This Opinion is Not a Precedent of the TTAB

Oral Hearing: April 7, 2016
Mailed: May 6, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nash-Finch Company
v.
Ahold Licensing Sarl

Cancellation No. 92058000

John A. Clifford and Heather J. Kliebenstein of Merchant & Gould P.C.
for Nash-Finch Company.

Harvey Freedenberg and Brian P. Gregg of McNees Wallace & Nurick LLC
for Ahold Licensing Sarl.

Before Zervas, Wellington, and Lynch,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Nash-Finch Company ("Petitioner") seeks to cancel Registration No. 4283988 for the mark shown below for "charitable fundraising services" in International Class 36, owned by Ahold Licensing Sarl ("Respondent"):[1]

[1] Registration No. 4283988 issued on January 29, 2013 based on an application (Serial No. 85547879) filed on February 21, 2012, and claims first use of the mark anywhere and in commerce in March 2012.

The term FOUNDATION has been disclaimed.[2]

Petitioner alleges likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), between its mark OUR FAMILY and Respondent's registered mark. In the Petition for Cancellation, Petitioner pleads ownership of two registrations and an application for the mark OUR FAMILY (by itself and stylized with a design) that, together, cover a wide variety of grocery and sundry items.[3]

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[2] Respondent's mark is described in the registration as "consist[ing] of the phrase 'OUR FAMILY FOUNDATION' appear[ing] in black below a design of three houses. The house on the left is green with a white window, the house in the center is white with a red heart, and the house on the right is gold with a white window."

[3] **OUR FAMILY** (Reg. No. 369014) issued on July 11, 1939 (renewed) covers canned fruits, canned vegetables, canned fruit juice for food purposes, canned corn, canned spaghetti, canned tuna fish, canned salmon, canned soup, canned [c]orn and beans, noodles, spaghetti, macaroni, tea, spices, mustard, vinegar, catsup, cocoa, evaporated milk, olives, pickles, jam, peanut butter, fruit preserves, marmalade, cane in International Class 1;

OUR FAMILY (Reg. No. 2690200) issued February 25, 2003 (Section 8 affidavit accepted, registration renewed) covers: dishwashing detergent, laundry detergent, laundry bleach in International Class 3; aluminum foil in International Class 6; paper towels, paper napkins, bath tissue, and facial tissue in International Class16; meals consisting of meat, fish or poultry in ready to cook portions, peanut butter, pickles, canned fruit and canned vegetables in International Class 29; macaroni, noodles, spaghetti, rice, coffee, spaghetti sauce, tea, pretzels, nacho chips, cocoa, catsup, mustard in International Class 30; pet food and unpopped popcorn in International Class 31; and vegetable juice, fruit juice and fruit drink in International Class 32; and

(Application Serial No. 85905473) filed on April 16, 2013, covers: dishwashing detergent, laundry detergent, laundry bleach, bath and hand soap in

Petitioner also pleads that it "closely associates its OUR FAMILY brand with some if its charitable and fundraising activities," including its "LABELS FOR LEARNING [fundraising] program."[4] Petitioner further alleges, *inter alia*, that "both parties will engage in charitable fundraising in similar or overlapping channels of trade, and often from the same sources;"[5] that Petitioner's OUR FAMILY marks are "famous and distinctive, and were famous prior to any first use [Respondent's mark];"[6] and that "[d]ue to the highly similar nature of [the parties' marks], the closely related nature of the goods and services provided by the respective parties, consumers and potential consumers are likely to believe that [Respondent's] services originate from

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International Class 3; paper towels, paper napkins, toilet tissue, facial tissue in International Class16; paper plates in International Class 21; frozen, prepared and packaged meals consisting of meat, fish or poultry in ready to cook portions, peanut butter, pickles, canned fruit and canned vegetables in International Class 29; macaroni, noodles, spaghetti, rice, coffee, spaghetti sauce, tea, pretzels, nacho chips, cocoa, leaf tea, catsup, mustard and un-popped popcorn in International Class 30; pet food in International Class 31; and vegetable juice, bottled drinking water, fruit juice and fruit drink in International Class 32.

