

This Opinion is Not a
Precedent of the TTAB

Mailed: October 13, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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McKee Foods Kingman, Inc.
v.
Coastal Sunbelt Produce, LLC
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Opposition No. 91224476
—

Sandra Edelman of Dorsey & Whitney LLP
for McKee Foods Kingman, Inc.

David J. Ervin of Crowell & Moring LLP,
for Coastal Sunbelt Produce, LLC.

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Before Taylor, Bergsman and Shaw,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Coastal Sunbelt Produce, LLC (“Applicant”) seeks registration on the Principal Register for the marks listed below, all filed on February 23, 2015:

1. Application Serial No. 86542924 for the mark SUNBELT ORGANIC (standard characters) for “organic foodstuffs, namely, salsa,” in Class 30;
2. Application Serial No. 86542882 for the mark SUNBELT ORGANIC and design, shown below, for “organic foodstuffs, namely, salsa,” in Class 30;



3. Application Serial No. 86542895 for the mark SUNBELT ORGANIC (standard characters) for “organic processed fruits and vegetables,” in Class 29;
4. Application Serial No. 86542911 for the mark SUNBELT ORGANIC (standard characters) for “organic fresh fruits and vegetables,” in Class 31;
5. Application Serial No. 86542872 for the mark SUNBELT ORGANIC and design, shown below, for “organic fresh fruits and vegetables,” in Class 31;



6. Application Serial No. 86542854 for the mark SUNBELT ORGANIC and design, shown below, for “processed organic fruits and vegetables,” in Class 29.



Applicant disclaimed the exclusive right to use the word “organic” in all the applications. Applicant claimed ownership of the following registrations in all the applications:

1. Registration No. 2961753 for the mark COASTAL SUNBELT PRODUCE and design, shown below, for “wholesale distributorship services featuring produce,” in Class 35.¹



2. Registration No. 2961770 for the mark COASTAL SUNBELT PRODUCE (typed drawing form) for “wholesale distributorship services featuring produce,” in Class 35.²
3. Registration No. 4454076 for the mark COASTAL SUNBELT PRODUCE and design, shown below, for “fresh produce, namely, fruits and vegetables,” in Class 31.³



Applicant disclaimed the exclusive right to use the word “produce” in all the registrations.

¹ Registered June 14, 2005; renewed.

² Registered June 14, 2005; renewed.

³ Registered December 24, 2013.

McKee Foods Kingman, Inc. (“Opposer”) filed a Notice of Opposition against the registration of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks so resemble Opposer’s SUNBELT, SUNBELT BAKERY, and SUNBELT BAKERY and design marks, for granola, granola bars, snack bars, cereal, cookies and snack cakes as to be likely to cause confusion. Opposer pleaded ownership of the following registrations:

1. Registration No. 1228969 for the mark SUNBELT (typed drawing) for “cookies and cakes,” in Class 30;⁴
2. Registration No. 1875441 for the mark SUNBELT (typed drawing) for “breakfast cereals, granola-based snack bars,” in Class 30;⁵
3. Registration No. 4831911 for the mark SUNBELT BAKERY (standard characters) for “granola; breakfast cereal; granola-based snack bars; grain-based snack bars; grain-based snack bars also containing fruit; cereal-based snack bars; cookie bars,” in Class 30.⁶ Opposer disclaimed the exclusive right to use the word “bakery”;
4. Registration No. 4836630 SUNBELT BAKERY and design, shown below, for “granola; breakfast cereal; granola-based snack bars; grain-based snack bars; grain-based snack bars also containing fruit; cereal-based snack bars; cookie bars,” in Class 30.⁷

⁴ Registered March 1, 1983; second renewal.

⁵ Registered January 24, 1995; second renewal.

⁶ Registered October 13, 2015.

⁷ Registered October 20, 2015.



Opposer disclaimed the exclusive right to use the word “bakery.”

Applicant, in its Answer, denied the salient allegations in the Notice of Opposition.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant’s application files. The record also includes the following items:

A. Stipulation

The parties stipulated that 16 third parties “offer for sale” various combinations of fruits, vegetables, salsa, granola, snack foods, cookies, *etc.* under the same marks.⁸

B. Opposer’s testimony and evidence.

1. Notice of reliance on the following items:

- a. Opposer’s pleaded registrations printed from the USPTO electronic database showing their current status and title;⁹ and
- b. Applicant’s responses to Opposer’s interrogatory Nos. 8 and 9;¹⁰

⁸ 12 TTABVUE.

