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

Proceeding	91167151
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FLOWERS BAKERIES)	
BRANDS, INC.,)	
)	
Opposer,)	Opposition No. 91167151
)	
v.)	Mark: COBBLESTONE MARKET
)	
INDEPENDENT MARKETING)	
ALLIANCE LP,)	
)	
Applicant.)	

OPPOSER’S REPLY BRIEF

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INTRODUCTION

The parties agree that this case presents two issues for the Board's resolution:

(1) whether IMA has committed fraud on the Patent and Trademark Office by falsely averring a bona fide intent, as of the filing date of its application, to use its mark in connection with certain goods recited in the application as published; and

(2) whether IMA's COBBLESTONE MARKET mark is likely to be confused with Flowers' prior-used COBBLESTONE MILL mark when used in connection with closely related goods.

The parties also agree on the description of the record; hence, there are no evidentiary disputes before the Board. As set forth in greater detail and below, that record confirms that IMA lacked the required bona fide intent to use its mark in connection with certain goods recited in the application as of the filing date of its application. It also confirms that there is a likelihood of confusion between Flowers' COBBLESTONE MILL mark and IMA's COBBLESTONE MARKET mark. IMA's trial brief fails to demonstrate otherwise, and the Board therefore should sustain the opposition and deny registration to IMA's mark.

I. IMA'S MARK SHOULD BE REFUSED REGISTRATION

A. IMA's Allegations of a Bona Fide Intent to Use Were Fraudulent as of the Filing Date of its Application.

On pages 8-17 of its opening brief, Flowers noted that IMA's sworn averments of a bona fide intent to use its mark in connection with certain goods covered by the application at publication were inaccurate in several respects:

(1) IMA "never" intended to use its mark in connection with vegetables;

(2) IMA did not have a bona fide intent to use its mark in connection with sandwiches as of the filing date of its application; and

(3) IMA only considered that it “might” someday sell deli mustard under its mark, despite the inclusion of that good in its original application.

In making these points, Flowers did not question IMA’s integrity or its business ethics – indeed, both parties have acknowledged that Flowers and IMA have a distribution relationship that predates this proceeding and continues today. Flowers did not suggest that the testimony of either of IMA’s primary witnesses lacked credibility. Flowers did not presume to second-guess the process by which IMA selected its mark. And Flowers certainly did not engage in *ad hominem* attacks on IMA’s counsel, with whom its own attorneys have had a cordial and professional relationship throughout this case.

Instead, Flowers’ fraud-based challenge to IMA’s application is based on a far narrower point, which is that IMA lacked a bona fide intent to use its mark in connection with certain goods covered by the application at publication – sandwiches, vegetables, and deli mustard – *as of the June 4, 2004 filing date of the application*. Indeed, the best argument that IMA can offer as is that it developed the required bona fide intent only *after* the application had been filed. As IMA itself summarizes its position on page 15 of its brief:

[R]eading the entire section of the deposition testimony of Planck 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 market and sell sandwiches, vegetables, and deli mustard under the mark COBBLESTONE MARKET in a manner entirely consistent *with the Amended Application filed in August, 2005*.

(emphasis added and footnote omitted)¹

¹ IMA authorized the examiner’s amendment that produced its final identification of goods in a telephone call with the examiner on August 1, 2005; the amendment itself was entered on August 2, 2005. Both parties therefore have referred to the amendment having taken place in August 2005.

As Flowers pointed out in its opening brief, this latter-day assertion is flatly inconsistent with IMA's explanation during discovery of how "sandwiches" came to be covered by the application:

Q. . . . What about sandwiches, the last item?

A. Well, we don't sell sandwiches prepared, we never have, under any brand of our own. . . . And, you know, frankly, I added this thing at some point with [outside trademark counsel] as an afterthought, gee, some day we might do sandwiches.

(Planck Dep. Vol. I at 49.)² It is equally unsupported by any objective evidence. Specifically, IMA's president has admitted that the company has no documentation of its intent to sell sandwiches, no marketing studies, no advertising, and nothing in its files that might identify the third party whose post-filing date inquiry IMA has alleged at trial allegedly triggered the company's interest in sandwiches. (*See* Planck Dep. Vol. II at 48-50.) On pages 14-15 of its responsive brief, IMA can only point to two pages of a deposition exhibit generated by a third party and dated "12/21/2005" – over four months after the amendment to IMA's application and over two months into this litigation. And, reproduced in full, even the text of these pages makes clear that

² Page 14 of IMA's brief accuses Flowers' counsel of having asked the "creative" and "misleading" question "Did you originally intend to sell sandwiches?" Without addressing the issue of how this exceedingly relevant question might have been simplified, Flowers refers the Board to the following testimony, *which was elicited by IMA's counsel from his own client*:

Q. So is it fair to say that originally you didn't intend to include sandwiches within the description?

A. That's correct.

. . . .