Petitioner also asserted ownership of a third registration (Reg. No. 1704384) and a second application (Serial No. 85418412). Respondent counterclaimed to cancel the '384 registration. Petitioner then surrendered the '384 registration and the Board dismissed the counterclaim without prejudice (see 17 TTABVUE). The application was abandoned (for failure to respond) on October 30, 2014. Accordingly, neither Reg. No. 1704384 nor App. Ser. No. 85418412 have any further significance to this decision.

[4] 1 TTABVUE 7 (Petition to Cancel ¶ 7). Record citations are to TTABVUE, the Trademark Trial and Appeal Board's publically available docket history system, by entry and, where applicable, page number. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

[5] *Id.* at 9 (Petition to Cancel ¶ 16).

[6] *Id.* at 10 (Petition to Cancel ¶ 19).

Petitioner, resulting in a likelihood of confusion in the marketplace, and damage to Petitioner."[7]

Respondent denies the salient allegations of the Petition for Cancellation.

The parties filed their trial briefs, and Petitioner filed a reply brief. The Board conducted an oral hearing on April 7, 2016.

I. Record

The record in this case includes the pleadings and, by rule, the file of the involved registration. Trademark Rule 2.122, 37 C.F.R. § 2.122.

Petitioner submitted copies of the testimony depositions, with accompanying exhibits, of John Paul (Petitioner's Vice President for private brands),[8] Michele Murphy (Petitioner's Director of Product Development),[9] and Paula Docken (a business analyst employed by Petitioner).[10] Petitioner also introduced the following materials, *inter alia*, under notice of reliance:[11] a copy of the file history for Respondent's registration; copies of Petitioner's pleaded Registrations Nos. 369014 and 2690200, and application Serial No. 85905473 obtained from the USPTO's TSDR electronic database; Respondent's responses to certain interrogatories propounded by Petitioner, and various documents produced with the interrogatory responses;

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[7] *Id.* at 9 (Petition to Cancel ¶ 15).

[8] 41 TTABVUE (public copy) and 39 TTABVUE (confidential version).

[9] 41 TTABVUE (public copy) and 35-38 TTABVUE (confidential version).

[10] 41 TTABVUE (public copy) and 37 TTABVUE (confidential version).

[11] 29-30 TTABVUE (public copy) and 27-28 TTABVUE (Confidential version).

portions of the Fed. R. Civ. P. 30(b)(6) discovery depositions of Respondent's witnesses, Tracy Pawelski (former Vice-President of External Communications and Community Relations for Ahold USA) and Deborah Hill (Manager of Public and Community Relations for Ahold USA), with certain accompanying exhibits; a screenshot of Petitioner's www.ourfamilyfoods.com website and third-party websites purportedly showing use of the OUR FAMILY and OUR FAMILY FOUNDATION marks; copies of third-party registrations covering both food products and charitable/ foundation services; printouts from third-party websites purportedly showing use of third-party marks used in connection with food products and charitable foundation services; and Petitioner's 2012-2013 annual reports obtained from Petitioner's website.

For its part, Respondent submitted a copy of the deposition testimony, with accompanying exhibits, of Ms. Pawelski.[12] Respondent also introduced the following materials under notice of reliance:[13] third-party registrations purportedly showing identical or similar marks registered for retail or grocery store services and charitable fundraising or similar services; printouts from third-party websites purportedly showing use of marks on goods commonly sold in grocery stores and the same or similar marks used by another party in connection with charitable fundraising or similar services; copies of third-party registrations for marks containing the terms

[12] 42 TTABVUE (public copy) and 43 TTABVUE (confidential version).

[13] 33 TTABVUE (public copy) and 34 TTABVUE (confidential version).

"our" and "family" for food-related products or retail food store services; a copy of the specimen of use in Registration No. 2897507; portions of the Fed. R. Civ. P. 30(b)(6) discovery deposition of Petitioner's witness, Mr. Paul, and certain exhibits; search results from the Google search engine for the phrase "our family" and "our family foundation" which purportedly show lack of confusion.

