

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
October 27, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Lighthouse Sales and Marketing, LLC*

*v.*

*MedLink, Incorporated*

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Opposition No. 91200752  
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Morris E. Turek of YourTrademarkAttorney.com for Lighthouse Sales and Marketing, LLC.

Victor L. Baltzell Jr. and Jeremy J. Beck of Ackerson & Yann PC for MedLink, Incorporated.

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Before Quinn, Taylor and Masiello, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

MedLink, Incorporated (“Applicant”) seeks to register on the Principal Register the standard character mark AGENTLINK<sup>1</sup> for “managing the operations of insurance agencies and brokers on an outsourcing basis” in International Class

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<sup>1</sup> Application Serial No. 85158267, filed October 21, 2010, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

35 and for “insurance agency and brokerage; insurance brokerage; insurance brokerage services” in International Class 36.

Lighthouse Sales and Marketing, LLC (“Opposer”) has opposed registration on the ground of fraud and that Applicant’s applied-for mark so resembles Opposer’s previously used mark as to be likely to cause confusion, mistake, or to deceive prospective consumers under Section 2(d) of the Lanham Act. In the notice of opposition, Opposer pleads ownership of the mark AGENT LINK which it alleges it has used in interstate commerce since at least as early as January 2010 for “marketing, advertising and consulting services designed to assist the insurance industry with marketing and lead generation.”<sup>2</sup>

Applicant, in its answer, denied the salient allegations of the notice of opposition.<sup>3</sup>

### The Record

By operation of Trademark Rule 2.122, 37 CFR §2.122, the record includes the pleadings and the application file for Applicant’s mark. The record also includes the following testimony and evidence.

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<sup>2</sup> In the ESTTA generated form which is considered a part of the pleading, *PPG Indus. Inc. v. Guardian Indus. Corp.*, 73 USPQ2d 1926, 1928 (TTAB 2005), Opposer identified as a basis for opposition trademark application Serial No. 85302200, which it filed on April 22, 2011, for the mark AGENT LINK for “Business marketing, advertising, and consulting services designed to assist the insurance industry with marketing and lead generation” in International Class 35.

<sup>3</sup> We find that statements made by Applicant at paragraphs 22 through 31 of the answer merely amplify its denials.

A. Opposer's Evidence.

1. The testimony deposition of its president, Ksenija (Senia) Gramajo, with attached exhibits Nos. 1-23.<sup>4</sup>
2. The rebuttal testimony deposition of Ms. Gramajo, with attached exhibit No. 1.

B. Applicant's Evidence.

1. Testimony deposition of Randall McDevitt, Applicant's founder and CEO, with attached exhibits, Nos. 6-9.
2. A notice of reliance filed February 3, 2014 on:
  - i. Kentucky Secretary of State database printout of Medlink, Incorporated (Exh. 1);
  - ii. Opposer's pending USPTO trademark application (Serial No. 85302200) for AGENT LINK showing Opposer's disclaimer of the word "AGENT" (Exh. 2);
  - iii. printouts from the Trademark Electronic Search System (TESS) database and various websites purportedly showing "[l]ack of proprietary interest in, and descriptiveness of, Opposer's mark (Exh. 3);
  - iv. a printout from Opposer's website showing Opposer's logo (Exh. 4); and
  - v. printouts from Opposer's website of Opposer's online publication, "Agent eNews" (Exh. 5).
3. A second notice of reliance filed February 3, 2014 on:

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<sup>4</sup> We note that portions of the deposition, and attendant exhibits, have been designated as confidential, and we find no need to separately list both the confidential and redacted versions. We note further that the confidential versions are found at 30 TTABVue (testimony) and 34 TTABVue (exhibits) and the redacted versions are found at 31 TTABVue (testimony) and 32 TTABVue (exhibits). Unless otherwise noted, any references to Ms. Gramajo's testimony and/or accompanying exhibits are to the redacted version.

We note further that Exhibit 15, in the confidential version of the exhibits is illegible and has not been considered. It is Opposer's responsibility to ensure that all evidence is legible.

- i. a copy of a page from the USPTO Official Gazette dated March 22, 2011 showing the publication and filing date of Applicant's application (Exh. 10); and
- ii. a TEAS filing receipt for Applicant's mark to show Applicant's date of filing (Exh. No. 11).<sup>5</sup>

Both Opposer and Applicant filed briefs, and Opposer filed a reply brief.