Q. 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?

A. Yes.

(Planck Dep. Vol. II at 23.)

what was being promoted was *meat*, and not *sandwiches*. With the text deleted by IMA restored, one reads:

Cobblestone Market™ whole turkey products feature what you like best. . . . Breasts and roasts can be sliced thick or thin, diced or julienne cut; they're great for everything from traditional sandwiches and wraps to party trays, entrees, soups and salads. Serve Cobblestone Market turkey with confidence in its flavor, quality—and *profit potential*.

Similarly, the other reads in relevant part:

Sliced meats that will always please

Cobblestone Market™ makes a great sandwich, terrific party tray or impressive appetizer. We select premium cuts of meat, then trim, cook, season and slice them—for your satisfaction and convenience. From turkey to ham to roast beef, a variety of delicious options and handy pack sizes will meet your needs. Cobblestone Market Brand is the choice for sliced meats.

Even had it predated either IMA's filing date or the date of its amendment, IMA's claimed evidence therefore relates only to sandwich *components* at most.³

Of greater importance, IMA identifies no record evidence or testimony placing into dispute its prior admissions that it had no bona fide intent to sell vegetables as separate branded items either before or after the August 2005 amendment to its application adding these goods:

Q. What about vegetables standing alone?

A. I don't – I believe our intention was always those were components of other products.

³ IMA does not claim, nor could it, that a bona fide intent to use its mark in connection with components of particular foods would establish its bona fide intent to use the mark with the foods assembled from those components. *See Ex parte Dan River Mills, Inc.*, 109 U.S.P.Q. 68, 69 (Comm'r 1956) ("Where a mark used on a finished product, either by its nature or manner of use, identifies a component of the goods or the material of which the goods are made, it may be registered only for the component and not for the finished product."); *Ex parte Pepsodent Co.*, 36 U.S.P.Q. 75, 76 (Comm'r 1937) (refusing registration to mark allegedly used in connection with toothpaste where record demonstrated that mark was only used in connection with an ingredient); *see also Mercantile Stores Co. v. Joseph & Feiss Co.*, 112 U.S.P.Q. 298, 300 (Comm'r 1957) (deferring final decision on registrability of mark for men's suits where record evidence suggested that applicant was only using mark in connection with fabric used to make men's suits).

Q. So to the extent that . . . a vegetable would appear in an IMA product, it would be a component of soup, for example?

A. Yes, it could be.

Q. Or as a component of the frozen entrees?

A. Could be.

Q. Okay. But not, for example, a bag of broccoli?

A. That was never – no, that was never our intent.

(Planck Dep. Vol. II at 50-51.)

And, finally, IMA points to nothing in the record supporting its alleged intent to use its mark in connection with deli mustard, a good included in the original application, whether as of its filing date or otherwise:

Q. . . . Let's jump to the next class of goods, deli mustard. How would you provide that to your customers?

A. Well, in this class of goods, it was probably an afterthought of, gee, we might do that some day.

(Planck Dep. Vol. I at 47.)

In any case, the Board need not address the issue of at what point after June 4, 2004 IMA developed a bona fide interest in particular goods because that issue is irrelevant. It is well-settled in the context of use-based applications that a sworn recitation of the basis of an application must be accurate *as of the application's filing date*. See *Hurley Int'l LLC v. Volta*, 82 U.S.P.Q.2d 1339, 1344 (T.T.A.B. 2007) (“In this instance, the law is clear that an applicant may not claim a Section 1(a) filing basis unless the mark was in use in commerce on or in connection with *all* the goods and services covered by the Section 1(a) basis as of the application filing date.”); see also *Sinclair Oil Corp. v. Kendrick*, 85 U.S.P.Q.2d 1032, 1037 (T.T.A.B. 2007) (“Applicant has pointed to no use of the mark in connection with any retail store services that would have provided applicant with any basis for claiming that the mark was in use in commerce when she filed her use-based application.”); *Hachette Filipacchi Presse v. Elle Belle LLC*, 85 U.S.P.Q.2d 1090, 1092 (T.T.A.B. 2007) (sustaining cancellation action on ground that “[t]here

is no dispute and, in fact, respondent admitted that it had not used its mark in connection with a significant number of the listed goods at the time it filed an application based on use in commerce which included a signed declaration attesting to the truth of all the statements in that application”); *Standard Knitting Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 U.S.P.Q.2d 1917, 1926 (T.T.A.B. 2006) (“The critical question is whether the marks were in use in connection with the identified goods as of the . . . filing date of the use-based applications . . .”).

