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

Proceeding	91195552
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRITO-LAY NORTH AMERICA, INC.,

Opposer/Petitioner,

v.

PRINCETON VANGUARD, LLC,

Applicant/Registrant.

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Opposition No. 91195552

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Cancellation No. 92053001

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OPPOSER/PETITIONER'S REPLY BRIEF

REDACTED PURSUANT TO THE BOARD'S STANDARD PROTECTIVE ORDER

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ARGUMENT

Applicant is correct that this case involves anti-competitive tactics but is wrong about the responsible party. While Applicant tries to appeal to the Board by emphasizing its entrepreneurial beginnings, it is Applicant—now owned by another corporate giant Snyder’s-Lance (App. Br. 9 n.2)—that is trying to gain exclusive, federal rights in a generic term. Every manufacturer of snack foods, big and small, should be allowed to use any and all generic synonyms of “pretzel crackers,” including the term “pretzel crisps,” to name their pretzel cracker products.

Tellingly, Applicant’s efforts have not succeeded in the marketplace. Despite the millions of dollars that Applicant has allegedly spent in marketing to try to improperly appropriate this generic term to its exclusive use, those attempts have failed as evidenced by the parties’ survey evidence demonstrating that “pretzel crisps” is *not* perceived as a brand name by a majority of relevant consumers. The survey evidence also demonstrates that a *higher* percentage of Applicant’s own target market associates the term “pretzel crisps” with multiple companies than with a single company, so it lacks secondary meaning. Apart from these surveys, Applicant has presented no satisfactory rebuttal to the strong evidence that the term “crisps” means “crackers”—including its own interchangeable use of “crisps” and “crackers”—and that the combination of “pretzel” and “crisps” retains the meaning of the constituent parts, resulting in a synonym for the genus of Applicant’s goods, “pretzel crackers.”

For the reasons herein and in Opposer’s main trial brief (cited herein as “Opp. Br.”), Applicant’s attempts to register a term that is generic and has not achieved secondary meaning should be rejected.

I. Applicant’s brief is riddled with inaccuracies

Applicant’s trial brief (cited herein as “App. Br.”) can be summarized as follows: overstatements of fact, misstatements of law, and failure to distinguish binding precedent.

a. The Board did not reject Opposer’s position that “pretzel crisps” is a generic compound term under the *Gould* Analysis

Applicant argues that the Board “soundly rejected” Opposer’s position that “pretzel crisps” (being a combination of the generic terms “pretzel” and “crisps”) is a generic compound term under *In re Gould*

Paper Corp. App. Br. 27. The Board made no such ruling. To the contrary, the Board noted that while a determination of the public’s understanding of a mark is based on consideration of the mark as a whole, “[i]f each constituent word is generic, the combination is generic if the entire formulation does not add any meaning to the otherwise generic mark.” Order 4, Feb. 9, 2011 (citing *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 92 U.S.P.Q.2d (BNA) 1682, 1684 (Fed. Cir. 2009)). The Board went on to rule that—while there is no dispute that “pretzel” is a generic term (Order 4, Feb. 9, 2011)—there was a genuine dispute “with respect to whether the relevant public understands ‘crisps’ as a generic term for ‘crackers,’ or with respect to whether the public understands ‘pretzel crisps’ to primarily refer to the genus of goods, ‘pretzel crackers,’” Order 3, Feb. 9, 2011. The Board later denied Applicant’s own summary judgment motion for the very same reasons. Order 3, Sept. 5, 2012. How Applicant construes these rulings as a sound rejection of the *Gould* analysis is beyond comprehension.

b. The applicable burden is preponderance, not clear and convincing

Applicant asserts that Opposer cannot prevail if there is a “mixed record with ambiguities as to whether the PRETZEL CRISPS mark is generic,” citing a series of decisions in ex parte cases. App. Br. 25–26. This statement totally miscomprehends the distinction between the preponderance of the evidence standard applied in opposition proceedings¹ and the clear and convincing evidence standard applied in ex parte appeals.² Although a mixed record may save an applicant from a genericness finding under the latter standard, it will not do so here. In virtually any case that proceeds to trial, the record will be “mixed” and contain certain “ambiguities.” In this case the record—mixed or not—strongly supports a finding that “pretzel crisps” is generic under the preponderance standard that must be applied in this case.

c. Federal Circuit precedent supports Applicant bearing the burden of proof on genericness

Applicant asserts that Opposer “conceded” that “Federal Circuit precedent holds that Frito-Lay bears the burden of proving Princeton Vanguard’s trademark is generic.” App. Br. 25. Opposer made no

¹ See, e.g., *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 U.S.P.Q. 2d (BNA) 1551, 1554 (Fed. Cir. 1991).

² See, e.g., *In re Hotels.com L.P.*, 573 F.3d 1300, 91 U.S.P.Q.2d (BNA) 1532, 1534 (Fed. Cir. 2009).

such concession. No Federal Circuit decision cited by either party holds that an opposer bears the burden of proof on genericness. In fact, the Federal Circuit’s decisions suggest to the contrary, emphasizing that prior to issuance of a principal registration the applicant bears the burden of proof on validity. *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 U.S.P.Q.2d (BNA) 1001, 1007 (Fed. Cir. 1988). In the words of the Federal Circuit, to hold otherwise “would give the applicant for a trademark the rebuttable presumption of validity that properly follows only the registration of the mark, not the publication of the proposed mark prior to its registration.” *Id.* (citing 15 U.S.C. § 1057(b)).

