

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Oral Hearing: November 15, 2011

Mailed: June 22, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Stoncor Group, Inc.
v.
Specialty Coatings, Inc.

Opposition No. 91187787
to application Serial No. 77428195
filed on March 21, 2008

Charles N. Quinn of Fox Rothschild LLP for Stoncor Group, Inc.

Thomas Hoxie of Hoxie and Associates LP for Specialty Coatings,
Inc.

Before Quinn, Holtzman and Lykos, Administrative Trademark
Judges.

Opinion by Lykos, Administrative Trademark Judge:

On March 21, 2008, Specialty Coatings, Inc. ("applicant")
filed an application to register the mark ARMORSTONE, in
standard character format, for "Clear and pigmented coatings
used in the nature of paint; Glazes; House paint; Interior
paint; Mixed paints; Paint for concrete floors; Paint primers;
Paint sealers; Paint thinner; Paints; Paints and lacquers;

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Pavement striping paint; Epoxy coating for use on concrete industrial floors" in International Class 2. The application was filed on March 21, 2008 pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging January 1, 2006 as the date of first use anywhere and in commerce.¹

On December 1, 2008, Stoncor Group, Inc. ("opposer") filed an ESTTA² cover sheet indicating the following grounds for opposition as reprinted below:

Deceptiveness	Trademark Act section 2(a)
False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is merely descriptive	Trademark Act section 2(e)(1)
The mark is deceptively misdescriptive	Trademark Act section 2(e)(1)
Dilution	Trademark Act section 43(c)

Opposer also listed on the ESTTA cover sheet fifteen registrations owned by opposer, and properly made of record those registrations by printing out copies from the USPTO Trademark Applications and Registrations Retrieval ("TARR") database. See Trademark Rule 2.122(d)(1). These pleaded

¹ Application Serial No. 77428195.

² ESTTA is the acronym for "Electronic System for Trademark Trials and Appeal," the Board's electronic or Internet filing system.

registrations are for marks which all begin with the prefix "STON-" and include the following:³

STONCLAD for "epoxy hardeners, chemical epoxy additives, epoxy curing agents, epoxies for use as components in mixtures, chemical solvents all solely for use in industrial and institutional applications" in International Class 1, and "floors and flooring systems composed of resins, curing agents, quartz aggregate for use in industrial and institutional applications" in International Class 19;⁴

STONHARD for "chemicals, namely two component epoxies; multicomponent mixtures of epoxies, curing agents and aggregates; multicomponent mixtures of urethanes, resins and hardeners; all for general industrial use" in International Class 1;⁵ and

STONSHIELD for "epoxy hardeners, chemical epoxy additives, epoxy curing agents, epoxies for use as components in mixtures, chemical solvents all solely for use in industrial and institutional applications" in International Class 1; and "floors and flooring systems comprised of epoxy resins, hardeners/curing agents for use with epoxy resins and quartz aggregates for use in industrial and institutional applications" in International Class 19.⁶

The pleading attached to the cover sheet reads in its entirety as follows: "THERE IS A LIKELIHOOD OF CONFUSION AS BETWEEN APPLICANT'S MARK AND THE INDIVIDUAL MARKS AND THE FAMILY OF MARKS PLEADED BY THE OPPOSER." The next day opposer filed a "Supplemental Statement" which included the following new allegation: "Opposer's marks are earlier in priority such that applicant's mark lacks priority and registration of the same is likely to cause confusion, thereby damaging Opposer." We

³ Opposer focused on these three registrations in its brief.

⁴ Reg. No. 1706070, issued August 11, 1992; renewed.

⁵ Reg. No. 1487280, issued May 10, 1988; renewed.

⁶ Reg. No. 1689713, issued June 2, 1992; renewed.

construe this "Supplemental Statement" as additional allegations to the original notice of opposition. Applicant in its answer essentially denied the allegations set forth in the notice of opposition and asserted various affirmative defenses.

