

This Opinion is Not a  
Precedent of the TTAB

Oral Hearing: September 11, 2019

Mailed: December 31, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Costa Farms, LLC*  
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Serial No. 87674168  
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Milton Springut and Tal Benschar of Springut Law PC,  
for Costa Farms, LLC.

John S. Miranda, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

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Before Kuhlke, Wolfson and Kuczma,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Costa Farms, LLC (“Applicant”) seeks registration on the Principal Register of the  
mark GROW WITH US (in standard characters) for:

Live flowers and living plants in International Class 31.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87674168 was filed on November 6, 2017, based upon Applicant’s claim of first use and first use in commerce of the mark on February 28, 2014 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

The Trademark Examining Attorney refused registration of Applicant's mark under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing Registration No. 5,005,777 owned by HGCI, Inc. ("Registrant"), for the mark GROW WITH US (standard character mark) for "Distributorship services in the field of wholesale horticulture supplies and accessories" in International Class 35<sup>2</sup>, as a bar to registration.

After the Examining Attorney made the refusal final, Applicant appealed to this Board and requested reconsideration of the refusal which was denied. Applicant and the Examining Attorney submitted briefs and Applicant also submitted a reply brief. As set forth below, the refusal to register is reversed.

### Likelihood of Confusion

Our determination under § 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion enunciated in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S.Ct. 1293, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *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)); *Federated Foods, Inc. v. Ft.*

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<sup>2</sup> Registration No. 5,005,777, issued July 26, 2016.

*Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). Additionally, we consider the similarity of the trade channels and the customers of the goods and services.

We have considered all of the evidence as it pertains to the relevant *DuPont* factors, as well as Applicant’s arguments (including any evidence and arguments not specifically discussed in this opinion). *DuPont*, 177 USPQ at 567-68; *see also Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (not all of the *DuPont* factors are relevant to every case, only factors of significance to the particular mark need be considered). The other factors we treat as neutral.

A. Similarity of the Marks

It is well settled that marks are compared in their entireties for similarities in appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). Applicant is in agreement that its applied-for mark GROW WITH US is identical to Registrant’s mark in appearance, sound and connotation and conveys a similar commercial impression when used in connection with Applicant’s flowers and plants and Registrant’s wholesale distribution services in the field of horticulture supplies and

accessories.<sup>3</sup> Therefore, the identity of the marks strongly favors a finding of likelihood of confusion. *See In re Shell Oil*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“The identity of words, connotation, and commercial impression weighs heavily against the applicant.”).

B. Similarity of the Goods and Services

We turn to the next *DuPont* factor involving the similarity of Applicant’s goods, live flowers and living plants, and the cited mark which covers distributorship services in the field of wholesale horticulture supplies and accessories. The issue is whether Applicant’s goods and Registrant’s services are related. 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 and services] 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)); *Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, 100 USPQ2d 1213, 1220 (TTAB 2011) (“Even if marks are identical, the goods and services must also be sufficiently related and/or the circumstances surrounding their marketing be such that purchasers encountering them would mistakenly believe that they emanate from the same source for us to find that confusion is likely to occur.”).

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<sup>3</sup> Applicant’s Appeal Brief p. 3 (14 TTABVUE 8); Applicant’s Reply Brief p. 1 (17 TTABVUE 3).

Notwithstanding Applicant's argument and evidence regarding the actual scope of its own and the cited Registrant's commercial uses of their marks, we may not limit by resort to extrinsic evidence the scope of goods in the subject application or the services in the cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic, llc*, 123 USPQ2d at 1749); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015).

