

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Oral Hearing:
October 21, 2010

Mailed:
March 10, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nestle Prepared Foods Company

v.

V & V Enterprises Incorporated

Opposition No. 91167465
to application Serial No. 76590414
filed on May 4, 2004

Virginia S. Taylor, Michael W. Rafter, Charlene R. Marino,
and Christopher P. Bussert of Kilpatrick Stockton LLP for
Nestle Prepared Foods Company

Michael S. Culver of Millen, White, Zelano & Branigan, P.C.
for V & V Enterprises Incorporated

Before Grendel, Zervas and Kuhlke, Administrative Trademark
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, V & V Enterprises Incorporated, seeks
registration of the mark shown below for goods identified in
the application as "pocket sandwiches" in International
Class 30.



The application was filed on May 4, 2004, alleging May 3, 2004, as the date of first use in commerce under Section 1(a), 15 U.S.C. §1051(a). The wording "POCKET FOODS CORPORATION" is disclaimed.

Opposer, Nestle Prepared Foods Company, as pleaded in its amended notice of opposition, opposed registration of applicant's mark, on the grounds that, as used with applicant's goods, the mark so resembles "each of opposer's HOT POCKETS Marks as to be likely to cause confusion, mistake, and deception, particularly in view of the competitive nature of the parties' goods."¹ Amended Notice of Opp. ¶10. Applicant filed an answer by which it denied the salient allegations and asserted that opposer "is not the owner of the pleaded registrations." Answer to Amended Notice of Opposition.

Briefs were filed and an oral hearing was held on October 21, 2010. As a preliminary matter, in its reply brief opposer moves to strike applicant's brief as untimely.

¹ In addition, opposer asserted a claim of abandonment; however, at oral argument opposer waived this claim. We note that, in any event, the record does not support this claim.

Opposition No. 91167465

Opposer filed its main brief on the case on February 24, 2010 and applicant filed its brief on March 31, 2010. Trademark Rule 2.128(a)(1) provides that the "brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief." Thus, applicant's brief was due on March 26, 2010. At oral hearing it became evident that applicant was under the misapprehension that the additional five days provided under Trademark Rule 2.119(c) was applicable to briefs on the case. However, Trademark Rule 2.119(c) provides that "[w]henver a party is required to take some action within a prescribed period after the service of a paper upon the party by another party and the paper is served by first-class mail...5 days shall be added to the prescribed period." (emphasis added). Trademark Rule 2.119(c) only applies when the time for taking action is triggered by the service of a paper. The Rule is not applicable to circumstances where the time for taking action is triggered by a set due date such as that prescribed in Trademark Rule 2.128(a)(1). Opposer argues that applicant has not shown excusable neglect and because of applicant's delay it had five fewer days in which to prepare and file its reply brief. At a minimum, opposer argues, applicant's evidentiary objections should be waived due to the untimely filing of the brief.

Opposition No. 91167465

Here, the five day delay in filing is minimal and has had no impact on the proceedings. As to any prejudice to opposer, opposer did not request an extension of time in which to file its reply brief and, in fact, filed a reply brief within the required timeframe addressing all of applicant's arguments and objections. While applicant's mistaken interpretation of the rules was within its control, it is also clear that its conduct did not fall within the realm of bad faith. Fed. R. Civ. P. 6(b)(1)(B). Under the circumstances, and because it benefits the Board in its ability to make a just determination of the case in light of the specific issues raised in this proceeding to have the briefs of both parties of record, applicant's brief, including the objections maintained therein is accepted.²

Before considering opposer's claim of priority and likelihood of confusion, we must first address which mark(s) are at issue in this proceeding. The amended notice of opposition refers to "HOT POCKETS" generally and "related 'POCKETS' marks" in certain paragraphs, it also contains allegations that two registrations will be "collectively referred to as "Opposer's HOT POCKETS Marks" and then refers to "Opposer's HOT POCKETS Marks" in the paragraph alleging likelihood of confusion. The pleading also lists three

