

This Decision is not a
Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: December 16, 2015

Opposition No. 91215734

Assa Realty, LLC

v.

The Solution Group Corp.

Before Kuhlke, Ritchie, and Kuczma,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

The Solution Group Corp., (“Applicant”) seeks to register the mark **cassa**, described as consisting “of the word ‘CASSA’ in lowercase in a stylized font,” for “real estate development and construction of commercial, residential and hotel property” in International Class 37.¹

On April 1, 2014, Assa Realty, LLC, (“Opposer”) filed a notice of opposition to the registration of Applicant’s involved **cassa** mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act. In support of its asserted claim, Opposer pleads common law rights in the mark CASSA and ownership of the following application:

¹ Application Serial No. 85900657, filed on April 10, 2013, based on an allegation of an intention to use the mark in commerce under Section 1(b) of the Trademark Act.

Application Serial No. 85955568, filed on June 10, 2013, for the mark CASSA in standard characters for “Lease of real estate; Leasing of real estate; Real estate services, namely, condominium management services; Real estate services, namely, rental of vacation homes, condominiums, cabins, and villas using pay per click advertising on a global computer network,” in International Class 36; “Real estate development; Real estate development and construction of commercial, residential and hotel property,” in International Class 37; and “Hotel accommodation services; Hotel services; Resort hotel services; Restaurant and hotel services,” in International Class 43, based on allegations of use in commerce on March 15, 2009 in each International Class, under Section 1(a) of the Trademark Act.

This case now comes before the Board for consideration of Opposer’s motion for summary judgment on Opposer’s asserted claim of likelihood of confusion.² The parties have fully briefed the issues. *See* Trademark Rule 2.127(a).

Analysis

Summary judgment is an appropriate method of disposing of cases that present no genuine disputes of material fact, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be true or is genuinely disputed must support its assertion by either 1) citing to particular parts of materials in the record, or 2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. *See* Fed. R. Civ. P. 56(c). The evidence must be viewed in a light favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant’s favor. *Lloyd’s Food Products, Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993). A

² We note that the ESTTA cover sheet of the notice of opposition lists the claims of (1) deceptiveness under Section 2(a) of the Trademark Act; (2) primarily merely a surname under Section 2(e)(4); and (3) fraud. None of these claims have been supported by allegations to adequately plead them. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949050 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In view of our decision below, these potential claims are moot.

factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

The moving party has the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987).

Standing

For the Board to grant summary judgment, Opposer must establish that there is no genuine dispute as to its standing as well as to the ground on which it seeks entry of summary judgment. *See Fed. R. Civ. P. 56(a)*. *See also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

Opposer has alleged a claim of likelihood of confusion that is plausible and is not wholly without merit. Moreover, as more fully discussed below, Opposer has established proprietary trademark rights in the mark CASSA in connection with real estate development, and leasing and sale of residential and hotel property.³

³ We note standing could have been established by Opposer's submission of the copy of its pleaded pending application Serial No. 85955568; however, while Opposer submitted a copy of the application, Opposer did not also submit the file of its application or any Office Action that would establish Opposer's allegation that Applicant's application was cited as a potential bar to Opposer's application under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), nor did Opposer address this in the affidavit. *See Weatherford/Lamb Inc. v. C&J Energy Services Inc.*, 96 USPQ2d 1834 (TTAB 2010).

Priority and Likelihood of Confusion

The issue to be determined here is priority; the marks are nearly identical (Applicant's stylization is minimal and, in fact, is very similar to Opposer's common law mark as shown *infra*). Moreover, once Opposer establishes use of its mark in connection with real estate development, and the sale and leasing of residential and hotel units, the services are also highly related if not identical to Applicant's services. Indeed, in its moving brief, Opposer listed as material facts not in dispute "[t]he marks at issue in this proceeding are identical; and, the services associated with the respective marks are also identical and/or highly related" (App. Br. p. 6, 13 TTABVUE 7) and Applicant did not present argument on the likelihood of confusion factors and restricted its response to the question of priority, *i.e.*, whether Opposer established prior proprietary rights in the pleaded common law mark.

