

This Opinion is not a  
Precedent of the TTAB

Mailed: August 25, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Kabushiki Kaisha Lawson*

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Serial No. 79138995

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Peter W. Peterson of DeLio, Peterson & Curcio, LLC,  
for Kabushiki Kaisha Lawson.

Darryl M. Spruill, Trademark Examining Attorney, Law Office 112,  
Angela Wilson, Managing Attorney.

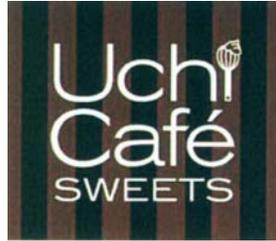
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Before Seeherman, Adlin and Gorowitz,  
Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Kabushiki Kaisha Lawson, a Japanese company (“Applicant”), has filed for an extension of protection pursuant to Section 66(A) of the Trademark Act, 15 U.S.C. § 1141(f) to register on the Principal Register the mark UCHI CAFÉ SWEETS and design, as shown below.<sup>1</sup>

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<sup>1</sup> Application Serial No. 79138995, filed on August 30, 2013, based on International Registration No. 1183027, issued August 30, 2013.



In the application, the mark is described as follows: “The mark consists of the stylized wording UCHI CAFÉ SWEETS in white colored [letters] against a striped background consisting [of] alternating brown and black vertical stripes. The letter ‘I’ in Uchi depicts a whisk with whipped cream on the top and appears above Café, which appears above SWEETS.” The colors brown, black and white are claimed as a feature of the mark. “The English translation of UCHI in the mark is HOME or HOUSE.” Applicant has disclaimed exclusive right to use CAFÉ and SWEETS apart from the mark as shown.

The Examining Attorney has issued a final refusal of registration of the mark with respect to the following goods and services:

Black tea, English tea; coffee; cocoa; confectionery, namely, ice candies, ice cream, frozen confectionery, castilla sponge cakes, tarts, caramels, candies, crackers, sherbets, cream puffs, sponge cakes, chewing gums, chocolate, doughnuts, nougat, biscuits, popcorn and rice crackers; bread; buns; unroasted coffee beans (the entirety of Applicant’s goods in Class 30);

Non-alcoholic carbonated beverages; fruit juices; whey beverages; vegetable juices and beverages (the entirety of Applicant’s goods in Class 32);

Retail store services and wholesale store services featuring a variety of goods in each field of clothing, foods and beverages, and living ware, carrying all goods together; retail store services and wholesale store services featuring foods and beverages; retail store services and wholesale store services featuring liquor; retail store services and wholesale store services featuring meat; retail store services and

wholesale store services featuring sea food; retail store services and wholesale store services featuring vegetables and fruits; retail store services and wholesale store services featuring confectionery; retail services [sic] store services and wholesale store services featuring bread and buns; retail store services and wholesale store services featuring rice and cereals; retail store services and wholesale store services featuring milk; retail store services and wholesale store services featuring carbonated drinks, non-alcoholic and non-alcoholic fruit juice beverages; retail store services and wholesale store services featuring tea, coffee and cocoa; retail store services and wholesale store services featuring processed food (Class 35); and

Providing foods and beverages (the entirety of Applicant's services in Class 43).<sup>2</sup>

Registration was refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the mark UCHI in standard characters, registered for "cafe-restaurants; carry-out restaurants; hotel, bar and restaurant services; restaurant and bar services; restaurant services; restaurants; self-service restaurants; take-out restaurant services" in Class 43.<sup>3</sup> The