² We note that had we stricken applicant's brief, we would not have considered opposer's reply brief.

registrations for marks that contain the wording HOT POCKETS. Plaintiff is not the owner of these registrations. They are owned by plaintiff's parent company Societe Des Produits Nestle S.A. (Societe), a Switzerland Corporation. Thus, plaintiff may not rely on the registrations for the presumptions afforded by Section 7(b) of the Trademark Act, 15 U.S.C. §1057, as opposer acknowledged at the oral hearing, and must prove priority through establishing prior use.³ See *Chemical New York Corp. v. Conmar Form Systems, Inc.*, 1 USPQ2d 1139, 1144 (TTAB 1986) (wholly-owned subsidiary of owner of registrations may not rely on registrations to prove priority); *Yamaha International Corp. v. Stevenson*, 196 USPQ 701, 702 (TTAB 1979) (opposer could not rely on 7(b) presumptions where registration is owned by its parent company); *Fuld Brothers, Inc. v. Carpet Technical Service Institute, Inc.*, 174 USPQ473, 475-76 (TTAB 1972)⁴

³ Thus applicant's objection to opposer's submission of these registrations under notice of reliance is sustained to the extent that they may only be used to show what appears on their face, namely, that an application was filed claiming use for the mark shown in the registration for the listed goods, and that the registration was granted.

⁴ We cannot let pass without noting that opposer's characterization of the case *Fuld Brothers, Inc. v. Carpet Technical service Institute, Inc.*, 174 USPQ 473, 476 (TTAB 1972) is incorrect. Opposer concluded that the Board in that case found "that opposer, the parent company, could still claim the priority date of registrations that were in the name of its wholly-owned subsidiary." Reply Br. p. 9. However, in that case the Board expressly stated "Respondent asserts that petitioner has no standing to cancel its mark because at the time this proceeding was brought, Associated Just Distributors, Inc., and not petitioner was the owner of the registration and the user of the mark 'OUT'. Respondent's contention as to petitioner's

(although petitioner can rely on its wholly-owned subsidiary's use of a mark, petitioner cannot rely on the registrations owned by its wholly-owned subsidiary for statutory presumptions); and *Joseph S. Finch & Co. v. E. Martinoni Co.*, 157 USPQ 394, 395 (TTAB 1968) (opposer cannot rely on registrations owned by its parent or its parent's subsidiaries). See also TBMP 704.03(b)(1)(B) (2d ed. rev. 2004).⁵

Turning to opposer's common law marks, applicant argues that opposer may not rely on the LEAN POCKETS and CROISSANT POCKETS marks inasmuch it did not plead use of those marks.

reliance herein on the pleaded registration is well taken. Notwithstanding the relationship of Associated Just Distributors, Inc., to petitioner, it is nevertheless a separate legal entity, it is the record owner of the registration, and, in view of the express language of Section 5 of the Statute, only the registrant can rely upon the prima facie presumptions afforded a registration under Section 7(b)." *Fuld*, 174 USPQ at 476. The Board in that case stated that the opposer could rely on the use by Associated Just Distributors in determining priority.

⁵ We note that in the civil action between the parties, the United States District Court for the District of Colorado, in its order on motions for summary judgment, stated that "the exclusive licensee of a trademark has the right to enforce the trademark ... [and that] [a]s the exclusive licensee of the four trademarks at issue, Nestle is considered a 'registrant' with rights to enforce the trademark." *Opp. NOR Exh. 7, Nestle Prepared Foods Co. v. Pocket Foods Corporation and V & V Enterprises Inc.*, Civ. Action No. 04-cv-02533-MSK-MEH (D.C.D.Colo. Aug. 24, 2009). However, it appears that the court only enforced those "rights" for which Nestle not only offered its parent's registrations but also had examples of use. In any event, it has been the jurisprudence of the Board for several decades that only the registrant may enjoy the benefits of Section 7(b) presumptions. We do not interpret the definition of "registrant" in Section 45 of the Trademark Act, 15 U.S.C. §1127, to include exclusive licensees to the extent that they may rely on Section 7(b) presumptions. Licensees may enforce trademark rights, but must establish priority through evidence of use and may not rely on their licensor's registrations.

