This Opinion is Not a Precedent of the TTAB

Mailed: December 3, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Novozymes A/S

Serial No. 79338481

Blake R. Hartz of Woodard, Emhardt, Henry, Reeves & Wagner LLP, for Novozymes A/S.

Patrick Carr, Trademark Examining Attorney, Law Office 125, Robin Mittler, Managing Attorney.

Before Lykos, Lynch and Stanley, Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Novozymes A/S ("Applicant") seeks to register on the Principal Register the standard character mark MAXPRO for goods ultimately identified as "Enzymes, yeasts and microorganisms for improvement of protein and fiber for use in feed formulations, being enzymes and yeast nutrients for industrial purposes and cultures of microorganisms other than for medical or veterinary use" in International Class 1.[1]

[1] Application Serial No. 79338481, filed February 8, 2022, under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f ("Madrid Protocol"), requesting extension of protection for

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the standard character mark MAXPRO on the Principal Register for "Inorganic salts for industrial purposes" in International Class 1 that it is likely to cause confusion or mistake or to deceive.[2]

Following issuance of the final refusal, Applicant timely filed a notice of appeal. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. Judicial Notice

A. Applicant's Request

Applicant requests that the Board take judicial notice of the definition of "inorganic" from the online version of THE AMERICAN HERITAGE DICTIONARY. Applicant embedded in its brief, with a hyperlink to the definition.[3]

International Registration No. 1656541. The mark appears on the drawing page as "MaxPro" but retains a claim as to standard characters and not special form. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a) (setting forth requirements for standard character mark); *see also In re Calphalon Corp.*, 122 USPQ2d 1153, 1158-61 (TTAB 2017) (applicant's amendment of mark from SHARPIN to SharpIn did not transform mark from standard character to special form).

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system. Citations to the record throughout the decision include references to TTABVUE, the Board's online docketing system. The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. *See Turdin v. Trilobite, Ltd.,* 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

[2] Registration No. 6835379, registered on August 30, 2022. The Examining Attorney also refused registration under Trademark Act Section 2(d) based on Registration No. 4820643 for the mark PROMAX in standard characters for "Proteins for use in the manufacture of food products and food supplements for animals" in International Class 1. Applicant secured a consent agreement with that registrant; the Examining Attorney found the agreement sufficient to obviate the refusal.

[3] Applicant's Brief, p. 2, 4 TTABVUE 3.

Applicant's request is denied because Applicant only submitted the hyperlink and did not submit with its brief a printout of the entry from the AMERICAN HERITAGE DICTIONARY website. *See In re Future Ads LLC*, 103 USPQ2d 1571, 1572 n.3 (TTAB 2012) (Board did not take judicial notice of online dictionary definition because only the link to the website was provided).

We also deny Applicant's request because the dictionary definition of "inorganic" that Applicant points to is inapplicable to "inorganic salts for industrial purposes."[4] Rather, when we review the entire entry for "inorganic" from the AMERICAN HERITAGE DICTIONARY, the more appropriate definition is from the field of chemistry as "[o]f or relating to compounds not containing hydrocarbon groups or derivatives."[5] We therefore sua sponte take judicial notice of this definition in order to better understand the nature of Registrant's goods. *See, e.g., In re Zuma Array Ltd.*, 2022 USPQ2d 736, at *12 n.18 (TTAB 2022) (Board took judicial notice of meaning of the word "module" in the identification of goods for purposes of assessing the possible mere descriptiveness of the proposed mark).

B. Examining Attorney's Request

We grant the Examining Attorney's request to take judicial notice of the dictionary definitions of the words "manufacture," "industrial," "proteinates," and "enzymes" because the Examining Attorney submitted with his appeal brief copies of the web

[4] That definition is "involving neither organic life nor the products of organic life" or "not arising in normal growth." Applicant's Brief, p. 2, 4 TTABVUE 3.

[5] The American Heritage Dictionary of the English Language (5th Edition 2022) accessed on 12/2/2024 at https://ahdictionary.com/word/search.html?q=inorganic.

pages containing the entries from the online versions of AMERICAN HERITAGE DICTIONARY and THE MERRIAM-WEBSTER DICTIONARY.

II. Trademark Act Section 2(d) Refusal

Section 2(d) of the Trademark Act prohibits the registration of a mark that:

> [c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont 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 making our determination, the Board has considered each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). When analyzing these factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *accord In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *2-3 (TTAB 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d

1253, 1261 (Fed. Cir. 2011); *Shell Oil Co.,* 26 USPQ2d at 1688 ("the various evidentiary factors may play more or less weighty roles in any particular determination"). "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. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *see also 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."). These factors and others are discussed below.

A. The Marks

We commence with the first *DuPont* factor which involves an analysis of the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. "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) (citing *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).

It is undisputed that Applicant's and Registrant's standard character marks MAXPRO are identical in appearance and sound. As standard character marks, they "have the potential to be used . . . in exactly the same manner." *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017). Furthermore, this is not a situation where the same marks are used to identify goods so dissimilar as to engender different connotations or commercial impressions. *See, e.g., In re SydelLingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977) (no likelihood of confusion found between BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's suits, coats and trousers). The identical nature of the marks weighs heavily in favor of finding a likelihood of confusion.

B. The Goods

The second *DuPont* factor "considers whether the consuming public may perceive the respective goods [ ] as related enough to cause confusion about the source or origin of the goods [ ]." *Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293 at *2 (Fed. Cir. 2024) (quoting *In re St. Helena Hosp.,* 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (cleaned up) (citation omitted)). Keeping in mind that where identical marks are involved, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines, *Shell Oil Co.*, 26 USPQ2d at 1689, we compare the goods as they are identified in the involved application and cited registration. *See In re Detroit Athletic Co.,* 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.,* 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Evidence of relatedness might include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both an applicant's goods (or similar goods) and the goods listed in the cited registration (or similar goods). *See, e.g., Davia*, 110 USPQ2d at 1817 (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

We need not find similarity as to each good listed in the application. "It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of within a particular class in the application." *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *see also Tuxedo*

Monopoly, Inc. v. General Mills Fun Grp., 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Before discussing the evidence of record, we analyze the language of each identification in order to ascertain the precise nature, function and application of Applicant's and Registrant's goods. Applicant's goods are identified as "Enzymes, yeasts and microorganisms for improvement of protein and fiber for use in feed formulations, being enzymes and yeast nutrients for industrial purposes and cultures of microorganisms other than for medical or veterinary use" and Registrant's identification recites "Inorganic salts for industrial purposes." Based on the plain language of the identification, Applicant's goods consist of three different products, but for our purposes we focus on "Enzymes,[6] … for improvement of protein and fiber for use in feed formulations, being enzymes … for industrial purposes and cultures of microorganisms other than for medical or veterinary use." Registrant's goods, "Inorganic salts," clearly are different products than Applicant's but are also used for "industrial purposes."