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<sup>2</sup> The application includes additional services in Class 35 which are not the subject of the refusal, namely: Advertisement and publicity services by television, internet, radio, mail, posters, hanging displays, banners, monitors inside and outside of shops; retail store services and wholesale store services featuring woven fabrics and beddings; retail store services and wholesale store services featuring clothing; retail store services and wholesale store services featuring footwear; retail store services and wholesale store services featuring bags and pouches; retail store services and wholesale store services featuring personal articles in the nature of false nails, false eyelashes, ferrules of metal for canes and walking sticks, shaving cases, pedicure sets, eyelash curlers, manicure sets, ear picks, personal ornaments, jewelry, vanity cases sold empty, umbrellas, walking sticks, canes, metal parts of canes and walking sticks, cane handles, hand fans, pocket mirrors, pocket mirror bags, cosmetic and toilet utensils (other than electric tooth brushes), woven textile goods for personal use, garters, sock suspenders, braces for clothing (suspenders), waistbands, belts (clothing), armband for holding sleeves, insignias for wear (not of precious metal), buckles for clothing, badges for wear (not of precious metal), brooches for clothing, special sash clips for obi obi-dome, bonnet pins (not of precious metal), ornamental adhesive patches for jackets, brassards, hair ornaments, buttons, false beards, false moustaches, hair curlers (non-electric).

<sup>3</sup> Registration No. 3722422, issued December 8, 2009.

registration includes the translation statement, “The English translation of the word "UCHI" in the mark is house or home.”

Applicant has appealed. Both Applicant and the Examining Attorney have filed briefs.

We affirm the refusal to register for all classes.

## I. Applicable Law

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

### A. The similarity of dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

First, we point out that Applicant is laboring under a misapprehension about the cited mark. Applicant has devoted much of its argument to its contention that the registered mark is the stylized word UCHI, in lower case letters, and that the Examining Attorney has erred in characterizing the mark as being in standard characters. However, the copy of the registration, taken from the USPTO’s electronic database and made of record in the December 25, 2013 Office action,

clearly identifies the mark as being in standard characters. Although the mark is displayed in lower case, as shown below, standard character marks may be so displayed. *See* Trademark Rule 2.52(a), TMEP §§ 807.03, 807.03(a), 807.03(b).

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Indeed, because a standard character mark may be depicted in any font style, color or size, Applicant's arguments regarding the differences in the depictions of the word UCHI in the two marks are not relevant; the Registrant may depict its mark in the same type style and color as UCHI in Applicant's mark, and therefore these words must be considered identical in appearance. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1910 (Fed. Cir. 2012).

Second, Applicant invokes the doctrine of foreign equivalents in a rather strange manner. In determining likelihood of confusion, if one mark is in a foreign language and the other mark is in English, the foreign language mark is normally translated into English to consider the meaning of the mark (although there are some exceptions that are not applicable here). But in the present case, the word UCHI in both marks is in the same foreign language, and both have the same translation, "house or home." As part of its argument that the doctrine of foreign equivalents is applicable to the present situation, Applicant cites *Lar Mor International, Inc.*, 221 USPQ 180 (TTAB 1983). However, although that same argument was made by the applicant in that case, the Board never endorsed this approach in the opinion; on the contrary, the Board, citing J. McCarthy, *Trademarks and Unfair Competition*

¶23:14 (1973), pointed out that “In fact, one legal scholar has suggested that if the marks being compared are both foreign words, the doctrine of foreign equivalents may not be applicable, and that the comparison should be based on phonetic similarity of the marks to the English-speaking customer. *Id.* at 181. Thus, although we look at the translation to understand the meaning that UCHI would have to consumers who understand Japanese, there is no need to consider the marks under the doctrine of foreign equivalents. They have identical meanings on their face and according to their translation statements.

We also disagree with Applicant’s argument that its mark conveys a unique impression because it is comprised of words from three different languages, i.e., that UCHI is Japanese, CAFÉ is French, and SWEETS is English. The Examining Attorney has submitted evidence that “café” is a recognized English word having the meaning of, *inter alia*, “a small restaurant where you can get simple meals and drink (such as coffee)” and “a usually small and informal establishment serving various refreshments (as coffee); broadly: RESTAURANT.”<sup>4</sup> Thus, consumers viewing Applicant’s mark will consider the word UCHI as having the greater source-indicating significance, and the words CAFÉ and SWEETS as describing the services and goods provided by Applicant under the mark UCHI.

