

This Opinion Is Not a
Precedent of the TTAB

Mailed: March 17, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Yarnell Ice Cream, LLC
v.
Outstanding Foods, Inc.
—

Opposition No. 91244684
—

Daniel Kegan and Jay R. Giusti of Kegan & Kegan, Ltd. for Yarnell Ice Cream, LLC.

Heather A. Antoine of Stubbs Alderton & Markiles, LLP for Outstanding Foods, Inc.
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Before Bergsman, Pologeorgis and Johnson, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Outstanding Foods, Inc. (Applicant) seeks registration on the Principal Register of the mark FULL OF FLAVOR FREE OF GUILT, in standard characters, for “vegetable based food products, namely, vegetable based snack foods; meat substitutes,” in International Class 29.¹ Applicant disclaims the exclusive right to use “Full of Flavor.”

¹ Application Serial No. 87566210 filed August 11, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s claim of a bona fide intent to use the mark in commerce.

Yarnell Ice Cream, LLC (Opposer) filed a Notice of Opposition against the registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), alleging that FULL OF FLAVOR FREE OF GUILT for "vegetable based food products, namely, vegetable based snack foods; meat substitutes" so resembles Opposer's mark GUILT FREE for "various foods, including frozen confections and ice cream" as to be likely to cause confusion.² Opposer pleaded ownership of the two registrations listed below:

- Registration No. 2120649 for the mark GUILT FREE, in typed drawing form, for "frozen confections," in International Class 30;³ and
- Registration No. 2316804 for the mark GUILT FREE, in typed drawing form, for "frozen dairy confections," in International Class 30.⁴

Applicant, in its Answer, denied the salient allegations in the Notice of Opposition and pleaded eight purported affirmative defenses.

² Notice of Opposition ¶1 (1 TTABVUE 3). Opposer also alleged that it "has used its GUILT FREE trademarks for foods since at least as early as September 1996 and has not abandoned them" and that "GUILT FREE for food is associated with a single source." *Id.* at ¶¶4 and 5 (1 TTABVUE 4).

³ Registered December 9, 1997; renewed.

Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R § 2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A typed mark is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks.").

⁴ Registered February 8, 2000; renewed.

On August 27, 2019, Opposer filed a motion for summary judgment.⁵ Applicant filed a response and cross-motion for summary judgment.⁶ Both parties filed reply briefs. On January 9, 2020, Opposer filed the parties' stipulation to proceed under the Board's Accelerated Case Resolution ("ACR") procedure. The parties have stipulated that the Board may "make a final determination of this opposition on the current record, including the evidence of record and the briefs on the pending motion for summary judgment and cross-motion for summary judgment" and the Board may resolve any disputes as to material facts.⁷

I. Preliminary Issues

A. Applicant's Affirmative Defenses

Applicant's first affirmative defense, i.e., failure to state a claim upon which relief upon which relieve can be granted, is not an affirmative defense. Because Applicant neither filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) during the pretrial phase of this proceeding, nor argued this purported affirmative defense in its briefs, failure to state a claim upon which relief can be granted is deemed waived. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1752 n.6 (TTAB 2013). In any event, the Notice of Opposition states a claim upon which relief can be granted.

⁵ 10 TTABVUE.

⁶ 15 TTABVUE.

⁷ 22 TTABVUE. The parties did not submit any testimony or evidence beyond the testimony and evidence attached to the motion for summary judgment and cross-motion for summary judgment.

The second, third, and sixth affirmative defenses are mere amplifications of Applicant's defense and not affirmative defenses.

The fourth affirmative defense is laches. Because Applicant failed to argue laches in its brief, Applicant waives the laches affirmative defense. *See Alcatraz Media*, 107 USPQ2d at 1752 n.6. In any event, in an opposition, laches begins to run when the USPTO publishes for opposition the mark in question. *See Nat'l Cable Tele. Assoc., Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991). Because Opposer acted at its first opportunity to object to the registration of Applicant's FULL OF FLAVOR FREE OF GUILT, the affirmative defense of laches is unavailable.

The fifth affirmative defense, abandonment, and seventh affirmative defense, Opposer's mark is generic, are compulsory counterclaims. Because Applicant did not file a counterclaim to cancel Opposer's pleaded registrations on the grounds of abandonment or genericness, we may not consider such claims. Trademark Rules 2.106(b)(3)(i) and (ii), 37 C.F.R. § 2.16(b)(3)(i) and (ii). In addition, Applicant waived those purported claims/affirmative defenses because Applicant failed to refer to them in its briefs. *See Alcatraz Media*, 107 USPQ2d at 1752 n.6.

B. Opposer's Pleaded Registrations

As noted above, Opposer pleaded two registrations: Registration No. 2120649 for the mark GUILT FREE for "frozen confections" and Registration No. 2316804 for the

mark GUILT FREE for “frozen dairy confections.” Nevertheless, Opposer introduced 15 additional GUILT FREE registrations listed below:⁸

- Registration No. 2367307 for the mark GUILT FREE, in typed drawing form, for restaurant services, in International Class 42;⁹

- Registration No. 2065990 for the mark GUILT FREE, in typed drawing form, for “dips, namely, dairy-based dips,” in International Class 29;¹⁰

- Registration No. 2096125 for the mark GUILT FREE, in typed drawing form, for “cottage cheese; sour cream; and milk,” in International Class 29;¹¹

- Registration No. 2099328 for the mark GUILT FREE, in typed drawing form, for “not frozen yogurt and egg nog,” in International Class 29;¹²

- Registration No. 2172033 for the mark GUILT FREE, in typed drawing form, for “cakes, candy, pies, namely, fruit pies,” in International Class 30;¹³

- Registration No. 2179680 for the mark GUILT FREE, in typed drawing form, for “toppings, namely, chocolate syrup and fudge topping,” in International Class 30;¹⁴

- Registration No. 2181580 for the mark GUILT FREE, in typed drawing form, for “dairy-based spreads and cheese,” in International Class 29, “cheese cakes, syrup, namely, chocolate syrup and table syrup, cake frostings, sugar substitutes, pizza,

⁸ Podracky Decl. ¶¶40-41 (10 TTABVUE 516).

⁹ Registered July 18, 2000; renewed. (10 TTABVUE 48-51).

¹⁰ Registered May 27, 1997; renewed. (10 TTABVUE 71-75).

¹¹ Registered September 9, 1997; renewed. (10 TTABVUE 77-85).

¹² Registered September 23, 1997; renewed. (10 TTABVUE 87-90).

¹³ Registered July 7, 1998; renewed. (10 TTABVUE 103-109).

