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SECRETARY OF STATE—WHERE IN EXERCISE OF DISCRETION HE PROPERLY FINDS THE NAME OF A CORPORATION, APPLICANT TO FILE ARTICLES OF INCORPORATION, IS NOT DISTINGUISHABLE FROM A TRADE NAME PROPERLY REGISTERED AND THE PUBLIC MAY BE MISLEAD, HE MAY PROPERLY REFUSE TO ACCEPT SUCH ARTICLES FOR FILING—SECTION 6240-11 G. C.

## SYLLABUS:

Where the Secretary of State properly finds in the exercise of his discretion that the name of a corporation seeking to file its articles of incorporation with him is not distinguishable from a trade name properly registered with him under Section 6240-11, General Code, and that the public is likely to be misled by the use of such name, he may properly refuse to accept such articles for filing.

Columbus, Ohio, April 9, 1947

Hon. Edward J. Hummel, Secretary of State  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“An application to incorporate under the name Merchants Transfer & Storage Co. was rejected for the reason the name was not available because we have a registered trade name known as Merchants Trucking & Storage Company, which was registered by R. K., Columbus, Ohio, under the provisions of Section 6240-11 of the General Code.

Attorneys for the proposed corporation claim that there is no provision under Section 6240-11, which could prevent the Secretary of State from filing Articles of Incorporation under the same or a similar name.

Your opinion is requested. May a corporation be organized adopting a name which is the same or similar to a registered trade name filed under Section 6240-11 of the General Code?”

Your request assumes that the two names mentioned therein are the same or similar so I am accepting that assumption without deciding that particular question.

Provision has been made in Section 6240-11, General Code, for the registration of trade names with the Secretary of State; also some prohibitions against such filing are set forth in Section 6240-12, General Code, as follows:

“The Secretary of State shall not file a statement proposing the registration of any such name, title or designation wherein such name, title or designation is likely to mislead the public, or unless the name, title or designation is such as to distinguish such name, title or designation from names, titles or designations, corporate or otherwise, previously recorded in the office of the Secretary of State, unless the written consent of the former registrant is filed with such statement.”

Your request indicates that the name “Merchants Trucking & Storage Company” has been properly registered with you. Section 6240-12, General Code, above mentioned, does not contain in itself any prohibition of the use of such name properly registered by a corporation seeking to file articles of incorporation in your office.

If we examine Section 8623-5, General Code, which pertains to domestic corporations organized for profit, we find the following provision contained therein:

“1. Except as otherwise provided in this section and in the sections of this act relating to the reorganization and consolidation of corporations, the secretary of state shall not file any articles if the corporate name is likely to mislead the public, nor unless the name is such as to distinguish the corporation from any other corporation authorized to do business in this state, unless there be filed with the secretary of state the written consent of such other corporation to the use of such name, evidenced by resolution of its board of directors certified by its secretary or an assistant secretary.”

While your question indicates that the corporation to be formed is one for profit, I wish, also, to quote a similar provision found in Section 8623-98, General Code, applicable to domestic corporations organized not for profit as follows:

“No name may be used which shall be likely to mislead the public. The secretary of state shall not file any such articles of incorporation \* \* \* wherein the proposed corporate name is not readily distinguishable from a name, title or designation, registered under the provisions of the General Code, unless the written consent of such registrant to the use of such name, title or designation is filed with such articles; \* \* \*.”

The prohibitions in each of these statutes are two-fold against the use of a name: (1) which is likely to mislead the public, and (2) which is not distinguishable from the name of another corporation doing business in this state. The purposes of these statutes are also two-fold: (1) to protect the public from being confused, misled or deceived, and (2) to protect the corporation from unfair trade practices so as to make resort to courts of equity unnecessary. See 66 A. L. R. 948; 13 Am. Jur. (Corporations) Section 131, page 268; Fletcher on Corporations, Perm. Edition, Volume 6, Section 2419.

Since the trade name registered is the trade name of an individual doing business in this state and not of a corporation, it does not come within the prohibition found in Section 8623-5, General Code, directed against you from filing the articles where the two names are not distinguishable. Notwithstanding this fact it would appear that the certificate of a corporation may be properly refused where its name is the same or similar to the name of another corporation or of an unincorporated society.

In regard thereto, it is stated in Fletcher on Corporations, Perm. Edition, Volume 6, Section 2419, at page 13:

“Under the statutes just mentioned, and even, perhaps, on principles of public policy, when the statute does not thus expressly provide, if corporators select a name which has previously been adopted and is being used by another corporation, a certificate of incorporation should be refused. Incorporation under the prejudicially similar name may, in a proper case, be enjoined.”

And, attention is particularly directed to the case of Polish National Catholic Church of St. Francis, 31 Penna. Superior Court, page 87, where it was held that the Superior Court will not review the discretion of the Court of Common Pleas in refusing to grant a charter to a church congregation under the name of the Polish National Catholic Church of St. Francis where the application for the charter is resisted by an unincorporated congregation already in existence under the name of The St. Francis Roman Catholic Church. See also 13 Am. Jur. (Corporations) Section 132, page 269, wherein is found the following statement:

“In the absence of statutory provisions forbidding the use of certain described names \* \* \* a corporation formed under the general laws may, as a general rule, adopt any name it desires, subject to the qualification that an existing body, even though an unincorporated association, may have a property right in its

name of which it cannot be deprived. \* \* \* Irrespective of any intent to mislead the public, it may be enjoined from using a name or conducting its business under a name so similar to the name of a previously established corporation, association, partnership, or individual engaged in the same line of business that confusion or injury results therefrom."