We also find that the pictorial elements in Applicant’s mark are not sufficient to distinguish the marks. The “striped background consisting [of] alternating brown and black vertical stripes” is, as Applicant itself has described it, a background for

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<sup>4</sup> Merriam Webster dictionary, [www.merriam-webster.com](http://www.merriam-webster.com), December 25, 2013 Office action, p. 7.

the words, and is not likely to be noticed by consumers or viewed as having source-indicating significance. See *In re Dixie Restaurants Inc.*, 41 USPQ2d at 1534. Applicant's mark also has a design of a whisk with whipped cream instead of the "I" in UCHI, but again, the design is not so significant as to be distinguishing. The design would still clearly be understood as the letter "I." Further, as has been frequently observed, "In the case of a composite mark containing both words and a design, 'the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.'" *In re Viterra*, 101 USPQ2d 1908, quoting *CBS Inc. v. Morrow*, 708 F.2d 1579 218 USPQ 198, 200 (Fed. Cir. 1983). Thus, if a mark comprises both a word and a design, the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). That would certainly be the case here; consumers will refer to the mark by the words, and not as the mark with the whisk and whipped cream and striped background design. For the reasons stated above, we find that UCHI is the dominant element of Applicant's mark, and we therefore give it more weight in our comparison of the marks. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties).

Because both marks contain the identical word UCHI, and because the additional descriptive and/or generic elements and the minor design elements in

Applicant's mark have little or no source-indicating significance, we find that the marks are similar in appearance. The marks are also similar in pronunciation and meaning, in that the word UCHI in Applicant's mark is identical to the Registrant's mark UCHI, and the descriptive and/or generic elements CAFÉ and SWEETS do not serve to distinguish the marks. The marks also convey the same commercial impression. Moreover, the word CAFÉ in Applicant's mark, which is depicted in the same font and size as UCHI, increases the likelihood of confusion, because it suggests that Applicant's name is UCHI CAFÉ, and that Applicant renders café services; the cited registration is also for café services. Thus, Applicant's mark, used in connection with the food and beverage items identified in Classes 30 and 32, and the retail store services for the sale of food and beverage items in Class 35, further suggests that these goods and services come from or are associated with the same source that renders café services.

After considering the marks in terms of their appearance, pronunciation, connotation and commercial impression, we find that they are similar. Moreover, we keep in mind that similarity is not a binary factor but is a matter of degree. *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003). In this case, because of the identical nature of the word UCHI, and the lack of distinctiveness of the additional elements in Applicant's mark, we find that this *du Pont* factor strongly favors a finding of likelihood of confusion.

In reaching this conclusion we have considered the numerous third-party registrations submitted by Applicant of marks that include the word HOME or

HOUSE. Third-party registrations are not evidence of use of the marks, or that the public is familiar with them. *See Olde Tyme Foods, Inc. v. Roundy's Inc.* 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992). However, they can be used to show the sense in which a mark is used in ordinary parlance, and thereby prove that a mark or portion thereof has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that it is relatively weak. *See Juice Generation, Inc. v. GS Enters. LLC*, \_\_F.3d\_\_, 115 USPQ2d 1671, 1675 No. 2014-1853 (Fed. Cir. July 20, 2015); *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, \_\_F.3d\_\_, \_\_USPQ2d\_\_, No. 2014-1789 (Fed. Cir. August 19, 2015). In the vast majority of the third-party registrations containing the word HOME or HOUSE for restaurant services, the term is used to indicate that a restaurant is known for a particular product. See, for example, Registration Nos. 4027145 for HOME OF THE BOTTOMLESS CUP, 2623831 for HOME OF THE WARM 'N FRESH DONUT, 2925540 for HOUSE OF DONUTS and design and 1302940 for HOUSE OF PIES. There are some registrations that do not fit into this pattern, such as No. 4304669 for HOME RUN INN, No. 3262085 for HOME SLICE PIZZA, No. 2702448 for HOME SUITE HOME, No. 4345993 for HOME TEAM GRILL and No. 3435786 for HOME TURF SPORTS BAR, but the “different” meaning of HOME in each of these registrations does not indicate that HOME or HOUSE has a particular significance for restaurant services. In short, the third-party registrations do not show that HOME or HOUSE per se has a suggestive or descriptive meaning for restaurant services. More importantly, the

registered mark is UCHI, not HOME or HOUSE. There are no third-party registrations of record for UCHI marks, and despite the fact that UCHI translates as HOME or HOUSE, Registrant's UCHI mark conveys a very different impression from these words. Therefore, we treat Registrant's mark UCHI as a distinctive mark and, as such, the cited registration is entitled to a broad scope of protection for restaurant services.