Applicant goes on to erroneously assert that Opposer “criticiz[ed]” the Federal Circuit’s decision in *Magic Wand*, 19 U.S.P.Q.2d (BNA) 1551. App. Br. 25. To the contrary (and as laid out previously, *see* Opp. Br. 21–22), *Magic Wand* correctly determined the applicable burden in a cancellation proceeding: a party possessing a principal registration benefits from the presumption of validity, so another party attempting to cancel the principal registration on the ground of genericness bears the burden of proof. *See* 19 U.S.P.Q.2d (BNA) at 1554. Here, Applicant has only a supplemental registration, not a principal registration; accordingly, Applicant receives no presumption and thus should bear the burden of proof on genericness. *See* 15 U.S.C. § 1057(b) (noting that a certificate of a principal registration is “prima facie evidence of the validity of the registered mark”); 15 U.S.C. § 1094 (noting that supplemental registrations do not receive the advantages of section 7(b) of the Act); *Otter Prods. LLC v. BaseOneLabs LLC*, 105 U.S.P.Q.2d (BNA) 1252, 1253 (T.T.A.B. 2012) (holding that a supplemental registration “is not evidence of ownership, validity, or the exclusive right to use” (quoting *In re Bush Bros.*, 884 F.2d 569, 12 U.S.P.Q.2d (BNA) 1058, 1059 n.2 (Fed. Cir. 1989))); *McCormick & Co. v. Summers*, 354 F.2d 668, 148 U.S.P.Q. (BNA) 272, 276 (C.C.P.A. 1966) (noting that supplemental registrations do not receive the advantages of section 7(b) of the Act).

d. Opposer presented ample evidence demonstrating lack of acquired distinctiveness in “pretzel crisps” sufficient to rebut ex parte evidence

Applicant erroneously asserts that Opposer “offered no evidence that the mark lacks distinctiveness and instead relies on its genericness arguments.” App. Br. 49. First, disregarding the

inaccuracy of Applicant's contention, genericness is competent evidence of lack of distinctiveness since a generic term can never acquire distinctiveness in the minds of the public. *See, e.g., H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs*, 782 F.2d 987, 228 U.S.P.Q. (BNA) 528, 530 (Fed. Cir. 1986) ("A generic term . . . can never be registered as a trademark because such a term is 'merely descriptive' within the meaning of § 2(e)(1) [of the Lanham Act] and is incapable of acquiring de jure distinctiveness under § 2(f).").

Second, the record contains direct evidence of lack of secondary meaning that refutes the indirect and circumstantial evidence Applicant presented on ex parte examination and relies on in this proceeding. Specifically, as further explained below and in Opposer's main brief, the survey conducted by Applicant's own expert George Mantis shows that even Applicant's target market does not view the primary significance of "pretzel crisps" as an identifier of a single source but, to the contrary, as an identifier of multiple sources.

Finally, Opposer pointed to other evidence in the record undermining secondary meaning. *See* Opp. Br. 50–51. For example, the evidence shows that Applicant's XXXXXXXXXXXXXXXXXXXXXXXX XX, thus giving the impression in the marketplace that "pretzel crisps" was associated with more than one source. Applicant did not address this argument at all in its brief,³ and thus effectively conceded that XXXXXXXXXXXXXXXX failed to present the term "pretzel crisps" as an identifier of a single source.

e. The "so highly descriptive" standard remains good law

As noted in Opposer's main brief, the Federal Circuit and the Board recognize that some marks, although not equivalent to the genus of the goods at issue, are "so highly descriptive" of that genus that they are incapable of acquiring distinctiveness as a trademark. *See In re Boston Beer Co.*, 198 F.3d 1370,

³ Applicant characterizes as "significant" that Opposer has a "stake" in Sabra Dipping Co., which used Applicant's PRETZEL CRISPS mark under license on a co-branded product. [Opp. 91190246, #25, at 46–47.] But as Applicant concedes, Opposer merely acquired an indirect, non-controlling interest in Sabra through a joint venture in 2008, long before Applicant filed the instant application to register PRETZEL CRISPS on the Principal Register, and Sabra has since discontinued its relationship with Applicant. App. Br. 21. In any event, Sabra was and remains an entity legally separate from Opposer, and no record evidence suggests otherwise.

53 U.S.P.Q.2d (BNA) 1056, 1058 (Fed. Cir. 1999); *In re Wm. B. Coleman Co.*, 93 U.S.P.Q.2d (BNA) 2019 (T.T.A.B. 2010). When confronted with these cases, Applicant makes no attempt to distinguish them and cites no binding contrary authority. The only authority Applicant can muster to support its assertion that Opposer “misstates the law” is a treatise section, App. Br. 54, hardly sufficient to contradict binding decisions from this Board and its primary reviewing court. *Cf. Gonzales-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (disapproving the “ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist”). *Boston Beer* and its progeny are still good law, and the Board should conclude that the phrase “pretzel crisps,” even were it not generic, is so close in meaning to “pretzel crackers” as to be incapable of acquiring distinctiveness.

II. Applicant failed to rebut evidence that “pretzel crisps” is a generic compound term

a. Applicant does not show how combining “pretzel” and “crisps” transforms the constituent terms into a new meaning

Applicant desperately argues that when determining genericness, a mark must be evaluated “in its entirety” and “as a whole.” App. Br. 26–28. Yet Applicant concedes (as it must) that where a purported mark is a compound word or phrase consisting solely of generic terms, “the inquiry remains the same: is the *sum total* of the *separate components* no less generic than the components themselves, or does the combination yield something more?” App. Br. 28 (emphasis added) (quoting *McCormick Del., Inc. v. Williams Foods, Inc.*, Cancellation No. 28,967, 2001 WL 253633, at *5 (T.T.A.B. Feb. 14, 2001) (non-precedential)). Indeed, evidence that each constituent word in a compound term is generic, and that the separate words joined together have a meaning identical to the meaning common usage would ascribe to them as a compound, is considered clear evidence that the compound term is also generic. *See, e.g., In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 U.S.P.Q.2d (BNA) 1807, 1810 (Fed. Cir. 2001) (explaining that such evidence satisfies the Director’s burden of proving a term generic). Opposer has demonstrated that Applicant’s goods are both “pretzels” and “crisps,” and that “pretzel crisps” is no less generic than its separate components. By contrast, Applicant flounders in attempting to argue that the combination yields some meaning other than “pretzel crackers.”

