

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Mailed:  
July 19, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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itote Inc.  
v.  
totes Isotoner Corporation

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Opposition No. 91121054  
to application Serial No. 75714429  
filed on May 26, 1999

Cancellation No. 92040619  
to Registration No. 1138767  
issued August 19, 1980

Cancellation No. 92040732  
to Registration No. 1154884  
issued May 19, 1981

Cancellation No. 92041389  
to Registration No. 2305847  
issued January 4, 2000

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totes Isotoner Corporation  
v.  
itote Inc.

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Opposition No. 91155989  
to application Serial No. 78018951  
filed on July 30, 2000

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Joseph F. Nicholson of Kenyon & Kenyon for itote Inc.

**Opposition No. 91121054, et al.**

Gregory F. Ahrens of Wood, Heron & Evans, L.L.P. for Totes Isotoner Corporation

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Before Seeherman, Hairston and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

In these consolidated proceedings Itote, Inc. (hereinafter Itote), as plaintiff in Opposition No. 91121054, seeks to prevent Totes Isotoner Corporation (hereinafter Totes) from registering the mark TOTES (in standard character form) for backpacks, day packs, belt bags, all purpose sports bags, duffle bags, and briefcases,<sup>1</sup> and as plaintiff in Cancellation Nos. 92040619, 92040732 and 92041389, seeks to cancel Totes' registrations for TOTES (in standard character form) for carrying cases and pouches for overshoes, raincoats and umbrellas;<sup>2</sup> TOTES (in standard character form) for fabric carryalls with umbrella storage compartment;<sup>3</sup> and TOTES SPORT (in standard character form, SPORTS disclaimed) for backpacks, carryall bags, duffel bags, and fanny packs.<sup>4</sup>

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<sup>1</sup> Serial No. 75714429, filed May 26, 1999. The application is based on use under Trademark Act Section 1(a), 15 U.S.C. §1051(a), alleging 1981 as the date of first use and first use in commerce.

<sup>2</sup> Registration No. 1138767, issued August 19, 1980, renewed.

<sup>3</sup> Registration No. 1154884, issued May 19, 1981, renewed.

<sup>4</sup> Registration No. 2305847, issued January 4, 2000.

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Itote has brought the notice of opposition and the petitions for cancellation on the grounds that (1) TOTES is the generic term for the goods identified in Totes' application and registrations, and (2) fraud.

Totes, in its answers, denied the salient allegations of the notice of opposition and petitions to cancel, and in Opposition No. 91121054 alleged affirmatively that its mark TOTES is famous as used with a "variety of goods."

Totes, as plaintiff in Opposition No. 91155989, seeks to prevent Itote from registering the mark ITOTE PC (in standard character form, PC disclaimed) for "carrying cases, backpacks, carry on bags, school bags, tote bags, travel bags and briefcases, all specifically designed to carry and transport portable computers" in International Class 9, and "carrying cases, backpacks, carry on bags, school bags, tote bags, travel bags and briefcases" in International Class 18.<sup>5</sup> In the notice of opposition, Totes alleges that ITOTE PC is confusingly similar to Totes' various previously used and registered TOTES marks. In its answer, Itote denies the salient allegations and asserted various "affirmative defenses."<sup>6</sup>

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<sup>5</sup> Serial No. 78018951, filed July 130, 2000. The application is based on a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. §1057(b).

<sup>6</sup> To the extent the answer sets forth affirmative defenses (e.g., estoppel or unclean hands) these affirmative defenses were not pursued at trial or in the brief other than to reargue Itote's

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The record consists of the pleadings, the files of the opposed applications and the subject registrations, the testimony depositions with accompanying exhibits of Michael Katz, a senior vice president with Totes, taken on October 14, 2004 (Katz I) and December 2, 2004 (Katz II), Adam Bennett, president and CEO of Itote, taken on October 29, 2004 (Bennett I) and February 10, 2005 (Bennett II), and Bradford E. Phillips (Phillips), prior owner of Totes, taken on October 14, 2004. In addition, Itote has submitted four notices of reliance upon various items. Totes has objected to various portions of the evidence and testimony and we will address these objections below. Briefs have been filed but an oral hearing was not requested.

Evidentiary Issues

Totes objects to the Internet printouts marked as exhibit nos. 3-12 during the Katz I deposition for lack of foundation and authentication. Itote took this deposition by subpoena and Totes did not produce these printouts to Itote. Rather, Itote presented these Internet printouts to Mr. Katz. Moreover, Totes argues that Itote's counsel "did not lay any foundation regarding Mr. Katz's personal knowledge or familiarity with Exhibits 3-12" and requests that the Board exclude Mr. Katz' testimony regarding exhibit nos. 3-12. Itote argues that in view of Totes' failure to

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contentions regarding the issues of genericness and fraud

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object at the time of the deposition the objections have been waived. While we agree that the objection is untimely, in view of the manner in which these Internet printouts were introduced, although of record, they have little probative value. The testimony elicited with regard to these printouts concerns the witness's own perception of the bags in the pictures; the testimony is not directed to the public's understanding of or exposure to these bags and how they are described on the website, nor do they prove that the bags are actually for sale or were being advertised at the time of the deposition.

In addition, Totes objects to the Internet printouts submitted under notice of reliance. Itote again responds that Totes' objection is untimely inasmuch as Totes did not file a motion to strike. Itote argues that had Totes filed a timely objection, Itote "would have had sufficient time to depose the person who performed the Internet searches, thus authenticating the documents." Br. p. 11. It is well settled that Internet printouts are not self-authenticating and are "not proper subject matter for introduction by means of a notice of reliance under Trademark Rule 2.122(e)."

Plyboo America Inc. v. Smith & Fong Co., 51 USPQ2d 1633, 1634 n.3 (TTAB 1999). See also Michael S. Sachs Inc. v. Cordon Art B.V., 56 USPQ2d 1132, 1134 (TTAB 2000); Raccioppi

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pertaining to Totes' marks and registrations.