¹⁴ Registered August 4, 1998; renewed. (10 TTABVUE 112-121).

salad dressings, mayonnaise, and chocolate toppings,” in International Class 30, “soft drinks, namely, low calorie soft drinks,” in International Class 32;¹⁵

• Registration No. 2189581 for the mark GUILT FREE, in typed drawing form, for “non-dairy dips,” in International Class 29;¹⁶

• Registration No. 2189588 for the mark GUILT FREE, in typed drawing form, for “rolls, doughnuts, muffins, and cookies,” in International Class 30;¹⁷

• Registration No. 2192459 for the mark GUILT FREE, in typed drawing form, for “processed meat,” in International Class 29;¹⁸

• Registration No. 2200081 for the mark GUILT FREE, in typed drawing form, for “processed nuts,” in International Class 29;¹⁹

• Registration No. 2200109 for the mark GUILT FREE, in typed drawing form, for “peanut butter,” in International Class 29, and “catsup and barbeque sauce,” in International Class 30;²⁰

• Registration No. 2205913 for the mark GUILT FREE, in typed drawing form, for “jams, jellies, butter, margarine, eggs and toppings, namely, dairy-based whipped toppings and non-dairy based whipped toppings,” in International Class 29, “cocoa,

¹⁵ Registered August 11, 1998; renewed. (10 TTABVUE 130-146).

¹⁶ Registered September 15, 1998; renewed. (10 TTABVUE 148-157).

¹⁷ Registered September 15, 1998; renewed. (10 TTABVUE 159-165).

¹⁸ Registered September 29, 1998; renewed. (10 TTABVUE 168-172).

¹⁹ Registered October 27, 1998; renewed. (10 TTABVUE 175-181).

²⁰ Registered October 27, 1998; renewed. (10 TTABVUE 186-201).

gravies, puddings and dairy-based desserts,” in International Class 30, and “soft drinks, namely, non-carbonated soft drinks,” in International Class 32;²¹

- Registration No. 2215013 for the mark GUILT FREE, in typed drawing form, for “toppings, namely, fruit toppings,” in International Class 29;²² and

- Registration No. 2226444 for the mark GUILT FREE, in typed drawing form, for “chocolate pies,” in International Class 30.²³

Stephen Podracky, Opposer’s Vice President of Sales, testified that Opposer’s “GUILT FREE frozen confections are marketed to supermarkets, restaurants, coffee houses, bakeries, sports stadiums, state parks, community events, and the Walmart Museum’s Spark Cafe”²⁴ and that Opposer’s confections were first sold in 1996 and are well known.²⁵ Rob Bell, a principal at Eric Rob & Isaac, Opposer’s advertising agency, testified about promoting Opposer’s ice cream and frozen confections.²⁶

Mr. Podracky also testified that “[o]ther GUILT FREE food products, from sauces to nuts, were licensed for diverse foods.”²⁷ For example, Mr. Podracky testified that Dean Foods, “the largest dairy company in the United States,” licenses Opposer’s GUILT FREE mark for milk, ice cream dairy products, juice and teas²⁸ and J.M.

²¹ Registered November 24, 1998; renewed. (10 TTABVUE 204-216).

²² Registered December 29, 1998; renewed. (10 TTABVUE 219-223).

²³ Registered February 23, 1999; renewed. (10 TTABVUE 225-229).

²⁴ Podracky Decl. ¶15 (10 TTABVUE 514).

²⁵ *Id.* at ¶22 (10 TTABVUE 514).

²⁶ Bell Testimony Decl. (10 TTABVUE 522-523).

²⁷ Podracky Decl. ¶25 (10 TTABVUE 515).

²⁸ *Id.* at ¶27 (10 TTABVUE 515).

Smucker Company licenses Opposer's GUILT FREE mark for fruit spreads, ice cream toppings, beverages, shortening, peanut butter, and other products.²⁹

All of [Opposer's] trademark registrations and their specimens of use are evidence of use of the mark. [Opposer], directly or through licensees, has used its GUILT FREE trademark for the registered goods and services. [Opposer] had – and has – no intention to abandon its GUILT FREE trademark rights. [Opposer] is actively continuing to seek appropriate licensees for its GUILT FREE trademark. The GUILT FREE trademark appears on snack bars marketed under license by [Opposer's] affiliate Schulze.³⁰

Based on this testimony, we find that Opposer is using the additional registrations to rebut Applicant's purported abandonment affirmative defense.

However, in discussing the parties' products, Opposer contends that

Processed meat, pizza, and barbeque sauce are related to meat and thus to meat substitutes. Vegans and vegetarians seek protein-rich foods as meat substitutes, such as cheese, cottage cheese, eggs, nuts, peanut butter, and yogurt.³¹

Likewise, when Opposer analyzes the similarity or dissimilarity and nature of the goods, Opposer asserts that its "GUILT FREE mark has long been used on a variety of foods and restaurant services, citing its numerous registrations."³²

²⁹ *Id.* at ¶28 (10 TTABVUE 515).

³⁰ *Id.* at ¶42 (10 TTABVUE 517). *See also* Opposer's Brief, p. 3 (10 TTABVUE 4) (paraphrasing the Podracky declaration testimony).

³¹ *Id.* at 4 (10 TTABVUE 5).

³² *Id.* at 9 (10 TTABVUE 10). *See also* Opposer's Reply Brief, p. 3 (19 TTABVUE 6) ("Applicant's goods are similar and related to GUILT FREE snack foods Opposer has marketed, namely, peanuts, bean dip, French onion dip[,] ice cream, and for meatless substitute, pizza, pizza sauce, eggs ... and Bakery [sic] goods.").

In addition, Mr. Podracky testified that since December 2011, Opposer has sold over one million dollars of GUILT FREE “product” and spent over \$250,000 in “selling and marketing expenses for GUILT FREE products.”³³ Although on its face, it appears that the revenues and advertising expenses apply to all the GUILT FREE products, in its brief, Opposer limits the revenues and advertising expenses to frozen confections.³⁴

Applicant did not object to Opposer’s introduction of the 15 unpleaded registrations. However, Applicant did not include them as part of its likelihood of confusion analysis. In Applicant’s analysis of the similarity or dissimilarity and nature of the goods and established, likely-to-continue channels of trade, Applicant refers only to Opposer’s frozen confections and frozen dairy confections. However, Applicant addresses the unpleaded registrations when Applicant analyzes the variety of goods on which Opposer’s mark is used.

Although Registrant [sic] contends in its Motion that it uses the ‘GUILT FREE’ mark on a variety of food products, including cheeses, nuts, peanut butter, processed meats, pizza, yogurt and others, Registrant [sic] fails to analyze how its use of the mark on these goods impacts the likelihood of confusion analysis. (See Mtn., at p. 15.)

Here, the fact that Registrant [sic] has purportedly licensed its mark to a variety of different products does not support a finding of likelihood of confusion.³⁵

³³ Podracky Supplement Decl. ¶¶8 and 9 (10 TTABVCUE 519).

³⁴ Opposer’s Brief, p. 13 (10 TTABVUE 14).

³⁵ Applicant’s Brief, p. 22 (15 TTABVUE 23).

More importantly, in Applicant's reply brief, Applicant argues that Opposer failed to prove that frozen confections and frozen dairy confections are related to Applicant's "vegetable based food products, namely, vegetable based snack foods; meat substitutes."³⁶ Applicant rejects Opposer's attempt to associate products other than frozen confections and frozen dairy confections with Applicant's description of goods because those other goods are not included in Opposer's pleaded registrations.

