

This Opinion Is Not a  
Precedent of the TTAB

Mailed: April 11, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Juice Generation, Inc.*  
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Serial No. 87376011  
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Nigamnarayan Acharya of Lewis Brisbois Bisgaard & Smith LLP,  
for Juice Generation, Inc.

Kyle Ingram, Trademark Examining Attorney, Law Office 125,  
Heather Biddulph, Managing Attorney.

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Before Zervas, Bergsman and Hightower, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Juice Generation, Inc. (Applicant) filed an application on the Principal Register to register the mark SUPA DUPA REWARDS (in standard character format) for the goods and services listed below:

Smoothies; Non-alcoholic beverages containing fruit juices;  
Vegetable-fruit juices, in Class 32;

Arranging and conducting incentive reward programs to promote the sale of prepared food, smoothies, restaurant and cafe services; providing an incentive rewards programs for customers through the issuance and processing of customer loyalty points and credits and loyalty cards for the purchase of goods and services; promoting the sale of

goods and services to others through the administration of an incentive rewards program enabling participants to obtain discounts and complimentary goods and services through membership, all of the foregoing in the field of restaurant services; Online ordering services in the field of restaurant take-out and delivery; retail store services featuring food and drink, in Class 35; and

Café and restaurant services; Juice bar services, in Class 43.<sup>1</sup>

Applicant disclaimed the exclusive right to use the word “Rewards.”

Although Applicant did not claim ownership of any prior registrations when it filed its application, during the prosecution of its application, Applicant submitted a copy of its Registration No. 4382789 for the mark SUPA DUPA GREENS (in standard character format) for “juice bar services,” in Class 43.<sup>2</sup> Applicant disclaimed the exclusive right to use the word “Greens.”

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark SUPER DUPER (in standard character format) for the goods listed below as to be likely to cause confusion.

Beauty beverages, namely, fruit juices and energy drinks containing nutritional supplements; Coconut-based

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<sup>1</sup> Serial No. 87376011, filed on March 17, 2017.

The filing basis for the goods in Class 32 and services in Class 35 is Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use anywhere and in commerce on March 1, 2017 for the goods and services in both classes.

The filing basis for the services in Class 43 is Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s claim of a bona fide intent to use the mark in commerce.

<sup>2</sup> December 20, 2017 Response to Office Action (TSDR 34). Citations to the examination record refer to the USPTO’s online Trademark Status and Document Retrieval System (TSDR) by page number retrieved in the downloadable .pdf format.

Applicant mark SUPA DUPA GREENS registered August 13, 2013.

beverages; Drinking waters; Energy drinks; Fruit-based beverages; Prepared entrees consisting of fruit drinks and fruit juices, fruit-based beverages, non-alcoholic beverages containing fruit juices, non-alcoholic fruit extracts used in the preparation of beverages, non-alcoholic fruit juice beverages, vegetable juices, vegetable-fruit juices and smoothies; Smoothies; Soft drinks; Sports drinks; Vegetable juices; Vegetable-fruit juices, in International Class 32.<sup>3</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.

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 likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”) (cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *du Pont* factor that is relevant or for which there is evidence of record. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). “[E]ach case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (internal citations removed). In any

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<sup>3</sup> Registration No. 4415893, registered October 8, 2013.

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.3d 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*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

- I. The strength of Registrant’s mark SUPER DUPER, including the number and nature of similar marks in connection with similar goods and services.

Because Registrant’s SUPER DUPER mark has been registered on the Principal Register, it is entitled to a presumption of validity by Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b). *See Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). Accordingly, even though the term “Super Duper” is defined

as “of the greatest excellence, size, effectiveness, or impressiveness,”<sup>4</sup> and, by definition, is laudatory, we find the mark is highly suggestive.<sup>5</sup>

Applicant submitted three registrations including the term “Super Duper” in connection with related goods and services. The registrations are listed below:

1. Registration No. 4464050 for the mark SUPER DUPER CHICKEN NUGGETS (in standard character format) (“Chicken Nuggets” disclaimed) for “frozen chicken nuggets,” in Class 29;<sup>6</sup>

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<sup>4</sup> MERRIAM-WEBSTER DICTIONARY (December 20, 2017 Response to Office Action, TSDR 12). Applicant submitted the definition from an online dictionary but failed to include the URL or the date the online document was accessed or printed. To properly submit Internet evidence, an applicant must include the URL and access or print date of the Internet evidence. *See In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018) (issued June 7, 2018) (citing *In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) § 710.01(b) (October 2018). Because Applicant submitted the dictionary definition before *I-Coat Co.* was published as a precedential decision and because the Examining Attorney did not object to the evidence and instruct Applicant how to properly submit Internet evidence, we consider the dictionary definition to be of record.