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v. Apogee Inc., 47 USPQ2d 1368, 1370 (TTAB 1998). Thus, Totes' objection is sustained. See Original Appalachian Artworks Inc. v. Streeter, 3 USPQ2d 1717, 1717 n.3 (TTAB 1987) (party may not reasonably presume evidence is of record when that evidence is not offered in accordance with the rules); and Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A., 221 USPQ 73, 74 n.2 (TTAB 1983) (objection raised in brief that items submitted by notice of reliance were neither official records nor printed publications sustained). We hasten to add that even if we considered these exhibits, as with the printouts attached to the Katz I deposition, these printouts have little probative value. We further note that all of the Internet printouts, including the exhibits attached to the Katz I deposition, are from one website and "totes" is used only three times in headers for pages with various bags (e.g., double handle tote, attachable shoulder tote). While the website apparently displays various designer's bags it is not known if the use of the word tote in connection with various types of bags is the designer's designation or from the website itself. Moreover, there is nothing in the record to indicate the extent to which consumers have been exposed to this one website.

Totes also objects to various items marked as exhibits during the Bennett II deposition. Specifically, Totes

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argues that Itote failed to authenticate exhibit nos. 5-7 and 11, and failed to lay a foundation and failed to authenticate exhibit nos. 8 and 12. These exhibits comprise photographs of products, hangtags, and receipts for Totes' products. The products were not purchased by the witness, nor was the purchaser identified, nor is there testimony to verify that the photographs are a fair and accurate representation of the actual products, hangtags, and receipts. However, other than exhibit no. 12, Totes has not argued that these are not hangtags from Totes' products. In response to the objection, Itote argues that during the deposition Totes did not object to exhibit nos. 5, 6 and 12 for lack of authentication; that Mr. Bennett's testimony that he had hired someone to make the purchases and that Mr. Bennett had sent the receipts to the Board with the pleading was sufficient to lay a foundation; and that exhibit no. 8 was "real evidence which does not rely on a witness's testimony." We note that the exhibits in question appear to pertain to purchases made in 2001. Mr. Katz, a Totes' senior vice president, had already, in a declaration dated July 3, 2001 and attached as exhibit no. 1 to the Katz I deposition, addressed the photographs of the products and stated the following:

I am aware that Itote Inc. has attached photographs of products purportedly purchased at a

totes<sup>7</sup> outlet store that are identified as a tote, a tote bag, an umbrella tote and a computer tote. This labeling is not approved totes labeling as totes does not and never has sold any tote bags under the TOTES mark...The identification of the products as a tote, tote bag, umbrella tote or computer tote was a mistake.

Mr. Katz further testified in the Katz II deposition that:

What had happened was some of the bags that were sold in our retail stores, which also had the totes trademark, those carryall bags were also marked as a tote, t-o-t-e, and that was inappropriate labeling because those bags did not satisfy our internal definition of what a tote bag is. And it was an error that was brought to our attention. It was corrected and we made sure we do not mislabel any of our goods that carry the totes trademark. Katz II p. 16.

We further note that no objection has been made to exhibit nos. 13 and 14, which are photographs of similar hangtags to those reproduced in exhibit nos. 5-8 and 11 but were purchased by Mr. Bennett in 2005. Inasmuch as Totes has substantively addressed the subject matter of the exhibits in question through the testimony of its senior vice president, Totes' objections are overruled and the exhibits remain of record.

Finally, Totes' objection to the evidence attached to Itote's brief is sustained. Evidence submitted for the

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<sup>7</sup> We note that Totes' corporate name is depicted as "totes" without capitalization, and therefore, in the testimony that is quoted throughout this opinion we have shown the name "totes" in this format.

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first time with a brief will not be considered.<sup>8</sup> Angelica Corp. v. Collins & Aikman Corp., 192 USPQ 387, 391 n.10 (TTAB 1976).

Opposition No. 91121054 and Cancellation Nos. 92040619, 92040732, and 92041389

We first address the four proceedings in which Itote is in the position of plaintiff and Totes is in the position of defendant, and involve the common issues pertaining to the alleged genericness of Totes' marks and the alleged fraud committed in filing, obtaining and/or maintaining the application and registrations.

Itote has sufficiently established that it has standing to bring these proceedings inasmuch as it has shown that it is a potential competitor in the same market as Totes. See Bennett I p. 7 ("Itote Inc., is a start-up that has been involved in the design and development of computer cases, primarily for the Apple market.") PlybooAmerica, Inc. v. Smith & Fong Co., supra. We also note that Totes has not disputed Itote's standing.

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<sup>8</sup> We note Totes' further objection "to other deposition exhibits and documents that itote submitted, but did not cite in the 'Description of the Evidence of Record.'" Br. p. 2 fn. 5. Totes has not specified what exhibits were purportedly not indicated in the Description of the Record, and the Board generally will not consider such a vaguely worded objection as that raised by Totes herein. In any event, while a listing in the brief of the materials that are of record is helpful to the Board, identifying all materials is not a requirement to their being considered. Otherwise, a party could presumably avoid having a negative testimony deposition considered simply by not listing it. Thus, we have considered all properly introduced evidence for its appropriate probative value.

Claim of Genericness

In order to prevail on the ground of genericness the plaintiff must establish genericness by a preponderance of the evidence. Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551, 1554 (Fed. Cir. 1991). The critical issue in determining genericness is whether members of the relevant public primarily use or understand the designation sought to be registered or that is already registered to refer to the genus or category of goods in question. H. Marvin Ginn Corp. v. Int'l Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?" Marvin Ginn, supra, 228 USPQ at 530. The correct legal test for genericness, as set forth in Marvin Ginn, "requires evidence of 'the genus of goods or services at issue' and the understanding by the general public that the mark refers primarily to 'that genus of goods or services.'" In re American Fertility Society, 188 F.3d 1341, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999). That is, do the members of the relevant public understand or use the term sought to be protected to refer to the genus of the goods and/or services in question?

