Hearing:
June 2, 2004

Mailed:
October 5, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

Commerce Bancorp, Inc.

v.

Martell & Associates
Financial Services Company

_____

Opposition No. 91124853
to application Serial No. 75542147
filed on August 25, 1998

Opposition No. 91150981
to application Serial No. 75981093
filed on August 25, 1998

Opposition No. 91151895
to application Serial No. 76172404
filed on November 29, 2000

_____

Timothy D. Pecsenye, Dennis P. McCooe, Christopher M. Turk and Megan E. Spitz of Blank Rom LLP for Commerce Bancorp, Inc.

G. Franklin Rothwell and Robert H. Cameron of Rothwell, Figg, Ernst & Manbeck, P.C. for Martell & Associates Financial Services Company

_____

Before Seeherman, Hohein and Chapman, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Commerce Bancorp, Inc. has opposed three applications filed by Martell & Associates Financial Services Company. The applications are Serial No. 75542147 for COMMERCE TRUST (with TRUST disclaimed) for "banking, and credit insurance brokerage";[1] Serial No. 75981093 for COMMERCE TRUST (with TRUST disclaimed) for "mortgage banking, mortgage lending, and mortgage brokering";[2] and Serial No. 76172404 for COMMERCE TRUST in the stylized form shown below for "financial services, namely, mortgage banking, mortgage lending and mortgage brokerage services" with TRUST disclaimed).[3]

[1] Filed August 25, 1998, based on an asserted bona fide intention to use the mark; originally the application included other services, but they were divided out into "child" application Serial No. 75981093 so that applicant could file an amendment to allege use with respect to the services in the child application.

[2] As explained above, this application was initially part of Application Serial No. 75542147, and was subsequently divided out into a child application. Applicant initially based the application on a claimed intention to use the mark in commerce, and subsequently filed an amendment to allege that the mark was first used and first used in commerce in July 1998, which was accepted by the USPTO on August 3, 2001.

[3] Filed November 29, 2000, and asserting first use and first use in commerce on May 15, 1999.

As grounds for opposition, opposer has alleged that it has used various marks composed in whole or in part of the word COMMERCE, namely C COMMERCE BANK (stylized), COMMERCE CAPITAL MARKETS, COMMERCE CHECKVIEW, COMMERCE ON-LINE, THE COMMERCE ADVANTAGE, COMMERCE!WOWZONE, COMMERCE!WOWZONE and design, COMMERCE, COMMERCE BANK and COMMERCE NATIONAL. Opposer has characterized these marks as "the COMMERCE mark," and has further alleged that it has offered a variety of financial services under "the COMMERCE mark," including banking services, mortgage services, financial services in the nature of financial planning and investment brokerage and consultation services, insurance services, namely, brokerage of a group personal insurance product that includes automobile and homeowner's insurance, and educational services in the nature of conducting children's programs in the fields of banking and financial services; that it owns various applications and registrations for "the COMMERCE mark," although it has identified only applications for several of the marks enumerated above; that it has used "the COMMERCE mark" since at least 1973; that it has provided mortgage services in Pennsylvania under "the COMMERCE mark" since 1989; that its use of "the COMMERCE mark" predates the filing date of applicant's intent-to-use application Serial No. 75542147; that its use of "the COMMERCE mark" predates the dates of first use alleged in

applicant's application Serial Nos. 75981093 and 76172404; and that the use of applicant's marks for its identified services is likely to cause confusion, mistake and deception.

Applicant has denied the salient allegations of the notices of opposition in its answers thereto. The proceedings were then consolidated by the Board upon applicant's consented motion.

Before discussing the record, we must address opposer's motion to strike. Opposer seeks to exclude the exhibits submitted under one of applicant's notices of reliance, as well as the 56 exhibits introduced with the testimony deposition of applicant's witness, Jessica M. Blydenburgh. Opposer asserts that applicant did not produce them in discovery in response to a document production request, and therefore opposer asserts that applicant is precluded from relying on them at trial. The specific discovery request for which opposer contends these exhibits should have been produced is, "All documents...upon which Applicant may rely in connection with the within proceeding."

