

**THIS OPINION IS NOT
PRECEDENT OF
THE T.T.A.B.**

Mailed:
January 9, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Trico Products Corporation
v.
Wexco Industries
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Opposition No. 91156682
to application Serial No. 78155840
filed on August 20, 2002
—————

Jonathan Hudis of Oblon, Spivak, McClelland, Maier &
Neustadt, P.C. for Trico Products Corporation.

Laura E. Goldbard of Stroock & Stroock & Lavan, L.P. for
Wexco Industries.

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Before Hohein, Walters, and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Wexco Industries has applied to register the mark EZ-
FIT WIPER BLADES and Design shown below on the Principal
Register for "windshield wipers and structural parts
therefor."¹

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¹ Application Serial No. 78155840, filed August 20, 2002. Applicant claims first use of its mark as of February, 2002, and first use in commerce as of June, 2002. Applicant disclaims the exclusive right to use "wiper blades" and describes its mark as follows: "The mark consists of a windshield wiper in place of a hyphen, separating the words 'EZ' and 'Fit', and a water drop, in place of the dot above the 'i' in 'Fit'."

EZ Fit Wiper Blades

Trico Products Company has opposed the application on the ground of priority of use and likelihood of confusion. Opposer alleges that applicant's mark EZ-FIT WIPER BLADES and Design so closely resembles opposer's previously used and registered mark EXACT FIT for "automotive windshield wiper blades" as to be likely to cause confusion.² Opposer has also asserted that applicant's mark is merely descriptive.³

Applicant has denied opposer's allegations of likelihood of confusion and descriptiveness.⁴

² Registration No. 2575252 for the mark EXACT FIT for "automotive windshield wiper blades" issued on the Principal Register under Section 2(f) on June 2, 2002, and Registration No. 2157832 for the mark EXACT FIT for "automotive windshield wiper blades" issued on the Supplemental Register on May 12, 1998. Opposer claims dates of first use as of May 3, 1995.

³ In its amended Notice of Opposition, Opposer also alleged two bases of fraud: (i) the application was electronically filed with the signature of Stephen J. Schwartz, applicant's CEO, but the application was, in fact, signed by his son, Seth Schwartz; and, (ii) although the description of goods is for "windshield wipers and structural parts therefore", applicant has not used the mark on "structural parts" for windshield wipers. In an Order dated February 23, 2005, the Board granted partial summary judgment in favor of applicant on opposer's claim of fraud.

⁴ In its affirmative defense, applicant alleged that opposer failed to state a claim upon which relief can be granted. Because the affirmative defense was not argued in applicant's brief, it is considered waived and no further consideration will be given to it.

Opposition No. 91156682

Both parties have fully briefed the issues before us, but no oral argument was requested.

For the reasons set forth below, the opposition is sustained on the ground that applicant's mark is merely descriptive and the opposition is dismissed on the ground of priority of use and likelihood of confusion.

A. The Record

1. Opposer's Evidence

- a. Certified copy of U.S. Trademark Registration No. 2,157,832 for the mark EXACT FIT for "automotive windshield wiper blades" (Supplemental Register) owned by opposer. The registration is subsisting;
- b. Certified copy of U.S. Trademark Registration No. 2,575,252 for the mark EXACT FIT for "automotive windshield wiper blades" (Principal Register-2(f)) owned by opposer. The registration is subsisting;
- c. Applicant's answers to Opposer's first set of interrogatories, Nos. 2, 3, 5, and 8-12;
- d. Applicant's answers to Opposer's second set of interrogatories, Nos. 1 and 2;

Opposition No. 91156682

- e. Excerpts from opposer's discovery deposition of Stephen Schwartz, applicant's CEO, including Exhibits 1 and 2;
- f. Definitions of the words "Easy", "Exact", and "Fit" from Random House Webster's College Dictionary (2000);
- g. Definitions of "EZ" and "Easy" from the Abbreviations Dictionary (8th ed. 1992) and the Acronyms, Initialisms & Abbreviations Dictionary (25th ed. 1999);
- h. Sales invoices for applicant's EZ-FIT WIPER BLADES;⁵
- i. Deposition transcript of James R. Croston, opposer's Director of Marketing, including opposer's Exhibit Nos. 1-44;
- j. Deposition transcript of Robert Korapaty, opposer's Market Controller, including opposer's Exhibit Nos. 45 and 46;
- k. Deposition transcript of Paul F. Wozniak, opposer's Product Engineering Manager, including opposer's Exhibit Nos. 47-50;

⁵ The parties stipulated that the documents produced by applicant during discovery are admissible in evidence by either party by way of notice of reliance without the need for any foundation testimony.