In support of its motion, Opposer submitted the affidavits (attached to the moving and reply briefs) of Mr. Salim ("Solly") Assa, the Manager and Principal of Opposer, with accompanying exhibits ("Assa 1st Aff." and "Assa 2nd Aff."). It is clear from this evidence that Mr. Assa and his brother own and control Opposer, Assa Realty, LLC, and the related companies, Assa Properties, Inc., Waterscape Resort, LLC and 511 Property LLC, that license and use the mark CASSA, the ownership and control of which resides with Opposer, Assa Realty, LLC, which is owned and managed by Salim Assa.⁴

⁴ See, *e.g.*, Assa 1st Aff. ¶¶ 1, 3, 6, 9, 21, 13 TTABVUE 13-15, 18; Assa 2nd Aff. ¶¶ 1, 4-5, 11, 16 TTABVUE 13, 14-15.

Applicant argues that “Opposer’s only affidavit to support its prior use is replete with hearsay and speculative statements. While the affidavit itself is hearsay, it should at least be based on assertions based on the affiant’s personal knowledge. That is not the case with Salim Assa’s affidavit”. App. Br. p. 2, 15 TTABVUE 3.

To the extent this statement amounts to an objection based on hearsay, Applicant’s objections are overruled. Fed. R. Civ. P. 56(c)(4) provides that:

Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

In Board proceedings, affidavits may be submitted in support of, or in opposition to, a motion for summary judgment provided that they (1) are made on personal knowledge; (2) set forth such facts as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. This is so even though affidavits are self-serving in nature, and even though there is no opportunity for cross-examination of the affiant. However, an adverse party may have an opportunity for direct examination of the affiant, if a Fed. R. Civ. P. 56(d) motion to take the discovery deposition of the affiant is made and granted. TBMP § 528.05(b) (June 2015). *See also Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4USPQ2d 1793, 1797 (Fed. Cir. 1987) (moving party’s affidavit and other evidence were not contradicted by nonmoving party); *Ava Ruha Corp. v. Mother’s Nutritional Center, Inc.*, 113 USPQ2d 1575, 1578 (TTAB2015) (Fed. R. Civ. P. 56(c)(4) allows testimony from personal knowledge based on review of files and records or position with company, and Board may not consider portions of affidavit

or declaration not based on personal knowledge). Applicant did not move for discovery under Fed. R. Civ. P. 56(d).

Mr. Assa is the co-founder, Manager and Principal of Opposer and the other relevant related companies licensed to use Opposer's mark CASSA. The statements of Mr. Assa in both affidavits were made with personal knowledge and not based on out-of-court statements of a person other than the declarant.⁵ *See* Fed. R. Evid. 802. The affidavits and exhibits attached thereto are being submitted for the purpose of showing prior use, the extent of Opposer's use of its mark throughout the United States, and public recognition of Opposer's mark. *See* Fed. R. Evid. 802. As such, the affidavits and exhibits submitted therewith are clearly relevant to the issues of likelihood of confusion and priority presented in this case. *See* Fed. R. Evid. 402.

Turning to the evidence of Opposer's prior use of the mark CASSA, Applicant did not assert an earlier use date than the filing date of its intent-to-use application, April 10, 2013, and in argument limits itself to that filing date. App. Br. p. 7, 15 TTABVUE 8. However, we note that Opposer submitted Applicant's responses to Opposer's first set of interrogatories which include the following response:

On or about March 18, 2013, the digital version of the CASSA at Georgetown Brochure was uploaded to the cassa.co website. The

⁵ *See Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856, 1864 n.8 (TTAB 2007) (self-serving declaration permissible on summary judgment despite absence of opportunity for cross-examination of declarant); *Corporate Document Services Inc. v. I.C.E.D. Management Inc.*, 48 USPQ2d 1477, 1479 (TTAB 1998) (use of standard language in declaration did not raise genuine issue as to personal knowledge); *C & G Corp. v. Baron Homes, Inc.*, 183 USPQ 60, 60 (TTAB 1974) (affidavit is competent evidence); *4U Co. of America, Inc. v. Naas Foods, Inc.*, 175 USPQ 251, 253 (TTAB 1972) (issue of credibility not raised as to statements by affiant which were competent and uncontradicted and suspicion alone is insufficient to invalidate).

printed version of the brochure was available on April 17, 2013. Bates Nos. 000064 through 000082 corresponds to the digital CASSA at Georgetown brochure. Bates Nos. 000061 through 000063 correspond to cached pages of the website from May 9, 2013.⁶

Therefore, to establish no genuine dispute as to the issue of priority, Opposer must establish use of the mark CASSA prior to March 18, 2013.

