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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Fast Casual Concepts Inc.

Serial No. 88403075

Joshua A. Schaul of Garvey Adam LLP,
for Fast Casual Concepts Inc.

Joanna Scleidorovich, Trademark Examining Attorney, Law Office 128,
Travis Wheatley, Managing Attorney.

Before Bergsman, Kuczma and Goodman,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Fast Casual Concepts Inc. d/b/a The Holy Cow Burgers and Ice Cream
("Applicant") seeks registration on the Principal Register of the following mark:



for “restaurant services” in International Class 43.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with two registered HOLY COW! marks (typed drawing and standard characters) for “bar and restaurant services” in International Classes 42 and 43, owned by the same entity.²

¹ Application Serial No. 88403075 was filed on April 25, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as April 18, 2019. “BURGERS & ICE CREAM” are disclaimed. The description of the mark states: “The mark consists of a black shaded horizontally oriented diamond with rounded corners; set within the diamond design is a single gray line inlay that conforms to the shape of the large diamond design; set within the center of the diamond design is a shaded gray cow head with a yellow halo design on the right horn of the cow head; above the cow head design is the wording ‘THE’ in stylized form and red color; superimposed on the cow head design is the wording ‘HOLY COW BURGERS & ICE CREAM’ in stylized form in white color with gray and black accents; on the left and right side of the ‘HOLY COW’ wording and cow head design are two horizontal shaded gray diamonds.” The colors red, gray, black, white, and yellow are claimed as a feature of the mark.

Page references to the application record refer to the online database pages of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board’s TTABVUE docket system.

² Reg. No. 2216797, renewed. This mark was issued pursuant to Concurrent Use Proceeding No. 1086 and is limited to the areas of Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

The other registration that issued pursuant to the concurrent use proceeding has since been cancelled.

Reg. No. 3141729 is an unrestricted registration and has been renewed.

A mark depicted as a typed drawing is the legal equivalent of a standard character mark. *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1236 n.5 (TTAB 2015) (citing Trademark Manual of Examining Procedure § 807.03(i)). Effective January 1, 2002, restaurant services were reclassified from International Class 42 to International Class 43, under the Nice Agreement.

When the refusal was made final, Applicant appealed and requested reconsideration.³ After the Examining Attorney denied the requests for reconsideration, Applicant filed an appeal. We affirm the refusal to register.

I. Evidentiary Issues

In its reply brief, Applicant requests that the Board take judicial notice of an attached TESS printout of 45 third-party registrations for HOLY COW, or its phonetic equivalent, or composite marks containing HOLY COW, 29 of which are listed as “dead” registrations. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that the record in an application should be complete prior to the filing of the appeal. Therefore, this evidence is untimely. In any event, this evidence would not be appropriate for judicial notice. *See In re Carolina Apparel*, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998) (“The Board does not take judicial notice of third-party registrations, and the mere listing of them is insufficient to make them of record”); and Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 1208.04 (2020). The request is denied.

Applicant also requests that the Board take judicial notice of the specimens in the registration files of the cited registrations. Applicant’s submission of the specimens with its appeal brief is untimely, Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), and the Board does not take judicial notice of the specimens or the file histories of registrations. *In re The Clausen Company*, 222 USPQ 455, 456 n.2 (TTAB 1984). Therefore, the specimens have not been considered.

³ Applicant sought reconsideration on August 30, 2019 and January 23, 2020.

II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *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.”). These and other factors are discussed below.

A. Similarity or Dissimilarity of the Services, Trade Channels and Classes of Consumers

We first consider the second *DuPont* factor. This factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). Our analysis under this factor is based on the identifications of services in the application and the cited registrations. *Id.*;

Stone Lion Capital Partners, LP v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014).

Applicant's services are "restaurant services." Registrant's services are "bar and restaurant services." Applicant's identification of services is identical in part to Registrant's services. This overlap in restaurant services supports a finding of similarity as to Registrant's entire class of services. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (similarity of any item identified in a class supports a finding of confusing similarity as to that entire class).

