

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: August 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Cofftea Trading Company Ltd.*  
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Serial No. 97562979  
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Ashley D. Johnson of Dogwood Patent and Trademark Law,  
for Cofftea Trading Company Ltd.

Jaime Whelan, Trademark Examining Attorney, Law Office 129,  
Pamela Y. Willis, Managing Attorney.

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Before Lykos, Coggins, and Stanley,  
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Cofftea Trading Company Ltd. (“Applicant”) seeks registration on the Principal Register of the mark COFFTEA (in standard characters) for “coffee; tea; coffee beans; fruit teas; herbal tea; peppermint tea; processed tea leaves; tea bags,” in International Class 30.<sup>1</sup>

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<sup>1</sup> Application Serial No. 97562979 was filed on August 24, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as August 30, 2019.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark COFFTEA (in standard characters) for "restaurant services," in International Class 43,<sup>2</sup> on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.<sup>3</sup>

When the refusal was made final, Applicant appealed and requested reconsideration.<sup>4</sup> After the Examining Attorney denied the request for reconsideration, the appeal was resumed.<sup>5</sup> We affirm the refusal to register.

#### I. Likelihood of Confusion

Section 2(d) of 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 of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*," setting forth factors to be considered and referred to as "*DuPont* factors"),

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<sup>2</sup> Registration No. 6111522, issued July 28, 2020. The registration issued under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e), based on a foreign registration. *See* June 14, 2023 Office Action at 6. Citations to the prosecution record in this decision refer to the .pdf version of the TSDR system; citations to the briefs in the appeal record refer to the TTABVUE docket system. *See, e.g., In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at \*1 n.1 (TTAB 2023); *In re Integra Biosciences Corp.*, 2022 USPQ2d 93, \*7 (TTAB 2022).

<sup>3</sup> *See* June 14, 2023 Office Action.

<sup>4</sup> *See* October 10, 2023 Final Office Action; 1 TTABVUE 1 (Notice of Appeal); November 2, 2023 Request for Reconsideration.

<sup>5</sup> November 29, 2023 Reconsideration Denied; 5 TTABVUE 1 (order resuming appeal).

*cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In any likelihood of confusion analysis, different *DuPont* factors may play a dominant role and some factors may not be relevant. *Naterra Int'l, Inc. v. Bensalem*, 92 F.4th 1113, 2024 USPQ2d 293, at \*2 (Fed. Cir. 2024) (quoting *Tiger Lily Ventures Ltd. v. Barclays Cap. Inc.*, 35 F.4th 1352, 2022 USPQ2d 513, at \*7 (Fed. Cir. 2022)). Similarly, varying weight may be assigned to each factor depending on the evidence presented, and “any one of the factors may control a particular case.” *Id.*; *see also In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*4 (Fed. Cir. 2023). While we consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019), two key considerations are the similarities between the marks and the similarities between the goods and services. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)). These factors, and two others, are discussed below. When analyzing the factors, the overriding concerns are not only to prevent buyer confusion as to the source of the goods and services, but also to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

A. Similarity of the Marks

Under the first *DuPont* factor, we compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567); *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1319 (Fed. Cir. 2014). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

There is no dispute that the standard-character COFFTEA marks in the application and cited registration are identical in sound and appearance. Notwithstanding this identity in appearance and sound, Applicant feebly argues that the marks have “substantially different” commercial impressions and meanings because, while “Applicant’s COFFTEA mark creates the commercial impression of [a] line of coffee and tea products that are provided and sold by Applicant for home brewing and enjoyment[,] . . . a typical consumer [of Registrant’s services] would believe that an establishment named COFFTEA would be a place to purchase prepared beverages, such as coffee drinks and brewed tea.”<sup>6</sup>

Applicant correctly intimates that the connotation and commercial impression of a mark must be determined in relation to the respective goods or services. *See, e.g.,*

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<sup>6</sup> 6 TTABVUE 14 (emphasis omitted). *But see id.* at 16 (while discussing the goods and services, Applicant concedes that “the marks COFFTEA are identical . . .”).