Opposition No. 91156682

- l. Deposition transcript of Andrew Weinstein, legal assistant at the law firm representing opposer, including opposer's Exhibit Nos. 57-58 ("Weinstein Dep. 1");
 - m. Deposition transcript of Charles E. Walker, Vice President of Sales and Marketing for Gates Corporation, a sister corporation to opposer, including opposer's Exhibit Nos. 59-62;
 - n. Deposition transcript of David Napierala, an account supervisor for Gelia, Wells & Mohr, a marketing communications company that works for opposer, including opposer's Exhibit Nos. 51-56; and,
 - o. Stipulation that Opposer's EXACT FIT windshield wiper blades are available for sale in "Advance Auto Parts" and "The Pep Boys" stores.
2. Applicant's Evidence
 - a. Certified copies of the following trademark registrations:
 1. Registration No. 2,759,541 for the mark FIRST TIME FIT for *inter alia* "vehicle parts accessories, namely, wiper arms and wiper blades";

2. Registration No. 2,627,296 for the mark SEAFIT for *inter alia* "windshield wiper blades and accessories"; and,
 3. Registration No. 2,243,566 for the mark PERFECT FIT for "windshield wiper blades";
- b. Definitions of "Easy", "Exact", and "Fit" from The Merriam-Webster Dictionary (2004);
 - c. Excerpts from the discovery deposition of Stephen J. Schwartz, applicant's CEO; and,
 - d. Deposition transcript of Angela Fisher, legal assistant supervisor for the law firm representing applicant, including applicant's Exhibit Nos. 1-6.

3. Opposer's Rebuttal Evidence

Andrew Weinstein deposition transcript, including opposer's Exhibit Nos. 63-67 ("Weinstein Dep. II").⁶

⁶ At the deposition, applicant lodged an objection to the Weinstein deposition as being improper rebuttal. The Weinstein rebuttal deposition properly forms part of opposer's case-in-chief rather than rebuttal. However, because applicant has not reasserted its objection in its brief, we have considered the evidence as if it had been introduced during opposer's initial testimony period. TBMP §707.04 ("by failing to preserve the objection in its brief on the case, a party may waive an objection that was seasonably raised at trial.").

B. Evidentiary issues

1. Opposer's objections to the Angela Fisher deposition.

Angela Fisher testified regarding her efforts to purchase FIRST TIME FIT, SEAFIT, and PERFECT FIT windshield wiper blades. Her testimony included printouts she made from websites advertising the windshield wiper blades. Ms. Fisher's testimony, supported by the websites, is evidence that FIRST TIME FIT and SEAFIT windshield wiper blades are offered for sale through the websites. Ms. Fisher did not complete the online purchase for the windshield wiper blades, but testified that she could have purchased the products. With respect to the PERFECT FIT product, because it was not offered for sale through the website, Ms. Fisher went to Strauss Auto and purchased a PERFECT FIT windshield wiper blade.

- a. Hearsay

Opposer objects to the website printouts on the ground that they constitute inadmissible hearsay (*i.e.*, because Ms. Fisher did not testify that she had personal knowledge that the wiper blades could be purchased, the exhibits constitute inadmissible hearsay). Opposer's objection is overruled. Applicant is attempting to introduce the websites, not to prove the truth of the matter set forth in the websites, but rather for what the websites show on their face (*i.e.*, that the wiper blades are being advertised and offered for sale).

Opposition No. 91156682

Accordingly, these documents are not deemed inadmissible hearsay. *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998).

b. Lack of personal knowledge.