Mr. Assa attests that “My brother, Isaac Assa, and myself, are developers of high end quality, and luxury hotels and residences. We have developed a business for luxury accommodations that include the very best in comfort, style and taste. We have been developing our mark ‘CASSA’ to be [the] brand of our business, so customers know that they are getting the very best.”⁷ Beginning in January 2007, Mr. Assa, Opposer’s Principal hired a design company to develop the CASSA mark, which is derived by combining the Spanish and Italian word “casa” for house and ASSA, the name of the various related companies, including Opposer, and the Principals’ (Salim and Isaac) last name.⁸ Mr. Assa, one of Opposer’s Principals, attests that in 2007 he authorized the use of the CASSA mark “and directed that Opposer provide[] a licensing agreement to Waterscape Resort, LLC.”⁹ Waterscape

⁶ Assa 1st Aff. Exh. 11 (App. Response Interrog. No. 8), 13 TTABVUE 103-104.

⁷ Assa 1st Aff. ¶ 3, 13 TTABVUE 13.

⁸ Assa 1st Aff. ¶ 5, 13 TTABVUE 14. Applicant asserts that the supporting exhibit (Exh. 14 an email concerning adoption of the mark CASSA), does not identify Mr. Assa’s email address; however, it clearly does identify him by his nickname “Solly.”

⁹ *Id.* ¶ 6.

Resort, LLC purchased the property developed into the CASSA hotel and residences.¹⁰ Mr. Assa further attests that:

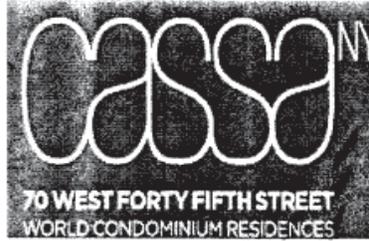
By March 15, 2009 we were using the Mark in commerce. In and around that time the marketing for the W45 Project included all manners of advertisement that displayed the Mark. A showroom was opened around the corner from the W45 Project in which we exhibited displays and signs using the Mark and its connection to us. ... At the same time, a website was launched for W45 Project offering units from the residential side for sale and lease. ... The website conspicuously displayed the Mark.¹¹

Applicant asserts that the testimony regarding use of the mark in the websites is contradictory because of an email stating that the website was in fact “unfinished” and “not working.” App. Br. p. 3, 15 TTABVUE 4. However, Mr. Assa clarifies that the website “was launched and was live as of March 2009” but experienced some problems at that time and that it has been live and in continuous use since March, 2009.¹² In any event, we have in the record a printout of the website from October 2010 as shown below.

¹⁰ *Id.* ¶ 4.

¹¹ *Id.* ¶ 7.

¹² Assa 2nd Aff. ¶ 9, 16 TTABVUE 15.



DEVELOPED BY

Assa Properties

Founded by Solly and Isaac Assa, Assa Properties has been developing and investing in major residential, retail and commercial properties since 2000. The firm has acquired over three million square feet of premium assets located throughout the United States and Mexico. Starting in 2002, Assa Properties began acquiring buildings within the New York City Area, namely 743 Fifth Avenue, 2 Herald Square and 6 Times Square - originally the Knickerbocker Hotel built by John Jacob Astor - with an eye towards building luxury retail and hotel experiences in some of the New York City's most distinctive neighborhoods. They have since evolved their original vision with two new developments, Cassa and Galene, full-service, luxury hotels and condominiums that will offer premium hotel services to their full-time residents.

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The web page dated September 8, 2014 in Exh. 29 includes the following “Cassa, a newly constructed luxury high-rise in the Midtown section of Manhattan built in 2009, stands out among Manhattan’s new luxury rental apartment buildings for many reasons ... Furthermore, Cassa is a Hotel and Residence, so renters at this newly constructed apartment building enjoy year-round hotel service...” While this is hearsay, it does align with the affiant’s statements regarding continuing use of the mark CASSA in connection with sales and leasing of real estate.

¹³ www.cassanyc.com (dated October 20, 2010) Assa 1st Aff., Exh. 39, 12 TTABVUE 5. *See also* Exhs. 25 – 27 showing use in connection with leasing and sales services on the Internet in later years up to 2015 to support continuing use.

Although there are no pictures of the showroom, they have diagrams and drawings for the development and design of the showroom/sales office and a flyer displaying the mark sent out to real estate agents at that time in 2009, as shown below:



Cassa Sales Showroom
1140 Avenue of the Americas
Floor 2
New York, NY 10036

70 WEST FORTY FIFTH STREET
WORLD CONDOMINIUM RESIDENCES

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In addition, “[b]y March 2009, a final version [of the brochure for the sale of residential units from 2007 to 2009] was published and we commenced using it.”¹⁵



The cover page of the brochure displays the mark

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below the wording “World Condominium Residences,” and the last page of the brochure includes the following:

¹⁴ Assa 1st Aff. ¶ 18, Exh. 41, 13 TTABVUE 18, 12 TTABVUE 54.

