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Mailed:
February 24, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

H-D Michigan, Inc.

v.

Hog Cream Enterprises, Inc.

Opposition No. 91152998
to application Serial No. 76219514
filed on March 5, 2001

Jerre B. Swann and William M. Bryner of Kilpatrick Stockton
LLP for H-D Michigan, Inc.

Hog Cream Enterprises, Inc., pro se.

Before Seeherman, Hohein and Walters, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

H-D Michigan, Inc. has opposed the application of Hog
Cream Enterprises, Inc. to register the mark HOG CREAM RIDE
THE BEST PORK THE REST SPF 15 and design, as shown below,
for suntan lotion.¹ The words CREAM and SPF 15 have been

¹ Application Serial No. 76219514, filed August 12, 2002, and
asserting first use and first use in commerce on February 23,
2001.

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disclaimed apart from the mark as shown. Applicant has described the design portion of its mark as a warthog riding a motorcycle.



As grounds for opposition, opposer has alleged, inter alia, that since prior to the filing of applicant's application, opposer has used various trademarks incorporating the word HOG in connection with the sale of a wide variety of goods and services; that opposer owns registrations for marks incorporating the word HOG;² that the consuming public have come to identify goods sold under the HOG marks with opposer or with a single source; that applicant's mark is confusingly similar to opposer's HOG marks, and applicant's identified goods are related to the goods and services sold under opposer's HOG marks; that applicant adopted its mark in order to trade on the reputation and goodwill associated with opposer's HOG marks;

² Such registrations are specifically set forth later in this opinion.

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and that applicant's mark, when used in connection with applicant's identified goods, so resembles opposer's previously registered and used HOG marks as to be likely to cause confusion or mistake or to deceive.

In its answer applicant has admitted that:

Opposer H-D Michigan, Inc., its subsidiary, Harley Davidson Motor Company Group, Inc. has for many years been engaged in interstate commerce in the business of manufacturing, distributing, and selling Harley-Davidson motorcycles, motorcycle parts and accessories;

Harley Davidson has a variety of trademarks including H.O.G. (Harley Owners Group), the bar and shield design;

Harley Davidson owns several trademarks in various classes; and

Harley Davidson registrations remain valid.

Applicant has also admitted that Harley-Davidson has extensively advertised its products, but asserts that opposer does not advertise a sport sunscreen, nor that it is famous for a sunscreen product. Applicant has also denied the other salient allegations in the notice of opposition.

The file includes the pleadings and the file of the opposed application. Opposer has submitted, under notice of reliance, portions of the discovery deposition of applicant; certified status and title copies of its pleaded registrations; printed publications referencing opposer's

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HOG trademarks; and the affidavit testimony, with exhibits, of Linda A. Heban, vice president and chief trademark counsel for H-D Michigan, Inc., and of Ed Schneegas, the store manager of Tombstone Cycles. Opposer has also submitted a written stipulation by the parties to the submission of testimony by affidavit.³

Applicant has submitted the declaration of Tammy G. Elczyn, applicant's president and CEO; and what are described as printed publications. Opposer has moved to strike the notice of reliance on printed publications, and to strike certain statements from Ms. Elczyn's declaration.⁴ Although applicant did not respond to the motion, we will not treat it as conceded (see Trademark Rule 2.127(a)), but will instead consider it on the merits.

Most of the exhibits submitted by applicant under notice of reliance appear to be portions of advertising materials of third parties who sell motorcycles. For example, applicant identifies Exhibit A as "Kawasaki Vulcan Cruise Sales pamphlet" and Exhibit B as "Honda VTX 1300C 1300S Sales pamphlet." Exhibit I, a Catalog Favorites catalog, bears the name of Tammy G. Elczyn with her

³ Opposer's consented motion to extend trial dates is granted.

