

ESTTA Tracking number: **ESTTA515996**

Filing date: **01/14/2013**

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

Proceeding	91178758
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Date	01/14/2013
Attachments	PUBLIC Reply Brief - McSWEET (PUBLIC).pdf (27 pages)(349153 bytes)

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

McDONALD’S CORPORATION,)	Application Nos.	78/947,247
)		77/722,272
Opposer,)		
)	Opposition Nos.	91178758
v.)		91192099
)		
McSWEET, LLC,)	Consolidated under:	91178758
)		
Applicant.)	Mark: McSWEET	

OPPOSER’S REPLY BRIEF

(Public Version)

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OPENING REBUTTAL STATEMENT

As has been clear from the outset of this proceeding, McDonald's is asserting its Mc family of marks. Yet, Applicant completely ignores this fact by focusing on McDonald's pleaded registrations individually, and then highlights purported distinctions between its actual use of McSWEET and those specific registrations. The issue before this Board is whether the word mark McSWEET, as limited *only* by the goods designated in the Subject Applications, is likely to be confused with McDonald's famous family of Mc-prefixed marks, based on the evidence.

While McDonald's will not repeat all of the law and evidence that support its claims, the record proves that Applicant's McSWEET mark is likely to cause consumer confusion with McDonald's family of Mc-prefixed marks. More specifically, the term McSWEET falls squarely within McDonald's Mc family of "Mc" plus a generic or descriptive term, and Applicant seeks registration on goods that are *at least* sufficiently, if not highly, related to those goods with which the Mc family of marks is used and, in many instances, registered. Applicant admits to the fame of McDonald's Mc family, and its suggestion that this fame somehow works against McDonald's is a misstatement of the law. A brief analysis of the purported third-party "MC marks" that Applicant offers to challenge McDonald's rights reveals that they are almost entirely surnames and fall outside McDonald's claimed Mc family. Thus, they are not relevant to the likelihood of confusion analysis. Applicant attacks McDonald's highly compelling expert survey with nothing more than non-expert attorney argument in a misguided attempt to claim that McDonald's has produced no evidence of actual confusion. A high degree of likelihood of dilution also arises from this same evidence. Finally, Applicant has failed to produce anything more than inadmissible hearsay to prove that it owned the McSWEET mark when it filed the Subject Applications. Accordingly, this Board should find for McDonald's on all grounds and sustain these opposition proceedings.

I. McDonald's Is Asserting Its Family of Marks, Not Just Certain Marks Individually

McDonald's main brief ("MB") carefully identified and laid foundation for its famous family of Mc-prefixed marks, and made clear that McDonald's is asserting its family in these oppositions. (MB, 9-15.) Indeed, McDonald's identified in the Notice of Opposition that the pleaded registrations were

merely illustrative examples of this larger family of marks. (See Dkt. No. 1, pp. 3-5.) Nevertheless, Applicant argues how “McSWEET and McDonald’s pleaded marks look and sound different,” and continues this comparison throughout its entire brief. (Applicant’s brief (“AB”), 20 (emphasis added).) Remarkably, in fifty-five pages Applicant does not even *mention* McDonald’s Mc family, and makes only one reference to the family of marks doctrine. (See AB, 33.)

In its Notices of Opposition, McDonald’s identified certain of its then-registered Mc marks by way of example, but pled its larger “Mc” family as the basis of its opposition.¹ This has been McDonald’s practice for more than thirty years of opposition proceedings, and the Board has repeatedly recognized McDonald’s Mc-prefixed family of marks. (ONOR K1-59.) Applicant’s position appears to be that there *is* no family of marks doctrine and that if McDonald’s is not presently using a single mark that is likely to be confused with McSweet, it has no recourse. Under Applicant’s approach, others could freely adopt marks that fall within a mark owner’s family and confuse consumers. That is not the law. The family of marks doctrine is universally accepted, both by the Board and by the courts. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); *J&J Snack Foods Corp. v. McDonald’s Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891-1892 (Fed. Cir. 1991); *Citigroup Inc. v. Capital City Bank Group Inc.*, 94 USPQ2d 1645, 1655 (TTAB 2010)(*affirmed*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011)); McCarthy, J.T., McCarthy on Trademarks and Unfair Competition §23.61 (4th ed., updated 2012)(citing cases); ONOR M16-22.

Applicant goes even further, asserting that McDonald’s is not only limited to its pleaded registrations, but is also limited to the goods and services set forth in those registrations. (AB, 26 (“*The identification of goods/services statement in the registration, not the goods/services actually used by the registrant, frames the issues.*”).) Here, Applicant confuses the law by borrowing a statement made in the context of a cancellation proceeding (where a registration is being challenged) and applying it to an opposition (where often a registration is being asserted). See *Cunningham v. Laser Golf Corp.*, 222 F.3d

¹ The fact that a few of those registrations have since expired is inconsequential. McDonald’s could assert a dozen other Mc family registrations to replace them. As explained in its main brief, McDonald’s strategically rotates the use of family members in use at any given time. (MB, 10.)

943, 55 USPQ2d 1842 (Fed. Cir. 2000). Regardless of whether the proceeding is an opposition or a cancellation, it is the *challenged* right that “frames the issues,” not the rights being asserted by the plaintiff. Though an opposer (plaintiff) may assert a registration as grounds for its opposition, the opposer is not limited to the bounds of that registration and can also assert common law rights in support of, or as a basis for, the opposition. *See, e.g., Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009)(“The Trademark Act permits opposition on the basis of prior use of ‘a mark or trade name previously used in the United States by another and not abandoned,’ i.e., ownership of a common-law trademark right.”) *Cunningham* was a cancellation, and was referring to the registration being challenged. 55 USPQ2d at 1846. It does not hold that an opposer is limited to the rights identified in the registered mark that it asserts as the basis for its opposition, and Applicant misstates the law in claiming that it does.²

McDonald’s opposition is not limited to the pleaded registrations, nor is it limited to the goods and services set forth in those registrations. It is limited only by the evidence McDonald’s has presented to substantiate its Mc family. The Mc family has been recognized by the Board, the Federal Circuit, and countless consumers in the country, based on McDonald’s use of it for decades. (MB, 13-15, 37-39, 45-48.) Applicant attempts to redefine that family as being comprised of “Mc and a generic noun that describes a particular menu item” (AB, 23) or limit it to marks “containing the ‘MC’ prefix related to food products.” (AB, 38.) Such a position is not supported by the evidence. The Mc family is comprised of marks featuring the “Mc” prefix followed directly by a generic or descriptive term, such as McCAMERA, McLANGUAGE, McBITES, McFUN, etc, etc. (MB, 9-10.) And contrary to Applicant’s assertion, McSWEET falls squarely within that Mc family.