As opposer correctly points out, properly discoverable material that is not produced during discovery cannot be relied upon at trial. However, a party need not specify the evidence it intends to present in support of its case. Polaroid Corporation v. Opto Specs, Ltd., 181 USPQ 542 (TTAB

1974). Applicant had no duty to disclose every document on which it "may rely," and therefore applicant's failure to produce these documents does not constitute a failure to produce properly discoverable material. See Time Warner Entertainment Company L.P. v. Jones, 65 USPQ2d 1650 (TTAB 2002); Charrette Corp. v. Bowater Communication Papers Inc., 13 USPQ2d 2040 (TTAB 1989).

Nor can applicant's response to the document production request--"Martell will produce responsive, non-privileged documents"--be considered a waiver of any objection to the request. See Charrette Corp. v. Bowater, supra. Accordingly, opposer's motion to strike these exhibits is denied.[4]

Opposer has also moved to strike Exhibit B to another of applicant's notices of reliance. This exhibit is an "unpublished" decision of the Board in In re Commerce Bancorp., Inc., involving Serial No. 75422600 for COMMERCE CAPITAL MARKETS, one of the applications pleaded in the notices of opposition. Opposer argues that because this decision is marked "Not Citable as Precedent," it should be stricken from the record. Applicant, in opposing the motion, has stated that it is relying on factual findings the Board made concerning issues overlapping with the

[4] In view of our finding that the document production request was not proper, we will not burden this opinion with a discussion of applicant's additional arguments opposing the motion.

instant proceeding, and not for controlling precedent. Applicant also stated, at the oral hearing before the Board, that it was submitted for its collateral estoppel effect.

Although in general the Board will not consider decisions which are marked "not citable as precedent," there are certain exceptions to this policy, e.g., when a party is asserting claim preclusion or issue preclusion. In this case, because the decision involves one of the applications which opposer has asserted in its pleadings, the Board will consider it for whatever probative value it may have. Opposer's motion to strike is denied. We would point out, however, that merely submitting a decision having certain findings of fact is not sufficient to establish those facts in another case.

The record includes the pleadings; the files of the opposed applications; the testimony, with exhibits, of opposer's witness Allegra Sandelli and applicant's witness Jessica M. Blydenburgh, and of opposer's rebuttal witness David M. Perry.[5] Opposer has submitted, under notice of

[5] The entire transcript of the Perry deposition, including all exhibits, was filed under seal. Board proceedings are matters of public record, and therefore only truly confidential material should be designated as such. Although much of the transcript involves attorney work product, in that the witness is an attorney for opposer, and testified regarding trademark enforcement, even the parties were aware during the deposition that certain portions of the testimony were not confidential. See pages 33-34 of the transcript. Moreover, we note that many of the exhibits are publicly available documents, taken from the records of the U.S. Patent and Trademark Office. Accordingly, opposer is allowed thirty days from the mailing date of this

reliance, status and title copies of six of its registrations and certified copies of two of its applications. Four of the registrations were applications at the time they were pleaded in the notice of opposition:

MARK	SERVICES
THE COMMERCE ADVANTAGE	Insurance services, namely, brokerage of group personal automobile and homeowner's insurance, and brokerage of group personal automobile and homeowner's insurance via a global computer network[6]
 (Section 2(f) as to COMMERCE)	Providing an interactive web site featuring information for children in the fields of banking and financial services; educational services in the nature of conducting children's programs in the fields of banking and financial services, featuring school presentations and contest development, and guided educational tours of bank branches; and educational services, namely, providing an interactive web site featuring educational information, downloadable lesson plans, and teaching aids for educators in the fields of banking and finance[7]

decision to submit a redacted copy of the transcript, deleting only testimony which is attorney work product or otherwise truly confidential material, and indicating which exhibit or exhibits should remain under seal. If opposer fails to do so, the entire transcript, with exhibits, will be treated as a public record.

[6] Registration No. 2708238, issued April 22, 2003 (Serial No. 75498020).

[7] Registration No. 2680303, issued January 28, 2003 (Serial No. 76333593).

