

ESTTA Tracking number: **ESTTA454189**

Filing date: **02/01/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050966
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Date	02/01/2012
Attachments	Trial Brief.pdf (46 pages)(465416 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration No. 3,074,073
Mark:



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ATLAS FLOWERS, INC. d/b/a GOLDEN FLOWERS,	:
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	:
Petitioner,	:
	:
- against -	:
	:
GOLDEN VISION FLOWER, INC.,	:
	:
Registrant.	:
-----X	

Cancellation No.: 92050966

PETITIONER’S TRIAL BRIEF

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DESCRIPTION OF THE RECORD

- A. Application File of Registration No. 3,074,073, which is at issue in the proceeding.
See TBMP § 704.03.
- B. Trial Deposition Transcript of Alejandro Bayona – with Trial Exhibits 100 to 152.
(hereinafter referenced as “Exh.” or “Exhs.”¹)

Most of the trial exhibits were filed together with the deposition transcript
(Dkt.. No. 27)

The following were filed separately:

Trial Exhibit 104 – filed Under Seal (Dkt.. No. 26)

Trial Exhibits 116A, 151 and 152 – filed under a “Notice of Physical Filing” dated
November 7, 2011.

- C. Petitioner’s Notice of Reliance (Dkt.. No. 25)
1. Transcript of Discovery Deposition of Shi Wen Huang of December 9, 2009,
with Stipulation of the parties re same.
 2. Transcript of Discovery Deposition of Shun Chi Huang of May 14, 2010.
 3. Transcript of Discovery Deposition of Li Ying Chuang of May 14, 2010.
 4. Discovery Deposition Exhibit 29 (Statement of Use submitted in support of
subjection application).
 5. Discovery Deposition Exhibit 33 (May 12, 2004 letter from Registrant’s Taiwan
counsel to U.S. counsel).
 6. Registrant’s corporate filings with Florida Secretary of State.

¹ “Exh.” or “Exhs.” alone reference the trial exhibits filed with the trial transcript. Discovery deposition exhibits will be expressly referenced as such.

7. Registrant's Answers to Interrogatories.
 8. Registrant's Answer and Affirmative Defenses to Second Amended Petition for Cancellation.
- D. Registrant's Notice of Reliance (Dkt. No. 29)
1. Discovery deposition of Alejandro Bayona taken June 3, 2010, with exhibits.
(Exhibits 8 and 9 omitted, submitted separately, see below)
 2. Registration and TARR status printout for "Golden Vision Flower, Inc." Mark
 3. Petitioner's Answers to First Interrogatories and counsel's supplement thereto.
 4. Petitioner's Response to Registrant's First Request for Admissions.
 5. Fictitious name registration for "Golden Flowers" filed with Florida Secretary of State April 6, 1998.
 6. Fictitious name registration for "Golden Flowers" filed with Florida Secretary of State September 3, 1999.
 7. Exhibits to discovery deposition of Shih Wen Huang.
 8. Exhibits to discovery deposition of Shuh Chi Huang.
 9. Exhibits to discovery deposition of Li Ying Chuang.
- E. Registrant's Notice of Filing (Dkt. No. 28)
- Bayona Discovery Deposition Exhibits 8 and 9

STATEMENT OF THE ISSUES

1. Should U.S. Registration No. 3,074,073 be cancelled because Petitioner has prior nationwide rights in its mark, and Registrant's use of the mark is likely to cause confusion, mistake or to deceive?

2. Should U.S. Registration No. 3,074,073 be partially cancelled (as to all goods listed except for "live orchids") because in fact Registrant has only made use of the mark as to "live orchids" and not any other of the types of good listed therein?

3. Should U.S. Registration No. 3,074,073 be cancelled because the Statement of Use filed in support thereof was false and fraudulent inasmuch as it was signed "Li Ying Chuang, President," when in fact that individual was never the President of the company, nor any other corporate officer, lacked personal knowledge of the facts verified, and was not otherwise qualified to verify the Statement of Use under applicable Trademark Office regulations?

4. Should U.S. Registration No. 3,074,073 be cancelled because the Statement of Use filed in support thereof was false and fraudulent inasmuch as it claimed use in commerce of thirteen (13) different kinds of goods all in the same class, when in fact Registrant had only made use of the mark as to one type of good listed therein?

STATEMENT OF FACTS

A. The Parties

Petitioner Atlas Flowers, Inc. doing business as Golden Flowers (“Golden Flowers”) is a Florida corporation based in Miami. (Bayona Trial Transcript (hereinafter “Bayona”)² 3:21 to 4:1, 5:5-18 and Exh. 102) Golden Flowers was founded around 1990, and is in the business of importing some thirty different varieties of flowers from Colombia and distributing same to customers throughout the United States and Canada. (*Id.* 6:10 to 7:1, 7:22 to 8:15, 8:16 to 9:24 and Exhs. 103 and 104)

Registrant Golden Vision Flower, Inc. (“Golden Vision Flower”) is a corporation based in Apopka, Florida. (See Exh. 101)

B. The Registration At Issue

Registration No. 3,074,073 (the ‘073 Registration”) is for the mark GOLDEN VISION FLOWER INC. and Design as shown in the caption above, the terms “FLOWER INC.” being disclaimed. (Exh. 101) The ‘073 Registration lists the following goods: “Cut flowers, dried flowers and live flowers; Flower bulbs; Flower seeds; Live flowering plants; Dried plants and live plants; Grass and grass seeds; Fresh herbs and raw herbs; Live orchids.” (*Id.*)

The ‘073 Registration was filed, pursuant to Section 1(b) of the Trademark Act, as an intent to use application. A Notice of Allowance issued on July 19, 2005. On January 6,

² “Bayona” standing alone references Mr. Bayona’s trial deposition transcript, Dkt. No. 27. Where Mr. Bayona’s discovery deposition is cited, that will be explicitly stated.

