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

Proceeding	92050966
Party	Plaintiff Atlas Flowers, Inc. d/b/a Golden Flowers
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

ATLAS FLOWERS, INC. d/b/a GOLDEN FLOWERS,	:	
Petitioner,	:	Cancellation No.: 92050966
- against -	:	
GOLDEN VISION FLOWER, INC.,	:	
Registrant.	:	

PETITIONER'S REPLY TRIAL BRIEF

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Petitioner Atlas Flower, Inc. dba Golden Flowers ("Golden Flowers") replies in further support of its Trial Brief.

ARGUMENT

I. Likelihood of Confusion

Registrant Golden Vision Flower, Inc. ("Golden Vision Flower") does not dispute that Golden Flowers has standing to bring this proceeding and priority in use of its trademarks. (*See* Reg. Br. 6, 8) As to the likelihood of confusion factors:

A. Similarity Of Marks

Registrant's Mark

Petitioner's Mark

No amount of legal verbiage can substitute for review of the marks in question, which the Board will perform and come to its own conclusion. Golden Flowers submits that the marks are indeed very similar, and that the differences pointed out by Golden Vision Flower are minor and thus not likely to be remembered by purchasers in an ordinary commercial situation. *See General Mills, Inc. v. Fage Dairy Processing Industry S.A.*, 100 U.S.P.Q.2d 1584, 1600 (TTAB 2011) ("The test . . . is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are

sufficiently similar in terms of their overall commercial impressions that confusion as to the source, sponsorship or affiliation of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks.")

B. Similarity Of Goods

On this issue Golden Vision Flower attempts to have it both ways. Although its current business consists exclusively of live orchids, it insists that it is entitled to maintain its registration as to all the goods listed therein, including "cut flowers, dried flowers and live flowers," which are virtually identical to Golden Flowers' "fresh cut flowers." If that is the case, then parties' goods are the same.

Even if the registration were partially cancelled for all goods except "live orchids" (as it should be, *infra* Point II), "live orchids" are highly similar to "cut flowers" – orchids are simply a type of flower, and, both typically are purchased to be used as gifts and decoration. The two are no more different than someone who has to decide whether to buy roses vs. tulips as a present for his spouse.

Golden Vision Flower's citation to *Viacom Intl. v. Komm,* 46 U.S.P.Q.2d 1233 (TTAB 1998), involving computer games and software accessories, is inapposite. There, the defendant sold a highly specialized form of software, with little connection to the video games and other merchandising offerings licensed by the opposer. Here, in sharp contrast, both parties sell flowers used for the same purpose, which are purchased in the same places – flower shops and other retail flower vendors**.**

C. Channels Of Trade

Golden Vision Flower's analysis of the channels of trade is fundamentally flawed. It neglects well-established law that in determining whether the channels of trade overlap, the Board considers the goods as described in the application and registration. *See Octocom Systems, Inc. v. Houston Computer Services, Inc*., 918 F.2d 937, 16 U.S.P.Q.2d 1783, 1787 (Fed. Cir. 1990); *In re GBI Tile and Stone, Inc.*, 92 U.S.P.Q.2d 1366, 1368 (TTAB 2009). As noted in Golden Flower's initial brief, Registrant is a very small operation, having a limited customer base, whose mark is only reviewed by wholesale purchasers. But its registration is not so limited, and it is free to expand (if it can) to the limits of the marketplace. In a proceeding such as this,[1] what controls is the scope of the registration, not the scope of the registrant's activities.

D. Actual Confusion

Golden Vision Flower manufactures an "inconsistent[cy]" (Reg. Br. 17) when contrasting Golden Flowers' treatment of channels of trade with actual confusion. There is no such inconsistency – the law simply treats the two factors differently. As noted, channels of trade are evaluated as to "the normal and usual channels of trade and methods of distribution," even if the registrant's current use of the mark is quite narrow. *CBS, Inc. v.*

[1] Many of the cases relied upon by Golden Vision Flower in its trial brief are federal cases which concern claims for infringement under the Trademark Act, not cancellation proceedings. In that context, the appropriate consideration is what the defendant is actually doing, not what it could do. In contrast, as the citations in the main text indicate, in a proceeding such as this the focus is on the registration and whether there would likely be confusion if the registration were exploited in all normal channels and markets. Golden Vision Flower's citation to such infringement cases is thus inapposite.

