

This Opinion is Not a
Precedent of the TTAB

Mailed: June 8, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Mello Meats Inc.

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Serial No. 87624232

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Rebecca L. Wilson of The Dobrusin Law Firm, P.C.,
for Mello Meats Inc.

Christine Martin, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

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Before Wolfson, Coggins and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Mello Meats Inc. (“Applicant”) seeks registration on the Principal Register of the mark BARE (in standard characters) for (as amended) “skinless beef sausage, skinless pork sausage; beef; pork; hamburger; beef snack sticks; processed pork, veal and beef” in International Class 29.¹

¹ Application Serial No. 87624232 filed on September 27, 2017, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the registered mark JUST BARE and Design as depicted below:



for "poultry," in International Class 29,² and the registered mark JUST BARE (in standard characters) for "poultry; processed chicken," in International Class 29,³ both registered on the Principal Register and owned by the same company, as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address a few evidentiary matters. The Examining Attorney objects⁴ to Applicant's submission of new evidence

² Registration No. 3655877, issued July 14, 2009. Renewed.

³ Registration No. 4118687, issued March 27, 2012. Declarations pursuant to Trademark Act Sections 8 and 15, 15 U.S.C. §§ 1058 and 1065, accepted and acknowledged.

⁴ The Examining Attorney's evidentiary objections may be found in the Examiner's Brief at 15 TTABVUE 3-4. Page references herein to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer

with its appeal brief, specifically: (1) pages from PILGRIM USA, JIMMY DEAN, BUTTERBALL, KOWALSKI, TYSON FOODS and JUST BARE CHICKEN web sites,⁵ and (2) copies of U.S. Registration Nos. 5922526 (OLINDAY FARMS), 5916867 (GOLD KIST CHICKEN), 5905394 (GOLD KIST), 5936357 (THE ARTISAN PIG), 5670204 (BREMERHAVEN), 5820102 (BIRD FARM), 5939199 (TYLER CHICKEN), and 5947457 (FORESTER FARMERS MARKET).⁶ The Examining Attorney also objects to Applicant's arguments referencing definitions of the term "JUST," because Applicant did not make these definitions of record during prosecution.

Applicant disputes the basis for the Examining Attorney's objections, argues that a portion of the evidence attached to its Appeal Brief already was submitted in its Request for Reconsideration, and contends that other portions of this evidence were submitted in direct response to the Examining Attorney's "final rejection" (denial of reconsideration) and on this basis should be allowed.⁷

The record in an application should be complete prior to the filing of an appeal. Trademark Rule § 2.142(d), 37 C.F.R. §2.142(d). To the extent Applicant's evidence was submitted untimely during this appeal, we do not consider it. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018) ("The evidence submitted with Applicant's appeal brief that Applicant did not previously submit during prosecution

to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

⁵ Applicant's Brief, Exhs. D & E, 13 TTABVUE 32-80.

⁶ Applicant's Brief, Exh. F, 13 TTABVUE 81-92.

⁷ Applicant's Reply Brief, 16 TTABVUE 3.

(including the request for reconsideration) is untimely and will not be considered.”). Had Applicant wished to introduce additional evidence after its appeal was filed, including evidence allegedly in direct response to the Examining Attorney’s denial of reconsideration, Applicant had the option of filing a written request with the Board to suspend the appeal and remand the application for further examination. Trademark Rule 2.142(d); *see also In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1734 n.15 (TTAB 2018).

Applicant and the Examining Attorney made of record pages from the JIMMY DEAN and TYSON FOODS websites during prosecution. Applicant also timely made of record pages from the BUTTERBALL and KOWALSKI websites. While it was unnecessary for Applicant to file this evidence again with its brief (a practice we discourage), we consider it. However, we do not consider the PILGRIM USA or JUST BARE CHICKEN web pages, nor U.S. Registration Nos. 5922526, 5916867, 5905394, 5936357, 5670204, 5820102, 5939199 or 5947457, accompanying Applicant’s Brief, as these items were not timely submitted during prosecution.

