

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 20, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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C.F.M. Distributing Company, Inc.

v.

*Theresa Costantine, as Personal Representative
of the Estate of Richard Costantine*

—
Opposition Nos. 91185766
against Serial No. 77402411

Original Maryland Fried Chicken, LLC

v.

*Theresa Costantine, as Personal Representative
of the Estate of Richard Costantine*

—
Opposition Nos. 91187377 and 91187378
against Serial Nos. 77402411 and 77497042

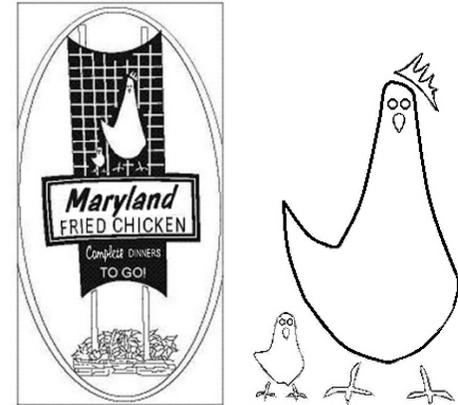
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Amber N. Davis of Beusse Wolter Sanks Mora & Maire P.A., for C.F.M. Distributing
Company, Inc., and Suzanne D. Meehle of The Meehle Law Firm, P.A., for Orig-
inal Maryland Fried Chicken, LLC.

Neil A. Saydah of the Saydah Law Firm for Theresa Costantine, as Personal Repre-
sentative of the Estate of Richard Costantine.

—
Before Bucher, Holtzman and Taylor,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

The involved applications were originally filed in 2008 by Richard Costantine. He sought registration on the Principal Register of two marks, one an image of a large exterior restaurant sign having the words “Maryland Fried Chicken: Complete Dinners To Go,” and a second of two chickens.



Both use-based applications recited the services as “restaurant services, including sit-down service of food and take-out restaurant services” in International Class 43. After Richard Costantine passed away on October 8, 2008, his widow, Theresa Costantine, was appointed as the personal representative of the estate of her late husband, and is now “applicant” in these proceedings.

The first of these two applications, Application Serial No. 77402411, was filed on February 21, 2008, by Richard Costantine, d.b.a. Maryland Fried Chicken, based upon a claim of use anywhere and use in commerce since at least as early as January 1, 1980. The mark is described in the record as consisting of “a large vertical rectangle containing an oval with a stylized design of a sign within the oval comprised of a small vertical rectangle with a checkerboard pattern and stylized designs of a small chicken and a large chicken and the wording, ‘Complete Dinners To Go!’ superimposed over the rectangle and with a horizontal rectangle containing the wording, ‘Maryland Fried Chicken’ and with the bottom legs of the sign terminating in a stylized design of a flower patch comprised of flowers and bordered by bricks.” Color is not claimed as a feature of the mark. Additionally, applicant has disclaimed all the wording in the composite mark, namely, “no claim is made to the exclusive

right to use the word ‘Maryland Fried Chicken: Complete Dinners To Go’ apart from the mark as shown.”

The second of these two applications, Application Serial No. 77497042, was filed on June 12, 2008, based upon an identical claim of use of this mark anywhere and use in commerce since at least as early as January 1, 1980. The mark is described in the record as consisting of “little chicken standing next to big chicken.”

I. The Oppositions

C.F.M. Distributing Company, Inc. (C.F.M.) opposed Application Serial No. 77402411 only (Opp. No. 91185766) while Original Maryland Fried Chicken, LLC (OMFC) has opposed both applications (Opp. Nos. 91187377 and 91187378) on the following grounds:

1. Applicant’s marks resemble marks or trade names previously used by opposers, such that when such marks are used in connection with applicant’s services they are likely to cause confusion, to cause mistake or to deceive;
2. Applicant is not now the rightful owner of the marks, and was not the rightful owner of the marks at the time of filing these applications;
3. Applicant has committed fraud on the United States Patent and Trademark Office by filing these applications;
4. If applicant ever had any rights in these marks, such rights were lost through abandonment of the marks, and they cannot be registered;
5. If applicant ever had any rights in these marks, such rights were lost through naked licensing and an absence of quality control such that the

marks no longer identify a single source of goods and services, and therefore no longer function as trademarks and cannot be registered; and

6. If applicant ever had any rights in these marks, such rights were lost through extensive third-party use of the marks, such that they no longer identify a single source of goods or services, and therefore no longer function as trademarks and cannot be registered.

Applicant, in its answers, denied all the salient allegations of opposers' original and amended notices of opposition.¹

II. The Record

The record in this case is voluminous and includes the pleadings, the files of the involved applications; trial testimony and notices of reliance, with related exhibits, submitted by each party. A partial listing of evidence submitted by opposers includes the following:

- Copies of extant, abandoned, expired and cancelled federal trademark applications and registrations, owned by the parties to this litigation and by third parties;
- Copies of expired trademark registrations issued by the State of Florida;
- File history of several federal trademark applications for registration;
- Copies of assignment records from the Assignment Branch of the United States Patent and Trademark Office;
- Corporate and leasing records for applicant's Leesburg, FL restaurant and real estate;
- Florida corporate records for enterprises involved in this litigation and of third parties;
- Website printouts for third parties;
- Deposition Transcripts of Anthony Costantine, Theresa Costantine, Robert Costantine, Paul Dion and James Gourley;
- Copies of Opposers' Request for Admissions and Applicant's Responses to Request for Admissions; Opposers' Interrogatory Requests and Applicant's Answer to Interrogatories;

¹ All three oppositions were eventually consolidated into a single proceeding, and separate counsel for the opposers have coordinated their litigation strategies in these consolidated proceedings.

- Corporate records for Maryland Fried Chicken, a general partnership; a Cross Collateral Security Agreement dated April 1, 1975; and a Warranty Deed for Orange Blossom Trail restaurant dated October 2, 1971; and
- Civil judgments of the Circuit Court for Orange County, Florida against Maryland Fried Chicken, Inc. and James Mairs, dated May and September 1975.

The evidence submitted by applicant includes documents related to applicant's 2009 litigation in an Orange County, Florida court against, *inter alia*, opposer, Original Maryland Fried Chicken, LLC, along with a subsequent settlement agreement, as well as the earlier affidavit of Richard Costantine dated February 28, 2008, with attendant exhibits and the affidavit of Theresa Costantine dated August 26, 2010, along with attendant exhibits. The parties filed lengthy briefs, and have consistently made arguments on a variety of matters, including some that we must determine prior to reaching the merits of this litigation.

III. Preliminary matters

A. Applicant's motion to strike

1. Deposition Transcript of Anthony Costantine: Notice of Reliance filed March 30, 2012 (ESTTA Doc. # 75, Exhibit #AA).

Applicant argues that the discovery deposition of Anthony Costantine should be excluded from the record pursuant to Rule 2.120(j)(1). Applicant argues that Anthony is not a party, he is not an officer, director or managing agent of the estate, nor is he a witness designated by the estate to testify on its behalf, and that in spite of the parties' stipulations, applicant has not consented to the use of his discovery deposition as evidence.

In response, opposer argues that there are multiple reasons why this discovery deposition should be included. First, Richard Costantine did in fact file a fictitious

name registration in 2008 for Maryland Fried Chicken, and one of the listed co-owners was Anthony Costantine.² In many respects, Anthony holds himself out as an agent of applicant given his long (more than 25 years) and direct (worker, manager, etc.) involvement in the Maryland Fried Chicken restaurant in Leesburg, FL. Finally, opposers argue that applicant's counsel consented to the use of this testimony on October 4, 2012.

We agree with opposers that throughout this proceeding, Anthony has played a key role on applicant's behalf,³ and he appears as a named principal in multiple entities having claims to the involved logos (e.g., a Florida partnership, an entity registered with a fictitious name, and MTM Enterprises Group, LLC). Finally, it would appear that applicant's counsel had opportunity to object to this testimony and, while objecting to some of the other submissions named by opposers, failed to object to this deposition.⁴ Hence, we deny this motion, and have considered Anthony Costantine's discovery deposition in reaching our decision herein.

² See Exhibit X to Opposers' Notice of Reliance.

³ For example, in addition to his own discovery testimony, he actually appeared with his mother, Theresa, during her trial testimony and coached her at various points.

⁴ Opposer's (OMFC's) counsel sent a letter to applicant's counsel on September 23, 2012, designed to secure a stipulation as to the documents being entered into evidence in Opposers' Notice of Reliance. Attached to the letter was a list of the evidence that OMFC intended to submit with its Notice of Reliance. This included item #4, "Deposition of Anthony Costantine in the instant case." The only deposition taken of Anthony Costantine at that time was his discovery deposition, which was taken on March 23, 2011. On October 4, 2011, applicant's counsel, Mr. Saydah, responded objecting to six specific items of evidence, but there was no objection to the deposition testimony of Anthony Costantine. Instead, after his listed objections he indicated that "***all other numbered items on the Evidence List I will consent to.***"

2. Opposer's (C.F.M.'s) Notices of Reliance (ESTTA ##71, 72, 74, and 75) were allegedly filed in an untimely manner, and hence applicant argues they should be stricken.