¹⁵ *Id.* ¶ 11, 13 TTABVUE 16.

¹⁶ Assa 1st Aff., Exh 34, 11 TTABVUE 46.

ASSA PROPERTIES

Founded by Solly and Isaac Assa, Assa Properties has been developing and investing in major residential, retail and commercial properties since 2000. The firm has acquired over three million square feet of premier assets located throughout the United States and Mexico. Starting in 2002, Assa Properties began acquiring assets within the New York City area, namely 743 Fifth Avenue, 2 Herald Square and 6 Times Square – originally the Knickerbocker Hotel built by John Jacob Astor – with an eye towards building luxury retail and hotel experiences in some of New York City’s most distinctive neighborhoods. They have since evolved their original vision with two new developments, Cassa and Galerie, which will serve as full-service, luxury hotels as well as offer premium hotel services to its condominium residents.

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Mr. Assa attests that “During the construction of the project, I directed that banners be hung at the site. I submit a photograph from February, 2009, depicting our clear use of the Mark prior to our date of Actual First use, see Exhibit 28, as we set up the banners at the site. Soon thereafter, all our banners were up. I include photographs of banners that were hung at the Project location from about March, 2009, until the opening of the Project in Sept, 2010, Exhibit 30.”¹⁸ A clip of Exhibit 30 is set forth below.

¹⁷ *Id.* at 67. The text reads:

ASSA PROPERTIES

Founded by Solly and Isaac Assa, Assa Properties has been developing and investing in major residential, retail and commercial properties since 2000. ... They have since evolved their original vision with two new developments, Cassa and Galerie, which will serve as full service, luxury hotels as well as offer premium hotel services to its condominium residents.

¹⁸ Assa 1st Aff. ¶ 13, 13 TTABVUE 17, Exh. 30, 12 TTABVUE 17.



Both the brochure and banners clearly reference “Asa Properties” as the developer of the “world condominium residences” and CASSA is used in connection with both the development of the property and the sale and leasing of condominium residences. As attested to by Opposer’s Principal, Opposer and Assa Properties are “100%” owned by Mr. Salim Assa and his brother and these entities are “controlled” by them.¹⁹

Mr. Assa submitted the minutes from several marketing meetings held between February, 2007 and June, 2009 for the development and marketing of the CASSA real estate (residential and hotel).²⁰

It is clear from the affidavit and the exhibits that sometime at least as early as spring 2009 the CASSA residences were advertised in the New York Times.²¹

¹⁹ Assa 2nd Aff. ¶ 5, 16 TTABVUE 14.

²⁰ Assa 1st Aff. ¶ 19, Exh. 42, 13 TTABVUE 18, 12 TTABVUE 58-136.

²¹ See Assa 1st Aff. ¶ 7, 13 TTABVUE 14, Exhs. 17, 19 (mock up advertisements, and emails regarding their placement and subsequent invoice for advertisements that ran April 26, May 3, May 10, 2009), 13 TTABVUE 133, 142.

Exhibit 20 shows 2009 advertising for CASSA World Condominium Residences with Hotel Services with the following “Cassa Residences brought to you by Assa Properties.”²²

In January 2012, Waterscape Resort LLC licensed another entity, 70 West 45th Street Holding, LLC, to use the CASSA mark in connection with the hotel that is in the same building as the residences. This licensing arrangement was done at the time Waterscape Resort, LLC had filed for Chapter 11 bankruptcy. The Chapter 11 filing was done as a “result of a dispute with its construction manager regarding the cost overruns, delays and defective work with its building project, a hotel and residential condominium building.” Reply Br. p. 6, 16 TTABVUE 7; Assa 1st Aff. ¶ 9, 13 TTABVUE 15.

