

This Opinion is not a  
Precedent of the TTAB

Mailed: July 2, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Forage Holdings LLC*

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Serial No. 87561681

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Hadi S. Al-Shathir of Thompson Coburn LLP,  
for Forage Holdings LLC.

J. Brendan Regan, Trademark Examining Attorney, Law Office 113,  
Myriah Habeeb, Managing Attorney.

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Before Zervas, Shaw and Goodman,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Forage Holdings LLC (“Applicant”) seeks registration on the Principal Register of the mark FORAGE KITCHEN, in standard characters, for “restaurant services” in International Class 43.<sup>1</sup> Applicant disclaims the term KITCHEN apart from the mark.

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<sup>1</sup> Application Serial No. 87561681 was filed under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), on August 9, 2017, claiming a date of first use anywhere and in commerce of October 12, 2015.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used with the identified services, so resembles the mark PHORAGE for "bar and restaurant services" in International Class 43,<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal resumed. The case is fully briefed.

### Analysis

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.").

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<sup>2</sup> Registration No. 5543376, issued August 21, 2018.

A. The nature and similarity or dissimilarity of the services, the established, likely-to-continue trade channels and classes of purchasers.

We first consider the similarity of the respective services. Both Applicant's and Registrant's services identify restaurant services. Applicant does not argue that the services are not the same. We find that Applicant's and Registrant's services are in part identical. Registration must be refused if Applicant's mark for any of its identified services is likely to cause confusion with the Registrant's mark for any of its identified services. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015) (“[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods [or services] within a particular class in the application.”).

Moreover, when an applicant's and a registrant's services are identical, we must presume that the channels of trade and classes of purchasers for those services are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of purchasers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). We so presume here, and find that purchasers of restaurant services include members of the general public.

The *du Pont* factors relating to the similarity of the services, the channels of trade and classes of purchasers favor a finding of likelihood of confusion.

B. The number and nature of similar marks for similar services

Before reaching the degree of similarity of the marks, we address Applicant's evidence and argument under the sixth *DuPont* factor, "[t]he number and nature of similar marks in use on similar goods [or services]," *DuPont*, 177 USPQ at 567, as this may impact the scope of protection accorded the cited registration. The Federal Circuit has held that evidence of the extensive registration and use of similar marks by others in the field can be powerful evidence of a mark's weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). The strength of a mark may be assessed based on its conceptual strength arising out of the nature of the mark itself and its commercial strength, derived from the marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010).

Of course, because Registrant's mark is registered, it is presumptively valid and distinctive for the identified services. Trademark Act Sections 7(b) and 33(a), 15 U.S.C. §§ 1057(b) and 1115(a); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007). Nonetheless, we may acknowledge the weakness of a registered mark in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).

The Examining Attorney argues, in part, that "[c]onsumers encountering the term PHORAGE are likely to be immediately struck by the commercial impression of

“forage” staring them in the face[.]”<sup>3</sup> That is, because the marks sound similar, “consumers would at least also understand the FORAGE connotation” in both marks.<sup>4</sup> Applicant, while arguing that the marks differ in commercial impression because “PHO’ is the distinct name of a popular Vietnamese soup,”<sup>5</sup> nevertheless argues that because the Examining Attorney finds that PHORAGE and the FORAGE element of FORAGE KITCHEN are similar, “[t]he Trademark Office must therefore consider evidence of third party uses of FORAGE on similar goods and services, for the purpose of determining scope of protection for the cited mark.”<sup>6</sup> Hence, Applicant argues that “[t]he term ‘FORAGE’ and its close variants are in widespread use in connection with restaurant services, and food and beverage preparation and distribution services and products, thus making the mark PHORAGE weak.”<sup>7</sup>

“Forage” is defined as “the act of foraging” or to “search for provisions.”<sup>8</sup> Similarly, “foraging” is defined as “to wander in search of forage or food.”<sup>9</sup> In support of its position that the cited mark is weak and entitled only to a limited scope of protection,

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<sup>3</sup> Examining Attorney’s Br., 8 TTABVUE 8.

<sup>4</sup> Final Office Action of May 14, 2019, TSDR p. 1.

<sup>5</sup> Applicant’s Br., p. 2, 6 TTABVUE 3; Merriam-webster.com, Applicant’s response to Office Action dated September 25, 2018, TSDR p. 5.

<sup>6</sup> Applicant’s Br., p. 5, 6 TTABVUE 6.

<sup>7</sup> *Id.* at 3, 6 TTABVUE 4.

<sup>8</sup> Merriam-webster.com, Applicant’s response to Office Action dated September 25, 2018, TSDR p. 10.

