

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Hearing:
April 15, 2011

Mailed:
December 8, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shuffle Master, Inc.

Serial No. 77394063

Tirzah Abe Lowe, of Knobbe, Martens, Olsen and Bear, LLP for
Shuffle Master, Inc..

Katy Halmen, Trademark Examining Attorney, Law Office 109 (Dan
Vavonese, Managing Attorney).

Before Grendel, Holtzman, and Lykos, Administrative Trademark
Judges.

Opinion by Lykos, Administrative Trademark Judge

Shuffle Master, Inc. ("applicant") filed an application to
register THREE CARD POKER for "entertainment services, namely,
providing live games of chance in gaming establishments" in
International Class 41.¹ Applicant seeks to register the mark

¹ Application Serial No. 77394063, filed February 11, 2008, alleging
September 1995 as the date of first use anywhere and in commerce.
Applicant has disclaimed the word POKER and claimed ownership of the
following prior registrations:

Registration No. 2233569 for the mark THREE CARD POKER and DESIGN
for "[playing cards,] layout cloth [,and instructions sold as a unit]
for [playing]casino card games" in International Class 28, with a
disclaimer of THREE CARD POKER;

pursuant to Section 2(f) of the Trademark Act, 15 U.S.C.

§ 1052(f), asserting that it has acquired distinctiveness.

Applicant has appealed the examining attorney's final refusal to register the mark on the Principal Register pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the grounds that it is generic for the identified services or, alternatively, that applicant's mark is merely descriptive, and that applicant has failed to present sufficient evidence to show acquired distinctiveness thereby making the mark registrable pursuant to Section 2(f) of the Act.

Upon final refusal of registration, applicant filed a timely appeal and concurrently therewith, a request for reconsideration. The examining attorney denied applicant's request for reconsideration, stating that "no new facts or reasons have been presented..." Examining Attorney's Denial of Applicant's Request for Reconsideration, dated April 18, 2011, p. 1. Both applicant and the examining attorney have filed briefs and an oral hearing was held. For the reasons explained below, we affirm both refusals to register.

Registration No. 3166898 for the mark THREE CARD POKER NATIONAL CHAMPIONSHIP for "entertainment services, namely hosting a poker tournament" in International Class 41 with a disclaimer of THREE CARD POKER and CHAMPIONSHIP; and

Registration No. 3357470 for the mark THREE CARD POKER and design for "software for the play of card games" in International Class 9 with a disclaimer of THREE CARD POKER.

I. *Applicant's Motion to Accept its Late-Filed Brief*

Applicant has requested that the Board accept its late-filed brief. Applicant's brief was due Friday, June 25, 2010 but not filed until Monday, June 28. According to applicant, it erroneously believed it had timely filed the brief on June 25 using the Board's electronic filing system ESTTA. The paralegal working for applicant's attorney mistakenly believed that the appearance on the screen of the "Validate and Submit" button constituted confirmation that the brief had been successfully transmitted without taking further action. To support its motion, applicant has submitted a copy of the ESTTA screenshot and email from the paralegal stating her erroneous belief that the brief was successfully filed.

TBMP Section 1203.02(a) (3d ed. 2011) provides in relevant part:

If the brief is filed late, the applicant will be allowed an opportunity to submit an explanation for the late filing; in the absence of an adequate explanation, the appeal will be dismissed.

In light of the circumstances noted above, and considering that the brief was late by only one business day, applicant's motion to accept its late-filed brief is granted.²

² At oral hearing, the Board admonished applicant for using a font size in its briefs that did not conform with Trademark Rule 2.126(b) ("...text in an electronic submission must be at least 11-point type.").

II. ***Evidentiary Issues***

At oral hearing, the examining attorney objected to the Declaration of Robert Snow, Executive Vice President and Corporate Product Group Chairman of applicant, submitted with applicant's reply brief as untimely.³ Applicant, however, contends that the examining attorney improperly submitted new evidence in its denial of applicant's request for reconsideration which applicant had no opportunity to rebut.