⁴ Opposer points out in its motion to strike that the Elczyn declaration does not contain proof of service on opposer. It is not clear whether opposer was not, in fact, served, or only whether the declaration did not contain proof of service. In any event, since it is obvious from opposer's motion that it did, in

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address, as does Exhibit J, a Cycle Emporium catalog. None of these promotional/advertising materials constitutes printed publications which may be submitted pursuant to Trademark Rule 2.122(e). See, generally, TBMP 704.08.⁵

Two of the Exhibits submitted under notice of reliance are identified as being from "opposer's reliance #1" (Exhibit G) and from "Opposer's Exhibit" (Exhibit H). Exhibit G is page 51 from the discovery deposition of Tammy Elczyn, portions of which opposer made of record under a notice of reliance. This page was part of opposer's submission, and therefore it is already of record. As for Exhibit H, it is a single page of what might be a catalog or other promotional material. However, because we cannot ascertain from what exhibit of opposer's Exhibit H is from, and because it has not been adequately identified, we have not considered it.⁶

fact, obtain the declaration, we take no action at this point regarding the lack of proof of service.

⁵ Exhibit F is a catalog of opposer, rather than a third-party. Such catalog does not constitute a printed publication which may be submitted under Trademark Rule 2.122(e). Even if this catalog were properly of record, it would not change the result herein.

⁶ It is possible that this page may have been part of an exhibit introduced during the discovery deposition of Ms. Elczyn, and relates to a portion of the discovery deposition that opposer did not submit under its notice of reliance. Trademark Rule 2.120(j)4 provides that if only part of a discovery deposition is made part of the record by a party, an adverse party may introduce under a notice of reliance any other part of the deposition which should in fairness be considered so as to make not misleading what was offered by the submitting party. Such a notice of reliance must be supported by a written statement explaining why the adverse party needs to rely upon each additional part. Because we cannot ascertain the origin of applicant's Exhibit H to even know that it is part of Ms.

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Accordingly, the only exhibit submitted under applicant's notice of reliance that we have considered is Exhibit G.⁷

Opposer has also moved to strike certain statements from the declaration of Ms. Elczyn. In general, the Board prefers not to strike testimony. However, to the extent that the statements are not supported by the record, or are based on unauthenticated materials, they have little or no probative value.⁸

Only opposer has filed a brief. Neither party requested an oral hearing.

Since 1903 opposer or its predecessors-in-interest or its corporate affiliates (hereafter opposer) have been engaged in the business of manufacturing, distributing and selling HARLEY-DAVIDSON motorcycles, parts and accessories,

Elczyn's discovery deposition, nor can we ascertain why, if it were part of the deposition, it should in fairness be considered so as to make not misleading those portions of the discovery deposition that were offered by opposer, we find that Exhibit H cannot be made of record pursuant to the provisions of Trademark Rule 2.122(j)(4).

⁷ In a footnote in its motion to strike, opposer points out that applicant failed to indicate the relevance of the exhibits she submitted, as required by Trademark Rule 2.122(e). Opposer does not ask that we strike the exhibits on this basis, and we decline to do so. See *Mack Trucks, Inc. v. California Business News, Inc.*, 223 USPQ 164, 165, n.5 (TTAB 1984).

⁸ Opposer points out in a footnote in its motion to strike that the testimony declaration by Ms. Elczyn was not accompanied by the written stipulation of the parties that provided for the submission of testimony by affidavit/declaration, even though the terms of the stipulation required that a copy be attached to any affidavit or declaration submitted thereto. Because opposer had previously submitted copies of the stipulation with the affidavit testimony of its witnesses, we do not consider applicant's failure to submit the stipulation to be material.