### Findings of Fact

#### *Opposer*

Opposer provides marketing, consulting, public relations, and lead generation services to the insurance industry under the trademark AGENT LINK.<sup>6</sup> Opposer provides its marketing services through direct mail, telephone contact to insurance agents, an online publication and email.<sup>7</sup> Opposer's reach through email is "about 500,000 insurance agents, brokers, or producers...."<sup>8</sup> Opposer explains that "we have a database of every licensed insurance agent in the country ... and we do marketing campaigns on behalf of our clients to those brokers, so [sic] insurance companies and wholesalers are our clients."<sup>9</sup> Opposer further explains that it targets its services to "three different target audiences; insurance companies, wholesalers, who are known by different acronyms; field marketing organizations,

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<sup>5</sup> This filing is superfluous inasmuch as Applicant's application is of record in accordance with the rules governing this proceeding.

While the decision on Opposer's motion for summary judgment and Applicant's Pre-Trial Disclosures are part of the record of this proceeding, they are not considered evidence filed by Applicant during its testimony period.

<sup>6</sup> Gramajo Depo., p. 10; 31 TTABVue 11.

<sup>7</sup> *Id.* at p. 11; 31 TTABVue 12.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 10 and 11, 31 TTABVue 11 - 12.

FMA's, MGA, marketing general agents, BGA, brokerage general agents, IMO's, insurance marketing organizations. And then the third target audience are [sic] insurance agents and/or brokers.”<sup>10</sup> With specific regard to Opposer's target market, Ms. Gramajo testified that “the wholesaler world in the insurance industry is a pretty small world, it's a small community. My estimate is that there's anywhere from 5,000 wholesalers, national wholesalers, to maybe at about 10,000, at most, national wholesalers in the country, so when we go to conferences and industry meetings, it's a pretty small, tight-knit community. Gramajo depo. p. 18. Since as early as January 2010, Opposer has been using AGENT LINK in connection with its business services. The particulars are as follows:

- On January 7, 2010, Opposer filed, with the state of Florida, a fictitious name registration, representing that Opposer does business as Agent Link. Gramajo depo., p. 26, Exh. 8.<sup>11</sup>
- On January 8, 2010, Opposer received an email from HostMonster, a company that registers domain names, confirming Opposer's registration of the domain name agentlinkmarketing.com, which is still in use by Opposer. Gramajo depo. p. 27, Exh. 9.<sup>12</sup>
- Opposer, on February 5, 2010, received email confirmation of its purchase from TollFreeNumbers.com of a toll free number for Agent Link, which

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<sup>10</sup> *Id.* at 64; 31 TTABVue 65.

<sup>11</sup> *Id.* at 26; 31 TTABVue 27.

<sup>12</sup> *Id.* at 27; 31 TTABVue 28.

number is still in use. The receipt for the toll-free number shows the company that purchased it was “Agent Link.” Gramajo depo. pp. 28-29, Exh. 10.

- On March 22, 2010, Opposer purchased a wireless headset to use when making phone calls on behalf of Agent Link to reach potential prospects and clients. Gramajo depo. p. 30, Exh. 11.
- Opposer’s website (located at [www.agentlinkmarketing.com](http://www.agentlinkmarketing.com)) has been publicly accessible since at least as early as April 17, 2010. A screenshot of the homepage of Opposer’s website from the Internet Archive WayBack machine indicates that “Agent Link is your one-stop shop for all your agent recruitment needs” and includes contact information for Opposer.<sup>13</sup>
- On May 3, 2010, Opposer entered into a confidentiality and non-disclosure agreement with a technology vendor to assist Opposer with email sending. The contract included the AGENT LINK logo at the top and was executed by Lighthouse Sales and Marketing, LLC DBA Agent Link. Opposer’s Br. p. 8 (citing) Gramajo conf. depo., p. 36, Exh. 14.<sup>14</sup>
- On July 2, 2010, Opposer sent an email to licensed agents and brokers/producers in its database for business solicitation purposes. The database included “whoever at MedLink is licensed.” The email displayed the AGENT LINK name with contact information for Agent Link Marketing. Ms. Gramajo testified that “Our [Opposer’s] total database I believe has about four million records, and there’s a lot of clean-up we do to arrive at the data.”

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<sup>13</sup> *Id.* at 31 and 32, Exh. 12; 31 TTABVue 32 and 33, 32 TTABVue 33.

<sup>14</sup> 34 TTABVue.

She further explained that Opposer acquires the names for its database from state insurance departments for a fee.<sup>15</sup>

- Although the specifics are confidential, Opposer introduced copies of screen shots from its customer relationship management software (“CRM”) showing the history of communication between Opposer and three different prospects who are national insurance wholesalers, two dating from July 8th through October 20th and the other from April 10, 2010 through October 20, 2010. Opposer indicated that the purpose of these interactions and communications was to let them know that Opposer could help them with their agent recruitment needs. Opposer also stated that “[its] prospects only know Opposer as “Agent Link.” Opposer’s Br. p. 8 (citing) Gramajo conf. depo., pp. 30, 38-40, Exh. 15.<sup>16</sup>
- Opposer also submitted, under seal, copies of email exchanges between it and twelve individuals in the insurance industry, most who are national wholesalers located throughout the United States. The email exchanges all occurred prior to the filing date of Applicant’s application and all were to solicit business. According to Opposer, the “vast majority” of the emails prominently displayed the AGENT LINK mark with Opposer’s contact information, and many received a response. Opposer’s Br. p. 9 (citing) Gramajo conf. depo., pp. 42-52, Exh. 16.