With this in mind, we now assess the probative value of the Examining Attorney's evidence to show that the goods are related. The Examining Attorney submitted evidence from the following twelve (12) third-party websites purportedly demonstrating that Applicant's and Registrant's goods emanate from the same

[6] An "enzyme" is defined as "[a]ny of numerous compounds that are produced by living organisms and function as biochemical catalysts. Some enzymes are simple proteins, and others consist of a protein linked to one or more non protein groups." Entry from the online version of THE AMERICAN HERITAGE DICTIONARY (www.ahdictionary.com) accessed on 11/28/2022, submitted with November 28, 2022 Office Action at TSDR 10.

entity:[7] United Salt Company;[8] Cargill;[9] BASF;[10] Origination O2D;[11] Barentz;[12] Redmond Agriculture;[13] Sostie;[14] ECHEMI;[15] Kerry;[16] Creative Enzymes;[17] Azelis;[18] and Actylis.[19] We have carefully reviewed each website and find that the following support a finding that Applicant's "Enzymes … for improvement of protein and fiber for use in feed formulations, being enzymes … for industrial purposes and cultures of microorganisms other than for medical or veterinary use" and Registrant's "Inorganic salts for industrial purposes" originate from the same manufacturer; the highlighting was supplied by the Examining Attorney:

- BASF manufactures "feed enzymes for the animal nutrition industry" to "produce feed that animals can digest far more easily, releasing and utilizing nutrients more efficiently, and mitigating naturally occurring antinutritional

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[7] We have not considered the Vetalis website with a French top level domain since we are unable to determine the extent of U.S. consumer exposure. *See The Heil Co. v. Tripleye GmbH,* Opposition No. 91277359, __ USPQ2d __ (TTAB 2024).

September 8, 2023 Final Office Action at TSDR 70-79.

[8] November 28, 2022 Office Action at TSDR 30-39.

[9] November 28, 2022 Office Action at TSDR 12-29 and September 8, 2023 Final Office Action at TSDR 56-62.

[10] September 8, 2023 Final Office Action at TSDR 13-33.

[11] September 8, 2023 Final Office Action at TSDR 34-45.

[12] September 8, 2023 Final Office Action at TSDR 34-45.

[13] September 8, 2023 Final Office Action at TSDR 46-55.

[14] September 8, 2023 Final Office Action at TSDR 63-67.

[15] September 8, 2023 Final Office Action at TSDR 88-103.

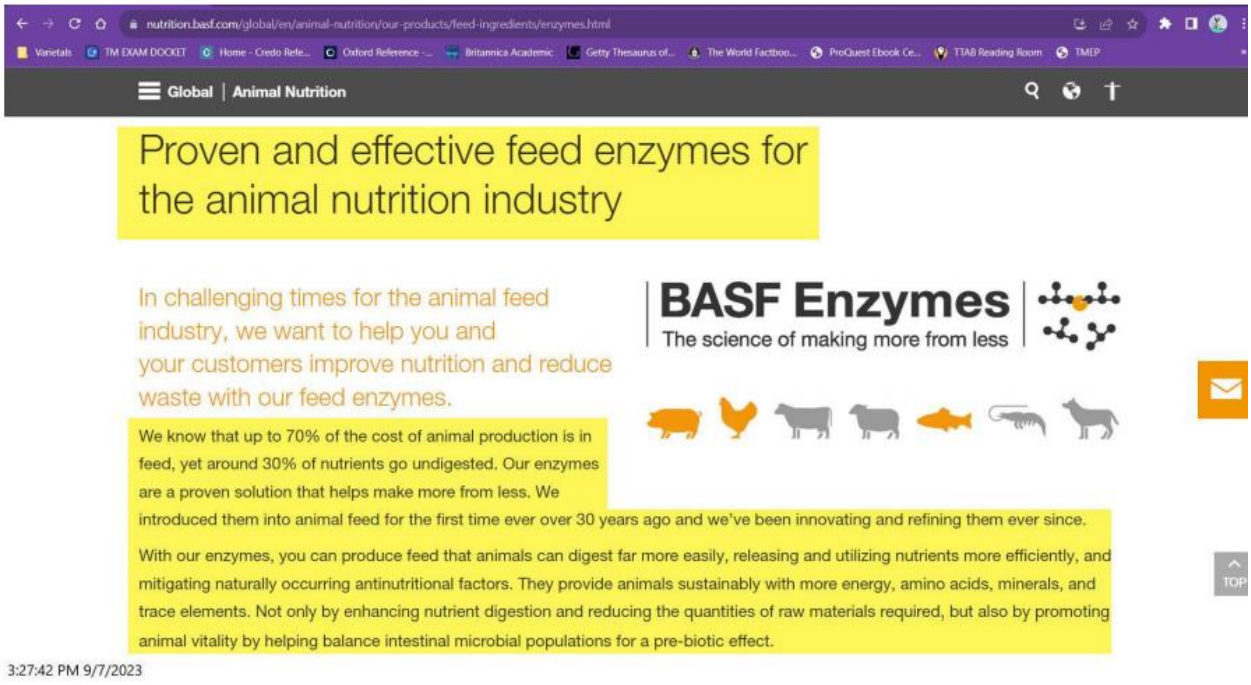
[16] September 8, 2023 Final Office Action at TSDR 104-110.

[17] September 8, 2023 Final Office Action at TSDR 111-125.

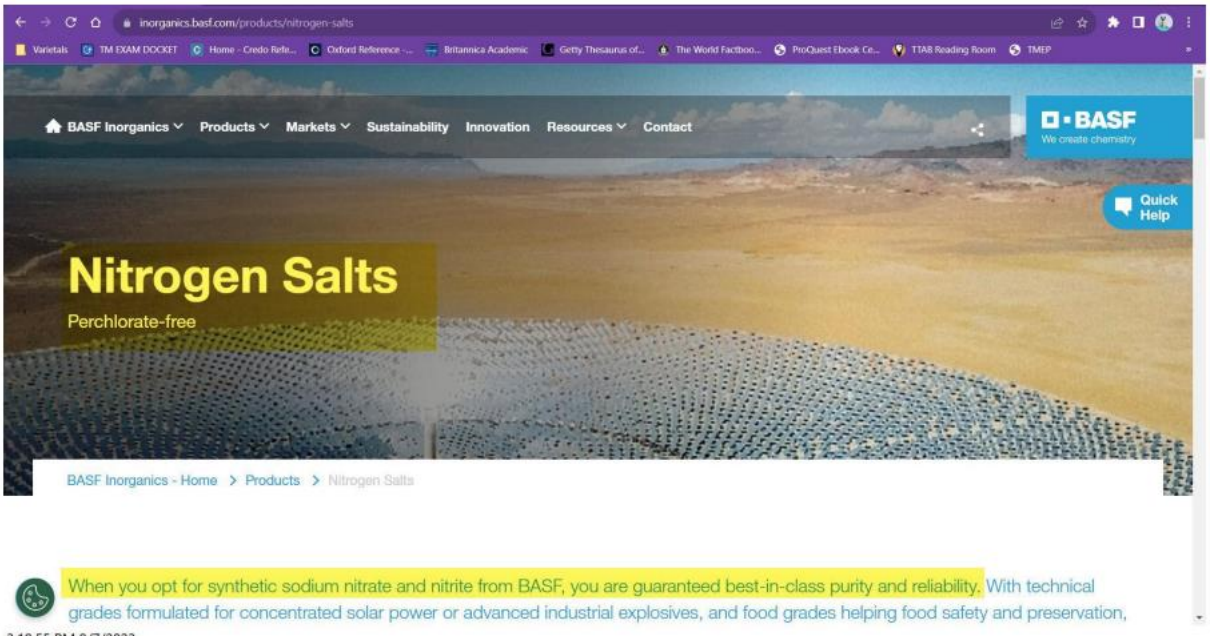
[18] September 8, 2023 Final Office Action at TSDR 126-132.