Thus, had IMA (1) filed a use-based application to register its mark for “cooked deli items” on June 4, 2004 and (2) amended that identification to claim “sandwiches” and “vegetables” in August of 2005 when, in fact, (3) no use in connection with sandwiches and vegetables had in fact occurred by the June 4, 2004 filing date, there would be no question that its application would be invalid. Likewise, had IMA’s application falsely claimed use of its mark in connection with mustard as of June 4, 2004, rather than the false intent to use at issue here, the application would have been similarly infirm. IMA fails to identify any principled basis for why the outcome of these scenarios should be any different in this case, in which, but for Flowers’ opposition, IMA would have had the benefits attaching to a registration dating back to June 4, 2004 when as of that date it had neither actual use nor a bona fide intent to use its mark in connection with all the goods covered by its application.

In the face of overwhelming Board authority precluding such a result, IMA also fails to identify any principled basis for why its amendment should be permitted to cure the inaccuracies in its application. Although IMA casts its amendment as a “good deed” made in the course of settlement negotiations, that amendment came only after IMA’s interrogatory responses and a discovery deposition of its president revealed the deficiencies in its claims of a bona fide intent to use. IMA’s strategy is therefore no different from that of other applicants and registrants who

waited until material misrepresentations in their filings were identified by an adversary before they suddenly “got religion.” IMA could easily have deleted the goods in question prior to the publication of its application for opposition, but chose not to do so. *See Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q.2d 1205, 1210 n.12 (T.T.A.B. 2003). Under these circumstances, its conduct falls squarely within the ambit of case law holding the post-publication amendment of an application to address an inaccurate statement of the application’s basis will not cure the original inaccuracy. *See, e.g., Sinclair Oil Corp. v. Kendrick*, 85 U.S.P.Q.2d 1032, 1033-37 (T.T.A.B. 2007) (sustaining fraud-based challenge to application despite having previously allowed amendment to change basis); *see also Hachette Filipacchi Presse v. Elle Belle LLC*, 85 U.S.P.Q.2d 1090, 1095 (T.T.A.B. 2007); *Medinol*, 67 U.S.P.Q.2d at 1208.

In contrast to the litigants in at least some of those cases, IMA can claim neither ignorance of the law nor ignorance of the contents of its own filings. For example, IMA’s president has acknowledged his awareness that “[b]ona fide must mean real and intention is a plan, and so I’d say it would be a real plan to use.” (Planck Dep. Vol. I at 56.) Likewise, and consistent with its verbose claims of the careful pursuit of trademark registrations, IMA does not argue that it was unaware of the final identification of goods that its outside trademark counsel negotiated through the August 2005 examiner’s amendment. On the contrary, the record clearly demonstrates that IMA’s Director of Marketing and General Merchandising, Robert Fontana, reviewed and approved that identification in an August 1, 2005 exchange of e-mails. (Fontana Dep. Vol. I at 18-20 & Ex. 4.) The record also establishes that even IMA’s original identification of goods was the result of a deliberate process that included a review of the product lines of IMA’s competitors by its president and representatives of its member companies. (Planck Dep. Vol. I at 41-42.)

It may be true 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.” (IMA Brief at 10.) It may also be true that IMA regards this aspect of Flowers’ challenge to its application as “inconsistent with the very process by which IMA conducts its business.” (*Id.* at 12.) But it is also true that, in June of 2004 (deli mustard) and August of 2005 (sandwiches and vegetables), IMA and its principals “were certainly in a position to have personal knowledge of the facts concerning their own [intent to] use . . . their mark on the [goods] identified in their application.” *Hurley Int’l*, 82 U.S.P.Q.2d at 1345; *see also Sinclair Oil*, 85 U.S.P.Q.2d at 1036. And it is equally true that, as to three of the goods covered by the application at publication, its recitation of a bona fide intent to use was false.

