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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91167151
Party	Defendant Independent Marketing Alliance LP
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FLOWERS BAKERIES BRANDS, INC.,	)	Opposition No. 91167151
Opposer	)	
v.	)	In the Matter of Application Serial No. 78/432642 Mark: COBBLESTONE MARKET
INDEPENDENT MARKETING ALLIANCE LP,	)	
Applicant.	)	Filing Date: December 6, 2005 Published: September 20, 2005

APPLICANT'S TRIAL BRIEF

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Du Pont factors:

(a) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression; 15

(b) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; 24

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(e) The fame of the prior mark; 31

(f) The number and nature of similar marks in use on similar goods; 36

(g) The nature and extent of any actual confusion; 38

(h) The length of time during and conditions under which there as been concurrent use without evidence of actual confusion; 40

(i) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark). 43

(j) The extent to which applicant has a right to exclude others from use of its mark on its goods; 43

(l) The extent of potential confusion, i.e. whether *de minimis* or substantial; 46

(m) Any other established fact probative of the effect of use. 46

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DESCRIPTION OF THE RECORD

In general Applicant, Independent Marketing Alliance, L.P. ("Applicant" or "IMA") agrees with the Description of the Record section of the Trial Brief filed by Flowers Bakeries Brands, Inc.("Opposer" or "Flowers"). IMA also agrees with Flowers that in order to streamline the proceedings and to reduce the cost and expense of extended, repetitive trial deposition testimony, the parties agreed to treat the discovery depositions of the only three witnesses who gave testimony of any kind in this case (namely, Janice Anderson, Vice President of Marketing for Flowers; Robert Planck, President of IMA, and Robert Fontana, Director of Marketing and General Merchandising for IMA) as trial testimony.

Further, in order to streamline consideration of this case, Applicant IMA has adopted Flowers' nomenclature when citing to the testimony of record in this case, also citing to the exhibits attached to such depositions, as follows: (1) "Anderson Dep. Vol. I" (August 17, 2006 discovery deposition of Janice Anderson); (2) "Anderson Dep. Vol. II" (September 18, 2007 trial testimony deposition of Janice Anderson); (3) "Planck Dep. Vol I" (August 22, 2006 discovery deposition of Robert D. Planck); (4) "Planck Dep. Vol II" (September 20, 2007 trial testimony deposition of Robert D. Planck); (5) "Fontana Dep. Vol I" (August 22, 2006 discovery deposition of Robert Fontana); (6) "Fontana Dep. Vol II" (September 20, 2007 trial testimony deposition of Robert Fontana).

IMA would also point out, however, that the exhibits attached to the depositions of Planck and Fontana have also been submitted by IMA under its Notice of Reliance served November 27, 2007. Also, IMA has submitted under that same Notice of Reliance Opposer's Answers to Applicant's First Set of Interrogatories #1,2,3,4,5,6,7,8,910 & 11, which Answers were served July 14, 2006 (Exhibit "D"), and Opposer's Responses to Applicant's Request for Production #5 & 6, which Responses were served July 14, 2006, and which are marked as Exhibit "E" within the Notice of Reliance served November 27, 2007.

ISSUES PRESENTED:

FLOWERS HAS OPPOSED IMA'S
APPLICATION BASED ON TWO THEORIES:

A. Flowers' Claim that IMA Committed Fraud in Filing its Intent to Use Application is Without Merit and Should be Dismissed

B. Flowers' Claim that Flowers' use of its COBBLESTONE MILL Mark in Connection with Bakery Goods is Likely to be Confused with IMA's Use of its COBBLESTONE MARKET Mark in Connection with Deli Meats, Cheeses and other Listed Items In Its Application are Without Merit and Should be Dismissed

FACTUAL BACKGROUND

A. OPPOSER FLOWERS' MARK: COBBLESTONE MILL

IMA does not dispute or challenge Flowers' registration of three different COBBLESTONE MILL marks as identified on page two of Flowers' Trial Brief. For clarification, however, it may be helpful to consider each of the COBBLESTONE MILL marks in the correct chronological order, namely that the first registration was obtained on March 19, 1985 which was a stylistic mark featuring an old fashioned cobblestone style mill building with a mill wheel and the words Cobblestone Mill above the building and wheel; the second registration was obtained on August 6, 1996 of the word mark, COBBLESTONE MILL; and as will become clear from the record, Flowers has switched to a new stylistic mark, best described as the words COBBBLESTONE MILL featured with the mill wheel, but omitting any cobblestones or the old building, which registration was obtained on September 9, 2003.

IMA vigorously disputes, however, the Factual Background section of Flowers' Trial Brief wherein Flowers makes conclusory allegations that (i) sales of product equates to and proves a strong mark and (ii) Ms. Anderson's testimony "Our consumer awareness is very high, and when we do studies, we find that consumers…are familiar with Cobblestone Mill". More specifically, in each instance Ms. Anderson admitted during cross examination that Flowers has no evidence that either of the two suggested propositions are in any manner based in truth or objective evidence, though she continues to believe it. Addressing the issue of whether sales necessarily prove market recognition or the strength of the COBBLESTONE MILL mark, Ms. Anderson testified[1]:

[1] Anderson Dep Vol I, P.58, L22-25, P59, L.15-25, P..60, L 1-25)

Q. Do you know which study would give us the most recent objective documentation to suggest how much awareness the consuming public has of your brand? . . .
A. The most recent research I see on here on this list is 1999, which would be misleading as to the awareness of the brand in 2006. . . .
Q. [A]re you saying what you produced is all you have documented but it is misleading and not reflective of what you believe the truth to be?
A. No, what I'm saying is that the brand has grown from 1995-2006. So it would be a given, if the brand has grown, the awareness has grown.
Q. Or that people just eat more bread. Maybe your percentage of the market hasn't grown, it's just that the overall pie grew, that's a possibility, right?
A. I suppose that's a possibility. . . .
Q. So it's your assumption because sales have grown probably awareness has grown?
A. Absolutely.
Q. Although we don't' have any documented proof of it?
A. That's correct.

Anderson's testimony on this point continues[2]:

Q. [Are] there any documents that you have produced or that you are aware of that show the importance of the Cobblestone Mill brand in the target market, that being the retail consumer, regarding the Cobblestone Mill brand purchase decision?
A. If you're asking if we have done an attitude and awareness study, we have not.
Q. Well, not only that, but any documents that would reflect it, even if it's not a formal study, other than the fact that you have significant sales of Cobblestone Mill – branded products, right?
A. Right.
Q. But there's no documents that tell us why you have –
A. That's correct.
Q. -- right – substantial sales?
A. Correct.
Q. It might be you're the cheapest?
A. It's not, but that's correct.
Q. It might be that you taste the best?
A. Right.
Q. You weren't going to say no on that, right?
A. That's a given.
Q. And it might be because of the brand? It's sort of a combination of reasons, right?
A. Right.
Q. And you really don't know sitting here today why, other than some combination of quality, price –
A. And package.
Q. -- distribution, packaging and branding –
A. Correct.

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[2] Anderson Dep Vol I, P.72,L5-25, P.73,L1-10)

Addressing the second completely unsupported conclusion drawn by Flowers in the Factual Background of its Trial Brief, namely the quotation from Ms. Anderson that studies have shown very high consumer awareness of the COBBLESTONE MILL mark, Ms. Anderson admitted during cross examination[3]:

Q. [After having the Court Reporter read back the relevant portion of your direct testimony conducted by Flowers' lawyers], I gathered that what your testimony … actually stated was: 'Research has proven to us that consumers always recognize the Cobblestone brand.' Is that a fair summation of what you said on the record?
A. That is fair.
Q. Is that in any way proven by any records, documents that you have provided to us during two years of this opposition proceeding?
A. No. . . .
Q. The simple question is this: Are there any documents or are there any studies that in any way support your statement that all – that consumers always recognize the Cobblestone brand?
A. No.
Q. And in fact, that's an untrue statement, isn't it?
A. I don't' believe so.
Q. You think all consumers recognized the Cobblestone brand?
A. No.
Q. And you also know that in fact and in truth there are no studies that in any way support that, right?
A. The studies that we have done support that.
Q. You said research studies. And you haven't produced any of those studies in this proceeding?
A. I have not produced anything.
Q. Do you think that might be something that would be important. Because we've spent a lot of time and effort talking about how well known your brand is, and if there was such a national study or even a local study that was documented that showed 2,000 people were asked what brand do you recognize for bread, and if all of them always recognized the Cobblestone brand, you would know that would be important, right?
A. It was not a study we have ever conducted. Had we conducted that specific study, I could produce that document for you. The studies we have conducted were not – the intent was not to determine the consumer recognition of the brand. I'm simply saying that our experience has been that consumers do recognize the brand.
Q. Ok. So a more truthful statement would have been in the nature of, "We at Flowers think that a lot of consumers recognize the Cobblestone brand"?
A. We at Flowers think that a majority of the consumers recognize the Cobblestone Mill brand.

[3] Anderson Dep II, P.60,L6-25, P.61,18-25, P.62, L1-25

Ms. Anderson's admissions demonstrate the complete lack of any probative evidence supporting the conclusory allegations offered by Flowers via its Trial Brief regarding the widespread market awareness of the COBBLESTONE MILL mark. As a followup, summary of this point, the following testimony by Ms. Anderson may also be helpful[4]:

> Q. And we have already said that there's no study or documentation regarding recognition, fame of the Cobblestone Mill brand, no documented study on that, right?
> A. Correct.