Trademark Rule 2.124(d) provides that the record in an application must be complete prior to filing an appeal. However, regardless of whether an applicant submits new evidence with a request for reconsideration, the examining attorney may introduce additional evidence directed to the issue(s) for which reconsideration is sought. See *In re Davey Products Pty Ltd.*, 92 USPQ2d 1198 (TTAB 2009); *In re Giger*, 78 USPQ2d 1405 (TTAB 2006). The evidence submitted by the examining attorney with the denial of applicant's request for reconsideration is precisely of this nature, and therefore was timely filed. Applicant's objection to the examining attorney's evidence submitted with her denial of applicant's request for

³ In addition to the declaration of Mr. Snow, applicant resubmitted with both its main brief and reply brief materials that were previously made of record during ex parte prosecution of this case. By doing so, applicant unnecessarily increased the burden on the Board and size of the proceeding file. See generally TBMP Section 702.05 (3d ed. rev. 2011).

reconsideration is therefore overruled.

In addition, Trademark Rule 2.124(d) states that after the filing of an appeal, if the applicant desires to submit new evidence, it should request suspension of the appeal and a request for remand. Inasmuch as applicant did not formally request a second remand with the requisite showing of good cause but instead waited to introduce the declaration of Mr. Snow with applicant's rebuttal brief, it is untimely.

In view thereof, applicant's objection is overruled and the examining attorney's objection is sustained. The Board has given the declaration of Mr. Snow no consideration.

III. ***Genericness Refusal***

As a preliminary matter, we note that inasmuch as applicant initially filed its application for registration of the mark THREE CARD POKER on the Principal Register pursuant to Section 2(f), applicant has effectively conceded that the mark is, at a minimum, descriptive. *See The Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 ("where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive."). *See also In re Country Music Ass'n, Inc.*, ___ USPQ2d ___ Application Serial Nos. 78906900 and 78901341 (TTAB October 25, 2011).

Now we turn to our genericness analysis. A mark is a generic name if it refers to the class or category of goods and/or services on or in connection with which it is used. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986) ("Marvin Ginn"). The test for determining whether a mark is generic is its primary significance to the relevant public. Section 14(3) of the Trademark Act; *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and *H. Marvin Ginn, supra*.

The United States Patent and Trademark Office (USPTO) has the burden of establishing by clear evidence that a mark is generic and, thus, unregistrable. *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). See also *In re American Fertility Society, supra*; and *Magic Wand Inc. v. RDB Inc., supra*. "Doubt on the issue of genericness is resolved in favor of the applicant." *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005).

Our first task under *Marvin Ginn* is to determine, based on the evidence of record, the genus of applicant's services. The examining attorney maintains that the proper genus of services

is "providing three card poker games of chance." Examining Attorney's Brief, unnumbered p. 5. As the examining attorney further explains, "poker is clearly a genus of games of chance" and that certain types of poker games, such as 5 card draw, 7 card stud, and Texas Hold'em are also genres of games of chance. In connection therewith, the examining attorney has requested that the Board take judicial notice of the dictionary definitions of "poker," "Texas Hold 'Em", "Draw Poker" and "Stud Poker" retrieved from the online versions of *Merriam-Webster*, and *The Free Dictionary*, for the proposition that they are "all generic games of chance."⁴ Applicant objects to the examining attorney's request to take judicial notice of the dictionary definitions of "poker," "Texas Hold 'Em", "Draw Poker" and "Stud Poker," arguing that it is improper for the Board to take judicial notice of a legal conclusion as opposed to an adjudicative fact. We disagree, finding that the definitions merely serve as evidence that there are many variations of poker. We note in particular the definition of "poker" as

Any of several card games in which the player bets the that value of his or her hand is greater than that of the hands held by others, in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot. *www.merriam-webster.com*.

⁴ The Board may take judicial notice of dictionary definitions obtained through an Internet web site which exist in printed format. See e.g. *Osmotica Holdings Corp.*, 95 USPQ2d 1666, 1668 (TTAB 2010).

Applicant's objection is therefore overruled.

Turning now to applicant's position, applicant maintains that the examining attorney has defined the genus too narrowly, relying on the flawed logic of *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296 (9th Cir. 1979) ("*Anti-Monopoly*"). In that case, the Court of Appeals for the Ninth Circuit held that "when members of the general public use a game name to denote the game itself, and not its producer, the trademark is generic and therefore invalid." *Id.* at 304. In response to this decision, Congress amended the Trademark Act to clarify that a registered mark shall not be deemed to be descriptive or generic "solely because such mark is also used as the name of or to identify a unique product or service." Applicant takes the position that the examining attorney has too narrowly defined the genus of services based on *Anti-Monopoly*, and that instead, the proper genus of services is adequately defined by the recitation of services -- "entertainment services, namely, providing live games of chance in gaming establishments." Applicant's Brief, p. 10.