The classes of consumers of restaurant services are the general public. Because these services are identical in part, and Applicant's and Registrant's Reg. No. 3141729 are unrestricted as to trade channels, we must also presume that these particular services travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers.⁴ *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 consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

This similarity or dissimilarity of the services, channels of trade, and classes of consumers weigh in favor of a finding of likelihood of confusion.

⁴ As to Registrant's geographically restricted Reg. No. 2216797, Applicant is seeking an unrestricted registration, and we must presume that Applicant is marketing and offering its services in Registrant's trading area such that the trade channels overlap for identical services.

B. Strength or Weakness of the Registered Marks

Applicant argues that “the phrase HOLY COW is weak and entitled to a narrow scope of protection” and that use of HOLY COW is “widespread and unfettered.” Applicant’s brief, 7 TTABVUE 9. To show that the cited registered marks are relatively weak and entitled to only a narrow scope of protection, Applicant submitted third-party registration evidence and third-party use evidence.

Third-party registrations are relevant evidence of the inherent or conceptual strength of a mark or term because they are probative of the meaning of HOLY COW. “Third party registrations show the sense in which the word is used in ordinary parlance and may show that a particular term has descriptive significance as applied to certain goods or services.” *See e.g., Institut National Des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992). *See also Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

Applicant submitted three HOLY COW use-based registrations in connection with food and beverages:⁵ Reg. No. 4688446, HOLY COW for coffee; Reg. No. 5263394, HOLY COW ICE CREAM CAFE for ice cream; ice cream sandwiches; ice cream

⁵ Applicant submitted two copies of one of the HOLY COW registrations (Reg. No. 1889418). August 30, 2019 Request for Reconsideration at 29-30. We do not consider registrations issued under Section 44(e) or Section 66(a) because they do not demonstrate exposure of the marks prior to registration through use in commerce and, therefore, have no probative value. *Calypso Tech., Inc. v. Calypso Capital Mgmt., LP*, 100 USPQ2d 1213, 1221 (TTAB 2011); *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509, 1511 (TTAB 2010). As a result, we do not consider the HOLY COW registration that issued under Section 44(e).

sundaes; and Reg. No. 1889418, HOLY COW! for beer. August 30, 2019 Request for Reconsideration at TSDR 24-30. Applicant also submitted six used-based third-party registrations for registered marks that contain either the term HOLY or COW for



food or restaurant services:⁶ Reg. No. 4961286, for fast food restaurants; Reg. No. 5570376, HOLY CRAB for restaurants supplying food and drink; Reg. No. 5272804, HOLY CHICKEN! for restaurant services; Reg. No. 4860793, SERIOUS COW for yogurt; Reg. No. 5109468, WILD COW for coffee shop and restaurant services; and Reg. No. 3977827, THE COMFY COW for restaurant services, namely providing food and beverages; July 30, 2019 Office Action at 47-52, 55, 57, 59, 60.

In its reply brief, Applicant disagrees with the Examining Attorney's position that HOLY COW is not diluted or weak. It appears that Applicant is arguing that the commercial weakness of HOLY COW is shown by its evidence of HOLY COW registrations, referencing the untimely TESS printout submitted with its reply brief, the third-party registration certificates for HOLY COW, and the composite third-party registrations containing either the term HOLY or COW for food and food-

⁶ We do not consider the WOW NO COW registration for food and drinks that issued under Section 66(a). See n.5. Applicant also included lists of third-party registrations resulting from a TESS search, but the Examining Attorney advised Applicant that these searches were insufficient to make the registrations of record. August 19, 2019 Office Action at TSDR 1.

related goods and services.⁷ Applicant's reply brief, 11 TTABVUE 3-4. As we already indicated, the list of TESS registrations is untimely, and will not be considered. In any event, third-party registrations are not evidence of marketplace use but are only evidence of adoption for use. *In re Ayrodev Processes Ltd.*, 179 USPQ 639, 640 (TTAB 1973). *See also AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 128, 129 (CCPA 1973) ("The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them[]").

