ESTTA Tracking number: **ESTTA104487**
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	76235496
Applicant	ADVANTEST CORPORATION
Applied for Mark	SILICON FINGER
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Submission	Appeal Brief
Attachments	App's Appeal Brief - SILICONFINGER2PTO.pdf (21 pages)(839850 bytes)
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Signature	/Alex Butterman/
Date	10/16/2006

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

In re Application -

Mark:	SILICON FINGER
Serial No.:	76/235496
Filed:	April 5, 2001
Applicant:	Advantest Corporation
Class:	9
Attorney Ref.:	1526.2002
Examining Attorney:	Angela Micheli

APPLICANT'S APPEAL BRIEF

I. INTRODUCTION

Applicant Advantest Corporation is seeking to register the mark SILICON FINGER (App. Serial No. 76/235,496; referred to hereinafter as "the Application") for "contactors and contactor probe cards, made of Micro-Electro-Mechanical Systems (MEMS) material including mechanical elements, sensors, actuators, and electronics on a common silicon substrate, for use in testing equipment to test electronic circuits and electronic devices, namely, semiconductor wafers, integrated circuits, printed circuit boards, semiconductor chips, and packaged semiconductor devices," as subsequently amended, (hereinafter referred to as "electronic circuit testing contactor goods"). In an Office Action issued July 6, 2005, the Examining Attorney made "final" a refusal to register the mark SILICON FINGER on the Supplemental Register under Trademark Act Section 23, 15 USC § 1091, on the ground that applicant's mark is generic and incapable of identifying the applicant's goods and distinguishing them from those of others. For the reasons set forth below, applicant submits that this refusal cannot be sustained, and respectfully requests that the Trademark Trial and Appeal Board (the "TTAB" or "Board") reconsider the refusal to register and direct that the application be passed to publication, or registered if on the Supplemental Register.

II. BACKGROUND

Applicant appeals the refusal of the Examiner to register the mark SILICON FINGER in International Class 9 for electronic circuit testing contactor goods, which the examining attorney initially and finally refused registration under §2(e)(1) of the Trademark Act, 15 USC § 1052(e)(1), on the grounds that the mark is at least merely descriptive of the goods, and also finally refused registration under Section 23 of the Trademark Act on the grounds that the mark is incapable of distinguishing the goods.

Applicant initially filed an intent to use application under Trademark Act Section 1(b), 15 USC §1051(b), on April 5, 2001 to register the trademark SILICON FINGER in connection with "component and component assemblies for integrated circuit and semiconductor testing apparatus and machines" in International Class 9. The Application was assigned to Examining Attorney Michelle Wiseman and in a first office action issued August 14, 2001, was refused registration on the alternative grounds that the mark SILICON FINGER is merely descriptive of the material and function of the goods or, if the goods do not contain silicon, deceptively misdescriptive of the goods under Trademark Act Section 2(e)(1), 15 USC 1052(e)(1). In that office action, the examiner requested additional information from the applicant about the nature of the goods and whether the wording SILICON FINGER either as an entire phrase or each word separately has any particular meaning in the relevant trade or industry. The examiner also required the applicant to state for the record whether the goods were made of silicon.

Applicant's February 14, 2002 response amended the identification of goods to "component and component assemblies for integrated circuit and semiconductor testing apparatus and machines, *namely contactors to a test device including a semiconductor wafer, and a packaged large scale integration device*" (emphasis added to show amended language);

argued against the merits of the descriptiveness refusal based upon the term FINGER, emphasizing that the goods are testing devices and not circuit devices; indicated that applicant's goods are partially made of silicon and that the wording SILICON FINGER and FINGER have no significance in the relevant trade or industry. Based upon this response and the applicant's information that the goods are partially made of silicon, the examiner issued a second, non-final office action on September 30, 2002 withdrawing the deceptively misdescriptive refusal but requiring further amendment of the identification of goods to specify the silicon composition, as well as clarify the allegedly ambiguous terms, "components, component assemblies, device, and including." The examiner also continued the Section 2(e)(1) descriptiveness refusal, requesting additional information on what aspect of the goods the phrase SILICON FINGER refers and any other information about the goods, challenging the accuracy of the applicant's argument in its previous response for the distinctiveness of the mark.