2006, Golden Vision Flower filed a Statement of Use (Discovery Depo. Exh. 29, Pet. Not. Reliance No. 4) and the registration issued on March 28, 2006. (Exh. 101; *see generally* application file)

C. Golden Flowers' Use Of Its Design Marks

1. The Initial Design Mark – Up till 2002

From 1990 until 2002, Golden Flowers used as its primary trademark a design mark incorporating the words GOLDEN FLOWERS and a drawing of a tulip which appears thus:



(hereinafter the “Initial Golden Flowers Design Mark”) The mark was used on boxes in which the goods were placed in Colombia, and then Golden Flowers shipped the goods in the same boxes, bearing the same mark, to wholesale and retail customers throughout the United States. The mark was also used in advertisements and various marketing materials. The Initial Golden Flowers Design Mark was registered on the principal register from 2002 until the registration was cancelled in 2009. (Bayona 10:22 to 14:14, 16:19 to 23:20 and Exhs. 105-113)

2. The Revised Design Mark – Late 2002 To Present

In 2002, the company adopted a revised marketing plan and logo. Golden Flowers hired a consultant, and in due course a new, revised logo was adopted, which appears thus:



(hereinafter the “Golden Flowers Design Mark”) (Bayona 14:15 to 16:9, 24:2 to 27:7 and Exhs. 114 & 115) The Golden Flowers Design Mark was adopted by the company in late 2002, and by Christmas was being exclusively used by the company. (*Id.* 27:8 to 28:3) The Golden Flowers Design Mark has since been used on two items of packaging which are directly associated with the goods. First, the mark was used on plastic sleeves which are wrapped around bunches of flowers. (*Id.* 29:9-13, 29:20 to 30:7, 31:2 to 32:5 and Exhs. 116 & 116A) The mark is also used on boxes in which the sleeved flowers are placed. (*Id.* 53:15 to 55:10 and Exh. 117) Thus, flowers are packed in both sleeves and boxes bearing the Golden Flowers Design Mark, from the farms in Colombia until the items are delivered to Golden Flowers’ customers throughout the United States. (*Id.*)

In addition, the Golden Flowers Design Mark has been used in trade magazine and internet advertising, on printed materials used for trade shows, and trade show displays, on price lists, on delivery trucks, and on other marketing materials, such as calendars, wall clocks, t-shirts, pens and videos on CD disks. (Bayona 62:10 to 80:17, 91:21 to 92:25, 93:9 to 96:17 and Exhs. 122-137, 147, 148-151) Such use has been continuous from late 2002 through the present. (*Id.* 81:4 to 91:13 and Exhs. 138-146)

3. Golden Flowers' 2008 Trademark Applications

In September 2008, Golden Flowers filed two trademark applications, for the marks GOLDEN FLOWERS and GOLDEN FLOWERS and Design. Both applications were rejected under Section 2(d) for likelihood of confusion, the Trademark Attorney relying on Golden Vision Flower's '073 Registration. (Bayona 58:1 to 59:12 and Exhs. 118-21)

D. Depositions of Registrant's Agents and Principals

The depositions of Golden Vision Flower's three witnesses cover various facts pertinent to the issues to be determined. (The transcripts are appended to Petitioner's Notice of Reliance, Nos. 1-3) Because the testimony is in part contradictory, we set forth pertinent portions of each deponent separately:

1. Shih Wen Huang

Ms. Huang is the general manager of Skypro-Trading, Inc. located in Apopka, Florida. (Ms. Huang Tr. 7:19-25, 8:1-3) Skypro-Trading is a separate company from and performs the marketing and sales for Golden Vision Flower. (Ms. Huang Tr. 8:20- 22) Golden Vision Flower is owned by Ms. Huang's parents, Shun Chi Huang and Li-Ying Chuang. (Ms. Huang Tr. 9:3-17) Ms. Huang began working for the company in 2007, previously assisting her father informally. (Ms. Huang Tr. 11:12 – 12:8)

Ms. Huang testified that Golden Vision Flower's business is focused solely on the selling of potted live orchids. (Ms. Huang Tr. 12:14-25, 13:2-10) She insisted that the

Company's business had never changed, always having solely been orchids. (Ms. Huang Tr. 13:11-15) The only other product that the company ever sold was pottery, which was used to package the orchids. (Ms. Huang Tr. 20: 9-23, 21:7-15) Ms. Huang confirmed that, apart from orchids, Golden Vision Flower never sold any of the products listed in its registration or on the tags submitted as a specimen in support of its Statement of Use. (Ms. Huang Tr. 77:21 – 78:17; *see* Discovery Depo. Exh. 29, Pet. Not. Reliance No. 4)

Golden Vision Flower is a small company. When it began in 2003 it had 10 to 12 employees, including one manager. (Ms. Huang Tr. 23:8-25) They worked in mainly two areas: the Golden Vision Flower greenhouse, caring for the flowers and shipping the products to customers. Later, the shipping function was transferred to Skypro. (Ms. Huang Tr. 25:8-20)

2. Shun Chi Huang

Mr. Huang resides in Taiwan and operates a business there. (Mr. Huang Tr. 7:7 – 8:24) The name of his Taiwan business is Chang Lung Flower Shop (Mr. Huang Tr. 9:19-21) In addition to operating the Taiwanese company, Mr. Huang is the President and CEO of Golden Vision Flower. (Mr. Huang Tr. 22:3-12) Mr. Huang originally formed the company. (Mr. Huang Tr. 22:13-15) Mr. Huang's wife was an investor, but not a company officer. (Mr. Huang Tr. 22:21-25)

Mr. Huang came to the U.S. in 2003, formed Golden Vision Flower and testified the company started using the subject mark in 2004. (Mr. Huang Tr. 29:2-17) The mark shown

in the '073 Registration³ was initially used on company stationery and on general information sheets handed out to potential customers, such as at trade shows. (Mr. Huang Tr. 31:8 to 33:24) The mark was also used on cards attached to the goods (*e.g.*, hanging on the flower stems) and on cartons in which the goods were shipped. According to him, the cards were used *only* with orchids and no other goods, while the cartons were used for both orchids and bamboo plants, but nothing else. (Mr. Huang Tr. 34:22 to 36:9, 40:22 to 42:7)

Mr. Huang affirmatively verified that the mark was *never* used in connection with cut flowers. (Mr. Huang Tr. 43:10-17) The mark was never used for dried flowers in the United States. (Mr. Huang Tr. 43:23 – 44:2) The mark was never used in connection with dried plants. (Mr. Huang Tr. 46:16-20) The mark was never used in connection with and, in fact, Golden Vision Flower never sold any fresh or raw herbs. (Mr. Huang Tr. 47:20 – 48:12)

Mr. Huang's testimony makes clear that Golden Vision Flower never had *any* commercial dealings in these goods under *any mark*. Mr. Huang testified that *all* of the company's products were put in cartons bearing the registered mark. (Mr. Huang Tr. 41:6-8) Thus, as to all items as to which Huang testified the registered mark was never used – cut flowers, dried flowers, dried plants and fresh or raw herbs – the company in fact must never have had *any* commercially dealings at all under any mark, for otherwise these goods would have been shipped in cartons bearing the registered mark.

³ At his deposition, Mr. Huang was shown the registration, which had been marked as Deposition Exhibit 30. (Mr. Huang Tr. 26:14-20) The testimony repeatedly references that exhibit number.