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The genus or category of goods involved in these cases are those goods set forth in the various identifications. Magic Wand, supra, 19 USPQ2d at 1552. Applicant attempts to redefine the genus, arguing that a genus is a class of objects divided into subordinate species and in these proceedings "tote" is the genus and the goods identified in the application and registrations are species of that genus. However, the various dictionary definitions of record do not support such a categorization:

Tote v. 1. to carry by hand: bear on the person: lug, pack 2. haul convey. Merriam-Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1998);

Tote n. 2. tote bag. Merriam-Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1998);

Tote bag. n A large 2-handled open-topped bag (as of canvas). Merriam-Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1998);

Tote transitive verb. toted, toting, totes. 1. To haul; lug. 2. To have on one's person; pack; toting guns. noun 1. A load; burden 2. A tote bag. The American Heritage Dictionary (2d College ed. 1991);

Tote bag. A large handbag or shopping bag. The American Heritage Dictionary (2d College ed. 1991);

Tote bag. A woman's large handbag used esp. for carrying small packages. Webster's Third New International Dictionary (1964).

Notably, these definitions do not include the identified goods. More specifically, none of the goods listed in the application and registrations is a tote bag,

shopping bag or handbag. We are therefore not persuaded by Itote's argument.<sup>9</sup>

The next question we must address is whether the relevant purchasers for the identified goods would understand TOTES to refer to the genus. Because the goods are consumer items, the relevant purchasers would be the general public.

"Evidence of purchaser understanding may come from direct testimony of consumers, consumer surveys, dictionary listings, as well as newspapers and other publications." Magic Wand, supra, 19 USPQ2d at 1553. See also In re Merrill Lynch, Pierce, Fenner, and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987), and In re Northland Aluminum Products, Inc., 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

Itote argues that "the target purchaser for these goods comprise men and women who want a container for carrying and transporting items and perceive of [sic] the word 'tote' or 'totes' as applied to these goods as generic -- not as an indicator of a single source." Br. pp. 19-20.

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<sup>9</sup> We note that a definition for "carryall," discussed *infra*, from the WordNet Dictionary, lists "tote" and "tote bag" as synonyms for a "carryall," and "carryall bags" is one of the goods listed in the registration for TOTES SPORT. However, this single listing is not sufficient for us to find that "tote" is the genus for Totes' identified goods in the TOTES SPORT registration. We discuss, *infra*, whether the record supports a finding that the public would perceive TOTES as a generic term for "carryall bags."

In support of its position that the relevant public understands Totes' marks to primarily refer to the various goods listed in the application and registrations, Itote submitted articles from several printed publications.<sup>10</sup> A sample of relevant excerpts are set forth below (emphasis added):

Whatever your budget, Hindmarch thinks women need three basic bags: First, a day-to-day work **tote**, which should be durable, scratch-resistant and have separate pockets for private things and work things...Next, you'll need a nighttime party bag that's small, flirty ...Then there's the in-between bag - preferably with the new baguette shape, which sits just under the arm...*New York Daily News* (March 12, 2000);

Snakeskin and patent leather evening bags in red and black...are marked down...Her classic **shoulder totes** in Napa leather will be slashed...*New York Daily News* (October 22, 2000);

Items needed include trash bags, **storage totes**, toilet paper...*Chicago Daily Herald* (July 17, 2001);

Now, her company manufactures several different **pet totes** for use around town or in the air. *Chicago Sun-Times* (April 24, 2001);

The portly pepperpot's line of handbags and **totes** is available exclusively through her perky pink-and-green Web site... *New York Post* (September 20, 1999);

I've tried everything: Duffels, old bowling bags, **totes**, suit bags, bags with four wheels, bags with two wheels, bags with no wheels. *Austin American-Statesman* (September 5, 1999);

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<sup>10</sup> A few of the articles were from foreign publications and are of no probative value as to the U.S. public's understanding of the designations.

A look at new rules for fans attending Ohio State games: ...No backpacks, fanny packs, cooler, bags, containers of any size, chair-back seats, seat cushions, cameras or radios. No bags or **totes** containing clothing items. *Akron Beacon Journal* (October 3, 2001);

The \$1 million campaign from TBWA/Chiat/Day, Los Angeles, connotes celebrity status for the upscale Samsonite 735 Series, an assortment of **tote**, computer, garment and wheeled bags that accommodate laptop computers, suits, and other necessities for business trips. *Brandweek* (September 13, 1999);

Webvan couriers bring **totes**, which customers empty. (Or, you can keep the **totes** for a deposit.) Peapod delivers some items in **totes** (again, if you keep them, you pay a deposit) but most products arrive in paper and plastic bags you can unpack at your leisure. *Chicago Tribune* (January 17, 2001);

First down the lane was Miuccia Prada's version. Her semi-circle-shaped carry-all is bigger than a baguette, more ladylike than a **tote** and not as pricey as a Hermes Kelly...Of course, this designer clearly knows what women want in a bag - those black nylon totes everyone lugged throughout the '90s were popularized by Prada. *New York Daily News* (June 4, 2000);

It's All Greek To Me is a supplier of plush products to the gift industry, while Toppers Inc. supplies sports bags, **totes**, luggage, briefcases, portfolios, caps, golf... *Gifts & Decorative Accessories* (July 1, 1999);

They travel lightly; nylon gum bags, **soft canvas totes**, comfy leather briefcases, maybe a dark shoulder bag where a flat dress suit waits for its moment in the sun. *Chicago Tribune* (August 12, 1999);

Sack sale Soco, the Nolita store specializing in French handbags, is having a sale on its **totes**, bags and purses until Jan. 6. A leather ostrich-embossed bowling bag in tan, purple or red with gold piping has been reduced from \$235 to \$188.

