Smithfield is a town in Virginia noted for processing meat, specifically ham. *See* the COLUMBIA GAZETTEER OF THE WORLD ([columbiagazetteer.org](http://columbiagazetteer.org)) (August 2, 2016 Office Action (TSDR 28)) and Wikipedia (May 29, 2018 Office Action (TSDR 7)). A Smithfield ham is "a dry-cured ham produced near Smithfield, Virginia." OXFORD DICTIONARIES ([oxforddictionaries.com](http://oxforddictionaries.com)) (December 21, 2015 Office Action (TSDR 6)); *see also* Wikipedia (August 2, 2016 Office Action (TSDR 13)); FOOD ENCYCLOPEDIA ([foodterms.com](http://foodterms.com)) (December 21, 2015 Office Action (TSDR 4)); Washington Post (July 20, 2018) (February 4, 2019 Denial of Request for Reconsideration (5 TTABVUE 5-10)) (distinguishing Smithfield and Smithfield ham). Even the Virginia Statute does not use the term Smithfield by itself as a designation for any particular type of ham but instead refers to them as "Genuine Smithfield Hams." June 21, 2016 Response to Office Action (TSDR 9) and March 6, 2017 Office Action (TSDR 47) (Virginia State Code definition of Smithfield hams requires that that ham be processed in Smithfield, Virginia); *see also* U.S. Department of Agriculture Food Safety and Inspection Service website defining a "Smithfield Ham" as "an aged, dry-cured ham made exclusively in Smithfield, Virginia." Because a Smithfield ham comes from Smithfield, Virginia, it is logical that the requirement that Applicant disclaim the exclusive right to use Smithfield or that Applicant claim that Smithfield has acquired distinctiveness is because Smithfield is primarily geographically descriptive. *See In re*

It is well settled that an applicant's prior inconsistent statements in its application for registration or in another proceeding do not give rise to an estoppel in subsequent proceedings. *Institutional Wholesalers v. Saxons Shoppes, Inc.*, 170 USPQ 107 (TTAB 1971); *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 154 and cases cited therein (TTAB 1973). However, such statements constitute admissions and may be considered as evidence, albeit not conclusive evidence, of the truth of the assertions therein. *Bakers Franchise Corp. v. Royal Crown Cola Co.*, 160 USPQ 192 (CCPA 1969); *Maremont Corp. v. Airlift Corp.*, 174 USPQ 395, 396 (CCPA 1972).

*EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 213 USPQ 597, 599 (TTAB 1982), *aff'd*, 706 F.2d 1213, 217 USPQ 986 (Fed. Cir. 1983); *see also Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984) (applicant's earlier contrary position taken before the examining attorney as to the meaning of its mark, as demonstrated by statements in the application illustrating the variety of meanings that may be attributed to, and commercial impression projected by, applicant's mark, may be relevant); *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978) ("That a party earlier indicated a contrary opinion respecting the conclusion in a similar proceeding involving similar marks and goods is a fact, and that fact may be received in evidence as merely illuminative of shade and tone in the total picture confronting the decision maker. To that limited extent, a party's earlier contrary opinion may be considered relevant and competent. Under no circumstances, may a party's opinion, earlier or current, relieve the decision maker of the burden of reaching his own ultimate

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*Moringa Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1744 (TTAB 2016) (assuming that the cited mark is on the Supplemental Register because it is geographically descriptive).

conclusion on the entire record.”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1172 (TTAB 2011) (prior statement by itself not conclusive, but is relevant evidence in support of conclusion based on the entire record); *M.C.I. Foods, Inc. v. Brady Bunte*, 96 USPQ2d 1544, 1552 (TTAB 2010) (considered opposer’s contrary position when opposer prosecuted its application noting that opposer’s prior position does not relieve the Board of making its own findings of fact); *Plyboo Am., Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633, 1642 (TTAB 1999) (“prior inconsistent positions may properly be considered as ‘illuminative of shade and tone in the total picture’ confronting the trier of fact, and thus are some evidence that ‘PLYBOO’ is a trademark instead of a merely descriptive term.”); *compare In re John Harvey & Sons Ltd.*, 32 USPQ2d 1451, 1455 (TTAB 1994) (“Applicant’s prior registrations which include disclaimers or claims of acquired distinctiveness are of little moment” because “[w]e are not privy to the files of those registrations.”).<sup>54</sup>