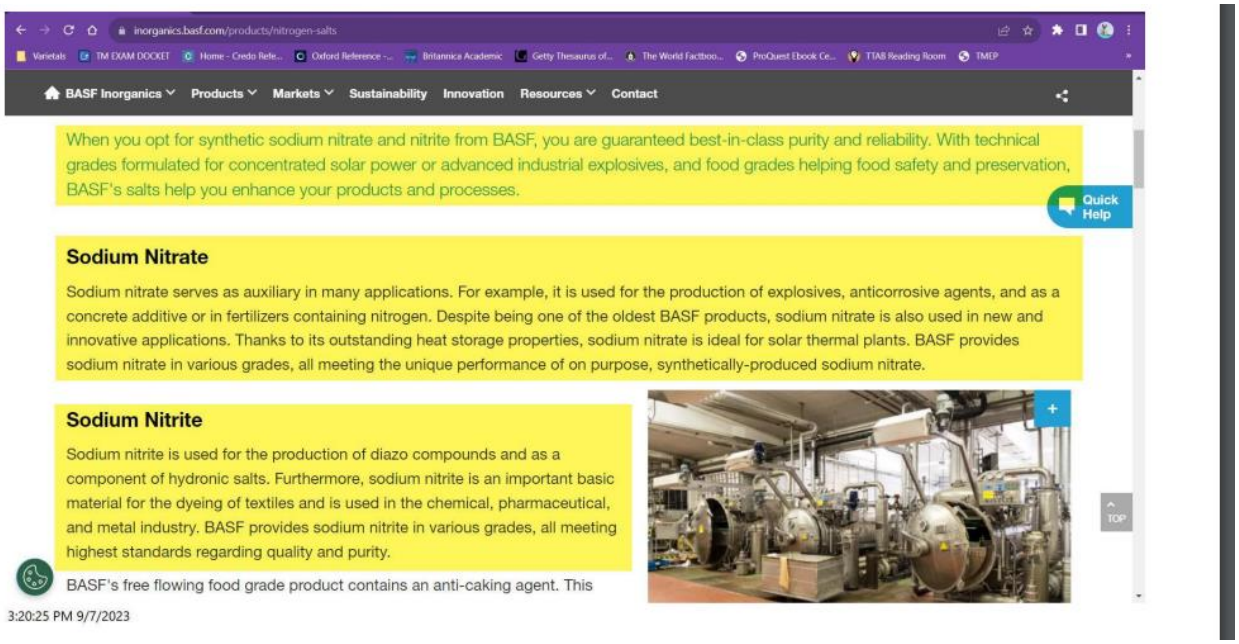
[19] September 8, 2023 Final Office Action at TSDR 133-139.

factors." It also produces "nitrogen salts" i.e., "synthetic sodium nitrate," a subset of "inorganic salts" for a variety of industrial applications, including "food safety and preservation" to "enhance products and processes."[20]

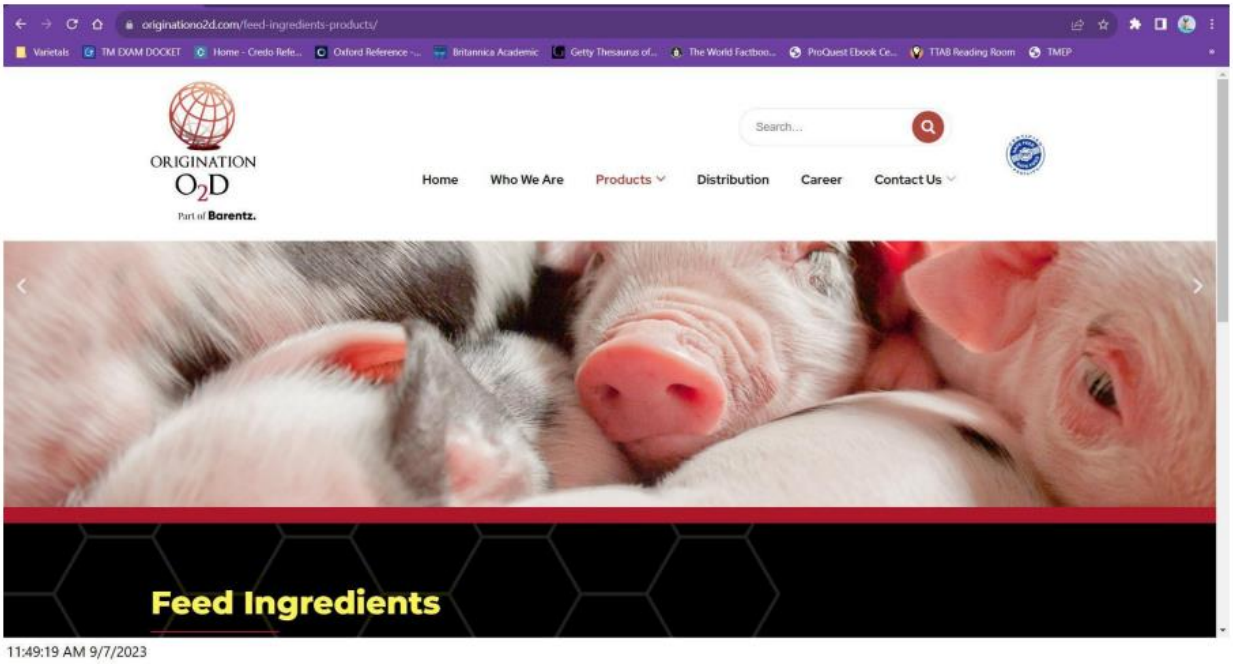


[20] Printouts from basf.com website accessed on 9/7/2023, attached to September 8, 2023 Final Office Action at TSDR 13-33.

