

This Opinion is not a  
Precedent of the TTAB

Mailed: January 20, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Basis Holdings LLC*

*v.*

*Bob's Red Mill Natural Foods, Inc.*

—  
Opposition No. 91219781  
To Serial No. 86163867  
—

Thomas B. Wilinsky of Biancone & Wilinsky, LLP  
for Basis Holdings LLC

Clifford S. Davidson of Sussman Shank LLP  
for Bob's Red Mill Natural Foods, Inc.

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Before Shaw, Hightower and Heasley,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Bob's Red Mill Natural Foods, Inc., seeks registration on the Principal Register of the mark **GOOD FOOD FOR ALL** (in standard characters) for various

foodstuffs in International Classes 29, 30, and 31.<sup>1</sup>

Opposer, Basis Holdings LLC, has opposed registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with Applicant's goods, so resembles Opposer's two

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<sup>1</sup> Application Serial No. 86163867 was filed on January 13, 2014, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The identified goods are:

In International Class 29: Textured soy protein for use as a meat extender; textured vegetable protein for use as a meat extender, meat substitute or food additive; soy protein concentrate for use as a food additive; soup mixes; dried eggs; milk powders; whey; processed edible seeds; processed edible seeds in their shells; potato flakes; processed fruits coated in rice, oat flour and oil; gluten-free textured vegetable protein for use as a meat extender or meat substitute; organic and non-organic soy protein powder for use as a food additive to accommodate special medical and health conditions the aforementioned for culinary use and not taken as a dietary supplement or for medical purposes; processed beans; gluten-free soy lecithin granules for culinary purposes; flaked coconut.

In International Class 30: Flour; processed bran; processed herbs; spices; grits; processed bulgar wheat; kasha; rice; tapioca; carob powder; wheat germ for human consumption; dried pieces of vital wheat gluten; edible seed meals; nut meals, namely, nut flours; processed cereals; breakfast cereals; granola; mixes for bakery goods; pie mixes; muffin mixes; biscuit mixes; cookie mixes; bread mixes; pancake and waffle mixes; coconut flour; cornmeals; polentas; couscous; processed oats; oatmeal; brown rice; farina, organic and non-organic cracked rye, organic and non-organic pumpernickel rye meal; sugars; food starch; baking powder; baking soda; salt; cooking salt; sea salt used as a savory ingredient in food; yeast; blends of whole grains used as a cereal or pilaf; popcorn; rolled oats; rolled grains; gluten additives, cream of tartar additives, guar gum and xanthan, all for non-nutritional purposes for use as a flavoring ingredient or filler; hemp protein powder, flours from grains, beans, lentils, roots and tubers, organic and non-organic grains; flax seed meal; pancake and waffle mixes; pizza crust mixes; whole grain teff and teff flour; food starches; baking powder, active dry yeast, nutritional large flake yeast, and coconut flour to accommodate special medical and health conditions, the aforementioned for culinary use and not taken as a dietary supplement or for medical purposes; soup flavoring mixes, namely, bean soup flavoring mix; unpopped popcorn; processed aramant, barley, buckwheat, corn, faro, freekeh, khorasan wheat, millet, oats, quinoa, rice, rye, sorghum, spelt, teff, triticale, and wheat.

In International Class 31: Raw, unprocessed seeds, namely, sesame, sunflower, caraway, chia, flax, poppy, pumpkin, teff, hemp and alfalfa seeds; raw coconut; raw whole grains for use in food preparation; unprocessed grains, namely, aramant, barley, buckwheat, corn, faro, freekeh, khorasan wheat, millet, oats, quinoa, rice, rye, sorghum, spelt, triticale, wheat; gluten-free raw seeds to accommodate special medical and health conditions; raw beans; wheat germ for human consumption; fresh coconut.

prior registered marks, **GOOD FOOD FOR ALL**<sup>2</sup> and **BASIS GOOD FOOD FOR ALL**,<sup>3</sup> both in standard characters, for “concession stands featuring food, food kiosk services, retail grocery stores, street vendor services featuring food, wholesale distributorship services” in International Class 35, as to be likely to cause confusion.