² *Cunningham’s* actual lesson is more apropos. There, the registrant argued that his customers were more sophisticated and his product was better than the “ordinary” products of the petitioner. *Id.* at 1846. The Federal Circuit affirmed the Board’s petition grant, noting that this evidence “was not probative” where the challenged registration was not limited to any particular class of purchasers. *Id.*

II. McDonald's is Opposing the Subject Applications, Not Applicant's Common Law Use

While evidence showing the strength and breadth of McDonald's actual use of its Mc family of marks is clearly relevant, evidence regarding how Applicant has used its McSWEET mark is much less so. That is because this dispute is about Applicant's attempt to obtain an exclusive, nationwide right to use the word mark McSWEET with the goods designated in the Subject Applications. It is not about the particular ways Applicant may or may not have chosen to thus far limit its actual use in the marketplace.

A. The Scope of the Subject Applications is Limited Only by Their Designations of Goods

The scope of an opposition is defined by the rights being sought. *See, e.g., Esso Standard Oil Co. v. E.F. Drew & Co., Inc.*, 277 F.2d 171, 125 USPQ 404, 404 (CCPA 1960) (“While appellee's evidence indicates that it applies the mark only to a specific composition used in laundering...we must consider it as embracing ‘water softeners’ generally, that being the present designation of the goods...”). Based on this well-established principle, broad sections of Applicant's brief where Applicant paints a narrow picture of its use of McSWEET to mask the broad scope of the registration it seeks must be disregarded. (*See, e.g., AB*, 15-17, 23-29.) Whether or not Applicant's goods are “*strikingly different...* [from Opposer's goods] *in the real-world marketplace*” (*Id.*, 9) is irrelevant. The Subject Applications do not limit use to “*products sold in jars specifically*” (*Id.*, 30), “*pickled deli-style vegetables as standalone items*” (*Id.*, 27), or even “*high-quality, fresh pickled vegetables.*” (*Id.*, 14.) There is no limit to use “*as part of [a] cocktail (e.g., on a toothpick)*” (*Id.*, 29) or as “*garnishes in alcoholic beverages.*” (*Id.*, 26.) Rather, Applicant's request for rights is only limited to:

pickled gourmet vegetables, namely, pickled cocktail onions, pickled garlic, pickled, marinated olive medley, pickled green beans, and giardiniera, namely, a pickled celery, carrot, red pepper, garlic, green bean, and cucumber mix (S/N 78/947,247); and pickled asparagus (S/N 77/722,272).

The above designation contains no limitation on packaging. “Ordinarily, for a word mark [the Board does] not look to the trade dress, which can be changed at any time.” *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984). While Applicant touts its “sophisticated packaging” (*AB*, 15), the product could be just as easily sold in a non-descript

plastic bucket (a form of packaging actually considered by Applicant (ONOR C29-30 (Response to RFA 75)), and still be covered under the rights sought. Despite the above guideline from *Specialty Brands*, Applicant relies on it to suggest the relevance of Applicant's trade dress. (AB, 23.) *Specialty Brands* did make an exception to its rule, finding that trade dress contributed to the likelihood of confusion where an applicant had adopted trade dress much like that of the opposer (perhaps because it evidenced applicant's bad faith intent). *Id.* at 1284. Here, Applicant presents its trade dress as a reason confusion is *unlikely*. However, "[i]t is settled that a distinction in trade dress cannot weigh *against* likelihood of confusion with respect to the registration of a simple word mark...." *Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 543 (Fed. Cir. 1985)(emphasis added); *see also* FN 2, *supra*.

Applicant's designation of goods also lacks any restriction of trade channels or class of purchasers. Though Applicant concedes that "absent restrictions...goods and services are presumed to travel in the same channels of trade to the same class of purchasers" (AB, 28), it nevertheless attempts to distinguish the scope of its mark based on these factors. Applicant repeatedly points out that its products are sold at farmers markets and "specialty stores." (*Id.*, 15, 23, 25, 28, 31, etc.) But Applicant admits that those are not the only channels in which its goods are sold, and the Subject Applications are not limited to those channels.³ Based on the unrestricted applications, Applicant could open a McSweet branded store next to a McDonald's restaurant, or sell its product at quick service restaurant counters - a channel common for pickled goods. (*See, e.g.*, O'Malley 146:3-147:18.) Likewise, while it claims that its products are "high-end" based upon its pricing (AB, 16, 31-32), Applicant could always drop its prices.⁴ Although Applicant argues the same person is "*never a customer of both* [Applicant's and Opposer's products] *at the same time*" (AB, 31), the evidence belies this fact as Applicant has proffered a receipt for a purchase of both Applicant's goods and McDonald's goods from the same QFC store. (ANOR 579.)⁵

³ Furthermore, Applicant's largest client is QFC and McDonald's has a presence in every QFC store. (MB, 17.)

⁴ In fact, it already undercuts its national brand competitor on unit price. (*See* MB, 25-26; App. Ex. 41.)

⁵ We note that, even if the Subject Applications *did* contain limitations to packaging, trade channels or class of purchasers, such limitations would be insufficient to counteract the high likelihood of confusion with and dilution of McDonald's Mc family based on the overall evidence in this matter.

B. “Gourmet” is Not a Meaningful Limitation

Applicant takes every opportunity to describe its products as “gourmet” in a further attempt to distinguish them from McDonald’s products. While the word “gourmet” is in the designation of one of the two Subject Applications, it is a vague term like “high-quality” and “premium,” and has come to be known in the food industry as a mere term of puffery. Unlike terms such as “organic” or “kosher,” there is no regulation over use of the term “gourmet.” In fact, McDonald’s uses the term “gourmet” in association with food products offered at some of its restaurants (ONOR L68-70), and has even used the mark McGOURMET. (*Id.*, L83-84.)