Thus, Registrant's attempt to compare "peanuts, bean dip, French onion dip," and "pizza, pizza sauce, eggs... and Bakery goods" with Applicant's "[v]egetable based food products, namely, vegetable based snack foods; meat substitutes" does not advance Registrant's argument. (*See* Opp, at p. 10.) Stated otherwise, because these other foods were *not* included in Registrant's registration, these foods have no bearing on the analysis. The simple truth is Registrant has submitted *no* evidence to suggest that "frozen confections" and "frozen dairy confections" are sufficiently similar to "[v]egetable based food products, namely, vegetable based snack foods; meat substitutes." As such, there can be no doubt that Registrant has failed to meet its burden of establishing that this factor supports a likelihood of confusion.³⁷

In cases brought under Section 2(d) of the Trademark Act, "the plaintiff must specifically plead any registrations on which it is relying and may not rely at trial on unpleaded registrations," unless "the plaintiff's pleading is amended (or deemed amended), pursuant to Fed. R. Civ. P. 15(a) or (b), to assert the matter." TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 309.03(c) (2019); *see, e.g., Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1424 n.14 (TTAB

³⁶ Applicant's Reply Brief, p. 3 (20 TTABVUE 4).

³⁷ *Id.* at 3-4 (20 TTABVUE 4-5).

2014) (opposer may not rely on registrations that were unpleaded; the underlying applications were unpleaded and opposer did not assert that the pleadings should be amended); *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1503 (TTAB 2007) (“In its brief, opposer listed a seventh registration, but it was not pleaded and a copy was not made of record by notice of reliance (NOR) or through testimony, so it has not been considered.”). Here, the parties dispensed with the trial period per se and submitted their trial evidence concurrently with their legal arguments. Applicant did not object to Opposer’s reliance on its unpleaded registrations in its briefs but did not affirmatively treat it as being of record for purposes of analyzing the similarity or dissimilarity and nature of the goods and established, likely-to-continue channels of trade.

The issue before us is whether the parties tried by implied consent Opposer’s 15 unpleaded registrations and, therefore, whether we should deem the pleadings amended pursuant to Fed. R. Civ. P. 15(b). Fed. R. Civ. P. 15(b) provides, in pertinent part, that when claims not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The parties may try an unpleaded issue by implied consent only where the nonoffering party: (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue. TBMP § 507.03(b); *see also Morgan Creek Prods. Inc. v. Foria Int’l Inc.*, 91 USPQ2d 1134, 1138 (TTAB 2009). “Fairness dictates whether an issue has been

tried by consent – there must be an absence of doubt that the nonmoving party is aware that the issue is being tried.” *Id.*

Based on the preceding discussion of the testimony, evidence and briefing, we find that Opposer did not fairly apprise Applicant that Opposer was relying on its unpleaded registrations to prove likelihood of confusion under Section 2(d) of the Trademark Act. We base our finding of fact on the following:

1. The USPTO registered all of the 15 unpleaded marks prior to the filing of the Notice of Opposition and Opposer was aware of those registrations when it filed the Notice of Opposition. Opposer’s failure to include the unpleaded registrations in its Notice of Opposition is inexplicable, especially Registration No. 2205913 for “cocoa, gravies, puddings and dairy-based desserts” and Registration No. 2192459 for “processed meat.” There is no excuse or explanation for Opposer’s failure to include the unpleaded registrations in the Notice of Opposition.
2. Despite contending that “[p]rocessed meat, pizza, and barbeque sauce are related to meat and thus to meat substitutes,”³⁸ Opposer did not expressly state that it was relying on the description of goods in Registration No. 2192459 for “processed meat,” Registration No. 2200109 “catsup and barbeque sauce,” or Registration No. 2181580 for “pizza.”
3. Opposer’s revenues and advertising expenses were limited to frozen confections and frozen dairy confections.

³⁸ Applicant’s Brief, p. 4 (10 TTABVUE 5).

4. In its reply brief, Applicant argued that Opposer may not rely on products other than frozen confections and frozen dairy confections because the other products are not included in the description of goods for Opposer's pleaded registrations.

In view thereof, we will not consider Opposer's unpleaded registrations in our likelihood of confusion analysis.

II. The Record

The record includes the pleadings, and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the subject application.³⁹ The record also includes:

A. Opposer's testimony and evidence.⁴⁰

1. Declaration of Daniel Kegan, Opposer's counsel, authenticating all of the evidence discussed below;⁴¹
2. Copies of Opposer's pleaded registrations printed from the USPTO database showing the current status of and title to the registrations;⁴²
3. Excerpts from Applicant's website (pigoutchips.com) displaying Applicant's mark FULL OF FLAVOR FREE OF GUILT on packaging;⁴³

³⁹ Therefore, it was not necessary for Applicant to introduce a copy of the application, nor a copy of the Notice of Opposition. 15 TTABVUE 36-40 and 187-213.

⁴⁰ Opposer also introduced evidence attached to its reply brief at 19 TTABVUE. Because much of the evidence is duplicative or irrelevant, we do not specifically refer to it in the summary of the record. We refer to the evidence Opposer introduced in its reply brief as appropriate.

⁴¹ 10 TTABVUE 527-528.

⁴² 10 TTABVUE 27-35.

⁴³ 10 TTABVUE 37-38. Once party has introduced a document, any party may rely upon it for any purpose permitted by the Federal Rules of Evidence. Trademark Rule

4. Wikipedia entry for “snack”;⁴⁴
5. Copies of Opposer’s unpledged GUILT FREE registrations;⁴⁵
6. Copy of a news article posted on Nosh.com introducing KIND frozen nutrition bars;⁴⁶
7. Copy of Flavor Kist Fruit & Grain cereal bar displaying the GUILT FREE mark;⁴⁷
8. Opposer’s marketing materials and news articles;⁴⁸
9. Opposer’s Facebook page;⁴⁹
10. Statement of Use in application Serial No. 75976038 for the mark GUILT FREE for cottage cheese, sour cream, and milk;⁵⁰
11. Excerpt from the Schulze & Burch Biscuit Company website (schulzeburch.com);⁵¹
12. Excerpt from Hillshire Snacking website (no url);⁵²

2.120(k)(3)(ii)(7), 37 C.F.R. § 2.120(k)(3)(ii)(7). Accordingly, it was not necessary for Applicant to introduce the same excerpts from its website. 15 TTABVUE 42.

⁴⁴ 10 TTABVUE 40-46.

⁴⁵ 10 TTABVUE 48-256.

⁴⁶ 10 TTABVUE 258-260.

⁴⁷ 10 TTABVUE 262.

⁴⁸ 10 TTABVUE 264-275.

⁴⁹ 10 TTABVUE 276-277.

⁵⁰ 10 TTABVUE 279-282.

⁵¹ 10 TTABVUE 284-286.

⁵² 10 TTABVUE 288.

