

This Opinion is not a  
Precedent of the TTAB

Mailed: April 19, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Southern Girls Gourmet Sauces LLC*  
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Serial No. 86932732  
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Southern Girls Gourmet Sauces, LLC, appearing pro se.

Tara L. Bhupathi, Trademark Examining Attorney, Law Office 102,  
Mitchell Front, Managing Attorney.

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Before Taylor, Wolfson and Kuczma,  
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Southern Girls Gourmet Sauces, LLC, (“Applicant”) through its owner, Renee Bryan, seeks registration on the Principal Register of the standard character mark SOUTHERN GIRLS GOURMET SAUCES for “Sauces; Spice rubs” in International Class 30.<sup>1</sup> At the request of the Examining Attorney, GOURMET SAUCES was disclaimed.

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<sup>1</sup> Application Serial No. 86932732 was filed on March 8, 2016, based upon Applicant’s allegation of an intention to use the mark under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark is confusingly similar to the marks in the registrations listed below, owned by two different entities:

1. Sycamore Brewing, LLC's Registration

Registration No. 4773555 for the mark SOUTHERN GIRL (standard characters) for "Brewed malt-based alcoholic beverage in the nature of a beer" in International Class 32.<sup>2</sup>

2. Southern Girl Cakes, LLC's Registration

Registration No. 3821535 for the mark SOUTHERN GIRL and design, , for "Bakery desserts; Bakery goods; Bakery products; Bakery products, namely, sweet bakery goods; Mixes for bakery goods" in International Class 30.<sup>3</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### **Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion

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<sup>2</sup> Issued July 14, 2015.


<sup>3</sup> Issued December 9, 2009; Sections 8 and 9 combined declaration accepted and acknowledged.

analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *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 any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

A. The Similarity/Dissimilarity of the Marks

We first consider the *du Pont* factor of the similarity or dissimilarity of the marks and compare them, as we must, in their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). That is, “[t]he 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) (citation omitted). See also *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353

(Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Here, the average customer includes members of the general public.

We find, on comparison, that Applicant’s mark SOUTHERN GIRLS GOURMET SAUCES is similar in appearance and sound to both the cited composite mark  and the standard character SOUTHERN GIRL mark. All three marks include the common term SOUTHERN GIRL, or its plural SOUTHERN GIRLS, as the dominant part of each and as the only literal word element in the cited composite mark. The visual and aural differences between the marks do not suffice to distinguish them. With particular regard to the cited composite mark, the block-lettering is not so stylized that the stylization creates a unique commercial impression apart from the words themselves and, thus, the stylization does not obviate the similarities between the terms. Nor is the colorization of the lettering so prominent.<sup>4</sup> Moreover, because Applicant is seeking registration of a standard character mark, its display is not limited to any particular font, style, size, or color, and we therefore must consider that Applicant’s mark might be used in any stylized display, including the same or similar stylization of the lettering used by Registrant.

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<sup>4</sup> The wording “Southern Girl” in the registered mark is described as being depicted in “dark brown text.”

*See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-10 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011).

Likewise, the design elements of that mark, which are described in the registration as a “cake with light brown and peach color with peach smoke,” fail to distinguish it from Applicant’s mark. Where both words and a design comprise the mark, then the words are normally accorded greater weight because the words are more likely to make an impression upon purchasers, would be remembered by them, and would be used by them to call for the goods. *In re Viterra Inc.*, 101 USPQ2d at 1908, citing *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed”); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430-31 (TTAB 2013); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). *See also Giant Food, Inc. v. Nation’s Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). It is the literal element SOUTHERN GIRL that must be accorded greater weight over the design elements because it is the part of the cited marks that will be used to call for Registrant’s goods. Moreover, the design itself highlights the bakery items sold under Registrant’s mark.

We find also that the addition of the plural “s” to the term SOUTHERN GIRLS in Applicant’s applied-for mark does not distinguish Applicant’s mark from the cited marks in terms of appearance, sound or commercial impression. “It is well established

that trademarks consisting of singular and plural forms of the same term are essentially the same mark.” *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (citing *Wilson v. Delaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (finding no material difference between the singular and plural forms of ZOMBIE such that the marks were considered the same mark); *In re Pix of Am., Inc.*, 225 USPQ 691, 692 (TTAB 1985) (noting that the pluralization of NEWPORT is “almost totally insignificant” in terms of likelihood of confusion among purchasers)). Further, SOUTHERN GIRLS is the prominent feature of Applicant’s mark given its location as the first part of the mark and, thus, the first words to appear on any label or to be articulated when pronouncing the mark. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). *See also Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word). As for the remaining portion of Applicant’s mark, the words “gourmet sauces” are descriptive, if not generic, for Applicant’s goods. As such these words have no source-indicating significance and do not distinguish Applicant’s mark from the cited marks.