Larger versions have been reduced from \$265 to \$210. Tiger-print shoulder bags have had \$15 knocked off their original price and are now available for \$170, as have the canvas messenger bags and **shopping totes**, now \$50 and \$60, respectively. Large weekend duffel bags in red, purple or green are down from \$130 to \$100. *New York Daily News* December 17, 2000);

**Totes**, hobo bags, garment bags, pocket books, shoulder bags, change purses, fanny packs, eyeglass and cosmetic cases, checkbook covers...*Chicago Tribune* (May 7, 2001);

When it comes to bags, spring's winners can be compartmentalized into one carryall: **totes**...Tote bags, though, are carrying increases and being reordered in droves for spring 2002. *DSN Retailing Today* (August 20, 2001);

**Totes** are like T-shirts—the perfect union of practicality and chic...If you rely on your tote as an organizer too, you'll be happy to know there's one for every sorting style. Some **totes** have a pouch sized for quick access to a cell phone or a PDA, and some have one for an umbrella...You can even get a **tote** with a removable zippered pouch should you need a secure zone within your open-top tote. *InStyle Magazine* (October 1, 2000);

The line has a variety of **totes**, handbags, gym bags, travel bags and accessories... *Daily News Record* (June 9, 2000);

Personalized photos can adorn T-shirts, jackets, **canvas totes**, gym bags or pillows or lap quilts. *Intelligencer Journal*, Lancaster, PA (February 2, 2001);

She helped coordinate a drive throughout the school to collect small suitcases, duffel bags, backpacks and **totes**. *Allentown Morning Call* (March 8, 2001).

Itote also submitted dictionary definitions for the word carryall:

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Carryall - A light covered carriage, having four wheels and seats for four or more persons, usually drawn by one horse. Webster's 1913 Dictionary;

Carryall - 2. a capacious bag or carrying case. Merriam-Webster Online Dictionary, [www.m-w.com](http://www.m-w.com);

Carryall - a capacious bag or basket Synonyms: holdall, tote, tote bag. WordNet Dictionary, [www.webster-dictionary.org](http://www.webster-dictionary.org), and [www.hyperdictionary.com](http://www.hyperdictionary.com).

In addition, Itote submitted a photocopy of a book entitled Terrific Totes & Carryalls (1<sup>st</sup> ed. 1998) which contains sewing instructions for different types of bags. Itote made of record the file of Registration No. 1042281, owned by a third party. The underlying application for this registration was filed on March 31, 1975 and included several specimens of use consisting of catalogues. These catalogues include references to various types of "totes," including "Striped Webbing Totes" referring to various types of bags (one-handled, two-handled, zipped top, flap top, etc.).

In arguing against Itote's position that TOTES is generic, Totes asserts that its mark is famous for use in connection with a wide variety of goods and services. The determination of whether the public will perceive a term as generic or a trademark must take into consideration evidence of trademark significance, so fame of the TOTES mark must be considered as the ultimate showing of trademark significance. In re Merrill Lynch supra, 4 USPQ2d at 1143

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(evidence does not clearly place appellant's mark in the category of a generic or common descriptive term where evidence of record also showed source recognition of record). In support of its position regarding the fame and strength of its mark, Totes has submitted evidence, through testimony and exhibits, that in the past ten years it "has had sales of luggage and related bags of nearly \$58 million," and has spent over \$18.5 million in advertising TOTES branded products over the same time period. Katz II pp. 10-11. In addition, the TOTES mark has been recognized "as one of the top 10 brand names for accessory merchandise." Katz II exh. No. 2. Totes points to a survey, known as the Fairchild 100, done by Fairchild Publications "to assess the popularity and recognition of apparel brands among consumers in the United States." Katz II p. 11. In 2000, the Fairchild 100 listed TOTES as third in the accessories category, which could include some of Totes' bag products. Katz II p. 12. The survey conducted by Fairchild is a "statistical survey of consumers across the United States to rank overall brand awareness and recognition" id. and "[i]n rank order out of the ten, number 1 was Nine West, 2 was Ray-Ban, 3 is Totes, 4 is Foster Grant, 5 is Coach, 6 is Capezio, 7 is Kenneth Cole, and 10 was Louis Vuitton." Katz II at 15. Further, Totes' internal measurements of brand recognition "indicate that 85

percent of the public recognizes the TOTES mark." Br. p. 4; Katz II p. 14. Finally, two of Totes' registrations are nearly 30 years old and, as stated in paragraph 2 of the Katz declaration (exhibit 1 to Katz I), Totes uses the mark TOTES in connection with a wide variety of goods and services, and it owns a number of United States trademark and service mark registrations on the TOTES mark.<sup>11</sup>

While this showing is not sufficient to establish fame as contemplated in a Section 2(d) analysis, see *infra*, it does affect our genericness determination and shows at the very least that TOTES is recognized as a trademark in connection with the identified goods.

Totes contends that Itote has not met its burden of proving TOTES is a generic term, and points to the lack of a consumer survey or any testimony regarding the public's understanding of the TOTES marks. It is Totes' position that there is no direct evidence regarding the public's

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<sup>11</sup> We note that Totes is under the misconception that all 47 of its pleaded registrations are of record. Itote took the deposition of Mr. Katz (Katz I) and introduced a declaration by a third party, Mr. Remaklus, which had been submitted by Totes in response to an earlier motion for summary judgment. Attached to the Remaklus declaration were copies of these 47 registrations. The status and title copies were not attached to the Remaklus declaration, nor attached as exhibits to the Katz I deposition, nor did Mr. Katz testify to the status and title of the registrations and, therefore, they are not of record. Although in the Remaklus deposition there is a statement that status and title copies of the registrations had been ordered and would be submitted upon receipt (again in response to the motion for summary judgment), these were never attached to the Katz I deposition and the fact that these status and title copies may

understanding. Totes also argues that the printed publications do not "demonstrate the public's relative understanding of the term TOTES vis-à-vis the goods recited in the application and registrations at issue." Br. p. 13. Finally, Totes states that using the word "tote" on hangtags for certain products was an error that was subsequently corrected internally, pointing to the following passage in Mr. Katz' testimony.

A. Internally we use a description of - or the definition of a tote bag as a carryall made of fabric with two handle straps and an open compartment, with no zippered compartment specifically. We've used that as an internal guideline and definition, like I said, of a specific tote bag. What had happened was some of the bags that were sold in our retail stores, which also had the totes trademark, those carryall bags were also marked as a tote, t-o-t-e, and that was inappropriate labeling because those bags did not satisfy our internal definition of what a tote bag is. And it was an error that was brought to our attention. It was corrected and we made sure we do not mislabel any of our goods that carry the totes trademark. Katz II p. 16.