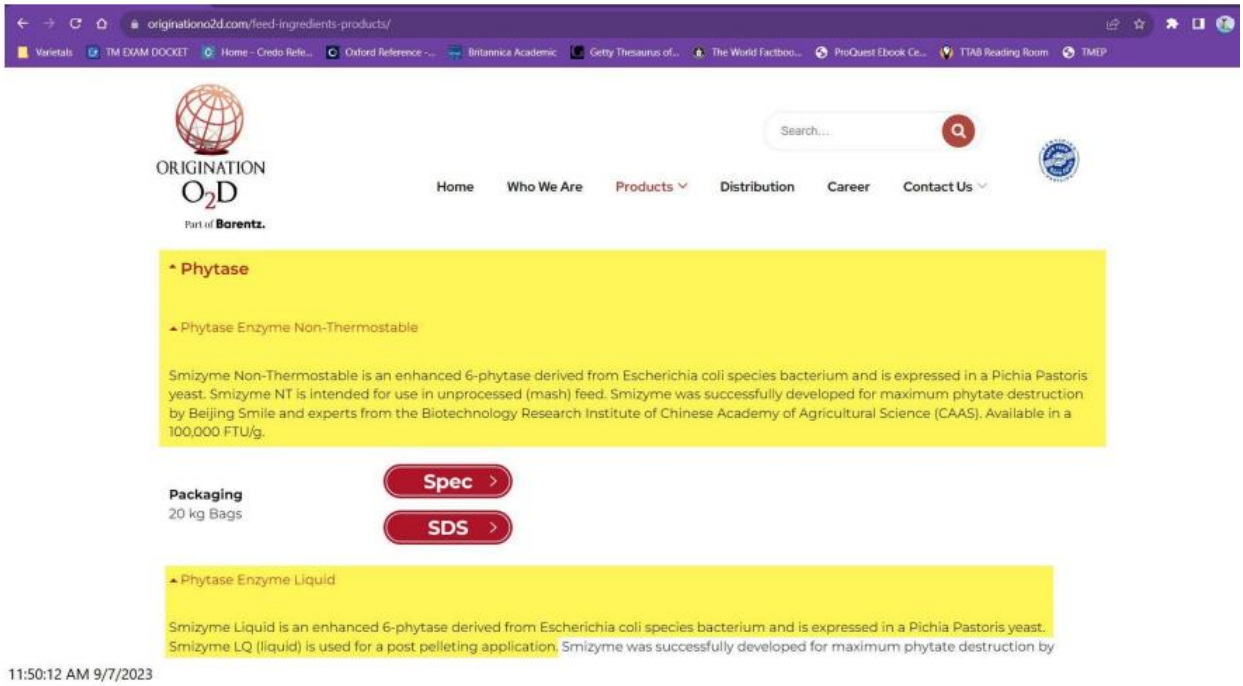

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When you opt for synthetic sodium nitrate and nitrite from BASF, you are guaranteed best-in-class purity and reliability. With technical grades formulated for concentrated solar power or advanced industrial explosives, and food grades helping food safety and preservation, BASF's salts help you enhance your products and processes.
Quick Help
Sodium Nitrate
Sodium nitrate serves as auxiliary in many applications. For example, it is used for the production of explosives, anticorrosive agents, and as a concrete additive or in fertilizers containing nitrogen. Despite being one of the oldest BASF products, sodium nitrate is also used in new and innovative applications. Thanks to its outstanding heat storage properties, sodium nitrate is ideal for solar thermal plants. BASF provides sodium nitrate in various grades, all meeting the unique performance of on purpose, synthetically-produced sodium nitrate.
Sodium Nitrite
Sodium nitrite is used for the production of diazo compounds and as a component of hydronic salts. Furthermore, sodium nitrite is an important basic material for the dyeing of textiles and is used in the chemical, pharmaceutical, and metal industry. BASF provides sodium nitrite in various grades, all meeting highest standards regarding quality and purity.
BASF's free flowing food grade product contains an anti-caking agent. This
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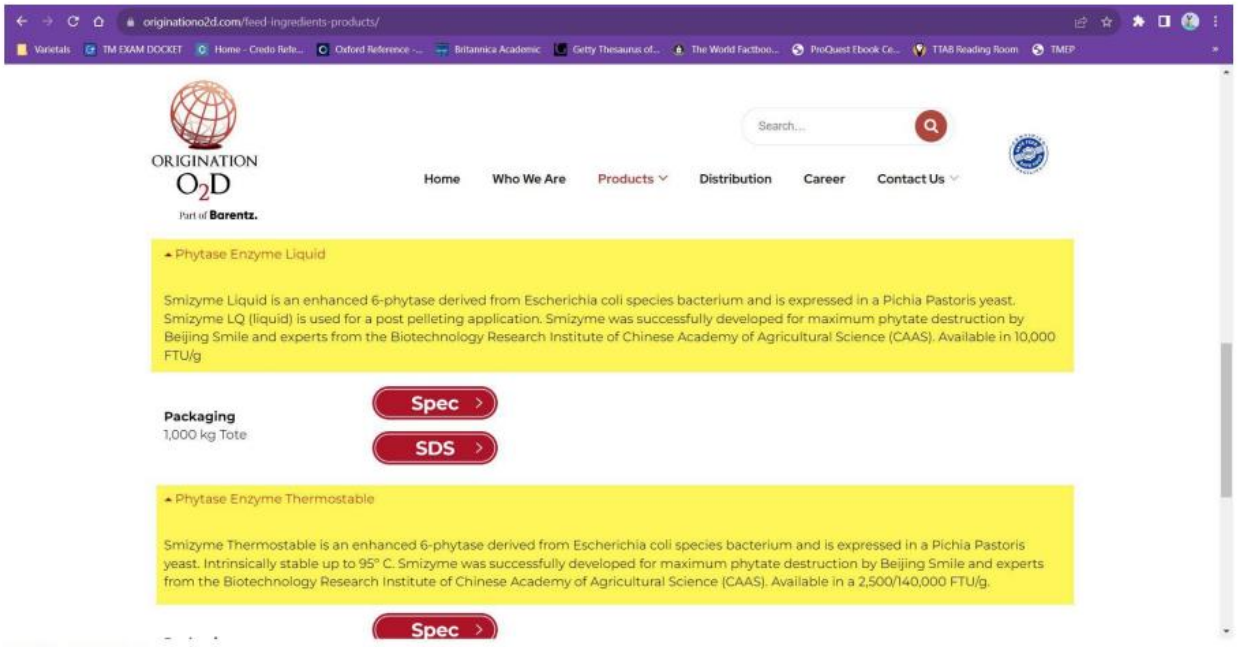
● Origination O2D manufactures a "Phytase Enzyme Non-Thermalstable" for "use in unprocessed (mash) feed" in "Feed Ingredients" for livestock. It also manufactures a type of inorganic salt for industrial purposes designed to "increase surface contact to jump start melting [of ice]."[21]