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

The services as identified in the cited registration are "cafe-restaurants; carry-out restaurants; hotel, bar and restaurant services; restaurant and bar services; restaurant services; restaurants; self-service restaurants; take-out restaurant services" in Class 43. Because Applicant has applied to register its mark in four classes, and because each class in a multi-class application is essentially treated as a separate application, we will discuss the goods and services in each class separately.

Class 43:

Applicant's Class 43 services are identified as "providing foods and beverages." Although Applicant has not used the exact words in its identification as the Registrant has, we find that these services encompass the various restaurant services identified in the cited registration, and therefore the services are, in part, legally identical.

Applicant has attempted to limit the Registrant's identification by characterizing the Registrant's business as a "Japanese restaurant" and as

rendering “take-out restaurant services.” Brief, 6 TTABVUE 16, 17. However, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in an applicant’s application vis-à-vis the goods and/or services recited in the cited registration, rather than what the evidence shows the goods and/or services to be. *See In re Dixie Restaurants Inc.*, 41 USPQ2d at 1534. Thus, Applicant’s services in Class 43 are, in part, legally identical to those in the cited registration.

This *du Pont* factor strongly favors a finding of likelihood of confusion.

Class 35:

Applicant’s services identified in Class 35 include retail store services featuring foods and beverages; many of the services listed in the identification are merely an elaboration of the food and beverage items that are the subject of the retail store services, e.g., retail store services featuring tea, coffee and cocoa. In order to show that Applicant’s identified retail store services are related to the Registrant’s services, the Examining Attorney has submitted third-party registrations in which parties have adopted a single mark for both types of services.<sup>5</sup> Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). The third-party registrations for retail store services in the field of food, and restaurant services, include:

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<sup>5</sup> Office action mailed December 25, 2013. We have given no probative weight to the third-party registrations which have been cancelled.

Registration No. 3642861 for PORTLAND COFFEE HOUSE for, *inter alia*, retail store services featuring ground and whole bean coffee, tea, cocoa, bottled water and other non-alcoholic drinks, including soft drinks and fruit juices, prepared coffee and tea, sandwiches, baked goods including muffins, biscuits, cookies and pastries, candy and confections (Class 35) and café and carry out restaurant services (Class 43);

Registration No. 4404663 for PHILZ COFFEE ONE CUP AT A TIME for, *inter alia*, retail outlets featuring ground and whole bean coffee, tea, cocoa, muffins, biscuits, cookies, pastries, cakes, breads, sandwiches and prepared foods, confectionery items, ready-to-eat food stuffs, juices and soft drinks (Class 35) and coffee houses and cafes (Class 43);

Registration No. 4180905 for SEATTLE'S BEST COFFEE for, *inter alia*, retail store services in the field of coffee, tea, cocoa, packaged and prepared foods, retail store services featuring carry out foods and beverages (Class 35) and restaurant, café, cafeteria, carry out restaurant and take out restaurant services (Class 43); and

Registration No. 4413094 for HOME OF THE ORIGINAL MEATBALL IN A CUP for concession stands featuring meatballs (Class 35) and restaurant services (Class 43).<sup>6</sup>

In addition to the third-party registrations, we note that there is a fine line between restaurant services and the retail sale of food. For example, the registration for SEATTLE'S BEST COFFEE includes "retail store services featuring carry out foods and beverages"; the registration for PHILZ COFFEE ONE CUP AT A TIME is for retail outlets that feature sandwiches and prepared foods and ready-to-eat food stuffs, and the registration for PORTLAND COFFEE HOUSE is for retail outlets that feature prepared coffee and tea, and sandwiches. The retail sales of these prepared foods are very similar, if not the same, as take-out restaurant