FACTUAL BACKGROUND (continued):

B. Applicant IMA's Intended Use Mark: COBBLESTONE MARKET

Independent Marketing Alliance, L.P. ("IMA"), Applicant herein, is a "facilitator for branding and product development and marketing support for the member owner companies."[5] The "six independent food service distributors[6] [member owners of IMA] are dominant, very large in their marketplace, [and] their combined sales is well over eight billion dollars[7], involving over a thousand salespeople selling to over 80 thousand customers.[8] IMA holds and manages in conjunction with its member owners around 25 different brands protected by federal trademark registration.[9] IMA started actually selling goods under the COBBLESTONE MARKET brand in 2004 and 2005[10], and by the two years preceding the trial testimony of Mr. Planck on September 20, 2007, the IMA member companies had already built an $80 million dollar plus annualized business under the COBBLESTONE MARKET mark.[11]

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[4] Anderson Vol I, P.91, L13-17.
[5] Planck Vol II, P.9, L.17-19
[6] Planck Vol I, P.12, L2-6: The IMA member companies are: Maines Food Service; Reinhart FoodService; Shamrock Foods Company; the Nicholas Company; the IJ Company, the IJ, letters I-J, Company; and Conco, C-O-N-C-O, Food Service.
[7] Planck Vol II, P.9, L.19-22.
[8] Planck Vol II, P.29, L.17-22
[9] Planck Vol II, P.12, L.5-10; those IMA brands and registered trademarks are identified and listed at Planck Exhibit #2, to the Planck Vol 1 Deposition.
[10] Fontana Vol II, P.24, L2-25, P.25, P.26, & P.27, L1-17
[11] Planck Vol II, P.9, L.15-19

IMA's process for developing brands and registering trademarks is best described by the testimony of the Director of Marketing and General Merchandising for IMA, Mr. Robert Fontana as follows[12]:

> "[IMA] is governed by committees set up from our member owners. We at IMA act as facilitators and we let various boards make the decisions that they want to guide their organization. So there is a procurement advisory council made up of senior purchasing people that determine what categories that they would like to pursue under a private brand. Then there is a marketing and advisory council that is made up of senior marketing execs of the company's that create brand positions and fit the products into those brand positions so they work in tandem to develop these brands and determine the needs." [13]

Fontana's testimony continues:[14]

Q. What's the general process for doing that once a category or a group of products has been selected for branding?

A. We determine that there is a need for a branding position and we employ the assistance of an outside ad agency called Newhall Klein and Nehall Klein will create ideation for review by the MAC council for consideration.

. . . .

[O]nce we have a list of potential brand names the ad agency runs them through various trademark searches to make sure those marks are clean on the top line basis and we can pursue a [cut] list of potential names.

. . . .

Generally next we'll refer to our attorneys for further review to make sure those marks are clear. We want to make certain that our marks are clean and clear and we can move forward with a clear conscience."

Attached to the Trial Deposition of Mr. Fontana (September 20, 2007) as Exhibit 8, is an email from Sandy Klein at Newhall Klein, indicating that she ran a trademark search using TESS and NameProtect.com, searching for possible trademarks for the deli meat, cheeses, etc at issue, and searched the names "Oakwood", "Market", "Oakwood Market", "Cobblestone-68 hits, and Corners-503 hits, and Cobblestone Corners – 1 hit", and responses by Shamrock Foods (IMA Member) somewhat upset at the recommendation to move away from Oakwood Market because of potential conflicts.

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[12] Fontana Dep Vol II, P. 11, L1-11(Sept.20, 2007)

[13] Fontana Dep Vol II, P. 11, L1-11(Sept.20, 2007)

[14] Fontana Dep Vol II, P, 11, L16-25, P.12, L1-9 (Sept.20, 2007):

IMA is not suggesting that its search results are dispositive or binding on the issues before this Board. However, IMA feels that it is important in reviewing the evidence and legal issues in this matter to appreciate that IMA does not approach its branding positions haphazardly, and it invests time and money in carefully evaluating potential marks before pursuing such marks through a fairly complex process. To the best knowledge of IMA, Flowers has not alleged bad faith or any attempt to in any manner trade off from the goodwill of Flowers, but they have made various claims, including but not limited to a claim that IMA's Intent To Use Application was filed fraudulently, which is completely without merit and really attempts to confuse the legitimate concerns at issue in this proceeding.

Based on a careful review of the various brand choices, and after running the COBBLESTONE MARKET mark through numerous searches at the ad agency level, through Thompson and Thompson and through evaluation by IMA's counsel, Bartt Thompson of Pagel, Davis & Hill, P.C., and an outside search and independent evaluation performed by John Egbert & Associates [15](all of which is again not binding but suggests a reasonable process for arriving at a legitimate mark for purposes of pursing a brand and registration), IMA filed its Application Serial No. 78/432642 to register the COBBLESTONE MARKET mark on June 4, 2004. As originally filed, the application recited a bona fide intent to use the mark in connection with the following goods:

> Deli meats, cooked deli items, cheese, refrigerated salads, pickles, bagged potato chips, frozen soups and entrees, in Class 29; and
>
> Deli mustard, in Class 30.[16]

Based on discussions with the PTO, IMA's review of its needs with member owners, the Examiner's Amendment, and discussions with counsel, in August of 2005, IMA amended its identification to include "vegetables" in International Class 29 and "sandwiches" in International Class 30. As published on September 30, 2005, IMA's application recited the following goods:

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[15] Planck Dep Vol II, P.10-11, & P.17-19

[16] Planck Dep. Vol I, Exhibit 10.

Deli meats, cooked deli items, namely, soups, and vegetables; cheese, refrigerated salads except macaroni, rice, and pasta salad; pickles; bagged potato chips, frozen soups; frozen entrees, namely, entrees consisting primarily of meat, fish, poultry or vegetables, in Class 29; and

Deli mustard; cooked deli items, namely, sandwiches, in Class 30.[17]

After the Opposition was filed and with the hope and expectation that deletion of sandwiches or any other products in Class 30 might resolve the dispute with Flowers, IMA through its President, Robert Planck, authorized counsel for IMA to attempt to negotiate a deletion of Class 30 items, especially sandwiches, which negotiation and discussions occurred (no formal mediation was ever conducted) during the depositions of Robert Planck and Robert Fontana on August 22, 2006. Mr. Planck and Mr. Fontana as IMA representatives participated in those depositions with the understanding that Flowers was considering a resolution based on deleting sandwiches and all Class 30 goods, and such negotiations were conducted during breaks between the depositions of Planck and Fontana.[18] This was a very confusing process and Flowers' citation to partial excerpts of testimony, taken out of context, should be viewed with that background.

Consistent with the proverbial saying that "no good deed goes unpunished," and while waiting for Flowers to respond to the proposal to eliminate sandwiches and Class 30 from the identification of goods and thereby end the dispute, Flowers instead filed a Motion for Leave with the Board to amend its Notice of Opposition to allege that Applicant had prosecuted the application through fraudulent filings. IMA was and remains surprised and incensed at Flowers' misrepresentations before this Board as to IMA's lack of bona fide intent. IMA has

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[17] Planck Dep. Vol I, Exhibit 11.

[18] Mr. Planck testified during his trial deposition on September 20, 2007 IMA 'did discuss the desire and interest in prepared sandwiches in both our MAC and pack and their conclusion was it was a small category and they didn't have a lot of interest in it so that's why the interest later on subsided and we were willing to make the changes as requested by Flowers." Planck Dep. Vol II, P49, L15-20; "Our intention was to introduce deli mustard, which was in category 30 I think. . . . . I think we dropped it the same time we dropped sandwiches. I still frankly would prefer to put deli mustard in our line but we cleaned up category [30] and dropped the sandwiches and hoped that would solve Flowers concerns of our being category 30. Unfortunately, the company did not respond to our gesture of good faith. Planck Dep. Vol II, P.52, L1-7.

mischaracterized the testimony of Robert Planck, the President of IMA, and such allegations are not only inconsistent with the very process by which IMA conducts its business but also not supported by the record as will become clear in the following section. For clarification, however, IMA received leave to amend its Application and in turn deleted vegetables and goods in Class 30 from its Application, which included the deletion of sandwiches.

II. ARGUMENT: OPPOSER'S CLAIMS TO PREVENT REGISTRATION SHOULD BE DISMISSED

A. Applicant's IMA's Intent to Use Application was truthful, submitted in good faith, and with the Bona Fide Intent to Utilize the COBBLESTONE MARKET Mark in Connection With the Goods Described in the Application; and as such, Opposer's Claims of Fraud Should be Dismissed

Flowers' Trial Brief occupies seven pages focused on attempting to misrepresent to this Board that IMA committed fraud on the PTO regarding its Intent To Use Application for the mark COBBLESTONE MARKET. Taking the allegations in the same order in which Flowers has presented its claims, Flowers alleges on page 9-10 of its Trial Brief that IMA falsely listed vegetables, like a bag of broccoli (presumably fresh or frozen broccoli) as within the recitation of goods. Reading the respective Intent To Use and Amended Intent To Use Applications, however, however, it is clear that the original Application filed June 4, 2004, did not specify vegetables, though it did describe "cooked deli items" without identifying which deli items would be cooked. Based on discussions with the Examiner[19] who needed greater definition of the item constituting "cooked deli items", the amended identification of goods filed in August of 2005 states in relevant part "cooked deli items, namely, soups, and vegetables; cheese; refrigerated salads except macaroni, rice, and pasta salad; pickles . . . ." [20]

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[19] See Office Action dated Jan 10, 2005, Serial Number 78/432642, which is contained within the Trademark Application file.

[20] Planck Dep. Vol I, Exhibit 11.

More specifically, the Examiner forwarded to IMA as Applicant the following concerns regarding Identification of Goods: "Some of the wording in the identification of goods needs clarification because it is overly broad. Specifically, "cooked deli items" is overbroad. Applicant must specify the common commercial name for the goods."[21] Further, the Examiner stated as follows:

> Applicant may adopt the following identification, if accurate:
>
> Deli meats; cooked deli items, namely, _____[specify common commercial name for each item]; cheese; refrigerated salads, namely, _____[specify type, e.g., "salads except macaroni, rice, and pasta salad]; pickles, bagged potato chips, frozen soups; frozen entrees, namely, entrees consisting primarily of meant, fish, poultry or vegetables, in Class 29"[22]

It was further clear from the reminder included within the Examiner's Office Action that the identification of goods could not be expanded or broadened, so that the amendment as represented by the August , 2005 Amended Application needed to simply clarify the goods. Nothing was intended to violate this rule and the Examiner appeared content with the clarification of the types of cooked deli items and salads that would be identified, namely vegetables as cooked components, sometimes refrigerated and sold as refrigerated salads. Flowers' decision to focus so much time and effort on this issue suggests a desire to confuse everyone in the process and to avoid talking about its own inability to establish any likelihood of confusion regarding its mark, COBBLESTONE MILL.

Next, Flowers claims that IMA committed fraud on the PTO by adding sandwiches to the Amended Application filed in August, 2005. Again, IMA could not have "added" sandwiches as an entirely new, stand alone item; for such addition would have violated 37 C.F.R. §2.71(a); TMEP §1402.06. Note that IMA Amended Application described "sandwiches" as a

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[21] See Office Action dated Jan 10, 2005, Serial Number 78/432642, which is contained within the Trademark Application file.