We compare the goods and services set forth in the application and cited registration to determine whether they are similar, commercially related, or travel in the same trade channels. *See Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1722-23; *Herbko Int'l v. Kappa Books*, 64 USPQ2d at 1381. And, where identical marks are involved, as is the case here, the degree of similarity between the goods and services that is required to support a finding of likelihood of confusion declines. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil*, 26 USPQ2d at 1689), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

It is well established that a "relatedness" which bespeaks likelihood of confusion may occur from the use of the same or similar marks for goods, on the one hand, and for services dealing with or related to those goods, on the other hand. *See e.g., In re Detroit Athletic*, 128 USPQ2d at 1052 ("[W]e have held that confusion is likely where one party engages in retail services that sell goods of the type produced by the other party . . . ."); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (holding BIGG'S (stylized) for retail grocery and general merchandise store

services and BIGGS and design for furniture likely to cause confusion); *Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1339, 186 USPQ 476, 480 (CCPA 1975) (“lacking merit is [applicant’s] contention that services [leasing, maintenance and servicing of apparatus for cleaning mechanical parts] and products [cleaning equipment] marketed under substantially the same mark cannot be found likely to cause confusion”); *In re H.J. Seiler Co.*, 289 F.2d 674, 129 USPQ 347, 347-48 (CCPA 1961) (finding that caterers were likely to sell specialty food products as well as to offer catering services supported conclusion that SEILER’S for catering services and SEILER’S for smoked and cured meats were related); *In re United Serv. Distribs., Inc.*, 229 USPQ 237, 239 (TTAB 1986) (design featuring silhouettes of man and woman for distributorship services in the field of health and beauty aids likely to cause confusion with design featuring silhouettes of a man and woman used in connection with skin cream).

Citing *Shen Mfg. Co., Inc. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355-56 (Fed. Cir. 2004), Applicant contends that the “critical question is whether the goods in [its] application and the services in the [cited] Registration are ‘related.’ Related has a specific legal definition: ‘related in the mind of the consuming public as to the origin of the goods . . . It is this sense of relatedness that matters in the likelihood of confusion analysis.’”<sup>4</sup> “Looser relationships do not suffice; for example, the mere fact that ‘two goods are used together, however, does not, in itself, justify a

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<sup>4</sup> Applicant’s Appeal Brief pp. 3-4 (14 TTABVUE 8-9).

finding of relatedness.” *Id.*<sup>5</sup> Additionally, as Applicant notes, the cited Registration “is expressly limited to distributorship services of horticultural supplies at the wholesale level, and it is that distribution channel where any confusion analysis must focus, as wholesale customers are the only class of relevant purchasers who might be confused.”<sup>6</sup>

As supported by the Declaration of Carlos Acevedo, Senior Vice President of Sales of Applicant for thirteen years, “[t]he assertion that ‘horticultural supplies’ encompasses live plants and flowers is simply incorrect.”<sup>7</sup> Mr. Acevedo explains that in the industry, horticultural supplies are “best defined as the hard-good inputs needed in horticultural endeavors, including growing live plants and flowers.” By searching in Google “for ‘horticultural supplies’ the name of several hard goods suppliers will come up.” *Id.* “[F]ive examples of websites or product catalogs that result from such a search, showing offerings of numerous hard goods, but not plants and flowers” are shown in Exhibits B to F to the Acevedo Declaration. Thus, in the industry, Mr. Acevedo maintains that horticultural supplies are a distinct category of goods from live flowers and plants.<sup>8</sup>

We agree with Applicant that the related services doctrine (services provided in connection with the same goods) has no application here. Registrant’s distributorship

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<sup>5</sup> Applicant’s Appeal Brief p. 4 (14 TTABVUE 9).

<sup>6</sup> Applicant’s Appeal Brief at p. 1 (14 TTABVUE 6).

<sup>7</sup> Declaration of Carlos Acevedo, Senior Vice President of Sales of Applicant ¶ 9 attached to Applicant’s April 10, 2019 Request to Suspend and Remand (10 TTABVUE).