B. Confusion is Inevitable Between IMA’s COBBLESTONE MARKET Mark and Flowers’ COBBLESTONE MILL Marks.

IMA’s arguments that confusion is unlikely between the parties’ marks is without merit on multiple levels: (1) IMA’s comparison of the marks themselves is based on an improper dissection of them that ignores their shared dominant element; (2) IMA’s proffered differences between the parties’ channels of distribution are irrelevant as a matter of law in light of the parties’ unrestricted filings; (3) the parties’ goods are more than related enough to support a finding of likely confusion; and (4) IMA has not introduced any cognizable evidence that Flowers’ mark is weak.

1. IMA’s Comparison of the Marks Themselves Is Based on an Improper Dissection of Them That Ignores Their Shared Dominant Element.

The parties agree that their marks should be considered in their entirety, but IMA’s analysis departs from this well-settled rule and instead invites the Board to focus almost exclusively on the word “market.” According to IMA, “the marks COBBLESTONE MILL and COB-

BLESTONE MARKET [do not] sound alike...since Market is a two syllable word and Mill is a single syllable word....” (IMA Brief at 23.) Unfortunately for IMA, the marks at issue are not MARKET and MILL, but COBBLESTONE MARKET and COBBLESTONE MILL, and as such, when viewed in their entireties, are confusingly similar in sight, sound, and appearance.

Both the legal and factual underpinnings of IMA’s position are without merit. At the outset, and contrary to IMA’s characterization, Flowers’ brief did not assert that a disclaimed portion of a mark should be ignored. What Flowers *did* argue, however, is directly supported by the McCarthy treatise, namely, that the disclaimed portion of a mark is necessarily the weaker, less dominant part of the mark:

It follows logically that when the PTO requires a disclaimer of a descriptive segment of a composite mark, the disclaimed segment is “not usually regarded as the dominant part of a mark.” At first look, this policy appears to be in discord with the principles discussed previously. But in reality there is no conflict. Under traditional rules for determining confusing similarity between marks, a descriptive part of a composite is regarded as a weaker and less dominant portion which makes a lesser impact on the ordinary customer. *The fact of a disclaimer is evidence that the disclaimed portion was descriptive, weak, and the dominant part of the composite is the remainder.* This is not in conflict with the principle that the disclaimed portion should not be ignored in determining the issue of likelihood of confusion. Rather, the marks should be compared through the eyes of the ordinary customer, *who is more likely to be confused by a similarity of the dominant portions of similar marks.*

3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:72 (4th ed. 2008); *see also Am. Brewing Co. v. Delatour Beverage Corp.*, 100 F.2d 253, 255 (C.C.P.A. 1938); *accord Am. Throwing Co. v. Famous Bathrobe Co.*, 250 F.2d 377, 381 (C.C.P.A. 1957); *see also Lone Star Steakhouse & Saloon v. Alpha of Va.*, 43 F.3d 922, 926 n.1 (4th Cir. 1995) (“[C]ourts should concentrate on the words not disclaimed in assessing the likelihood of confusion necessary for trademark infringement”).

IMA's brief also fails to address the placement of the allegedly dominant element of its mark at the end of that mark. Both the Federal Circuit and the Board have recognized that the first part of a mark is most likely to be remembered by consumers, especially if it is followed by a generic term. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.* 9 U.S.P.Q.2d 1895, 1897 (T.T.A.B. 1988) (finding that it is the first part of a mark that is most likely to be impressed upon the mind of a purchaser and remembered); *see also Palm Bay Imports Inc v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372-73 (Fed. Cir. 2005) (affirming holding of likely confusion in part because “[t]he presence of [a] strong distinctive term as the first word in both parties’ marks renders the marks similar, especially in light of the largely . . . non-source identifying significance of the word[s]” following it); *In re Melville Corp.*, 18 U.S.P.Q.2d 1386, 1388 (T.T.A.B. 1991) (“The names ‘Taylor’ and ‘Taylors’ are central to both opposer’s marks and applicant’s mark, respectively, because they are the first words consumers see when encountering the marks. Therefore, the names ‘Taylor’ and ‘Taylors’ are more likely to have a greater impact on purchasers and be remembered by them.”). As in *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 872 (Fed. Cir. 1992), “upon encountering each mark, consumers must first notice this identical lead word.” IMA cites to no authority to the contrary.