[22] See Office Action dated Jan 10, 2005, Serial Number 78/432642, which is contained within the Trademark Application file.

component of a cooked deli item with the following language: "Deli mustard; cooked deli items, namely, sandwiches, in Class 30"[23]

As noted above, the Examiner thought the reference to cooked deli items was too vague and overbroad, so the Examiner requested a clarification and examples of how the cooked deli items might be featured. The answer is that they might become components of soups, or cooked and then refrigerated and become part of a refrigerated salad, or cooked and then placed in a sandwich.[24] "Question: Once you agreed to go ahead and add the clarifying word sandwich, did you have a bona fide intent at that point to go ahead with sandwiches? Answer: Yes"[25] It again challenges the imagination as to how Flowers could misuse this interaction with the Patent and Trademark Office to even suggest that IMA committed fraud.

Flowers' creative questioning of Planck and Fontana as to, "Did you originally intend to sell sandwiches" or "Did you intend to sell bags of broccoli" are misleading and inconsistent with the history of this Application (Original Application vs. Amended Application) and interaction with the Examiner. IMA's willingness to delete vegetables and all Class 30 goods, including sandwiches as a component of cooked deli items, and to discuss same during the same depositions that Flowers now uses against IMA is the real fraud in this case. Litigants typically play hide the ball or focus on red herrings when the substance of their case lacks merit. Such is the situation in this proceeding.

But before leaving the topic of Fraud, however, it is worth reviewing Exhibit "C" Evidence Submitted by Defendant IMA within its Notice of Reliance, which includes Exhibit 6 to the deposition of Bob Fontana. Exhibit 6 in turn is paginated/identified by a numbering system used during discovery(IMAL Doc4), which was produced in discovery, called the CM (i.e. Cobblestone Market) Merchandising Catalog produced by Nehall Klein, the Ad Agency for IMA.

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[23] Planck Dep. Vol I, Exhibit 11

[24] Planck Dep. Vol II, P.22, L.8-11: "The PTO had concern about further defining what cooked deli items were and I believe the suggestion was that -- that sandwiches would be a descriptive term that would describe that."

[25] Planck Dep. Vol II, P.23, L16-19.

This document clearly shows a bona fide intent to market and sell sandwiches under the Cobblestone Market mark. More specifically, IMAL DOC 4, Page 1, is a picture of a sandwich with meats and vegetables inside the sandwich, and then references in the tagline under the Cobblestone Market logo that "…they're great for everything from traditional sandwiches and wraps to party trays, entrees, soups and salads." Similarly, IMAL DOC 4, Page 3, Exhibit 6, shows a picture of several sandwiches with meats inside the sandwiches, and then states in the tag line: "Cobblestone Market™ makes a great sandwich. . . ." Further, reading the entire section of the deposition testimony of Planck[26] and Fontana referenced in Flowers Trial Brief, not just the cut and paste portions cited in Flowers' Trial Brief, suggests that IMA had a bona fide intent to sell and market sandwiches, vegetables, and deli mustard under the mark COBBLESTONE MARKET in a manner entirely consistent with the Amended Application filed in August, 2005.

II. ARGUMENT: OPPOSER'S CLAIMS TO PREVENT REGISTRATION SHOULD BE DISMISSED (Continued)

B. Flowers' Claim that Flowers' use of its COBBLESTONE MILL Mark in Connection with Bakery Goods is Likely to be Confused with IMA's Use of its COBBLESTONE MARKET Mark in Connection with Deli Meats, Cheeses and other Listed Items In Its Application are Without Merit and Should be Dismissed

Flowers cites the *Du Pont*[27] case for the factors to be considered in testing for a likelihood of confusion under Sec. 2(d). IMA agrees that these factors should be considered, and urges a thorough review of each to determine there is in fact no likelihood of confusion, just as was determined in *Du Pont.*

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[26] Additionally see Planck Depo II, (Sept.20, 2007) P18, L 7-11: "Q. [In reviewing the description of goods in the Application], [w]ere those representative of your or IMA's bona fide intent to use those – to market those products under the Cobblestone Market at some point in the future whey you filed this intent to use application? A. Yes, sir, absolutely."

[27] *In re E. I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973)

(a) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression;

As Flowers rightly points out, the term "MARKET" by itself, is not extended trademark protection and, accordingly, Applicant IMA has disclaimed rights to the word "MARKET" without reference to COBBLESTONE. However, it does not logically flow that tautology that the term MARKET is not of central importance in the mark viewed as a whole, since the mental image conveyed by Applicant's mark is that of a Market – albeit a deli type market, featuring hand made cheeses and deli meats, with a cobblestone street running in front of an older part of the city where such deli market resides.

Similarly, in further analyzing Opposer's mark, COBBLESTONE MILL, it is clear that the word MILL is suggestive of the concept of wheat flour and, hence, a bakery. Standing alone, the word MILL may not have particular uniqueness that renders it capable of protection without the word COBBLESTONE, but at the end of the day the word MILL is what connects to and conveys the image of an old fashioned mill for "milling" flour, from which Opposer bakes its bread.

Opposer Flowers has completely mis-cited 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §19.72 (4th ed. 2008) with allegedly quoted language from this well respected treatise that "[D]isclaimed descriptive words in a mark should not be given the same prominence, . . . that disclaimed descriptive words could [never] be given the dominant part of a mark, [and that] disclaimed words, although they are a part of the mark, could only in a very minor degree indicate origin of goods in the [junior user](sic).[28]

[28] See pp.17-19 of Flowers' Trial Brief.

In contrast to the improper citation by Flowers, 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §19.72 (4th ed. 2008) actually states:

Even if a portion of a composite registered mark has been disclaimed the total composite (including the disclaimed matter) will be considered in determining a likelihood of confusion with the composite mark (P.19-224).

> The disclaimed portion is considered in determining likelihood of confusion since a prospective buyer is confronted in the marketplace by the entire mark, and in fadt, it is really immaterial to any buth the registrant and those others who may wish to use disclaimed matter that a disclaimer has been made. Since infringement is determined by the likely reaction of reasonably prudent buyers, who neither know nor care about disclaimers, the disclaimer is irrelevant in determining likelihood of confusion.(P19-224-5)

In seeking to create confusion where none exists, Flowers has focused on the word COBBLESTONE , urged this Board to ignore a portion of the challenged mark, "MARKET", and in the process has attempted to convince the Board to break down its analysis into a matching component part as opposed to reviewing the mark as a whole. Instead, the mark must be reviewed for likelihood of confusion as a whole and should not be broken into component parts to reach a conclusion of confusing similarity. [29] Opposer's mark is COBBLESTONE MILL; Applicant's mark is for the word mark "COBBLESTONE MARKET". Accordingly, the marks are obviously not similar in appearance, connotation, or sound. As such, there is no showing of a likelihood of confusion.

The undisputed evidence in this case, as testified to by not only IMA executives, but also Janice Anderson, Flowers' Vice President of Marketing and their sole witness, is that

[29] *In re Harst Corp.*, 25 U.S.P.Q.2d 1238, 1239 (Fed.Cir. 1992)("marks tend to be perceived in their entireties, and all components thereof must be given appropriate weight.")

Opposer's Mark and Applicant IMA's mark are not similar in appearance, connotation, sound or meaning, though Ms. Anderson does point out that they share the first word: COBBLESTONE.

Planck testified:

> Q. [W]hat does Newhall Klein do for IMA?
> A. Newhall Klein is an independent advertising and marketing agency that specializes in the food service market segment; and they assist us in brochure, point of sale development, ideation, sub-brand identifiers, marketing slogans for products, and, in the past, in developing our branded positions.[30]
> . . . .
> Q. Who first proposed the [Cobblestone Market] trademark?
> . . .
> A. The – the idea of using Cobblestone something was originally, I think, offered by Newhall Klein. We discussed a lot of different names and zeroed in on Market because of the trade image of a marketplace that we were trying to – trying to develop. [31]

Fontana testified:

> Q. And did Newhall Klein propose the Cobblestone Market mark?
> A. Yes.[32] . . .
> Q. And what is your understanding about why the Cobblestone Market mark was selected?
> A. Again, by a consensus vote of the marketing advisory council, they felt that that was the strongest brand name that was presented to them. . . .
> Q. Do you think that the Cobblestone Market mark conveys any particular type of impression or connotation?
> A. Yes.
> Q. And what would that be?
> A. That of an old fashioned marketplace, where you can get quality deli items.
> Q. And what do you consider the predominant component of that mark?
> A. It would first and foremost be "market".[33]

Planck testified:

> Q. Is this mark [Cobblestone Market] intended to remind customers of a traditional deli?
> A. It's intended to remind them of a market and of deli foods. The primary customer that we sell is restaurants and institutions, but even those accounts

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[30] Planck Vol I, P.19, L5-11:

[31] Planck Vol I, P.21, L16-21 :

[32] Fontana Vol I, P.8, L9-11:

[33] Fontana Vol I, P.11, L19-25, P.12, L1-12:

want to think of themselves as selling a premium product, which delis and markets conjure up.

Q. Okay. Does the word "Cobblestone" play any role in that?

A. Cobblestone plays a role or we wouldn't have selected it. The role is of sort of old-timey tradition, and "Market" being the primary focus of our logo, with cobblestones around it. . . ..

The – the idea of using Cobblestone something was originally, I think, offered by Newhall Klein. We discussed a lot of different names and zeroed in on Market because of the trade image of a marketplace that we were trying to – trying to develop. [34]

Planck testified:

A. I think that the application [for the Cobblestone Market trademark] that we use focuses on a market. A photo, a picture of a market very strongly implies the use of a market. And the opposer's goods focuses on a grist mill or mill or application of parts of a mill and deals with flour and baked goods and products, where ours deals with a market and market environment."[35]

Planck testified:

Q. Was [the Cobblestone Mill mark] suggestive to you of producing flour which would be used for bakery products?

A. Absolutely. The mill gives you that connotation instantly, at least it does me.

Q. And in your experience when you looked at that mark, especially as it was used, and compared it with the image that IMA was trying to evoke by utilization of the mark Cobblestone Market, did you see any possibility of being confused?

A. No.[36]

Janice Anderson, Flowers' Vice President of Marketing, testified:

Q. "[In the 1985 Cobblestone Mill Registration] it says, Cobblestone Mill, but then the featured part of the stylistic mark or the featured item seems to be an old-fashioned gristmill?

A. Correct[37]

Janice Anderson, Flowers' Vice President of Marketing, further testified:

Q. "How would you generally describe what flowers was trying to convey to the marketing public when they used [the 1985 stylistic mark] of the Cobblestone Mill, if anything, with the feature of the gristmill?

