

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 1, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*USA Marble, LLC*

*v.*

*StoneHardscapes, LLC*

—  
Opposition No. 91267234

—  
Darren Spielman, Alexander D. Brown and Evan Sheres of  
The Concept Law Group, P.A for USA Marble, LLC

Cecilia R. Dickson and Maximilian D. Meese of The Webb Law Firm  
for StoneHardscapes, LLC

—  
Before Bergsman, Lynch and Dunn,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

**I. Background and Evidentiary Matters**

StoneHardscapes, LLC (“Applicant”) seeks registration on the Principal Register,  
with a claim of acquired distinctiveness, of the standard-character mark CREMA

BELLA for “pavers; paver tiles” in International Class 19.<sup>1</sup> The application contains the following statement: “The English translation of ‘CREMA BELLA’ in the mark is ‘BEAUTIFUL CREAM.’”

In its Notice of Opposition, USA Marble, LLC (“Opposer”) opposes registration of Applicant’s mark as merely descriptive and lacking acquired distinctiveness. In its Answer, Applicant admitted the following:

“[T]he words ‘CREMA BELLA’ may be translated to English from Italian...”<sup>2</sup>

“‘BELLA’ in Italian may be translated to ‘beautiful’ in English, and ‘CREMA’ in Italian may be translated to ‘cream’ in English.”<sup>3</sup>

“[O]ne definition of ‘cream’ may be ‘a very pale yellow or off-white color.’”<sup>4</sup>

“Applicant has asserted that Opposer’s use of the ‘CREMA BELLA’ mark infringes Applicant’s trademark and creates a likelihood of consumer confusion, and therefore, has demanded that Applicant [sic] cease all such use.”<sup>5</sup>

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<sup>1</sup> Application Serial No. 88597442 was filed on August 29, 2019, based on alleged use of the mark in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). The application, as amended with consent during the course of this proceeding, 23 TTABVUE, claims first use of the mark and first use of the mark in commerce on October 7, 2015.

Citations to TTABVUE are to the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Both parties designated some evidence as confidential, and we discuss it only in general terms.

<sup>2</sup> Answer ¶ 3 (4 TTABVUE 2).

<sup>3</sup> Answer ¶ 4 (4 TTABVUE 2).

<sup>4</sup> Answer ¶ 5 (4 TTABVUE 3).

<sup>5</sup> Answer ¶ 15 (4 TTABVUE 4).

Otherwise, Applicant denied the salient allegations in the Notice of Opposition.<sup>6</sup>

The record includes the pleadings<sup>7</sup> and, pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the opposed application.<sup>8</sup> Both parties supplemented the record with discovery materials filed under notices of reliance as well as testimony with exhibits.

As testimony, Opposer introduced:

- an affidavit from Kenan Yagmur, President of third-party Rain Foreign Trade, Inc.;<sup>9</sup>

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<sup>6</sup> 4 TTABVUE (Answer). Applicant’s affirmative defense of unclean hands, and its alleged “defense” that the notice of opposition failed to state a claim upon which relief may be granted, have not been considered. Despite stating them in its Answer, Applicant did not pursue any defense at trial. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff’d*, 565 F. App’x 900 (Fed. Cir. 2014) (mem.); *Swiss Watch Int’l Inc. v. Fed’n of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1734 n.4 (TTAB 2012) (affirmative defenses deemed waived where no mention of them in trial brief); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.01 (2023) (“If a party fails to reference a pleaded claim or affirmative defense in its brief, the Board will deem the claim or affirmative defense to have been waived”). Also, failure to state a claim is not a true affirmative defense; it “relates to an assertion of the insufficiency of the pleading of the plaintiff’s claim rather than a statement of a defense to a properly pleaded claim.” *John W. Carson Found. v. Toilets.com, Inc.*, 94 USPQ2d 1942, 1949 (TTAB 2010) (citing *Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1738 n.7 (TTAB 2001)). Finally, in its last “affirmative defense,” Applicant reserves the right to assert additional defenses as they become known to Applicant. Applicant’s “attempt to reserve the right to add defenses is improper under the Federal Rules of Civil Procedure, because that would not give ... [Opposer] fair notice of such defenses.” *Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, \*4 n.6 (TTAB 2021); *see also FDIC v. Mahajan*, 923 F.Supp.2d 1141 (N.D. Ill. 2013) (“[A]ffirmative defenses that purport to reserve the right to add affirmative defenses at a later date ... are stricken because they are improper reservations under the Federal Rules.”).

<sup>7</sup> For this reason, it was unnecessary for Applicant to submit the Notice of Opposition under Notice of Reliance. 24 TTABVUE.

<sup>8</sup> For this reason, it was unnecessary for Applicant to submit the file of its opposed application under Notice of Reliance. 24 TTABVUE.

<sup>9</sup> 17 TTABVUE.

- a declaration from Gary Remick, Merchandising Vice President of Stone and Adjacent Categories for third-party Floor and Décor Outlets of America, Inc.;<sup>10</sup>
- an affidavit from Mert Karcilar, Opposer's Vice President;<sup>11</sup> and
- transcript excerpts from the deposition of Pamela Luciani, Applicant's General Manager.<sup>12</sup>

As testimony, Applicant introduced:

- transcript excerpts from the deposition of Mert Karcilar;<sup>13</sup> and
- a declaration from Pamela Luciani.<sup>14</sup>

The proceeding has been fully briefed.

In its Brief, Opposer raised for the first time a number of objections to Applicant's Luciani declaration. To the extent Opposer makes objections based on lack of proper foundation or personal knowledge, these procedural objections should have been raised promptly after the declaration to allow the opportunity for a cure. *See Moke America LLC v. Moke USA, LLC*, 2020 USPQ2d 10400 at \*4 (TTAB 2020); *The Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1637 n. 16 (TTAB 2007). Because such objections were raised only in the Brief, we consider them waived as untimely.

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<sup>10</sup> 18 TTABVUE.

<sup>11</sup> 19 & 20 TTABVUE.

<sup>12</sup> 21 & 22 TTABVUE 5-173.

<sup>13</sup> 25 TTABVUE.

<sup>14</sup> 26 & 27 TTABVUE.

*Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241 (TTAB 2021); *Pass & Seymour, Inc. v. Syrelec*, 224 USPQ 845, 846 (TTAB 1984).

As for Opposer's hearsay objections, we overrule them because we do not agree that the statements in question, the existence and content of Applicant's oral agreement and the audience reach of an advertisement – constitute out-of-hearing statements offered for their truth.

Opposer's objections regarding exhibits lacking dates and/or location information are overruled because date and location information on the face of the documents is not required for testimony exhibits.

Regarding objections that Ms. Luciani's declaration offers legal conclusions, in our review of testimony, the Board disregards legal conclusions and opinions from lay witnesses. *See, e.g., Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153-54 (CCPA 1978) (likelihood of confusion is a legal conclusion; "under no circumstances may a party's opinion . . . relieve the decision maker of the burden of reaching [its] own ultimate conclusion on the entire record"); *Harco Labs., Inc. v. Decca Navigator Co.*, 150 USPQ 813, 814 n.2 (TTAB 1966) (the Board forms its own legal conclusions rather than relying on a party's admission).

"[T]he Board generally does not strike testimony taken in accordance with the applicable rules on the basis of substantive objections; rather, the Board considers such objections when evaluating the probative value of the testimony at final hearing." *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1047 (TTAB 2017) (quoting *Bd. of Regents v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1194

n.19 (TTAB 2014)). We therefore overrule Applicant's objections but will consider them in weighing the objected-to testimony.

