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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applicant:	JUDICAKES, L.L.C.)	
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Mark:	JUDICAKES)	
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Trademark Trial and Appeal Board
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APPLICANT'S APPEAL BRIEF

Applicant hereby submits the present brief in support of its appeal of the Trademark Examining Attorney's refusal to register the trademark JUDICAKES under the Trademark Act Section 2(d), 15 U.S.C. § 1052(d), because of a likelihood of confusion with the mark in U.S. Reg. No. 3,582,876 ("JUDY'S BREADSTICKS" for use with bread, breadsticks, croutons, crackers, cookies, biscotto and bakery goods).

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II. DESCRIPTION OF THE RECORD

On October 22, 2014, Applicant filed an application for registration of the mark JUDICAKES. Applicant uses the mark with the following International Class of goods: Baked goods, namely, pound cakes.

On February 12, 2015, the Examining Attorney initially refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the basis of a likelihood of confusion with U.S. Registration Nos. 2,533,954, 3,400,138, and 3,582,876.¹

Applicant timely responded on April 17, 2015. Applicant traversed the Examining Attorney's likelihood of confusion rejection. Applicant requested that the Examining Attorney reconsider and withdraw all refusals and allow the JUDICAKES mark to register.

On May 1, 2015, the Examining Attorney issued a final action refusing Applicant's JUDICAKES trademark application on the grounds of likelihood of confusion. The Examining Attorney withdrew her likelihood of confusion rejections based on U.S. Registration Nos. 2,533,954 and 3,400,138. The Examining Attorney maintained her likelihood of confusion rejection based on U.S. Registration No. 3,582,876.

Applicant does not agree with the Examining Attorney's position that the applied-for mark JUDICAKES is likely to cause consumer confusion with the mark "JUDY'S BREADSTICKS" in U.S. Registration No. 3,582,876.

III. STATEMENT OF THE ISSUES

The instant appeal involves one issue, identified as:

1. Whether Applicant's applied-for JUDICAKES mark is likely to cause consumer confusion with the mark "JUDY'S BREADSTICKS" in U.S. Registration No. 3,582,876.

¹ February 12, 2015 Office Action, TSDR p. 3.

IV. FACTUAL BACKGROUND

A. APPLICANT'S APPLIED-FOR MARK JUDICAKES

Applicant seeks registration on the Principal Register of its mark:

JUDICAKES

for Baked goods, namely, pound cakes.

B. THE CITED REGISTRATION

Registration No. 3,582,876:

JUDY'S BREADSTICKS

for Bread, breadsticks, croutons, crackers, cookies, biscotti, and bakery goods.

V. ARGUMENT

A. LEGAL STANDARD

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant.² The court in *In re E. I. du Pont de Nemours & Co.*³ listed the principal factors to be considered when determining whether there is a likelihood of confusion under Section 2(d).⁴ Those factors are:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods . . . described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.

² See 15 U.S.C. §1052(d).

³ 476 F.2d 1357 (C.C.P.A. 1973).

⁴ See TMEP §1207.01.

- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” v. careful, sophisticated purchasing.
- (5) The fame of the prior mark
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used
- (10) The market interface between the applicant and the owner of a prior mark
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion
- (13) Any other established fact probative of the effect of use.⁵

Not all factors are necessarily relevant or of equal weight, and any one factor may be dominant in any given case, depending upon the evidence of record.⁶ In most cases, the most important factors to be considered are (1) the similarity of the marks as to appearance, sound, meaning, and commercial impression, and (2) the similarity of the involved goods and/or services.⁷ However, one must consider all the evidence as it may relate to each of these factors.⁸

⁵ *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. at 567 (C.C.P.A. 1973).

⁶ *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1355 (Fed. Cir. 2011); *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003); *see In re E. I. duPont*, 476 F.2d at 1361-62.

⁷ *Federated Foods, Inc. v. Fr. Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (CCPA 1976); *see also Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) (the likelihood-of-confusion analysis considers all DuPont factors for which there is evidence of record but “may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods”).