During its rebuttal testimony period, Petitioner submitted the following under a notice of reliance: portions of the Fed. R. Civ. P. 30(b)(6) discovery deposition of Petitioner's witness, Mr. Paul, pursuant to Rule 2.120(j); and third-party website printouts that purportedly demonstrate the disparate nature of the business, business models or charitable purpose of entities previously identified by Respondent.

II. Petitioner's Standing

On the record before us, it is clear that Petitioner is more than a mere intermeddler and has a personal interest in seeking to cancel the involved registered mark, OUR FAMILY FOUNDATION (stylized with a design). *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). In particular, Petitioner has made of record its two pleaded registrations and pleaded application for marks containing the term OUR FAMILY, either by itself or stylized with a design for a variety of food products.[14] In addition, Mr. Paul, testified that OUR FAMILY has been continuously used on "virtually every category [of food and nonedible goods]

[14] 29 TTABVUE 433-445.

in a grocery store" since 1904[15] and that OUR FAMILY is used by Petitioner in connection with "charitable services."[16] Accordingly, Petitioner has shown it has standing in this matter, and we note that Respondent has not challenged Petitioner's standing.

III. Priority

For purposes of establishing priority, the parties may, at the very least, rely on the filing dates of the underlying applications for their registrations. *M.C.I. Foods, Inc. v. Bunte,* 96 USPQ2d 1544, 1550 (TTAB 2010); s*ee also, J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 437 (CCPA 1965).

In this case, the filing date of the underlying application for Respondent's registration is February 21, 2012 (see footnote 1, *supra*). Respondent does not argue, let alone prove, an earlier date of first use. Thus, this is the earliest date that Respondent can rely upon for purposes of priority, and Petitioner must establish that it acquired trademark rights prior to this date.

As set forth in the Petition for Cancellation, Petitioner's likelihood of confusion claim is based on its asserted prior rights in the OUR FAMILY mark on grocery-type goods as well prior rights in this same mark being used in connection with its LABELS FOR LEARNING fundraising program, further described *infra*. In order to prevail on its asserted rights in connection with the grocery goods, Petitioner must

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[15] 41 TTABVUE 237-238.

[16] *Id.* at 249.

establish that it acquired trademark rights in these goods prior to Respondent's priority date of February 21, 2012. Likewise, Petitioner must show that it acquired trademark rights in connection with fundraising services prior to that date in order to prevail on a likelihood of confusion claim based on these services.

As for the grocery-type goods, there is no real dispute that Petitioner acquired rights in its OUR FAMILY mark on these goods long before 2012. Petitioner's pleaded registrations, which cover many of these goods, were issued in 1939 (Reg. No. 369014) and 2003 (Reg. No. 2690200). See footnote 3, *supra*. Through the filing dates of the applications for registration, Petitioner has established priority for the goods listed in the registrations. *M.C.I. Foods*, 96 USPQ2d 1550.

With respect to priority and Petitioner's asserted charitable fundraising services, because Petitioner does not own a registration for such services, it must rely on established prior common law rights. The record supports a finding that before 2012, Petitioner began using OUR FAMILY, by itself and with LABELS FOR LEARNING, in connection with the relevant services. Specifically, through the testimony of Ms. Murphy and Mr. Paul, Petitioner has established that it began using the OUR FAMILY mark with its LABELS FOR LEARNING program at least as early as 2005.[17] Without divulging the specifics of Mr. Paul's testimony, much of which has

[17] 39 TTABVUE (Paul 88:23-89:1). This portion of Mr. Paul's testimony was designated as "confidential." Indeed, the parties over-designated many pages of testimony and exhibits as confidential; for example, Petitioner "removed for confidentiality" pages 45-225 of the Paul deposition and this clearly includes "Labels for Learning" information that was made available to the general public.

been designated "confidential," we note that he has explained in sufficient detail the mechanics of this fundraising program and how it enables schools, churches and other organizations to raise money by collecting OUR FAMILY product UPC barcode labels. Petitioner coordinates with retailers so that consumers can support a school, churches or other organizations by purchasing specific OUR FAMILY items from the retailer and by turning in the labels. The following is what Mr. Paul described as part of a package of materials, used long before 2012, that grocery store retailers would receive from Petitioner:

[18]

[18] 41 TTABVUE 356 (Paul Exhibit 58); 39 TTABVUE (Paul dep. 96:8-102:12).

