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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91182396
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of application Serial No. 77/158,037
published in the Official Gazette
on October 16, 2007; Mark: FULL WAVE AUDIO

Bose Corporation

Opposer/Plaintiff, Opposition No. 91,182,396

v.

PWC Industries, Inc.

Applicant/Defendant.
_____/

APPLICANT'S BRIEF IN SUPPORT OF REGISTRATION OF THE MARK FULL WAVE AUDIO

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I. Description Of the Record

PWC Industries, Inc. ("Applicant" or "PWC") applied for registration of the subject mark FULL WAVE AUDIO (the "MARK") on April 16, 2007. The application identified the goods as "marine waterproof amplifier, waterproof stereo speakers" and "2 way marine radio communication system". The latter goods were eliminated and a disclaimer of "AUDIO" was entered by an Examiner's Amendment dated July 31, 2007. The application published on October 16, 2007.

Bose Corporation ("Opposer" or "Bose") filed its Notice of Opposition on February 12, 2008 and the Board instituted this proceeding on April 10, 2008 (PTO file). The Notice of Opposition alleges that "[A]pplicant's FULL WAVE AUDIO mark is deceptively similar to Opposer's WAVE and ACOUSTIC WAVE trademarks so as to cause confusion and lead to deception as to the origin of the goods bearing [A]pplicant's mark". The details of Opposer's alleged marks and registrations are as follows:

Registration No. 1,633,789
Mark: WAVE
Goods/Services: radios, clock radios, audio tape recorders and players, portable radio and cassette recorder combinations, compact stereo systems, and portable compact disk players
Filing Date: October 10, 1989
Registered: February 5, 1991

Supplemental Registration No. 1,338,571
Mark: ACOUSTIC WAVE
Goods/Services: loudspeaker systems
Filing Date: April 30, 1984
Registered: May 28, 1985

Registration No. 1,764,183
Mark: ACOUSTIC WAVE
Goods/Services: loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disk player and audio tape cassette player
Filing Date: February 3, 1992

Registered: April 13, 1993

Registration No. 3,457,854
Mark: WAVE
Goods/Services: music systems consisting of a loudspeaker system and amplifier and at least one of a radio tuner, compact disk player and digital music player; compact disk changer; digital music playing docket station
Filing Date: November 15, 2007
Registered: July 1, 2008

The lattermost mark was not registered or even applied for until after Applicant's filing date. None of the cited registrations specifies marine products or waterproof goods of any kind. Both WAVE registrations and the only ACOUSTIC WAVE principal registration identify an integrated or combination music system featuring an integral player (i.e. a radio, clock radio, audio tape recorder and player, portable radio and cassette recorder combination, compact stereo system, portable compact disk players, digital music player, digital music player docking station, compact disk changer).

Opposer has taken and filed the testimonial deposition of David Snelling, who is the Senior New Product Manager for Bose and, more particularly, for the "WAVE category" of products. Snelling Dep., page 5, lines 21 – 22. This was accompanied by Snelling's Exhibits. Applicant has taken and filed the testimonial deposition of Todd Bootes who is the Vice President and R&D Director of PWC. Bootes Dep., page 4, lines 11 – 12. Applicant has also taken and submitted the testimonial deposition of Douglas James Richardson. Mr. Richardson has many years of extensive experience in a number of fields relevant to this proceeding. For over 40 years, he has been involved in electronics and amplifier repair, as well as the installation of sound and stereo systems. Richardson Dep., pages 3 – 6. He is currently involved in the repair and restoration of products including electronic amplifiers. Mr. Richardson is also quite familiar with the construction, use and

benefits of the goods covered by the MARK. He has installed Applicant's goods in his kayak and operated Applicant's goods frequently in extremely wet marine conditions. Richardson Dep., pages 7 – 15. Mr. Richardson is very familiar with Bose Corporation and its products as well. He has owned a Bose WAVE Radio for 15 years and has a favorable impression of Opposer's goods. Mr. Richardson possesses and is quite familiar with the products of both Applicant and Opposer. Richardson Dep., pages 16 – 17. Richardson is therefore qualified to testify regarding issues relevant to this opposition.

Applicant has also filed Applicant's Exhibits 1 – 15 (accompanying the Bootes and Richardson deposition transcripts), as well as a Notice of Reliance pursuant to Rule 2.122 including the Office records of 43 currently effective registrations for marks including the term "WAVE" for sound, audio or acoustic products in International Class 009.

II. Statement Of Facts

Applicant manufactures and sells various products for the marine industry, including waterproof products for personal watercraft, boats and kayaks, and a microprocessor controlled safety light for a personal watercraft and boats. Bootes Dep., page 4, line 15 – page 5, line 2. Applicant owns various patents and patents pending for these and other of its products. Bootes Dep., page 5, lines 11 – 19.

Applicant has adopted and used the mark FULL WAVE AUDIO for its waterproof system (Bootes Dep., page 5, lines 5 – 7), which, as set forth in the application for registration of the MARK, consists of a marine waterproof audio amplifier, and waterproof stereo speakers. Bootes conceived of FULL WAVE AUDIO and adopted the MARK to fit a waterproof amplifier suitable for use while riding a jet ski. Bootes recognized that in such

conditions, the rider is submerged half the time and when he or she hits big waves, the waves would destroy a traditional amplifier. Accordingly, he designed a waterproof amplifier for which he adopted the name FULL WAVE AUDIO. Bootes Dep., page 6, line 17 – page 7, line 2. See also Bootes Dep., page 4, lines 20 – 23. The meaning Applicant intends to convey by using "FULL WAVE" in the MARK is that of a water or ocean wave. Bootes Dep., page 34, line 21 – page 35, line 2. This is also the meaning that customers and users of Applicant's goods associate with the MARK. Richardson Dep., page 22, lines 14 – 17.

Prior to seeking registration for the MARK, Mr. Bootes personally conducted a search for FULL WAVE AUDIO through the records of the United States Patent and Trademark Office. Bootes Dep., page 7, lines 6 – 8. He also ordered a full trademark search through Legal Zoom. Bootes Dep., page 7, lines 8 – 13. Mr. Bootes' searching did not reveal Opposer's marks. Bootes Dep., page 7, lines 6 – 13; page 37.

