

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: December 13, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re European Specialties, LLC DBA Holy Cow! Kosher and Albert Mayzels*

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Serial No. 86859900  
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Joshua A. Schaul of Sherman IP LLP,  
for European Specialties, LLC DBA Holy Cow! Kosher and Albert Mayzels

Jessica (Lauren) Turner, Trademark Examining Attorney, Law Office 123,  
Susan Hayash, Managing Attorney.

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Before Wellington, Greenbaum and Coggins,  
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

European Specialties, LLC DBA Holy Cow! Kosher and Albert Mayzels  
("Applicants") seek registration on the Principal Register of the mark HOLY COW!  
KOSHER (in standard characters, KOSHER disclaimed) for

Substitute bacon; substitute bacon bits; beef; beef jerky;  
beef patties; substitute charcuterie; chicken; chicken stock;  
substitute ham; substitute head cheese; hot dogs; beef  
kielbasa, turkey kielbasa, chicken kielbasa; beef, veal,  
turkey, chicken knockwurst; liver; liver paste; liver paté;  
substitute mortadella; substitute pancetta; substitute  
prosciutto; beef and lamb ribs; salami; beef or chicken-  
based sausage meat; sausages; turkey; turkey burger  
patties; turkey sausages; veal; veal stock; substitute

braunschweiger; corned beef; corned beef hash; dried beef; frozen chicken, namely, breast; frozen chicken, namely, leg quarters; meat-based snack foods; poultry, namely chicken; poultry, namely, turkey; poultry, namely, duck; poultry, namely, goose; preserved meats and sausages; processed lamb; processed meat, namely, beef; processed meat, namely, turkey; processed meat, namely, duck; processed meat, namely, veal; processed meat, namely, lamb; processed meat, namely, elk; processed meat, namely, chicken; processed meat, namely, bison; roast beef; smoked sausages; turkey sausages; uncooked sausages; all of the foregoing is certified Kosher, in International Class 29.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicants' mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicants' mark, when applied to Applicants' goods, so resembles the previously registered mark HOLY COW (in typed format) for "sandwich spreads, namely, sweet fruit based spread and savory vegetable based spread" in International Class 29, and "condiments, namely, ketchup, mustard, and mint; spices; sauces for curry and rice" in International Class 30, as to be likely to cause confusion, mistake or deception.<sup>2</sup>

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<sup>1</sup> Application Serial No. 86859900 was filed on December 29, 2015 based upon Applicants' claim of first use anywhere and use in commerce since at least as early as February 1, 2014, with prior use in a different form since at least as early as November 4, 2014. The claimed date of prior use in a different form appears to be a typographical error, as it postdates Applicants' February 1, 2014 claimed date of first use by approximately nine months. The Board has deleted the stray end parenthesis between the word "chicken" and "knockwurst" which first appeared in Applicants' October 18, 2016 Response to Office Action, as it is an obvious typographical error. *See* TMEP §§ 707.02(6) and 1402.12 (Oct. 2017).

<sup>2</sup> Registration No. 2906127 issued on November 30, 2004, from an application filed April 4, 2001; renewed. Other goods, including "meat, fish, poultry, game and seafood" in International Class 29, were deleted from the registration before the Examining Attorney issued her First Office Action. Before November 2, 2003, "standard character" drawings were known as "typed" drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i).

When the refusal was made final, Applicants appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

### I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicants submitted evidence with their brief and with their reply brief. Only evidence filed during examination is timely, Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and it should not be submitted (or resubmitted) on appeal. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 1203.02(e) (June 2017).

The evidence attached to Applicants’ brief consists of listings from the TESS electronic database and printouts of several third-party applications and registrations from the TSDR electronic database for marks that contain the word HOLY or COW for goods in Class 29. The marks of Applicants and Registrant also appear on each list. We will consider this evidence because Applicants previously made the same evidence of record with their April 14, 2017 Request for Reconsideration. The Examining Attorney waived any objection to consideration of the TSDR lists themselves because when she issued her denial of Applicants’ Request for Reconsideration, she did not advise Applicants that the listings are insufficient to make the registrations of record. The listings also have been stipulated into the record because the Examining Attorney discussed them her brief.<sup>3</sup>

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<sup>3</sup> See discussion in Examining Attorney’s Brief, 9 TTABVUE 16-19, specifically referencing (at 9 TTABVUE 18) the evidence submitted on pages 20-108 of Applicants’ Brief.