The following is an example of a promotional flyer with a "registration card" sent to prospective recipient schools (or other organizations):

Our Family®
Quality Since 1904
LABELS for LEARNING

Together We Can Make a Difference!

It's As Easy As

1. Raise money for your school/church or organization!
Together we can work to make a difference in the education of our children. It's easy; just save UPC barcodes for cash. When you receive your checks, your school, church or organization is free to spend the money any way they want. New textbooks, band uniforms, computer programs, art supplies; many ways to support.

2. Save Our Family UPC barcodes...It's that easy!
During 2006 - June, 2007, just save the barcodes from Our Family products. You will earn $25.00 in cash for each bundle of 500 UPC barcodes sent to us.

3. Where to find Our Family
You will fnd more than 2000 Our Family items with national brand quality, every day, all priced lower than national brands. Our Family has turned the corner into the second century of quality and value, so you'll be assured satisfaction with every purchase. Find Our Family products at finer grocery stores everywhere!

Get Started Now
To participate, complete the registration card and mail it today. You will receive an information packet explaining the details of the program. We will work together in building a better education for our children..

Our Family®

REGISTRATION CARD

Yes, our school, church or organization wants to participate in the Our Family Labels for Learning™ Program. Please send us the Our Family Labels for Learning Bonus* Certificate (worth an additional $25.00 with your bundle of 500 Our Family barcodes.)

Group Name _____

Address _____

City _____ State _____ Zip _____

Contact Person _____ Phone ( ) _____

*Bonus certificate and Labels for Learning™ rebate checks will be issued to a school, church or organization only. Each group may redeem only one Bonus Certificate. The Bonus Certificate is valid when redeemed with the first 500 Our Family barcodes from your group's collection. A W-9 Tax ID form must accompany your first bundle along with the Bonus Certificate to receive your check.

Our Family®
Quality Since 1904
LABELS for LEARNING

[19]

[19] *Id.*

Petitioner also introduced advertising, demonstrating how the general public would be exposed to Petitioner's mark OUR FAMILY (by itself and with LABELS FOR LEARNING) in connection with its fundraising activities for schools:

[20]

[20] 41 TTABVUE 62; Murphy Exhibit 208.

Ms. Murphy testified that the grocery store advertisement (shown above) is one example of how Petitioner's OUR FAMILY mark was used in 2006 and is being used today in connection with Petitioner's fundraising services.[21]

In view of the aforementioned evidence, Petitioner has established that it has prior, common law rights in the mark OUR FAMILY (by itself and with the additional wording LABELS FOR LEARNING) in connection with fundraising services offered in conjunction with its affiliate grocery store retailers to schools, churches and other organizations.[22]

IV. Likelihood of Confusion

We now turn our attention to likelihood of confusion. Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Company, Inc.,* 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

A. Similarity of the Services, Channels of Trade and Purchaser Care

For purposes of our likelihood of confusion analysis, we focus on Petitioner's established prior rights in the OUR FAMILY mark in connection with its fundraising

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[21] 41 TTABVUE (Murphy dep. 71:1-13).

[22] At the oral hearing, counsel for respondent conceded that Petitioner has prior use of the mark OUR FAMILY (by itself and with the additional wording LABELS FOR LEARNING) for fundraising services.

services, and not its prior rights in that mark on grocery goods, because the aforementioned services are clearly more closely related to Respondent's described "charitable fundraising services."

In comparing the parties' services, we base our determination on the description of the services as recited in Respondent's registration rather than what the record may reveal regarding Respondent's actual services. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (*quoting Octocom Sys., Inc. v. Houston Computer Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); see also, *Canadian Imperial Bank v. Wells Fargo Bank,* 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Indeed, in this case, Respondent's identification "charitable fundraising services" is broad and must be read to include fundraising services of the type engaged in by Petitioner, namely, fundraising for schools, churches or other organizations through a product purchasing program. The services hence are in part, legally identical. Although Respondent's fundraising services are prefaced as "charitable," this does not distinguish them from Petitioner's fundraising services because both parties may offer their fundraising services to charitable organizations or to further a charitable cause.