In addition to the name FULL WAVE AUDIO, Bootes and PWC also adopted a "ocean wave" design logo, Applicant's Exhibits 1 – 3, comprising an opposing pair of breaking ocean waves on respective sides of the name FULL WAVE AUDIO. Bootes derived that design again for emphasizing that the PWC system, which was designed to be used principally with personal watercraft, was submersible, waterproof and safely usable in the water and particularly in a marine environment. Bootes Dep., page 13, lines 13 – 24; page 16, lines 16 – 24. All of Applicant's packaging and labeling include the words FULL WAVE AUDIO and the crashing ocean wave logo. Bootes Dep., pages 14, 26. The logo reinforces both the name FULL WAVE AUDIO and the nature of Applicant's goods as a waterproof marine product. Applicant's logo, used on all labeling and

packaging for the goods, further includes the phrase "Made in USA by PWC Industries, Inc.". Bootes, Dep., page 14, lines 10 – 15. Applicant provides this designation on the products to advise customers precisely who is making the product, namely PWC Industries, Inc..

Applicant's waterproof system specifically includes an amplifier and a pair of speakers. Bootes Dep., page 10, lines 21 – 25; Applicant's Exhibits 2 and 3. These are the waterproof amplifier and speakers respectively identified in the subject application. Bootes Dep., page 11, lines 12 – 17. The amplifier comprises a circuit board placed in a mold cavity and covered by an injected PVC plastic that forms the body of the amplifier and renders the amplifier waterproof and impervious to water. Bootes Dep., page 22, lines 2 – 13. The speakers contain a ferro-fluid that resists mixing with water such that the speakers likewise are waterproof. Bootes Dep., page 22, lines 14 – 18.

Due to the waterproofing of Applicant's amplifier and speakers, Applicant's system operates exceptionally well in a marine environment. Bootes Dep., pages 23 – 24. When installed on a jet ski, Applicant's Exhibits 11 & 12, Applicant's system is constantly subjected to battering from salt or fresh water and is usually submerged. Bootes Dep., page 23, line 23 – page 24, line 8. By the same token, when Applicant's system is installed in a kayak, Applicant's Exhibits 14 & 15, the system can be subjected to 5' or 6' breakers and struck by hundreds of gallons of water. Richardson Dep., page 14, line 10 – page 15, line 2. Nonetheless, the system components (amplifier and speakers) continue to operate effectively and resist failure. Richardson Dep., page 15, lines 6 – 8; Bootes Dep., page 24, lines 18 – 23. Without the critical and identified feature that the

components are waterproof, Applicant's system would be inoperable and, in fact, would be destroyed in a marine environment. Bootes Dep., page 26, lines 6 – 12.

Applicant's waterproof amplifier is directly wired or hardwired to a 12 volt battery aboard a marine vessel. Richardson Dep., page 12, line 19 – page 13, line 3; Bootes Dep., page 17, line 25 – page 18, line 1; page 26, lines 13 – 20; page 27, lines 18 – 20. The waterproof speakers of Applicant's system are permanently mounted in the watercraft. Bootes Dep., page 17, lines 16 – 18 and Applicant's Exhibits 11 & 12; Richardson Dep., page 11, line 21 – page 12, line 3. Applicant's system requires a professional installation and is not simply taken out of a box and plugged into an electrical outlet in the wall. Richardson Dep., page 17, line 16 – page 18, line 9. See FULL WAVE AUDIO Installation Instructions, Bootes Dep., pages 17 – 18; Applicant's Exhibit 6.

Applicant's system has no capability for connecting to a 12 volt adapter in the boat. Richardson, Dep., page 13, lines 12 – 14; Bootes Dep., page 26, lines 13 – 20. Under no circumstances is Applicant's system suitable for indoor use or capable of being powered by an AC power source. Bootes Dep., page 27, lines 13 – 17. In fact, the voltage from a standard household AC source would be too high for Applicant's system and would destroy that system. Bootes Dep., page 27, lines 4 – 12.

Applicant's system includes only the waterproof amplifier and waterproof speakers. It does not include any type of integral radio or CD player. Richardson Dep., page 13, line 25 – page 14, line 9; Bootes Dep., page 11, lines 18 – 21.

Applicant advertises its goods to a marine audience and particularly at jet ski rallies, through word of mouth and by advertising in jet ski magazines. Bootes Dep., page 27,

lines 23 – 24. Applicant does not advertise through general circulation print or broadcast media. Bootes Dep., page 28, lines 6 – 23.

Applicant distributes the goods covered by the subject mark from its shop or from various power sport dealers including dealers that sell motorcycles and personal watercraft. Bootes Dep., page 29, lines 1 – 4. Applicant's targeted customers are specifically personal watercraft users or persons using the system on the beach or around water. Bootes Dep., page 30, lines 15 – 18. Bootes Dep., page 29, lines 4 – 5. Applicant also sells through its website (Bootes Dep. page 29, lines 11 – 13), which feature Applicant's products relating exclusively to the personal watercraft and marine industries. On its website, Applicant promotes the subject goods with its other marine products. Applicant's Exhibits 4 and 5. Applicant's goods are not sold through general retail stores, electronic stores, military outlets, through television or by direct mail. Bootes Dep., page 30, lines 1 – 12.

Applicant commenced using the MARK for its identified goods in February 2007 (PTO file, Bootes Dep., page 8, lines 3 – 4; Bootes Dep., page 7, line 25 – page 8, line 4.). That use has continued to the present. Bootes Dep., page 5, lines 5 – 6. In that entire time, Applicant has experienced no confusion between its mark and the mark of Opposer. In particular, Applicant has never been mistakenly contacted by anyone looking for Bose's products and has never received any misdirected calls, e-mails, regular mail or faxes intended for Opposer. Bootes Dep., page 35, lines 7 – 20. By the same token, Applicant is aware of no party who mistakenly contacted Opposer when looking for Applicant. Bootes Dep., page 35, lines 21 – 23. Mr. Richardson likewise was unaware of any instances of confusion, even when the respective goods were both sold

contemporaneously at a store where he was employed. Richardson Dep., pages 22 – 23. He testified that he cannot see how confusion would be possible due to the drastically different nature of the parties' products and the totally different environments in which they are used. Richardson Dep., pages 17 – 18, 23.