Again without citation to supporting authority, IMA expends considerable energy drawing the Board’s attention to the fact that two of Flowers’ three registrations feature a grist mill design. Flowers chose to register the third in standard character format, however, and any reliance that IMA may make on the design components of the other two registrations is misplaced, especially because IMA’s own filing is not limited to a particular design. *See In re Melville Corp.*, 18 U.S.P.Q.2d 1386, 1387-88 (T.T.A.B. 1991). As T.M.E.P. § 1207.01(c)(iii) explains:

If a mark (in either an application or a registration) is presented in typed form, the owner of the mark is not limited to any particular depiction. The rights associated

with a mark in typed form reside in the wording (or other literal element, *e.g.*, letters, numerals, punctuation) and not in any particular display.

See also In re Hester Indus., 231 U.S.P.Q. 881, 882 n.6 (T.T.A.B. 1986) (“Inasmuch as the drawing of applicant’s mark is in typed form, applicant is not limited to any particular form of display.”).

Independent of these *legal* principles, there is ample *factual* evidence that IMA does not itself regard “market” as the dominant element of its mark. To begin with, the testimony of IMA’s president is consistent with the rules according primary significance to lead elements of marks:

Q. Was there any consideration to putting the word “Market” first?

A. Market Cobblestone? No, it didn’t sound very good. I don’t think that it was ever considered.

(Planck Dep. Vol. I at 32.)

Likewise, and independent of the legal effect of the disclaimer, it too serves as factual evidence that IMA itself does not actually regard “market” as the dominant component of its mark. The record is clear that IMA disclaimed “market” apart from the mark in its entirety without any apparent consideration to objecting to the disclaimer request. Presumably, if the term was the dominant term in IMA’s mark, and of such significance as IMA now asserts, IMA would not have agreed to the disclaimer request in response to an initial refusal of registration with the alacrity that it did. Yet, IMA’s own president acknowledged the limitations of the word’s significance to consumers:

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. Well, what about the word market by itself without the word –

A. No.

Q. Okay. 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.

(Planck Dep. Vol. II at 33.)

As further proof that MARKET is not the dominant term or of most importance to IMA, IMA apparently did not conduct or commission a comprehensive trademark availability search for the term MARKET by itself or as part of a larger mark. IMA commissioned preliminary searches for the marks COBBLESTONE CORNER and OAKWOOD MARKET, but commissioned a comprehensive search for only the mark COBBLESTONE. (Fontana Dep. Vol. II Ex. 8, Planck Dep. Vol. I. Ex. 6.) If IMA indeed regarded “market” as the dominant component of the mark, it approached the subject of that component’s availability with surprising nonchalance. Indeed, even with respect to preliminary searches, its witnesses testified as follows:

Q: Do you know whether there was any search obtained to determine the availability of any mark that included the term “market”?

A: Not off the top of my head.

Q: Do you know whether there were any focus groups or other branding or advertising studies done in connection with the term “market”?

A: Not to my recollection.

(Fontana Dep. Vol. I at 12.)

Q. ... Has [Applicant] ever run a trademark search for the word “market”?

A. As a separate freestanding word, no, we have not.

Q. Has it run one for the word as part of a larger mark?

A. I don’t believe so.

(Planck Dep. Vol. I at 55.)

IMA similarly mistates the record when it asserts at pages 17-18 of its brief that “[t]he undisputed evidence in this case, as testified to by . . . Janice Anderson, Flowers’ Vice President of Marketing and their sole witness, is that Opposer’s Mark and Applicant IMA’s Mark are not similar in appearance, connotation, sound or meaning” In support of this proposition, pages 21-22 of IMA’s brief assert the following:

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.
- 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.

Flowers submits that the Board can easily determine from its own review of the quoted testimony that it relates only to the words “mill” and “market” standing alone and that it does not contain, as IMA asserts, a concession by Ms. Anderson “that the mental image or impression between COBBLESTONE MARKET and COBBLESTONE MILL are not the same.”