13. Copy of a news article entitled “FDA targets snack food industry over allergens,” (April 14, 2001) from the BMJ Publishing Group;⁵³
14. Copy of a manuscript entitled “Food Label Accuracy of Common Snack Foods” (January 21, 2013);⁵⁴
15. Wikipedia entry for “vegetarianism”;⁵⁵
16. Wikipedia entry for “veganism”;⁵⁶
17. Wikipedia entry for “meat analogue”;⁵⁷
18. Excerpt from the USPTO Manual of Identification of Goods and Services;⁵⁸
19. Copy of a news article posted on Forbes.com entitled “Impossible Foods’ Bleeding Burgers”;⁵⁹
20. Copy of application Serial No. 87924475 for the mark IMPOSSIBLE BURGER for “substitutes for food, namely, plant-based meat substitutes, plant-based fish substitutes, and plant-based chicken substitutes” printed from the USPTO Trademark Electronic Search System (TESS);⁶⁰
21. Photograph of Opposer’s SCOOP mascot;⁶¹

⁵³ 10 TTABVUE 290-291.

⁵⁴ 10 TTABVUE 293-301.

⁵⁵ 10 TTABVUE 303-337.

⁵⁶ 10 TTABVUE 339-395.

⁵⁷ 10 TTABVUE 397-404.

⁵⁸ 10 TTABVUE 406.

⁵⁹ 10 TTABVUE 408-413,

⁶⁰ 10 TTABVUE 415-416.

⁶¹ 10 TTABVUE 418.

22. Excerpt from Opposer's Twitter account and other websites referring to Opposer;⁶²
23. Marketing material for Opposer;⁶³
24. Excerpt from the Walmart Museum website (walmartmuseum.auth.cap-hosting.com);⁶⁴
25. Menu from the Walmart Museum;⁶⁵
26. Excerpt from TripAdvisor.com;⁶⁶
27. Wikipedia entry for "guilt";⁶⁷
28. A news article entitled "Prevention";⁶⁸
29. Search results from the USPTO TESS database for "Guilt*," and "Guilt and Free";⁶⁹
30. Copy of Applicant's Corporate certificate of registration from the Nevada Secretary of State;⁷⁰
31. Excerpt from LinkedIn.com⁷¹

⁶² 10 TTABVUE 420-435.

⁶³ 10 TTABVUE 437-439.

⁶⁴ 10 TTABVUE 441 and 449-450.

⁶⁵ 10 TTABVUE 443-444.

⁶⁶ 10 TTABVUE 446-447.

⁶⁷ 10 TTABVUE 452-459.

⁶⁸ 10 TTABVUE 461-462.

⁶⁹ 10 TTABVUE 464-468.

⁷⁰ 10 TTABVUE 470-471.

⁷¹ 10 TTABVUE 473-475.

32. List of TTAB proceedings involving Opposer printed from the USPTO TTABIS database;⁷²
33. Wikipedia entry for “due diligence”;⁷³
34. Copy of Opposer’s initial disclosures;⁷⁴
35. Applicant’s amended responses to Opposer’s request for production of documents;⁷⁵
36. Solicitation letters from Opposer to potential licensees;⁷⁶
37. Enforcement letters from Opposer to purported infringers;⁷⁷
38. Excerpt from Opposer’s Twitter account;⁷⁸
39. Declaration of Stephen Podracky, Opposer’s Vice President of Sales;⁷⁹
40. Stephen Podracky Supplemental Declaration;⁸⁰ and
41. Declaration of Rob Bell, a principal of Eric Rob & Isaac, an advertising agency.⁸¹

⁷² 10 TTABVUE 477-481.

⁷³ 10 TTABVUE 483-489.

⁷⁴ 10 TTABVUE 490-493.

⁷⁵ 10 TTABVUE 495-507. Opposer did not introduce any documents.

⁷⁶ 11 TTABVUE 4-36 (Confidential).

⁷⁷ 11 TTABVUE 38-96 (Confidential).

⁷⁸ 10 TTABVUE 525.

⁷⁹ 10 TTABVUE 512-517.

⁸⁰ 10 TTABVUE 518-520.

⁸¹ 10 TTABVUE 522-523.

B. Applicant’s Testimony and Evidence.

Applicant introduced the declaration of Crystal Y. Jonelis, Applicant’s counsel, with exhibits, including;⁸²

1. Excerpt from Applicant’s website;⁸³
2. Applicant’s marketing materials;⁸⁴
3. Definition of “confection”;⁸⁵
4. Definition of “vegan”;⁸⁶
5. A copy of the “locations” page of Applicant’s website;⁸⁷
6. Excerpts from websites of third-party websites selling Applicant’s products;⁸⁸
7. A copy of a news article entitled “Veganism on the Rise Among Health-Conscious Consumers,” posed on the New Hope website (newhope.com);⁸⁹
8. A copy of a news article entitled “Veganism on the Rise and QSRs Need to Adapt” posted on the Civic Science website (civicscience.com);⁹⁰

⁸² 15 TTABVUE 28-33.

⁸³ 15 TTABVUE 44-50.

⁸⁴ 15 TTABVUE 52-185.

⁸⁵ 15 TTABVUE 215-229.

⁸⁶ 15 TTABVUE 231-244.

⁸⁷ 15 TTABVUE 246-248.

⁸⁸ 15 TTABVUE 250-253.

⁸⁹ 15 TTABVUE 255-260.

⁹⁰ 15 TTABVUE 262-282.

9. Copies of third-party registrations consisting of marks with variations of the term “Guilt Free”;⁹¹
10. Third-party websites offering the sale of products using variations of the term “Guilt Free”;⁹² and
11. Applicant’s amended responses to Opposer’s first set of interrogatories.⁹³

III. Standing

Standing is a threshold issue in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). To establish standing in an opposition or cancellation proceeding, a plaintiff must prove that it has a “real interest” in the proceeding and a “reasonable” basis for its belief of damage. *See Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Opposer has established its standing by properly introducing into evidence its pleaded registrations showing the status of the registrations and their title in Opposer. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (plaintiff’s two prior registrations suffice to establish plaintiff’s

⁹¹ 15 TTABVUE 284-328.

⁹² 15 TTABVUE 330-358.

⁹³ 15 TTABVUE 360-371. “Written disclosures, **an answer to an interrogatory**, or an admission to a request for admission, may be submitted and made part of the record **only by the receiving or inquiring party.**” (Emphasis added). Trademark Rule 2.120(k)(3)(ii)(5), 37 C.F.R. § 2.120(k)(3)(ii)(5). Because Opposer did not object to Applicant’s introduction of its own interrogatory answers, we deem the parties to have stipulated them into the record.

direct commercial interest and its standing); *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015). Applicant, in its brief, did not challenge Opposer's standing.

IV. Priority

Because Opposer's pleaded registrations are of record, priority in the opposition proceeding is not at issue with respect to the mark and goods identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)). Applicant, in its brief, did not challenge Opposer's priority.