The examining attorney never issued a refusal under § 2(d) on the grounds that Applicant's MARK was likely to cause confusion with either the marks of Opposer or any other mark. Indeed, there are numerous marks including the term "WAVE" which are already registered in International Class 009, including, but not limited to, the 43 registrations submitted with Opposer's Notice of Reliance Pursuant to Rule 2.122.

Each of Opposer's alleged goods comprises a one-piece music system (Snelling Dep., page 29, lines 4 – 5 and page 74, line 9 – page 75, line 5). See also Snelling Exhibits 3 and 13. Opposer does not sell amplifiers alone under either WAVE or ACOUSTIC WAVE. Snelling Dep., page 75, lines 8 – 10. Mr. Snelling could not name any loudspeaker system currently being made by Bose under the mark ACOUSTIC WAVE, although that mark is the subject of Opposer's only registration identifying loudspeaker systems per se. Snelling Dep., page 75, lines 11 – 19. Significantly, that registration is a supplemental registration only.

The Opposer's goods are designed to be powered principally by a standard AC power source. Snelling Dep., page 64, line 19 – page 65, line 6. Although the ACOUSTIC WAVE MUSIC SYSTEM 2 apparently offers an optional 12 volt adapter, none of Opposer's device is or could be directly wired or hardwired to a 12 volt battery. Richardson Dep., page 18, line 22 – page 19, line 1; Bootes Dep., page 31, lines 20 – 22; Snelling Dep., page 64, line 13 – page 66, line 1. The WAVE system and WAVE RADIO 2

are certified for indoor use and intended to be used principally indoors. Snelling Dep., page 65, line 22 – page 66, line 1. The goods are delivered in a box and conveniently ready for the user to remove, plug in and play. Richardson Dep., page 18, lines 4 – 9.

As further established by the testimonial depositions taken in this case, Opposer's goods are wholly inappropriate for use on a jet ski or otherwise in a marine environment where they could be sprayed by or submerged in water. Bootes Dep., page 31, lines 3 – 15; Snelling Dep., page 64, lines 2 – 12; Richardson Dep., page 18, lines 16 – 21. Indeed, the owner's manuals accompanying the WAVE and ACOUSTIC WAVE products caution against using the product anywhere near water due to a risk of electrical shock. Snelling Dep., page 66, lines 2 – 16. Snelling Exhibits 3 and 13 – Important Safety Instructions page.

Opposer has never employed either FULL WAVE AUDIO or FULL WAVE. Snelling Dep., page 73, lines 14 – 18. Mr. Snelling testified that Opposer derived the names ACOUSTIC WAVE and WAVE from the acoustic technology utilized by Opposer. This is a means of amplifying signals that the Opposer employs in a proprietary system used in its products. Snelling Dep., page 68, lines 4 – 12. Mr. Snelling further stated that the term "Acoustic" relates to sound. Snelling Dep., page 70, lines 19 – 20. Hence, Opposer's marks WAVE and ACOUSTIC WAVE suggest the meaning "sound wave". Messrs. Bootes and Richardson likewise testified that the Opposer's marks suggest or connote sound waves. Bootes Dep., page 34, lines 4 – 21. Richardson Dep., page 21, line 22 – page 22, line 8.

Mr. Snelling could not identify any publications in which Opposer advertises its goods specifically directed to the personal watercraft or marine industries. Snelling Dep.,

page 75, line 22 – page 77, line 4. Opposer's goods are promoted and sold to the general public through various general circulation, broadcast and printed media. Snelling Exhibits 14 – 17; Snelling Dep., pages 50 – 51, 53.

III. Legal Argument

A. Opposer has utterly failed to establish the allegations presented in the Notice of Opposition; Opposer did not allege likelihood of confusion in the Notice of Opposition and has presented no evidence whatsoever of either deception or resulting confusion, which were alleged.

Pursuant to TBMP § 314, a plaintiff/opposer may not rely on an unpleaded claim. The plaintiff's pleading must be amended (or deemed amended), pursuant to Federal Rules Of Civil Procedures, Rule 15(a) or (b), to assert the matter. Otherwise, the plaintiff/opposer is bound by the grounds pleaded in its Notice of Opposition. See McCarthy on Trademarks, § 20.08[3], Third Vol. (1992) citing Midland International Corp. v. Midland Cooperatives, Inc., 168 USPQ 107 (CCPA 1970); Robert Hall Clothes, Inc. v. Studds, 128 USPQ 542 (CCPA 1961). See also Levi Strauss & Co. v. R. Josephs Sportswear, Inc., 28 USPQ 2d 1464, 1471 n. 11 (TTAB 1993).

Opposer's Brief deals exclusively with the "likelihood of confusion" test under Section 2(d) of the Trademark Act. However, the Notice of Opposition does not allege likelihood of confusion. Rather, paragraph 5 of the Notice of Opposition states, "The Applicant's FULL WAVE AUDIO mark is deceptively similar to Opposer's WAVE and ACOUSTIC WAVE trademarks so as to cause confusion and lead to deception as to the origin of the goods bearing the Applicant's mark". [emphasis added] This allegation

asserts only that Applicant's MARK (1) is deceptively similar to Opposer's marks, and (2) has thus caused confusion and led to deception. To prevail in this Opposition, Bose must therefore prove these two explicit allegations. In order to prove deceptiveness, the Opposer must establish an intent by Applicant to deceive. TMEP § 1207.02. Pursuant to Opposer's own pleading, Opposer must therefore establish both Applicant's deceptive intent in adopting the "deceptively similar" MARK and that actual confusion was caused thereby. Likelihood of confusion was not alleged.