Applicant, in its answer, admitted that Opposer owns the registered marks, based on public records; that Opposer’s marks list the services described above; that Applicant filed the subject Application; that Applicant’s mark is identical to one of the registered marks and highly similar to the other; and that Applicant seeks registration of its mark in three classes of goods, all related to foodstuffs.<sup>4</sup> Applicant nonetheless denied that its goods were closely related to Opposer’s services, that they were likely to travel through the same channels of trade to the same class of customers, and that there was any likelihood of confusion between Opposer’s registered marks and Applicant’s mark.<sup>5</sup>

Opposer moved for summary judgment, which was denied on the ground that “[a]t a minimum, a genuine dispute of material fact remains with respect to the relatedness of Opposer’s services and Applicant’s various food items, as well as the channels of trade.”<sup>6</sup> Both parties subsequently filed notices of reliance and trial briefs.

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<sup>2</sup> Registration No. 3862905 issued on the Principal Register on October 19, 2010; combined Section 8 and 15 declaration filed on October 18, 2016.

<sup>3</sup> Registration No. 3901117 issued on the Principal Register on January 4, 2011; combined Section 8 and 15 declaration accepted and acknowledged.

<sup>4</sup> Answer, ¶¶ 1-4, 6 TTABVUE 2-3.

<sup>5</sup> Answer, ¶¶ 5-7, 6 TTABVUE 3.

<sup>6</sup> 11 TTABVUE 6. As the Board Order further noted, Applicant’s affirmative defense, that Opposer’s marks were not in use with all of the services listed in the registrations, would be given no consideration absent Applicant filing a compulsory counterclaim to cancel one or

## **I. Standing and Priority**

Opposer has standing to oppose the subject Application. As owner of the two pleaded prior registrations, it has a real interest—that is, a direct and personal stake in the outcome of this proceeding—and a reasonable basis for its belief that it would be damaged by registration of Applicant’s mark. *See* Trademark Act Section 13, 15 U.S.C. § 1063; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Further, Opposer has established priority by virtue of its prior registrations, which are properly pleaded and of record. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

## **II. 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 file.

### **A. Opposer’s Evidence**

Opposer’s record evidence consists of a notice of reliance<sup>7</sup> containing the following exhibits:

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both registrations. 11 TTABVUE 3. *See* Trademark Rule 2.106(b)(2)(i). Applicant did not file a counterclaim.

<sup>7</sup> 12 TTABVUE.

- a. Registration No. 3862905: Trademark Electronic Search System (TESS) and Trademark Status & Document Retrieval (TSDR) printouts showing status and title to registration;
- b. Registration No. 3901117: TESS and TSDR printouts showing status and title to registration;
- c. A printout from USPTO electronic databases of an Office Action pertaining to third-party application Serial No. 85679953 for the mark GOOD FOOD FOR ALL, filed by applicant Snowville Creamery, LLC for dairy products, which was attached to Opposer's Notice of Opposition;
- d. TESS and TSDR printouts for application Serial No. 85679953, which show that the application was abandoned following an 11/13/2012 Office Action refusing registration based on Opposer's two cited prior registrations, as well as third-party registrations showing both dairy products and food distribution and retail grocery store services emanating from same sources;
- g-p. TESS printouts of third-party registrations, each offered to show the same or similar goods and services identified in the subject Application and Opposer's registrations offered by a single registrant;
- q. Printouts from Applicant's website under the category "Find a Store," downloaded 11/12/2015, listing stores offering Applicant's products in New York City and Portland, Oregon;

- r. Printouts from Applicant's website under the category "Bob's Red Mill Whole Grain Store," downloaded 11/12/2015, describing Applicant's retail store purporting to purvey all of its products;
- s. Printouts from Applicant's website under the category "Get A Coupon," downloaded 11/12/2015, referring to "retail stores that carry Bob's Red Mill products in the United States."<sup>8</sup>