COMMERCEWOW!ZONE	Providing an interactive web site featuring information for children in the fields of banking and financial services; educational services in the nature of conducting children's programs in the fields of banking and financial services, featuring school presentations and contest development, and guided educational tours of bank branches; and educational services namely, providing an interactive web site featuring educational information, downloadable lesson plans, and teaching aids for educators in the fields of banking and finance[8]
COMMERCE CAPITAL MARKETS (CAPITAL MARKETS disclaimed)	Financial services in the nature of financial planning and investment brokerage and consultation services[9]

Another of the registrations which was submitted, for the mark COMMERCE for "insurance agencies featuring home, accident, life, property, casualty, and business insurance" and which had issued several years prior to the filing of the notices of opposition, was not pleaded.[10] Also not

[8] Registration No. 2671666, issued January 7, 2003 (Serial No. 76333594).
[9] Registration No. 2664917, issued December 24, 2002 (Serial No. 75422600).
[10] Registration No. 2084001, issued July 29, 1997 (Serial No. 75156449); Section 8 affidavit accepted; Section 15 affidavit acknowledged. This registration originally issued to Commerce Insurance Agency, Inc., so it is possible that, at the time the

pleaded was a registration for a C design, shown below, for banking services.[11]

At the time that the notices of opposition were filed, this registration had not yet issued, and opposer did not claim ownership of the application in its pleading. The applications submitted under the notice of reliance are for COMMERCE BANK and C design for banking services[12] (shown below), which was pleaded in the notices of opposition, and COMMERCE COMMERCIAL LEASING and design for commercial leasing services,[13] which was not.

Although certain of the registrations were not pleaded, we deem the pleadings to be amended under Fed. R. Civ. P. 15(b) to assert a claim of likelihood of confusion with

---

notices of opposition were filed, it had not yet been assigned to opposer.

[11] Registration No. 2506199, issued November 13, 2001 (Serial No. 76128099).

[12] Application Serial No. 76127975, filed September 14, 2000.

[13] Application Serial No. 76317350, filed September 26, 2001.

respect to these registered marks.[14] The applications, however, need not have been pleaded in any event, since the ownership of an application is not a basis for a claim of likelihood of confusion (although such ownership can establish a party's standing).

Opposer has also submitted, under notice of reliance, applicant's responses to opposer's requests for admission, responses to certain of opposer's interrogatories, and portions of the discovery deposition, with exhibits, of Frank Martell.

Applicant has submitted, under notices of reliance, dictionary definitions, copies of third-party registrations, excerpts from yellow pages phone directories, file histories of one of opposer's pleaded registrations and three of its pleaded applications, opposer's responses to certain of applicant's interrogatories and requests for admission, printed publications taken from the NEXIS database, and two decisions by the Board, in both of which opposer was a party.

The proceeding has been fully briefed, and both parties were represented at an oral hearing before the Board. Applicant has moved to strike opposer's brief because it was filed on Tuesday, January 20, 2004, when it was due on

[14] As discussed infra, this deemed amendment to the pleadings has no effect on our decision herein, that is, the presence or absence of the registrations does not change the outcome.

Friday, January 16. At the oral hearing, opposer explained that the late filing of its brief was due to a docketing error. In view of the minimal delay in filing the brief, (Monday, January 19 was a federal holiday), and because briefs are of benefit to the Board, we have exercised our discretion to consider the brief. Applicant's motion to strike is therefore denied.

As to the merits of these proceedings, we find that opposer has established its standing. It has made of record its applications and registrations for various marks containing the word COMMERCE, and has submitted testimony evidence regarding its use of the mark COMMERCE BANK.