*In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1632 (TTAB 2018) (considering the meaning of the mark to customers of the identified goods).<sup>7</sup> But here, Applicant’s argument boils down to only a difference between goods (e.g., coffee and tea) and services involving the same goods (e.g., restaurants serving coffee and tea). As Applicant’s argument concedes, the mark COFFTEA suggests coffee and tea whether used on the goods themselves or services involving those goods. That is a distinction without a meaningful difference. *See In re H.J. Seiler Co.*, 289 F.2d 674, 129 USPQ 347, 347-48 (CCPA 1961) (affirming likelihood of confusion when applicant listed catering services and registrant listed smoked and cured meats since “the difference between a service for the catering of food and the actual sale of food is a rather fine legal distinction not likely to be drawn by laymen”).

There is no evidence that consumers would perceive COFFTEA to engender a different meaning or commercial impression in the context of the goods listed in the application than in the context of the services in the cited registration. *See In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4 (TTAB 2019) (no evidence that

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<sup>7</sup> Applicant repeatedly states that it believes the registered mark is no longer in use. *See* 6 TTABVUE 14, 20. This argument is irrelevant to the issues before us as it constitutes a collateral attack on the cited registration, which is not permissible in an ex parte appeal. *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997) (“Dixie’s argument that DELTA is not actually used in connection with restaurant services amounts to a thinly-veiled collateral attack on the validity of the registration . . . the present ex parte proceeding is not the proper forum for such a challenge.”); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) (“Evidence of actual marketplace usages that seeks to limit or alter the usages encompassed by the marks, goods and services, or usages listed in the application and registration are not considered in assessing likelihood-of-confusion in the registration context.”); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1009 (May 2024) (“[Section] 44 applicants are not required to allege use or provide specimens or dates of use prior to registration . . . in an application based solely on §44.”).

identical marks engender different impressions as applied to non-identical goods (i.e., bread buns) and services (i.e., bakery shops and bakery services)). We find the standard-character COFFTEA marks in the application and cited registration have the same connotation and commercial impression.

Due to the identity of the marks, the first *DuPont* factor weighs heavily in favor of finding a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Services

The second *DuPont* factor considers the similarity or dissimilarity and nature of the goods and services as described in the involved application and cited registration, *DuPont*, 117 USPQ at 567, and contemplates whether the consuming public may perceive the respective goods and services as related enough to cause confusion about their source or origin. *Naterra Int'l v. Bensalem*, 2024 USPQ2d 293, at \*2 (quoting *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014)).

The goods and services need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). The issue is not whether purchasers would confuse the goods and services, but rather whether

there is a likelihood of confusion as to the source of these goods and services. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

Where the identification of services is broad, the Board “presume[s] that the services encompass all services of the type identified.” *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015), *aff’d mem.*, 652 F. App’x 971 (Fed. Cir. 2016). “It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *see also Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Where identical marks are involved, as is the case here, the degree of similarity between the goods and services required to support a finding of likelihood of confusion declines. *Country Oven*, 2019 USPQ2d 443903, at \*5 (citing *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *Shell Oil*, 26 USPQ2d at 1689), *aff’d*, 123 USPQ2d 1744)).

Evidence of relatedness may include excerpts from websites showing that the goods and services are used by the same purchasers, and advertisements showing that the goods and services are advertised together or offered by the same provider, or copies of third-party use-based registrations of the same mark for both Applicant’s goods and Registrant’s services. *In re Embiid*, 2021 USPQ2d 577, at \*8 (TTAB 2021) (citing *In re Ox Paperboard*, 2020 USPQ2d 10878, at \*5 (TTAB 2020); and *Hewlett-*

*Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). The plain identifications of goods and services in the subject application and cited registration also may be evidence of relatedness. *Hewlett-Packard Co.*, 62 USPQ2d at 1005 (finding the Board erred in concluding that there was insufficient evidence of relatedness, because it “did not consider the important evidence already before it, namely the ITU application and [opposer’s] registrations”).