Applicant responded to the second, non-final office action on March 31, 2003 again amending the identification of goods, submitting presentation materials to provide the examiner with more information on the nature of the goods and presenting additional arguments and explanations on the distinctiveness of the mark in relation to the particular goods. The goods description was amended to "contactors and contactor probe cards for use in testing equipment to test electronic circuits and electronic devices, namely semiconductor wafers, integrated circuits, printed circuit boards, semiconductor chips, and packaged semiconductor devices, in Class 9." The USPTO then reassigned the Application to the present examiner, Angela Micheli, who issued a final office action on July 9, 2003 refusing registration on the grounds of descriptiveness and maintaining the requirement to amend the identification of goods to specify that the goods are "partially made of silicon."

On January 9, 2004, applicant responded to the aforementioned final refusal by filing a Request for Reconsideration and amending the identification of goods to its present form. The Request for Reconsideration included a declaration of Robert Keith Lee, then General Manager of the Custom Design Engineering Department of Advantest America, a subsidiary of the applicant, and noticing its intent to appeal the final refusal. In order for the examiner to decide on the acceptability of the identification of goods amendment and reconsideration request, the Board remanded the application to the examiner, suspending the appeal pending her decision. The examiner issued an office action denying the Request for Reconsideration on February 20, 2004, which was supplemented by a March 10, 2004 office action acknowledging acceptance of the identification of goods amendment and withdrawing that previous requirement.

The applicant filed an amendment requesting registration of the Application on the Supplemental Register on April 23, 2004 which once again required remanding the application to the examiner and suspending the appeal pending her decision. The examiner responded with a May 23, 2004 office action rejecting amendment to the Supplemental Register because the applicant had not yet alleged use of the mark in the intent to use application. After the applicant electronically filed an Amendment to Allege Use and a Response re-requesting registration of the Application on the Supplemental Register, the examiner issued a November 3, 2004 office action refusing registration of the mark on the Supplemental Register, concluding that the mark SILICON FINGER is incapable of identifying applicant's goods and distinguishing them from others.

The applicant filed its response on May 3, 2005 arguing against the alleged genericness of the mark and refusal of the examiner to register the mark on the Supplemental Register. The examiner maintained this refusal in a July 6, 2005 final office action. The applicant filed

another Request for Reconsideration on February 24, 2006[1] urging registration of the mark on the Supplemental Register and presenting negative news database evidence showing the lack of any documents that contain the SILICON FINGER mark or phrase in reference to the applicant's product or terms relevant thereto. Upon issuance on July 5, 2006 of the examiner's rejection of the latest Request for Reconsideration by the Applicant, the application was returned to the Board and the appeal resumed in an Order dated August 17, 2006.

III. ARGUMENT

A. SILICON FINGER Is Not Generic for Applicant's Electronic Circuit Testing Equipment

According to *H. Marvin Ginn v. Internat'l Ass'n of Fire Chiefs*, 782 F.2d 987 (Fed. Cir. 1986), "[D]etermining whether a mark is generic... involves a two-step inquiry. First, what is the genus of goods or services at issue? Second, is the term sought to be registered... on the register understood by the relevant public primarily to refer to that genus of goods or services? The burden of proving that the mark sought to be registered is generic for the goods or services as described in the application rests with the Trademark Examining Attorney. *In Re Merrill Lynch,* 828 F. 2d 1567, 1571 (Fed. Cir. 1997). The Examining Attorney must establish genericness by clear evidence. *Id.; TMEP* § 1209.01(c)(i). In other words, "a strong showing is required when the Office seeks to establish that a term is generic," *In re: K.T. Zoe Furniture Inc.,* 29 USPQ2d 1787 (Fed. Cir. 1994), and any doubt on the issue of genericness must be resolved in favor of the Applicant. *In re Waverly Inc.*, 27 U.S.P.Q. 2d 1620, 1624 (TTAB 1993).