Indeed, Applicant’s own culinary consultant explains that terms like “specialty” and “gourmet” have come to mean different things to different people. (ONOR F8-10, 89 (Bergman 19:2-7; 21:5-13; 137:11-15).) For example, you can feast on a Budget Gourmet[®] frozen dinner from QFC for fifty cents.



(*Id.*, L13.) Moreover, some members of the media have described certain mainstream McDonald’s products as “gourmet.” (*Id.*, L71, L73-75, L99-101). While Applicant may believe that “gourmet” has a particular meaning, it presents no evidence on “the quality of ingredients, the care in preparation, [or the] unique brine recipe” that allegedly make its products “gourmet.” (AB, 15.) Likewise, Applicant presents no evidence on how the term “gourmet” is commonly understood.⁶ As a result, “gourmet” offers no basis for distinguishing Applicant’s goods or the Subject Applications.

⁶ From the outset, Applicant has wanted to make this case about product quality and has repeatedly characterized McDonald’s products as “cheap” and “unhealthy.” Attacking McDonald’s products is baseless and irrelevant. Though armed with considerable evidence concerning Applicant’s **REDACTED** **REDACTED** McDonald’s will not engage in such conduct, but rather limit its arguments to the confusing and diluting nature of Applicant’s McSWEET mark.

C. Applicant's Actual Use Serves Only to Establish the Priority Afforded the Subject Applications

The question of priority has never been at issue in this case because, as Applicant admits, McDonald's use far precedes even Applicant's *claimed* first use date. However, Applicant's first use date is relevant to the issue of actual confusion, discussed *infra* at page 20.

Applicant alleges that (1) Leo McIntyre first used the McSWEET mark with pickled onions in 1990, and (2) that the mark has been used with those goods "continuously from then until the present day." (AB, 43.) The record does not support either of these contentions. Applicant's sole member admits that he had no involvement with the McSWEET mark or the sale of pickled onions until 1999. (McCaslin, 10:19-12:22.) Everything prior to that date is based purely on hearsay. Applicant admits that it has no record of any sales occurring prior to 1999. (ONOR E42 (McCaslin Disc. 61:10-24).) Instead, it relies on hearsay as to what the deceased Mr. McIntyre allegedly told Mr. McCaslin and Ms. Murray, printouts from Applicant's present day website where Applicant repeats this hearsay-based story (App. Ex. 30), and a single-page internal third party hotel "newsletter" for which there is no foundation and which is not a proper specimen of trademark use. (App. Ex. 1). (AB, 10, 18.) Because all of this is inadmissible hearsay, it should be stricken or given no weight.

Even if the third party "newsletter" advertisement could be construed as establishing use in 1990, there is no evidence showing continuous use from that point forward to 1999 other than Applicant's self-serving statement that there was. (AB, 43.) Thus, on this record, this Board would have to assume the mark was abandoned in 1994 (15 U.S.C. §1127), and Applicant's "subsequent use...does not retroactively cure past abandonment." *AmBRIT Inc. v. Kraft Inc.*, 812 F.2d 1531, 1 USPQ2d 1161, 1177 (11th Cir. 1986). And while Applicant had nearly four years of discovery in this case to find a single witness that purchased a jar of pickled onions prior to 1999, it apparently could not do so. Applicant's priority date is 1999, and the designations in the Subject Applications define the rights which Applicant seeks to obtain in the McSWEET mark.

III. McDonald's Has Met Its Burden of Proving Likelihood of Confusion and Dilution

McDonald's trial brief establishes how each of the *du Pont* factors and dilution by blurring factors weigh in its favor. Thus, only the key factors on which Applicant focused its brief are highlighted below.

A. The Mark McSWEET Falls Squarely Within McDonald's Mc Family of Marks

When the McSWEET mark is properly compared to McDonald's Mc family of marks, the similarity of marks is beyond question. The mark McSWEET consists of the distinctive "Mc" prefix followed directly by a generic or descriptive term, namely, "sweet." This fits precisely with how McDonald's defines (and the marketplace understands) McDonald's Mc family. Moreover, the fact that McDonald's has already used the McSWEET mark in foreign countries (MB, 18-19) underscores how it falls within McDonald's globally recognized Mc family.

Applicant claims that McDonald's case for similarity relies on "Mc" being the dominant portion of the mark, and proceeds to argue that the emphasis should be on "sweet." (AB, 20-21.) However, that argument is without merit. Distinctiveness is what makes a term a trademark and the only distinctive part of "McSweet" is "Mc". The record is replete with admissions from Applicant that the "sweet" component of the mark was selected because it describes the flavor of Applicant's products. (ONOR C38 (Response to RFA No. 8); E129-131 (McCaslin Disc. 187:10-189:10).) As such, "Mc" is the distinctive and source designating portion of Applicant's Mark.

B. The Goods are *More* than "Sufficiently Related"

McDonald's agrees with Applicant that "the goods and services need not be the same or competitive for confusion to be likely," rather they need only be "sufficiently related." (AB, 25.) Where the parties differ is on what constitutes "sufficiently related." Because of the fame of the Mc family, McDonald's food products do not have to "overlap" with Applicant's food products (*Id.*, 26), and McDonald's need not "specialize in pickled vegetables" for a likelihood of confusion to arise. (*Id.*, 27.) Indeed, the Board has found likelihood of confusion with the Mc family in cases where the applicant's goods were not food products and were much less similar than here. *See, e.g., McDonald's Corp. v.*

McClain, 37 USPQ2d 1274 (TTAB 1995)(legal services). In this case, both parties specialize in food products, and the record shows that both parties sell many of the same vegetables. (MB, 31.) Both McDonald’s and Applicant sell vegetables as ingredients. (*Compare* AB, 26 to *McCaslin* 86:14-87:17; 89:12-90:15; 92:13-93:5.) Both parties also use the marks at issue to sell grocery products.⁷ McDonald’s has sold its Arch Cards in thousands of grocery stores for many years (Kizior 22:19-22) and, contrary to Applicant’s assertion, many of the cards *do* feature Mc marks. (*See, e.g.*, Kizior 15:11-20; McD Ex. 3 (McCafe).) These cards reflect a pre-purchase of McDonald’s food products, and have no purpose other than for redemption for food and beverage products at a McDonald’s restaurant. (*Id.*, 6:13-20.) Furthermore, Applicant’s statement that it “seems unlikely [McDonald’s] will enter the grocery sector” with food products (AB, 30) **REDACTED**

REDACTED

⁸

Applicant cites a 1976 case for the premise that goods not “commercially related” do not become similar simply by virtue of being sold in the same grocery store. (AB, 29). In that case, *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976), the goods at issue were toilet paper and sponges. *Id.* at 29. Thus, it was not hard for Judge Rich to point out their many off-setting differences. When the case involves food products used in a complementary fashion, the result is much different. *See, e.g., In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984)(bread and cheese sold in same grocery sufficiently related). There is plenty of evidence in the record showing how Applicant has marketed its pickled vegetables as complimentary to the types of food McDonald’s is famous for providing under its Mc family of marks, such as sandwiches and hamburgers. (MB, 32.)