Considering all the evidence, and keeping in mind the heavy burden a plaintiff faces in establishing that a mark is or has become generic, we find that Itote has not met its burden.

There is simply not sufficient evidence that, to the relevant consumers, the primary significance of TOTES, used in connection with Totes' goods, would be the common name of

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have been ultimately filed in response to the motion for summary judgment does not make them of record for purposes of the trial.

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the goods rather than the source identifier. Here, we have 1) dictionary definitions for tote and tote bag that do not include the goods identified in the application and registrations, and 2) dictionary definitions for the word carryall that do not include tote, totes or tote bag. The Internet reference listing carryall as synonymous with tote or tote bag also is not sufficient to constitute a preponderance of the evidence to deem the marks in Registration Nos. 1154884 and 2305847, which include "carryalls with umbrella storage compartment" and "carryall bags" in the identifications of goods, generic.

The articles from various publications show tote bag, tote or totes used as a separate item in lists of goods that include the specific goods identified in Totes' registrations and application, e.g., backpacks, duffel bags, carryall bags. This indicates that they are considered to be different items from Totes' identified goods.<sup>12</sup> With regard to the catalogue specimens in the third-party registration file, there is no evidence as to their distribution or their exposure to consumers. See Allied Mills, Inc. v. Kal Kan Foods, Inc., 203 USPQ 390, 397 n. 11 (TTAB 1979) (specimens from third-party registration files

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<sup>12</sup> The only article that even appears to link one of the identified goods - carryall bags -- with totes is in a trade publication, *DSN Retailing Today*, that does not appear to be distributed to the general public.

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are not evidence of the fact that the specimens filed in the underlying applications or even with Section 8 affidavits are in use today or that such specimens have ever been used to the extent that they have made an impression on the public).

The Internet printouts attached to the Katz I deposition consist of several pages from one website, ebags.com, that show bags apparently from different designers either accompanied by the word "tote" (e.g., Kenneth Cole Reaction - Edge of Town Double Handle Tote, Victorinox - Trek Pack Plus Attachable Shoulder Tote) or under the page headings "New Totes Products" or "Top Ten Totes Best Sellers." As noted above, these printouts have minimal probative value coming from one website and not accompanied by testimony regarding its exposure to consumers. In addition, none of the printouts refers to or displays any of the goods listed in the registrations and application. The sewing book, Terrific Totes & Carryalls, underscores Totes' argument that a tote and a carryall are different items and that a tote refers specifically to a canvas open-topped two handled bag, as distinguished from a carryall which appears in a separate chapter.

We acknowledge that there are Totes' labels where TOTES, used in a prominent manner as a source indicator, is juxtaposed against the word tote used in close proximity in

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a clearly generic manner with other descriptive wording, e.g., computer tote. However, these examples do not persuade us of a different result. At most these hangtags present a case of mixed usage manifested in one location. In re Merrill Lynch supra, 4 USPQ2d at 1143 ("The mixture of usages unearthed by the NEXIS computerized retrieval service does not show, by clear evidence, that the financial community views and uses the term CASH MANAGEMENT ACCOUNT as a generic, common descriptive term for the brokerage services to which Merrill Lynch first applied the term") (footnote omitted). Moreover, Mr. Katz testified that these labels were marked incorrectly. See Katz II p. 16. Finally, as to TOTES SPORT we add that there is no evidence of record showing use of the term TOTES SPORT in a generic manner. See American Fertility, supra.

In reaching our conclusion that Itote has failed to demonstrate that TOTES is generic for the identified goods, we have considered the asserted admissions that Itote claims Totes has made. We address each in turn. Totes in its answer filed in Cancellation No. 92040619 stated, "Respondent admits that the term 'totes' existed as a word in the English lexicon during the years 1979 and 1982." Answer to Cancellation No. 92040619 p. 3 ¶11. We do not regard this statement as an admission of genericness of the

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word totes as applied to the identified goods, nor, as discussed infra, does it support a finding of fraud.

Itote has also asserted that Totes admitted, in connection with the prosecution of the application that became Registration No. 1154884, that "totes" is the plural usage of "tote." Statements made during examination of an application may be considered as illuminative of shade and tone in the total picture confronting the decisionmaker." Interstate Brands Corp. v. Celestial Seasonings, Inc., 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978). Totes' statement made in response to an office action reads, "The word TOTES (note the plural usage) is certainly not the phrase or term commonly used in the marketplace as a description of applicant's goods (namely, and as amended, 'fabric carryalls with umbrella storage compartment') for which registration is sought." Bennett I, Exh. No. 24. This statement is ambiguous at best and clearly Totes' position was that the term is not descriptive of its goods. Thus, we do not regard it in any way as being an admission of genericness.

Itote also argues that, because Mr. Phillips stated in his deposition that "bags and pouches would be included in the meaning of the word 'totes'" Totes has admitted this as a fact. Totes argues that this statement cannot be an admission because Itote "was seeking a legal conclusion about the definition of the term 'totes,'" and Mr. Phillips

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"was a fact witness and was not qualified to give a legal opinion regarding the definition of the term 'totes.'" Br. p. 14. Further, Totes argues that Mr. Phillips "was not testifying on behalf of totes during his individually-noticed deposition." Id. The testimony in question is reproduced below.

Q. Prior to purchasing the company So-Lo works, and you mentioned some of their goods were called totes, had you heard the term "totes" used before?

A. I don't remember.

Q. Do you think that the term "totes" denotes a bag, any kind of handbag?

A. Are you talking about the brand itself or are you talking about the word?

Q. No, just the term "totes," the word "totes"?

Mr. Ahrens: Again, I'll object to the extent it calls for a legal conclusion or analysis.