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<sup>15</sup> Gramajo depo. p. 31, 31 TTABVue 32; 32 TTABVue 35.

<sup>16</sup> As noted earlier herein, Exhibit 15 is illegible.

- In October of 2010, Opposer sent out a “40 percent Letter”<sup>17</sup> to the wholesalers and insurance companies in its database, “to promote our business and get more business so we wanted to get some leads in so that we could sell them.” The letter includes the wording: “Agent Link is here to help you with your recruiting efforts.” The letter was sent out as a batch print from the template and there were “around 1,200 records” at that time it was printed. The letters were placed in envelopes, stamped and taken to the post office. Opposer stated only that it did not receive return mail from Applicant and that it had feedback from one recipient. Opposer further stated that it did not send out the letter any time prior to October 2010.<sup>18</sup>
- In addition, on October 18, 2010, Senia Gramajo, on behalf of Opposer, emailed a document entitled “Are you Recruiting Agents?” and which has “Agent Link on there,” “to drum up business” and “to promote our brand, Agent Link” as a resource for agents to help them with back office support. Opposer indicated that there was no email failure as to Applicant, MedLink.<sup>19</sup>
- Although we can only comment in general terms due to the confidential nature of the information, Opposer made of record a fully executed sales agreement for the sale of its services to a single purchaser, signed by the

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<sup>17</sup> Opposer identified the letter as such because marketing information indicated that “over 40% of producers [insurance agents and brokers] are looking to switch wholesalers.” Exh. 5 to the Gramajo depo., 31 TTABVue 25.

<sup>18</sup> Gramajo depo, pp. 19-21, 31 TTABVue 20-22; 32 TTABVue 25.

<sup>19</sup> Gramajo depo. pp. 23-25, 31 TTABVue 24-26; 32 TTABVue 27.



purchaser on October 25, 2010. Opposer stated that it subsequently rendered the services. Opposer's Br. pp. 9-10 (citing) Gramajo conf. depo., p. 10, Exh. 19.<sup>20</sup>

*Applicant*

Applicant works with independent agents and insurance agencies to simplify their business by handling "back room support."<sup>21</sup> In performing back room support, Applicant does proposals for brokers, submits and reviews [insurance] applications and places insurance contracts for brokers with insurance carriers.<sup>22</sup> Applicant's offerings include employee benefits, life insurance, disability insurance for individuals, annuities and long-term care insurance.<sup>23</sup> Applicant's clients and customers are insurance agents.<sup>24</sup> Applicant describes its business as "that of a wholesaler."<sup>25</sup> Applicant filed for registration of the mark AgentLink on October 21,

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<sup>20</sup> Opposer also referenced a proposed sales agreement that was never executed by the prospective client. We consider this document only to the extent it confirms email exchanges between Opposer and another prospective purchaser.

<sup>21</sup> McDevitt depo., p 5; 37 TTABVue 7.

<sup>22</sup> *Id.* at 6; 37 TTABVue 8.

<sup>23</sup> *Id.* at 7; 37 TTABVue 9.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* Mr. McDevitt testified:

Q. Okay. The Opposer in this action has described your type of business as that of a wholesaler. Is that a term that would typically apply to you?

A. That's a term that's used in the industry, yes.

Q. What does that term mean within the industry?

A. Well, within the industry we are contacted [sic] with various carriers so that an agent doesn't have to go to each carrier individually. We are contracted with these carriers to provide support and provide their products and services to the agent. And it's kind of like a one-stop shop place. You can come to us and we can do all that for you without an agent having to

2010, and at that time Mr. McDevitt testified that he had not heard of nor had any contact with anybody connected to Opposer.<sup>26</sup> Applicant has been in the business since 1991 under the mark MedLink, which it used until it began using AgentLink as a trade or business name.<sup>27</sup> With regard to the adoption and use of the AgentLink mark, Mr. McDevitt testified as follows:<sup>28</sup>

Q. Anyway, when did you begin the process of looking at using a name in addition to MedLink?

A. Well, when we began expanded servicing and offering a variety of products we felt like the MedLink name didn't state what we do, didn't brand us properly, so we engaged with a marketing advertising firm approximately the first part of 2010, maybe even earlier ....

