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Bottorff

THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Archer Daniels Midland Company
v.
Chocolates a la Carte, Inc.

Opposition No. 107,594
to application Serial No. 75/121,455
filed on June 17, 1996

Gary D. Krugman of Sughrue, Mion, Zinn, MacPeak & Seas,
PLLC for Archer Daniels Midland Company

Michael A. Painter of Isaacman, Kaufman & Painter for
Chocolates a la Carte, Inc.

Before Cissel, Hanak and Bottorff, Administrative Trademark
Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register
of the mark THE RESOURCE FOR CHOCOLATE SENSATIONS for
services recited in the application as "custom manufacture
of fine chocolates and chocolate desserts."¹

¹ Application Serial No. 75/121,455, filed June 17, 1996. May 1,
1996 is alleged in the application to be the date of first use of
the mark anywhere and the date of first use of the mark in
commerce.

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Opposer has opposed registration of applicant's mark, claiming that registration is barred under Trademark Act Section 2(d), 15 U.S.C. §1052(d). In particular, opposer has alleged in the notice of opposition that opposer is the prior user of the mark THE CHOCOLATE RESOURCE in connection with "various products and services related to the manufacture, sale and distribution of confectionery, chocolate, cocoa and related goods," and that applicant's mark, when used in connection with applicant's recited services, so resembles opposer's previously-used mark as to be likely to cause confusion, to cause mistake, or to deceive.² Applicant filed an answer by which it denied the allegations of the notice of opposition which are essential to opposer's claim.

² Opposer also pleaded ownership of Registration No. 1,725,537, issued October 20, 1992, for goods and services identified in the registration as "publications, namely periodic pamphlets and brochures pertaining to confectionery, chocolate, cocoa and related goods and services; printed recipe cards," in Class 16; "rendering consulting services in the field of marketing confectionery chocolate and cocoa products; rendering of consulting services in the field of marketing confectionery chocolate and cocoa products through the use of a telephone hotline service," in Class 35; and "wholesale, retail and institutional store services in the fields of confectionery, chocolate, coatings, and cocoa," in Class 42. Opposer submitted a status and title copy of this registration by notice of reliance during its testimony period.

However, opposer notified the Board (and applicant) in its main brief that opposer had failed to file the required Section 8 affidavit of continued use for the registration prior to the October 20, 1998 due date therefor, that the registration is expected to be cancelled, and that opposer accordingly now is relying solely on its common law rights in the mark as the basis of its Section 2(d) priority claim in this case.

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The evidence of record in this case consists of the pleadings; the file of applicant's involved application; opposer's notice of reliance on applicant's responses to opposer's interrogatories and requests for admission³; applicant's notice of reliance on opposer's responses to applicant's interrogatories; the testimony deposition of opposer's vice president William Ryan and exhibits thereto; and the testimony deposition of applicant's president Richard Pocrass and exhibits thereto. Opposer and applicant filed main briefs, and opposer filed a reply brief. An oral hearing was held on May 13, 1999 at which both parties were represented by counsel.

In reaching its decision herein, the Board has carefully considered all of the parties' arguments and submissions, even those which are not expressly discussed in this opinion.

We turn first to the issue of priority. As discussed more fully *infra* in connection with the issue of likelihood of confusion, the evidence of record establishes that opposer, since prior to applicant's first use of applicant's mark, has continuously used its mark THE CHOCOLATE RESOURCE on its chocolate products, on brochures relating to the

³ As noted *supra* at fn. 2, during its testimony period opposer also submitted, under notice of reliance, a status and title copy of its now-cancelled pleaded registration, but opposer has stated in its brief that it is no longer relying on that registration in support of its Section 2(d) claim.