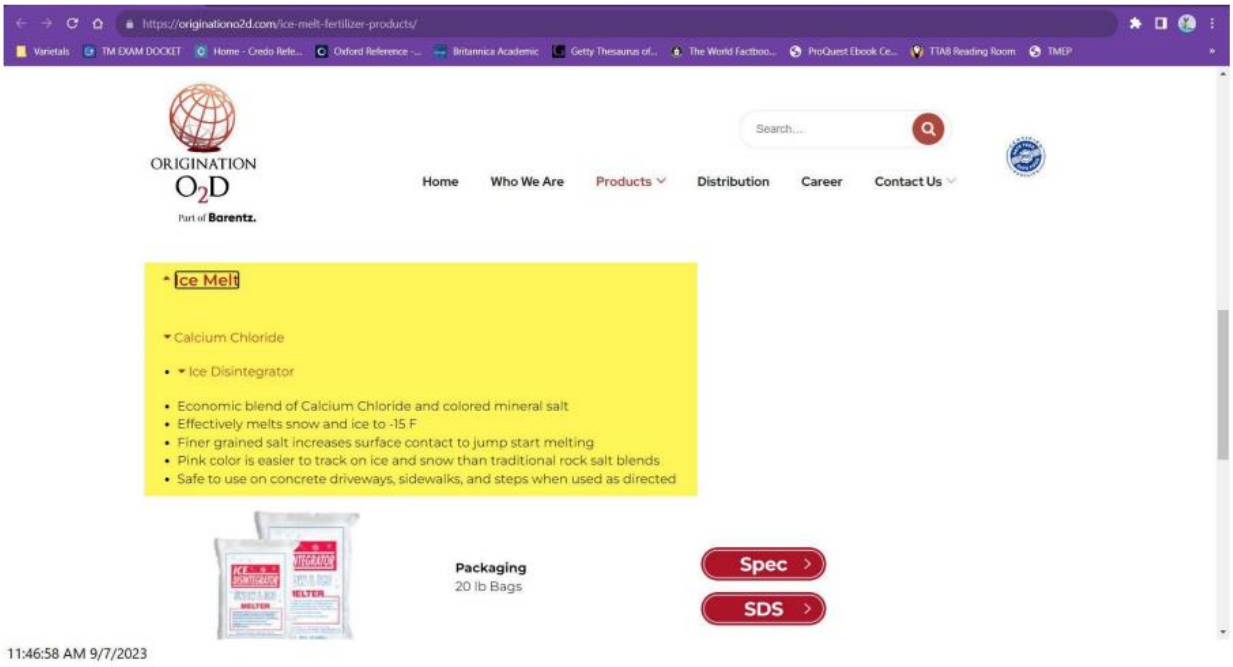
[21] Printouts from the orignationo2d.com website accessed on 9/7/2023, attached to September 8, 2023 Final Office Action at TSDR 34-45.



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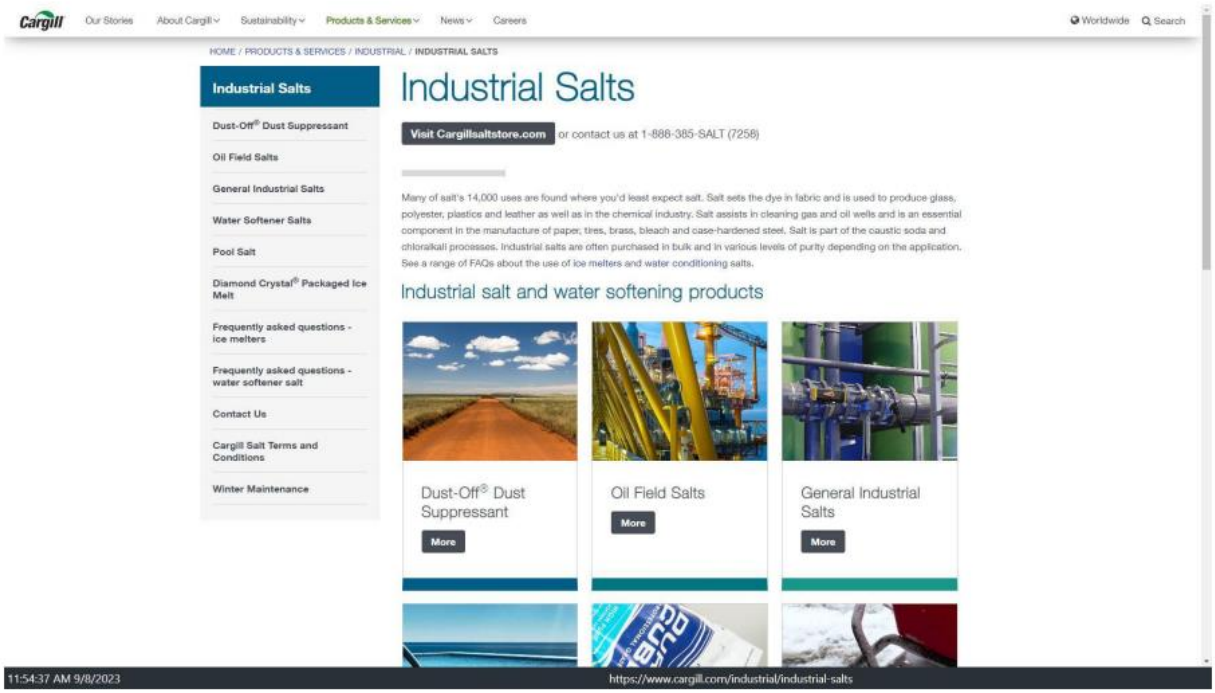