Turning to the issue of likelihood of confusion, there is a preliminary matter we must address. Opposer has argued in its brief that it has a family of COMMERCE marks, and that applicant's marks are likely to cause confusion with this family. However, opposer never pleaded ownership of a family in the notices of opposition. What opposer stated was only that it "has made continuous and extensive use of the following marks comprised in whole or in part of the word 'COMMERCE' (hereafter 'The COMMERCE Mark')", and then listed various marks which include the word "commerce." (paragraph 2).[15] We do not regard this as an allegation of

[15] Opposer also used this same device, of referring to all of its marks as just "the COMMERCE mark," in its brief. Because it did so, opposer never discussed the issue of priority with respect to

ownership of a family of marks in which COMMERCE is the common element. Nor, from our review of the evidence submitted at trial, can we find that this issue was ever tried. Opposer never elicited any testimony about ownership of a family of marks.

However, although applicant has vigorously argued against opposer's assertion of a family of marks, it has not contended that this issue was neither pleaded nor tried. On the possibility that applicant's response indicates that applicant believes that the issue was tried, we will address the issue on the merits. Simply put, we find that opposer has failed to demonstrate that it had established a family of marks based on the common element COMMERCE prior to applicant's first use or constructive use of its three marks. To demonstrate that one has a family of marks, it is not sufficient to show that it has a number of registrations or uses marks with a common term; rather, the plaintiff must show that use of marks sharing a recognizable common characteristic predates applicant's first use or constructive use of its marks and is made in such a way as to create recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods. Sports Authority Michigan Inc. v. PC Authority

---

its individual marks, nor did it provide an analysis of the issue of likelihood of confusion with respect to each of its marks.

Inc., 63 USPQ2d 1782 (TTAB 2001), citing J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 1462, 18 USPQ2d 1889 (Fed. Cir. 1991). Although opposer has submitted a few advertisements in which more than one of its marks containing the word COMMERCE is shown, they are not sufficient to show that consumers would recognize the COMMERCE marks to represent a family, let alone that they would have recognized it as a family prior to July 1998, when applicant first used its COMMERCE TRUST mark. We also note that in these advertisements, the common element is not the word COMMERCE per se, but is also the prominent C design which is the subject of Registration No. 2506199, depicted infra.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Depending on the case, each of the factors may play a dominant role. DuPont, 476 F.2d at 1361, 177 USPQ at 567. Thus, in a particular case, a single duPont factor may be dispositive. Kellogg Co. v. Pack'em Enterprises Inc., 21 USPQ2d 1142, 951 F2d 330 (Fed. Cir. 1991).

In this case, the factor of the number and nature of similar marks in use on similar goods or services plays a dominant role in our decision. Applicant has made of record materials taken from the websites of fourteen third parties which use the words "COMMERCE" or "COMMERCE BANK" in their names in connection with banking services. The bank names include Commerce Bank, New Commerce Bank, Commerce Bank & Trust, another and different Commerce Bank, and Commerce Bank of Arizona. Although information provided in websites is not always accurate, in this case we find the evidence probative that there are banking services being offered under these names. First, we see no reason why a company would purport to use a name on its website and indicate the services it offers if it does not offer such services under that mark. Further, applicant's counsel's employee telephoned many of these entities, and the calls were answered with the name of the bank. In addition, many of these entities responded to the witness's request for information with written materials bearing the names of the banks.[16]

[16] In an apparent attempt to counter the evidence of third-party use of COMMERCE marks, opposer has submitted the rebuttal testimony of one of its attorneys, who explained the general efforts that are made to police opposer's trademarks, and the specific actions that have been taken in individual situations. However, the question here is not whether opposer has failed to enforce its rights, but whether, because of use of COMMERCE marks by third parties, the public distinguishes among them based on other elements in the marks.

Applicant has also submitted excerpts from yellow pages directories which show listings or advertisements for New Commerce Bank in the Greater Greenville (SC) directory, Coastal Commerce Bank in the Houma (LA) directory, and Commerce Bank & Trust in the Topeka (KS) directory.