As to the third-party registration evidence that is of record, the use-based registrations are not of a significant number to show conceptual weakness of HOLY COW or the separate terms HOLY or COW. *Compare In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 F. App'x (Fed. Cir. 2019) (four third-party registrations held less significant as to conceptual weakness) *with Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030 (TTAB 2016) (eight third-party ROSE formative registrations coupled with evidence of extensive use of ROSE and ROSE formative marks found relevant evidence of weakness of marks comprising in whole or in part ROSE for senior living services). Therefore, we cannot conclude based on the third-party registration evidence that HOLY COW carries a suggestive or descriptive connotation in the food and beverage industry or in the restaurant industry. As to the third-party registrations for marks that contain HOLY or COW, they convey different commercial impressions than the cited marks.

⁷ Applicant also references the eight uses of HOLY COW, discussed below.



“Evidence of third-party use of similar marks on similar [services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005). In determining the degree of weakness, if any, of the shared term HOLY COW “we must ‘adequately account for the apparent force of [third-party use and registration] evidence,’ regardless of whether ‘specifics’ pertaining to the extent and impact of such use[s] have been proven.” *In re Inn at St. John’s, LLC*, 126 USPQ2d at 1746. “[E]xtensive evidence of third-party registration and use is ‘powerful on its face,’ even where the specific extent and impact of the usage has not been established.” *Jack Wolfskin*, 116 USPQ2d at 1136 (citing *Juice Generation*, 115 USPQ2d at 1674).

Although Applicant refers to *In re Broadway Chicken*, 38 USPQ2d 1559 (TTAB 1996) as supportive of its position, Applicant’s brief, 7 TTABVUE 13, the evidence of seven uses of marks incorporating the term HOLY COW/WHOLLY COW is not of a caliber similar to the record in *Broadway Chicken*, where the applicant provided evidence of hundreds of restaurants and eating establishments offering services using a trademark or a trade name containing the term BROADWAY. The third-party use evidence also “reflects a more modest amount of evidence than that found convincing in *Jack Wolfskin* and *Juice Generation* wherein ‘a considerable number of third parties’ use [of] similar marks was shown.” *In re FabFitFun*, 127 USPQ2d 1670, 1674 (TTAB 2018) (quoting *Juice Generation*, 115 USPQ2d at 1674). There also are fewer third-party uses here than in *FabFitFun*, where ten uses of SMOKIN’ HOT were

found supportive of the conclusion that the SMOKIN' HOT component of the cited mark was "somewhat weak." *Id.*

Nonetheless, we find that Applicant's use evidence shows that HOLY COW in Applicant's and Registrant's marks is somewhat weak in connection with restaurant services and that some consumers have been exposed to its use in connection with restaurant services. *See Juice Generation*, 115 USPQ2d at 1673 n.1 (third-party marks beginning with the words "peace" and "love" (e.g., PEACE LOVE AND PIZZA, PEACE LOVE & BARBECUE, PEACE LOVE AND HOT DOGS) showed weakness of opposer's marks incorporating the phrase PEACE & LOVE); *FabFitFun*, 127 USPQ2d at 1675 (finding that the "relative weakness of the component term SMOKIN' HOT common to both marks weighs somewhat in favor of a finding of no likelihood of confusion"). However, HOLY COW is not so weak that it is entitled to only a narrow scope of protection. The sixth *DuPont* factor weighs only slightly in favor of a finding of no likelihood of confusion.

C. Similarity or Dissimilarity of the Marks

We next turn to the first *DuPont* factor, which requires us to determine the similarity or dissimilarity of the marks when viewed in their entirety in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imps.* 73 USPQ2d at 1691. The test, under the first *DuPont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is

likely to result. *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007)). Finally, when the services are identical, as we have in this case, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).



Applicant's mark is (with Burgers & Ice Cream disclaimed) and Registrant's marks are HOLY COW! (typed drawing and standard characters).