Finally, we note that in its Brief,<sup>15</sup> Applicant lists as part of the trial record and repeatedly cites to evidence offered (at 9 and 10 TTABVUE) in connection with Opposer's summary judgment motion. However, as the Board Order denying summary judgment stated, "the evidence submitted in connection with Opposer's motion for summary judgment is of record only for consideration of this motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period."<sup>16</sup> Thus, we cannot consider evidence from the summary judgment unless it was submitted during the trial period. *See* 37 C.F.R. § 2.121(a) ("No testimony shall be taken or evidence presented except during the times assigned....").

## **II. Statutory Entitlement to Oppose**

Despite the requirement that any plaintiff in an inter partes case establish entitlement to a statutory cause of action, neither party addressed the issue in its briefing. *See 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, 109 USPQ2d 2061, 2067 n.4 (2014)). To prove a statutory entitlement to oppose under Section 13 of the Act, 15 U.S.C. § 1063, Opposer must demonstrate a real interest in the proceeding and a reasonable belief

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<sup>15</sup> *E.g.*, 31 TTABVUE 6-7, 13,

<sup>16</sup> 12 TTABVUE 6 n.3 and cases cited therein.

of damage. *Australian Therapeutic Supplies*, 2020 USPQ2d 10837 at \*3; *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012).

As noted above, Applicant has admitted that: “Applicant has asserted that Opposer’s use of the ‘CREMA BELLA’ mark infringes Applicant’s trademark and creates a likelihood of consumer confusion....”<sup>17</sup> Opposer also introduced testimony that it has “used the name ‘CREMA BELLA’ in connection with the sale and distribution of cream-colored tiles and pavers” and continues to do so currently.<sup>18</sup> In addition, Applicant stated in answering an interrogatory that “[t]he Parties sell similar products to similar customers, including tile and pavers under the Crema Bella name.”<sup>19</sup>

The record showing Opposer’s use of CREMA BELLA for competing goods and Applicant’s infringement allegation prove Opposer’s legitimate commercial interest in the use of the wording at issue in Applicant’s proposed mark. *See Empresa*, 111 USPQ2d at 1062 (a plaintiff must have a “legitimate commercial interest sufficient to confer standing”). “[A] plaintiff need only show that it is engaged in the manufacture or sale of the same or related goods as those listed in the defendant’s involved application ...; that is, that plaintiff has a real interest in the proceeding

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<sup>17</sup> 4 TTABVUE 4 (admitting ¶ 15 of the Notice of Opposition); *see also* 1 TTABVUE 5, ¶ 15.

<sup>18</sup> 19 TTABVUE 2 (Karcilar Affidavit).

<sup>19</sup> 24 TTABVUE 168 (Answer to Interrogatory No. 15).

because it is one who has a present or prospective right to use the term descriptively in its business.” *Poly-America, L.P. v. Illinois Tool Works Inc.*, 124 USPQ2d 1508, 1512 (TTAB 2017) (quoting *Binney & Smith Inc. v. Magic Marker Indus., Inc.*, 222 USPQ 1003, 1010 (TTAB 1984)). In light of the infringement accusation, the prospect of Applicant securing a registration for CREMA BELLA gives rise to Opposer’s reasonable belief of damage. See *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1848 (TTAB 2017), *rev’d on other grounds by stipulation pursuant to settlement agreement*, No. 3:17-cv-02150-AJBMSB (S.D. Cal. Apr. 13, 2021) (opposer established standing by proof that it was a competitor of the applicant and that it received a cease-and-desist letter from the applicant); *Miller v. Miller*, 105 USPQ2d 1615, 1619 (TTAB 2013) (“These cease and desist letters provide additional evidence that opposer has business interests that have been affected, i.e., a real interest in the proceeding, and thus, has standing.”).

### **III. Descriptiveness**

Section 2(e)(1) of the Trademark Act precludes registration of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1). “A mark is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). Descriptiveness must be assessed “in relation to the particular goods for which registration is sought,



the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *Bayer AG*, 82 USPQ2d at 1831 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). The descriptiveness analysis concentrates on the identification of goods in the application. See *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1636 (Fed. Cir. 2016) (citing *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USQP2d 1783, 1787 (Fed. Cir. 1990)).

Applicant, to overcome a refusal, amended its application to claim acquired distinctiveness, and therefore conceded the descriptiveness of CREMA BELLA.<sup>20</sup> *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1479 (TTAB 2016); see also *The Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) (“[W]here an applicant seeks registration on the basis of Section 2(f), the mark’s descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution presumes that the mark is descriptive.”); *In re RiseSmart Inc.*, 104 USPQ2d 1931, 1932 (TTAB 2012) (“[W]hen an applicant responds to a refusal based on mere descriptiveness of a mark, or portion of a mark,

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<sup>20</sup> Although Applicant initially offered its Section 2(f) claim in the alternative (TSDR June 3, 2020 Response to Office Action), the application file reflects that after a phone conversation with Applicant’s attorney, the Examining Attorney entered the proffered Section 2(f) claim by Examiner’s Amendment (TSDR June 22, 2020 Note to the File; TSDR July 2, 2020 Trademark Snap Shot Amendment & Mail Processing Stylesheet). Applicant did not object, and the application published for opposition with the Section 2(f) claim. To preserve a claim of inherent distinctiveness, an applicant must maintain the Section 2(f) claim in the alternative and appeal the refusal on the basis that the mark is not inherently distinctive – i.e. is descriptive. *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1713 (TTAB 2011). As Opposer notes, Applicant failed to appeal “and therefore conceded to the fact that the mark is not inherently distinctive and certainly that the mark is not suggestive.” 33 TTABVUE 10 (Opposer’s Reply Brief).

by claiming acquired distinctiveness, such amendment to seek registration under Section 2(f) of the Trademark Act is considered an admission that the proposed mark is not inherently distinctive.”). “Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of distinctiveness as an established fact.” *Yamaha Int’l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988).

Therefore, we reject Applicant’s arguments in its Brief that CREMA BELLA is inherently distinctive.<sup>21</sup> However, we discuss some of the parties’ arguments and evidence regarding descriptiveness below, in connection with our determination of the degree of descriptiveness, as a prerequisite to analyzing Applicant’s claim of acquired distinctiveness. *See Spiritline Cruises LLC v. Tour Mgmt. Servs.*, 2020 USPQ2d 48324, at \*16 (TTAB 2020) (geographic descriptiveness established based on amendment to include a 2(f) claim, but “we do not forgo discussion on the degree of geographic descriptiveness”).

#### **IV. Acquired Distinctiveness**

We turn to the issue of acquired distinctiveness. Trademark Act Section 2(f), 15 U.S.C. § 1052(f), permits the registration of a primarily descriptive mark “which has become distinctive of the applicant’s goods in commerce.”

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<sup>21</sup> 31 TTABVUE 27-28.

### **A. Degree of Descriptiveness**

First, we determine the degree of descriptiveness as a necessary part of assessing the claim of acquired distinctiveness. *See Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1048 (Fed. Cir. 2018) (“If it reaches the question of acquired distinctiveness, the Board must make an express finding regarding the degree of the mark’s descriptiveness on the scale ranging from generic to merely descriptive, and it must explain how its assessment of the evidentiary record reflects that finding.”).