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as well as other goods and services related to motorcycling or of interest to motorcycle enthusiasts. In 1982, opposer established the Harley Owners Group, or "H.O.G.," as a social club for owners of Harley-Davidson motorcycles. Opposer has used "HOG" marks since 1982. As evidenced by opposer's 1997 catalog (exhibit 37), opposer has used various HOG marks, e.g., those depicted in Registration Nos. 1710653 (HOG, HARLEY OWNERS GROUP Design), 14383313 (HOG with Wheel Design and 1710643 (HOG, LADIES OF HARLEY Designs), on, inter alia, sweatshirts, shirts, caps, bandanas, mugs, plaques, pins, zipper pulls, decals, atlases, travel clocks, pens, key rings, directors chairs, poker kits, flags and patches. Since 1983 opposer has distributed to its H.O.G. members a publication called HOG TALES. Currently 600,000 copies are distributed in the United States on a bi-monthly basis. Opposer sells its HOG-branded merchandise through a network of authorized independent dealers and through retail outlets, amounting to 793 outlets nationwide. The products are also sold through the chapters of its H.O.G. club, at motorcycle rallies and H.O.G.-sponsored events.

H.O.G. and local H.O.G. chapters conduct state, regional and national motorcycle rallies and various other activities, amounting to thousands of H.O.G.-sponsored

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events each year. The H.O.G. marks are displayed on tents and banners at these events.

From 1994-2003, opposer has spent in excess of \$111 million advertising and promoting its HOG marks and, between 1999 and 2003, has sold in excess of \$14 million of goods bearing the HOG marks.

Opposer has also, through the years, used porcine images in connection with promoting its goods and services. These images include a HOG bank that was used in an advertising campaign in 1981-82, a HOG mug and HOG cookie jar in 1983-84 and, in the early 90's, a hog stuffed animal.

Applicant was started in July 2000 by Tammy Gray-Elcyzyn, who is its president, CEO and sole officer, shareholder and employee. Because Ms. Elcyzyn and applicant are essentially alter egos, references to Ms. Elcyzyn's activities are the same as references to applicant's. Ms. Elcyzyn created HOG CREAM sunscreen to capture the market of "unscented" sunscreen buyers. Her idea was to customize the labels of the product to the type of activity tourists to Daytona Beach would attend, and the product would thereby become a souvenir of their visit. Motorcycle racing is a major event/activity in Daytona Beach. She chose a warthog as a character because it had the skin texture and attitude she wanted to convey, and had this character depicted riding a motorcycle because she felt that a label appealing to

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motorcycle enthusiasts would give her the most outlets of the various labels she envisioned. Future labels that she has in mind would depict the warthog character riding other "toys" that are used in Daytona, such as stock cars and surfboards.

The consumer base for applicant's suntan lotion is the public at large. Applicant's first sale was to Ms. Elcyzyn's husband, on February 22, 2001. This was followed by sales in March, during "Bike Week," to a few vendors in Daytona and New Smyrna Beach, Florida, i.e., Bulldog Leathers, a motorcycle accessories store (parts and clothes), the Harley-Davidson dealership in New Smyrna Beach, and a gas station in Barberville, Florida. In January 2002 applicant made a sale to Tombstone Cycles, a motorcycle sales and parts store in New Smyrna Beach. Her only other customer has been Highlander Café and Gifts, a gift shop and ice cream parlor. Applicant's sales from 2001 through 2003 have amounted to \$314, and it has stopped actively selling its HOG CREAM suntan lotion since it received notification of this opposition.

Applicant has not expended any sums for advertising. When applicant was actively selling the product, its promotional activities were limited to directly visiting possible retailers. Applicant also has a website that advertises its product, although the primary purpose of

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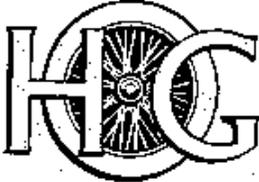
having the site is to make applicant appear to be a more substantial business. Applicant intends to advertise its brand through other products such as T-shirts and caps.

Applicant has used the "tag lines" "lightly scented to entice those with wheels not wings" and "Looking good in Leather, not like Leather" in connection with promoting goods sold under its mark. On its website, it lists, as a reason for buying its product, "I sold my Harley to start this business! And I really would like to buy another someday."

