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Decision mailed:
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GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Penn Security Bank & Trust Co.
v.
NBT Bank, N.A.

Cancellation No. 92041926

David C. Jenkins and Richard V. Westerhoff of Eckert Seamans Cherin & Mellott, LLC for Penn Security Bank & Trust Co.

Mark Levy of Mark Levy & Associates for NBT Bank, N.A.

Before Hohein, Zervas and Mermelstein, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Penn Security Bank & Trust Co. has petitioned to cancel the registration issued to and owned by NBT Bank, N.A. of the mark "COSMIC KIDS" in standard character form on the Principal Register for "banking services, namely, savings and checking accounts and savings clubs" in International Class 36.[1]

[1] Reg. No. 2,549,603, issued on March 19, 2002 from an application filed on November 17, 2000, which sets forth a date of first use anywhere of July 20, 1998 and a date of first use in commerce of November 13, 2000.

As grounds for cancellation, petitioner alleges that it "has adopted and continuously used the trademark and service mark COSMIC CARD and COSMIC CARD (stylized), since at least as early as June 30, 1991 (cards) and July 1, 1991 (services) to the present, in connection with the use in commerce of bank debits [sic] cards and in providing retail bank debit card services"; that petitioner is the owner of a subsisting registration on the Principal Register "for the trademark and service mark COSMIC CARD (stylized)," as reproduced below,

"for bank debit cards in International Class 16 and for retail banking debit card services in International Class 36";[2] that "[t]here is no issue as to priority of use" inasmuch as "[p]etitioner's registration issued long prior to the first date of use of the registrant, [namely,] July 20, 1998"; and that "[i]n view of the similarity of the respective marks and the related nature of the goods and services of the respective parties, ... respondent's registered mark so resembles petitioner's marks ... as to be likely to cause confusion, or to cause mistake or to deceive."

[2] Reg. No. 1,695,152, issued on June 16, 1992 from an application filed on December 24, 1990, which sets forth--contrary to the allegations in the petition to cancel--a date of first use anywhere and in commerce of July 1, 1991 for the goods in International Class 16 and a date of first use anywhere and in commerce of June 30, 1991 for the services in International Class 36; renewed. The word "CARD" is disclaimed.

Respondent, in its answer, has admitted that there is no issue as to priority of use and that petitioner's pleaded registration is subsisting and owned by petitioner, but has denied the remaining allegations of the petition to cancel.

The record consists of the pleadings, including a certified copy of petitioner's pleaded registration which shows that such registration is subsisting and owned by petitioner; the file of the involved registration; petitioner's trial deposition, with exhibits, of Christe A. Casciano;[3] and, pursuant to a stipulation by the parties that the following "shall be admitted into evidence and may be relied upon by either party," (i) petitioner's discovery deposition, with exhibits, of Florence R. Doller, the "Vice President and Director of Marketing" "for NBT Bank" (Doller dep. at 5), (ii) petitioner's discovery deposition, with exhibits, of Dominick Mitchell, Jr., "the Senior Vice President in charge of retail sales and administration of the Pennstar Bank" division of NBT Bank (Mitchell dep. at 5), (iii) petitioner's Interrogatory Nos. 1, 3-9, and 23, and respondent's answers and exhibits thereto, and (iv) a second certified copy of petitioner's pleaded registration.[4] Respondent, however, did not

[3] Such deposition, however, is entitled to essentially no weight since neither the testimony, nor any exhibit introduced pursuant thereto, identifies who the witness is employed by, his job title and/or a description of his duties, or any other information sufficient to establish that the witness has first-hand knowledge of the matters to which he testified and thus is competent to testify with respect thereto.