Applicant’s goods include “coffee” and “tea.” Registrant’s services are “restaurant services.” It is a matter of common knowledge that restaurants serve coffee and tea. The identification of services contains no restrictions on the kinds of foods or beverages sold at the restaurants. “It is well established that the Board may not read limitations into an unrestricted registration or application.” *Country Oven*, 2019 USPQ2d 443903, at \*5 (quoting *i.am.symbolic*, 123 USPQ2d at 1748). Thus, we must consider Registrant’s services to encompass a broad spectrum of food and beverages that quite obviously includes coffee and tea. *Id.* (citing, inter alia, *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (finding that “applicant’s ‘general merchandise store services’ would include the sale of furniture,” the goods in the cited registration)). We find that the identifications in the application and registration themselves support finding the goods and services are related.

The Examining Attorney introduced the following sixteen (16) examples of third-party websites which show restaurants using the same mark in connection with their



restaurant services and coffee and/or tea: STARBUCKS, LADURÉE, CRACKER BARREL, and CARIBOU COFFEE;<sup>8</sup> DUNKIN', PANERA BREAD, IHOP, and PEETS,<sup>9</sup> and FROTHY MONKEY, ZEKE'S COFFEE, TIM HORTONS, DUNN BROTHERS, THE HUMAN BEAN, PAVEMENT COFFEEHOUSE, URTH CAFFÉ, and GREGORYS COFFEE.<sup>10</sup> This evidence demonstrates there are restaurants that use the same mark in connection with restaurant services and coffee or tea, and bolsters our finding of relatedness. *Country Oven*, 2019 USPQ2d 443903, at \*10; *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (“[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both” Applicant’s and Registrant’s goods).

The Examining Attorney also introduced more than fifty (50) use-based, third-party registrations showing that the same entity has registered a single mark identifying at least coffee or tea, as a good classified in International Class 30, and restaurant services in International Class 43.<sup>11</sup> The following ten registrations are representative of the more than fifty third-party registrations of record:<sup>12</sup>

- Registration No. 7029548 for the mark NICELY DUNN
- Registration No. 5801706 for the mark SUNNY & RIGHT TEA STUDIO

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<sup>8</sup> June 14, 2023 Office Action at 8-62.

<sup>9</sup> October 10, 2023 Final Office Action at 8-46.

<sup>10</sup> November 29, 2023 Reconsideration Denied at 8-99.

<sup>11</sup> November 29, 2023 Reconsideration Denied at 100-212. We do not include or consider the marks registered under Trademark Act Sections 44(e) or 66(a), 15 U.S.C. §§ 1126(e) or 1141f(a), because they are not use-based. *In re 1st USA Realty Pros., Inc.*, 84 USPQ2d 1581, 1583 (TTAB 2007) (registrations not based on use in commerce not probative to show relatedness of the goods and services).

<sup>12</sup> November 29, 2023 Reconsideration Denied at 100-115, 118-121.

- Registration No. 7098520 for the mark 
- Registration No. 6003420 for the mark VILLAGE DEN
- Registration No. 6748710 for the mark ABOUTEA 
- Registration No. 6628805 for the mark CHERUBIC
- Registration No. 6883187 for the mark 
- Registration No. 6617920 for the mark MUDPENNY
- Registration No. 5334484 for the mark LIFE IS TOO SHORT TO BE BITTER
- Registration No. 5187160 for the mark GRISINI COFFEE.

“As a general proposition, third-party registrations that cover goods and services from both the cited registration and an Applicant’s application are relevant to show that the goods and services are of a type that may emanate from a single source under one mark.” *Country Oven*, 2019 USPQ2d 443903, at \*8; *see also In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988). The Examining Attorney’s “registrations are sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *Country Oven*, 2019 USPQ2d 443903, at \*10 (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). *See also In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050-51 (TTAB 2012) (five third-party registrations probative to suggest “coffee” is related to “providing food and drink”).