The best that Applicant can do is argue that it was the first to combine the terms “pretzel” and “crisps” and that necessarily adds “new meaning to the overall term beyond its constituent parts.” App. Br. 44–45. Unfortunately for Applicant, the Board rejected this very argument years ago in *In re Hask Toiletries, Inc.*, 223 U.S.P.Q. (BNA) 1254, 1254–55 (T.T.A.B. 1984). Like Applicant here, the *Hask* applicant argued that “combining, for the first time, the conditioning ingredients known as henna and placenta” was enough to endow the phrase HENNA ‘N’ PLACENTA with trademark distinctiveness. *Id.* The Board disagreed, holding that the designation “accurately describes the two key elements of the product” and that the combination of the terms “invests these generic terms with no special or new significance or different commercial impression to support a finding of trademark ‘capability.’” *Id.* Here, the Board should similarly find that combining, for the first time, the words “pretzel” and “crisps” invests those generic terms with no special or new significance or different commercial impression to support a finding of trademark capability.

Applicant protests that if Opposer is correct, then well-established marks such as WHEAT THINS, CHEESE NIPS, and VITAMINWATER would never exist. App. Br. 27. This argument reflects a fundamental misunderstanding of the critical distinction between descriptive and generic terms. Each of the terms “WHEAT,” “CHEESE,” and “VITAMIN”—while merely descriptive of an ingredient in each of those products—is not generic for the products themselves. In contrast, both “pretzel” and “crisps” are generic terms for Applicant’s products.

Applicant makes the strange assertion that Opposer “conceded” that the majority of cases that Opposer cited for examples of compound term analysis involve adjective-noun marks, whereas “pretzel” and “crisps” are both nouns. App. Br. 45. Opposer made no such concession; to the contrary, Opposer cited a number of cases involving noun-noun combinations. Opp. Br. 29–30. In any event, it does not matter what parts of speech make up the subject mark. The Board’s prior cases hold that both noun-noun marks (*e.g.*, screenwipe, henna ‘n’ placenta, jojoba butter beads) and arguably adjective-noun marks (*e.g.*, Christmas ale) can be generic compound terms. The common denominator in these kinds of cases is not that the component terms come from particular lexical categories but instead that they lack a new,

transformative meaning when combined. When the terms “pretzel” and “crisps” are combined, no new meaning is conveyed beyond the fact that Applicant’s goods are a pretzel and a crisp, rendering the purported “mark” generic.

b. Applicant fails to rebut the overwhelming evidence that “crisps” means “crackers”

Applicant attempts to present argument and evidence that “crisps” does not mean “crackers,” but these attempts are futile.

Applicant claims that Opposer “ignored the existence of numerous trademark registrations for crispy snack foods that contain the word ‘CRISPS.’” App. Br. 46–47. Applicant then cites a number of registrations that, when examined, reveal why they should be ignored. The majority of those registrations cover goods that are not crackers or cracker-like items. Instead, they include “breaded cheddar cheese curd snack food” (CHEDDAR CRISPS, Reg. No. 1217695), “breaded cheese curd snack food” (MOZZARELLA CRISPS, Reg. No. 1589133), “breakfast cereal” (CORN CRISPS, Reg. No. 2055703), “cereal grain-based nutritionally-fortified food particles used as an ingredient for commercial food products” (FLAV-R-CRISPS, Reg. No. 3464315), and “protein based nutrient-dense snack foods” (CONTROLCRISPS, Reg. No. 3655446). These registrations provide absolutely no support for Applicant’s argument that “crisps” is not a generic term for crackers.

The only registrations Applicant cites that are even arguably relevant here are Reg. No. 1306252 covering BAGEL CRISPS for “bagel chips,” Reg. No. 1562411 covering PITA CRISPS for “pita chips,” and Reg. No. 1584989 covering HARVEST CRISPS for “crackers.” The existence of these registrations does not undermine the genericness of “pretzel crisps” for a number of reasons. First, the registrations issued many years before Applicant started selling its product, and as indicated by examining attorneys and witnesses in this case, during that long period of time since then, the term “crisps” has evolved in meaning to become synonymous with “crackers.” *See* Opp. Br. 11–17. Indeed, the PTO now clearly treats “crisps” as a generic term for crackers and cracker-type products as evidenced by numerous disclaimer requirements, goods descriptions, and rejections of “___ CRISPS” applications in more recent years. *Id.* 16–17. Given that evolution, it is likely that BAGEL CRISPS and PITA CRISPS are also now generic

terms for the respective goods. Regarding HARVEST CRISPS, the mark as a whole is not generic for “crackers” because of the addition of the descriptive (or perhaps suggestive) “harvest” to the mark. The combination of “harvest” and “crisps” means more than just “crackers,” whereas the combination of “pretzel” and “crisps” has no meaning other than “pretzel crackers.”

Applicant also incorrectly argues that the dictionary definition of “rye crisps” has no bearing on the case. App. Br. 46. This argument fails to appreciate that dictionaries, which are often beyond the times with respect to common usage, are already including combinations similar in form and meaning to “pretzel crisps,” thus providing more evidence that “crisps” is generic for cracker-type products (such as rye crisps) and that the combination is generic.

c. A picture is worth a thousand words

Perhaps the most damning evidence showing that “crisps” is a generic term for crackers was provided by Applicant itself on its own packaging. As Applicant’s founder Warren Wilson explains, Applicant redesigned its packaging in July 2010, resulting in a limited run of the phrase “NEW LOOK, MORE CRISPS” appearing prominently on the front of the bag. [#44, at 85–86.] Wilson also notes that the change from “Crisps” to “Crackers” in the nutrition facts occurred around the same time as this package redesign. [#44, at 86.] These statements reveal the significant extent to which Applicant used “crisps” generically: on every single one of its packages from the introduction of the product in October 2004 [see #37, at 4] all the way to the package redesign in July 2010, nearly six years, Applicant presented “Crisps” as a generic term in the nutrition facts box. Applicant then substituted “Crackers” for “Crisps” using the same typeface, size, position, and capitalization, indicating to consumers that the two terms are synonymous.