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See 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). We therefore take judicial notice of the following definitions from the MERRIAM-WEBSTER online dictionary:⁸

⁸ <https://www.merriam-webster.com/dictionary/just> (last visited June 4, 2020), <https://www.merriam-webster.com/dictionary/bare> (last visited June 4, 2020).

- **JUST** – (as an **adjective**) (1)(a) having a basis in or conforming to fact or reason, reasonable, (1)(b) conforming to a standard of correctness, proper; (2)(a)(1) acting or being in conformity with what is morally upright or good, righteous, (2)(a)(2) being what is merited, deserved, (2)(b) legally correct, lawful; (as an **adverb**) (1)(a) exactly, precisely, (1)(b) very recently, (2)(a) by a very small margin, barely, (2)(b) immediately, directly; (3)(a) only, simply, (3)(b) quite, very; (4) perhaps, possibly, almost.
- **BARE** – (as an **adjective**) (1)(a) lacking a natural, usual, or appropriate covering, (1)(b)(1) lacking clothing, (1)(b)(2) obsolete, (1)(c) lacking any tool or weapon; (2) open to view, exposed; (3)(a) unfurnished or scantily supplied, (3)(b) destitute; (4)(a) having nothing left over or added, (4)(b) mere, (4)(c) devoid of amplification or adornment; (5) obsolete, worthless; (as a **verb**) to make or lay (something) bare, uncover.

Because we have taken judicial notice of these two terms, the Examining Attorney's objection to Applicant's arguments referencing definitions of the term "JUST," is overruled.

II. Likelihood of Confusion - Applicable Law

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, "each case

must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”)).

III. Analysis

We now review the arguments of Applicant and the Examining Attorney in view of applicable law and the evidence of record. In this appeal, Applicant and the Examining Attorney focused their arguments and evidence on the similarity or

dissimilarity of the BARE and JUST BARE marks, the relatedness of the goods associated with the respective marks, the channels of trade and prospective purchasers therefor, and the sophistication of the consumers for the respective goods.

A. The Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014).

"The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *In re i.am.symbolic, llc*, 123 USPQ2d at 1748. "The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks." *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007).

Applicant argues that:

[T]he cited marks need to be analyzed as JUST BARE and JUST BARE & design against the mark as applied-for, which is BARE. ... There are clear differences, lack of similarities in appearance, as well as distinct connotations. For instance, the implication of the word "just" can mean "based on or behaving according to what is morally right and fair," or "exactly," or "very recently," or "barely," or "simply" "only", or "no more than." Each of these definitions of the word changes the next word in addition to it completely. This makes the cited registrations very different from that of a singular word "Bare." The word "Bare" in and of

itself has numerous definitions, so there is absolutely no way that the Examining Attorney can know which connotation is implied to each of the cited registrations and then the applied-for registration to say that they have similar connotations.⁹

The Examining Attorney argues:

[T]he applicant's mark BARE in standard characters is similar to the registered JUST BARE marks in sound, appearance and commercial impression. Specifically, the marks include the identical wording BARE, the applicant has merely deleted the wording JUST from the registered marks. With the mere deletion of this term, applicant's mark is likely to appear to prospective purchasers as a shortened form of registrant's mark. [citation omitted] ... [T]he mere omission of this wording from the registered mark does not overcome a likelihood of confusion. [citation omitted] ... [T]he applicant's mark does not create a distinct commercial impression from the registered mark because it contains some of the wording in the registered mark (namely, BARE) and does not add any wording that would distinguish it from that mark. ... [B]ecause the marks at issue contain the identical wording BARE and applicant has merely deleted the wording JUST from the registered marks, these marks are likely to engender the same connotation and overall commercial impression when considered in connection with the applicant's and registrant's respective goods.

* * *

With respect to [Registrant's mark JUST BARE and Design] ..., when evaluating a composite mark consisting of words and a design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods. [citations omitted]. Thus, although marks must be compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. [citation omitted]. Accordingly, the wording JUST BARE is the dominant portion of the registered mark, and it is confusingly similar with the applied for mark.¹⁰

⁹ Applicant's Brief, 13 TTABVUE 9-10.