Opposition No. 91167465

At trial, opposer clearly asserted its use of the marks HOT POCKETS, LEAN POCKETS and CROISSANT POCKETS in connection with stuffed sandwiches. During opposer's testimony, applicant did not object to testimony about such use and in fact conducted cross-examination on these marks. Implied consent to the trial of an unpleaded issue can be found only where the nonoffering party (1) raised no objection to the introduction of the evidence on the issue, and (2) was fairly apprised that the evidence was being offered in support of the issue. *Morgan Creek Productions Inc. v. Foria International Inc.*, 91 USPQ2d 1134, 1138 (TTAB 2009); *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1720-1721 (TTAB 2008). There is no question that applicant was apprised of opposer's intent to try the issue of its use and reliance on the asserted LEAN POCKETS and CROISSANT POCKETS marks. Thus, despite applicant's objection to the testimony and accompanying exhibits pertaining to these marks presented for the first time in its brief, applicant has implicitly consented to trial of the issue of priority and likelihood of confusion with respect to opposer's use of LEAN POCKETS and CROISSANT POCKETS and there is no prejudice to applicant in so holding. In view thereof, the pleadings are amended by implied consent to assert opposer's use of LEAN POCKETS and CROISSANT POCKETS in connection with stuffed sandwiches, and to the extent there was any

Opposition No. 91167465

ambiguity, the pleadings are clarified to allege likelihood of confusion with opposer's asserted common law HOT POCKETS mark. Fed. R. Civ. P. 15(b). We note that opposer only discussed the HOT POCKETS and LEAN POCKETS marks in its brief. Thus, opposer's asserted marks at issue before us are the asserted common law marks HOT POCKETS and LEAN POCKETS. We focus our decision on its HOT POCKETS mark.

In view of the above, the evidence of record consists of the pleadings herein; the file of applicant's subject application; the testimony deposition (with exhibits) submitted by opposer of Michael Raymond Niethammer,⁶ opposer's Group Marketing Manager for the Hot Pockets brand; opposer's notices of reliance on registrations, official records and the discovery deposition of applicant's 30(b)(6) witness Carl Vennitti; and defendant's notices of reliance on various documents, including online dictionary definitions, third party registrations and a cookbook.⁷

⁶ Certain testimony and exhibits were designated as confidential and we will discuss those portions of the record in general terms. In addition, while we only discuss certain portions of the record in the decision, we have considered the entire record in arriving at our determination.

⁷ Opposer's objections to these documents are noted. The objection to Exh. A is denied. These online dictionary definitions are widely available in print and, as such, are admissible. Cf. *In re Cyberfinancial.net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002). In addition, internet printouts may be introduced under notice of reliance. *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010). Opposer's objection to Exh. B is also overruled. We accept under notice of reliance excerpts from the USPTO's own Acceptable Identification of Goods and Services Manual. The objection to Exh. C is

STANDING

As discussed below, opposer has shown that it uses the marks HOT POCKETS and LEAN POCKETS in connection with frozen stuffed sandwiches and has demonstrated a real interest in preventing registration of applicant's mark. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Thus, opposer has established its standing.

PRIORITY

As noted above, because opposer is not the owner of the pleaded registrations, opposer must prove its common law rights prior to applicant's priority date. *Hydro-Dynamics Inc. v. George Putnum and Company Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987). "Under the rule of *Otto Roth*, a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows by a preponderance of the evidence that his term is distinctive of his goods, whether

sustained. The magazine from which the excerpt was obtained does not appear to be in general circulation and there is no evidence upon which to determine that it is sufficiently available to fall within the definition of a printed publication for purposes of introduction through notice of reliance. As to the objections to the remaining documents, in essence they address the probative value of the evidence and we have taken that into consideration in making our decision.

inherently or through the acquisition of secondary meaning or through 'whatever other type of use may have developed a trade identity.'" Towers v. Advent Software Inc., 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990), citing, Otto Roth & Co. v. Universal Food Corp., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981).