Regarding connotation and commercial impression, Applicant, without evidentiary support, argues that its mark creates a connotation of cool and unique or different sauces and rubs for barbeque meats and vegetables while Registrants' SOUTHERN GIRL marks create a connotation of food products made in the south. While that may be so for some consumers, some may view, or additionally view, the wording SOUTHERN GIRLS in Applicant's applied-for mark as meaning that the sauces and spice rubs are made in the south or that the wording SOUTHERN GIRL in Registrants' respective marks connotes cool and unique or different bakery items and beer.

We recognize that in comparing the marks, we must consider Applicant's and Registrants' marks in their entireties, not merely the dominant portions. Thus, we have taken into account all of the differences in appearance, sound, and meaning between them. We nonetheless find that despite these differences, given the similarities between the marks in sound, appearance and meaning due to the shared term SOUTHERN GIRL(S), the marks engender very similar overall commercial impressions.

Accordingly, the similarity between the marks is a factor that weighs in favor of a finding of likelihood of confusion.

Before leaving this discussion, we observe that Applicant points to the two cited registrations, noting that they are owned by diverse registrants and arguing that such ownership indicates that "dilution of the terms involved in the instant refusal [is] sufficient enough that [sic] fact favors a finding of an absence of a likelihood of

confusion under the relevant du Pont factors.” Br. p. 8.<sup>5</sup> To the extent that Applicant is arguing that if these two registrations owned by different entities can co-exist on the register, its applied-for mark should also be registrable, we find the argument unpersuasive. While the Office strives for consistency in examination, the Board is not bound by the prior decisions of examining attorneys in allowing marks for registration. It is well established that each case must be decided on its own facts. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987).

To the extent Applicant is arguing that the cited registrations should be treated in the same manner as third-party registrations, these two registrations do not persuade us that the phrase SOUTHERN GIRL(S) “has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that [term] is relatively weak.” *Juice Generation, Inc. v. GS Enters.* 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (citing 2 *McCarthy on Trademarks and Unfair Competition* § 11:90 (4<sup>th</sup> ed. 2015) (finding third-party registrations relevant to prove that some segment of the composite marks which both contesting parties use has normally understood and well-recognized descriptive or suggestive meaning). That is to say, the existence of only two registrations does not evidence that the phrase

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<sup>5</sup> 5 TTABVUE 9.



SOUTHERN GIRL(S) carries a suggestive or descriptive connotation in the food and beverage industry such that we can conclude that the cited marks are so weak that the public would be able to distinguish the source of Applicant's goods from those of Registrants by the slight differences in their respective marks.

B. The Goods/Channels of Trade/Classes of Purchasers

We turn then to the goods. It is well settled that the goods of Registrant and Applicant need not be identical or competitive, or even be offered through the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012); *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). The issue here, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

In making our determination regarding the relatedness of the goods, we must look to the goods as identified in the application and the cited registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918

F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

Applicant's goods are identified as sauces and spice rubs and Registrants' goods are identified as "Bakery desserts; Bakery goods; Bakery products; Bakery products, namely, sweet bakery goods; Mixes for bakery goods" and "Brewed malt-based alcoholic beverage in the nature of a beer," respectively. The Examining Attorney maintains that the goods are related because they are of a type commonly offered by the same entity under the same mark, in the same stream of commerce, to the same class of consumer, in the same field of use.

