

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

Mailed: July 8, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Smith's Bakeries Inc.

Serial No. 97312629
—

James M. Duncan of Scanlon Duncan LLP, for Smith's Bakeries Inc.

Christian Bonner, Trademark Examining Attorney, Law Office 123,
Travis Wheatley, Managing Attorney.

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Before Zervas, Kuhlke and Greenbaum,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Smith's Bakeries Inc. ("Applicant") seeks registration on the Principal Register of
the mark SMITHS'S BAKERIES THE BAKERS OF BAKERSFIELD and design,



displayed as

, for

Freshly-baked goods, namely, Bakery desserts; Bakery goods; Bakery goods, namely, cakes, cupcakes, eclairs, coffee cakes, pies, cobblers, cookies, brownies, breads, turnovers, donuts, breads, muffins, croissants, bagels

buns; Danish; Bakery products, namely, sweet bakery goods, in International Class 30.¹

The Trademark Examining Attorney finally refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used on or in connection with the identified goods, so resembles the following two marks, owned by different registrants, as to be likely to cause confusion, mistake or deception: (1) MRS. SMITH'S (typeset) for "bakery products-namely, frozen pies" in International Class 30 ("887 Reg.");² and (2)

SMITH'S, in stylized format appearing as , for "Rolls; white bread; hot dog buns; hamburger buns; English muffins" in Class 30 ("209 Reg.")³

When the refusal was made final, Applicant requested reconsideration and appealed to this Board. Reconsideration was denied, proceedings were resumed, and the appeal is fully briefed. We affirm.

¹ Application Serial No. 97312629 was filed on March 15, 2022 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and first use in commerce since at least as early as 1956. The application includes a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), of THE BAKERS OF BAKERSFIELD, a disclaimer of BAKERIES, and the following description of the mark: "The marks consists of a red oval containing the literal elements 'Smith's Bakeries The Bakers of Bakersfield' appearing in red font with the first letter S of Smith's framed between stylized drawings in red outline of bakers in chef's hats, each chef holding baked goods, all red elements appearing on a white background." The colors red and white are claimed as a feature of the mark.

² Reg. No. 0786887 issued March 16, 1965 and has been maintained. A typed or typeset mark is the legal equivalent of a standard character mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) ("until 2003, 'standard character' marks formerly were known as 'typed' marks.").

³ Reg. No. 3093209 issued May 16, 2006 and has been maintained. Color is not claimed as a feature of the mark.

I. Evidentiary Issue

The Examining Attorney embedded in their brief a “screen capture from Applicant’s website” with a January 23, 2024 capture date that was not previously made of record and to which Applicant objects. Ex Atty. Br., 6 TTABVUE 7; App. Reply Br., 7 TTABUVE 6. We sustain the objection. 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 on appeal.⁴ See, e.g., *In re Dist. of Columbia*, 101 USPQ2d 1588, 1591-92 (TTAB 2012) (third-party registrations submitted for first time with appeal brief are not considered), *aff’d sub nom., In re City of Houston*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013); see also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 1203.02(e), 1207.01 & 1208.03 (2024). We therefore do not further consider this evidence or any related arguments based on this evidence.

II. Likelihood of Confusion

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *2 (Fed. Cir. 2023) (cleaned up).

Our determination under Trademark Act Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du*

⁴ For information about requests to remand for additional evidence, see TBMP § 1207.02.

Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Charger Ventures*, 2023 USPQ2d 451, at *4 (“In any given case, different *DuPont* factors may play a dominant role and some factors may not relevant to the analysis.”). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)). However, in any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The

fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect registrants from damage caused by registration of similar marks likely to cause such confusion. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Similarity or Dissimilarity of the Goods and Channels of Trade

Under these *DuPont* factors, we compare the goods as they are identified in the application and cited registrations. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Dixie Rests.*, 41 USPQ2d at 1534; *see also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (Board must “give full sweep” to an identification of goods or services regardless of registrant’s actual business); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Here, the “bakery goods” identified in the application are broadly worded and encompass the more specific “bakery goods, namely, frozen pies” identified in the ’887 Reg., and the “rolls; white bread; hot dog buns; hamburger buns; English muffins” identified in the ’209 Reg. Likewise, the “bakery products, namely, sweet bakery

goods” identified in the application encompass the “bakery goods, namely, frozen pies” identified in the ’887 Reg. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Therefore, the goods are in-part legally identical.