Morrow, 708 F.2d 1579, 1581, 218 U.S.P.Q. 198, 199 (Fed. Cir. 1983). In contrast, in evaluating actual confusion (or the lack thereof), the Board necessarily has to look at what the parties actually did. "The lack of evidence of actual confusion [generally] carries little weight," *General Mills*, 100 U.S.P.Q.2d at 1603, and is significant only "if it can be shown that there have been meaningful opportunities for such confusion to occur." *Id.*

Golden Vision Flower's conflation of the two (Reg. Br. 17) is a legal nonsense. As to the past, Golden Vision Flower's actual market share and channels of trade have been very narrow, and it is thus not surprising that there has been little *actual* confusion. As to the future, however, given its broad unlimited registration, Golden Vision Flower is free to exploit means that such a *likelihood* of confusion will occur.

E. Sophistication Of Purchasers

Golden Vision Flowers' assertion that its target market of wholesalers are "sophisticated discerning professionals" (Reg. Br. 15) lacks any support in the record. Further, even if true this argument suffers from a legal mistake – focusing on the parties' actual practices, as opposed to the normal practices in the industry. Those are far broader.

As already pointed out, there are at least three levels of distribution in the flower market: distributors, retailers and flower shops and end-consumers. While Golden Vision Flower's mark is only used at the wholesale level, Golden Flowers' mark is seen by purchasers at all levels of distribution. And, while Golden Flowers only focuses its

marketing level at the first two levels, others in the industry do focus on the end consumer. (Pet. Br. 19-22)

With respect to the middle level (retailers, florists, wedding planners), as Mr. Bayona testified, such customers often will enter coolers maintained by the wholesalers, where they see multiple marks of different competitors, and where they often select product based on its trademark. (Bayona Discovery Depo. Tr. 45:8 to 47:6, Reg. Not Reliance No. 1) Golden Vision Flower does not even argue that such middle-level consumers are in any way particularly sophisticated or discerning in their purchasing decisions.

And certainly, as to the end purchaser, the testimony indicates that both parties' flowers are sold at retail for around $20.[2] That is hardly a purchase to which someone would give significant care and discernment, and could easily be confused.

F. Third-Party Registrations

Golden Vision Flowers cites a number of third-party registrations containing the words GOLD or GOLDEN. (Reg. Br. 18) Such registrations are not of record and are not properly before the Board in this case. *See* TBMP § 704.03(b)(1)(B). Further, such registrations have limited probative value, because they do not demonstrate what occurs in the marketplace. *See AMF Inc. v. American Leisure Products, Inc*., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *Nike, Inc. v.WNBA Enterprises, LLC,* 85 U.S.P.Q.2d 1187, 1200 (TTAB 2007).

[2] Golden Vision Flower's orchids generally sell from $20 to as much as $100. (Ms. Huang Tr. 31:23 to 32:10) Golden Flowers' prices vary. However, a typical bouquet is sold for around $5; the wholesale marks it up 40% to 50% and the retailer then further doubles or triples that. (Bayona Tr. 48:20-25) That works out to a retail price of $14 to $22.50.

G. Failure Of Citation Of Prior Registraton

Golden Vision Flower also seeks to make something of the fact that the Examining Attorney who reviewed its application did not cite Golden Flowers' then registered predecessor mark. (Reg. Br. 10) First, there is no evidence that the Examining Attorney was even aware of that prior mark. Second, a different Examining Attorney that reviewed the applications to register Golden Flowers' *current* mark concluded that there *was* a likelihood of confusion – that was the very reason to reject the applications. In any case, the prior decisions of Examining Attorneys have no relevance to *inter partes* proceedings. *See Promark Brands, Inc. v. Schwan's IP LLP*, Opposition No. 91159653 (August 17, 2007).

II. Cancellation For Non-Use

Golden Vision Flower's trial brief suffers from a fundamental legal flaw on this point by focusing on the wrong time period. While the fraud claims (discussed *infra*) must necessarily be analyzed at the time of filing the Statement of Use, the claim for non-use rests on the current use – or lack thereof – of the trademarks. Where a mark is no longer in use as to some of the goods listed in the registration, then "the registration needs to be restricted to reflect commercial reality." *In re Bose Corp.*, 580 F.3d 1240, 1247, 91 U.S.P.Q.2d 1938 (Fed.Cir. 2009).