In an attempt to demonstrate that the goods and services are not related, Applicant submitted fourteen (14) sets of screenshots from TSDR of third-party registrations showing that the Office has registered the same mark purportedly to

different parties for the goods and services at issue.<sup>13</sup> *See Embiid*, 2021 USPQ2d 577, at \*37 (“[A]pplicants may submit sets of third-party registrations to suggest the opposite, i.e., that the Office has registered the same mark to different parties for the goods at issue,’ suggesting that the goods are not related.” (quoting *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1369-70 (TTAB 2009)). *See also In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1546 (TTAB 2015) (considering similar argument).

Applicant’s fourteen “pairs” of third-party registrations do not outweigh the Examining Attorney’s evidence, for several reasons. First, the number of sets is much smaller than what has been found to rebut a relatedness showing. *See Thor Tech*, 113 USPQ2d at 1548-49 (fifty sets of third-party registrations submitted by the applicant sufficient to overcome the Examining Attorney’s two third-party registrations). Second, there is no evidence that either Applicant or the owner of the cited

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<sup>13</sup> Applicant submitted twenty-four (24) “pairs” of marks, but we do not consider ten of them. Firstly, Applicant failed to include the owner of the mark for any of the registrations, so we cannot tell if the paired sets of marks were registered to different parties; however, because the Examining Attorney did not object to the evidence on this basis, *see* TMEP § 710.03 (“If the applicant’s response includes improper evidence of third-party registrations, the examining attorney must object to the evidence in the first Office action following the response.”), but instead objected that five of the sets were owned by the same registrants, *see* October 10, 2023 Final Office Action at 4, and Applicant did not argue otherwise as to those five sets, we exclude the five sets but presume all other sets are owned by different parties. *See* September 13, 2023 Response to Office Action at 27-28 (FUTURE marks), 29-30 (TASTE marks), 33-34 (MUD marks), 39-40 (VAMPIRE marks), and 55-56 (MOJO marks). Secondly, for three pairs Applicant included not two registrations, but one registration and one application, *see* September 13, 2023 Response to Office Action at 38 (Application Serial No. 79342680 for the mark FORTE), 50 (Application Serial No. 97485894 for the mark MYSTIC), and 54 (Application Serial No. 88935109 for the mark AD). “[T]hird-party applications have no probative value except to show that an application has been filed.” *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011). Thirdly, one pair does not show the same mark. *See* September 13, 2023 Response to Office Action at 57-58 (V and Λ marks). And fourthly, one registration specifically excludes coffee. *See id.* at 32 (Registration No. 5742365 for the mark VERVE).

registration in this appeal owns any of the registrations among the “pairs” upon which Applicant relies. *Thor Tech*, 113 USPQ2d at 1548 (decision based in large part on the “significant” fact that “seven sets of third-party registrations [in that case] appear to be owned, respectively, by the Registrant [owner] of the cited registration and [the Thor Tech] Applicant or one of [the Thor Tech] Applicant’s related companies”). Third, proving that the third-party marks Applicant relies on have coexisted on the Register “does not prove that they coexisted during that time without confusion in the marketplace.” *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006). Fourth, we do not know whether there are licenses or coexistence agreements, much less the terms thereof, which could explain the coexistence of these registrations. Fifth, there is no evidence concerning how many times applications covering coffee or tea were refused based on existing registrations of similar marks for restaurant services, or vice versa. And finally, “[n]either the Trademark Examining Attorney nor the Board is bound to approve for registration an Applicant’s mark based solely upon the registration of other assertedly similar marks for other goods or services having unique evidentiary records.” *In re Datapipe, Inc.*, 111 USPQ2d 1330, 1336 (TTAB 2014) (citing *In re Boulevard Ent. Inc.*, 334 F.3d 1336, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003) (“the PTO must decide each application on its own merits, and decisions regarding other registrations do not bind either the agency or this court,” citing *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“The Board must decide each case on its own merits. 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 Board or this court."))).