I. Pleading and Claim Issues

Opposer did not argue the following claims in its brief: deceptiveness pursuant to Section 2(a), false suggestion of a connection pursuant to Section 2(a), deceptive misdescriptiveness pursuant to Section 2(e)(1) and dilution pursuant to Section 43(c).⁷ In accordance with the Board's usual practice, we find those claims to have been waived by opposer.⁸ See, e.g., *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005).

Opposer argued in its brief the likelihood of confusion and descriptiveness claims as well as a newly asserted claim that widespread third-party generic use of the term "armorstone" precludes registration of the mark. Thus, we are left with the question of whether these claims were properly pleaded or tried by express or implied consent.

For an opposition to a Section 66(a) application, the ESTTA cover sheet constitutes the entirety of the complaint. See *CSC*

⁷ In its reply brief, opposer explicitly acknowledged it did not argue its asserted dilution claim. Reply Brief, p. 16.

⁸ The fact that applicant argued some of these claims in its brief (e.g. dilution) is irrelevant. At oral argument, applicant requested that opposer's unargued claims be deemed waived.

Holdings, LLC v. SAS Optimhome, 99 USPQ2d 1959 (TTAB 2011). By contrast, for an opposition to an application based on Section 1(a), as in this case, merely checking off the ESTTA box for a particular claim does not constitute a proper pleading of that claim, absent further allegations relating to the claim in the notice of opposition. Applying this standard, we find that opposer properly pleaded a Section 2(d) claim based on the allegations contained in the attached and supplemental supporting pleadings. See *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"). However, since the supporting pleadings are devoid of any allegations regarding opposer's descriptiveness and genericness claims, we find that opposer failed to properly plead these claims. See *Ashcroft v. Iqbal*, 129 S. Ct. at 1949, citing *Twombly*, 550 U.S. at 555 ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice").

We now turn to the issue of whether opposer's descriptiveness and genericness claims were tried by express or implied consent. Fed. R. Civ. P. 15(b) provides, in pertinent part, that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

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Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue. TBMP § 507.03(b) (3d ed. 2011). See also Fed. R. Civ. P. 15(b)(2); *Morgan Creek Productions Inc. v. Foria International Inc.*, 91 USPQ2d 1134, 1138 (TTAB 2009); *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720-1721 (TTAB 2008); *Boise Cascade Corp. v. Cascade Coach Co.*, 168 USPQ 795, 797 (TTAB 1970) ("Generally speaking, there is an implied consent to contest an issue if there is no objection to the introduction of evidence on the unpleaded issue, as long as the adverse party was fairly informed that the evidence went to the unpleaded issue"). The question of whether an issue was tried by consent is basically one of fairness. The non-moving party must be aware that the issue is being tried, and therefore there should be no doubt on this matter. *Morgan Creek Productions Inc. v. Foria International Inc.*, 91 USPQ2d at 1139.

Clearly, applicant was aware that the descriptiveness claim was tried because it specifically presented arguments against this claim in its brief and did not object to such evidence introduced during trial. See, e.g., *Nexel Communications Inc., v. Motorola, Inc.*, 91 USPQ2d 1393, 1399 (TTAB 2009). However, applicant did not address in its brief opposer's claim of

genericness due to widespread third-party use of applicant's mark. Moreover, opposer's purported evidence of third-party use submitted by notice of reliance could have easily been interpreted by applicant as pertaining to opposer's descriptiveness claim. As such, it would be unfair to conclude that applicant was apprised that such evidence related to opposer's genericness claim. See, e.g., *Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1630 (TTAB 1998). We therefore find that while opposer's descriptiveness claim was tried by implied consent, opposer's claim that third-party use renders applicant's mark generic was not tried in this manner.

In view of the foregoing, and as set forth below, we will be deciding the following issues: (1) opposer's motion to strike, (2) whether opposer has standing to bring the instant proceeding, and (3) whether oppose has met its burden of proof on its Section 2(d) and descriptiveness claims.