Moreover, where the mark is a phrase, the examining attorney cannot simply cite

[1] The Feb. 24, 2006 Request for Reconsideration was filed along with a Petition to Revive since the examiner's July 6, 2005 office action was never actually received by Applicant's attorney due to an error in updating the Applicant's

definitions and generic uses of the individual components of the mark, but must provide evidence of the meaning of the composite mark as a whole. *In re American Fertility Society*, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999) ("evidence that the components "Society" and "Reproductive Medicine" were generic was not enough to establish that the composite phrase SOCIETY FOR REPRODUCTIVE MEDICINE was generic for association services in the field of reproductive medicine"). The *In re American Fertility Society* case specifically limited on its facts the previous case law for compound word marks held generic in *In re Gould Paper Corp.*, 5 USPQ2d 1110 (Fed. Cir. 1987), which permitted concluding the compound word SCREENWIPE for a wipe for television and computer screens was generic because of the meanings of the individual words. Thus, for a phrase the Federal Circuit has distinguished the law from compound words and held that an examining attorney must show: (1) the genus of goods/services that the applicant provides; and (2) that the relevant public understands the proposed **composite** mark to primarily refer to that genus of services (emphasis added).

Applicant respectfully submits that the Examining Attorney has erred by failing to follow the clear, two-step inquiry set forth in *H. Marvin Ginn,* as modified by *In re American Fertility Society,* namely, first, identifying the proper genus of goods and services at issue, and only then determining whether the entire composite mark is understood by the relevant public primarily to refer to that genus. Instead, the Examining Attorney recast the supposed genus in her own terms incorporating the component words of the mark, preordaining her conclusion on genericness, or an incapability of the mark to acquire distinctiveness.[2] Moreover, the examiner

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correspondence address. The application was subsequently revived on March 24, 2006.

[2] While the examiner appears to have only implied that applicant's mark is generic without expressly stating it in her refusal to allow registration on the Supplemental Register, because the examiner states that applicant's mark is "incapable of identifying the applicant's goods...," applicant is treating this language as a conclusion by the examiner that the mark is generic and the application by the examiner of the *Marvin Ginn* test corroborates this.

seems to be applying the wrong genericness case law as applicant's mark SILICON FINGER is not a compound word but a phrase which requires the application of the *American Fertility* case law.

1. The Proper Genus of the Applicant's Goods are Testers for Electronic Circuits

Applicant's goods are presently described in the application as, "contactors and contactor probe cards, made of Micro-Electro-Mechanical Systems (MEMS) material including mechanical elements, sensors, actuators, and electronics on a common silicon substrate, for use in testing equipment to test electronic circuits and electronic devices, namely, semiconductor wafers, integrated circuits, printed circuit boards, semiconductor chips, and packaged semiconductor devices." In the examiner's November 3, 2004 office action initially refusing registration of the SILICON FINGER mark on the Supplemental Register, the examiner states that SILICON FINGER is the "apt or common descriptive name of a key feature of applicant's goods....The term immediately identifies that the applicant's probe cards are comprised of silicon fingers." This analysis seems conclusory and appears to refer to the "descriptiveness" of a term more than how the term constitutes a genus of goods. A "key feature" of a good is a characteristic or trait and any portion of a mark or an entire mark that refers to only one aspect of a good is not referring to a genus of goods; it is considered merely describing the goods and is typically a term that, with sufficient usage, can acquire distinctiveness in relation to the goods. Also, the statement that "applicant's probe cards are comprised of 'silicon fingers,'" the term that constitutes the mark, omits specifying the actual genus of the goods and simply concludes without any rationale or explanation other than presumably backwards reasoning that the mark is the genus of goods. However, it seems inferrable from the examiner's analysis that

the examiner is concluding that the genus of applicant's goods would be probe cards. Applicant submits that this is a fairly specific interpretation of the genus and suggests that the proper genus of the applicant's goods are testers or testing equipment for electronic circuits. The applicant's contactors or contactor probe cards are a form of testing equipment for electronic circuits.