¹⁰ Examiner's Brief, 15 TTABVUE 5-7.

In reply, Applicant essentially repeats the arguments made in its Appeal Brief, but emphasizes more forcefully that “[t]he marks should be evaluated as a whole, not dissected. Therefore, the cited marks need to be analyzed as JUST BARE and JUST BARE & design against the mark as applied-for, which is BARE.”¹¹ In neither its Appeal Brief nor its Reply Brief does Applicant separately argue that the design portion of the JUST BARE and Design mark serves to distinguish this mark from Applicant’s BARE mark.

In a completely separate line of argument, Applicant argues that:

As a way to compare similar[ly] situated marks, there are numerous marks in existence that use a part of [a] pre-existing mark. ... All these registrations co-exist peacefully without any issues of confusion and with possibly related goods/services as well as similar words within each mark.¹²

In response to this argument, the Examining Attorney responds that “prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board.”¹³

¹¹ Applicant’s Reply Brief, 16 TTABVUE 4.

¹² Applicant’s Brief, 13 TTABVUE 10-11; Applicant’s Reply Brief, 16 TTABVUE 6. The registered marks made of record and compared by Applicant are GARDEN FRESH GOURMET (Reg. No. 5347365) and GARDEN FRESH (Reg. No. 4556163); HOLLYWOOD SPOTLIGHT (Reg. No. 5409107) and SPOTLIGHT (Reg. No. 5801139); and TWISTED TEA (Reg. No. 2574263) and TWISTED (Reg. No. 5835079). Office Action Response of October 1, 2019 at TSDR 14-37. Each compared pair of marks are registered to different parties. Although Applicant claims there are “numerous marks in existence [on the Federal Register] that use a part of [a] pre-existing mark”, Applicant made of record only three pairs of such marks to support its argument.

¹³ Examiner’s Brief, 15 TTABVUE 7.

We agree with Applicant that the similarity or dissimilarity of two marks is determined based on the marks in their entireties, and our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). “On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant’s argument that the term “JUST” in Registrant’s JUST BARE marks distinguishes them from Applicant’s BARE mark is not well taken. In fact, “the presence of an additional term in the [Registrant’s] mark does not necessarily eliminate the likelihood of confusion if some terms are identical.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (affirming the Board’s finding that the applicant’s mark ML is likely to be perceived as a shortened version of the registrant’s mark ML MARK LEES when used on the same or closely related skin care products).

If, as in this case, a significant portion of both marks is the same (the term “BARE”), then the marks may be similar notwithstanding some differences. *See, e.g.*,

Stone Lion Capital Partners, LP v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (affirming the Board’s finding that applicant’s mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties’ marks). In context, we find that the term JUST serves as an adjective modifying BARE in the registered marks, emphasizing BARE as the dominant term. We thus find that the marks BARE and JUST BARE appear and sound similar in that they share the dominant term “BARE,” notwithstanding the addition of the term “JUST” in Registrant’s standard character mark as well as the additional design features in Registrant’s JUST BARE and Design mark.

As to meaning and commercial impression, the marks relate to Applicant’s and Registrant’s respective products (processed chicken and poultry vs. pork and beef products), such that the term “BARE” suggests the goods have nothing added (such as filler or meat byproducts). In Registrant’s marks, “JUST” could mean “only” or “simply” – together, JUST BARE could suggest simply (or only) chicken or poultry, nothing else.¹⁴ These are the only definitions of “BARE” and “JUST” that make sense in context. That BARE or JUST “may have other meanings in different contexts [as Applicant argues]¹⁵ is not controlling.” *In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)).

¹⁴ See the definitions of “BARE” and “JUST” from the MERRIAM-WEBSTER online dictionary cited above.

¹⁵ Applicant’s Brief, 13 TTABVUE 10.

We find the addition of the term JUST to BARE in the registered marks does not create a distinct commercial impression from Applicant's mark, which is the term BARE standing alone. Thus, we also find that the marks BARE and JUST BARE have similar meanings and overall commercial impressions.