3. Li-Ying Chuong

Ms. Chuong is also a resident of Taiwan. (Chuong Tr. 6:13-16) She is her husband's, the president of the Taiwanese company, assistant. (Chuong Tr. 7:22 – 8:1) Ms. Chuong is not an officer of Golden Vision Flower; she has no title with the company; and expressly acknowledged that she is not the President of Golden Vision Flower. (Chuong Tr. 13:11 – 14:16; 39:15-17)

Ms. Chuong hired a Taiwanese law firm which, in turn, hired a firm in the United States, to register Golden Vision's mark. The firm in Taiwan explained to her about the documents needed to apply for the U.S. trademark registration. (Chuong Tr. 17:4 – 18:13 and Discovery Depo. Exh. 33, Pet. Not. Reliance No. 5) During prosecution of the application, the Taiwanese firm advised that a statement of use would have to be filed. This was transmitted to Ms. Chuong. (Chuong Tr. 18:19 – 19:3) Ms. Chuong signed the Statement of Use. (Discovery Depo. Exh. 29) The Taiwanese law office explained the various portions of the Statement of Use to her and she testified she understood the document based on this explanation. (Chuong Tr. 27:8 – 29:22)

The specimen submitted in support of the Statement of Use (*See* Discovery Depo. Exh. 29) was a tag or card purportedly to be attached to the product. Ms. Chuong explained that the transactions reflected by the Statement of Use were actually sales made by her company in Taiwan, Chang Long, to Golden Vision Flower in Florida. (Chuong Tr. 29:21 – 34:11)

Ms. Chuong's testimony makes clear that she had no personal involvement in or knowledge of Golden Vision's use of the mark and related commercial dealings. Thus, for example, with respect to "cut flowers," while Ms. Chuong claimed that Golden Vision Flower had sold them at the beginning of its business, she was not personally involved in such sales and did not know when they started. (Chuong Tr. 40:7-23, 42:7-14)

Similarly, with respect to dried flowers, Ms. Chuong claimed recall of one order, sent from Taiwan, and had no personal knowledge of Golden Vision's activities with respect to dried flowers. (Chuong Tr. 42:15-23) And again, with respect to flower bulbs, Ms. Chuong was only vaguely aware of some use at the beginning of the company's business, unsure whether this was in 2004 or 2005. And, she referred the deposition questioner to Golden Vision Flower itself for more information. (Chuong Tr. 43:18 – 44:18) Likewise, Ms. Chuong lacked personal knowledge with respect to the sale of flower seeds by Golden Vision Flower. (Chuong Tr. 45:18 – 46:2)

Indeed, with regard to the various items listed on the specimen tag which was submitted with the Statement of Use, Ms. Chuong was simply unaware what items listed the company was still selling, other than orchids. She did not believe they were still selling dried flowers and was unsure about anything else. (Chuong Tr. 46:9 – 47:18)

SUMMARY OF ARGUMENT

1. U.S. Registration No. 3,074,073 should be cancelled because Golden Flowers has prior nationwide rights in its mark, and the use by Golden Vision Flower of its mark is

likely to cause confusion, mistake or to deceive. Golden Flowers began using its Golden Flowers Design Mark in late 2002, while Golden Vision Flower's priority date is June 2004. The marks are for very similar goods, appear similar in appearance, sound and connotation, and travel in the same channels of trade.

2. U.S. Registration No. 3,074,073 should be partially cancelled as to all listed goods other than "live orchids" because while the Registration claims use in commerce of thirteen (13) different kinds of goods in the same class, the record is clear that Golden Vision Flower had only made use of the mark as to one of the types of good listed therein, live orchids.

3. U.S. Registration No. 3,074,073 should be cancelled because the Statement of Use filed in support of the registration was false and fraudulent inasmuch as it was signed by "Li Ying Chuang, President," who in fact was never the President of the company, nor any other corporate officer, lacked personal knowledge of the facts verified, and was not otherwise qualified to verify the Statement of Use under applicable Trademark Office regulations.

4. U.S. Registration No. 3,074,073 should be cancelled because the Statement of Use filed in support thereof was false and fraudulent inasmuch as it claimed use in commerce of thirteen (13) different kinds of goods in the same class, when in fact Golden Vision Flower had only made use of the mark as to one type of good listed therein. The false declaration was recklessly made because the person making same had no basis for the assertions of use made therein, lived thousands of miles away from Registrant's place of business and lacked first hand knowledge of its dealings. Further, given the small size of

Registrant, and that is has *never* dealt in these goods (apart from live orchids), it is inconceivable that anyone could have believed in good faith that the company had in fact made use of its mark for these goods.

ARGUMENT

THE '073 REGISTRATION SHOULD BE CANCELLED

I. Golden Flowers Has Standing To Petition For Cancellation

“A person ‘who believes that he is or will be damaged . . . by the registration of a mark on the principal register’ may petition to cancel the registration under 15 U.S.C. § 1064.” *Herbko Intl., Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1161, 64 U.S.P.Q.2d 1375 (Fed. Cir. 2002). “To obtain cancellation of the registration, the petitioning party must show both standing and valid grounds for cancellation.” *Id.* “Standing requires only that the petitioner have a ‘real interest’ in the cancellation proceeding.” *Id.* “In most settings, a direct commercial interest satisfies the ‘real interest’ test.” *Id.*

Golden Flowers’ direct commercial interest in its GOLDEN FLOWERS and GOLDEN FLOWERS and Design marks, which it has used for over a decade, amply demonstrates a “real interest” sufficient to confer standing. *Cf. id.* (petitioner’s interest in its own similar mark sufficient to confer standing). Further, “[t]he rejection of petitioner’s trademark application on the basis of the challenged registration is a basis for petitioner’s standing.” *DaimlerChrysler Corp. v. American Motors*, 94 U.S.P.Q.2d 1086, 1087 (TTAB 2010). *See Lipton Industries, Inc. v. Ralston Purina Company*, 670 F.2d 1024, 213 U.S.P.Q.

185, 189 (CCPA 1982) (“[T]o have standing in this case, it would be sufficient that appellee prove that it filed an application and that a rejection was made because of appellant’s registration”).

II. The ‘073 Registration Should Be Cancelled For Likelihood Of Confusion

“One valid ground for cancellation is section 2(d) of the Lanham Act, which precludes registration when a mark is likely to cause confusion with a mark or trade name previously used or registered by another.” *Herbko*, 308 F.3d at 1161-62; *see* 15 U.S.C. § 1052(d). “[A] party petitioning for cancellation under section 2(d) must show that it had priority and that registration of the mark creates a likelihood of confusion.” *Id.* at 1162.