The record shows that on three separate occasions, C.F.M.'s counsel tried to file the involved Notices of Reliance. The first attempt was made in a timely manner, but for some reason it appears as if the United States Patent and Trademark Office website was unable to process the volume of documents submitted in conjunction with opposers' Notices of Reliance. C.F.M.'s counsel made several attempts immediately to correct this situation.⁵ There also was apparently no harm to applicant inasmuch as it received copies of the filings without any delay according to the Certificate of Service. Hence, we deny this motion, and have considered the documents submitted via these Notices of Reliance in reaching our decision herein.

3. Strike from the record Exh. A ((Doc. # 25, as attached to opposer C.F.M.'s Amended Notice of Opposition) and strike all references to Exh. A from opposer C.F.M.'s brief.

In response to this motion to strike, opposer C.F.M. acknowledges that it inadvertently failed to include this exhibit in the trove of other documents submitted during its trial period, and so we grant this motion to strike, and have not consid-

⁵ We do note that the website for the Board's ESTTA electronic filing system (ESTTA) (<http://estta.uspto.gov/>) states as follows: "Because unexpected problems can occur, you should keep filing deadlines in mind and allow plenty of time to resolve any issue which might arise. ... If ESTTA filing is not possible prior to a deadline for any reason, parties should submit their filings in paper."

ered a “Distribution Contract” between C.F.M. and Maryland Fried Chicken (Exh. A) in our determination herein.⁶

B. Applicant’s motion to amend the dates of use

When filing the involved applications, Richard Costantine repeatedly claimed a date of first use anywhere and use in commerce of January 1, 1980. Now applicant has asked to amend its dates of use to claim first use anywhere almost twenty years earlier, namely, on July 14, 1961, and use in commerce since at least as early as July 1, 1963.

These much earlier dates must be established by clear and convincing evidence. *See Bass Pro Trademarks LLC v. Sportsman's Warehouse, Inc.*, 89 USPQ2d 1844, 1856 (TTAB 2008) (respondent failed to provide clear and convincing proof of use prior to the dates of use stated in the registration).

We note that although this record is extensive, the probative value of the record has been significantly reduced by a variety of factors, *inter alia*: the imperfect or selective memories of alleged business activities that happened as long as fifty years ago; over the decades, key transactions claimed by applicant are supported by no documentation, and critical testimony often seems to be contradicted by what documentary evidence is available; material witnesses who were principals of the parties and who had personal knowledge of the business of the respective parties, including adoption of their marks, died prior to this litigation; applicant’s principal remaining witness, Theresa Costantine, presented credibility problems inasmuch as

⁶ This “Distribution Contract” of May 29, 1975, was attached to opposer’s (C.F.M.’s) amended pleadings of October 14, 2009, but was not subsequently identified and introduced in evidence during the period for the taking of testimony.

she professed in an earlier deposition to know substantially nothing of her late husband's business. Then in later testimony, in addition to contradicting her earlier testimony, she seemed to have refreshed memories and more exacting details in areas where she earlier claimed to have no knowledge. Actually, at no time did Theresa make any definitive statements on applicant's dates of first use.⁷ We certainly question whether her general statements tardily pulled from her memory concerning these much earlier use dates of the marks were made based upon her own personal knowledge.

Similarly, Richard's statements in his affidavit from the state court action concerning earlier use dates are vague and are not supported by documentation. Then, when comparing the testimony of Richard, Theresa and Anthony Costantine, whenever their statements move beyond vague and ambiguous generalities ("the company' went bankrupt in the late 70s"), the narratives surrounding ownership and control involve many contradictions and inconsistencies. This decreases significantly the reliability of statements contained in some affidavits and testimony. In fact, as to the specific first dates of use to which applicant wants to amend, we note that even Richard merely recites to the undeniable fact that his brothers and extended family members began using the mark in Orlando in the early 1960's. For example:

- Applicant was an original owner and operator of a restaurant at 2740 S. Orange Blossom Trail, Orlando, which was the first restaurant that used the Applicant's trademark in approximately 1959, and in approximately June,

⁷ Theresa Affidavit, ¶10: "The Company opened a number of franchise restaurants in the early 1960's based on the original SOBT [South Orange Blossom Trail] restaurant, including a Leesburg (Florida) Restaurant. The Leesburg Restaurant has operated continuously and successfully since that time."

1979, the Applicant purchased the Leesburg, Florida restaurant, which had been using the Applicant's mark from sometime in the 1960's (and currently is the only restaurant owned by the Applicant). Thus, the Applicant has continuously used the trademark since the inception of the first restaurant in approximately 1959 to date.

- Applicant has continuously used the trademark either with the 2740 S. Orange Blossom Trail, Orlando Florida restaurant or the Leesburg, Florida restaurant since approximately 1959.
- Richard Affidavit, ¶9: The Maryland Fried Chicken restaurant located in Leesburg, Florida (the "Leesburg Restaurant") was originally opened as a franchise restaurant in the early 1960's. The Leesburg Restaurant has operated continuously and successfully since that time.

Note that Richard does not state with specificity why he should be able at this late date (i.e., 2008), shortly after alleging a first use date of 1980, to claim that he continuously used the involved marks since very specific dates in 1961 or 1963.

Given the exacting standard against which we must weigh such an amendment, we find that the affidavits and testimony put forward by applicant definitely fail to provide clear and convincing support for an amendment to the dates of use. In fact, as will be seen in much more detail below, based upon this entire record, it is questionable what rights applicant can even claim as of 1980.

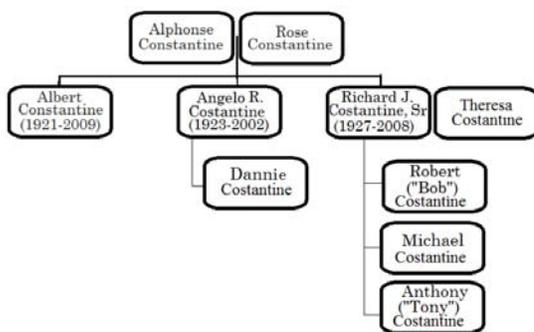
IV. Background

We are faced herein with an extended family spat that has been building for decades over the ownership of asserted source-indicators for restaurants selling pressure-fried chicken. These disputes have survived the passing of three brothers from what has been popularly referred to as "the greatest generation," including significantly for this proceeding, Richard Costantine's death in 2008. The disagreements all arise from a string of restaurants begun in the 1960s in the Orlando, Florida area trading under the name, "Maryland Fried Chicken." While all the parties

to this litigation seem to agree that in the context of fast food restaurants, this three-word term, “Maryland Fried Chicken,” retains substantially no source-indicating capacity, that has not stopped constant disagreements over a range of cartoon-like fowl images alone and within a variety of composite Maryland Fried Chicken service marks and trademarks, apparently used in Central Florida by both related and un-related parties since the 1960s.

A. The Constantine/Costantine family

In order to present the extended family relationships integral to this dispute in an understandable context, we have created from the record an abbreviated Family Tree as well as an undated photograph from happier times:



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B. The fifty year narrative

Albert Constantine, a native of Wilmington, Delaware, moved to Orlando, Florida in 1958-59. His full-menu, sit-down restaurant known as simply “Constantine’s” was opened in 1959 at 2740 South Orange Blossom Trail (SOBT), Orlando, FL. Af-

⁸ In addition to observing their lack of “constancy” with business naming practices, one will note a decidedly relaxed attitude toward spelling of the shared family name. While Albert spelled his surname with the Latin “Constantine,” as did his father, the family patriarch, his two younger brothers (and their families) seem to prefer the more familiar “Costantine.”

ter experimenting with thousands of combinations of ingredients and steps for preparing chicken using pressure-fryers and pure peanut oil, he decided to target the many Baltimoreans then in Central Florida by selling his delicious product as “Maryland Fried Chicken.” This three-word term has evidently been used much further north (e.g., in the Delmarva Peninsula) since at least as early as 1828, when one Mary Randolph used the term “Maryland Fried Chicken” in her book, *The Virginia House-Wife*. By his own admission, Constantine also had grand ideas of taking on an honorary Kentucky colonel named Harland Sanders, then becoming well-known for his own popular brand of franchised fried chicken.

In February 1961, Albert Constantine and a partner of his, W.H. Truesdell, filed a Florida trademark application for **MARYLAND FRIED CHICKEN**. The address of applicant was Spartan Drive and Highway 17/92, in Maitland. According to later federal trademark applications, Albert Constantine claimed July 14, 1961 as the first date that the term **MARYLAND FRIED CHICKEN** was used.

Evidently sometime later, Albert’s two younger brothers, Angelo (Angel) R. Costantine (1923-2002) and Richard J. Costantine, Sr. (1927-2008), moved to Florida from Delaware and allegedly bought out Mr. Truesdell's interest in the growing business, although there appears to be no documentation in this extensive record supporting when this alleged purchase took place, or indeed, whether it ever actually happened this way. In any case, a “chattel mortgage” document from February 1962 shows that brothers Angelo, Albert and Richard were “doing business as Con-

stantine's Restaurant.”⁹ At some indeterminate point, Albert Constantine erected a 35-foot high sign saying “Maryland Fried Chicken” in front of Constantine's Restaurant, and his fried chicken became an instant hit. It is the imagery of this sign that is portrayed in the drawing of involved Serial No. 77402411 and several third-party composite marks implicated herein.