In order to resolve this issue, we find instructive both the recitation of services set forth in the application and applicant's own submissions describing its services. *See Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d at 1552 ("[A] proper genericness inquiry focuses on the description of [goods

or] services set forth in the [application or] certificate of registration."). See also *In re Reed Elsevier Prop. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (the Board, in order to define the proper genus of services, appropriately reviewed the www.lawyers.com website to determine the context of the recitation of services in applicant's application; although the recitation of services did not include the term "lawyers," Board properly concluded in determining the genus that lawyers were a "central and inextricably intertwined element" of the genus); *In re Steelbuilding.com*, 75 USPQ2d 1420, 415 F.3d 1293, 1298 (Fed. Cir. 2005) (where the Federal Circuit began its analysis of the genus by focusing on applicant's amended recitation of services ["computerized on-line retail services in the field of pre-engineered metal buildings and roofing systems"], but interpreted the meaning of "computerized online retail services" in light of the actual use being made by the applicant on its web site).

As noted above, the recitation of services in the application is "entertainment services, namely, providing live games of chance in gaming establishments" in International Class 41. Applicant's specimen of use describes applicant's services in the following manner:

Three Card Poker® is an exciting stud poker game that offers three ways to play and four different ways to win. You may be against the dealer, bet

on the value of your own three card hand or bet both.

Applicant's own materials make clear that the provision of "live games of chance in gaming establishments" encompasses a particular variation of the game of poker. Thus, the genus of services involved herein may be accurately identified as providing live games of chance in gaming establishments, including a variation of the game of poker.⁵ See e.g., *In re International Business Machines Corp.*, 81 USPQ2d 1677, 1679 (TTAB 2006) (based on dictionary definitions, Board found "server" to be the proper genus for goods identified as "computer network access products, namely, computer hardware and operating software therefor that allow connectivity to and the administration of public and proprietary computer networks and the processing of information contained thereon"); *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC generic for sprinklers used in attics; "The broad general category of goods involved here is sprinklers for fire protection. However, a product may be in more than one category, and here applicant's goods also fall within the narrower category of sprinklers for fire protection of attics."). See also, *Reed Elsevier*, *supra* at

⁵ In light of our determination, we need not reach the issue of whether it was proper for the examining attorney to request judicial notice of dictionary definitions to support her assertion that "three card poker" is the proper genus for our analysis.

1380 (LAWYERS.COM generic for online information exchange in the fields of law, legal news, and legal services; "a central and inextricably intertwined element of [the claimed] genus is information about lawyers and information from lawyers.")

Next, we must determine whether the designation THREE CARD POKER is understood by the relevant purchasing public primarily to refer to that genus of services. Our first task is to define the "relevant purchasing public." The record evidence in this case supports a finding that the relevant purchasing public consists of the general public who encounter live games of chance in gaming establishments.

With this in mind, we must now ascertain whether the designation THREE CARD POKER is understood by the relevant purchasing public as primarily referring to a live game of chance found in a gaming establishment, namely, a variation of the game of poker. We find that, in this case, the mark THREE CARD POKER is more analogous to the phrase considered by the court in *American Fertility Society, supra*, than it is to the compound word considered in *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110 (Fed. Cir. 1987),⁶ and should be analyzed according to the test set forth in that case and further

⁶ In other words, unlike the term SCREENWIPE contemplated by the Federal Circuit in *In re Gould, supra*, THREE CARD POKER appears to be a phrase comprising its constituent words, and not a compound word.

clarified in the case of *In re Dial-A-Mattress Operating Corp.*,
supra, 57 USPQ2d at 1810:

[W]here the proposed mark is a phrase (such as "Society for Reproductive Medicine"), the board "cannot simply cite definitions and generic uses of the constituent terms of a mark"; it must conduct an inquiry into "the meaning of the disputed phrase as a whole." *In re The Am. Fertility Soc'y*, 188 F.3d at 1347, 51 USPQ2d at 1836.