The time for determining whether the subject matter sought to be registered is inherently distinctive is the time when registration is being sought. *See Chippendales USA*, 96 USPQ2d at 1686. Nevertheless, the Board may consider evidence of earlier uses because earlier uses can shed light on the current situation. *Id.* at 96 USPQ2d at 1687. Applicant’s Registration No. 4921482 for the mark SMITHFIELD RECIPE

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<sup>54</sup> Applicant’s “belief” that “any consideration of past claims of acquired distinctiveness and/or disclaimers as conclusive to be inappropriate,” is correct. Applicant’s Brief, p. 24 (9 TTABVUE 25). As noted in the body of the decision, Applicant’s past claims of acquired distinctiveness and disclaimers of the exclusive right to use SMITHFIELD are facts to be considered and weighed with the entire record in analyzing whether SMITHFIELD is primarily geographically descriptive.

READY and design for “lard; pork” registered on March 22, 2016, and Registration No. 4778928 for the mark SMITHFIELD PRIME, in standard character form, for “meat, pork” registered on July 21, 2015, and both claimed acquired distinctiveness for SMITHFIELD. Inasmuch as those registrations are relatively contemporaneous with this application, Applicant’s prior registrations issued under Section 2(f) are analogous to evidence of earlier uses because they shed light on the current situation.

According to Applicant, circumstances have changed both legally and factually since it last claimed that SMITHFIELD had acquired distinctiveness so that SMITHFIELD is now an inherently distinctive mark. With respect to legal changes, Applicant argues that the Federal Circuit has discredited the USPTO’s reliance on gazetteer, Wikipedia, and Internet evidence in general, citing *Newbridge Cutlery*, 113 USPQ2d at 1450.<sup>55</sup> The Federal Circuit’s analysis in *Newbridge Cutlery* is not a change in the law; rather, it is a reminder that applicants and examining attorneys must carefully consider the materials retrieved through their research, including Internet searches, and make judicious submissions of the results. *See In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 n.1 (Fed. Cir. 1987) (quoting *Vittel*, 3 USPQ2d at 1451 (“It is indeed remarkable to see the thoroughness with which NEXIS can regurgitate a [term] casually mentioned in the news.”); *In re Max Capital Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010). In fact, the Court expressly stated that it does “not foreclose the PTO from using gazetteer entries or internet websites to identify whether a location is generally known.” *Newbridge*

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<sup>55</sup> Applicant’s Brief, pp. 7-8 (16 TTABVUE 8-9).

*Cutlery*, 113 USPQ2d at 1450. In *Newbridge Cutlery*, the Federal Circuit found that the evidence submitted by the USPTO failed “to show the extent to which the relevant American consumer would be familiar with the locations listed in this gazetteer” and by extension the other Internet evidence. *Id.* In other words, just because a location is identified or referred to in a reference work or an Internet website does not mean that it is a generally known place to the relevant consumers. It is essential that the evidence explain or refer to facts or perceptions sufficient to lead the Board or court to the conclusion that the relevant consumers generally know the place named. Every advocate always has had this responsibility.

Turning to Applicant’s argument that the factual circumstances have changed so that SMITHFIELD does not have “a primary geographic significance,” Applicant states:

In the past twelve (12) years, Applicant’s national presence has continued to grow, negating any allegation that “Smithfield” as used by Applicant today would have a primary geographic significance to Smithfield, Virginia. Although Applicant began in Smithfield, Virginia in 1936 “as a pork processing operation called The Smithfield Packing Company,” through “a series of acquisitions starting in 1981, [Applicant] has become the largest pork processor and hog producer in the world” with operations all over the world. (2017-02-02 Office Action Response, Ex. C (Smithfield Form 10-K) p. 3.) In 2013, Applicant merged with WH Group Ltd. allowing Applicant “to provide high-quality, competitively-priced and safe U.S. meat products to consumers in markets around the world.” (*Id.* p. 29 (emphasis added).)<sup>56</sup>

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<sup>56</sup> Applicant’s Brief, p. 24 (9 TTABVUE 25).