Witnesses for applicant move from vague discussions of “the Company” (e.g., Albert and Truesdell, then Albert, Angelo and Richard) during the early sixties and quickly morph into the history of “Maryland Fried Chicken, Inc.” However, despite no evidence of the legal structure of “the Company” between 1959 and 1963, it seems clear that “Maryland Fried Chicken, Inc.” was not created until 1963, and the documents of record demonstrate no ownership interest in this entity by Richard or Angelo.

On July 22, 1964, Maryland Fried Chicken, Inc., a Florida corporation (of Maitland, FL) filed USPTO Application Serial No. 72198364 for “carryout restaurants” claiming first use anywhere as of July 14, 1961, and first use in commerce since at least as early as July 1, 1963, from which the resulting Registration No. 0798190 issued on October 26, 1965. Registrant agreed during the prosecution of this registration that “no claim was made to the exclusive right to use the words ‘Maryland Fried Chicken’ or the representation of the chicken apart from the mark as shown. This entity initiated a



⁹ ESTTA #64, Theresa, Exh. 3.

franchise system beginning with outlets in the Orlando area. In any case, the record shows that an inventory of restaurant equipment created on December 9, 1964, was for the eatery still known as “Constantine’s Restaurant.” As



seen in the above photo taken in early November 1967, the name Constantine’s Restaurant and Maryland Fried Chicken were both prominently displayed as service marks for the establishment. Applicant actually argues that this photo of Richard’s wife, Theresa (and the current “applicant”), taken in front of Constantine’s Restaurant is a piece of the overall proof of its continuous use of the marks since at least 1967. However, as noted by opposers, applicant has been unable to provide a single piece of documentation that Richard Costantine was ever an officer, director or owner of Maryland Fried Chicken, Inc., or that he or Angelo ever had a property interest in the original Maryland Fried Chicken restaurant on SOBT (or any other individual restaurant in the 1960s to mid-70s).

While applicant suggests that “the Company was operated by the brothers Albert, Richard, and Angelo Costantine” for some unspecified number of years, growing divisions among the brothers were apparent from the mid-1960s. Among the confusing web of companies that have come and gone, two new corporations were formed within days of each other in May 1967. First, on May 24th, National Restaurant Supply Inc., (Maitland FL) was formed by the two younger brothers, Angelo Costantine, Pres. & Treas. (Apopka FL), and Richard Costantine, VP & Sec. (Altamonte Spring FL), having a business mailing address of 1712 Hwy 17/92, Mait-

land.¹⁰ Among its roles was distribution of packaging, etc. Although applicant also contends that this entity retained ownership of the five restaurants then in existence, there is nothing in the record to verify that to be true.¹¹ Then days later, on May 26th, “Maryland Fried Chicken of S.O.B.T., Inc.,” was allegedly formed, Theresa (President), Robert (V.P.), and Michael Costantine (Sec./Treas./Director). We have seen no evidence of any trademark assignments from Maryland Fried Chicken, Inc. to National Restaurant Supply, to Maryland Fried Chicken of S.O.B.T., Inc., or to Richard, Theresa or Angelo. Based upon the overall record and the lack of documentation supporting applicant’s position, there remain many unanswered questions about the purpose and role of these two corporations, what tangible or intangible properties, if any, they may have owned, and how these entities related to the Maryland Fried Chicken, Inc. entity formed on February 15, 1963. As of May 1967, Albert seemed to be in control of Maryland Fried Chicken, Inc., which was still very much in existence, and possessed a claim to the chain of title in the only existing federal trademark registration owned by the family.

The next corporate iteration of Maryland Fried Chicken, Inc., was a Delaware corporation listing principals named James F. Mairs (Winter Park FL), Carol Register and Robert Warfield. This was formed on April 16, 1970, and was the surviving entity after a merger with Maryland Fried Chicken, Inc., the Florida Corporation, formed in February 1963, and Maryland Fried Chicken of America, Inc., a Georgia

¹⁰ Richard Affidavit, ¶10: “Maryland Fried Chicken, Inc. ultimately went bankrupt and dissolved. At that time, Angelo and I formed National Restaurant Supply, Inc., which retained ownership of five Maryland Fried Chicken restaurants ... I took ownership of the restaurant located on Orange Blossom Trail.”

¹¹ *Id.*

Corporation (about this latter disappearing entity, the record reveals nothing). We note that within these records of incorporation, there is no indication of the ownership interest of Richard Costantine, or indeed, any member of the Constantine/Costantine family. Nonetheless, Albert seems to have retained an interest in the surviving Delaware corporation inasmuch as on July 23, 1971, he signed the Sections 8 and 15 affidavits on Registration No. 0798190 as “president” of Maryland Fried Chicken, Inc. The 1971 specimens of record refer to the fact that “Maryland Fried Chicken” is “prepared from Al Constantine’s famous recipe”

Then on October 2, 1971, the original South Orange Blossom Trail property was transferred from Maryland Fried Chicken, Inc. (with signatures by Pres. Albert C. Constantine and Treas. Lee Jay Colling) to Albert C. Constantine, as an individual.¹² It was not until 1985-86 that Albert Constantine, in connection with the twenty-year renewal of federal Registration No. 0798190, recorded a *nunc pro tunc* assignment to himself that he then declared had been effective as of January 1, 1972. If these two documents are to be trusted, as of 1971-72, it appears as if Albert Constantine considered himself then to be the sole owner of the original restaurant on South Orange Blossom Trail as well as of the federal trademark registration.

The record contains some claims that Albert Constantine “went on to establish a chain of [Maryland Fried Chicken restaurants] that earned him millions before he

¹² See opposers’ Exhibit JJ. This would certainly seem to contradict applicant’s claim that Richard “took ownership of the restaurant located on Orange Blossom Trail.”

finally sold the franchise operation in 1975.”¹³ Other witnesses claimed that after “the Costantine brothers” built a successful franchise system of Maryland Fried Chicken ... in the 1960s and 1970s,” the “brothers sold the Company.”

While these two “successful” scenarios are contradictory in their details, the documents in the record suggest that perhaps the unvarnished truth is even more complicated. Between April and September of 1975, various contracts, security agreements growing out of unpaid promissory notes, and multiple judgments against Maryland Fried Chicken, Inc., and against James F. Mairs, support the conclusion that the Maryland Fried Chicken enterprise was experiencing financial difficulties. Sprinkled throughout the record is testimony about the company “going bankrupt” in the 1970s.¹⁴ Also in the time frame of 1975-76, C.F.M. Distributing, one of the opposers herein, agreed to handle the continued distribution of fast food products and other supplies to Maryland Fried Chicken, Inc.’s restaurants. By the time C.F.M. Distributing appeared on the scene in the mid-1970s, Angelo and Richard Costantine’s National Restaurant Supply Inc. was clearly no longer in business.

In June 1978, another entity known as Maryland Fried Chicken, Inc. was formed by Evan and Zack Zagoria (South Miami FL), who also submitted a Florida state trademark application for **MARYLAND FRIED CHICKEN: COMPLETE DINNERS TO GO**. Although there may have been a franchisee in Miami at that time, this short-lived Florida corporation seems to have had no relationship with any of the

¹³ Several citations within the record: *see e.g.*, <http://marylandfriedchicken.com/> as captured on 10/01/2009; Original Article <http://www.citypaper.com/special/story.asp?id=6651>, in the Baltimore City Paper.

¹⁴ See, e.g., Testimony of Anthony Costantine at 16, 19.

Constantine/Costantine family enterprises and no perceptible effects on the ownership rights of anyone involved in this dispute.

There is no indication in the record that Richard Costantine was involved with the family business at all between the mid-1970s and 1979. In fact, it was not until June 1979 that Richard and Theresa Costantine leased a pre-existing Maryland Fried Chicken restaurant located at 708 N. 14th St., Leesburg, FL. This conveyance had a detailed listing of restaurant contents, including the “Henny Penny” pressure fryers, but without any indication of a transfer of even the goodwill associated with that restaurant. The town of Leesburg is located in Lake County, some distance west of Orange County and the city of Orlando. Richard and Theresa’s son, Robert, now estranged and a principal in opposer, Original Maryland Fried Chicken, LLC,¹⁵ was involved in 1979-80 with opening the Leesburg restaurant. Robert’s younger brothers, Michael and Anthony were part of this family operation for years, and continue to be employees of the Maryland Fried Chicken restaurant of Leesburg. Although declarations and testimony submitted in support of applicant repeatedly claim that the Leesburg restaurant has been operating continuously since the 1960s, there is no documentation to support this claim.¹⁶ To the contrary, the tract of land located at 708 N. 14th St., Leesburg was leased to Burger Queen of Leesburg,

¹⁵ OMFC was not formed until decades later, around 2006.

¹⁶ In other affidavits, Richard claimed to have taken over ownership of the restaurant on Orange Blossom Trail, perhaps rationalizing this bridge as support for continuous ownership of a Maryland Fried Chicken operation continuously since the 1960s, but there are several problems with this line of reasoning. First, there is nothing in the record corroborating the claim that Richard regained ownership of the SOBT restaurant, and it also seems clear that the SOBT location closed before Richard took over the Maryland Fried Chicken restaurant in Leesburg.

