

This Opinion is not  
Precedent of the TTAB

Mailed: May 22, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Honeyhole Sandwiches Inc.*  
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Serial No. 87138294  
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Gene Bolmarcich of Law Offices of Gene Bolmarcich  
for Honeyhole Sandwiches Inc.

Kim Teresa Moninghoff, Trademark Examining Attorney, Law Office 113,  
Odette Bonnet, Managing Attorney.

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Before Wellington, Wolfson and Hightower,  
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Honeyhole Sandwiches Inc. (“Applicant”) seeks registration on the Principal Register of the mark HONEYHOLE SANDWICHES (in standard characters, “Sandwiches” disclaimed) for “restaurant with bar specializing in serving proprietary unique sandwiches, local beers and alcohol in a vibrant, eclectic environment” in International Class 43.<sup>1</sup>

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<sup>1</sup> Application Serial No. 87138294 was filed on August 15, 2016, under Section 1(a) of the Trademark Act, based upon Applicant’s allegation of first use of the mark, and first use of the mark in commerce, on May 28, 1999.

The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in association with the services identified in the application, so resembles the mark HONEY HOLE (in standard characters), previously registered on the Principal Register for "alcoholic beverages except beers" in International Class 33, as to be likely to cause confusion, to cause mistake, or to deceive.<sup>2</sup> When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

#### I. EVIDENTIARY OBJECTION

Before we begin our likelihood of confusion analysis, we address the Examining Attorney's objections to Applicant's submission of three lists of third-party registrations (a "ThorCheck Report"<sup>3</sup> and two Trademark Electronic Search System (TESS) printouts<sup>4</sup>). Specifically, the Examining Attorney objects to the lists based on the format in which they were submitted (*i.e.*, by listing the registrations rather than providing USPTO database copies thereof).

The ThorCheck Report purports to list 100 pairs of registrations showing that the same mark has been registered by one company for restaurants or related services on the one hand, and by an unrelated company for wine, spirits, or other types of liquors,

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<sup>2</sup> Registration No. 4878595, issued December 29, 2015. All citations to the prosecution history for the application are to the TSDR (Trademark Status and Document Retrieval) database. Citations to the appeal record are to TTABVUE. *See* TBMP § 1203.01.

<sup>3</sup> April 17, 2017, Response at 13-22.

<sup>4</sup> April 28, 2017 Request for Reconsideration, 4 TTABVUE 4-9.

on the other. There are two TESS printouts, one of which purports to show that there are 38,801 live registrations for restaurant services; the other purports to show that there are 38,434 live registrations for restaurant services which do not include goods in Class 33.<sup>5</sup>

Third-party registrations may not be made of record by merely listing them in response to an Office Action. Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1207.03 (June 2017). “To make registrations of record, copies of the registrations or the complete electronic equivalent (i.e., complete printouts taken from the USPTO’s Trademark database) must be submitted.” Trademark Manual of Examining Procedure (TMEP) § 710.03 (October 2017); *see also In re Houston*, 101 USPQ2d 1534, 1536 n.5 (TTAB 2012), *aff’d*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013) (“It is well-established that in order to make third-party registrations properly of record, applicant should submit copies of the registrations themselves, or the electronic equivalent thereof from the USPTO’s electronic databases . . . .”) (internal citations omitted); TBMP § 1208.02 (“Mere listings of registrations, or copies of private company search reports, are not sufficient to make the registrations of record.”).

Here, the Examining Attorney promptly objected to the ThorCheck Report and TESS printouts as insufficient.<sup>6</sup> The Examining Attorney further advised Applicant

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<sup>5</sup> Out of the over 38,000 registrations assertedly developed by each search, the printouts list 200; 100 for each search.