Opposer objects to Ms. Fisher's entire testimony regarding her efforts to purchase the FIRST TIME FIT, SEAFIT, and PERFECT FIT wiper blades because she had no personal knowledge why she was asked to purchase those products or where the names of those products came from. Ms. Fisher testified that she conducted a TrademarkScan search for the word "fit" in connection with wiper blades and turned the results over to applicant's counsel. Ms. Fisher did not review the results of the search. Applicant did not proffer the TrademarkScan search results into evidence. Opposer argued that the non-production of the search results and lack of knowledge on the part of Ms. Fisher renders the testimony regarding the third-party marks untrustworthy. Opposer's objection is overruled. The source of applicant's knowledge regarding the third-party marks is irrelevant. Ms. Fisher authenticated the documents in her testimony and the documents themselves are relevant. Accordingly, the testimony and exhibits regarding third-party use are not untrustworthy.

c. Relevance

Opposer objects to the Fisher testimony and exhibits as irrelevant on the ground that applicant "never lodged a formal attack on opposer's EXACT FIT mark or the registrations therefor." Opposer argued that the testimony and exhibits regarding third-party use is an improper attempt to narrow the scope of opposer's mark. Opposer's objection is overruled. Third-party use is one of the likelihood of confusion factors enumerated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("The number and nature of similar marks in use on similar goods"). Applicant is entitled to proffer evidence of third-party use to show that opposer's mark is entitled to a narrow scope of protection or exclusivity of use. Accordingly, the Fisher testimony and exhibits are not irrelevant.

Opposer also objects as to the lack of relevancy of the testimony and exhibits regarding the SEAFIT trademark because the SEAFIT wiper blades are intended for use in connection with marine vessels. Opposer's objection to the SEAFIT testimony and exhibits is overruled. Such testimony and exhibits are relevant. Opposer's better argument would have been that the SEAFIT trademark is entitled to little probative value. Accordingly, the Fisher testimony and exhibits regarding the SEAFIT trademark are not irrelevant.

d. Lack of foundation

Opposer objects to Ms. Fisher's testimony that she could have purchased the FIRST TIME FIT and SEAFIT wiper blades on the ground that she did not have personal knowledge whether or not she could have made the purchases. Opposer's objection is sustained. Ms. Fisher did not purchase the FIRST TIME FIT and SEAFIT wiper blades and there is no testimony regarding her knowledge of the retail availability of those wiper blades. Accordingly, we will not consider Ms. Fisher's testimony that she could have purchased the FIRST TIME FIT and SEAFIT wiper blades.

2. Opposer's objections to applicant's submission of U.S. Trademark Registration No. 2,627,296 for the mark SEAFIT.

Opposer objects to the introduction into evidence of U.S. Trademark Registration No. 2,627,296 for the mark SEAFIT for "windshield wiper blades and accessories" on the ground that it is irrelevant because the wiper blades are for marine use. The registration at issue lists a wide variety of marine products in multiple classes. Opposer's objection is overruled. In our opinion, the registration is relevant for demonstrating the meaning of "fit" in connection with wiper blades. Accordingly, the SEAFIT trademark registration is not irrelevant and it is admissible into evidence.

C. Section 2(e)(1) - Descriptiveness

Opposer has alleged that applicant's mark EZ-FIT WIPER BLADES and Design is merely descriptive and has not acquired distinctiveness and that opposer is engaged in the manufacture and sale of wiper blades. (Opposer's Amended Notice of Opposition, ¶14). Applicant, on the other hand, has argued that the registration of its mark will not prevent opposer and others from using the terms "EZ" or "Fit" or "Wiper" or "Blade" in a descriptive, non-trademark sense and, therefore, opposer will not be damaged by the registration of applicant's mark.

1. Opposer has standing to prosecute the opposition.

In order to establish its standing to object to the registration of applicant's mark on the ground that it is merely descriptive, opposer need only plead and prove that it is engaged in the manufacture of windshield wipers or related products. *Binney & Smith Inc. v. Magic Marker Industries, Inc.*, 222 USPQ 1003, 1010 (TTAB 1984); *No Nonsense Fashions, Inc. v. Consolidated Foods Corporation*, 226 USPQ 502, 504 (TTAB 1985).