**B. Applicant's Evidence**

Applicant's record evidence consists of a notice of reliance<sup>9</sup> incorporating by reference "[a]ll evidence designated in Opposer's First Notice of Reliance" and adding the following exhibits:

- 1. Printout of article from New York Magazine, available through Opposer's website at [www.BasisFoods.com](http://www.BasisFoods.com), describing Opposer as a food delivery service;
- 2. Printout from website of the Economic Research Service, U.S. Department of Agriculture, at [www.ers.usda.gov](http://www.ers.usda.gov), downloaded 11/3/2015, concerning the number of food stores in the United States;
- 3. Printout from the USPTO Trademark Acceptable Identification of Goods & Services manual ("Trademark ID Manual") showing results of a query of the word "food".

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<sup>8</sup> Opposer also submitted copies of the Notice of Opposition, Answer, and printouts from USPTO electronic databases from the file of the opposed application, all of which automatically form part of the record. *See* Trademark Rule 2.122(b)(1).

<sup>9</sup> 13 TTABVUE.

### III. Likelihood of Confusion

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

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

We have considered each *DuPont* factor that is relevant, and have treated any other factors as neutral. 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.”). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”).

### A. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Opposer's marks as compared in their entirety, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

It is undisputed that the applied-for mark is identical to Opposer's registered mark **GOOD FOOD FOR ALL**.<sup>10</sup> Because both parties' marks are in standard characters, Opposer's mark may be depicted in any font size, style or color that Applicant might adopt for its applied-for mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Citigroup v. Capital City Bank*, 98 USPQ2d at 1259. They are the same in sight, sound, meaning, and overall commercial impression. *See Palm Bay Imports*, 73 USPQ2d at 1692.

It is also undisputed that the applied-for mark is highly similar to Opposer's other registered mark, **BASIS GOOD FOOD FOR ALL**.<sup>11</sup> This registered mark, also in standard characters, incorporates Applicant's mark in its entirety. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (finding applicant's mark ML similar to registrant's mark ML MARK LEES); *Hunter Indus., Inc. v. Toro*

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<sup>10</sup> Applicant's Answer, ¶ 3, 6 TTABVue 3. Reg. No. 3862905.

<sup>11</sup> Applicant's Answer, ¶ 3, 6 TTABVue 3. Reg. No. 3901117.

Co., 110 USPQ2d 1651, 1660-61 (TTAB 2014) (finding entirety of applicant's PRECISION mark incorporated into registrant's PRECISION DISTRIBUTION CONTROL mark). The addition of Opposer's "house mark," BASIS, does little to distinguish the marks. *See In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1366-67 (TTAB 2007) (finding CLUB PALMS MVP and MVP confusingly similar); *In re Christian Dior, S.A.*, 225 USPQ 533, 534 (TTAB 1985) (finding LE CACHET DE DIOR and CACHET confusingly similar); TMEP § 1207.01(b)(iii) (Oct. 2016).

Given that the marks are identical or highly similar, the first *DuPont* factor weighs heavily in favor of a finding of likelihood of confusion. *See In re i.am.symbolic*, 116 USPQ2d 1406, 1411 (TTAB 2015); *accord In re Integrated Embedded*, 120 USPQ2d 1504, 1513-14 (TTAB 2016).

#### **B. Relatedness of the Goods and Services and Channels of Trade**

Under the second and third *DuPont* factors, we consider the degree to which the parties' identified goods and services are related, as well as the channels of trade through which they would be offered. *DuPont*, 177 USPQ 567. "[T]he greater the degree of similarity between the applicant's mark and the cited registered mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion." *Time Warner Entm't Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002). And where identical word marks are involved, as is the case here, the degree of relatedness required to support a finding of likelihood of confusion declines even further. *See In re Shell Oil Co.*, 26 USPQ2d at 1689 ("even when the goods or services

are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source”).