In support of her position, the Examining Attorney made of record web pages from various websites showing use of the same mark for both sauces and/or spice rubs and bakery items or beer. She has also made of record copies of used-based, third-party registrations for marks covering items of the types identified in both Applicant's application and the cited registrations.<sup>6</sup> Third-party registrations that individually cover different goods and that are based on use in commerce serve to suggest that the listed goods are of a type that may emanate from a single source. *See Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless

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<sup>6</sup> Office Action dated June 24, 2016, TSDR pp. 40-62, 81-95. Registration No. 3747574 has been cancelled and, accordingly, has no probative value. An expired or cancelled registration is evidence of nothing but the fact that it once issued. *Anheuser-Busch, LLC v. Innovopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1819 n.4 (TTAB 2016) (citing *Sunnen Prods. Co. v. Sunex Int'l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987)).

have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source”). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). The uses and registrations include, for example:

*Evidence of Relatedness as to Registration No. 3821535*

a. Internet excerpts

- Stonewall Kitchen ([www.stonewallkitchen.com](http://www.stonewallkitchen.com))<sup>7</sup> showing bakery goods, baked goods and spice rubs sold under the STONEWALL KITCHEN mark;
- Sur La Table ([www.surlatable.com](http://www.surlatable.com))<sup>8</sup> showing bakery goods, baked goods, sauces and spice rubs sold under the Sur La Table mark;
- Williams Sonoma ([www.williamssonoma.com](http://www.williamssonoma.com))<sup>9</sup> showing bakery goods, sauces and spice rubs sold under the Williams-Sonoma mark;
- Dean & DeLuca ([www.deanandeluca.com](http://www.deanandeluca.com))<sup>10</sup> showing baked goods and spice rubs sold under the DEAN & DELUCA mark;
- Harry & David ([www.harryanddavid.com](http://www.harryanddavid.com))<sup>11</sup> showing baked goods and sauces sold under the HARRY & DAVID mark;

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<sup>7</sup> Office Action dated June 24, 2016, TSDR pp. 13-20. Complete URLs may be found in the cited TSDR records.

<sup>8</sup> *Id.* at 21-27.



<sup>9</sup> *Id.* at 28-39.

<sup>10</sup> Office Action dated August 11, 2016, TSDR pp. 9-12.

<sup>11</sup> *Id.* at 13-17.

- Wild Harvest (www.mywildharvest.com)<sup>12</sup> listing baked goods, sauces and spice rubs sold under the WILD HARVEST mark;
- Zabar’s (www.zabars.com)<sup>13</sup> showing baked goods and spices sold under the ZABAR’S mark; and
- Zingerman’s (www.zingermans.com)<sup>14</sup> showing baked goods, spice rubs and sauces sold under the ZINGERMAN’S mark.

b. Third party registrations

Registration No.	Mark	Pertinent Goods <sup>15</sup>
4150551	TASTE OF THE FARM	sauces and spice rubs and mixes for bakery goods
3957064	EARL’S GONE WILD	barbeque dry rub, barbeque sauce, hot sauce, sauces and spice rubs and bread mixes, cake mixes, Cookies and mixed for bakery goods
4205575	MY SOUTHERN PANTRY	salt, seasoning mixes and spice rubs and mixes for bakery goods
4734086	WILDTREE	sauces and spice rubs and mixes for bakery goods
4955304		sauces and edible spices and bakery products
4968657	BHAVANI (and design)	sauces and spices and bakery desserts and bakery goods
4887027	PUEBLO LINDO	sauces and mixes for bakery goods
4966424		sauces and bakery goods

<sup>12</sup> *Id.* at 18-23.

<sup>13</sup> *Id.* at 24-

<sup>14</sup> *Id.* at 27-32.

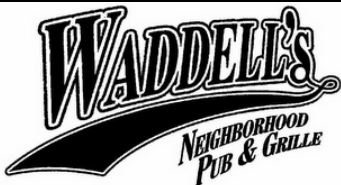

<sup>15</sup> The registrations include additional goods and/or services that are not at issue here.

*Evidence of Relatedness as to Registration No. 4773555*

a. Internet excerpts<sup>16</sup>

- Great Lakes Brewing Co. (www.greatlakesbrewing.com)<sup>17</sup> showing beer and sauces sold under the marks GREAT LAKES BREWING CO;
- Stone Brewing (www.stonebrewingcompany.com)<sup>18</sup> showing beer and sauces sold under the STONE BREWING mark; and
- Yuengling (www.yuengling.com)<sup>19</sup> showing beer and sauces sold under the Yuengling mark.

b. Third-party Registrations

Registration No.	Mark	Goods
4382869	1881 and design	Sauces and spices and beer
4507276		Seasonings, spices and sauces and beer
4451211	SENDIK'S	Barbeque sauces, hot sauce, marinades, Sloppy Joe seasoning mix and steak sauces and beer
4558662		Spices and food seasonings and beer
4809709	THE MASON DIXIE COMPANY	Spice rubs and sauces and beer

<sup>16</sup> We have not considered the excerpts from the Trader Joe's website because they do not show goods of a type identified by both Applicant and Registrant sold under the same mark. Similarly, we have not considered the excerpts from the Landshark and Margaritaville Foods websites because it is unclear as to whether they are sponsored by the same entity.