Applicant attempts to explain away this devastating evidence by pointing to a statement in Wilson’s declaration that the use of “Crisps” on the product’s packaging was a shorthand reference to PRETZEL CRISPS, characterizing that statement as “unrefuted.” App. Br. 47. But labeling a statement as unrefuted does not make it credible or true. As the old adage says, a picture is worth a thousand words—Wilson’s statement is objectively belied and refuted by simply looking at the packages themselves:



Wilson’s post-facto, self-serving, conclusory declaration ignores the objective reality of Applicant’s long generic use of the term and, frankly, amounts to Applicant closing its eyes, plugging its ears, and wishing that the evidence of its own generic use of the components of its “trademark” would go away. Applicant’s use of “Crisps” and “Crackers” in an identical, synonymous manner on its packaging is powerful evidence that the terms are equivalent and equally generic.

d. “Pretzel crisps” is as generic, if not more generic, than other concededly generic terms for “pretzel crackers”

Applicant concedes that there are several other generic terms for “pretzel crackers,” including “pretzel flatz,” “pretzel thins,” “pretzel chips,” “pretzel rounds,” “pretzel dippers,” and “pretzel snacks.” App. Br. 33; [#37, at 14]. Yet Applicant proffers no reason why “pretzel crisps” is distinguishable from these syntactically similar terms. How is it that combining “pretzel” with terms such as “flatz,” “thins,” “chips,” “rounds,” “dippers,” and “snacks” results in generic terms for pretzel crackers, but combining “pretzel” with “crisps” magically results in a protectable mark? None of these combinations add any new, transformative meaning to their generic constituents. Just as all of these terms are admittedly generic for Applicant’s product, so too is “pretzel crisps.”

e. Kraft’s use of “pretzel crisps” and agreement with Applicant strongly support a finding of genericness

Applicant badly mischaracterizes the record regarding Kraft’s use of “pretzel crisps” in connection with its RITZ MUNCHABLES products, and the ensuing settlement agreement. Applicant claims that Kraft acknowledged both “the validity of Princeton Vanguard’s mark” and “Snack Factory’s exclusive right to use the PRETZEL CRISPS mark” (App. Br. 32), but Kraft did nothing of the sort. Instead, Kraft merely acknowledged the obvious—that Princeton Vanguard “owns *the Registration* [Reg. No. 2,980,303 on the Supplemental Register], which registration establishes that *the PTO* does not believe the mark PRETZEL CRISPS is generic” [#37, at 268 (emphasis added).] Kraft went on to

reserve the right to use any trademark (including PRETZEL CRISPS) “in any jurisdiction where it has been found to be generic or merely descriptive by a national trademark office or court of competent jurisdiction, after all appeals have been exhausted.” [#37, at 269.] Thus, Kraft carefully avoided any admission that PRETZEL CRISPS is not a generic term or is a valid mark.

Applicant criticizes Opposer’s observation that Kraft presumably entered into the settlement agreement to avoid litigation as “rank speculation.” App. Br. 32. But the agreement specifically states that the parties “desire to amicably resolve any disputes between them regarding the PRETZEL CRISPS mark, without any admission of liability or nonliability.” [#37, at 265.] Doesn’t that sound like a desire to avoid litigation?⁴

Applicant tries to minimize the devastating impact of Kraft’s generic use of “pretzel crisps” by arguing that Kraft agreed to take a license covering all of its use from inception through phase-out. App. Br. 32. But this *ex post facto*⁵ “license” does not rewrite history or change the underlying fact that Kraft was using “pretzel crisps” as a generic term, not as a mark. Indeed the agreement essentially acknowledges as much, requiring that every use of pretzel crisps by Kraft “must be accompanied in close proximity by the RITZ MUNCHABLES trademark” [#37, at 266] and that following the phase-out, Kraft would “stop using . . . ‘pretzel crisps’ . . . as a product descriptor—*i.e.*, the words commonly used after the product’s trademark on packaging to communicate to the consumer what type of product it is” [#37, at 266]—exactly what Kraft was doing at the time and continued to do with “RITZ MUNCHABLES pretzel crisps” on packaging throughout the term of the so-called “license.”

The fact that Kraft was using “pretzel crisps” as a generic term on its packaging throughout the period of the license is also confirmed by the changes it made when the license ended. At that point, Kraft changed the generic product descriptor following the RITZ MUNCHABLES mark from “pretzel crisps”

⁴ What is rank speculation is Applicant’s unsupported statement that Kraft “clearly has the financial ability to defend against an infringement claim” App. Br. 32.

⁵ There is no question that when Kraft launched its product on or about March 1, 2010, there was no license from Applicant in place. Although the agreement provides a license term dating back to that date “*nunc pro tunc*” [#37, at 265–66], it was not signed by all parties until April 20, 2010 [#37, at 272].

to “pretzel thins” (which Applicant concedes is a generic term), using essentially the same font, stylization, etc.:



If anything, the license makes the situation even worse for Applicant. Not only did the license fail to erase a prominent and highly visible generic use of “pretzel crisps” by a direct and large national competitor,⁶ it took that use a step further—it made it Applicant’s own. The agreement explicitly states, “All use by Kraft Foods of the Licensed Mark shall inure to the benefit of Princeton Vanguard” [#37, at 268.] If Applicant’s contention that Kraft was a licensee is to be taken seriously, Applicant must accept all of the consequences. The legal result is that Applicant itself—through its licensee—used “pretzel crisps” as a generic term prominently and extensively on packaging for at least five months.⁷ Applicant cannot have its cake (or in this case pretzel crisps) and eat it too.

f. The record does not show Applicant policing generic media uses

Applicant also discounts the many generic uses of “pretzel crisps” in the media,⁸ arguing that there were more uses of the term in the media as a brand rather than a category and that the instances that Opposer pointed to were in “the early days” of its pretzel cracker product. App. Br. 30. Besides the fact that several of the uses of “pretzel crisps” as a category that Opposer identified were as late as 2011 [*e.g.*,

⁶ Applicant characterizes Kraft as “another giant in the snack food industry.” App. Br. 21.

⁷ Even after the phase-out period ended on July 31, 2010, Kraft’s customers were permitted to continue distributing and selling the product in the “RITZ MUNCHABLES pretzel crisps” packaging previously sold by Kraft. [#37, at 267.]