On the other hand, we will not consider the exhibits submitted for the first time with Applicants' reply brief as the exhibits are untimely, and the Examining Attorney did not have an opportunity to respond to them.<sup>4</sup> *In re City of Houston*, 101 USPQ2d 1534, 1537 (TTAB 2012) (citing *In re Zanova Inc.*, 59 USPQ2d 1300, 1302 (TTAB 2001) ("By attempting to introduce evidence with its reply brief, applicant has effectively shielded this material from review and response by the Examining Attorney.")), *aff'd*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013).

## II. Applicable Law – Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co.*, 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 or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). We discuss below these and other relevant factors. *See M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are "relevant and of record" need be considered).

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<sup>4</sup> This material consists of a four-page printout from the Amazon website with images of packaged bacon products and their prices. Applicants' Reply Brief, 10 TTABVUE 8-12.

A. The Similarity or Dissimilarity of the Marks

We compare Applicants' mark HOLY COW! KOSHER and Registrant's mark HOLY COW "in their entireties as to appearance, sound, connotation and commercial impression." *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (quoting *du Pont*, 177 USPQ at 567). See also *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). "The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted). Further, marks "must be considered ... in light of the fallibility of memory ...." *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). "[S]imilarity is not a binary factor but is a matter of degree." *St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003)).

Applicants argue that the differences in the marks in sound and appearance are sufficient to distinguish them, KOSHER is the dominant element in Applicants' mark, and the marks have different connotations because HOLY COW! KOSHER

indicates that unlike Registrant's products, Applicants' products are "certified Kosher," which consumers would not expect. The Examining Attorney focuses on the visual, aural, and connotative similarities between the identical wording HOLY COW, which she contends is the most distinctive portion, and therefore the strongest source identifying element, of Applicants' mark.

We find HOLY COW! KOSHER and HOLY COW to be extremely similar. Applicants' mark contains Registrant's mark in its entirety, and adds an exclamation point and the word KOSHER. Although there is no absolute rule that a likelihood of confusion is present where an applicant's mark contains the whole of the registered mark and additional matter, the fact that Applicants' mark includes the entirety of the cited registered mark increases the similarity between the two. *See, e.g., Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant's mark BENGAL LANCER for club soda, quinine water and ginger ale is likely to cause confusion with BENGAL for gin). The prominence of the term HOLY COW is further enhanced by its placement at the beginning of Applicants' mark HOLY COW! KOSHER. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered"). *See also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

“Holy cow” is a slang interjection “used to express bewilderment, surprise, or astonishment.”<sup>5</sup> There is no evidence that HOLY COW has any significance as applied to any of the goods identified in the application or registration.<sup>6</sup> On the other hand, “kosher” is highly descriptive, if not generic, of Applicants’ identified goods, all of which are “certified Kosher,” and appropriately has been disclaimed. *See In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). Descriptive matter typically is less significant or less dominant when comparing marks. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) (the “descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion”)). *See also In re Chatham Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Because “ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks under *DuPont*. As a generic term, ALE simply delineates a class of goods.”).

We find that consumers likely will view the term KOSHER in Applicants’ mark as an indication that the identified products are “certified Kosher,” rather than as a source-distinguishing element. It is well-settled that marks containing additional wording may be confusingly similar. *Stone Lion Capital Partners, LP v. Lion Capital*

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<sup>5</sup> Dictionary.com Unabridged, based on the Random House Dictionary (2016). Attached to October 31, 2016 Final Office Action, TSDR p. 2.

<sup>6</sup> We discuss below Applicants’ evidence of third-party uses of the individual terms HOLY and COW for goods similar to those identified in the application and registration.

*LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (STONE LION CAPITAL incorporated entirety of registered marks LION CAPITAL and LION). The addition of the word KOSHER in Applicants' mark does not change the meaning or commercial impression of the interjection HOLY COW. *Cf. In re P. Ferrero & C.S.p.A.*, 479 F.2d 1395, 178 USPQ 167 (CCPA 1973) (TIC TAC and TIC TAC TOE); *Lever Bros. Co. v. Barcolene Co.*, 463 F.2d 1107, 174 USPQ 392 (CCPA 1972) (ALL and ALL CLEAR); *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400, 167 USPQ 529 (CCPA 1970) (PEAK and PEAK PERIOD). Rather, HOLY COW has the same meaning in both marks in connection with the respective goods, i.e., as an interjection expressing surprise, and it engenders the same commercial impression in each mark.