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<sup>6</sup> This third-party registration was submitted by Applicant, Response filed June 30, 2014, p. 167.

services. In addition, numerous other third-party registrations that include restaurant services also include food items “for consumption on or off the premises,” essentially food that is “take-out” food from a restaurant. See, for example, Registration No. 4216737, which includes both “pizza sold for consumption on or off the premises” and “restaurant and carryout food services”<sup>7</sup>; Registration No. 1476111 for “frozen desserts, namely ice cream for consumption on or off the premises” and “restaurant services”<sup>8</sup>; Registration No. 1302940 for “pies of all kinds for consumption on or off the premises” and “restaurant and carryout restaurant services”<sup>9</sup>; Registration No. 3569680 for, *inter alia*, bread, sandwiches, cookies, coffee, tea, for consumption on or off the premises” and “restaurant services, carry-out and take-out restaurant services.”<sup>10</sup>

The greater the degree of similarity between the marks, the lesser the degree of similarity between the goods or services that is necessary to support a finding of likelihood of confusion. *Bd. Of Regents, Univ. of Tex. Sys. V. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1189 (TTAB 2014). In this case, as previously discussed, the marks are extremely similar. Applying this principle to our consideration of the *du Pont* factor of the similarity or dissimilarity of the services, we find that, because of the very close relationship between retail sales of prepared food and carry-out restaurant services, supported by the third-party registrations discussed above, this

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<sup>7</sup> Submitted by Applicant with June 30, 2014 response, p. 183.

<sup>8</sup> *Id.*, p. 258.

<sup>9</sup> *Id.*, p. 264.

<sup>10</sup> Office action mailed December 25, 2013, p. 11-12.

factor favors a finding of likelihood of confusion with respect to the services in Class 35.

Class 30:

The following third-party registrations show that a single mark has been registered for some of the goods listed in Applicant's identification of goods in Class 30, and the restaurant-type services listed in the cited registration:

Registration No. 4415127 for TIM HORTONS CAFE & BAKE SHOP for, *inter alia*, donuts, muffins, cookies, pastries, cakes, tea biscuits, bagels, coffee, tea, hot chocolate, coffee beans and ground coffee beans (Class 30), and café featuring coffees and baked goods, sit-down and take-out restaurant services (Class 43);

Registration No. 4170195 for YOUR NEIGHBORHOOD GATHERING PLACE for, *inter alia*, cookies, pastries, cake and ice cream (Class 30) and for restaurant services (Class 43);

Registration No. 4442188 for TAPIOCA EXPRESS for, *inter alia*, coffee, tea, cocoa, frozen desserts consisting of fruit and cream, frozen desserts consisting of flavored ice blocks with toppings, frozen yogurt confections, cookies, candy (Class 30), and restaurant services, take-out restaurant services and café services;

Registration No. 4404663 for PHILZ COFFEE ONE CUP AT A TIME for, *inter alia*, coffee beans, coffee, tea (Class 30) and coffee shops and cafes (Class 43);

Registration No. 4180905 for SEATTLE'S BEST COFFEE for, *inter alia*, ground and whole bean coffee, cocoa, herbal and non-herbal tea, muffins, biscuits, cookies, pastries and breads, candy (Class 30), and restaurant, cafe, cafeteria, carry out restaurant and take out restaurant services (Class 43);

Registration No. 4027145 for HOME OF THE BOTTOMLESS CUP for coffee (Class 30) and restaurant services (Class 43);<sup>11</sup>

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<sup>11</sup> Submitted by Applicant with June 30, 2014 response, p. 129.

