This Opinion is not a
Precedent of the TTAB

Mailed: December 16, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bernatello's Pizza, Inc.
v.
Colmont Restaurant Group, LLC

Opposition No. 91241107

Laura M. Davis of DeWitt LLP and Anthony J. Bourget of Bourget Law, S.C.
for Bernatello's Pizza, Inc.

Eric R. Harlan and William E. Carlson of Shapiro Sher Guinot & Sandler, P.A.
for Colmont Restaurant Group, LLC.

Before Kuhlke, Adlin and Dunn,
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Colmont Restaurant Group, LLC seeks registration of LOTSA STONE FIRED PIZZA, in standard characters (STONE FIRED PIZZA disclaimed), for "restaurant services; restaurant carry out services; restaurants featuring delivery services; fast casual restaurants" in International Class 43.[1] In its notice of

[1] Application Serial No. 87435377, filed May 3, 2017 under Section 1(a) of the Trademark Act based on first use dates of May 5, 2016.

opposition, Opposer Bernatello's Pizza, Inc. alleges prior use and registration of LOTZZA MOTZZA for "frozen pizza"[2] and LOTZZA HOTZZA for "pizza."[3] Opposer's LOTZZA MOTZZA registration is over five years old. Opposer also alleges prior common law use of, and ownership of a pending application to register, LOTZZA MOTZZA in standard characters for "restaurant services; restaurant services, namely, providing of food and beverages for consumption on and off the premises; quick service restaurant services; restaurant services provided by mobile food kiosks; concession stands."[4] As grounds for opposition, Opposer alleges that use of Applicant's mark would be likely to cause confusion with Opposer's marks. In its answer, Applicant denies the salient allegations in the notice of opposition, and asserts affirmative defenses which it did not pursue or prove at trial, and which are therefore waived. *Miller v. Miller*, 105 USPQ2d 1615, 1616 n.3 (TTAB 2013); *Baroness Small Estates Inc. v. Am. Wine Trade Inc.*, 104 USPQ2d 1224, 1225 n.2 (TTAB 2012).

I. The Record and Evidentiary Objections

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Opposer introduced:

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[2] Registration No. 4225275, issued October 16, 2012; Section 8 Affidavit accepted, Section 15 Affidavit acknowledged.

[3] Registration No. 5073411, issued November 1, 2016.

[4] Application Serial No. 87916171, filed May 10, 2018 under Section 1(a) of the Act, based on first use dates of November 1, 2013.

Notice of Reliance on third-party registrations, several of Applicant's uninvolved applications and Internet printouts ("Opp. NOR 1"). 15 TTABVUE.[5]

NOR on portions of its discovery depositions of: Applicant under Fed. R. Civ. P. 30(b)(6) ("DiGangi Disc. Tr."), Michael Salandra, Applicant's founder ("Salandra Disc. Tr.") and Deborah Billings ("Billings Disc. Tr."), and the exhibits thereto; and portions of Applicant's responses to Opposer's discovery requests ("Opp. NOR 2").[6] 16 TTABVUE.

Testimony declaration of Chad D. Schultz, its Chief Operating Officer ("COO"), and the exhibits thereto ("Schultz Dec."). 18 TTABVUE.

Rebuttal NOR on portions of Mr. Schultz's discovery deposition[7] and an Internet printout ("Opp. Reb. NOR"). 28 TTABVUE.

Applicant introduced:

NOR on third-party registrations, Opposer's and its predecessor's registrations, both pleaded and unpleaded, and Internet printouts ("App. NOR 1"). 22 TTABVUE.

NOR on portions of its discovery deposition of Mr. Schultz ("Schultz Disc. Tr."), and portions of Opposer's responses to Applicant's discovery requests ("App. NOR 2"). 23 TTABVUE.

Testimony declaration of Anthony DiGangi, Applicant's Chief Operating Officer, and the exhibits thereto ("DiGangi Dec."). 25 TTABVUE.

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[5] Citations to the record reference TTABVUE, the Board's online docketing system. The number preceding "TTABVUE" corresponds to the docket entry number(s), and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.

[6] Opp. NOR 2 includes documents Applicant produced in response to Opposer's interrogatories. *See* Trademark Rule 2.120(k)(3)(i).

[7] Opposer introduced these portions of Mr. Schultz's deposition "so that Applicant's designations [of other portions of the deposition] are not misleading." 28 TTABVUE 2.

> Testimony declaration of Mr. Salandra, and the exhibits thereto ("Salandra Dec."). 27 TTABVUE.

Opposer's hearsay objections to paragraphs 5-7 and 9 of Mr. Salandra's declaration are overruled. As Opposer acknowledges, under Fed. R. Civ. P. 801(c), hearsay is a statement "the declarant does not make while testifying at the current trial or hearing." Here, while Mr. Salandra mentions "discussions" he had with Mr. Manarelli in paragraph 5, Mr. Salandra is the declarant, not Mr. Manarelli. Mr. Salandra does not specify or quote any particular statements by Mr. Manarelli. Elsewhere in paragraph 5 and the other passages Opposer objects to, Mr. Salandra testifies about knowledge he acquired, and about Mr. Manarelli, Victor Corbi and Mr. Corbi's grandfather, but nowhere does Mr. Salandra state that he acquired the knowledge from any particular statement(s) made by Manarelli or the Corbis. We hasten to add that even if we had sustained Opposer's hearsay objections, our ultimate decision in this case would not change.

Opposer's objection to a portion of paragraph 29 in Mr. DiGangi's declaration is also overruled, as Mr. DiGangi has the requisite "personal knowledge" under Fed. R. Evid. 602. Indeed, in paragraph 1 of his declaration, Mr. DiGangi testifies that the entire declaration is "based on my personal knowledge," and in paragraph 2 Mr. DiGangi testifies that he is Applicant's Chief Operating Officer, and thus obviously well-situated to personally know the origins of Applicant's former name. For example, Mr. DiGangi specifically testifies that he recalled "seeing a photograph of a young Victor Corbi wearing a T-shirt with the phrase 'Lotsa Mozza' printed on it." 25

TTABVUE 7 (DiGangi Dec. ¶ 29). Again, even if we had sustained this objection, our ultimate decision in this case would not change.

II. Relevant Facts

Opposer "is a family owned and operated business that manufacturers and distributes frozen pizza brands …." 18 TTABVUE 3 (Schultz Dec. ¶ 2). Its frozen pizza is sold to "grocery stores, convenience stores, taverns, schools, club stores, food service providers [and] fundraising organizations." *Id.* at 4 (Schultz Dec. ¶ 5).