<sup>6</sup> Applicant submitted the ThorCheck Report on April 17, 2017 in response to the Examining Attorney’s first Office Action of December 1, 2016. The Examining Attorney objected to the ThorCheck Report in the final Office Action, dated April 26, 2017. The TESS search results were submitted on April 28, 2017, in Applicant’s Request for Reconsideration (4 TTABVue)

that to make the third-party registrations contained in the lists part of the record, it must submit copies of the registrations, or the complete electronic equivalent from the USPTO's automated systems, prior to appeal. Because the Examining Attorney objected to the ThorCheck Report and TESS printouts, we would ordinarily not consider either the third-party registrations or the lists themselves. However, for the reasons discussed below, we have considered the ThorCheck Report, the specific third-party registrations referenced in the Report that were made of record by the Examining Attorney, and the statistical data from the face of the TESS printouts.

Turning first to the TESS printouts, while we agree that they are insufficient to make the underlying registrations of record, we accept them for what they show on their face, namely that there are 38,801 live registrations residing in the USPTO database in Class 43 that include the term "restaurant" and that there are 38,434 live registrations residing in the USPTO database in Class 43 that include the term "restaurant" but do not include Class 33 goods.<sup>7</sup> Nonetheless, the probative value of such statistical information is quite limited. Applicant argues that these lists are evidence that less than 1% of trademarks for restaurants (or 367) also include Class 33 goods. However, the lists do not account for duplicates, or for cases where parties have entered into co-existence agreements or are owned by related companies. The scope of the search also is inherently limited; restaurants that sell alcohol may not

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that was filed in response to the April 26, 2017 final Office Action. The Examining Attorney objected to the TESS search results by way of the Denial of the Request for Reconsideration, dated May 11, 2107.

<sup>7</sup> The exact search queries are: "live(ld) & 'RN > 0 & 043(ic) & (restaurant)(gs)" and "live(ld) & 'RN> 0 & 043(ic) & (restaurant)[gs] not 033[ic]."

file for separate Class 33 coverage but may instead include such goods in their Class 43 statement.<sup>8</sup> Importantly, the existence of 367 registrations that purportedly cover both restaurants and alcohol is strong evidence that the goods and services are, in fact, related.<sup>9</sup>

Turning to the ThorCheck Report, because the information shown on the face of the ThorCheck Report was discussed by the Examining Attorney in response to Applicant's reliance on such lists, and because the Examining Attorney further submitted copies of 15 of these registrations<sup>10</sup> and prosecution history documents for three others on the list,<sup>11</sup> we have considered the ThorCheck Report for "what it shows on its face" as well as the particulars of the registrations in the ThorCheck Report that have been made of record by the Examining Attorney, and the prosecution history documents that have been made of record by the Examining Attorney.<sup>12</sup> *See In re Heeb Media LLC*, 89 USPQ2d 1071, 1072 (TTAB 2008) (treating as of record evidence attached to applicant's brief that examining attorney considered and relied on despite pointing out its untimeliness). We have not considered the particulars of any of the registrations for which no printouts were submitted.<sup>13</sup> *See*,

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<sup>8</sup> The INTERNATIONAL SCHEDULE OF CLASSES OF GOODS AND SERVICES, 37 C.F.R. § 6.1, defines Class 43 services as "Services for providing food and drink; temporary accommodation."

<sup>9</sup> To be clear, we do not admit the TESS printouts as evidence of the validity of any of the registrations listed on the printouts or as making any of the registrations of record in this proceeding.

<sup>10</sup> Attached to April 26, 2017 Office Action at 124-81.

<sup>11</sup> *Id.* at 182-218.

<sup>12</sup> The Board will not consider more than the information provided. TBMP § 1208.02 ("if the applicant has provided only a list of registration numbers and/or marks, the list will have very limited probative value").

<sup>13</sup> None of the registrations listed in the TESS lists have been made of record either by Applicant or the Examining Attorney.

*e.g., Chicken Delight, Inc. v. Delight Wholesale Co.*, 196 USPQ 136, 139 n.16 (TTAB 1977) (private search reports are incompetent as evidence to prove the status of a registration).