[4] Such copy is identical to, and hence duplicative of, the certified copy of petitioner's pleaded registration which it made of record, pursuant to Trademark Rule 2.122(d)(1), when it filed the petition to cancel. See TBMP §704.03(b)(1)(A) (2d ed. rev. 2004).

take a trial deposition or submit any further evidence. Only petitioner filed a main brief.[5]

Priority of use is not in issue in this proceeding. Respondent, as previously noted, has admitted such in its answer and, in any event, petitioner is entitled to priority inasmuch as the filing date of the application which matured into its pleaded registration is earlier than the filing date of the application which matured into respondent's involved registration. See, e.g., Hilson Research Inc. v. Society for Human Resource Management, 27 USPQ2d 1423, 1428-29 at n. 13 (TTAB 1993); and American Standard Inc. v. AQM Corp., 208 USPQ 840, 841-42 (TTAB 1980). The sole issue to be decided, therefore, is whether there is a likelihood of confusion.

According to the record, petitioner is the owner of its pleaded and subsisting registration for the mark "COSMIC CARD" (in stylized form) for "bank debit cards" and "retail banking debit card services." Respondent, on the other hand, renders various banking services through its NBT Bank division "in 17 counties in upstate New York" (Doller dep. at 7) and in portions of Pennsylvania through the Pennstar Bank division thereof. In

[5] To the extent, however, that the appendices to such brief refer to evidence which was not otherwise properly made of record at trial (e.g., "the Notice of Acceptance/Notice of Renewal, Appendix 2," which pertains to petitioner's pleaded registration), such evidence has been given no consideration. See TBMP §704.05(b) (2d ed. rev. 2004) ["evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony"]. Likewise, statements in petitioner's brief which reference evidence which was not properly made of record have been given no consideration. See TBMP §704.06(b) (2d ed. rev. 2004) ["[f]actual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial"].

particular, as to its "COSMIC KIDS" banking services, while such services are principally "aimed at children," that is, "persons under the age of 14," respondent nevertheless requires that an adult, usually the child's parent or guardian, sign the application in order to open a "COSMIC KIDS" account. (Id. at 17.) According to Mr. Mitchell, "[t]he adult needs to be there because we don't open up savings accounts [for children] without an adult on the account." (Mitchell dep. at 27.) Thus, not only is a "COSMIC KIDS" account, as actually provided by respondent, "a savings account" for which the maximum age for opening the account is age 14 (Doller dep. at 26), but the parent or adult guardian of the child applying to open such account would be aware thereof. Once opened, a "COSMIC KIDS" account nonetheless can remain open after the child ages past age 14 and therefore could be used by someone older than age 14 (although presently there are no instances thereof). Respondent, however, has no plans to market its "COSMIC KIDS" account to persons over the age of 14.

No debit card is issued in connection with a "COSMIC KIDS" account because, as a matter of policy, respondent "would not associate a debit card as a primary account with any savings vehicle" and, in any event, a debit card "would only be issued to someone of the age of 18 or older." (Id. at 29.) Thus, even if someone who had previously opened a "COSMIC KIDS" account were to continue using such account after reaching the age of 18, respondent "would not issue a debit card in association with a

savings account." (Id.) Similarly, respondent does not promote a credit card in connection with its "COSMIC KIDS" account because "[t]he purpose of the Cosmic Kids account program is to provide children with a vehicle to begin saving." (Id. at 46.) Although respondent does offer credit cards to its customers, the customer must be a "legal adult," that is, a person of age 18 or older, "and then a credit history would [also] be [required,]" including information on employment and indebtedness. (Id.)

Furthermore, while a parent or adult guardian does not have to sign a deposit slip when a child makes a deposit to a "COSMIC KIDS" account, "[t]he adult on the account with the child would have to sign the withdrawal slip." (Id. at 30.) A child, therefore, could not make a withdrawal from such an account without a parent's or adult guardian's knowledge. Nonetheless, according to Ms. Doller, as to respondent's statement savings accounts, it is the case with respect to automated teller machine ("ATM") and point of sale cards that "ATM cards can be associated with our statement savings accounts." (Id. at 47.) Thus, as clarified by Mr. Mitchell, the adult signatory on a "COSMIC KIDS" account may have an ATM card as part of such account.