Because the goods in the application and cited registrations include legally identical goods, we need not further consider their relatedness. It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application. *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 123 USPQ2d 1744 (Fed. Cir. 2017) (“Likelihood of confusion must be found if there is likely to be confusion with respect to any item in a class that comes within the identification of goods in the application and cited registration.”); *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

Moreover, given the in-part legal identity of the identified goods, and the lack of restrictions or limitations in the application or cited registrations as to their nature, channels of trade, or classes of customers, we must presume that the channels of

trade and classes of purchasers for these goods are the same. *See Viterra*, 101 USPQ2d at 1908 (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

Applicant addresses neither *DuPont* factor in its appeal brief, and simply notes in its reply brief that the application identifies “a listed variety of ‘freshly baked goods,’” and “Applicant’s ‘freshly baked goods’ are not identical to the ‘frozen pies’ identified by the ‘MRS. SMITH’S mark.” 8 TTABVUE 5 & 10. In addition to only addressing one of the two cited registrations, Applicant’s arguments are inapposite because Applicant’s identified goods are not limited to “freshly baked goods.” Applicant’s use of semicolons in its identification of goods between “freshly baked goods, namely desserts” and “bakery goods” indicates that the former and latter are in separate categories. *See In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (finding that, because a semicolon separated the two relevant clauses in the registrant’s identification, its “restaurant and bar services” is a discrete category of services that stands alone and independently as a basis for a likelihood-of-confusion analysis, and is not connected to or dependent on the services set out on the other side of the semicolon). And, as discussed above, Applicant’s identified “bakery goods” encompass goods identified in both cited registrations, including the “frozen pies” identified in the ’887 Reg. Absolute identity between Applicant’s identification of goods and the identifications of goods in either (or both) of the cited registrations is

not required in a likelihood of confusion analysis. *See i.am.symbolic*, 116 USPQ2d at 1409.

These *DuPont* factors weigh heavily in favor of likelihood of confusion.

B. Strength of SMITH/SMITH'S

Under the sixth *DuPont* factor, we consider “[t]he number and nature of similar marks in use on similar goods [or services].” *DuPont*, 177 USPQ at 567. Evidence of third-party use bears on the strength or weakness of a registrant’s mark. *i.am.symbolic*, 123 USPQ2d at 1751. If the evidence establishes that the consuming public is exposed to third-party uses of similar marks for similar goods or services, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).

Applicant contends “SMITH’S” is a weak term entitled to a narrow scope of protection or exclusivity of use because “Smith’ is the most prevalent surname in ... the United States,” with approximately 2.44 million Americans who bore the surname Smith as of the 2010 census. 4 TTABVUE 16. As evidence, Applicant points to a Wikipedia entry for “Smith (surname),” and portions of websites of eleven different third-parties showing “Smith” or “Smith’s” in association with bakeries and baked goods. *Id.* (referencing April 4, 2023 Response to Office Action, TSDR 7 (Wikipedia) & July 17, 2023 Request for Reconsideration, TSDR 10-20 (Exhibits A-K)). According

to Applicant, if the cited registrations for the marks **Smith’s** and MRS.

SMITH'S can coexist with the other SMITH-formative marks, then Applicant's mark also should be permitted to register.

The fact that the cited registered marks are registered on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act means that despite any inherent weakness as a surname, the cited marks have source indicating significance in the marketplace. Each cited registration is "entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods." *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006). If Applicant is arguing that the registrations themselves are invalid because SMITH'S is a surname, "the validity of a cited registration cannot be challenged in an ex parte proceeding." *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517 (TTAB 2016). *See also In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) ("inasmuch as the cited mark is registered on the Principal Register, we must assume that it is at least suggestive and we cannot entertain applicant's argument that the registered mark is descriptive of registrant's services.").