In addition, the exclamation point following HOLY COW in Applicants' mark underscores the meaning of HOLY COW as an interjection, and thus does not serve to distinguish the marks. *See St. Helena Hosp.*, 113 USPQ2d at 1085 (TAKETEN and TAKE 10! engender similar commercial impressions despite addition of exclamation point); *Bond v. Taylor*, 119 USPQ2d 1049 (TTAB 2016) (BLACK MEN ROCK confusingly similar to BLACK GIRLS ROCK!); *Cf. In re Promo Ink*, 78 USPQ23 1301, 1305 (TTAB 2006) (finding proposed mark merely descriptive, Board stated punctuation mark in PARTY AT A DISCOUNT! does not significantly change the commercial impression of the mark); *In re Burlington Indus., Inc.*, 196 USPQ 718, 719 (TTAB 1979) (“[A]n exclamation point does not serve to identify the source of the goods.”). In fact, recent articles posted on the websites for Inside Philanthropy,<sup>7</sup>

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<sup>7</sup> February 23, 2016 article by Alyssa Ochs titled *Holy Cow, This Community Foundation is Exploding. Why is That?* discusses the surge in a foundation's annual grantmaking.



Chicago Magazine,<sup>8</sup> The Seattle Times,<sup>9</sup> and CNN Money U.S.<sup>10</sup> demonstrate recent usage of the term HOLY COW as an interjection with and without an exclamation point.

We further find that purchasers who are familiar with both marks likely would perceive Applicants' mark HOLY COW! KOSHER as a subset, product line extension, or variant of Registrant's mark HOLY COW, with both marks identifying products made by HOLY COW. *See, e.g., In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion, noting that the marks are more similar than they are different and that the addition of applicant's "product mark," VANTAGE, to the registered mark would not avoid confusion).

Finally, Applicants' standard character mark and Registrant's typed mark are not limited to any particular depiction. The rights associated with a standard character

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[http://www.insidephilanthropy.com/home/2016/2/23/holy-cow-this-community-foundation-is-exploding-why-is-that\\_html](http://www.insidephilanthropy.com/home/2016/2/23/holy-cow-this-community-foundation-is-exploding-why-is-that_html). Attached to October 31, 2016 Final Office Action, TSDR p. 3-4.

<sup>8</sup> December 2015 article by James Hughes titled *Holy Cow! Home Alone is 25!* Celebrates the 25th anniversary of the movie *Home Alone* with interviews with some of its main cast and crew members. <http://www.chicagomag.com/Chicago-Magazine/December-2015/Home-alone/>. Attached to October 31, 2016 Final Office Action, TSDR pp. 5-25.

<sup>9</sup> September 8, 2016 Associated Press article titled *Holy cow! California steer vies for world's tallest bovine* leads with "Holy cow! A giant, 1-ton Holstein steer who loves to eat bread and romps like a puppy at a Northern California zoo is vying for the title of world's tallest bovine." <http://www.seattletimes.com/nation-world/holy-cow-california-steer-vies-for-worlds-tallest-bovine/>. Attached to October 31, 2016 Final Office Action, TSDR pp. 26-28.

<sup>10</sup> August 5, 2015 article by Virginia Harrison titled *Holy cow! India is the world's largest beef exporter* leads with "A country where cows are sacred is exporting a record amount of red meat," and discusses India's exportation of large quantities of water buffalo meat. <http://money.cnn.com/2015/08/05/news/economy/india-beef-exports-buffalo/>. Attached to October 31, 2016 Final Office Action, TSDR pp. 29-31.

mark reside in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445, 1448 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); TMEP § 1207.01(c)(iii) (October 2017). We must consider Applicants' and Registrant's marks "regardless of font style, size, or color." *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011), including iterations minimizing the highly descriptive, if not generic, word KOSHER in Applicants' mark.

For these reasons, we find that HOLY COW is the dominant and sole distinctive element in Applicants' mark HOLY COW! KOSHER. HOLY COW thus is entitled to more weight in our analysis of these marks. In coming to this conclusion, we do not ignore the presence of the additional wording or punctuation in Applicants' mark. However, for the reasons discussed above, we find that consumers are more likely to remember the term HOLY COW than the other elements of Applicants' mark.