A. Golden Flowers Has Priority Of Use

“To establish priority, the petitioner must show proprietary rights in the mark that produce a likelihood of confusion.” *Herbko*, 308 F.3d at 1162. “These proprietary rights may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *Id.*

In response to interrogatories, Registrant identified its date of first use of its mark as June 1, 2004. (Reg. Response to Interrogatory No. 5, submitted with Pet. Notice of Reliance, Doc. 7) That is the same date it filed the application as an intent-to-use application. (*See* Exh. 101, registration, listing that filing date; *see also* record of application.)

As shown in the trial testimony of Alejandro Bayona, Golden Flowers began using its Golden Flowers Design Mark by Christmas 2002, both on packaging for the goods (sleeves and boxes) as well as associated marketing materials, such as price lists. That alone gives it some 18 months priority.

Further, Golden Flowers is entitled to “tack on” its prior use of its Initial Golden Flowers Design Mark, because the two marks “create the same continuing commercial impression.” *See Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 1159, 17 U.S.P.Q.2d 1866 (Fed. Cir. 1991). The two designs are compared as follows:



Golden Flowers



The dominant portion of the marks – the words GOLDEN FLOWERS – is identical, and the logos are both designs of tulips. Indeed, the latter was intended to be a more modernized “continuation” of the prior. (Bayona 26:3-8, 28:13-25) *Cf. Navistar International Transportation Corp. v. Freightliner Corp.*, 52 U.S.P.Q.2D 1074 (N.D.Ill. 1998) (“The reason for the tacking rule is that trademark rights inure in the basic commercial impression created by a mark, not in any particular format or style. This flexibility in trademark law allows users to modernize their trademarks without losing years of accumulated value in, or goodwill toward, their trademarks.”) (*citing* 2 J. Thomas

McCarthy, *Trademark Law And Unfair Competition* § 17:26, at 17-40); *The Wet Seal, Inc. v. FD Management, Inc.*, 82 U.S.P.Q.2d 1629, 1635 (TTAB 2007) (“[A] minor difference in the marks, such as an inconsequential modification or modernization of the later mark . . . would not be a basis for rejecting a tacking claim.”); *In re Flex-O-Glass, Inc.*, 194 U.S.P.Q. 203, 205-06 (TTAB 1977).

B. There Is A Likelihood Of Confusion Between The Marks

“The PTO may refuse to register a trademark that so resembles a registered mark ‘as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.’” *Herbko*, 308 F.3d at 1164 (*quoting* 15 U.S.C. § 1052(d)). “The Board . . . determine[s] likelihood of confusion based on the factors set forth in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. (BNA) 563, 567 (CCPA 1973).” *Id.* The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but “may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods.” *Id.* *See Panda Travel, Inc. v. Resort Option Enters., Inc.*, 94 U.S.P.Q.2d 1789, 1795 (TTAB 2009) (“[T]wo key considerations are the similarities between the marks and the similarities between the goods.”)

Consideration of the factors relevant to this proceeding indicates that there is a strong likelihood of confusion:

1. Similarity Of The Marks



Registrant's Mark



Petitioner's Mark

Although marks must be compared in their entireties, it is proper to give more weight to the dominant portion of the mark and less weight to a less distinctive portion. *E.g., In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 1407, 41 U.S.P.Q.2d 1531 (Fed.Cir. 1997). Portions of a mark which are disclaimed and portions which are descriptive or generic are usually considered weak portions of a mark which do little to distinguish it from other marks. *See id.*

The parties' marks are quite similar. Generally, the dominant portion of such marks is the words, not the design, *see Herbko*, 308 F.3d at 1165, and that is particularly the case here where the design portions are drawings of flowers – the very goods sold by the parties.

Further, the drawings are both stylized drawings of flowers.

The word portions – GOLDEN FLOWERS and GOLDEN VISION FLOWER, INC. – are clearly quite similar, especially when one disregards FLOWER(S) and INC., which are both generic and disclaimed. Further, in both marks the word GOLDEN is emphasized in larger letters.

The marks are thus extremely similar and convey the same “commercial impression” – as indeed the Examining Attorney concluded. (*See Exhs. 119 and 121*) Golden Flowers incorporates that analysis here and submits that it is highly persuasive. Further, any minor differences between the marks are not likely to be remembered by purchasers. “The test . . . is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source, sponsorship or affiliation of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.” *General Mills, Inc. v. Fage Dairy Processing Industry S.A.*, 100 U.S.P.Q.2d 1584, 1600 (TTAB 2011).

Since the similarity of the marks is “a predominant inquiry,” *Herbko*, 308 F.3d at 1165, this factor weighs heavily in favor of finding a likelihood of confusion.

2. Similarity of the Goods

As the records shows above, Golden Flowers sells some thirty (30) different types of “fresh cut flowers.” The goods listed in the ‘073 Registration include “cut flowers, dried flowers and live flowers.” These goods are virtually identical. The other goods listed are all similar horticultural products that would be grown and marketed through nurseries and similar outlets.

Even if Golden Vision Flower’s goods were limited to “live orchids” (which as discussed below, are the only goods for which it has used the mark in commerce), such are

certainly closely similar to the thirty different forms of fresh cut flowers in which Golden Flowers deals. *See General Mills, Inc.*, 100 U.S.P.Q.2d at 1597 (TTAB 2011) (“The respective goods do not have to be identical or even competitive in order to determine that there is a likelihood of confusion. It is sufficient that the respective goods are related in some manner . . .”)

3. Channels Of Trade

In determining whether the goods have overlapping channels of trade, the Board considers the goods as described in the application and registration. *In re GBI Tile and Stone, Inc.*, 92 U.S.P.Q.2d 1366, 1368 (TTAB 2009). *See Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 U.S.P.Q.2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed”).

Thus where goods are described broadly without any limitation as to types of goods or particular channels of trade, the Board must assume that the application and registration cover goods of all types listed, rather than particular categories of goods or channels of trade in which the parties in fact deal. *See Lacoste Alligator S.A. v. Maxoly, Inc.*, 91 U.S.P.Q.2d 1594 (TTAB 2009). *See, generally, Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1492, 1 U.S.P.Q.2d 1813 (Fed. Cir. 1987) (consideration given to all

normal channels of trade for goods listed in registration and application, even if the parties' current business practices are narrower).

Golden Vision Flower generally sells its goods to wholesalers, wholesale growers and nurseries, who distribute the orchids locally to florists, floral designers and flower shops, who in turn sell to the end consumer. (Ms. Huang Tr. 20:1-8, 31:5-22) Golden Flowers similarly sells to floral wholesalers, retailers, and e-marketers in the United States and Canada. (Bayona 6:20-23, 13:7-13) Many of Golden Flowers's customers deal in orchids. (*Id.* 50:6-25) Thus, the channels of trade almost completely overlap – the same wholesale and retail distribution system.