Thus, in order to prevail, opposer must establish that it acquired trademark rights in the HOT POCKETS mark, that it is distinctive, either inherently or through acquired distinctiveness, and that its use predates applicant's first actual or constructive use. Applicant relies on its filing date of May 4, 2004, thus, opposer must establish use prior to applicant's constructive use date, May 4, 2004, the filing date of the pending application.

Because opposer tried this case under the mistaken belief that it could rely on Societe's registrations, the evidence of use is limited to 2003-2008. However, this does predate applicant's filing date. Mr. Niethammer testified to opposer's sales and advertising for the HOT POCKETS brands for frozen stuffed sandwiches beginning in 2003. While the data for 2003 includes sales and advertising expenses for all three brands, HOT POCKETS, LEAN POCKETS and CROISSANT POCKETS, it is substantial and taken in the context of the other testimony and exhibits it is clear that

the HOT POCKETS brand comprises a large portion of opposer's sales and advertising. Niethammer Test. p. 8-12 Exh. 1 (profit and loss statement covering 2003-2008). This evidence of sales is for the "retail side of the business" which covers grocery stores (e.g., Safeway); warehouse club stores (e.g., Costco) and super centers (e.g., Walmart). Id.

Applicant argues that opposer's mark, HOT POCKETS, is merely descriptive and the evidence of record is not sufficient to establish that it has acquired distinctiveness.

To the extent applicant has shown that opposer's mark is not inherently distinctive,⁸ opposer has submitted the results of a PERT survey showing extensive brand awareness for the HOT POCKETS brand for the years 2004 - 2009, including a breakout for the first quarter of 2004. Neithammer Test., Exh. 3. Mr. Niethammer testified that PERT tracks brand awareness measures by surveying consumers and opposer receives quarterly reports from PERT. Niethammer Test. p. 26-27. Based on this survey in the first quarter of 2004 the HOT POCKETS brand commanded 96 percent brand awareness, meaning that when asked if a consumer had heard of the HOT POCKETS brand 96 percent responded yes. See Niethammer Test. p. 28, Exh. 3. The HOT

⁸ We discuss applicant's evidence of mere descriptiveness infra.

POCKETS brand commanded 30 percent brand awareness in the unaided survey, meaning a consumer responded with the HOT POCKETS name when asked to name a brand of frozen food. Niethammer Test. p. 59. This evidence is sufficient to establish, at a minimum that HOT POCKETS had acquired distinctiveness for frozen stuffed sandwiches by the first quarter of 2004, prior to applicant's filing date.

In view of the above, opposer has shown rights in the mark HOT POCKETS prior to applicant's filing date and, thus, has established priority.

We turn then to consider whether there is a likelihood of confusion.

LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Section 2(d) 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 and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

The parties have presented evidence and argument on the factors of the similarity of the marks, the relatedness of the goods, channels of trade, classes of purchasers, the strength of opposer's marks, and bad faith.

With regard to the goods, applicant's "pocket sandwiches," encompass opposer's frozen stuffed sandwiches.

Opposition No. 91167465

As to channels of trade, because applicant has no limitations in its identification of goods we must consider all channels of trade appropriate for the goods of this type. See *Octocom Systems Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed."); *In re Elbaum*, 211 USPQ 636 (TTAB 1981). Applicant's goods are of a type that would travel in the same channels of trade established by opposer, i.e., retail grocery stores, warehouse club stores and super centers. Therefore, we must presume that applicant's and opposer's goods travel in the same channels of trade and are purchased by the same classes of consumers. *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

In view of the above, we find that, the goods are legally identical and the parties' trade channels and customers overlap.