Opposer acquired Five Star Foods, Inc. ("Five Star") in 2011 or 2012, "including the business, goodwill and branding of LOTZZA MOTZZA frozen pizza." *Id.* (Schultz Dec. ¶ 7); 23 TTABVUE 135 (Opposer's Response to Interrogatory No. 2).[8] In 2012, Opposer "launched a new variety of frozen pizza branded as LOTZA MOTZZA BREW PUB. This product was designed with unique ingredients and packaging distinct from its competitors to target consumers in the marketplace for a 'super-premium' frozen pizza":

[8] Mr. Schultz testified that Opposer acquired Five Star in 2011, but Opposer's interrogatory response indicates that the acquisition was in 2012.

18 TTABVUE 4, 17 (Schultz Dec. ¶ 10 and Ex. A).

One of LOTZA MOTZZA frozen pizza's "features" is "over ½ lb. of award winning real premium Wisconsin Mozzarella cheese." *Id.* at 5 (Schultz Dec. ¶ 13). As Mr. Schultz put it during his discovery deposition, "**LOTZZA MOTZZA is our brand that screams what it is, lots of Wisconsin cheese** because we put over a half pound of cheese on that product. So that's positioned as our heavy premium, heavy cheese branded pizza." 23 TTABVUE 17 (Schultz Disc. Tr. at 11) (emphasis added). Mr. Schultz described BREW PUB as one of Opposer's "umbrella brands." *Id.*

The product is successful, as production increased from 9.3 million units in 2016 to 14.7 million in 2019, leading to Opposer expanding its pizza manufacturing facility, increasing capacity to approximately 35 million units (presumably per year). 18 TTABVUE 5-6 (Schultz Dec. ¶¶ 14-15). Opposer "launched its LOTZZA HOTZZA brand of frozen pizza" in February 2016. *Id.* at 5 (Schultz Dec. ¶ 17).

Opposer's promotional expenses for the LOTZZA MOTZZA brand are fairly significant, totaling more than $9 million since 2012. 18 TTABVUE 13-14 (Schultz Dec. ¶ 31). Perhaps not surprisingly, its sales are also fairly significant, increasing steadily from $12.8 million in 2013 to $64.7 million in 2019, and totaling "approximately $305 million." *Id.* at 14 (Schultz Dec. ¶ 33).

Opposer has also provided what it refers to as "restaurant services" since October 2012.[9] *Id.* at 7 (Schultz Dec. ¶ 20). However, Opposer does not operate a traditional

[9] Mr. Schultz testified that Five Star began using LOTZZA MOTZZA for restaurant services in 1996, and recalled "seeing cooked LOTZZA MOTZZA pizza on the menu at a tavern in

restaurant and its "restaurant services" are at best atypical. Specifically, while Opposer claims to provide "restaurant services" at stadiums, bars, fairs, festivals, charity events and elsewhere, these locations offer LOTZZA MOTZZA pizzas "cooked from frozen." *Id. at* 8, 16 (Schultz Dec. ¶¶ 23, 37). For example, during his discovery deposition Mr. Schultz testified that LOTZZA MOTZZA frozen pizzas are delivered to bars and taverns frozen, and the bars and taverns heat the pizzas before serving them. 23 TTABVUE 22 (Schultz Disc. Tr. 34) (stating "[t]hey always serve it fresh and hot ...."). The following photos showing Opposer's "restaurant services" at Target Center in Minneapolis are typical of other venues where Opposer claims to provide "restaurant services":

Green Bay, Wisconsin, in approximately 2011." 18 TTABVUE 7 (Schultz Dec. ¶ 21). The record does not reveal whether Five Star continuously used the mark between 1996 and 2011, or establish that the mark was not abandoned for "restaurant services" sometime before 2011. The specific nature of Five Star's "restaurant services" is unclear from the record, other than Mr. Schultz's testimony about seeing "cooked from frozen" pizza on a tavern's menu.

18 TTABVUE 53, 56 (Schultz Dec. Ex. F-1, F-4). The Target Center or its food service contractor provides the kiosk, not Opposer. 23 TTABVUE 40 (Schultz Disc. Tr. 59). In describing one of Opposer's "restaurants" in a stadium, perhaps the one depicted above on the right or one like it, Mr. Schultz testified: "And we had a restaurant kiosk looking decked out, you know, LOTZZA MOTZZA with the BREW PUB sub-brand to it. You know, those are restaurants to us, also, so – To me, it's a gray area a little bit on – If you are serving fresh pizza hot, you know, is that a restaurant?" 23 TTABVUE 27 (Schultz Disc. Tr. 44).[10]

Sometimes, these types of venues may provide tables and chairs for customers eating Opposer's frozen pizza after it is heated:

18 TTABVUE 62 (Schultz Dec. Ex. G-6); 23 TTABVUE 30 (Schultz Disc. Tr. 47) ("The tables are provided by the Resch Center. The logo'ing is provided by us."). The pizza is not heated by Opposer's employees, however. Rather, "[t]he food service company

[10] While Mr. Schultz sometimes uses the word "fresh," his testimony and the record as a whole make clear that he is using the term to describe Opposer's frozen pizzas which are heated before being served.

would provide the people and operate it." 23 TTABVUE 29 (Schultz Disc. Tr. 46). Opposer believes that these types of "restaurants" are not open every day, or on a set schedule, but rather only when there is an event at the venue. *Id.* at 30-32 (Schultz Disc. Tr. 47-49). Sometimes tables and chairs are also provided for customers of Opposer's "restaurant trailers," though it is not clear who provides the tables or chairs:

Id. at 71 (Schultz Dec. Ex. L-2). Mr. Schultz conceded that Opposer does not operate restaurants, but rather sells pizza to what it refers to as "restaurants":

Q With respect to the restaurants and taverns and bars and so forth where Bernatello's ships and sells frozen pizza, does it consider that aspect of its business providing restaurant services under the LOTZZA MOTZZA brand?

A Yes.

Q Why is that?

A Because they serve pizza hot and fresh, you know, under the LOTZZA MOTZZA brand as restaurants do.

Id. at 41-43 (Schultz Disc. Tr. 63-65).

