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Subject: U.S. TRADEMARK APPLICATION NO. 86718038 - SUMTHIN' SWEET - N/A - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86718038

MARK: SUMTHIN' SWEET



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Sultana Distribution Services Inc.

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EXAMINING ATTORNEY'S APPEAL BRIEF

STATEMENT OF THE CASE

Applicant has appealed the trademark examining attorney's final refusal to register the mark "SUMTHIN' SWEET" for "Candies; and Candy". The examining attorney refused registration on the Principal Register because the applicant's mark, used in connection with "Candies; and Candy," is likely to be confused with "SOMETHING SWEET, INC." in U.S. Registration No. 3985042 for "Wholesale bakery

shop." Trademark Act § 2(d), 15 U.S.C. § 1052(d). For the reasons and authorities cited below, it is requested that the refusal to register be affirmed.

STATEMENT OF FACTS AND PROCEEDINGS

On August 7, 2015, the applicant, Sultana Distribution Services Inc., filed to register the mark "**SUMTHIN' SWEET**" (Application Serial No. 86718038) for "Candies; and Candy."

On November 24, 2015, the Initial Office Action was issued. The examining attorney refused registration under Trademark Act § 2(d) on the ground that the mark, when used on the identified goods, so resembles the mark "**SOMETHING SWEET, INC.**" (U.S. Registration No. 3985042) as to be likely to cause confusion, mistake, or deception. Furthermore, the examining attorney requested a substitute specimen and a disclaimer of the wording "SWEET".

On May 19, 2016, the applicant argued against the refusal of registration under Trademark Act § 2(d). The applicant's responses to the examining attorney's substitute specimen and disclaimer requirements were accepted by the examining attorney.

On May 21, 2016, the examining attorney maintained and made FINAL the refusal of registration under Trademark Act § 2(d) with regard to U.S. Registration No. 3985042.

On January 8, 2017, the applicant filed its Appeal Brief, and the file was forwarded to the examining attorney for statement on January 10, 2017. The file was re-assigned to the undersigned examining attorney in February 2017.

ISSUE

The issue on appeal is whether the applied-for mark, when used in connection with the identified goods, so resembles the mark in U.S. Registration No. 3985042, as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act § 2(d).

APPLICABLE LEGAL PRINCIPLES

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. See 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by-case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); see *In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and services, and similarity of the trade channels of the goods and services. See *In re Viterra*

Inc., 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

ARGUMENT

BECAUSE THE MARKS WILL BE APPLIED TO CLOSELY RELATED GOODS, REGISTRATION OF "SUMTHIN' SWEET", WHICH CREATES A HIGHLY SIMILAR COMMERCIAL IMPRESSION TO THE REGISTERED MARK "SOMETHING SWEET, INC.", IS LIKELY TO CREATE CONSUMER CONFUSION AS TO SOURCE.

I. Establishment of *Prima Facie* Case of Likelihood of Confusion

A. Comparison of the Marks

1. The Marks Create Substantially Similar Commercial Impressions

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

In this instance, the applicant's mark "SUMTHIN' SWEET" is highly similar to the registered mark "SOMETHING SWEET" because the marks are both essentially the same in sound, appearance, and meaning.

Specifically, with the exception of "INC." in the registered mark and the lack of "G" in the applicant's mark, "SUMTHIN' SWEET" and "SOMETHING SWEET" are nearly identical in pronunciation. Slight

differences in the sound of similar marks will not avoid a likelihood of confusion. *In re Energy Telecomm. & Elec. Ass'n*, 222 USPQ 350, 351 (TTAB 1983); see *In re Viterra Inc.*, 671 F.3d 1358, 1367, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) Furthermore, similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); see *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); TMEP §1207.01(b)(iv).

Moreover, the presence of "INC." in the registered mark does not obviate likelihood of confusion between the marks. First, "Inc." is a business type designation, which is not source indicating. See definition of "Inc.", p. 2-7 of Examiner's Final Office Action. Business type designations and abbreviations such as "Corporation," "Inc.," "Company," "LLC," and "Ltd." or family business designations such as "& Son's" or "Bros." merely indicate applicant's business type or structure and generally have no source-indicating capacity. TMEP §1213.03(d); see, e.g., *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 602-03 (1888); *In re Piano Factory Grp., Inc.*, 85 USPQ2d 1522, 1526 (TTAB 2006); *In re Patent & Trademark Servs., Inc.*, 49 USPQ2d 1537, 1539-40 (TTAB 1998). Therefore, "INC." is not significant in distinguishing the marks, and this fact renders "SOMETHING SWEET" the dominant portion of the registered mark.

