

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: QuickFresh, LLC)
Serial No.: 90737211)
Filed: May 26, 2021)
For: **QUICKFRESH**)
Examiner: Gayne G. Zimmerman)

I. APPLICANT’S RESPONSE TO OFFICE ACTION

Applicant respectfully requests reconsideration of the present application in view of the following remarks in response to the Office Action of February 15, 2022.

II. LIKELIHOOD OF CONFUSION REFUSAL

The Examiner has refused registration of the Applicant’s standard character QUICKFRESH mark pursuant to Trademark Act Section 2(d), 15 U.S.C. §1052(d), on the ground that the mark is likely to be confused with Registration No. 1550424 for FRESH ‘N’ QUICK. For the following reasons, Applicant respectfully requests that the Examiner reconsider the statutory refusal and allow registration of the Applicant’s mark.

Likelihood of confusion between two marks is determined by a review of all of the relevant factors under the *du Pont* test. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Although the issue of likelihood of confusion often revolves around the similarity or dissimilarity of the marks and the relatedness of the goods or services, “there is no mechanical test for determining likelihood of confusions and “each case must be decided on its own fact.” TMEP § 1207.01 (*citing du Pont*, 476 F.2d at 1361, 177 USPQ at 567). Each of the 13 *du Pont* factors may be

considered in weighting likelihood of confusion, if raised, and any one may be dispositive. *See* TMEP § 1207.01. In some cases, a determination that there is no likelihood of confusion may be appropriate, even where the marks share common terms and the goods/services relate to a common industry, because these factors are outweighed by other factors, such as differences in the relevant trade channels of the goods/services, the presence in the marketplace of a significant number of similar marks in use on similar goods/services, the existence of a valid consent agreement between the parties, or another established fact probative of the effect of use. *Id.*

The 13 *du Pont* factors are:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.
2. The similarity or dissimilarity and nature of the goods . . . described in an application or registration or in connection with which a prior mark is in use.
3. The similarity or dissimilarity of established, likely-to-continue trade channels.
4. The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
5. The fame of the prior mark.
6. The number and nature of similar marks in use on similar goods.
7. The nature and extent of any actual confusion.
8. The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.
9. The variety of goods on which a mark is or is not used.

10. The market interface between the applicant and the owner of a prior mark.
11. The extent to which applicant has a right to exclude others from use of its mark on its goods.
12. The extent of potential confusion.
13. Any other established fact probative of the effect of use.

Id. at 1361, 177 USPQ at 567. Not all of the *DuPont* factors may be relevant or of equal weight in a given case, and “any one of the factors may control a particular case,” *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

A. Table 1: Relevant Marks and Goods.

<u>Applicant’s Mark</u>	<u>Cited Mark</u>
QUICKFRESH	FRESH ‘N’ QUICK
Class 29: Ready-to-eat meals comprised primarily of meats, <u>and</u> cheese and also including vegetables; vacuum-sealed meals consisting primarily of vegetables; prepared meals consisting primarily of meat, fish, <u>and</u> poultry or vegetables.	Class 31: Fresh vegetables.

B. Amendment of Goods and Services of Applicant.

Applicant has amended its recited goods and services as follows, “Ready-to-eat meals comprised primarily of meats, and cheese ~~and also including vegetables; vacuum-sealed meals consisting primarily of vegetables;~~ prepared meals consisting primarily of meat, fish, and poultry ~~or vegetables.”~~

These amendments eliminate reference to vegetables and help distinguish from the cited mark. Applicant notes that the prepared meals which it sells do not consist primarily of vegetables (

though some vegetables are included) and refer the examiner to screenshots of Applicant's products discussed below.

Here, Applicant seeks registration of the standard character mark QUICKFRESH for meals, rather than vegetables. Applicant has been refused registration based on the alleged likelihood of confusion with the standard character mark FRESH 'N' QUICK for "fresh vegetables." There is no likelihood that consumers will be confused as to the source of the good in connection with each of these two marks because Applicant's mark is different in appearance, sound and commercial impression. Applicant respectfully requests the Examiner withdraw his refusal and permit Applicant's mark to be published on the Principal Register.

1. The Marks are Different in Sound, Appearance, Meaning and Commercial Impression.

Under *du Pont*, marks are compared for similarity or dissimilarity *in the entirety* as to appearance, sound, connotation and commercial impression. Marks. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973).