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marketing of chocolate, and in connection with certain marketing consulting services. This evidence is sufficient to establish opposer's standing to oppose and its priority under Section 2(d). We reject applicant's contention that opposer has failed to prove use of the mark in connection with the brochures and the consulting services. Likewise, we reject applicant's contentions, under *Otto Roth & Co., Inc. v. Universal Foods Corp.*, 209 USPQ 40 (CCPA 1981), that opposer has no proprietary rights in its mark as applied to chocolate products because the mark is merely descriptive of those products and had not acquired distinctiveness for such products prior to the date of applicant's first use of applicant's mark.⁴

More particularly with respect to applicant's *Otto Roth* arguments, we find that the term RESOURCE is, at most, highly suggestive as used in opposer's mark and as applied to opposer's chocolate products, and that opposer's mark accordingly is not merely descriptive of those products.⁵

⁴ We need not and do not rule on opposer's contention that applicant, by waiting until its brief on the case to raise its arguments regarding the alleged mere descriptiveness of opposer's mark and opposer's lack of proprietary rights therein, has waived its right to assert those challenges. Even assuming that these issues have not been waived by applicant and are properly before us, we find that opposer has proven that it has the requisite proprietary rights in its mark THE CHOCOLATE RESOURCE to establish its standing and its Section 2(d) priority.

⁵ We note in this regard that opposer's mark was registered on the Principal Register without a disclaimer of the word RESOURCE, and likewise that applicant was not required to disclaim the word

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Moreover, even if opposer's mark could be deemed to be merely descriptive of opposer's chocolate products, we find that the mark had acquired distinctiveness prior to applicant's first use of applicant's mark on May 1, 1996. The evidence of record establishes that, for the years 1989-1995, opposer's sales of chocolate products under its mark were \$53,000,000 per year in its food service and retail confectionery divisions alone,⁶ and that opposer's advertising and promotional expenditures during that period were \$500,000 per year.⁷ This evidence is sufficient to establish that opposer's mark acquired distinctiveness for chocolate products prior to applicant's first use of applicant's mark.

In short, we find that opposer has proprietary rights in its mark which are sufficient to establish its standing to oppose and its Section 2(d) priority in this case.

RESOURCE as used in its mark THE RESOURCE FOR CHOCOLATE SENSATIONS.

⁶ Opposer's witness did not have figures regarding opposer's total sales under the mark, in dollar amounts, but he stated that opposer's annual sales volume under the mark amounted to 300 million pounds of product, 75% of which was sales to industrial users and the remainder to food service, retail confectioners and consumer products users.

⁷ Opposer's advertising expenditures for 1996 (\$52,000) and 1997 (\$45,000) were substantially smaller than in previous years as a result of uncertainties surrounding the transfer of the business from Grace to ADM during that period. However, we reject applicant's contention that such reductions resulted in an abandonment of opposer's mark or in a loss of the acquired distinctiveness generated by opposer's efforts between 1989 and 1995.

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Having found that priority rests with opposer, we now turn to the question of likelihood of confusion. Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering first the similarity or dissimilarity between the parties' marks, we find that applicant's mark THE RESOURCE FOR CHOCOLATE SENSATIONS is more dissimilar than similar to opposer's mark THE CHOCOLATE RESOURCE. Although both marks include the words CHOCOLATE and RESOURCE, the transposition of those words in the respective marks and the presence of the distinctive word SENSATIONS in applicant's mark render the two marks distinguishable when viewed in their entireties.

Indeed, the only points of similarity between the marks are their shared uses of the words RESOURCE and CHOCOLATE. CHOCOLATE, of course, is a highly descriptive term as applied to each parties' goods and services; its presence in

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both marks is of relatively slight significance in our determination of whether the two marks are confusingly similar. Likewise, the word RESOURCE, while not merely descriptive as used by both parties in their marks, nonetheless cannot be deemed to be a strong, highly distinctive term which should be accorded a particularly wide scope of protection.

It does not appear from the record that there are any third parties using marks which include both the words CHOCOLATE and RESOURCE for goods and services of the type involved in this case. However, given the relative weakness of the words CHOCOLATE and RESOURCE as applied to the relevant goods and services, the absence of evidence of similar third-party marks using these words matters less in this case than it would in a case involving marks comprised of more highly distinctive terms.

In short, we find that applicant's mark is not particularly similar to opposer's mark, when the marks are viewed in their entireties.