Applicant has admitted opposer's ownership of its pleaded registrations. Opposer has also made these registrations of record by submitting certified copies thereof, showing that the registrations are subsisting and are owned by opposer, for the following:

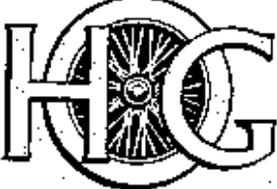
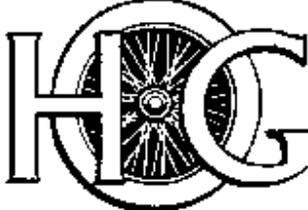
Mark	Goods/Services
HOG	Motorcycle parts, namely timer covers, derby covers, and medallions; ⁹
HOG	Metal badges; figurines made of metal; folding knives, sport knives and knife cases; clocks, watches, jewelry of precious and non-precious metal, namely, pins, charms, earrings, bracelets, necklaces, and rings; ornamental lapel pins; ashtrays, cigarette cases and holders of cigarette lighters of precious metals; belt buckles of precious metal; greeting cards, road atlas,

⁹ Registration No. 1599492, issued June 5, 1990; Section 8 & 15 affidavits accepted and acknowledged; renewed.

	<p>posters, calendars, newsletters, books and magazines relating to motorcycling, paper banners relating to motorcycling, playing cards, decals, note paper, pens and pencils, checkbook clutches; drinking steins; glassware, namely, plates, cup saucers, glasses and other containers for food and beverage mugs, cups, insulated can holders, commemorative plates, toothbrushes, quencher cups and figurines made of ceramic porcelain and glass; leather can, glass and mug holders; flags and banners not of paper; clothing, namely, shirts, sweatshirts, T-shirts, caps, hats, jackets, vests, socks, shoes, boots, scarves, belts, sweat pants, pants, bandanas, gloves, suspenders, chaps, rainsuits, and mittens; belt buckles not of precious metals, ornamental pins and embroidered patches for clothing; ashtrays, cigarette cases and holders of cigarette lighters not of precious metal; cigarette lighters¹⁰</p>
 <p>(hereafter "HOG with Wheel Design")</p>	<p>Motorcycle parts, namely timer covers, derby covers and gas cap medallions¹¹</p>

¹⁰ Reg. No. 1716992, issued September 18, 1992; Section 8 & 15 affidavits accepted and acknowledged; renewed.

¹¹ Reg. No. 1483313, issued April 5, 1988; Section 8 & 15 affidavits accepted and acknowledged.

	<p>Clocks, watches, pins, necklaces, rings, bracelets, charms and tie tacks; pens, mechanical pencils, paper banners and road atlases; wall plaques; T-shirts, caps, sweatshirts, jackets, sweatpants and shirts; embroidered patches and belt buckles¹²</p>
	<p>Sport knives and knife cases; mugs, cups, insulated can holders; flags and banners not of paper; cigarette lighters not made of precious metal¹³</p>
<p>HOG CLUB (CLUB disclaimed)</p>	<p>Sandwiches¹⁴</p>
<p>HARLEY HOG</p>	<p>Sandwiches¹⁵</p>
<p>HOG TIES (TIES disclaimed)</p>	<p>Tie down straps for motorcycles¹⁶</p>
 <p>(hereafter HOG, HARLEY OWNERS GROUP Design)</p>	<p>Folding knives and knife cases; greeting cards, road atlases, posters, calendars, paper banners relating to motorcycling, playing cards, decals, note paper, pens, pencils, and checkbook covers and holders, newsletters, books, and magazines relating to motorcycling; drinking steins, beverage glassware, mugs, cups, insulated can holders, leather can, glass and mug holders, commemorative plates, non-electric toothbrushes, quencher cups, and figurines made of ceramic, porcelain and glass; flags and banners not of paper, clothing, namely, shirts,</p>

¹² Reg. No. 1534200, issued April 11, 1989; Section 8 & 15 affidavits accepted and acknowledged.

¹³ Reg. No. 1810475, issued December 14, 1993; Section 8 & 15 affidavits accepted and acknowledged; renewed.

¹⁴ Reg. No. 1958775, issued February 27, 1996; Section 8 & 15 affidavits accepted and acknowledged.