Applicant also made of record numerous newspaper articles, taken from the Nexis database, which mention banks with the word "commerce" in their names. Although these articles are not evidence of the truth of the matters reported therein, they do show public exposure to such usage, while the fact that a banking institution is mentioned in the article indicates the existence of such institution. These stories include the following statements:

> ...the firm that represents Hillside's primary mortgagee, Commerce Bank and Trust Co.
> "Providence Journal-Bulletin" (Rhode Island), September 12, 2002;
>
> Worcester's Commerce Bank & Trust Co., for instance, said its mortgage activity has remained steady throughout the recent change in rates.
> "Sunday Telegram" (Massachusetts), September 7, 2003;
>
> Set up the city's first bank account at Commerce bank [sic].
> "The Miami Herald," August 24, 2003;
>
> Tennessee Commerce Bank yesterday reported first-quarter operating income of $196,627....
> "The Tennessean," April 16, 2003;

> Mr. Massad heads a group of investors who own Commerce Bank, the same bank where Wall Street Financial Associates Inc. has been issued a line of credit….
> "Telegram & Gazette" (Massachusetts), August 22, 2003;
>
> The principal lender--First Commerce Bank, recently acquired by Granite Falls-based Bank of Granite--approved the deal, he said.
> "Charlotte Observer" (North Carolina), August 21, 2003;
>
> John Fager, vice president of marketing for Commerce Bank & Trust, said the branch bank….
> "Topeka Capital-Journal" (Kansas), August 21, 2003;
>
> Curphy [sic] Smith named to the executive position of small business specialist at Commerce Bank in Illinois.
> "The Pantagraph" (Blooomington, IL), March 2, 2003;
>
> AFM also obtained a $2 million line of credit through Commerce Bank of Washington.
> "Puget Sound Business Journal," January 24, 2003; and
>
> Coral Gable, Fla.-based Commerce Bank, owned by Caracas' Mercantil Servicio Financieros, ...
> "Milwaukee Journal Sentinel," January 21, 2003.

In addition to the evidence of third-party use submitted by applicant, in other contexts opposer itself has acknowledged and, indeed, strongly asserted that there are many third parties using the word COMMERCE in their trademarks or names. During the prosecution of opposer's application for COMMERCE CAPITAL MARKETS (Serial No.

75422600), which matured into Registration No. 2664917, and is one of the registrations on which opposer relies in the instant proceedings, the Examining Attorney refused registration, inter alia, on the ground of likelihood of confusion with a registration for COMMERCE FUNDS and design for "mutual fund investment services, namely the solicitation and sale and distribution of mutual funds." In arguing against the refusal, opposer (as applicant therein) stated that "a search of the Lexis/Nexis Business Name Database shows that there are over 700 companies in the United States that have the word 'Commerce' in their name," and that "a search of the Business and Economy Section of the Internet Search Engine YAHOO! produced similar results." Request for recon, filed February 18, 2000. Copies of these searches were attached to the submission, and the entire file has been made of record by applicant in this proceeding.

The Lexis/Nexis materials list such company names as Commerce Union Bank, Commerce Bank and Trust, Commerce Financial, Ltd., Commerce Finance Corporation, Commerce Bank, Commerce Bank & Trust Company, Commerce Bancorp, Inc., and Commerce Financial Corporation. There are "active" listings for "Bank of Commerce" in California, Tennessee Mississippi, Texas, Wyoming, Idaho, Louisiana and Kansas. The Yahoo materials include the following:

> Redding Bank of Commerce--provider of banking services to business and professionals;
>
> National Bank of Commerce--operates six branches state-wide ;
>
> Commerce Bank--online banking and financial services for businesses and individuals;
>
> Bank of Commerce;
>
> Metro Commerce Banks--services to business clients include commercial leasing, SBA loans, construction loans, and deposit services;
>
> Commerce Bank & Trust;
>
> Commerce Bank--Midwestern United States based commercial and retail bank; and
>
> Western Commerce Bank--serving the New Mexico communities of Hobbs, Turner, Albuquerque, and Carlsbad and outlying communities within a 150 mile radius of each division or office.

Although the information provided in the Nexis and Yahoo excerpts is extremely limited, because it was opposer itself that furnished this information to show that "commerce" is a commonly used term in connection with financial services, and in support of its position that "marks incorporating the word 'Commerce' in connection with financial services are weak marks," we think that such evidence is entitled to some weight in the present proceedings.