<sup>8</sup> Acevedo Decl. ¶ 9 and Exhibits B-F (10 TTABVUE 7, 14-74).

services in the field of wholesale horticulture supplies and accessories are not related to Applicant's live flowers and plants, they are at most related to a different type of goods, i.e., horticultural supplies and accessories.<sup>9</sup> The Examining Attorney does not dispute that horticultural supplies and accessories do not include live flowers and plants. Rather, he argues that Applicant's live flowers and plants, and the horticultural supplies and accessories distributed by Registrant, all fall within the "broad category" of horticultural products,<sup>10</sup> citing no authority for extending the related services doctrine to encompass flowers and plants as horticultural products. Reliance on the related services doctrine is not appropriate here where Registrant's services are provided in connection with goods (horticultural supplies and accessories) which are different from Applicant's live flowers and plants. Even if Applicant's flowers and plants and, Registrant's distributorship in services in the field of wholesale horticultural supplies and accessories, both have some relationship to the broad category of horticultural products, this does not render them related in a manner that confusion is likely to occur. *See Calypso Tech.*, 100 USPQ2d at 1222 (computer software related to financial services was found not related to "equity investment management and fund services," even though both were in the same broad category – the financial field).

To support a likelihood of confusion it is not necessary that the goods or services on or in connection with which the marks are used be identical or even competitive

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<sup>9</sup> Applicant's Appeal Brief p. 18 (14 TTABVUE 23).

<sup>10</sup> Examining Attorney's Brief at 16 TTABVUE 6.

in order to find that they are related for purposes of our likelihood of confusion analysis. It is enough if there is a relationship between them or they are marketed under the same or similar conditions and surroundings to the same general class(es) of purchasers such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources. That is, the issue is not whether customers would confuse the goods and services themselves, but rather whether they would be confused as to the source of the goods and services or find an association between their sources. *J.C. Hall Co. v. Hallmark Cards, Inc.*, 144 USPQ 435 (CCPA 1965); *McDonald's Corp. v. McKinley*, 13 USPQ2d 1895, 1898 (TTAB 1989); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Here, however, there is no evidence showing that Applicant's goods and Registrant's services may emanate from a single source. Instead, the evidence shows that horticultural supplies are manufactured goods that are subsequently distributed by entities different than those that sell highly perishable live flowers and plants which are grown by breeders and growers, requiring special handling by specialized companies.<sup>11</sup>

In view of the foregoing, the relatedness of Applicant's goods and Registrant's services in the wholesale market has not been established. Thus, the *DuPont* factor of the similarity of the goods and services favors Applicant.

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<sup>11</sup> Acevedo Decl. ¶¶ 5-6 (10 TTABVUE 6).

C. Channels of Trade and Classes of Customers

With respect to the channels of trade and classes of customers, our determinations under these factors are also based on the services as they are identified in the cited registration and the goods identified in Applicant's application. *See Stone Lion v. Lion Capital*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Dixie Rests.*, 41 USPQ2d at 1534.

While Applicant's identification of goods contains no channels of trade or user limitations, because Registrant's services are limited to distribution services in the wholesale channel of trade and customers who purchase its goods wholesale, "the relevant class of purchasers" is the "retailer [outlets] to whom [registrant's] distributorship services are directed." *See In re United Servs. Distribs.*, 229 USPQ at 238-239 (where use of a mark is directed to distributorship services in a particular field, the relevant class of purchasers for determining likelihood of confusion are the retailers who are the wholesaler's customers in that field).

Because Registrant's mark is limited to the field of wholesale distribution of horticulture supplies and accessories, Applicant and the Examining Attorney agree that is the proper focus of the confusion analysis and that the customers of wholesale distribution include retail outlets, such as nurseries, garden centers and garden departments of large chain stores.

The same commercial entities that would purchase Applicant's flowers and plants could also avail themselves of the services offered by Registrant. However, there is no evidence that the same people at those entities make the decision to purchase

wholesale distributor services for horticulture supplies and accessories, and also purchase live flowers and plants. *See Calypso Tech.*, 100 USPQ2d at 1221 citing *Electronic Design & Sales Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992) (the mere purchase of the goods and services of both parties by the same institution does not, by itself, establish similarity of trade channels or overlap of customers); *Electronic Data Sys. Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1465 (TTAB 1992) (the fact that a large company, which buys a myriad of different products and services, may purchase opposer's and applicant's services and goods, does not either make the services and goods related or demonstrate that confusion is likely to occur because of the use of similar marks). The mere likelihood that a business will purchase services and products from both Applicant and the owner of the cited registered mark does not, by itself, establish similarity of trade channels or overlap of customers. *Electronic Design v. Electronic Data*, 21 USPQ2d at 1391; *In re Digirad Corp.*, 45 USPQ2d 1841, 1844 (TTAB 1998) (“[S]imilarity of trade channels or overlap of customers is not established simply because both [applicant and registrant] ... sell their products to the same institution.”). Therefore, the fact that Applicant's goods and Registrant's services may fall within the overall category of horticultural products does not make them related. *See Electronic Design*, 21 USPQ2d at 1390-91.