While there are some specific differences between the two marks, we find that in their entireties, Applicants' mark HOLY COW! KOSHER and Registrant's mark HOLY COW are extremely similar in appearance, sound, and connotation due to the shared term HOLY COW, and they convey similar commercial impressions. The factor of the similarity of the marks thus favors a finding of likelihood of confusion.

B. The Number and Nature of Similar Marks in Use on Similar Goods

The Federal Circuit has held that evidence of the extensive registration and use of a term by others can be "powerful" evidence of weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d

1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). To this end, Applicants contend that the cited mark HOLY COW deserves only a narrow scope of protection in view of ten third-party registrations containing the term HOLY and two third-party registrations containing the term COW for “goods such as meat in International Class 029.”<sup>11</sup> However, the third-party registrations have minimal probative value because none of them includes both HOLY and COW, either separately or, more importantly, as the unitary interjection HOLY COW. This results in marks that look and sound different from Registrant’s mark HOLY COW.

The additional matter in each of the registrations arguably provides additional points of difference as compared to Registrant’s mark. For example, BROWN & WHITE COW, COWAMONGUS, HOLY LAND (and two other HOLY LAND-inclusive marks, all owned by one registrant), and HOLY HOTS convey different commercial impressions than does HOLY COW. The remaining third-party registrations, all owned by different registrants, are either different plays on the interjection HOLY COW or plays on other interjections, with additional humorous meanings specific to their identified goods resulting in different commercial

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<sup>11</sup> 7 TTABVUE 18, referencing Exhibits A and B attached to Applicants’ April 14, 2017 Request for Reconsideration. Each list also includes a number of third-party applications. There is no evidence that any of the applications ever registered and, in any event, a pending application is evidence only that the application was filed on a certain date; it is not evidence of use of the mark. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). In addition, although 17 marks appear on each list, which brings the total to 34 marks, as previously mentioned, each list includes Applicants’ mark and Registrant’s mark. Further, the third-party registration for HOLY COCONUT covers coconut oil, body spray, and supplements, goods that are unrelated to those here at issue.

impressions from Registrant's mark: HOLYPENO (beef jerky), HOLY SCHNITZEL (meats and processed foods including poultry and beef), HOLY SMOKE (smoked olive oil), HOLY MOLE CHICKEN FRIJOLE (prepared ready-to-eat entrees consisting primarily of meat), and HOLY POSOLE (soup).

The third-party registrations for different marks do not persuade us that the interjection HOLY COW "has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that the [term] is relatively weak." *Juice Generation*, 115 USPQ2d at 1675 (citation omitted). That is to say, the existence of the aforementioned third-party registrations does not demonstrate that the interjection HOLY COW carries a suggestive or descriptive connotation for the products identified in the application and registration such that we can conclude that the cited mark is so weak that the public would be able to distinguish the source of Applicants' goods from those of Registrant's by the slight differences in the marks.

We find this factor neutral.

### C. Goods and Channels of Trade

With regard to the goods and channels of trade, we must make our determinations under these factors based on the goods as they are identified in the application and registration. *Dixie Rests.*, 41 USPQ2d at 1534. *See also Stone Lion*, 110 USPQ2d at 1161-62; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

1. Relatedness of Goods

The second *du Pont* factor “considers whether the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and services.” *St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett-Packard*, 62 USPQ2d at 1004). When analyzing the relatedness of the goods, “it is not necessary that the products of the parties be similar or even competitive to support a finding of likelihood of confusion.” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). See also *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000) (The products need not be identical or even competitive to find a likelihood of confusion). Rather, “likelihood of confusion can be found ‘if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Coach Servs.*, 101 USPQ2d at 1722 (quoting *7-Eleven*, 83 USPQ2d at 1724). The issue is whether there is a likelihood of confusion as to the source of the goods, not whether purchasers would confuse the goods. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

In addition, under this *du Pont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each and every product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335,

209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

The goods identified in the application include various meat and processed meat products, all of which are “certified Kosher,” and the registration identifies sandwich spreads, condiments, spices, and sauces. The goods are related on their face as complementary products intended to be used and consumed together, and Applicants do not dispute this relationship.<sup>12</sup> Instead, Applicants argue that the goods are not commercially related because Applicants’ goods are certified Kosher and prepared under strict rabbinical supervision, while Registrant’s goods are not kosher. However, we are bound by the identification of goods set forth in the application and registration. *See Dixie Rests.*, 41 USPQ2d at 1534. The registration is not limited to kosher or non-kosher items, and therefore encompasses both kosher and non-kosher sandwich spreads, condiments, spices, and sauces. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (if services are unrestricted and broadly described, they are presumed to encompass all services of the type described)).