V. Likelihood of Confusion

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*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). "In discharging this duty, the thirteen *DuPont* factors 'must be considered' 'when [they] are of record.'" *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019), quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997), quoting *DuPont*, 177 USPQ at 567. "Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re*

Mighty Leaf Tea, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); *see also 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.”). “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 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.3d 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.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

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

Applicant's description of goods is "vegetable based food products, namely, vegetable based snack foods; meat substitutes" and Opposer's descriptions of goods are "frozen confections" and "frozen dairy confections."⁹⁴

Wikipedia describes a "Snack" as follows:

A snack is a portion of food, smaller than a regular meal, generally eaten between meals. Snacks come in a variety of forms including packaged snack foods and other processed foods, as well as items made from fresh ingredients at home.⁹⁵

A "vegetable" is defined, inter alia, as "any plant whose fruit, seeds, roots, tubers, bulbs, stems, leaves, or flowers are used as food, as the tomato, bean, beet, potato, onion, asparagus, spinach, or cauliflower."⁹⁶ Accordingly, a "vegetable based snack food" is a small portion of vegetables generally eaten between meals.

⁹⁴ Opposer, in its brief, incorrectly stated that Applicant applied for "vegetable based snack foods which have a bacon flavor; meat substitutes." (10 TTABVUE 11).

As noted above, because the parties did not try Opposer's unpleaded registrations by implied consent, we do not consider any GUILT FREE products other than frozen confections and frozen dairy confections. Accordingly, we do not consider Opposer's argument that it has marketed other snack foods including peanuts, bean dip, French onion dip, pizza, pizza sauce, eggs and bakery goods. Opposer's Reply Brief, p. 5 (19 TTABVUE 6).

⁹⁵ 10 TTABVUE 40. *See also* Dictionary.com based on the Random House Unabridged Dictionary ("a small portion of food or drink or a light meal, especially one eaten between regular meals.").

⁹⁶ *See also* Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY.

Merriam-Webster.com defines a “Confection,” inter alia, as “a sweet food.”⁹⁷ The word “frozen” is defined, inter alia, as “congealed by cold,” or frigid; very cold.”⁹⁸ Accordingly, a frozen confection is a solid, very cold sweet food.

This *DuPont* factor requires us to determine whether a small portion of vegetables generally eaten between meals and a solid, very cold sweet food are related. See *Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (the Board must consider the goods as they are described in the application and registration); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”); *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.”).

In determining whether the good are related, it is not necessary that the goods of the parties be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that a party claiming damage establish that the goods are related in some manner and/or that conditions and activities

⁹⁷ 15 TTABVUE 216. See also Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (“a sweet preparation of fruit or the like, as a preserve or candy.”).

⁹⁸ Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY.

surrounding marketing of these goods are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012).

Opposer introduced one website that shows the same mark used to identify vegetable-based snacks and frozen confections. Whole Foods Market (wholefoodsmarket.com) advertises the **365** brand pumpkin pie ice cream sandwiches, “berry rhubarb fruit & veggie bars,” “carrot tangerine fruit & veggie bars,” and tropical greens fruit & veggie bars.”⁹⁹ However, there is no testimony or evidence showing what sort of commercial impact these products have made.

Opposer also introduced the Nosh website (nosh.com) that posted a news article reporting that KIND Snacks is launching KIND Frozen Creamy Almond Bars, “the brand’s first entry into the frozen category, available exclusively at Wal-Mart.”¹⁰⁰ However, a news article posted on a website is hearsay; it has evidentiary value for what it shows on its face. *See Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010) (Internet documents are admissible only to show what has been printed, not the truth of what has been printed). *See also WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1038 (TTAB 2018)

⁹⁹ 19 TTABVUE 135-137).

¹⁰⁰ 10 TTABVUE 258.

(Internet evidence constitutes hearsay and may not be relied on for the truth of the matters asserted therein).

To prove that the goods are related, Opposer relies on the fact that Applicant's "vegetable based snack foods" and Opposer's frozen confections are both snacks.¹⁰¹

The law, the food industry, and consumers consider both chips and ice cream as snacks, often substitutable foods depending upon availability, a consumer's recent food consumption, and their dietary preferences of the day.¹⁰²

The goods are related only in the sense that they are both snacks. *See Elec. Data Sys. Corp. v. EDSA Micro Corp.*, 23 USPQ2d 1460, 1463 (TTAB 1992) ("the issue of whether or not two products are related does not revolve around the question of whether a term can be used that describes them both, or whether both can be classified under the same general category."); *Cooper Indus., Inc. v. Repcoparts USA, Inc.*, 218 USPQ 81, 84 (TTAB 1983) ("the mere fact that the products involved in this case (or any products with significant differences in character) are sold in the same industry does not of itself provide an adequate basis to find the required "relatedness."). Opposer did not prove that the same entities sell vegetable-based snacks and frozen confections, let alone that the same entities use the same mark to identify those products. There is no evidence that vegetable-based snacks and frozen confections are competitive products, share essential characteristics or sales appeal, or consumers consume the products together.

¹⁰¹ Applicant's Brief, p. 10 (10 TTABVUE 11).

¹⁰² *Id.*

Based on the evidence of record, Opposer has failed to prove that the goods are related.

B. Established, likely-to-continue channels of trade and classes of consumers.

Opposer's "GUILT FREE frozen confections are marketed to supermarkets, restaurants, coffee houses, bakeries, sports stadiums, state parks, community events, and the Walmart Museum's Spark Cafe."¹⁰³ Opposer "directly and through licensees, has engaged in successful marketing efforts at community events, the key sports stadium, television news demonstrations, social media promotional events and more," citing Podracky Exhibits 31, 32, 44-46.¹⁰⁴

Exhibit 31 is six documents downloaded from the Internet.¹⁰⁵ Only one document, a historical review about Opposer, refers to GUILT FREE in passing.

Through acquisitions, [Opposer] became the last Arkansas-based ice cream manufacturer. With an eye towards innovation, [Opposer] expanded its offerings beyond "Premium Reds" into Frozen Yogurt and "Guilt Free" ice creams.¹⁰⁶

The document does not refer to where or how Opposer sells its GUILT FREE frozen confections.

¹⁰³ Podracky Decl. ¶15 (10 TTABVUE 514).

¹⁰⁴ Podracky Decl. ¶18 (10 TTABVUE 514).

¹⁰⁵ Kegan Decl. ¶¶2 and 4 (10 TTABVUE 527).

¹⁰⁶ 10 TTABVUE 265.

Exhibits 44 and 46 do not refer to GUILT FREE frozen confections.¹⁰⁷ Exhibit 45 consists of eight documents.¹⁰⁸ Of those documents, only Opposer's Twitter account refers to GUILT FREE frozen confections.¹⁰⁹

Nevertheless, because both descriptions of goods are unrestricted without any limitations as to channels of trade and classes of consumers, we must presume that both parties offer their vegetable based snacks or frozen confections in all channels of trade normal for those products and they are available to all classes of consumers for those products. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Therefore, there is some overlap in the channels of trade and classes of consumers.

Applicant contends that it sells its products at high-end supermarkets, such as Whole Foods, natural food stores, such as Good Earth Natural Foods, and online from Applicant's website, Amazon.com, and vegan websites, whereas Opposer failed to introduce any evidence that Opposer sells its products online, let alone from vegan websites.¹¹⁰ Applicant's argument is inapposite. As noted above, we must compare Applicant's goods and Opposer's goods as the parties identified them in the application and the pleaded registrations. *See Stone Lion Capital Partners, LP v. Lion*

¹⁰⁷ 10 TTABVUE 418 and 437-439.