We next shall consider the similarity and relationship between the parties' respective goods and services, as well as between the parties' respective classes of customers and trade channels. Applicant's services, as recited in the application, are "custom manufacture of fine chocolates and chocolate desserts." The record reveals that applicant

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designs and manufactures molded chocolate containers and other chocolate specialty items which are used by applicant's customers as components of dessert plates, or as amenity and gift items. For example, applicant will design, manufacture and ship to a food service customer, e.g., a restaurant, chocolate containers in the shape of a swan or a piano, which the restaurant's pastry chef then will fill with mousse, fruit, ice cream, or cake, etc., to create high-end dessert plates. Applicant also makes and sells specially-designed chocolate items such as corporate logos, which may be used by event planners or corporations as amenities and by hotels as "turn-down" gifts to be left in customers' rooms. Applicant also will custom-design special items to its customers' specifications, such as the chocolate saxophones it designed for a hotel which was hosting an event during President Clinton's first inauguration. In addition, applicant has hundreds of available existing designs which applicant will manufacture to the customer's order and ship within several days, as well as dozens of standard designs which are kept in stock and available to be shipped overnight.

It appears from the record that the normal (and actual) classes of customers for applicant's services include hotels, caterers, white tablecloth restaurants, airlines, cruise lines, event planners, food service corporations,

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food distributors, country clubs, city clubs, colleges, schools, and corporations. Applicant also makes limited sales to bakeries, novelty manufacturers, candy store owners and retail confectioners, who might incorporate applicant's chocolate containers into their display case designs or use them as a value-added feature of their respective products.

Applicant advertises its services by direct mailings to its customers, and in trade publications such as Chef, Food Arts, Restaurant News, National Culinary Review, Special Events, Club Managers, Food & Beverage Journal, Pastry Arts & Design, Chocolatier, Culinary Trends, Resort, and Event Solutions. Applicant has exhibited at trade shows including those sponsored by American Culinary Federation, Event Planners, Country Club Managers, Western Restaurant Association, Luxury Box Association, New York Restaurant Association, New York Hotel & Motel Association, and the National Restaurant Association. At these trade shows, applicant's exhibits often include demonstrations by pastry chefs who create dessert plates using applicant's chocolate containers.

As for opposer, the evidence of record shows that its "core business" is the manufacture and sale of chocolate, confectionery and cocoa products.⁸ (Ryan, pp. 13-14.)

⁸ Opposer also uses its mark on brochures and other printed goods, and its now-cancelled registration included such publications in its identification of goods. (See *supra* at fn.

Industrial users such as Nabisco and Keebler comprise 75% of opposer's sales of such products, with the remainder going to opposer's food service customers (e.g., restaurants, hotel restaurants, hospitals, colleges, and schools), to retail confectioners (e.g., candy stores with 1-10 locations, cake decorating businesses, and novelty manufacturers),⁹ and to its consumer products division customers such as home candymakers.¹⁰ Opposer markets its chocolate products bearing the mark THE CHOCOLATE RESOURCE to its industrial and food service customers under the Ambrosia brand name, and to its retail confectionery

2.) However, opposer has not relied on its use of the mark on the brochures, per se, as an independent basis of its Section 2(d) claim. Moreover, the Board's review of the brochures reveals that, to the extent that they are not merely advertisements for opposer's chocolate products, they are essentially the vehicle for the marketing consulting services opposer provides to its chocolate customers. And, as noted *infra*, opposer's marketing consulting services essentially are rendered as merely an adjunct to and in furtherance of opposer's sale of its chocolate products.

⁹ Opposer does not sell its chocolate directly to event planners. Opposer's candy store and other retail confectionery customers may have event planners as their own customers.

¹⁰ Opposer's Exhibits 9 and 10 are Merckens brochures, bearing the mark THE CHOCOLATE RESOURCE, which are specifically directed to the home candymaker and which list opposer's chocolate and compound coatings and provide instructions relating to their use in home candymaking. The other "consumer" products identified by Mr. Ryan in his deposition (at pp. 60-61), i.e., opposer's "Tixies" product and its twelve-ounce bags of chocolate chips sold "primarily under private labels," do not appear to bear the mark THE CHOCOLATE RESOURCE. Mr. Ryan also referred to chocolate chips sold to consumers "in various-size bags" under the Ambrosia label, but it cannot be determined from the record that such goods also bear the mark THE CHOCOLATE RESOURCE.

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customers under the Merckens brand name. (Ryan dep., pp. 20-21).