Respondent selected the mark "COSMIC KIDS" to fit with other services rendered by NBT Bank under such names as "Star Checking, Star Business Advantage, [and] Star Privilege." (Id. at 16.) Specifically, according to Ms. Doller, rather than choosing a name with the word "star," such as "Star Kids," for savings and checking accounts and savings clubs targeted principally to children, respondent chose the mark "COSMIC KIDS"

because "[w]e liked the fact that the word cosmic kept to the same theme but incorporated a new word into the overall collection of accounts that we had." (Id.)

Respondent first used the mark "COSMIC KIDS" in connection with savings account services sometime in 1998[6] in New York and sometime between 2000 and March of 2001 in Pennsylvania. Respondent uses such mark on account registers and in brochures. Respondent does not advertise its "COSMIC KIDS" banking services in newspapers nor does it do so on radio or television or in ads that specifically target adults. Such services, instead, are advertised through personal savings account brochures which are available at branches of its NBT Bank. The brochures, which mention the bank's "COSMIC KIDS" account, are "directed to anyone who visits a branch, which ... could be an adult or a child." (Id. at 21.) Respondent, in addition, has distributed fliers promoting its "COSMIC KIDS" account at a "children's health fair" held in Pennsylvania. (Mitchell dep. at 12.) Respondent has also promoted its "COSMIC KIDS" account at schools where "branch managers or other bank representatives were visiting ... to talk to children about banking and money" by leaving "with the children some information about the Cosmic Kids account." (Doller dep. at 23.) While, as a result, respondent does not expect school children to open such an account themselves (and, as noted above, an adult's signature is in any event required on

[6] In particular, when asked if she knew the date of first use of such mark, Ms. Doller testified that: "It was in 1998, and I don't recall the specific date, although I believe it was in the month of June." (Doller dep. at 16.)

the account application), it anticipates that the children will take the information home to let their parents see it.

Mr. Mitchell testified that he did not know how many "COSMIC KIDS" accounts were currently open at Pennstar Bank[7] and Ms. Doller, in her testimony, gave no indication as to the number of such accounts open at branches of NBT Bank. However, in its answer to petitioner's Interrogatory No. 9, respondent indicated that as of July 31, 2003, its NBT Bank division had 4,536 "COSMIC KIDS" accounts with $1.4 million on deposit; its former Central National Bank division (which was subsequently combined with its NBT Bank division in July of 2004 according to the testimony of Ms. Doller) had 7,338 "COSMIC KIDS" accounts with $3.7 million on deposit; and its Pennstar Bank division had 8,635 "YOUNG SAVERS" ACCOUNT" accounts, which also used the name "COSMIC KIDS CLUB" in connection therewith, with $5.3 million on deposit. There is no credible corresponding information, however, as to the extent of petitioner's use of its "COSMIC CARD" mark, given the lack of proper foundation for the testimony and exhibits of Mr. Casciano (as previously noted).[8]

Further, in its answer to petitioner's Interrogatory No. 5, respondent stated that it believed that confusion between the respective marks of the parties is not likely for various reasons, including the fact that its "COSMIC KIDS mark is related

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[7] As shown by the exhibits introduced with his testimony, Pennstar Bank actually has used the substantially similar mark "COSMIC KIDS CLUB" in connection with its "YOUNG SAVERS ACCOUNT" savings club accounts for children rather than, as testified to, the mark "COSMIC KIDS" *per se*.

[8] See footnote 3.

to a savings account geared toward children" while petitioner's "COSMIC CARD is a debit card that may be attached to a checking or savings account" which, to the best of respondent's knowledge, involves a "service [which only] is available to adults age 18 or older"; and that "{w]hile these marks have in common the word 'COSMIC,' the [respective] products/services are completely different" inasmuch as "[a] savings account is a product used to collect or save money" while "[a] debit card is a service that gives an accountholder the ability to access and spend money." Respondent, moreover, is unaware of any instances of actual confusion between the respective marks of the parties. According to Ms. Doller's testimony:

> Q. Are you aware of any instances of confusion between a Cosmic Card and a Cosmic Kid [sic] account?
>
> A. I am not.