Q. You can answer the question if you understand it.

A. I think bags and pouches would be included in the meaning of the word. Phillips pp. 31-32.

We agree that this statement cannot be considered an admission by Totes, inasmuch as Mr. Phillips, who is retired, is not a party to the proceeding and was not representing a party. At most the testimony merely reflects Mr. Phillips's individual opinion and understandings.

Itote also argues that Totes has admitted "that 'tote' was being used by others to identify their own bags, pouches and sacks." Br. p. 13. Again the basis for this assertion is testimony by Mr. Phillips and cannot be considered an admission by Totes. Moreover, there is, at the very least, ambiguity as to whether Mr. Phillips was discussing

descriptive usage of the word totes, rather than generic usage. The testimony as to Mr. Phillips's knowledge with regard to the use of the word totes for bags is reproduced below.

Q. Well, my question, basically, in the '70s - this is 1975 as I noted - do you recall there being bags called totes handbags?

A. No. Phillips p. 34

...

A. Yeah. When we applied for that, I believe that we - we were the sole user of that brand name for the products that I was describing. I certainly was aware that there are pouches and bags and sacks around, but I did not see anybody using those pouches, bags and describing those pouches, bags and sacks by the - by a brand name application, such as totes. There was - no one was advertising totes for sale as a branded item.

Q. Was anyone calling their pouches or - or bags or things that you mentioned, were they calling them totes in general, not branded, just in general?

A. They were described sometimes as totes, but they were not described as a totes brand. Phillips p. 42<sup>13</sup>

Itote argues that Mr. Katz admitted that "a tote bag would be described as a fabric carryall." The relevant testimony is reproduced below.

Q. I want to know what exactly is your definition of a tote, like totes bags?

Mr. Ahrens: Objection. Vague. Calls for legal conclusion.

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<sup>13</sup> We note that in its brief Itote asserts that, in response to an office action involving a Totes' application which is not a subject of these proceedings, Totes submitted examples from catalogues or brochures that included products referred to as totes. In fact, it appears these were submitted by the examining attorney in making his initial refusal under Section 2(e)(1). The underlying application subsequently issued as Registration No. 1315771 under Section 2(f) of the Trademark Act.

Q. You can answer, sir. Paragraph 10 is what I'm referring to.

A. A tote bag would be described as a fabric carryall.

Q. And a tote bag being a fabric carryall is that your personal definition or is that, like, a Totes Corporation definition such as something you might include in a license agreement if you have to have someone make bags?

A. I don't believe that term is - is defined in that manner in a - in a licensing agreement of any kind. It's more of a personal understanding or definition. Katz I p. 25

...

Q. Okay. And would you just describe sort of in your own words what the circumstances were and explain what actually happened and what you were talking about in paragraph 10?

A. Sure. Sure. Internally we use a description of - or the definition of a tote bag as a carryall made of fabric with two handle straps and an open compartment, with no zippered compartment specifically. We've used that as an internal guideline and definition, like I said, of a specific tote bag. What had happened was some of the bags that were sold in our retail stores, which also had the Totes trademark, those carryall bags were also marked as a tote, t-o-t-e, and that was inappropriate labeling because those bags did not satisfy our internal definition of what a tote bag is. And it was an error that was brought to our attention. It was corrected and we made sure we do not mislabel any of our goods that carry the Totes trademark. Katz II p 16.

Totes argues first that Mr. Katz was not acting as Totes' 30(b)(6) representative during the deposition and second that Mr. Katz clarified that it was his personal understanding or definition and not Totes' definition. While Rule 30(b)(6) is not relevant to a testimony deposition, it is clear from the testimony that the passage "a tote bag would be described as a fabric carryall" is Mr. Katz's personal understanding; furthermore, none of the

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testimony specifically describes or denotes Totes' identified goods. Moreover, this testimony is conflicting in view of the later statement that labeling a carryall bag as a tote was inappropriate because it is not a tote bag. Thus, even as to the "carryall bags" in Registration No. 2305847 and "carryalls with umbrella storage compartment" in Registration No. 1154884, this testimony is, at best, mixed. With regard to Registration No. 2305847 we also note that the mark in that registration is the combined mark TOTES SPORT. Finally, while it is the testimony of a witness who is in the trade and presumably knowledgeable about the products, this is not substantial evidence of the public's understanding.

Itote's arguments regarding Totes enforcement of its trademark rights against third parties have no relevance to the question as to the primary significance of the term "TOTES" used in connection with Totes' identified goods.<sup>14</sup>

Itote's argument that "a prospective purchaser seeing the alleged mark TOTES on a pouch or carrying case would know that it was for carrying something," (br. p. 28) is an argument for descriptiveness, i.e., is the mark descriptive of a purpose or function of the goods, but the issue of

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<sup>14</sup> Generally, it is the lack of action against third parties using a mark that would be relevant in a determination of genericness.

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descriptiveness is not before us, and these arguments are unpersuasive in the context of the genericness claim.<sup>15</sup>

As noted by Itote, a product can have more than one generic name. In re Recorded Books Inc., 42 USPQ2d 1275 (TTAB 1997). However, its primary meaning must be only as the generic designation, i.e., that it has no other meaning among the consuming public. On this record, Itote has not shown that the term totes used in connection with Totes' identified goods primarily signifies those specific goods. The only item in Totes' identification of goods where there may be some question would be the carryalls with umbrella storage compartment and carryall bags but all the record contains is mixed testimony from Mr. Katz and an Internet synonym reference. As to the remaining goods in the Totes' application and registrations (backpacks; day packs; belt bags; all purpose sports bags; duffle bags; briefcases; carrying cases and pouches for overshoes, raincoats and umbrellas) there is no evidence that TOTES would signify the goods rather than the source to the relevant public. In contrast, Totes has shown recognition of TOTES as a trademark, as evidenced by nearly thirty years of trademark use on these goods and significant sales, amounting to \$58

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<sup>15</sup> In this connection, we note that Registration Nos. 1138767 and 1154884 are more than five years old, and therefore are not subject to cancellation on the ground of mere descriptiveness. Nor did Itote assert this ground in the petition to cancel Registration No. 2305847 or in the opposition.

million dollars over a ten year period. We further note Totes' ranking in the top ten brands in terms of consumer recognition in the accessories category. While we do not have the actual survey to analyze and therefore cannot determine, for example, the number of consumers polled, we have guarantees of its validity because the Fairchild survey is considered an "important bellwether" of how a company is doing.<sup>16</sup> Katz II p. 13.