Applicant's and the Registrant's marks are different in appearance, sound and commercial impression. The cumulative effect of these significant differences between Applicant's mark and the cited mark weighs against the likelihood of confusion refusal.

D. Lack of Overlap of the Goods.

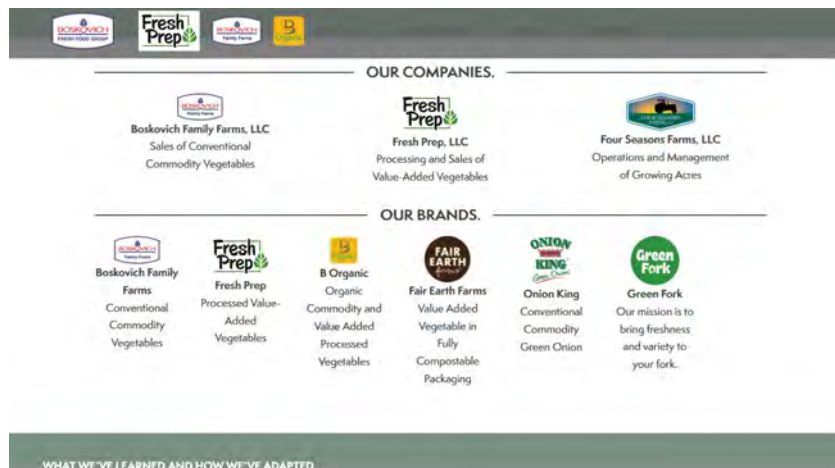
Applicant is seeking to register its mark for meals in Class 31 while Registrant has its mark registered only for vegetable in Class 29. With Applicant's amendments to the goods and services, on their face, the goods of Applicant are distinct from the goods of Registrant. The Registrant does not sell meals using the cited mark, but only raw vegetables. *See* Specimens of Registrant annexed

hereto as **Annex A**.¹

E. Abandonment or Diminished Fame of the Cited Mark.

Registrant renewed its registration of the cited mark in 2019, but all indications are that Registrant has since abandoned use of the cited mark. Applicant submits the following:

1. Registrant does not, or is no longer, listing FRESH ‘N’ QUICK as one of its brands or companies on its website. *See* Screenshots of Registrant’s Website collectively annexed hereto as **Annex B** (showing seven other brands names being used by Registrant, and omitting the cited mark).

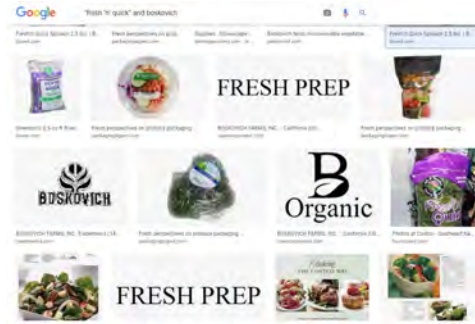


2. Products of Registrant, marked with the cited mark, can no longer be found for sale anywhere online and are not available for purchase on Registrant’s website. After extensive Google searching, using both the search terms “Fresh ‘N’ Quick” and “Boskovich Farms,” Applicant can find only one remnant listing anywhere for Registrant’s product bearing the cited mark (which is annexed hereto as **Annex C**), which listing shows Registrant’s product is “out of stock”² and not for sale.

¹ These are the three specimens of record which have been filed with the USPTO.

² <https://www.boxed.com/product/1268/freshn-quick-spinach-2.5-lbs>. (last access February 19, 2022).

3. A review of former locations online where Registrant's product used to be for sale shows the Registrant has apparently replaced pictures of its FRESH 'N' QUICK products with Registrant's FRESH PREP mark (filed in 2018 and issued in



2021), further manifesting an intent by Registrant to adopt FRESH PREP in place of the cited mark or reduce or eliminate use of the cited mark. *See* screenshot annexed hereto as **Annex D** and shown below.

4. Importantly, Registrant's FRESH PREP mark was originally rejected in view of a mark for FRESHPREP FOODS to another party, which party delivered meals. Registrant obviated this rejection by arguing that "food delivery services *are not* in the same channels of trade as farm grown fruits and vegetables sold at grocery stores." *See* Registrant's Office Action Response annexed hereto as **Annex E** (emphasis added). Registrant has already represented to the USPTO that meal sales and delivery is a different channel of trade that the sale of farm grown fruits and vegetables, which is a relevant factor under the *du Pont* analysis weighing in favor of Applicant.