(Id. at 40.) Likewise, Mr. Mitchell testified that:

> Q. Are you aware of any instances of confusion between Cosmic Card and Cosmic Kids Club?
>
> A. No.

(Mitchell dep. at 35.) To the same effect, he further testified that:

> Q. .... To your knowledge, has there ever been any confusion between Cosmic Kids and Cosmic Card in the bank branches of Pennstar [Bank] near any Penn Security [Bank & Trust Co.] branch?
>
> A. No.

(Id. at 37.)

Determination of the issue of likelihood of confusion is based upon consideration of all of the pertinent factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177

USPQ 563, 567 (CCPA 1973), for which there is evidence in the record. See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods and/or services at issue and the similarity or dissimilarity of the respective marks in their entireties.[9] Such considerations, in light of petitioner's proof that it is the owner of its pleaded registration and that such registration is subsisting, are the principal *du Pont* factors, along with the factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion, which need to be addressed.

Turning first to consideration of the *du Pont* factor which pertains to the similarity or dissimilarity of the goods and/or services at issue, petitioner correctly notes in its brief that goods and/or services need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient, instead, that the goods and/or services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks employed in connection therewith, to

[9] The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the

the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In addition, it is pointed out that it is well settled that the issue of likelihood of confusion must be evaluated on the basis of the identification of the goods and/or services as set forth in the subject registration and the identification of the goods and/or services as recited in any pleaded registration made of record by the petitioner, regardless of what the record may (or may not) reveal as to the particular nature of the respective goods and/or services, their actual channels of trade, or the classes of purchasers to which they are in fact directed and sold. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). It is also well established that, absent any specific limitations or restrictions in the identification of goods and/or services as listed in the subject registration and in the identification of goods and/or services as set forth in any of the petitioner's registration(s), the issue of likelihood of confusion must be determined in light of a consideration of all normal and usual channels of trade and methods of distribution for the respective goods and/or services. See, e.g., CBS Inc. v.

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essential characteristics of the goods [and/or services] and

Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Here, as broadly identified in the subject registration, respondent's "banking services, namely, savings and checking accounts and savings clubs" clearly are commercially related to the "bank debit cards" and "retail banking debit card services" set forth in the pleaded registration which petitioner made of record. In particular, various brochures utilized by respondent to advertise, *inter alia*, its "COSMIC KIDS" savings accounts (and "COSMIC KIDS CLUB" savings club accounts) show on their face that respondent also offers, with respect to other kinds of savings and checking accounts, debit cards and services, although not under the same mark. Specifically, respondent advertises to potential customers that "[y]ou can take advantage of many banking services designed to give you convenient access to your money"; that such services include use of a card; that "[y]ou can use this card to access your checking and savings account at ATMs"; and that, because such card "is accepted at VISA® locations worldwide, ... you can pay for purchases quickly and easily" in that "[y]our purchases are automatically deducted from your checking account with no checks to write and no need to present identification or courtesy cards." (Doller dep. Exhs. D and E.) In fact, respondent's applications for opening a "COSMIC KIDS" savings account recognize the use of debit cards as a

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differences in the marks." 192 USPQ at 29.

vehicle for transferring funds and specifically limit in a statement period "[t]ransfers from a savings and Money Market account to another account or to third parties ... to 6 with no more than 3 transfers by ... Debit Card or similar order to third parties." (Doller dep. Exhs. F and G.)