There are two problems with Applicant's argument. First, Applicant's reference to the past twelve years is inapposite because those arguments are undercut by more recent registrations. Registration No. 4921482 for the mark SMITHFIELD RECIPE READY and design for "lard; pork" registered on March 22, 2016, and Registration No. 4778928 for the mark SMITHFIELD PRIME, in standard character form, for "meat, pork" registered on July 21, 2015, and both claimed acquired distinctiveness for SMITHFIELD. Accordingly, Applicant should have focused its evidence and argument on activities occurring after the dates of issuance of the registrations, March 22, 2016 or July 21, 2015, that presumably converted SMITHFIELD into an inherently distinctive mark rather than a primarily geographically descriptive term that requires a claim of acquired distinctiveness to be registered.

Second, Applicant contends that it is Applicant's renown as the largest pork processor and hog producer in the world with over \$14 billion in annual sales that is nationally known, not its geographic location in Smithfield, Virginia.<sup>57</sup> In other words, Applicant claims that the evidence proves that the primary significance of Smithfield is Applicant, not a geographic location. Applicant's market success is relevant in establishing acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). However, in this application, Applicant has not claimed the benefits of Section 2(f) (except for specially made ham from Smithfield, Virginia), and, without a formal claim of distinctiveness under Section 2(f), the evidence of Applicant's renown cannot serve as the basis for allowing registration of its mark. *Cf.*

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<sup>57</sup> Applicant's Brief, p. 13 (9 TTABVUE 14).

*In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1404 (TTAB 2018) (because applicant did not seek registration under Section 2(f), the Board rejected applicant's argument that that the renown of applicant's business and its customers' recognition of the style of applicant's products have resulted in recognition of applicant's mark as a trademark); *In re Cazes*, 21 USPQ2d 1796, 1797 (TTAB 1991) (“[A]pplicant has not claimed the benefits of *Section 2(f)* of the Act and, without a formal claim of distinctiveness ..., evidence of fame cannot serve as the basis for allowing registration of applicant's mark.”); *In re Industrie Pirelli Societa per Azioni*, 9 USPQ2d 1564, 1565 (TTAB 1988) (“Applicant has not claimed the benefits of Section 2(f) and, without a formal claim of distinctiveness under Section 2(f), the evidence of fame and prior registration cannot serve as the basis for allowing registration of applicant's mark.”); *In re McDonald's Corp.*, 230 USPQ 304, 307 (TTAB 1986) (“While applicant has demonstrated a strong public association between the mark sought to be registered and applicant's restaurant services, the Board concludes that this evidence is evidence of secondary meaning and that in the absence of a claim of secondary meaning pursuant to *Section 2(f)*, registration must be refused under *Section 2(e)(3)*.”). Essentially all the evidence shows that the famous Smithfield Hams must be made in Smithfield, Virginia. The renown of the Smithfield Ham and Applicant's success has helped to put Smithfield, Virginia on the map.

In addition, Applicant argues that because there are numerous other more populous cities with the name Smithfield, consumers will not associate the name

“Smithfield” with Smithfield, Virginia.<sup>58</sup> However, we must consider the impression made by the mark not in the abstract, but in connection with the goods for which registration is sought. In this case that includes meat in general, and ham in particular. As a result, evidence that “Smithfield” identifies more than one geographic location does not detract from the primary geographic significance of the name “Smithfield” in connection with Applicant’s “meat, lard, offals” where, as here, the public would be likely to make a goods/place association between Smithfield, Virginia and ham.<sup>59</sup> See *In re Loew’s Theatres, Inc.*, 769 F.2d 764, 226 USPQ 865, 868 (Fed. Cir. 1985); *In re Cambridge Digital Sys.*, 1 USPQ2d 1659, 1662 (TTAB 1986).