<sup>9</sup> *Id.*

Applicant introduced printouts from the following internet web pages for restaurants or food service businesses using the term FORAGE in their names.<sup>10</sup>

- **Foragecambridge.com**, describing a restaurant in Cambridge Massachusetts called FORAGE. The website states: “Forage is a neighborhood bistro in Cambridge right outside of Harvard Square. Through partnerships with local farmers, fishermen, and foragers we offer a local, seasonal ingredient-driven menu served in a casual setting.”
- **Foragela.com**, featuring a restaurant called FORAGE with the tag line “visit | eat | connect” and offering lunch and dinner.
- **Forageandlounge.com**, featuring information about the Forage Bistro and Lounge.
- **Foragepublichouse.com**, featuring information about the Forage Public House restaurant in Lakewood Ohio.
- **Freshforage.com**, featuring information about a restaurant called Fresh Forage, featuring foods characterized as “Farm to Table, Fast!”
- **Foragemarket.com**, featuring information about a food establishment called FORAGE selling bagels.
- **Frothandforage.com**, featuring information about a “Coffeehouse and Eatery” called FROTH & FORAGE offering breakfast, lunch and dinner, with food sourced from “Local Farmers.”

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<sup>10</sup> Applicant’s Response to Office Action dated April 24, 2019, TSDR pp. 4-13; Applicant’s request for Reconsideration dated November 30, 2020, TSDR pp. 9-10.

- **Foragersmarket.com**, featuring information about a restaurant called FORAGERS.
- **Foragerbrewery.com**, featuring information about a “scratch Kitchen & Brewery” called the FORAGER BREWERY.
- **Urbanforagewinery.com**, featuring information about a “winery and cider house” called URBAN FORAGE WINERY.
- **Foragedrestaurant.com**, featuring a Denver restaurant called FORAGED offering food and beverages to “EAT DRINK TAKE OUT”.
- **Sokolblosser.com**, featuring information about a “FARM AND FORAGE” food and wine tasting experience. The web site states: “Following our ‘good to the earth’ motto, we source from local purveyors and also forage on our property, often finding mushrooms, nettles, salad greens, and more. Our chef, Travis Bird, creates a 6-course tasting menu to provide a culinary experience you won’t forget.”

Applicant also submitted copies of a number of third-party registrations issued to different entities for FORAGE-formative marks identifying restaurant and food preparation services, as well as for a variety of food products. The following registrations are several of the registrations submitted by Applicant:<sup>11</sup>

<b>Mark</b>	<b>Reg. No.</b>	<b>Relevant Services/Goods</b>
FORAGERS TABLE	4703525	Restaurant services
FRESHFORAGE (in standard characters and stylized)	5756619 and 5751244	Restaurant services

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<sup>11</sup> Applicant’s request for Reconsideration dated November 30, 2020, TSDR pp. 18-21, 25-37, 47-50, 54-56, 60-67, 77-80. All marks issued on the Principal Register unless noted.

Mark	Reg. No.	Relevant Services/Goods
FORAGE SOUTH	5438072	Food preparation services
FARMERS & FORAGERS	4689359	Dried and processed legumes, mushrooms, truffles, fruit, nuts, seeds, peppers, and vegetables
FORAGED & FOUND	5931960	Jellies and jams; pickles; pickled and preserved vegetables
FORAGER	4514448	Granola
FORAGER PROJECT	4582966	Vegetable and fruit beverages; nut-based food beverages
FREE AND FORAGED (Supplemental Register)	5532102	Eggs

In addition, Applicant also submitted internet web pages excerpts regarding the trend of foraging for food. The following examples are representative:<sup>12</sup>

- **Notastelikehome.org/forage-to-table**, featuring information about a business called NO TASTE LIKE HOME offering foraging food tours. The web site states: “Our tours include two ways of enjoying your ‘catch of the day.’ Our foraging and private tours include a brief cooking lesson and tasting, and all tours include a free appetizer with dinner at one of several Asheville restaurants featuring the edibles you met on your tour.”
- **Foragedandfoundedibles.com**, featuring information about a business called FORAGED & FOUND EDIBLES selling foraged foods, such as mushrooms.

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<sup>12</sup> Applicant’s request for Reconsideration dated November 30, 2020, TSDR pp. 5, 7, 101-14.



- **Ice.edu/blog/quick-guide-to-foraging**, featuring a *Quick Guide to Foraging* prepared by the Institute for Culinary Education. The website states: “Foraging has gained popularity in the last decade as the movement for fresh and sustainable ingredients has grown. While many chefs nowadays use suppliers or farmers markets to find the perfect ingredients for their restaurant, foraging can be a great way to bring new ingredients to their kitchens.”
- **Foodtank.com**, featuring an article titled *Chefs are Going Back to their Roots for Local, Sustainable Foraged Foods*. The article highlights twenty-one chefs who serve foraged ingredients, and states:

Chefs around the world are using foraged ingredients to add exciting, fresh, and eco-friendly flavors to their menus. By searching for herbs, fruits, and roots from the wild, they create fresh, flavorful dishes. They also champion sustainable practices, indigenous produce, and a sense of adventure. Ultimately, these foraging chefs bring diners unique experiences closer to nature.