Opposer has been manufacturing and selling EXACT FIT wiper blades since 1995. (Croston Dep. pp. 11-12; Wozniak Dep. p. 9; Korapaty Dep., p. 8; Walker Dep., p. 80; Napierala Dep., p. 14). Inasmuch as opposer manufactures and markets wiper blades and is a competitor of applicant

Opposition No. 91156682

with respect to wiper blades, there can be no question as to opposer's standing to maintain this opposition.

2. Applicant's mark is merely descriptive.

Opposer argued that applicant's mark is merely descriptive because the components of the mark are descriptive and nondistinctive: EZ-FIT immediately conveys a desired feature of applicant's product (*i.e.*, it easily fits on the wiper arm), WIPER BLADES is the generic term for the product, and the design element comprises a wiper blade which is the pictorial equivalent of the term "wiper blade." Applicant argued that its composite mark does not directly describe the nature of its products and that competitors do not need to use applicant's exact mark to describe their products.

"EZ" is an abbreviation for the word "Easy." Abbreviations Dictionary, p. 318 (8th ed. 1992); Acronyms, Initialisms & Abbreviations Dictionary, p. 1092 (25th ed. 1999).

The word "Easy" means "requiring no great labor or effort; not hard or difficult." Random House Webster's College Dictionary, p. 415 (2000); The Merriam Webster Dictionary, p. 227 (2004) ("not causing distress or difficulty").

Opposition No. 91156682

The word "Exact" means "strictly accurate or correct . . . precise." Random House Webster's College Dictionary, p. 458 (2000); The Merriam Webster Dictionary, p. 248 (2004).

The word "Fit" has numerous meanings including "to be of the right size or shape for . . . the manner in which a thing fits." Random House Webster's College Dictionary, p. 496 (2000); The Merriam Webster Dictionary, p. 273 (2004) ("to be suitable for or to; to be correctly adjusted to or shaped for; to insert or adjust until correctly in place").

"Easy Fit" is used to describe a characteristic of windshield wiper blades. (Weinstein Dep. II, Exhibits 64 - 67) (emphasis added):

ACDelco wiper blades have "**Easy-fit** assembly for quick installation";⁷

TE-135 **Easy-to-Fit** Wiper Blade with Stable Performance.⁸

The Mighty Wiper is "Ultra compact size and shape for **easy fit**."⁹

"EZ FIT" is commonly used to describe a multitude of products. (Weinstein Dep. I, Exhibits 57 and 58). Representative examples of "EZ FIT" include the following uses (emphasis added):

⁷ Weinstein Dep. II, Exhibit 65.

⁸ Weinstein Dep. II, Exhibit 66.

⁹ Weinstein Dep. II, Exhibit 66.

Opposition No. 91156682

- a. **E-Z FIT** Magnetic Shoulder Pad;
- b. ONGUARD Hazmax® **EZ-Fit** Boots;
- c. **E-Z-FIT** Safety Latch Gate. . . EASY TO FIT!. . . Installed in minutes;
- d. Men's Tuxedo Shirt. . . Available in Standard or "**EZ fit**" for comfort/sizing;
- e. **EZ Fit** Mesh Visor Cap;
- f. Design FIREFLEX-FRP flex connector with **EZ-FIT** couplings and enjoy an easy to install and maintain piping system to handle every installation requirement; and,
- g. **EZ-Fit** Belt Clip.

Prior to the filing date of applicant's application (August 20, 2002) or applicant's date of first use (February, 2002),¹⁰ opposer promoted its EXACT FIT wiper as easy to install. Opposer introduced the EXACT FIT wiper blades in 1996 with a "click on easy" advertising tagline that is still used today. (Napierala Dep., pp. 24-25; Croston Dep., Exhibit Nos. 3, 24, 28, 29, 30, 34, 36, 37, 40, 41, and 43). The EXACT FIT packaging touts the easy installation with the following statement:

Fully Assembled
One Step
Easy Installation

(Croston Dep., Exhibit 8). Easy installation is a theme that appears in virtually all of opposer's advertising.