Applicant characterizes the licensing arrangement between Opposer and other entities as “enigmatic, at best.” App. Br. p. 2, 15 TTABVUE 3. Applicant questions whether “Waterscape Resort LLC was the owner of the mark and the license agreement was an afterthought for this controversy.” App. Br. p. 3, 15 TTABVUE 4. Applicant contends that “Opposer’s pleadings also contradict Affiant’s position since the license agreements existed from 2012 (and not 2009 as now alleged in the affidavit).” *Id.* We first note that the reference in the pleading is to the sublicense between Waterscape Resort, LLC and a third party which is consistent with Mr. Assa’s affidavit, and does not serve to contradict the earlier oral license between

²² Assa 1st Aff. ¶ 11 Exh. 20, 13 TTABVUE 16, 144. Applicant asserts this document was not disclosed in Opposer’s answer to interrogatories Nos 7 and 10. In its reply brief, Opposer clearly shows that it was submitted in its supplemental responses served on December 11, 2014, as evidenced by the corresponding Bates number AR0439. Compare Exh. 8, 13 TTABVUE 82 with Exh. 20, 13 TTABVUE 144.

Opposer and Waterscape Resort, LLC. Moreover, throughout both affidavits Mr. Assa attests to the oral license between Opposer and its related entities, including Waterscape Resort, LLC, and the subsequent sublicense between Waterscape Resort, LLC and, the purchaser of the hotel portion of the CASSA building, for use in connection with the hotel:

6. I immediately authorized the use of the “CASSA mark, in 2007 and directed that Opposer provide[] a licensing agreement to Waterscape Resort, LLC. ...

9. On April 5, 2011, Waterscape Resort, LLC, filed for Chapter 11 Bankruptcy Protection. As part of its Chapter 11 Plan, Waterscape Resort, LLC, sold the hotel portion of the W45 Project, CASSA Hotel, to 70 West 45th Street, Holding, LLC. The closing of CASSA Hotel occurred on January 23, 2012. As part of the closing, Opposer, permitted and authorized Waterscape Resort, LLC, to license the Mark to 70 West 45th Street Holding, LLC so the new owners could continue operating the hotel as CASSA Hotel. ...

20. As part of branding licensing, Opposer licensed and permitted Waterscape Resort, LLC, to do business as Cassa Hotel & Residence. ...

22. All this evidence demonstrates that I and my brother, through Opposer, created and developed the Mark so as to brand all our current and future projects under “CASSA.”²³

5. Regarding the control and ownership of the various Assa entities, they are all controlled by my brother and me. We own and control 100% of Opposer Assa Realty, LLC. We own and control 100% of Assa Properties, Inc. We own and control 62% of Waterscape Resort, LLC, of which I am the Managing Member. Finally, we own and control 50.1% of 511 Property, LLC, and I manage that company as well. In short, the foregoing entities (the “Assa Entities”), two of which use our name, are controlled by us. We thus control the quality and use of the Mark by the entities.

6. ... In January, 2007, Opposer Assa Realty LLC granted a license to Waterscape Resort LLC to use the Mark. As noted, I am the manager of both Assa Realty LLC and Waterscape Resort, LLC. ...

13. In sum, Opposer developed the Mark. Opposer and the other Assa Entities used the Mark starting in March 2009, and have never stopped using the Mark.²⁴

²³ Assa 1st Aff. ¶¶ 6, 20, 22, 13 TTABVUE 14, 18.

The Board recognizes oral agreements. *See The Nestle Company Inc. v. Nash-Finch Co.*, 4 USPQ2d 1085 (TTAB 1987) (written license not required); *John Anthony, Inc. v. Fashions by John Anthony, Inc.*, 209 USPQ 517 (TTAB 1980) (Oral license found).²⁵ Mr. Assa's attestations are sufficient to establish the license from Opposer to its related companies, including Waterscape Resort LLC, and allowance of the sublicense from Waterscape Resort LLC to a third party, and Applicant has not presented evidence to raise a genuine dispute as to this fact.

Applicant further argues without legal support that "it appears that Opposer abandoned any rights it may have had over the CASSA designations when it permitted the purported licensee, Waterscape Resort, LLC to [license the mark]... . This was done in the context of a bankruptcy proceeding under Chapter 11 requiring the disappearance of the 'licensor'." It is not possible for the licensor to retain the power to control the quality of the nature or quality of the services rendered by the licensee after that. Thus, the mark CASSA was abandoned in April, 2011." App. Br. p. 4, 15 TTABVUE 5.

In response Opposer explains that:

A petition filed pursuant to Chapter 11 of the Bankruptcy Code permits a corporation to reorganize its debts to keep its business alive and pay creditors over time. See 11 U.S.C. § 1101 et seq. Chapter 11 Bankruptcy is not a liquidation of assets, as occurs in a Chapter 7 filing. See 11 U.S.C. § 701. ... As part of its Chapter 11 Plan of Reorganization, Waterscape Resort, LLC, retained ownership and

²⁴ Assa 2nd Aff. ¶¶ 5, 6, 13, 16 TTABVUE 14, 16. *See also* Assa 2nd Aff., Exh. 47 (January 20, 2012 License agreement between Waterscape Resort, LLC and 70 West 45th Street Holding, LLC), 16 TTABVUE 18-25.