The ThorCheck Report shows on its face that the USPTO at one time registered the marks to different owners for the goods and services listed therein. There are several shortcomings to the Report's probative value; the dates the marks were registered is missing and the current status of the registrations is unknown. In thirty-eight pairs (out of 100 pairs) of registrations, one or both of the registrations contain additional design elements. There are also shortcomings to the evidentiary value of the admitted registrations as identified by the Examining Attorney in her discussions of the particulars of these registrations. Several have issued on the Supplemental Register, with a Section 2(f) claim, or with a disclaimer. One apparently issued with a consent from the owner of a mark that was paired with its equivalent,<sup>14</sup> another with a claim of ownership by the same entity,<sup>15</sup> and four pairs of registrations issued under the same ownership for each pair.<sup>16</sup> Moreover, whatever probative value there is to Applicant's lists of registrations is weighed in conjunction with the evidence submitted by the Examining Attorney,<sup>17</sup> introduced to show that restaurant services and alcoholic beverages are offered by a single source under the same mark, discussed more fully infra.

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<sup>14</sup> Serial No. 86206142.

<sup>15</sup> Serial No. 85194030.

<sup>16</sup> Reg. Nos. 4806802 and 4984116 for the mark GRIMALDI'S; Reg. Nos. 2452939 and 3920146 for the mark LUCE; Reg. Nos. 3007070 and 4782367 for the mark PENTHOUSE; and Reg. Nos. 2263907 and 3978444 for the mark VAMPIRE.

<sup>17</sup> April 26, 2017 Office Action at 46-124.

Applicant also submitted Internet evidence with its Request for Reconsideration.<sup>18</sup> The materials submitted by Applicant (copies of pages from one blog and one online retail store) do not include the date the webpages were published or accessed from the Internet, and are also missing information as to their source, *e.g.*, the complete URL address of the websites. In denying the Request for Reconsideration, the Examining Attorney advised Applicant that in order to make Internet evidence of record, it is necessary to include the URL and date of publication or the date the submitted material was accessed and printed, citing TMEP § 710.01(b) and *Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010). While she did not affirmatively treat the evidence as being of record, she described it as “a blog article about honey-flavored beverages and an on-line retail store, presumably based in the UK based on the currency, featuring honey flavoured drinks available for sale,”<sup>19</sup> and noted that “[a]lthough this evidence appears to relate somehow to the registrant’s honey-flavored whiskey, the applicant has not provided any argument or explanation for the inclusion of this evidence.”<sup>20</sup> In her brief, the Examining Attorney clearly stated her reasons for objecting to the evidence.<sup>21</sup>

Generally, material obtained through the Internet or from websites is acceptable as evidence in *ex parte* proceedings. *See* TBMP § 1208.03. It has been the Board’s past practice to prefer, but not require, that a web page submitted by an applicant “be

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<sup>18</sup> Submitted by Applicant on April 29, 2017 as “Exhibit B” to its Request for Reconsideration, 5 TTABVUE 4-9.

<sup>19</sup> 6 TTABVUE 3-4.

<sup>20</sup> *Id.*

<sup>21</sup> 13 TTABVUE 4.

identified by the full address (url) for the web page, and the date it was downloaded, either by the information printed on the web page itself, or by providing this information in an Office action or an applicant's response." TBMP § 1208.03; *see also In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 n.6 (TTAB 2010) (pointing out preference for full address (URL) for webpages and dates pages were downloaded).<sup>22</sup> Although we generally take a somewhat more permissive stance with respect to the admissibility of evidence in an ex parte proceeding than in an inter partes proceeding, if a web page is submitted without a URL or the date the page was accessed or printed, the evidence cannot be readily verified by the non-offering party. We have recently held that to properly make such Internet evidence of record, a trademark examining attorney must include the URL and the date when the material was accessed, and that if an examining attorney fails to do so, the material will be considered only if the applicant does not object to the improperly submitted evidence. *See In re Mueller Sports Medicine, Inc.*, \_\_\_ USPQ2d \_\_\_, Serial No. 87209946 (TTAB May 16, 2018); *see also* TMEP § 710.01(b). We stated our intention in *Mueller Sports Medicine* to adopt the same approach with respect to website excerpts proffered by applicants in ex parte proceedings.