Finally, Applicant places considerable emphasis on a “something more” requirement for comparing a mark used with restaurant services to one used with food products. (AB, 25-27.) Such

⁷ Applicant’s argument that McDonald’s “*Arch Card is not a grocery store product*” because it does not reflect as “sold” on the receipt (AB, 29) completely misses the point. Grocery customers do not care how the grocer handles its accounting. They care about the source of the goods in their cart.

⁸ Though not of record, the Board may take judicial notice that McDonald’s has filed S/N 85/719,760 for McCAFE for use with ground and whole bean coffee.

requirement might apply if McDonald's use of its Mc family was limited to restaurant services, but the record clearly demonstrates otherwise. However, even if this requirement were applied here, it would be easily met. The need for "something more" was first announced by Judge Rich in *Jacobs v. Int'l. Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982). Judge Rich then provided an example of what that "something" could be, citing a case where "the owner of BEEFEATER for gin, a *well known and famous* mark, was successful in halting the use of BEEFEATER...to identify restaurant services." *Id.* (emphasis in original). In another example relied upon by Applicant, the Federal Circuit applied the "something more" requirement to vacate the summary judgment cancellation of a mark for barbeque sauce brought by a petitioner that used the same mark in association with restaurant services at its single location restaurant in Alabama. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993). McDonald's uses its Mc family of marks at more than fourteen thousand restaurants across this country. (Sterling 7:1-3.) Even if applied, the "something more" requirement is met. The immense fame of McDonald's Mc family warrants broad protection. As such, the goods are more than sufficiently related in this case.

C. The Fame of McDonald's Mc Family Does NOT Favor Applicant

Fame is the trump card in a likelihood of confusion analysis. "There is no excuse for even approaching the well-known trademark of a competitor and that all doubt as to whether confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous." *Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1904 (Fed. Cir. 1989)(emphasis added). While Applicant may take the position that it is not a "competitor" of McDonald's, this warning against intruding upon famous marks still applies. *See, e.g., Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000)("[F]ame of the prior mark, when present, plays a dominant role in the process of balancing the DuPont factors...[and this] applies with equal force when...the goods are not closely related.").

Applicant admits the McDonald's brand is "arguably one of the most famous in the world." (AB, 9.) But it then argues that "the fame of the McDonald's brand makes confusion highly unlikely." (*Id.*,

32.) It even relies on this argument against McDonald's claim of dilution, which defies all logic since fame is a statutory prerequisite of dilution. (See AB, 48.) To support its position that famous marks are harder to protect, Applicant relies on two cases. But neither are good law.

The first case is *Jim Beam Brands Co., Inc. v. Beamish & Crawford, Ltd.*, 852 F.Supp. 196, 31 USPQ2D 1518 (SDNY 1994). In that case, in the context of an infringement analysis, and applying the *Polaroid* factors of the Second Circuit rather than the *du Pont* factors that control this proceeding, the district court cited the strength of the JIM BEAM mark for bourbon as a reason that it would not be confused with BEAMISH for an Irish stout beer. *Id.* at 1520. Were this Opposition an infringement case in the Second Circuit, this seemingly wrong holding would have to be addressed. But it is not, and the case cannot be relied upon as persuasive authority here because the Federal Circuit looked at the same marks for the same goods used by the same parties on the question of registration (*i.e.*, the question before this tribunal), found confusion likely, and cancelled the BEAMISH registration. *James B. Beam Distilling Co. v. Beamish & Crawford Ltd.*, 10 USPQ2d 1317, 1318 (Fed. Cir. 1989). In doing so, it specifically cited "the considerable fame Beam Distilling's trademarks have acquired." *Id.*

Applicant also relies on *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ2d 1719 (Fed. Cir. 1988), but the reading of the statement upon which Applicant relies has been soundly rejected by the Federal Circuit. The case dealt with an opposition of a logo mark featuring the letters "B A D" for clothing items by the owner of registrations for "B.V.D." for similar goods. *Id.* at 1720. With a dissent and a concurrence both longer than the majority opinion, the Court affirmed the Board's dismissal of the opposition based largely on the difference in the marks. *Id.* However, in dicta, the majority stated:

The fame of a mark cuts both ways with respect to likelihood of confusion. The better known it is, the more readily the public becomes aware of even a small difference.

Id. at 1721.

It was not long before another applicant picked up on this language and used it to attempt to turn the fame of its opponent's mark against its opponent, just as Applicant attempts to do here. While the

Board found for the applicant, the Federal Circuit quickly corrected this reading of *B.V.D.* See *Kenner Parker Toys Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2D 1453 (Fed. Cir. 1992). Finding that “the Board treated the fame of Kenner’s mark as a liability,” the Federal Circuit reversed the dismissal of the opposition. *Id.* at 1454. In doing so, it made very clear that the dicta statement from *B.V.D.* had been misapplied:

If investors forfeit legal protection by increasing a mark's fame, the law would then countenance a disincentive for investments in trademarks. The law is not so schizophrenic. In consonance with the purposes and origins of trademark protection, the Lanham Act provides a broader range of protection as a mark's fame grows. The Board erred by reading a statement from B.V.D. to undercut the legal standard for famous marks. ... Even a summary examination of this court's treatment of famous marks, however, shows that the Board read that statement out of context. Both before and after B.V.D., this court has consistently afforded strong marks a wider latitude of legal protection than weak marks. Indeed, the Board's misreading of B.V.D. also conflicts with its own precedent before and after B.V.D. The holding of B.V.D. , to the extent it treats fame as a liability, is confined to the facts of that case.