Smithfield is a generally known geographic location where well known, if not famous, Smithfield hams are processed. Further, Applicant previously has obtained registrations for SMITHFIELD under the provisions of Section 2(f) of the Trademark Act thereby conceding that SMITHFIELD was not inherently distinctive at least at the time those registrations issued. Applicant has not provided a sufficient explanation for what has changed since the last time Applicant registered SMITHFIELD under Section 2(f) so as to obviate its effective admissions that SMITHFIELD is not inherently distinctive.

We, therefore, find that SMITHFIELD is the name of a place known generally to the public.

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<sup>58</sup> Applicant’s Brief, pp. 17-21 (9 TTABVUE 18-22).

<sup>59</sup> See the discussion *infra*.

We now turn to whether “meat (including ham, excluding specially processed ham from Smithfield, Virginia), lard, and offals” originate in Smithfield, Virginia. The evidence shows that the goods originate in Smithfield, Virginia. For example, in its 10-K Report (January 3, 2016), Applicant states that its Smithfield, Virginia processing plant is part of its “Fresh Pork and Packaged Meats” segment whose operations include “slaughtering and cutting hogs; fresh and packaged pork products.”<sup>60</sup> “Fresh and packaged pork products” encompass more than just specially processed ham from Smithfield, Virginia. In this regard, the Washington Post (July 20, 2018), in an article about the closing of the last smokehouse in Smithfield, Virginia, reported that “[t]he huge meatpacking plants on the edge of town slaughter more than 10,000 hogs per day.”<sup>61</sup> Applicant does not dispute this evidence, nor does Applicant dispute that it has meat, lard and offals originating in Smithfield, Virginia.

We find that Applicant’s meat (including ham, but excluding specially processed ham from Smithfield, Virginia), lard, and offal originate in Smithfield, Virginia.

Finally, we address whether purchasers would likely believe that the goods originate in the geographic location identified by SMITHFIELD (i.e., “a goods/place association”). The USPTO needs to show “a reasonable predicate” for its conclusion that the public would be likely to make the particular goods/place association.

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<sup>60</sup> February 2, 2017 Response to Office Action (TSDR 49). Applicant has stated that it is the only commercial ham producer in Smithfield, Virginia. *See, e.g.*, September 6, 2017 Response to Office Action (TSDR 5) (“to Applicant’s knowledge, Applicant is also the only commercial ham producer ‘within the corporate limits of the town of Smithfield, Virginia,’ so if a ham is a ‘Genuine Smithfield Ham,’ made per the Virginia Code, then it was made by Applicant.”).

<sup>61</sup> February 4, 2019 Denial of Request for Reconsideration (5 TTABVUE 7-8).

*Newbridge Cutlery*, 113 USPQ2d at 1449 (quoting *In re Miracle Tuesday, LLC*, 695 F.3d 1339, 104 USPQ2d 1330, 1333 (Fed. Cir. 2012) (quoting *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1631 (Fed. Cir. 2003))).

Where, as here, a case involves goods rather than services, we have held that “the goods-place association often requires little more than a showing that the consumer identifies the place as a known source of the product.” *In re Les Halles De Paris J.V.*, 334 F.3d 1371, 1374 [67 USPQ2d 1539, 1541] (Fed. Cir. 2003) (citations omitted). Therefore, to establish a goods/place association, “the case law permits an inference that the consumer associates the product with the geographic location in the mark because that place is known for producing the product.” *Id.* (citation omitted).

*Miracle Tuesday*, 104 USPQ2d at 1333; *see also Loew’s Theatres*, 226 USPQ at 868 (“The PTO’s burden is simply to establish that there is a reasonable predicate for its conclusion that the public would be likely to make the particular goods/place association on which it relies.”).