⁹ 14 TTABVUE 6-20.

¹⁰ 17 TTABVUE 22-25. Applicant’s responses to interrogatory Nos. 8 and 9 were designated as confidential. Pursuant to Trademark Rule 2.116(g), 37 C.F.R. § 2.166(g), “[t]he Board may treat as not confidential that material which cannot reasonably be considered confidential, notwithstanding a designation as such by a party.”

2. Testimony declaration of Kenny Hammontree, Associate Brand Manager-Sunbelt Bakery at McKee Foods Corporation, with attached exhibits;¹¹
3. Expert testimony deposition of George Mantis, the principal of The Mantis Group, Opposer's survey expert, with attached exhibits;¹²
4. Rebuttal testimony declaration of Jeff Badger, Director of Granola, Cereal, and Specialty Brands at McKee Foods Corporation with attached exhibits;¹³
and
5. Rebuttal testimony declaration of Kenny Hammontree with attached exhibits.¹⁴

C. Applicant's testimony and evidence.

1. Testimony declaration of Thomas Brown, Vice President of Retail Sales at East Coast Fresh, the related company with common ownership with Applicant, with attached exhibits;¹⁵
2. Testimony declaration of Jessica Amodeo, Marketing Associate, with attached exhibits;¹⁶ and
3. Notice of reliance on the following items:

¹¹ 15 TTABVUE. The portions of the Hammontree declaration designated as confidential are posted at 16 TTABVUE.

¹² 18 TTABVUE. The parties stipulated that George Mantis' expert report will serve as his direct testimony. Mantis Dep., pp. 5-6 (18 TTABVUE 8-9).

¹³ 24 TTABVUE.

¹⁴ 15 TTABVUE.

¹⁵ 19 TTABVUE.

¹⁶ 19 TTABVUE 12.

- a. Opposer's responses to Applicant's interrogatory nos. 3, 4, 9 and 11-13;¹⁷
- b. Herb Sorensen, *The Science of Shopping*, 5 **Marketing Research** No. 3, Fall 2003, at 20-35;¹⁸
- c. U.S. Dep't of Agriculture, Labeling Organic Products Fact Sheet (October 2012);¹⁹ and
- d. U.S. Dep't of Agriculture, Guide for Organic Crop Producers (November 2012).²⁰

II. Standing

Because Opposer's pleaded registrations have been made of record, Opposer has established its standing in this proceeding. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

III. Priority

Because Opposer has properly made of record its pleaded registrations, and because Applicant has not filed a counterclaim to cancel any of Opposer's pleaded registrations, Section 2(d) priority is not an issue in the opposition as to the marks and the goods covered by the pleaded registrations. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

¹⁷ 20 TTABVUE 6.

¹⁸ 20 TTABVUE 15.

¹⁹ 20 TTABVUE 23.

²⁰ 20 TTABVUE 26.

IV. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”) (cited in *B&B Hardware, Inc. v. Hargis Ind., 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). We have considered each *du Pont* factor that is relevant and for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“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.”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 303 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The similarity or dissimilarity of the marks.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. “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.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007); *see also San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir.1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the

goods at issue are salsa, processed and fresh organic fruits and vegetables, cookies, cakes, granola, breakfast cereal, granola-based snack bars, grain-based snack bars, grain-based snack bars also containing fruit, and cereal-based snack bars, the average customer is an ordinary consumer.

The marks are similar because they share the word “Sunbelt” and, to that extent, they are identical in appearance, sound, connotation and commercial impression. For the reasons discussed below, we find the word “Sunbelt” to be the dominant element in the marks of both parties. Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the 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. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also 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, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 224 USPQ at 751.

With respect to Opposer’s mark SUNBELT BAKERY and design



and Applicant's SUNBELT ORGANIC and design,



the parties incorporate different designs. However, where the marks consist of words and a design, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the goods. *See In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983)); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

The word "Organic" in Applicant's mark is descriptive and has been disclaimed.²¹ Likewise, the word "Bakery" in Opposer's mark is descriptive and has been

²¹ "Organic" is defined, *inter alia*, as "pertaining to, involving, or grown with fertilizers or pesticides of animal or vegetable origin, as distinguished from manufactured chemicals: *organic farming; organic fruits.*" *Dictionary.com* based on the **Random House Dictionary** (2017). 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

disclaimed. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846 (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 224 USPQ at 752); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression”).

Finally, the significance of “Sunbelt” as the dominant element of the parties’ marks is reinforced by its location as the first part of the mark. *See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”).

(TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

In this regard, some consumers are likely to refer to Applicant's SUNBELT ORGANIC products, as well as Opposer's SUNBELT BAKERY products, as just SUNBELT. "[U]sers of language have a universal habit of shortening full names – from haste or laziness or just economy of words. Examples are: automobile to auto; telephone to phone; necktie to tie; gasoline service station to gas station." *In re Abcor Development Corp.*, 588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (J. Rich, concurring).

[C]ompanies are frequently called by shortened names, such as Penney's for J.C. Penney's, Sears for Sears and Roebuck (even before it officially changed its name to Sears alone), Ward's for Montgomery Ward's, and Bloomies for Bloomingdales.

Marshall Field & Co. v. Mrs. Fields Cookies, 25 USPQ2d 1321, 1333 (TTAB 1992).
See also Giant Food, Inc. v. Nation's Foodservice, Inc., 218 USPQ at 395 ("Although the record does not indicate that applicant's business is commonly referred to as 'Giant', it does indicate that people have called it by that name, omitting the word 'Hamburgers'. Thus, in a conversation between two consumers in opposer's area about a place of business called 'Giant', there likely would be confusion about which 'Giant' they were talking about."); *Big M Inc. v. The United States Shoe Co.*, 228 USPQ 614, 616 (TTAB 1985) ("[W]e cannot ignore the propensity of consumers to often shorten trademarks and, in the present case, this would be accomplished by dropping the 'T.H.' in referring to registrant's stores [T.H. MANDY].").

The word “Sunbelt” is defined as “the southern and southwestern region of the U.S.”²² Thus, Opposer’s marks SUNBELT and SUNBELT BAKERY and Applicant’s mark SUNBELT ORGANIC suggest similar meanings and engender similar commercial impressions (*i.e.*, products originating from the sunbelt or the southern U.S.). Given the parties’ stipulation that third parties “offer for sale” various combinations of fruits, vegetables, salsa, granola, snack foods, cookies, *etc.*, consumers familiar with Opposer’s SUNBELT products are likely to believe that SUNBELT BAKERY products are the SUNBELT bakery line of products and that SUNBELT ORGANIC products are the SUNBELT line of organic fruits and vegetables.

Applicant argues to the contrary that the marks engender different commercial impressions. According to Applicant, SUNBELT ORGANIC “invoke[s] notions of the sun with freshness and agriculture and supports the consumer’s association between freshness and the organic classification of the SUNBELT ORGANIC products.”²³ Applicant’s contention is based on Jessica Amodeo’s testimony that the SUNBELT ORGANIC mark was derived from the COASTAL SUNBELT organic line of products.²⁴ As noted above, the marks consist of COASTAL SUNBELT PRODUCE, COASTAL SUNBELT PRODUCE and design, shown below,

²² *Dictionary.com* based on the **Random House Dictionary** (2017); *see also Merriam-Webster* (*merriam-webster.com*) (“region of the southern and southwestern U.S. characterized by a mild winter climate and rapid population growth especially from 1970 to 1990.”).

²³ Applicant’s Brief, p. 9 (29 TTABVUE 15) (citing Amodeo Decl. ¶16 (19 TTABVUE 16)).

²⁴ Amodeo Decl. ¶16 (19 TTABVUE 16).



Those marks mean and engender the commercial impression of produce originating along the coast of the Sunbelt as opposed to any “notions of the sun with freshness and agriculture.”²⁵

In view of the foregoing, we find that the marks are similar in their entireties in terms of appearance, sound, meaning and commercial impression.

B. The similarity or dissimilarity and nature of the goods.

It is only necessary that there be a viable relationship between the goods of the parties to support a finding of likelihood of confusion. *In re Concordia Int’l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). The issue is not whether purchasers would confuse the parties’ goods, but rather whether there is a likelihood of confusion as to the source of these goods. *In re Cook Medical Tech. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012); *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).²⁶

²⁵ Amodeo Decl. ¶16 (19 TTABVUE 16).

²⁶ Applicant presented testimony and argues in its brief that its fruits and vegetables are different than Opposer’s granola and bakery style products. Applicant’s Brief, p. 13 (29 TTABVUE 19); Brown Decl. ¶¶16-20 (19 TTABVUE 5-6). However, the differences in the products *per se* is of limited relevance if consumers believe that those products emanate from a single source. Thus, Opposer contends that consumers perceive Applicant’s products as being related to Opposer’s products based on Opposer’s evidence showing that third parties sell the products of both parties under the same mark, that the products may be sold in the same section of a grocery store, that the products are promoted as providing similar benefits, and that they are complementary products. *See* the discussion below.