Inc., in February 1961, a building then had to be constructed, and the resulting restaurant was operated as a Burger Queen restaurant at that location at least until 1966. Throughout much of the 1970s, this restaurant location was an independent Maryland Fried Chicken restaurant, operated by another tenant, U-MAC Fast Foods Inc. of Leesburg (Cecil and Mary Harris), until at least 1976. It also seems clear from Anthony's testimony that his parents, Richard and Theresa, never expanded beyond the Leesburg restaurant location (i.e., at any time since 1979-80).¹⁷

Then, as noted earlier, in 1985-86, Albert Constantine recorded his *nunc pro tunc* assignment (allegedly as of January 1, 1972) to himself, and then immediately renewed this federal trademark registration individually as the sole "owner" of the federal trademark registration.

Almost ten years later, on October 26, 1995, Albert C. Constantine assigned his entire interest in the federal registration to Edith Swain of Waycross GA.¹⁸ Applicant questions whether this 1995 transaction involved the transfer of anything of residual value. In fact, Anthony referred to family lore that sometimes Albert "tried to make a quick buck."¹⁹ Then in 1997-98, Richard Heavilon and Edith Swain, as joint owners, filed applications for **THE ORIGINAL MARYLAND FRIED CHICKEN** (in standard character format and in special form) and **AL'S ORIGINAL MARYLAND FRIED CHICKEN**, all for "restaurant services." Also in 1997, C.F.M. Distributing Company, Inc., one of the opposers herein, filed a cancellation, resulting in the can-

¹⁷ Anthony testimony at 45.

¹⁸ Registration No. 0798190; assignment recorded at Reel 1539/Frame 0149.

¹⁹ Anthony testimony at 28.

cellation of Registration No. 0798190 that had issued on October 26, 1965. Despite the alleged transfer of ownership to Ms. Swain, according to United States Patent and Trademark Office records, Albert Constantine appeared *pro se* in this action.

The record contains a Florida Secured Transaction Registry document of April 23, 2002, that was filed on behalf of Maryland Fried Chicken, a Florida General Partnership, and signed by Michael, Anthony and Richard Costantine.

On July 14, 2005, after almost a decade of some form of ownership of the federal trademark registrations for **MARYLAND FRIED CHICKEN**, **THE ORIGINAL MARYLAND FRIED CHICKEN**, **AL'S ORIGINAL MARYLAND FRIED CHICKEN**, Ms. Edith Swain, of Waycross Georgia, assigned her half interest in Registration No. 2428658 (**THE ORIGINAL MARYLAND FRIED CHICKEN** in special form) to Robin S. Heavilon, an individual residing in Blackshear, Georgia.²⁰

In July 2006, Robert Costantine, through Original Maryland Fried Chicken, LLC, (opposer to both applications involved herein) opened his own Maryland Fried Chicken restaurant (the "Apopka restaurant") at 1672 South Orange Blossom Trail, Apopka (Orange County), FL.

Then in February 21, 2008, one of the applications at issue (Serial No. 77402411) was filed by Richard Costantine, an individual, d.b.a. Maryland Fried Chicken. A second application filed on the same day (Serial No.77403096) for the mark **MARYLAND FRIED CHICKEN** (*in standard character format*) was refused by the

²⁰ The record shows that at some point in the past, opposer C.F.M. was also involved in litigation with Ms. Swain in order to ensure that they could continue supplying restaurants with Maryland Fried Chicken imprinted products. See Testimony of James E. Gourley, at 35-37.

examining attorney as being merely descriptive. On the same day (February 21, 2008), co-owners Anthony, Michael and Richard Costantine, using the restaurant address of 708 N. 14th St., Leesburg, FL, registered “Maryland Fried Chicken” as a Fictitious Name for their group. Then on June 12, 2008, the second of the applications at issue (Ser. No. 77497042, i.e., “little chicken standing next to big chicken”) was filed by Richard Costantine, d.b.a. Maryland Fried Chicken. We note that in all three of these applications, the claimed date of first use is January 1, 1980, which is generally consistent with the enlargement and re-opening of the Maryland Fried Chicken restaurant in Leesburg by Richard and Theresa Costantine in the 1979-80 timeframe.

On October 8, 2008, Richard Costantine passed away and Theresa Costantine was appointed as the personal representative of her late husband’s estate.

Within months of his father’s death, Robert Costantine opened a Maryland Fried Chicken restaurant (Feb-March 2009) at 17195 US Hwy 441, Mt. Dora (Lake County), FL. While Robert argues that no one entity or individual retained any exclusive rights in the Maryland Fried Chicken logos as of that date, it does appear as if Albert Constantine provided encouragement for his nephew, Robert.²¹ Following a temporary injunction by an Orange County court, Robert signed a settlement

²¹ Richard Affidavit, ¶23: “I was recently provided a copy of a document signed by my brother Albert purporting to give Robert the right to use the Mark and freely open Maryland Fried Chicken restaurants [2005]. My brother Albert is not of sound mind and has spent the past few years in a nursing home. He has not been involved in the business for well over twenty years and has no rights in the Mark. Notwithstanding his lengthy absence from the business, this is not the first time Albert has attempted to convey his non-existent rights to the Mark. He previously attempted to assign all of his rights in the Mark to a woman in Georgia. It is my understanding that a court determined the assignment document to be worthless during litigation between her and our distributor.”

agreement whereby Original Maryland Fried Chicken, LLC and Robert Costantine agree not to place a Maryland Fried Chicken restaurant in Lake County, FL. In ending what has been characterized by opposer C.F.M. as nothing more than a “family dispute,” Robert testified that his “[signing the settlement agreement] was just to – to make my mother happy. You know what I’m saying? ...”

On June 5, 2009, Application Serial No. 77752805 (“Modern” Chicks Design) was filed by MTM Enterprises Group, LLC, based upon applicant’s claim of use anywhere and use in commerce since at least as early as May 1, 2009.²² This application has been suspended awaiting the outcome of Application Serial No. 77497042, the second application at issue. This application was not filed by applicant (i.e., the estate of Richard Costantine). Rather, MTM Enterprises Group, LLC is a franchising company owned by Anthony Costantine, Michael Costantine and their previous attorney in this case, Matthew McKinney.²³ In this latest family chapter, it seems that Richard's two youngest sons, Michael and Anthony Costantine, who had operated his Leesburg restaurant with him side-by-side for nearly thirty years, are still hoping to capitalize on the family business by offering exclusive and authentic Maryland Fried Chicken Franchises to potential franchisees in multiple areas. However, as noted by opposers, Theresa Costantine is not listed as an owner of MTM En-

²² We also note that although this was a Section 1(a) application based on use in commerce, applicant’s own witnesses have admitted that no one actually uses this mark and that the applicant, MTM Enterprises Group, LLC, owns no restaurants.

²³ Evidently any email inquiries sent to info@MarylandFriedFranchise.com go largely to Matthew McKinney. Anthony testimony at 37.

terprises Group, LLC.²⁴ And although the record contains testimony that Theresa allegedly gave MTM a license, there is no documentation supporting this claim.

In October 2009, opposers accessed << <http://marylandfriedchicken.com/> >> a website allegedly owned by one Michael Smith of Conway, SC – but having no obvious connections to anyone associated with applicant.²⁵

On September 29, 2010, this Board held Richard Costantine’s mark **MARYLAND FRIED CHICKEN** (Ser. No. 77403096) to be merely descriptive, and furthermore, that the claimed § 2(f) showing of acquired distinctiveness was insufficient.²⁶

Then on January 12, 2011, Application Serial No. 85216239 for **MARYLAND FRIED CHICKEN** was filed by Theresa Costantine d.b.a. Maryland Fried Chicken, based upon applicant’s claim of use anywhere as early as July 14, 1961, and use in commerce since at least as early as July 1, 1963. As seen earlier, there is a Maryland Fried Chicken entity recorded with a fictitious name, but the named owners are her sons Anthony and Michael, and her late husband, Richard, but not Theresa.²⁷

C. The opposers in focus

1. Original Maryland Fried Chicken, LLC

²⁴ See Exhibits D and M.

²⁵ See Exhibit Z. Note, this should not be confused with <http://www.marylandfried.com/> another website shown in the record advertising the Melbourne (FL) “Original Maryland Fried Chicken” restaurant – an operation that is located far away from Orange County. Although other evidence in the record suggests that this restaurant is still in existence, the website from which the screen print was copied is now defunct. Of course, applicant is not shown to be affiliated in any way with either of these websites.

²⁶ See Exhibits K1-K5.

²⁷ See Exhibit C.

Robert Costantine helped his father set up the Leesburg, Florida restaurant in 1979-80. He opened a Maryland Fried Chicken restaurant in Apopka (Orange County) in 2006, which is still in operation. When Robert individually, along with Original Maryland Fried Chicken, LLC, of which Robert is president, tried to open a second location in Mt. Dora in 2008, his late father sued him over the placement of this restaurant in the same county – noting *inter alia* that the Mt. Dora site was only thirteen miles away from the Leesburg restaurant via a major U.S. highway. This single action of suing his eldest living son was the only evidence in the record of Richard’s policing the claimed marks on the part of applicant. Evidently Robert and Richard were estranged from each other at the time of his father’s death. The eventual settlement agreement simply prohibits Robert from establishing another restaurant within Lake County.