II. Evidentiary Issues - Opposer's Motion to Strike

Opposer has moved to strike Appendix A/Exhibit 1 attached to applicant's brief consisting of applicant's request for admissions purportedly served on opposer during discovery.⁹ Insofar as applicant failed to make its discovery requests of

⁹ Opposer contends that applicant's requests for admission were never served on opposer by electronic service as agreed upon by the parties; and even if they were served, they were not received. Applicant in its brief maintains that because opposer failed to respond, the requests are deemed admitted. However, as explained above, because applicant failed to properly make them of record, we need not reach these issues.

record in this proceeding by notice of reliance during its assigned testimony period, opposer's motion is granted; the requests for admission have been given no consideration. See Trademark Rule 2.120(j)(3)(i).

III. The Record

Pursuant to Trademark Rule 2.122(b), the record includes applicant's application file and the pleadings. In addition, opposer introduced the following evidence: opposer's pleaded registrations; opposer's first and second notices of reliance (June 11, 2010) comprised of screen-prints from opposer's website; opposer's third and fourth notices of reliance (June 11, 2010), opposer's fifth notice of reliance (July 27, 2010) and opposer's sixth notice of reliance (August 24, 2010), each comprised of screen-prints from third-party websites; and the testimony deposition of Mr. Michael Jewell, Vice President of Marketing, ("Jewell Deposition") and exhibits attached thereto.

Applicant introduced no evidence during its assigned testimony period. Both parties filed briefs, and both parties were represented by counsel at an oral hearing.

IV. Standing

Applicant has challenged opposer's standing to bring this opposition. Specifically applicant contends that opposer's ownership of registrations for marks incorporating the prefix "STON-" does not constitute a basis for opposer to believe it

would be harmed by the registration of applicant's ARMORSTONE mark, because the letters "STON-" "comprise less than half (40%) of the entirety of" applicant's mark and "are found in the latter-half of the mark." Applicant's Brief, p. 19.

In the case of a notice of opposition, the standing requirement has its basis in Section 13 of the Trademark Act which provides in relevant part that "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register, ... may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor... ." An opposer must also satisfy two judicially-created requirements in order to have standing: the opposer (1) must have a "real interest" in the proceedings, and (2) must have a "reasonable" basis for his belief of damage. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

We disagree with applicant and find that opposer has demonstrated a "real interest" in this case and a "reasonable" basis for its belief in damage by properly making its pleaded registrations of record. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024,

213 USPQ 185 (CCPA 1982). Opposer's pleaded registrations, which were properly made of record with the notice of opposition, are sufficient to confer standing to bring this proceeding. As to applicant's objections, we find that opposer's pleaded marks and applicant's applied-for mark are not so distinct as to render opposer's belief in damage as "unreasonable." Each incorporates the same element of the four letters "STON." Whether or not the marks at issue are sufficiently similar is a matter to be determined under our analysis of likelihood of confusion, and not standing.

V. Section 2(d) Claim

We will first consider opposer's Section 2(d) claim.

A. Priority

Priority is not in issue in view of opposer's ownership of valid and subsisting registrations. *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

B. Likelihood of Confusion

Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also, *In re Majestic*

Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *du Pont* factors are discussed below.

1. *The Marks*¹⁰

We first turn to the *du Pont* likelihood of confusion factor regarding the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. Opposer in its brief focuses on its three registrations for the marks STONCLAD, STONHARD, and STONSHIELD. As such, we will focus our analysis on these three registered marks.

Opposer relies primarily on the testimony of Mr. Jewell who stated that in his view, the typical general contractor would mistakenly believe that flooring material bearing the mark ARMORSTONE, would identify a product manufactured by opposer.¹¹ Opposer argues that based on his testimony and the fact that applicant failed to cross-examine Mr. Jewell on this subject,

¹⁰ In its reply brief, opposer stated that it was no longer arguing that it had established a "STON-" family of marks, the ninth *du Pont* factor. Opposer's Reply Brief, p. 15. This was confirmed by counsel for opposer during oral argument.