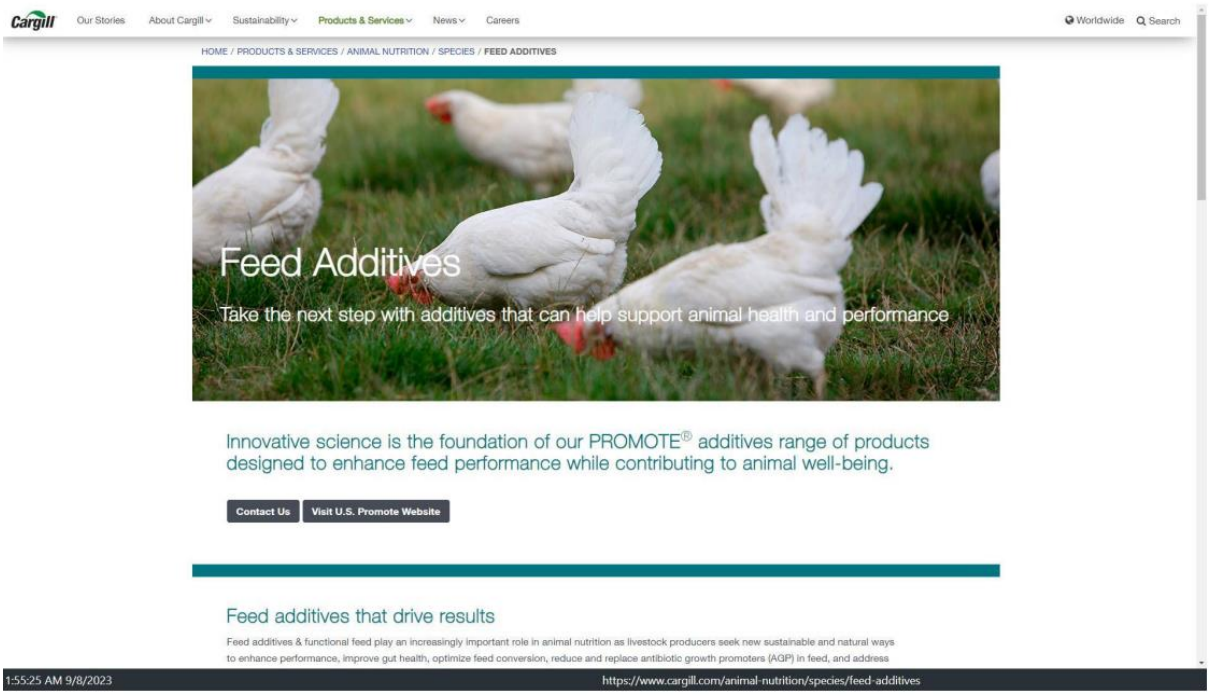
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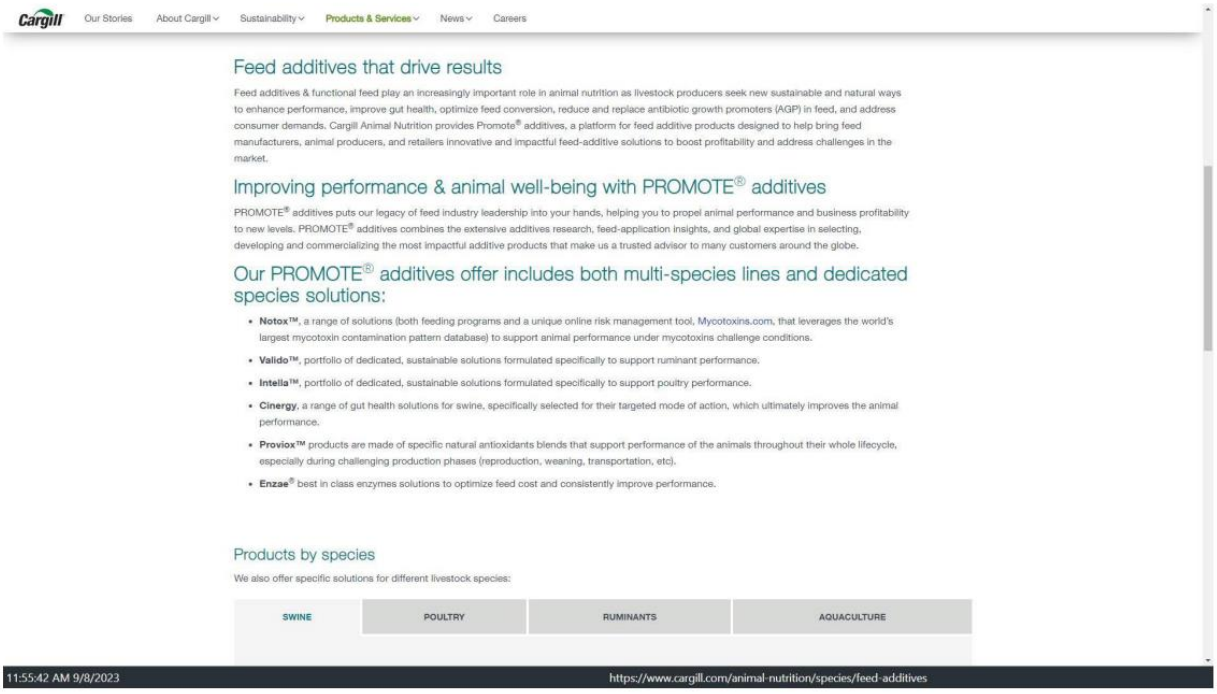


● Cargill manufactures "Feed Additives" for livestock including an enzyme under the brand name "Enzae best in class enzymes solutions to optimize feed cost and consistently improve performance." It also manufactures "Industrial Salts" for a variety of applications.[22]

[22] Printouts from www.cargill.com accessed on 9/8/2023, attached to September 8, 2023 Final Action at TSDR 56-62.