In addition, a trademark registration on the Principal Register is *prima facie* evidence of the validity of the registration and the registrant’s exclusive right to use the mark in commerce in connection with the specified goods. 15 U.S.C. § 1057(b). Consequently, Applicants’ argument that Registrant offers only non-kosher products

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<sup>12</sup> Applicants’ arguments concerning the differences between the goods mainly focus on meat and shellfish products that were deleted from the identification of goods in the cited registration.

constitutes an impermissible collateral attack on the cited registration, and may not be considered in an *ex parte* proceeding. *See Dixie Rests.*, 41 USPQ2d at 1534-35.

The record also confirms the close relationship between the goods identified in the application and registration. In particular, the Examining Attorney submitted marketplace evidence that the identified goods are related, and that customers are accustomed to encountering both types of goods together on the same retail websites. In particular, she submitted screenshots from the websites of third-parties Sabrett (sabrett.com) and Nathan's (nathansfamous.com), both of which sell hot dogs, sausages, and condiments under their respective marks.<sup>13</sup> She also submitted screenshots from the Rockland Kosher Supermarket (rocklandkosher.com), Shalom Kosher (theshalomgroup.com), and Aarons Gourmet (aaronsgourmet.com) websites demonstrating that there are kosher versions of at least some spices, sauces, and condiments, and they are sold together with kosher meat and processed meat.<sup>14</sup> *See Hewlett-Packard*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis”).

The Examining Attorney also submitted a number of use-based, third-party registrations from the USPTO's electronic database which cover meat and processed

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<sup>13</sup> April 18, 2016 First Office Action, TSDR pp. 41 (Sabrett) and 44 (Nathan's).

<sup>14</sup> October 31, 2016 Final Office Action, TSDR pp. 32-35 (Rockland), 36-38 (Shalom Kosher), and 39-49 (Aarons Gourmet).

meat products as well as sauces, spices, and condiments under a single mark.

Representative examples<sup>15</sup> are depicted in the following table:

Reg. No.	Mark	Relevant Goods
Reg. No. 4358459	NEWTON FARMS	Various types of chicken sausage; marinades, honey mustard, and chipotle ketchup
Reg. No. 4384574	LYFE KITCHEN LOVE YOUR FOOD EVERYDAY	Processed meat, namely bacon, beef, chicken, ham, sausage links, and turkey; fruit sauces, namely, applesauce and cranberry sauce, gravies, processed herbs, spices and seasonings, cooking sauces, mayonnaise, ketchup, mustard, relish, hot sauce, spices
Reg. No. 4274887	LIPARI LF SINCE 1963	Preserved meats and sausages, pastrami, beef; barbeque sauce, mayonnaise, and mustard
Reg. No. 4568225	ZAXBY'S	Cooked chicken; condiments, namely, dipping sauce, teriyaki sauce, barbecue sauce, honey mustard sauce, sweet and spicy sauce

Third-party registrations which individually cover a number of different goods that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed goods are of a type which may emanate from the same source. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re*

<sup>15</sup> Attached to April 18, 2016 First Office Action, TSDR pp. 4-6, 7-10, 11-13, and 17-19, respectively.



*Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). *See also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicants question the probative value of the third-party registrations because unlike the goods identified in the application, none of the goods identified in the third-party registrations are limited to kosher products. The absence of such a restriction does not affect the probative value of this evidence, however, as we presume that the broadly worded registrations include both kosher and non-kosher products. *C.f. Jump Designs*, 80 USPQ2d at 1374 (The cited registrant's furniture goods were not limited in any way as to nature, type, use or purpose and, thus, were broad enough to encompass the type of furniture sold by the applicant). Moreover, in light of the marketplace evidence from Rockland, Shalom Kosher, and Aarons Gourmet mentioned above, Applicants' argument is a red herring.