Moreover, neither respondent's "banking services, namely, savings and checking accounts and savings clubs," nor petitioner's "bank debit cards" and "retail banking debit card services" contain any limitations or restrictions as to either the kinds of purchasers to which they are offered or the types of channels of distribution in which they are rendered. The respective goods and/or services of the parties would thus be sold to the same classes of purchasers, including ordinary consumers, through identical channels of trade, including commercial banks. Consequently, even though respondent offers savings accounts under its "COSMIC KIDS" mark that are directed to children, the adults who are required to be accountholders on such accounts could also be expected to utilize, in connection with such accounts or other checking and/or savings accounts, the same types of bank debit cards and retail banking debit card services as those provided by petitioner under its "COSMIC CARD" mark. Accordingly, it is clear on this record that petitioner's goods and services, as identified in its pleaded registration, are commercially related to respondent's services, as recited in its involved registration, such that if those goods and/or services were rendered under the same or similar marks, confusion as to the source or sponsorship thereof would be likely to occur.

The *du Pont* factor pertaining to the similarity or dissimilarity of the goods and/or services at issue therefore favors opposer.[10]

As to the *du Pont* factor which pertains to the similarity or dissimilarity of the respective marks in their entireties as to appearance, sound, connotation and commercial impression, we agree with opposer's arguments, as set forth in its brief, that such marks are substantially similar. In particular, opposer points out that respondent's mark, like petitioner's mark, consists of two words in which "a two-syllable word [is] followed by a single syllable word," with both marks not only "begin[ning] with the 'k' sound, [and] thus providing a pleasing alliteration," but as we further note, the second word likewise begins "with the 'k' sound." Both marks, as opposer additionally observes, begin with the identical, arbitrary term "COSMIC" and terminate, in the case of petitioner's mark, in a word which ends with the letter "d" while respondent's mark ends with a "word [which similarly] includes a 'd'." Thus, "the marks COSMIC CARD and COSMIC KIDS are, in large part, identical in sound and appearance and have a general similarity in cadence. Moreover, we note, because respondent's mark is in standard character form, it could be displayed, like petitioner's mark, in the same special form in which petitioner's mark is registered, that is, with the angled lettering and shadowing thereof

[10] Plainly, given the absence of any limitations or restrictions in the identifications of the respective goods and/or services, the related *du Pont* factors of the similarity or dissimilarity of established, likely to continue trade channels and the conditions under which and buyers to whom sales are made likewise necessarily favor opposer and a finding of a likelihood of confusion.

decreasing towards a vanishing point. See, e.g., Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971); and INB National Bank v. Metrohost Inc., 22 USPQ2d 1585 (TTAB 1992).

Furthermore, as opposer correctly notes, while the marks at issue must be considered in their entireties, and thus any descriptive or generic terms therein cannot be ignored, our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." Id. As opposer properly observes:

> Here, the dominant portion of the marks is the word "COSMIC." That is, in the Petitioner's ... [mark], the word "CARD" describes the debit card upon which Petitioner's ... [mark is] used. Further, the Registrant contends that the Registrant's Mark is used on a young saver's, or "KIDs," bank account. Thus, the word "COSMIC" is more likely to be perceived as an arbitrary term indicating the source of the goods and/or services.

Additionally, citing Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988), for the proposition that,

as stated therein, "[i]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered," opposer accurately points out that the marks at issue herein "share an identical dominant word, 'COSMIC.'" Such word, we note, retains its ordinary dictionary meaning, whether coupled with the generic term "CARD" as in petitioner's mark or paired with the descriptive word "KIDS" as in respondent's mark. In consequence thereof, the respective marks are substantially similar in connotation and, given their previously noted similarities in sound and appearance, along with their similarity in structure, engender a substantially similar overall commercial impression. The *du Pont* factor which pertains to the similarity or dissimilarity of the respective marks in their entireties thus favors opposer.

Finally, while the *du Pont* factors discussed above point to a conclusion that confusion is likely from contemporaneous use by the parties of their respective marks in connection with the goods and/or services at issue herein, the record also indicates that, as to the *du Pont* factor pertaining to the length of time during and conditions under which there has been contemporaneous use of the respective marks without evidence of actual confusion, that respondent, according to the testimony of Ms. Doller and Mr. Mitchell, is unaware of any incidents of actual confusion. Evidence of the absence of any instances of actual confusion over a significant period of time is, of course, indicative of no likelihood of confusion. However, such evidence is meaningful only where the record demonstrates appreciable and

continuous use by the defendant of its mark in the same market(s) as those served by the plaintiff under its mark. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992); and Chemetron Corp. v. Morris Coupling & Clamp Co., 203 USPQ 537, 541 (TTAB 1979). Specifically, there must also be evidence showing that there has been an opportunity for incidents of actual confusion to occur. See, e.g., Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000).