In addition, with regard to Applicant's evidence to support alleged weakness in the term SMITH'S, nearly all of such evidence is deficient. First, several of the third-party marks include distinguishing matter such as additional wording or a design, or both, resulting in marks with various commercial impressions:

- Exhibit B (July 17, 2023 Request for Reconsideration, TSDR 11) shows the mark “Sweet Smith’s Bakery” in a small, highly stylized font below a design



of a large mixer: , identifying an individual named “Sweet Smith” as the owner;

- Exhibit E (*id.* at TSDR 14) shows the mark “Smith Island Baking Company”



with an arch/bridge design: . The company offers “Authentic Smith Island Cakes,” and the term “Smith Island” in the mark identifies a geographic location;

- Exhibit H (*id.* at TSDR 17) is an excerpt from the “A.P. Smith’s Student Bakers” Instagram page. The exhibit shows the stylized mark with pie



design: , and states the student-run bakery is located at “Paul Smith’s College, Cantwell Hall,” thus identifying a specific educational institution;

- Exhibit I (*id.* at TSDR 18) shows the mark “Lula Smith’s Bakery” in a highly stylized format with a large mixer design in the middle of the mark:



. , identifying an individual named “Lula Smith” as the owner; and

- Exhibit K (*id.* at TSDR 20) shows the mark “The Witten Farm Market at



Smith Farm” in stylized format: . This market offers

“Pre-Order Pickup” for “our Smith Farm Bakery items,” and references the bakery only in conjunction with the named entity “Smith Farm.”

Next, three other exhibits are entitled to little or no probative weight because they do not show how, or whether, any of the three companies actually use SMITH/SMITH’S in the bakery industry. In particular, Exhibit A (*id.* at TSDR 10) discusses a defunct bakery (“Old Smith’s Bakery”) located at a landmark location in Pensacola, Florida. And Exhibits D (*id.* at TSDR 13) and G (*id.* at TSDR 16), comprising basic online information (addresses and phone numbers) from yelp.com about “Mrs Smith’s Bake Shoppe” and from punchbowl.com about “Smith’s Bakers,” respectively, are not from the companies’ own websites and do not constitute technical trademark use.

Finally, the remaining exhibits are Exhibit C (*id.* at TSDR 12), an excerpt from an article about “Smith’s Orchard & Bake Shop”; Exhibit F (*id.* at TSDR 15), the homepage for “Smith’s Orchard Bake Shop”; and Exhibit J (*id.* at TSDR 19), the homepage for “Mister Smith’s,” a bakery, café and catering business. As the Examining Attorney pointed out, 6 TTABVUE 9, and Applicant did not rebut, Exhibits C and F appear to name a single entity rather than two separate businesses.

“[E]xtensive evidence of third-party use and registrations is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established,” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015) (citing *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). Here, however, Applicant’s evidence consists of marketplace evidence of arguably seven different entities using SMITH or SMITH’S in association with their bakery services, nearly all of which have limited or no probative value, as discussed above, and no third-party registrations covering goods or services similar to the bakery items identified in the cited registrations. This evidence is far short of the volume of evidence found convincing in *Jack Wolfskin* (at least 14 relevant third-party uses or registrations of record) or *Juice Generation* (at 26 relevant third-party uses or registrations of record). *See also Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030 (TTAB 2016) (weakness found based on at least 85 actual uses of ROSE-formative marks for similar services, eight similar third-party registrations, expert testimony and other evidence regarding the common

nature of ROSE-formative marks in the industry, and testimony by opposer that it did not vigorously enforce its mark).

Finally, because we are not privy to the reasons the two cited registrations for the marks MRS. SMITH'S and **Smith's** coexist, we follow the often repeated principle from the Federal Circuit, our primary reviewing court, that every application is examined on its own record. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“[The Federal Circuit], like the Board must evaluate the evidence in the present record to determine whether there is sufficient evidence”); *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.”); *see also 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 Designs’ application, the PTO’s allowance of such prior registrations does not bind the [Trademark Trial and Appeal] Board or this court.”).

On this record, we find the sixth *DuPont* factor neutral.

C. Similarity or Dissimilarity of the Marks



We compare Applicant's composite mark to the

cited registered marks MRS. SMITH'S and **Smith's** "in their entirety as to appearance, sound, connotation and commercial impression." *Detroit Ath. Co.*, 128 USPQ2d at 1048. *See also Palm Bay Imps.*, 73 USPQ2d at 1691. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Inn at St. John's*, 126 USPQ2d at 1746 (citation omitted); *accord Krim-Ko Corp. v Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted). Further, the marks "must be considered ... in light of the fallibility of memory" *Id.* at 1085 (quotation omitted). We focus on the recollection of the average consumer – here, an ordinary consumer of baked goods – who normally retains a general rather than a specific impression of trademarks. *See id.* at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F2d 1005, 169 USPQ 39, 40 (CCPA 1971).