2. The Entire Mark SILICON FINGER Is Not Understood by the Relevant Public to Refer to the Genus of Applicant's Goods

If the genus of applicant's goods are defined as testing equipment for electronic circuits, or even more specifically as contactors or contactor probe cards, then the second step in the genericness analysis is to determine if the mark SILICON FINGER is commonly understood by the relevant public to refer to either electronic circuit testing equipment or more specifically to contactors used in the field of circuit testing. The relevant public for these goods would seem to be professional electrical engineers or sophisticated electricians involved in the design and repair of circuits, circuit boards, computer chips and the like. Applicant respectfully contends that all of the evidence produced to date in this lengthy application record fails to demonstrate by clear evidence that the relevant public understands the term SILICON FINGER to refer to this genus of the goods.

As the examiners have repeatedly stated throughout the office actions, "evidence of the public's understanding of a term may be obtained from competent sources, such as...trade journals, newspapers and other publications." *Citing In re Aluminum Prods., Inc.*, 227 USPQ 961 (Fed. Cir. 1985). As such, searches for the appearance of the phrase SILICON FINGER and its context in which it is found in such articles and documents in a popular on-line news database such as Lexis-Nexis® should be probative and indicative of the public's understanding

of this term. In applicant's Request for Reconsideration filed on February 24, 2006 in response to the final office action of the examiner refusing registration on the Supplemental Register, the applicant attached five printouts of search queries in the Lexis-Nexis® database as follows:

- **"finger w/s probe card"** = finger within sentence 'probe card'
- **"silicon finger and probe card"** = the phrases 'silicon finger' and 'probe card' in the same article
- **"finger and probe card"** = the phrase 'probe card' combined in an article with finger
- **"silicon finger not circuit board"** = silicon finger in an article that does not contain the phrase 'circuit board'
- **"silicon finger and automatic test equipment"** = a combination of the phrases 'silicon finger' and 'automatic test equipment' in the same article

Applicant resubmits and re-encloses these printouts with this brief for the convenience and easy reference of the examiner and the Board.[3] These printouts show only the actual search query and not any results or actual articles retrieved because these queries did not yield any articles. Applicant respectfully views this outcome as significant evidence of the fact that SILICON FINGER does not appear in an article in relation to the phrase "probe card" or "automatic test equipment," nor does the term SILICON FINGER appear in any article that omitted the phrase "circuit board," which phrase was excluded because it appeared in so many articles retrieved in the database and, as noted previously, is irrelevant since applicant's goods are not circuit boards. While applicant understands that different combinations of search queries could yield different search results, applicant respectfully believes that these most relevant queries, when combined with the remaining Lexis-Nexis® evidence of record submitted by the examiners (see No. 5 below), clearly show the omission of SILICON FINGER as a phrase in various news articles as well as the omission of FINGER used to refer to the goods or their genus. If SILICON FINGER is so commonly understood by the relevant public, and the genus of goods could be referred to

[3] Since this evidence is a copy of evidence already properly submitted with the Request for Reconsideration,

as "probe cards," then this evidence of the dearth of articles retrieved should show that SILICON FINGER is not such a well-known or commonly understood term as the examiner contends.

The applicant has thoroughly reviewed the following evidence of record submitted by both examiners in the subject application and notes with respect to each the following:

1. A dictionary definition from Childers, *The Glossary of Printed Circuit Design and Manufacturing*, which defines only the word FINGER as "a gold-plated terminal of a card-edged connector [derived from its shape]. Also, a dictionary definition from *Precision Products Co., Inc., The Printed Circuit Board Co.* which only refers to the single-word FINGER in a definition for DEAD CONTACT PIN... "Any contact pin or finger which is void of circuitry..."

2. Excerpts from U.S. Patent No. 5,614,113 for "*Method and Apparatus for Performing Microelectronic Bonding Using a Laser*" which contains the following language in the abstract: "...lead finger of an integrated circuit...lead finger...lead finger." Again this refers only to the word FINGER.

3. A dictionary definition from the *American Heritage Dictionary of the English Language* for the word SILICON, identifying it as a nonmetallic element; and a list of Google® references from a search for documents containing SILICON and SEMICONDUCTOR and FINGER. None of these references showed the word SILICON adjacent to FINGER as a phrase and none of these references show SILICON or FINGER specifically in relation to testing equipment for electronic circuits or specific goods within that category. As applicant noted in its response to the first office action, applicant's goods are not semiconductors or circuit devices but, rather, testing devices for those goods.