The evidence established in this proceeding clearly indicates that Opposer has failed to prove either deception or confusion caused thereby. No evidence of deceptive or bad faith intent by Applicant has been shown. Rather, Applicant's Vice President Bootes testified that FULL WAVE AUDIO was chosen to convey the meaning of a water or ocean wave which Applicant's waterproof system would resist. Bootes Dep., pages 4, 6, 7 and 34. Moreover, Bootes conducted extensive trademark searching, both himself and through Legal Zoom, prior to filing the application for registration of the MARK. Bootes Dep., pages 7 and 37. Opposer did not elicit or present a shred of evidence indicating that Applicant's intent was to deceive customers. Instead, Applicant has established that its intent was to establish its own goodwill and brand identity through the good faith and reasonable use of FULL WAVE AUDIO, which indicates that Applicant's waterproof marine amplifier and waterproof stereo speakers are resistant to damage from a "full wave" striking the waterproof components of Applicant's goods.

By the same token, Opposer has not proven its allegation that confusion was caused due to Applicant's deception. Neither Bootes nor Richardson were aware of any instances of customer confusion. Bootes Dep., page 35; Richardson Dep., pages 22 –

23. By the same token, Opposer did not present a single instance of actual confusion or mistake between the parties respective marks.

Opposer's Notice of Opposition expressly alleges that Applicant's MARK is "deceptively similar to Opposer's .... trademarks so as to cause confusion and lead to deception". Opposer has not offered any evidence to support either deception or confusion caused by deceptive similarity. Accordingly, the Opposition should be dismissed.

B. There is no likelihood of confusion between Applicant's FULL WAVE AUDIO for marine waterproof goods and Opposer's WAVE and ACOUSTIC WAVE for non-waterproof goods that cannot be used in the manner or environment intended for Applicant's goods.

A determination of likelihood of confusion must be started by comparing the respective marks in their entireties as to appearance, sound and meaning. In re E.I. Dupont de Nemours, Co., 177 USPQ 536, 567 (CCPA 1973); In re Bed and Breakfast Registry, 229 USPQ 818 (Fed. Cir. 1986). Likelihood of confusion will not be found where there are substantial differences in appearance, pronunciation and meaning, even when the goods or services are identical. Sears Mortgage Corp. v. Northeast Savings, F.A., 24 USPQ 2d 1227 (TTAB 1992). [APPROVAL PLUS and APPROVALFIRST not likely to be confused for mortgage banking and mortgage brokerage services since the marks do not closely resemble each other in appearance or pronunciation and since the meaning of each is different]. It is imperative that the marks be compared in the entireties. Shen Manufacturing Co. v. Ritz Hotel Ltd., 73 USPQ 2d 1350 (Fed. Cir. 2004). [THE RITZ KIDS not confusingly similar to RITZ.]

Opposer's and Applicant's respective marks in their entireties differ substantially in sound, appearance and meaning. Opposer has used and registered the single word mark WAVE, as well as the two word mark ACOUSTIC WAVE. Conversely, Applicant's MARK is the three-word phrase FULL WAVE AUDIO. Opposer has not registered or alleged any use of either FULL WAVE AUDIO or FULL WAVE and Mr. Snelling knew of no use of such marks by Opposer. Snelling Dep., page 73. Indeed, Opposer has alleged no use of either "FULL" or "AUDIO" as a part of any of its marks. By the same token, no evidence was presented that Applicant has used the term "WAVE" by itself as a trademark or has ever used "ACOUSTIC" or "ACOUSTIC WAVE".

Opposer contends that "WAVE" is the dominant term in each of the marks in question. Opposer further argues that Applicant's unique use of "FULL" and "AUDIO" should be discounted because Applicant has disclaimed "AUDIO" and, in Opposer's opinion, "FULL" is a laudatory, descriptive term. Specifically, Opposer maintains that "[t]he use of "FULL" only reinforces the likely consumer perception that the FULL WAVE AUDIO product is an enhanced or special "WAVE" audio product ...". Opposer's Brief, page 15.

Opposer's dismissal of Applicant's unique use of "FULL" and "AUDIO" in the MARK is misplaced. For one thing, a disclaimer does not remove the disclaimed matter from the MARK. The MARK must still be regarded as a whole including the disclaimed matter in evaluating similarity to other marks. See TMEP § 1213.10 and the cases cited therein, including In re National Data Corp., 224 USPQ 749 (Fed. Cir. 1985). Moreover, as is explained more fully below, Opposer's contention that consumers will view FULL WAVE AUDIO merely as an "enhanced or special WAVE audio product" is totally inaccurate in view of the true meaning and commercial impression that have been established for

Applicant's MARK. Contrary to Opposer's assertion, FULL WAVE AUDIO connotes a waterproof marine product that is capable of withstanding the force of a full ocean wave. The term "FULL" will not be understood by consumers to refer to an "enhanced or special" Bose's product but rather to the height and force of a large or "full", breaking ocean wave which Applicant's product can successfully withstand. Bootes Dep., pages 6 – 7; Richardson Dep., page 22. Accordingly, "FULL" is not merely a laudatory descriptive term but rather a suggestive term that has trademark significance and which should be considered carefully when evaluating differences in the sound, appearance and meaning of the respective marks in their entireties.

Probably the most significant factor in comparing the marks in their entireties as to appearance, sound and meaning is the very different meaning, connotation or commercial impression provided by Opposer's and Applicant's respective marks. The meaning or connotation of a mark must be determined in relation to the named goods or services. Even marks that are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods and services so that there is no likelihood of confusion. See TMEP § 1207.01(b)(v); In re Sears, Roebuck and Co., 2 USPQ 2d 1312 (TTAB 1987) [CROSSOVER for bras held not likely to be confused with CROSSOVER for ladies' sportswear wherein the former suggests the construction of applicant's bras and the latter suggests sportswear that "crosses over" the line between informal and formal wear.] In re Best Products Co., Inc., 231 USPQ 988 (TTAB 1986). [BEST JEWELRY and Design for retail jewelry stores services held not likely to be confused with JEWELERS' BEST for jewelry]; McCallum-Legaz Fish Co. v. Frozen Food Forum, Inc., 118 USPQ 178 (Comm. Pats. 1958). [FROSTY SEAS for

frozen seafood products including deviled crabs, fish sticks, shrimp, skinned haddock, cod, flounder, ocean perch and ocean catfish and SEAFROST for frozen salmon and halibut and frozen whole halibut, whole salmon and steaks and fillets therefrom present different commercial impressions – the former implying cold sea water versus the latter implying white frost crystals.]; In re Mavest, Inc., 130 USPQ 40 (TTAB 1961). [SQUIRE TOWN for men's sports clothes presents a different commercial impression than TOWN SQUIRES for men's shoes.]