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). *See also 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 entireties. *Stone Lion*, 110 USPQ2d at 1161. For instance, as the Federal Circuit has observed, “[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark....” *Nat'l Data*, 224 USPQ at 751.

We also are mindful that “[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). *Cf. Shen Mfg. Co. v. The Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004) (where goods and services are highly related, “the degree of similarity necessary to support a conclusion of likely confusion declines.”) (quoting *Century 21 Real Estate Corp.*, 23 USPQ2d at 1700).

Applicant argues that the marks look and sound different, the marks convey different commercial impressions, and the Examining Attorney dissected the marks, giving undue weight to the shared term SMITH’S, rather than comparing the marks in their entireties. The Examining Attorney focuses on the visual and aural

similarities between Applicant's mark and both cited registered marks mark due to the common term SMITH'S, which the Examining Attorney contends is the most distinctive portion, and therefore the strongest source identifying element of each mark. We agree with the Examining Attorney's assessment of the similarity of the marks.



Looking at Applicant's composite mark in its entirety, the term SMITH'S immediately attracts the consumer's attention due to its large size and central position in an oval-shaped carrier. As such, SMITH'S is the dominant element in Applicant's mark. The design of two bakers in chef's hats holding baked goods on either side of the initial letter "S" in the term SMITH'S does not overwhelm, detract from or change the commercial impression of the term SMITH'S, but rather focuses the eye on the centrally placed term SMITH'S.⁵ Moreover, when viewed with the other literal elements of the mark, BAKERIES and THE BAKERS OF BAKERSFIELD, the design of two bakers serves as a visual cue reinforcing to consumers that SMITH'S is a bakery located in Bakersfield.

Although we assess each mark in its entirety, wording often is considered the dominant feature of a mark comprising both literal and design elements because it is

⁵ Applicant does not include in its description of the mark the two partial lines below the letter "I" in SMITH'S, next to the word BAKERIES. To the extent consumers notice the lines, the lines may be viewed as underscoring SMITH'S.

most likely to indicate the source of the goods. *See Jack Wolfskin*, 116 USPQ2d at 1134; *Viterra*, 101 USPQ2d at 1908. The words are likely to make a greater impression upon purchasers than the designs and would be remembered by them and used by them to request the goods. *Viterra*, 101 USPQ2d at 1908 and 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)). This general principle applies here, where the design element in Applicant's mark would not be verbalized.

The placement of BAKERIES and THE BAKERS OF BAKERSFIELD below SMITHS's, and the relatively small font size of those terms compared to SMITH'S, focuses attention on SMITH'S, alone, as the source identifier. The generic, disclaimed term BAKERIES, and the admittedly non-inherently distinctive wording THE BAKERS OF BAKERSFIELD, are subordinate to, and do not detract from the dominance of, the term SMITH'S in creating the mark's commercial impression. *Dixie Rests.*, 41 USPQ2d at 1533-34 (affirming Board's finding that "DELTA," rather than the disclaimed generic term "CAFÉ," is the dominant portion of the mark THE DELTA CAFÉ."); *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive.").

The prominence of the term SMITH'S is further enhanced by its placement as the initial literal element in Applicant's mark. *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.*, 23 USPQ2d at 1700 (upon encountering the marks, consumers must first notice the identical lead word).

That the wording THE BAKERS OF BAKERSFIELD is a unitary expression, as Applicant repeatedly argues and the Examining Attorney concedes, does not affect, let alone overcome, our finding that SMITH’S is the dominant element in Applicant’s mark. 4 TTABVUE 8, 10-11 & 13-15; 6 TTABVUE 5. Nor do we find persuasive Applicant’s argument that THE BAKERS OF BAKERSFIELD is a double entendre that “suggests that SMITH’S BAKERIES literally put the word ‘BAKERS’ into the name of the city ‘BAKERSFIELD,’” and that the phrase “provides a significant source-indicating aspect of the mark.” 7 TTABVUE 7. Given the relatively small size and placement of the wording when viewing Applicant’s mark as a whole and Applicant’s Section 2(f) claim of acquired distinctiveness as to the wording, the import of which we just discussed, to the extent consumers even notice the wording, we think it unlikely they would understand it to have another meaning that is not merely descriptive. *Cf. In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017) (“The multiple interpretations that mark an expression a ‘double entendre’ must be associations that the public would make fairly readily, and **must be readily apparent from the mark itself.**”) (emphasis in original); *cf. e.g., In re Tea and Sympathy Inc.*, 88 USPQ2d 1062, 1064 (TTAB 2008) (THE FARMACY not merely descriptive because it is a play on the “farm-fresh” characteristics of applicant’s herbs

and organic products used for medicinal purposes); *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (SUGAR & SPICE not merely descriptive for bakery products because it immediately calls to mind “sugar and spice and everything nice” from the well-known nursery rhyme).