Here, the marks are also essentially identical in terms of meaning. As applied to the applicant and registrant's respective goods and services, the marks convey the same impression of providing goods that are sweet in taste. The fact that "SUMTHIN" is used in the applicant's mark, in contrast to "SOMETHING" in the registered mark, does not obviate the similarity of commercial impression between the marks. Specifically, "sumthin" is a common slang form of the word "something." See definition of "sumthin", p. 4-11 of Examiner's Office Action. Therefore, the marks are highly similar in sound,

connotation, and overall commercial impression, and consumers are likely to be confused between the marks.

2. The Applicant Did Not Submit An Argument Against Similarity of the Marks

The applicant has not submitted an argument against the examining attorney's finding that the marks are substantially similar, and therefore the undersigned examining attorney assumes that the applicant agrees that the marks are substantially similar.

Generally, the greater degree of similarity between the applied-for mark and the registered mark, the lesser the degree of similarity between the goods and services of the parties is required to support a finding of likelihood of confusion. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015) (citing *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001)); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009). Here, therefore, because the marks are highly similar, a lesser degree of similarity between the respective goods and services is required. This burden has been met, as explained below.

B. Comparison of the Goods and Services

Applicant's applied-for goods and the services in the registered mark are related, as demonstrated below.

1. The Goods in the Applied-For Mark and the Services in the Registered Mark Commonly Emanate from the Same Source

The examining attorney's evidence clearly demonstrates that candies and candy are commonly sold at wholesale bakery stores, therefore demonstrating similarity of the goods and services at issue. For example, the Initial Office Action contains screenshots of webpages of many wholesale bakeries that also sell candy, including Clasen's European Bakery, the website of which states that it sells "chocolates and candy," "from turtles and toffee, to chocolate covered marzipan" (p. 43); Denny's 5th Avenue Bakery, the website of which states, "Minneapolis Tastefully Special Cakes, Cookies, Candy and Cupcakes" (p. 45); Tart Bakery, the website of which states "In addition to our edible treats, our shop is stocked with gifts galore. Beautiful cake stands...paper goods, cards, and candies!!" (p. 47); and Variations Pastry Creations, the website of which includes "Pastries and Candies" (p. 51). Additionally, the Final Action also includes screenshots of webpages of many wholesale bakeries that also sell candy, including West Town Bakery & Diner, the website of which indicates that it offers "Candy & Treats" (p. 9); Just Cakes By Soni, the website of which states, "We specialize in custom flavors and designs for cakes, cookies, cupcakes, and candies." (p. 10); Dottie's Delights DC, the website of which states, "Visit us in North Andover for handcrafted candies & tempting baked treats, local indulgences & classic sweets!" (p. 11), Northwoods Bakery Cafe, the website of which states that "They do cookies, candies, and all kinds of cakes" (p. 13); and Concannon's Bakery Café, the website of which states, "Check out some of the Candy we make for your appetite" (p. 14). Taken together, this evidence conclusively demonstrates that wholesale bakeries commonly produce, sell, and market candy under the same mark through the same trade channels to the same classes of consumers in the same fields of use.

Evidence obtained from the Internet may be used to support a determination under Section 2(d) that goods are related. *See, e.g., In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007). The Internet has become integral to daily life in the United States, with Census Bureau data showing approximately three-quarters of

American households used the Internet in 2013 to engage in personal communications, to obtain news, information, and entertainment, and to do banking and shopping. See *In re Nieves & Nieves LLC*, 113 USPQ2d 1639, 1642 (TTAB 2015) (taking judicial notice of the following two official government publications: (1) Thom File & Camille Ryan, U.S. Census Bureau, Am. Cmty. Survey Reports ACS-28, *Computer & Internet Use in the United States: 2013* (2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acs-28.pdf>, and (2) The Nat'l Telecomms. & Info. Admin. & Econ. & Statistics Admin., *Exploring the Digital Nation: America's Emerging Online Experience* (2013), available at http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf). Thus, the widespread use of the Internet in the United States suggests that Internet evidence may be probative of public perception in trademark examination.

Additionally, the trademark examining attorney attached to both the Initial Office Action and the Final Office Action evidence from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods and services as those of both applicant and registrant in this case. This evidence shows that the goods and services listed therein, namely "candies; and candy" and "wholesale bakery shop," are of a kind that may emanate from a single source under a single mark. See *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); TMEP §1207.01(d)(iii).