We find Applicant's fourteen sets of registrations do not rebut the higher quantity and diversity of the Examining Attorney's evidence showing the existence of both third-party website uses and third-party registrations using the same marks on the relevant goods and services. "Here, the totality of the Internet and third-party registration evidence demonstrates that consumers would readily expect that these goods [and services] emanate from the same sources." *In re I-Coat Co.*, 126 USPQ2d 1373, 1739 (TTAB 2018).

Based on the same fourteen sets of registrations, Applicant also argues that affirming the Section 2(d) refusal "would be contradictory and inconsistent with prior determinations by the USPTO."<sup>14</sup> As has often been stated by this Board, "[a]lthough the [USPTO] strives for consistency, each application must be examined on its own merits." *In re Datapipe, Inc.*, 111 USPQ2d at 1336. "The Board has made clear that while we recognize that consistency is highly desirable, consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules." *Embiid*, 2021 USPQ2d 577, at \*61 (quoting *In re Ala. Tourism Dep't*, 2020 USPQ2d 10485, at \*11 (TTAB 2020); and *In re Am. Furniture Warehouse Co.*, 126 USPQ2d 1400, 1407 (TTAB 2018)) (cleaned up). Simply put, the

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<sup>14</sup> 6 TTABVUE 20.

co-existence of these other sets of registered marks does not persuade us that the obviously related goods and services are unrelated.

Finally, Applicant argues “that because Applicant’s products are in Class 030 and Registrant’s services are in Class 043, this provides strong evidence that the goods/services are sufficiently different.”<sup>15</sup> However, classification is an administrative matter “solely for the ‘convenience of Patent and Trademark Office administration,’” and is “wholly irrelevant to the issue of registrability under section 1052(d), which makes no reference to classification.” *Detroit Athletic Co.*, 128 USPQ2d 1051 (citing *Jean Patou, Inc. v. Theon, Inc.*, 9 F.3d 971, 29 USPQ2d 1771, 1774 (Fed. Cir. 1993)).

We find that the goods and services are related, and the second *DuPont* factor supports a finding of a likelihood of confusion.

### C. Channels of Trade and Classes of Purchasers

As to the established, likely to continue channels of trade and classes of purchasers under the third *DuPont* factor, we must make our analysis on the goods and services as they are identified in the application and cited registration. *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Because the respective identifications contain no limitations as to channels of trade or classes of purchasers, it is presumed that the coffee and tea beverage items

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<sup>15</sup> 6 TTABVUE 18.

identified in the application and the restaurant services identified in the cited registration move in all channels of trade normal for those services, and that they are available to all usual classes of purchasers for those services, including members of the general public. *See Stone Lion*, 110 USPQ2d at 1161; *see also Coach Servs.*, 101 USPQ2d at 1723 (absent limitation, “goods are presumed to travel in all normal channels . . . for the relevant goods.”); *FCA US*, 126 USPQ2d at 1217 (“[W]here an application contains no such restrictions, examining attorneys and the Board must read the application to cover all goods of the type identified, to be marketed through all normal trade channels, and to be offered to all normal customers therefor.”). We find that the identifications themselves demonstrate overlapping trade channels and classes of consumers. “[W]here one party uses its mark on goods that are sold in retail stores that customarily vend those goods, it is clear that the trade channels and customers overlap.” *Country Oven*, 2019 USPQ2d 443903, at \*14 (internal citation omitted) (finding bread buns and retail bakery shops overlap in trade channels and consumers based on the identifications themselves).