Applicant disagrees with the Examining Attorney's position that the marks are confusingly similar. Applicant's brief, 7 TTABVUE 13-19; Examining Attorney's brief, 9 TTABVUE 4-10, 12-15. Applicant argues that the marks are visually and audibly distinct because its mark contains a design and additional wording while Registrant's marks contain an exclamation point. Applicant's brief, 7 TTABVUE 15-17.

There are some clear dissimilarities in appearance and sound between the marks due to the additional wording and design in Applicant's mark and the exclamation

point in Registrant's marks, but there are also similarities in appearance and sound due to the shared term HOLY COW. Although we must consider a mark in its entirety, one feature may be recognized as being more significant than other elements. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“[I]n 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, provided the ultimate conclusion rests on consideration of the marks in their entireties.”).

In this case, HOLY COW stands out from the rest of Applicant's mark. It appears in large letters, squarely in the center of the mark, is most prominent of all the literal terms, and is on top of cow design, causing the cow design to visually recede and form part of the background of the mark. In addition, the cow's head and the halo simply reinforce the most prominent wording, HOLY COW. Consumers will perceive the geometric diamond shape that encloses the wording and design elements as a background design or carrier rather than as a separable design element with trademark significance and the two diamond shapes at each side of the cow's head are not significant to the overall commercial impression. *See Guess? Inc. v. Nationwide Time Inc.*, 16 USPQ2d 1804, 1805 (TTAB 1990) (a common, geometric shape, particularly one serving as a carrier or background design element, is not usually considered distinctive).

Moreover, consumers tend to remember words rather than designs in marks because they use the words to refer to or call for the goods or services. Thus,

consumers will recall the words in Applicant's mark more readily than the design. *See In re Viterra Inc.*, 101 USPQ2d at 1911; *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999) ("It is the word portion of the marks which is most likely to be impressed upon a customer's memory as it is used by prospective purchasers when asking for applicant's and registrant's goods."). Therefore, the addition of the design in Applicant's composite mark does not add significantly to the overall commercial impression of the mark. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *4-5 (TTAB 2020) (citing, inter alia, *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) ("This design connotes a crossword puzzle, which reinforces the connotation created by the words of the mark. . . . [I]t serves only to strengthen the impact of the word portion in creating an association with crossword puzzles.")). We find the literal portion of Applicant's mark is the dominant portion.

As to the literal portions of Applicant's and Registrant's marks, we note that the addition of the exclamation point in Registrant's marks is not significant nor is the addition of the definite article "the" in Applicant's mark. *See e.g., In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) ("the" adds no source indicating significance); *In re Samuel Moore & Co.*, 195 USPQ 237, 240 (TTAB 1977) (presence of exclamation point is of no effect in connection with descriptive mark as it remains descriptive). The cited registrations are for HOLY COW! in typed or standard characters, which means they can be displayed in any font style. But for the exclamation point, HOLY COW in Applicant's mark incorporates the registered mark HOLY COW in its entirety. As to the remainder of the literal portion of Applicant's mark, the word

HOLY COW in Applicant's mark also makes a stronger impression than the disclaimed wording BURGERS & ICE CREAM which appears in much smaller lettering than does the wording HOLY COW.

While Applicant argues that it is irrelevant that BURGERS & ICE CREAM are disclaimed for purposes of comparing the marks, Applicant's brief, 7 TTABVUE 18-19, it is not the disclaimer itself but the underlying reason for it that influences consumer perception. The descriptive or generic nature of a term renders it less important in the comparison of marks because consumers would be unlikely to focus on it to distinguish source. *Nat'l Data*, 224 USPQ at 751-752. So while we do not ignore BURGERS & ICE CREAM in the analysis, the non-source identifying nature of these words and the disclaimer "constitute rational reasons for giving those terms less weight in the analysis." *Detroit Athletic Co.*, 128 USPQ2d at 1049. In this case, the additional disclaimed terms BURGERS and ICE CREAM merely describe specialties of the restaurant and do not serve as indicators of source.