¹⁰ Schwartz Dep., p. 27.

Opposition No. 91156682

(Croston Dep., Exhibit Nos. 6, 11, 12, 13, 16, 17, 18, 19, 20, 21, 26, 27, 35, 36, and 43).¹¹

It is well settled that a mark is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. [Internal citation omitted]. It is not necessary that a mark describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the mark describes a significant attribute or aspect about them. Moreover, whether a mark is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services because of the manner of its use. [Internal citation omitted].

Plyboo America Inc. v. Smith & Fong Co., 51 USPQ2d 1633, 1640 (TTAB 1999). See also, *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Whether a term is unique or whether a competitor has need to use the identical mark to describe its goods is not

¹¹ In its application guides, Opposer touts the easy installation of its wiper blades by stating that "the secret behind TRICO II's [later changed to Exact Fit's] fast, easy installation is our Exact Fit program." (Croston Dep. Exhibit Nos. 11 - 13, and 16 - 21).

Opposition No. 91156682

the test of descriptiveness. The issue is whether the mark projects a readily understood meaning to the average purchaser. *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973).

On the record before us, we conclude that the mark EZ-FIT WIPER BLADES and Design as a whole is merely descriptive. EZ-FIT WIPER BLADES directly conveys an important characteristic or feature of applicant's products: that is, applicant's wiper blades can be installed without difficulty.¹² The wiper blade design, as shown in conjunction with the words in the mark, is an accurate depiction of applicant's product and is merely descriptive.¹³ No multistage reasoning or utilization of imagination, thought, or perception is necessary to determine the attributes of applicant's wiper blades.

The issue, therefore, comes down to whether applicant's composite mark, comprised of descriptive matter, is presented in such a distinctive manner as to render the mark as a whole registrable. In our opinion, the layout or display of applicant's mark is not so striking as to make a

¹² A slight misspelling of a word will not turn a descriptive word or designation into a nondescriptive mark. *In re Quik Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) ("There is no legal difference here between 'quik' and 'quick'."). Therefore, "EZ" is the legal equivalent to "Easy."

¹³ A picture or design and the word that describes the design are legal equivalents that must be treated as such in an opposition. *Thistle Class Association v. Douglass & McLeod, Inc.*, 198 USPQ 504, 511 (TTAB 1978).

commercial impression that is separate and apart from the word portion of the mark. Applicant's mark as a whole is, therefore, merely descriptive.

D. Section 2(d) - Likelihood of Confusion

1. Priority is not in issue.

Opposer is the owner of U.S. Trademark Registration Nos. 2575252 and 2157832 for the mark EXACT FIT for "automotive windshield wiper blades." In light of opposer's ownership of subsisting registrations, the issue of priority does not arise in this opposition. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

2. Likelihood of confusion factors.

We analyze the issue of likelihood of confusion based on all the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

a. The goods of the parties and the channels of trade are identical.

In an opposition, the issue of likelihood of confusion must be determined in light of the goods as identified in the involved application and pleaded registrations and, in the absence of any specific limitations therein, on the

Opposition No. 91156682

presumption that all normal and usual channels of trade and methods of distribution are or may be utilized for such goods. *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 490, 1 USPQ2d 1813, 185 (Fed. Cir. 1987); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983).

The goods as identified in opposer's U.S. Trademark Registration Nos. 2,575,252 and 2,157,832 for the mark EXACT FIT are "automotive windshield wiper blades." The goods in the application are set forth as "windshield wipers and structural parts therefor." The term "windshield wipers" means the complete wiper, including the wiper blade and the structural parts that hold the wiper blade. (Schwartz Dep., pp. 21, 33). In fact, the products of opposer and applicant are identical, but for their connector systems. (Schwartz Dep., pp. 90-93). Moreover, there is nothing in the description of goods of the cited registration or of the application that would limit channels of trade or classes of consumers for windshield wipers. In view thereof, the goods of the parties are, thus, the same. These factors favor opposer.