Finally, and notwithstanding IMA’s insistence that the marks are not similar, IMA takes a different view later in its trial brief on the issue of what constitutes similar marks. IMA cites two cases, *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906 (C.C.P.A. 1974), and *Specialty Brands, Inc. v. Coffee Bean Distrib. Inc.*, 748 F.2d 669 (Fed. Cir. 1984). (IMA Brief at 46-47.) IMA describes these cases as both “deal[ing] with competing products *with similar names.*” (*Id.* at 47 (emphasis added).) The “similar names” at issue in these cases were, respectively, “Frosty Air” and “Frostep,” and “Spice Islands” and “Spice Valley.” With respect to the first case and set of marks at issue, if IMA believes that the marks FROSTY AIR and FROSTEP are “similar,” its contention that the marks COBBLESTONE MILL and COBBLESTONE MARKET are

“obviously not similar” is at best disingenuous. The second case and set of marks at issue provides an even more on-point comparison. In that case, the marks described as “similar” by IMA are SPICE ISLANDS and SPICE VALLEY, each of which consists of the same initial term, SPICE. In the present case, IMA’s mark and Flowers’ mark are even more similar. They not only share the same initial term, COBBLESTONE, but the second term of each mark, namely MILL and MARKET, begins with the same letter. This alliteration is not present in the comparison of the SPICE ISLANDS and SPICE VALLEY marks, and the terms ISLANDS and VALLEY share no phonetic similarities, yet IMA describes these latter marks as “similar.”

2. The Parties’ Goods Are More Than Related Enough To Support a Finding of Likely Confusion.

As previously explained in Flowers’ opening brief, the parties’ respective goods need not be identical to support a finding of a likelihood of confusion; rather, a likelihood of confusion may exist if the goods bear some relationship to another and could be encountered by the same persons in a manner or under circumstances suggesting a common source. Even if the marks themselves are not identical in the present case, that does not change the fact that the respective goods are closely related. Flowers’ registrations of its COBBLESTONE MILL Marks cover bakery products, including bread, buns, and rolls, many of which are used for sandwiches. IMA’s application covers “deli meats; cooked deli items, namely, soups, 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 other words, sandwich components and sandwich accompaniments. It would not be surprising for a delicatessen to offer a sandwich made with COBBLESTONE MILL bread and COBBLESTONE MARKET deli meat, served with COBBLESTONE MARKET chips or COBBLESTONE

MARKET soup, and a COBBLESTONE MARKET pickle. IMA's president has conceded as much:

Q. . . . So, for sandwiches, the company might provide the components for a sandwich?

A. It's possible an operator would buy all the components for a sandwich, including [Flowers'] bread distributed through our companies.

. . . .

Q. . . . Would your customers purchase deli meats and bread during the same time period?

A. Our customers would purchase all their use items, including . . . foods . . . , during a similar period of time

Q. Okay, would that also apply to mustard and bread?

A. Yes, it would.

Q. Cheese and bread?

A. It would apply to any product that they would consume and use in their business?

. . . .

Q. Okay. Would you consider sandwiches and bread to be related items?

A. They are components that somebody used together or separately; so, you know, there is some relationship between those, as there is between mustard and ham and mustard and bread. They could be used together under some circumstances.

Q. Cheese and bread as well?

A. Any item that could conceivably use bread could be related to any other item, including cheese.

(Planck Dep. Vol. I at 49, 66-67.)

Contrary to IMA's characterization of Flowers' argument on this point, Flowers has not argued that the Board should apply a *per se* rule in this action simply because both parties market food items. On the contrary, Flowers has merely pointed out the obvious, namely that the parties' goods are closely related. With the supermarket delis here substituted for the fast food restaurant at issue in *In re Hester Indus.*, 231 U.S.P.Q. 881 (T.T.A.B. 1986), the Board's observations in that case are directly on point:

In the present case, the goods involved are not only food products but also are complementary in nature. That is, precooked boneless chicken parts are appropriate for use together with bread to make sandwiches, and, in fact, it is not unusual

for [supermarket delis] to sell chicken sandwiches. Moreover, the identification “bread” is broad enough to encompass rolls, and [supermarket delis] which sell fried chicken, for example, often sell rolls therewith. Thus the goods of applicant and registrant might well be sold to the same purchasers (i.e., [supermarket delis] for use together.

Id. at 882 (footnote omitted).