The reasons cited in the cases from which the above principle has been taken are, protection to the public, the elimination of confusion in the collecting of taxes and uncertainty in the judicial processes of the courts, and to prevent unfair trade advantages.

So it would seem that in the absence of such statutes there is authority for your refusing to file such a certificate which would tend to mislead the public or result in an unfair trade advantage to either an incorporated or unincorporated body.

It should be noted that Section 8623-5, General Code, contains a prohibition against the Secretary of State—"shall not file any articles if," etc. This statute also provides that a corporation already having filed may consent to the taking of its name by a new corporation. While such consent would remove that prohibition found in the statute, it does not necessarily follow that the Secretary of State could then be compelled to accept the articles for filing.

However, I do not find it necessary to base my conclusion on the foregoing grounds but rather on Section 8623-5, General Code, which to me seems to answer your question, where it provides "if the corporate name is likely to mislead the public."

While the name submitted in the articles of incorporation is not the same name or similar to the name of another corporation, it is a name likely to mislead the public for the reason that a similar name is already in use and registered with you. Since you have decided, and I have assumed, that the names are the same or similar, it is difficult to see how the public would not be misled thereby. Both business concerns are apparently engaged in the same kind of business and as I have learned, in two cities in Ohio not very far distant from each other. The goods and services of the new corporation would likely, in the eyes of the public, be confused with those of the other business unit.

It may be argued that the phrase "mislead the public" means the use of descriptive language in the name which may tend to mislead with

reference to the character of the corporation and the nature of its business such as "police," "bank" or "trust." This seems to be the position taken by Mr. Davies in his work on Ohio Corporations. See Vol. I thereof at page 180. In the light of the history of Section 8623-5, General Code, I am not inclined to limit this phrase to that meaning alone. The former analogous section, being Revised Statutes 3238, was amended in 92 O. L. page 320 in so far as pertinent to your question, to read as follows:

"\* \* \* but the secretary of state shall not in any case file or record any articles of incorporation in which the name of the corporation is the same as one already adopted or appropriated by an existing corporation of this state or so similar to the name of such existing corporation as to be likely to mislead the public, unless the written consent of such prior existing corporation signed by its president and secretary, be at the same time filed with such articles of incorporation."

And in 95 O. L. page 76, this section was further amended to read as follows:

"\* \* \* but the secretary of state shall not in any case file or record any articles of incorporation in which the name of the corporation is such as is likely to mislead the public *as to the character or purpose of the business authorized by its charter* or is the same as one already adopted or appropriated by an existing corporation of this state or so similar to the name of such existing corporation as to be likely to mislead the public, unless the written consent of such prior existing corporation, signed by its president and secretary, be at the same time filed with such articles of incorporation." (Emphasis added.)

Then later Section 8628, General Code, was passed to read as follows:

"The secretary of state shall not file or record any articles of incorporation wherein the corporate name *is likely to mislead the public as to the nature or purpose of the business its charter authorizes*, nor if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation, signed by its president and secretary, be filed with such articles." (Emphasis added.)

The two above amendments presented a substantial change from former sections; they indicated that the public was not to be misled by the use of a name as to the nature or purpose of the corporation's business

while heretofore the public was not to be misled with reference to conflicting names of corporations. This change indicated that the Legislature intended a broadening of the field in which the public was not to be misled.

Section 8628, General Code, was repealed, as reported in 112 O. L. 58, and Section 8623-5 was enacted in the same session to read as follows (see 112 O. L., page 11):

“The secretary of state shall not file any articles *if the corporate name is likely to mislead the public, nor unless the name* is such as to distinguish the corporation from any other corporation authorized to do business in this state, unless the written consent of such other corporation signed by its president or a vice-president is filed with such articles.”

(Emphasis added.)

Here, again, the Legislature has made a substantial change; it again has broadened the scope of this statute; it has indicated that the corporate name shall not mislead the public without designating in what particulars it shall not be misled, or without placing any limitations thereon. It would seem that the Legislature has now indicated that the Secretary of State shall not file articles if the corporate name is likely to mislead the public *in any way nor* unless the name is such as to distinguish it from any other corporation. As far as pertinent this section in this form has continued to the present. I should think then that you could properly find that the public is likely to be misled by the name of a new corporation which is the same or so similar as not to be distinguishable from the duly registered trade name of an individual already doing business in this state. See *Parma Democratic Club v. Democratic Club of Parma, Inc.*, 29 O. L. Abs. 30; *Cincinnati Realty Company v. St. Nicholas Plaza, Inc.*, 28 O. N. P. (N. S.) 354; *Cranford v. Jordan, Secretary of State*, 61 Pac. 2nd 45.

A determination as to whether or not a name is misleading or distinguishable is a matter calling for the exercise of discretion by you and the courts will not interfere in the exercise of that discretion unless your action is arbitrary or capricious. *Davies, Ohio Corporation Law, Vol. I, page 181.*

Therefore, in specific answer to your question, I am of the opinion that where the Secretary of State properly finds in the exercise of his discretion that the name of a corporation seeking to file its articles of

incorporation with him is not distinguishable from a trade name properly registered with him under Section 6240-11, General Code, and that the public is likely to be misled by the use of such name, he may properly refuse to accept such articles for filing.

Respectfully,

HUGH S. JENKINS,  
Attorney General.