⁸ *In re E. I. DuPont*, 476 F.2d at 1362, 177 U.S.P.Q. 563.

The possibility of confusion is insufficient; rather, the risk of confusion must be probable before a likelihood of confusion can exist.⁹

The Examining Attorney focused on two *DuPont* factors in her final rejection – the similarity of the marks and the relatedness of the goods and services.

B. NO LIKELIHOOD OF CONFUSION EXISTS

1. Differences Between Applicant’s Mark and the Cited Mark Support Registration

The similarity or dissimilarity of the marks is a predominant inquiry that requires examination of “the relevant features of the marks, including appearance, sound, connotation, and commercial impression.”¹⁰ Rather than comparing individual components of each mark, one must examine the marks in their entirety.¹¹ The use of identical, even dominant, words in common does not automatically mean that two marks are similar.¹² Relatedly, marks having similar elements may be dissimilar because of the addition of a prefix or suffix. For example, in *In re Mana Prods., Inc.*, this Board found that the marks “COLOR THERAPY” and “ESSENTIAL COLOR THERAPY” have differences that outweigh their similarities when considered in their entireties.¹³ This Board has also held that “SILKY TOUCH” was not confusingly similar to “TOUCH O’ SILK” because the marks are pronounced differently.¹⁴

⁹ See, e.g., *Bongrain Int’l (Am.) Corp. v. Delice de France, Inc.*, 811 F.2d 1479, 1486, 1 U.S.P.Q.2d 1775 (Fed. Cir. 1987).

¹⁰ *Kerbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165, 64 U.S.P.Q.2d 1375 (Fed. Cir. 2002).

¹¹ *China Healthways Institute, Inc. v. Wang*, 491 F.3d 1337, 1340, 83 U.S.P.Q.2d 1123 (Fed. Cir. 2007).

¹² *Freedom Sav. & Loan Ass’n v. Way*, 757 F.2d 1176, 1183, 226 U.S.P.Q. 123 (11th Cir. 1985); see also *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 U.S.P.Q.2d 1442 (8th Cir. 1987) (finding that OATMEAL RAISIN CRISP was not confusingly similar to APPLE RAISIN CRISP).

¹³ 2002 WL 31628771, at *2 (TTAB Nov. 20, 2002); see also *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 U.S.P.Q.2d 1459 (Fed. Cir. 1998) (holding that “CRISTAL” and “CRYSTAL CREEK” invoked different images in the minds of consumers).

¹⁴ *In re Akzona, Inc.*, 219 U.S.P.Q. 94 (TTAB 1983).

a. Applicant's Mark Differs in Appearance from the Cited Mark

The mark cited by the Examining Attorney is not confusingly similar to Applicant's JUDICAKES mark because the appearance of Applicant's mark is different from the appearance of the cited mark. Applicant's mark is for the single word "JUDICAKES." The cited mark "JUDY'S BREADSTICKS" contains the possessive word "JUDY'S" in combination with the second word "BREADSTICKS." In contrast to Applicant's single word mark, the cited mark includes two words. In addition, Applicant's mark appears different from the cited mark because it is much shorter. In fact, Applicant's mark consists of nine letters while the cited mark consists of 16 letters and one character. Moreover, although marks must be considered in their entirety, even if the comparison between the marks could be conducted piecemeal, Applicant's mark would still appear different from the cited mark. For example, if consumers were to skim the second part of Applicant's mark and the second word of the cited mark without reading every letter in between the first and the last letters, the Applicant's mark would appear different from the cited mark because Applicant's hypothetically dissected mark begins with a "C" and ends with an "S" and only contains "A," "K," and "E" in between while the cited mark begins with a "B" and ends with an "S" and contains "R," "E," "A," "D," "S," "T," "I," "C," and "K" in between. Nevertheless, because the marks must be compared for their similarities in their entirety, there is no likelihood of confusion between Applicant's mark and the cited mark because Applicant's mark differs in appearance from the cited mark.