In connection with the descriptiveness, analysis, the parties dispute the applicability of the doctrine of foreign equivalents in this case. “Under the doctrine of foreign equivalents, foreign words from common, modern languages are translated into English to determine ... descriptiveness.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005). We make no distinction between English terms and their equivalents from common, modern foreign languages with respect to registrability. *See Cordua Rests.*, 118 USPQ2d at 1637, and *In re Spirits Int’l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1491 (Fed. Cir. 2009) (both quoting *Palm Bay Imps.*, 73 USPQ2d at 1696 (“Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as the similarity of connotation in order to ascertain confusing similarity with English word marks.”)). The doctrine of foreign equivalents applies when it is likely that “the ordinary American purchaser would ‘stop and translate [the mark] into its English equivalent.’” *Palm Bay Imps.*, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*,

190 USPQ 109, 110 (TTAB 1976)). Such “ordinary American purchaser” in a case involving a foreign language mark includes purchasers knowledgeable in English as well as the pertinent foreign language. *See In re Thomas*, 79 USPQ2d at 1024 (“The ‘ordinary American purchaser’ in this context refers to the ordinary American purchaser who is knowledgeable in the foreign language”); *see also In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647-48 (TTAB 2008) (“The Board has determined that the ‘ordinary American purchaser’ in a case involving a foreign language mark refers to the ordinary American purchaser who is knowledgeable in English as well as the pertinent foreign language.”).

Applicant does not dispute that CREMA BELLA is Italian wording,<sup>22</sup> and does not argue against Italian qualifying as a common modern language for purposes of the doctrine. However, despite Applicant having agreed to the entry of a translation statement that its proposed mark means “beautiful cream,” Applicant now argues that there is no literal and direct translation of CREMA BELLA, such that consumers would not stop and translate the proposed mark. *Cf.* TMEP § 1209.03(g) (2022) (noting the applicability of the doctrine of foreign equivalents “when the relevant English translation is literal and direct”).

Opposer contends that Applicant’s translation statement is an admission that “beautiful cream” constitutes “the clear and exact equivalent” translation because only such translations are entered for publication under TMEP § 809.03.<sup>23</sup> Opposer

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<sup>22</sup> *See, e.g.*, 31 TTABVUE 24, 27-28 (Applicant’s Brief).

<sup>23</sup> 29 TTABVUE 15-16 (Opposer’s Brief).

also asserts that even apart from the alleged translation admission, use by others in the industry of “Crema Bella,” as set forth in more detail below, shows that the wording is highly descriptive.

As an initial matter, we agree that the prosecution history of the opposed application supports a literal and direct translation of “crema bella” as “beautiful cream.” After lodging the same alternative translation argument that CREMA can refer to custard and therefore is suggestive of something cool and smooth,<sup>24</sup> and that “bella” can mean “nice” or “beautiful,” Applicant’s attorney agreed to amend the application to enter the translation now in the record – “beautiful cream.”<sup>25</sup> The agreed-upon translation, along with Applicant’s Section 2(f) claim, facilitated the Examining Attorney’s publication of the application, following her determination that the outstanding refusals and requirements “have been overcome and/or addressed and all issues have been resolved.”<sup>26</sup>

To the extent that Applicant now wishes to amend its application to withdraw the translation or enter a new translation, the amendment comes too late. In the absence of the adverse party’s consent, a motion to amend an application “should be made prior to trial to give the opposer fair notice.” *Monster Energy Co. v. Lo*, 2023 USPQ2d 87 at \*9 (TTAB 2023) (quoting *City of London Distillery, Ltd. v. Hayman Grp. Ltd.*, 2020 USPQ2d 11487 , at \*12 (TTAB 2020)); *see also* 37 C.F.R. § 2.133(a)

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<sup>24</sup> TSDR June 3, 2020 Response to Office Action at 1 (Google translate evidence provided).

<sup>25</sup> TSDR July 1, 2020 Examiner’s Amendment.

<sup>26</sup> TSDR July 1, 2020 Examiner’s Amendment.

(prohibiting amendment of an application subject to an opposition “except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board, or upon motion granted by the Board”). The translation in the application stands. Applicant cannot now change its position.

We find that the literal and direct translation of CREMA BELLA is “beautiful cream.” We are not persuaded by Applicant’s argument that consumers would be inclined to apply (even as a double entendre) a food-related meaning.<sup>27</sup> “That a term may have other meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012). Moreover, where the terms have a clear descriptive meaning in the context of Applicant’s goods, in this case referring to the beauty<sup>28</sup> and cream color of the paver tile,<sup>29</sup> consumers likely will focus on that meaning when encountering the mark on the goods. *See, e.g., In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (RECOIL found to “immediately convey information regarding the ability of [medical and athletic cohesive tape] to rebound or return to its original length or close to it” even though record contained six dictionary definitions of the word) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)). *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1173

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<sup>27</sup> While Applicant emphasizes that it sometimes markets its products as cool to the touch, 27 TTABVUE 79, we note that its marketing literature also states that “Crema Bella offers a chic yet warm feel to your home or property with a blend of cream, white and beige hues.” 27 TTABVUE 65.

<sup>28</sup> Applicant submitted an example of its direct email marketing and several social media posts that refer to the goods at issue as “beautiful.” 27 TTABVUE 24, 45, 52, 56.

<sup>29</sup> Applicant submitted a brochure for the goods that refers to its “cream and white hues.” 27 TTABVUE 26. One example of its social media posts refers to “the cream tones.” *Id.* at 42. Others refer to the “cream tones” and “consistent cream tones.” *Id.* at 57, 55, 66, 68.

(TTAB 2013) (rejecting the applicant’s contention that its SUPERJAWS mark called to mind a superhero rather than simply giving the impression of the laudatory term “super” modifying the generic term for applicant’s jaws tool); *see also DuoProSS*, 103 USPQ2d at 1757 (descriptiveness assessed as to the relevant goods, and not in the abstract).

Applying the doctrine of foreign equivalents, we find that consumers would stop and translate CREMA BELLA to “beautiful cream.” Each word describes a feature of Applicant’s goods, which Applicant promotes both as beautiful and cream-colored.<sup>30</sup> “The commercial context here demonstrates that a consumer would immediately understand the intended meaning” of the proposed mark, *N.C. Lottery*, 123 USPQ2d at 1710, which is nothing more than the sum of its descriptive parts.

Interestingly, though, we could leave aside the doctrine of foreign equivalents in this case, and still find the proposed mark highly descriptive based on the rather extensive use by others in the industry of the foreign-language wording CREMA BELLA to refer to cream-colored tile quarried from Turkey, as detailed below. The record shows that regardless of translation, consumers would recognize the term CREMA BELLA as a type of paver tile. Applicant’s evidence of its use shows that its goods are such cream-colored paver tiles.<sup>31</sup> Thus, we need not even resort to translating CREMA BELLA for proof of its descriptiveness. An overview of this aspect of the record follows.

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<sup>30</sup> 27 TTABVUE 24, 45, 52, 55-57, 65, 66, 68, 79.

<sup>31</sup> *See, e.g.*, 24 TTABVUE 69-101. *See N.C. Lottery*, 123 USPQ2d at 1709-10.

The testimony of Opposer's Vice-President, Mert Karcilar, includes the following:<sup>32</sup>

“[Opposer] used the name ‘CREMA BELLA’ in connection with the sale and distribution of cream-colored tiles and pavers at least as early as January 28, 2010, until at least April 30, 2012. *See Exhibits A, B.*” [The referenced Exhibit A consists of sales reports dating back to 2010 for products that include a “Line Description” of “18X18 CREMA BELLA TILE” and “18X18 CREMA BELLA PREMIUM TILE.” The referenced Exhibit B consists of Opposer's sales invoice dated April 27, 2010 for “18X18 CREMA BELLA TILE”.]<sup>33</sup>

“[Opposer] began selling Crema Bella pavers again in 2019 and has continued to sell Crema Bella pavers through the present.”