The parties have stipulated that 16 third parties “offer for sale” various combinations of the relevant goods under the same mark.²⁷ For example, the following examples are representative:

- OCEAN SPRAY fresh fruit and granola containing dried fruit;
- GOYA canned vegetables and fruit, frozen vegetables, salsa, snack foods and cookies;²⁸
- CASCADIAN FARMS cereals, granola, granola bars, frozen fruits and vegetables.

Based on this evidence of third-party use, we infer that the goods of the parties may emanate from the same source.

Applicant argues to the contrary that the inference is invalid because none of the third-parties uses their marks in connection with organic, fresh-cut fruit vegetables, or salsa.²⁹ However, as noted above, the average customer is an ordinary consumer and we see no reason why an ordinary consumer would distinguish the source of different kinds of fruits and vegetables sold under similar marks, nor has Applicant provided any explanation. Applicant might have us conclude that consumers will make such a distinction because consumers for organic produce exercise a high degree of consumer care. But the record indicates that consumers exercise a high degree of care based on the price of organic produce (*e.g.*, “organic produce, such as those sold

²⁷ 12 TTABVUE.

²⁸ Goya Foods, Inc. is the only listed third party selling salsa.

²⁹ Applicant’s Brief, p. 14 (29 TTABVUE 20).

by [Applicant], can ‘reflect an approximate \$1.00 per pound premium over non-organic versions” of the same products.”).³⁰ But when organic fruits and vegetables and granola-based products are sold under similar marks, consumers are likely to believe that the products are different lines of products sold by a company specializing in healthful foods.

Opposer submitted testimony and evidence that supermarkets often sell fresh fruits and vegetables in close proximity to granola.³¹ Applicant submitted contrary testimony.³² Based on the testimony and evidence, we find that fruits, vegetables and granola may be sold in both the same section and in different sections of grocery stores.³³ However, we note that there is no evidence or testimony regarding where salsa may be found.

Both parties promote their products as healthful foods. Applicant selected the mark SUNBELT ORGANIC to support consumers’ association between freshness and the unadulterated nature of organic products.³⁴ Opposer advertises its products “as

³⁰ Applicant’s Brief, p. 16 (29 TTABVUE 22) (citing Brown Decl. ¶¶13, 15 (15 TTABVUE 5-6)).

³¹ Badger Decl. ¶¶3-6 and Exhibits A-D (24 TTABVUE 2-3 and 6-14); Hammontree Decl. ¶2 and Exhibit AA (25 TTABVUE 2 and 5). On the other hand, Kenny Hammontree also testified that Opposer’s granola products are “not typically displayed in the same aisle as fresh or processed fruits and vegetables.” Hammontree Decl. ¶17 (15 TTABVUE 7).

³² Brown Decl. ¶¶21-23 (19 TTABVUE 8).

³³ That the products of both parties may be sold in supermarkets should not foreclose further inquiry into whether the goods are related. *See Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978); *see also Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171-72 (TTAB 1987) (finding that beef snack foods and fruit juices are not related because they are completely different in character, they are not normally sold in the same section of the food store, and would not be expected to originate from the same entity).

³⁴ Amodeo Decl. ¶¶16-19 (19 TTABVUE 16).

having no preservatives, no high fructose syrup and being made from whole grains,” as well as providing a low fat option.³⁵ In fact, many of the products in Opposer’s product line contain fruit.³⁶

Also, the products of the parties are consumed together.³⁷ *See General Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1599 (TTAB 2011), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014) (non-precedential) (finding yogurt and cereal related because, *inter alia*, “[c]onsumers mix and consume yogurt and cereal together”); *see also In re Davia*, 110 USPQ2d at 1815 (“Pepper sauce and agave sweeteners are also commonly used together, and conjoint use is a fact proper to be considered along with other facts present in particular cases”) (internal quotations and citations omitted). “Many of the items in the SUNBELT line contain fruit or fruit-based ingredients.”³⁸ Consumers also combine fruit with the other items in the SUNBELT line that do not contain fruit or fruit-based ingredients.³⁹

³⁵ Hammontree Decl. ¶28 and Exhibits V and Y (15 TTABVUE 11, 144-146, 151-179).

³⁶ Hammontree Decl. ¶12 and Exhibit D (15 TTABVUE 5 and 43-53). There is no testimony or evidence that any of the products in Opposer’s product line contain salsa or are used in salsa.