2. C.F.M. Distributing Company, Inc.

C.F.M.²⁸ was formed with the support and blessing of the owners of Maryland Fried Chicken, Inc. The timing suggests it may well have taken over a role played earlier by the then-defunct National Restaurant Supply, Inc. Since some indeterminate date in the early 1970s, C.F.M. has served as the commissary and exclusive distributor of goods and materials bearing the involved marks for the expanding number of Maryland Fried Chicken restaurants as they cropped up across the southeastern states. In the mid-1970s, C.F.M. began distributing C.F.M.’s proprietary coleslaw and breading mix, food containers, disposable paper, plastics, T-shirts,

²⁸ There is a hint of a sense of humor in the suggestion in the record that C.F.M. is simply a reverse spelling of the initialism, M.F.C.

and chemical cleaners – substantially all of which were emblazoned with the Maryland Fried Chicken logos. By 1975, the hold of the Constantine/Costantine family on its “franchise operations” seemed to be at risk with the financial difficulties being experienced by the family business of fast-food restaurants.

Despite the confusing and conflicting record of Constantine/Costantine family ownership, C.F.M. has been continuously providing fast food products and other supplies to an ever-changing number of Maryland Fried Chicken restaurants (approximately thirty nationwide, and a dozen still in the state of Florida). Each of these restaurants has continued to be independently owned and operated – some for more than forty years and in some cases documented in the record, now independently owned and operated by the second generation of family members.²⁹ In fact, it is interesting to note that for much of the past thirty years, C.F.M.’s customers have included applicant’s Leesburg restaurant, which purchases boxes and other supplies from C.F.M. bearing Maryland Fried Chicken trademarks and logos.

D. Timeline

Given the extensive record created during this litigation, we have set up a brief timeline of relevant, documented events over the past fifty-five years:

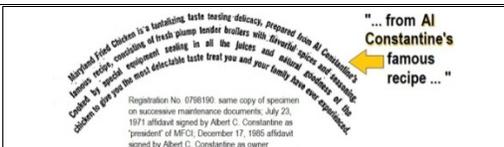
1958	Albert Constantine (1921-2009) second son of Italian immigrants, Alphonse and Rose Constantine (then of Delaware), moved to Orlando Fl. with plans to open a restaurant
Feb/March 1959	Albert and his mother together purchased a restaurant property located at 27 th and South Orange Blossom Trail from Burrell Chastain (formerly “Chastain’s Restaurant”) 2740 South Orange Blossom Trail, Orlando, FL, and soon thereafter opened “Constantine’s Restaurant”

²⁹ Testimony of James E. Gourley, at 15-16, 20, 35, 45, 49.

Feb. 10, 1961	Florida state trademark application for MARYLAND FRIED CHICKEN was filed by W.H. Truesdell and Albert Constantine ³⁰	
	Albert's two younger brothers, Angelo (Angel) R. Costantine (1923-2002) and Richard J. Costantine, Sr. (1927-2008), moved to Florida from Delaware and bought out Mr. Truesdell's share of the Company	
July 14, 1961	Date of first use anywhere as claimed on Maryland Fried Chicken Inc. federal trademark application	
Feb. 21, 1962	Angelo R. Constantine, Albert Constantine and Richard Constantine, were still doing business as Constantine's Restaurant ³¹	
February 15, 1963	Maryland Fried Chicken Inc. a Florida corporation, was formed	[Merged into Maryland Fried Chicken, Inc., a Delaware corporation on April 16, 1970]
July 1, 1963	Date of first use in commerce as claimed on MFC Inc. federal trademark application	
July 22, 1964	Maryland Fried Chicken, Inc., a Florida corporation (of Maitland, FL) filed Application Serial No. 72198364 for "carryout restaurants" from which the resulting Registration No. 0798190 issued on October 26, 1965. No claim was made to the exclusive right to use the words "Maryland Fried Chicken" or the representation of the chicken apart from the mark as shown	
Dec. 9, 1964	Equipment and Inventory lists for "Constantine's Restaurant"	
Oct. 26, 1965	Registration No. 0798190 issued to Maryland Fried Chicken, Inc.	
May 24, 1967	National Restaurant Supply Inc., (Maitland, FL) formed by Angelo Costantine, Pres. & Treas. (Apopka, FL), and Richard Costantine, VP & Sec. (Altamonte Spring, FL); business mailing address, 1712 Hwy 17/92, Maitland	
May 26, 1967	Maryland Fried Chicken of S.O.B.T., Inc., formed, Theresa (President), Robert (V.P.), and Michael Costantine (Secretary/Treasurer/Director) Dissolved December 5, 1978	
Aug. 8, 1968	Maryland Fried Chicken of Union Park, Inc., formed, listing Dannie Costantine as owner; Union Park Maryland Fried Chicken Restaurant is located at 9710 E. Colonial Dr., Orland, FL.	
April 16, 1970	Maryland Fried Chicken, Inc., a Delaware corporation listing James F. Mairs (Winter Park FL), Carol Register / Robert Warfield was formed with the merger of Maryland Fried Chicken, Inc., a Florida Corporation, and Maryland Fried Chicken of American, Inc., a Georgia Corporation	

³⁰ See opposers' Exhibit F.

³¹ Chattel Mortgage, ESSTA 64, Teresa, Ex. 3

July 23, 1971	Albert C. Constantine signed Sections 8 and 15 affidavits as “president” of Maryland Fried Chicken, Inc.	
August 1971	Promissory Note (See Security agreement of April 16, 1975)	
October 2, 1971	South Orange Blossom Trail property transferred from MFC Inc. (Pres. Albert C. Constantine and Treas. Lee Jay Colling) to Albert C. Constantine ³²	
January 1, 1972	Date listed on Albert Constantine’s <i>nunc pro tunc assignment of federal Trademark Registration</i> to himself, recorded January 16, 1986	
April 16, 1975	Cross Security Agreement granting Southeast First National Bank of Maitland interest in four pieces of real estate and the restaurant inventory (References promissory note of August 1971); signed by James W. Sackett as V.P. of Maryland Fried Chicken, Inc. ³³	
May 28, 1975	Judgment for Bank of East Orange against Maryland Fried Chicken, Inc., and James F. Mairs ³⁴	
September 23, 1975	Judgment for Continental Can Company against Maryland Fried Chicken, Inc., and James F. Mairs ³⁵	
December 11, 1976	National Restaurant Supply Inc., (Maitland FL) formed in May 1967, by Angelo Costantine, Pres. & Treas. (Apopka FL), and Richard Costantine, VP & Sec. (Altamonte Spring FL), is dissolved	
June 21, 1978	Maryland Fried Chicken, Inc. formed by Evan & Zack Zagoria (S. Miami)	
June 21, 1978	Florida state trademark app. for MARYLAND FRIED CHICKEN: COMPLETE DINNERS TO GO was filed by Maryland Fried Chicken, Inc. (S.Miami) ³⁶	
Dec. 5, 1978	Maryland Fried Chicken of S.O.B.T, Inc., was dissolved	
June 28, 1979	Richard and Theresa Costantine executed a mortgage agreement on building at 708 N. 14 th St., Leesburg, FL, with detailed listing of restaurant contents; Son, Robert, is involved with formation of this restaurant	
December 5, 1979	Dissolution of Maryland Fried Chicken, Inc., a Delaware corporation listing James F. Mairs (Winter Park FL) formed in April 1970	
December 16, 1981	Maryland Fried Chicken, Inc. formed by Evan and Zack Zagoria (South Miami FL) in June 1978 is dissolved	
Dec. 17, 1985	Albert Constantine signed Renewal as “owner”	
January 16, 1986	Albert Constantine recorded <i>nunc pro tunc assignment</i> (allegedly as of January 1, 1972) to himself of federal Trademark Registration	
October 26, 1995	Albert Constantine assigned his entire interest to Edith Swain (Waycross, GA) ³⁷	
April 29,	ITU/1(b) Application Serial No.	

³² See opposers’ Exhibit JJ.

³³ See opposers’ Exhibit II.

³⁴ See opposers’ Exhibit GG.

³⁵ See opposers’ Exhibit HH.

³⁶ See opposers’ Exhibit G.

³⁷ Registration No. 0798190; assignment recorded at Reel 1539/Frame 0149.