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And since we did so many more things than that beginning back then, I felt like we needed to expand on our name and make it more recognizable for exactly what we do. And they -- I told them I was real pleased having the name link in there. I would like to keep that and they came back with the name AgentLink and I said, I like it, let's go with it. And I did ask at that time, does it cause any problems with anybody else out there, and they said -- their reply to me was, it does not. There are people using the name; however, there's no one doing exactly what you do that is using the name. I said, that's fine. Let's go.

Q. Okay.

A. That's how it came about.

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go through the effort and their staff go through the effort of making all these calls and all these comparisons. We do all that for them. *Id.* at 7-8.

<sup>26</sup> *Id.* at 9; 37 TTABVue 11.

<sup>27</sup> *Id.* at 6; 37 TTABVue 8.

<sup>28</sup> *Id.* at 9-10, 18-19; 37 TTABVue 11-12, 20-21.

Q. So when you say the first part of 2010, you're talking about the first quarter, January, February, March; would that be an accurate statement?

A. At least that early, yes.

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Q. And the design [of the MedLink logo] has been associated with MedLink until you changed to the AgentLink design --

A. Yes.

Q. -- in 2010; correct?

A. Yes.

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MR. TUREK: I'm sorry, can you qualify, what did you do back in 2010?

THE WITNESS: Well, when we went to using the name AgentLink, we also -- part of the process was to have a new logo for that name, and that's when we began using that, was sometime probably during the early to mid 2010.

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Q. (cross-examination by Opposer's counsel) Okay. When did you start publicly advertising your services under that name AgentLink?

A. That would be approximately the middle part of 2010.

In response to questioning during cross-examination, Mr. McDevitt stated that Applicant acquired the domain name <agent-link.net> on October 18, 2010 and filed a fictitious name certificate with the state of Kentucky indicating that it was doing business under AgentLink on April 20, 2011.<sup>29</sup>

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<sup>29</sup> Id. at 24; 37 TTABVue 26.

### Standing

An opposer must have “a ‘real interest’ in the outcome of a proceeding in order to have standing.” *Richie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). The evidence of record shows that Opposer provides marketing, consulting, public relations, and lead generation services to the insurance industry under the trademark AGENT LINK. This is sufficient to demonstrate that Opposer has a real interest in this proceeding and, therefore, has standing. *Lipton Industries v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Opposer, as plaintiff in these opposition proceedings, has the burden of proving, by a preponderance of the evidence, its asserted grounds of priority and likelihood of confusion and/or fraud. *See Cerveceria Centroamericana, S.A. v. Cerveceria India, Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989). We first address the issue of priority and likelihood of confusion.

### Discussion

#### *Priority*

To establish priority on a likelihood of confusion claim brought under Trademark Act § 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States ... and not abandoned...." Trademark Act Section 2, 15 U.S.C. § 1052. A party may establish its own prior proprietary rights in a mark through ownership of a prior registration, actual use or through use analogous to trademark use, such as use in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet websites,

which creates a public awareness of the designation as a trademark identifying the party as a source. *See* Trademark Act §§ 2(d) and 45, 15 U.S.C. Sections 1052(d) and 1127; *T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996), *vacating Pactel Teletrac v. T.A.B. Systems*, 32 USPQ2d 1668 (TTAB 1994). Priority is an issue in this case because Opposer does not own an existing registration upon which he can rely under § 2(d). *See King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Applicant claims that it, and not Opposer, has priority. In support of this position, Applicant contends:

Opposer has disclaimed exclusive proprietary interest in the word "AGENT", while Applicant has continuously and consistently utilized the dominant word "LINK" in connection with its business and the services to its customers since June 12, 1991, nearly twenty years before Opposer.

Applicant's Br. p. 10. This argument fails for several reasons. First, to the extent Applicant argues that the disclaimed matter in Opposer's mark must be ignored, it is simply incorrect. Disclaimed matter is not removed from a mark, and must be considered with the rest of the mark as a whole in assessing likelihood of confusion.

As the Federal Circuit stated,

it is well settled that the disclaimed material still forms a part of the mark and cannot be ignored in determining likelihood of confusion. Such disclaimers are not helpful in preventing likelihood of confusion in the mind of the consumer, because he is unaware of their existence. Therefore, the disclaimed portions of the mark must be considered in determining likelihood of confusion.

*Giant Good, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983); *see also In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751-752 (Fed. Cir. 1985); *V-M Corp. v. Mayfair Sound Prod., Inc.*, 480 F.2d 898, 178 USPQ 477, 477-478 (CCPA 1973). For that reason, we must determine whether it is Applicant or Opposer who has the prior proprietary interest in its respective AgentLink/AGENT LINK mark. To be clear, we will not ignore the presence of the word AGENT in our assessment of either mark.