Applicant points to Mr. Acevedo's Declaration where he declares:

5. In my experience, at the wholesale level . . . the companies that distribute horticultural supplies are different than those which distribute live flowers and plants. Horticultural supplies are manufactured by

numerous manufacturers, and then distributed through other companies that distribute the various supplies at wholesale. In contrast, live plants and flowers are not manufactured articles — they are grown by breeders and growers in greenhouses or farms. These products are highly perishable, and hence require special handling in packaging and transporting them to outlets where they are sold to the public.

6. Given that the growing of live plants and flowers is such a different business and requires specialized handling, it is generally done by different companies and using different trademarks. . . .<sup>12</sup>

According to Mr. Acevedo, the growing of live plants and flowers which require specialized handling is such a different business than distribution of horticultural supplies that it is generally done by different companies using different trademarks.<sup>13</sup> He is aware of only two companies that have been involved with growing live plants and flowers, and in manufacturing horticultural supplies.<sup>14</sup> The first company, ScottsMiracle-Gro, manufactures fertilizers and other gardening supplies. It entered into a partnership with a company named Bonnie Plants, a national grower and distributor of flower and vegetable plants. Although ScottsMiracle-Gro and Bonnie Plants collaborate on product development and research, they operate as separate businesses each with its own management, labor pool, sales team, and distribution channel, and, each utilize separate trademarks for their respective product lines.<sup>15</sup>

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<sup>12</sup> Acevedo Decl. ¶ 5-6 (10 TTABVUE 5).

<sup>13</sup> Acevedo Decl. ¶ 6 (10 TTABVUE 6).

<sup>14</sup> Acevedo Decl. ¶ 6 (10 TTABVUE 6).

<sup>15</sup> Acevedo Decl. ¶ 7 and Exhibit A (10 TTABVUE 6-7). While ¶ 7 of the Acevedo Decl. refers to “fertilizers and other gardening suppliers,” it is obvious from the context of the sentence that “gardening supplies” was the intended term. Although the July 9, 2018 Greenhouse Grower article entitled “How Bonnie Plants and ScottsMiracle-Gro Are Investing in

Similarly, Central Garden & Pet, a manufacturer of garden and lawn care products, acquired a grower named Bell Nursery in 2018. According to Mr. Acevedo, Central Pet & Garden is the parent company; yet, Bell Nursery continues to operate as a separate business, using its own, different trademarks to identify its product line of flowers and plants.<sup>16</sup>

Based on the foregoing, Applicant argues that wholesale distribution of horticultural equipment and, wholesale distribution of highly perishable live plants and flowers, have different physical requirements. In short, Registrant's distribution services of horticultural supplies and accessories, and Applicant's live flowers and plants, are distinct business lines, with distinct distribution, that are not handled by the same sources.<sup>17</sup> Applicant concludes that in the wholesale market the same entities never provide Registrant's services and Applicant's goods citing *Calypso Tech.*, 100 USPQ2d at 1221, (even though there was "clearly some connection" between the goods and services at issue, as both were "in the financial field," that was insufficient to find them related) in support.<sup>18</sup>

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Consumer Success" attached as Exhibit A to the Acevedo Decl., says ". . . Through these efforts, the company discovered that most consumers already associated the ScottsMiracle-Gro name with plants, not just products to nurture plants." (10 TTABVUE 11), this refers to end consumers which involve a different trade channel and class of customer than those in this case.

<sup>16</sup> Acevedo Decl. ¶ 8 (10 TTABVUE 7).

<sup>17</sup> Applicant's Appeal Brief p. 6 (14 TTABVUE 11); Applicant's Reply Brief p. 2 (17 TTABVUE 4).