In conclusion, the record does not contain substantial evidence to establish that TOTES, as used on the identified goods, would be perceived by consumers as a generic designation rather than as a source-indicating trademark. Accordingly, we cannot say that Itote has met its burden for demonstrating that TOTES is a generic term.

#### Fraud Claims

We now address Itote's fraud claims. Fraud in obtaining a trademark registration occurs "when an applicant knowingly makes false, material representations of fact in connection with his application." Torres v. Cantine Torresella S.r.l., 808 F.2d 46, 1 USPQ2d 1483, 1484 (Fed. Cir. 1986); Mister Leonard Inc. v. Jacques Leonard Couture Inc., 23 USPQ2d 1064, 1065 (TTAB 1992) ("Thus, according to Torres, to constitute fraud on the PTO, the statement must be (1) false, (2) a material representation and (3) made

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<sup>16</sup> We address Totes' allegation of fame *infra* in connection with

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knowingly." ). See also Medinol Ltd. v. Neuro Vasx Inc., 67 USPQ2d 1205 (TTB 2003) ("A trademark applicant commits fraud in procuring a registration when it makes a material representation of fact in its declaration which it knows or should know to be false." ).

Fraud must be proven with clear and convincing evidence, and any doubt must be resolved against a finding of fraud. See Giant Food, Inc. v. Standard Terry Mills, Inc., 229 USPQ 955, 962 (TTAB 1986) and cases cited therein. Furthermore, fraud will not lie if it can be proven that the statement, though false, was made with a reasonable and honest belief that it was true. See Woodstock's Enterprises Inc. (California) v. Woodstock's Enterprises Inc. (Oregon), 43 USPQ2d 1440 (TTAB 1997).

Itote presents three different sets of circumstances in support of its claim of fraud. In Cancellation No. 92040619 Itote brings its claim of fraud based on an allegedly false date of first use. However, the critical question is whether the mark was in use in connection with the identified goods as of the filing date of the use-based application. If the mark was in use at that time, then the first use, even if false, does not constitute fraud because the first use date is not material to the decision to approve a mark for publication. See Standard Knitting, Ltd.

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its claim of likelihood of confusion in Opposition No. 91155989.

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v. Toyota Jidosha Kabushiki Kaisha, 77 USPQ2d 1917 (TTAB 2006); Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A., 221 USPQ 73, 76 (TTAB 1983) ("The Examining Attorney gives no consideration to alleged dates of first use in determining whether conflicting marks should be published for opposition.").

In addition, Itote alleges that Totes committed "further fraud in the procurement by failing to state in its application that the alleged first use of the mark in 1949 for the identified good was by a predecessor, not by [Totes]. Had [Totes] been forthcoming, the Office would have required evidence of uninterrupted use of the mark and passage of title from that date." Br. pp. 32, 33. These allegations also do not state a claim of fraud inasmuch as they are also tied to use prior to the filing date of the underlying application and are, thus, not material to the procurement of the registration. For a representation to be material it must be something that would have prevented issuance of the federal registration. See Morehouse Mfg. Corp. v. J. Strickland & Co., 407 F.2d 881, 160 USPQ 715 (CCPA 1969). See also Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A., supra.

With regard to Opposition No. 91121054 and Cancellation Nos. 92040732 and 92041389, Itote argues that Totes committed fraud when in its declarations submitted as part

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of the applications it "claimed that it had the exclusive rights to use the alleged mark TOTES for its totes" and Totes "knew, or at least should have known, since at least as early as 1968 that the term 'totes' was widely used by third parties as a generic name to describe the exact goods for which [Totes] claims exclusive rights -- totes." Br. pp. 34-35. Further, Itote continues that "it is clear that [Totes] knowingly made false statements to the Office when Totes asserted it had exclusive rights to the term 'totes.' [Totes] knew that the term 'totes' was generic and in widespread use by third parties to describe all sizes and shapes of totes." Br. p. 35. As support for this argument Itote points to Exhibit No. 3 submitted under Itote's notice of reliance and the deposition of Michael Katz (Katz II). This exhibit is a book published in 1998 titled "Terrific Totes & Carryalls" and is a compilation of sewing instructions for various types of bags. Itote also points to the testimony of Mr. Phillips, reproduced in part above, pertaining to Mr. Phillips's knowledge of the use of the term totes at the time he signed the applications.

The declarations in Totes' application Serial No. 75714429 and the underlying application for Registration No. 2305847 were signed by Harlen Kent, Totes' vice president at that time, and the underlying applications for Registration

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Nos. 1138767 and 1154884 were signed by Mr. Phillips.

However, the wording in the declaration is as follows:

...he believes applicant to be entitled to use such mark in commerce; to the best of his knowledge and belief no other person, firm, corporation, or association has the right to use the above identified mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive.

In order to establish fraud in this situation, Itote must prove that Totes had no reasonable basis to believe TOTES and TOTES SPORT were marks. Itote must prove that at the time of signing the declarations Totes knew that the terms TOTES and TOTES SPORT were the generic terms for the goods identified in the application and registrations. See Bart Schwartz Intern. Textiles Ltd. v. F.T.C., 289 F.2d 665, 129 USPQ2d 258, 262 (CCPA 1961). In view of our finding that TOTES and TOTES SPORT are not generic for the goods identified in the respective application and registrations, this claim must fail. Moreover, the statements made by the declarants do not represent a "conscious effort to obtain for his business a registration to which he knew it was not entitled." Metro Traffic Control, Inc. v. Shadow Network Inc., 104 F.3d 336, 41 USPQ2d 1369, 1373 (Fed. Cir. 1997).