<sup>5</sup> Applicant submitted the list of results from an unidentified search engine for the term “Super Duper Juice,” (December 20, 2017 Response to Office Action (TSDR 14-16)), and from the Google search engine (*id.* at TSDR 21-23). Neither list included the URL or the date the Internet evidence was accessed or printed. *See* the preceding note.

Furthermore, a list of Internet search results generally has little probative value, because such a list does not show the context in which the term is used on the listed web pages. *See In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (deeming Google search results that provided very little context of the use of ASPIRINA to be “of little value in assessing the consumer public perception of the ASPIRINA mark”); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008) (finding truncated Google search results entitled to little probative weight without additional evidence of how the searched term is used).

<sup>6</sup> December 20, 2017 Response to Office Action (TSDR 30).

2. Registration No. 4484826 for the mark SUPER DUPER WEENIE (in standard character format) (“Weenie” disclaimed) for, inter alia, restaurant, catering, and take-out restaurant services, in Class 43;<sup>7</sup> and
3. Registrant’s Registration No. 4382789 for the mark SUPA DUPA GREENS (in standard character format) (“Greens” disclaimed) for “juice bar services,” in Class 43.<sup>8</sup>

Two third-party registrations and Registrant’s registration for SUPA DUPA GREENS are far less in quantity and quality than that in *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1673 n.1 (Fed. Cir. 2015) and *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 n.2 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016).

Finally, Applicant submitted a copy of a webpage from the Recipe of Health website displaying the phrase “Super Duper Healthy for You Smoothie/Juice Recipe”<sup>9</sup> and a webpage from the Conscious Planet website using the phrase “My Super Duper Smoothie & Green Juice Recipes.”<sup>10</sup> Neither of these webpages uses the term “Super Duper” as a trademark; their usage reflects the dictionary definition of the term “Super Duper” as being excellent recipes. This corroborates the finding that Registrant’s mark SUPER DUPER is highly suggestive.

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<sup>7</sup> *Id.* at TSDR 32.

<sup>8</sup> *Id.* at TSDR 34.

<sup>9</sup> *Id.* at TSDR 17.

<sup>10</sup> *Id.* at TSDR 24.

Where, as here, Registrant's mark is highly suggestive and, thus, a weak mark, Applicant's mark may come closer to Registrant's mark without causing a likelihood of confusion. *Juice Generation*, 115 USPQ2d at 1674.

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

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *du Pont*, 177 USPQ at 567. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

In comparing the marks, we are mindful that "[t]he proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *San Fernando Elec. Mfg. Co. v. JFD Elec. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas*

*Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Inasmuch as the goods and services at issue are smoothies, fruit and vegetable juices, fruit bar services and related loyalty and reward programs, the average customer is an ordinary consumer.

Applicant is seeking to register SUPA DUPA REWARDS and Registrant’s mark is SUPER DUPER both in standard character format. While the marks are not identical, Applicant concedes that both marks are “permutations to the term ‘super duper.’”<sup>11</sup>

Applicant disclaimed the exclusive right to use the word “Rewards” because it is merely descriptive when used in connection with Applicant’s Class 35 reward and loyalty programs.<sup>12</sup> It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is

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<sup>11</sup> Applicant’s Brief, p. 4 (8 TTABVUE 5).

<sup>12</sup> June 20, 2017 Office Action (TSDR 5-6); December 20, 2017 Response to Office Action (TSDR 3 and 6).

often “less significant in creating the mark’s commercial impression”). There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat’l Data Corp.*, 224 USPQ at 751; *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012).