¹¹ Jewell Deposition, pp. 72-73.

"it is undisputed" that a prospective consumer would confuse applicant's ARMORSTONE mark with opposer's STONCLAD, STONHARD, and STONSHIELD marks. Opposer's Brief, p. 18.

Aside from the fact that Mr. Jewell's testimony is hearsay, it is at best speculative, and therefore accorded minimal probative value. Furthermore, the fact that applicant elected not to cross-examine Mr. Jewell on this topic does not make his testimony dispositive of the issue. Instead, we will examine the marks themselves to reach a determination on this first *du Pont* factor.

At the outset, we note several key distinctions between applicant's ARMORSTONE and each of opposer's STONCLAD, STONHARD, and STONSHIELD marks. Applicant's mark incorporates the grammatically correct spelling of the word "stone." Opposer's marks, while pronounced by counsel for opposer at oral argument as "stoneclad," "stonehard," and "stoneshield," are not spelled in a manner consistent with this pronunciation. Rather, according to the spelling of each mark, the letter "o" is pronounced as a short vowel sound as opposed to the long vowel sound. Opposer did not introduce any evidence at trial that "STON-" would be pronounced and perceived by prospective consumers as the equivalent of the word "stone."

In addition, the placement of the terms "-STONE" and

"STON-" differs in each mark - opposer's appearing at the beginning while applicant's appearing at the end. Applicant's mark is three syllables; opposer's is two. We find these differences in sound and appearance to be substantial.

Opposer argues in its brief that applicant's mark ARMORSTONE and opposer's STONCLAD, STONHARD, and STONSHIELD marks all connote "protection of or by stone." Opposer's Brief, p. 19. However, during trial opposer introduced no dictionary definitions or other objective type evidence (e.g. excerpts from articles retrieved from the Nexis® database)¹² that applicant's and opposer's marks have the same connotation or commercial impression. Instead, opposer relies on the testimony of Mr. Jewell that opposer's marks are well known in the construction field by contractors and as the recipient of a Reader's Choice Award.¹³ Mr. Jewell's testimony again is not particularly probative on this issue. The fact that opposer's STON-

¹² In opposer's brief, opposer refers to the dictionary definitions of "armor," "clad," and "shield" from *Webster's New Collegiate Dictionary*, but did not make such definitions of record during its assigned testimony period, nor request that the Board take judicial notice thereof. Nonetheless, in order to be complete in our analysis, we *sua sponte* take judicial notice of the dictionary definitions of "armor," "shield," "clad," and "hard" from the online version of *Merriam-Webster Dictionary*, www.merriam-webster.com. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed Cir. 1983). The Board may take judicial notice of dictionary definitions obtained through an Internet web site which exist in printed format. See e.g. *Osmotica Holdings Corp.*, 95 USPQ2d 1666, 1668 (TTAB 2010).

¹³ Jewell Deposition, p. 28; Opposer's Brief, p. 21.

formative marks may enjoy third-party recognition in the construction field has no bearing on the commercial impression of the mark. Moreover, even if we were to find the words "shield," "clad," and "hard" similar in meaning to "armor," given the dissimilarities noted above in the presentation and pronunciation of the terms "STON" and "STONE," we find that the marks create different commercial impressions when considered as a whole. As such, we find that the first *du Pont* factor weighs against finding a likelihood of confusion.