Opposer totally ignores that Applicant's FULL WAVE AUDIO, and particularly the term "WAVE" therein, present a commercial impression totally different than that presented by Opposer's marks WAVE and ACOUSTIC WAVE. The evidence clearly indicates that Opposer uses the word "WAVE" in both its WAVE and ACOUSTIC WAVE marks to connote the sound produced by its products. Snelling Dep., pages 68, 70. See also Snelling Dep. Exhibits 3, page 6; Exhibit 13, page 6. Messrs. Bootes and Richardson likewise testified that they understood Opposer's marks to convey the commercial impression of sound waves. Bootes Dep., page 34; Richardson Dep., pages 21 – 22. There is absolutely nothing in the Record indicating that the term "WAVE" as used by Bose suggests any other type of meaning. It certainly does not convey the meaning of an ocean wave.

Conversely, when considered in relation to Applicant's identified goods, namely a marine waterproof stereo amplifier and waterproof stereo speakers, Applicant's mark FULL WAVE AUDIO conveys an entirely different meaning. As used by Applicant, "WAVE" and "FULL WAVE" specifically relate to ocean or water waves, which Applicant's specifically manufactured marine waterproof goods are able to withstand. In total contrast

to the goods offered by Opposer. Bootes has testified that he designed an amplifier suitable for use while riding a jet ski in a marine environment. In such conditions, the rider is submerged half the time and when he or she hits big waves, those waves would destroy a traditional amplifier. Accordingly, he designed a waterproof system for which he adopted the name FULL WAVE AUDIO to indicate the waterproof nature of PWC's goods. Bootes Dep., pages 6 – 7. Applicant's use of "WAVE" is intended to convey the meaning of a large or "full" water or ocean wave. Bootes Dep., pages 34 – 35. This is the meaning that is understood by purchasers and users of Applicant's goods. Richardson Dep., page 22.

Applicant's term "FULL" further emphasizes the waterproof marine nature of Applicant's goods and indicates that those goods are capable of withstanding strikes by and submersion in a "full wave". Indeed, the logo employed by Applicant, while not a component of the applied for mark, depicts a pair of opposing full ocean waves. Applicant's Exhibits 1 – 3. This logo emphasizes both the terms "FULL" and "WAVE" and further conveys the impression that the system is designed to be submersible, waterproof and used principally with personal watercraft and in a water and marine environment. Bootes Dep., page 13, 16. Although the logo is not present in the application, it is utilized on all of Applicant's packaging and labels. Bootes Dep., page 14. This reinforces the nature of the goods as explicitly identified in the application, i.e. <u>marine</u> <u>waterproof</u> amplifier and <u>waterproof</u> stereo speakers. Opposer conversely does not use either of its alleged marks for products that are in any manner waterproof or suitable for marine use where those products can be struck by a full wave. The truly different meaning provided by Applicant's mark, when considered in relation to Applicant's identified goods,

distinguishes Applicant's mark from those of Opposer and obviates a likelihood of confusion.

Likelihood of confusion is to be determined not only from visual comparison of the trademarks in questions, but also from a number of additional extrinsic factors. Among of these are the following:

1. The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use;
2. The similarity or dissimilarity of established, likely to continue trade channels;
3. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing; and
4. The number and nature of similar marks in use on similar goods.

See In re E.I. Dupont de Nemours, Co., 177 USPQ 536, 567 (CCPA 1973).

Applicant's goods are clearly and unequivocally distinguishable from the goods offered by Opposer. All of the goods sold by Opposer under the marks WAVE and ACOUSTIC WAVE relate to one-piece, "out of the box", "plug and play" music systems. Snelling Dep., pages 29, 74 – 75. See also Snelling Exhibits 3 and 13. Opposer does not offer amplifiers alone under either of its alleged marks and the term "amplifier" is identified for WAVE alone only in the application (Serial No. '854) that Opposer filed after the filing date of the present application. Moreover, Mr. Snelling could not name any loudspeaker system made by Bose under the mark ACOUSTIC WAVE (Snelling Dep., page 75) despite the fact that such goods are the only goods listed in Supplemental Reg. No. '571 for ACOUSTIC WAVE.

In contrast, Applicant's FULL WAVE AUDIO system includes only a marine waterproof amplifier and waterproof speakers. PTO application record; Bootes Dep., page 10; Applicant's Exhibits 2 and 3. The present application does not list any type of integral

player such as a radio or CD player. See Bootes Dep., page 11; Richardson Dep. pages 13 – 14.

Opposer's goods are certified and designed principally for indoor use. Snelling Dep., page 65 – 66. Although some of Opposer's products can be powered by portable batteries or a DC adaptor, they are not directly wired or hardwired to a 12 volt battery. Richardson Dep., pages 18 – 19; Bootes Dep., page 31; Snelling Dep., page 64 – 66.

Applicant's waterproof amplifier, on the other hand, is directly wired or hardwired to a 12 volt battery aboard a marine vessel. Richardson Dep., pages 12 – 13; Bootes Dep., pages 17 – 18, 26 – 27. The waterproof speakers of Applicant's system are permanently mounted in the watercraft. Bootes Dep., page 17; Richardson Dep., pages 11 – 12; Applicant's Exhibits 11 and 12. Applicant's system requires a professional installation; it is not simply taken out of a box and plugged into an electrical outlet in the wall. Richardson Dep., pages 17 – 18; Applicant's Exhibit 6.