Golden Flowers' mark is seen and functions as a trademark at all levels of the distribution chain – not only its direct customers, but downstream purchasers (such as florists and retailers) and even end-consumers. As Mr. Bayona explained at his discovery deposition:

Prior to 2002, we started using Golden Flowers in the boxes so people and our customers, the customer base wholesalers receive most of the product in boxes, so they differentiate different vendors by the box and name on the box, so they recognize Golden Flowers. And we started, in 2002, using the name on the sleeves of the product. They take the product out of the boxes and put it in buckets with water so the bark starts to drink water again and grow again. And in that moment, now the sleeve also differentiates from other product, from other vendors that are in those coolers and buckets.

Actually, when you walk into a wholesaler, they have coolers with the product inside. You can recognize different vendors that carry fresh cut flowers because of the sleeves they carry.

Q Okay. But you told me earlier, correct, that you're not sure that those sleeves remain on the flowers when they get to the consumer, correct?

A To the consumer.

Q Okay.

A If I explain again --

Q No. I understand what you're saying with the wholesaler. The wholesaler will leave them on there until they get to the end user.

A And the florist will go in and the florist or designer can choose -- let's say, use roses. There could be four bunches of roses, four different companies. And they can choose -- and they have a recognition of the marks. They know which mark has worked well for them and which mark hasn't worked well for them, which has very opening or better quality. So they choose according.

Q How do you know that?

A They tell us. It happens. It is actual. The florist -- because we get requests. We get requests from our customers for specific varieties, same as when our customers are calling; they say they want your product. Plus, part of the marketing we do is to position our brand as a quality brand so that retailers ask for the particular brand to the wholesalers.

We are -- that's why we advertise it at florist -- at trade magazines. They also go to florists. So they request for the mark, Golden Flowers, not Queens Flowers, not whatever other company. But just Golden Flowers to their wholesalers.

(Bayona Discovery Depo. Tr. 45:8 to 47:6, Registrant's Not. Of Reliance No. 1) Indeed, at times the mark is retained by the retailer or florist when displaying flowers to the end customer, and there has been end-consumer recognition of the mark. (Bayona 135:23 to 137:18) And, while Golden Flowers's current focus is not on marketing to the end consumer, there are others in the flower industry who do indeed market to them (*Id.* 139:2-13) and no doubt such competitors employ their trademarks as part of that marketing effort.

Thus, in the flower industry in general (and to a great extent for Golden Flowers in particular), trademarks can and do function as source identifiers at all levels of distribution. Even if the parties' current use of their marks is not to the full extent of the market and channels of trade for such goods, what is controlling here is the broad description in the '073 Registration, which contains no restrictions as to channels of trade:

Where likelihood of confusion is asserted by an opposer [or here a petitioner] with respect to a trademark for which an application for registration has been filed, the issue must be resolved on the basis of not only a comparison of the involved marks, but also on consideration of the goods named in the application and in opposer's registration and, in the absence of specific limitations in the application and registration, on consideration of the normal and usual channels of trade and methods of distribution. *The description of the goods in the application for registration is critical because any registration that issues will carry that description. Moreover, although a registrant's current business practices may be quite narrow, they may change at any time from, for example, industrial sales to individual consumer sales.*

CBS, Inc. v. Morrow, 708 F.2d 1579, 1581, 218 U.S.P.Q. 198, 199 (Fed. Cir. 1983)

(emphasis supplied).

4. Actual Confusion

Registrant during the course of this proceeding has sought to make much of the fact that there is no evidence of actual confusion. However, "the test under § 1052(d) is likelihood of confusion, not actual confusion. Hence, a showing of actual confusion is not necessary to establish a likelihood of confusion." *Herbko*, 308 F.3d at 1164. While the presence of actual confusion can be probative, "[t]he lack of evidence of actual confusion [generally] carries little weight." *General Mills*, 100 U.S.P.Q.2d at 1603.

Lack of actual confusion over a period of time is significant only “if it can be shown that there have been meaningful opportunities for such confusion to occur.” *Id.* Where, on the other hand, the parties have in fact distributed their goods through different retail outlets, then it is not surprising that there would be no evidence of actual confusion. *See id.* (lack of actual confusion not probative where applicant’s products were initially distributed through ethnic and specialty stores and only later entered general supermarkets where Opposer distributed its goods). Further, “[i]n general, evidence of actual confusion is notoriously difficult to come by and, in particular, where relatively inexpensive items . . . are involved, confusion about sponsorship or affiliation would not necessarily be brought to the attention of either applicant or opposers.” *Id.* at 1604.

Golden Vision Flower’s business has been modest – about \$2 Million per year. (Ms. Huang Tr. 29:23 to 30:2) Indeed, its manager considered the company to be “new to the state.” (*Id.*) Golden Flowers is unaware of any common customers with Golden Vision Flower. (Bayona 125:16-19) And, unlike Golden Flowers, Golden Vision Flower proffered no evidence that anyone other than immediate customers – wholesalers – ever sees its trademark. On this record, there is little basis that there was ever any opportunity for actual confusion to arise, nor if there was any, that such would have come to the attention of either Golden Flowers or Golden Vision Flower. Accordingly, this factor should bear little weight in the analysis. *Cf. General Mills*, 100 U.S.P.Q.2d at 1603-04 (reaching similar conclusion).

II. The '073 Registration Should Be Cancelled For Failure Of Use

The testimony cited above makes clear that currently Golden Vision Flower only sells “live orchids,” and it is indeed doubtful whether it has ever sold anything else listed in the '073 Registration. It is accordingly clear that, other than for live orchids, Registrant is not using the mark for any of the 12 other goods listed therein. (*See* Ms. Huang Tr. 12:14 to 13:15, 20:9-23, 21:7-13, noting that “a hundred percent” of the company’s business consists of selling orchids, and that the company does not do anything besides selling orchids and associated pottery.) The registrations should at least be partially cancelled for failure to use the mark for anything other than live orchids. *See Marshall Field & Co. v. Mrs. Field's Cookies*, 11 U.S.P.Q.2d 1355, 1359 (TTAB 1989) (failure of use of the mark for goods listed in registration a valid basis for cancellation).