We turn now to the evidence of record. Competent sources to show the relevant purchasing public's understanding of a contested term include purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications. *In re Dial-A-Mattress Operating Corp.*, *supra*; *In re Bed & Breakfast Registry*, 791 F.2d 157, 160, 229 USPQ 818, 819 (Fed. Cir. 1986).

We find that the examining attorney has met her burden of proof that the relevant purchasing public would understand the term "three card poker" to refer to a live game of chance found in a gaming establishment, and more specifically, a variation of the game of poker. To demonstrate that applicant's applied-for term is generic, the examining attorney has made of record excerpts from various third-party Internet websites and articles retrieved from the LEXIS/NEXIS database. Some representative examples include (emphasis added):

"Games: Poker room and 2,600 slots (1 cent-\$100); 86 gaming tables: blackjack, sports betting, Spanish 21, craps, roulette, baccarat, mini-baccarat, four-card poker, **three-**

card poker, a poker room with 14 tables, Caribbean stud, Let It Ride, pai gow poker...Games: Poker room (19 tables) and more than 2,400 slot machines (1 cent-\$100); more than 80 table games: blackjack, blackjack bonus, craps, roulette, baccarat, mini-baccarat, **three-card poker**, Let It Ride, pai gow poker, Casino War, Big 6 Wheel, poker...Games: More than 3,000 slots (1 cent-\$25), 75 tables: blackjack, craps, roulette, single zero roulette, mini-baccarat, **three-card poker**, four-card poker, progressive pai gow, casino war, progressive Texas Hold'em, Ultimate Hold'em and a nonsmoking poker room." *Detroit Free Press*, April 8, 2010;

"As early as July, the Sands Casino Resort Bethlehem plans to add these 89 games: 41 blackjack tables, four craps, four roulette, four **three-card poker**, five mini-baccarat, four midi-baccarat, four pai gow, one Big Six, two Let It Ride, two Caribbean stud, four Texas Hold'em Bonus, one Casino." *The Morning Call, Inc.*, April 8, 2010;

"In addition to 2,000 slots, including progressive slots and video poker machines, Barona has more than 80 table games including blackjack, Pai Gow poker, Caribbean Stud, Barona Craps, **three-card poker**, four-card poker, Mississippi Stud, Let It Ride and new chipless table games including Barona Roulette, Rapid Baccarat and i-Table Blackjack." *Targeted News Service*, April 1, 2010;

"Hollywood Casino plans to run 40 table games and 12 live Texas Hold 'em/stud poker games. The games are 40 black jack tables; four tables each of roulette, craps and **three-card poker**; two tables each of mini-Baccarat, Pai Gow Poker and Let It Ride; and one table each of four-card poker and Spanish 21." *The Patriot-News*, March 24, 2010;

"At Parx, the gaming floor could include 39 blackjack tables, four craps tables, five roulette tables, five **three-card poker** tables and four baccarat tables." *Philadelphia Business Journal*, March 16, 2010;

"The well-lit, tan-carpeted main room is filled with clusters of slot machines - about 750 total - and eight card tables for blackjack and **three-card poker** games." www.trib.com;

"Take your choice from nine tables, including 2 blackjack, 1 single deck blackjack, 2 Spanish 21, 1 double deck Spanish 21, 1 **three card poker**, 1 ultimate Texas hold'em poker, and 1 Pai Gow (no commission)." www.bearrivercasino.com;

"Owned by the Concow-Maidu of the Mooretown Rancheria tribe, Feather Falls Casino in Oroville offers non-stop gaming action in a 100,000 square foot casino with 1,000 slot machines, 12 single deck blackjack tables, **three-card poker** tables, a non-smoking poker room, a 950-seat Showroom with live entertainment, and two restaurants - Village Café and Dreamcatcher Buffet." www.gowest.choicehotels.com;

"The Grand Victoria also has numerous table games including 18 blackjack tables, 3 **three-card poker** tables, four craps tables, one Caribbean stud poker table, one mini-baccarat table, and one full-size baccarat table, all located on one level for an easy transition between tables." www.conciergepreferred.com;

"The **three card poker** is another exciting poker variant which seems to have an increase in popularity in recent years." www.poker3card.com;

"Bodog 3 Card Poker, also known as Bodog 3 Card Poker, is a game that is not actually that different from other **three card poker** games at other casinos." www.allcasinoslots.com.