Regarding the JUST BARE and Design mark of Reg. No. 3655877, we find the design element does not outweigh the similarity created by the literal portion vis-à-vis Applicant's BARE mark. When evaluating a composite mark consisting of words and a design, the word portion is normally accorded greater weight because it is likely to make a greater impression upon purchasers, be remembered by them, and be used by them to refer to or request the goods. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018). Therefore, although marks must be compared in their entireties, the word portion is often considered the dominant feature and is accorded greater weight in determining whether marks are confusingly similar, even where the word portion has been disclaimed. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012).

As to Applicant's argument that "there are numerous marks in existence that use a part of [a] pre-existing mark[.]"¹⁶ Applicant's showing of only three pairs of such marks on the Federal Register is insufficient to show a purported pattern of federal registrations. Additionally, the mere omission or addition of wording from a registered mark does not necessarily overcome a likelihood of confusion. *See In re Mighty Leaf Tea*, 94 USPQ2d at 1260. Moreover, prior decisions and actions of other

¹⁶ *Id.*

trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the Board. *See In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017).

The first *DuPont* factor, therefore, favors a finding that confusion is likely.

B. The Similarity or Dissimilarity and Nature of the Goods

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration....” *DuPont*, 177 USPQ at 567. “This factor considers whether ‘the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)).

“Likelihood of confusion must be found as to the entire class of [goods] ... identified if there is likely to be confusion as to **any** [product] ... that comes within the recitation of [goods] ... in that class.” *Primrose Retirement Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)) (Emphasis original).

The goods need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894,

1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] ... emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of use-based registrations of the same mark for both Applicant’s goods and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

As evidence of product relatedness, the Examining Attorney made of record copies of 20 third-party use-based registrations, each depicting the same mark for both Applicant’s goods and the goods listed in the cited registrations.¹⁷ Although such registrations are not evidence that the registered marks are in use or that the public is familiar with them, they nonetheless have some probative value to the extent that they serve to suggest that the goods identified in those registrations are of a kind

¹⁷ Third-party registrations made of record with the Office Action of October 17, 2018 at TSDR 9-53, 82-83.

which may emanate from a single source under a single mark. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The Examining Attorney also provided pages from 16 websites showing, at each site, that the same entity promotes and offers for sale under the same mark the types of goods identified in Applicant's involved application and the cited registrations:

- NICK'S ORGANIC FARM (<http://www.nicksorganicfarm.com/>) – featuring processed beef, sausage, poultry (including chicken).
- MARY'S LAND FARM (<https://www.maryslandfarm.com/>) – featuring processed beef, pork, pork sausage, beef sausage, poultry (including chicken), beef snack sticks.
- SEVEN SONS (<https://sevensons.net/store>) – featuring processed beef, pork, poultry.
- PRIMAL PASTURES (<https://primalpastures.com/collections/all-products>) – featuring beef sausage, chicken, pork sausage, hamburger, beef.
- GOOD EARTH FARMS (<http://www.goodearthfarms.com/>) – featuring poultry (including chicken), beef, and pork.
- ORGANIC PRAIRIE (<https://www.organicprairie.com>) – featuring poultry (including chicken), beef, pork, hamburgers, sausage.
- WHITE OAK PASTURES (www.whiteoakpastures.com) – featuring beef, poultry (including chicken), pork.
- TYSON (<https://www.tyson.com/products/seasoned-proteins>) – featuring beef, chicken, pork.
- JIMMY DEAN (<https://www.jimmydean.com>) – featuring poultry, pork sausage.
- MASSA NATURAL MEATS (<http://www.massanaturalmeats.com>) – featuring pork, pork sausage, chicken.
- FOSSIL FARMS (<https://www.fossilfarms.com>) – featuring beef, poultry (including chicken).
- DIETZ & WATSON (<https://www.dietzandwatson.com>) – featuring poultry (including chicken), beef, pork, sausages.
- APPLGATE (<https://www.applagate.com>) – featuring poultry (including chicken), beef, pork.
- WELLSHIRE (<https://www.wellshirefarms.com>) – featuring chicken, pork sausage, beef, pork.