III. The '073 Registration Should Be Cancelled For Fraud

A. Fraud Is A Basis For Cancellation

A third party may petition to cancel a registration on the grounds that the “registration was obtained fraudulently.” 15 U.S.C. § 1064(3); *In re Bose Corp.*, 580 F.3d 1240, 1243, 91 U.S.P.Q.2d 1938 (Fed.Cir. 2009). “Fraud in maintaining a trademark registration occurs when a registrant, in an affidavit of use, renewal application or another post-registration filing, knowingly makes a specific false, material representation of fact with the intent of maintaining a registration to which it is otherwise not entitled.” *Kaplan v. Cytosport, Inc.*, Cancellation No. 92050950 (TTAB April 27, 2010). “[T]o prevail on his claim of fraud,

petitioner must show that [1] a particular statement was false; [2] that the statement was made with knowledge that it was false; and [3] that the statement was material to the examiner's decision to accept the [submission at issue].” *Id.*

B. Golden Vision Flower Committed Two Different Acts Of Fraud

Golden Flowers alleges two instances of fraud, both in connection with the Statement of Use submitted by Golden Vision Flower on January 6, 2006 (Discovery Depo. Exh. 29, Pet. Not. Reliance No. 4): (1) the Statement of Use was verified by a person purporting to be Golden Vision Flower’s president, but who in fact was neither an officer nor otherwise qualified to verify that document and (2) the Statement of Use verifies use for thirteen (13) different products, whereas Golden Vision Flower has never used its mark for (indeed, never had *any* commercial dealings in) at least five, and perhaps as many as 12, of these products. These theories are addressed below.

C. Reckless Disregard Of The Facts Constitutes Fraud

As noted, a charge of fraud must be supported by evidence that “the statement was made with knowledge that it was false.” A *fraudulent* (as opposed to merely false) representation is one that is accompanied by a “subjective intent to deceive.” *Bose*, 580 F.3d at 1245. The Federal Circuit in *Bose*, however, did not reach the question of whether a showing of reckless disregard for the truth satisfies the requirement for fraud. *Id.* at 1246 n. 2. See *Daimlerchrysler Corp.*, 94 U.S.P.Q.d. at 1089 n. 5 (whether recklessness satisfies the intent to deceive standard is “still open” after *Bose*). For the reasons set out below,

Petitioner submits that the Board should now hold that the recklessness standard does satisfy the requirement of showing intent to deceive or “scienter.”

The Trademark Act permits a party to move to cancel a registered trademark on the grounds that the “registration was obtained fraudulently.” 15 U.S.C. § 1064(3). The term “fraudulently” is nowhere defined in the statute. In interpreting the statute, common law precedent is instructive. Indeed, the Supreme Court has repeatedly instructed that “it is [a] well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court *must* infer, unless the statute dictates otherwise, that Congress means to incorporate the established meaning of these terms. *E.g.*, *Neder v. United States*, 527 U.S. 1, 23 (1999) (emphasis added); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) (“Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense.”) *See also O’Neill v. Dept. of HUD*, 220 F.3d 1354, 1360 (Fed. Cir. 2000) (“It is a well-recognized principle of statutory construction that ‘[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’”)(quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)). This presumption is mandatory – absent an express statutory indication otherwise, the common-law meaning controls. *See Neder v. United States*, 527 U.S. at 23 (“we must *presume* that Congress intended to incorporate [the common law understanding] ‘unless the statute otherwise dictates.’”) (emphasis in original, citation omitted).

The statutory word “fraudulently,” 15 U.S.C. § 1064(3), clearly connotes a common law legal term – fraud. *Cf. Neder v. United States*, 527 U.S. at 23-25 (term “to defraud” in federal criminal mail and wire fraud statutes interpreted in accordance with common law rules of fraud, including specifically a requirement of showing that the misrepresentation was material). It has long been the rule at common law that a representation of fact knowing that there is no real basis for believing it constitutes fraud. *See Hadock v. Osmer*, 47 N.E. 923, 923-924 (N.Y. 1897); Second Restatement of Torts, § 526(b) (1977) (fraudulent to make a false statement “if the maker . . . does not have the confidence in the accuracy of his representation that he states or implies.”); First Restatement of Torts, § 526(b) (1938)⁴ (fraudulent to make a false statement if the maker “knows that he has not the confidence in its existence or non-existence asserted by his statement of knowledge or belief.”) The Restatement comments note:

In order that a misrepresentation may be fraudulent it is not necessary that the maker know the matter is not as represented. Indeed, it is not necessary that he should even believe this to be so. It is enough that being conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert it. Indeed, since knowledge implies a firm conviction, a misrepresentation of a fact so made as to assert that the maker knows it, is fraudulent if he is conscious that he has merely a belief in its existence and recognizes that there is a chance, more or less great, that the fact may not be as it is represented. This is often expressed by saying that fraud is proved if it is shown that a false representation has been made without belief in its truth or recklessly, careless whether it be true or false.

First Restatement of Torts, § 526, comment e. *Accord*, Second Restatement of Torts, § 526, comment e (incorporating identical language.) *See, also, Bose Corp. v. Consumers Union*,

⁴ Notably, the First Restatement was published in 1938, only eight years before the Trademark Act was passed in 1946. It thus represents the general understanding of the law of fraud at the time.

466 U.S. 485, 501 n. 19 (1984) (fraud can be proved “when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false,” quoting *Derry v. Peek*, 14 App. Cas. 337, 374 (1889)).

The Federal Circuit has applied the common law rule in a context parallel to that here: obtaining a patent through fraud on the Patent Office. Although generally a patent owner enjoys immunity from antitrust liability for enforcing its patent, in *Walker-Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), the Supreme Court held that where it is shown that the patent was obtained by fraud, the owner loses that immunity and others may bring a claim for monopolization under the Clayton Act. In applying this rule, the Federal Circuit has held that “*Walker-Process* fraud is a variant of common law fraud” requiring proof of all elements of common law fraud. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1358, 71 U.S.P.Q.2d 1705 (Fed. Cir. 2004); *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 807, 53 U.S.P.Q.2d 1747 (Fed.Cir. 2000). The state-of-mind element for both common law and *Walker Process* fraud requires proof of “the intent to deceive or, at least, *a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter).*” *Unitherm*, 375 F.3d at 1358 (emphasis added); *Spalding*, 203 F.3d at 807 (emphasis added). Thus the Federal Circuit has *already* recognized not only that reckless disregard for the truth satisfies the scienter requirement for common-law fraud but has also applied that rule to the context of fraud on the Patent Office. Why should the issue here – obtaining a trademark registration by committing fraud on the Trademark Office – be treated under a different standard?

Further, federal courts have repeatedly held that reckless conduct satisfies a finding of fraud in other federal statutory contexts as well. For example, in securities fraud cases, “[e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly . . .” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n. 3 (2007). Similarly federal *criminal* fraud statutes (mail fraud, wire fraud) have generally been held to be violated where a person acted with “reckless indifference to the truth.” *United States v. DeRosier*, 501 F.3d 888, 897-98 (8th Cir. 2007); *United States v. Munoz*, 233 F.3d 1117, 1136 (9th Cir. 2000)(mail fraud); *O'Malley v. New York City Transit Authority*, 896 F.2d 704, 707 (2d Cir. 1990) (mail fraud).