"So you want to be a millionaire? Count your lucky stars and head to Thunder Valley Casino where a **three-card poker** promotion offers a way. The promotion, which runs through November, will send the casino's best and luckiest **three-card poker** players to represent Thunder Valley in the Shuffle Master Three-Card Poker World Tournament at the Mandalay Bay Hotel & Casino in Las Vegas on Dec. 14-16. www.sfgate.com.⁷

⁷ Submitted by applicant as part of Exhibit H to the Declaration of Kirsten Clark, Vice President of Worldwide Marketing of applicant, paragraphs 4-8, 13 and 15, submitted with Response to Office Action dated June 12, 2009.

Applicant argues that the evidence submitted by the examining attorney is not probative. As a threshold matter, applicant contends that the excerpts from articles obtained from the Lexis/Nexis database are not a competent source to prove genericness. Applicant is mistaken. As part of the Board's long standing practice, an examining attorney may submit as evidence articles or excerpts of articles from the LEXIS/NEXIS database or other similar databases to support a refusal. See *In re Shiva Corp.*, 48 USPQ2d 1957, 1958 (TTAB 1998). See also TBMP Section 1208.01 (3d ed. rev. 2011). These articles are competent evidence of exposure of the term in a generic manner to the public and the meaning the public is likely to associate with the term.⁸

Applicant also contends that the examining attorney had a duty to disclose all articles retrieved from her search results of the LEXIS/NEXIS database. See footnote 19, Applicant's Brief. As an illustration, applicant points out that the examining attorney only submitted for the record 102 articles of a search that retrieved 1597. Again, we disagree. The Board would like to make clear that the examining attorney is under no

⁸ The same principle applies to evidence obtained from the Internet. See *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 1379, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (third-party websites are competent sources to determine what the relevant public would understand LAWYERS.COM to mean and provide substantial evidence to support the Board's decision).

obligation, and indeed is discouraged, from making such a large number of articles obtained from a Nexis search of record. Only a representative sample need be submitted.

Next, applicant contends that the evidence submitted by the examining attorney is not probative because it consists of nominative use referring to applicant itself. In addition, applicant maintains that many of the articles refer to licensed use of applicant's mark.⁹ As applicant argues, the mark THREE CARD POKER identifies a patented, proprietary game invented by Derek Webb, applicant's predecessor in interest, and licensed for use at over 1400 gaming tables in U.S. casinos and used in virtually every casino in the United States. See Declaration of Kirsten Clark, Vice President of Worldwide Marketing of applicant, paragraphs 4-8, 13 and 15, submitted with Response to Office Action dated June 12, 2009 ("Clark Declaration").

We are not persuaded by applicant's evidence regarding licensing of its mark. Applicant itself uses "three card poker" generically in its patent for the game as noted in the excerpt below:

The present invention comprises a casino style
wagering game against a dealer, comprising the steps