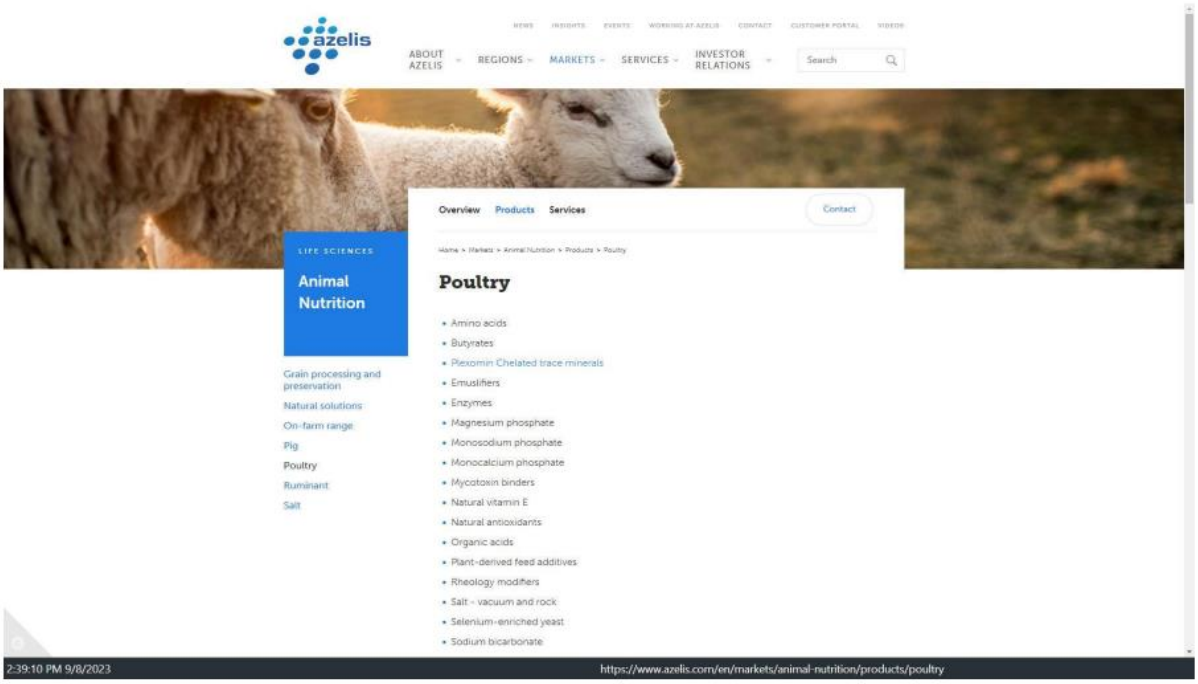

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Many of salt's 14,000 uses are found where you'd least expect salt. Salt sets the dye in fabric and is used to produce glass, polyester, plastics and leather as well as in the chemical industry. Salt assists in cleaning gas and oil wells and is an essential component in the manufacture of paper, tires, brass, bleach and case-hardened steel. Salt is part of the caustic soda and chloralkali processes. Industrial salts are often purchased in bulk and in various levels of purity depending on the application. See a range of FAQs about the use of ice melters and water conditioning salts.
Industrial salt and water softening products
Dust-Off® Dust Suppressant
More
Oil Field Salts
More
General Industrial Salts
More
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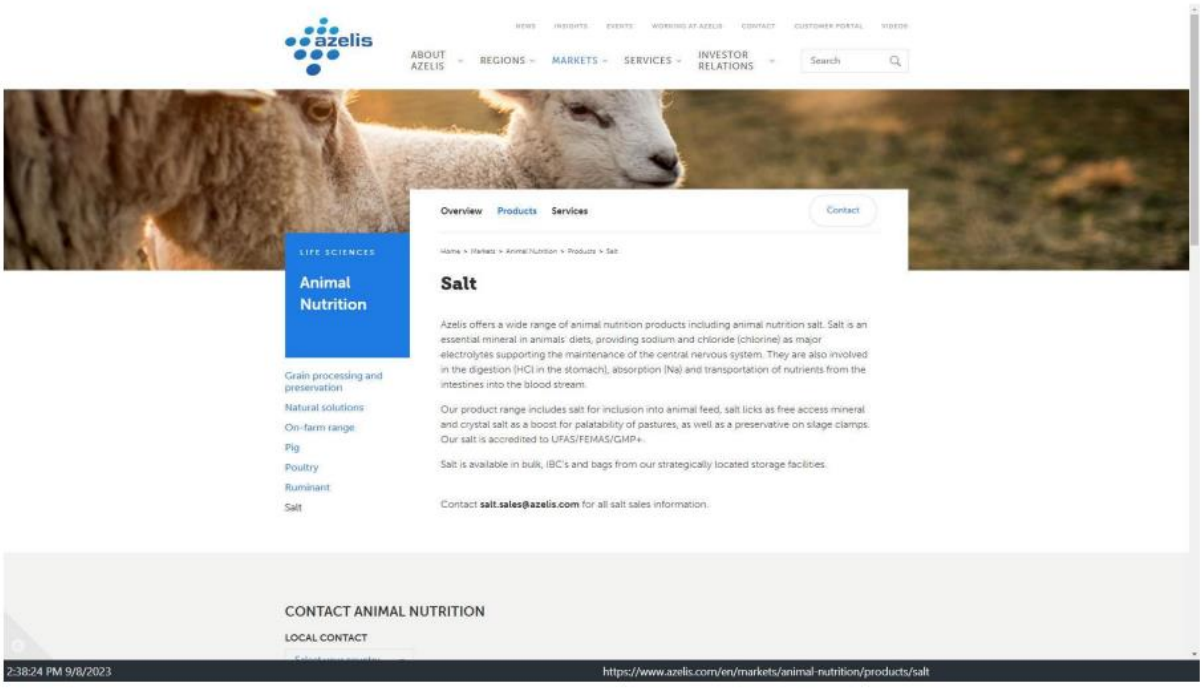

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Feed additives & functional feed play an increasingly important role in animal nutrition as livestock producers seek new sustainable and natural ways to enhance performance, improve gut health, optimize feed conversion, reduce and replace antibiotic growth promoters (AGP) in feed, and address
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https://www.cargill.com/animal-nutrition/species/feed-additives



● Azelis offers enzymes for use in "Animal Nutrition" for "Poultry" as well as "Animal Nutrition Salt" for "inclusion in animal feed, salt licks as free access mineral and crystal salt as a boost for palatability of pastures, as well as a preservative on silage clamps."[23]

[23] September 8, 2023 Final Action, TSDR p. 126-132.


azelis
ABOUT AZELIS
REGIONS
MARKETS
SERVICES
INVESTOR RELATIONS
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Overview
Products
Services
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LIFE SCIENCES
Animal Nutrition
Grain processing and preservation
Natural solutions
On-farm range
Pig
Poultry
Ruminant
Salt
Poultry
Amino acids
Butyrates
Plexomin Chelated trace minerals
Emulsifiers
Enzymes
Magnesium phosphate
Monosodium phosphate
Monocalcium phosphate
Mycotoxin binders
Natural vitamin E
Natural antioxidants
Organic acids
Plant-derived feed additives
Rheology modifiers
Salt - vacuum and rock
Selenium-enriched yeast
Sodium bicarbonate
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Grain processing and preservation
Natural solutions
On-farm range
Pig
Poultry
Ruminant
Salt
Salt
Azelis offers a wide range of animal nutrition products including animal nutrition salt. Salt is an essential mineral in animals' diets, providing sodium and chloride (chlorine) as major electrolytes supporting the maintenance of the central nervous system. They are also involved in the digestion (HCl in the stomach), absorption (Na) and transportation of nutrients from the intestines into the blood stream.
Our product range includes salt for inclusion into animal feed, salt licks as free access mineral and crystal salt as a boost for palatability of pastures, as well as a preservative on silage clamps. Our salt is accredited to UFAS/FEMAS/GMP+.
Salt is available in bulk, IBC's and bags from our strategically located storage facilities.
Contact salt.sales@azelis.com for all salt sales information.
CONTACT ANIMAL NUTRITION
LOCAL CONTACT
2:38:24 PM 9/8/2023
https://www.azelis.com/en/markets/animal-nutrition/products/salt