For example, Registration No. 4527748 ("MILLE-FEUILLE") includes both "Wholesale store services featuring baked goods" and "Candy", "Candy bars", "Candy decorations for cakes", and "Candy with cocoa" (Initial Office Action, p. 14-16); Registration No. 4595426 ("VICTOR BENÊS") includes both "Retail

bakery shops featuring pastries, cookies, pies, cakes, sweet rolls, candies, bread, coffee, tea, juice and related condiments" and "Baked Goods, namely pastries, cookies, pies, cakes, sweet rolls, breads, and candies" (Initial Office Action, p. 21-23); Registration No. 4714102 ("THE GOOD BATCH") includes both "Retail bakery shops" and "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" (Initial Office Action, p. 30-32); Registration No. 4750930 ("THE CHARMING KITCHEN") includes both "Online retail bakery shops; Retail bakery shops" and "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" (Initial Office Action, p. 33-35); Registration No. 3929654 ("MR. AND MRS. MISCELLANEOUS") includes both "Wholesale and retail store services featuring ice cream, beverages, candy and bakery products" and "Candy" and "Candy decorations for cakes" (Final Office Action, p. 35-37); Registration No. 3863279 ("MIETTE") includes both "Retail bakery shops; Retail candy stores" and "Candies", "Chocolate candies", "Gift baskets containing candy", and "Sweets" (Final Office Action, p. 38-40); Registration No. 3335170 (design only) includes both "Retail Bakery Shops" and "Chocolates, candies, pastries, cookies and cakes" (Final Office Action, p. 41-42); Registration No. 3963642 ("LILLY MAGILLY'S") includes both "Retail bakery shop" and "take-out bakery services" and "cookies", "sweets", and "candy" (Final Office Action, p. 43-45); and Registration No. 4866877 ("ÉTONNÉ") includes both "On-line wholesale and retail store services featuring bakery goods, candies, pastries, and cookies" and "Candy" and "Gift baskets containing candy" (Final Office Action, p. 60-62).

Overall, the attached evidence demonstrates that the same entity commonly produces and markets the relevant goods (candies; candy) and services (wholesale bakery services) under the same mark through the same trade channels to the same classes of consumers in the same fields of use.

Furthermore, consumers are likely to be confused by the use of similar marks on or in connection with goods and with services featuring or related to those goods. TMEP §1207.01(a)(ii); see *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (holding BIGG'S for retail grocery and general merchandise store services likely to be confused with BIGGS for furniture); *In re United Serv. Distribs., Inc.*, 229 USPQ 237 (TTAB 1986) (holding design for distributorship services in the field of health and beauty aids likely to be confused with design for skin cream); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (holding 21 CLUB for various items of men's, boys', girls' and women's clothing likely to be confused with THE "21" CLUB (stylized) for restaurant services and towels); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (holding CAREER IMAGE (stylized) for retail women's clothing store services and clothing likely to be confused with CREST CAREER IMAGES (stylized) for uniforms); *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983) (holding STEELCARE INC. for refinishing of furniture, office furniture, and machinery likely to be confused with STEELCASE for office furniture and accessories); *Mack Trucks, Inc. v. Huskie Freightways, Inc.*, 177 USPQ 32 (TTAB 1972) (holding similar marks for trucking services and on motor trucks and buses likely to cause confusion). Here, registrant's services commonly feature the applicant's goods, as demonstrated by the evidence attached to the Initial Office Action and the Final Office Action. Therefore, consumers are likely to be confused by the use of the respective marks on the respective goods and services.

Despite this evidence, however, the applicant appears to argue that the consumers of the applied-for goods are different than the consumers of the registered services. However, the applicant provides no evidence for this assertion. Moreover, the evidence attached to the Initial Office and Final Office Actions – specifically, the webpages of entities that sell and market both candy and wholesale bakery services – demonstrates that the applicant's and registrant's services do in fact commonly emanate from the same source, and are likely to be purchased by the same consumers. Contrary to the applicant's statements,

it is entirely possible, and even likely, that consumers of candy would also be consumers of wholesale bakery services, particularly because both candy and bakery products are common dessert foods, as demonstrated by the above-explained evidence.

2. Examining Attorney's Evidence Consists of Wholesale Bakery Websites

The applicant also attempts to discredit the examining attorney's evidence contained in the Final Office Action, stating that the third-party website printouts in the Final Office Action are not for wholesale bakery services. *See Applicant's Brief*, p. 2. Not only is this statement entirely conclusory and unsubstantiated, but it is also patently false. Both the Initial Office Action and the Final Office Action are replete with evidence of entities that provide wholesale bakery services. For example, the Initial Office Action includes screenshots of webpages of many wholesale bakeries, including Denny's 5th Avenue Bakery, the website of which calls the bakery a "From Scratch Wholesale Bakery in Minneapolis" (p. 44); Renaud's Patisserie & Bistro, the website of which states that it is a "Southern California restaurant and retail and wholesale bakery" (p. 46); and Tart Bakery, the website of which states that "Tart Bakery has established an impressive clientele in their history as a wholesale bakery" (p. 49). Moreover, the Final Office Action also includes screenshots of webpages of many wholesale bakeries, including West Town Bakery & Diner, the website of which states that "we are a 3-Star Green Certified restaurants [sic] and production facilities [sic] and the only certified wholesale bakery" (p. 8); Northwoods Bakery Café, the website of which states that "So with the combined Retail, Wholesale, and Restaurant aspects of the business are growing every year" (p. 13); Deising's Bakery, the website of which states that "Deising's has been wholesaling our retail quality products since the 1970's" (p. 17); Annie's Accents Bakery, the website of which states that "We sell both retail and wholesale" (p. 18); and Gramma Jan's Sweet Sensations, the website of which states that "Since 1997, Jim and Jancene Shields have owned and

operated Gramma Jan's Sweet Sensations, a successful, family operated wholesale bakery specializing in cookies and brownies" (p. 20). The applicant's claim is therefore without any support.