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<sup>22</sup> We have allowed this information to be provided "either by the information printed on the web page itself, or by providing this information in an Office action or an applicant's response." TBMP § 1208.03. However, the better practice is to print the URL and access date on the documents themselves so that the nonoffering party may readily verify the document through the date and source information and, if inaccurate, rebut the probative value of the document by showing that there has been a significant change to the document as submitted by the offering party.

Following our decision in *Mueller Sports Medicine*, we no longer consider Internet evidence filed by an applicant to be of record unless the URL and access or print date has been identified, either directly on the webpage itself, or by providing this information in a response or an accompanying declaration. Where, as here, an applicant files Internet evidence with its request for reconsideration without a URL or date it was printed, there is no further opportunity for the applicant to cure its error; in such case, the material will be considered only if the examining attorney does not object and affirmatively treats the evidence as being of record. Because the Examining Attorney did not affirmatively treat the evidence as being of record, we would not normally treat the evidence as being of record, but since the requirement was not enforced at the time this application was prosecuted, we have considered the website information. We turn now to the merits of this case.

## II. LIKELIHOOD OF CONFUSION

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.2d 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 and differences in the marks.”); *see also In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015).

A. THE MARKS; STRENGTH OF REGISTRANT’S MARK

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

With respect to Applicant’s mark, the dominant element is the term HONEYHOLE. The term is defined in the record as “slang for a location that yields a valued commodity or resource.”<sup>23</sup> It appears first and is followed by the disclaimed and descriptive wording, SANDWICHES. *Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Thus, for purposes of noting any source-identifying qualities of Applicant’s proposed mark, consumers will likely focus on the term HONEYHOLE.

In terms of appearance and sound, the cited mark, HONEY HOLE, is virtually identical to the dominant element of Applicant’s mark. The addition of a space between the terms has little, if any, significance for purposes of distinguishing the two marks. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016) (“The absence of a space in Applicant’s mark MINIMELTS does

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<sup>23</sup> *See Wikipedia*, Honey Hole, at [https://en.wikipedia.org/wiki/Honey\\_hole](https://en.wikipedia.org/wiki/Honey_hole), attached to December 1, 2016 Office Action at 4.

not meaningfully distinguish it from Opposer's mark [MINI MELTS]."); *Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) ("the marks [SEA GUARD and SEAGUARD] are, in contemplation of law, identical"); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (BEEFMASTER and BEEF MASTER "are practically identical"); *Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (STOCKPOT and STOCK POT are confusingly similar). The connotation created by both Applicant's mark HONEYHOLE SANDWICHES and the cited mark HONEY HOLE is driven by the term HONEY HOLE (whether as one word or two). To the extent consumers are familiar with the slang expression ("a location that yields a valued commodity or resource"), they will attribute that meaning to both marks.

Applicant argues that Registrant's mark, when applied to its goods, strongly suggests that Registrant's alcoholic beverages contain honey. Applicant provided a copy of the specimen from the application underlying Registrant's registration that shows Registrant's mark on a label for a honey-flavored beverage.<sup>24</sup> Below is a reproduction of Registrant's specimen:

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<sup>24</sup> April 17, 2017 Response to Office Action at 12.



We agree that it is reasonable to conclude that consumers of Registrant’s honey-flavored beverages would make this connection. However, they are also likely to make the connection to the slang meaning of the term, given the description on the label that explains this meaning. While the inherent strength of the cited mark is slightly undercut by either connotation, there is no evidence of record pertaining to “the number and nature of similar marks in use on similar goods” (the sixth *du Pont* factor) to support a conclusion that Registrant’s HONEY HOLE mark for “alcoholic beverages except beers” is commercially weak and only entitled to a narrow scope of protection. As for conceptual weakness, at most the mark is suggestive of honey-flavored whiskey, and the Trademark Act, at Section 7(b), requires us to treat the mark as inherently distinctive. The additional meaning in Registrant’s mark does not