In view of the above, Itote has failed to meet its burden on the genericness and fraud claims brought in

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We now turn to Totes' opposition to Itote's registration of the mark ITOTE PC (in standard character form, PC disclaimed) for "carrying cases, backpacks, carry on bags, school bags, tote bags, travel bags and briefcases, all specifically designed to carry and transport portable computers" in International Class 9 and "carrying cases, backpacks, carry on bags, school bags, tote bags, travel bags and briefcases" in International Class 18. In bringing the opposition Totes alleges that as applied to Itote's goods, the mark so resembles Totes' previously used and registered TOTES and TOTES formative marks for a wide variety of "retail consumer goods," including carrying cases and pouches for overshoes, raincoats and umbrellas, carryalls with umbrella storage compartment, and backpacks, as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d), 15 U.S. C. §1052(d). Among the registrations pleaded in the notice of opposition are the three registrations which were the subject of the cancellation proceedings. In view of our decision that the petitions to cancel these registrations must be dismissed, we accord these registrations full effect in this opposition proceeding.

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Totes has sufficiently established its standing. Priority is not in issue in Opposition No. 91155989 by virtue of the three pleaded registrations which are the subject of the consolidated cancellation proceedings, and which are therefore of record in this consolidated proceeding. See King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, Totes has also established its standing and priority through the testimony of Mr. Katz as to Totes' sales of luggage and related bags under the TOTES mark. See Katz II pp. 9-10.

Likelihood of Confusion under Section 2(d)

Totes' registrations which are of record, and are in full force and effect and owned by Totes, are summarized as follows:

Registration No. 1138767, which is for the mark TOTES (in standard character form) for "carrying cases and pouches for overshoes, raincoats and umbrellas" in International Class 18, issued on August 19, 1980;

Registration No. 1154884, which is for the mark TOTES (in standard character form) for "fabric carryalls with umbrella storage compartment" in International Class 18, issued on May 19, 1981; and

Registration No. 2305847, which is for the mark TOTES SPORT (in standard character form) for "backpacks, carryall bags, duffel bags, and fanny packs" in International Class 18, issued on January 4, 2000.

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Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

We first address Totes' allegation, argument and supporting evidence that its TOTES and TOTES formative marks are famous. "[T]he fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident." Bose Corp. v. QSC Audio Products, Inc., 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002). While the record shows substantial sales of Totes' luggage and related bags under the TOTES marks, Totes has not provided advertising expenditures specific to these goods, or evidence of the extent of the advertising (e.g., which markets, how frequently the advertisements appear, over what time period). There is nothing in the record to establish a sustained and continuing advertising program. Further, the Fairchild survey upon which Totes' relies has limited probative value as to the element of fame inasmuch as it provides information as to brand recognition for only one year.

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As stated by the Board in Blue Man Productions Inc. v. Tarmann, 75 USPQ2d 1811, 1819 (TTAB 2005), "In view of the extreme deference that is accorded to a famous mark in terms of the wide latitude of legal protection it receives, and the dominant role fame plays in the likelihood of confusion analysis, we think that it is the duty of a plaintiff asserting that its mark is famous to clearly prove it." On this record, we cannot say that Totes has provided sufficient evidence about the extent of its use of the mark, or its sales under the mark such that we can conclude that Totes' TOTES or TOTES SPORT marks can be considered famous marks in the context of a Section 2(d) claim. See Kenner Parker Toys Inc. v. Rose Art Industries Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Turning now to consider the goods identified in Totes' registrations and Itote's application, we find the goods to be identical or otherwise related. In particular, with regard to Registration No. 1138767, Itote's "carrying cases" in International Class 18 encompass Totes' carrying cases and pouches for overshoes, raincoats and umbrellas, and as such are legally identical goods. With regard to Registration No. 2305847, Itote's backpacks are identical to Totes' backpacks.

In addition, inasmuch as there are no limitations in the applicant's identification of goods we presume that the

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trade channels overlap, and that the goods would be offered to all normal classes of purchasers. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

We now turn to the first du Pont factor, i.e., whether Itote's mark and Totes' marks are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression.

TOTES and TOTES SPORT are highly suggestive of the goods and as such we accord these marks a very narrow scope of protection. Because of the highly suggestive meaning of "TOTES," we find that the other elements in Itote's mark are sufficient to distinguish ITOTE PC from TOTES and TOTES SPORT. Itote's mark is pronounced differently and the elements of the "I" preceding TOTE and "PC" succeeding TOTE, besides changing the appearance of the mark, present a connotation of the user carrying a PC, certainly when used in connection with the International Class 9 goods, bags specifically designed for computers. In contrast, TOTES does not present the same connotation. We find that ITOTE PC creates a different commercial impression from TOTES and TOTES SPORT. Overall, and given the weakness of the common element, we find the differences in the marks outweigh the similarities. King Candy Co. v. Eunice King's Kitchen,

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Inc., supra, 182 USPQ at 110 (confusion unlikely when marks are of such non-arbitrary nature that the public easily distinguishes slight differences in the marks under consideration). See also Colgate-Palmolive Co. v. Carter-Wallace, Inc., 432 F.2d 1400, 167 USPQ 529 (CCPA 1970) (because common element in marks is a common noun or adjectival word of everyday usage in the English language and has a laudatory or suggestive indication, PEAK PERIOD for personal deodorants is not confusingly similar to PEAK for dentifrice); and 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; marks SURE-FIT and RITE-FIT, both for slip-covers, held not confusingly similar). In view of the above, we find, as to each of Totes' registrations, that the parties' marks are not similar.

We conclude that the evidence of record as it pertains to the relevant du Pont factors does not support a finding of likelihood of confusion as to any of Totes' registrations. We find that the dissimilarity of the marks simply outweighs the other relevant du Pont factors.

Kellogg Co. v. Pack'em Enterprises Inc., 14 USPQ2d 1545 (TTAB 1989), aff'd, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

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**Decision:** Opposition No. 91121054 and Cancellation Nos. 92040619, 92040732 and 92041389 are dismissed as to all claims. Opposition No. 91155989 is dismissed.