³⁷ Hammontree Decl. ¶¶13-15 and Exhibits E-G (15 TTABVUE 5-6 and 55-89). There is no testimony or evidence that salsa is consumed with Opposer’s products.

³⁸ Hammontree Decl. ¶12 (15 TTABVUE 5) and Exhibit D (15 TTABVUE 43-53) (SUNBELT BAKERY fruit and grain bars with blueberry, strawberry, apple cinnamon, raspberry, banana oat, and apple spice and SUNBELT BAKERY granola cereal with banana nut and fruit and nuts).

There is no testimony or evidence regarding any of Opposer’s products containing salsa or used with salsa.

³⁹ Hammontree Decl. ¶13 (15 TTABVUE 5) and Exhibit E (15 TTABVUE 55-63 (excerpts from FACEBOOK showing photographs and comments from consumers who have combined SUNBELT products with fruit) and Exhibit F (15 TTABVUE 65-82) (photographs on social media sites from consumers who have combined granola and granola bars with fruit).

Applicant relies on *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 14 USPQ2d 1577 (S.D. Ohio 1990) (HEARTWISE for cereal is not likely to cause confusion with HEARTWISE for an egg substitute and an alternative meat product) for the proposition that food items with different characteristics are unrelated.⁴⁰ However, as discussed above,⁴¹ the issue is not whether consumers will confuse the goods; the issue is whether consumers will confuse the source of the goods. Also, the Court in *Worthington* analyzed the relatedness of the goods in terms of whether the defendant intended to palm off its breakfast cereal as emanating from the same source as plaintiff's egg substitute and alternative meat products. *Id.* at 1590. The Court focused its analysis on whether the products were substitutes for one another or reasonably interchangeable. *Id.* at 1591. Under this definition of related products, the Court found that defendant's products were not a substitute, nor interchangeable with plaintiff's products. *Id.* In this opposition, whether Applicant's fruits, vegetables or salsa is a substitute or interchangeable with Opposer's granola, granola-based products, and other bakery products, while relevant, is not the entire basis of the analysis regarding the similarity or dissimilarity and nature of the goods.

In view of the foregoing, we find that Applicant's fruits and vegetables are related to Opposer's products. However, there is not sufficient evidence to find that Applicant's salsa is related to Opposer's products.

There is no testimony or evidence regarding consumers combining Opposer's products with salsa.

⁴⁰ Applicant's Brief, p. 12 (29 TTABVUE 18). The Court in *Worthington* described plaintiff's product as "a country-style breakfast containing a meat analog product." 14 USPQ2d at 1589.

⁴¹ See note 26.

C. Established, likely-to-continue channels of trade.

Opposer sells its products through wholesale distributors who sell to retailers, including supermarkets, grocery stores, mass market stores (*e.g.*, Walmart, Target, *etc.*), and convenience stores.⁴² Opposer's products "are purchased by a wide variety of consumers in the general public across a broad spectrum of income and age demographics."⁴³ Opposer's "products have a special appeal to consumers who place importance on healthy eating and snacking."⁴⁴

Applicant also sells its products through brokers or distributors who in turn sell to retailers, including grocery stores, supermarkets and mass market stores (*e.g.*, Costco).⁴⁵ The distributors sell Applicant's products to the produce departments of the retailers.⁴⁶ Like Opposer's products, Applicant's products appeal to consumers interested in healthful eating. Applicant packages its products to "underscore the fresh and unadulterated nature of the organic products sold under the SUNBELT ORGANIC Marks."⁴⁷ The organic quality of the products is an important characteristic for Applicant's customers.⁴⁸

⁴² Hammontree Decl. ¶16 (15 TTABVUE 6).

⁴³ Hammontree Decl. ¶26 (15 TTABVUE 10).

⁴⁴ Hammontree Decl. ¶28 (15 TTABVUE 11); *see also* Hammontree Decl. ¶¶28-19 (15 TTABVUE 11).

⁴⁵ Brown Decl. ¶10 (19 TTABVUE 4).

⁴⁶ Brown Decl. ¶16 (19 TTABVUE 6).

⁴⁷ Amodeo Decl. ¶18 (19 TTABVUE 16).

⁴⁸ Amodeo Decl. ¶¶20-21 (19 TTABVUE 17).

Because the products of the parties are sold through the same type of retail outlets to the same class of consumers, the products move in some of the same channels of trade.