eliminate the resemblance between the marks, and because the Registrant's goods are broadly worded, Registrant is not limited to using its mark only in connection with honey-flavored beverages. Even for the relevant consumers who are unfamiliar with the slang expression and who recognize that at least some of Registrant's goods may contain honey, because of the near visual and aural identity of the dominant portion of HONEYHOLE SANDWICHES and HONEY HOLE, consumers are likely to conclude that the marks emanate from the same source of origin. Applicant has simply incorporated Registrant's mark in its entirety and added to it a merely descriptive term. *See, e.g., Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL for gin and BENGAL LANCER for nonalcoholic club soda, quinine water and ginger ale); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (BARR GROUP for IT training, engineering services and expert witness services and BARR for engineering, consulting and technical consultation services and computer consulting and web site design services); *Motion Picture Ass'n of Am., Inc. v. Respect Sportswear, Inc.*, 83 USPQ2d 1555, 1561 (TTAB 2007) (RATED R SPORTSWEAR for clothing and RATED R for entertainment services); *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services). Thus, the marks are similar in sight, sound, connotation and commercial impression. Both *du Pont* factors one and six favor a finding of likelihood of confusion.

B. SIMILARITIES BETWEEN THE GOODS AND SERVICES

We next consider the second *du Pont* factor regarding the similarity of Applicant's restaurant services and Registrant's alcoholic beverages.

In making our determination under the second *du Pont* factor, we look to the services as identified in the involved application and cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 17893, 1787 (Fed. Cir. 1990); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("This 'relatedness of the goods' factor compares the goods and services in the applicant's application with the goods and services in the opposer's registration."). The goods and services need not be identical, and they obviously are not, to find likelihood of confusion under Section 2(d) of the Trademark Act. Rather, they need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods and services originate from or are associated with the same source. *See On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Opus One Inc.*, 60 USPQ2d 1812, 1814-5 (TTAB 2001); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988).

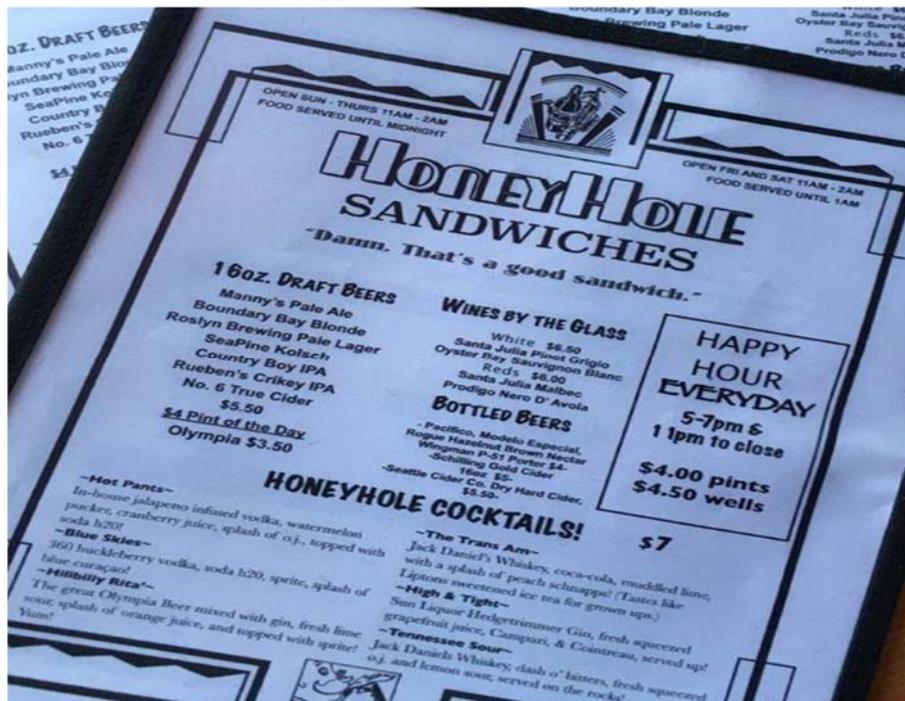
In analyzing the relatedness of restaurant services and food items, we keep in mind the "something more" requirement that is imposed by the Federal Circuit. When determining the relatedness of one party's food provision services, *e.g.*, restaurant services, and the food and/or drink products of another party, it has long been held