As demonstrated in Golden Flowers' initial brief, Ms. Shi Wen Huang has effectively been Golden Vision Flower's sales manager for some time, and has worked for the company since 2007. She operates the company in Florida on a day-to-day basis, while her father is the absentee president based in Taiwan. Her testimony is clear – at least today,

"a hundred percent" of the company's business consists of selling orchids, and that the company does not do anything besides selling orchids and associated pottery. (*See* Ms. Huang Tr. 12:14 to 13:15, 20:9-23, 21:7-13) Whatever may have been the situation in 2004 or 2005, today and in recent years, Golden Vision Flower's business consists solely of live orchids. That is today's "commercial reality;" the registration should be restricted on that basis.

III. Fraud Claims

A. Recklessness

Golden Vision Flower simply ignores the most compelling argument[3] for adopting a recklessness standard:

1. It has long been the common law rule that recklessness satisfies the mental state requirement for fraud.

2. Under *Neder v. United States*, 527 U.S. 1, 23 (1999) and the cases cited therein, there is a mandatory presumption that the statutory language (permitting cancellation where the "registration was obtained fraudulently," 15 U.S.C. § 1064(3)) includes the common law standard. (Pet. Br. 26-28)

[3] As for the other examples, while of course each area of law has its own context, the fact remains that in a wide variety of contexts, including fraud on the Patent Office, criminal fraud statutes, and securities fraud, (*see* Pet. Br. 28-29) federal courts have consistently interpreted the pertinent statutes to include reckless conduct within the definition of "fraud." That some courts (like the Supreme Court on the issue of securities fraud) may have reserved on the issue does not detract from the point. Indeed, Golden Vision Flower has not cited a single case where fraud was construed *not* to include reckless conduct.

Golden Vision Flower's policy arguments about the now-rejected "should have known" standard (Reg. Br. 28) are meritless. The recklessness standard goes well beyond mere negligence. Rather, the actor must be "conscious that he has neither knowledge nor belief in the existence of the matter he chooses to assert it." First Restatement of Torts, § 526, comment e.

An actor who makes a representation of fact knowing that he has no basis for that representation commits fraud. This is different from and well beyond mere negligence. The common law has dealt with the distinction for over a century – numerous cases apply the distinction in various contexts. *See, e.g.*, *Ultramares Corp. v. Touche*, 255 N.Y. 170, 187-89, 174 N.E. 441, 447-48 (1931) (liability of accountants who performed audit in negligence limited to those with whom they are in privity, but as to fraud, they are liable to a much wider group). The Board can likewise apply the same distinction in fraud cases concerning cancellation of trademarks.

Indeed, public policy supports holding that recklessness is a sufficient showing of scienter. The very structure of the Trademark Act relies upon applicants to verify their own use of a mark. *See* 15 U.S.C. §§ 1051 (a,d) If Statements of Use could be verified by a person who knows they lacked all knowledge of the very facts they are verifying, then such verification would become an utter farce.

Under the theory proffered by Golden Vision Flower, an applicant need merely to have someone ignorant of the facts to sign their name, and fraud has been avoided. That has never been the law in other contexts – to the contrary, as then Chief Judge Cardozo aptly stated, "[f]raud includes the pretense of knowledge when knowledge there is none."

Ultramares Corp., 255 N.Y. at 179, 174 N.E. at 444. An applicant who verifies a fact in an application under such pretense would have been considered by the common law to have acted fraudulently, and there is no reason why the Trademark Act's cancellation provision for a "registration [that] was obtained fraudulently," 15 U.S.C. § 1064(3) should be read differently.

B. Fraud As To False Signature As "President"

Golden Vision Flower does not dispute that Ms. Chuong was not in fact its president; factual falsity is thus established. As for the other two elements:

1. Materiality

As noted in Golden Flowers' initial brief, to qualify to sign a Statement of Use for a corporate applicant, the signatory must be (1) a corporate officer; (2) have actual or implied authority AND have personal knowledge of the facts verified; or (3) be an attorney. (Pet. Br. 30-31) Golden Vision Flower does not even argue that Ms. Chuong qualified under the first or third tests. As to the second test, the regulations require not only knowledge but also *firsthand* knowledge. That Ms. Chuong may have had some second-hand knowledge might make her testimony relevant (and hence citable in the case).[4] But the Rules require firsthand knowledge. The cited testimony (Pet. Br. 31) indicates that she had none. Indeed, given that