“Based on my experience in and knowledge of the marble/stone industry, the name Crema Bella is used by many different companies in the tile and pavers industry in the United States and throughout the world.”

Mr. Karcilar also testified to finding third-party websites “selling or offering to sell CREAM [sic] BELLA tiles and pavers,” and attached screenshots as exhibits. For example:<sup>34</sup>

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<sup>32</sup> 19 TTABVUE (Karcilar Affidavit).

<sup>33</sup> Mr. Karcilar provided the necessary background to qualify the documents as business records. 19 TTABVUE 3.

<sup>34</sup> 19 TTABVUE 61-81, 99, 113, 115.



8/27/2021 Crema Bella Classic Polished Marble Tile - 12 x 24 - 100051697 | Floor an

**18-Month Special Financing Available 8/09/21 - 10/17/21**

Enable Accessibility Shop By Room   Inspiration   Free Design Services   Financing   Pro Services

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**FLOOR & DECOR**  Fort Lauderdale  
View store details

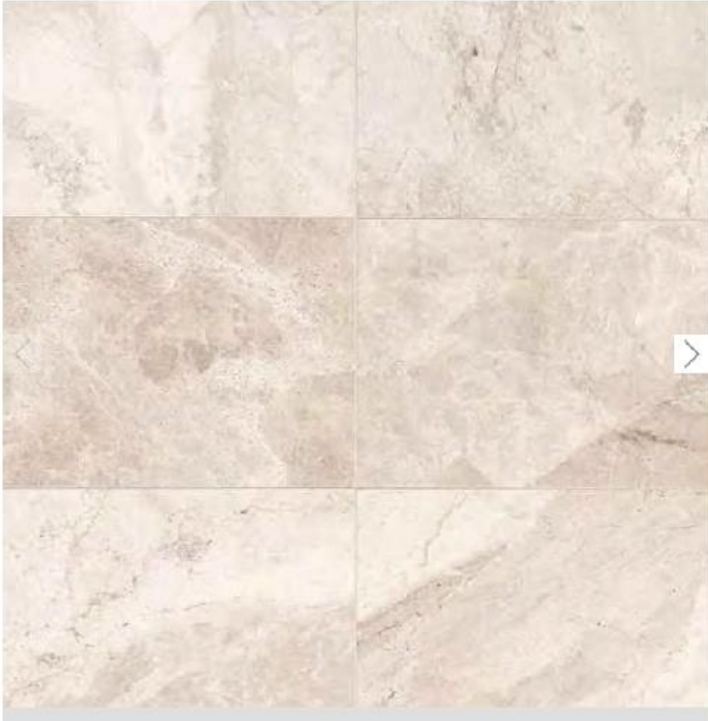
TILE   STONE   WOOD   LAMINATE   VINYL   DECORATIVES   INSTALLATION MAT

HOME > > DECORATIVES > > Shop By Type > > WALL TILE

## Avillano Crema Bella Classic Polished Marble Tile

Size: 12 x 24 | SKU: 100051697 **\$5.49** /sqft \$65.88 / box *Fort Lauderdale's everyday low price!*





**HOW MUCH DO YOU NEED**

**CALCULATE SQUARE FOOTAGE**

Add 10% for content

**QUANTITY OF BOXES**

-  +

1 box = 12.00 sqft | 6 pieces

**PICKUP OR DELIVERY**

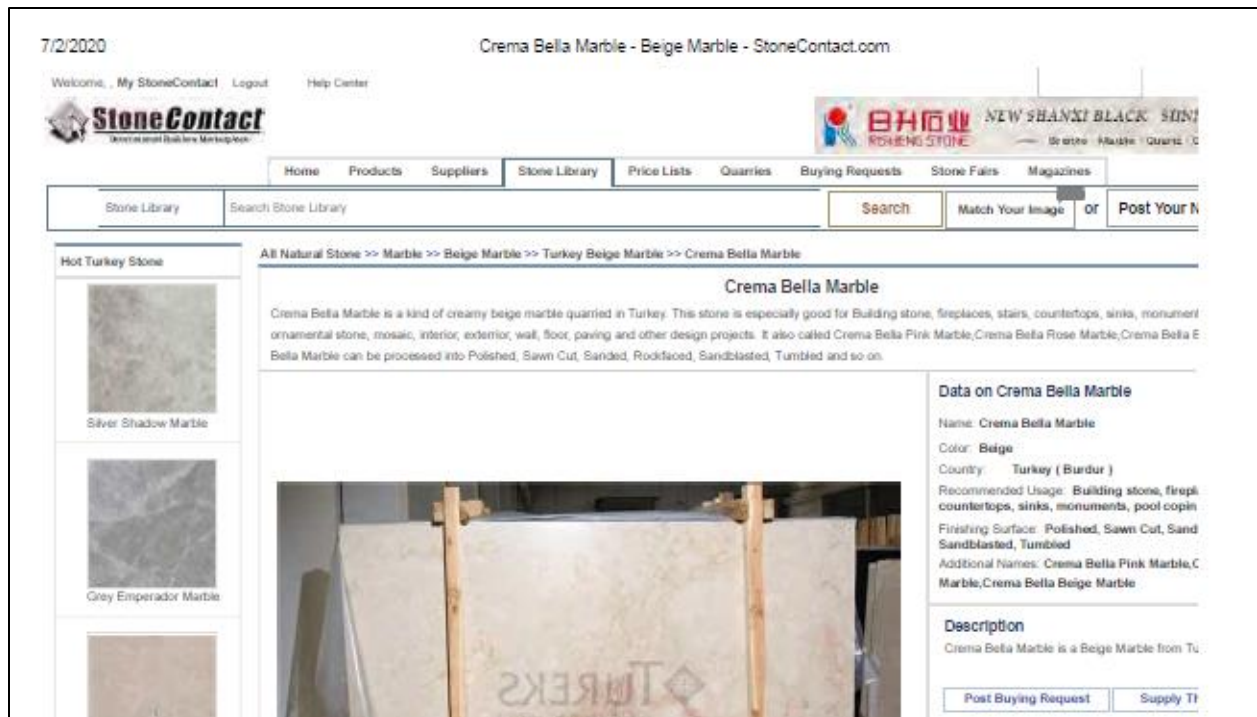
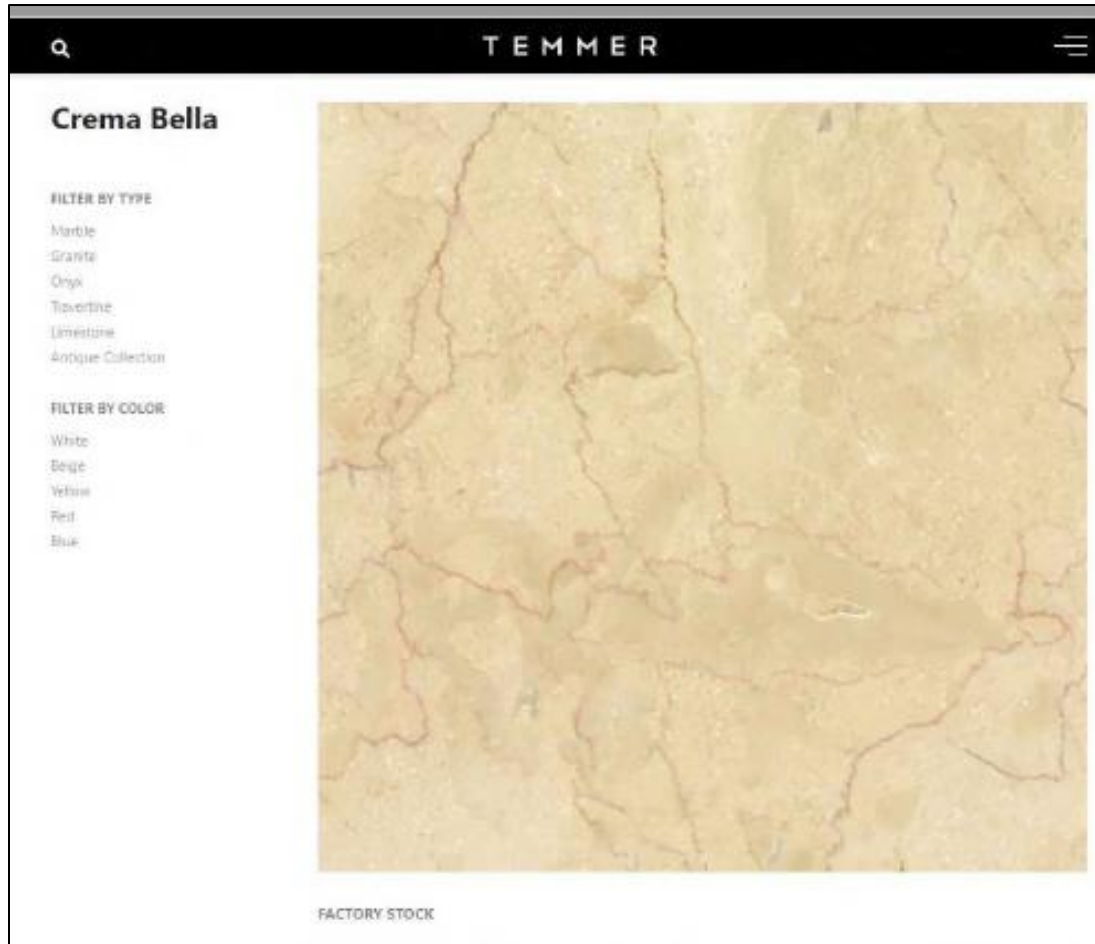
**Pick up in store - Choose a store**