that the mere fact that a restaurant may offer certain food items or beverages does not by itself mean that the food or drink is related to the restaurant services ; rather, in order “[t]o establish likelihood of confusion a party must show **something more** than that similar or even identical marks are used for food products and for restaurant services.” *Jacobs v. Int’l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) (emphasis added); *see also Opus One*, 60 USPQ2d at 1813 (finding restaurant services related to wine); *cf. In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) (no showing of “something more” sufficient to find likelihood of confusion between beer and restaurant services).

To determine whether confusion is likely to result from use of similar marks for food or beverage items and restaurant services, courts and the Board look for evidence of a “specific commercial relationship between [the goods] and restaurant services” that indicates consumers would be likely to believe an association exists between the specific food or beverage items involved in the proceeding and restaurant services. *Opus One*, 60 USPQ2d at 1813-15. For example, the Board has found the “something more” requirement to be met where an applicant’s mark made clear that its restaurant specialized in registrant’s type of goods. *See In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990) (GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services confusingly similar to GOLDEN GRIDDLE for table syrup); *In re Azteca Restaurant Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items). The Board also found the requirement met where the

registrant's mark was "a very unique, strong mark" and there was a commercial relationship between the goods (mustard) and restaurants. *Mucky Duck*, 6 USPQ2d at 1469 (no evidence of third-party use or registrations of marks containing the expression "Mucky Duck"); see also *Opus One*, 60 USPQ2d at 1813-15 (finding "something more" based on "strong and arbitrary character of registrant's OPUS ONE mark" and the fact that the record showed that registrant's wines were actually sold in applicant's restaurant).

In the case at hand, as discussed above, we find Registrant's mark to be strong for the identified goods, a factor in favor of finding "something more." In addition, Applicant's recitation of services specifically includes "serving ... alcohol," and the menu Applicant submitted as a specimen of use shows that Applicant uses the term HONEYHOLE to identify cocktails sold at its establishment. The following is a copy of the specimen:



As shown, although the individual drinks are identified by other names, the menu's heading for the cocktail section is HONEYHOLE COCKTAILS! Applicant's mark, HONEYHOLE SANDWICHES, and the tag line "Damn. That's a good sandwich." also appear on the specimen, establishing a direct association between the mark and the sale of sandwiches and cocktails. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1060 (TTAB 2017) (finding "something more" for restaurant services and vodka based in part on restaurant's use of the mark in cocktail names); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050-51 (TTAB 2012) (applicant's own website evidence indicated that it was in the business of rendering coffee house services under similar mark, supporting finding of "something more" vis-à-vis cited mark registered for coffee); *cf. Mucky Duck*, 6 USPQ2d at 1469. ("[M]ustard is, as the Examining Attorney has noted, a condiment which is commonly utilized in restaurants by their patrons, ... and we think it is common knowledge that restaurants sometimes market their house specialties, including items such as salad dressings, through retail outlets.").

The Examining Attorney also submitted copies of 45 use-based third-party registrations for marks covering both restaurant services as well as alcoholic beverages, not including beer.<sup>25</sup> One of the registrations includes "sandwiches" and "alcoholic drinks" in the identification of goods.<sup>26</sup> These registrations are probative to the extent that they suggest that the services of Applicant and alcoholic beverages are goods and services that may emanate from a common source. *In re Comexa Ltda.*,

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<sup>25</sup> December 1, 2016 Office Action at 1; April 26, 2017 Office Action at 24-90.

<sup>26</sup> Reg. No. 4778964 for the mark BARCADE, issued July 21, 2015.