[4] Registrant yet again manufactures a supposed inconsistency where all there is is a legal difference. Its argument that "[i]f Ms. Chuang had knowledge to testify about the goods that Golden Vision Flower was allegedly not selling, then she had knowledge sufficient to sign the Statement of Use" (Reg. Br. 30) simply ignores the different legal standards regarding qualifying to verify a Statement of Use and to merely testifying in a proceeding.

she lived in Taiwan, 8,000 miles away from Golden Vision Flower's base in Florida, where it used its trademark on its goods, one wonders how Ms. Chuong could possibly have firsthand knowledge.

2. Intent To Deceive

Golden Vision Flower does not dispute that Ms. Chuong was aware in 2005 that she was not in fact the company president. It argues, however, that she did not intend to deceive the Trademark Office because she does not understand English and the portion of the Statement of Use which identifies her as "President" was not translated to her. But, notwithstanding that Ms Chuong is not fluent in English, she testified that her lawyers explained the entire document to her and she understood it. (Chuong Tr. 27:14-24) Notably, Golden Vision Flower has failed to proffer any evidence that the translation to Ms. Chuong of the document did not include the signature line.

Golden Vision Flower's questioning of the motive to misrepresent her status is misplaced. Golden Flowers does not have to provide motive. Further, the apparent motive is the same reason Ms. Chuong was asked to sign in the first place: convenience. It would have been very easy for her husband, the corporate president, to sign; for whatever reason, it was more convenient for him to assign the task to her. Misrepresenting herself as the company president allowed her to engage in this contrivance.

C. Fraud As To The Goods Listed In The Statement Of Use

2. Factual Falsity Of Statements

a. The Testimony Of Shun Chi Huang Was The Most Credible

Golden Vision Flower makes much of the conflicting nature of the testimony. But the mere fact that the witnesses gave conflicting accounts about the sales of various products and use of the trademark does not mean that Golden Flowers cannot prove its case by clear and convincing evidence. The Board is not obligated to believe any particular witness. If the testimony of one witness is credible and establishes the falsity of the registration, that is enough to meet the burden. *Cf. Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (in criminal trial requiring proof beyond a reasonable doubt, a jury may resolve conflicts in testimony and convict by crediting one witness over another).

Of the three witnesses, Mr. Shung Chi Huang is the most credible and should be relied upon to prove falsity. His daughter, Ms. Shi Wen Huang, as Golden Vision Flower itself points out, only joined the company in 2007 and if anything her testimony is even *more* damaging than her father's. As for Ms. Chuong's testimony, as between her and her husband Mr. Huang, he should be credited. Mr. Huang is and always was the president of the company, and his testimony is binding on the company. Further, Ms. Chuong's testimony is itself evasive and riddled with contradictions – while she claimed in some instances that there had been early use of the mark on some goods, in other instances she protested lack of knowledge about the details. (*See* Tr. Ms. Chuong 39 to 47)

In contrast, Mr. Huang clearly and unequivocally testified that the mark shown in the '073 Registration[5] was *never* used in connection with cut flowers. (Mr. Huang Tr. 43:10-17) The mark was *never* used for dried flowers in the United States. (Mr. Huang Tr. 43:23 – 44:2) The mark was *never* used in connection with dried plants. (Mr. Huang Tr. 46:16-20) The mark was *never* used in connection with and, in fact, Golden Vision Flower *never* sold any fresh or raw herbs. (Mr. Huang Tr. 47:20 – 48:12)

Furthermore, Mr. Huang's testimony indicates that the mark was in fact only used for two categories of goods. Mr. Huang testified that the mark was initially used on company stationery and on general information sheets handed out to potential customers, such as at trade shows. (Mr. Huang Tr. 31:8 to 33:24) That of course is not a use in commerce as defined in 15 U.S.C. § 1127. The mark was also used on cards attached to the goods (*e.g.*, hanging on the flower stems) and on cartons in which the goods were shipped. According to Mr. Huang, the cards were used *only* with orchids and no other goods, while the cartons were used for both orchids and bamboo plants, but nothing else. (Mr. Huang Tr. 34:22 to 36:9, 40:22 to 42:7) This compelling testimony – completely ignored by Golden Vision Flower – establishes that no use of the trademark (as defined by the statute) was ever made with respect to anything other than orchids and bamboo plants.