2. *The Goods, Trade Channels, and Consumers*

The issue of likelihood of confusion herein must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in opposer's pleaded registrations. *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846; and *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992). In this case, applicant's identified goods include "glazes" and "epoxy coating for use on concrete industrial floors;" opposer's registrations for the marks STONSHIELD and STONCLAD include "floors and flooring systems comprised of epoxy resins, hardeners/curing agents for use with epoxy resins;" and opposer's registration for the mark STONHARD includes "two component epoxies." Mr. Jewell testified that opposer's goods are epoxies, and epoxy coatings, that the coatings are for use

on concrete floors, and that these goods are competitive or complementary with applicant's glazes and coatings.¹⁴ Based on this the identification of goods, as well as the testimony of Mr. Jewell, we therefor find that opposer's expoxies and epoxy coatings are related to applicant's glazes and coatings.

Regarding the purchasers and conditions of sale, opposer presented testimony that its products are sold to building contractors, facility managers and building owners.¹⁵ In addition, because the goods are competitive and/or closely related and, as identified, there are no restrictions as to their channels of trade or classes of purchasers, we must presume that opposer's and applicant's goods are offered in the same channels of trade and provided to the same relevant purchasers under the same conditions. *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Consequently, these *du Pont* factors favor finding a likelihood of confusion.

3. *Fame*

We now consider the fifth *du Pont* factor of fame. Fame of the prior mark plays a dominant role in likelihood of confusion

¹⁴ Jewell Deposition, p. 84, lines 4-21.

¹⁵ Jewell Deposition, p. 71, line 16 to p. 72, line 3.

cases featuring a famous mark. *Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992). Because of the extreme deference accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting fame to clearly prove it. *Lacoste Alligator S.A. v. Maxoly Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009); and *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Opposer asserts that its marks have achieved substantial fame and recognition as a result of its advertising, trade show participation, website hits and sales calls made by opposer's sales representatives. Opposer's Brief, p. 33. According to the testimony of Mr. Jewell, opposer spends approximately \$200,000 annually on advertising expenditures for its STON-formative marks¹⁶ and attends approximately 12-15 trade shows per year.¹⁷ He also testified that opposer's web site receives approximately 5 to 9000 hits per month and points to reader surveys conducted by the magazine *Food Processing* showing that

¹⁶ Jewell Deposition, p. 69, lines 11-19.

¹⁷ *Id.*, p. 57, line 16 to p. 58, line 5.

opposer's flooring ranked first in as the flooring of choice among readers.¹⁸ Opposer also notes that it sells and completes approximately 5000 epoxy flooring projects per year. In addition, opposer argues that applicant has failed to introduce any evidence of fame of its applied-for ARMORSTONE mark.

Initially we note that the lack of evidence of fame of applicant's mark is not relevant to the *du Pont* factor of fame since that factor refers to the prior mark. As explained above, opposer has priority in this case. We therefore focus our analysis on whether opposer, as the prior user, has "clearly" established fame of any of its marks.

We find that on this record, opposer has failed to meet its burden. It is problematic that opposer's advertising figures pertain to all STON- formative marks and are not broken down for each individual STONCLAD, STONHARD, and STONSHIELD mark. Equally problematic, opposer has not submitted evidence of sales figures under each mark. Apart from these deficiencies, opposer's advertising figures, promotional efforts and media exposure are not at the level required for fame. *See, e.g., Miss Universe L.P. v. Community Marketing Inc.*, 82 USPQ2d 1562, 1566 (TTAB 2007). Notably, opposer has not submitted evidence regarding advertising figures of competitors so that we can place opposer's evidence in proper context. *See Bose Corp. v.*

¹⁸ *Id.*, p. 70, lines 6 - 10.

QSC Audio Products Inc., 63 USPQ2d at 1309. Thus, while opposer has enjoyed some degree of recognition in the construction industry, opposer's evidence noted above falls short of establishing the fame of any of opposer's marks as required under the fifth *du Pont* factor. This factor is therefore neutral.