Where, as here, the geographic significance of a term is its primary significance and the geographic place is neither obscure nor remote, for purposes of §2(e)(2), the goods/place or services/place association may be presumed from the fact that the applicant’s goods or services originate in or near the place named in the mark. *In re Spirits of New Merced, LLC*, 85 USPQ2d 1614, 1621 (TTAB 2007) (YOSEMITE BEER held geographically descriptive of beer produced and sold in a brewpub in Merced, California, the Board stating that “[s]ince the goods originate at or near [Yosemite National Park], we can presume an association of applicant’s beer with the park.”); *In re Joint-Stock Co. “Baik,”* 80 USPQ2d 1305 (TTAB 2006) (BAIKALSKAYA – the Russian equivalent of from Baikal or Baikal’s – held primarily geographically

descriptive of vodka made from water piped from Lake Baikal, the Board presuming a goods/place association “because applicant is located near Lake Baikal, in the city of Irkutsk.”); *In re Cal. Pizza Kitchen Inc.*, 10 USPQ2d 1704 (TTAB 1988) (CALIFORNIA PIZZA KITCHEN held primarily geographically descriptive of restaurant services that originate in California); *In re Handler Fenton Westerns, Inc.*, 214 USPQ 848 (TTAB 1982) (DENVER WESTERNS held primarily geographically descriptive of western-style shirts originating in Denver). Accordingly, because, as noted above, we find that Applicant’s meat (including ham, but excluding specially processed ham from Smithfield, Virginia), lard, and offal originate in Smithfield, Virginia, we presume that there is a goods/place association among the consuming public.

We further find that even without the presumption of a goods/place association, *Newbridge Cutlery*, 113 USPQ2d at 1449 (“This presumption may well be proper, but, as this case can be decided on other grounds, we do not address its propriety and leave it for another day.”), the good/place association is supported by evidence.

It is undisputed that SMITHFIELD hams come from Smithfield, Virginia and that Smithfield, Virginia is known for specially processed ham from Smithfield, Virginia. However, the goods at issue are meat (excluding specially processed hams from Smithfield, Virginia), lard, and offals. Nevertheless, because Smithfield is noted for the specialty ham, in the modern marketing context, consumers expect that a geographic region noted for ham is likely to expand from its traditional products to related products such as meat (e.g., pork, bacon, spareribs, etc.), lard, and offal. *See*

*In re Save Venice N.Y. Inc.*, 259 F.3d 1346, 59 USPQ2d 1778, 1784 (Fed. Cir. 2001) (“the registrability of a geographic mark may be measured against the public’s association of that region with both its traditional goods and any related goods or services that the public is likely to believe originate there.”).

In the modern marketing context, geographic regions that are noted for certain products or services actively promote and adapt their specialties to fit changing consumer needs. Thus we see no reason to believe that a modern merchant of Venice would not expand on the traditional Venetian products listed by the Board, to begin marketing products or services related to such goods. Similarly, from the consumer’s perspective, we also find no reason to believe that the public strictly limits its association of a place to the geographic region’s traditional products or services. Because we consider that consumers may assume that geographic regions, like other commercial actors, are likely to expand from their traditional goods or services into related goods or services, we hold that the registrability of a geographic mark may be measured against the public’s association of that region with both its traditional goods and any related goods or services that the public is likely to believe originate there. The essence of the test is whether consumers are likely to be confused by the source of the related goods identified by a distinctive geographic mark.

*Id.* Thus, there is a reasonable predicate or basis to find that the public will believe that meat (other than Smithfield ham), lard, and offal originate in Smithfield, Virginia and, thus, there is a goods/place association.