Opposer advertises its chocolate products in trade publications in the confectionery, food service, bakery and dairy fields, including Candy Industry, Manufacturing Confectioner, Dairy Field, and Bakery & Snack. Opposer exhibits at trade shows sponsored by the Retail Bakery Association, the Institute of Food Technologists, and the National Restaurant Association, and at the All Candy Expo and the Philadelphia Candy Show. Opposer's trade show exhibits include demonstrations by pastry chefs who create chocolate desserts using opposer's products.

Opposer's arguments to the contrary notwithstanding, it appears from the record that opposer's chocolate products bearing the mark THE CHOCOLATE RESOURCE, whether marketed to opposer's industrial, food service or retail confectionery customers, are limited to basic chocolate and chocolate ingredients packaged and sold in bulk form. Applicant has submitted (as Exhibit 27 to the testimony deposition of its president Mr. Pocrass), opposer's advertisement from the June 1998 edition of Candy Industry, the text of which reads as follows:

Chocolate confections may come in different colors, different shapes and different designs - but if they're made with Merckens, they'll have the same great taste time after time. We're not here to compete with you, but to support and

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complement your efforts with consistent, timeless quality. And isn't that what you want in your chocolate and cocoa ingredients supplier? Call us today for more information. 1-800-MERCKENS. The Chocolate Resource™.

Opposer's own exhibits and testimony further establish the "bulk" nature of opposer's chocolate products. For example, opposer's 1998 Ambrosia catalog (Ryan deposition, Exh. 34), which Mr. Ryan asserted in his deposition (at pp. 82-83 and 94) to be the current and complete list of the standard products available to opposer's industrial and food service customers, lists opposer's products in the following categories: chocolate coatings, compound coatings, chunks, chocolate drops, compound drops, wafers, cocoas, liquors, ice cream products, food service products (identified as various coatings, confectionery wafers, baking chocolate, baking cocoa, chocolate flavored syrup, baking chips, etc.), and retail products (identified as break up, coatings and baking chips). Moreover, with respect to opposer's food service customers, Mr. Ryan testified as follows (at pp. 65-66):

Q Okay. As to the food service category, can you define in detail for us what you mean by that, and who those customers are? What type of businesses are they?

A Okay. Well, the ultimate - the ultimate user would be restaurants and institutions. Institutions would and could include things such as hospitals, colleges, schools. The restaurants would be anyone from fast food to

white tablecloth restaurants, and the products that they would buy from us would be primarily for their dessert applications.

Q Is this bulk chocolate you're talking about?

A It's - when you say "bulk", we're packaging in food-service-size packages, chocolate chips, cocoa, chocolate coatings in five- and ten-pound packages as opposed to 50-pound packages where the industrial people would be using them. We also have in our - in our food service line . . . we've had sprinkles or jimmies for ice cream toppings . . . and they're packed in kind of like milk cartons, and they'd be things for an ice cream bar in a restaurant where you would top your own sundae.

Likewise with respect to opposer's retail confectionery product line, opposer's 1998 Merckens catalog (Ryan dep., Exh. 33), which Mr. Ryan acknowledged to be the complete and current list of the standard products available to opposer's retail confectionery customers, lists opposer's goods in the following general categories: "Compound Coatings," "Chocolate Coatings," and "Primary Ingredients and Breakup," a category which is said to include products such as chocolate liquor, vanilla caramel, chocolate starter, cocoa butter, and semi-sweet chocolate drops. With respect to this last category, the catalog states, "Merckens offers a variety of specialty products to fulfill your chocolate ingredient needs," and "Merckens breakup is a selection of several of our very popular coating products, moulded into 2 lb. blocks for ease of display," characterizations which confirm that these products, as packaged and sold by

opposer, are not finished "fine chocolates and chocolate desserts."

Mr. Ryan testified (at p. 83) that the only products which would not be listed in these 1998 Ambrosia and Merckens catalogs would be "proprietary" or "custom-made" products. In discussing these non-standard products at pages 48-50 of his deposition, Mr. Ryan referred to them as "specific formulas and recipes" which opposer would work with its customers to develop:

The particular tastes of the product would be discussed, whether it would be a milk chocolate or a bittersweet chocolate and particular favor [sic - flavor] notes. We would probably do some - do some sampling; and, generally speaking, the product would come back and be tweaked again until it was finally a product, but it would go through a design stage, and also in some cases packaging might be also part of this customization if it - if it wasn't going to be a standard package. In the case of, say, industrial users they might have different - different means of - of automating their system, and we would work then in - in the delivery of the package as well as the - the product.