Fundamentally, the Bose goods cannot be used on a jet ski or otherwise in an exposed marine environment where they could come in contact with water. Such contact would short out the electronics, destroy the system and/or subject the user to the risk of electrocution. Bootes Dep., pages 31, 38; Snelling Dep., page 64; Richardson Dep. page 18. Opposer's owner manuals for the ACOUSTIC WAVE and WAVE products explicitly warn the user against placing the product close to the water due to the risk of electric shock. Snelling Dep., page 66; Snelling Exhibit's 3, 13 – Important Safety Instruction pages. This contrasts with Applicant's goods which are a low voltage product that is fully and safely submersible in water. Applicant's amplifier and speakers are specifically manufactured so that they are waterproof. Bootes Dep., page 22. As a result, Applicant's

system is capable of being submerged in water when installed in a personal watercraft, kayak or other marine vessel. Bootes Dep., pages 23 – 26; Richardson Dep., pages 14 – 15; See Applicant's Exhibits 11, 12, 14 and 15.

Although an optional 12 volt adapter is provided for one of Opposer's goods, this does not change the fact that those goods cannot come in contact with water and should not be used anywhere close to water according to Opposer's own instruction manual. Opposer's goods do not require professional installation. An amplifier and speakers certainly do not have to be permanently mounted into the hull or elsewhere in a marine vessel. Essentially, the Bose goods are designed to be removed from their packaging, plugged into an AC outlet and played. Richardson Dep., page 18; Snelling Exhibits 3 and 13. Conversely, Applicant's marine waterproof amplifier and waterproof speakers are not usable in an indoor household environment where Opposer's goods are typically used. Applicant's goods are designed to run on a 12 volt direct current only; voltage from a standard household AC source would destroy Applicant's system. Bootes Dep., page 27. Likewise, there is no capability for Applicant's system to operate using a 12 volt adapter. Richardson Dep., page 13; Bootes Dep., page 26. The incompatibility of Applicant's system with a principally indoor environment wherein Opposer's goods are used is not surprising. Applicant's explicitly identified goods are a <u>marine waterproof</u> amplifier and <u>waterproof</u> stereo speakers. Applicant's goods are intended and identified for outdoor sport use on personal watercraft and other <u>marine</u> watercraft wherein the system components may be submersed in and otherwise subjected to contact with water.

Typically, when a mark incorporates another mark in its entirety but the respective marks are employed for different goods, no likelihood of confusion will be found. <u>David</u>

Crystal, Inc. v. Sharon Ray Corp., 177 USPQ 460 (CCPA 1973). In fact, where respective goods differ widely in use and characteristics, the use of even identical marks on them is not likely to cause confusion. The Pep Boys – Manny, Moe & Jack v. Edwin Guth Co., 94 USPQ 158 (CCPA 1952). Therein, an opposer who owned the registered mark CADET for storage batteries, attempted to have an applicant enjoined from registering the mark CADET for use in connection with lighting fixtures. The Court determined that even though both marks were applied to electrically related goods, they were clearly purchased with different considerations in mind. With regard to the fixtures, lighting and decor were the primary concerns. However, appearance was a negligible factor in the purchase of storage batteries. Therefore the Court determined that purchasers were not likely to be confused by the similar marks.

Here, the respective customers of Opposer's and Applicant's goods have very different purchasing considerations in mind. Opposer's customers are seeking an integrated, one-piece "plug and play" music system designed principally for indoor use. Opposer's customers primarily operate the goods using a standard indoor AC power supply. A simple and convenient "out of the box" and "plug and play" operation is desirable. Sound quality, simplicity, user-convenience and ease of operation are principle customer considerations.

In contrast, Applicant offers a rugged marine waterproof system. Applicant advertises its goods to a marine audience and principally a personal watercraft and outdoor sport audience. Applicant particularly advertises at jet ski rallies, through word of mouth and by advertising in jet ski magazines. Bootes Dep., page 27. These type of purchasers are interested principally in a product that will withstand extremely rough

treatment, resist failure and perform well in a harsh (typically saltwater) marine environment wherein the components are subjected to constant battering from water and waves, and which is normally incompatible with the electronic equipment. The identified waterproof nature of Applicant's goods is a critical and paramount concern and consideration for potential customers. Such a concern does not apply at all to customers for the Opposer's goods. Applicant's customers are also uniquely concerned with the manner in which Applicant's goods must be custom or professionally installed in their particular marine craft. Applicant's and Opposer's purchasers obviously have very different considerations when reviewing the parties respective goods and would never be confused by the respective marks.

The very different media through which Opposer and Applicant advertise and the very different channels through which the parties distribute their goods, further reinforces the difference between the goods as explicitly identified by Applicant and Opposer. Applicant advertises to a marine audience and particularly at jet ski rallies, through word of mouth and by advertising in jet ski magazines. Bootes Dep., page 27. Applicant does not advertise through general circulation, print or broadcast media as does Opposer. Bootes Dep., page 28. On its website, Applicant promotes the subject goods with its other, exclusively marine products. See Applicant's Exhibits 4 and 5.

Likewise, Applicant distributes its marine waterproof goods directly from its own shop or through various power sport dealers including dealers that sell motorcycles and personal watercraft. Bootes Dep., page 29. Applicant does not sell its goods through general retail stores, electronic stores, military outlets, through television or by direct mail. Bootes Dep., page 30.

Although Applicant's channels of trade and customers are not explicitly recited in the identification of goods, it is clear that the identification reveals the intended purchasers and channels at least implicitly. Applicant's goods are identified as marine products. Moreover, they are explicitly identified as waterproof goods. This plainly indicates that the goods are intended for an outdoor water sports oriented customer base, as opposed to the primarily indoor, at home users who are the target customers of Opposer's integrated, one-piece "out of the box" music system. As testified to by Mr. Bootes, Applicant's identified goods are designed for sports enthusiasts and particularly persons operating personal watercraft. Applicant's products moreover require professional installation and do not include an integrated CD or radio as in Opposer's products. The difference between the respective parties' goods is compelling and favors as a determination that there is no likelihood of confusion.