4. *Third-Party Uses*

The sixth *du Pont* factor focuses on the number and nature of similar marks in use on similar goods. Opposer contends that because it actively opposes third-party marks similar to any of its "STON-" formative marks, the "number and nature of marks that are arguably similar to any of StonCor's marks in substantial actual use on similar or related goods is small." Opposer's Brief, p. 33. We simply cannot draw this conclusion based on the number of oppositions filed by opposer. Although the record does reflect opposer's numerous filing of oppositions against applied-for marks before this tribunal, it is devoid of any evidence regarding the number of similar third-party registrations or uses of similar marks for similar goods. As such, this factor is neutral.

5. *Actual Confusion*

Regarding the seventh *du Pont* factor, opposer contends that because opposer is the "registrant and senior user," even though there is no evidence of actual confusion, this factor favors

opposer. Opposer's Brief, p. 34. This factor considers the nature and extent of any actual confusion, and since there is no evidence of any actual confusion in this case, this factor is neutral.

6. *Contemporaneous Use*

Opposer argues that because applicant has presented no evidence regarding this eighth *du Pont* factor and because opposer has "completed over thousands of projects over the last decade," this factor favors opposer. Opposer's Brief, pp. 34-35. We are not persuaded. Based on this evidence alone, we are unable to gauge whether there has been a meaningful opportunity for confusion to occur in the marketplace. Accordingly, the eighth *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

7. *Market Interface Between the Parties*

The tenth *du Pont* factor requires us to consider evidence pertaining to the "market interface" between the parties, including evidence of any past dealings between the parties which might be indicative of a lack of confusion in the present case. As opposer states, there is no evidence of any type of consent agreement or arrangement between the parties. Consequently, this factor is neutral.

8. *Applicant's Right to Exclude*

Regarding the eleventh *du Pont* evidentiary factor, "the extent to which applicant has a right to exclude others from use of its mark on its goods," opposer contends that by virtue of ownership of its uncontestable registrations, opposer has the right to exclude others from use of its marks. Opposer's argument is misplaced. This factor requires us to consider evidence pertaining to the applicant's right to exclude others from use of its mark, not as to the opposer's right to exclude others. There is no such evidence in the record with respect to applicant, and the eleventh *du Pont* factor therefore is neutral in this case.

9. *Balancing the Factors*

Considering all of the evidence of record as it pertains to the relevant *du Pont* factors, we conclude that while the goods are related, the marks are too distinct in sound, appearance and commercial impression to find a likelihood of confusion.

VI. **Descriptiveness Claim**

We now turn to opposer's claim that applicant's mark is merely descriptive. Opposer, relying on applicant's own advertising materials,¹⁹ argues that because applicant's mark ARMORSTONE incorporates the term "stone" to name one of the key components of applicant's "epoxy coating for use on concrete

¹⁹ During oral argument, opposer clarified that the evidence of third-party brand name use of the term ARMORSTONE submitted by notice of reliance was not in support of opposer's descriptiveness claim.

industrial floors," applicant's mark as a whole is merely descriptive. As opposer maintains:

Since "stone" is the second half of ARMORSTONE, Specialty Coatings mark ARMORSTONE describes the "stone" appearance resulting when using Specialty Coatings' "epoxy coating for use on concrete industrial floors" product. Such description of a characteristic, namely the "stone" appearance resulting when using the ARMORSTONE product, renders ARMORSTONE descriptive and unregistrable.

Opposer's Brief, p. 39.

Opposer's position represents a misunderstanding of the legal standard for descriptiveness. A mark is merely descriptive if it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). The entire mark, not just a single component, must be considered. In this particular case, applicant has applied to register a unitary mark - ARMORSTONE. Opposer has introduced no evidence (for example, dictionary definitions, excerpts from news databases or the Internet) that the combination of the terms "armor" and "stone" are merely descriptive of applicant's goods. While applicant's mark may be suggestive of the quality of applicant's goods, there is nothing in the record to establish that it is

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merely descriptive. Accordingly, opposer has also failed to sustain its burden of proof on this claim.

DECISION: The opposition is dismissed.