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[34] Planck Vol I, P.38, L16-25, P.39, L1-3 :

[35] Planck Vol I, P.65, L.2-8:

[36] Planck Vol II, (Sept.20, 2007) P26, L5-14:

[37] Anderson Vol I, P.11, L4-10

A. Well, once Cobblestone Mill was established as our name, we were trying to make it a place.
Q. And the old-fashioned gristmill was the place that you tried to make it?
A. That's Correct
Q. So that people would identify it being the sort of old-fashioned gristmill where they grind wheat and things like that to make them into flour? Is that basically the issue?
A. That was the thought process at that time"[38]

Janice Anderson, Flowers' Vice President of Marketing, further testified:
Q. So the new stylistic mark that was originated in September of 2003 is the one – it still keeps the gristmill, but its feature is a little less prominent?
A. That's correct."[39]

Janice Anderson, Flowers' Vice President of Marketing, further testified:
Q. Is the concept of [the grist] mill still important to Flowers?
A. Yes.
Q. So that if someone were to create a mark [that] used the word mill in it which related to bakery goods, that might give you some consternation?
A. A brand that used cobblestone or mill would give us some consternation.
Q. Either one?
A. Yes"[40]

Janice Anderson, Flowers' Vice President of Marketing, further testified:
Q. Can you generally describe [the new stylistic mark that was originated in September of 2003]?
A. It is a larger Cobblestone Mill and a much smaller representation of the mill. And rather than having the full mill, it is a wheel.
Q. And why did you do that?
A. To further enhance the brand of Cobblestone Mill and downplay the graphics.[41]

While there is nothing inherently wrong with changing one's brand, it is worth noting that the Cobblestone Mill image/stylistic mark that Flowers now uses was first developed in 2003 and was only starting to be utilized during the pendency of this Opposition Proceeding at the same time that IMA was independently developing an $80 million business annually under its COBBLESTONE MARKET mark.

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[38] Anderson Vol I, P.13, L16-25, P.14, L.1-4:

[39] Anderson Vol I, P.14, L5-8:

[40] Anderson Vol I, P.15, L9-18

[41] Anderson Vol I, P.16, L16-22:

Janice Anderson, Flowers' Vice President of Marketing, further testified:

Q. As you over the years have transitioned from making the old gristmill the focus of your mark, the picture itself, to now the picture being less and less important, have you tried to give a different impression to the consumer of it not being the old-fashioned mill or – I'm trying to understand what the motivation for that transition is.
A. The motivation is just to continually update the logo.
Q. Is the connotation still supposed to be given with the logo even though the old shack is not on there anymore and now you have just got a big wheel? Is it to still suggest to the consumer that this is a bread that's associated, at least, with some kind of an old gristmill, the concept of milling grain to be able to produce the bread?
A. A mild power of suggestion, but the brand itself is more important thatn the graphic.
Q. Even the brand itself, when you say the brand itself as opposed to the graphic, that's right, there's two ways to get there, I guess, the one is the picture of the wheel now, right?
A. Right.
Q. Which suggests an old gristmill, right?
A. Right.
Q. And then the word itself, Cobblestone Mill –
A. Right.
Q. --means a gristmill?
A. That's correct.
Q. So you still want to convey that same image, but now you're going more with the mark of the word part of the mark as opposed to the picture part of the mark, is that a –
A. That's true.[42]

Very significantly, Janice Anderson admitted that the mental image or impression between COBBLESTONE MARKET and COBBLESTONE MILL are not the same, but she makes a claim against anyone who uses the word COBBLESTONE; she testified:

Q. Does the word itself "market" create an impression in your mind that's anything close to the old-fashioned gristmill that we've been talking about.
A. No.
Q. So it's just the fact that the second word starts with an M?
A. And that the first word is identical.

[42] Anderson Vol I, P.29, L13-25, P.30, L.1-21:

Q. The first word is cobblestone in both marks and the first letter of the second word starts with an M?
A. Yes, but we would also object to perhaps cobblestone with a word that didn't start with an M. We are very protective of the brand itself in its entirety.
Q. Well, when I saw your discovery responses . . . I thought that there's other cobblestones out there that you did not object to. Is that true?
A. I can't answer that. I don't know. [43]

Again, Janice Anderson admitted during her deposition testimony that the mental impression that she gets from COBBLESTONE MARKET is entirely different than the image of COBBLESTONE MILL and the image that Flowers is attempting to project. Anderson testified:

Q. Is it the case that when you think about the word Cobblestone Market, does it suggest to you a market where people buy things? Is that the first impression that you get when you hear Cobblestone Market?
A. Yes. [44]

Janice Anderson, Flowers' Vice President of Marketing, stretched the truth, then admitted the stretch, but in the process revealed that she views Flowers as owning a commanding power over COBBLESTONE and she views Flowers' rights in MILL as being equally protected, regardless of the mental impression or similarity of goods: She further testified:

A. [W]e have found in consumer research that our consumers [the retail consumer] often refers to our mark as just Cobblestone."
Q. [Is that] anecdotal evidence?
A. That's correct.
Q. So there's no document and ther's no study that demonstrates that [retail consumers refer to the Flowers' mark as just Cobblestone]?
A. That's correct.
Q. It's sort of anecdotal within Flowers that at this point you think a lot of the consumers focus on the cobblestone by itself without even the mill or the wheel or the little gristmill shack?
A. That is correct. The point being that we are as protective of cobblestone as we are of the word mill"[45]

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[43] Anderson Vol I, P.37, L.16-25, P.38, L1-8:
[44] Anderson Vol I, P41, L22-25, P.42, L.1).
[45] Anderson Vol I, P.54, L1-6, P.55, L.5-15:

If that testimony were not clear enough, Anderson follows up with testimony as follows:

> Q. [I]f retail consumers at the retail level see any mark that contains the word cobblestone in it, it's your view that that would be dilution of your mark?
> A. Potentially, yes.
> Q. Or if any mark used the word mill?
> A. Yes.
> Q. At least any kind of food service product?
> A. Correct."[46]

Again, Anderson admits that Flowers is changing from the prior logo:

> Q. In the new Exhibit 12, the new logo that goes with the Cobblestone Mill mark [i.e. the 2003 mark featuring the wheel], I see the mill being the wheel, that's pretty prominent, right?
> A. Right.
> Q. I don't' see any cobblestones, which would be actually depicted stones, that would somehow look like cobblestone, do you?
> A. I do not.[47]

The only person identified in the Interrogatory Responses, Response #3, as to people with Opposer with knowledge of Applicant's trademark as used on food products is Janice Anderson, Vice-President of Marketing, which Response was submitted with Applicant IMA's Notice of Reliance. Therefore, the above testimony by Anderson represents the testimony of Flowers' only witness on the subject of the similarity of the marks and mental impressions gathered when viewing the respective marks, and related evidentiary issues.

Despite Flower's conclusory statement that the marks COBBLESTONE MILL and COBBLESTONE MARKET sound alike, which they do not since Market is a two syllable word and Mill is a single syllable word, each mark evokes an entirely different image or meaning,

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[46] Anderson Vol I, P.88, L16-24)
[47] Anderson Vol II, P.58, L.10-21:

especially in connection with their respective goods[48] As noted above, other than speculation by counsel for Flowers, the only witness for Flowers actually agrees that the marks are not similar and certainly do not evoke a similar mental impression. The sum and substance of the similarity is that they share a common word, COBBLESTONE, which it will be shown below to include 3,580,000 Google search hits when searching just the word COBBLESTONE[49] Even when refining the Google search by adding the word "food" as in "Cobblestone food", the Google search still returned 1,290,000 hits.[50] Nonetheless, Ms. Anderson and Flowers have brought this Opposition Proceeding with the intention of preventing IMA and its owner members from receiving trademark protection on their 80 million annual business using the mark, COBBLESTONE MARKET, without Flowers actually believing that the mark, viewed as a whole, creates a similar mental impression to Flowers' mark, COBBLESTONE MILL.

(b) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use;

Flowers claims that the Parties' Goods are Closely Related and Used in the Same Context. Flowers cites *In re Colonial Stores*, 216 U.S.P.Q. 793, 794 (T.T.A.B. 1982) for the proposition that bread and meats, because consumed together in sandwich form, are complementary products, but misses the key facts of Colonial Stores which distinguish that case from the present case, namely that the marks there were identical ("Country Pride" for bread and "Country Pride" for prepared meat products). In fact, the Board seemingly discounts the

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[48] *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 47 U.S.P.Q.2d 1459, 1460 (Fed.Cir. 1998)(finding no likelihood of confusion between CRISTAL for chamagnet and CRYSTAL CREEK for wine, partly because the terms have different meanings as used).

[49] See Exhibit 17 to Planck Trial Depo, Vol II and testimony related to same.

[50] See Exhibit 16 to Planck Trial Depo, Vol II and testimony related to same.

importance of the sandwich connection, and instead places great weight (and discussion) to the identical character of the marks, saying:

> The Board is not unmindful of the differences between baked foodstuffs and meat products, nor does it wish to overdraw the fact that bread and prepared meats are complementary products which are often prepared and consumed together, principally in sandwich form. However, we give great weight to the identical character of the marks in making the judgment call toward likelihood of confusion in this case.[51]

Flowers makes an even greater leap into the abyss of misread cases when it cites and quotes *In re Martin's Famous Pastry Shoppe, Inc.*, 221 U.S.P.Q. 364, 366-67 (T.T.A.B. 1984), and again attempts to lead this Board to the faulty conclusion that complementary products leads consumers to assume a common source. See Flowers Brief at 21. This is an improper conclusion because, as stated in Colonial Stores, complentary use is but one of many factors to consider. Just as with Colonial Stores, the Martin's Board downplayed the significance of the complementary nature of the products, and placed a great deal of reliance on the identical nature of the two marks ("Martin's" for bread and "Martin's" for cheese), stating:

> In giving credence to complementary use, the Board has stressed that it did not wish to overdraw the importance of this element, viewing it as but one factor in the likelihood of confusion equation (In re Colonial Stores, supra, at 794) yet not something to be ignored in close cases such as that now before us…[52]

Though the Board in Martin's did consider the related nature of the products, it was the relatedness "combined with the use of identical marks" that "would raise doubts as to consumer

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[51] *See In re Colonial Stores*, 216 U.S.P.Q. at 794 (citing Midwest Biscuit Co. v.John Livacich Produce, Inc., 203 U.S.P.Q. 628 (T.T.A.B. 1979)). The Board goes on to even distinguish the facts of Colonial Stores with a number of other cases with non-identical marks. Id. (citing I*nterstate Brands v. Celestial Seasonings, Inc.*, 198 USPQ 151 (C.C.P.A. 1978) ("RED ZINGER" for herb tea and "ZINGERS" for cakes); King Candy Co. v. Eunice King's Kitchen, Inc., 182 USPQ 108 (C.C.P.A., 1974) ("MISS KING'S" for cakes and "KINGS" for candy); Kraft, Inc. v. Balin, 209 USPQ 877 (T.T.A.B. 1981) ("LIGHT AND EASY" for frozen low calorie foods and "LIGHT N'LIVELY" for milk and milk products; Merritt Foods Co. v. Americana Submarine, 209 USPQ 591 (T.T.A.B. 1980) ("BOMBER" for sandwiches and "BOMB" marks for frozen confections); *Safe-T Pacific Co. v. Nabisco, Inc.*, 204 USPQ 307 (T.T.A.B. 1979) ("CRAZY" for ice cream cones and "KRAZY GLAZY" for pastries)).