- b. While wiper blades may be "impulse" purchases, the degree of consumer care is not a significant likelihood of confusion factor.

Windshield wiper blades are sold to purchasers in the automotive trade (e.g., warehouse distributors, jobbers, retailers, and installers) and to the ultimate consumer (i.e., a car owner). (Korapaty Dep., pp. 10-11; Napierala Dep., p.11; Walker Dep., pp. 9-10; Croston Dep., pp. 70-71). Opposer's wiper blades have an average wholesale price of \$9 per blade and an average retail price of \$12 per blade. (Walker Dep., p. 13). The evidence shows that car owners purchase windshield wiper blades as "impulse" purchases. (Croston Dep., pp. 28-29; Walker Dep., pp. 10-13).

Opposer argues that because wiper blades are inexpensive, impulse purchases, there is a greater likelihood of confusion. We agree that as a general rule, the lower of the degree of consumer care, the greater the likelihood of confusion, and vice versa. However, that does not mean that the lower degree of consumer care *ipso facto* means that there is a greater likelihood of confusion. The issue of consumer care entails the degree to which consumers consider the marks in their purchasing decision. In this regard, we are not persuaded that the trademarks have a significant role, if any, in the car owner's decision to purchase a particular windshield wiper blade. The testimony

indicates that consumers select wiper blades without reference to the trademark.

Generally, they have not done the research or had the number of options made available to them until they walk into the store to buy the product at that point. They look at several different products and are easily confused.

* * * *

Main reason is that they do not think of wipers as a rule unless it is raining. At that point, they immediately go into a location that sells wipers to have the blades replaced for need purposes. It becomes an impulse buy rather than a buying decision.

(Walker, Dep. pp. 12 and 13).¹⁴

Because wiper blades are an impulse purchase, the degree of consumer care is a likelihood of confusion factor that favors opposer to the extent that prospective purchasers who are not paying much attention to windshield wiper brands are more likely to be easily confused by any similarities in the marks. However, based on this record, the degree of consumer care is not a significant factor in our analysis.

¹⁴ The reference to confusion could be confusion as to which quality or type of wiper blade to buy rather than confusion as to source.

Opposition No. 91156682

- c. The absence of any reported instances of confusion is not a significant likelihood of confusion factor.

Notwithstanding the facts that applicant made a total of thirty-one sales to eight customers in five states and does not advertise its EZ-FIT WIPER BLADES,¹⁵ applicant argues that because the products of the parties move in the same channels of trade to the same types of customers, the absence of any reported instances of confusion is probative that there is no likelihood of confusion. Suffice it to say that the issue before us is likelihood of confusion, not actual confusion. *Charette Corp. v. Bowater Communication Papers, Inc.*, 13 USPQ2d 2040, 2042-2043 (TTAB 1989); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738, 742 (TTAB 1978). Moreover, the absence of any reported instances of confusion is meaningful only if the record evidences appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its mark. In other words, there has to have been an opportunity for confusion to occur. *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1991); *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB

¹⁵ Schwartz Dep., p. 50; Applicant's Response to Opposer's Interrogatory No. 2. In fact, Mr. Schwartz testified that applicant has not "really begun selling" the EZ-FIT WIPER BLADES. (Schwartz Dep., p. 50).

1988). In light of applicant's meager sales and non-advertising, the lack of any reported instances of actual confusion has no probative value and, therefore, has not been given any weight in the likelihood of confusion analysis.

- d. The third-party "Fit" trademarks are not a significant likelihood of confusion factor.

Angela Fisher testified on behalf of applicant regarding the availability of FIRST TIME FIT, SEAFIT, and PERFECT FIT wiper blades. Applicant argues that this evidence demonstrates that the use of the term "Fit" is so common in the automotive field that no one entity may claim rights in the term "Fit" and that the addition of other matter to the word "Fit" is sufficient to distinguish the marks of the parties. We are not persuaded by applicant's evidence comprising only three "Fit" trademarks that the word "Fit" is in such common use for wiper blades that consumers have learned to distinguish "Fit"-suffix marks by other portions thereof and, therefore, would not be likely to be confused by the common suffix.