It appears from this description that these "proprietary" and "custom-made" chocolate products of opposer's, like the "standard" products listed in the 1998 Ambrosia and Merckens catalogs, are packaged and sold in bulk form, and are not finished "fine chocolates and chocolate desserts" of the type sold by applicant.

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We are not persuaded on this record by opposer's contention (at pp. 25-26 of its main brief) that opposer itself, like applicant, manufactures and sells custom-made chocolate corporate logos and gift baskets for corporate customers. Mr. Ryan testified (at p. 51, in connection with opposer's Exhibit 7¹¹) that "[t]here's a lot of business for our customers in logos and in corporate-type things, and we'd use our expertise in helping them get into that - that segment." Neither this testimony nor any other evidence in the record establishes that opposer itself has corporate customers for whom it designs and manufactures chocolate corporate logos or other specialty items.

Likewise, Exhibit 5 to Mr. Ryan's deposition is a 1991 Merckens brochure/price list displaying various molded chocolate novelty items packaged in foil wrappings, such as Santas, bells, ornaments, Easter eggs and bunnies, hearts and flower croquettes. These items appear to be of the same type, at least generally, as the molded chocolate items sold by applicant. However, there is no testimony or other evidence as to the volume or duration of opposer's sales, if any, of these novelty items.¹² Moreover, we note that these

¹¹ The question from counsel to which Mr. Ryan is responding makes reference to the exhibit as "number 16," but the exhibit at issue clearly is Exhibit No. 7.

¹² Mr. Ryan testified (at p. 59) that opposer sells chocolate to manufacturers of chocolate novelty items, but he did not testify regarding any manufacture and sale of novelty items by opposer itself. Furthermore, Mr. Ryan's testimony (at p. 61) regarding

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novelty products are not included in either of opposer's 1998 catalogs, which Mr. Myer identified as comprising a complete current listing of the standard products sold by opposer under the Merckens and Ambrosia brands and under the mark THE CHOCOLATE RESOURCE. In view of the fact that these items, if sold by opposer, would appear to be the most closely related to applicant's products and thus the most supportive of opposer's likelihood of confusion claim, opposer's failure to present any specific testimony or evidence regarding these products leads us to reasonably conclude on this record that opposer has no current common-law rights in the mark THE CHOCOLATE RESOURCE for such products.

The record shows that in addition to the goods discussed above, opposer also provides certain services in connection with its mark THE CHOCOLATE RESOURCE. As previously noted, opposer will work with its customers to develop customized chocolate recipes and formulas. (Ryan, pp. 48-50). Opposer also conducts periodic seminars for its customers relating to chocolate applications (Ryan, pp. 51-52).¹³

opposer's sales of the chocolate dessert cups depicted in the 1994 "European Choice" brochure (Exh. 18) does not mention the period during which such products were sold or the volume of any such sales, nor when their sale was discontinued. We cannot conclude from this testimony that opposer has any current common-law rights in the mark THE CHOCOLATE RESOURCE for these goods.

¹³ Opposer also apparently has a toll-free telephone number available for customers' questions about opposer's chocolate

Opposer also has developed and used a marketing consulting program called "Merchandising Magic," which Mr. Ryan described as "something that we used literature and people including our sales and marketing people as well as some specialists to work with customers to create ideas for them to build their business." (Ryan, pp. 51-52.) The "Merchandising Magic" program, as directed to opposer's food service customers such as restaurants, consists of the distribution of brochures containing recipes and ideas on how to use opposer's chocolate and cocoa products to create desserts and maximize the customers' dessert profits.

(Ryan, pp. 80, 97.) Such recipes and ideas include recipes for chocolate cake, low-fat chocolate cheesecake, chocolate fondue, chocolate covered strawberries, chocolate-covered fruit kebabs, and chocolate piping or threads over fresh fruit plates. (Ryan dep., Exhibits 2-4, 12, 15-17 and 22).