Mr. Schultz explained that Opposer acquired the LOTZZA MOTZZA brand in part because of "the way it rolls off your tongue. That's why our owners in the acquisition of Five Star loved that brand, really wanted to take it to another level, which we did." 23 TTABVUE 24 (Schultz Disc. Tr. 41). Mr. Schultz continued: "LOTZZA HOTZZA was just a little bit of a takeoff of that in a variety of offering of, just like it says – **LOTZZA HOTZZA means hot pizza** … spicy hot." *Id.* (emphasis added). All LOTZZA HOTZZA pizza packages also bear the LOTZZA MOTZZA mark, and all LOTZZA MOTZZA pizza packages also bear the BREW PUB mark. *Id.* at 25 (Schultz Disc. Tr. 42).

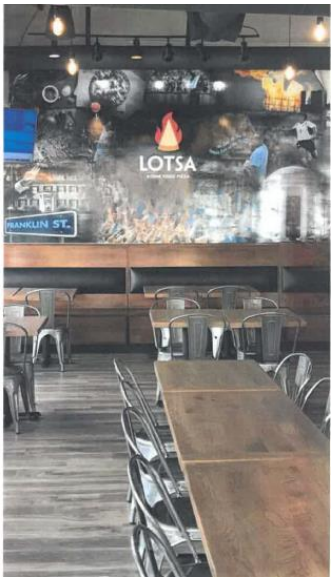
Applicant was formed in early 2015, following years of discussions between its founder Mr. Salandra, whose prior work experience was in professional staffing, and Joe Manarelli, whose prior experience was in restaurants and food trucks. 27 TTABVUE 2 (Salandra Dec. ¶¶ 3-4). Mr. Manarelli owned an Italian restaurant, as well as food trucks "outfitted to rapidly cook wood fired pizza," and suggested that Mr. Salandra consider "a restaurant venture that prepared and served fast-cooked

fresh pizzas to its customers in a restaurant setting." *Id.* at 2-3 (Salandra Dec. ¶¶ 4-5). Mr. Manarelli also suggested that the business be called Lotsa Mozza, which was an expression his friend Victor Corbi's grandfather used "when describing how much cheese the Corbi family business used." *Id.* at 3 (Salandra Dec. ¶ 5).

In May 2015 Victor Corbi assigned to Applicant: the LOTSA MOZZA mark; the domain name "lotsamozza.com;" social media accounts named LOTSA MOZZA with Facebook, Twitter, Instagram, Pinterest, Tumblr and Vine; and several LOTSA/LOTSA MOZZA hashtags. *Id.* at 3-4, 10-12 (Salandra Dec. ¶ 9 and Ex. B). Applicant filed applications to register the LOTSA MOZZA mark about two months later. *Id.* at 3 (Salandra Dec. ¶ 8). However, after the applications were opposed by a third-party and Opposer objected to Applicant's use of the mark, Mr. Salandra "decided to abandon the use of the name 'Lotsa Mozza.'" *Id.* at 4 (Salandra Dec. ¶ 11). According to Mr. Salandra, "only the Morgantown, West Virginia location was ever branded as 'Lotsa Mozza,' which branding was discontinued." *Id.* (Salandra Dec. ¶ 12).

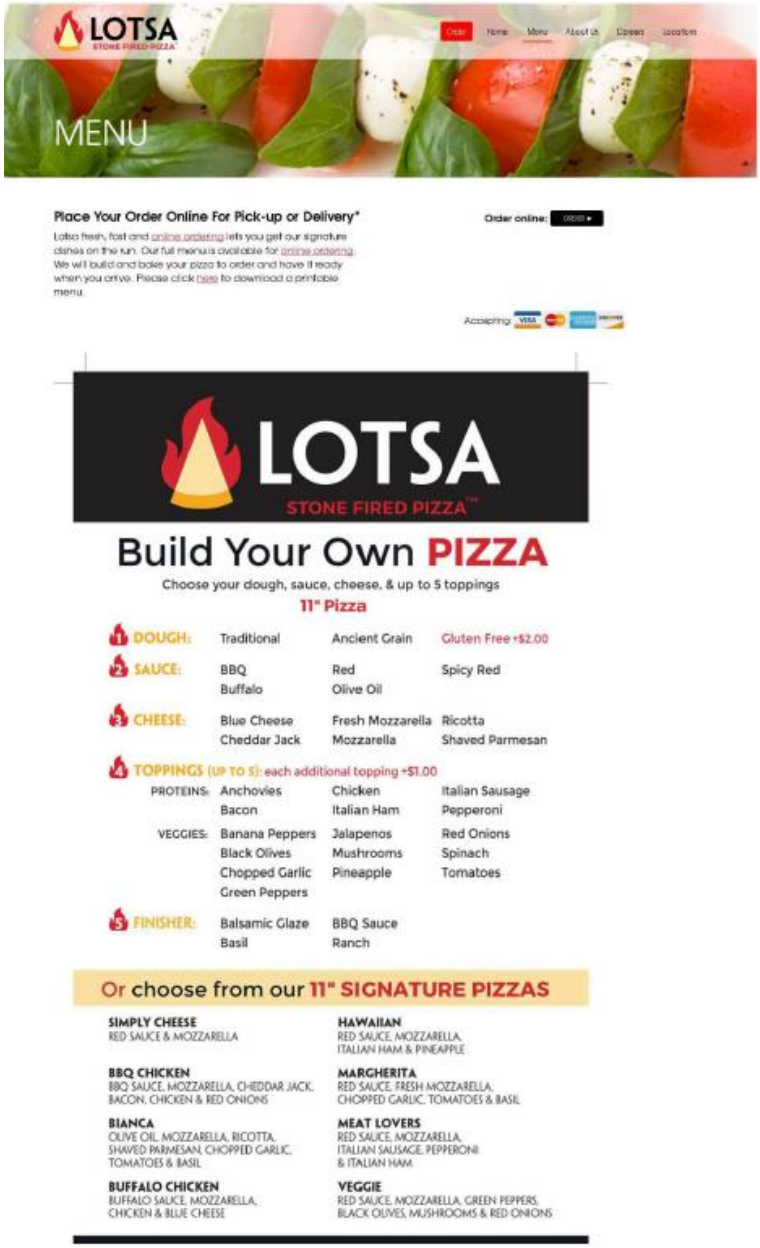
Applicant then began using its new, involved mark LOTSA STONE FIRED PIZZA at its Morgantown restaurant in May 2016. 25 TTABVUE 5 (DiGangi Dec. ¶ 19). Applicant currently operates a number of pizza restaurants under that name, most or all of which are in "college towns" or locations, including: Annapolis and College Park, Maryland; Pittsburgh (Oakland and Southside), Pennsylvania; Morgantown, West Virginia; West Lafayette, Indiana; and Tallahassee, Florida. *Id.* at 2 (DiGangi Dec. ¶ 5); 32 TTABVUE. Applicant previously operated several additional

restaurants, including in the Midwest where Opposer is based, such as the Madison, Wisconsin location. Some of Applicant's restaurants are depicted below:



Id. at 20, 22, 23, 26 (DiGangi Dec. Exs. A, B).