¹⁵ Reg. No. 2118685, issued December 9, 1997; Section 8 & 15 affidavits accepted and acknowledged.

¹⁶ Reg. No. 2386246, issued September 12, 2000.

	<p>sweatshirts, T-shirts, caps, hats, jackets, vests, socks, shoes, boots, scarves, belts, sweat pants, pants, bandanas, gloves, suspenders, chaps, rainsuits, and mittens; belt buckles not of precious metal, ornamental lapel badges not of precious metal and embroidered patches; cigarette lighters, cigarette cases not of precious metal, and holders for cigarette lighters not of precious metal¹⁷</p>
 <p>(OWNERS GROUP disclaimed)</p>	<p>jewelry¹⁸</p>
 <p>(OWNERS GROUP disclaimed)</p>	<p>Motorcycle club services¹⁹</p>

¹⁷ Reg. No. 1710653, issued August 25, 1992; Section 8 & 15 affidavits accepted and acknowledged; renewed. Although opposer did not plead this registration, it submitted it to applicant with its requests for admission (asking applicant to admit that the certificate was a true copy that was issued by the USPTO, which applicant did), and also submitted a status and title copy of the registration under notice of reliance. Therefore, we deem the pleadings to be amended to assert this registration as a basis for opposer's likelihood of confusion claim. FRCP 15(b).

¹⁸ Reg. No. 2305867, issued January 4, 2000

¹⁹ Reg. No. 1455826, issued September 1, 1987; Section 8 & 15 affidavits accepted and acknowledged.

 <p>(hereafter "HOG, LADIES OF HARLEY Design")</p>	<p>Paper banners relating to motorcycling; shirts, sweatshirts, T-shirts, caps and vests; embroidered patches²⁰</p>
	<p>Clocks, watches, jewelry of precious and non-precious metal, namely ornamental lapel and hat pins, charms, earrings, bracelets, necklaces and rings²¹</p>
<p>HOG TALES</p>	<p>Newsletter relating to motorcycling²²</p>

In view of opposer's ownership of these subsisting registrations, priority is not in issue. King Candy Company v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Opposer has also submitted evidence that it used the mark HOG on sunscreen in 1998, and an exhibit shows such mark with the legend "1983-1998." However, during the discovery deposition of Ms. Elczyn, apparently in connection with Ms. Elczyn's concerns about confidentiality of her business plans, opposer's counsel made the statement that opposer didn't "have any suntan lotion" and that "honestly, I do not know of any plans of theirs in that

²⁰ Reg. No. 1710643, issued August 25, 1992; Section 8 & 15 affidavits accepted and acknowledged; renewed.

²¹ Reg. No. 2084703, issued July 29, 1997; Section 8 & 15 affidavits accepted and acknowledged.

²² Reg. No. 1477667, issued February 23, 1988; Section 8 & 15 affidavits accepted and acknowledged.

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regard." p. 51. It is possible that sunscreen was offered under the HOG mark only during 1998. It is also possible that opposer's counsel, who was not testifying, would not be aware of all of the merchandising products on which opposer uses its marks.²³ In any event, because there is some question as to whether opposer has used the mark HOG on sunscreen subsequent to 1998, we have not considered such use in determining the issue of priority.

This brings us to the issue of likelihood of confusion. Our determination of this issue is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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 (CCPA

²³ Applicant points out that opposer's 2001 catalog does not list sunscreen. This catalog (Exhibit F), as noted previously, has not been considered because it was not properly made of record. In any event, we note that this catalog is devoted only to motor accessories and motor parts. It is obvious from other catalogs that opposer has made of record that its catalogs have different focuses. "Therefore, even if the catalog were of record, we would draw no negative conclusion from the fact that sunscreen products do not appear in it.