Registration No. 1983873 for T.J. CINNAMONS and design for, *inter alia*, bakery goods (Class 30) and restaurant services (Class 42);<sup>12</sup>

Registration No. 2623831 for HOME OF THE WARM 'N FRESH DONUT for donuts, bakery goods and coffee (Class 30) and restaurant, carry out and take out food services (Class 42);<sup>13</sup>

Registration No. 2925540 for HOUSE OF DONUTS and design for, *inter alia*, doughnuts, muffins, croissants, pastries, bakery products, bakery desserts (Class 30) and restaurant and cafeteria services (Class 42)<sup>14</sup>;

Registration No. 1476111 for HOUSE OF FLAVORS for ice cream for consumption on or off the premises (Class 30) and restaurant services (Class 42)<sup>15</sup>;

Registration No. 1302940 for HOUSE OF PIES for pies of all kinds for consumption on or off the premises (Class 30) and restaurant services (Class 42)<sup>16</sup>; and

Registration No. 4470956 for HOUSE FOODS for, *inter alia*, tea, sherbet, frozen confectionery (Class 30) and restaurant services (Class 43).<sup>17</sup>

We are aware that merely because a particular food can be served in a restaurant is not a sufficient basis for finding that goods and services are related, and that “something more” is required. *See In re Coors Brewing Co.*, 68 USPQ2d at

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<sup>12</sup> This third-party registration was submitted by Applicant, Response filed June 30, 2014, p. 136. The restaurant services are classified in Class 42, rather than Class 43, because the registration issued in 1996, prior to the reclassification of restaurant services in Class 43.

<sup>13</sup> *Id.* at p. 139. This registration, too, issued prior to the reclassification of restaurant services in Class 43.

<sup>14</sup> *Id.* at p. 255. This registration issued prior to the reclassification of restaurant services in Class 43.

<sup>15</sup> *Id.* at p. 258, also cited at footnote 8. This registration issued prior to the reclassification of restaurant services in Class 43.

<sup>16</sup> *Id.* at p. 264. This registration issued prior to the reclassification of restaurant services in Class 43.

<sup>17</sup> *Id.* at p. 318.

1064; *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641 (CCPA 1982). In this case, the third-party registrations, listed above, provide that “something more,” showing that third parties have adopted a single mark for both the food products listed in Applicant’s application and restaurant services. As a result, when consumers familiar with the Registrant’s restaurant services offered under the mark UCHI encounter these food products sold under the highly similar mark UCHI CAFÉ SWEETS and design, with the inclusion of CAFÉ further heightening the connection with a restaurant, they are likely to believe that the goods come from the same source as the restaurant services.

This *du Pont* factor favors a finding of likelihood of confusion with respect to the goods in Class 30.

Class 32:

The Examining Attorney made the first five third-party registrations of record with the December 25, 2013 Office action; the sixth registration was submitted by Applicant.

Registration No. 3257813 for ANIMO JUICE for, *inter alia*, fruit juices (Class 32) and restaurant services (Class 43);

Registration No. 4415127 for TIM HORTONS CAFÉ & BAKE SHOP for, *inter alia*, fruit juices, soft drinks, bottled water (Class 32) and sit-down and take-out restaurant services (Class 43);

Registration No. 4170195 for YOUR NEIGHBORHOOD GATHERING PLACE for, *inter alia*, soft drinks and fruit juices and restaurant services;

Registration No. 4442188 for TAPIOCA EXPRESS for, *inter alia*, fruit juices, fruit beverages, soda pops [sic], bottled water (Class 32) and

restaurant services, take-out restaurant services and café services (Class 43);

Registration No. 4180905 for SEATTLE'S BEST COFFEE for, *inter alia*, fruit juice based beverages, fruit drinks (Class 32) and restaurant, cafe, cafeteria, carry out restaurant and take out restaurant services (Class 43); and

Registration No. 4470956 for HOUSE FOODS for, *inter alia*, soft drinks (Class 32) and restaurant services (Class 43).<sup>18</sup>

For the same reasons we have discussed in connection with Applicant's Class 30 goods, we find that the *du Pont* factor of similarity/dissimilarity of the goods and services favors a finding of likelihood of confusion with respect to the Class 32 services.