Applicant's restaurants offer both "signature pizzas" and "build-your-own" pizzas, as shown in its menu:



Id. at 17 (DiGangi Dec. Ex. A). LOTSA STONE FIRED PIZZA is a "fast casual" concept – "build-your-own" customers line up at a counter, choose from among types of dough, cheese and sauce, and pick toppings, and then wait while their pizza is "fast cooked on a flame-heated rotating pizza stone," in two and one-half minutes. 25 TTABVUE 3-5 (DiGangi Dec. ¶¶ 8-12, 20). Applicant's pizza is only available at its

restaurants (dine-in or carryout); it is not available through grocery stores or third-parties, and is not sold frozen. *Id.* at 4 (DiGangi Dec. ¶¶ 14-15).

Like Opposer, Applicant has been fairly successful. It has spent over $700,000 promoting its restaurant services since May 2016, and its sales have exceeded $19 million since that time. *Id.* at 8 (DiGangi Dec. ¶¶ 33-34).

As indicated, Applicant's predecessor used the mark LOTSA MOZZA, and Applicant still owns the "lotsamozza.com" domain name, which currently redirects to Applicant's website at "lotsa.com." *Id.* at 7 (DiGangi Dec. ¶¶ 29-30).

Opposer became aware of Applicant when Applicant opened its Madison location "under Lotsa Motsa (sic)."[11] 23 TTABVUE 50 (Schultz Disc. Tr. 89). After Opposer objected to Applicant's use of the term, Applicant began using LOTSA alone or LOTSA STONE FIRED PIZZA rather than LOTSA MOZZA. *Id.*

However, Opposer also objects to these uses of LOTSA. According to Mr. Schultz, "[e]verything that we have seen in our dispute is because of the use of the word *lotsa*. And the l-o-t-s-a versus the L-O-T-Z-Z-A – lotsa, l-o-t-s-a, LOTZZA, L-O-T-Z-Z-A, the phonetics are identical, and that's the issue we have." *Id.*

III. Opposer's Section 2(d) Claim

Before addressing whether the parties' marks are likely to be confused, we must first consider whether Opposer is entitled to bring this proceeding. If it is we must

[11] While the transcript of Mr. Schultz's deposition spells the name "Lotsa Motsa," we assume this is a mistaken reference to the LOTSA MOZZA mark used by Applicant's predecessor and Applicant itself for a period of time. To the extent Mr. Schultz's testimony that the Madison location was "under Lotsa Motsa (sic)" may be inconsistent with Mr. Salandra's testimony that the Morgantown location was the only location "branded" as LOTSA MOZZA, that is irrelevant to our ultimate decision.

then consider whether priority is at issue and if it is which party has it. *See* 15 U.S.C. §§ 1052(d) and 1063.

A. Opposer's Entitlement to Bring a Statutory Cause of Action[12]

Entitlement to a statutory cause of action is a threshold issue in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when such opposition is within its zone of interests and the plaintiff has a belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration of a mark, which demonstrates damage proximately caused by registration of the mark). Here, Opposer's pleaded registrations, which it properly introduced into the record, 1 TTABVUE 8-12, establish that Opposer is entitled to oppose registration of Applicant's mark on the ground of likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

[12] Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

B. Priority

Because Applicant has not counterclaimed to cancel Opposer's pleaded registrations, priority is not at issue with respect to the marks and goods identified therein. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Furthermore, to the extent that Opposer's distribution of frozen pizza to stadiums, taverns and other venues for resale, and its pizza sales from trailers, may constitute "restaurant services," Opposer has established prior common law use of its mark for those services. In fact, it has provided these services since 2012, and Applicant does not claim first use of its involved mark until 2016. 18 TTABVUE 7 (Schultz Dec. ¶ 20). Applicant does not dispute Opposer's priority.

C. Will the Marks and Sources of the Goods Be Confused?

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which there

is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

We focus here on Opposer's pleaded registration for the mark LOTZZA MOTZZA in standard characters for frozen pizza, as well as Opposer's common law rights in LOTZZA MOTZZA for its "restaurant services." If we find confusion likely between Applicant's involved mark and Opposer's LOTZZA MOTZZA mark, we need not consider the likelihood of confusion between Applicant's mark and Opposer's LOTZZA HOTZZA mark. On the other hand, if we find no likelihood of confusion between Applicant's mark and LOTZZA MOTZZA, we would not find confusion likely between Applicant's mark and LOTZZA HOTZZA. *In re Max Capital Grp.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

1. The Goods and Services, Channels of Trade and Classes of Consumers

Turning first to Opposer's frozen pizza and Applicant's restaurants, Opposer "must show something more than that similar or even identical marks are used for food products and for restaurant services." *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982). Opposer has met this burden and therefore we find that there is a clear relationship between these goods and services.

In fact, the requirement for "something more" is satisfied because Opposer's goods, pizza, are the same type of food offered at Applicant's restaurants, as announced by Applicant's involved mark LOTSA STONE FIRED PIZZA. Moreover, and as explained in more detail below, Opposer's mark is highly suggestive of pizza, or at least pizza or other foods featuring lots of mozzarella. *See e.g. In re Azteca Restaurant*

Enterprises Inc., 50 USPQ2d 1209, 1211 (TTAB 1999) (in affirming refusal to register AZTECA MEXICAN RESTAURANT for restaurant services due to prior registration of AZTECA for prepared Mexican foods, "something more" was found because "Mexican food items are often principal items of entrees served by restaurants, certainly by Mexican restaurants. The average consumer, therefore, would be likely to view Mexican food items and Mexican restaurant services as emanating from or sponsored by the same source if such goods and services are sold under the same or substantially similar marks"); *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074, 1075 (TTAB 1990) (affirming refusal to register GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services based on registration of GOLDEN GRIDDLE for table syrup, finding that "Applicant's mark makes it clear that its restaurant serves pancakes and, no doubt, pancake (or table) syrup, as well. There is an undeniable connection between the goods of the registrant and the services of applicant."). Similarly, in this case the evidence reveals an "undeniable connection" between the pizza which Opposer offers in frozen form and the signature and build-your-own stone fired pizzas offered fresh in Applicant's restaurants. *Cf. In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) (affirming refusal to register OPUS ONE for restaurant services based on a likelihood of confusion with the same mark for wine, and stating "[t]he fact that applicant's restaurant serves the type of goods (indeed the actual goods) identified in the cited registration is certainly probative evidence which supports a finding under the second *du Pont* factor that applicant's services and opposer's goods are related").