⁸ Contrary to Applicant’s claim (App. Br. 29), the record includes more than five undisputed media uses of “pretzel crisps” generically and many others with mixed usage. [See #46, at 81–87; Madrid Decl. ¶¶ 7, 10 & Exs. 6, 9 (sealed).]

#46, at 73–79], hardly “early days,” it is telling that Applicant presents no evidence of attempts to correct these generic uses by the media.

III. The survey evidence favors Opposer

The running theme of Applicant’s case—overstatement of fact and misstatement of law—continues with the survey evidence. Two out of the three surveys in this case (Simonson and Mantis) support a finding that the primary significance of the term “pretzel crisps” in the minds of consumers is a generic name, not a brand name, and the third (Jay) has significant design flaws such that its results (which only marginally favor Applicant in any event) must be given little weight. Further, Applicant’s own “secondary meaning” survey (Mantis) conclusively demonstrates a lack thereof.

a. Applicant’s arguments regarding Simonson’s control numbers apply equally to Jay’s survey

The principal objection that Applicant raises against Dr. Simonson’s survey is that it did not use gatekeeping questions in the format discussed in *Zimmerman v. National Ass’n of Realtors*, 70 U.S.P.Q.2d (BNA) 1425 (T.T.A.B. 2004). But as explained in Opposer’s main brief, the high percentage of the respondents’ correct responses on the control names objectively demonstrates the survey’s reliability. Stated simply, Simonson’s respondents “got it.”

Applicant misleadingly suggests that there was appreciable noise in the Simonson survey since, Applicant claims, “39%” of respondents incorrectly identified I-POD as a common name and “28%” identified GINGER ALE as a brand name. App. Br. 40–41. First, Applicant cited the wrong data: Simonson’s survey results actually show that only 28% (not 39%) identified I-POD as a common name⁹ (an additional 11% said they didn’t know), and 25% (not 28%) identified GINGER ALE as a brand name (another 3% didn’t know).¹⁰ [#35, at 121.] Second, if those numbers demonstrate fundamental flaws or noise in the respondent population, then Dr. Jay’s results are similarly (and even more) flawed given that

⁹ As explained by Dr. Simonson, this result for a brand like I-POD is not surprising and is consistent with other Teflon studies he has conducted “where names that may be perceived as ‘both’ brand names and generic terms (like Jello, Vaseline, Bandaid, Q-tips, Rollerblades, Jetway, Jacuzzi, etc.) virtually always receive significantly less brand mentions in a Teflon survey but still more than a majority.” [#53, at 16.]

¹⁰ Applicant fails to mention that the percentage of correct responses for all of the other control names in Simonson’s survey ranged from 80-93%.

34% of her respondents incorrectly identified FLAVOR TWISTS as a common name, and 25% identified GOURMET POPCORN as a brand name. [#35, at 33.] Thus, if Applicant's contention is correct, then even with the presence of gatekeeping questions Dr. Jay's results are less reliable than Dr. Simonson's.

At the very least, this comparison of control results further demonstrates that the respondents in Simonson's survey adequately understood the distinction between brands and generic names. If, as Applicant claims, "[t]he veracity of Dr. Jay's results is supported by the fact that respondents accurately categorized each of the six control terms," App. Br. 36, so too is the veracity of Dr. Simonson's results supported by the high correct responses given by respondents for the control terms he used.

b. Applicant's additional criticisms of the Simonson survey are unavailing

Applicant goes on to nitpick Dr. Simonson's survey on several other purported grounds. For example, Applicant argues that restricting the universe to purchasers of salty snacks in supermarkets and grocery stores was underinclusive because Applicant's products are available in other types of stores. App. Br. 41. Yet Applicant admits that "PRETZEL CRISPS crackers are primarily sold in the deli section in supermarkets and grocery stores." *Id.* at 12. Thus, Simonson's decision to restrict the universe to supermarket and grocery store shoppers was entirely appropriate (if anything it would have only skewed the results in Applicant's favor).

Applicant also criticizes Simonson's survey universe as overinclusive on the ground that six months is too long of a window and "captures those who infrequently purchase salty snacks and have limited familiarity with those brands." App. Br. 41. Yet six months has been used several times in other snack surveys without being found problematic. *See, e.g., In re Hershey Chocolate & Confectionary Corp.*, Serial No. 77809223, slip op. at 14 (T.T.A.B. June 28, 2012) (non-precedential). This criticism of Dr. Simonson's universe does not have any support apart from Dr. Jay not liking it.

Applicant further objects that "each term used in the Simonson Survey is an indisputably famous mark that can be easily categorized," App. Br. 41, citing *Eagle Snacks, Inc. v. Nabisco Brands, Inc.*, 625 F. Supp. 571, 582, 228 U.S.P.Q. (BNA) 625, 632 (D.N.J. 1985). Applicant misstates the holding of that case. The court's criticism was not that the expert used famous marks as control names, but instead used

marks “easily categorized as arbitrary or fanciful,” namely “Pepsi” and “M&Ms.” *Id.* at 632–33. Here, as Applicant’s expert concedes, Simonson used at least one descriptive mark, AMERICAN AIRLINES, as a control brand [#56, at 26], thus satisfying the cited criteria of *Eagle Snacks*. Applicant also fails to mention that the same court later rejected the very argument that Applicant makes here. *See J & J Snack Foods Corp. v. Nestle USA, Inc.*, 149 F. Supp. 2d 136, 153 n.12 (D.N.J. 2001) (“the use of well known, clearly established marks” among other criticisms “do not discredit the fundamental reliability of [the genericness] survey evidence, in this Court’s view.”). Indeed, the TEFLON survey itself used only famous marks (COKE, JELLO, and STP) as control brands. *E.I. DuPont de Nemours & Co. v. Yoshida Int’l, Inc.*, 393 F. Supp. 502, 185 U.S.P.Q. (BNA) 597, 616 n.54 (E.D.N.Y. 1975).