In parsing the cases cited in Flowers’ opening brief, IMA does not attempt to distinguish the parties’ respective goods themselves. Instead, IMA conflates the inquiries into the similarity of marks and goods to argue that the related nature of the parties’ goods has significance only if the parties’ marks are identical. This suggestion is contradicted by the outcomes in other Board cases, *see, e.g., In re Shoemaker’s Candies, Inc.*, 222 U.S.P.Q. 255 (T.T.A.B. 1984) (confusion likely between MISS BUTTER MAID and BUTTER-MAID marks for noncompetitive food items), and does not have support even in the cases discussed by IMA. For example, although *In re Colonial Stores*, 216 U.S.P.Q. 793 (T.T.A.B. 1982), gave great weight to the identical character of the marks at issue, it nonetheless found that “bread and prepared meats are complementary products which are often prepared and consumed together, principally in sandwich form.” *Id.* at 794. Similarly, Flowers does not submit that the relatedness of the goods was the dispositive factor in the Board’s analysis in *In re Martin’s Famous Pastry Shoppe, Inc.*, 221 U.S.P.Q. 364, 366-67 (T.T.A.B. 1984). Nonetheless, it cannot be denied that the Board found bread and cheese to be related goods, and may be perceived as emanating from a common source; in fact, the Board even noted that “larger store deli-counters may well display bread and rolls in close proximity to the cold cuts and cheese purveyed there.” *Id.* at 366.⁴

⁴ IMA’s brief suggests that Flowers’ brief included an “incorrect reading” of the case, “as there was in fact no likelihood of confusion between Martin’s Famous Pastry Shoppe Inc. and Martin’s.” The marks at issue were MARTIN’S FAMOUS PASTRY SHOPPE, INC. & Design and MARTIN’S, on the one hand, and MARTIN’S, on the other hand. Although the Board found no likelihood of confusion between MARTIN’S FAMOUS PASTRY SHOPPE, INC. & Design and

3. IMA's Proffered Differences Between the Parties' Channels of Distribution Are Irrelevant as a Matter of Law in Light of the Parties' Unrestricted Filings.

IMA does not dispute that, because Flowers' registrations and IMA's application are unrestricted with respect to trade channels, any argument that the parties' channels of trade are different is irrelevant. *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990); *accord J&J Snack Foods Corp. v. McDonalds Corp.*, 932 F.2d 1460, 1463 (Fed. Cir. 1991); *Helene Curtis Indus. v. Suave Shoe Corp.*, 13 U.S.P.Q.2d 1618, 1623 (T.T.A.B. 1989). As a matter of law, therefore, an application of this factor weighs in favor of a finding of likely confusion.

Notwithstanding this legal rule, IMA's arguments regarding channels of trade are in fact nothing more than a repetition of its arguments regarding the relatedness of the goods:

Relatedness, or channels of trade, means, in this context, that the goods or services of Applicant and Opposer 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. *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.*

(IMA Brief at 27.) IMA's channels of trade are not deli meats, cooked deli items, and the other items recited above; those are IMA's *goods*. The *du Pont* channels of trade factor refers not to the parties' goods but to "how and to whom the respective goods of the parties are sold." MCCARTHY, *supra*, § 24:51.

Of greater importance, if one does examine the channels of trade, they in fact are overlapping if not the same. IMA admits that the parties' respective goods "may both end up in a

MARTIN'S, it did in fact find a likelihood of confusion between the marks MARTIN'S and MARTIN'S.

grocery store.” (IMA Brief at 28.) Although IMA contends that the goods would be offered in different sections, this is not necessarily true. As previously noted, “larger store deli-counters may well display bread and rolls in close proximity to the cold cuts and cheeses purveyed there.” *In re Martin’s Pastry Shoppe, Inc.*, 221 U.S.P.Q. at 366. The bakery and deli departments of a grocery store often are adjacent to one another. Moreover, Flowers’ COBBLESTONE MILL breads are in fact offered for sale in grocery store delicatessens and advertised on “kneeboards,” an advertising display featured in grocery delis. (Anderson Dep. Vol. II at 12.)

Thus, from a legal perspective, because the parties’ respective registrations and application are unrestricted, any argument by IMA that the channels of trade are different is irrelevant; IMA’s argument mistakes channels of trade for the parties’ goods; and finally, even if the actual channels of trade are examined, they are in fact overlapping, if not the same.

4. Flowers’ COBBLESTONE MILL Marks are Strong and Entitled to Broad Protection.

Pages 35-38 of IMA’s brief refer to alleged third-party uses as putative evidence of the weakness of Flowers’ mark. Even if IMA’s showing consisted wholly of authenticated records from the USPTO, however, such data have no probative value in the absence of evidence that the underlying marks actually are in use:

Little weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.

