Opinion by Adlin, Administrative Trademark Judge:

Kristin A. Harris (“Applicant”) seeks registration of CELIABRATE, in standard characters, for:

- Appliques in the form of decals; Decalcomanias; Decals;
- Food wrappers; Gift bags; Gift boxes; Gift cards;
- Motivational cards; Occasion cards in International Class 16;
- Shirts; T-shirts; Tee shirts in International Class 25;
- Bakery desserts; Bakery goods; Bakery products;
- Brownies; Chocolate candies; Cookies; Macaroons; Sweets in International Class 30; and
Providing a web site featuring information on health and nutrition; Providing a web site featuring medical information; Providing a website featuring content regarding healthy living and lifestyle wellness; Providing a website featuring information concerning alternative health and healing; Providing an on-line computer database featuring information regarding health and nutrition; Providing health information; Providing information on maintaining a healthy lifestyle and losing weight; Providing medical information in International Class 44.¹

The Examining Attorney refused registration on the ground that the specimens submitted in support of Applicant’s Statement of Use do not show use of the mark in commerce, specifically because the mark as shown in the specimens “disagrees” with the mark in the drawing. After the refusal became final, Applicant appealed and Applicant and the Examining Attorney filed briefs.²

The Specimens

Applicant’s April 1, 2013 Statement of Use is supported by the specimens reproduced below:

¹ Application Serial No. 77807042, filed August 18, 2009, based on an intent to use the mark in commerce under Section 1(b) of the Act. Following issuance of a Notice of Allowance, Applicant filed a Statement of Use alleging first use dates of March 10, 2013 for the Class 30 goods and March 30, 2013 for the goods and services in Classes 16, 25 and 44.

² Applicant’s objections to the Examining Attorney’s brief are overruled. While Trademark Rule 2.142(b)(2) requires “an alphabetical index of cited cases,” the required index is for the Board’s convenience, and we do not regard it as being so essential that the failure to comply with the requirement should result in our not considering the brief. To the contrary, not having the brief and benefit of the Examining Attorney’s arguments would impose a burden on the Board. In any event, even if we were to regard the failure to provide an index of cases as a basis for not considering the brief, this would not result in our treating “this appeal as unopposed,” thus treating the lack of an acceptable brief as a withdrawal of the refusal. We would still consider the appeal on the merits. Finally, Applicant’s contention that the Examining Attorney’s brief impermissibly “fails to completely and clearly present each argument” is also not well-taken.
KristAnn's Badge Decal

Price: $2.99
Item Diameter: 1 1/2”

Celebrate™ Inspiration! With our signature badge logo decal! Measuring 1.5” in diameter, these round decals affix to most smooth, hard surfaces using static-cling rather than glue so you can peel them off again and again without leaving a trace. These decals are round with bright blue lettering on a clear background and have static on the back so the color of your surface will show through. Click the display image to the right to see the decal on a white background. Stick them somewhere fun, then peel them off and put them somewhere new.

Perfect for adorning most smart phones, PDAs, e-readers, tablets and laptops with a little reminder that with the right attitude you can celebrate everything!

SOU Specimen No. 1.
KristAnn's Badge T-Shirt

Price: $19.99
Material: 100% Cotton

**Cool Breeze** Line. Made to be comfortable and cool. Cool in 100% cotton and screen printed using the softest inks our shirts are comfy and fun. Whether you're running around town or just lounging at home this tee is sure to become a fast favorite.

Our women's crew neck badge tee from Next Level comes in light pink with light blue print. Supersoft, cut slightly longer than typical to provide full midriff coverage and emblazoned with our signature badge logo, this really is the perfect tee. Available in Small, Medium and Large sizes.

All product colors shown on this website are representative only. Actual colors may vary slightly.

SOU Specimen No. 2.
### Truffles

<table>
<thead>
<tr>
<th>Color</th>
<th>Shape</th>
<th>Packaging</th>
<th>Quantity</th>
<th>Add To Cart</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dark Chocolate</td>
<td>Domes</td>
<td>Gift Box</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

**Dark Chocolate Domes Gift Box**

Price: $8.00  
Package Quantity: 4  
Item Diameter: 1 1/8"  
Item Height: 7/8"

Celebrate™ Bliss! with our divinely decadent truffles. We use only the finest premium chocolate and highest-quality ingredients to hand-craft these ecstatic inducing treats that'll leave you pondering... "How can that be gluten-free?" The secret's in our baked core, which results in a morsel that's both impossibly light and richly satisfying. We offer all of our truffles in two different sizes: Domes and Gems. Truffle Domes are available only in gift boxes; Truffle Gems are available in both gift boxes and samplers. Use the menus above to explore all the flavor, size and packaging options. Try one or try them all. No matter what you choose one things for sure...you're gonna want more!