Furthermore, Opposer has established that the same sources use and have registered identical marks for frozen pizza on the one hand and restaurant services on the other. In fact, Opposer introduced more than 30 use-based third-party registrations showing that the same marks are registered in connection with both pizza/frozen pizza and restaurant services. 15 TTABVUE 13-88. "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1998).[13] Opposer also introduced evidence that many third parties use identical marks for frozen pizza and restaurant services, including, California Pizza Kitchen, Uno, Gino's East, Sbarro and Mystic Pizza, among many others. *Id.* at 98-237. Thus, Opposer's frozen pizza is related to Applicant's restaurant services.

As for Opposer's "restaurant services," the situation is less clear-cut. We take judicial notice that a restaurant is "a place where meals are prepared and served to customers."[14] Apparently, that does not describe Opposer's services.

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[13] Opposer should be aware, however, that pending applications, cancelled registrations and registrations which are not use-based are not probative on this question.

[14] dictionary.cambridge.org/us/dictionary/english/restaurant. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

Opposer does not own or even operate the places where it provides its services, stadiums and other third parties do. Nor does it appear accurate to say that Opposer's pizza is "prepared" in these places. Opposer "prepares" the pizzas in its manufacturing facility, and Opposer's customers merely reheat the pizza for their customers. In any event, we need not decide whether Opposer in fact provides "restaurant services," because, as explained in more detail below, even if it did, that would not change our ultimate decision about the likelihood of confusion.[15]

As for the channels of trade and classes of consumers, Opposer's evidence makes clear that they overlap. Consumers buy lots of pizza, some frozen, some hot or "fresh," in stores, restaurants and at kiosks and other outlets such as "restaurant trailers." The record makes clear that the same pizza consumers sometimes buy frozen or cooked pizza to eat at home or elsewhere, and at other times buy pizza in restaurants. For example:

> Uno's website lists its many restaurants, and offers frozen pizza, stating "Now you can get our original, legendary pizza shipped straight to your home in 2 packs, 4 packs, and 6 packs. We carefully freeze and ship our 10-inch deep dish pizzas anywhere in the continental U.S." 15 TTABVUE 98-103.
>
> Gino's East's website lists its restaurant locations and offers "nationwide shipping" of a variety of its pizzas. *Id.* at 104-108.
>
> California Pizza Kitchen's website lists its pizza restaurants and Walmart's website offers many different

[15] Applicant argues that "[c]haracterizing [Opposer's] bar, tavern and small format sales as 'restaurant services' is similar to claiming that Anheuser-Busch's sales of beer to a bar which then serves it cold to bar patrons constitutes 'bar and taproom services.'" 31 TTABVUE 28 (Applicant's Trial Brief at 20).

> types of frozen California Pizza Kitchen pizzas for sale. *Id.* at 109-112.
>
> Sbarro's website lists its many restaurants and depicts boxes of its frozen pizza. *Id.* at 113-130.

Opposer introduced a large number of additional similar or analogous examples. *Id.* at 131-237.

In short, the goods and services are at least related, and travel in the same channels of trade to the same consumers. These factors weigh in favor of finding a likelihood of confusion.

2. The Strength of Opposer's Mark

Before comparing the marks, we consider the strength of Opposer's mark, as that impacts the scope of protection to which it is entitled. There are two types of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).").

Turning first to conceptual strength, because Opposer's mark is registered, we must presume that it is inherently distinctive, i.e. that it is at worst suggestive of Opposer's services. 15 U.S.C. § 1057(b) (registration is "prima facie evidence of the validity of the registered mark"); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, "we must assume that it is at least suggestive"). While Opposer's mark is valid and inherently distinctive, the record reveals that it is highly suggestive.

Opposer itself effectively conceded the point when Mr. Schultz testified that "**LOTZZA MOTZZA is our brand that screams what it is, lots of Wisconsin cheese** because we put over a half pound of cheese on that product." 23 TTABVUE 17 (Schultz Disc. Tr. at 11) (emphasis added). In other words, LOTZZA, the phonetic equivalent of "lotsa," also has the same meaning, which the Oxford University Press Online Dictionary defines as "lots of":

Home US English lotsa

Definition of lotsa in English:

lotsa

Pronunciation /ˈlätsə/ /ˈlɑtsə/

CONTRACTION

informal

Lots of.

'I wish them lotsa luck'

'he's got lotsa money'

More example sentences

Origin

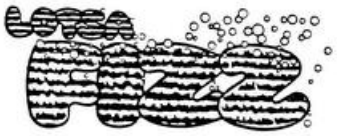
Late 19th century (as lotser): representing a nonstandard pronunciation.

Pronunciation

lotsa /ˈlätsə/ /ˈlɑtsə/

22 TTABVUE 110 (https://www.lexico.com/en/definition/lotsa). Thus, LOTZZA is highly suggestive of the quantity of "Wisconsin cheese" in Opposer's frozen pizza (there is "lots of" it).

Applicant also relies on the following third-party registrations, only one of which is used for clearly related goods:

Mark/Reg. No.	Goods/Services
LOTSA BUBBLES (BUBBLES disclaimed) Reg. No. 5979344	bubble making wand and solution sets; novelty toy items in the nature of toys that produce soap-film bubbles
LOTSA CHICKEN (CHICKEN disclaimed) Reg. No. 4485374	cat food; consumable pet chews; dog food; edible food for animals for chewing; food for animals; pet food; pet treats
 Reg. No. 1659958	Candies
LOTSA HEART ELEPHANT (ELEPHANT disclaimed) Reg. No. 5291119	Plush toys
 Reg. No. 3290334	organizing community members through online calendar services, namely, providing calendar services for others via a global computer network for the purpose of assisting those in need providing online electronic bulletin boards for transmission of messages among computer users for the purpose of organizing community members to assist those in need
LOTSA LOVE Reg. No. 3113413	live flower floral arrangements and bouquets sold with or without plush toy, balloons, or candy
LOTSA MEAT PIZZA (MEAT PIZZA disclaimed) Reg. No. 4559789	Pizza
LOTSA' NOODLES (NOODLES disclaimed)	Soup

Reg. No. 3400163	
LOTSA SLOTS (SLOTS disclaimed) Reg. No. 5855613	… downloadable computer software for providing casino games, slot games … entertainment in the nature of providing, though any computerized platform … slot games …

22 TTABVUE 11-95.[16] Sometimes, third-party registrations may function as a dictionary, by showing "the sense in which a mark is used in ordinary parlance." *Juice Generation, Inc. v. GS Enterprises, LLC*, 794 F.2d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015). Here, however, only the third-party registration for LOTSA MEAT PIZZA is directly probative, because it is used for goods which are on their face related to those at issue here. At the same time, it is perhaps not surprising, given the definition of LOTSA, that third parties have registered marks such as LOTSA CHICKEN for pet food and LOTSA NOODLES for soup.