Further reinforcing SUPA DUPA as the dominant part of Applicant’s mark SUPA DUPA REWARDS is its position as the lead term; it is a single defined term that appears first in reading and hearing the mark and is likely to be noticed and remembered by consumers so as to play a dominant role in the mark. *See Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (noting that the dominance of BARR in the mark BARR GROUP is reinforced by its location as the first word in the mark); *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”).

SUPA DUPA is a misspelling of SUPER DUPER and is visually similar to SUPER DUPER. Both marks consist of two terms: the first term in both marks begins with the letters S-U-P and the second term in both marks begins with the letters D-U-P.

SUPA DUPA is also phonetically similar to SUPER DUPER. Both of these terms rhyme with one another and the terminal sounds for the terms SUPA and DUPA in Applicant's mark are not particularly different from the terminal sounds in Registrant's mark SUPER DUPER.

SUPA DUPA, as permutation of "Super Duper," and SUPER DUPER both have identical meanings and engender the same commercial impression. As noted above, the term "Super Duper" is defined as "of the greatest excellence, size, effectiveness, or impressiveness."<sup>13</sup> Applicant's mark SUPA DUPA REWARDS means and engenders the commercial impression of excellent or huge rewards and Registrant's mark means and engenders the commercial impression of excellent quality or size. Consumers familiar with Registrant's SUPER DUPER smoothies, fruit juices or vegetable juices may mistakenly believe that SUPA DUPA REWARDS is a new line of products or services associated with SUPER DUPER smoothies, fruit juices or vegetable juices. Naturally, we disagree with Applicant's conclusion that the marks engender different commercial impressions.<sup>14</sup>

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<sup>13</sup> MERRIAM-WEBSTER DICTIONARY (December 20, 2017 Response to Office Action, TSDR 12).

<sup>14</sup> Applicant's Brief, p. 5 (8 TTABVUE 6) (citing *Approved Pharm. Corp. v. P. Leiner Nutritional Prods. Inc.*, 5 USPQ2d 1219 (TTAB 1987)). However, as noted by Applicant, *Approved Pharm. Corp.* involved a consent to use and register signed by respondent. That fact carried great weight in the Board's decision in that case. See *In re Four Seasons Hotels Ltd.*, 987 F.2d 1565, 26 USPQ2d 1071, 1072 (Fed. Cir. 1993) (consent agreements should carry great weight in the likelihood of confusion analysis); *Amalgamated Bank of N.Y. v. Amalgamated Trust & Sav. Bank*, 842 F.2d 1270, 6 USPQ2d 1305, 1308 (Fed. Cir. 1988)

We find that SUPA DUPA REWARDS is similar to SUPER DUPER in terms of appearance, sound, connotation and commercial impression.

III. The similarity or dissimilarity and nature of the goods and services and established, likely-to-continue channels of trade.

The Examining Attorney submitted the evidence listed below to show that the goods and services are related:<sup>15</sup>

1. Smoothie King website (smoothieking.com) advertising juice bar services, rewards program and smoothies;<sup>16</sup>
2. Maui Wowi website (mauiwowie.com) advertising juice bar services and smoothies;<sup>17</sup>
3. Organic Avenue website (organicavenue.com) advertising a stylized OA mark for fruit and vegetable drinks and online ordering services in the field of restaurant take-out and delivery restaurant;<sup>18</sup>

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(“The TTAB’s reliance on its own views regarding the banking industry, rather than the views of the parties in question, contravenes the scope and intent of this court’s precedent in *DuPont* and *Bongrain*. In fact, the motions and agreement filed indicated the contrary to the board’s opinion.”); *du Pont*, 177 USPQ at 568 (“[W]hen those most familiar with use in the marketplace and most interested in precluding confusion enter agreements designed to avoid it, the scales of evidence are clearly tilted. It is at least difficult to maintain a subjective view that confusion will occur when those directly concerned say it won’t.”).

<sup>15</sup> Neither the Robeks website (robeks.com), nor the Red Mango website (redmango.com) show the same mark used for juice bar services or rewards programs and for smoothies or fruit or vegetable juices. *See* June 20, 2017 Office Action (TSDR 15 and 20 and 28). In other words, neither the Robeks website nor the Red Mango website showed use of ROBEKS or RED MANGO to identify beverages.