(*Id.* at 1457 (numerous internal citations omitted).) *Kenner* marked the last time the Board relied on *B.V.D.* to support the position Applicant now advocates and Applicant failed to make that clear to this Board in citing *B.V.D.* Today, only its dissent is cited with favor. See, e.g., *Nike Inc. v. Maher*, 100 USPQ2d 1018, 1022 (TTAB 2011)(“[A] purchaser is *less* likely to perceive differences from a famous mark.”)(citing *B.V.D.* (Nies, J., dissenting).”). The law is clear that McDonald’s fame strongly favors McDonald’s on both likelihood of confusion and dilution.⁹

D. McDonald’s Use of Its Mc Family Marks Is At Least Substantially Exclusive

Applicant has placed great emphasis on certain third party “Mc” marks in claiming that “Mc” is a common prefix with limited trademark significance and, thus, confusion is not likely here. (AB, 33-38.) “The damage that third-party users of a mark can cause an owner who seeks to enforce his mark is the weakening of the mark's strength.” *Quality Inns Int’l, Inc. v. McDonald’s Corp.*, 695 F.Supp. 198, 8 USPQ2d 1633, 1644 (D. Md. 1988). “However, where the owner of the mark has been reasonably diligent in protecting his rights, even though infringements exist,” the owner’s ability to enforce its rights

⁹ *B.V.D.* did not address dilution at all, yet Applicant cited it to support Applicant’s theory that fame also works against McDonald’s dilution claim. (AB, 48.)

will not be inhibited. *Id.* Applicant does not suggest that third party use of Mc-prefixed marks has affected the strength of McDonald’s Mc family. To the contrary, Applicant repeatedly admits that the family is famous. (AB, 9, 32.) Moreover, McDonald’s efforts to police its Mc family, discussed at length in its main brief (MB, 15, 39-40) and at much greater length in the deposition of Jennifer O’Malley (O’Malley 42:11-121:1), have been thorough, focused and constant.

The enforcement evidence McDonald’s has offered surely parallels, if not exceeds, that put forth by UMG in *UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868 (TTAB 2011). There, the Board credited UMG’s enforcement efforts as a primary reason that its MOTOWN mark had achieved dilution-level fame despite “evidence of third-party use of MOTOWN in marks or trade names identifying organizations and businesses.” *Id.* at 1889. Based on these policing efforts, the Board found UMG’s use of MOTOWN to be “substantially exclusive.” *Id.* Nevertheless, Applicant suggests that the “millions of dollars [McDonald’s] has spent protecting its pleaded marks is irrelevant” because of a handful of what it calls “‘MC’ marks” used with food products. (AB, 47.) Yet, when analyzed against the definition of McDonald’s Mc family (*i.e.*, the “Mc” prefix followed by a generic or descriptive term), it is clear that the “‘MC’ marks” cited by Applicant are irrelevant. Of the many marks Applicant lists in its brief,¹⁰ nearly all of them are the common name or surnames of the founder or principal of the company that uses the mark. More importantly, the component following the “Mc” is not a generic or descriptive term.

Mark	Origin	Evidence
McAuslan	Founded by Peter McAuslan	ONOR N77-N80
McCabe’s	Founded by Marie McCabe	ANOR L267
McCadam	Founded by William McCadam	ANOR L278
McCain	Founded by Wallace and Harrison McCain	Czoschke, 71:2-72:5
McCann’s	Family name of John McCann	Fields, 62:11-19
McCormick and Schmick’s	Founded by Bill McCormick and Doug Schmick	ONOR N76
McCormick Distilling	Original distillery founded by John T. McCormick	ONOR N68-70

¹⁰ Applicant lists 24 marks in its footnote 13, but then says it offers evidence of only 23. (AB, 34.) It seems the discrepancy is “McCORMICK shortbread,” for which Applicant appears to have submitted no evidence. McDonald’s also finds no evidence of this mark, an internet search simply affiliating “McCormick shortbread” with the McCormick spices company. Accordingly, it is not addressed.

McCormick	Founded by Willoughby M. McCormick	(FN) ¹¹
Dr. McGillicuddy's	Invented by Dr. Aloysius McGillicuddy	ANOR L259
McIlhenny	Family business began by Edmund McIlhenny	McIlhenny, ¶¶ 6-7
McLelland	Founded by Archibald McLelland	ANOR L307
McLib's	Founded by Elizabeth McKay ("Lib" is short for Elizabeth)	ONOR N71-73
McManis	Founded by Ron & Jamie McManis	ANOR L195
McNess	Founded by Fredrick McNess	ANOR L180
McTavish	Originated as a McTavish family recipe	ONOR N83-84
McVitie's	Founded by Robert McVitie	ONOR N87

In the case of the McADAMS mark, the brand's owner ultimately surrendered it in favor of McADAMS CANADIAN BLENDED WHISKEY after the Federal Circuit reinstated a petition to cancel by the Scotch Whiskey Association over concern that a Scottish surname was being used to describe a Canadian whiskey product. (ONOR N60-67.) McAdams, like all of the other marks in the chart above, is a surname. Applicant argues that McSWEET is a surname, but simultaneously argues that it should not be considered one. (AB, 22.) In any event, Applicant admits that "McSWEET is not the name of any person associated with Applicant." (*Id.*) More importantly, it admits that "sweet" is a descriptive term. (E129-131 (McCaslin Disc. 187:10-189:10).) It is this critical difference that separates Applicant's mark from every mark in the chart above. Because of the descriptive nature of the word "sweet," McSWEET falls squarely within the definition of McDonald's Mc family.

As to the remaining marks, they may be quickly dismissed. The three "Mac" marks are non-descriptive names of people affiliated with the respective brands (ONOR N74-75, 81-82). The only "McKINLEY" on which Applicant submitted evidence is McKinley Springs Winery, located less than a mile off McKinley Springs Road near a natural spring (presumably named after someone named McKinley) in rural Washington. (*Id.*, N85-86.) This is a surname like those above, borrowed from a nearby geographic landmark. Based on Applicant's evidence, McCRISPY appears to be a mark used by a

¹¹ McDonald's regrets that a page intended for filing with its Rebuttal Notice of Reliance was inadvertently omitted. However, the origin of the McCormick spices name is easily verified. See <http://www.mccormickcorporation.com/OurCompany/CompanyHistory.aspx>.