KristAnn's Truffle Domes are generous treats that are truly indulgent. Measuring a robust 1 1/8" in diameter at their base by 7/8" tall to the top of the crown, these truffles are sure to satiate even the most hard-core chocolate fiend. Always packaged in groups of four in our signature gift boxes, Truffle Domes are an excellent way to tell someone you care... even if that someone is you!

Far from boring, our Dark Chocolate Truffles are anything but bland. 100% chocolate with no other competing flavor, these exquisite confections are uncomplicated in their excellence. Comprised of our signature baked dark chocolate cores ensheathed in a cauldron of our special blend of variously sumptuous dark chocolate, they're one mainstay that's sure to never disappoint.

---

SOU Specimen No. 3.
Celiac Disease

What is celiac disease?
Celiac disease is an autoimmune disorder that involves the body mistaking certain grain proteins as potentially harmful threats, causing the immune system to attack both those proteins and the body’s own tissue. This results in the breakdown of certain cellular structures, particularly within the small intestines. When a person with celiac disease eats or drinks something that contains a triggering protein, such as wheat, barley or rye, their immune system typically reacts by attacking the tissue in the intestines where the protein is present. Since the body is attacking its own tissue, this can cause inflammation of the small intestines and other organs and erosion of the small, hairlike projections inside the intestines called villi. The initial autoimmune response is often accompanied by unpleasant symptoms such as gas, bloating, abdominal pain, nausea and others, which can vary in severity depending on the person and range from becoming noticeable almost immediately to going undetected for an extended period of time. Moreover, the villi are essential to the absorption of nutrients into the bloodstream. Over time as they become damaged and eventually destroyed, the body is hampered in its ability to absorb all the nutrients it needs to remain healthy, which can lead to a host of serious long-term side effects and potentially even death.

Once thought to be a rare childhood disorder, celiac disease is now known to afflict people of all ages and nationalities, including as many as 2 million people or more in the United States alone. Celiac disease is found everywhere in the world and has been confirmed in similar incidence levels in many countries, making it one of the most common human genetic diseases.

Are celiac disease and coeliac disease the same thing?
Yes. The Greek word kóla (or kolika), which roughly translates to “belly” or “abdomen”, is the root of both spellings. “Celiac” is the spelling typically used in the United States while “coeliac” is common in other parts of the world including Europe, New Zealand and Australia. Whichever spelling is used, the condition, symptoms and side-effects being described are the same.

What is gluten sensitivity?
Gluten sensitivity is the name commonly given to a wide range of celiac-like symptoms experienced by people who have tested negative for celiac disease. Although these people do not experience the same autoimmune reaction as those with true celiac disease, they do experience many or all of the same symptoms. The term gluten sensitivity may also be used to describe people who have never been formally tested for celiac disease, but who experience celiac-like symptoms after ingesting triggering proteins and relief from those symptoms when adhering to a gluten-free diet.

In response to the May 4, 2013 Office Action finding that the mark as shown in these specimens disagrees with the mark in the drawing, Applicant submitted additional specimens, explaining that “the specimens originally submitted along with the statement of use do not contain all material visible when viewing my company’s website at www.kristanns.com using an internet browser. In particular, the instances of the CELIABRATE mark standing alone that appear in the upper
middle of each specimen submitted herewith do not appear in those original specimens.” Declaration of Kristin Harris in Support of Applicant’s November 4, 2013 Office Action response (“Harris Dec.”) ¶ 2. The following is a representative example of one of these supplemental specimens:

Supplemental Specimen No. 1.

In addition, Applicant’s November 4, 2013 Office Action response includes supplemental specimens not previously provided, specifically “a page on my company’s website to highlight and explain the mark,” which “has been included as part of my company’s website since it was launched prior to the submission of the
statement of use.” Harris Dec. ¶ 3. These specimens include this “screen capture” (hereafter Supplemental Specimen No. 2):

![Screen Capture](image)

and this “printout” (hereafter Supplemental Specimen No. 3):

![Printout](image)

---

3 Applicant’s November 4, 2013 Office Action response includes additional substitute specimens not reproduced here, and the “SOU Specimen No. ___” and “Supplemental Specimen No. ___” designations used herein are only for purposes of this decision and convenience. These designations are not used in Applicant’s Statement of Use or November 4, 2013 response, and do not reflect the order in which the original or substitute specimens were submitted.
Supplemental Specimen No. 3. As set forth in Supplemental Specimen Nos. 2 and 3, “celiabrate” is highlighted as the name for Applicant’s “philosophy on gluten-free living. Celebrating celiac disease and a gluten-free lifestyle while steadfastly refusing to ever sacrifice flavor, texture or aroma.”