In any event, based on the dictionary definition of LOTSA and Mr. Schultz's testimony that the term "screams" that Opposer's pizza has "lots of" Wisconsin cheese," we find that LOTSA strongly suggests that Opposer's frozen pizza features "lots of" Wisconsin mozzarella cheese. Indeed, MOTZZA sounds the same as the first two syllables of the word "mozzarella."[17] In the context of Opposer's frozen pizza

[16] Applicant should be aware that cancelled registrations and pending applications are not probative, and we have only listed active registrations here.

[17] By the same token, LOTZZA HOTZZA refers to Opposer's pizza being "spicy hot." 23 TTABVUE 24 (Schultz Disc. Tr. 41)

goods, the meaning of MOTZZA is obvious, and reinforced by Opposer's see-through packaging which draws attention to how much mozzarella Opposer puts on its pizza:

18 TTABVUE 4, 17 (Schultz Dec. ¶ 10 and Ex. A).[18]

Third-party uses of similar terms further reveal that LOTZZA MOTZZA is highly suggestive.[19] Indeed, a Utah pizza restaurant uses an essentially identical mark and trade name, also for pizza:

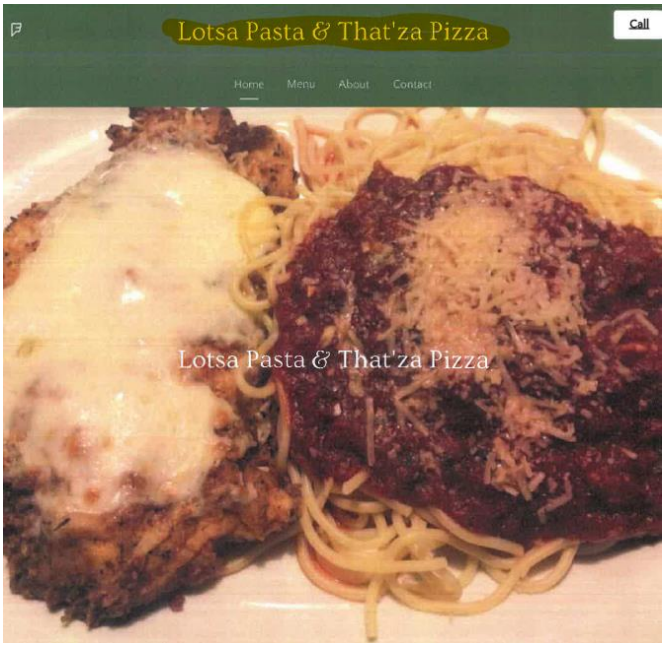
[18] When a mark identifies a product's ingredient(s), it may be considered merely descriptive. *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1576 (Fed. Cir. 2015) ("The Board found that the relevant consumer, knowing that the goods are supplements containing nopal cactus juice, would understand the mark NOPALEA to convey information that the goods contain ingredients from the *Nopalea* cactus …Substantial evidence supports the Board's findings, and its conclusion that 'nopalea' is merely descriptive of TriVita's goods.").

[19] While third-party uses of similar marks for similar goods or services are typically considered in evaluating a term's commercial weakness, as discussed infra, in this case we also find them probative of conceptual weakness.

22 TTABVUE 111. While this mark, LOTSA MOTSA PIZZA, differs slightly from Opposer's mark by replacing the "zz"s in Opposer's LOTZZA MOTZZA with "s"s, this mark conveys the same exact meaning as Opposer's mark for the same exact goods, and thus is highly probative in further establishing the strongly suggestive nature of LOTZZA MOTZZA.

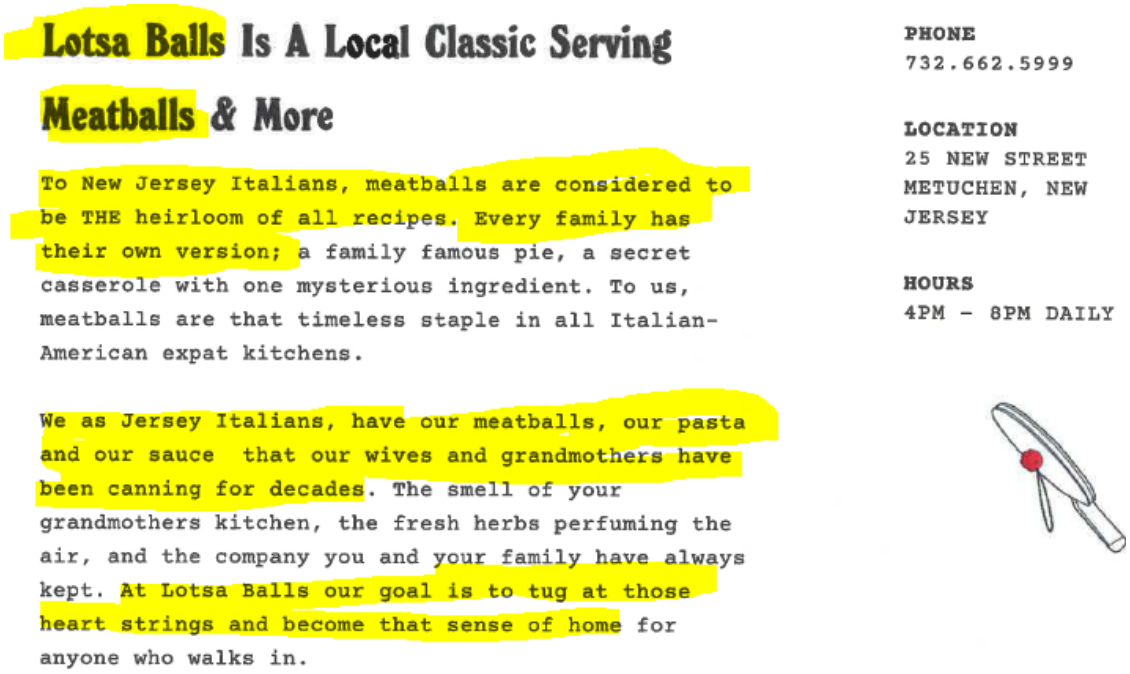
In addition, Mr. Schultz admitted that there is a separate, unrelated company using the mark LOTSA MEAT PIZZA, which is reflected in the table of third-party registrations above. 28 TTABVUE 16. Thus, Opposer's marks coexist with LOTSA MOTSA PIZZA and LOTSA MEAT PIZZA, among other similar marks.

