

This Opinion is not a
Precedent of the TTAB

Mailed: March 23, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Trilliant Food and Nutrition, LLC
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Serial No. 87159762
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Kyle T. Peterson of Patterson Thuente Pedersen PA,
for Trilliant Food and Nutrition, LLC.

Karen P. Severson, Trademark Examining Attorney, Law Office 117,
Hellen Byran-Johnson, Managing Attorney.

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Before Mermelstein, Lykos and Pologeorgis,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Trilliant Food and Nutrition, LLC (“Applicant”) seeks registration on the Principal Register of the mark JAKE’S COFFEE (in standard characters; COFFEE disclaimed) for “coffee sold in individual cartridges for use in single serve coffee brewers” in International Class 30.¹

¹ Application Serial No. 87159762, filed on September 2, 2016, based on an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the two registered marks identified below owned by different Registrants.

JAKE'S, in standard characters, for "chocolate truffle cakes" in International Class 30;² and

JAKE'S DESSERTS and design, as illustrated below, for "bakery desserts; bakery goods; bakery goods and dessert items, namely, cakes, cookies, pastries, candies, and frozen confections for retail and wholesale distribution and consumption on or off the premises; bakery goods and dessert items, namely, cheesecakes for retail and wholesale distribution and consumption on or off the premises; bakery goods, namely, cookies, ice cream, cupcakes; bakery products; bakery products, namely, sweet bakery goods; gluten-free desserts, namely, cookies, ice cream, cupcakes" in International Class 30.³



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

I. Procedural Matters

It has come to the Board's attention that one of the two registrations cited as a bar to Applicant's application, namely, Registration No. 1328806 for the mark

² Registration No. 1328806, issued on April 2, 1985, claiming November 1, 1983 as the date of first use and November 28, 2013 as the date of first use in commerce. First renewal accepted on January 18, 2005.

³ Registration No. 4879396, issued on October 20, 2015, claiming January 1, 2014 as both the date of first use and the date of first use in commerce. The term "DESSERTS" is disclaimed.

JAKE'S, has been canceled by the Office in light of Registrant's failure to file a timely Section 9 renewal affidavit.⁴ In view thereof, the Section 2(d) refusal is deemed moot as to this registration and the analysis herein will focus solely on cited Registration No. 4879396 for the mark JAKE'S DESSERT and design.

We also note that Applicant attached copies of the evidentiary record, previously submitted during prosecution of the involved application, to its appeal brief. Because this evidence is already of record as part of the application file, its re-submission with Applicant's brief was unnecessary. *See ITC Ent. Group Ltd. v. Nintendo of America Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (submission of duplicative papers is a waste of time and resources, and is a burden upon the Board).

Parties to Board cases occasionally seem to labor under the misapprehension that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submissions, is a courtesy or a convenience to the Board. It is neither. The entire record is readily available to the panel. Because we must determine whether such attachments are properly of record, citing to the attachments requires us to examine the attachments and then attempt to locate the same evidence in the record developed during prosecution of the application, requiring more time and effort than would have been necessary if citations were directly to the prosecution history.

⁴ Registration No. 1328806 was canceled on March 16, 2017.

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all 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 Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and services. *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.”).

A. Comparison of the Marks

We first address the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). “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).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, 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 entirety. *In re Nat'l Data*, 224 USPQ at 751.

Applicant’s mark is JAKE’S COFFEE. As noted above, the only cited mark under consideration is JAKE’S DESSERTS and design.

Applicant argues that the marks differ both visually and phonetically.⁵ Additionally, Applicant contends that the inclusion of the design element in the cited JAKE’S DESSERTS mark is sufficient to avoid a likelihood of confusion with its applied-for mark.⁶ We disagree.

We find that the term JAKE’S is the dominant feature of both Applicant’s mark and the cited mark JAKE’S DESSERTS and design, particularly since it is the first term in each mark. Consumers are generally more inclined to focus on the first word,

⁵ Applicant’s Appeal Brief, pp. 15-16, 7 TTABVUE 16-17.

⁶ *Id.*

prefix, or syllable in any trademark or service mark. *See Palm Bay Imps.*, 73 USPQ2d at 1692 (“VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (“[T]he dominance of BARR in [a]pplicant’s mark BARR GROUP is reinforced by its location as the first word in the mark.”); *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 upon the mind of a purchaser and remembered” when making purchasing decisions). Additionally, we note that “JAKE’S” is a given name in possessive form, and when considering the descriptive elements in each mark and the design element in the cited mark, we find that the marks have similar commercial impressions and connotations – that of desserts created by and coffee produced by someone named Jake.