<sup>18</sup> Applicant's Reply Brief p. 2 (17 TTABVUE 4).

The Examining Attorney submits evidence of some retail outlets that carry both horticultural supplies and live plants, some that carry only flowers and plants, and a few distributors of horticultural supplies<sup>19</sup>:

1. Retailers Offering Only Flowers and Plants

Merrifield Garden Center website (1/22/18 Office Action, TSDR 10-15)

Shows the offering of various plants and flowers, as well as landscaping services at retail. The sole offerings are plants, not horticultural supplies. Thus, it does not provide any evidence about wholesale distribution of Applicant's goods or Registrant's services.

Meadows Farms website (1/22/18 Office Action, TSDR pp. 16-17)

Shows the offering of various plants and flowers, as well as landscaping services. This is not a wholesale supplier, so it evidences nothing about wholesale distribution of Applicant's goods or Registrant's services. Additionally, the sole offerings are plants, not horticultural supplies, so it does not support the sale of Applicant's goods and Registrant's services.

Both of these two retailer websites only show use of a mark at retail to the end consumer, which is not the wholesale distribution channel of trade involved here.

2. Retailers Offering Both Plants and Horticultural Supplies

Gardener's Supply Co.; Ikea; Roberta's Gardens; Terrain; Cost Plus World Market (3/12/19 Denial of Reconsideration, TSDR 5-14, 15-20, 21-28, 29-32, 33-42)

These pages are from the websites of online retail outlets using their own house mark for online retail store services to offer both flowers and plants, and horticultural supplies (and presumably other goods as well) to end consumers.

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<sup>19</sup> Examining Attorney's Brief (16 TTABVUE 5).

None of the foregoing evidence shows that the same entity provides both Applicant's goods and Registrant's services under the same brand names.

### 3. Wholesalers Offering Only Horticultural Supplies

Carlin (8/6/18 Final Office Action, TSDR 23-25)

Wholesale supplier of horticultural supplies and equipment. There is no offering of live plants and flowers.

BFG Supply Co. (1/22/18 Office Action, TSDR 18-30)

BFG is a wholesale supplier of horticultural supplies. The main part of the BFG site (TSDR 18-21) lists several catalogs under the BFG mark (BFG) offering various horticultural and gardening supplies, but not plants and flowers.

Another section of the BFG website (TSDR 22-30) identifies "The Plant Connection," a separate (and differently named) division of the BFG company. The Plant Connection refers customers to a list of over 100 independent growers around the country who sell plants and flowers under their own separate trademarks. Viewers are offered to "Connect Yourself to our extensive network of growers." located all over the country. (TSDR 22).

Carlin is a wholesale supplier that does not offer live plants and flowers; BFG is also a wholesale supplier referring customers to growers of live flowers and plants who offer them for purchase under their own, separate tradenames and trademarks. The evidence from Carlin and BFG does not show that either of them provide both Registrant's services and Applicant's goods under the same mark.

When analyzing the channels of trade and classes of purchasers, we must keep in mind that even though Applicant and Registrant conduct business in related fields, possibly with some of the same companies, the mere purchase of goods and services of both parties by the same institution does not, by itself, establish similarity of trade

channels or overlap of customers. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1412 (TTAB 2010) (citing *Electronic Design*, 21 USPQ2d at 1391) (“[T]he mere purchase of the goods and services of both parties by the same institution does not, by itself, establish similarity of trade channels or overlap of customers.”); *see also, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (although we may assume that vodka and wine are sold to the same class of purchasers, this is not a sufficient basis on which we may conclude that such goods are related).