We find that the foregoing evidence establishes that FORAGE-formative marks are both conceptually and commercially weak and, therefore, are entitled to a narrow scope of protection.

Regarding conceptual strength, the fact that FORAGE-formative marks have been registered by different restaurants and food preparation services indicates that FORAGE in this context suggests food that is wild-harvested and fresh. Similarly, the articles discussing the trend of chefs using foraged ingredients demonstrate that the term “forage” is descriptive when used in connection with collecting food in the

wild. The dictionary definition of “forage” further supports the concept that food can be “wild-collected.” Thus, we agree with Applicant that FORAGE-formative marks have conceptual weakness in association with restaurant services. *See Juice Generation*, 115 USPQ2d at 1675 (third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.”) (internal quotation marks omitted). *See also Jack Wolfskin*, 116 USPQ2d at 1136.

Regarding commercial strength, the evidence establishes that it is common for restaurant names to comprise or incorporate FORAGE-formative terms. As noted above, these restaurants emphasize food made from fresh ingredients, sourced locally. The number of third-party marks used in connection with restaurants is “powerful” evidence that consumers encountering marks in the restaurant field have become conditioned to distinguish marks incorporating FORAGE-formative terms based on minute differences including the addition of terms such as “lounge,” “public house,” “brewery,” “market,” etc. *Juice Generation*, 115 USPQ2d at 1674 (extensive third-party use and registration is “powerful on its face”); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565-66 (TTAB 1996) (“Evidence of widespread third-party use, in a particular field, of marks containing a certain shared term is competent to suggest that purchasers have been conditioned to look to other elements of the marks as a means of distinguishing the source of the goods or services in the field.”).

The Examining Attorney discounts Applicant's evidence of third-party use on the grounds that the web page excerpts provide "no indication whether *federally-registered trademark protection*, the primary objective of this or any application, is held or was even sought by the parties."<sup>13</sup> This argument is unpersuasive. Examples of third-party use indicate whether a mark or portion of a mark is commercially weak. In *Juice Generation*, the Court reiterated that evidence of third-party use of similar marks on similar goods (or services) can show that a mark is relatively weak and entitled to a narrow scope of protection. *Juice Generation*, 115 USPQ2d at 1674. The Court went on to say that despite the lack of specifics as to the extent and impact of third-party use, the "fact that a considerable number of third parties use similar marks was shown in uncontradicted testimony." *Id.* See also *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011) (stating internet printouts "on their face, show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein"). Thus, the evidence regarding third-party use of FORAGE-formative marks is relevant regardless of whether registration was sought.

The Examining Attorney also discounts Applicant's use and registration evidence on the ground that much of the evidence relates to food products and other food-related services rather than restaurant services. As noted above, the evidence includes third-party use of and registrations for FORAGE-formative marks for products such as dried fruits and vegetables, jellies and jams, eggs, and the like. In

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<sup>13</sup> Examining Attorney's Br., 8 TTABVUE 6.

the absence of evidence demonstrating how consumers would encounter these FORMATIVE-branded goods in the restaurant context, we have not considered them. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration).

Nevertheless, because the majority of the evidence shows that consumers have been exposed to numerous FORAGE-formative marks used in association with restaurants, we find that the minute differences between these marks are sufficient to distinguish them. *See Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). (“The purpose of [an applicant] introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different such marks on the bases of minute distinctions.”). Accordingly, the sixth *du Pont* factor concerning the strength (or in this case, the weakness of the term FORAGE) supports a finding that confusion is unlikely with regard to the cited registration for the mark PHORAGE for restaurant services.

C. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

Next, we consider the similarity or dissimilarity of the marks. In comparing the marks we must consider their appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. The emphasis of our analysis must be on

the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Although we consider the mark as a whole, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Moreover, “when the goods [or services] at issue are identical, ‘the degree of similarity necessary to support a conclusion of likely confusion declines.’” *Viterra*, 101 USPQ2d at 1912 (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)).

To recap, Applicant’s mark is FORAGE KITCHEN and the cited mark is PHORAGE. Both marks are in standard character form. Applicant argues that “PHORAGE is a coined term that is a play on the trendiness of the Vietnamese soup, PHO. As established in the evidence of record, PHO is ‘all the rage.’”<sup>14</sup> Applicant argues that this difference in meaning is sufficient to distinguish the marks:

“PHO” is the distinct name of a well-known Vietnamese soup, which is not disputed. In view of the PHO element, consumers will see, pronounce and understand PHORAGE to mean something different than simply “forage.” This material difference, combined with the presence of KITCHEN in the FORAGE KITCHEN mark, are sufficient to distinguish the marks, especially when properly viewed in the context of the relevant landscape of uses and registrations of FORAGE.<sup>15</sup>

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<sup>14</sup> Applicant’s Br., p. 14, 6 TTABVUE 15; Applicant’s response to Office Action dated September 25, 2018, TSDR pp. 5-8, 13-19.