1997	75283437 was filed by Richard Heavilon and Edith Swain, later amended to 1(a) based upon applicant's claim of use anywhere and use in commerce since at least as early as October 10, 1997.	THE ORIGINAL MARYLAND FRIED CHICKEN
June 17, 1997	Application Serial No. 75310109 was filed by Richard Heavilon and Edith Swain, as joint owners from which the resulting Registration No. 2428658 for "restaurant services" issued on February 13, 2001	
August 8, 1997	Registration No. 0798190 was cancelled as a result of Cancellation No. 92025732 brought by C.F.M. Distributing Company, Inc.; Albert Constantine appeared <i>pro se</i>	
August 27, 1998	Edith Swain and Richard Heavilon filed ITU Application Serial No. 75543675 for AL'S ORIGINAL MARYLAND FRIED CHICKEN , later abandoned	
February 13, 2001	Registration No. 2428658 for "restaurant services" issued to Richard Heavilon and Edith Swain, as joint owners	
April 23, 2002	Florida Secured Transaction Registry filed on behalf of Maryland Fried Chicken, a Florida General Partnership, signed by Michael, Anthony and Richard Costantine ³⁸	
July 14, 2005	Ms. Swain, an individual residing in Waycross Georgia, assigned her half interest in Registration No. 2428658 to Robin S. Heavilon, an individual residing in Blackshear Georgia, as recorded by the United States Patent and Trademark Office on December 21, 2006 (at Reel 3448/Frames 0812 and 0853)	
July 2006	OMFC / Robert Costantine opened his own Maryland Fried Chicken restaurant at 1672 South Orange Blossom Trail, Apopka (Orange County) FL	
February 21, 2008	One of the applications at issue (Ser. No. 77402411) was filed by Richard Costantine d.b.a. Maryland Fried Chicken, based upon applicant's claim of use since at least as early as January 1, 1980	
February 21, 2008	Application Serial No.77403096 was filed by Richard Costantine d.b.a. Maryland Fried Chicken, also based	MARYLAND FRIED CHICKEN

³⁸ See Exhibit FF.

	upon applicant's claim of use since at least as early as January 1, 1980; the examining attorney found the mark to be merely descriptive. ³⁹	
February 21, 2008	Maryland Fried Chicken, filed as a Fictitious Name for joint owners Anthony, Michael and Richard Costantine, with address of 708 N. 14 th St., Leesburg, FL	
June 12, 2008	The second of the applications at issue (Ser. No. 77497042, i.e., "little chicken standing next to big chicken," was filed by Richard Costantine d.b.a. Maryland Fried Chicken, based upon applicant's claim of use since at least as early as January 1, 1980	
October 8, 2008	Richard Costantine passed away and Theresa Costantine was appointed as the personal representative of her husband's estate	
Feb-March 2009	Robert Costantine opened a Maryland Fried Chicken restaurant at 17195 US HWY 441, Mt. Dora (Lake County), FL; following temporary injunction by an Orange County court, settlement agreement where OMFC, LLC and Robert Costantine agree not to place a MFC restaurant in Lake County, FL	
June 5, 2009	App. Serial No. 77752805 filed by MTM Enterprises Group, LLC; based upon applicant's claim of use anywhere and use in commerce since at least as early as May 1, 2009; MTM Enterprises Group, LLC is a franchising company owner by Anthony Costantine, Michael Costantine and their previous attorney in this case, Matthew McKinney. See Exhibit D ⁴⁰	
October 1, 2009	Opposers accessed << http://marylandfriedchicken.com/ >> a website allegedly owned by one Michael Smith of Conway, SC ⁴¹	
September 29, 2010	TTAB held Richard Costantine's mark MARYLAND FRIED CHICKEN (Ser. No. 77403096) was merely descriptive and that § 2(f) showing was insufficient ⁴²	
January 12, 2011	Application Serial No. 85216239 for MARYLAND FRIED CHICKEN was filed by Theresa Costantine d.b.a. Maryland Fried Chicken, based upon applicant's claim of use anywhere as early as July 14, 1961 and use in com-	

³⁹ See Exhibits K1-K5.

⁴⁰ Application Serial No. 77752805 "Modern" Chicks Design; this application has been suspended pending resolution of the instant Opposition Proceeding, because the examining attorney believes the new application is likely to cause confusion with Application Serial No. 77497042. See Exhibit M.

⁴¹ See Exhibit Z.

⁴² See Exhibits K1-K5.

	merce since at least as early as July 1, 1963	
April 30, 2011	MTM Enterprises Group, LLC changes mailing address to Leesburg MFC address	
Oct. 5, 2011	Opposers access website of Maryland Fried Chicken Franchise www.marylandfriedfranchise.com/	

V. Legal Analysis

Although opposers have raised claims of priority and likelihood of confusion, alleged fraud on the part of Richard Costantine in filing these applications, charged that applicant has abandoned these marks through a pattern of naked licensing and widespread, uncontrolled use by an array of third parties, we see all of these related complaints as reflections of a long-term, complex, extended family battle over the ownership of elusive property rights. As this Board has done in resolving trademark ownership disputes in previous fact patterns involving other splintered family businesses, overlapping circles of not-for-profit companies, fifth-generation band members and past managers, divided auto clubs in neighboring towns, etc., we turn to an analytical framework drawing on evidentiary factors identified in *Wrist-Rocket Manufacturing Co. v. Saunders*, 379 F. Supp. 902 (D. Neb. 1974), *aff'd in part and rev'd in part*, 516 F.2d 846, 186 USPQ 5 (8th Cir. 1975), *cert. denied*, 423 U.S. 870 (1975).⁴⁴

⁴³ See Exhibit Y.

⁴⁴ See Pamela S. Chestek's helpful analysis at 96 TRADEMARK REP. 681 (2006).

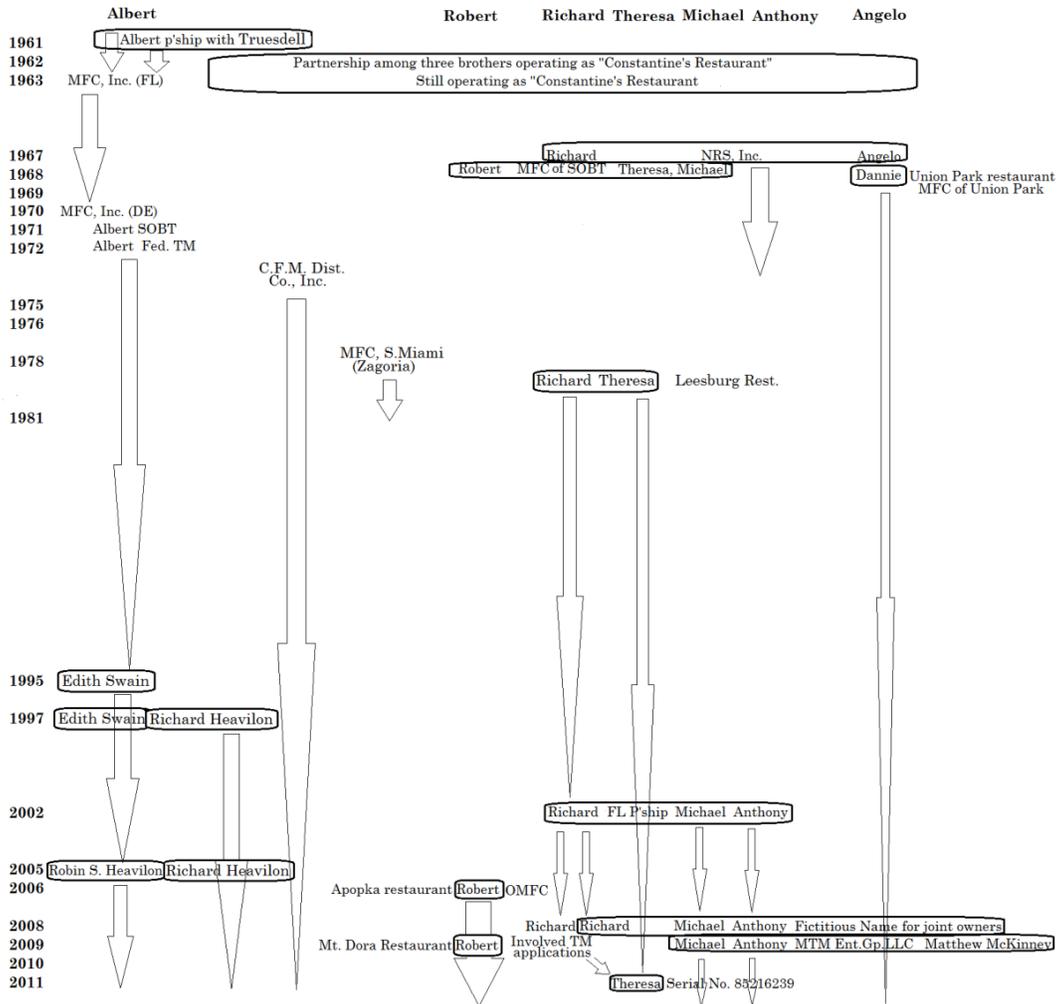
Accordingly, in deciding which party, if any, owns these various composite marks, we look to three separate interests, namely contractual expectation, responsibility for the quality of the goods and/or services, and consumer perception.⁴⁵

In reliving the timeline and narrative above, one witnesses an ever-changing cast of characters constantly jockeying to try to protect a piece of the Maryland Fried Chicken enterprise:

- Albert C. Constantine (from 1959 to 1995);
- W.H. Truesdell (1959 to 1962);
- Richard Costantine (from a variety of dates, including 1961-62-63 / 1968 / 1979 / 1980, etc. to 2008);
- Theresa Costantine (from 1961-63, 1979 / 1980 to present);
- Maryland Fried Chicken, Inc., a Florida corporation (1961 to 1972);
- National Restaurant Supply Inc. (from 1967 to 1975-76);
- Maryland Fried Chicken of S.O.B.T., Inc.," allegedly formed by Theresa (President), Robert (V.P.), and Michael Costantine (Secretary/Treasurer/Director (from 1967 until sometime in 1970s);
- Maryland Fried Chicken, Inc., a Delaware corporation -- James F. Mairs (from 1970 to 1979);
- C.F.M. Distributing (from 1975 to present);
- Maryland Fried Chicken, Inc. -- Evan and Zack Zagoria, South Miami (from 1978 to 1981);
- Edith Swain (from 1995 to 2005);
- Richard Heavilon (from 1997 to present);
- Robin Heavilon (from 2005 to present);
- Robert Costantine and Original Maryland Fried Chicken, LLC (from 2006 to present);
- Richard Costantine's estate (2008 to present);
- MTM Enterprises Group, LLC (from 2009 to present);

Again, given the complexities of the transactions, the constantly changing alliances, and the extended period over which these events have unfolded, we present the following pictorial:

⁴⁵ *Id.*, at 698-703.