C. The similarity or dissimilarity of established, likely-to-continue trade channels.

Because the application in Class 43 is for services that are identical in part to the Registrant's identified services, and because neither identification includes any restrictions, the channels of trade must be deemed to be legally identical. *See In re Viterra*, 101 USPQ2d at 1908. As for the other classes of goods and services in Applicant's application, although the Examining Attorney states that the channels of trade *du Pont* factor is one of the most relevant, brief, 8 TTABVUE 8, he did not submit any evidence regarding the channels of trade. Further, while he contends that the third-party registrations demonstrate that the goods and retail store services emanate from a single source, the registrations do not show that the goods and services move in the same channels of trade as restaurant services. Nor does

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<sup>18</sup> *Id.*

the presumption that the goods and services move in all normal channels of trade, Brief, 8 TTABVUE 22, demonstrate what those channels of trade are. What we can conclude from the identifications is that the goods and services are consumer items that would be sold or offered to the general public, and therefore that the same classes of consumers would encounter both Applicant's goods and services and the Registrant's services. To this extent, this *du Pont* factor favors a finding of likelihood of confusion.

D. The conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.

Although not discussed by either Applicant or the Examining Attorney, we consider this factor to be relevant to our determination. The involved goods and services, as previously discussed, are sold to the general public. Further, many of the goods, such as tea, doughnuts and carbonated beverages, are inexpensive items that may be purchased on impulse. Even the decision to enter a retail store to purchase fruits or vegetables or candy can be made on impulse, and without careful consideration of the mark for such goods or services. Accordingly, we find that this *du Pont* factor, too, favors a finding of likelihood of confusion.

E. The number and nature of similar marks in use on similar goods.

Applicant has listed this as one of the relevant *du Pont* factors in this case. However, Applicant has not submitted any evidence of use of similar marks on similar goods and services. Applicant relies on the third-party registrations it submitted as support for this factor, but as we have said in discussing the registrations, they are not evidence of use of the marks shown therein. We reiterate

from that discussion that there are no third-party registrations for UCHI marks, and the registrations containing the English words HOME or HOUSE are very different in commercial impression. Because we have no evidence of use of third-party marks, we treat this factor as neutral.

F. The extent of potential confusion, i.e., whether de minimis or substantial.

Because the goods and services are ordinary consumer items which may be frequently purchased by the public at large, the extent of potential confusion, i.e., the number of people who may be confused, is substantial. This factor favors a finding of likelihood of confusion.

G. The remaining *du Pont* factors.

To the extent that any of the remaining *du Pont* factors are relevant, we find that they are neutral.

## II. Conclusion

After reviewing all of the relevant *du Pont* factors, we find that Applicant's mark UCHI CAFÉ SWEETS and design, used for the goods and services that are the subject of this appeal, is likely to cause confusion with the mark UCHI in the cited registration.

**Decision:** The refusal to register Applicant's mark UCHI CAFÉ SWEETS and design is affirmed with respect to all of the identified goods and services in Classes 30, 32 and 43, and the following services in Class 35:

Retail store services and wholesale store services featuring a variety of goods in each field of clothing, foods and beverages, and living ware,

carrying all goods together; retail store services and wholesale store services featuring foods and beverages; retail store services and wholesale store services featuring liquor; retail store services and wholesale store services featuring meat; retail store services and wholesale store services featuring sea food; retail store services and wholesale store services featuring vegetables and fruits; retail store services and wholesale store services featuring confectionery; retail services store services and wholesale store services featuring bread and buns; retail store services and wholesale store services featuring rice and cereals; retail store services and wholesale store services featuring milk; retail store services and wholesale store services featuring carbonated drinks, non-alcoholic and non-alcoholic fruit juice beverages; retail store services and wholesale store services featuring tea, coffee and cocoa; retail store services and wholesale store services featuring processed food.

After the period for appeal concludes, the application will be passed to publication for the remaining services in Class 35, as listed in footnote 2. As noted above, the description of the mark appears to have omitted the words “letters” and “of”; if Applicant wishes to correct the description, it should, prior to the expiration of the two-month appeal period, file an amendment to the description with the Examining Attorney through the TEAS filing system.