There also is no evidence in the record that Applicant has been using "Link," alone, as an indicator of source for its identified services. Instead, the record clearly shows that Applicant previously used the trademark MedLink in connection with the identified services.<sup>30</sup>

If, as it appears, Applicant is attempting to defeat Opposer's claim of priority by "tacking" on its earlier use of the mark MedLink, we find the argument unavailing as Applicant is not entitled to tack in this case. "Tacking" (for priority purposes) of a party's use of an earlier mark or name onto its use of a later mark or name is permitted only in rare circumstances, and only where the applied-for mark is "the same mark" as the one, or ones, previously used. That is, whether the applied-for mark and the previous marks/names are "legal equivalents," i.e., whether they create the same, continuing commercial impression such that the consumer would consider all of the marks as the same mark. *See Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 USPQ2d 1866 (Fed. Cir. 1991); *Ilco v.*

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<sup>30</sup> McDevitt Depo, at p. 8, Exhs. 6-7, 33 TTABVue 9, 42-43.

*Ideal Security Hardward Corp.*, 527 F.2d 1221, 188 USPQ 485 (CCPA 1976); *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992).

A minor difference in the marks such as mere pluralization or an inconsequential modification of a later mark will not preclude application of the rule. See *In re Loew's Theatres, Inc.*, 223 USPQ513 (TTAB 1984) *aff'd*, 769 F.2d 764, 226 USPQ 865 (Fed. Cir. 1985); *In re Flex-O-Glass, Inc.*, 194 USPQ 203 (TTAB 1977). At the same time, however, it is clear that the “legal equivalents” standard is considerably higher than the standard for “likelihood of confusion.” Thus the fact that two (or more) marks may be confusingly similar does not necessarily mean that they are legal equivalents. *Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 17 USPQ2d at 1868.

In this case, we find that MedLink is not the legal equivalent of AgentLink. While the different terms are arguably descriptive in relation to the identified services, they nonetheless have some trademark significance.

Since Applicant is not entitled to tack on its use of the MedLink mark, and because Applicant did not otherwise seek to establish an earlier first use date, the earliest date upon which Applicant can rely for purposes of priority is the filing date of its application, i.e., October 21, 2010.

Opposer asserts prior common law rights in the AGENT LINK mark. In order for a plaintiff to prevail on a claim of likelihood of confusion based on its ownership of common law rights in a mark, the mark must be distinctive, inherently or otherwise, and plaintiff must show priority of use. See *Otto Roth & Co. v. Universal*

*Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). Applicant has questioned the distinctiveness of Opposer's asserted mark, arguing that it is merely descriptive of the services. As support for this position, Applicant points to the disclaimer of the term "AGENT," present in the pleaded application, and two statements made by Ms. Gramajo, Opposer's representative, during her testimony deposition.<sup>31</sup> We agree with Opposer that this evidence is insufficient to support a finding that Applicant's mark is not inherently distinctive. Opposer claims rights in AGENT LINK, not AGENT, and the disclaimer of AGENT does not demonstrate that the mark, as a whole, is merely descriptive. Further, as Opposer notes, its representative is not an attorney and there is no evidence that she appreciated the legal distinction between merely descriptive trademarks and suggestive trademarks. In any case, as Opposer aptly states, "she did not admit in either of those statements that AGENT LINK is merely descriptive of Opposer's services, and both statements could reasonably be interpreted as indicating her belief that AGENT LINK is a mark that suggests something about Opposer's services."<sup>32</sup> Moreover, we find it odd that Applicant has challenged the distinctiveness of the

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<sup>31</sup> The testimony, in pertinent part, reads:

Q. Well, Agent Link is a trade name for Lighthouse?

A. Correct ... We have always, from the beginning, used [the] name Agent Link, because it is more descriptive of what we actually do.

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Q. And why did you file the fictitious name registration [for Agent Link]?

A. Because it represented what our business does and what our business is."

Gramajo depo., at pp. 76 and 26, 31 TTABVue 49 and 27.


<sup>32</sup> Reply brief, p. 3.



mark inasmuch as it seeks to register, without any showing of acquired distinctiveness, a virtually identical mark for related and complementary services. Because AGENT LINK is not, on its face, merely descriptive of Opposer's services, and because Applicant has failed to introduce any competent evidence demonstrating that AGENT LINK is merely descriptive when used in connection with Opposer's services, we find Opposer's AGENT LINK mark inherently distinctive.<sup>33</sup>

As regards priority, based on the evidence of record, we find that Opposer did not establish technical trademark use of its AGENT LINK mark prior to the filing date of Applicant's application. In order to demonstrate technical service mark use, as defined in the Trademark Act, it must be shown that the mark has been used or displayed in the sale or advertising of the services and that the services have been rendered. See Trademark Act § 45, 15 U.S.C. § 1147. The earliest date on which Opposer may have rendered its services under the mark is October 25, 2010, the date a contract for the sale of its services to a single customer was fully executed.<sup>34</sup>