We find the evidence of record sufficient to establish that meat and processed meat products and condiments, sauces, and spreads, whether kosher or not, are closely related in that they are complementary items that routinely are sold and used together. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) (holding MARTIN'S for wheat bran and honey bread, and MARTIN'S for cheese, likely to cause confusion).

## 2. Channels of Trade

Considering the channels of trade and classes of purchasers, Applicants argue that their "certified kosher" products are directed to a very specific market. However, because there are no limitations as to channels of trade or classes of purchasers in

either the application or registration, we must presume that the goods identified in the application and registration travel through all normal and usual trade channels for such goods and are sold to all classes of prospective purchasers for those goods. *Stone Lion*, 110 USPQ2d at 1161. *See also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation “goods are presumed to travel in all normal channels ... for the relevant goods.”). The ordinary channels of trade for kosher meat and processed meat products on the one hand, and condiments, spices, and sauces on the other hand, include the same online and brick and mortar grocery stores of all sizes and varieties. In fact, the record includes evidence that specialty supermarkets that feature only kosher products, such as Rockland Kosher Supermarket and Shalom Kosher, also sell sauces, condiments and meat, and Aarons Gourmet sells various kosher meats and kosher spices.<sup>16</sup>

Applicants point to photographs of Applicants’ goods on a grocery store shelf amid signs that read “kosher” to support their argument that their goods are marketed and sold in different channels of trade from Registrant’s goods. However, there is no evidence that Applicants’ goods always are displayed in this manner in all grocery stores, or that Registrant’s goods are not also displayed in this manner. More importantly, such evidence, if it existed, would not support a finding that Applicants’ goods and Registrant’s goods move in distinct trade channels. We must assess this *du Pont* factor according to the identifications of the respective goods in the

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<sup>16</sup> Attached to October 31, 2016 Final Office Action, TSDR pp. 32-35 (Rocklands), pp. 36-38 (Shalom Kosher), and pp. 39-49 (Aarons Gourmet).

application and registration at issue, neither of which is so limited, not on extrinsic evidence of actual use. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722; *Octocom*, 16 USPQ2d at 1787.

In view of the foregoing, we find that the goods identified in the application and registration are closely related complementary products that are sold through the same channels of trade to the same class of purchasers. These factors weigh in favor of likely confusion.

#### D. Purchasing Conditions

Finally, we address Applicants' contention that their customers are sophisticated. This argument concerns the fourth *du Pont* factor, the "conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *du Pont*, 177 USPQ at 567. Applicants argue that they target a narrow class of customers, namely, those who seek premium kosher products. Applicants emphasize the importance of the kosher standard to those who adhere to a kosher diet, due to their need for products based on their religious beliefs and cultural identity, and contend that the sophistication of these consumers mitigates the likelihood of confusion.

We do not find the record evidence sufficient to establish that the goods identified in the subject application are expensive and necessarily sold only to discriminating customers. Even if Applicants target self-selecting purchasers who would only buy "certified kosher" products, the record does not support a finding that other purchasers who do not follow such dietary restrictions would not also buy "certified

kosher products.” Moreover, because there are no limitations in the cited registration, we presume that Registrant’s goods are available to all potential classes of ordinary consumers, including those who purchase only “certified kosher products,” and that kosher products include inexpensive as well as expensive items. *See Citigroup*, 98 USPQ2d at 1261; *In re Integrated Embedded*, 120 USPQ2d 1504, 1515 (TTAB 2016). When relevant consumers include both discerning purchasers and the general public, precedent requires that we base our decision on the least sophisticated potential purchasers. *Stone Lion*, 110 USPQ2d at 1163.

However, even if we were to assume that purchasers of Applicants’ kosher meat and meat products are discriminating, it is settled that even sophisticated purchasers are not immune from source confusion, especially where the marks are so similar and the goods are closely related. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers ... are not infallible.”)).

This *du Pont* factor is neutral.

### III. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of Applicants’ arguments relating thereto, including those arguments not specifically addressed herein, we conclude that consumers familiar with Registrant’s sandwich spreads, condiments, spices, and sauces offered under the mark HOLY COW would be likely to believe, upon encountering Applicants’ mark HOLY COW!

KOSHER for kosher meat and meat products, that the goods originated with or are associated with or sponsored by the same entity.

**Decision:** The refusal to register Applicants' mark HOLY COW! KOSHER is AFFIRMED.