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1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Turning first to the marks, as noted, opposer owns registrations for HOG per se, as well as for marks which contain the word HOG. In many of these registrations, and in particular those for the mark HOG with Wheel Design, HOG is the dominant element of the subject mark. In fact, in the HOG with Wheel Design mark, not only is HOG the only word in the mark, but the wheel forms the letter "O." In applicant's mark, the word portion HOG CREAM is prominently displayed, and is likely to be the term by which consumers refer to and call for the goods. While the mark also contains the phrases RIDE THE BEST, PORK THE REST and SPF 15, these are clearly subordinate and/or descriptive matter. Further, although the mark also contains the design of a "Hog Man" riding a motorcycle, it is the HOG CREAM word portion that is dominant element of the mark, since consumers will call for it by these words. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Further, the word CREAM in applicant's mark, which applicant has admitted is generic for its goods and which has been disclaimed, has no source-indicating significance. The "hogman" design in applicant's mark simply reinforces the effect of the word HOG. Thus, HOG must be considered the dominant element of applicant's mark as well. Although we

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have compared the marks in their entirety, we have thus accorded greater weight to the HOG portion of applicant's mark and to the word HOG in opposer's HOG and Wheel Design mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety).

The factor of the similarity of the marks thus favors opposer.

With respect to the goods, opposer's registration for its mark HOG (Reg. No. 1716992) covers a wide variety of consumer products, including figurines, knives, jewelry, greeting cards, T-shirts and caps, mugs and cigarette lighters. Similarly, opposer's registration for HOG with Wheel Design (Regs. No. 1534200 and 1810475) includes, inter alia, clocks, jewelry items, pens, T-shirts and caps, knives, mugs, embroidered patches and cigarette lighters. It is clear from the evidence submitted that opposer uses its marks as merchandising marks for a broad range of collateral items, such that consumers are likely to believe, upon seeing a mark that is confusingly similar to opposer's

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marks on an item like suntan lotion, that such product is part of opposer's merchandising line. In fact, opposer has, at least in 1998, used the mark HOG on suntan lotion. Opposer has also offered, under its HARLEY mark, suntan lotion and lip balm.

It is not necessary that the goods of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In this case, applicant's goods are designed to appeal to motorcycle enthusiasts. It is for that reason that applicant has depicted a motorcycle as part of the mark. As stated by applicant's president in applicant's supplemental response to Interrogatory No. 13:

Decided that the label design with the Hogman riding a motorcycle gave me the most outlets. Nascar has two events each year also but only 2 or 3 stock car type stores, cafes are here. Whereas there are many motorcycle type stores in

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the Daytona area. Also motorcycle dealerships are all over the country, while surf shops and jetski dealerships are limited.

Applicant solicited motorcycle accessories stores and motorcycle dealerships to sell its goods. Three of the five venues to which it was able to sell its suntan lotion sell motorcycles or accessories used by motorcyclists.

In view of the way applicant's goods are marketed, we find that the parties' goods are related, and that the factor of the similarity of the goods accordingly favors opposer.

The goods are also, as the record establishes, sold in the same channels of trade. In addition to applicant's discovery responses regarding its solicitation of and sales to motorcycle and motorcycle accessories stores, opposer has submitted the affidavit testimony of Ed Schneegas, the store manager of Tombstone Cycles in Daytona Beach, Florida. He testified that Tombstone Cycles is a motorcycle dealer that sells motorcycles, motorcycle parts and motor-related products, and that he had observed that the Daytona Beach store had for sale sunscreen lotion bearing the mark HOG CREAM with a design of a hog riding a motorcycle.

The du Pont factor regarding the channels of trade therefore favors opposer.

With respect to the conditions under which sales are made, suntan lotion is obviously an inexpensive item

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(applicant's product sells for \$5.00 per bottle) that can be purchased on impulse, such as when a person is shopping for another product and buys suntan lotion because it happens to come into view. This factor, too, favors opposer.