Since we are not persuaded that the third-party uses have any impact on consumer perceptions, applicant's evidence of third-party use is of limited probative value because opposer is not claiming the exclusive right to use the word "Fit" in the automotive field. Opposer's argument is essentially that EZ-FIT for windshield wiper blades so

Opposition No. 91156682

closely resembles EXACT FIT for windshield wiper blades as to be likely to cause confusion.

Accordingly, the third-party use of "Fit" marks is not a likelihood of confusion factor that we considered significant in this case.

e. EZ-FIT is not similar to EXACT FIT.

We now turn to a determination of what we find to be the key likelihood of confusion factor in this case, which is whether applicant's mark and opposer's mark, when considered in their entirety in terms of appearance, sound, connotation, and commercial impression are similar or dissimilar.

When we compare the marks in terms of appearance, we find that they are significantly different. We recognize that the marks both have a "Fit" suffix word. However, the first words in each mark, "EZ" and "Exact", are common words which would be readily recognized as such and which are readily distinguishable from each other. Thus, when the mark EZ-FIT WIPER BLADES and Design and EXACT FIT are considered in their entirety, we find that they are more dissimilar than similar in appearance.

Considering the sound of the marks, we find that the difference in the pronunciations of the words "EZ-FIT WIPER BLADES" (or "Easy") and "Exact Fit" render the marks different in terms of sound.

Opposition No. 91156682

Finally, when we compare the marks in terms of their respective meanings or connotations, we find that they are very different. Applicant's mark EZ-FIT WIPER BLADES means that applicant's wiper blades will fit on the purchaser's vehicle without difficulty. Opposer's mark EXACT FIT means that opposer's wiper blades will fit on the purchaser's vehicle with precision. The marks both convey desirable, but different, characteristics of the wiper blades.

In making our analysis of the similarities and dissimilarities of the marks, we note the inherent weakness of the marks and find that the differences in the marks outweigh the similarities. *King Candy Co. v. Eunice King's Kitchen, Inc.*, *supra* 182 USPQ 110 (confusion unlikely when marks are of such non-arbitrary nature that the public easily distinguishes slight differences in the marks under consideration); *Colgate Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400, 167 USPQ 529, 530 (CCPA 1970) (because the common element in the marks is a common noun or adjective of everyday use and has a laudatory or suggestive indication, PEAK PERIOD for personal deodorants is not confusingly similar to PEAK for dentifrice); *Sure-Fit Products Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295 (CCPA 1958) (where a party has a weak mark, competitors may come closer to the mark than would be the case with a strong mark without violating the party's rights; SURE-FIT

Opposition No. 91156682

and RITE-FIT both for slip covers, held not confusingly similar).

In reaching our decision that the marks are not confusingly similar, we wish to make it clear that in so doing, we have considered the "market" strength of opposer's mark as evidenced by its annual sales in the multiple millions of units and tens of millions of dollars, its advertising, and unsolicited media attention. (Korapaty Dep., pp. 8-16, Exhibit 46; Croston Dep., pp. 18-33, 39-103, 113-124, 128-130, Exhibits 3-7, 10-39, 41-44; Napierala Dep., pp. 15-24, 34-39, Exhibit 53). While the sales and advertising have been extensive, we are not persuaded that EXACT FIT is entitled to a broad scope of protection, given the difference in appearance, sound, and connotation of opposer's mark from applicant's mark.

Viewing all of the evidence of record as it pertains to the *du Pont* factors, we conclude that there is no likelihood of confusion between opposer's mark EXACT FIT and applicant's mark EZ-FIT WIPER BLADES and Design, even though those marks are used on identical products. Simply put, the dissimilarity between the marks is dispositive in this case. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991). Therefore, we dismiss the opposition as to the likelihood of confusion claim.

Opposition No. 91156682

Decision: The opposition is dismissed on the ground of likelihood of confusion under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

The opposition is sustained on the ground that applicant's mark is merely descriptive under Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1), and registration to applicant is refused.