In support of the position of applicant herein, Richard’s supporters, including his two youngest sons, claim that he alone was the “only one [of his three brothers] who continuously carried the family tradition and the same delicious Maryland Fried Chicken secret recipe to the people for nearly fifty years.” However, we find that applicant has not established a clear, uninterrupted chain of title for ownership of these marks, and applicant’s claims to such ownership currently are very much in dispute. Unfortunately for applicant, based upon the totality of this record, Richard’s name was not attached to recorded ownership of any bundles of the extended family’s sticks for much of that fifty-year period – except for the same rights

exercised by thirty other restaurant owners to use his family's marks at a single restaurant location – in Richard's case, in Leesburg, FL. Otherwise, there is substantially no evidence that Richard and/or Theresa Costantine maintained any formal relationship with any of the dozens of third-party restaurant owners from the mid-1960s to the present.

We get an interesting peek inside the mind of Richard Costantine during the heady days of 1968. In responding to the inquiries of a newspaper columnist from Wilmington (in Delaware, the state of his birth) about the possibility that the family might want to establish Maryland Fried Chicken franchise restaurants in Delaware, Richard responded "We're open to offers ..." However, more than any focus on the product – the famously delicious fried chicken prepared using the family's secret recipe – he seems personally to be taken more with tri-color packaging:

"We send out the mix, the seasoning, the paper – the packaging," he said. "The packaging is very important. We won a prize with our packaging in Miami last year. Everybody came in with two colors, we came in with three."

He attributed a flush of new-found success to the hard work on the part of the extended family in the period from 1963 to 1968, while also admitting to mistakes:

The second restaurant, specializing in fried chicken, was opened in Winter Park. It was a success.

"After that, we started the franchise. Believe me, the first five years it was strictly the family. We did the whole thing, without lawyers, CPAs, anything. We made a lot of mistakes, but we got the job done."

Now, he said, the firm has enough lawyers and CPAs to account for all five years and the ones since. Maryland Fried Chicken recently merged with Cherokee Insurance Co. of Macon, Ga., he said, and the expansion is continuing.

"We have commissaries in Macon and Orlando; we still take care of the Florida franchises out of Orlando."

Finally, in a hint of the future challenges the family faced, he alludes to the problems one faces with setting up a successful franchise operation:

There are problems with franchises, he said. Inspectors have to be sent out regularly to make spot checks to see that the fried chicken is really Maryland Fried Chicken, that the paper carrying the name is in the form it's supposed to be, that all the sanitary rules are being observed.⁴⁶

Whatever the family's experience was with franchising by 1968, perhaps this statement stands as dramatic foreshadowing of problems to come. We note that while many witnesses continue to refer to the thirty-some odd Maryland Fried Chicken restaurant owners as "franchisees," the record shows that to be a misuse of a legal term of art. There is clearly not a "franchisor" anywhere behind this curtain.

This old (and failed) "franchise system" involved an absence of franchise fees and contractual obligations, splintered centers of alleged ownership, deals seemingly based on the informality of a handshake,⁴⁷ and independent restaurateurs able to envision what they each wanted in a restaurant, and then doing just that. The most rigorous consultation was with the commissary – who incidentally wanted to keep all of its customers happy with consistent restaurant products and by encouraging the prospective new guy on the block to check with the owner of the nearest extant restaurant before opening a new restaurant.

More recently, we note that Richard and Theresa's two youngest sons, Michael and Anthony Costantine (along with applicant's former attorney, Matthew Kinney) are attempting to benefit from the sale of "authentic" Maryland Fried Chicken franchisees. Yet the very pitch contained on the website of MTM Enterprises Group,

⁴⁶ Exhibit 3-D, "*This Bears Mention*," by Tom Malone, undated but said to be from 1968.

⁴⁷ Testimony of Paul Dion, October 26, 2011, at 11, 14.

LLC ("MTM") << www.marylandfriedfranchise.com >> corroborates this history, and seems to admit to the extended family's failures at earlier franchising efforts.

A. Contractual expectation

In trying to determine which of the parties to this litigation, if any, first affixed the mark onto relevant goods or services, we conclude that all parties to this dispute agree that Albert Constantine was the initial driving force behind the Maryland Fried Chicken phenomenon in Central Florida in the early 1960s. However, fifty years later, no current party to this litigation can claim to have a clear, uninterrupted chain of title for ownership of these contested service marks.

To the extent that there is any advertising in recent years, it seems that each independent restaurant owner is involved in placing and paying for local advertising much as would any other mom-and-pop dining operation. The advertising on the Internet seems to be directed to current (C.F.M.) or prospective restaurant owners (MTM).

We are intrigued by the process involved in opening up a new Maryland Fried Chicken restaurant. We begin this discussion by noting that there is no indication applicant approved any of the third-party restaurants that have been originated in recent years. To the contrary, Paul Dion, the owner of the Maryland Fried Chicken in Winter Garden since 1980 (and the manager for Doug Bartolo, at that same location, since 1975) testified that over the past thirty years, he had never been in-

volved in any way with applicant (paying compensation, seeking any permissions, being visited or audited by applicant, etc.).⁴⁸

All the parties to this action agree that each restaurant owner is presumed to have around its outlet a particular (if unwritten and undefined) geographic area of exclusive operation. It seems that occasionally when someone wants to open a new restaurant, the would-be owner contacts the nearest current restaurant owner for approval. Mr. Gourley (C.F.M.) testified that other times, C.F.M. acts as the intermediary in this process and makes sure that the prospective new owner does not face an objection from a current owner. That is, if C.F.M. Distributing Company, Inc. learns that someone wants to open a new Maryland Fried Chicken restaurant, Mr. Gourley of C.F.M. tries to coordinate the desired new location with the affected owners of nearby Maryland Fried Chicken restaurants.⁴⁹

C.F.M. is not claiming a contractual right in playing this role. In fact, C.F.M. agrees that it “has never licensed, or had negotiations to license, assign, or otherwise grant rights to third parties to use the MFC trademarks” Rather, C.F.M. appears simply to be filling a vacuum created by the absence for decades of an effective franchising system. C.F.M. is the largest and longest-lasting entity derived from Albert Constantine’s initiatives fifty years ago. Faced with constant flux in a largely uncontrolled marketplace,⁵⁰ it seems that the C.F.M. business model de-

⁴⁸ Testimony of Paul Dion, October 26, 2011, at 5-9.

⁴⁹ Mr. Gourley testified about his role in this process in a number of specific restaurants recently opened in SC, GA and FL. See Testimony of James E. Gourley, 15-18,

⁵⁰ At various points in the record, it became clear that there was a constant churning of stores. New restaurants were being opened and many restaurants closed. For example, in comparing a 2011 list of Maryland Fried Chicken restaurants who were C.F.M. customers

pende in part upon the ongoing demand of a healthy volume of Maryland Fried Chicken restaurants happily purchasing products bearing the involved Maryland Fried Chicken marks.⁵¹

B. Responsibility for the quality of the goods and services

As to which party maintains the quality and uniformity of the product, there is no simple answer. As noted above, since the mid-1970s, C.F.M. has been continuously providing paper products, some fast food products as well as other restaurant supplies imprinted with the involved marks to substantially all of the individual, independent Maryland Fried Chicken outlets. Hence, over the past four decades, C.F.M. has been responsible for the most consistent usage of the involved logos as applied to goods-in-trade as seen by members of the consuming public.

Ironically, Richard Costantine's own affidavit (drafted in the Florida state action against his eldest living son, Robert) appears to ascribe to C.F.M. some continuing responsibility for guaranteeing the quality and consistency of the Maryland Fried Chicken experience:

“... Over the past 47 years, we have allowed numerous Maryland Fried Chicken franchise restaurants to be opened in Florida. ... ***Moreover, each Maryland Fried Chicken restaurant utilizes the same distributor in order to ensure the quality and consistency of the food being sold.***⁵²

with a 2008 listing, at least thirteen restaurants went out of business in the interim. See Testimony of James E. Gourley, at 18-20.

⁵¹ “... [Y]ou're on your own. Just buy [C.F.M.'s] products, that's all he [Mr. Gourley] wanted.” Dion at 14.

⁵² Richard Affidavit, ¶8.

Nonetheless, the record demonstrates that this very limited control of the marks by C.F.M. on paper products and other restaurant supplies, for example, does not ensure consistent quality among the retail quality of the ready-to-eat food products or related services offered in the various Maryland Fried Chicken restaurants.

