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

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|------------------------|--|
| Proceeding | 91195552 |
| Party | Plaintiff Frito-Lay North America, Inc. |
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| Attachments | 2013-09-17 response letter opp. no. 91195552.pdf(600864 bytes) |



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September 17, 2013

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22314

Re: *Frito-Lay North America, Inc. v. Princeton Vanguard, LLC*,
Opposition No. 91195552/Cancellation No. 92053001

Dear Judges Cataldo, Ritchie, and Taylor,

This responds to Applicant's letter citing *Sheetz of Delaware v. Doctor's Associates*, No. 91992657 (TTAB, Sept. 5, 2013).

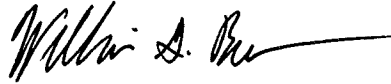
In *Sheetz*, the Board recognized the fundamental purpose of "gate-keeping questions" in genericness surveys is "to determine whether the survey participant understands the difference between 'brand names' and 'common names.'" *Id.* at 37. Although noting Cogan's lack of a "mini-test," *id.*, the Board also compared the results on the control names in both parties' surveys in determining whether respondents understood that difference. *Id.* at 45 (noting that 3% of Johnson's respondents misidentified COCA-COLA while 21% of Cogan's respondents misidentified DIET COKE as a common name).¹ Based on this comparison the Board concluded, "Johnson's survey results demonstrate that the respondents had a firm understanding regarding the difference between a common name and a brand name." *Id.* A similar comparison here shows that a *higher* percentage of respondents in Simonson's survey correctly identified the control names than did the respondents in Jay's survey. Opposer's Reply Br. 15-16. These control results should provide the Board great confidence that Simonson's respondents "understood the difference between a common name and brand name" at least as well (if not better) than Jay's respondents, regardless of any "mini-test."

Sheetz is also relevant in other ways. The Board rejected criticism of Johnson's survey for using famous marks as brand exemplars, *Sheetz* at 48, the same criticism Applicant levied against Simonson. Applicant's Br. 41. The Board also rejected a number of arguments similar to those of Applicant: *compare Sheetz* at 37 ("applicant's extensive advertising campaign may have created *de facto* secondary meaning (*i.e.*, buyer association with a generic term)," 50 ("the fact that dictionaries do not define 'Footlong' as a sandwich is not controlling"), 57 ("the first and/or sole user of a generic term . . . does not entitle applicant to register such a term"), and 59 ("acquiescence to demands to cease use of a term can be equally viewed as simply a desire to avoid litigation"), *with* Applicant's Br. at 12-21, 46, 44-45, and 32-33, respectively.

¹ The Board also criticized Cogan's survey for several other reasons. *Id.* at 36-39.

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U.S. Patent and Trademark Office
September 17, 2013
Page 2

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William G. Barber", with a long horizontal flourish extending to the right.

William G. Barber

cc: Counsel of record (via email by agreement of the parties)