Here the parties take issue. Opposer contends that Applicant’s “broad descriptions of its products” are closely related to Opposer’s services because they are food-related products and services likely to travel through the same channels of trade to the same class of customers:<sup>12</sup> “For example, the goods and services are likely to be advertised together in food catalogs, directories and trade publications,” Opposer argues. “Moreover, Applicant’s goods are likely to be sold through the Opposer’s concession stands, food kiosks, grocery stores, street vendor services and wholesale food distributorships.”<sup>13</sup> In circumstances such as these, Opposer concludes, the use of similar marks on or in connection with Applicant’s food products and Opposer’s food-related services is likely to cause confusion. In support of its argument, Opposer cites, among other cases, *In re Thomas*, 79 USPQ2d 1021, 1023 (TTAB 2006) (holding the use of similar marks both for jewelry and for retail jewelry and mineral store services was likely to cause confusion).

Applicant distinguishes the *Thomas* decision, arguing that unlike jewelry stores carrying jewelry, “not many concession stands, kiosks or street vendors sell organic grains and flours.”<sup>14</sup> Applicant instead likens this case to *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003), where our reviewing Court held

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<sup>12</sup> Opposer’s brief, p. 16, 14 TTABVUE 22.

<sup>13</sup> *Id.*

<sup>14</sup> Applicant’s brief, 19 TTABVUE 9.

that “to establish likelihood of confusion a party must show *something more* than similar or even identical marks are used for food products and for restaurant services.” *Id.* at 1063 (quoting *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982)). Applicant maintains that the “something more” is unproven here. At the wholesale food distribution level, it argues, Opposer introduced no evidentiary basis for its assertion that the parties’ products and services are likely to be advertised together in food catalogs, directories and trade publications.<sup>15</sup> At the retail grocery store level, it argues, this case factually resembles *Coors Brewing*, where the Court found that “a tiny percentage of all restaurants also serve as a source of beer, which is a very weak evidentiary basis for a finding of relatedness.” 68 USPQ2d at 1063. Here, as there, it argues, Applicant’s identified goods—consisting of organic grains, flours and mixes, among other foodstuffs—“are carried in approximately 7,900 markets nationwide—a small percentage of the 212,000 traditional food stores in the United States....”<sup>16</sup> Beyond that, it contends, Opposer operates a food delivery service,<sup>17</sup> and “a consumer searching for a service will not necessarily find a good, and vice-versa, and can tell the difference between a good and a service.”<sup>18</sup> For these reasons, Applicant concludes, its goods are not sufficiently

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<sup>15</sup> *Id.*, 19 TTABVUE 3.

<sup>16</sup> *Id.*, 19 TTABVUE 7, citing Applicant’s Notice of Reliance exhibit 2, USDA Economic Research Service report, which indicates on its face that 212,000 traditional food stores in the United States, of which 91% were grocery stores, and Notice of Reliance exhibit 3, a printout of acceptable descriptions of food products in the Trademark ID Manual. 13 TTABVUE 5-22.

<sup>17</sup> Applicant’s brief, 19 TTABVUE 2, Applicant’s notice of reliance, exhibit one, 13 TTABVUE 4.

<sup>18</sup> Applicant’s brief, 19 TTABVUE 8.

related to Opposer's services to engender consumer confusion.

As we have repeatedly emphasized, however, the issue is not whether purchasers would confuse the parties' goods and services, but rather whether there is a likelihood of confusion as to the source of these goods and services. *E.g.*, *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989); *In re Binion*, 93 USPQ2d 1531, 1535 (TTAB 2009). It is sufficient that the goods and services be related in some manner, or that the circumstances surrounding their use be such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective services. *See On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000).

Even accepting Applicant's argument that concession stands, kiosks and street vendors tend to sell more processed, ready-to-eat food products than organic grains, flours and mixes, Opposer is not limited to these forms of retail food stands. Nor is it limited to food delivery services, as Applicant suggests.<sup>19</sup> Rather, the scope of Opposer's services is determined by the identification of services in its registrations, which contain no such limitation. *See Stone Lion*, 110 USPQ2d at 1162; *Octocom*

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<sup>19</sup> As we observed earlier, in the absence of a counterclaim, Applicant cannot limit the presumptive scope of Opposer's cited registrations by adducing extrinsic evidence that their use in commerce is more restricted than the identification of services in the registrations. *See* n.6 *supra*.

*Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Bond v. Taylor*, 119 USPQ2d 1049, 1052 (TTAB 2016). Opposer's registrations also encompass wholesale food distributorship services and retail grocery stores, which we find to be normal channels of trade for Applicant's sort of goods. See *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.").

It is not uncommon for distributors and retailers to own trademarks, even for goods produced by others. See generally *Uveritech, Inc. v. Amax Lighting, Inc.*, 115 USPQ2d 1242, 1251 (TTAB 2015) (citing, *inter alia*, *In re Los Angeles Police Revolver & Athletic Club, Inc.*, 69 USPQ2d 1630, 1634 (TTAB 2003) ("[T]he mere fact that applicant is the distributor of goods is not necessarily fatal to its claim of ownership of the mark.")); *In re Supply Guys Inc.*, 86 USPQ2d 1488, 1495 (TTAB 2008) (citing *Giant Food Inc. v. Rosso and Mastracco, Inc.*, 218 USPQ 521, 524 (TTAB 1982) ("The word 'GIANT' appears on several hundred products marketed in opposer's stores....")).

As Professor McCarthy puts it, "It is clear that one need not actually manufacture goods in order to acquire and own a valid trademark for the goods. That is, one who only distributes goods made by another can be the 'owner' of a trademark which the distributor places on the goods to identify the distributor. ... The Board has stated expansively that a merchant can be the owner of a trademark, 'if he applies or has

someone in his behalf apply his own trademark to goods to which he has acquired ownership and title and sells or merely transports such goods in commerce.” 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 16:46 (4th ed. 2016).

Opposer has introduced in evidence ten used-based TESS printouts of third-party registrations for marks covering foodstuffs similar to Applicant’s as well as wholesale distribution and/or retail grocery store services,<sup>20</sup> e.g.:

Registered Mark	Representative Goods and Services
<p>TRADE FAIR</p> <p>Reg. No. 4816795</p>	<p>Supermarkets, retail grocery stores;</p> <p>Canned beans, evaporated milk, condensed milk, trail mix consisting primarily of processed nuts, seeds, dried fruit and also including chocolate, processed nuts, namely, almonds, pecans, pine nuts, pistachios, peanuts, walnuts, cashews, vegetable chips, frozen peas, preserved peas, dried beans, dried lentils, rice, salt, honey, spices</p>
<p>SIMPLE TRUTH ORGANIC</p> <p>Reg. No. 4798375</p>	<p>Supermarket services featuring organic products;</p> <p>Coconut oil, processed lentils, hazelnut spread, soup, tahini, soy sauce, bagged grains, namely, processed rice, popcorn; all of the foregoing being organic and derived from or based upon organic principles.</p>
<p>ARTISAN JOURNEY</p> <p>Reg. No. 4808968</p>	<p>Wholesale store services, retail store services, featuring food products;</p> <p>Barley flour, processed grains, honey, oatmeal, pancake mix, rice</p>

<sup>20</sup> Opposer’s notice of reliance, 12 TTABVUE 262-91.

<p>ANCIENT GRAINS FOR A MODERN WORLD</p> <p>Reg. No. 4677211</p>	<p>Retail store services featuring gluten free food products, namely, flour, dough, breads and desserts in the nature of bakery desserts; wholesale store and distributor services featuring gluten free[] products, namely, flour, dough, breads and desserts in the nature of bakery desserts;</p> <p>Gluten free food products, namely flour, dough, breads and desserts in the nature of bakery desserts.</p> <p>Custom manufacture of gluten free products, namely, flour, dough, breads and desserts in the nature of bakery desserts</p>
<p>WHERE GREAT TASTE IS PLANT-BASED</p> <p>Reg. No. 4698499</p>	<p>Retail store services featuring foods; wholesale distributorships featuring foods;</p> <p>Seafood substitute, meat substitute and poultry substitute</p>