Turkish company for a product manufactured in Bulgaria. (ANOR L170-175.) Applicant has produced no evidence that it is sold in the United States, so it is not relevant here.

Of Applicant's 24 listed "MC marks," this leaves MOLLY McBUTTER—the only mark Applicant has identified that features "Mc" followed by a generic or descriptive term (butter) used in commerce in this country. *Compare Quality Inns*, 8 USPQ2d at 1644 (finding third party use of McHAPPY, McTRAVEL, McDIVOTS, McQUICK, McMAID, and McPRINT to be inconsequential in light of McDonald's policing efforts.) Moreover, the mark is not McBUTTER, and its owner never uses "McButter" without the first name "Molly" preceding it. (Maskal, ¶29; ANOR L629-632.) Finally, though not listed in Applicant's footnote of "MC marks" (AB, 34), Applicant states that McCormick has a registration for "MC." (*Id.*, 37.) Applicant is referring to the blue and red McCormick logo mark shown in the image in Applicant's brief. (*Id.*) However, when McCormick tried to register the letters "MC," McDonald's opposed and McCormick abandoned its application. (ONOR N44-55.) Over the five years of these proceedings, Applicant has failed to produce a single example of a Mc family mark used by another in this country that McDonald's has not addressed. *That* constitutes substantially exclusive use of a mark.

E. McDonald's Has Provided Persuasive Evidence of Actual Confusion

Just as it ignores the fact that McDonald's is asserting a family of marks, Applicant ignores or misrepresents some of the most compelling evidence proffered in this case—McDonald's survey.

"Opposer offered no evidence of actual confusion." (AB, 39.)

"There is no evidence that [MC] conveys any particular meaning to buyers." (AB, 21.)

"Opposer's consumers do not expect to find McDonald's products inside a grocery store...and...has offered no evidence that customers do make such an association." (AB, 33.)

These conclusions completely disregard the expert survey submitted by McDonald's performed by Philip Johnson of Leo Shapiro & Associates, which found that 26% of consumers of pickled vegetables would believe a grocery store product named McSWEET would come from McDonald's, and a distinct 41% would think of McDonald's when exposed to the mark. (McD Ex. 111, p.28.)

Though Applicant argues why it believes McDonald's survey should be disregarded, these arguments have no merit. Most of Applicant's criticism of the survey is based on Applicant's incorrect assumption that the Subject Applications are limited by Applicant's actual use rather than by their goods designations. For example, Applicant complains the survey population included respondents under the drinking age (AB, 41), but there is no age restriction in the Subject Applications, nor are Applicant's goods limited to use with alcohol. It complained about the font used to present the marks to survey respondents (*Id.*, 40), but the Subject Applications are not limited to a particular font.¹² It wanted the term "gourmet" used more (*Id.*, 40), but, as explained above, "gourmet" is a meaningless limitation. Applicant complains that the survey was conducted in a mall (*Id.*, 41), but the mall intercept is the most widely-accepted survey format for studies of consumer products, McCarthy §32.165, and this case presents no reason to deviate from it. (*See* Johnson 74:19-76:11). Finally, Applicant complains that the survey report did not prove lack of duplication between confusion and dilution results. (AB, 42.) But Applicant never bothered to request the underlying survey data that proves lack of duplication, and Philip Johnson, the recognized survey expert who calculated the results, testified under oath that there was no duplication. (Johnson, 93:5-94:5.)

McDonald's survey results provide compelling evidence of actual marketplace confusion over the use of McSWEET as proscribed in the Subject Applications. And while Applicant criticizes McDonald's for "purchasing" a survey (AB, 42), Applicant draws its contrary conclusions on consumer perception out of thin air.

"MCSWEET will most likely be perceived simply as the mark, corporate name and source of goods distributed by McSweet, LLC." (AB, 22-23.)

"Consumers associate Opposer's marks with goods and services strictly related to McDonald's fast-food products sold only at McDonald's fast-food restaurants." (AB, 33.)

¹² Applicant's assertion that the placards used the "*exact* typographical font used by McDonald's" (AB, 40 (emphasis in original)) is not only unsupported, it is untrue. Applicant challenged the survey expert on this topic on cross examination and he simply replied that a standard font was used, and that he did not know what font McDonald's uses. (Johnson 80:9-81:4.)

Thus, with no citation or evidentiary support whatsoever, Applicant offers only its self-serving opinion that there will be no consumer confusion. McDonald's produces objective, statistical evidence to the contrary.

Finally, Applicant's argument that there would have been confusion by now (AB, 43) is flawed. First, it is based on an unfounded priority date of 1990. (*See infra*, p. 10.) As mentioned above, Applicant has no evidence of use prior to 1999. Next, and more telling, there was no real expansion of Applicant's use until 2008 when it began investing in marketing consultants and selling to food distributors. Even today, most of Applicant's sales are **REDACTED** (AB, 15.) While Mr. McCaslin may be able to adequately assure people that he does not work for McDonald's, he cannot be in every grocery store as Applicant begins to expand its reach.

In sum, Applicant's brief fails to unsettle the insurmountable evidence McDonald's has compiled and presented showing that a likelihood of both confusion and dilution exist in this case. Accordingly, this Board should find for McDonald's on both of these issues.

IV. Applicant Has Failed To Establish Ownership

On the matter of ownership, this Board should consider the admissible evidence, not Applicant's conjecture and hearsay. McDonald's sought to take a deposition from Mr. McIntyre but was told by Ms. Murray that he was ill and unavailable. Applicant apparently did not try at all to secure Mr. McIntyre's testimony, and should not be rewarded for this with unsupported presumptions.¹³ As explained in McDonald's Statement of Objections, Mr. McCaslin's and Ms. Murray's comments about what they believe Mr. McIntyre thought, desired, or told them many years ago are classic inadmissible hearsay.¹⁴ All arguments based on these comments (essentially, pages 11-14 and 49-54 of Applicant's brief) should

¹³ Applicant's thinly veiled accusation that McDonald's waited to assert the question of ownership until Mr. McIntyre passed (AB, A3) is unsupported by the evidence and in poor form. McDonald's sought to depose Mr. McIntyre before his passing and was denied the opportunity. (*See* ONOR I65.) Furthermore, McDonald's did not learn of Mr. McIntyre's passing until after McDonald's moved to add the ownership issue. McDonald's motion was based entirely upon facts learned during Mr. McCaslin's deposition taken one month prior to its filing.

