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Mailed: September 10, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Express Mortgage Lenders of America, Inc.

v.

Mortgage Express, Inc.

Opposition No. 91122996
to application Serial No. 75678705
filed on **April 9, 1999**

Allen M. Krass of Gifford, Krass, Groh, Sprinkle for Express
Mortgage Lenders of America, Inc.

Adam H. Jacobs of the Law Offices of Adam H. Jacobs for Mortgage
Express, Inc.

Before Simms, Hairston and Holtzman, Administrative Trademark
Judges.

Opinion by **Holtzman**, Administrative Trademark Judge:

An application has been filed by Mortgage Express, Inc.
(applicant) to register the mark shown below for "mortgage loan
services."¹ The word "mortgage" is disclaimed.

¹ Application Serial No. 75678705, filed April 9, 1999, based on an
allegation of a bona fide intent to use the mark in commerce.



Registration has been opposed by Express Mortgage Lenders of America, Inc. (opposer). As grounds for opposition, opposer asserts that since 1983 it has continuously used, through a predecessor-in-interest, the mark EXPRESS in connection with mortgage services, including mortgage brokering, funding and servicing; that opposer owns a registration for the mark shown below for "mortgage brokerage services";² that opposer has developed valuable goodwill and consumer recognition with respect to its use of EXPRESS in connection with its services, and, as a result, this mark has become a strong mark over time; and that applicant's mark "contain[ing] opposer's EXPRESS mark in its entirety" when applied to the similar or identical services identified in the application "is likely to be confused with that of opposer's and mistaken therefor."

Opposer submitted a status and title copy of its pleaded registration with the notice of opposition.

² Registration No. 1610103; issued August 14, 1990. The words "SPEEDY CASH MORTGAGE BROKERS, INC." are disclaimed.



Applicant, in its answer, has denied the salient allegations in the notice of opposition.

The record includes the pleadings; a status and title copy of opposer's pleaded registration; the file of the involved application; and opposer's notice of reliance on applicant's answers to interrogatories and documents attached as exhibits to those responses. The record also includes the testimony (with exhibits) of opposer's president, Maurice Janowitz.

Applicant neither attended the deposition of opposer's witness nor took any testimony in its own behalf.

Only opposer filed a brief. An oral hearing was not requested.

As indicated above, opposer has made of record a status and title copy of its pleaded registration. Therefore, priority with respect to the registered mark for the services identified therein (mortgage brokerage services) is not in issue.

King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In addition, Mr. Janowitz's testimony and supporting documentation establishes opposer's priority of use with respect to the word mark EXPRESS in connection with mortgage loan services and related mortgage

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services. Mr. Janowitz testified that the mark EXPRESS was first used through a predecessor-in-interest in 1982. The exhibits accompanying this testimony demonstrate use of EXPRESS in connection with residential home loan services and related mortgage services since at least as early as 1990. In any event, opposer has demonstrated use of its mark well prior to the April 9, 1999 filing date of applicant's application, which, in view of the absence of other evidence, is the earliest date on which applicant is entitled to rely.

Thus, we turn to the question of likelihood of confusion. In our analysis we will direct our attention to the mark of opposer which can be considered closest to the mark in the subject application, that is, the word mark EXPRESS.

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, including the similarity of the marks and the similarity of the services. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The factors deemed pertinent in this proceeding are discussed below.

We turn first to the services. Applicant's services are identified in the application as mortgage loan services, and the evidence shows that opposer provides residential home loans and related mortgage services. Thus, the parties' services are identical. Because the services are identical, they must be

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deemed to be sold in the same channels of trade and directed to the same purchasers. *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). In fact, the evidence shows that both parties' services are marketed to homeowners through direct mail and other forms of print advertising. It is clear that if these identical services are offered under similar marks there would be a likelihood of confusion.

Thus, we turn our attention to the marks, keeping in mind that when marks would appear on identical services, as in this case, the degree of similarity between the marks necessary to support a finding of likely confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

It is well settled that marks must be compared in their entireties. Nevertheless, one feature or part of a mark may have more significance than another and greater weight may be given to that part or feature in determining whether confusion is likely. In *re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). When opposer's mark EXPRESS and applicant's mark EXPRESS MORTGAGE and design are considered in their entireties, giving appropriate weight to the components and features thereof, we find that the marks are similar in sound, appearance, meaning and overall commercial impression. The word EXPRESS is opposer's entire mark and is visually and aurally a significant portion of applicant's mark. Although applicant's mark also includes the

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word MORTGAGE, that word is generic for the services and of little or no significance as an indication of source. Nor is the design element sufficient to distinguish the marks. It is the literal portion of a mark, rather than the design component, which is more likely to be recalled by purchasers because it is used to call for and refer to the services offered under the mark. See *In re Continental Graphics Corp.*, 52 USPQ2d 1374 (TTAB 1999) citing *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Purchasers who are familiar with EXPRESS, alone, for mortgage loan services, are likely to remember that word upon hearing or seeing applicant's mark EXPRESS MORTGAGE at a different time in connection with identical services.

Not only are the marks similar in sound and appearance, but they convey the same meaning. Both marks suggest the quick or speedy delivery of mortgage services. The image of the moving train in applicant's mark reinforces this meaning. While the term EXPRESS is suggestive of the services, opposer's mark is certainly entitled to protection from applicant's very similar mark for identical services.

It is reasonable to assume that homeowners may be careful about the company they select to provide their mortgage loans. However, there is no evidence or even argument in this case that these purchasers are sophisticated or experienced in these matters, and indeed they may not be. Moreover, even if these purchasers were shown to be sophisticated with respect to these

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services, we would have no basis upon which to conclude that such sophistication would extend to the marks used in connection with them.

Decision: The opposition is sustained.