Arguments

The Examining Attorney argues that the original and supplemental specimens include the marks CELIABRATE LOVE!, CELIABRATE LIFE!, CELIABRATE INSPIRATION! and CELIABRATE BLISS!, which are “unitary” expressions, but that CELIABRATE alone, the mark in the drawing, is not being
used as a mark. While CELIABRATE! appears alone as a “tab” on some of the supplemental specimens, next to the “Gluten,” “Celiac Disease” and “Shop” tabs, according to the Examining Attorney the CELIABRATE! tab “merely displays the backstory on what inspired the applicant to pursue creating gluten-free treats and come up with the term ‘Celiabrate’ that she uses in (sic) slogan ‘Celiabrate Life!’,” but is mere advertising and not used as a mark. Examining Attorney’s Appeal Brief at 9-10. The Examining Attorney does not contend that Applicant’s website specimens are unacceptable for any other reason, such as that they do not constitute displays associated with Applicant’s goods and services.

Applicant argues that CELIABRATE is used alone, as a mark, in the specimens, and that where it is used in a “composite” mark, it is separable from the composites’ other elements such as “Life!” and “Bliss.” Applicant stresses that CELIABRATE is inherently distinctive and that the Examining Attorney does not contend otherwise.

**Decision**

The drawing of Applicant’s mark “must be a substantially exact representation of the mark as used on or in connection with the goods and/or services,” as shown by the specimens. Trademark Rule 2.51(b). At the same time, however, because Applicant seeks registration under Section 1, she “has some latitude in selecting the mark [she] wants to register,” and “may seek to register any portion of a composite mark if that portion presents a separate and distinct...

---

4 The Examining Attorney informed Applicant that if she attempted to amend the mark in the drawing to conform to the mark(s) in the specimens, the amendment would constitute a material alteration, and Applicant has not attempted to amend the mark in the drawing.
commercial impression which indicates the source of applicant’s goods or services and distinguishes applicant’s goods or services from those of others.” In re 1175856 Ontario Ltd., 81 USPQ2d 1446, 1448 (TTAB 2006); see also, In re Chemical Dynamics Inc., 839 F.2d 1569, 5 USPQ2d 1828, 1830 (Fed. Cir. 1988) (in context of an attempt to register the “background portion” of a mark, holding that the applicant “must show that the portion sought to be registered creates a separate and distinct commercial impression, which thereby performs the trademark function of identifying the source of the merchandise to consumers”). Indeed, in appropriate cases we “may recognize the right to registration of one part of an owner’s mark consisting of two parts.” In re Servel, Inc., 181 F.2d 192, 85 USPQ 257, 260 (CCPA 1950).

Here, as the Examining Attorney correctly points out, Applicant’s specimens reveal use of CELIABRATE LIFE!, CELIABRATE INSPIRATION!, CELIABRATE LOVE! and CELIABRATE BLISS!, at least at times as phrases. In fact, in several places these phrases appear in their entirety on the same line, in the same font and with the same emphasis, and in other places these entire phrases, rather than their constituent words, are separated from each other, such as on “KristAnn’s Badge Decal” in SOU Specimen No. 1 and “KristAnn’s Badge T Shirt” in SOU Specimen No. 2. In addition, CELIABRATE LIFE! appears as a phrase under “KristAnn’s” at the top of each of Applicant’s SOU Specimens and Supplemental Specimens reproduced herein. However, we agree with Applicant that this does not end the inquiry as to the commercial impression of the term CELIABRATE.
While this is a close case, the specimens of record reveal that CELIABRATE itself presents a separate and distinct commercial impression which identifies the source of Applicant’s goods and services, and distinguishes them from those of others. For example, while the CELIABRATE! tab in Applicant’s Supplemental Specimens does not clearly show use of CELIABRATE alone in connection with Applicant’s goods, it does constitute use of the mark in the drawing in connection with Applicant’s Class 44 services. Indeed, clicking on the CELIABRATE! tab takes users to the “What does Celiabrate mean?” page of Applicant’s website, which provides information on health and nutrition, and the CELIABRATE! tab is next to other tabs which take users to pages providing information on gluten and celiac disease. Applicant’s services include “providing a web site featuring information on health and nutrition” as well as “medical information.” When viewing the information about gluten and celiac disease, consumers are presented with the CELIABRATE! mark in the center of the top of those webpages.5

As for Applicant’s goods, the common thread between Applicant’s specimens for its goods in Classes 16, 25 and 30 is CELIABRATE, the mark in the drawing. In fact, the logo on Applicant’s badge decal and t-shirt includes an outer circle on which CELIABRATE LIFE!, CELIABRATE LOVE! and CELIABRATE BLISS! appear consecutively, and the description of the badge decal begins with