Without any restrictions as to channels of trade or classes of consumers in Respondent's registration and given the parties' services are identical, in part, we must assume that these services will be offered in the same channels of trade and offered to the same consumers. *Canadian Imperial,* 1 USPQ2d at 1815. For example, we must anticipate that the same recipient organizations, whether it be schools or

churches, who encounter Petitioner's OUR FAMILY fundraising activities will also encounter Respondent's charitable fundraising services being offered under its OUR FAMILY (stylized with a design) mark. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods in the applications and/or registrations, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute,* 101 USPQ2d 1022, 1028 (TTAB 2011). We further note that those who purchase groceries, essentially the general public, will also encounter the marks and these fundraising services to the extent that they are exposed to advertisements informing them that they can participate by purchasing certain goods to facilitate fundraising for a particular organization.

Accordingly, the second *du Pont* factor, involving similarity of the services, and the third *du Pont* factor, involving the trade channels in which the services travel, both strongly support a finding of likely confusion.

With respect to the fourth *du Pont* factor, involving the conditions under which and buyers to whom sales are made (i.e., "impulse" vs. careful, sophisticated purchasing), this slightly favors a likelihood of confusion because the parties' services will be directed at least in part to the general public, who may decide to purchase products for purposes of supporting a school or other organization. Inasmuch as many grocery store goods are relatively inexpensive and consumers therefore exercise less care when purchasing goods in conjunction with the fundraising programs forming either party's services.

B. Similarity of the Marks

We now consider the similarity or dissimilarity of the marks at issue in terms of appearance, sound, meaning, and overall commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In doing so, we keep in mind that "[t]he proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

In this case, Petitioner's OUR FAMILY mark is very similar to Respondent's OUR FAMILY FOUNDATION (stylized with a design). The fact that the entirety of Petitioner's mark is the primary and only non-descriptive wording in Respondent's mark is crucial. The addition of the term FOUNDATION, which Respondent disclaimed, merely describes an entity type and thus has little to no source-identifying significance. *In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1539-40 (TTAB 1998) ("the term 'Inc.' in applicant's mark does not serve to identify the source of applicant's services but rather merely indicates the type of entity which performs the services, and thus has no service mark significance."). We do not ignore

the two houses and heart design element in Respondent's mark; however, it is settled that with a composite mark comprising a design and words, the word portion of the mark is usually the one most likely to indicate the origin of the services to which it is affixed. *CBS, Inc. v. Morrow,* 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Dakin's Miniatures, Inc.,* 59 USPQ2d 1593, 1596 (TTAB 2001) ("In the case of marks which consist of words and a design, words are normally accorded greater weight because they would be used by purchasers to request the goods [or services]."). In this case, Petitioner's mark, OUR FAMILY, is the portion of Respondent's mark with the strongest source-indicating role and will likely be the wording used by consumers for referencing Respondent's services at a later time.

Respondent's adoption of the OUR FAMILY wording also helps create a similar commercial impression or connotation with that of Petitioner's mark. While it has not been shown that this term has any specific meaning or significance with respect to charitable fundraising services, it may be understood as being suggestive of helping others to the extent that they are part of "our family."

In sum, although there are some differences between the marks, we find that they are overall very similar in appearance, sound and meaning. That is, the design element and addition of the term FOUNDATION in Respondent's mark are outweighed by the similarity resulting from Respondent's incorporation of Petitioner's mark. Accordingly, this factor weighs in favor of finding a likelihood of confusion.

C. Fame of Petitioner's Mark

We now turn to the likelihood of confusion factor involving the alleged fame of Petitioner's mark. Petitioner argues, on brief, that its OUR FAMILY mark is "extremely strong and famous."[23] In support, Petitioner has submitted evidence of its use of the mark on grocery goods since 1904 as well as impressive dollar figures for its sales and promotion of these goods and its grocery store services for the years 2008 to 2013.[24] Petitioner has engaged in significant promotional efforts, including the sponsorship of the Minnesota Twins, a major league baseball team since 2006.