Finally, Applicant asserts that Dr. Simonson should have addressed the “don’t know” responses in his survey either by applying the responses equally to each side or by throwing out the responses, with both resulting in a 50%-50% split. But Dr. Simonson properly chose to consider the “don’t know” responses by taking neither of those approaches in this case. As Dr. Simonson explained, he was asked in his deposition whether it would be prudent to exclude “don’t know” responses, and he answered that it *could* be prudent. [#49, at 122.] However, it would not be appropriate here given the very large percentage of respondents (18%) answering that they did not know whether “pretzel crisps” was a brand name or category name. [#49, at 122–24.] Given that high level of “don’t know” responses, it would simply be inaccurate to conclude that 50% of the relevant universe believes “pretzel crisps” is a brand name, let alone that that is its primary significance. [#49, at 123–24.] Rather, as Dr. Simonson properly concluded, less than a majority (41%) of relevant consumers perceived “pretzel crisps” as a brand name, with an equal percentage believing it was a generic term. [*Id.*]

c. Applicant failed to adequately address the significant flaws in the Jay survey

As mentioned in prior briefing, the survey that Dr. Jay conducted improperly biased the results in favor of Applicant’s position. Instead of relying on the traditional TEFLON approach, Dr. Jay selected her gatekeeping questions to consist of certain specific terms from the salty snack category. Dr. Jay did this to restrict her survey universe to individuals that would be most familiar with terms in the salty snack

category. Dr. Jay freely admits this. [#56, at 14.] What Dr. Jay should have done was stick with the TEFLON approach, which merely requires respondents from the relevant universe to have the ability to distinguish brand from generic. [#54, at 9.] By introducing this third “familiarity” criterion, Dr. Jay introduced severe bias by reducing the population of respondents until she arrived at a subset of the relevant universe that had particularly higher levels of brand familiarity she needed to show PRETZEL CRISPS being perceived as a brand name. [#54, at 9–11.] This deviation improperly excluded over a third of the relevant survey universe. [#54, at 11.]

Applicant attempts to address this criticism by claiming that Dr. Jay’s use of specific names in the category of salty snacks was “an accepted refinement in the *Teflon* methodology.” [#56, at 14.] Besides Dr. Jay not citing any scholarly consensus to back up this claim, it goes against the practice of the actual TEFLON survey in which the other terms tested were CHEVROLET, WASHING MACHINE, STP, THERMOS, MARGARINE, JELLO, REFRIGERATOR, ASPIRIN, and COKE, all of which are well outside the product category in which TEFLON belongs. *E.I. Du Pont*, 185 U.S.P.Q. (BNA) at 616 & n.54. So in the actual TEFLON survey, a wide variety of marks were used from various product categories. By contrast, Dr. Jay’s survey was designed to “ensur[e] that the respondent is familiar with product names” in the category being tested, thus selectively harvesting the sort of respondents that would be naturally more familiar with Applicant’s “mark” from the wider universe of all of salty snack purchasers that should have been consulted. The artificial inflation of the results by needlessly excluding a large segment of relevant consumers based on “familiarity” biased the results in favor of Applicant.

d. Applicant misstates the standard for “one company/more than one company” surveys, relying only on brand awareness surveys

As mentioned in Opposer’s main trial brief, despite the Mantis survey’s design bias in favor of Applicant’s position, the survey still reveals not only that nearly two-thirds of Applicant’s target consumers fail to associate the term “pretzel crisps” with a single source, but that an even higher percentage of those consumers (47.8%) associate “pretzel crisps” with multiple sources than with a single source (38.7%). Because secondary meaning requires that the primary significance of a term identify the

source of the product and not the product itself, the failure of a supermajority of consumers to identify “pretzel crisps” with a single source, coupled with an even higher percentage of consumers identifying “pretzel crisps” with multiple sources, conclusively establishes the lack of secondary meaning in the term.

To get around this glaring problem, Applicant misleadingly argues that “[t]he Board and numerous courts have likewise found surveys probative where the results demonstrated that less than 50% of respondents associated the mark with a single source or with the source at issue.” App. Br. 52. But none of the cases that Applicant cites supports its argument because none of them employ the kind of survey that Mantis employed in this case.

The Mantis survey here was a “one company/more than one company” survey, which is designed such that “respondents are given a choice between two mutually exclusive alternatives,” namely, whether the term at issue associated with one source or more than one source. Vincent N. Palladino, *Surveying Secondary Meaning*, 84 Trademark Rep. 155, 178 (1994). When faced with two mutually exclusive alternatives, the majority response determines whether there is secondary meaning or not. *Id.* The only reason to depart from this rule is to accommodate guessing and “no company” responses, “but not because cases involving other survey techniques have reported other numbers.” Vincent N. Palladino, *Secondary Meaning Surveys in Light of Lund*, 91 Trademark Rep. 573, 617 (2001). “It is inappropriate to infer secondary meaning from a ‘one company/more than one company’ survey that shows ‘significant or substantial’ association of the claimed trademark with the goods of only one company if that association is less than fifty percent.” *Id.*

Instead of citing other cases involving “one company/more than one company” surveys, Applicant relies exclusively on cases employing brand recognition surveys. To illustrate the difference between the surveys involved, consider a “less-than-majority” survey that Applicant cites, *Monsieur Henri Wines, Ltd. v. Duran*, 204 U.S.P.Q. (BNA) 601 (T.T.A.B. 1979). That case concerned an applicant employing a matador and bull design used on sangria, and the opposer had commissioned a survey regarding its own matador and bull design for sangria. However, the survey employed was not a one company/more than one company style survey. Instead, the survey presented respondent sangria drinkers

with six bull and matador designs and asked respondents to name the brand that used the particular design. *Id.* at 605. 37% of the respondents correctly identified opposer's bull-and-matador design with opposer's brand, dwarfing the percentages correctly identifying the other 5 brands (2.8%, 1.8%, 0.4%, and 0.1%). *See id.* Given these results, it is hardly surprising that the Board found opposer's design possessed secondary meaning. This type of survey design and result in no way support a finding of secondary meaning from the Mantis survey, where more respondents than not associated PRETZEL CRISPS with multiple companies.