Item will be **SHIPPED**  
You will be notified via email  
Shipping charges may apply

**0 boxes** in stock - Fort Lauderdale

**Check Other Stores** ▶

**Have it Delivered - Choose a location**



# CREMA BELLA

## MARBLE PAVER LEATHER FINISH

Stone is product of nature and will vary in color, marking and texture. This samples show the general

USA000212

<https://www.milestonepavers.com/marble-pavers/crema-bella-marble-pavers/>

8/18/2021

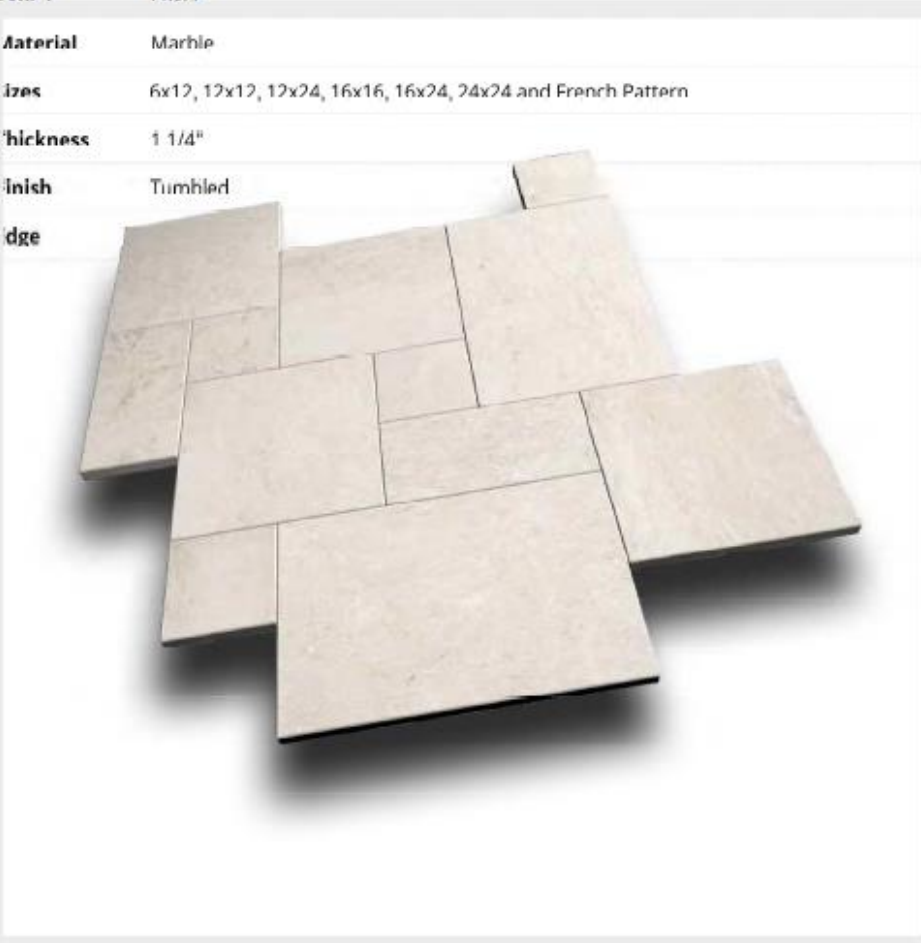
Crema Bella Marble Pavers Leather Finish | Milestone Pavers

Page 2 of 6

characteristics of the variety named.

### Additional Information

Types	Paver
<b>Material</b>	Marble
<b>izes</b>	6x12, 12x12, 12x24, 16x16, 16x24, 24x24 and French Pattern
<b>hickness</b>	1 1/4"
<b>inish</b>	Tumbled
<b>dge</b>	



**Available in**

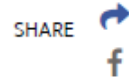
6x12, 12x24 and French Pattern.

Stone is product of nature and will vary in color, marking and texture. This samples show the general characteristics of the variety named.



You are here: [Home](#) / [Natural Stone](#) / [Limestone](#) / Crema Bella Limestone

## CREMA BELLA



Crema Bella Limestone  
Exterior Cladding, Finish: Split  
Face

**Stock Tile Size & Finish:**

*Honed:* 24 x 36 x 3/4" | *Fine Chiseled:* 12 x 36 x 5/8"

**Approx. Stock Slab Size & Finish:** *Honed:* 55 x 86 x 1-1/4" or 2"

**Custom Slab Finish:** The following custom finishes may be applied: Brushed, Bush-Hammered, Chateau, Polished & Drift. Edge & finish detail also available. Please inquire regarding above options.

**Usage:** Commercial & Residential; Interior & Exterior applications.

**Product Info:** Pictures shown are representations ONLY.

Sizes are approximate & may vary slightly with each order.

Call for current stock. Custom sizes & finishes subject to minimum quantity & lead time. Stock LA Warehouse.