As to the conditions of sale, these are relatively inexpensive goods and are subject to a lower level of purchaser care. *In re Martin's Famous Pastry Shoppe, Inc.*,

Opposition No. 91167465

223 USPQ 1289, 1290 (Fed. Cir. 1984) ("Bread and cheese are staple, relatively inexpensive comestibles, subject to frequent replacement. Purchasers of such products have long been held to a lesser standard of purchasing care.").

Opposer argues that the element of "bad faith" or "intent to trade off the goodwill" (categorized under du Pont factor 13) weighs in its favor because applicant knew of opposer's HOT POCKETS Mark. To put it simply, without more we cannot make such findings as to applicant's intent, good or bad. This is not a record where an inference of bad faith may be made. Accordingly, we find no bad faith in applicant's adoption of its mark.

The main question in this case is whether opposer's mark HOT POCKETS is sufficiently similar to applicant's mark



such that when used on nearly identical goods, there is likely confusion. We examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are

Opposition No. 91167465

sufficiently similar in their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. In making this determination we recognize that that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 32 USPQ2d 1698 (Fed. Cir. 1992). However, where the matter common to the marks is not likely to be perceived by purchasers as distinguishing source, similarity may not be found. See *Citigroup Inc. v. Capital City Bank Group, Inc.*, 94 USPQ2d 1645 (TTAB 2010); *Safer, Inc. v. OMS Inv., Inc.*, 94 USPQ2d 1031 (TTAB 2010) and *In re Shawnee Milling Co.*, 225 USPQ 747 (TTAB 1985).

Central to the analysis in this case is the impact of the common term "pocket" to a potential consumer and whether use of that word is enough to create a likelihood of confusion.

Opposer asserts that its marks are very strong based on their inherent distinctiveness and "opposer's extensive use and promotion of the POCKETS Marks, as well as sales of goods under the marks for over 25 years, and thus are entitled to a broad scope of protection." Br. p. 14. In response, applicant argues that there is not sufficient evidence upon which to make a determination that the marks

Opposition No. 91167465

are well known and, in fact, the common term "pocket" is not only weak but descriptive of the parties' respective goods.

The evidence does show that the mark HOT POCKETS, in its entirety, has strong commercial strength. The commercial strength "of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). It is also important to place such numbers in the context of the relevant marketplace and the extent of consumer exposure. The unrebutted evidence establishes that the HOT POCKETS brand is a market leader in the stuffed sandwich category. Niethammer Test. p. 22-25, Exhs. 2 and 3. Further, the brand awareness study shows consistently high aided and unaided awareness for the years 2003-2009. Niethammer Test. Exh. No. 3.

However, "[b]ecause of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it." *Lacoste Alligator S.A. v. Maxoly Inc.*, 91 USPQ2d 1594, 1597 (TTAB 2009); *Leading Jewelers Guild Inc. v. LJOW*

Opposition No. 91167465

Holdings LLC, 82 USPQ2d 1901 (TTAB 2007). As noted above, there is no evidence of long term use and the 2003 - 2009 data is not separated by brand, i.e., HOT POCKETS, LEAN POCKETS and CROISSANT POCKETS, which diminishes somewhat the weight of that evidence in that it is unclear which brand is strongest, while unlikely, it is possible that CROISSANT POCKETS is the strongest one and opposer has not presented argument on that mark. In addition, the evidence of "widespread renown within popular culture" is somewhat vague and not supported by documentary evidence. For example, Mr. Niethammer testifies that "people that are aware of HOT POCKETS ... can recite that jingle to you as well." Niethammer Test. p. 38. But this statement is not supported by evidence. Similarly, Mr. Niethammer testifies that:

So there are several hundred Facebook pages of people who have created, like, a HOT POCKETS club for people to join. There are several hundred of those. And then You Tube, there are several thousand videos that people have made with HOT POCKETS sandwiches in them, the jingle, the packaging. So they will do a number of - make their own commercials, make a song. And there's, you know, like 5,000 videos on You Tube with consumers and advocates of the brands doing this.