The other Board cases that Applicant cites are likewise merely brand recognition surveys. The survey from *In re Carl Walther GmbH* asked respondents to "identify the 'company or companies that make a pistol with a particular shape.'" Serial No. 77096523, slip op. at 9 (T.T.A.B. Oct. 26, 2010) (non-precedential). The 33% number that Applicant cited was the number of individuals that explicitly named the applicant, not the number that identified the shape with a single source (54%). *Id.* The numbers that Applicant reports for the survey from *In re Hershey Chocolate & Confectionary Corp.* (42%) was not the number of respondents associating the chocolate bar design with one company as opposed to more than one company. *In re Hershey*, Serial No. 77809223, slip op. at 14. Instead, 42% represented the respondents that "correctly identified applicant as the maker of the candy bar." *Id.* By contrast, Mantis's survey did not ask anyone to identify Applicant as the source behind the term "pretzel crisps."

Decisions that Applicant cites from outside the Board are also brand recognition surveys. The survey involved in *Tri-Star Pictures, Inc. v. Unger* asked respondents whether they had heard of a motion picture title with the phrase "River Kwai." 14 F. Supp. 2d 339, 349 (S.D.N.Y. 1998). The survey did not ask whether respondents associated the phrase "River Kwai" with one motion picture or more than one motion picture. Besides this fundamental difference, the court in *Tri-Star* did not rely solely on a 42% response of people who had "heard or seen a motion picture" with the phrase, as Applicant misleadingly claims. App. Br. 53. The Court also relied on an additional survey showing a 51% brand recognition response coupled with an affirmative identification of the specific motion picture at issue from 75% of the persons who had heard of the phrase. *Tri-Star*, 14 F. Supp. 2d at 349. Applicant not only did not use the

sort of survey in *Tri-Star* but manifestly does not have a survey showing the sorts of numbers present in that case. Finally, the numbers cited for the survey involved in *McNeil–PPC, Inc. v. Granutec, Inc.* “followed the traditional ‘Ever-Ready’ design,” 919 F. Supp. 198, 37 U.S.P.Q.2d (BNA) 1713, 1716 (E.D.N.C. 1995), even though the “Ever-Ready” survey is not a one company/more than one company survey and, in fact, is a survey designed to test likelihood of confusion, not secondary meaning. *See Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 188 U.S.P.Q. (BNA) 623, 640 (7th Cir. 1976).

In a last ditch effort to rely on less than a majority response, Applicant claims that Opposer’s secondary meaning expert Dr. Ivan Ross agrees that a 38.7% response “is sufficient for a survey to establish secondary meaning.” App. Br. 52. However, that ignores the context of Dr. Ross’ deposition. Dr. Ross mentioned less-than-majority response in the context of a discussion regarding the type of survey that he designed in the *Grupo Gigante* case. [#55, at 240–41.] The survey that Dr. Ross employed in that case “was designed to test both unaided and aided awareness of the Gigante name.” *Grupo Gigante S.A. de C.V. v. Dallo & Co.*, 119 F. Supp. 2d 1083, 1093 (C.D. Cal. 2000), *vacated*, 391 F.3d 1088, 73 U.S.P.Q.2d (BNA) 1258 (9th Cir. 2004). Thus, again, Applicant is attempting to rely on numbers for brand awareness surveys instead of “one company/more than one company” surveys.

At the end of the day, Applicant fails to cite a single case in which a survey like the one Mantis conducted—where a higher percentage of respondents associated a name with more than one company than with one company—was held to support a finding of secondary meaning. To do so would defy logic and make a mockery of the Supreme Court’s “primary significance” test for secondary meaning. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 U.S.P.Q. (BNA) 1, 4 n.11 (1982). Despite Applicant’s misunderstanding of survey evidence and cases, this is not complicated—it’s simple math: if A > B, then B cannot be “primary.” Mantis’ survey conclusively proves that the primary significance of “pretzel crisps” to consumers is not a single source.

e. Mantis’ survey is also probative of genericness

As explained in Opposer’s main brief, the Mantis survey is also probative of genericness because the instructions he used mixed in the language used for TEFLON surveys, instructing respondents to

equate “single source” (secondary meaning survey) with “brand name” (TEFLON survey) and “more than one source” (secondary meaning survey) with “common name” (TEFLON survey). Applicant admits this mixing and claims that the mixing is appropriate, App. Br. 53 (citing *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 U.S.P.Q.2d (BNA) 1549, 1571 n.46 (T.T.A.B. 2009)),¹¹ but then denies that the survey can be used for both purposes without providing any justification for its assertion, merely reiterating that the survey was only a secondary meaning survey, App. Br. 43. This assertion is at odds the *Stuart Spector* decision itself. In that case, the applicant conducted a survey which presented respondents with several shapes of guitars and asked the respondents to name the guitar and to identify the manufacturer of the guitar shape. *Stuart Spector*, 94 U.S.P.Q.2d (BNA) at 1570. After criticizing the survey, the Board noted that the survey could have been designed to follow the TEFLON format “where interviewees are first instructed on the differences between matter that is generic and matter that is source-identifying” and which would then ask respondents whether applicant’s guitar shapes along with generic shapes were associated with one company or more than one company. *Id.* at 1571 n.46. This sort of survey would “answer the lingering question, are respondents recognizing a brand or are applicant and its Stratocaster, Telecaster, and Precision Bass guitars, simply dominant in the marketplace.” *Id.*

The same is true here: combining a “one company/more than one company” survey with TEFLON methodologies, as Mantis did, helps resolve whether the survey respondents recognize PRETZEL CRISPS as a brand or whether they recognize a common name that Applicant, who is simply dominant in the marketplace, has attempted to appropriate to its exclusive use. Because Mantis’ survey mixed genericness and secondary meaning concepts (as Applicant acknowledges), it is probative on both issues as suggested by the very case that Applicant uses to support its mixing of the concepts. Thus, Mantis’ results support the conclusion that more consumers in Applicant’s target market believe PRETZEL CRISPS is a common name than a brand name.