Respondent seems to acknowledge that Petitioner "may have impressive sales and advertising statistics for its OUR FAMILY line of products" but goes on to argue that this "does not mean that it has an brand recognition with respect to unrelated charitable fundraising/ donation services or that its scope of protection extends beyond food/household products."[25]

In this case, the evidence certainly demonstrates that there has been a substantial period of time (over 100 years) for the public to be exposed to the mark OUR FAMILY in connection with grocery store food products and that Petitioner has made great efforts to advertise these products with much success. Nevertheless, the record shows that Petitioner's efforts and success in this regard are concentrated on its use of the

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[23] 46 TTABVUE 43; Brief, p. 35.

[24] The actual figures have been designated "confidential."

[25] 48 TTABVUE 38; Brief, p. 32.

OUR FAMILY mark on grocery store goods with a regional focus in the Midwest part of the United States. *Cf. UMG Recordings Inc. v. Mattel Inc.,* 100 USPQ2d 1868, 1888 (TTAB 2011) ("Applicant's arguments that the fame of opposer's MOTOWN mark is limited to a niche market is not well taken, as opposer's fame is obviously not limited to a geographic region, a segment of an industry or service, or a particular channel of trade.") (citing *Toro Co. v. ToroHead Inc.,* 61 USPQ2d 1164 1182 (TTAB 2001).

Regardless, Petitioner has not shown that its OUR FAMILY mark is famous for the fundraising services on which we focus our analysis. Nevertheless, the strength of a mark is measured in degrees and, in this regard, we note that OUR FAMILY is an arbitrary mark and there is no evidence of any use of similar marks in connection with fundraising services. These factors help make the mark strong and "not only entitles the registered mark to a broad scope of protection, but significantly increases the likelihood that the marks, when used in connection with the identical goods [or services], would cause confusion." *In re Ginc UK Ltd*., 90 USPQ2d 1472, 1479 (TTAB 2007) (citing *Palm Bay,* 73 USPQ2d at 1692 ("VEUVE is an arbitrary term as applied to champagne and sparkling wine, and thus conceptually strong as a trademark."). In sum, we find that Petitioner's OUR FAMILY mark is a strong mark in the context of fundraising services. Thus, the *du Pont* factor involving strength of the Petitioner's mark weighs somewhat in favor of finding a likelihood of confusion.

D. Lack of Instances of Actual Confusion

In its brief, Respondent argues there has been no reported instances of actual confusion despite contemporaneous use of the parties' marks for approximately three

years,[26] and argues that the "lack of actual confusion despite a reasonable opportunity for confusion is dispositive."[27] Contrary to this argument, it is well-settled that that while the presence of confusion may be very useful to our analysis, the lack of evidence of actual confusion carries little weight. *J.C. Hall,* 144 USPQ at 438. As our primary reviewing court pointed out, "a showing of actual confusion is not necessary to establish a likelihood of confusion." *Herbko Int'l v. Kappa Books*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002). Furthermore, it has often been recognized that such evidence is very difficult to obtain. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1834 (TTAB 2012).

Accordingly, we find this *du Pont* factor to be neutral or, at best, weighs slightly in favor of finding no likelihood of confusion.

E. Conclusion

We have carefully considered all evidence of record and the parties' arguments as they pertain to the relevant *du Pont* factors. We find that Respondent's mark OUR FAMILY FOUNDATION (stylized with a design), so closely resembles Petitioner's previously-used and strong mark, OUR FAMILY, that when these marks are used in connection identical or closely-related fundraising services, being offered in the same trade channels to the same classes of consumers, there is likely to be confusion as to the source of these services. The only factor that may favor Respondent and a finding

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[26] Based on Respondent's alleged first use (in September 2012) to the end of the trial (in August 2015).

[27] 48 TTABVUE 24; Brief p. 18.

of no likelihood of confusion is the coexistence of the parties' marks for the past three years without any known instances of actual confusion. Even so, this would weigh in Respondent's favor only slightly and is certainly outweighed by the evidence of record on the other aforementioned *du Pont* factors which point to the existence of a likelihood of confusion.

Decision: The petition for cancellation is granted and Registration No. 4283988 will be cancelled in due course.