All of this shows that the cited mark FRESH 'N' QUICK is not famous, if being used at all, under factor 5 of the *du Pont* analysis.

F. Dissimilarity of Established, Likely-to-Continue Trade Channels.

Applicant is seeking to register its mark for meals. On their face, Applicant's good appear to be distinct from the goods of Registrant in terms of their character and use. Applicant's website clearly illustrates that Applicant sells meals and only meals. *See* Screenshot of Applicant's website and product annexed hereto as **Annex F**. Registrant, on the other hand, appears to sell only bulk

quantities of vegetables in packages not intended for immediate consumption. *See* Photograph of Registrant's Product annexed hereto as **Annex G**, showing a 2.5 pound bag of spinach, which would be more than could be eaten in a meal by an individual. Neither party manufactures, sells, or markets the other's products.

Registrant sells its products in bulk to grocery stores, while Applicant delivers its products to individual consumers through the mail. There is a difference in the channels of trade. Applicant has no intention of changing its trade channels and all available evidence suggests that Registrant is seeking to reduce or abandon its trade channels to overlap with Registrant's products. *See* Section E *supra*.

G. Number and Nature of Similar Marks in Use on Similar Goods.

Evidence of third-party use falls under the sixth *du Pont* factor – the “number and nature of similar marks in use on similar goods.” *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). If the evidence establishes that the consuming public is exposed to third-party use of similar marks on similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373-74, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); *see also In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1675 (TTAB 2018) (finding the component term SMOKING HOT in the marks I'M SMOKING HOT and SMOKIN' HOT SHOW TIME to be “somewhat weak” based in part on evidence of third-party use of the term on similar cosmetics goods, noting that such uses “tend to show consumer exposure to third-party use of the term on similar goods”); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (noting that evidence that third parties had adopted marks that were the same as or similar to opposer's mark for use in connection with food products “may show that a term carries a highly suggestive connotation in the industry and, therefore, may be considered weak”); *but see Lilly*

Pulitzer, Inc. v. Lilli Ann Corp., 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (“the existence of confusingly similar marks already on the register will not aid an applicant to register another confusingly similar mark”).

Applicant has annexed hereto as **Annex H** a number of copies of registrations for similar marks in use on similar goods, including:

1. QUICK BITE FRESH DELICIOUS EMPANADAS WITH A GORMET STYLE;
2. LES FERMES CAVENDISH FARMS FRESH ‘N’ FAST QUICK-COOK POTATOES POMMES DE TERRE A CUISSON RAPIDE;
3. QUICK ‘N’ FRESH

This evidence also weighs in favor of allowing Applicant’s Mark. All of these Marks are in the food related classes except number 3, which is for personal cosmetics. Each of these marks show various examples of use together of “Quick,” “Fresh” and/or “N”³.

H. Previous Registration of QUICK FRESH.

Applicant notes that the mark QUICK FRESH was previously registered on the principal register in 2011 for the goods “Wholesale and Retail Store Services Featuring Food, Fresh Fruits and Fresh Vegetables.” *See* Reg. No. 4,056,876 annexed hereto as **Annex I**. This marks is now dead, but was registered originally in spite of the cited mark being live at the time for the sales of food products containing vegetables without rejection from the USPTO.

I. Other Factors.

There has never been any actual confusion between Applicant and Registrant, which is a factor under du Pont factor 7. The grocery stores purchasing Registrant’s products are sophisticated

³ Applicant notes that additional examples of marks which are dead are not included, including MITAKI QUICK & FRESH JAPANESE CUISINE, QUICK & FRESH, QUICK FRESH, and others.

buyers, who track all sales and carefully consider competitors, competitive pricing, and who have automated systems for analyzing consumer purchasing practices. On the other hand, the individual buyers purchasing Applicant's product are typically sold to "impulse" purchasers online. This weighs in favor of approving Applicant's registration under *du Pont* factors 3 and 4.

Registrant owns many marks, as shown by the screenshots of Registrant's website (Annex D). The evidence shows that Registrant does not sell products exclusively using the cited Mark. Only a small variety of Registrant's good, if any, are marked with the cited mark, weighing in Applicant's favor under *du Pont* factor 9.

III. CONCLUSION

Applicant has responded to all issues raised in the Office Action. If any further information or response is required, please contact the Applicant's attorney. The attorney may be reached telephonically at 801-347-5173.

Respectfully submitted,

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