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<sup>33</sup> Applicant also appears to argue that Opposer's use of its mark is inconsistent. This argument is unavailing. We note Opposer's use of the AGENT LINK mark without and with the logo,  and find that either use would support a claim to have used the designation AGENT LINK. In addition, to the extent Applicant similarly questions Opposer's use of "Agent E-News" and "agentlinkmarketing," Opposer is in no way prevented from using "Agent E-News" in connection with its online publication or agentlinkmarketing.com as its domain name. With regard to the former, we recognize that Opposer's AGENT LINK logo mark appears only on the subscription page of the online publication and there is no indication in the record that the newsletter was in circulation prior to the filing date of Applicant's application. We thus accorded that use no probative value in our priority analysis. As for the latter, we note that the domain name includes the word "marketing."

<sup>34</sup> The particulars regarding this transaction are confidential and we refer to them in general terms only.

Although Opposer stated that the services were subsequently rendered, there is no testimony or evidence regarding when those services were actually performed. Nor do we have any evidence as to whether the costs of those services represented a substantial amount of business in the field of marketing, consulting, public relations, and lead generation for the insurance industry; nor is there evidence of any other executed service contracts. In any event, the lone “sale” occurred after the filing date of Applicant’s application.

Nonetheless, as Opposer aptly points out, it is the commercial usage of a trademark which creates trademark rights. *Reflange Inc. v. R-Con International*, 17 USPQ2d 1125, 1130 (TTAB 1990). “Such usage can consist of use analogous to trademark use and need not be technical trademark use.” *Id.* Because the filing date of Opposer’s pleaded application is subsequent to the filing date of Applicant’s application, and because Opposer’s evidence of technical trademark use postdates the filing date of Applicant’s application, Opposer must rely on use analogous to trademark use if it is to prevail in this proceeding.<sup>35</sup> Before a prior use becomes an analogous use sufficient to create proprietary rights, the opposer must show prior use sufficient to create an association in the minds of the purchasing public between the mark and the opposer’s services. *Malcolm Nicol & Co. v. Witso Corp.*, 881 F.2d

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<sup>35</sup> Although some of Opposer’s referenced uses of AGENT LINK are as a trade name, e.g., Opposer’s filing of a fictitious name certificate, the purchase of a toll-free number and telephone headset by the company AGENT LINK and the use of AGENT LINK as a DBA of Lighthouse Sales and Marketing, LLC on contracts, Opposer did not plead prior rights in AGENT LINK as a trade name or argue such prior rights in its brief. We note, in addition, that in some instances, Opposer identified itself as agentlinkmarketing or Lighthouse Sales and Marketing, LLC DBA Agent Link. Accordingly, we have considered the references only in the context of our analogous use analysis.

1063, 11 USPQ2d 1638, 1639 (Fed. Cir. 1989). A showing of analogous use does not require direct proof of an association in the public mind. *T.A.B. Systems. v. PacTel Teletrac*, 37 USPQ2d at 1882. “[T]he fact finder may infer the fact of identification on the basis of indirect evidence regarding the opposer’s use of the word or phrase in advertising brochures, catalogs, newspaper ads, and articles in newspapers and trade publications.” *Id.* at 1881. However, the activities claimed to create such an association must reasonably be expected to have a substantial impact on the purchasing public before the user acquires proprietary rights in a mark. *Id.*

In this case, Opposer has offered insufficient proof that its efforts to publicize and attract business under AGENT LINK created the necessary prior association or public identification with its services. Opposer’s acquisition of a fictitious name certificate, its purchase of a domain name, toll-free number and telephone headset, and its contractual agreement for assistance from an IT firm in sending emails are activities in the nature of setting up a business. No potential customer was exposed to the designation AGENT LINK in association with Opposer’s offered services. The only persons who were exposed to the AGENT LINK mark were the appropriate state agency issuing the proper credentials and the vendors supplying the necessary IT support and equipment. In addition, although we have testimony that Applicant’s website at [www.agentlinkmarketing.com](http://www.agentlinkmarketing.com) was up and running by April 17, 2010, we have no information as to what impact Opposer’s use of AGENT LINK on its website had on potential customers. Just because a website is available for viewing does not mean that it was actually viewed. Because there is no information

whatsoever as to the number of views the site received, use of AGENT LINK on the site does not support the necessary inference of public association.