---

5 The exclamation point appearing on the CELIABRATE! tab is insignificant from a trademark perspective and does not change the commercial impression of the CELIABRATE mark. See TMEP § 807.12(a)(iii) (2014) (“Generally, extraneous, non-distinctive punctuation marks that appear on the specimen may be omitted from the drawing, if the matter on the drawing makes an impression separate and apart from the punctuation marks that appear on the specimen.”) and TMEP § 807.14(c) (“Punctuation, such as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark.”).
“Celiabrate™ Inspiration!” and ends with “celiabrate everything!” SOU Specimen Nos. 1 and 2. The packaging for Applicant's chocolate gift box bears the phrase CELIABRATE LIFE!, and the description to the left of the picture of the product on Applicant’s website begins with “Celiabrate™ Bliss!” Because it is used often and consistently, in various ways, in these specimens, CELIABRATE will be perceived as a source identifier. If CELIABRATE was always used with a single specific word or trademark component then Applicant’s source identifier would be more readily perceived as the combination of CELIABRATE with that particular consistently used component, such as CELIABRATE LIFE!. But because Applicant uses the word CELIABRATE consistently and repeatedly throughout the specimens, with and without various additional terms, we find that CELIABRATE alone presents a separate and distinct commercial impression which indicates the source of Applicant’s goods and services. And even if the “Celiabrate!” tab and use of “Celiabrate!” alone at the top of the “What does Celiabrate mean?” page do not constitute use in connection with Applicant’s goods (as opposed to her services), these uses nonetheless support our finding that CELIABRATE alone makes a separate and distinct commercial impression. See generally, In re Raychem Corp., 12 USPQ2d 1399, 1400 (TTAB 1989) (“Such independent significance is in fact supported by applicant’s use of the mark without the part number or generic designation in its advertising materials.”). Indeed, as a coined term, “celiabrate” is more likely to make a commercial impression than the less distinctive terms “life,” “love,” “bliss,” “inspiration” and “everything.”
This commercial impression made by CELIABRATE alone is reinforced by Applicant’s placement of the ™ symbol immediately following CELIABRATE in the descriptions of each of Applicant’s products. “Though not dispositive, the ‘use of the designation ‘TM’ … lends a degree of visual prominence to the term’” CELIABRATE. In re Sones, 590 F.3d 1282, 93 USPQ2d 1118, 1124 (Fed. Cir. 2009) (quoting In re Dell Inc., 71 USPQ2d 1725, 1729 (TTAB 2004)).

Applicant’s declaration provides further support for our finding that CELIABRATE presents a separate and distinct commercial impression. Therein, she states

I routinely receive inquiries from customers who are curious about the CELIABRATE mark. These inquiries began before the launch of my company’s website, and have always focused exclusively on the literal CELIABRATE mark. To date, no customer has ever mentioned any of the additional words or design elements present on the products, product labels and/or website pages when inquiring about or discussing the CELIABRATE mark. In response to my customers’ curiosity and inquiries about the CELIABRATE mark I created a page on my company’s website to highlight and explain the mark ....

Harris Dec. ¶ 3. In an analogous situation, this Board reversed a refusal to register DUMPMASTER alone based on a specimen depicting the mark as DUMPMASTER, stating:

The record shows that applicant has consistently used the term “DUMPMASTER”, per se, in its advertisements to refer to its products; that purchasers and prospective purchasers used that designation alone in making reference to applicant’s product; that purchasers have ordered applicant’s product by the term “DUMPMASTER”, alone; that writers in various trade
journals referred to applicant’s product by the designation “DUMPMASTER”; and that purchasers do in fact recognize “DUMPMASTER” as being a brand of equipment made only by applicant.

*In re Dempster Brothers, Inc.*, 132 USPQ 300 (TTAB 1961)

Finally, in a variety of analogous circumstances, we have allowed owners of a composite mark to register separately one or more of its several elements. See e.g., *In re Servel, Inc.*, 85 USPQ at 257 (reversing refusal to register SERVEL where specimen depicted mark as SERVEL INKLINGS, in part because “Servel’ is a “coined and arbitrary term”); *In re Royal BodyCare, Inc.*, 83 USPQ2d 1564 (TTAB 2007) (reversing refusal to register NANOCEUTICAL, where specimen depicted mark “embedded in the phrase RBC’S NANOCEUTICAL”); *In re Raychem Corp.*, 12 USPQ2d at 1399 (reversing refusal to register TINEL-LOCK for metal rings for attaching a cable shield to an adapter where mark as used on specimens was TRO6AI-TINEL-LOCK-RING); *In re EMCO, Inc.*, 158 USPQ 622 (TTAB 1968) (reversing refusal to register RESPONSER where specimen depicted use of MEYER RESPONSER).

**Decision:** The refusal to register Applicant’s mark because the specimens do not support use of the mark shown in the drawing is reversed.