Niethammer Test. p. 40.

Again there is no evidence to substantiate this statement. No examples were given and no specific data as to consumer exposure to these social media sites were provided. Thus, we do not give much weight to the testimony regarding use of the HOT POCKETS within "popular culture."

Opposition No. 91167465

Overall, we find that the record evidence relevant to the strength of opposer's mark is not sufficient to reach the level where the renown of the mark plays "a 'dominant' role in the process of balancing the du Pont factors." *Recot Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000). See also *Packard Press Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1356 (Fed. Cir. 2000); and *Hard Rock Cafe*, 48 USPQ2d at 1409.

Moreover, the record also shows that the word "pocket," used in connection with stuffed sandwiches or snacks is, at a minimum, highly suggestive. The term "pocket bread" refers to "pita" which is defined as "a round flat bread of Middle Eastern origin that can be opened to form a pocket for filling." App. NOR Exh. A. The use of the term "pocket" to refer to a filled sandwich or snack is demonstrated by the cookbook titled Edible Pockets for Every Meal (2003). App. NOR Exh. H. An excerpt from the preface is set forth below:

Whether they are called dumplings, turnovers, pasties, calzones, empanadas, piroshki boreks, quesadillas, knishes, pot stickers or any other name, edible pockets are enjoyed all over the world. ... Pockets make wonderful appetizers, picnic fare or light entrees ... The basis for pocket wrappers depended on what was grown in the region ... There are some traditional pockets that use a specific filling...

Applicant also submitted third-party registrations which include the term POCKET or POCKETS in the marks and

Opposition No. 91167465

have the term disclaimed, are on the Supplemental Register and/or use the term "pocket" or "pockets" in the identification of goods.⁹ See, e.g., Reg. No. 3309541 for the mark FILLO POCKET SINGLES and design "fillo pocket singles" disclaimed for "fillo dough-based pockets with or without filling"; Supp. Reg. No. 3006772 for the mark STIRFRIES RICE POCKETS "rice pockets" disclaimed for "frozen and refrigerated food entrees comprised primarily of rice, with an outer cooked rice grain shell component encompassing various non-grain fillings";¹⁰ Supp. Reg. No. 2626936 for the mark SALAD POCKETS for "pita pocket bread"; Reg. No. 1542783 for the mark PARTY POCKETS "pockets" disclaimed for "pocket bread"; Supp. Reg. No. 1513234 for the mark TEENY POCKETS for "bread, namely pita bread"; Reg. No. 1377467 for the mark LEAN POCKETS "pockets" disclaimed for "pre-cooked, ready to eat, frozen bread having a fruit, meat, cheese

⁹ The third-party applications submitted by applicant have no probative value on this point as they are only evidence that they were filed. *Glamorene Products Corporation v. Earl Grissmer Company, Inc.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979). Similarly, the cancelled registrations are of little probative value on this point. *Action Temporary Services Inc. v. Labor Force Inc.*, 10 USPQ2d 1307 (Fed. Cir. 1989).

¹⁰ Opposer's argument with regard to these two registrations that because the disclaimers contain other matter, is not persuasive. The fact that the wording in these marks may be for a specific type of food "pocket" does not diminish their probative value as to the descriptiveness in connection with the term "pocket." Further, to the extent the additional descriptive or generic matter makes a difference, that undercuts opposer's argument that applicant's mark is similar to opposer's mark.

Opposition No. 91167465

and/or vegetable filling";¹¹ Reg. No. 3703153 for the mark BABU'S and design for "prepared foods, namely frozen pocket sandwiches with vegetable and/or meat filing"; Reg. No. 3700429 for the mark SPICE VICE for, inter alia, "dough-based pockets with filling consisting primarily of meats, poultry, fish, fruits and vegetables and cheese"; and Reg. No. 3682826 for the mark KASHI for, inter alia, "pocket sandwiches." While these registrations do not serve as evidence of the sixth du Pont factor, inasmuch as they are not evidence of third-party use, they do serve in the nature of a dictionary definition to support a finding that the term "pocket" may be descriptive or highly suggestive of the subject goods. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). See also *Olde Tyme Foods, v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992).