We further note that Applicant has disclaimed the generic term “COFFEE” in its applied-for mark and the generic wording “DESSERTS” has been disclaimed in the cited mark. Disclaimed matter that is descriptive of or generic for a party’s goods and/or services is typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat’l Data Corp.*, 224 USPQ at 752.

Finally, we find that the inclusion of the design element in the cited mark is insufficient to distinguish the marks. Specifically, the presence of the cupcake and spoon design, as well as the oval carrier, in the cited mark is less dominant since it tends to reinforce the descriptive connotation of the disclaimed generic term

DESSERTS in the cited mark and does little to create a different commercial impression from Applicant's mark. *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963) ("We have before us, in opposing array, a picture and a word used in conjunction with a picture. Both have the same meaning...."). Moreover, when considering a composite mark containing both words and a design, the word portion may be more likely to indicate the origin of the goods and services because it is that portion of the mark that will be used by purchasers. *Viterra, Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016).

Because the design elements in a mark are less dominant than its literal elements, because disclaimed matter is less dominant than matter that has not been disclaimed and because the first word in a mark is more likely to be impressed upon a purchaser's mind, we find that, when the marks are considered as a whole, the similarities in the marks outweigh their differences, including the differences noted by Applicant. We therefore find that the marks, considered in their entirety, are similar in appearance, sound, commercial impression and connotation. Accordingly, the first *du Pont* factor favors a finding of likelihood of confusion.

B. Strength of Registrant's Mark

Applicant argues that the term JAKE'S is weak when used in connection with various food products identified in International Class 30 and should therefore be afforded a narrow scope of protection. In support of its argument, Applicant submitted third-party registrations containing the term JAKE'S or variations thereof

used in connection with goods identified in International Class 30.⁷ The registrations are as follows:

U.S. Registration No. 3840939 for JAKE & AMOS and design for “canned fruits and vegetables; jellies and jams;”

U.S. Registration No. 3027869 for JAKE BAKED for “pretzels;”

U.S. Registration No. 487060 for JAKE VITAMINCANDY for “vitamin enriched chewing gum and candies;”

U.S. Registration No. 4217115 for JAKE & AMOS for “barbeque sauce; hot sauce; mustard; pickle relish; salad dressing;”

U.S. Registration No. 4532012 for JAKEMAN’S for “table syrup, maple syrup, sugar, tea, coffee;”

U.S. Registration No. 1306235 for JAKE’S for “cocktail and tartar sauce;”

U.S. Registration No. 4920416 for JAKE’S GRILLIN for “barbeque dry rub; barbeque sauce;” and

U.S. Registration No. 4678420 for JAKE’S SUPER CARMEL PUFF CORN for “puffed corn snacks.”

Evidence of extensive registration and use by others of a term on the same or very similar goods can be “powerful” evidence of weakness. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New 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).

Here, Applicant has not submitted any evidence of actual third-party marketplace use of the term “JAKE’S” used in connection with baked or confectionary goods. Instead, Applicant has submitted only live third-party registrations. Third-party

⁷Applicant’s November 4, 2016, Request for Reconsideration.

registrations such as those offered by Applicant are not evidence of *use* of the marks, *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992), but they can be used to show that a mark or portion thereof is weak. *See Juice Generation*, 115 USPQ2d at 1675 (weakness of PEACE, LOVE); *Jack Wolfskin*, 116 USPQ2d at 1136; *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). An applicant may come closer to a weak mark without causing a likelihood of confusion. *Juice Generation*, 115 USPQ2d at 1674.

Applicant’s third-party registration evidence is far less extensive than the evidence of registrations *and* actual use in *Juice Generation* and *Jack Wolfskin*.⁸ None of them (except for the registration for the mark JAKE VITAMINCANDY) identifies goods that are identical or similar to the goods identified in the cited registration and, therefore, have no bearing on the determination of the strength of Registrant’s mark. *See Kay Chems., Inc. v. Kelite Chems. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (third-party registrations found to be of limited value because goods identified in the registrations appeared to be in fields which were far removed from the involved products). Accordingly, these third-party registrations do not support a finding that the term

⁸ We note that in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, *see* 115 USPQ2d at 1672 n.1, and in *Jack Wolfskin*, there were at least fourteen, 116 USPQ2d at 1136 n.2.

JAKE'S or any variation thereof is weak for the goods identified in the cited JAKE'S DESSERTS and design mark.⁹

With regard to the registered JAKE VITAMINCANDY mark for "vitamin enriched chewing gum and candies," we find that although the goods identified in this registration and the cited registration for JAKE'S DESSERTS and design both include "candies," we nonetheless find that these two registrations, standing alone and without any evidence of actual use of the marks, is insufficient evidence under our reviewing court's decisions in *Juice Generation* and *Jack Wolfskin* to establish that the term JAKE or JAKE'S is weak when used in connection with baked goods or confectionary goods.