4. References to two additional U.S. Patents, Nos. 6,232,669 for *Contact Structure Having Silicon Finger Contactors and Total Stack-up Structure* and 6,441,629 for *Probe System Having Planarity Adjustment Mechanism* which contains the term SILICON FINGER. The same office action also cites a biographical article on Ted Khoury, an inventor in the aforementioned patents and a former manager of applicant. The applicant is the source of both of these patents and the references to the term SILICON FINGER in the Khoury biography are references to then common law marks of applicant while Khoury was employed by applicant. As such, this evidence is not truly evidence of third party usage of the SILICON FINGER term. Moreover, applicant respectfully submits that the erroneous inclusion of a term in a patent for which applicant considers a trademark is not sufficient evidence in itself of a mark's incapability of acquiring distinctiveness and being generic.

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applicant submits that this evidence may properly be made of record and is not evidence submitted for the first time on appeal.

5. The only Lexis-Nexis® news database evidence produced by the examiner consists of 11 "randomly" selected articles produced by the search query, "FINGER within sentence 'electronic circuit' or semiconductor or wafer or 'circuit board' or 'integrated circuit'." The same office action also produces some copies of scientific articles discussing semiconductor physics and utilizing the term FINGER apparently as a part or anatomy of the semiconductor. However, not one of these articles shows the phrase SILICON FINGER and at best all of these articles show FINGER used in reference to a circuit board or semiconductor as a part of its anatomy but not with respect to testing the functionality of circuits. Applicant has already contended that the proper genus of goods is not circuits or circuit boards or semiconductors but testing apparatus for same.

6. A page from applicant's web site using the phrase SILICON FINGER. Applicant respectfully contends that this usage is trademark use, even if not properly formatted as such with a TM marking.

7. A *Merriam-Webster* on-line dictionary definition of FINGER which at best states, "something that resembles a finger." This does not even show that FINGER is a term of art in the semiconductor or circuit fields, let alone referring to the applicant's particular goods or genus of goods, testing apparatus for circuits or contactors within same.

8. The final item of evidence of the examiner, and the only one included in the initial and final refusals to register the SILICON FINGER mark on the Supplemental Register, is a single article from *TechnologyReview.com*, entitled "May the Micro Force Be With You," which discusses a type of conductor like the applicant's made out of what is known in the industry as MEMS and refers to "fingers" and "silicon fingers," or "fingers made of silicon" primarily as a way of describing the product and not as a term of art within the industry. While applicant submits that this may be some evidence of how the phrase can describe the product, it is not sufficient evidence of how the term SILICON FINGER is widely understood by the public as specifically referring to the genus of the goods. Moreover, applicant submits that this language in the article is an example of careless and irresponsible journalism that typically can result in genericide of a mark but one which applicant would vigilantly attempt to thwart if granted a registration for its mark.

It appears from reviewing all of this evidence that the examiners have argued for the genericness of the SILICON FINGER mark based upon the facts that FINGER is highly descriptive or generic of applicant's goods because applicant's goods "look like" a finger and SILICON describes applicant's goods because the goods contain, but are not even made entirely out of, silicon. *See* applicant's declaration of January 8, 2004 executed by declarant Robert Keith Lee, General Manager of the Custom Design Engineering Dept. of Advantest America,

Inc., subsidiary of applicant. This argument is tantamount to suggesting that the longstanding and arguably well-known Beetle® mark (Reg. No. 1014346) for automobiles should be considered generic for a car that looks like or moves like a type of bug commonly known as a beetle.

Furthermore, the examiner has applied the wrong legal test in concluding that applicant's SILICON FINGER mark is generic. The examiner constantly refers to the *Gould* Federal Circuit case as the basis for concluding that applicant's SILICON FINGER mark is generic by explaining that the evidence submitted of the meaning of each word is sufficient to show that the SILICON FINGER mark is generic. The examiner states on page 2 of her final action refusing registration on the Supplemental Register, "Like the proposed mark in *Gould*, the applicant's proposed mark immediately and unequivocally describes the purpose, function and nature of the goods." However, the examiner has failed to produce evidence showing how the entire SILICON FINGER mark describes the goods in that manner. Moreover, describing an aspect of the goods like purpose, function and nature is not describing an entire genus for the goods as is required to show genericness.