¹⁴ Furthermore, based on previous incidents, Mr. McCaslin's lack of truthfulness does not justify application of the residual hearsay exception. (*See, e.g.*, MB, 54-55.)

be stricken or given no weight. Applicant responds to McDonald’s objections by simply repeating the same hearsay (AB, A5) and assuming the very question at issue to be a fact supporting reliability. (*Id.*, A4 (“the transfer of the McSweet business to Mr. McCaslin evidences that Mr. McCaslin has owned the MCSWEET mark since September 2003.”).) Sections II and III of Applicant’s Response to Objections merely continue or reiterate arguments made in its brief. Given that this would put Applicant over its page limit, this Board will presumably disregard these sections.

Even if Applicant’s conjecture over Mr. McIntyre’s intent were admissible, intent to transfer does not effectuate transfer. *Arachnid, Inc. v. Merit Industries, Inc.*, 939 F.2d 1574, 19 USPQ2d 1513, 1518 (Fed. Cir. 1991)(“[A]n agreement to assign in the future...does not by itself vest legal title....”). At best, the 1999 loan (App. Ex. 3) and the 2003 bequest (App. Ex. 4) suggest a mere intent to transfer. Per statute, trademark “assignments shall be by instruments in writing duly executed.” 15 U.S.C. §1060(a)(3).¹⁵ Thus, Applicant’s claimed “oral transfer” in 2003 also had no effect as a matter of law. Applicant’s cases offered to the contrary (AB, 49-50) simply recognize that trademarks (*e.g.*, goodwill) are presumed to pass with the formal transfer of the entity that owned the goodwill. Had Mr. McIntyre signed over his Automated Sales company to Mr. McCaslin, any rights in the McSWEET mark vested in Automated Sales would have passed with it. But, as admitted by Mr. McCaslin himself, Mr. McIntyre remained the owner of Automated Sales and Mr. McCaslin never had an ownership interest in his company. (ONOR E54 (McCaslin Disc. 77:1-13).)

By Applicant’s own admission, the only written instrument was the 2004 Royalty Agreement under which [REDACTED] (*Id.*, E14 (McCaslin Disc. 30:12-17; App. Ex. 5.) Citing the Supreme Court, Applicant pleads that this Board look to “the legal effect of [the Royalty Agreement’s] provisions” rather than its raw terms. (AB, 51.)¹⁶ But the “legal effect” was that [REDACTED]

¹⁵ While §1060 deals with transfer of registered marks, there is nothing to suggest the same rule would not apply to marks yet to be registered.

¹⁶ Applicant’s “legal effect” request works counter to its other request—that the Board focus singularly on [REDACTED] (AB, 51.)

away (and long after Applicant filed the Subject Applications without consulting Mr. McIntyre). Thus, the legal effect was to create a license, not to transfer rights. Finally, Applicant cites a clause in Mr. McIntyre's will, which Mr. McIntyre apparently drafted, but never interpreted for anyone involved. The clause simply [REDACTED] (ONOR 152.)

The logical reading of this clause is that Mr. McIntyre presumed [REDACTED] [REDACTED] as would be commonly expected. There is no mention of Applicant, or that [REDACTED]

[REDACTED]

When it comes to the issue of ownership of intellectual property rights, this Board should follow the lead of the Federal Circuit and take this opportunity to draw a bright line. *See, e.g., Huang v. Tzu Wei Chen Food Co. Ltd.*, 849 F.2d 1458, 7 USPQ2d 1335, 1336 (Fed. Cir. 1988)(affirming registration refusal where the applicant had mistakenly filed in his own name, but had transferred rights in the mark to a corporation he founded just days before filing); *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 55 USPQ2d 1742, 1747-49 (Fed. Cir. 2000)(dismissing a fully tried case of patent infringement where it was recognized on appeal that the plaintiff did not have proper title). Taking its lead from Congress, the Federal Circuit has recognized the great "public interest in finality and certainty" with respect to the ownership of intellectual property. *In re Youman*, 679 F.3d 1335, 102 USPQ2d 1862, 1866 (Fed. Cir. 2012). To the extent that Mr. McIntyre had an interest in the McSWEET mark, Applicant has failed to show that it was passed with any finality and certainty. To hold otherwise here would literally open the floodgates for competing claims of ownership based on little or no evidence. Accordingly, this Board should also find for McDonald's on the issue of ownership.

V. Applicant's Brief Is Factually Erroneous

Finally, McDonald's must note that Applicant's brief is rife with misrepresentations and inaccuracies. This Reply has already shown where Applicant incorrectly represented the law, (*infra*, pp. 5-6, 7-8, and 13-15). However, the factual misrepresentations in Applicant's brief are simply too egregious to ignore. Further confounding matters, Applicant often cites hundred-plus page exhibits such as App. Ex. 30 or a McDonald's annual report, offering no pin cite and leaving this Board to wade

through the evidence. Because the record in this case is large and it may be burdensome to check Applicant's citations, McDonald's submits the following chart highlighting certain misrepresentations with a corresponding accurate account of the record.