We similarly find evidentiary deficiencies with regard to Opposer's email and postal campaigns. With particular regard to the July 2, 2010 email campaign, the testimony that Opposer's database contained four million records at the time the July email was sent is contradicted by the testimony that the database had "around 1200 records" in October 2010 and by Opposer's statement that its target market is a "small community," consisting of anywhere from 5,000 to 10,000 wholesalers. There is no testimony whatsoever regarding whether there was any email failure or what effect the email campaign had in publicizing Opposer's AGENT LINK mark. There is no indication that consumers contacted Opposer as a result of this campaign. Opposer's October email and postal campaigns have similar informational deficiencies. Other than stating that there was no email failure or return mail with respect to Applicant, Opposer indicated only that it heard from one potential customer as a result of these campaigns. Although Opposer seemingly identified its universe and sought to connect with approximately 12 to 25 percent thereof, we can conclude only that these campaigns were attempts to reach the public that may or may not have resulted in public exposure of the AGENT LINK mark.

Last, with regard to the email exchanges between Opposer and particular potential customers, we find the 15 potential customers to be an insubstantial number to translate into a public exposure of AGENT LINK with Opposer.

Collectively, all of these uses are insufficient to establish prior use analogous to service mark use because it cannot be reasonably inferred that a public association of the mark AGENT LINK with Opposer's services was created in the marketplace for marketing consulting, public relations, and lead generation services to and for the insurance industry. Opposer, therefore, has failed to show use analogous to service mark use of AGENT LINK which is sufficiently clear, widespread and repetitive so as to have created the requisite association in the minds of potential customers of AGENT LINK as an indicator of source of Opposer's services.

Opposer, as plaintiff in this proceeding, has the burden of proof with respect to its claim of priority of use and likelihood of confusion. *See, e.g., Bose Corp. v. QSC Audio Products Inc.*, 293 F.2d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (“[t]he burden of proof rests with the opposer ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion); *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (“[i]n opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark”). In view thereof, and because Opposer has failed to establish that prior to the October 21, 2010 filing date upon which Applicant can rely, it either was actually rendering its marketing consulting, public relations, and lead generation services to and for the insurance industry under the AGENT LINK mark, or that it had made use analogous to service mark use of AGENT LINK that was sufficient to have a significant impact on the

purchasing public, Opposer has not satisfied its burden of proof and its claim must fail.

### Fraud

We turn then to Opposer's fraud claim. Opposer essentially contends that because Randall McDevitt had actual knowledge of Opposer's prior use of a nearly identical trademark in connection with services that are strongly related to those listed in Applicant's application, Mr. McDevitt, when he signed the application declaration oath, could not have reasonably believed that (1) Applicant was entitled to use the AGENTLINK mark in commerce, and (2) that no other person, firm, corporation, or association had the right to use AGENTLINK, or a confusingly similar variation, in commerce"; and that Mr. McDevitt's representations were material to the registrability of the AGENT LINK mark and were made with the intent to deceive the USPTO.<sup>36</sup> Opposer particularly states that on October 13, 2010, approximately one week prior to Applicant's filing its application, it printed out a marketing piece referred to as the "40% Letter," and that on the next day the letter was sent to insurance wholesalers and insurance companies, including Nick McDevitt, Applicant's corporate development officer, for the purpose of solicitation. Applicant's Br. pp. 19-20.<sup>37</sup> According to Opposer, the solicitation letter displayed Opposer's AGENT LINK trademark in connection with the services offered by Opposer, was sent by first class mail to Mr. N. McDevitt and was not returned as undeliverable. Opposer noted that Applicant admitted to receiving materials from a

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<sup>36</sup> Notice of opposition ¶ 19.

<sup>37</sup> Citing Gramajo depo., 18, 19, 22-23; McDevitt depo., p. 28.

company called AGENTLINK, but Applicant claimed the letter was received after it filed its trademark application.

Opposer also stated that on October 18, 2010, three days prior to Applicant's filing its application, Opposer sent a promotional email to the "prospects" in its database, which included Applicant, to drum up business and to promote the AGENT LINK brand. Opposer indicated that, as to Applicant, it did not receive any email delivery failure notification and had no reason to believe that Applicant did not receive the email on or about October 18<sup>th</sup>, 2010. Yet, Opposer asserts, Applicant's representative, Mr. Randall McDevitt, "declared" at the time Applicant filed its trademark application, in pertinent part, that he

believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. § 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive....

Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with its application with intent to deceive the USPTO. *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009), *citing Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483, 1484. (Fed. Cir. 1986). "The very nature of the charge of fraud requires that it be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt

must be resolved against the charging party.” *Id.*, at 1939, *quoting Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981).