The Examining Attorney argues that consumers are more inclined to focus on the first word, prefix, or syllable in any trademark.¹⁵ However, the Examining Attorney cannot ignore

¹⁵ May 1, 2015 Office Action, TSDR p. 4.

the fact that, one must examine the marks in their entirety.¹⁶ In fact, the use of identical, even dominant, words in common does not automatically mean that two marks are similar.¹⁷ Therefore, Applicant's mark differs from the cited mark because JUDICAKES is starkly different in appearance from JUDY'S BREADSTICKS.

b. Applicant's Mark Differs in Sound from the Registrant's Mark

In addition to the apostrophe, the additional word, and the length of words in the cited mark as compared to the Applicant's mark, which suggest dissimilarity in appearance, there is also a stark difference in how the marks sound. In *Crown Radio Corporation v. Soundsciber Corp.*, the court found that there was a likelihood of confusion between SOUNDSCRIBER and CROWNSCRIBER based largely on the similarity in sound.¹⁸ Phonetically, JUDICAKES sounds entirely different from JUDY'S BREADSTICKS. Determining the overall sound of Applicant's mark as compared to the cited mark, Applicant's mark consists of a single word of "JUDICAKES", with no pause in between when read. In contrast, when a consumer reads the cited mark, he or she will pause between the first word, "JUDY'S" and the second word. "BREADSTICKS" because there is a space in between the words. Thus, reading or speaking Applicant's mark differs from the cited mark because Applicant's mark can be read much faster than the cited mark. In addition to sounding different due to the space in between the cited mark, the Applicant's mark also sounds different from the cited mark because Applicant's mark consists of three, quick syllables whereas the cited mark consists of four, long syllables in two

¹⁶ *China Healthways Institute, Inc.*, 491 F.3d at 1340.

¹⁷ *See Gen. Mills, Inc.*, 824 F.2d at 627, 3 U.S.P.Q.2d at 1442.

¹⁸ 506 F.2d 1392, 1394, 184 USPQ 221, 222-23 (CCPA 1974). *See Vornado, Inc. v. Breuer Elec. Mfg. Co.*, 390 F.2d 724, 727, 156 USPQ 340, 342-43 (CCPA 1968)(finding a likelihood of confusion between VORNADO and TORNADO in part because the two marks are strikingly similar in sound).

separate words. Therefore, because the cited mark sounds different from, and is pronounced differently than, Applicant's mark, there is no likelihood of confusion.¹⁹

In contrast to the Examining Attorney's argument that JUDI and JUDY'S sound nearly the same,²⁰ a mark must be considered in its entirety.²¹ As the Examining Attorney notes, slight differences in the sound of similar marks will not avoid a likelihood of confusion.²² However, the case cited by the Examining Attorney was comparing the applied-for mark, "ENTELEC & DES," with the registered mark, "INTELECT."²³ Thus, the only difference in sound between these two marks was the final "T" at the end of the registered mark. In contrast, Applicant's mark sounds starkly different from the cited mark and is not merely different by a single "T" at the end. Therefore, Applicant's mark is not confusingly similar to the cited mark.

c. Applicant's Mark Differs in Connotation from the Cited Mark

Moreover, the connotation of Applicant's mark differs from the connotation of the cited mark. In particular, a consumer would understand the cited mark to mean that it is Judy's breadsticks. Thus, the cited mark implies that the breadsticks belong to Judy or were made by Judy. In contrast, Applicant's mark does not imply that the cakes belong to Judi or were made by Judi. Rather Applicant's mark creates a new word for the product and does not attempt to show possession of the product. Furthermore, because Applicant has created a new word not already in the English language whereas the cited mark consists of a common name and a common food, a consumer must make a mental leap to understand Applicant's mark whereas the cited mark requires no mental leap or imagination to be understood. Although Applicant's mark

¹⁹ See, e.g., *Upjohn Co. v. Schwartz*, 246 F.2d 254, 262, 114 U.S.P.Q. 53 (2d Cir. 1957) (ruling that SYROCOL and CHERACOL "do not . . . sound enough alike to justify a holding of trademark infringement").