We further find unpersuasive Applicant's argument that because the Office did not cite the now canceled registration for the mark JAKE'S for "chocolate truffle cakes" against the cited registration for the mark JAKE'S DESSERT and design as a bar to the JAKE'S DESSERT and design registration, both used in connection with baked goods, the Office has determined that the term JAKE'S is weak when used in association with such products and therefore by not allowing Applicant's mark to proceed to registration would create an inconsistent treatment of JAKE'S formative marks.

⁹ We note that merely because the goods identified in the third-party registrations submitted by Applicant are classified in International Class 30 does not equate to a finding that these goods are necessarily related. *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993) ("classification is wholly irrelevant to the issue of registrability under [15 U.S.C.] section 1052(d)").

Prior decisions and actions of other trademark examining attorneys in registering other marks or approving marks for registration have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. *See In re Cordua Rest. Inc.*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016) (citing *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 Nett Design’s application, the PTO’s allowance of such registrations does not bind the Board or this court.”)). Each case is decided on its own facts, and each mark stands on its own merits. *See In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Accordingly, Applicant has not demonstrated that the term “JAKE” or “JAKE’S” is weak or diluted for any of the goods in the cited registration. This factor is therefore neutral.

C. Comparison of the Goods

We next compare Applicant’s goods and the Registrant’s goods. In making our determination under this second *du Pont* factor, we look to the goods as identified in the involved application and cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an

applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). *See also Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

In determining whether Applicant's goods are related to Registrant's goods, it is not necessary that the goods of Applicant and Registrant be similar or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes to establish that the goods are related in some manner or that conditions and activities surrounding marketing of these goods are such that they would or could be encountered by same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Coach Servs., Inc.*, 101 USPQ2d at 1722; *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978).

As noted above, Applicant's identified goods are "coffee sold in individual cartridges for use in single serve coffee brewers." The goods identified in the cited registration for the mark JAKE'S DESSERTS and design are for various baked goods and confectionary goods.

The Examining Attorney made of record numerous active third-party, used-based registrations showing that the same entity has registered a single mark identifying both coffee and baked goods. By way of illustration, we note the following:¹⁰

ATRISTRY IN CHOCOLATE (Reg. No. 3147785) for, among other things, “candy and chocolates; hand-crafted candy and chocolates; bakery desserts; dessert mousse; dessert puddings; pastries; cakes; brownies; cookies; candy and chocolates, namely creams and nougats; boxed candies and chocolates; individual dessert and specialty cakes; candy and chocolate bars; **coffee**; tea; coffee drinks; tea drinks; and hot cocoa mixes” in International Class 30;

GROM (Reg. No. 3415949) for, among other things, “Ice cream, frozen yogurt, sherbet, sorbet and ice cream cakes; ice cream cookie sandwich; ice-cream, sorbet and frozen yogurt bars; sundaes; coffee, coffee-based beverages containing milk; ice milk, low fat frozen dairy desserts, frozen yogurt, flavored topping syrups for use on ice cream; **coffee**, cocoa, cakes, pies, cookies; sherbets, sorbets for consumption on or off the premises; food flavorings for use in making ice cream; prepared espresso and espresso-based beverages; powdered chocolate and vanilla; flavoring syrups to add to beverages; baked goods, namely, muffins, scones, biscuits, cookies, pastries and breads; sandwiches; powdered flavoring additives for non-nutritional purposes; cocoa products, namely, cocoa mixes and cocoa powder; hot chocolate; cocoa beverages with milk; prepared cocoa and cocoa-based beverages; preparations for making chocolate or cocoa based drinks, namely, liquid and powdered hot chocolate mix and liquid and powdered hot cocoa mix; ice-cream mixes; popper popcorn; candy” in International Class 30;

DOMINIQUE ANSEL (Reg. No. 4169326) for, among other things, “bakery goods and dessert items, namely, croissants, meringues, marshmallows, brownies, cannelé, and nut brittle for retail and wholesale distribution and consumption on or off the premises; bakery products; mixes for bakery goods; croissants, breads, baguettes and buns; bread rolls; bread sticks; confectionery products, namely, frozen confections, chocolate and candy; beverages, namely, espresso, cappuccino, iced coffee, iced tea, hot chocolate, **coffee**, tea; cocoa, sugar,