Also Available in [Flared](#) & [3-Dimensional](#)

[Product PDF](#)

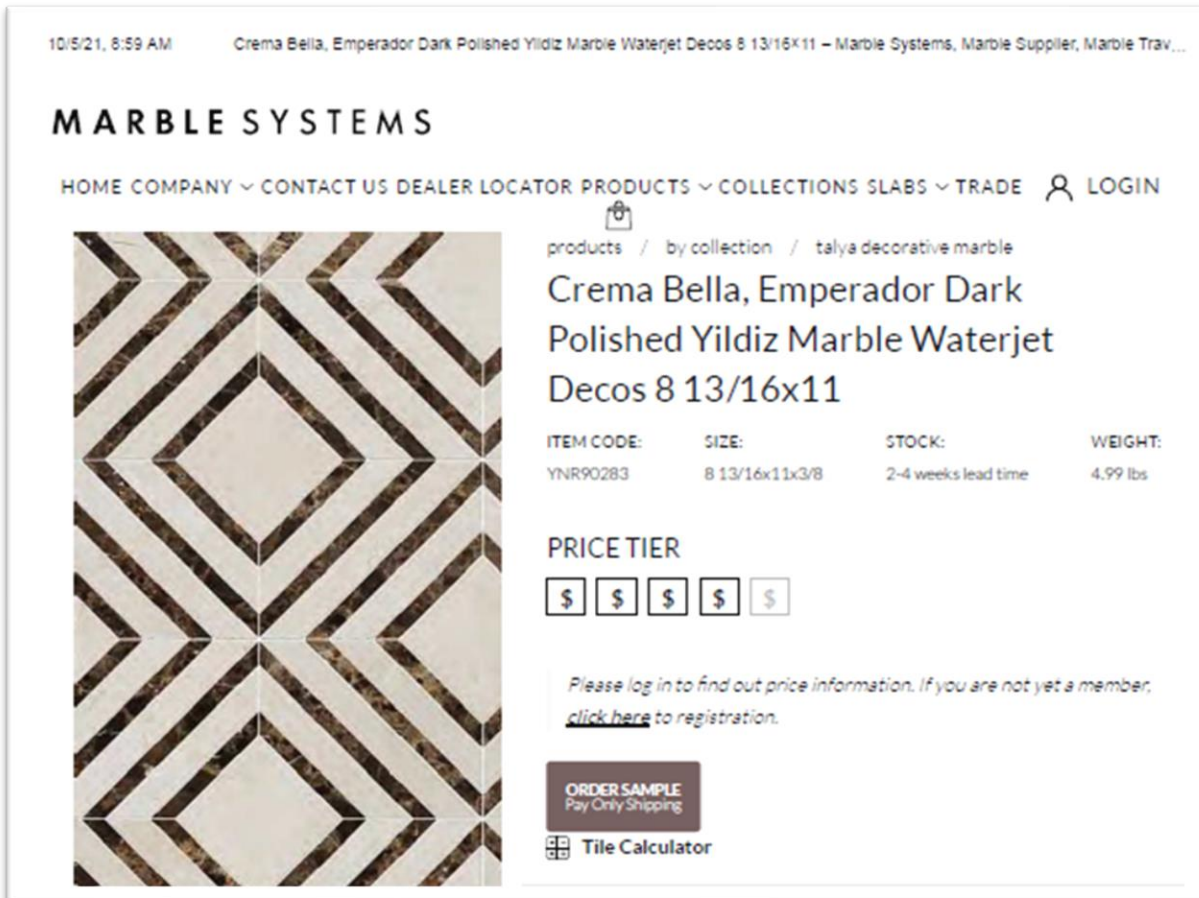
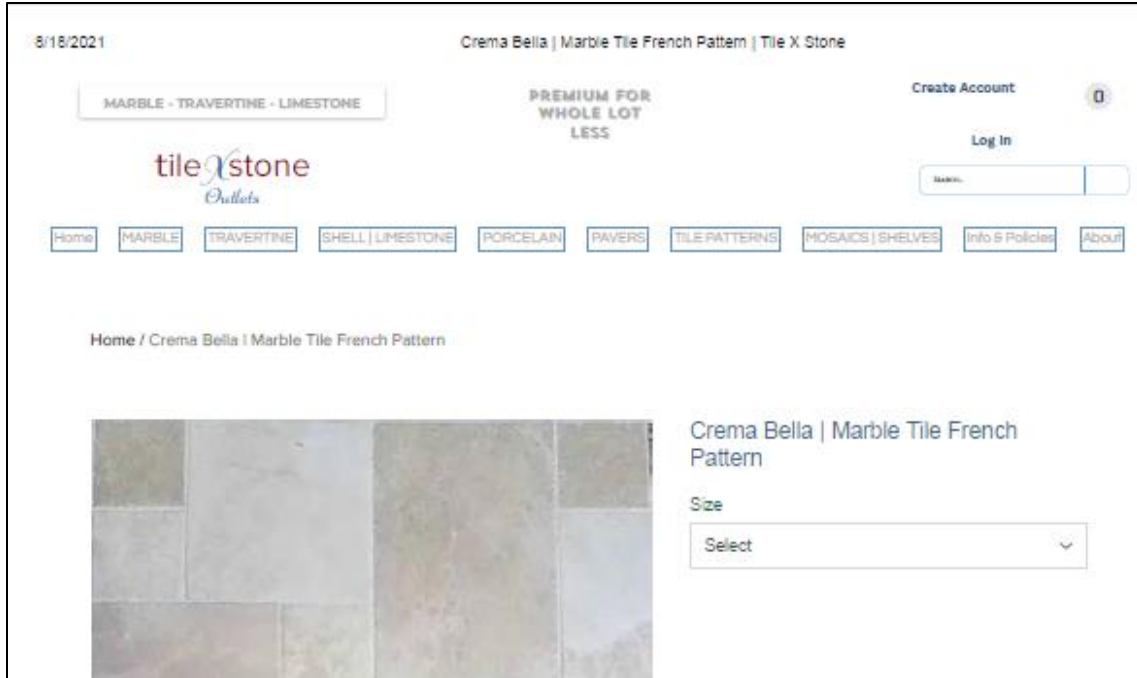
[Request a Quote](#)

USA000218

<https://rockmillstone.com/natural-stone/limestone/crema-bella-limestone/>

8/18/2021

Crema Bella Limestone tiles and slabs are cut from blocks extracted from quarries. Each block will vary. Pictures shown are representations only. For current batch please contact us.



7/2/2020 Crema Bella Turkey Marble 24 x 24 Straight Edge Tile

SALES 973 732 1112 - CUST SERVICE 732 630 7744  
ALL ITEMS IN STOCK AND READY TO SHIP

SAMPLE ORDER START AT \$6.99


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### Crema Bella Turkey Marble 24 x 24 Straight Edge Tile



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(<https://mosaictiledirect.net/crema-bella-turkey-marble-24-24-straight-edge-tile/reviews#review-form>)

Regular Price: ~~\$500.00~~  
**Special Price: \$339.60**  
**You SAVE: 32% on this item.**