Of the three witnesses, Mr. Huang, as company president, was and is in the best position to know what the company did, and the company is bound by his testimony. The clear and credible testimony by Golden Vision Flower's president establishes that the

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

Statement of Use was false in at least five categories of goods, and indeed for all but live orchids and bamboo plants. That is clear and convincing evidence of factual falsehood.

b. Offers For Sale And Attempted Sales Did Not Involve Use Of The Mark

Golden Vision Flower's attempt to deflect the Board by speculation that it may have "offered" certain items for sale and "tried" selling them (albeit unsuccessfully) is flawed. The facts of this case demonstrate that any such marketing efforts did not involve use of the registered mark. As noted above, Mr. Huang testified that the mark was used only on stationery (not a trademark use), and on cards and cartons. That same testimony indicates that the cards and cartons were used *when the goods were sold*. The cards were "attached with the merchandise to the consumers." (Mr. Huang Tr. 34:22-24). The cartons were used to package the goods once they were sold. (*Id.* 37:2-4)

Thus, whatever efforts might have been made to offer for sale certain items, such offers did not involve use of the mark. Of course, the whole purpose of the Statement of Use – and its express language – were to verify use of the mark, not attempted commercial dealings in goods unconnected to such trademark use. The Statement of Use's verification of *use of the mark* as to most of the categories of goods listed was clearly false. That is all that is material to these proceedings.

3. Intent To Deceive

Contrary to Golden Vision Flower's argument (Reg. Br. 33) there is no need to introduce "direct evidence of fraudulent intent." *Bose*, 580 F.3d at 1245. Nevertheless, such evidence has been introduced here. It is clear from the testimony cited by Golden Flowers (Pet. Br. 35-36) that Ms. Chuong knew that she had no basis for making the affirmative statements she did in the Statement of Use. As already noted, in August 2005, Ms. Chuong verified that Golden Vision Flowers "has adopted and is using" the mark in commerce for all the goods listed in the application, and that the "current use" of the mark was reflected in the attached specimen. (Dep. Exh. 29, Pet. Not. Reliance No. 4) But in her testimony, Ms. Chuong clearly admitted that at that time, she had no knowledge of for what items, other than orchids, the company was using the mark:

> Q With regard to the various items listed on the tag, which is the last page of Exhibit 29 –
>
> A We got more.
>
> Q Which of these items was Golden Vision Flower selling in August of 2005?
>
> A August?
>
> Q August 2005.
>
> A The only thing I did I helped them did one booking in 2004, that's all.
>
> Q So by your answer do I understand you to mean that you don't know whether Golden Vision Flower was selling any of these item in August of 2005?
>
> MR. DAWSON: Object to the form.
>
> THE INTERPRETER: (Translating): 2005? I only helped them booking in 2004. They operating to today, they must have some sales.

BY MR. SPRINGUT:
Q But you don't know?

A I did not involve in operate in this.

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

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

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

A Orchids, that's a positive.

Q Anything else?

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

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

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

(Ms. Chuong Tr. 46:9 to 47:18)

As one court aptly put the point in affirming a directed verdict of fraud: "[Defendants'] alleged statements were positive and unqualified. They purported, by clear implication, to know what they were talking about. Where knowledge is possible, one who represents a mere belief as knowledge misrepresents a fact." *Sovereign Pocohontas Co. v. Bond*, 74 App.D.C. 175, 176, 120 F.2d 39, 40 (D.C. Cir. 1941). Ms. Chuong, by her own testimony, exhibited a "pretense of knowledge when knowledge there is none." *Ultramares*

Corp., 255 N.Y. at 179, 174 N.E. at 444. That is and has always been construed to constitute fraudulent intent.

CONCLUSION

In view of the facts and arguments presented herein and in the initial trial papers, Golden Flowers requests cancellation of Registration No. 3,074,073.

Dated: March 19, 2012
New York, New York

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above **PETITIONER'S TRIAL BRIEF** was served upon Registrant's attorney of record, by first class mail, postage prepaid, and by email, addressed to Jeffrey S. Dawson, Esq., P.O. Box 1111, Winter Haven, Florida 33882, *jdawson@jdawsonlaw.com* on this 19th day of March 2012.

By: /S/ Tal S. Benschar
Tal S. Benschar