Here, given the lack of foundation with respect to the testimony and exhibits of Mr. Casciano as petitioner's witness, there is simply no credible evidence concerning the nature and extent of petitioner's use of its "COSMIC CARD" mark. Moreover, the testimony and exhibits provided by Ms. Doller and Mr. Mitchell demonstrate that respondent's use of its "COSMIC KIDS" mark has, in any event, been rather modest at best. In particular, as mentioned earlier, respondent first used such mark in connection with savings account services sometime during 1998 in New York and sometime between 2000 and March of 2001 in Pennsylvania, and its use thereof since then has been limited to use on account registers and in brochures. Respondent does not advertise its "COSMIC KIDS" banking services in newspapers nor does it do so on radio or television or in ads that specifically target adults. Such services, instead, are advertised through personal savings account brochures which are available at branches of its NBT Bank and the distribution of fliers promoting the "COSMIC KIDS" account at a single health fair for children which was held in Pennsylvania. While respondent also has

promoted its "COSMIC KIDS" account by having its branch managers or other bank representatives visit schools to talk to children about banking and money and distribute information about such an account, Mr. Mitchell testified that he did not know how many "COSMIC KIDS" accounts were currently open at its Pennstar Bank locations and Ms. Doller, in her testimony, gave no indication as to the number of such accounts open at branches of its NBT Bank. Furthermore, in answering one of petitioner's interrogatories, respondent indicated with respect to the amount of business conducted under its mark that, as of July 31, 2003, its NBT Bank division had only 4,536 "COSMIC KIDS" accounts with just $1.4 million on deposit; its former Central National Bank division had 7,338 "COSMIC KIDS" accounts with $3.7 million on deposit; and its Pennstar Bank division had 8,635 "YOUNG SAVERS" ACCOUNT" accounts, which also used the name "COSMIC KIDS CLUB" in connection therewith, with $5.3 million on deposit. Such volume, on average, thus ranged from between about $300 to roughly $600 per account.

On this record, we are not persuaded that circumstances have been such that the absence of any instances of actual confusion is probative evidence of a lack of a likelihood of confusion. While, concededly, there apparently has been some modest opportunity for incidents of actual confusion to occur during, approximately, a six-year period in which respondent has made use of its mark, it is by no means clear that, if confusion were likely to take place, it would have happened *and* that the parties would have become aware of at least some of those

incidents. Given the average level of deposits for its "COSMIC KIDS" savings accounts and that respondent selected its mark to fit with the same theme as other services rendered by its NBT Bank under such names as "Star Checking," "Star Business Advantage" and "Star Privilege," customers who also may have encountered petitioner's "COSMIC CARD" mark for bank debit cards and retail banking debit card services might not be expected to notice the differences in the respective marks, much less voice a complaint or concern as to the provider of such goods and services. At best, therefore, we view the *du Pont* factor pertaining to the length of time during and conditions under which there has been contemporaneous use of the respective marks without evidence of actual confusion as being neutral rather than favoring respondent.

Accordingly, because all of the pertinent *du Pont* factors either favor petitioner or, in the case of one of those factors, is neutral, and none of such factors favors respondent, we conclude that contemporaneous use by respondent of the mark "COSMIC KIDS" in connection with "banking services, namely, savings and checking accounts and savings clubs," would be likely to cause confusion with use by petitioner of the substantially similar mark "COSMIC CARD" and design in connection with its commercially related "bank debit cards" and "retail banking debit card services."

Decision: The petition to cancel is granted and Reg. No. 2,549,603 will be canceled in due course.