Finally, the examiner has also failed to show any compelling third party need for using the term SILICON FINGER which would justify keeping this term in the public domain and depriving the applicant of their right to register the SILICON FINGER mark. One test of suggestiveness, set forth in *Educational Dev. v. Economy Co.*, 195 USPQ 482 (10th Cir. 1977), is the competitor's "need" test. A term will be considered merely descriptive (or perhaps generic) and not suggestive if competitors need to use the term in describing their products or services to purchasers and potential purchasers. *Id.* at 485. The examining attorney has cited U.S. patent nos. 6,232,669, 6,441,629 and 6,452,407 (U.S. application no. 09/740,179) as

evidence of the descriptive nature of Applicant's mark. As noted above, Applicant is also the assignee of U.S. patent nos. 6,535,003; 6,472,890; 6,466,043 and 6,420,884. The examining attorney is advised that a search of the USPTO patent database for patent abstracts containing the terms "silicon", "finger" and "contactors" revealed five patents, all of which are owned by Applicant and identified above. A search of the USPTO patent database for patent abstracts containing "silicon finger" returned zero results. Accordingly, under the competitor's need's test set forth above for determining suggestiveness, Applicant's mark should be considered at least suggestive as competitors do not appear to need to use the mark in describing their products or services.

B. SILICON FINGER Is Properly Entitled to Registration on the Supplemental Register because the Burden to Prove the Genericness of the Mark Has Not Been Satisfied by Clear Evidence

As noted above, in order to support a genericness refusal, or an inability to register a mark on the Supplemental Register, the examiner has the burden to prove by "clear evidence" that the mark sought to be registered is generic for the goods or services as described in the application. *In Re Merrill Lynch,* 4 USPQ2d 1141 (Fed. Cir. 1997) (overturning the TTAB's holding that CASH MANAGEMENT ACCOUNT is generic for financial services because the burden of showing that a proposed trademark is generic remains with the Patent and Trademark Office). In overturning the Board's genericness holding for the CASH MANAGEMENT ACCOUNT mark, the Federal Circuit stated, "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." *Id.* at 1143 (emphasis added).

Applicant respectfully submits that the evidence of record provided by the examiners in the subject case also involves a mixture of uses which in their totality do not rise to the level of clear evidence and are not sufficient to shift the burden of proving genericness from the USPTO to the applicant (to show the mark is not generic). The examiners have not submitted any articles or evidence showing the entire phrase SILICON FINGER used by third parties to refer to any sort of electronic circuit testing device or probe contactor device. The only references to this phrase cited by the examiners are a couple of instances in which the applicant's own goods are discussed, usually by the applicant itself as in a page from the applicant's web site or in a U.S. Patent issued to the applicant. According to the *American Fertility* case, absent such a showing, there can be no genericness holding for the mark. The evidence that the examiners submit showing the various and independent meanings of the words SILICON and FINGER are not sufficient to show the genericness of an entire phrase, as per the *American Fertility* case and, consequently, this evidence is insufficient to show the genericness of the entire SILICON FINGER mark. Applicant also considers much of that evidence insufficient as it relates more to actual semiconductor or electric circuit goods and not to testing devices for those goods, which are the real genus of applicant's goods. Moreover, since the evidence in the application record submitted by the applicant illustrates that not only is applicant the first and only user of the SILICON FINGER mark, but others in the field have no competitive need to use that term to describe or refer to similar or like goods, applicant contends that the USPTO has no justification for depriving applicant of its right to at least register the mark on the Supplemental Register and show how the mark could acquire distinctiveness over time.

IV. CONCLUSION

For the foregoing reasons, applicant respectfully requests that the refusal to register SILICON FINGER be reversed.

Respectfully submitted,

10/16/06
Date

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Exhibit 1

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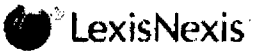

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