Thus the consensus of authority is that when a party makes a representation with “reckless indifference to truth,” he or she is acting fraudulently, and may be liable for common law fraud or federal statutory fraud crimes and civil statutory fraud liabilities. There is no reason why the Trademark Act should be interpreted any differently than this mass of precedent – and indeed, the common law precedent is compelling under *Neder* and the cases cited therein.

D. Fraud Regarding Ms. Chuong’s Status As “President”

The first basis for asserting fraud is that Golden Vision Flower submitted a Statement of Use verified by Li Ying Chuong, who signed as its “President.” (Discovery Depo. Exh. 29) Notwithstanding Ms Chuong is not fluent in English, she testified that her lawyers explained the entire document to her and she understood it. (Chuong Tr. 27:14-24)

In fact, Ms. Chuong is not and has never been that company's President, nor any officer. At best, she was an "investor" in the company, who owned "ten-something percent" of the shares. (Mr. Huang Tr. 22:16 – 24:5, Chuong Tr. 13:11 – 14:16) Indeed, Golden Vision Flower admits that Ms. Chuong was not its President. (Golden Vision Flower's Answer to Second Petition for Cancellation, ¶ 14, Pet. Not. Reliance, No. 8)

This was a knowing falsehood. Clearly, Ms. Chuong knew that, in fact, she was not the president of Golden Vision Flower, as she readily testified. (Chuong Tr. 39:15-17) Indeed, when called upon to properly identify its officers, Golden Vision Flower knew how. Its corporate filings with the State of Florida (Pet. Not. Reliance, No. 6) all list only a single officer: Shun-Chi Huang. (*Id.*) Scienter is thus established.

The false statement was material to the Statement of Use. The underlying application which issued as the '073 Registration was filed as an Intent to Use application under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). When the Trademark Office issues a Notice of Allowance, the applicant then has six months to file a "a verified statement that the mark is in use in commerce and specifying the date of the applicant's first use of the mark in commerce and those goods or services specified in the notice of allowance on or in connection with which the mark is used in commerce." *Id.*, § 1051(d)(1).

Not every person is qualified to sign a verification in support of such an application:

A verification in support of an application for registration . . . must be sworn to or supported by a declaration under §2.20, signed by the owner or a person properly authorized to sign on behalf of the owner. A person who is properly authorized to verify facts on behalf of an owner is:

(i) A person with legal authority to bind the owner (e.g., a corporate officer or general partner of a partnership);

(ii) A person with firsthand knowledge of the facts and actual or implied authority to act on behalf of the owner; or

(iii) An attorney as defined in §11.1 of this chapter who has an actual written or verbal power of attorney or an implied power of attorney from the owner.

37 C.F.R. § 2.193(e)(1); *see* TMEP §§ 611.03(a) and 804.04.

Ms. Chuong did not qualify under any of these subsections. Golden Vision Flower has argued that she was qualified because her husband, the company President, asked her to deal with the paperwork. But, that argument cannot be squared with the regulation.

Subsection (i) by its terms means authority as a matter of law to bind the legal entity. For corporations, this means a corporate officer, *i.e.*, “a person who holds an office established in the articles of incorporation or corporate bylaws.” TMEP § 611.06(d). Ms. Chuong never held any such position with Golden Vision Flower. (Mr. Huang Tr. 22:16 – 24:5; Chuong Tr. 13:11 – 14:16) Any *ad hoc* authorization of Ms. Chuong by her husband, Mr. Huang, to sign the submission to the Trademark Office simply does not qualify her under subsection (i).

While arguably such an authorization might qualify under subsection (ii), that subsection *also* requires that the person have “firsthand knowledge of the facts” being verified. Ms. Chuong lacked first-hand knowledge of the use of the trademark made by Golden Vision Flower – she was “not involve[d]” in such sales. Indeed she resides in Taiwan and only relied upon second-hand reports from Florida. (*See* Chuong Tr. 40:17-23, 41:2-6, 42:13-23, 45:1 – 47:19) Finally, Ms. Chuong is clearly not an attorney nor has any power of attorney ever been produced or filed for her.

In short, Golden Vision Flower committed fraud on the Trademark Office when it submitted a Statement of Use verified by a person falsely claiming to be its “President” who in fact was not and was not otherwise qualified to sign the registration.

E. Fraud As To Types Of Goods For Which The Mark Was Used

1. Factual Falsity

As noted, the ‘073 Registration (and the supporting Statement of Use) lists the following goods: “Cut flowers, dried flowers and live flowers; Flower bulbs; Flower seeds; Live flowering plants; Dried plants and live plants; Grass and grass seeds; Fresh herbs and raw herbs; Live orchids.” (Exh. 101) At least five and more than likely as many as twelve were false.

All of Golden Vision Flower’s witnesses agree that it has used the mark for live orchids. Indeed, according to Ms. Huang, that is the *only* item listed as to which Golden Vision Flower has *ever* sold or used the mark. Her testimony is also consistent with Golden Vision Flower’s response to Interrogatory No. 6 which lists three types of orchids as the sole item for which Golden Vision Flower has used its mark. (Reg. Response to Interrog. No. 6, Pet. Notice of Reliance, No. 7) It is also consistent with Golden Vision Flower’s Florida incorporation papers which states that the purpose of organizing the corporation is “[t]o plant, grow and sell orchid flowers.” (Pet Not. Reliance No. 6)

Mr. Huang claimed that Golden Vision Flower had also sold a small number of live bamboo plants. In addition, he argued that certain of the categories (live flowers, live

flowering plants, live plants) refer to the live orchids sold by the company.⁵ But Mr. Huang was clear that the company *never* used the mark with respect to “Cut flowers, dried flowers . . . Dried plants . . . [and] Fresh herbs and raw herbs.” (Mr. Huang Tr. 43:10-17, Tr. 43:23-44:2, 46:16-20, Tr. 47:20 – 48:12). As to the other items listed in the registration, Mr. Huang claimed there had been some minimal use early in the company history, although he could not produce any proof thereof. (*See* Mr. Huang Tr. 47:12-19)

Given that Ms. Huang has been operating the company on a day-to-day basis for nearly five years (while her parents live in Taiwan and have only a remote connection to the operations of the company), her testimony is the most credible, particularly since it is also consistent with Golden Vision Flower’s interrogatory responses and government filings. On that testimony, the only goods ever sold by Golden Vision Flower were live orchids. But even by Mr. Huang’s testimony, while the Statement of Use purported to verify use of the mark as to thirteen product categories, the statement was false as to at least five of the listed categories. Notably, it is sufficient for Golden Flowers to prevail by demonstrating fraud as to *even one* of the thirteen product categories, since “[a] finding of fraud with respect to a particular class of goods or services renders any resulting registration void as to that class.” *Meckatzer Lowenbrau Benedict Weis KG v. White Gold, Inc.*, 95 U.S.P.Q.2d 1185, 1188 (TTAB 2010).