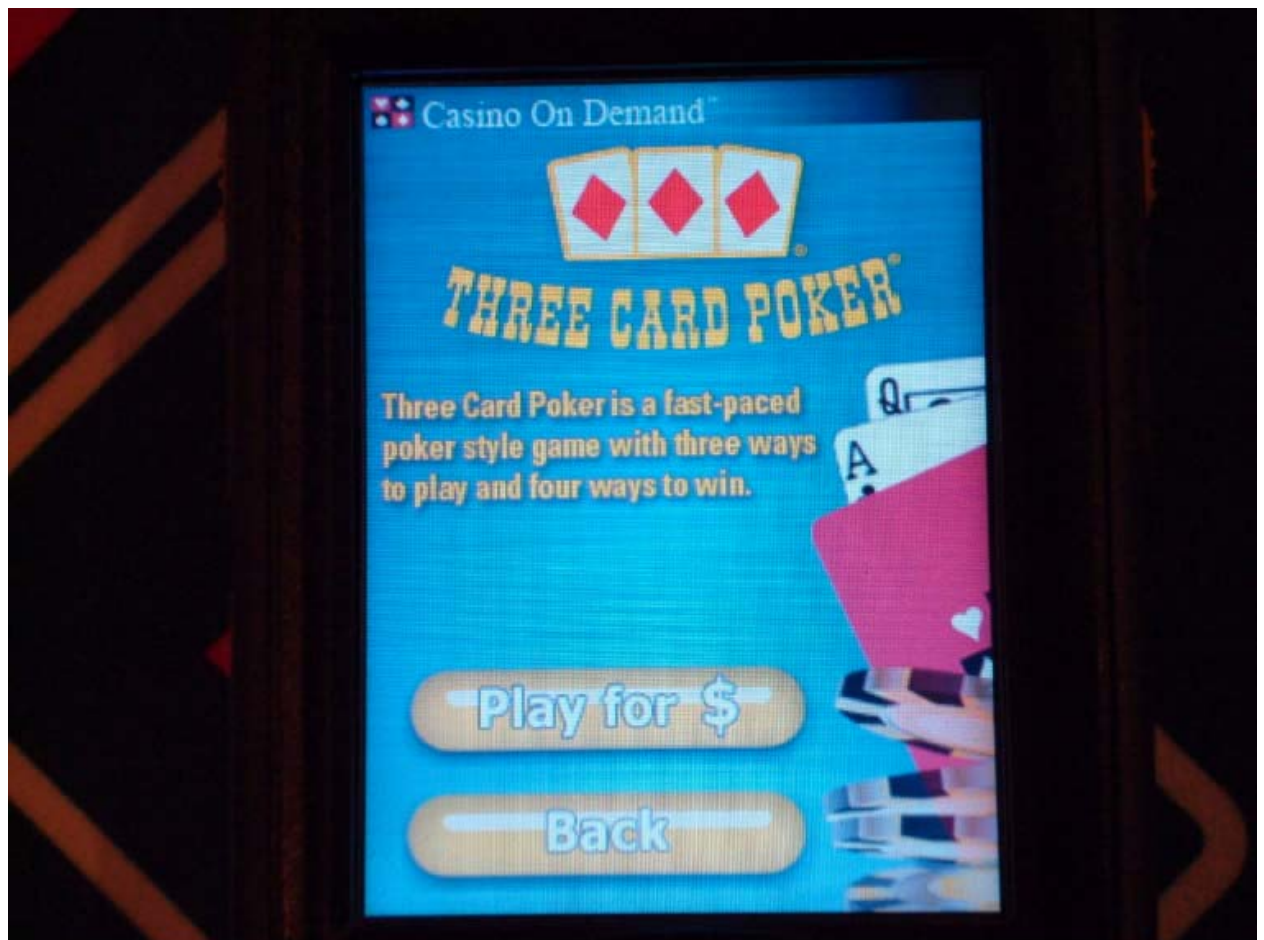
⁹ As an illustration, applicant contends that the following articles the examining attorney retrieved from the Nexis database attached to the December 12, 2008 Office Action refer to licensed uses of applicant's proprietary game: 1, 2, 4, 6, 7, 11, 12, 17, 20-23, 32, 43, 46, 52, 54, 55, 57, 58, 63, 65, 67-69, 71-74, 77, 78, 80-87, 89-92, 94-98, and 100.

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of placing a wager, dealing a **three card poker** hand to each player...

Applicant's Patent No. US 6,698,759 B2, dated March 2, 2004, copy attached to Response to Office Action. It is well established that applicant's own use in a generic manner is strong evidence that the term is generic. *See In re Gould, supra*, 5 USPQ2d at 1112. Moreover, although applicant states through the Clark Declaration that its licensees are required to identify the proprietary game using only the trademark THREE CARD POKER, the evidence shows that the mark as actually used by the licensees is not simply THREE CARD POKER, but rather THREE CARD POKER combined with other words and/or design elements in a particular display. Note the following representative examples:







PRIZE STRUCTURE

FIRST	\$500,000
SECOND	\$250,000
THIRD	\$125,000
FOURTH	\$75,000
FIFTH	\$50,000
SEMIFINALISTS	\$5,000
QUARTER FINALISTS	\$500

We acknowledge that many of the Internet and LEXIS/NEXIS excerpts show the term "three card poker" in initial capitalization form, which generally indicates use as a trade or brand name, and may refer to applicant or licensed use by third parties. See *In re Country Music Ass'n, Inc.*, __ USPQ2d __ Application Serial Nos. 78906900 and 78901341 (TTAB October 25, 2011) ("...initial capitalization of a term or phrase is generally used to designate a brand name, as opposed to a generic term."). Indeed, it is clear that many of the articles the examining attorney has submitted using the term "three card poker" refer directly to applicant. Nonetheless, in this particular case, the examining attorney submitted a sufficient amount of other evidence showing use of the term "three card poker" in a manner indicative of generic use of the term.