The third-party commercial websites discussed above showing companies such as Starbucks, Cracker Barrel, Caribou Coffee, and Dunkin’ offering packaged coffee as well as restaurant services featuring coffee bearing the companies’ marks advertised together further demonstrates that the goods and services are offered by the same restaurants and would be encountered by the same purchasers. *See Accelerate*, 101 USPQ2d at 2051 (“Because of the nature of the identified goods [i.e., “coffee”] and services [i.e., “providing food and drink”], this would mean that both are offered to

the general public, and that the coffee certified by registrant could be served and sold directly by applicant's coffee house."); *see also In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012); *Thomas*, 79 USPQ2d at 1023 (TTAB 2006) (deeming channels of trade and classes of purchasers to be the same for jewelry and jewelry stores when the application and registration contain no limitations).

The third *DuPont* factor also supports a finding of a likelihood of confusion.

#### D. Consumer Sophistication and Care

The fourth *DuPont* factor considers the "conditions under which and buyers to whom sales are made, i.e. 'impulse' v. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567.

Applicant argues – without evidence – that coffee and tea beverages "are selected after careful consideration" and "consumers are very particular about what products they eat or drink, as well as what restaurants they support."<sup>16</sup> The argument fails because it is unsupported by evidence or legal authority, and because there are no limitations on price point or consumer type in either the application or cited registration. We must presume that the coffee and tea items in the application, and the restaurant services in the cited registration, are sold at all price points and to all types of consumers. We must base our decision "on the least sophisticated potential purchasers." *Stone Lion*, 110 USPQ2d at 1163.

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<sup>16</sup> 6 TTABVUE 15.



Coffee is a relatively inexpensive, comestible product subject to frequent purchase, consumption and replacement. *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). The Examining Attorney introduced an Internet screenshot showing a bag of ground coffee offered at \$9.99.<sup>17</sup> “Purchasers of such products have been held to a lesser standard of care.” *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35, 37 (CCPA 1974) (finding tea a relatively inexpensive and frequently purchased comestible); *In re Davia*, 110 USPQ2d at 1818 (“Generally, 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.”).

Similarly, the Examining Attorney introduced an Internet screenshot showing a restaurant offering brewed coffee at \$2.89.<sup>18</sup> Restaurant services may be the subject of impulse visits as well as advance reservation, and may offer inexpensive sandwiches and drinks at a counter as well as more elaborate fare in a formal dining room, and so we find these services are not subject to a heightened level of care. *See, e.g., Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d at 1026 (“[I]f a registration issues . . . for ‘restaurant services,’ it will include within its scope restaurants of all kinds and all price ranges.”); *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) (rejecting an argument about the high cost of restaurant services where the application identified them merely as “restaurant services,” and finding “no evidence

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<sup>17</sup> June 14, 2023 Office Action at 26 (shop.crackerbarrel.com).

<sup>18</sup> October 10, 2023 Final Office Action at 17 (panerabread.com).

in the record from which we might conclude that . . . restaurant services, in general, are necessarily expensive, or that purchasers thereof are necessarily sophisticated and careful in making their purchasing decisions.”).

The fourth *DuPont* factor is neutral, at best.

#### E. Balancing the *DuPont* factors

When we consider and weigh the evidence of record and the relevant likelihood of confusion factors, *Charger Ventures*, 2023 USPQ2d 451, at \*7 (“[I]t is important . . . that the Board . . . weigh the *DuPont* factors used in its analysis and explain the results of that weighing.”), we find confusion is likely between Applicant’s mark and the cited mark.

We have found the marks to be identical, which weighs heavily in favor of a likelihood of confusion and lessens the degree of similarity between the goods and services required to support a finding of likelihood of confusion. We have found the goods and services to be related, and the trade channels and classes of consumers to overlap. These factors also weigh in favor of a likelihood of confusion. Because the relevant consumers would not exercise any degree of heightened care in making purchasing decisions, we treat this factor as neutral. Balancing the factors, we find that confusion is likely.

## II. Decision

The Section 2(d) refusal to register Applicant’s mark COFFTEA is affirmed.