This evidence shows that it is not uncommon for the same entities to manufacture goods such as Applicant's enzymes and Registrant's inorganic salts, which supports a finding that these goods are related. *See, e.g., In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion where website evidence showed that "[t]he same companies, including applicant itself, produce both ultrasound and MRI medical diagnostic imaging machines"). That this record includes only four relevant websites to support this does not preclude a finding that the goods are in-part related, especially when we account for the fact that the goods at issue here are not general consumer merchandise but rather specialized industrial products. For example, in *In re Toshiba Med. Sys. Corp.*, *supra*, the Board pointed to website evidence from just three companies, including the applicant, that manufacture both ultrasound and MRI medical diagnostic imaging machines to support a finding that those goods were related.[24]

Applicant likens the third-party manufacturers of Applicant's and Registrant's goods to supermarkets or big box retailers. To the contrary, the Examining Attorney's third-party website evidence is not from "big box" online or brick-and-mortar retailers selling a wide variety of goods from different suppliers but rather from manufacturers

[24] In *Toshiba*, the applicant argued that evidence from Toshiba, Philips, and Siemens was irrelevant because these companies are "large international companies often engaged in vast and diverse business areas." 91 USPQ2d at n.12. Applicant in the case before us lodges the same criticism. *See* Applicant's Brief, p. 4, 4 TTABVUE 6 ("For example, Cargill.com identifies industries as diverse as Beauty, Transportation, and Risk Management."). We reject Applicant's argument, and reiterate the Board's response from *Toshiba* that "it is of no aid to applicant to show that its competitors also make unrelated products." *Id.*

specializing in the production of industrial products. *See In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *8 (TTAB 2020) ("[T]he fact that more targeted sellers offer goods of both the Registrant and the Applicant tells us that the goods are related."). As a result, this evidence carries more probative weight.

Applicant points to the lack of relevant third-party registration evidence to show relatedness. This argument is misplaced. The Examining Attorney is not limited to this particular type of evidence and may rely on evidence from third-party websites to demonstrate that goods are related. *See, e.g., Country Oven, Inc.*, 2019 USPQ2d 443903, at *5-6 (evidence of relatedness included third-party websites showing bakeries offering under the same mark retail bakery shop services and bakery products in their retail bakery shops).

Applicant also discounts the Examining Attorney's evidence because the "use of a house mark like Cargill (rather than a shared brand name for specific goods at issue of nutrients used in feed formulations and industrial salts) is not probative of relatedness of goods here."[25] Applicant's criticism reflects a misunderstanding of the evidence. Such third-party websites do not show use of the same house mark in connection with Applicant's and Registrant's goods. Rather, they show origination of Applicant's enzymes and Registrant's inorganic salts from a common source. As the U.S. Court of Appeals for the Federal Circuit and its predecessor court have explained innumerable times, evidence that the same company manufactures the involved goods suffices to show relatedness. *See Majestic Distilling Co.,* 65 USPQ2d at 1205

[25] Applicant's Brief, pp. 4-5; 4 TTABVUE 6-7.

("[T]he . . . mistaken belief that [a good] is manufactured or sponsored by the same entity [as another good] . . . is precisely the mistake that §2(d) of the Lanham Act seeks to prevent."); *Shell Oil Co.*, 26 USPQ2d at 1689 ("The degree of 'relatedness' must be viewed in the context of all the factors, in determining whether the services are sufficiently related that a reasonable consumer would be confused as to source or sponsorship."); *Paula Payne Prods. Co. v. Johnson's Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that the goods they identify emanate from the same source."). Accordingly, the second *DuPont* factor weighs in favor of finding a likelihood of confusion.[26]

C. Purchasing Conditions

"The fourth *DuPont* factor considers '[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing.'" *Stone Lion Cap. Partners, LP v. Lion Cap. LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *DuPont*, 177 USPQ at 567). A heightened degree of care when making a purchasing decision may tend to minimize likelihood of confusion. *See, e.g., In re N.A.D., Inc.,* 754 F.2d 996, 224 USPQ 969, 971 (Fed. Cir. 1985) (because only sophisticated purchasers exercising great care would purchase the relevant goods, there would be no likelihood of confusion merely because of the similarity between

[26] The Examining Attorney contends that the record shows that both Applicant's and Registrant's goods are sold in the same trade channels. We have carefully reviewed the evidence and do not find adequate support for the Examining Attorney's position. The third *DuPont* factor is therefore neutral.

the marks NARCO and NARKOMED). Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed Cir. 2005).

The identifications of Applicant's and Registrant's goods are restricted to "industrial purposes." Goods for industrial applications by their intrinsic nature are not impulse items purchased by ordinary retail consumers. Rather, they are purchased by more discriminating professionals or equally sophisticated purchasing agents with specialized knowledge who exercise greater than ordinary care. *See Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1413 (TTAB 2010) ("Just based on the products involved in this proceeding [medical monitors], one would expect that all of the purchasers would exercise a high degree of care when making their purchasing decision."). The fourth *DuPont* factor therefore weighs against a likelihood of confusion.

D. Weighing of the *DuPont* Factors

The final step in analyzing likelihood of confusion is to weigh the *DuPont* factors for which there has been evidence and argument; "explain the results of that weighing;" and "the weight [we] assigned to the relevant factors." *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023). "No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark." *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010). *See also Naterra*, 2024 USPQ2d

293, at *2. "There is no litmus rule which can provide a ready guide to all cases." *DuPont*, 177 USPQ at 567. We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto.

The marks are identical, meaning that the first *DuPont* factor weighs heavily in favor of likelihood of confusion. The second factor weighs in favor of a likelihood of confusion because the evidence shows that the goods are in-part related insofar as they may be manufactured by the same company. The fourth factor, the level of consumer care in making purchasing decisions, weighs against a likelihood of confusion. However, with identical marks and related goods, even a sophisticated purchaser with specialized expertise is unlikely to understand that the goods emanate from different sources. *See, e.g., Shell Oil Co.*, 26 USPQ2d at 1690 ("even sophisticated purchasers can be confused by very similar marks"); *Weiss Assocs. v. HRL Assocs.,* 902 F.2d 1546, 1548, 14 USPQ2d 1840, 1841-42 (Fed. Cir. 1990) (similarities of goods and marks outweighed sophisticated purchasers, careful purchasing decision, and expensive goods); *In re Johns-Manville Corp.*, 180 USPQ 661, 662 (TTAB 1973) ("While the average purchaser of [building doors and asphalt shingles] may be skilled craftsmen, it does not necessarily follow therefrom that they are equally informed as to the source of the products that they use and are, unlike customers for other products, immune from the likelihood of confusion or deception that the statute is attempting to preclude.").

We conclude that the critical first and second *DuPont* factors outweigh the fourth factor, and that confusion is likely between Applicant's applied-for mark and the

mark in the cited registration for the identified goods. *See i.am.symbolic,* 123 USPQ2d at 1747 (the first and second *DuPont* factors are "key considerations") (quoting *Herbko Int'l,* 64 USPQ2d at 1380); *see also Federated Foods,* 192 USPQ at 29 ("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.").

Decision: The Section 2(d) refusal is affirmed.