¹⁰ See October 23, 2016, Office Action. We also note that because the term “coffee” identified in the third-party registrations submitted by the Examining Attorney is so broad, it necessarily encompasses Applicant’s more narrowly identified coffee sold in individual cartridges for single use.

rice, tapioca, sago, **artificial coffee** and flour; edible ices; ices for refreshment; sandwiches, pizzas, pancakes; cookies, biscuits, and cakes; edible decorations for cakes; cake paste, namely, cake dough and cake mixes; petit fours; cake powder in the nature of cake mixes; quiche; tarts; muffins; eclairs; scones; pastries; donuts; brioches; macaroons; madeleines” in International Class 30;

CHOCO CARD (Reg. No. 4365579) for, among other things, “bakery desserts; bakery goods; bakery goods and dessert items, namely, cheesecakes for retail and wholesale distribution and consumption on or off the premises; bakery products; **coffee** and tea; coffee based beverages; **coffee beans**; coffee beverages with milk; coffee capsules containing coffee for brewing; coffee essences; coffee essences for use as substitutes for coffee; coffee extracts; coffee extracts for use as substitutes for coffee; coffee flavored syrup used in making food beverages; coffee pods; coffee substitutes; coffee substitutes; coffee-based beverage containing milk; coffee-based beverages” in International Class 30;

ZAIN (Reg. No. 4802204) for, among other things, “sweets, desserts and baked goods, namely, pastries and candies; cookies, cakes, bread, tea, noodles, chocolate, confectionery; rice, **ground coffee beans, coffee beans**” in International Class 30;

INES ROSALES (Reg. No. 4865526) for, among other things, “**coffee**, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and cereal-based snack foods, bread, pastry and confectionery made of sugar, flavored ices, edible ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces not including salad dressings; spices; ice; sponge cakes, biscuits, shortbread biscuits, cider sweetmeats, almond cakes; sponge cakes; Viennoiserie; filled bread rolls; pastry confectionery; non-medicated confectionery made of sugar; pastries, namely, sweet pasties; pies; sweet or savoury tarts and cakes; pastry shells; madeleines; petits fours; biscuits, pastries, tarts, pies, cakes and frozen confectionery; cake dough; bakery goods and biscuits; sugar wares, namely, confectionery made of sugar; baked goods, chocolate and bakery desserts; tarts and cakes; sweet or savoury tarts and pies; pies; sweet pies” in International Class 30; and

CRAVINGS (Reg. No. 4939468) for, among other things, “bakery desserts; bakery goods and dessert items, namely, cakes, muffins, pastries, cookies, granola, oat-based breakfast bars, protein bars, bread, croissants, brownies, rolls, pies, and specialty gift packages sold as a unit comprised of any combination of cookies, brownies, candy, muffins,

croissants, rolls, and/or cakes; gluten-free food products, namely, cakes, muffins, pastries, cookies, granola, oat-based breakfast bars, protein bars, bread, croissants, brownies, rolls, pie, and specialty gift packages sold as a unit comprised of any combination of cookies, brownies, candy, muffins, croissants, rolls, and/or cakes; candy; coffee-based beverages; **coffee**” in International Class 30.

As a general proposition, although use-based third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source. *See In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988).

The Examining Attorney also submitted Internet evidence constituting e-commerce direct-to-consumer websites purportedly demonstrating that entities provide both coffee (both in ground and whole bean form, as well as in individual cartridges) and baked and/or confectionary goods under the same brand name.¹¹ As example:

Web page printouts from www.mishacoffee.com – allegedly showing coffee and baked goods offered under a common mark via identical trade channels.

Web page printouts from www.starbucks.com – showing coffee and baked goods offered under a common mark via identical trade channels.

Web page printouts from www.dunkindonuts.com – showing coffee sold in individual cartridges for use in single serve coffee brewers and baked goods offered under a common mark via identical trade channels.

¹¹ See October 1, 2016 and November 1, 2016, Office Actions.

After a careful review, we find that the webpage printout from the website www.mishacoffee.com, while showing that coffee shops provide both coffee and baked goods to their customers, also demonstrates that the baked goods offered at this particular coffee shop emanate from third-parties under different marks than the name of the coffee shop itself. Accordingly, this particular Internet evidence does not demonstrate that consumers may expect to find both Applicant's coffee products and Registrant's baked goods offered under the same or similar brand name. In contrast, however, the remaining webpage printouts from the websites identified above do show that coffee, including coffee sold in individual cartridges, and baked goods are sold under the same or similar brand name.

We further note that this Internet evidence demonstrates that coffee and baked goods are complementary goods that may be purchased together and eventually consumed together. Where evidence shows that the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks. *See In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1567, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination and noting that "[s]uch complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion"); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009) (holding medical MRI diagnostic apparatus and medical

ultrasound devices to be related, based in part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease).