We also find the trade name/service mark LOTSA PASTA & THAT'ZA PIZZA for a Colorado restaurant to be probative of the suggestiveness of Opposer's mark:



22 TTABVUE 113. This restaurant uses LOTSA in the exact same way as Opposer, to suggest a large quantity of food, in this case pasta. Furthermore, this mark includes THAT'ZA PIZZA, which reveals another way in which Opposer's mark is suggestive – it is used for Italian food. That is, combining LOTSA (or LOTZZA) with generic terms for types of Italian food that also end with "A" and rhyme with the "A" sound in LOTSA/LOTZZA results in a composite that calls to mind an Italian accent, perhaps that of the chef or a consumer who is particularly appreciative of good pizza or pasta. In other words, it is not just the meaning of the word LOTSA which strongly suggests a large quantity of Italian food, but also the term's pronunciation, at least when, as here, it is used in conjunction with rhyming words which also call to mind (or are generic for) Italian food. Another third-party uses LOTSA PASTA in the exact same way, for a Kentucky international food shop which offers pizza and other Italian food:

Id. at 126-127. And another third-party uses LOTSA BALLS for meatballs intended to call to mind meatballs made by "Jersey Italians" based on family recipes:



Lotsa Balls Is A Local Classic Serving Meatballs & More

To New Jersey Italians, meatballs are considered to be THE heirloom of all recipes. Every family has their own version; a family famous pie, a secret casserole with one mysterious ingredient. To us, meatballs are that timeless staple in all Italian-American expat kitchens.

We as Jersey Italians, have our meatballs, our pasta and our sauce that our wives and grandmothers have been canning for decades. The smell of your grandmothers kitchen, the fresh herbs perfuming the air, and the company you and your family have always kept. At Lotsa Balls our goal is to tug at those heart strings and become that sense of home for anyone who walks in.

PHONE
732.662.5999

LOCATION
25 NEW STREET
METUCHEN, NEW
JERSEY

HOURS
4PM - 8PM DAILY

Id. at 133-139. These examples further reinforce that LOTSA is highly suggestive when used in connection with food, especially Italian food, including pizza. Of course, while LOTSA may be particularly appropriate for and suggestive of Italian food, it may also be used more generally by restaurants and food providers to signify a large

quantity of any type of food, such as the trade name/service mark LOTSA LOBSTER for a seafood market. *Id.* at 130.

Turning to the evidence of commercial strength, Opposer has shown that its pizza is successful, based on sales totaling "approximately $305 million," and promotional expenses totaling more than $9 million 18 TTABVIE 13-14 (Schultz Dec. ¶¶ 31, 33). In addition, the LOTZZA MOTZZA mark is displayed in venues which host sports and other events, such as Target Center, where we would expect relatively large numbers of potential consumers to encounter the mark. On the other hand, there is no direct evidence that consumers recognize the mark or that it has received significant media attention. "Opposer does not contend that Opposer's Marks are famous." 23 TTABVUE 141 (Opposer's response to Interrogatory No. 17). Overall, we find that Opposer's mark is commercially somewhat strong.

We must balance this evidence of commercial success and a moderate level of advertising against the third-party uses of LOTSA MOTSA PIZZA, LOTSA MEAT PIZZA, LOTSA PASTA INTERNATIONAL FOOD SHOP and LOTSA BALLS meatballs. Four third-party uses is not quantitatively sufficient to establish that a significant portion of United States pizza consumers have been conditioned to distinguish between LOTSA marks for food or even Italian food. However, these third-party uses do show consumer exposure to use of the term LOTSA by third party food providers.

All of the evidence of conceptual weakness, including the dictionary definition and Mr. Schultz's testimony discussed above highlights the conceptual weakness of

LOTSA and highly similar terms such as LOTZZA. We keep all of this evidence in mind as we turn to comparing the parties' marks.

3. The Marks

Opposer argues that "LOTSA/LOTZZA is the dominant term of the parties' marks." 30 TTABVUE 43. We agree at least with respect to Applicant's mark, for two reasons. First, LOTSA appears and will be read and spoken first. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) ("The identity of the marks' initial two words is particularly significant because consumers typically notice those words first."); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). Second, the rest of Applicant's mark, STONE FIRED PIZZA, is at best descriptive of Applicant's restaurants, and disclaimed, so it is entitled to less weight in our analysis. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *see also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ).

This is not enough to find confusion, however, even if we agreed that LOTZZA is the dominant portion of Opposer's mark. In fact, while STONE FIRED PIZZA is entitled to less weight in our analysis of Applicant's mark, we may not ignore it, even

though it is disclaimed. *Shen Mfg. v. Ritz Hotel, Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1355 (Fed. Cir. 2004) ("The disclaimed elements of a mark, however, are relevant to the assessment of similarity … This is so because confusion is evaluated from the perspective of the purchasing public, which is not aware that certain words or phrases have been disclaimed."); *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 144 USPQ 433 (CCPA 1965). Similarly, even if we considered LOTZZA to be the dominant portion of Opposer's mark, we could not ignore MOTZZA. Stated differently, we must consider the marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567).

When we do so, we find that the marks are different in appearance and sound. To state the obvious, Applicant's mark does not contain MOTZZA, MOTSA, MOZZA MOZZARELLA or any similar words or terms, and Opposer's mark does not contain STONE, FIRED or PIZZA. The differences in how LOTZZA MOTZZA and LOTSA STONE FIRED PIZZA look and sound are thus readily apparent.[20]

The marks convey somewhat similar meanings, however, because Opposer's mark is highly suggestive of pizza and perhaps Italian food generally, while Applicant's mark itself makes clear that it is for pizza that is stone fired. On the other hand, the

[20] To the extent Opposer argues that confusion is unlikely because Applicant often displays the term LOTSA in much larger font than STONE FIRED PIZZA, this is irrelevant. Applicant seeks registration in standard characters, and therefore could display the mark in any font or size. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012).

meanings are dissimilar because Opposer's mark focuses on the quantity of a particular ingredient, while Applicant's focuses on the quantity of pizza itself.