60 USPQ2d 1118, 1123 (TTAB 2001) (48 use-based registrations where various entities registered the same marks for sauces on the one hand and restaurant services on the other supported finding of “something more”); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

While evidence of third-party registrations of the same mark for alcoholic beverages on the one hand, and restaurant services on the other, is generally insufficient by itself to show the requisite “something more,” the Examining Attorney has also submitted evidence showing that restaurants offer private-label alcoholic beverages under the same mark as that used for their restaurant services, and news articles discussing the trend in restaurants to offer private label alcoholic beverages. *See Tao Licensing*, 125 USPQ2d at 1061 (use of restaurant mark on private label vodka). For example, an article in the Tampa Tribune, “*Mother’s Restaurant Features Fresh Food That Feels Like Home*,” describes the private wine label offering of this restaurant, which offers sandwiches among its menu items in an “upscale, casual environment.”<sup>27</sup> “Daddy-O,” a self-described “great neighborhood bar, superb restaurant and haven for craft cocktails” advertises “Daddy-O Single Barrel Private Label Reserve Bourbon.”<sup>28</sup> Founding Farmers offers private label wine, rye whisky and gin (“All of our proprietary beverages can be found behind the bar at our restaurants.”);<sup>29</sup> Arnaud’s Restaurant offers “Arnaud’s Four Roses Single Barrel

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<sup>27</sup> Danielle Hauser, *Mother’s Restaurant Features Fresh Food That Feels Like Home*, TAMPA TRIBUNE, November 4, 2016, at 10.

<sup>28</sup> At <http://www.daddyonyc.com>, attached to April 26, 2017 Office Action at 173-4.

<sup>29</sup> At <http://www.wearefoundingfarmers.com>, *id.* at 161.

Bourbon”;<sup>30</sup> and Boss Shepherd’s offers “our own private label whiskey.”<sup>31</sup> The fact that restaurants offer restaurant services and alcoholic beverages under the same mark is probative evidence that the goods and services are sufficiently related. *See Opus One*, 60 USPQ2d at 1815 (finding news articles inform the public that a restaurant may name a wine after itself. “Being aware of that possibility, purchasers are more likely to assume, upon encountering a wine and a restaurant bearing the same mark, that the wine is the restaurant’s private label wine or that some other source connection between the wine and the restaurant exists, and they are less likely to assume that it is a mere coincidence that the restaurant and the wine use the same mark.”).

Finally, evidence of online advertising by companies offering to create private label beverage lines for restaurants supports a “something more” finding. For example: Private labeling services are offered to restaurants by Prestige Imports, LLC (“We also offer a complete high quality and low cost spirit line perfect for any account to private label and sell to any bar, restaurant, nightclub or off premise account.”)<sup>32</sup> and by “Wild Scotsman Whisky” (“Private labeling of Scotch Whisky is great for retailers, restaurant/bars, golf clubs, weddings, business gifts, and whisky societies. This is a serious investment which is not intended for buyers looking for a few bottles.”).<sup>33</sup>

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<sup>30</sup> At <https://arnaudsrestaurant.com>, *id.* at 164.

<sup>31</sup> At <http://boss-shepherds.com>, *id.* at 165.

<sup>32</sup> At <http://www.prestigeimportsllc.com>, *id.* at 158.

<sup>33</sup> At <http://wildscotsman.com>, *id.* at 159.

Applicant argues that it is a specialty sandwich shop that only sells “local beers and alcohol”<sup>34</sup> under the “HONEYHOLE” mark at its restaurant and that even though some restaurants admittedly do sell private label liquor, “no consumer familiar with Applicant’s Honeyhole Sandwiches restaurant would, upon encountering registrant’s goods, believe that a sandwich restaurant would also be selling alcoholic beverages.”<sup>35</sup> Obviously, Applicant’s menu would disabuse any such skeptical consumers. In any event, according to the identification of services Applicant itself chose, it is a “restaurant,” and the fact that it “specializes” in sandwiches does not limit the type of restaurant services it will provide or for which its mark would be entitled to pursuant to the presumptions accorded by Section 7(b) of the Act. According to Applicant, only 1% of all restaurants serve liquor. Even assuming this is an accurate figure,<sup>36</sup> there is nothing in the record to indicate the percentage of restaurants that may be considered “sandwich shops,” or that the restaurants that the Examining Attorney submitted as examples of establishments that offer private label liquor do not also specialize in sandwiches. The fact that the applied-for mark contains the word “SANDWICHES” does not, *per se*, limit the services to the sale of sandwiches.