D. The conditions under which sales are made, i.e., “impulse” vs. careful, sophisticated purchasing.

Opposer argues that because its granola products are ordinary grocery products that are relatively inexpensive, consumers do not exercise a high degree of care making their purchasing decisions.⁴⁹ For example, the retail price of individually wrapped granola bars is approximately \$0.35-\$0.50 and the retail price of a box of granola cereal is approximately \$2.50-\$3.00.⁵⁰ Accordingly, “customers do not spend extensive time at the point of sale and decide which granola products to select from the shelf in a minute or less.”⁵¹

Applicant argues, to the contrary, that customers for organic produce are discerning because, *inter alia*, organic produce can cost \$1.00 more per pound over non-organic produce.⁵² Customers for organic produce pay close attention to the product’s size, quality, and freshness, “as customers considering purchasing organic produce desire premium quality for the premium prices associated with those products.”⁵³

⁴⁹ Opposer’s Brief, p. 36 (28 TTABVUE 44).

⁵⁰ Hammontree Decl. ¶33 (16 TTABVUE 12).

⁵¹ Hammontree Decl. ¶34 (15 TTABVUE 12).

⁵² Brown Decl. ¶¶13 and 15 (19 TTABVUE 6). The price of Applicant’s salsa is \$5.49-\$5.99 for a 16 ounce jar. Brown Decl. ¶13 (19 TTABVUE 6).

⁵³ Brown Decl. ¶15 (19 TTABVUE 6).

Because purchasers of granola products and organic produce are not mutually exclusive, those purchasers who exercise a high degree of care purchasing their organic produce may not exercise that same high degree of care when purchasing granola products and may mistakenly believe that the products emanate from the same source because of the similarity of the marks. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1162 (the Board properly considered the sophistication of all potential customers); *General Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d at 1600 (“Although some of the parties’ more health-conscious consumers may be more careful in their purchase, we must base our decision on the least sophisticated potential purchasers.”).

E. The nature and extent of any actual confusion.

Opposer is not aware of any reported instances of confusion between its SUNBELT mark and Applicant’s use of SUNBELT ORGANIC.⁵⁴ Likewise, Applicant is not aware of any reported instances of confusion between Opposer’s SUNBELT mark and Applicant’s use of SUNBELT ORGANIC.⁵⁵ However, the lack of any reported instances of confusion is relevant only where there has been a reasonable opportunity for confusion to have occurred. *Citigroup Inc. v. Capital City Bank Group, Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In

⁵⁴ Opposer’s response to Applicant’s interrogatory No. 12 (20 TTABVUE 11).

⁵⁵ Amodeo Decl. ¶124 (19 TTABVUE 17).

this case, Applicant first began selling and promoting its SUNBELT ORGANIC products in 2014 in “an area comprising the east coast states from as far north as New York and as far south as Georgia.”⁵⁶ On the other hand, Opposer has “a significant market presence” in the Midwest and Mountain states.⁵⁷ Accordingly, because the parties have not been selling their products in the same geographical trading areas, the same consumers may not have been exposed to both marks and, therefore, there has not been a reasonable opportunity for confusion to have occurred.

F. Opposer’s likelihood of confusion survey

Opposer authorized George Mantis to conduct a survey “to assess whether the use of the name Sunbelt Organic to identify organic fruit is put out by or with the authorization or sponsorship of the Opposer.”⁵⁸ Mantis states:

I concluded based on the survey results that the name Sunbelt Organic to identify such products is likely to cause confusion [with Opposer’s marks]. And the level of confusion that I assessed in the study ranges between 20 percent and 23.4 percent of those respondents interviewed.⁵⁹

⁵⁶ Brown Decl. ¶¶7 and 11 (19 TTABVUE 4 and 5).

⁵⁷ Mantis Dep. Exhibit 1, p. 5 (18 TTABVUE 89). George Mantis, Opposer’s survey expert, conducted his survey in Boise, Idaho, Des Moines, Iowa, Kansas City, Missouri, Minneapolis, Minnesota, Omaha, Nebraska, and Salt Lake City, Utah where Opposer has significant market penetration because “in such areas, confusion levels will rise appreciably.” Mantis Dep., p. 27 and Exhibit 1, p. 5 n.3 (18 TTABVUE 30 and 89). He did not include metropolitan areas where Opposer did not have market penetration because such areas will yield “a relatively low level of confusion.” Mantis Dep., Exhibit 1, p. 5 n.3 (18 TTABVUE 89).

⁵⁸ Mantis Dep., pp. 6, 14-15 and Exhibit 1 (18 TTABVUE 9, 17-18 and 87). Mr. Mantis did not test whether there was a likelihood of confusion with salsa. Mantis Dep., p. 13 (18 TTABVUE 16).