¹⁰⁸ 10 TTABVUE 420-437.

¹⁰⁹ 10 TTABVUE 426.

¹¹⁰ Applicant's Brief, p. 12 (15 TTABVUE 12).

Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Notwithstanding Applicant’s argument and evidence regarding the actual scope of its own and the cited Registrant’s commercial use of its mark, we may not limit, by resort to extrinsic evidence, the scope of goods as identified in Opposer’s pleaded registrations or in Applicant’s application. *E.g.*, *Coach Servs.*, 101 USPQ2d at 1722 (citing *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”)). *See also Octocom Sys.*, 16 USPQ2d at 1787 (the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods or services set forth in the application, regardless of what the record may reveal as to the particular nature of applicant’s goods, the particular channels of trade, or the class of purchasers to which sales of the goods or services are directed).

Nevertheless, this *DuPont* factor only weighs slightly in favor of finding that there is a likelihood of confusion because there is no evidence that the same consumers will encounter the products in the same marketing milieu (i.e., that they are sold in close proximity to one another). *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899-1900 (Fed. Cir. 2000) (finding no error in the Board’s failure to consider the trade channels as weighing in prior owner’s favor where both products were sold in supermarkets and where there was no evidence “that the products are sold in close

proximity to one another.”); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (noting that although dairy products generally need to be refrigerated and may be kept in different area of market, not error for Board to take notice that baked goods are stored and sold in refrigerated or frozen form, and that bread and cheese may be displayed in close proximity in the deli counter); *Federated Foods*, 192 USPQ at 26 (stating that the mere existence of modern supermarket containing a wide variety of products should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed).

C. The conditions under which the parties make sales.

Opposer contends that frozen confections and vegetable-based snacks are low cost products because purchasers take less care when purchasing an inexpensive product thereby increasing the risk of confusion.¹¹¹ The Walmart Museum Spark Cafe advertises the sale of ice cream, including “Guilt-Free Homemade Vanilla” for 99 cents¹¹² and a one scoop chocolate sundae with “Guilt-Free” vanilla ice cream, whipped cream and a cherry for \$3.95.¹¹³ The Lucky 32 restaurant menu (circa 1992) advertises the sale of a slice of pie a la mode for \$4.95.¹¹⁴ Applicant’s website advertises the sale of a 12-pack of Applicant’s products for \$59.99 or \$5 per

¹¹¹ Opposer’s Brief, p. 12 (10 TTABVUE 3).

¹¹² 10 TTABVUE 441 and 444.

¹¹³ 10 TTABVUE 446.

¹¹⁴ 10 TTABVUE 244, 251 and 256.

package.¹¹⁵ The AJC.com website and the VeganEssentials.com website advertise the sale of Applicant's product for \$4.99 for a 3.5-ounce bag.¹¹⁶

When products are relatively low-priced, they may be subject to impulse buying, and the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care." *Recot*, 54 USPQ2d at 1899 (citing *See Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed.Cir.1985). On the other hand, because the marks engender the commercial impression of diet friendly products, some customers may prove to be discriminating.

Considering the particular nature of the goods herein, we do not believe that purchasing decisions are apt to be made impulsively or carelessly, as would be the case of a child purchasing candy or a toy. Thus, even in the hustle and bustle atmosphere of a supermarket, diet-conscious purchasers of these prepared entrees are a special class of purchasers who may be expected, at least, to examine the front of the packages in order to determine what kind of entree is contained therein and its caloric content. On both of these parties' packages, as well as on most of the competitive brands, this information is prominently displayed in close association with the trademarks. Therefore, a lesser standard of care is not justified.

Stouffer Corp. v. Health Valley Nat. Foods, Inc., 1 USPQ2d 1900, 1902 (TTAB 1986) (citing *Weight Watchers Int'l v. I. Rokeach & Sons, Inc.*, 211 USPQ 700, 706 (TTAB 1981), *aff'd on other ground*, 576 F.Supp. 841, 216 USPQ 1090 (S.D.N.Y. 1982).

¹¹⁵ 15 TTABVUE 42

¹¹⁶ 15 TTABVUE 177-78 and 251.

However, recognizing the well settled precedent that we must consider the “least sophisticated consumer in the class,” we must presume the purchasers for frozen confections and vegetable-based snacks include ordinary consumers who may buy inexpensive snacks on impulse. *Stone Lion Capital Partners*, 110 USPQ2d at 1163-64. *See also In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that not all purchasers of wine may be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”).

D. The strength of Opposer’s mark GUILT FREE, including fame and the number and nature of similar marks in use in connection with similar goods and services.

In determining the strength of a mark, we consider both its inherent strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning.”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:83 (5th ed. 2019) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). Market strength is

the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899. In other words, it is similar to acquired distinctiveness. For purposes of the likelihood of confusion analysis, a mark's renown may "var[y] along a spectrum from very strong to very weak." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotations omitted).

We turn first to the inherent or conceptual strength of Opposer's GUILT FREE trademark. To evaluate the inherent or conceptual strength of a word mark, we place the mark in one of the following classes: "(1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful. The lines of demarcation, however, are not always bright." *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ2d 759, 764 (2d Cir. 1976). Word marks that are arbitrary, fanciful, or suggestive are "held to be inherently distinctive." *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000).

According to Wikipedia,

Guilt is a cognitive or an emotional experience that occurs when a person believes or realizes – accurately or not – that they have compromised their own standards of conduct or have violated a universal moral standard and bear significant responsibility for that violation. Guilt is closely related to the concept of remorse.¹¹⁷

¹¹⁷ 10 TTABVUE 452. See also Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY (2020) accessed March 10, 2020 defining "guilt," inter alia, as "a feeling of responsibility or remorse for some offense, crime, wrong, etc., whether real or imagined." The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome*

The suffix “-free” is defined as “a combining form with the general sense ‘free of or from something specified,’ and typically ‘not having, containing, subject to, or affected by something unwanted, burdensome, etc.’”¹¹⁸ Thus, the term “Guilt Free” means not subject to remorse or shame. When Opposer uses GUILT FREE in connection with frozen confections or frozen dairy confections, it suggests that a person may enjoy the frozen treat remorse, shame or guilt due to the calories in the frozen treat.

The 25 third-party registrations incorporating the word “Guilt” used in connection with food, owned by 17 entities, Applicant introduced into evidence engender a guilt free commercial impression. We list the third-party registrations below:¹¹⁹

Mark	Reg. No.	Goods
BETTER POP {GUILT-FREE} POPCORN	4648468	Popcorn
WHITE CAMEL GOURMET HUMMUS GUILT-FREE OINDULGENCE	4758795	Hummus
EAT ME GUILT FREE	5268676	Powdered peanut butter
GUILTLESS PIZZA	4610647	Gluten-free, grain-free, low-carb pizza crust
GUILTLESS BREAD	4610648	Gluten-free, grain-free, low-carb bread
GUILTLESS CUISINE	5051331	Appetizers
GUILTLESS SUPERFOODS	5155358	Bakery products
MY GUILTLESS TREATS	5224708	Gummy candies, dessert puddings
GUILTLESS GOODIES	5598992	Cakes, cookies, pastries, and frozen confections.
GUILTLESS GUAC	5633838	Guacamole
REDUCED GUILT	3452518	Potato chips

Enters. Inc., 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

¹¹⁸ Dictionary.com based on the RANDOM HOUSE UNABRIDGED DICTIONARY.