Based on this record, we find the requisite “something more” showing has been made and that Applicant’s restaurant services, as recited, are sufficiently related to Registrant’s “alcoholic beverages except beers.”

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<sup>34</sup> 10 TTABVUE 5.

<sup>35</sup> *Id.*

<sup>36</sup> We note Applicant’s contradictory statement that “most restaurants serve alcoholic beverages of some kind.” 4 TTABVUE 3 n.1.

Accordingly, this *du Pont* factor strongly favors a finding of likelihood of confusion.

### C. CHANNELS OF TRADE AND CLASSES OF CONSUMERS

Because there are no limitations as to channels of trade or classes of purchasers in the description of goods in either the cited registration or the application,<sup>37</sup> we must presume that Registrant's alcoholic beverages move in all channels of trade normal for such goods and are available to all potential classes of ordinary consumers, as are Applicant's restaurant services. See *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). The ordinary trade and distribution channels for Registrant's alcoholic beverages include restaurants; Applicant operates a restaurant. The evidence of record shows that alcoholic beverages are served at restaurants. Indeed, Applicant sells cocktails at its own restaurants. When the goods and services are unrestricted as to their channels of distribution, it is assumed that such goods and services are sold or offered to all relevant purchasers, including general-public purchasers exercising only ordinary care, and at all price points. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000). As such, the third *du Pont* factor – the similarity or dissimilarity of established, likely to continue trade channels and the classes of consumers – also favors a finding of likelihood of confusion.

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<sup>37</sup> The description of Applicant's restaurant as having a bar, of "specializing in serving proprietary unique sandwiches, local beers and alcohol" or of being "in a vibrant, eclectic environment" does not restrict the normal trade channels through which Applicant provides restaurant services.

### III. SUMMARY

In sum, we find that Registrant's mark HONEY HOLE for "alcoholic beverages except beers" is not so weak that it is not entitled to protection against Applicant's quite similar mark, HONEYHOLE SANDWICHES, which is also dominated by the arbitrary term HONEYHOLE, notwithstanding the presence of the additional term SANDWICHES. The evidence shows there is "something more" to the relatedness of the involved goods and services other than simply the fact that restaurants sell alcoholic beverages. That is, numerous third parties have registered particular marks for both alcoholic beverages and restaurant services; the public has been exposed to the practice of restaurants offering private label liquors at their establishments and, indeed, it is a practice for companies to promote private labeling services for restaurants; and Applicant itself offers cocktails under the HONEYHOLE mark. Accordingly, the requisite "something more" has been established. *See Opus One*, 60 USPQ2d at 1816; *Accelerate*, 101 USPQ2d 2050; *cf. In re H.J. Seiler Co.*, 289 F.2d 674, 129 USPQ 347 (CCPA 1961) (food products and catering services related); *In re Comexa Ltda.*, 60 USPQ2d at 1120 (AMAZON and design for chili sauce and pepper sauce held likely to be confused with AMAZON for restaurant services); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987) (restaurants and sausages related).

In light of the foregoing, we conclude that consumers familiar with Registrant's "alcoholic beverages except beers" sold under the mark HONEY HOLE, upon encountering Applicant's "restaurant with bar specializing in serving proprietary unique sandwiches, local beers and alcohol in a vibrant, eclectic environment" offered

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under its mark HONEYHOLE SANDWICHES, would likely be confused as to the source of the goods and services.

**Decision:** The refusal to register is affirmed.