3. Goods and Services Need Not Be Identical

The applicant also argues that "candy and bakery shops are distinguishable and unrelated goods and/or services," apparently based on the fact that candy does not include flour, which is present in baked goods. Applicant's Brief at p. 2. However, the goods and/or services of the parties 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, 1329, 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).

The respective goods and/or services need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

4. The Applicant's Additional Arguments Are Unpersuasive

In arguing against the § 2(d) refusal, the applicant also asserts that the fact that the USPTO has allowed what the applicant views as "similar marks" (the applicant does not clear to which mark, applicant's or

registrant's, to which the marks are similar) to register for "other food products." Applicant's Brief at p. 2. Specifically, the applicant refers to "SOMETHING SWEET TO DELIGHT" (U.S. Registration No. 5106688) and "UNWRAP SOMETHING SWEET" (Serial No. 87186453, published for opposition on February 7, 2017). However, prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. TMEP §1207.01(d)(vi); see *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (citing *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001)). Each case is decided on its own facts, and each mark stands on its own merits. See *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Binion*, 93 USPQ2d 1531, 1536 (TTAB 2009).

Moreover, the applicant has not made the referenced registration and application of record. The Trademark Trial and Appeal Board generally does not take judicial notice of third-party registrations. *In re Ruffin Gaming LLC*, 66 USPQ2d 1924, 1925 n.3 (TTAB 2002); *In re Carolina Apparel*, 48 USPQ2d 1542, 1543 n.2 (TTAB 1998); TBMP §§1208.02, 1208.04; TMEP §710.03; see Fed. R. Evid. 201; 37 C.F.R. §2.122(a), 2.142(d). Accordingly, the trademark examining attorney requests that the Board disregard the third-party registrations submitted by applicant with its appeal brief.

To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO's automated systems, prior to appeal. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006); *In re Ruffin Gaming*, 66 USPQ2d at 1925 n.3; TBMP §1208.02; TMEP §710.03.

Even if the applicant had properly attached the registration and application, third-party registrations are entitled to little weight on the issue of confusing similarity because the registrations are “not evidence that the registered marks are actually in use or that the public is familiar with them.” *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013) (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); see TMEP §1207.01(d)(iii). Moreover, the existence on the register of other seemingly similar marks does not provide a basis for registrability for the applied-for mark. *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re Total Quality Grp., Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999). Similarly, third-party applications are “evidence only that the application was filed on a certain date; it is not evidence of use of the mark.” *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002)); TBMP §1208.02; TMEP §710.03.

Finally, the applicant appears to argue that the examining attorney's statement that refusing registration of the applicant's mark is necessary to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer is inapplicable, because the applicant has apparently been using the applied-for mark "since at least 1990". Applicant's Brief, p. 2. However, the "First Use Anywhere" and "First Use in Commerce" dates stated in the applicant's application are both "at least as early as 01/01/1999." The "First Use Anywhere" and "First Use in Commerce" dates in registrant's application are both "at least as early as 12/31/1994," before the applicant's dates. Even if the applicant has in fact used its mark in commerce since 1990, the operative date in determining priority in the USPTO is the date of the filing of the application – here, October 27, 2010 for the registrant and August 7, 2015 for the applicant. See TMEP § 201.01; see also registration and application, respectively. Moreover, the

applicant's cancelled registration (U.S. Registration No. 2314722) for the same mark that is currently at issue has no practical or legal effect on the current proceedings.

CONCLUSION

The applicant's mark, "SUMTHIN' SWEET", is confusing similar to the mark in U.S. Reg. No. 3985042, "SOMETHING SWEET". The applicant's mark and registrant's mark are highly similar in sound, appearance, and meaning. Moreover, the marks are used in conjunction with substantially related goods and services, as demonstrated by the evidence submitted by the examining attorney. As such, it is highly likely that the applicant's mark will cause consumer confusion in relation to source indication with the registrant's mark. Furthermore, the applicant's submitted arguments are unpersuasive, and any doubts concerning the likelihood of confusion must be resolved in favor of the registrant. For these reasons, it is respectfully requested that the Refusal of Registration under Trademark Act Section 2(d) be affirmed.

Respectfully submitted,

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