- LOBEL'S OF NEW YORK (<https://www.lobels.com>) – featuring poultry (including chicken), beef, hamburgers, pork.
- OMAHA STEAKS (<https://www.omahasteaks.com>) – featuring poultry, veal, pork, hamburgers, pork sausages, (including chicken).¹⁸

We find the third-party registration evidence and the Internet website evidence together amply demonstrate the relatedness of Applicant's and Registrant's goods.

Applicant attempts to distinguish its goods from Registrant's goods by arguing that: (1) there are just as many trademark registrations for only one type of meat product as there are trademark registrations for multiple types of meat products, including poultry and chicken, and (2) there are multiple online locations that only sell one type of meat product in addition to those (made of record by the Examining Attorney) that sell multiple types of meat products, including poultry and chicken.¹⁹ Even if we were to consider Applicant's evidence supporting these arguments,²⁰ it would not be of assistance to Applicant. Merely because some companies register or promote their marks in connection with one type of meat product does not mean we can simply ignore the plethora of evidence made of record by the Examining Attorney showing the registration and promotion of many companies' marks in connection with

¹⁸ Pages from the NICK'S ORGANIC FARM, MARY'S LAND FARM, SEVEN SONS, PRIMAL PASTURES, GOOD EARTH FARMS, ORGANIC PRAIRIE and WHITE OAK PASTURES websites were made of record with the Office Action of April 1, 2019 at TSDR 61-94; pages from the TYSON, JIMMY DEAN, MASSA NATURAL MEATS, FOSSIL FARMS, DIETZ & WATSON, APPLGATE, WELLSHIRE, LOBEL'S OF NEW YORK and OMAHA STEAKS websites were made of record with the Examining Attorney's Denial of Request for Reconsideration of October 25, 2019 at TSDR 5-88. Notably, Applicant also made of record portions of some of the same websites as did the Examining Attorney, namely, TYSON and JIMMY DEAN. *See* Applicant's Request for Reconsideration of October 1, 2019 at TSDR 39-46.

¹⁹ Applicant's Brief, 13 TTABVUE 13-14.

²⁰ As noted above, we only consider evidence filed during prosecution; we do not consider evidence filed for the first time with Applicant's Brief.

multiple types of meat products including beef, pork, poultry and chicken (including processed chicken).

As noted above, the goods at issue need not be identical to support a finding of likelihood of confusion. They need only be related in some manner and/or the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source. Here, the evidence of record clearly shows that Applicant's goods and Registrant's goods are related because they are the types of goods provided by the same entities under the same marks. The respective goods also are sold for the same purpose, non-dairy, non-vegetarian, protein-based food products for human consumption.

Thus, the second *DuPont* factor also favors a finding of likelihood of confusion.

C. The Similarity or Dissimilarity of Trade Channels and Classes of Purchasers

Under the third *DuPont* factor, we must base our determination regarding the similarities or dissimilarities between channels of trade and classes of purchasers for the goods as they are identified in the application at issue and the cited registrations. *Octocom Sys., Inc. v. Hous. Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1471 (TTAB 2016). Neither Applicant's application nor the cited registrations contain any limitations as to trade channels or classes of customers, and we may not read any limitation into them. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983), *quoted in In re Mr. Recipe, LLC*, 118 USPQ2d

1084, 1091 (TTAB 2016); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 119 USPQ 139 (CCPA 1958)). Therefore, the goods of both Applicant and Registrant must be assumed to travel in all channels of trade usual for such goods. Applicant's attempt to narrow the trade channels or classes of purchasers for Registrant's goods²¹ is unavailing. An applicant may not restrict the scope of its goods or the scope of the goods covered in the registration by extrinsic argument or evidence. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764–65 (TTAB 1986).

The only evidence relating to the trade channels through which the goods at issue travel is the third-party website evidence submitted by the Examining Attorney and Applicant, discussed above. This evidence shows that the goods identified in Applicant's application, as well as goods identified in the cited registrations, may be offered via the same virtual marketplace to all relevant classes of purchasers, i.e., individuals interested in non-dairy, non-vegetarian, protein-based food products for human consumption.