Applicant has been using the applied-for marks on its restaurant services in the Leesburg restaurant since 1980, and like other Maryland Fried Chicken restaurant owners, buys products from C.F.M. that it uses in its store. However, except for a single instance of litigation with son Robert over opposer's (OMFC's) attempt to place a store in Mt. Dora, Richard seems not to have exerted control over the use of this mark by any other third-party restaurateur in more than thirty years. Much like the other Maryland Fried Chicken restaurant owners, OMFC has been using substantially similar marks on its restaurant services in the Apopka restaurant since 2006, but otherwise has no claim to any larger rights.

In spite of claims made by Richard in his earlier affidavit,⁵³ as restated in the subsequent testimony of Theresa and Anthony, we find that since the mid- to late-70s, as the Constantine/Costantine family was engaged in a frenetic game of corporate/partnership/proprietorship/joint-grouping musical chairs, no one has really maintained any responsibility for the quality of the food products or services offered at retail under these marks.

⁵³ Richard Affidavit, ¶16: I have also controlled the use of the Mark by others. I have approved each and every Maryland Fried Chicken restaurant that uses the Mark in commerce, with the exception of the restaurants recently opened by my son Robert.

Specifically, we note the testimony, photos⁵⁴ and documentation provided by James Gourley, vice president and general manager of opposer, C.F.M. Distributing Company.⁵⁵ He has been an officer of C.F.M. for more than twenty years, with a total of more than thirty years of employment with the company.⁵⁶ His insights are most instructive in this context. Other than the actual food itself (e.g., chicken, potatoes, cabbage, etc.), C.F.M. provides most everything else that most Maryland Fried Chicken restaurants use day-in and day-out. This includes breading mixes, its proprietary coleslaw dressing, five different sizes of carry-out food containers, pre-packaged meal kits (e.g., napkins, spork/fork, wet towelette, salt packets, etc.), all imprinted with the Maryland Fried Chicken logo, as well as paper towels, toilet paper, chemical cleaners, etc.⁵⁷

Otherwise, all the Maryland Fried Chicken restaurants are quite different.⁵⁸ James Gourley and Paul Dion testified that each one of the thirty Maryland Fried Chicken restaurants can serve whatever its owner desires.⁵⁹ There is no requirement that a Maryland Fried Chicken restaurant serve the same fried chicken products. In fact, the taste of the fried chicken products at retail can vary widely. Some restaurants are offering chicken that is crunchier than that of other Maryland Fried Chicken outlets. A customer will notice the chicken as served at various outlets has

⁵⁴ See Exh. E. Mr. Gourley's photographs of the street-level views of Maryland Fried Chicken restaurants in Florida, Georgia and South Carolina demonstrate the incredible differences in the exterior look-and-feel of the various storefronts.

⁵⁵ Testimony of James E. Gourley, October 25, 2011.

⁵⁶ *Id.* at 5-6.

⁵⁷ *Id.* at 6-12.

⁵⁸ *Id.* at 20-54; Dion at 10-15.

⁵⁹ Gourley at 46-47, 49.

more or less salt, more or fewer spices, different cooking oils and different styles of marination.⁶⁰ Although C.F.M. provides a consistent breading mix product, individual restaurant owners use it quite differently in deriving the house recipe – some using the C.F.M./MFC branded breading mix alone, other using it with its own unique ingredients, while yet others choose not to use a C.F.M. breading mix at all.⁶¹ For example, the owner of the Winter Garden restaurant uses the C.F.M. house brand of breading mix (not that traded by C.F.M. under the Maryland Fried Chicken label) and then adds another completely different mix of his own choosing.⁶²

While most Maryland Fried Chicken restaurants do sell fried chicken, even that is not strictly a requirement. Some sell barbeque chicken,⁶³ while others specialize in steak, pork, Brunswick stew, pizza or seafood. In fact, a number of Maryland Fried Chicken outlets are known more prominently as “Shrimper Seafood” outlets because an entire chain of seafood restaurant owners decided this was a convenient way to offer chicken in addition to shrimp.⁶⁴ The record also shows that some Maryland Fried Chicken restaurants specialize in Greek, Mexican, Chinese or other Asian cuisine. Therefore, consumers can get one product and product selection from one Maryland Fried Chicken restaurant and something entirely different at another Maryland Fried Chicken location.

⁶⁰ *Id.* at 38-39.

⁶¹ *Id.* at 20-21, 41-42.

⁶² *Id.* at 42.

⁶³ *Id.* at 25.

⁶⁴ *Id.* at 27-30.

As to the external appearance of Maryland Fried Chicken buildings, outdoor painting schemes are quite different, as is the signage.⁶⁵ The Albany store has a rooster mural,⁶⁶ some chicken logos have the hen with two little chicks,⁶⁷ another prominently displays the image of a chef with a hat,⁶⁸ while yet another features a large mural of Bob Marley on the outside wall of the restaurant.⁶⁹ The internal décor is also quite different among the stores,⁷⁰ including some featuring Asian décor.⁷¹ The outlets each display significantly different type of menus,⁷² menu boards and internal signage. Some smaller locations have minimal seating, while others are fairly large sit-down restaurants.⁷³

As one travels from restaurant to restaurant, one will notice that there are not similar uniforms provided for staff members. Some owners provide employees with T-shirts from C.F.M., while others create their own artwork and hire a silk-screen artist or local T-shirt company to make whatever designs they want.⁷⁴ In some restaurants, employees simply wear regular street clothes, while in yet others they

⁶⁵ *Id.* at 21.

⁶⁶ *Id.* at 25-26, 34.

⁶⁷ *Id.* at 30.

⁶⁸ *Id.* at 48.

⁶⁹ *Id.* at 33.

⁷⁰ *Id.* at 39.

⁷¹ *Id.* at 32-33.

⁷² *Id.* at 44-50.

⁷³ *Id.* at 39.

⁷⁴ *Id.* at 39-40, 52.

might don aprons. No one provides standardized training for employees from restaurant to restaurant,⁷⁵ and the retail prices vary widely from outlet to outlet.

C. Consumer perception

The members of the public in the southeastern portion of the United States, and especially in Central Florida, have been faced for decades with products and services bearing visually similar Maryland Fried Chicken trademarks and service marks. However, with each outlet having such diverse qualities, we find that these logos have totally lost any of their earlier abilities to identify a sole source. It would seem at this late date that very few members of the consuming public in Central Florida (or elsewhere) still contemplate a single enterprise as standing behind the Maryland Fried Chicken products or services. Those few who do anticipate the consistent quality of the prototypical franchise operation will likely find themselves disappointed as they take their business from one Maryland Fried Chicken outlet to another. Certainly, if one has an unpleasant experience at a particular Maryland Fried Chicken restaurant, there is not one single entity to whom that aggrieved customer could turn with a complaint.

D. Conclusions

Whether or not one relies upon language of abandonment or naked licensing, the uncontrolled use of an alleged mark by many different parties is anathema to the role and function of a source indicator. Through conscious acts of commission taken by various family members, any property rights that existed in the 1960s ap-

⁷⁵ *Id.* at 40-41.

pear to have been totally splintered. Repeated and inconsistent transfers of alleged bundles of sticks by constantly realigned individuals and groups of persons has created total confusion about who, if anyone, was in charge of this one-time family enterprise. Continuing acts of omission over recent decades on the part of applicant have further caused these alleged marks to lose any remaining significance as indicators of source.

The record contains not a single copy of a licensing or franchising document. Even if arguably there were mutual but informal understandings between the Constantine/Costantine family members and their implicit licensees at some point within the last forty years, no one seems to have exercised ongoing control or supervision over the restaurant owners. In the absence of any formal contracts, it is not surprising that each restaurant owner viewed himself/herself as an independent operator without any responsibilities to the Constantine/Costantine family. The most consistent products involved paper products imprinted with the familiar logos, but this involved no control over the quality of the restaurant services at the retail locations.

As to what any one of these parties may represent to others about the source or origin of their chicken products or restaurant services, whatever the designs of Albert Constantine in the early 1960s, the current confusing state of affairs seems to have been accepted by most of the actors, and no one rocks the boat until such point as one party makes a play for exclusivity that threatens the other players. The litigation surrounding these applications seems to have been such an event. Unfortunately, we see no reason to think the pieces of this would-be franchise can ever be

put back together. These parties have lost their trademark rights against the world, and thus against each other. Accordingly, despite, for example, C.F.M.'s claims of its priority over that of applicant, we view the several opposers' actions herein to be less an attempt to claim rights in these marks for themselves, but instead merely wanting to maintain the *status quo* by keeping applicant from being able in the future to assert a right to which it is not entitled, under the facts of the case.

The current hodge-podge arrangement that is Maryland Fried Chicken is clearly not optimal. On the other hand, given the state of play, the *status quo* is preferable to the scenario where a single player, like applicant, is given the imprimatur of a federal registration and the appearance of exclusivity, when in reality – to quote Gertrude Stein's famous observations about Oakland – "There is no there there."

In conclusion, we find that applicant was not the owner of these marks at the time the applications were filed, and consequently, both of these involved applications are deemed to be void *ab initio*. As discussed throughout this opinion, we find that the traditional concepts of priority and likelihood of confusion are of little help in resolving these disputes, and we do not reach the questions of whether applicant has committed fraud on the United States Patent and Trademark Office by filing these applications.

Decision: The oppositions to the registration of applicant's two marks are hereby sustained, and the issuance of registrations to applicant is herein denied.