[52] In re Martin's Famous Pastry Shoppe, Inc., 221 U.S.P.Q. at 367.

confusion…" Id. This fact is made even more evident when the Board in Martin's allowed the registration to proceed for the other mark, "Martin's Famous Pastry Shoppe, Inc.", saying:

> …we are no longer dealing with identical marks. The compound mark at issue in Serial No. 280,013 irrespective of the descriptive cast of its word matter beyond "MARTIN'S", exhibits clear differences in sound and appearance from registrant's mark and, perhaps more important, projects a significantly different commercial impression, we believe, than "MARTIN'S" alone.[53]

This holding certainly contrasts with the incorrect reading cited in Flower's brief, as there was in fact no likelihood of confusion between Martin's Famous Pastry Shoppe Inc. and Martin's.

The facts of this case are obviously distinguishable from Martin's and Colonial Stores in that this case does not involve identical marks, but like the second mark in Martin's, involves marks with clear differences in sound, appearance and commercial impression.

Lest there be any confusion as to whether any of IMA's identified goods are competitive with any Flowers' goods under their COBBLESTONE MILL mark, the testimony of Janice Anderson, Flowers' Vice President of Marketing is instructive:

> Q. Are any of the goods identified in the application as amended by IMA competitive goods with any of the goods that Flowers sells?
> A. They are not competitive with any of the goods that Flowers sells.[54]

Moreover, Janice Anderson has testified that there is no intention or likelihood of expanding the goods sold under the COBBLESTONE MILL mark to any other product line, and certainly no products which are competitive with IMA:

> Q. [Is the Cobblestone Mill brand] placed on all bakery goods or just certain types of bakery goods?
> A. It is not placed on any sweet goods, it is on breads, buns, rolls and breakfast items, bagels and English muffins and breakfast bread.
> Q. Do you have any intention to extend it to any other products that you are aware of?
> A. I am not aware of anything today.[55]

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[53] *In re Martin's Famous Pastry Shoppe, Inc.*, 221 U.S.P.Q. at 367.
[54] Anderson Vol II P.69, L10-14
[55] Anderson Vol I, P.20, L21-25, P.21, L1:

Q. [Regarding foodservice, chain restaurants like Denny's or Olive Garden, would you negotiate contacts with them to sell the Cobblestone Mill brand bread]?
A. We would not sell Cobblestone Mill to a chain under any kind of contractual arrangement. If we sold a chain food service product it would be under the Flowers food brand, it would not be Cobblestone Mill.
Q. Is there a reason for that?
A. Cobblestone Mill ins intended as a retail brand, it's not intended as a food service brand.
Q. So it might be the same product being sold to food service, but it wouldn't be the same brand?
A. That's correct.
Q. I take it then, as fare as you know, no restaurant or deli sells its sandwiches by referring to the fact that the sandwich includes a Cobblestone Mill slice of bread or loaf of bread?
A. That's correct.[56]

(c) The similarity or dissimilarity of established, likely-to-continue trade channels;

Relatedness, or channels of trade, means, in this context, that the goods or services of Applicant and Opposer are related in some manner or some circumstance surrounding the marketing such that they are likely to be encountered by the relevant public under circumstances that will give rise to the mistaken belief that they originate from or in some way are associated with or sponsored by the same producer. The nature of the respective party's goods or services, and thus their relatedness, is determined on the basis of the goods or services set forth in the application or registration.[57] Applicant IMA's channels of trade are limited to deli meats, cooked deli items, cheese, salads, pickles, potato chips, soups, and entrees as set forth in the Amended Application. It is clear from this record that Flowers' bread

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[56] Anderson Vol I, P.36, L19-25, P.37, L.1-9:

[57] *In re Dixie Restaurants Inc.*, 41 U.S.P.Q.2d 1531, 1534 (Fed.Cir 1997)("Indeed, the second *DuPont* factor expressly mandates consideration of the similarity or dissimilarity of the services as described in an application or registration.").

is sold on the bread aisle; whereas IMA's Application describes its goods and channels of trade as being deli items, refrigerated and cooked in the confines of a deli. The bread isle does not include refrigeration and cooking, and so the location of the products are inherently different, though it is admitted that such items may both end up in a grocery store (albeit in different sections of the grocery store). *In Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 f.2D 1098, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976) it was stated:

> A wide variety of products, not only from different manufacturers within an industry, but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion arising from the use of similar marks on any goods so displayed."[58]

In *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, the U.S. Court of Customs and Patent Appeals found that herb tea and cakes were unrelated and held that a *per se* rule that all foods and beverages are related would be "improper and inconsistent with §2(d) of the Lanham Act."[59] That rule has been elaborated on mayny times. In Hi-Country Foods Corp. v. Hi Country Beef Jerky, for example, the Board found that beef jerky and fruit juice were unrelated, stating "there can be no 'per se' rule that all food products are related goods by nature or by virtue of their capability of being sold in the same food markets."[60] More specifically:

> [W]e believe that prepared snack foods and fruit juices, while both edible food products, are completely different in character, would not normally be sold in the same sections of food stores or convenience stores and would not be expected to originate from the same entity, even sold under virtually identical trademarks….[61]

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[58] *In Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 f.2D 1098, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976)

[59] 198 U.S.P.Q. 151, 152 (C.C.P.A. 1978)

[60] 4 U.S.P.Q. 2d 1169, 1171-72 (T.T.A.B. 1987)

[61] 4 U.S.P.Q. 2d 1169, at 1172 (T.T.A.B. 1987)

In *Worthington Foods, Inc. v. Kellogg Co.*, 14 U.S.P.Q. 2d 1577, 1604-05 (S.D.Ohio 1990) it was held that HEARTWISE as used on frozen breakfast food items was not confusingly similar to HEARTWISE as used on breakfast cereal because the goods are unrelated *Id* at 1604-05, stating that:

> [T]he Court agrees with the defendant that the parties' products appear in completely unrelated sections of grocery stores. On one hand Worthington products are in freezer chests or frozen food cases. Kellogg products, on the other hand, appear in an aisle set aside for ready-to-eat cereals. The separate presentation of the parties' goods almost entirely eliminates any confusion which might arise from the appearance of the parties' foods in the same store. Therefore, although the fact that both parties sell their goods in grocery stores increases the likelihood of confusion, the increase is very small.[62]

Anderson testified:

Q. [Regarding foodservice, chain restaurants like Denny's or Olive Garden, would you negotiate contacts with them to sell the Cobblestone Mill brand bread]?
A. We would not sell Cobblestone Mill to a chain under any kind of contractual arrangement. If we sold a chain food service product it would be under the Flowers food brand, it would not be Cobblestone Mill.
Q. Is there a reason for that?
A. Cobblestone Mill is intended as a retail brand, it's not I intended as a food service brand.
Q. So it might be the same product being sold to food service, but it wouldn't be the same brand?
A. That's correct.
Q. I take it then, as fare as you know, no restaurant or deli sells its sandwiches by referring to the fact that the sandwich includes a Cobblestone Mill slice of bread or loaf of bread? That's correct.[63]

Anderson further testified:

Q. [To the extent that Flowers sells bread] through food service, you say the same product, it may be the same bread, but it will not be under the Cobblestone Mill brand?
A. Absolutely not.
Q. Because you want that to be a retail brand, right?
A. Well, not only that, the distributors own it. We cannot – it would be a violation of the distributor agreement for us to bring it in frozen into a territory that a distributor owns the brand.
Q. Or sell it through the food service division to restaurants?
A. That's correct.[64]

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[62] *Worthington Foods, Inc. v. Kellogg Co.*, 14 U.S.P.Q. 2d 1577, 1599-1600 (S.D.Ohio 1990)
[63] Anderson Vol I, P.36, L19-25, P.37, L.1-9
[64] Anderson II P90, L8-21

Q. So neither restaurants nor delis nor anybody is currently selling a Cobblestone Mill branded sandwich?
A. That is correct.
Q. And it is also true that no one is selling a Cobblestone Mill Select branded sandwich product?
A. That is correct.[65]

Planck has testified that IMA is utilizing the COBBLESTONE MARKET mark for deli meats, cheeses and items found in a deli as referenced in the Amended Application, not breads, and that, in fact, IMA has an entirely separate mark for Breads, Brickfire Bakery, and has no intention of expanding COBBLESTONE MARKET to include bread:

Q. When the MAC (IMA Marketing Council) tries to come up with a brand or a mark that's associated with a particular product, is it sort of like a group of products? Like, for example, you said bread products. Is that kind of a category?
A. It's almost always a category. The product category or a market segmentation. For example, we have a Mexican products brand. We actually have two Italian products brands, one aimed at upscale white-cloth restaurants, another one at Tartaria pizzeria type restaurants and there are a series of different brands, different products that fit that marketplace's needs.
Q. Does IMA have a bread product related product brand name?
A. Yes, we do.
Q. And what is that?
A. Brickfire Bakery is that brand and, in fact, we have some 25 different brands that we've sought.[66]

(d) The conditions under which and buyers to whom sales are made, ie. "impulse" vs. careful, sophisticated purchasing;

This section of the Du Pont analysis addresses the purchasing methodology, but the testimony is also relevant to other factors such as the fact that Flowers' bread is found in the bread aisle, not in the deli within the grocery stores, so there is no likelihood of a consumer seeing COBBLESTONE MARKET deli meats and cheeses when they are looking for Flowers

[65] Anderson II P99, L2-9
[66] Planck Vol II (Sept.20, 2007), P.11, L14-25

COBBLETONE MILL bread in the bread aisle, and vice versa. The testimony is not repeated but only referenced as having relevance to other points of analysis.