As directed to its retail confectionery customers such as candy shops, opposer's "Merchandising Magic" program consists of the distribution of brochures containing ideas "designed to help your business increase profits, provide inspiration for new products and promotions, and build customer interest and traffic." (Ryan dep., Exh. 6 and 7.)

products and their applications. However, Mr. Ryan testified that the toll-free number was only included in opposer's print advertisements up until 1994 or 1995, and that he does not know when the last time that a restaurant called the toll-free number might have been. (Ryan, pp. 105-08.)

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The marketing ideas set forth in the various brochures include "How to Sweeten Profits by Using Your Local Convention and Visitors Bureau" (Ryan dep., Exh. 6), "How to Use Chocolate to Win Corporate Accounts and Sweeten Your Bottom Line" (Ryan dep., Exh. 7), "How to Profit with Chocolate and Strawberry Promotions" (Ryan dep., Exh. 11), and "How to Build Profits by Staging a Chocolate Festival" (Ryan dep., Exh. 16).

In summary, opposer's services, including its working with customers to develop custom chocolate recipes and formulas, its educational seminars on chocolate applications, and its marketing consulting services, all appear to be offered to opposer's customers in conjunction with and in furtherance of opposer's efforts to sell its bulk chocolate and chocolate ingredient products. Opposer does not render services of the type rendered by applicant, i.e., custom-manufacture of finished fine chocolates and chocolate desserts. Nor, with respect to opposer's goods, can we conclude from this record that opposer has rights in the mark THE CHOCOLATE RESOURCE for finished specialty goods of the type custom-manufactured by applicant. Rather, opposer's goods are limited to chocolate and chocolate ingredients packaged and sold in bulk form.

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On this record, the only apparent market interface between applicant's services and opposer's goods and services exists in the context of sales to food service customers such as restaurants,¹⁴ and perhaps also in the context of sales to retail confectioners. The parties' food service customers, in making desserts for consumption by their patrons, might use both parties' products as complementary components of such desserts. For example, a restaurant or hotel's dessert chef may create a dessert plate composed of applicant's custom-made chocolate containers filled with chocolate mousse made from bulk chocolate purchased from opposer. Likewise the parties' retail confectioner customers such as candy stores and chocolatiers who use opposer's bulk chocolate to make their confections may also use applicant's specialty items as value added components of their products or as display case items.

However, these shared customers would appear to be professional chefs, chocolatiers and others who, when it comes to the ingredients they use in their dessert creations and confections, are likely to be sophisticated and careful purchasers, not impulse purchasers. Moreover, both

¹⁴ Indeed, the only trade show at which both parties have exhibited is the National Restaurant Association show. Otherwise, the parties exhibit at different trade shows and advertise in different trade publications, directed to different target audiences.

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applicant and opposer have minimum order requirements for their respective goods, a fact which further supports an inference of careful purchasing. It does not appear on this record that these purchasers are accustomed to seeing or would expect that bulk chocolate such as opposer's and specialty chocolate items such as applicant's originate from a single source. Neither opposer nor applicant sells both types of products, on this record, nor does it appear that any third party does so.

In these circumstances, we cannot say that the purchasers who encounter opposer's bulk chocolate products sold under the mark THE CHOCOLATE RESOURCE and applicant's "custom manufacture of fine chocolates and chocolate desserts" under the mark THE RESOURCE FOR CHOCOLATE SENSATIONS are likely to be confused as to source, sponsorship or otherwise. The marks consist of rather weak terms arranged in different manners, and the presence of the word SENSATIONS in applicant's mark further serves to distinguish the two marks. The parties' respective goods and services are largely dissimilar and non-competitive, and are marketed to different classes of customers in different trade channels. To the extent that there is a shared class of customers for the parties' goods and services, those customers are sophisticated and careful purchasers who have

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not been shown, on this record, to be likely to assume that bulk chocolate like opposer's and finished chocolate designs like applicant's would originate from a single source merely because they are marketed under marks which each include the weak terms CHOCOLATE and RESOURCE.

Finally, we note that there is no evidence of any instances of actual confusion arising from the parties' contemporaneous use, since applicant's first use in May 1996, of their respective marks in connection with their respective goods and services. This fact, while not dispositive, nonetheless corroborates our conclusion that, for the reasons discussed above, no likelihood of confusion exists in this case.

Decision: The opposition is dismissed.

R. F. Cissel

E. W. Hanak

C. M. Bottorff

Administrative Trademark Judges
Trademark Trial and Appeal Board