¹¹ Applicant apparently accidentally marked the *Stuart Spector* decision as “non-precedential” in its brief. App. Br. 53.

f. Mantis' survey is biased in favor of Applicant, yet still supports Opposer

As discussed in Opposer's main trial brief, the results of Mantis' survey, even though they support Opposer on both genericness and secondary meaning, are in fact inflated in Applicant's favor¹² due to Mantis' failure to use an external control in his survey. By failing to use an external control, Mantis captured responses from a large number of respondents (23.8%) who believed that ONION RINGS identified a single source and not multiple sources. Opp. Br. 47. The importance of an external control is emphasized in *In re Hershey*, which used a control design so that the results could be appropriately adjusted to account for noise. *See In re Hershey*, Serial No. 77809223, slip op. at 14.

Applicant does not dispute that Mantis failed to include an external control but, instead, complains that internal control numbers should not be subtracted from the test number. But neither Applicant nor Mr. Mantis provide any reasonable alternative to assess the level of noise or the reliability of his results in this case. Although Mantis admitted that any variance reflected by the internal controls should be used to "assess the meaningfulness of the survey's data" [#55, at 12], he completely failed to conduct any such analysis. He opines in superficial, conclusory fashion that PRETZEL CRISPS has acquired secondary meaning because an "[a]ppreciable percentage of relevant consumers associate this name with only one company" [#55, at 28], ignoring the fact that an "appreciable percentage" (23.8%) of those very same consumers also associated the generic term ONION RINGS with only one company. Setting aside the indisputable fact that more respondents associated PRETZEL CRISPS with multiple companies than with one company, Mantis' failure to properly account for or consider noise in his results severely undermines the credibility of his opinions.

¹² As noted in Opposer's main brief, Mantis' survey is also biased in Applicant's favor because his universe was limited to consumers in the age range of Applicant's target market. Opp. Br. 48-49. Applicant fails to explain why this restriction was appropriate for the Mantis survey, but not for Applicant's other survey conducted by Dr. Jay.

IV. Applicant's other evidence is of little consequence on genericness and secondary meaning

a. Applicant's marketing evidence is unpersuasive in light of the direct evidence showing genericness and lack of acquired distinctiveness

Applicant's argument that Opposer has presented no evidence to dispute the success of its marketing efforts is plainly incorrect in light of the objective survey results showing that "pretzel crisps" is generic and lacks acquired distinctiveness. Thus, like other cases in which a company attempts to acquire trademark rights in a generic term by spending its way onto the register, Applicant's marketing evidence should be disregarded.

Applicant's argument is reminiscent of *Miller Brewing Co. v. G. Heileman Brewing Co.*, in which Miller tried to assert trademark rights in the designation LITE for "less filling, low-calorie beer." 561 F.2d 75, 195 U.S.P.Q. (BNA) 281, 282 (7th Cir. 1977). To assert that LITE had acquired secondary meaning, Miller presented evidence of an extensive advertising campaign and sales effort, increasing its annual marketing expenditures from \$500,000 to \$12,000,000 and its sales from 50,000 to 4,000,000 barrels. *Id.* at 283. Miller also submitted a survey showing that consumers identified "LITE (43%), Miller LITE (11%), or LITE from or by Miller (1%) as a distinct brand name indicative of a low-calorie or less-filling beer." *Id.* The court did not find this evidence persuasive:

The word "light," including its phonetic equivalent "lite," being generic or common descriptive term as applied to beer, could not be exclusively appropriated by Miller as a trademark, "despite whatever promotional effort (Miller) may have expended to exploit it."

Id. at 286 (quoting *Henry Heide, Inc. v. George Ziegler Co.*, 354 F.2d 574, 147 U.S.P.Q. (BNA) 383, 384–85 (7th Cir. 1965)). Applicant's marketing and sales efforts suffer the same fate here. No amount of advertising and sales success—even if it results in de facto secondary meaning—can convert a generic term into a registrable mark.

b. The declarations from Applicant's sales brokers are inherently untrustworthy, not persuasive, and not expert opinion

Applicant proffers the declarations of four individuals associated with food brokerage businesses

to argue that the industry uses the term “pretzel crisps” to refer exclusively to Applicant’s product.¹³ By the declarants’ own admission, these companies have strong financial ties to Applicant as they sell millions of dollars’ worth of PRETZEL CRISPS products. [Opp. 91190246, #27, at 279, 284, 288, 292.] Applicant characterizes these declarations as “compelling evidence,” but precedential holdings from the Board disagree and instead find these sorts of declarations of “little persuasive value.” *Mag Instrument, Inc. v. Brinkman Corp.*, 96 U.S.P.Q.2d (BNA) 1701, 1723 (T.T.A.B. 2010); accord 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 12:13, at 12-50 (4th ed. 2012) (“Trademark law is skeptical of the ability of an associate of a trademark holder to give an impartial account of the value of the holder’s mark.”). In *Mag Instrument*, even with 16 declarations the Board was not persuaded as the declarations “almost exclusively” came from applicant’s sales representatives. 96 U.S.P.Q.2d (BNA) at 1723. Just as the Board found unpersuasive sixteen declarations that were mostly but not all from sales associates, the four declarations in this case entirely from biased sales associates should be entitled to even less consideration, if considered at all.

CONCLUSION

Despite Applicant’s best effort to overstate the facts, misstate the law, and ignore binding precedent, the record evidence nevertheless demonstrates that “pretzel crisps” is a generic term for pretzel crackers and indicates multiple sources in the mind of consumers. Because Applicant failed to establish that the term “pretzel crisps” is a valid, distinctive trademark, the Board should sustain the opposition and the petition to cancel.

Respectfully submitted,

PIRKEY BARBER PLLC

Dated: March 12, 2013

By: William G. Barber/
William G. Barber

¹³ Applicant claims that these individuals are “experts” despite failing to disclose them as such during discovery or properly qualifying their testimony as such under Fed. R. Evid. 702.

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2013, a true and correct copy of the foregoing
OPPOSER/PETITIONER'S REPLY TRIAL BRIEF (redacted version) was served via first class mail,
postage prepaid, addressed as follows:

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