The Board, in deciding the appeal of the Examining Attorney's refusal to register opposer's mark COMMERCE

CAPITAL MARKETS, was persuaded by its arguments and evidence, and found that, because of "the widespread use of the word 'commerce' in connection with various types of financial institutions," "consumers of financial services have become accustomed to distinguish between marks and trade names containing this word based upon other elements of the marks and trade names," and reversed the refusal of registration that was based on likelihood of confusion in In re Commerce Bancorp, Inc., Serial No. 75422600 (TTAB October 3, 2001). As shown by the file history submitted by applicant of opposer's application for COMMERCE CHECKVIEW, opposer later relied on this decision in support of its application to register this mark for "providing customers with bank statements containing images of their checks rather than the actual checks." Serial No. 76128098 (now Registration No. 2831145).

Although a party's statements during the prosecution of other applications with respect to an asserted lack of a likelihood of confusion are not binding on the Board, which has the responsibility of deciding such an issue based on the entire record, they are "illuminative of shade and tone in the total picture confronting the decision maker." Interstate Brands Corporation v. Celestial Seasonings, Inc., 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978).

In addition to opposer's prior statements regarding third-party use of "commerce" marks, opposer has also asserted, again in the prosecution of its applications for other COMMERCE marks, that COMMERCE is a suggestive term for financial services. In its application for the mark COMMERCE CAPITAL MARKETS, opposer submitted a list of 191 registered marks that contain the word "commerce," 39 of which are in Class 36. In its application for COMMERCE CHECKVIEW, opposer stated that there were 218 such registered marks, of which 43 are in Class 36. The list of third-party registrations that opposer (again as applicant therein) filed showed only the registration number and mark, without the goods or services. While such a listing would normally not be sufficient to make those registrations of record even in an ex parte proceeding, because it was submitted by opposer it is appropriate to assume, in the context of the present action, that opposer's statements as to the existence of the COMMERCE registrations, and specifically the registrations in Class 36, are accurate. Further, in addition to the list submitted by opposer, applicant has submitted, under a notice of reliance, third-party registrations for TEXAS COMMERCE BANK, COMMERCE ON LINE, NEW COMMERCE, TENNESSEE COMMERCE BANK and design, and FIRST COMMERCE BANK, all for banking services.

Third-party registrations may show the meaning of a mark or a portion of a mark in the same way that dictionaries are employed. Mead Johnson & Company v. Peter Eckes, 195 USPQ 187 (TTAB 1977). As opposer stated in its application for COMMERCE CAPITAL MARKETS, "suggestive marks are accorded a lesser degree of protection than the more distinctive arbitrary or fanciful marks," citing Money Station Inc. v. Cash Station, Inc., 38 USPQ2d 1150 (Fed. Cir. 1995) and In re Shawnee Millions Co., 225 USPQ 747 (TTAB 1985). Request for recon, filed February 18, 2000. Based on the evidence in this record, and as acknowledged by opposer during the prosecution of its applications, COMMERCE is at the very least a highly suggestive term for financial services. In fact, in several of the third-party registrations, as well as some of opposer's own registrations, the word "commerce" has been disclaimed, or the registration has issued pursuant to Section 2(f) of the Trademark Act, thus indicating that the term may be merely descriptive. See, Reg. No. 1868580 for TEXAS COMMERCE BANK, registered under Section 2(f), with "bank" disclaimed; Reg. No. 2611416 for FIRST COMMERCE BANK, with "commerce bank" disclaimed; opposer's Reg. No. 2680303 for COMMERCE WOW! ZONE and design, with a Section 2(f) claim as to the word "commerce." We also take judicial notice of the definition of "commercial bank" as meaning "a bank whose principal

functions are to receive demand deposits and make short-term loans."[17]