⁵⁹ Mantis Dep., p. 6 and Exhibit 1 (18 TTTABVUE 9 and 87).

The Mantis survey followed the “Eveready” model,⁶⁰ a widely used and accepted format for likelihood of confusion surveys.⁶¹ See e.g., *Anheuser-Bush, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1828-29 (TTAB 2015); *Starbucks U.S. Brands LLC v. Ruben*, 78 USPQ2d 1741, 1758 (TTAB 2006); see generally, J. Thomas McCarthy, **McCarthy on Trademarks and Unfair Competition**, § 32:174 (4th ed. updated 2017) (discussing the acceptability of the Eveready format in likelihood of confusion cases). The survey consists of responses from 410 respondents from Internet interviews.⁶² Relying on *Carl Karcher Enters. v. Stars Rests. Corp.*, 35 USPQ2d 1125, 1133 (TTAB 1995) (opposer is not required to take the survey in applicant’s trading area because “[a]n opposer need not show a likelihood of confusion in areas outside of its own market area.”), Opposer interviewed respondents in Boise, Idaho, Des Moines, Iowa, Kansas City, Missouri, Minneapolis, Minnesota, Omaha, Nebraska, and Salt Lake City, Utah,⁶³ who are 18 years or older, shop for their household, and are likely to purchase organic fruit within the next three months.⁶⁴

Applicant argues that the Mantis survey is unreliable and not probative of confusion for the following reasons:

⁶⁰ Named for the case in which it was used with approval, *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 188 USPQ 623 (7th Cir. 1976).

⁶¹ Mantis Dep., pp. 57-58 (18 TTABVUE 60-61).

⁶² Mantis Dep., Exhibit 1 (18 TTABVUE 88).

⁶³ Mantis Dep., Exhibit 1 (18 TTABVUE 89).

⁶⁴ Mantis Dep., Exhibit 1 (18 TTABVUE 89).

1. The universe selected by Mr. Mantis is limited to prospective consumers of organic fruit and does not include past consumers;⁶⁵
2. The survey was limited to Opposer's primary trading area;⁶⁶
3. The survey was limited to fruit and did not include vegetables or salsa;⁶⁷
4. The calculation of "confusion" includes "several ambiguous responses ... which undermines the twenty percent figure;"⁶⁸ and
5. There is no indication that the survey was independently verified.⁶⁹

To the extent that Applicant asserts the survey should not be admitted into evidence, we disagree. Along with most courts, the Board generally treats the survey flaws alleged by Applicant as affecting the probative weight of a survey, rather than its admissibility. *E.g., Anheuser-Bush, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d at 1828; *Nat'l Pork Bd. v. Supreme Lobster and Seafood Co.*, 96 USPQ2d 1479, 1484-85 (TTAB 2010). Accordingly, we see no reason to exclude the Mantis survey.

Applicant essentially contends that the Mantis survey universe is under inclusive because it consists only of prospective purchasers of organic fruit and does not include past purchasers. "In a traditional case claiming 'forward' confusion, not 'reverse' confusion, the proper universe to survey is potential buyers of the *junior user's* goods or services." J. Thomas McCarthy, **McCarthy on Trademarks and Unfair**

⁶⁵ Applicant's Brief, p. 17 (29 TTABVUE 23).

⁶⁶ *Id.*

⁶⁷ *Id.* at 18 (29 TTABVUE 24).

⁶⁸ *Id.* at 19 n.3.

⁶⁹ *Id.*

Competition, § 32:159. The survey universe may be under inclusive by not including past purchasers of organic fruit, but because the survey universe includes prospective purchasers of organic fruit who may also be past purchasers of organic fruit, the survey provides information about a significant segment of the relevant universe. We fail to see, and Applicant failed to explain, how Opposer’s selection of the survey universe skewed the results of the survey in Opposer’s favor.

Applicant’s argument that the survey results were skewed in Opposer’s favor because it was conducted in Opposer’s primary trading area was discussed and rejected in *Carl Karcher Enters. v. Stars Rests. Corp.*, 35 USPQ2d at 1133:

An opposer need not show a likelihood of confusion in areas outside of its own market area. Thus, there is no basis for the position that the survey should have been taken in applicant's trading area as well as opposer's. We therefore have no problem with the survey's having been taken in opposer's trading area only.

As noted above, Mr. Mantis conducted a survey “to assess whether the use of the name Sunbelt Organic to identify organic fruit is put out by or with the authorization or sponsorship of the Opposer.” That is the extent to which we will give Opposer’s survey any probative value. We do not extend the results to vegetables or salsa.