The fifth du Pont factor is fame. As noted above, from 1994-2003, opposer has spent in excess of \$111 million advertising and promoting its HOG marks and, between 1999 and 2003, has sold in excess of \$14 million of goods bearing the HOG marks. However, opposer has not broken down its sales and advertising for each HOG mark and the goods on which it is used. Because opposer has not pleaded a family of marks, our determination of likelihood of confusion must be made with respect to each mark in connection with the particular goods. As a result, the vagueness of the evidence precludes us from finding that each mark is famous. We can say, however, that opposer's HOG marks are strong marks. The catalogs that are in the record show that opposer's marks are used on collateral items because they are merchandising marks, that is, consumers purchase the goods because they prominently display the marks. Thus, although we do treat this du Pont factor as playing the dominant role that it can when a famous mark is involved, see *Kenner Parker Toys Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992), the strength

of opposer's HOG marks, as shown by the evidence of record, favors opposer.

Related to the preceding factor is the number and nature of similar marks in use on similar goods. There is no evidence of third-party use, and therefore this factor, too, favors opposer.²⁴

The next two du Pont factors relate to the presence or absence of evidence of actual confusion. We note that in his affidavit Mr. Schneegas stated that, when he first started working at Tombstone Cycles store in Daytona Beach and encountered HOG CREAM sunscreen lotion he believed that the product was connected with opposer. Because he was an employee at the store, and there is no indication that he was considering buying the sunscreen lotion, we do not treat this testimony as evidencing actual confusion. On the other hand, there have been so few sales of applicant's product that we can draw no conclusions from the lack of evidence of actual confusion.²⁵ These du Pont factors are therefore neutral.

²⁴ At Ms. Elczyn's discovery deposition she was asked about certain third-party registrations that she had found by searching the USPTO's electronic records. She confirmed that she was not aware of any use of these registered marks. Third-party registrations are not evidence of use of the marks therein in the marketplace, and they do not show that the public is familiar with the marks. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973).

²⁵ As for actual confusion among the store managers to whom applicant sold cases of its product, Ms. Elczyn testified that

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The variety of goods on which opposer's mark is used is a factor that strongly favors opposer. As noted previously, opposer uses and has registered its HOG marks for a wide variety of goods, and particularly goods that can be broadly classified as accessories that would appeal to motorcyclists. As Ms. Hebert testified, suntan lotion is an item that would also appeal to motorcyclists. As a result, consumers are likely to believe that suntan lotion is a product offered by opposer.

Because applicant sold only a minimal amount of suntan lotion, and because it is a start-up business, the extent of potential confusion at this time is de minimis. However, because applicant intends to and has appealed to the same customers that would purchase opposer's products and has to and intends to offer them through the same channels of trade, including motorcycle dealers and motorcycle parts and accessories stores, the potential for confusion in the future if its business expands is substantial.

Finally, although not a specific factor, we must comment on the general impression created by applicant's mark and its promotional efforts. Applicant's mark depicts a "hogman" riding a motorcycle; opposer is famous for its motorcycles and, as Mr. Schneegas's testimony shows, those

when she solicited these people she introduced herself as being from a local business. Given her explanation, it is not

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who have personal and professional experience with motorcycles understand "hog" to refer to opposer. The wording RIDE THE BEST in applicant's mark, and the tag line "Looking good in Leather" on its website, suggest motorcycle riding. Applicant also uses the tag line "Lightly scented to entice those with wheels not wings," on its website, and two of opposer's marks, namely HOG, HARLEY OWNERS GROUP Design and HOG, LADIES OF HARLEY Design, prominently feature a wings design. Further, applicant states on its website that "I sold my Harley to start this business!" Although applicant has explained why it chose each portion of its mark and tag lines, taken together applicant's mark and advertising material, at the very least, conjure up images of opposer and may well be perceived as indicating a connection between applicant's goods and opposer. However, we need decide whether or not applicant intended to trade on opposer's reputation. We find, on the basis of the du Pont factors that we have discussed, that opposer has established that applicant's mark, as used on its goods, is likely to cause confusion with its HOG and HOG with Wheel Design marks. In view thereof, we do not reach the question of whether applicant's mark is likely to cause confusion with the remaining HOG marks pleaded by opposer in the notice of opposition.

surprising that there is no evidence that the retailers were not

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Decision: The opposition is sustained.

confused.