Because opposer's marks, in general, consist of the highly suggestive word COMMERCE coupled with descriptive or generic words, the scope of protection of opposer's COMMERCE marks is extremely limited. Essentially, opposer may use these marks only to prevent the registration of virtually identical marks for virtually identical services. Thus, in determining the issue of likelihood of confusion, we focus our attention on opposer's rights in COMMERCE BANK or relevant variations thereof for banking and mortgage services. Opposer's registered marks COMMERCE CAPITAL MARKETS, COMMERCEWOW!ZONE and COMMERCEWOW!ZONE and design, THE COMMERCE ADVANTAGE and COMMERCE are for services that, in the context of the highly suggestive nature of the mark COMMERCE, are too different from the applicant's banking, credit insurance brokerage and mortgage services, for us to find a likelihood of confusion.[18] In this connection, we

[17] Webster's II New College Dictionary, © 2001. This definition is found in the dictionary excerpt submitted by applicant in connection with the word "commerce." The Board may take judicial notice of dictionary definitions. University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

[18] We do not imply from this statement that banking services and, for example, financial planning services, or providing guided educational tours of banks, or insurance services, are not related. Rather, we say only that, in the context of the entire circumstances presented by this record, and most particularly the very circumscribed scope of protection accorded to opposer's marks, such services are not sufficiently similar to the

note that credit insurance brokerage, despite the inclusion of the word insurance in that identification, is not at all like the brokerage of automobile and homeowner's insurance or insurance agencies featuring home, accident, life, property, casualty, and business insurance, that are identified in opposer's registrations. Nor is opposer's "C" design (depicted infra), registered for banking services, at all similar to applicant's marks.

Thus, because opposer cannot show likelihood of confusion on the basis of its registered marks, it cannot rely on those registrations in terms of the issue of priority. Rather, because the key issue here is whether opposer can show likelihood of confusion with respect to the mark COMMERCE and/or COMMERCE BANK for banking or mortgage or other very closely related services, we must look at what common law rights opposer has established in those marks.

We begin this examination by noting that information about applicant, its mark and services all come from applicant's discovery responses that opposer has made of record. Applicant has responded, in requests for admission, that it did not use its COMMERCE TRUST marks before July 1998, and that its services rendered under the marks at issue are presently limited to mortgage services. The

---

applicant's identified services to support a finding of likelihood of confusion.

request for admission did not state that applicant actually began using its marks in July 1998; therefore, and because applicant never submitted any evidence as to its first use, the earliest date on which applicant is entitled to rely is the August 25, 1998 filing date of its applications for COMMERCE TRUST in typed form, and the November 29, 2000 filing date of its application for COMMERCE TRUST in stylized form. Of Counsel Inc. v. Strictly of Counsel Chartered, 21 USPQ2d 1555 (TTAB 1991).

The record shows that opposer was founded in 1973, beginning with branches in New Jersey and expanding to Pennsylvania in 1984. By the time of trial, opposer had expanded to Delaware and, in New York, New York City and parts of Long Island. From the beginning the mark COMMERCE BANK C logo (the subject of Application Serial No. 76127975, depicted infra), was used as signage on the bank branches. In 1996 opposer entered the insurance arena, originally as Commerce National Insurance Services and, since 2002, as Commerce Insurance Services. Another affiliate, Commerce Capital Markets, does personal investment, brokerage and on-line trading. This service was offered under this mark beginning in 1993, the company's presence in this area increased with the acquisition of A.H. Williams, a public finance company, in 1998.

Commerce Bank is part of opposer. It provides a full array of banking services. On the consumers side, these include checking, savings, investment products, lending products such as consumer loans, home equity loans, auto loans and residential mortgages. On the business side, it offers a full array of banking services, cash management services, and leasing and lending services, such as real estate and other commercial loans. Opposer's witness Allegra Sandelli testified that Commerce Bank's most significant growth occurred in the six years prior to her testimony, and currently it has more than 300,000 customers, 245 offices, and assets approaching $20 billion.

Opposer advertises through newspapers, business and trade publications, radio, television, direct marketing, billboards and the like. It also gives away promotional materials, such as pens, yoyos and bottles, and "Commerce Bank Ballpark" appears on the stadium for the Somerset Patriots.