¹¹⁹ 15 TTABVUE 284-328.

Mark	Reg. No.	Goods
GUILTLESS GOURMET — TONY LITTLE'S GUILTLES ENTREES — GUILTLESS ENTREES	1816047 1939643 1937014 1939663 2019700 2747519 2804552 4129017	Tortilla chips and spicy tomato-based salsa Dairy-based dips and bean-based dips Potato chips and snack food dips Prepared low fat, low calorie meals consisting primarily of pasta and rice Prepared meals consisting primarily of meat, fish, poultry or vegetables
HALF THE GUILT BURGER	3685236	Hamburgers
AL'S SLIM PICKENS 100% TASTE & 0% GUILT	3843558	Bakery goods
ALLISON FRAHN'S 100% TASTE & 0% GUILT	5004198	Flavor enhancers used in food and beverage products
THE DELICIOUS COOKIE WITHOUT THE GUILT	4026118	Cookies and biscuits
ALL OF THE COMFORT, NONE OF THE GUILT	4652465	Bread, coffee, hamburgers, pizza, salad dressings, sandwiches, sauces and teas
FONDRE SNACK WITHOUT GUILT	5471822	Chocolate infused coffee, cocoa, cereal, mueslis, candy, dibble ices, sugar and sugar cubes, tubes of sugar

In addition, Applicant introduced excerpts from 13 third-party websites advertising products using marks that engender the “Guilt Free” commercial impression. We list the third-party websites below:

- WalMart.com¹²⁰



- Eat Me Guilt Free website (eatmeguiltfree.com)¹²¹



¹²⁰ 15 TTABVUE 330.

¹²¹ 15 TTABVUE 332.

- White Camel website (whitecamelhummus.com)¹²²



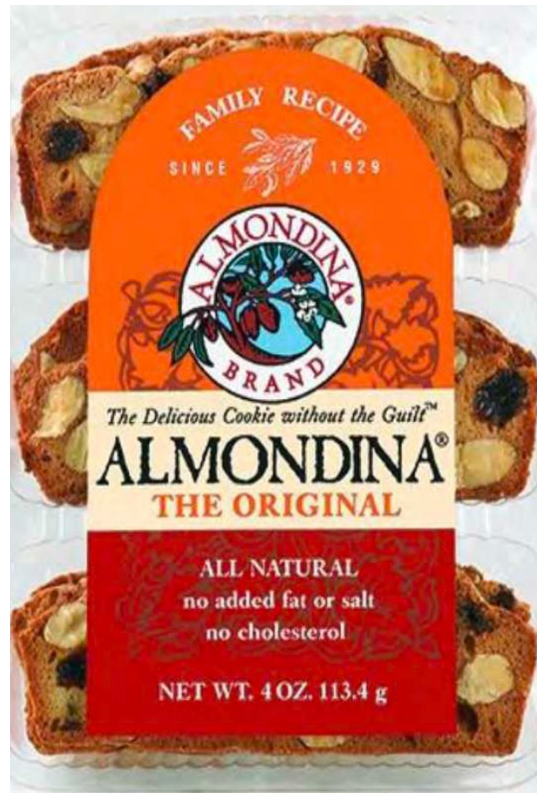
- Trader Joe's Reduced Guilt potato chips on ebay.com¹²³



¹²² 15 TTABVUE 334.

¹²³ 15 TTABVUE 336.

- Almondina Biscuits (amazon.com).¹²⁴



- Alison-Frahn.com¹²⁵



¹²⁴ 15 TTABVUE 338 and 19 TTABVUE 185.

¹²⁵ 15 TTABVUE 340.

- Elevation Burger website (elevationburger.com)

• HALF THE GUILT VEGGIE BURGER 480 CAL

One Veggie and one organic beef patty served on a potato bun

• HALF THE GUILT VEGAN BURGER 500 CAL

One Vegan and one organic beef patty served on a potato bun

- TheGuiltlessGarden.com¹²⁶



- Guiltless Goodies Superseed Bakery Facebook page¹²⁷



¹²⁶ 15 TTABVUE 346.

¹²⁷ 15 TTABVUE 348.

- Central Market website (centralmarket.com)¹²⁸

GUILTLESS SUPERFOODS SKINNY DONUTS DARK CHOCOLATE, 15 OZ
\$14.48 ea

- My Guiltless Treats website (myguiltlesstreats.com)¹²⁹



- Guiltless Gourmet on Amazon¹³⁰

Guiltless Cuisine Veggie Burger, 4 Ounce --
36 per case.
by Guiltless Gourmet
★★★★☆ 6 customer reviews | 3 answered questions

- Guiltless Gourmet website (The Manischewitz Company)
(guiltlessgourmet.com)¹³¹



¹²⁸ 15 TTABVUE 350.

¹²⁹ 15 TTABVUE 352.

¹³⁰ 15 TTABVUE 354.

¹³¹ 15 TTABVUE 356 and 358.

As noted above, Stephen Podracky testified that Opposer licenses others to use GUILT FREE. However, the manner in which Smucker's, a licensee, displays the mark is unlikely to point to Applicant as the source of the products. For example, consumers are likely to perceive Smucker's as the source of the sorbet, hot fudge topping, or chocolate syrup shown below rather than Applicant or any other single anonymous source.¹³²



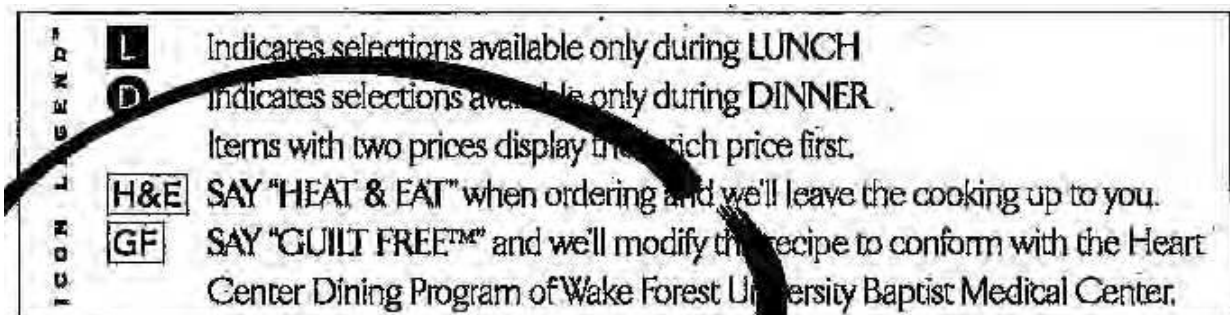
The use of GUILT FREE emanating from more than one source does not create the commercial impression of trademark because it does not identify the products of one entity and distinguish them from the products of others (i.e., consumers will not perceive the use of GUILT FREE to be exclusive to Opposer).¹³³ Cf. *British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197, 1203 (TTAB 1993), *aff'd on other grounds*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994) (“When such a party has sold its own

¹³² 10 TTABVUE 99, 117, and 118.