<sup>15</sup> Applicant’s Reply Br., p. 4, 9 TTABVUE 5.

The Examining Attorney argues that “consumers are more likely to focus on the dominant portion in applicant’s mark, FORAGE, and because this dominant portion is the phonetic equivalent of the entirety of registrant’s mark, the marks create a similar commercial impression and are therefore confusingly similar.”<sup>16</sup>

We agree with the Examining Attorney that FORAGE and PHORAGE will likely be pronounced the same. Such similarity in sound alone may be sufficient to support a finding that the compared wording is confusingly similar. However, as we found above, FORAGE is weak for restaurant services and consumers are able to distinguish among numerous FORAGE restaurants based solely on the presence of additional wording such as “lounge,” “public house,” “brewery” and “market.” Thus, the fact that FORAGE in FORAGE KITCHEN and PHORAGE may be pronounced the same is not enough to find that the marks are sufficiently similar to support a finding of likely confusion. Rather, given that FORAGE KITCHEN and PHORAGE have different meanings—PHO is the name of a well-known Vietnamese soup and FORAGE means to search for food—we think it likely that consumers would be able to distinguish the marks based on these significantly differing meanings.

Accordingly, we find that the similarity of the marks is a factor that does not weigh in favor of a finding of likelihood of confusion.

D. Registrant’s statements regarding likelihood of confusion

Applicant claims that Registrant has admitted that confusion is unlikely between PHORAGE and FORAGE marks based on statements made during the prosecution

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<sup>16</sup> Examining Attorney’s Br., 8 TTABVUE 9.

of the application underlying the cited registration. We consider this argument under the thirteenth *DuPont* factor which encompasses “[a]ny other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. Applicant notes that

In response to a Section 2(d) refusal citing a prior registration for FORAGE for *restaurant services* in IC 43 (which has since been cancelled), Registrant admitted that PHORAGE is not likely to be confused with FORAGE, because “the appearance, sound connotation and commercial impression of [PHORAGE and FORAGE] render confusion unlikely.”<sup>17</sup>

In addition, Applicant points to a letter of consent between Registrant and the owner of a different pending application for the mark FORAGE, also for restaurant services. The letter of consent states that Registrant “do[es] not believe that there is any confusion between [PHORAGE and FORAGE], and their respective [restaurant] services” due to “the significant differences in the marks themselves” and that “FORAGE and PHORAGE are different and connote different commercial impressions.”<sup>18</sup>

The Examining Attorney maintains that Registrant’s statements are “not relevant, as no such assertions have been made by the registrant with respect to applicant’s mark in the present proceeding.”<sup>19</sup>

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<sup>17</sup> Applicant’s Br., p. 16, 6 TTABVUE 17 (quoting Registrant’s response to an office action refusing registration in application Serial No 87062283), Applicant’s Request for Reconsideration of November 30, 2020, TSDR pp. 144-55.

<sup>18</sup> Applicant’s Br., pp. 16-17, 6 TTABVUE 17-18; Applicant’s Request for Reconsideration of November 30, 2020, TSDR pp. 156-64.

<sup>19</sup> Examining Attorney’s Br., 8 TTABVUE 10.

Clearly, Registrant is not a party to this proceeding and has not admitted that there is no likelihood of confusion between its mark and Applicant's mark. Rather, Registrant's statements are illuminative of shade and tone in the total picture before us. *Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1223 (TTAB 2011) (recognizing that a party's position in a prior proceeding "is not an admission, but may be considered only as illuminative of shade and tone in the total picture"); *Anthony's Pizza & Pasta Int'l Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1281 (TTAB 2009) (finding a party's position in a prior proceeding does not "rise to the level of an admission against interest"). Given our findings on the strength of FORAGE-formative marks and on the differences in commercial impression, we need not consider Registrant's statements. Nevertheless, we note that Registrant's statements are consistent with our findings.

#### E. Conclusion

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) ("[T]he various evidentiary factors may play more or less weighty roles in any particular determination"). Here, although the services are identical and travel in the same trade channels to the same classes of consumers, the term FORAGE is weak when used in connection with restaurant services. The ubiquity of FORAGE in the restaurant industry and the significantly differing commercial impressions, thus outweighs the identity of the services. Accordingly, we



find there is no likelihood of confusion between Applicant's mark, FORAGE KITCHEN, and the mark, PHORAGE, in the cited registration.

***Decision:*** The refusal to register Applicant's mark, FORAGE KITCHEN, under Section 2(d) of the Trademark Act is reversed.