It further is common knowledge that various meat products as well as processed chicken and poultry may be purchased in the same or at the very least adjacent sections of the same supermarkets, delicatessens and specialty food shops. Thus, the respective goods, as identified, would be provided in the same or at least overlapping channels of trade to the same or overlapping classes of purchasers. Applicant even concedes "that these products can exist in the same store." Applicant's

²¹ Applicant's Brief, 13 TTABVUE 17-18.

counterargument, however, that these goods are sold “in different locations” of the same stores is not supported by any evidence of record.²²

Thus, the third *DuPont* factor weighs in favor of a finding a likelihood of confusion.

D. The Conditions under Which and Buyers to Whom Sales Are Made, i.e. “Impulse” v. Careful, Sophisticated Purchasing

“The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Applicant posits the following arguments to support its contention that confusion between Applicant’s and Registrant’s mark and products is not likely: (1) “the nature of the discriminating consumer[s] of the goods at issue,” (2) “the type of sophisticated purchaser who will be involved in the purchase of Registrant’s and Applicant’s corresponding highly expensive and specific goods exercises a greater degree of [purchasing] care,” (3) “consumers of the products offered by Applicant or the Registrant seek to transact business with each party based on or to satisfy a specific need or purpose for specific goods, heightening the degree of [purchasing] care,” and (4) “consumers who purchase relatively expensive goods ... such as the products offered by the Applicant and/or the Registrant which are specific in the nature of the goods exemplified by Applicant’s and/or the Registrant’s mark[s] are often seen as ‘discriminating purchasers’.”²³

First and foremost, none of these statements are supported in the record. Counsel’s arguments are not evidence, and we will not rely on them. *See Cai v.*

²² Applicant’s Brief 13 TTABVUE 17.

²³ Applicant’s Brief 13 TTABVUE 15-18.

Diamond Hong, Inc., 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”)); *In re Simulations Publ’ns, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975) (“Statements in a brief cannot take the place of evidence.”).

On the other hand, the Examining Attorney argues that “poultry, beef and pork are every day, relatively low-priced food items routinely purchased by the general public[,] ... and subject to impulse buying....” Arguing further, the Examining Attorney contends that “the risk of likelihood of confusion increases because purchasers of these products are held to a lesser standard of purchasing care, citing *In re Bay State Brewing Co., Inc.*, 117 USPQ2d 1958, 1960 (TTAB 2016). “Casual purchasers of low-cost, every-day consumer items [, says the Examining Attorney,] are generally more likely to be confused as to the source of the goods. *In re Davia*, 110 USPQ2d at 1818. As with Applicant, the Examining Attorney does not point to any evidence in the record supporting these arguments, and we have found none.

Binding precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion*, 110 USPQ2d at 1163. Purchasers of poultry (including processed chicken), pork and meat products are ordinary consumers, most of whom would be unlikely to exercise a higher degree of care. Further, even were we to consider care in purchasing the goods in the application and cited registrations, particularly in the context of similar marks and related goods, even discerning consumers are not “immune from trademark confusion.” *See Harry Winston, Inc. v.*

Bruce Winston Gem Corp., 111 USPQ2d 1419, 1442 (TTAB 2014); *see also In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods.”).

Thus, we consider the fourth *DuPont* factor to be neutral with respect to a finding a likelihood of confusion.

IV. Conclusion: Likelihood of Confusion

The first, second, and third *DuPont* factors favor a finding of likelihood of confusion. The fourth *DuPont* factor we find to be neutral. Neither Applicant nor the Examining Attorney presented evidence or argument in their briefs as to the other *DuPont* factors and, accordingly, we treat those factors as neutral well. As the marks at issue are similar, and the goods are related and would travel in overlapping trade channels to the same or overlapping classes of purchasers, we find that Applicant’s BARE mark, when used in connection with Applicant’s goods, so closely resembles the cited JUST BARE and JUST BARE and Design marks as to be likely to cause confusion, mistake or deception as to the source of Applicant’s goods.

Decision:

The refusal to register Applicant’s mark BARE on grounds of likelihood of confusion under Trademark Act Section 2(d) is affirmed.