¹³³ “The marks of different entities may, of course, appear on a single product where they serve separate functions; for example, manufacturer/distributor, ingredient/product, licensor/licensee.” *In re Polar Music Int'l AB*, 714 F.2d 1567, 221 USPQ 315, 317 (Fed. Cir. 1983). Consumers will perceive Smucker's as the source of the product because the marks do not differentiate different functions.

goods, bearing a color which it asserts has become distinctive of its goods, to third parties for resale to the consuming public as the products of those third parties, such practice detracts even further from the alleged distinctiveness of the color as that party's trademark.”).

Finally, the Lucky 32 restaurant “Get Lucky & Go” take out menu that Opposer’s predecessor-in-interest submitted as a specimen of use in the underlying application for Registration No. 2367307 for the mark GUILT FREE for restaurant services, uses the term “Guilt Free” as a suggestive term. We reproduce the relevant part of the menu below:¹³⁴



Based on the commercial impression engendered by the term “Guilt Free” and the third-party registrations and use of marks incorporating variations of the word “Guilt” to engender the commercial impression of a food a person can eat without remorse, we find that Opposer’s mark GUILT FREE is suggestive.

We turn now the commercial strength of Opposer’s mark. In his August 26, 2019, Supplemental Declaration, Stephen Podracky, Opposer’s Vice President of Sales, testified that since December 2011, Opposer has sold over one million dollars of

¹³⁴ 10 TTABVUE 251.

GUILT FREE frozen confections and frozen dairy confections and “has invested over a quarter-million dollars in selling and marketing expenses for GUILT FREE products.”¹³⁵ In approximately 7½ years, Opposer has sold over \$1,000,000 worth of GUILT FREE frozen confections for an average of \$133,333 per year. Over that same period, Opposer has spent on average \$33,333 per year on advertising and marketing.

Opposer contends that it “has engaged in successful marketing efforts at community events, the key sports stadium, television news demonstrations, social media promotions, and more,” citing its exhibit Nos. 32 and 44-50.¹³⁶ However, there is little, if no testimony, as to where those efforts took place and how many people encountered Opposer’s GUILT FREE mark. Moreover, the focus of the advertising in the cited exhibits is YARNELL, Opposer’s house mark, not GUILT FREE. Exhibit 32, an excerpt from Opposer’s Facebook page, refers to GUILT FREE in passing:

Flavors in the Yarnell’s Guilt Free line of ice cream, which offers flavored, real ice cream that low fat with no sugar added, will include Butter Pecan, Chocolate and Vanilla.¹³⁷

There is no testimony as to how many people visit Opposer’s Facebook page or who have viewed the entry posted as Exhibit 32. Likewise, Opposer posted a GUILT FREE advertisement on its Twitter account but did not provide any testimony as to how many people follow Opposer on Twitter or who may have viewed the advertisement.¹³⁸

¹³⁵ Podracky Supplemental Decl. ¶¶8 and 9 (10 TTABVUE 519).

¹³⁶ Opposer’s Brief, p. 13 (10 TTABVUE 14).

¹³⁷ 15 TTABVUE 276.

¹³⁸ 15 TTABVUE 426.

The Spark Café at the Walmart Museum advertises Opposer’s ice cream. However, as shown on the excerpt from the menu, the Spark Cafe does not display GUILT FREE as a product mark; it is just one of many flavors.¹³⁹



Based on Opposer’s testimony and evidence regarding Opposer’s sales of GUILT FREE frozen confections and its advertising and marketing efforts, we find that GUILT FREE has made little, if any, commercial impact. In view of the suggestive nature of Opposer’s mark GUILT FREE and its lack of commercial strength, we find that GUILT FREE falls on the weak side of the spectrum from very strong to very weak. Accordingly, the mark GUILT FREE only will bar the registration of marks where the resemblance to Opposer’s mark is striking enough to cause one seeing it to assume that there is a connection, association, or sponsorship between the two. *Cf.*

¹³⁹ 15 TTABVUE 441. *See also* 15 TTABVUE 447, the Spark Café menu board displaying GUILT FREE as a sundae option in the manner of “banana split,” “MoonPie Palooza,” or “The SuperCenter Sundae.”

Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co., Inc., 95 USPQ2d 1271, 1278 (TTAB 2009), *aff'd*, 415 F. Appx. 222 (Fed. Cir. 2010) (citing *Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983)).

E. The similarity or dissimilarity of the marks.

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

“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.” *Cai v. Diamond Hong*, 127 USPQ2d at 1801 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); *see also* *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *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 include vegetable-based snack foods and frozen confections, the average customer is an ordinary consumer.

Applicant is seeking to register FULL OF FLAVOR FREE OF GUILT and Opposer’s mark is GUILT FREE. On one hand, the marks are similar because they have similar meanings, they engender similar commercial impressions and they sound alike. On the other hand, there are obvious differences between the marks. Applicant’s mark FULL OF FLAVOR FREE OF GUILT is more of an advertising tagline or slogan consisting of two terms, “Full of Flavor” followed by “Free of Guilt.” Applicant’s mark rolls off the tongue because of the alliteration of the letter “F” and the uniform, rhythmic structure and cadence of the two terms thereby distinguishing Applicant’s mark from Opposer’s mark when compared in their entireties.

Considering the suggestive nature of Opposer’s mark GUILT FREE and the commercial weakness, as well as the numerous third parties using marks comprising variations of the word “Guilt,” the differences between the marks discussed above are sufficient to distinguish the marks. Therefore, unlike a situation involving an arbitrary or fanciful mark, the addition of other matter to a laudatory or suggestive

term, such as FULL OF FLAVOR added to FREE OF GUILT, is enough to distinguish it from GUILT FREE. *See In re Hunke & Jocheim*, 185 USPQ 188, 189 (TTAB 1975).

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

Sure-Fit Products Company v. Saltzson Drapery Company, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958). Under these circumstances, we accord marks engendering a “Guilt Free” commercial impression in connection with food products a narrow scope of protection. Keeping this in mind, we find in this case that the marks are sufficiently different to avoid the likelihood of confusion.

F. Balancing the factors.

Despite the facts that the products are offered in some of the same channels of trade to the same or overlapping classes of consumers under conditions in which consumers may not exercise a high degree of purchasing care, and because Opposer’s mark GUILT FREE used in connection with frozen confections is suggestive and has little commercial strength, we find that the marks are not similar. In addition, Opposer did not meet its burden of proving that the frozen confections and vegetable-based snacks are related products. Accordingly, we find that Applicant’s mark FULL OF FLAVOR FREE OF GUILT for “vegetable based food products, namely, vegetable based snack foods; meat substitutes” is not likely to cause confusion with the marks

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in Opposer's pleaded registrations, GUILT FREE for "frozen confections" and "frozen dairy confections."

Decision: The opposition is dismissed.