In the same vein, Opposer has submitted a copy of an Office action refusing registration to another applicant’s application for the mark **GOOD FOOD FOR ALL** for dairy products, citing Opposer’s same two prior registrations; that Office action attached twenty-two third-party registrations for marks covering dairy products and other food products, as well as wholesale distribution and/or retail grocery store services.<sup>21</sup> Even though that office action is not binding upon us, *see In re Cordua Rests. LP*, 118 USPQ2d 1632, 1635 n.2 (Fed. Cir. 2016); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1567 (Fed. Cir. 2001), its attached third-party

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<sup>21</sup> Opposer’s notice of reliance, exhibit f, Office action of November 13, 2012 for application Serial No. 85679953, 12 TTABVUE 159-260.

registrations help demonstrate the same point: that Applicant's identified food goods and Opposer's wholesale and retail services are of a type that may emanate from the same source under the same mark. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012). Applicant fails to rebut any of this evidence.

The primary decision on which Applicant relies, *Coors Brewing*, is distinguishable from this case. Coors adduced evidence that "only a very small percentage of restaurants actually brew their own beer or sell house brands of beer." *Coors Brewing*, 68 USPQ2d at 1063. Nothing was offered to counter that evidence, so the Court concluded, "Thus, the evidence before the Board indicates not that there is a substantial overlap between restaurant services and beer with respect to source, but rather that the degree of overlap between the sources of restaurant services and the sources of beer is *de minimis*." *Id.* at 1063-64. Here, in contrast, Applicant fails to counter Opposer's evidence that the goods and services are of a type that may emanate from a single source. Applicant's assertion that its goods "are carried in approximately 7,900 markets nationwide—a small percentage of the 212,000 traditional food stores in the United States"<sup>22</sup> is unavailing for three reasons. First, it pertains only to markets carrying Applicant's own *brand* of foodstuffs, not all markets carrying the sort of goods identified in its application. Second, it fails to quantify the extent to which those sorts of food goods emanate under distributors'

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<sup>22</sup> Applicant's brief, 19 TTABVUE 7.

and retailers' brands, as Coors did. And third, the evidence supporting its assertion—a declaration of Applicant's Executive Vice President of Sales and Marketing, offered in opposition to Opposer's motion for summary judgment<sup>23</sup>—was not included in Applicant's notice of reliance. Thus, it is not of record.<sup>24</sup> *Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1217 (TTAB 2011); Trademark Rule 2.123(b), 37 CFR § 2.123(b), (k); TBMP §§ 703.01(b), 706. So unlike in *Coors Brewing*, Applicant has failed to rebut the evidence that its goods and Opposer's services are of a sort that may emanate from a single source. *See In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1093 (TTAB 2016).

In any event, the Federal Circuit has explained more recently that the “something more” standard “has application whenever the relatedness of the goods and services is not evident, well-known or generally recognized.” *In re St Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014). “In circumstances in which the types of goods and services in question are well-known or otherwise generally recognized as having a common source of origin, the ... burden to establish relatedness will be easier to satisfy.” *Id.* As the foregoing evidence indicates, distributors and retailers offer foodstuffs, including those identified in the subject application, under their own marks commonly enough to be “generally recognized as having a common source of

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<sup>23</sup> Applicant's opposition to motion for summary judgment, Gilliam Declaration, 8 TTABVUE 36.

<sup>24</sup> The Board's ruling on the motion for summary judgment advised the parties, “In addition, evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).” 11 TTABVUE 6 n.6.

origin.” And even if the “something more” standard applied, it has been satisfied.

Consequently, we find under the second and third *DuPont* factors that Applicant’s goods are related to Opposer’s services, and flow through similar channels of trade.

### **C. Conclusion**

For these reasons, taking the record evidence as a whole, including the portions of the record evidence we have not expressly mentioned or discussed, we find by a preponderance of the evidence that Applicant’s applied-for mark is likely to cause confusion with Opposer’s registered marks **GOOD FOOD FOR ALL** and **BASIS GOOD FOOD FOR ALL** under Section 2(d) of the Trademark Act.

**Decision:** The opposition to Applicant’s mark **GOOD FOOD FOR ALL** is sustained. Application No. 86163867 will be abandoned in due course.