As noted in *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1206-07 (TTAB 1997),

the Board frequently has held that an applicant’s failure to disclose to the PTO the asserted rights of another person is not fraudulent unless such other person was known by applicant to possess a superior or clearly established right to use the same or a substantially identical mark for the same or substantially identical goods or services as those in connection with which registration is sought. If the parties’ respective marks and goods or services are not substantially identical, then the applicant has a reasonable basis for believing that contemporaneous use of such marks by the parties, on or in connection with their respective goods or services, is not likely to cause confusion. The applicant’s averment of that reasonable belief in its application declaration or oath is not fraudulent. *See Space Base Inc. v. Stadis Corp.*, [17 USPQ2d 16, 1218-19 (TTAB 1990)]; *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, [221 USPQ 73, 76 (TTAB 1983)]; *SCOA Industries Inc. v. Kennedy & Cohen, Inc.*, [188 USPQ 411, 414 (TTAB 1975)]. *See also Yocum v. Covington*, 216 USPQ 211 (TTAB 1982) (applicant possessing at least color or title to the mark had reasonable basis for believing that it had the exclusive right to use the mark, and is not guilty of fraud in executing application oath to that effect). Similarly, if the other person’s rights in the mark, vis-à-vis the applicant’s rights, are not known by applicant to be superior or clearly established, e.g., by court decree or prior agreement of the parties, then the applicant has a reasonable basis for believing that no one else has the right to use the mark in commerce, and the applicant’s averment of that reasonable belief in its application declaration or oath is not fraudulent.

Applying these principles to the case at hand, we find that the record does not support Opposer’s claim. Although Applicant acknowledged that at some point



both Messrs. McDevitt were in possession of Opposer's 40% Letter,<sup>38</sup> given the limited time frame between the mailing date of the letter by Opposer and the filing date of Applicant's application, we cannot conclude that Applicant received, let alone reviewed and appreciated any trademark significance allegedly imparted by, the letter prior to Applicant's filing date. While Opposer arguably can confirm the receipt of the 40% Letter by a third party by October 18<sup>th</sup>, Opposer can, at best, only show with respect to Applicant that the letter was part of a batch of letters mailed prior to the October 21, 2014 application filing date and not returned as undeliverable; that is, it cannot show that Applicant received (and reviewed) the

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<sup>38</sup> Dr. McDevitt particularly testified:

Q. Okay. And did Nick McDevitt ever indicate to you that he received some material from a company calling itself AgentLink?

A. He did.

Q. And what was your reaction to that?

A. Again, it was no reaction.

Q. Did you receive those materials before or after you filed your trademark application?

A. After.

Q. Did you see the materials yourself, did Nick show you the materials?

A. He showed me one letter he received.

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Q. Okay. Had you ever heard of AgentLink, the opposer in this proceeding, prior to filing your trademark application for AgentLink?

A. No.

Q. So when Nick shared with you some communication from Opposer, Lighthouse, in this case, you were not concerned about its use of a very similar, nearly identical name --

A. No.

Q. -- for its services?

A. No.

Q. And why were you not concerned?

A. Because we don't do the same thing.

McDevitt depo., pp. 28-29; 37 TTABVue 29-30.

letter by the application filing date. Similarly, with regard to the solicitation email, Opposer only indicated that there was no delivery failure with respect to Applicant's address; this does not show that the email was reviewed. Further, Mr. McDevitt explicitly testified that he had no knowledge of Opposer at the time Applicant filed its application and, despite Opposer's protestations to the contrary, we find no reason to doubt this testimony.

Applicant also argues that even if constructive knowledge could be shown, presumably by virtue of the *receipt* by Applicant of Opposer's promotional letter and email prior to the filing date of Applicant's application, "the Declaration was made in good faith 'on information and belief ... believed to be true,'" and it further explains that "Applicant has consistently taken the position throughout this dispute that the parties' respective uses of AGENT LINK lie in different trade channels and thus such uses would not and do not 'cause confusion, ... mistake, or ... deceive.'"<sup>39</sup>

Given that fraud must be proven to the hilt, we find that even if Opposer had shown that Applicant had received the solicitation letter and/or email prior to Applicant's executing the application declaration, receipt alone does not prove that Applicant knew that Opposer had any rights, much less, superior rights in the AGENT LINK mark, or that Applicant believed that its use of its mark would be likely to cause confusion. Moreover, the parties' services are not substantially identical and, therefore, Applicant's belief that there was no likelihood of confusion resulting from the parties' concurrent use of their respective marks in connection

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<sup>39</sup> Applicant's Br. p. 33.

with their respective services was not unreasonable. Quite simply, Opposer's evidence falls far short of meeting the standard of proof for fraud, and its ground that Applicant committed fraud in executing the application declaration is therefore dismissed. *Cf.*, *Nationstar Mortgage LLC v. Mujahid Ahmad*, (Opposition No. 91177036 issued September 30, 2014) \_\_ USPQ2d \_\_ (TTAB 2014) (Fraud found where Applicant made false representations of use with an intent to deceive the USPTO when he filed an application under Section 1(a) of the Trademark Act for the identified services when he knew he had not used the mark in commerce for any of those services at the time of filing).

Decision: The opposition is dismissed as to both grounds.