Notwithstanding Opposer's allegedly extensive use of WAVE for one-piece, plug and play music systems, likelihood of confusion is further avoided in this case by the commonplace presence of third party registrations of marks that include "WAVE" for various audio related goods and services in International Class 009. Third party registrations are relevant to show that a mark or a portion of a mark is so commonly used that the public will look to other elements to distinguish the source of the goods or services. TMEP § 1207.01(d)(iii); AMF, Inc. v. American Leisure Products, Inc., 177 USPQ 268, 269 – 270 (CCPA 1973); Plus Products Crystal, Inc. v. Star-Kist Foods, Inc., 220 USPQ 541, 544 (TTAB 1983); King Candy Co. v. Eunice King's Kitchen, Inc., 182 USPQ 108 (CCPA 1974).

Third party registrations may be considered to demonstrate the meaning of a word which comprises the mark, or a portion thereof, in order to show that there is a well known and commonly understood meaning of that word and that the mark has been chosen to convey that meaning. In re Melville Corp., 18 USPQ 2d 1386, 1388 (TTAB 1991). As stated therein, "[t]he conclusion to be drawn in such cases is that there is an inherent weakness in a mark comprised in whole or in part of a word in question and that, therefore, the question of likelihood of confusion is colored by that weakness to the extent that only slight differences in the marks may be sufficient to distinguish one from the other". (emphasis added) 18 USPQ 1388. Likewise, the Federal Circuit has stated, "[w]hen the field is crowded with similar marks, the scope or protection is confusingly narrow. Knudsen & Sons, Inc. v. Vita Pakt Products Co., 11 USPQ 2d 1654 (Fed. Cir. 1989). Therein, the Court ruled that the Trademark Trial and Appeal Board erred in denying registration of VITA JUICE for fruit juice based on a likelihood of confusion with the Opposer's VITA PAKT, also for fruit juice, in view of evidence demonstrating extensive use of "VITA" in third party registrations.

Applicant has submitted with Applicant's Notice of Reliance Pursuant to Rule 2.122 copies of 43 registrations that include the term "WAVE", which Opposer has alleged is the dominant term in Applicant's MARK. This list comprises only some of the marks featuring "WAVE", which are registered in Class 009 and a mere fraction of all registered marks featuring "WAVE". Nonetheless, the 43 registrations that are submitted, plainly indicate that "WAVE" is commonly used to refer to audio or acoustic products in Class 009. A number of these, such as WAVEFRONT COHERENT, WAVE JAMMER and TRIPLE ONDA SISTEMAS ACUSTICOS – ILLUMINACION – ACOUSTIC

AND LIGHTING SYSTEMS and Design specifically identify loudspeakers and loudspeaker related goods. Still others including POWERWAVE TECHNOLOGIES, POWERWAVE and TRIPLE ONDA SISTEMAS ACUSTICOS – ILLUMINACION – ACOUSTIC AND LIGHTING SYSTEMS and Design identify amplifiers. These third party registrations plainly indicate that the term "WAVE" by itself is commonly conveys the meaning of audio or sound for Class 009 goods. Because the term "WAVE" is so commonly used and registered in this manner, it is quite likely that the public will look to other elements of Applicant's MARK to distinguish the source of Applicant's goods. See TMEP § 1207.01(d)(iii) and the cases cited therein. Specifically, the consuming public will consider Applicant's suggestive term "FULL" (connoting a full ocean wave) to distinguish Applicant's goods. In addition, due to the crowded nature of marks employing "WAVE" for audio products in Class 009, Applicant's very use of that term, with other terms not employed in any of Opposer's marks and for distinctly different and incompatible products, indicates that Opposer's mark should be entitled to less deference in the likelihood of confusion analysis. The difference between the parties' respective goods are magnified accordingly. See King Candy Co. v. Eunice King's Kitchen, Inc., supra.

Indeed, Applicant's distinction is especially compelling because the primary meaning that Applicant's FULL WAVE AUDIO conveys is not related to sound. It instead relates to ocean waves and the marine waterproof nature of Applicant's goods.

Just as many other marks employing WAVE have been registered in Class 009 for audio related products, so should Applicant's MARK be registerable. Applicant employs two terms "FULL" and "AUDIO" that are not used in either of Opposer's alleged

marks. Moreover, Applicant never employs the term "ACOUSTIC". Applicant likewise never employs "WAVE" per se. In addition, as previously discussed, Applicant's goods are identified in the application as marine waterproof amplifier and waterproof speakers. This proceeding has clearly established that Opposer's products are anything but waterproof and are not intended for a marine use in a manner even remotely resembling the use intended for Applicant's goods.

Although WAVE and ACOUSTIC WAVE have admittedly become well known for particular types of integrated, one-piece music systems, the terms "ACOUSTIC" and "WAVE" are themselves fairly commonplace and descriptive in the extremely broad field of audio and sound related products. This is evidenced not only by the 43 cited third party registrations that include "WAVE", but also by the fact that Bose has received only a Supplemental Registration (No. '571) for ACOUSTIC WAVE in connection with loud speakers alone. The legal affect of that particular registration is therefore quite limited. In the present case, it should not constitute a bar to Applicant's registration of FULL WAVE AUDIO especially in view of the fact that (1) the Bose registration is supplemental; (2) Mr. Snelling testified that he is unaware that Bose is currently using ACOUSTIC WAVE for loudspeakers alone (Snelling Dep., page 75); (3) Applicant never uses "ACOUSTIC"; (4) ACOUSTIC WAVE clearly means sound waves whereas FULL WAVE AUDIO connotes an ocean wave; and (5) the products are incompatible as described above.