Ultimately, we find that even though the marks convey somewhat similar meanings, and begin with terms which sound the same and look somewhat similar, they are not likely to result in consumer confusion due to the conceptual weakness of Opposer's mark and the shared term LOTSA/LOTZZA. That term is simply too weak to result in a finding of confusing similarity here, even when the marks are used for pizza on the one hand and pizza restaurants on the other, and even if we assume that Opposer's alleged "restaurant services" are in fact identical to Applicant's traditional restaurant services. In fact, consumers will perceive the marks' first terms as merely laudatory, strongly suggesting that Opposer provides lots of mozzarella with its pizza and that Applicant's restaurants serve lots of pizza. Some consumers are also aware that LOTSA and variations thereof is used by unrelated food providers, perhaps especially those which offer Italian food, including pizza.

The bottom line is that because the only thing the marks have in common is the demonstrably weak term LOTZZA/LOTSA, confusion is unlikely. *See e.g. Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958) (finding no likelihood of confusion between SURE-FIT and RITE-FIT, both for slip covers, because the term "fit" is "eminently suitable for use in connection with goods such as ready-made slip covers … [u]nder these circumstances, we do not feel that appellant is entitled to the broad protection which it seeks"); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476-78 (TTAB 2014) (finding

"that the mark PERKSPOT is sufficiently different from the marks PERKS and PERKSCARD to avoid a likelihood of confusion" even though the marks were used for legally identical services); *Plus Prods. v. Natural Organics, Inc.*, 204 USPQ 773, 779-80 (TTAB 1979) (allowing registration of NATURE'S PLUS for vitamins despite prior registration of PLUS for vitamins given coexistence of a number of registrations containing PLUS for similar goods).

The involved mark is LOTSA STONE FIRED PIZZA, not LOTSA MOZZA (or LOTSA MOTSA). Opposer should not be able to prevent others from registering marks which share with Opposer's mark only the term LOTSA or variations thereof, even for pizza. Indeed, as the record demonstrates, companies which offer large quantities of pizza or its ingredients, or other food products, may have a need or desire to use the same highly suggestive term. As the Federal Circuit's predecessor court stated in *Sure-Fit*:

> It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

Sure-Fit Prods., 117 USPQ at 297.

4. Actual Confusion

Opposer alleges that there have been "at least two examples of actual confusion." 30 TTABVUE 48 (Opposer's Trial Brief at 39-40). The supporting evidence is quantitatively and qualitatively insufficient to support a finding of actual confusion.

In the first "example," Twitter user Mac Wilson was poking fun at Opposer in a tweet, but misspelled Opposer's mark as LOTSA MOZZA, thereby mistakenly "tagging" Applicant. 25 TTABVUE 6-7, 76 (DiGangi Dec. ¶ 28 and Ex. O). This was not actual confusion between the sources of the parties' goods, the goods themselves or the parties' marks. It was a spelling or tweeting error. Moreover, it was a short-lived error, because three days later Mr. Wilson e-mailed Applicant explaining that "[m]y intended (and non-serious!) target was Lotzza Motzza … As it turns out, this wound up tagging you …." 16 TTABVUE 169. In any event, in the absence of Mr. Wilson's testimony, this evidence is not probative of actual confusion. *See Corporate Fitness Programs, Inc. v. Weider Health and Fitness, Inc.*, 2 USPQ2d 1682, 1691 (TTAB 1987) ("we agree with applicant's contention that the testimony is of little probative value in the absence of testimony from the third persons themselves as to whether they were confused and, if so, what caused their confusion") and *Toys "R" Us, Inc. v. Lamps R Us*, 219 USPQ 340, 346 (TTAB 1983) ("One important defect, which might have been revealed had the involved customers been available for cross-examination, is that there is nothing to indicate whether the reason for the question as to affiliation was the result of the similarity of the marks.").

In the second "example," Jodi Koepp e-mailed Applicant with a complaint about Opposer's pizza fries. 25 TTABVUE 7-8 (DiGangi Dec. ¶¶ 31-32); 16 TTABVUE 548. The mistake appears to be the result of Ms. Koepp contacting Applicant through its "lotsa.com" website. While this contact may tend to suggest that Ms. Koepp could have been confused in some manner about the parties or their products, Applicant

quickly dispelled any confusion. 16 TTABVUE 548. Furthermore, to the extent Ms. Koepp was confused, that confusion does not appear to be the result of the involved mark LOTSA STONE FIRED PIZZA, but rather the domain name "lotsa.com." This proceeding is not about the domain name, and the Board is not the proper venue for domain name disputes. In any event, even if this incident qualified as actual confusion based on the parties' marks and goods or the sources thereof, it is de minimis. *Syndicat Des Proprietaires Viticulteurs De Chateaneuf-Du-Pape v. Pasquier DesVignes*, 107 USPQ2d 1930, 1942 (TTAB 2012); *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 USPQ2d 1901, 1905 (TTAB 2007). This factor is neutral.

5. Whether the Goods and Services are Subject to Impulse Purchase

We accept Opposer's argument that "[s]ince pizza is a relatively inexpensive product frequently purchased by consumers without detailed scrutiny of the goods, an average frozen pizza consumer will not exercise a high degree of care when purchasing frozen pizza." 30 TTABVUE 51-52 (Opposer's Trial Brief at 42-43). The same is true of dining on pizza at a "fast casual" restaurant, kiosk or "restaurant trailer." This factor weighs in favor of finding of likelihood of confusion.

6. Applicant's Intent

Opposer points out that Applicant was aware of Opposer and its goods and services prior to applying for registration of LOTSA STONE FIRED PIZZA. 30 TTABVUE 52-53 (Opposer's Trial Brief at 43-44). This is not sufficient to establish bad faith and therefore this factor is neutral. *Action Temporary Services, Inc. v. Labor Force, Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1310 (Fed. Cir. 1989) ("*mere knowledge of the existence of the prior user* should not, by itself, constitute bad faith").

IV. Conclusion

Even if we assume that the parties' goods and services are identical and that all channels of trade and classes of consumers overlap, confusion is unlikely despite those goods and services being subject to impulse purchase. The parties' marks are simply too different, given that their shared component is conceptually weak and used by third-parties for the same or similar goods, for confusion to be likely. *See Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive.").

Decision: The opposition is dismissed.