Applicant contends, in a footnote, that Opposer’s calculation of “confusion” includes “several ambiguous responses ... which undermines the twenty percent figure.” Applicant points out two purported ambiguous responses. However, we find the explanation of how Mr. Mantis calculated the responses to be credible.⁷⁰

⁷⁰ Mantis Dep., pp. 47-62 (18 TTABVUE 50-65).

Nevertheless, even if we adjusted downward, Opposer's finding that the survey resulted in a 20 percent and 23.4 finding of "confusion," the results still support an inference that confusion is likely. *E.g., Exxon Corp. v. Tex. Motor Exch. of Hous., Inc.*, 628 F.2d 500, 208 USPQ 384, 390 (5th Cir. 1980) (a showing that "[a]pproximately 15 percent of the individuals surveyed associated the" defendant's mark with plaintiff "indicate[s] a high possibility of confusion"); *James Burrough, Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 192 USPQ 555, 565 (7th Cir. 1976) ("Though the percentage of likely confusion required may vary from case to case, we cannot consider 15 percent, in the context of this case, involving the entire restaurant-going community, to be *de minimis*."); *Miles Labs., Inc. v. Naturally Vitamin Supplements, Inc.*, 1 USPQ2d 1445, 1465 (TTAB 1986) (survey showing 18 percent confusion corroborates finding of likely confusion; "surveys disclosing likelihood of confusion ranging from 11% to 25% have been found significant"); *see also* Lawrence Evans & David Gunn, *Trademark Survey Evidence*, 20 Tex. Tech. L. Rev. 1, 22 (1989) (noting "an emerging national consensus that a showing of ten percent or more is sufficient to establish likelihood of confusion").

Applicant correctly notes that there was no check on the accuracy of the responses by any respondents and that there was no effort to verify that any respondents actually participated in the survey. These omissions minimize the probative value we can accord the Mantis survey. *See ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1248-49 (TTAB 2015) (failure to independently validate participation rendered results dubious); *Sheller-Globe Corp. v. Scott Paper Co.*,

204 USPQ 329, 334 (TTAB 1979) (declining to accord any weight to mail survey citing, *inter alia*, the failure to check validity of responses).

In view of the foregoing, we find that the Mantis survey is probative of *de minimus* confusion between organic fruit and Opposer's granola-based products which supports Opposer's likelihood of confusion claim vis-à-vis organic fruit and granola-based products identified by similar marks.

G. Analyzing the factors.

Because the marks are similar and Opposer's granola-based products are related to Applicant's "organic fresh fruits and vegetables" and "processed organic fruits and vegetables" and those products move in the same channels of trade and are sold to the same classes of consumers, we find that Applicant's marks SUNBELT ORGANIC (standard characters) and SUNBELT ORGANIC and design for "organic fresh fruits and vegetables" and "processed organic fruits and vegetables" are likely to cause confusion with Opposer's registered marks SUNBELT (typed drawing) for "breakfast cereals, granola-based snack bars," SUNBELT BAKERY (standard characters) for "granola; breakfast cereal; granola-based snack bars; grain-based snack bars; grain-based snack bars also containing fruit; cereal-based snack bars; cookie bars," and SUNBELT BAKERY and design for "granola; breakfast cereal; granola-based snack bars; grain-based snack bars; grain-based snack bars also containing fruit; cereal-based snack bars; cookie bars."

On the other hand, because the record fails to show that Applicant's salsa is related to the goods in Opposer's pleaded registrations or that those products move

in the same channels of trade, we find that Applicant's mark SUNBELT (standard characters) and SUNBELT ORGANIC and design for "organic foodstuffs, namely, salsa" is not likely to cause confusion with Opposer's registered marks SUNBELT (typed drawing) for "breakfast cereals, granola-based snack bars" and "cookies and cakes," SUNBELT BAKERY (standard characters) for "granola; breakfast cereal; granola-based snack bars; grain-based snack bars; grain-based snack bars also containing fruit; cereal-based snack bars; cookie bars," and SUNBELT BAKERY and design for "granola; breakfast cereal; granola-based snack bars; grain-based snack bars; grain-based snack bars also containing fruit; cereal-based snack bars; cookie bars."

Decision: The opposition to Application Serial Nos. 86542924 and 86542882 is dismissed.

The opposition to Application Serial Nos. 86542895, 86542911, 86542872, and 86542854 is sustained.