<sup>16</sup> June 20, 2017 Office Action (TSDR 22-25).

<sup>17</sup> *Id.* at TSDR 26.

<sup>18</sup> January 19, 2018 Office Action (TSDR 11-34).

4. Juice Press website (juicepress.com) advertising JUICE PRESS fruit and vegetable juices, retail stores, and catering services;<sup>19</sup>
5. Juice It Up website (juiceitup.com) advertising juice bar services, rewards programs, and smoothies and fruit and vegetable juices;<sup>20</sup> and
6. Nekter Juice Bar website (nekterjuicebar.com) advertising its “loyalty” program, juice bar services, and fruit and vegetable juices.<sup>21</sup>

A. Class 32

Applicant is seeking to register SUPA DUPA REWARDS for “Smoothies; Non-alcoholic beverages containing fruit juices; Vegetable-fruit juices.” The cited mark, SUPER DUPER, is registered for, inter alia, smoothies, non-alcoholic beverages containing fruit juices, and vegetable-fruit juices. Accordingly, the goods are in part identical. Under this *du Pont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each and every product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *see also In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d*, 123 USPQ2d 1744 (Fed. Cir. 2017).

Because the goods described in the application and Registrant’s registration are in part identical, we presume that the channels of trade and classes of purchasers are

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<sup>19</sup> *Id.* at TSDR 35-43.

<sup>20</sup> *Id.* at TSDR 44-48.

<sup>21</sup> *Id.* at TSDR 49-59.

the same. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1745 (TTAB 2018) (“Because the services described in the application and the cited registration are identical, we presume that the channels of trade and classes of purchasers are the same.”); *Viterra*, 101 USPQ2d at 1908 (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

B. Class 35.

As noted above, Applicant’s Class 35 description of services include (i) incentive reward or loyalty programs in connection with food, smoothies, restaurant and café services, (ii) “online ordering services in the field of restaurant take-out and delivery,” and (iii) “retail store services featuring food and drink.” Applicant argues that the Examining Attorney is required to satisfy the “something more” requirement because the relatedness of Applicant’s services and Registrant’s beverages is not evident citing *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014).<sup>22</sup> “Something more” is only required in the context of comparing goods versus services where the relationship between the goods and services is obscure or less evident. *See*

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<sup>22</sup> Applicant’s Brief, p. 8 (8 TTABVUE 9).

*id.* at 1087. As explained in TMEP § 1207.01(a)(ii) (“Establishing Relatedness of Goods to Services”):

... when the relatedness of the goods and services is not evident, well known, or generally recognized, “something more” than the mere fact that the goods and services are used together must be shown. *In re St. Helena Hosp.*, 774 F.3d at 754, 113 USPQ2d at 1087 (finding that substantial evidence did not support relatedness of hospital-based residential weight and lifestyle program and printed materials dealing with physical activity and fitness). Therefore, when comparing services such as “restaurant services” with less apparently related goods such as “beer,” or “cooking classes” with “kitchen towels,” “something more”—beyond the fact that the goods are used in the provision of the services—must be shown to indicate that consumers would understand such services and goods to emanate from the same source.

However, because the Federal Circuit has held that the requirement that “something more” be shown to establish the relatedness of food and restaurant services for purposes of demonstrating a likelihood of confusion, *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003), it stands to reason that the USPTO must show “something more” to establish the relatedness between smoothies, fruit juices, or vegetable juices and retail store services featuring food and drink.

In *Coors Brewing*, the Federal Circuit explained why more evidence than just showing restaurants sell beer is required to prove that those goods and services are related:

It is not unusual for restaurants to be identified with particular food or beverage items that are produced by the same entity that provides the restaurant services or are sold by the same entity under a private label. Thus, for example, some restaurants sell their own private label ice

cream, while others sell their own private label coffee. But that does not mean that any time a brand of ice cream or coffee has a trademark that is similar to the registered trademark of some restaurant, consumers are likely to assume that the coffee or ice cream is associated with that restaurant. The *Jacobs* case [*Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641 (CCPA 1982)] stands for the contrary proposition, and in light of the very large number of restaurants in this country and the great variety in the names associated with those restaurants, the potential consequences of adopting such a principle would be to limit dramatically the number of marks that could be used by producers of foods and beverages.