²⁰ May 1, 2015 Office Action, TSDR p. 4.

²¹ *China Healthways Institute, Inc. v. Wang*, 491 F.3d at 1340.

²² May 1, 2015 Office Action, TSDR p. 4.

²³ *In re Energy Telecomm. & Elec. Ass'n*, 222 USPQ 350, 351 (TTAB 1983).

is made up of the words JUDI and CAKES, this mark must be compared in its entirety to the cited mark and not broken apart into its constituent parts. Because Applicant's mark is starkly different from the cited mark in connotation, there is no likelihood of confusion.

Although the Examining Attorney argues that "matter that is descriptive of or generic for a party's goods is typically less significant or less dominant in relation to other wording in the mark,"²⁴ the Examining Attorney relied on a case where the cited mark consisted of two words "BINION'S ROADHOUSE," where "ROADHOUSE" was disclaimed and the applied for marks consisted of simply "BINION" and "BINIONS."²⁵ However, this is readily distinguishable from the present facts. Whereas the cited mark consists of "JUDY'S BREADSTICKS," where "BREADSTICKS" is disclaimed, Applicant's mark does not merely consist of "JUDY" or "JUDYS." Rather, Applicant's mark is a single word consisting of "JUDICAKES." Therefore, Applicant's mark is not confusingly similar to the cited mark and registration should be allowed.

d. Applicant's Mark Differs in Commercial Impression from the Registrant's Mark

The overall commercial impression that each mark creates as a whole, not the parts of the mark, is what is compared.²⁶ The fact that the marks have different commercial impressions, sounds, meaning, and connotations outweighs any similarity of goods.²⁷ Moreover, no element of a mark is ignored because it is less dominant.²⁸ Therefore, the mark as a whole must be evaluated, not certain elements of each mark. The mark cited by the Examining Attorney is not confusingly similar in commercial impression to Applicant's mark. Whereas the cited "JUDY'S

²⁴ May 1, 2015 Office Action, TSDR p. 4.

²⁵ *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009).

²⁶ *In re National Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985).

²⁷ *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 333, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991)("[w]e know of no reason why, in a particular case, a single du Pont factor may not be dispositive).

²⁸ *Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 USPQ2d 1390 (TTAB 1991).

BREADSTICKS” mark is understood to commercially indicate that the breadsticks were made by Judy or are Judy’s, Applicant’s mark would indicate to the consumer a new type of cake because of the use of the single word without the possessive. Therefore, in light of all of the differences in appearance, sound, and commercial impression, there is no doubt that a consumer would not confuse these two marks and thus, there is no likelihood of confusion.

2. Differences Between the Goods and Services Offered by Applicant and the Cited Mark Support Registration

The Applicant admits that the class of goods for the cited mark and the Applicant’s mark are both in International Class 030 and Class 046. However, the cited mark’s goods are marketed as a health food product line that is vegan with “no milk from a cow nor honey from a bee” and baked with “organic whole grain and organic wheat flours, olive oil, barley malt, sea salt and yeast, kneaded with lots of love and handrolled in seeds.”²⁹ In contrast, the Applicant’s goods are marketed as “warm, home-style, yummy desserts.”³⁰ Thus, whereas the cited mark’s goods are vegan, and therefore contain no animal products such as eggs, a key ingredient in Applicant’s goods is eggs, as further indicated by a photograph on Applicant’s website, shown below:



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²⁹ Judy’s Breadsticks, http://lovesticks.com/nav_products.html (Oct. 5, 2015).

³⁰ Judicakes, <http://www.judicakes.co/cakes.html> (Oct. 5, 2015).

³¹ Judicakes, <http://www.judicakes.co/aboutus.html> (Oct. 5, 2015).