The dominant portion of Applicant’s mark is virtually identical to the entirety of

the cited registered mark **Smith’s** (‘209 Reg.). The minimal stylization of this mark has little effect in distinguishing it from Applicant’s mark, and Applicant does not argue otherwise. *Cf. In re Sadoru Grp., Ltd.*, 105 USPQ2d 1484, 1490 (TTAB 2012) (common and ordinary lettering with minimal stylization is generally not sufficient to make an impression on purchasers separate from the wording).

While there is no rule that a likelihood of confusion is present where one mark encompasses another, in this case, as in many others, the fact that Applicant’s mark includes the entirety of this cited registered mark increases the similarity between them. *See, e.g., Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (finding CALIFORNIA CONCEPT marks substantially similar to prior mark CONCEPT); *Coca-Cola Bottling Co. of Memphis, Tenn., 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).

SMITH’S also is the dominant portion of the cited registered mark MRS. SMITH’S (‘887 Reg.). MRS. is merely a courtesy title that draws attention to the term that

follows it, in this case, SMITH'S.⁶ MRS. therefore has less source-indicating significance than the term SMITH'S. *See Nat'l Data*, 224 USPQ at 751; *cf. Palm Bay Imps.*, 73 USPQ2d at 1692.

Additionally, we note that MRS. SMITH'S is registered in (the legal equivalent of) standard characters and thus is not limited to any particular depiction. The rights associated with a standard character 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); TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") Section 1207.01(c)(iii) (May 2024). We must consider both standard character 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 emphasizing the shared term SMITH'S.

While there are some specific differences between Applicant's mark and each of the cited registered marks when they are considered side-by-side, "[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."

⁶ We take judicial notice that "Mrs." is "used as a courtesy title for a married, widowed, or divorced woman before her own surname or full name: Mrs. Doe; Mrs. Jane Doe," or "as a courtesy title for a married or widowed woman before the surname or full name of her husband: Mrs. Doe; Mrs. John Doe." THE AMERICAN HERITAGE DICTIONARY (2022) (ahdictionary.com), accessed July 1, 2024. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

Cai v. Diamond Hong, Inc., 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018). “Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quotation omitted). Here, when the marks are viewed in their entireties, they look and sound similar because each contains (or consists entirely of) SMITH’S, which is the dominant element in each mark. The marks also convey similar meanings and create similar commercial impressions, whether SMITH’S is perceived as an arbitrary term, or as a surname.⁷

On this record, Applicant’s addition of generic or descriptive wording (BAKERIES and THE BAKERS OF BAKERSFIELD), and the design of two bakers in chef’s hats holding baked goods on either side of the letter “S” in SMITH’S, all of which appear in and oval carrier and in the color red on a white background, is insufficient to distinguish Applicant’s mark from the cited registered marks.

The *DuPont* factor of the similarity of the marks thus favors a finding of likelihood of confusion.

D. Conclusion

We have considered all of the evidence and arguments bearing on the likelihood of confusion issue. The marks are similar, the goods are in-part legally identical and are presumed to move in the same trade channels to the same classes of consumers, and Applicant was not able to demonstrate that SMITH/SMITH’S is conceptually weak. Accordingly, the first, second and third *DuPont* factors weigh in favor of a

⁷ As discussed above, there is no evidence to suggest that SMITH/SMITH’S has any meaning or significance in connection with bakery goods (or in the bakery industry).

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finding of likelihood of confusion, with the second and third *DuPont* factors weighing heavily so. The sixth *DuPont* factor is neutral, and no *DuPont* factor weighs against a finding of likelihood of confusion.

We therefore conclude confusion is likely between Applicant's mark



and each of the cited registered marks

Smith's and MRS. SMITH'S when the marks are used in association with their respective identified goods.

Decision: The refusal to register Applicant's mark under Trademark Act Section 2(d) is affirmed as to each cited registration.