Opposer has made of record numerous advertisements from 1996, 1997 and 1998 showing its use of the COMMERCE BANK C logo in connection with its banking services, including advertisements specifically for home equity loans and mortgages. One advertisement (Sandelli exhibit 14) is for a First Step Mortgage, and ran in daily newspapers in markets with low- and moderate-income households, including the

"Philadelphia Inquirer." Other ads for mortgages, prominently displaying the COMMERCE BANK C logo, ran in early 1998 in newspapers in the New Jersey shore region.

We find, on the basis of the evidence of record, that opposer developed common law rights in the COMMERCE BANK C logo for banking services, including mortgage lending services, prior to applicant's filing date/constructive use date of August 25, 1998, the date of filing of its two COMMERCE TRUST applications. (The application for COMMERCE TRUST in stylized form was, as noted previously, November 29, 2000.) Thus, opposer has established its priority.

We further find that opposer's and applicant's services are identical, in that opposer has shown prior use of its COMMERCE BANK C logo for banking services, one of the services which is identified in applicant's Application Serial No. 75542147, and for mortgage loan services (which, in any event, are a type of banking service). Thus, this duPont factor favors opposer. Further, because the services are identical, the channels of trade and classes of customers are identical as well. These customers include all members of the public, since the banking services and mortgage services are offered to everyone. These factors, too, favor opposer.

With respect to the marks, they are virtually identical. The word portion of opposer's mark is COMMERCE BANK; applicant's marks are the words COMMERCE TRUST, with one mark shown in stylized form. Obviously, the word COMMERCE is common to both marks. Further, in each, the word COMMERCE is followed by a generic or descriptive term for the type of entity performing the service. In this connection, we are not persuaded by applicant's argument that "trust," which has a definition of "total confidence in the integrity, ability and good character of another," is suggestive of a characteristic of applicant's services.[19] It is far more likely that, in connection with banking and mortgage services, consumers would view the word TRUST in applicant's marks as referring to a "trust company," which is defined in the same dictionary excerpt submitted by applicant as "a commercial bank that manages trusts." Thus, the connotations and commercial impression of both opposer's and applicant's marks, based on their respective uses of COMMERCE BANK and COMMERCE TRUST, is the same. We recognize that opposer's mark also has a prominent stylized letter "C", and that one of applicant's marks appears in stylized letters. However, even considering the very narrow scope of protection to which opposer's mark is entitled, we find that

[19] Webster's II New College Dictionary, © 2001, submitted by applicant under a notice of reliance.

these differences are too minor to distinguish the marks. This duPont factor, too, favors opposer.

Opposer has also submitted evidence regarding extensive advertising and increasing numbers of customers in what has been an expanding geographic area. Although opposer has not asserted that its mark is famous, and we do not find it to be so, this factor does not favor applicant, and must be considered neutral.

Applicant has argued that consumers are likely to be careful and discriminating purchasers when it comes to financial services. Even if we accept this as true, the differences in the parties' marks are so insignificant, and the commercial impressions so highly similar, that we think even careful purchasers are likely to be confused between COMMERCE BANK C logo and COMMERCE TRUST for identical services. Thus, although this duPont factor favors applicant, it does not outweigh the duPont factors which favor opposer.

As for the factors involving actual confusion, the evidence on this is unclear. There was some discovery testimony by applicant's witness, Frank Martell, about receiving a spate of wrong numbers and/or misdirected telephone calls for a brief period of time. We cannot determine from this testimony whether these calls were in fact evidence of actual confusion. However, the lack of

evidence of actual confusion does not weigh against opposer, since we have no information about any advertising or the extent applicant has offered any services under the subject marks. Thus, these duPont factors are neutral.

In summary, such factors as the number of similar marks for similar services and the discrimination of purchasers weigh in applicant's favor. Although, because of the highly suggestive nature of opposer's marks, we have accorded them a very limited scope of protection, opposer's mark COMMERCE BANK C logo and applicant's COMMERCE TRUST marks are so similar that, when used on identical services, we find that applicant's marks are likely to cause confusion.

Decision: The three oppositions are sustained.

(As noted in footnote 5, opposer is allowed thirty days in which to file a redacted copy of the Perry testimony deposition, and to designate which exhibits are confidential, failing which the entire transcript and all exhibits will be treated as a public record.)