Applicant argues that the products offered under the cited mark are completely different than Applicant's products inasmuch as none of the goods identified in the cited registration "come close to the individual cartridges that are used in connection with single serve brewing machines," and thus, a consumer for the dessert products offered under the cited mark is unlikely to come across Applicant's brewing cartridges, much less confuse Applicant's mark or goods for the cited mark or the goods identified in the cited registration.¹²

As noted above and contrary to Applicant's arguments, the goods or services need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods."); TMEP § 1207.01(a)(i) (Jan. 2017).

In view thereof, we find that the evidence of record sufficiently demonstrates that the goods identified in Applicant's application and the goods identified in the cited registration are related and consist of complementary products. Thus, the second *du Pont* factor also weighs in favor of finding a likelihood of confusion.

¹² Applicant's Appeal Brief, pp. 6-7, 7 TTABVUE 7-8.

D. Similarity of Trade Channels and Class of Purchasers

Applicant argues that Applicant and Registrant are targeting entirely distinct consumers and that the channels of trade in which their respective goods are offered also differ.¹³ Specifically, Applicant contends that its JAKE'S COFFEE mark will only be used by consumers in connection with single-serve brewing machines.¹⁴ In contrast, Applicant argues that Registrant markets its goods in the restaurant, bakery and dessert market, which is a very different class of purchasers.¹⁵

We base our determination regarding the similarities between the channels of trade and classes of purchasers on the goods as they are identified in the application and the cited registration. *Octocom Sys. Inc.*, 16 USPQ2d at 1787; *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Applicant's application and the cited registration contain no limitation as to channels of trade or classes of customers, and we decline to read any such limitation into them. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983), *quoted in In re Mr. Recipe*, 118 USPQ2d 1084, 1091 (TTAB 2016). We do note, however, that the Examining Attorney submitted Internet evidence demonstrating that both coffee and baked goods are sold at coffee shops.¹⁶ For example:

Web page printouts from www.groundcoffeeshop.com – showing ground coffee and baked goods offered via identical trade channels.

¹³ Applicant's Appeal Brief, pp. 7-8, 7 TTABVUE 8-9.

¹⁴ Applicant's Appeal Brief, p. 9, 7 TTABVUE 10.

¹⁵ *Id.*

¹⁶ See November 1, 2016, Office Action.

Web page printouts from www.stelmoscoffeepub.com – showing ground coffee and baked goods offered via identical trade channels.

This evidence shows that coffee (in ground or whole bean form) and baked goods may be sold via the same marketplace to all relevant classes of purchasers. Thus, the respective goods, as identified, would be provided in the same or at least overlapping channels of trade to the same or overlapping classes of purchasers. Thus, the third *du Pont* factor also weighs in favor of finding a likelihood of confusion.

E. Sophisticated Consumers

Applicant argues that the consumers of its identified goods are sophisticated and are therefore unlikely to be confused as to the source of each party's respective goods.¹⁷ Even assuming that purchasers of Applicant's goods are sophisticated, when it comes to their buying decisions, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as this one involving similar marks and related goods. *See Stone Lion Capital Partners*, 110 USPQ2d at 1163 (although the services recited in the application also encompass sophisticated investors, Board precedent requires the decision to be based on the least sophisticated potential purchasers who will exercise care when making financial decisions but who are not immune from source confusion where similar marks are used in connection with related services). Moreover, the evidence of record demonstrates that coffee sold in single serve cartridges is a relatively low cost every-day impulse product that is purchased casually.¹⁸ When products are low priced and subject to impulse buying

¹⁷ Applicant's Appeal Brief, p. 5, 7 TTABVue 6.

¹⁸ *See* November 1, 2016, Office Action.

without careful consideration, the risk of likelihood of confusion increases because purchasers are held to a lesser standard of purchasing care. *See Recot, Inc.*, 54 USPQ2d at 1898-99. We therefore find this factor weighs in favor of a finding of likelihood of confusion.

F. Balancing the Factors

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. Because we have found that the marks at issue are similar; that Applicant's identified goods are related to Registrant's goods; that they would move in the same or overlapping trade channels; that they are offered to the same class of purchasers; and that they are relatively inexpensive goods resulting in "impulse" purchasing, we conclude that Applicant's mark, as used in connection with the goods identified in the application, so resembles the cited mark JAKE'S DESSERTS and design for the identified goods as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's JAKE'S COFFEE mark under Section 2(d) of the Trademark Act is affirmed.