Opposer argues at length that it should prevail in this proceeding primarily because of the purported fame of the Bose's WAVE and ACOUSTIC WAVE marks. Notwithstanding any prior use or recognition that the alleged marks may have, the fame

of the alleged registered mark is only one of thirteen factors in determining likelihood of confusion under the Dupont test. The alleged fame of a registered mark should be discounted or provided less consideration in cases where the respective marks in their entireties convey significantly different commercial impressions or where the subject matter common to the mark is so commonly used that it is not likely to be perceived by consumers as distinguishing the source of the goods. See Shen Manufacturing Co. v. Ritz Hotel Ltd., 73 USPQ 2d 1350 (Fed. Cir. 2004) wherein the court determined that RITZ and THE RITZ KID presented different commercial impressions.

In the present case, the differences in commercial impression provided by Opposer's and Applicant's marks is compelling. Opposer's marks clearly convey the meaning of an acoustic or sound wave. Applicant's MARK on the other hand conveys the commercial impression of a large or "FULL" ocean wave. The registrations submitted with Applicant's Notice Of Reliance plainly indicate that the term "WAVE" is commonly used for audio or sound products. Accordingly, the differences between the meaning conveyed by Opposer's goods and the meaning conveyed by Applicant's goods, as well as the very real differences between their respective products (i.e. only Applicant's goods relate to a marine waterproof amplifier or waterproof stereo speakers) clearly and unequivocally distinguish the respective marks in the minds of consumers, notwithstanding the purported strength that Opposer's marks have acquired.

Although the test under Section 2(d) is likelihood of confusion, the Dupont test also permits consideration of "[t]he nature and extent of any actual confusion ... and [t]he length of time during and condition under which there has been concurrent use without evidence of actual confusion. In re E.I. Dupont de Nemours, Co., 177 USPQ 536, 567

(CCPA 1973). Both of the foregoing factors likewise favor Applicant PWC. As previously indicated, not a single instance of confusion or mistake has been reported to Applicant. Bootes Dep., pages 7, 8, 35; Richardson Dep., pages 22 – 23. Likewise, Bose has submitted not a single piece of evidence that there has ever been actual confusion between the respective marks.

Mr. Bootes testified that Applicant's MARK has been continuously in use for the identified goods since February 2007. Bootes Dep., pages 5, 7 and 8. Applicant submits that the parties advertise and sell their products to distinctly different markets wherein the customers have very different purchasing considerations and concerns. Opposer argues to the contrary that "There is a direct overlap in the channels of trade and potential purchasers ...". Opposer's Brief page 22. Applicant disagrees with this contention; however, if Opposer's contention is accepted for purposes of argument, this plainly supports Applicant's position that there is no likelihood of confusion under the Dupont factor relating to the length of time and conditions under which there has been concurrent use without evidence of actual confusion. Specifically, Applicant has used FULL WAVE AUDIO for 2½ years without a single instance of confusion and notwithstanding Opposer's own position that "There is a direct overlap in the channels of trade and potential purchasers of the PWC's FULL WAVE AUDIO products and Bose's ACOUSTIC WAVE products." If there was such a direct overlap and persons were likely to be confused, it seems self-evident that either Bose or PWC would be able to cite at least one instance of confusion or mistake! Instead, there are none.

In view of the foregoing, when all factors of the Dupont test are applied to the present case, a determination of no likelihood of confusion is plainly warranted.

IV. CONCLUSION

Opposer has failed to prove the allegations set forth in the Notice of Opposition. Bose has presented absolutely no evidence whatsoever of any bad faith, deceptive intent on the part of Applicant. To the contrary, Applicant has presented significant evidence of its good faith in adopting FULL WAVE AUDIO to establish Applicant PWC as the source of a marine waterproof amplifier and waterproof speakers. By the same token, Opposer has utterly failed to establish that Applicant's MARK was "deceptively similar" such as to cause confusion. Not a single instance of customer confusion was presented in this case.

Although "likelihood of confusion" was not alleged in the Notice of Opposition, the facts elicited in this proceeding do not establish a likelihood of confusion in any event. The respective marks are different in sound, appearance and meaning. Applicant employs FULL WAVE AUDIO, not WAVE or ACOUSTIC WAVE. Likewise, Bose has never used FULL WAVE or FULL WAVE AUDIO.

Critically, the meanings and commercial impressions conveyed by the respective marks are entirely different. Opposer's marks WAVE and ACOUSTIC WAVE connote sound waves, as is clearly presented by the third party registrations submitted herewith. In contrast, Applicant's FULL WAVE AUDIO conveys the meaning of a full ocean wave, which Applicant's goods (a marine waterproof amplifier and waterproof steno speakers) are capable of withstanding when used in a rugged and waterlogged marine environment.

The respective goods (both as identified and as proven through the evidence) are incompatible and entirely different. Opposer's goods are an integral, one-piece, plug and play music system wherein a player of some type is incorporated with speakers and

amplifiers. The only registration Bose proffers listing loudspeakers per se is a supplemental registration for ACOUSTIC WAVE and Mr. Snelling's testimony indicates that such products are no longer being sold by Opposer. That registration should therefore have no effect upon Applicant's FULL WAVE AUDIO, which clearly lacks ACOUSTIC and presents a wholly different meaning. The way the respective goods are constructed, installed and used are entirely different. Opposer's products are not marine, waterproof components and cannot operate when submerged in or contact by water. By the same token, Applicant's goods are sold through different trade channels and to different types of customers, i.e. persons looking for a marine product and a waterproof product as explicitly identified in the application.

For the foregoing reasons, Applicant respectfully requests that the Notice of Opposition be dismissed and the subject mark be registered.

Respectfully submitted.

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this correspondence is being electronically filed using ESTTA on this 31st day of July, 2009.

William E. Noonan

CERTIFICATE OF SERVICE

I William E. Noonan, attorney for Applicant, PWC Industries, Inc., hereby certify that the attached Applicant's Brief In Support of Registration Of The Mark FULL WAVE AUDIO is being served via first class mail on the attorneys for Opposer, Bose Corporation, Michelle Brownlee, Esq., The Mountain, MS-40, Framingham, MA 01701 and Amy L. Brosius, Fish & Richardson P.C., 225 Franklin Street, Boston, MA 02110 on this 31st day of July, 2009.

William E. Noonan