The Examining Attorney contends the evidence clearly establishes that third-party live-plant distributors, such as McHutchison and Michell’s, describe themselves as “horticultural,” “with MCHUTCHISON calling itself a ‘horticultural’ company and MICHELL’S describing its business as ‘dealing with seeds, plants and a wide range of other horticultural products.’”<sup>20</sup> Based on the foregoing, the Examining Attorney argues that “[t]his strongly persuasive evidence of record makes it clear that applicant’s goods fall within the general category of ‘horticultural’ products, and therefore, travel in the same channels of trade as registrant’s horticultural supply distribution services.”<sup>21</sup>

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<sup>20</sup> Examining Attorney’s Brief (16 TTABVUE 5) citing to March 12, 2019 Denial of Request for Reconsideration at TSDR 44-46, 47-49 (McHutchison website at TSDR 44: “We’re a horticultural distributor passionate about delivering quality products and superior service to our customers.”) (Michell’s website at TSDR 48: “. . . dealing with seeds, plants, and a wide range of other horticultural products. . .”).

<sup>21</sup> Examining Attorney’s Brief (16 TTABVUE 5).

However, a closer look at this evidence reveals that McHutchinson's which sells "the highest quality plant material . . ." refers to itself as a "horticultural distributor" and Michell's sells plant materials advertising that it is "the first choice for numerous wholesale horticultural customers nationwide." While these websites use the term "horticultural" in the broadest sense, both parties are selling plants or flowers, not offering distributorship services in the field of wholesale horticulture supplies and accessories. Therefore, these websites do not show use in the same trade channels as Registrant. Neither does the ROOM FOR IMPROVEMENTS website evidence submitted by the Examining Attorney, which identifies gardening tools and explains how to use them in planting and maintaining a garden.<sup>22</sup> The Examining Attorney's argument that Applicant's live flowers and plants are intended to be used together with the horticultural supplies and accessories provided via Registrant's distributorship services misses the point. The argument in connection with the ROOM FOR IMPROVEMENT website is directed towards the complementary uses of live flowers and plants in connection with horticultural supplies in the end consumer market. The channel of trade and class of customer involved in this case however, is the commercial market and the purchasers in that market.

Applicant contends that in the wholesale market for Applicant's goods and Registrant's services, the buying personnel are different. This difference, according to Applicant, means that the respective goods and services operate in different trade

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<sup>22</sup> Examining Attorney's Brief (16 TTABVUE 5-6) citing to Room for Improvements website in the August 6, 2018 Final Office Action at TSDR 26-32.

channels. As addressed above, Applicant's evidence shows that in the wholesale market different personnel are involved in purchasing Applicant's flowers and plants and utilizing Registrant's wholesale distribution services for horticultural supplies indicating that there are different channels of trade. The fact that "*end consumers* might make 'conjoint use' of the two types of goods is not at all probative of whether *wholesale customers* at issue here would be confused."<sup>23</sup> None of the evidence submitted by the Examining Attorney shows the same mark being used for flowers and plants sold at wholesale and the wholesale distribution of horticultural supplies.

There is an absence of evidence tending to show that Applicant's goods and Registrant's services, even if bought by the same commercial entities, would be purchased by the same individuals employed by such entities and thus give rise to a likelihood of confusion as to source or sponsorship. As noted by our principal reviewing court in *Electronic Design*, 21 USPQ2d at 1391, it is error to deny registration simply because an applicant markets and sells its goods in one (or more) of the same generalized fields as those in which a registrant markets and sells its goods without also determining who are the relevant purchasers in instances of common institutional customers. Here, the possible purchase by the same institutions of both Applicant's flower and plant products and Registrant's wholesale distributorship of horticulture supplies and accessories, does not, of itself, establish similarity of trade channels or overlap of customers. Any likelihood of confusion must,

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<sup>23</sup> Applicant's Appeal Brief p. 7 (14 TTABVUE 12).

instead, be shown to exist not in a purchasing institution but in a shared customer or purchaser, which evidence is lacking here.

#### D. Sophistication

Sophistication is important and often dispositive because sophisticated purchasers may be expected to exercise greater care. *See Electronic Design*, 21 USPQ2d at 1392. The evidence in this case shows that the sophistication of the relevant purchasers and their knowledge of the realities of the wholesale market weighs against any confusion.