⁵ It is problematic that such double identification satisfies the requirement to “specify” the goods and services for which the registration is issued. *See, generally*, T.M.E.P. § 1402.

2. Materiality

Given that the statute expressly requires *use in commerce* as a condition for issuance of a registration under Section 1(b), whether or not Golden Vision Flower used its mark for the various goods listed in the registration is clearly material. *See Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 U.S.P.Q.2d 1917 (TTAB 2006) (Fraud found based on misrepresentation regarding use of the mark on most of the goods identified in the filed applications. “[T]he false statements were material to the issuance of the registrations. There is no question that the USPTO would not have granted registrations covering goods on which the mark is not being used.”)

“[F]raud as to any goods or services in a single class will lead to a finding that the application or registration is void in the class in which fraud has been committed.” *G&W Laboratories, Inc. v. GW Pharma, Ltd.*, 89 U.S.P.Q.2d 1571, 1573 (TTAB 2009). All of the goods in the ‘073 Registration are in a single class, Class 31. Since fraud has been shown as to at least five (indeed, probably twelve) of the thirteen listed product types, the entire registration is subject to cancellation.

3. Scienter or Intent To Deceive

As discussed above, it has long been the rule at common law, and should be the rule for proceedings such as this, that fraudulent intent can be established where it is shown that a party made a representation recklessly, or “being conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert it.” First Restatement of Torts, § 526, comment e. *See Hadock v. Osmer*, 47 N.E. at 923-924 (Fraud “may exist when one

asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know.”). The record clearly demonstrates that Ms. Chuong had such a state of mind.

The representations made by Ms. Chuong on behalf of Golden Vision Flower were both serious and specific. They were made under penalty of perjury. They went beyond merely stating that the applicant had once used the mark for the listed goods. Rather, the Statement of Use expressly stated that the applicant “has adopted” and “is using” the mark for the listed goods and that the “current use” of the mark is shown by the attached specimen. (Discovery Depo. Exh. 29, Pet. Not. Reliance No. 4)

Ms. Chuong clearly knew that she lacked any basis to make these specific representations. Her own testimony shows that she had no first hand knowledge of on which goods the company used the mark nor any involvement in its commercial dealings. She was not an officer of the company, and lived and worked in Taiwan, not in Florida where Golden Vision Flower is based. By her own testimony she was “not involve[d]” in the commercial activities of Golden Vision Flower. (Chuong Tr. 42:13, 45:9-17, 47:2-18) Indeed, she admitted that in August 2005, when she signed the Statement of Use, she had no knowledge of for what items, other than orchids, the company was using the mark:

Q With regard to the various items listed on the tag, which is the last page of Exhibit 29 –

A We got more.

Q Which of these items was Golden Vision Flower selling in August of 2005?

A August?

Q August 2005.

A The only thing I did I helped them did one booking in 2004, that's all.

Q So by your answer do I understand you to mean that you don't know whether Golden Vision Flower was selling any of these item in August of 2005?

MR. DAWSON: Object to the form.

THE INTERPRETER: (Translating): 2005? I only helped them booking in 2004. They operating to today, they must have some sales.

BY MR. SPRINGUT:

Q But you don't know?

A I did not involve in operate in this.

Q Okay. So in August of 2005 when you signed the attached statement of use, you didn't know whether or not the company was selling any of these items; is that a fair statement?

A They selling but I don't know if that's everything.

Q Well, which items do you know that they were selling in August of 2005 from the list?

A Orchids, that's a positive.

Q Anything else?

A I don't think they sold dry flowers. The market is different, others, I don't know.

Q Okay. So the only thing you can testify is that they were selling orchids in 2005, correct?

A Yes. Let me double check. Anything related with orchids they would sell.

(Ms. Chuong Tr. 46:9 to 47:18) By her own testimony, Ms. Chuong simply lacked the knowledge of whether the representations she verified in the Statement of Use were true as

of the date they were made in August 2005. That is sufficient to demonstrate fraudulent intent under the *Hadcock* and the Restatement standard cited above.

Additional facts also support an inference that Ms. Chuong had no basis for her representations:

- Since Mr. Huang, the company President, lives in Taiwan and readily admitted that the company had never used the registered mark for at least five types of goods listed, it is apparent that Ms. Chuong did not take even the most rudimentary form of diligence, *i.e.*, verifying the facts with her husband. She was utterly “careless whether [the representations she made] be true or false.” First Restatement of Torts, § 526, comment e.
- The fact that Ms. Chuong knowingly deceived the Trademark Office about her status as the company President also supports the inference that the other falsehoods *in the very same document* were deliberate. *See, generally*, Fed.R.Evid. 404(b) (other bad acts admissible to show state of mind). *Cf. United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (Conviction for knowingly making false statement to bank upheld. Evidence of other false statements in the same loan application held admissible to prove fraudulent intent.)
- Golden Vision Flower had a motive to deceive the Trademark Office. Golden Vision Flower had applied for (and was allowed) an intent-to-use registration as to thirteen product categories. It was undoubtedly *hoping* to market these other goods at some point in the future. (*See Ms. Huang Tr. 76:17-21*) But by the time the Statement of Use was due, only one product had materialized as a commercial

reality. Rather than submitting a Statement of Use limited to the goods actually in use and reapplying later for additional goods, Golden Vision Flower was motivated to simply lie about its actual use and hope that its commercial efforts in the other product categories would come to fruition.

While Golden Flowers has the burden of proving deceptive intent by clear and convincing evidence, *Bose*, 580 F.3d at 1245, such intent can be inferred from indirect and circumstantial evidence, “because direct evidence of deceptive intent is rarely available.” *Id.* The above circumstances point to but one conclusion: Golden Vision Flower submitted a false Statement of Use which was made either knowingly or recklessly as to whether it was true.

* * *

Golden Flowers has shown two frauds committed by Golden Vision Flower in obtaining the ‘073 Registration: (1) the Statement of Use was verified by a “President” who was not an officer of the company and not qualified to verify the document, and (2) it verified use as to thirteen product categories, when in fact it’s business consists of, and has always consisted solely of, live orchids. (*See Ms. Huang Depo. Tr. 13:15: “It’s always been orchids.”*)