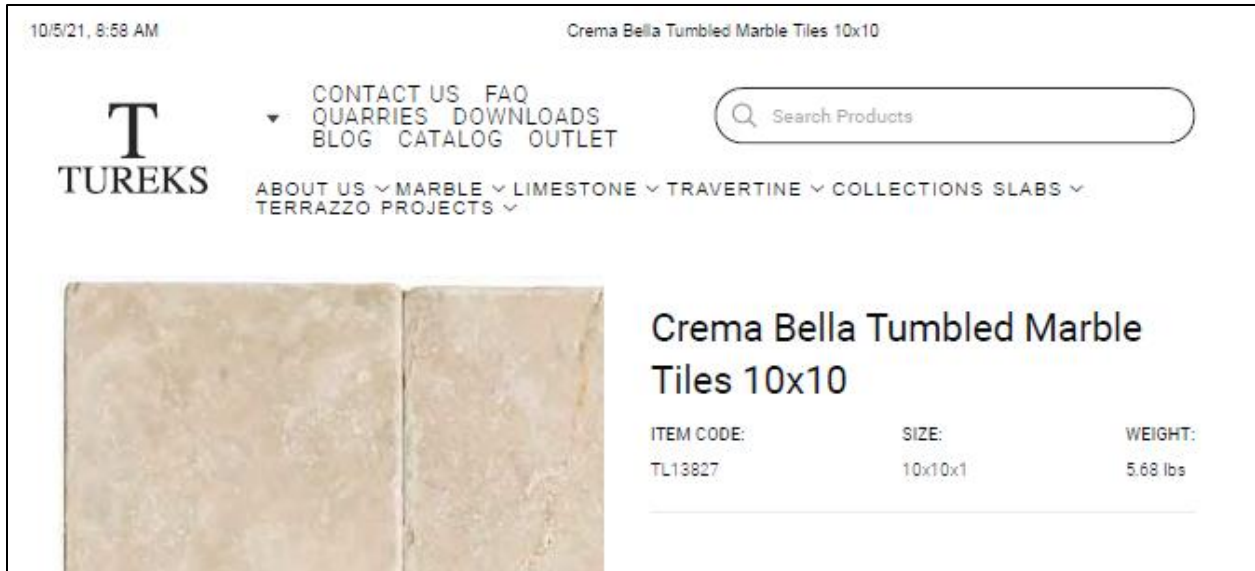
**Buy 10 Boxes** or more for \$335.00 each  
*and save 2% more*

**Buy 20 Boxes** or more for \$320.00 each  
*and save 6% more*

For custom order quantity please call us on 973 732 1112

Price	Box Size	Price Per Sqft
<b>\$339.60 / Box</b>	<b>40 Sqft</b>	<b>\$8.49</b>

1 Box



Mr. Karcilar also included an online article from the Nalboor Tiles website directed to wholesalers that refers to “Crema Bella marble tile” that they offer, noting “Crema Bella tile is quarried and manufactured in Turkey. It comes under a range of names, including Crema Monica, Turkish Botticcino, and Crema Milk.”<sup>35</sup> This is consistent with the explanation of “Crema Bella Marble” on the Stone Contact website, shown above, which states that it “is a kind of creamy beige marble quarried in Turkey.”<sup>36</sup>

Mr. Karcilar also testified that he ordered “Crema Bella product” from Monterrey Tile Company and provided an invoice for “Marb Crema Bella Samples,” as well as the photo below of what he received:<sup>37</sup>

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<sup>35</sup> 19 TTABVUE 102-11.

<sup>36</sup> 19 TTABVUE 111.

<sup>37</sup> 19 TTABVUE 92.



Opposer also introduced testimony and accompanying documentary evidence from third parties in the industry about the use and significance of “Crema Bella.” Kenan Yagmur (President of Rain Foreign Trade, Inc. (“RFI”) testified to the following:<sup>38</sup>

“I have worked in the stone distribution business in South Florida since approximately 2002.”

“RFI is a wholesale distributor of high quality natural stone products.”

“I know from my personal experiences that Stonehardscapes [Applicant] did not create the name Crema Bella nor was it the first to use it.... To the contrary, Crema Bella is a very common name in the stone industry and is used generally to describe cream colored stone originating from Turkey.”

“I first heard the name Crema Bella (as used with stone) sometime around 2005 or 2006, when I purchased cream

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<sup>38</sup> 17 TTABVUE 2-4 (Yagmur Affidavit).



colored stone under that same name from a company called Ganee Stone, located in Delray Beach, Florida.”

“Through RFI, I have been selling cream colored stone under the name Crema Bella since 2005/2006.”

“I purchase the Crema Bella stone from two factories in Turkey. The factories refer to the product they sell me as Crema Bella. I do not believe these factories have any relationship to [Applicant].”

“I know of many other companies selling cream colored stone under the name Crema Bella at this time, and know, for a fact, that the name has been used by many other parties prior to 2014.”

The Yagmur affidavit includes several RFI invoices for “Crema Bella,” each to a different customer in the U.S., including one dated July 17, 2014, one dated January 27, 2014, and another dated November 1, 2012 (all prior to Applicant’s claimed first use date).<sup>39</sup>

Gary Remick stated in his testimony:

“I am the Merchandising Vice President of Stone and Adjacent Categories for Floor and Décor Outlets of America, Inc. (“Floor & Decor”).”

“Since at least as early as 2013, Floor & Decor has consistently used the term ‘Crema Bella’ in connection with the sale of marble tile sourced from Turkey.”

Mr. Remick’s declaration includes a table showing the square footage of such tile sold by year, including 8,859 in 2013, 56,690 in 2014, and the sales table continues through 2022, reflecting ongoing sales of “Crema Bella” tile.<sup>40</sup>

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<sup>39</sup> 17 TTABVUE 10-12 (Yagmur Affidavit).

<sup>40</sup> 18 TTABVUE 2-3 (Remick Declaration). While Applicant’s Ms. Luciani criticizes this testimony for not reflecting use of “crema bella” as a mark, use of this nature is not necessary to establish descriptiveness and counter secondary meaning. The upshot of Opposer’s

Coupled with the meanings of the component terms, the nature and voluminous amount of use of CREMA BELLA in the industry prove that the wording is highly descriptive of the goods. *See In re Guaranteed Rate*, 2020 USPQ2d 10869, \*3 (TTAB 2020) (third-party uses of the terms “guaranteed rate,” “guaranteed mortgage rate,” and “guaranteed interest rate” established that claimed mark GUARANTEED RATE was highly descriptive of mortgage-related services).

### **B. Sufficiency of Evidence of Acquired Distinctiveness**

A descriptive designation may acquire distinctiveness when “in the minds of the public, the primary significance of [the] . . . term is to identify the source of the product rather than the product.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1, 4 (1982); *see also Coach Servs.*, 101 USPQ2d at 1729; *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005). “[T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” *In re Boston Beer Co.*, 198 F.3d 1370, 1373 (Fed. Cir. 1999) (quoting *In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1727 n.4 (Fed. Cir. 1990)); *Performance Open Wheel Racing, Inc. v. U. S. Auto Club Inc.*, 2019 USPQ2d 208901, \*7 (TTAB 2019) (“Highly descriptive terms are less likely to be perceived as trademarks, and therefore more substantial evidence of secondary meaning will ordinarily be required to establish their distinctiveness.”).

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argument and evidence is that the wording remains merely descriptive, not that it is used as a source-indicator by others.

The following six so-called *Converse* factors inform whether a mark has acquired secondary meaning:

(1) association of the trade[mark] with a particular source by actual purchasers (typically measured by consumer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark . . . All six factors are to be weighed together in determining the existence of secondary meaning.

*Converse, Inc. v. Int’l Trade Comm’n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018). “Although all six factors are to be weighed together in determining the existence of secondary meaning, no single factor is determinative.” *Flame & Wax, Inc. v. Laguna Candles, LLC*, 2022 USPQ2d 714, at \*36 (TTAB 2022). We consider the entire record to assess acquired distinctiveness, bearing in mind that Applicant bears the ultimate burden of persuasion on this issue. *Yamaha Int’l*, 6 USPQ2d at 1006.

Under the first factor, Applicant has submitted no consumer survey or other direct evidence of consumer perception of CREMA BELLA as a source indicator for Applicant. Other direct evidence of consumer perception from distributors in the industry, discussed above, indicates the opposite – that the wording refers to a type of paver tile.

Under the second factor, Applicant introduced testimony, with corroborating invoices, that it has used the proposed mark in commerce since October 2015, and that it has used the mark for sales in “multiple states.”<sup>41</sup> See 15 U.S.C. § 1052(f)

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<sup>41</sup> 26 & 27 TTABVUE 6 & Exhibit A.