The relevant buyer class is composed solely of commercial or professional purchasers familiar with the fields of flowers and plants, and distribution of wholesale horticulture supplies and accessories. This factor typically strongly favors a finding of no likelihood of confusion. Based on the record, we agree with Applicant that “the only narrow and limited overlap in the potential class of customers comprise sophisticated, knowledgeable individuals who have a close business relationship with applicant,” and that these consumers are not likely to be confused.<sup>24</sup> In view thereof, Applicant’s mark for “live flowers and living plants,” is not likely to cause confusion with the identical mark in the cited registration for “distributorship services in the field of wholesale horticulture supplies and accessories.”

As explained by Mr. Acevedo, Senior Vice President of Sales for Applicant, horticultural supplies are manufactured by numerous manufacturers and then

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<sup>24</sup> Applicant’s Appeal Brief p. 9 (14 TTABVUE 14).

distributed through distributors that distribute the various supplies at wholesale to accounts such as box stores, garden centers and nurseries. In contrast, live plants and flowers are grown by breeders and growers in greenhouses or farms. Such products are highly perishable, requiring special handling in packaging and transporting them to outlets where they are sold to the public.<sup>25</sup>

It is reasonable to assume that Applicant's and Registrant's commercial customers will be relatively sophisticated in making their purchases of these goods. *Centraz Industries Inc. v. Spartan Chemical Co.*, 77 USPQ2d 1698, 1699-1700 (TTAB 2006) (commercial and institutional buyers of cleaning products, including floor finishing preparations relatively sophisticated). Even the Examining Attorney recognizes that "wholesale purchasers are generally sophisticated consumers."<sup>26</sup>

Here, the potential for confusion appears to be a mere possibility not a probability. *See Electronic Design*, 21 USPQ2d at 1393. The purchasers of Applicant's goods and Registrant's services would likely be sophisticated purchasers, which undercuts the possibility of confusion. *Id.* at 1392; *Astra Pharmaceutical Prods., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 220 USPQ 786 (1st Cir.1983) (purchasers of local anesthetic preparations, cardiovascular medicines, and prefilled syringes, on the one hand, and purchasers of computerized blood analysis machines, on the other hand, are distinct professionals and unlikely to be confused).

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<sup>25</sup> Acevedo Decl. ¶ 5 (10 TTABVUE 6).

<sup>26</sup> Examining Attorney's Brief (16 TTABVUE 6).

The sophisticated purchasers involved in the wholesale purchase of Applicant's live plant goods and Registrant's distributorship services in the field of wholesale horticulture supplies and accessories would be aware of the practices of the industry and recognize that such goods and services do not emanate from a single source. *Calypso Tech.*, 100 USPQ2d at 1222.

E. Conclusion

Any of the *DuPont* factors may play a dominant role from case to case. *DuPont*, 177 USPQ at 567. In this case, the factors of the dissimilarity of the goods and services and even more importantly, the sophistication of the purchasers, outweigh the other factors, including the identity of the marks, and favors a finding of likelihood of confusion.

While Applicant's applied-for mark and Registrant's mark are identical, that by itself is not dispositive. Even identical marks have been held not to be confusing where the goods and services are not related. *See, e.g., Shen Mfg.*, 73 USPQ2d 1355-56. It is clear that retailers and others who receive Registrant's wholesale distributorship services of horticulture supplies and accessories are also the type of wholesale purchasers of Applicant's flowers and plants for their retail outlets which are re-sold to the ultimate consumer. This class of customers, which utilize purchasing personnel, is more sophisticated in their purchasing habits than the ultimate end consumer of flowers and plants, and horticultural supplies and accessories. Based on the evidence submitted, we believe that this class of customer, familiar with wholesale distribution of horticulture supplies and accessories sold

under a particular mark are sophisticated and careful wholesale purchasers, who upon coming into contact with a seller of flowers and plants sold under an identical mark, would not erroneously believe that said distributorship services and the flowers and plants were somehow sponsored by or associated with the same source.

Inasmuch as “[w]e are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal,” *Electronic Design*, 21 USPQ2d at 1391, quoting from *Witco Chem. Co. v. Whitfield Chem. Co.*, 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969), and taking into account the record in this case, we find that confusion with Registrant’s mark is not likely.

**Decision:** The refusal to register Applicant’s mark GROW WITH US under § 2(d) of the Trademark Act is reversed.