Janice Anderson has testified:

> Q. Is it generally true that people who want to buy your [Cobblestone Mill] bread in order to do that have to go to the bread aisle?
> A. That is correct, unless there is an off-rack display somewhere in the store, which would be a temporary location.[67]
>
> Q. And when they go to the bread aisle, they surely are intending to buy bread of some kind, maybe not your brand, but somebody else's brand?
> A. Correct.
> Q. So it's not the case that it's an impulse item, it's sort of an intention – a consumer has to have an intention to want to buy bread in order to even go down the bread aisle, right?
> A. That's correct[68]
>
> Q. [Regarding Flowers' position that there is] "relatively limited amount of consideration by consumers when purchasing the type of products covered [by the Cobblestone Mill mark], what is that referring to?
> A. . . . The referece there would be that through research we have sort of named the bread aisle the zoom aisle, and that oftentimes a loyal consumer knows when she goes to the grocery store she's going to buy Cobblestone Mill onion rolls and she knows where they are and she goes and she picks them up withoutspecific thought to, oh, this is a Cobblestone Mill. She knows where it is. It's a habit.
> . . .
> Q. [W]hen we talked about the limited amount of consideration, you're saying that you're focused on the fact that the consumer goest to this – what do you call it, bread aisle or bread --
> A. Bread aisle. We refer to it as the zoom aisle - -
> Q. Zoom aisle, that's what it was.
> A. -- because so many times consumers know when they get there what their purchase is going to be. But that's not always the case, and you want to – for the consumer, ther's perusing the bread aisle and trying to make a decision, and then your package needs to stand out from the crowd."[69]

(e) The fame of the prior mark;

[67] Anderson Vol I, P.23, L11-16
[68] Anderson Vol I, P.28, L15-23:
[69] Anderson Vol I, P.55, L15-25, P56, L.1-7, P.57, L4-16:

Flowers Trial Brief in the section entitled Factual Background and in other places takes the position that the COBBLESTONE MILL marks are strong and entitled to broad protection. Their evidence, however, is non existent, and it has already been demonstrated earlier in this Trial Brief that Flowers' recitation of sales equaling a strong trademark and "studies showing widespread awareness" are just plain false. Ms. Anderson so admitted during cross examination, and such earlier discussion is incorporated by reference.

Flowers cites *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 355 (Fed. Cir. 1992) for the proposition that the Federal Circuit has recognized that a strong mark casts a long shadow which competitors must avoid. *See Flowers' Brief* at 26. However, Flowers fails to point to a single piece of evidence to suggest that Flowers and IMA are in fact competitors. In *Kenner*, the two marks "Fundough" and "Play-doh" were held to convey a similar impression to consumers not only because of similar names, but also because they were "practically identical products" marketed in "practically identical channels of trade" and had a "multitude of similarities in trade dress". *Id.* at 355-56. This case is distinguishable as stated above.

As mentioned earlier, Anderson has admitted that Flowers has no evidence that sales equal market awareness of the COBBLESTONE MILL mark:

> Q. [After having the Court Reporter read back the relevant portion of your direct testimony conducted by Flowers' lawyers], I gathered that what your testimony … actually stated was: 'Research has proven to us that consumers always recognize the Cobblestone brand. Is that a fair summation of what you said on the record?
> A. That is fair.
> Q. Is that in any way proven by any records, documents that you have provided to us during two years of this opposition proceeding?
> A. No.
> . . .
> Q. The simple question is this: Are there any documents or are there any studies that in any way support your statement that all – that consumers always recognize the Cobblestone brand?
> A. No.
> Q. And in fact, that's an untrue statement, isn't it?
> A. I don't' believe so.
> Q. You think all consumers recognized the Cobblestone brand?

A. No.
Q. And you also know that in fact and in truth there are no studies that in any way support that, right?
A. The studies that we have done support that.
Q. You said research studies. And you haven't produced any of those studies in this proceeding?
A. I have not produced anything.
Q. Do you think that might be something that would be important. Because we've spent a lot of time and effort talking about how well known your brand is, and if there was such a national study or even a local study that was documented that showed 2, 000 people were asked what brand do you recognize for bread, and if all of them always recognized the Cobblestone brand, you would know that would be important, right?
A. It was not a study we have ever conducted. Had we conducted that specific study, I could produce that document for you. The studies we have conducted were not – the intent was not to determine the consumer recognition of the brand. I'm simply saying that our experience has been that consumers do recognize the brand.
Q. Ok. So a more truthful statement would have been in the nature of we at Flowers think that a lot of consumers recognize the Cobblestone brand?
A. We at Flowers think that a majority of the consumers recognize the Cobblestone Mill brand.[70]

Anderson also admitted that Flowers has no research or studies or documents which prove market awareness of their mark, COBBLESTONE MILL:

Q. Do you know which study would give us the most recent objective documentation to suggest how much awareness the consuming public has of your brand?
. . .
B. The most recent research I see on here on this list is 1999, which would be misleading as to the awareness of the brand in 2006.
. . .
Q. [A]re you saying what you produced is all you have documented but it is misleading and not reflective of what you believe the truth to be?
A. No, what I'm saying is that the brand has grown from 1995-2006. So it would be a given, if the brand has grown, the awareness has grown.
Q. Or that people just eat more bread. Maybe your percentage of the market hasn't grown, it's just that the overall pie grew, that's a possibility, right?
A. I suppose that's a possibility.
. . .
Q. So it's your assumption because sales have grown probably awareness has grown?
A. Absolutely.
Q. Although we don't' have any documented proof of it?
A. That's correct.[71]

[70] Anderson Vol II, P.60,L6-25, P.61,18-25, P.62, L1-25
[71] Anderson Vol I, P.58, L22-25, P59, L.15-25, P..60, L 1-25)

. . . .

Q. [Are] there any documents that you have produced or that you are aware of that show the importance of the Cobblestone Mill brand in the target market, that being the retail consumer, regarding the Cobblestone Mill brand purchase decision?
A. If you're asking if we have done an attitude and awareness study, we have not.
Q. Well, not only that, but any documents that would reflect it, even if it's not a formal study, other than the fat that you have significant sales of Cobblestone Mill – branded products, right?
A. Right.
Q. But ther's no documents that tell us why you have –
A. That's correct.
Q. -- right – substantial sales?
A. Correct.
Q. It might be you're the cheapest?
A. It's not, but tht's correct.
Q. It might be that you taste the best/
A. Right.
Q. You weren't going to say no on that, right?
A. That's a given.
Q. And it might be because of the brand? It's sort of a combination of reasons, right?
A. Right.
Q. And you really don't know sitting here today why, other than some combination of quality, price –
A. And package.
Q. -- distribution, packaging and branding –
A. Correct.[72]

. . . .

R. And we have already said that there's no study or documentation regarding recognition, fame of the Cobblestone Mill brand, no documented study on that, right?
B. Correct.[73]

Flowers has asked this Board to largely ignore the MILL vs MARKET portion of the respective marks, and instead focus on the shared term "COBBLESTONE". The term "COBBLESTONE" in relation to trademarks has a varied and widespread use. The TTAB has given weight to credible and probative evidence of widespread, significant, and unrestrained use by third parties of marks containing elements in common to demonstrate that confusion is not, in

[72] Anderson Vol I, P.72,L5-25, P.73,L1-10)
[73] Anderson Vol I, P.91, L13-17

fact, likely. [74] Absent the terms MILL or MARKET, the stand alone mark "COBBLESTONE" is a weak mark which is used to describe numerous goods and services outside of the scope of Opposer's bread products.

A sample TESS list of registrations and applications (80 Records) demonstrates that the term "COBBLESTONE" has been adopted by a number of other users as a good or services designation. (provided to the Trademark Examiner and is in the record attached to the letter of June 10, 2005 which is in the Application file). In the case of weak marks, even slight differences between the marks may be deemed sufficient to avoid a finding that confusion is likely. [75]The Applicant's mark includes the additional term "MARKET" to make the mark "COBBLESTONE MARKET", just as Opposer's mark includes the additional term "MILL" to make the mark "COBBLESTONE MILL". Due to the dilute nature of the mark "COBBLESTONE" the scope of protection afforded such a mark in considerably narrower than that afforded a more arbitrary designation. As such, the additional and deletions in the Applicant's mark are as such that the purchasing consumer would not be confused as to the source of the respective goods. The term "COBBLESTONE" is a very dilute mark similar to such a degree that the public is inundated with this term in day to day life on an assortment of goods and services, and therefore it should be granted very narrow protection on this basis. Thus, there is no likelihood of confusion. COBBLESTONE by itself is a very weak mark.[76] See the next section describing widespread use and internet searches showing millions of hits on a Google search, even when

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[74] *Miles Labs. Inc. v. Naturally Vitamin Supplements Inc.*, 1 U.S.P.Q.2d 1445, 1462 (TTAB 1986)

[75] *See In re: Dayco Products – Eaglemotive Inc.*, 9 U.S.P.Q.2d 1910, 1912 (TTAB 1988)("As such, we find the term to be a relatively weak mark and we agree with applicant that the scope of protection afforded such a mark is considerably narrower than that afforded a more arbitrary designation"); *see also In re Copytele Inc.*, 31 U.S.P.!.2d 1540, 1542 (TTAB 1994).

[76] *CareFirst of Maryland, Inc. v. First Care, P.C.*, 77 U.S.P.Q.2d 1577, 1582 (4th Cir. 2006)(finding that substantial third-party use of "care," "CareFirst," and "First Care" in the health ccare industry made the terms weak); *Steve's Ice Cream v. Steve's Famous Hot Dogs,* 3 U.S.P.Q.2d 1477, 1479 (T.T.A.B. 1987)(determining that "Steve's" was so prevalent that the public could distinguish between businesses using the terms based on small distinctions). *First Sav. Bank F.S.b. v. First Bank Sys., Inc.*, 40 U.S.P.Q.2d 1865, 1873 (10th Cir. 1996)(finding FIRST BANK SYSTEM and FIRSTBANK distinctive and stating, "[w]hen the primary term is weakly protected to begin with, minor alternations may effectively negate any confusing similarity between the two marks").

including the second word "food", suggesting that the word COBBLESTONE has widespread use in relation to foods of all types and in all regions and in all channels of distribution.

(f) The number and nature of similar marks in use on similar goods;

Evidence regarding use of the term COBBLESTONE is summarized as follows:

Notice of Reliance, Exhibit "B" – Evidence Submitted by Defendant IMA, includes Attachment "A" which is a TESS Search of Cobblestone" showing 80 records.

Flowers' Reponses to Interrogatories, Exhibit "D" to Notice of Reliance, Response No. 4 provides list of 13 trademark users of the mark COBBLESTONE for use in the foods products field.