*Coors Brewing*, 68 USPQ2d at 1063. In other words, there is no per se rule that certain goods and services are related. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993) (no per se rule about confusion, where similar marks are used in connection with restaurant services and food products).

The Federal Circuit recognizes that the diversity and expansion of businesses in a modern economy is not, in and of itself, sufficient to support an inference that purchasers are apt to believe that disparate products or services emanate from the same source. *See also In re American Olean Tile Co.*, 1 USPQ2d 1823, 1826 (TTAB 1986). Taking the Examining Attorney's position to its logical extreme, not only would a senior user of a mark for juice bars have prior rights for that mark for smoothies, fruit juices or vegetable juices, but the senior user of a mark for juice bars could have prior rights for that mark for other food, beverages and condiments (*e.g.*, wine or spirits, salsa or mustard, and chips or desserts, *etc.*) and a variety of broadly described promotional items (*e.g.*, clothing, glassware, toys, jewelry, sunglasses, paper products, *etc.*).

The Board has found the “something more” requirement to be met under the following circumstances:

1. 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 Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) (AZTECA MEXICAN RESTAURANT for restaurant services confusingly similar to AZTECA for Mexican food items);
2. The record showed that registrant’s wines were actually sold in applicant’s restaurant. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) (“the record in this case reveals that registrant’s OPUS ONE wine is offered and served by applicant at its OPUS ONE restaurant”); and
3. Registrant’s mark was found to be “a very unique, strong mark.” *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988) (“the Examining Attorney has indicated that he has been unable to find, in the records of the Patent and Trademark Office, any registration, other than the cited registration, for a mark containing the expression ‘Mucky Duck,’” nor has applicant offered any evidence of third-party use of marks containing the expression).

The Examining Attorney has failed to meet the “something more” standard. First, Registrant’s mark SUPER DUPER is not “a very unique, strong mark.” As discussed above, it is highly suggestive.

Second, the record does not show that Registrant’s smoothies, fruit juices, vegetable juices, or other beverages are sold in Applicant’s retail stores. The Examining Attorney misapplied *Opus One* where the record showed that applicant’s OPUS ONE restaurant sold the registrant’s OPUS ONE wine.<sup>23</sup> 60 USPQ2d at 1815. In this appeal, while Applicant seeks to register its mark for, inter alia, “retail store services featuring food and drink,” there is no evidence to show that Applicant’s businesses sell Registrant’s smoothies, fruit juices or vegetable juices. In fact, the evidence does not show that smoothies, fruit juices or vegetable juices are sold anywhere other than by the company that makes them.

Finally, Applicant’s mark SUPA DUPA REWARDS does not make clear that any of the activities comprising its description of services specialize in Registrant’s smoothies, fruit juices, vegetable juices, or other beverages.

Nevertheless, the third-party use of the same mark used in connection with smoothies, fruit or vegetable juices and rewards programs promoting the sale of smoothies or fruit or vegetable juices, online ordering services, and retail store services featuring food and drink is sufficient to show these goods and services are offered in the same channels of trade to the same classes of consumers.

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<sup>23</sup> 10 TTABVUE 13.

C. Class 43.

Applicant's description of services in Class 43 includes café, restaurant, and juice bar services. For same reasons that the Examining Attorney failed to satisfy the "something more" standard for Applicant's Class 35 services, the Examining Attorney has failed to satisfy the "something more" standard for Applicant's Class 43 services.

The Examining Attorney asserts the record shows that "it is common practice for entities which provide applicant's Class 43 café, restaurant, and juice bar services to also produce, under the same mark, the juices as part of the rendering of Class 43 services. ... These juices are regularly provided for purchase by the public outside of the context of café, restaurant, and juice bar services,"<sup>24</sup> thus, meeting the "something more" requirement. However, the record simply does not support the Examining Attorney's contention that the smoothies, fruit juices or vegetable juices made by a company rendering café, restaurant, or juice bar services are available at third-party locations.

Nevertheless, the third-party use of the same mark used in connection with smoothies, fruit or vegetable juices and café, restaurant, or juice bar services is sufficient to show the beverages and services are offered in the same channels of trade to the same classes of consumers.