<sup>17</sup> Office Action dated June 24, 2016, TSDR pp. 63-67.

<sup>18</sup> *Id.* at 67-75.

<sup>19</sup> *Id.* at 76-77.

We find this evidence sufficient to show that Applicant's sauces and spice rubs are related to Registrants' bakery items and beer, such goods all being comestibles and flavorings for food that are often sold by the same source under the same mark.

Applicant's only argument regarding the relatedness of the goods is that neither Registrant offers goods identical to those identified in Applicant's application. This argument is unavailing. As we have previously stated, the goods need only be related in such a manner that they could be encountered by the same consumer under situations that would lead to the mistaken belief that they originate from the same source. *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1723.

Because there are no limitations as to channels of trade or classes of purchasers in Applicant's or Registrants' identifications of goods, we must presume that Applicant's and Registrants' goods move, or will move, in all channels of trade usual for these goods, including online and in specialty food stores and are, or will be, purchased by the usual classes of purchasers which, in this case, include ordinary consumers. *See In re Viterra*, 101 USPQ2d at 1908; *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

The second and third *du Pont* factors thus favor a finding of likelihood of confusion.

### C. Sophistication of Purchasers

We also are not persuaded by Applicant's argument that purchasers of both Applicant's and Registrants' goods would exercise "sufficient care" in their purchasing, thus minimizing any potential for a likelihood of confusion between the

respective marks. As aptly noted by the Examining Attorney in her brief, “[g]enerally, casual purchasers of low-cost, every-day consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods.” Examining Attorney’s brief,<sup>20</sup> quoting *In re Davia*, 110 USPQ2d 1810, 1818 (TTAB 2014). The record here shows that sauces, spices, bakery goods and mixes, as well as beers, are relatively inexpensive consumer items. Although there are no specifics as to the projected costs of Applicant’s identified goods or the costs of Registrants’ products, in the absence of any limitations in the respective identifications, we must presume that both Applicant’s and Registrants’ goods include or will include inexpensive varieties of the identified consumer items. As such, prospective purchasers of both Applicant’s and Registrants’ goods will exercise no more than ordinary care in their purchasing decisions. We thus find this *du Pont* factor is neutral.

*D. Absence of Actual Confusion*

The final argument made by Applicant is that “there is no evidence of record indicating that there has been actual confusion in the marketplace as between Applicant’s goods and registrant’s goods.” Br. p. 15.<sup>21</sup> We point out, however, that it is not necessary to show actual confusion in order to establish likelihood of confusion. *See Weiss Associates Inc. v. HRL Associates Inc.* 902 F.2d 1546, 223 USPQ 1025 (Fed. Cir. 1990). Particularly in an *ex parte* proceeding, Applicant’s assertion of the absence


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<sup>20</sup> 7 TTABVUE 17.

<sup>21</sup> 5 TTABVUE 16.

of actual confusion is of little probative value in our determination on the issue of likelihood of confusion because the Board cannot readily determine whether there has been a significant opportunity for actual confusion to have occurred, such that the absence of confusion is meaningful. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984). Indeed, Applicant seeks registration based on an intention to use its applied-for mark in commerce, and there is nothing of record to indicate that Applicant has commenced use of its SOUTHERN GIRLS GOURMET SAUCES mark in commerce on or in connection with sauces and spice rubs.

*E. Conclusion*

Because the marks are similar, the goods are related, and the channels of trade and classes of purchasers overlap, we find that Applicant's mark SOUTHERN GIRLS GOURMET SAUCES for sauces and spice rubs is likely to cause confusion with the registered marks  and SOUTHERN GIRL for bakery items and beer, respectively.

**Decision:** The refusal to register Applicant's mark SOUTHERN GIRLS GOURMET SAUCES is affirmed.