Anderson testified as to widespread use of the term COBBLESTONE as follows:

Q. [When] I saw your discovery responses . . . I thought that there's other cobblestones out there that you did not object to. Is that true?

A. I can't answer that. I don't know.

Q. Do you know if there's any proceeding that you're objecting to anyone's application for any mark that includes the word cobblestone other than the present one, the one with IMA?

A. I don't recall.

Q. In Discovery Interrogatory Number 4 . . . Cobblestone Bread owned by Leo Toril Thomas apparently filed an application for an intent to use and then he subsequently abandoned it. Then there's Coblestone Kitchens, which includes food, beverages and staple goods; Cobblestone Restaurant and Bar; there's Cobblestones Restaurant and Lounge; andother Cobblestones for restaurant services; andother Cobblestone for spices and extract; a Cobblestone bake shop for retail bakeries in Pennsylvania; another Cobblestone bakery in Spokane, Washington; a Cobblestone for confectionary candy, a Cobblestone Cookery and Imports; another Cobblestone Kitchen for bakeries in Arcadia, Oklahoma; a Cobblestone Diner for seafood; and a Cobblestone Gifts for health and diatetic foods. I will hand you those [Flowers' Responses to 'Interrogatory No. 4] just to refresh your recollection. You can study them for a second.

A. (Witness complies)

Q. Now that you have studied the responses to Interrogatory 4, has it refreshed your recollection as to whether Flowers has taken any action to prohibit or stop any of these uses of the word cobblestone?

A. I cannot recall a specific incidence, but I would refer to counsel on that.

Q. At least in the last eight or ten years since you've been . . . Vice President of Marketing or Director of Marketing for the last eight or ten years?
A. Right.
Q. You're not aware of any personal involvement in disputing any of these, is that right?
A. That's correct.
Q. To the best of your knowledge, has any of these uses of cobblestone harmed your brand or cost you any sales, as far as you know?
A. I don't know.
Q. So it's fair to say you are not aware of any harm to your brand or to your sales for the use of these other cobblestone marks that I described to you in Interrogatory 4, thought it may be the case, you just don't know?
A. That's correct."[77]

Exhibit 3 to the Planck Deposition, Vol I, is an email identifing other Cobblestone uses on food products as being more concerning than Cobblestone Breads.

Exhibit 8 attached to the Fontana Trial Deposition II, (September 20 2007), is an email from Sandy Klein at Newhall Klein, indicating that she ran a trademark search using TESS and NameProtect.com, searching for possible trademarks for the deli meat, cheeses, etc at issue, and searched the names "Oakwood", "Market", "Oakwood Market", "Cobblestone-68 hits, and Corners-503 hits, and Cobblestone Corners – 1 hit", and responses by Shamrock Foods (IMA Member) somewhat upset at the recommendation to move away from Oakwood Market because of potential conflicts.

Robert Planck testified as follows:

Q. [In reviewing communications with the PTO were] there some marks identified [with which you understood] that the PDO might have issues.
A. Yes, there were some marks identified that might have issues.
Q. And what were those marks?
A. Boston Cobblestone, Cobblestone Kitchens, and Cobblestone Restaurant and Bar were identified as possible worries.
Q. And even if you remember at the time or thereafter, do you remember anything in the office actions from the PTO or anything else was in thePTO that suggested that Cornerstone Mill would b ea problem?
A. No.[78]

Planck further testified:

Q. "[Doing a Google search as set forth in Exhibit 17 attached to Planck's Trial Deposition II], how many uses of the word Cobblestone by itself do you see in your search result?
A. …3,580,000
. . . .

[77] Anderson Vol I, P.38, L4-25, P39, 1-25, P.40, L.1-11
[78] Planck Vol II, (Sept.20, 2007) P20, L15-25 , P.21, L1-3

Q. You never know but [the mark Cobblestone by itself] wouldn't be a very strong brand, would it?
A. No, it would not. . . . .[79]

Planck further testified:

Q. Well, let's assume we just limit [the Google search] to foods, so we do a search, Exhibit 16. That is just Cobblestone including the word food. How many Googles come up with the word Cobblestone in connection with some kind of food item?
A. 1,290,000 including Cobblestone Bread from Eagle Supermarkets.
Q. Now you're not part of Cobblestone Bread, are you?
A. No, I have no interest. . . . .
Q. Are you aware of whether Flowers sued Cobblestone whatever it is? . . . .
A. I'm not aware they have.
. . . .
Q. With the Google search you [performed] today, you don't' know if [this search result is] exactly the same as they were several years ago when you did this same ---
A. No, I'm sure not. I'm sure they've changed over time. There's more now than there were then.
Q. Well, is that similar in nature to what your [search results revealed previously]?
A. Yes, it was, as I said, at least in the hundreds of thousands now.
Q. So did you think it would be possible, for example, to trademark the word Cobblestone in connection with your deli meats by itself just the word Cobblestone?
A. No. . . . .
Q. So was it only the combination of the two words?
A. Only the combination of two words in association with one another they could be – in my opinion be trademarked
Q. At least to develop a brand that be worth you developing?
A. Yes. Yes.[80]

Exhibit 16 to Planck Trial Depo II shows a Google Search of the word combination "Cobblestone food" and shows the results of 1,290,000 hits.

Exhibit 17 to Planck Trial Depo II shows a Google Search of the word combination "Cobblestone" by itself and shows the results of 3,580,000 hits.

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[79] Planck Depo II, (Sept.20, 2007) P31, L 11-25

[80] Planck Vol II, (Sept.20, 2007) P31, L 25, P.32, L1-25, P..33, L1- :

(g) The nature and extent of any actual confusion;

While actual confusion may not be dispositive, with sales since 2004 and sales the two years prior to the trial depositions taken in this case, with over a thousand sales people selling COBBLESTONE MARKET deli items through IMA owner member firms, one would have thought that at least one instance of actual confusion would have been detected by the parties if, in fact, these marks possess any likelihood of confusion. The Board may not be impressed by IMA's evidence that not a single instance of actual confusion has been detected, but it is significant that Flowers has not encountered a single instance of actual confusion.

Janice Anderson testified:

Q I think you testified earlier that you have no instances that you are aware of any actual confusion between IMA's mark, Cobblestone Market; and Flowers' mark, Cobblestone Mill, right?
A. That's correct.
Q. Is there anything else that you're aware of, that you can testify about today, that would tend to approve or support the notion that the public would likely be confused from IMA's use of its mark?
A. No.[81]

Robert Planck testified:

Q. Have you encountered any actual confusion between IMA's Cobblestone Market trademark and ---
A. No, sir, I have not.
Q. -- and Flowers Cobblestone Mill?
A. Absolutely not.[82]

Anderson testified:

Q. So there has not been any actual confusion over the last two years, right?
A. Not that I'm aware of, abut I can't say that I would knw.

[81] Anderson Vol I, P.92, L1-10
[82] Planck Vol I, P.68, L1-5:

Q. Has anybody at Flowers, to the best of your knowledge, learned of any actual confusion?
A. No.[83]

(h) The length of time during and conditions under which there as been concurrent use without evidence of actual confusion;

In relation to the fact that there is no actual confusion as noted above, there is plenty of reason to suggest that under the massive marketing and sales effort undertaken by IMA member owner companies since 2004 that some actual confusion would have been detected if the marks and goods were in any manner likely to cause confusion. Again, no actual confusion has been detected as noted above.

Planck has testified:

Q. Which goods are currently being sold under the [Cobblestone Mill] mark and which are not.
A. … deli meats are being marketed under the brand….
Soups are under use in the brand, [and vegetables] as components of soups….
Cheese is under the brand….
Yes, refrigerated salads are marketed under the brand….
Pickles are marketed under the brand
Q. Bagged potato chips?
A. They have been approved. I'm not certain that they're actually being sold yet. ….
Q. Frozen soups?
A. Frozen soups are in the marketplace under the Cobblestone Market brand. …
Q. What about the frozen entrees?
A. Not at this time.
Q. Okay. Deli mustard?
A. Not at this time.
Q. Okay. Sandwiches we may have covered, but if you could confirm that?
A. Sandwiches, in the sense I take this to mean prepared sandwiches, marketed and sold as sandwich units, no, that is not in the marketplace--[84]

[83] Anderson II P73, L21-25, P.74, L1-2

[84] Planck Vol I, P.60, L7-25, :

.

Anderson testified that COBBLESTONE MARKET sales are occurring in the grocery stores where Flowers' products are also located, but as noted above, she has yet to identify a single instance of actual confusion:

> Q. So the fact that there is meats and cheeses being sold under the Cobblestone Market brand in a delicatessen that's in the same grocery store that you may have Cobblestone Mill-branded bread being sold is at least one aspect of where you think there's a likelihood of confusion?
> A. Yes.
> Q. Have you done any kind of a market survey to see if that is, in fact, the case to the consuming public?
> A. No.
> Q. Other than your impression in discussions with counsel and other people within Flowers, have you done anything else to determine whether the scenario you just depicted as creating a likelihood of confusion, in fact, exists?
> A. No. . . .
> Q. Have you to date had a single instance of actual confusion between Cobbestone Market and Cobblestone Mill?
> A. No.[85]

Fontana testified that IMA member owners started selling COBBLESTONE MARKET products in the 2004 2005 timeframe and that:

> Q. When did IMA and its member owners start actually using the Cobblestone Market brand?
> A. … Probably somewheres around year 2004, 2005.
> Q. What kind of investment did first IMA make itself as the organization I guess that pursues the brands in the brand Cobblestone Market?
> A. Generally it's approximately $25,000 to create a brand through Newhall Klein. … That's just ideation and creation of the brand and logo.
> . . . .
> Q. And then does IMA also invest in any marketing materials?
> A. Each project generally has a point of sale piece attached to it that can cost anywhere between 15 thousand and $30,000. I believe this project was around $25,000.
> Q. That's really not dissemination of advertising material or marketing material. That's just the creation at the creative level. Right?
> A. Correct.
> Q. So all total what would estimate that IMA has spent in just in developing the brand? I'm not talking about marketing it, just developing the Cobblestone Market brand?
> A. Between 40 and $50,000 for the ideation and brand creation and the initial point of sale runs.
> . . . .