Moreover, the cited mark is being used for breadsticks, croutons, cookies, biscotti and other bakery goods. In contrast, Applicant's mark is being used for baked goods, namely pound cakes. Applicant's pound cakes are not made from bread or bread products. Therefore, although the nature of goods may be similar because both are baked, this similarity is not enough to cause a likelihood of confusion when the appearance, sound, and commercial impression are so starkly different when viewed as a whole.³²

3. Differences in the Channels of Trade by Applicant and the Cited Mark Support Registration

This Board has repeatedly found “no likelihood of confusion even with respect to identical marks applied to goods and/or services used in a common industry where such goods and/or services are clearly different from each other and there is insufficient evidence to establish a reasonable basis for assuming that the respective goods as identified by their marks, would be encountered by the same purchasers.”³³ As discussed, the cited mark's goods are vegan products containing no animal products. In contrast, Applicant's goods are home-style pound cakes made with eggs, which are an animal product and therefore not suitable for a vegan diet. Thus, a consumer shopping for the cited mark's goods would not confuse the Applicant's goods with those vegan products. In the present case, no evidence exists to establish a reasonable basis for assuming Applicant's goods and the cited mark's goods would be encountered by the same purchasers since vegans do not eat egg based products. For example, Lovesticks, Inc. is a company that sells their goods to vegans. Accordingly, they market their goods to vegans. As stated on their website, their “product line is vegan which means there is no milk from a cow nor

³² See, e.g., *Shen Mfg. Co., Inc. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 1244, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004) (holding that a finding of relatedness is not justified merely because two products or services could be used together within a broader industry).

³³ *Borg- Warner Chems. Inc. v. Helena Chem. Co.*, 225 U.S.P.Q. 222, 224 (TTAB 1983) (citing cases).

honey from a bee.”³⁴ In contrast, Applicant’s goods are marketed as home-style desserts made using wholesome products. Applicant’s goods are not marketed to vegans because the products contain animal products. As a result, purchasers of the Judy’s Breadstick products are discerning and are not impulse buyers.

For likelihood of confusion to occur, even when two marks are identical (which is **not** the case here), the goods and channels of trade must be sufficiently related so that the use of highly similar marks thereon would be likely to generate such confusion, mistake, or deception.³⁵ In the case at hand, Applicant’s and the cited mark’s goods and channels of trade are not sufficiently related such that it would be likely to generate confusion, mistake, or deception. Thus, the fact that JUDY’S BREADSTICKS and JUDICAKES have different commercial impressions, visual impressions, and sounds outweighs any miniscule similarity in goods that may be present.³⁶

³⁴ Judy’s Breadsticks, http://lovesticks.com/nav_products.html (Oct. 5, 2015).

³⁵ See, e.g., *In re Fesco, Inc.*, 219 USPQ 437 (TTAB 1983) (no confusion likely where identical FESCO mark used on distributorship services in the field of farm equipment and machinery, and in the field of fertilizer processing equipment and machinery); *In re Shipp*, 4 USPQ2d 1174, 1176 (TTAB 1987) (no confusion likely where identical mark of PURITAN used on laundry and dry cleaning services and on commercial dry cleaning machine filters); *Chase Brass and Copper Co., Inc. v. Special Springs, Inc.*, 199 USPQ 243 (TTAB 1987) (no confusion likely where identical BLUE DOT mark used on springs for engine distributors and on brass rods used on auto manufacturing).

³⁶ See *Kellogg Co.*, 951 F.2d at 330, 21 USPQ2d at 1145 (“We know of no reason why, in a particular case, a single du Pont factor may not be dispositive”).

VI. CONCLUSION

When weighing the du Pont factors together, the similarity or dissimilarity of the marks, including appearance, sound, and commercial impression, strongly support a finding that no likelihood of confusion exists between JUDICAKES and JUDY'S BREADSTICKS. In fact, the Examining Attorney's logic of dissecting the mark and focusing on JUDI in Applicant's mark and JUDY's in the cited mark only strengthens the differing characteristics of the two marks when compared in their entireties. For all of these reasons, Applicant requests registration of the mark.

Respectfully submitted this 30th day of October 2015,

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