AMF Inc., v. Am. Leisure Prods., Inc., 474 F.2d 1403, 1406 (C.C.P.A. 1973); *see also In re Philips-Van Heusen Corp.*, 228 U.S.P.Q. 949, 951 n.5 (T.T.A.B. 1986) (“[W]here a party to a proceeding, whether ex parte or inter parte, introduces copies of *third party* registrations,” such “copies of third-party registrations are incompetent, in and of themselves, to establish that the

marks shown therein are in use, or that the public is familiar with them.”); *In re Great Lakes Canning, Inc.*, 227 U.S.P.Q. 483, 485 (T.T.A.B. 1985) (“[T]hird-party registrations are of little probative value because they cannot serve to establish that the marks shown therein are in use or that the public is familiar with them, nor can their existence justify the registration to an applicant of a mark which so resembles a registered mark as to be likely to cause confusion.”).

Here, of course, most of IMA’s evidence does not consist even of bare records of registrations. Rather, the alleged third-party uses upon which it relies are contained in search results that IMA has not independently researched and that have been generated by search algorithms that are not a matter of record (*See* Planck Dep. Vol. II at 34-61.) As its president testified:

Q. . . . [A]re you familiar with the methodology used by Google to generate such results?

A. No, I’m not.

....

Q. Of the [Google] search results, . . . I take it . . . there was no additional investigation into these 1[.]29 million users that might be reflected in any search results?

A. I would agree with that statement.

Q. So you don’t know whether any entity that might be reflected in these results actually is using Cobblestone as a trademark?

....

A. I don’t have evidence one way or another to that question, either.

....

Q. With the exception of that attachment [a trademark availability search report], does IMA have within its possession any evidence of use by other persons of Cobblestone as a trademark?

A. Not to my knowledge.

Q. So to your knowledge, the company has not produced any such evidence?

A. That’s correct.

....

Q. . . . Did the company commission any research on any of the companies disclosed by this search report?

A. No.

Q. So no attempts to buy product?

A. No.

Q. No ordering say, of Dun & Bradstreet reports?

A. No.

- Q. No use of any third-party vendors to conduct research?
A. No.

(Planck Dep. Vol. II at 34, 39-40, 45, 47.)

- Q. . . . Are you aware of any company that uses the word Cobblestone as part of a trademark or service mark?
A. Flowers Bakery.
Q. Any other company other than Flowers Bakery?
A. IMA.
Q. Any other company other than Flowers or IMA?
A. No.

Fontana Dep. Vol. II at 52.) Accordingly, IMA's papers fail to demonstrate that Flowers' mark is weak. *See Charrette Corp. v. Bowater Commc'n Papers, Inc.*, 13 U.S.P.Q.2d 2040 (T.T.A.B. 1989) (references to mark in cases and media articles as evidenced by a LEXIS/NEXIS database search report is not proof of weakness of plaintiff's mark); *Centraz Indus. v. Spartan Chem. Co.*, 77 U.S.P.Q.2d 1698 (T.T.A.B. 2006) (declining to accept trademark search report as credible evidence of the third-party uses or registrations).

IMA also attempts to argue that "Flowers has no evidence that sales equal market awareness of the COBBLESTONE MILL mark," and in doing so mischaracterizes Ms. Anderson's testimony. In fact, Ms. Anderson testified that in Flowers' experience, consumers recognize the COBBLESTONE MILL brand. She did not testify that sales equal market awareness; instead, she acknowledged that the studies commissioned by Flowers were not for the specific purpose of determining consumer recognition of the brand:

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.

(Anderson Vol. II at 62.) At no point in this exchange did Ms. Anderson discuss whether sales equal market awareness, contrary to IMA's depiction of her testimony in its brief. However,

Flowers' sales as recited in its opening brief amply confirm that consumers are aware of and recognize the COBBLESTONE MILL brand.

CONCLUSION

The evidence and testimony of record clearly shows that IMA's mark should be refused registration because IMA knowingly lacked the requisite bona fide intent to use the mark for certain goods covered by its application at the time of publication. And as to the goods remaining in the application, IMA's COBBLESTONE MARKET mark is confusingly similar to Flowers' COBBLESTONE MILL marks. Flowers therefore requests the Board to sustain the opposition and deny registration to IMA's mark.

Respectfully submitted,

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

FLOWERS BAKERIES)	
BRANDS, INC.,)	
)	
Opposer,)	Opposition No. 91167151
)	
v.)	Mark: COBBLESTONE MARKET
)	
INDEPENDENT MARKETING)	
ALLIANCE LP,)	
)	
Applicant.)	

CERTIFICATE OF SERVICE

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

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This the 24th day of April, 2008.

/Theodore H. Davis Jr./