**Decision:** The refusal to register Applicant’s mark SMITHFIELD is affirmed.

Dunn, Concurring Opinion:

I join my colleagues in the decision to affirm the refusal of the mark SMITHFIELD as primarily geographically descriptive of meat, lard, and offals. I agree that Smithfield names a generally known place, that Applicant's meat, lard, and offals originate from that place, and so, the required goods/place association may be presumed. I write concurrently because I diverge from the majority in assessing the evidence corroborating the goods/place association. The majority finds the necessary goods/place association based on their finding that Smithfield is noted for a single product, the specially processed (and statutorily protected) Smithfield ham, and the finding that, under *In re Save Venice N.Y.*, consumers expect that a geographic region noted for one product is likely to expand to related products.

I disagree that Smithfield is noted only for the specially processed Smithfield ham, and find that the record, even stripped of all reference to the specially processed Smithfield ham, still would establish the necessary goods/place association between Smithfield and meat, lard and offals. Applicant is based in Smithfield, Virginia and is the biggest producer of pork products in the world, a fact listed in its SEC 10-K filing, its website, the Wikipedia entry for the Town of Smithfield, Virginia, the Town of Smithfield, VA city portal webpage, an online travel article about Smithfield, Virginia, and the Washington Post article about the company's presence in Smithfield, Virginia.<sup>62</sup> Applicant's SEC 10-K filing states that Applicant's packaged

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<sup>62</sup> February 2, 2017 Response to Office Action, TSDR 31, 166; May 29, 2018 Office Action, TSDR 7, 69; March 6, 2017 Office Action, TSDR 21; February 4, 2019 Office Action, TSDR 6.

meat segment sold about 3 billion pounds of packaged meat products in 2015.<sup>63</sup> This number is not based on just the specially processed Smithfield ham; the report notes that Applicant's packaged meats include "smoked and boiled hams, bacon, sausage, hot dogs (pork, beef and chicken), deli and luncheon meats, specialty products such as pepperoni, dry meat products, and ready-to-eat, prepared foods such as pre-cooked entrees and pre-cooked bacon and sausage."<sup>64</sup> Moreover, this number affects the U.S. consumer of meat, because the report also notes that only 3% of the volume of Applicant's packaged meats are export sales.<sup>65</sup> The ordinary purchasers of meat, lard, and offals throughout the United States are likely to believe that the SMITHFIELD goods of Applicant, an international Fortune 500 company based in Smithfield, Virginia, originate in Smithfield, Virginia. *See In re Compagnie Generale Mar.*, 26 USPQ2d at 1655; *In re Cambridge Digital Systems*, 1 USPQ2d at 1662.

While the evidence listed by the majority includes excerpts devoted to the Smithfield ham, the evidence listed by the majority also refers to Smithfield as known for meat processing (Columbia Gazetteer of the World), as the ham capital of the world (Wikipedia entry for Smithfield, Virginia), and as a little town obsessed with pork products (Washington Post). The majority's evidence also notes a Yelp review for Smithfield referring to its famous Virginia ham in lieu of the specially processed, or genuine Smithfield ham, and a food website noting "A lot of hams produced in

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<sup>63</sup> February 2, 2017 Response to Office Action TSDR 32.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

Smithfield aren't 'Smithfield' hams" (Cook's Info). The Smithfield, Virginia websites promote pork products as its local food, not limited to the Smithfield ham.<sup>66</sup> Online travel articles refers to pork ribs as well as ham originating in Smithfield, and point out that Applicant produces a variety of hams in addition to the specially processed Smithfield ham.<sup>67</sup>

Based on this evidence, I would not find, as does the majority, that the required goods/place association depends on the specially processed Smithfield ham from Smithfield, which leads consumers to expect Smithfield to expand to also produce meat, lard, and offals. I find that the record evidence ties Smithfield to pork products and byproducts, and so there is a direct goods/place association between Smithfield and meat, lard, and offals.

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<sup>66</sup> May 29, 2018 Office Action, TSDR May 29, 2018 Office Action, TSDR 55. 69; October 2, 2017 Office Action, TSDR 43, 45, 47.

<sup>67</sup> March 6, 2017 Office Action, TSDR 21; May 29, 2018 Office Action, TSDR 59.