In addition, all of opposer's evidence to show strength is for the marks HOT POCKETS and LEAN POCKETS in their entirety and not for the term POCKETS by itself. These circumstances are distinguished from *Bose*, 63 USPQ2d at 1303, where the record included evidence of fame for the common term WAVE apart from the house mark BOSE. To the contrary, here, the evidence of record points to the

¹¹ This registration is owned by opposer's parent and was also made of record by opposer.

opposite conclusion. Pocket refers to a type of sandwich or snack that is stuffed and closed. Opposer appears to concede this point in its reply brief in arguing that the marks have similar connotations:

The common use of "POCKET" in both marks also conveys the same meaning to consumers (namely, stuffed sandwiches), and therefore they are more likely to be confusion.

Reply Br. p. 19.

In view of the weakness of the common term POCKET in connection with frozen stuffed sandwiches, the substantial dissimilarities in sound, appearance, connotation and overall commercial impressions of the marks outweigh the differences. First, we are not convinced that the term "pocket" is the dominant element in applicant's mark. The letters PF are the most prominent element and as discussed above "pocket" is at a minimum highly suggestive of applicant's goods.¹² Moreover, even considering that potential purchasers may rely on the wording POCKET FOODS CORPORATION to identify source, the structure of this portion of the mark creates a significantly different commercial impression from opposer's marks where the term POCKETS is preceded by a modifier (HOT or LEAN). In re Best

¹² Of course, the application contains a disclaimer of the term "pocket" and the goods are identified as "pocket sandwiches," which would indicate that the term "pocket" is descriptive for these goods. However, we must consider even descriptive matter in our analysis.

Opposition No. 91167465

Products Co., Inc., 231 USPQ 988 (TTAB 1986) (BEST JEWELRY and JEWELER'S BEST for retail jewelry shops not confusingly similar). As noted earlier the evidence pertaining to the commercial strength of opposer's marks are to the marks as a whole.

We have carefully considered all of the evidence pertaining to the relevant du Pont factors, as well as the parties' arguments with respect thereto (including any evidence and arguments not specifically discussed in this opinion). In balancing the relevant factors, we conclude that despite the relatedness of the goods, overlap in trade channels and classes of purchasers, because applicant's mark is so dissimilar from opposer's HOT POCKETS and LEAN POCKETS marks, there is not a likelihood of confusion. In particular, the one point of similarity, at a minimum, is highly suggestive of the goods such that the marks are not confusingly similar.¹³

¹³ Opposer urges the Board to find the marks similar based on the District Court's finding that "the product and names of three Pocket Food's products (Cheese & Pepperoni Pizza Pocket, Meatball Pocket, and Ham and Cheese Pocket) are almost identical to the names of products sold under the HOT POCKETS mark (Pepperoni Pizza Hot Pocket, Meatballs and Mozzarella Hot Pocket, Ham and Cheese Hot Pocket)." Opp. NOR Exh. 7, p. 24 (Nestle Prepared Foods Co. v. Pocket Foods Corporation and V & V Enterprises Inc.) However, applicant's mark at issue in this case is quite different and opposer's marks are not being considered in conjunction with the specific product names. We further note the Court decision was very specific as to the product names and found no infringement as to opposer's asserted "Breakfast Pockets" mark and applicant's "Breakfast Pocket" because opposer was no longer selling that product. Id. Thus, it appears that

Opposition No. 91167465

Decision: The opposition is dismissed.

opposer's other marks (HOT POCKETS, LEAN POCKETS, etc.) were not infringed by applicant's use of "Breakfast Pocket."