[85] Anderson Vol I, P.44, L13-25, P.45, L.1-21

Q. What level of brand marketing support was targeted by your member owners for the Cobblestone Market brand?
A. Approximately two percent goes into their local marketing funds to promote this item locally.
Q. And what were the sales last year, or through this year, the annual sales of the Cobblestone Market brand product?
A. Approximately 80 million dollars.
. . . .
Q. So what do you believe to be the amount of money that's been spent by IMA and its member owners to promote the brand Cobblestone Market on an annual basis?
A. Well, at the local level at two percent that would be approximately 1.6 million between all our member owners to – and would encompass food somehow allowances, flier allowances, they have local magazines that target the food service operator that I referred to, the chef and the food service managers, and they circulate those so all those activities cost money but the two percent equals about 1.6 million.
Q. And in spending all the 1.6 million, is that on an annual basis?
A. Correct.
Q. On all that advertising and all those sales, have you found any time that a customer came to you, or anybody, and said, "Gee, are you the bread people?"
A. Never.
Q. Would you be surprised if somebody came and said "I thought maybe that bakery started making hams"?
A. Yes.
Q. In your industry, or your experience in the industry, are bakeries usually focused on baked and bread products?
Q. And has it been your experience that they expand into something like making turkey or deli ham or salads?
A. No.
Q. And by comparison, is IMA's Cobblestone Market brand selling any bread products under the Cobblestone Market brand?
A. No. And to further elaborate, we actually have a separate stand-alone brand of bread so there's no confusion.
Q. Okay. What is the brand that you sell for breads?
A. Brickfire Bakery.[86]

Anderson knew that in 2006 COBBLESTONE MARKET products were being sold:

Q. [Y]ou knew, at least by your last deposition, and you knew even at the time of the opposition, and at the time that the application was filed or shortly thereafter, that in fact IMA was actually selling, at least some of these products, under the name Cobblestone Market, right?
A. That is correct.[87]

[86] Fontana Vol II, P.24, L2-25, P.25, P.26, & P.27, L1-17
[87] Anderson Vol II P70, L20-25

Yet, still as of the late 2007 deposition of Anderson, neither Anderson nor Flowers has detected a single instance of actual confusion:

> Q. So there has not been any actual confusion over the last two years, right?
> A. Not that I'm aware of, abut I can't say that I would know.
> Q. Has anybody at Flowers, to the best of your knowledge, learned of any actual confusion?
> A. No.[88]

Anderson appears to admit that there really is no likelihood of confusion in the actual market place, but that this Opposition Proceeding is really about trademark as a technical legal process and right, independent of any likelihood of confusion in the real world:

> Q. I understand tehre's a concern with the technical legal process of registering trademarks and protecting that registration, right, that's a concern that Flowers has, right?
> A. Right.
> . . .
> Q. But outside of that, in the real world of business, is there any indication that you've seen or heard of that the Cobblestone Market, sale of its products, is in any way either – you've already answered the question, it's not confusing, -- but harming in any way the sales of Cobblestone Mill branded products?
> A. Not that I'm aware of.[89]

(i) The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).

Flowers' Trial Brief has attempted to argue that Sara Lee is a fair comparison to the situation with Flowers and IMA because Sara Lee is known to have a wide variety of products. This is inapposite, however, because all evidence demonstrates that IMA is limited to deli meats,etc as set forth in its current Amended Application (meaning Class 29 goods only) and all evidence demonstrates that Flowers will not and cannot expand the COBBLESTONE MILL brand to foodservice, and certainly has no intention of expanding it to any products other than its bakery products.

Anderson has testified:

> Q. [Is the Cobblestone Mill brand] placed on all bakery goods or just certainy types of bakery goods?
> A. It is not placed on any sweet goods, it is on breads, buns, rolls and breakfast items, bagels and English muffins and breakfast bread.
> Q. Do you have any intention to extend it to any other products that you are aware of?
> A. I am not aware of anything today.[90]

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[88] Anderson Vol II P73, L21-25, P.74, L1-2

[89] Anderson II P75 L7-23

(j) Flowers claims that its goods and Applicant's Goods Interface Directly in the Marketplace.

Flowers' cites *Sun-Fun Prods., Inc. v. Suntan Research & Dev., Inc.*, 656 F.2d 186, 191 (5th Cir. 1981) and states that this case had a "finding of likely confusion as a matter of law based in part on past manufacturer-distributor relationship between parties." *See Flowers' Brief* at 28. When you actually read the case, though, nothing in Flowers' description of the case rings true.

First, there was no finding of likely confusion by the Court. In fact the Court makes it quite clear that their decision was only that it was improper for the lower court to grant directed verdict and that it was up to a jury to weigh the similarities and differences between the two products (each were suntan lotions). *See Sun-Fun Prods.*, 656 F.2d at 190. The Court even states that "[a] jury might well conclude that the marks are too dissimilar to justify a finding of infringement." *Id.*

Next, there was no evident past manufacturer-distributor relationship between the parties *Sun-Fun Prods.*, but rather, at one time the parties' products had been sold at the same poolside stands. Regardless, in contrast to *Sun-Fun Prods.*, the products at issue here are neither identical products, nor are they the only products sold in a certain distributor's store. There are a multitude of products at the usual grocery store. The likelihood that a consumer will confuse two of those many products as being from the same source simply because the word Cobblestone is contained in the name, along with other descriptors, is simply remote.

(k) The extent of potential confusion, i.e. whether *de minimis* or substantial;

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[90] Anderson Vol I, P.20, L21-25, P.21, L1:

Anderson/Flowers have admitted no actual confusion and even Ms. Anderson's testimony seems to suggest no real or substantial likelihood of confusion.

As evidence on this point, IMA has filed its Notice of Reliance, Exhibit D, Flowers' Responses to Request for Production No.5, which stated: "[Please produce all] documents in the possession or control of Opposer which Opposer believes cause direct or indirect confusion by any entity, person or business involving the "Cobblestone Market" mark and the "Cobblestone Mill" mark."

Response: Subject to the General Objections, Flowers will produce responsive non-privileged and non-work product documents at a mutually convenient time and place upon entry of an appropriate confidentiality order."

Despite agreement and entry of such an order, Flowers never produced a single document in response to this request.

Anderson/Flowers has failed to provide any evidence of harm from IMA's use of the COBBLESTONE MARKET mark, or from the myriad of other uses of Cobblestone which exist in the marketplace and for which Flowers has done nothing:

Anderson has testified:

> After reviewing the list of Coblestone marks used by competitors and others as identified in Flowers' Responses to Interrogatory No. 4 (including Cobblestone Bread owned by Leo Toril Thomas, Coblestone Kitchens, which includes food, beverages and staple goods; Cobblestone Restaurant and Bar; Cobblestones Restaurant and Lounge; and other Cobblestones for restaurant services; Cobblestone for spices and extract; a Cobblestone bake shop for retail bakeries in Pennsylvania; another Cobblestone bakery in Spokane, Washington; a Cobblestone for confectionary candy, a Cobblestone Cookery and Imports; another Cobblestone Kitchen for bakeries in Arcadia, Oklahoma; a Cobblestone Diner for seafood; and a Cobblestone Gifts for health and diatetic foods, Anderson as Vice-President/Director of Marketing was Flowers was asked if Flowers took any actions to prevent such uses of the mark Cobblestones or whether the use by competitors and others of the mark, Cobblestones, had harmed Flowers in any manner (Anderson I, P.38, L4-25, P39, 1-25, P.40, L.1-11). The relevant . responsive testimony by Anderson is as follows:[91]
>
> Q. Now that you have studied the responses to Interrogatory 4, has it refreshed your recollection as to whether Flowers has taken any action to prohibit or stop any of these uses of the word cobblestone?
> I cannot recall a specific incidence, but I would refer to counsel on that.

[91] Anderson Vol I, P.38, L4-25, P39, 1-25, P.40, L.1-11

At least in the last eight or ten years since you've been . . . Vice President of Marketing or Director of Marketing for the last eight or ten years?
A. Right.
Q. You're not aware of any personal involvement in disputing any of these, is that right?
A. That's correct.
Q. To the best of your knowledge, has any of these uses of cobblestone harmed your brand or cost you any sales, as far as you know?
A. I don't know.[92]
Q. So it's fair to say you are not aware of any harm to your brand or to your sales for the use of these other cobblestone marks that I described to you in Interrogatory 4, thought it may be the case, you just don't know?
A. That's correct."

Anderson and Flowers have not bothered to try to identify any potential or actual confusion:

Q. So the fact that there is meats and cheeses being sold under the Cobblestone Market brand in a delicatessen that's in the same grocery store that you may have Cobblestone Mill-branded bread being sold is at least one aspect of where you think there's a likelihood of confusion?
A. Yes.
Q. Have you done any kind of a market survey to see if that is, in fact, the case to the consuming public?
A. No.
Q. Other than your impression in discussions with counsel and other people within Flowers, have you done anything else to determine whether the scenario you just depicted as createing a likelihood of confusion, in fact, exists?
A. No.[93]

(l) Any other established fact probative of the effect of use.

Finally, Flowers states that when a competitor uses a similar mark, doubt as to confusion should be resolved against the newcomer, and cites two cases for this proposition. *See Lone Star Manufacturing Co., Inc. v. Bill Beasley, Inc.*, 498 F.2d 906,

[92] Anderson Vol I, P39, 13-25, P.40, L.1-11).
[93] Anderson Vol I, P.44, L13-25, P.45, L1-4).

182 U.S.P.Q. 368; *Specialty Brands, Inc. v. Coffee Bean Distrib. Inc.*, 748 F.2d 669 (Fed. Cir. 1984). Flowers again fails to provide any evidence that it is a competitor with IMA and thus this proposition and these cases are irrelevant to the outcome of this matter. In contrast, both of these cases deal with competing products with similar names. In *Lone Star*, it was two air conditioners were called "Frosty Air" and "Frostemp", while in *Specialty Brands*, the Court dealt with two tea products, "Spice Islands" and "Spice Valley." Here, the products are not identical and there has not be any evidence presented that indicates they are competitors. In fact, as noted above Anderson, Flowers' only witness and their Vice President of Marketing, has consistently testified that IMA's products sold under the COBBLESTONE MARKET mark are not in any manner competitive with the goods sold by Flowers under the COBBLESTONE MILL mark.

CONCLUSION

For the reasons set forth above and the evidence identified which has been previously filed under Notice of Reliance by IMA, including IMA's file Application, there is no evidence and no basis for finding that IMA's mark COBBLESTONE MARKET is likely to cause confusion to the buying public or to otherwise serve as a detriment to Flowers' mark COBBLESTONE MILL.

This 9th day of April, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 26th, 2007 the foregoing document was served upon Opposer by depositing a copy thereof in the United States mail as first class mail, postage pre-paid, addressed as follows:

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