²⁵ Even for registration purposes an oral licensing agreement may be recognized. *In re Raven Marine, Inc.*, 217 USPQ 68, 69 (TTAB 1983).

control of the residential portion of the project, but sold Cassa Hotel and the restaurant portion of the building, i.e., the commercial condominium units within the building used by Cassa Hotel and the restaurant. ... The proceeds of the sale were used to fund Waterscape Resort, LLC's Chapter 11 Plan, which became a confirmed plan on January 23, 2012, at the time the sale of Cassa Hotel closed. ... Waterscape Resort continued to use the mark in connection with the residential portion of the building. Far from constituting "abandonment," the licensing of the Mark for use in connection with the hotel portion of the project is entirely consistent with Opposer's ongoing use of and control over the Mark – use and control that predated Applicant's alleged first use in March 2013.

App. Reply Br. pp. 6-7, 16 TTABVUE 7-8.

Thus, there is nothing to raise a genuine dispute as to Waterscape Resort, LLC's activities or ability to enter into a licensing agreement. We further note Chapter 11 bankruptcy allows for the debtor in possession to continue its operations. 11 U.S.C. §§ 1107 ("...a debtor in possession shall have all the rights ... and powers, and shall perform all the functions and duties, ... of a trustee serving in a case under this chapter.") and 1108 ("Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.").

Applicant quibbles with the evidence of use asserting that it does not show "technical use since the displays and signs with the Mark provided a connection to an entity, and did not advertise services." App. Br. p. 2, 15 TTABVUE 3. First, Opposer is relying on common law rights and need not show use sufficient to support registration. Second, the evidence does in fact show use of the mark in connection with the development and construction of residential and hotel property

and real estate sales and leasing services in connection with the residential property (*see, e.g.*, Exhs. 30, 34, 39, 41).

Finally, we note that the statements in the affidavits are not contradictory or inconsistent and establish Opposer's prior proprietary rights in the mark CASSA for real estate development, sales and leasing services. Even affidavits that are not supported by documentary evidence may nevertheless be given consideration if the statements contained in the affidavits are clear and convincing in character, and uncontradicted. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1736 (TTAB 2001) (opposer's declaration, while not accompanied by any documentary evidence, was internally consistent, not characterized by uncertainty and was unchallenged by applicant); *4U Co. of America, Inc. v. Naas Foods, Inc.*, 175 USPQ 251, 253 (TTAB 1972) (fact that allegations in affidavit not supported by invoice does not undermine the testimony when uncontradicted.). Here, the statements regarding use of the mark CASSA are internally consistent and not characterized by uncertainty and moreover *are* supported by evidence of that use.

While Mr. Assa on occasion interchanges "I" "we" and "opposer" when indicating ownership and control of the mark, this is not surprising in view of the closely held nature of the "Assa entities" including Opposer. Taken as a whole it is clear from the affidavits that Opposer owns and controls use of the mark CASSA, as managed by Mr. Assa and as used by its related entities and a third party.

As noted above, there is no dispute as to the likelihood of confusion factors. *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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Applicant's mark **cassa**, is nearly identical to Opposer's common law mark . Applicant's "real estate development and construction of commercial, residential and hotel property" services are closely related to Opposer's development, sales and leasing of residential and hotel property services. Because the identification in the opposed application is not limited by trade channel, we must presume all ordinary channels of trade for such services *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's unlimited channels of trade encompass Opposer's demonstrated channels of trade, developing residential and hotel properties in Manhattan, NY, and advertising sales and leasing of such property in a national newspaper and on the internet. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board "was entitled to rely on this legal presumption in determining likelihood of confusion")

In view of the foregoing, we find that Applicant has not put forth evidence to raise a genuine dispute of material fact to overcome Opposer's showing of prior proprietary rights in the mark CASSA for the development, sales and leasing of residential and hotel property, that the marks are nearly identical and that the services are related and are presumed to travel in the same channels of trade. Accordingly, Opposer's motion of summary judgment on the claim of likelihood of confusion is **GRANTED**.

Judgment is hereby entered against Applicant and the Opposition is **SUSTAINED**.