Applicant also argues that the marks have different connotations and commercial impressions and that the exclamation HOLY COW! in Registrant's marks is a reference to a phrase used by a famous baseball announcer Harry Caray and is "synonymous with Harry Caray from the title of his books [t]o the name of a series of sodas." Applicant's brief, 7 TTABVUE 17. Applicant also argues that Registrant's restaurants are located in Chicago such that HOLY COW! would have an "obvious connection, meaning and commercial impression of Harry Caray and his "Holy Cow!" signature phrase" when used with those services. Applicant's brief, 7 TTABVUE 17-

18. As a result, Applicant submits that Registrant's marks "are inextricably connected to the famous Harry Caray." Applicant's reply brief, 11 TTABVUE 15. As to its mark, Applicant submits that the connotation is that of a religious (holy) icon, a cow. Applicant's brief, 7 TTABVUE 18. Applicant's reply brief, 11 TTABVUE 15.

However, this argument is not persuasive because we must compare the marks and services as they appear in the application and cited registration without extrinsic evidence as to actual use in the marketplace. *In re Aquitaine Wines USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB2018). Consumers of Applicant's and Registrant's services may simply take the ordinary meaning of the interjection HOLY COW⁹ from both marks but they may also attribute the "holy cow, religious icon" connotation suggested by Applicant as the meaning. Given the identical services, and usage of the identical term HOLY COW in each mark, many consumers will give the term HOLY COW the same meaning in both marks.

In this case, the inclusion of HOLY COW in Registrant's and Applicant's marks underscores the similarity between the marks. Therefore, the commercial impressions for Applicant's and Registrant's marks would be very similar, even with the additional descriptive terms BURGERS & ICE CREAM in Applicant's mark. *See e.g., Clinton Detergent Co. v. Procter & Gamble Co.*, 302 F.2d 745, 133 USPQ 520, 522-23 (CCPA 1962) (where the added word simply describes a use for the product

⁹ HOLY COW is "used as an interjection to express surprise or excitement." We take judicial notice of this definition. The Board may take judicial notice of dictionary definitions in online dictionaries that exist in printed format. *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018). Merriam-Webster Dictionary, [merriam-webster.com https://www.merriam-webster.com/dictionary/holy%20cow](https://www.merriam-webster.com/dictionary/holy%20cow) (accessed September 23, 2020).

(JOY vs. CARJOY detergent) it did not avoid confusion); *Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (addition of suggestive or descriptive words or other matter is generally insufficient to avoid a likelihood of confusion as to source where entirety of arbitrary mark of another incorporated into composite mark). *See also In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (applicant's mark ML is similar to registrant's mark ML MARK LEES).

We find this *DuPont* factor weighs in favor of a finding of likelihood of confusion.

D. Conditions of Sale

Applicant argues that consumers of restaurant services are sophisticated and can distinguish between the marks. Applicant's brief, 7 TTABVUE 19-20. Applicant references the previously discussed 41 pairs of similar third-party registered marks covering restaurant services owned by different registrants as evidence to support this argument. However, this evidence does not establish the degree of care in purchasing decisions by customers of Applicant's or Registrant's services, and Applicant has not otherwise introduced any evidence that the normal purchasers of restaurant services are especially sophisticated or careful in making their purchasing decisions. Here, neither the application nor the registrations limit the restaurant services in question in a way that would suggest that the services are particularly expensive or are otherwise limited to a knowledgeable or sophisticated clientele. We conclude that both Applicant's and Registrant's services are rendered to the general public and could include less expensive offerings. This *DuPont* factor is neutral.

E. Conclusion

On balance, having carefully considered all of the arguments and evidence of record, and all relevant *DuPont* factors, we find that the marks, taken in their entirety, are similar, Applicant's identified services are identical in part to those identified in the cited registrations and would travel through the same channels of trade, and that the evidence of third-party use does not sufficiently outweigh the other *DuPont* factors. We find that there is a likelihood of confusion under Section 2(d).



Decision: The Section 2(d) refusal to register Applicant's mark is affirmed.