Page	Applicant's Statement	Actual Record Evidence
20	<i>Opposer does not use MCSWEET in the United States nor does it intend to.</i> (Opposer's Brief at 19; ANOR A85-86 (Supplemental Response to RFA 31).)	In the cited evidence, McDonald's states that it has not used McSWEET in the United States. It makes no representation as to its intent to do so in the future. Also, ANOR A85-86 is not a response to RFA No. 31.
20	<i>Opposer's assertions that third parties have allegedly used the term "McSweet" to draw a connection with McDonald's is also irrelevant. In each instance, the term "McSweet" was playfully used in its slang meaning of outstanding or beyond sweet.</i> (ONOR, L-137-140.)	There is no evidence that McSWEET has a "slang meaning of outstanding or beyond sweet," and this is the first time Applicant has ever mentioned it. The pages Applicant cites show the McSWEET mark being used by the public together with open references to McDonald's.
20	<i>At no time did the third parties use "McSweet" to identify Opposer or its products.</i>	This is false. McDonald's submitted dozens of examples where consumers have identified McDonald's Sweet Tea as "McSweet Tea." See, e.g., McD Ex. 107, ONOR L143-172.
23	<i>Consumers are likely to encounter the parties' respective marks in completely divergent contexts – MCSWEET in grocery stores, specialty stores, farmers markets and the like, and MCDONALD'S only in and for McDonald's restaurants.</i> (See infra, §I(C).)	There is considerable evidence in the record that McDonald's distribution is not limited to its restaurants, and does, for example, extend to REDACTED grocery stores. (See, e.g., McD Ex. 4.)
24	<i>Opposer's products are packaged in bright yellow or red cardboard boxes, plastic cups/bowls, or paper wrappings.</i> (ONOR G73 (Cayton Disc., 176:9-25); ANOR 159 (Cayton Disc., 177:1-6).)	In the referenced sections, Craig Cayton admits that he has been to a McDonald's exactly twice in the past five years. He makes no mention of yellow or red boxes, plastic cups or bowls, or paper wrappings.
25 32	<i>Opposer sells cheap, mass-produced, fast-food products packaged in cardboard, plastic, or paper and sold exclusively at McDonald's restaurants.</i> (See generally Sterling, 317:19-22, 319:7-9, 322:19-323:5, 369:16-370:13)	Applicant may characterize McDonald's goods as it sees fit, but it cannot attribute its characterization to McDonald's Vice President of Marketing. In fact, none of the words "cheap," "mass-produced," "fast-food," or "cardboard" passed Mr. Sterling's lips in more than eight hours of testimony. Mr. Sterling <i>did</i> , however, testify as to how McDonald's food is <i>not</i> sold exclusively at its restaurants. See, e.g., 355:17-357:6.
27 31	<i>Opposer is a fast-food restaurant known for "value" and "inexpensive fast-food."</i> (Sterling, 317:19-22, 319:7-9, 322:19-	The only mention of "inexpensive" in Mr. Sterling's testimony is where he denies that McDonald's goods are advertised in that

	323:5, 369:16-370:13)	manner. (352:17-353:1) The only mention of "fast-food" is where he denies that McDonald's advertises itself as a fast-food restaurant. (353:12-14.)
29	<i>the Arch Card...is sold under Opposer's ARCH CARD mark and Opposer's Golden Arch Logo, not a "MC" mark. (Kizior, 11:23- 12:21,95:14-97:23,104:2-106:21; McD Ex. 1.)</i>	The Arch Card is sold under the Arch Card and Golden Arches logo marks. It is also sold under Mc-prefixed marks. <i>See, e.g.,</i> Kizior 15:12-20 and McD Ex. 3.
30	<i>(Oakland, 103:22). ...McDonald's products are offered for sale only within the McDonald's restaurant and are not comingled with Walmart products (Id.)</i>	At 103:22, Mr. Oakland responds "no" to a question asking whether Big Mac sandwiches can be found on Wal-Mart shelves. However, Mr. Oakland testifies at length about how the sale of McDonald's products extends out onto the floor of Wal-Mart stores. <i>See e.g.,</i> 88:3-92:11.
43	Opposer acknowledges it has no evidence of actual confusion. (ANOR A2 (Response to Interrogatory 4); ANOR A78-79 (Supplemental Response to Interrogatory 5 and 6); ANOR 556 (Response to Interrogatory 15).)	This is false. McDonald's acknowledges no such thing. In each of these responses, McDonald's identified its expert report containing the survey results as evidence of actual confusion.

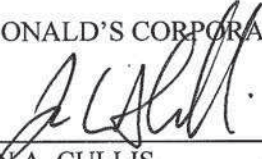
SUMMARY

For the reasons set forth herein, McDonald's Oppositions should be sustained on all grounds and registration of the Subject Applications should be refused.

Respectfully submitted,

McDONALD'S CORPORATION

Date: January 14, 2013

By: 
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APPENDIX A

Applicant objects to a number of Internet printouts submitted by McDonald's as parts of its Third Notice of Reliance for allegedly failing to comply with the guidelines set forth in *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010). *Safer* holds that an Internet printout is admissible via a notice of reliance under Trademark Rule 2.122(e) so long as it identifies "its date of publication or date that it was accessed and printed, and its source (*e.g.*, the URL)." *Id.* at 1039. Applicant reads past the "e.g." to interpret a hard requirement for a complete URL (root website + full webpage extension). Such a reading creates exactly the type of formulaic, rule-over-substance obstacle *Safer* sought to eliminate.

While the homepage of a website usually has a short URL, webpages within that website typically have much longer URLs. This is because the file structure of the website is incorporated into the URL. When pages with longer URLs are printed, the print setup often truncates the end of the URL. Some URLs are several hundred digits long, making this unavoidable. However, because only the end of the URL is lopped off, the root website from which the webpage came is still visible. In other words, its "source" is still apparent. In the paper reference world, this would be akin to knowing what day an article appeared in the New York Times, but perhaps not knowing the page number. *Safer's* lengthy discussion on admissibility under Rule 2.122(e) found that the Board historically admitted articles that "identifie[d] the publication and the date published." *Id.* at 1037. There was historically no page number requirement.

The vast majority of the documents to which Applicant objects have truncated URLs. All of these reveal the "source" of the document and the date printed. The utility in having the full URL extension is minute anyway. Given the full URL on a printout, one must carefully type in the random letters and numbers into a browser and hope the website's file structure has not changed. More likely, one would just go to the root website and search for the content. Such is the nature of the Internet.

L2-6, L121, and L175 are PDF documents. In each case, the immediately preceding page in Exhibit L shows the URL and date where the PDF resides, along with an arrow identifying the button to launch the PDF. L126 is an image used to assign an identifier to the actual CD submitted in hardcopy. All of the documents Applicant objects to comply with *Safer*, are admissible, and should be considered.

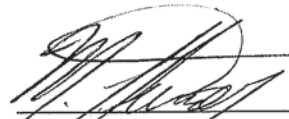
CERTIFICATE OF SERVICE

I, Mike R. Turner, state that I served a copy of the foregoing *Opposer's Reply Brief* via first class

U.S. mail, postage pre-paid, upon:

Katherine Hendricks
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on this 14th day of January, 2013.


Mike. R. Turner

NGEDOCs: 2045363.11