IV. Other established facts probative of the effect of use.

As indicated above, Applicant is the owner of Registration No. 4382789 for the mark SUPA DUPA GREENS (in standard character format) for "juice bar services,"

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<sup>24</sup> 10 TTABVUE 14.

in Class 43. Because SUPA DUPA GREENS was registered on August 13, 2013, it is not subject to cancellation on the ground of likelihood of confusion. Although Applicant does not contend that its SUPA DUPA GREENS registration has any affect in this appeal, we must analyze whether the coexistence of Applicant's existing registration for SUPA DUPA GREENS with the cited registration for over five years affects the registrability of Applicant's mark SUPA DUPA REWARDS. *See In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1400 (TTAB 2012) (finding that the coexistence of applicant's existing registration with the cited registration for over five years, when applicant's applied-for mark is substantially similar to its existing registered mark, both for identical goods, outweighed the other factors in the likelihood of confusion analysis).

The Class 43 identification of services in the application at issue is "café and restaurant services; juice bar services." Because café and restaurant services are broader than juice bar services, the services in the application exceed the scope of the existing registration. Because the facts in this application and the application underlying the existing registration are different, the issuance of the prior registration does not require the approval of a second registration. Thus, Applicant's prior registration does not assist Applicant in establishing that there is no likelihood of confusion. *See In re USA Warriors Hockey Program, Inc.*, 122 USPQ2d 1790 (TTAB 2017) (substantially similar mark for identical services but the existing registration was less than five years old); *cf. In re Am. Sail Training Ass'n*, 230 USPQ 879 (TTAB 1986) (applicant not required to disclaim the exclusive right to use "Tall Ships" in the

mark RETURN OF THE TALL SHIPS where applicant owned a registration for TALL SHIPS for identical services). The 13<sup>th</sup> *du Pont* factor is neutral.

V. Analyzing the factors.

A. Class 32.

Because the marks are similar, the goods are identical and are presumed to be in the same channels or trade and offered to the same classes of consumers, we find that Applicant's mark SUPA DUPA REWARDS for "smoothies; non-alcoholic beverages containing fruit juices; vegetable-fruit juices" is likely to cause confusion with the registered mark SUPER DUPER for, inter alia, non-alcoholic beverages containing fruit juices, smoothies, and vegetable-fruit juices.

B. Classes 35 and 43.

Despite the similarities of the marks and the fact that products and services at issue are offered in the same channels of trade to the same classes of consumers, because Registrant's mark SUPER DUPER is highly suggestive and because the USPTO failed to prove the goods and services are related, we find that Applicant's mark SUPA DUPA REWARDS for, inter alia, "arranging and conducting incentive reward programs to promote the sale of prepared food, smoothies, restaurant and cafe services," "online ordering services in the field of restaurant take-out and delivery; retail store services featuring food and drink," and "café and restaurant services; juice bar services" is not likely to cause confusion with the registered mark SUPER DUPER for, inter alia, non-alcoholic beverages containing fruit juices, smoothies, vegetable-fruit juices, fruit-based beverages, and vegetable juices. Although the goods

and services may be offered in the same channels of trade and offered to the same consumers, that does not necessarily establish that consumers will perceive Registrant's beverages and Applicant's services as emanating from the same source. *See Canada Dry Corp. v. Am. Home Prods. Corp.*, 468 F.2d 207, 175 USPQ 557 (CCPA 1972) (HI-SPOT for detergent is not likely to cause confusion with HI-SPOT for soft drinks despite the fact that both products are sold to the general public in supermarkets, groceries and similar outlets and that both products are purchased by housewives in the normal course of shopping); *Autac Inc. v. Walco Sys. Inc.*, 195 USPQ 11, 15 (TTAB 1977) (AUTAC for thermocouple automatic temperature regulators for brushless wire preheaters is not likely to cause confusion with AUTAC for retractile electric cords despite the fact the products are offered in the same channels of trade to the same classes of consumers).

**Decision:** The refusal to register Applicant's mark SUPA DUPA REWARDS in Class 32 is affirmed.

The refusal to register Applicant's mark SUPA DUPA REWARDS in Classes 35 and 43 is reversed.