(USPTO “**may** accept as prima facie evidence ...proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date” of the Section 2(f) claim) (emphasis added); *see also In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (noting that this statutory provision is discretionary and does not require the USPTO to accept five years’ use as prima facie evidence of acquired distinctiveness).

In *Alcatraz Media*, the Board deemed the proposed mark ANNAPOLIS TOURS “highly descriptive” and held that use even nearing 20 years “would not be sufficient to establish acquired distinctiveness.” 107 USPQ2d at 1766. Given our similar determination of the highly descriptive nature of CREMA BELLA, Applicant’s use for over seven years does not necessarily show secondary meaning. *See also In re R.M. Smith, Inc.*, 734 F.2d 1482, 222 USPQ 1, 3 (Fed. Cir. 1984) (affirming USPTO’s decision to require more than an affidavit of eight years of continuous and substantially exclusive use); *In re Kalmbach Publ’g Co.*, 14 USPQ2d 1490, 1492 (TTAB 1989) (deeming a Section 2(f) claim of more than 10 years of use insufficient for a highly descriptive mark “without specific evidence of the extent of the mark’s exposure to the purchasing public and of the purchasers’ perception of the asserted mark”); *In re Synergistics Research Corp.*, 218 USPQ 165, 167 (TTAB 1983) (“[W]e have consistently held that a declaration or affidavit of continuous and exclusive use as a mark for an extended period of years is insufficient in and of itself to support registrability under Section 2(f) of the Trademark Act where the term sought to be registered is highly descriptive in character”).

Also, as set forth above, there is significant evidence of third-party use of the same wording for paver tiles. This evidence, that in part led us to find CREMA BELLA highly descriptive, undercuts Applicant's claim that its use since 2015 has been substantially exclusive. The record clearly reflects otherwise. *See Coach Servs.*, 101 USPQ2d at 1730 ("We conclude that the Board's failure to consider all pre-decision third-party use of the term 'coach' for educational materials undermines its secondary meaning analysis and requires remand so that the Board can assess the extent to which those titles might cut against a claim of 'substantially exclusive use.'"); *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) ("When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.").

Applicant's focus on whether Opposer is "a senior user" is misplaced in the acquired distinctiveness inquiry. To the extent Applicant seeks to rely under the third *Converse* factor on its use of CREMA BELLA, we consider the degree of exclusivity of such use, and an assessment of priority is not involved.

Here, the abundant evidence of third-party use of CREMA BELLA for the same types of goods that Applicant identifies "weighs heavily against Applicant's claim of acquired distinctiveness. That other entities have repeatedly used this wording in connection with [pavers and paver tiles] is inconsistent with the requirement for

acquired distinctiveness that the mark sought to be registered indicate a single source.” *Guaranteed Rate*, 2020 USPQ2d 10869, at \*26.

Under the third factor, in an interrogatory answer, Applicant stated that for advertising expenditures, Applicant “does not specifically differentiate or target the CREMA BELLA product line, nor is it in possession of a breakdown of expenditures by brand.”<sup>42</sup> However, the Luciani declaration states more generally that “Applicant has advertised CREMA BELLA products separate and apart from other products that Applicant sells.”<sup>43</sup> She also testified that:

Applicant has advertised its products at least in flyers, brochures, Applicant websites, third-party websites, emails, social media, trade shows, and television media. *See Exhibits D, E, F, and G.* Applicant’s directly targeted advertisements (*e.g.*, emails, flyers, etc.) regularly reach an audience of at least 5,000-10,000 entities. Applicant has advertised CREMA BELLA products separate and apart from other products that Applicant sells.

Applicant has improved the customer identification and searching for Applicant’s CREMA BELLA products through use of certain search engine optimization techniques, including file name schemes that increase traffic for users of search engines. *See Exhibit I.*<sup>44</sup>

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<sup>42</sup> 21 TTABVUE 177.

<sup>43</sup> 26 & 27 TTABVUE 6. We note that Applicant’s Section 2(f) declaration by Ms. Luciani submitted during prosecution contained a specific advertising expenditure for the relevant goods. However, statements made in an affidavit or declaration in the file of an application or registration are not testimony. MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES, 81 Fed. Reg. 69950, 69963 (October 7, 2016) (“Now that testimony by affidavit or declaration is unilaterally available, it is necessary to clearly distinguish material residing in an application or registration from testimony introduced in the proceeding.”).

<sup>44</sup> 26 & 27 TTABVUE 6.

Applicant also presented testimony that its goods were installed in “the Seminole HardRock expansion project,” and that it promoted their use in the project.<sup>45</sup>

Under the fourth *Converse* factor,<sup>46</sup> Applicant did not provide evidence of the number of its products sold under the mark, or the relevant number of customers. Ms. Luciani gave confidential testimony as to the general revenue from sales of the mark, and attached a document with dollar amounts from 2015 to 2021 and a dollar amount next to the line “Crema Bella Sold Total,” though this document does not include any numbers of units sold. In addition to failing to provide sales unit numbers and customer numbers, Applicant provided no context for the dollar amounts in revenue it did submit, rendering the information minimally probative. *See In re Palacio Del Rio, Inc.*, 2023 USPQ2d 630, at \*\*40-41 (TTAB 2023); *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016) (probative value of sales revenue figures quantified as doses sold is diminished by the fact that the amount is just a raw number without context as to the applicant's market share or whether this amount is significant in the industry).

The record includes no evidence of intentional copying under the fifth factor.

Under the sixth factor, although it is unclear whether or not the media recognition was solicited or unsolicited, Applicant’s goods under the mark were featured on “Modern Living with Kathy Ireland” and on “The Vanilla Ice Project.”<sup>47</sup> The testimony

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<sup>45</sup> 26 TTABVUE 7 (Luciani Declaration).

<sup>46</sup> Here, Applicant’s

<sup>47</sup> 26 TTABVUE 7 (Luciani Declaration).

refers to these as “nationally and internationally broadcast television show[s]” but provides no detail on the consumer reach or the nature of alleged media recognition in these programs.<sup>48</sup> Applicant’s social media posts promoting “The Vanilla Ice Project” suggest that it aired July 22, 2017 on the DIY Network.<sup>49</sup> Given the very limited information about these two media features, we cannot gauge their potential impact on consumer perception.

Considering the record in its entirety, we find consumers do not recognize CREMA BELLA as indicating a single source for the identified goods, and instead would view it as a term that merely describes paver tile. The very modest evidentiary showing by Applicant under the *Converse* factors is easily overridden by the substantially non-exclusive use, which presents a serious problem for Applicant, because it indicates that the relevant public would not perceive the designation as an indicator of a single source. *Spiritline Cruises LLC v. Tour Mgmt. Servs.*, 2020 USPQ2d 48324, at \*33 (TTAB 2020), citing *Levi Strauss*, 222 USPQ at 940-41 (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”); *DeWalt, Inc. v. Magna Power Tool Corp.*, 289 F.2d 656, 129 USPQ 275, 279 (CCPA 1961) (“Power Shop” for woodworking saws is not substantially exclusive “in view of [Opposer’s] millions of competitive and continuing uses of ‘power

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<sup>48</sup> *Id.*

<sup>49</sup> 26 TTABVUE 107-08. The shows also are mentioned in Applicant’s Section 2(f) declaration as occurring in 2016 and 2017.



shop.”); *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1024 (TTAB 2017) (lack of exclusivity undermines Section 2(f) claim).

**Decision:** Applicant’s proposed mark is merely descriptive and has not acquired distinctiveness. The opposition is sustained.