Next, applicant argues that the absence of a dictionary definition for "three card poker" indicates that the term is not generic, in light of the numerous dictionary entries for the term "poker." Applicant also points to the fact that the entry in *Wikipedia* for "three card poker" specifically states that it is a "trademarked name" referring to a proprietary game developed by Derek Webb, applicant's predecessor in interest. We are not persuaded. Contrary to applicant's assertion, the term does appear in a dictionary. We take judicial notice of the entry for "three card poker" in the online version of

Encyclopedia Britannica under the heading "poker"): "Three-card poker is a house-banked stud game in which three cards are dealt facedown to each player and the dealer. Each player makes two initial bets, one bet placed on a centre circle and the other placed on an ante square..." www.britannica.com.

Notwithstanding the entry from *Encyclopedia Britannica*, the examining attorney has provided ample evidence from other sources that the relevant public perceives "three card poker" as a generic designation for applicant's services. While applicant's predecessor in interest may have developed the game, as evidenced by the submission proffered by the examining attorney, the mark THREE CARD POKER is a generic term for the game.

Applicant argues that its disclaimer of the wording "THREE CARD POKER" on the Supplemental Register in its U.S. Registration No. 3166898 does not operate as an admission of genericness. We agree that the disclaimer does not constitute an admission of genericness. However, it does serve as probative evidence on the issue of genericness and illustrates that the applicant has not continuously asserted its exclusive rights to the wording "THREE CARD POKER". See *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 (Fed. Cir. 1987); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006); *In re Finisar Corp.*, 78 USPQ2d 1618, 1621

(TTAB 2006). This determination is consistent with the findings made above regarding unlicensed use of applicant's mark.

Finally, we consider applicant's consumer survey which purports to use both a "*Thermos*" and "*Teflon*" style methodology¹⁰ to measure the relevant public's understanding of the significance of the term THREE CARD POKER. See e.g., *In re Hotels.com L.P.*, 87 USPQ2d 1100, 1109 (TTAB 2008) (applicant submitted "Teflon" type survey in an attempt to show consumer recognition of HOTELS.COM as a brand name).¹¹ Applicant asserts that the survey results demonstrate that THREE CARD POKER is not generic. We disagree, finding that the survey methodology is fundamentally flawed.

For the *Thermos* style question, respondents were asked: "If you walk into a brand new casino and want to find the area where the dealer games are located, how would you complete the following question: Excuse me where can I find the ___?" The choices were BLACKJACK, CASINO WAR, CARD GAMES, FORTUNE PAI GOW, POKER, TABLE GAMES, TEXAS NO LIMIT, HOLD'EM POKER, or THREE CARD POKER. However, unlike the respondents in *Thermos*, *supra*,

¹⁰ See *E.I. du Pont de Nemours and Company v. Yoshida International, Inc., et.al.*, 393 F.Supp. 502, 185 USPQ 597 (E.D.N.Y. 1975) and *American Thermos Products Co. v. Aladdin Industries, Inc.*, 207 F. Supp. 9, 134 USPQ 98 (D. Conn. 1962) for a further explanation.

¹¹ Respondents were also asked a series of questions regarding the genus of the services at issue. We did not find the survey results to be probative on this issue; therefore, they were not considered when making our determination regarding genus.

the respondents in this case were not also asked to name any proprietary or brand name dealer games, or more specifically, whether any of the above terms referred to brand or proprietary names. As such, this portion of applicant's survey is of little probative value.

Respondents were then asked another series of questions which purported to use the *Teflon* style methodology, asking respondents whether THREE CARD POKER was "primarily" a "common name" for the following choices -- "live games of chance," "casino services," "casino games," "table games," "card games," or "poker" or whether it identified a "the name for a specific type of poker." Respondents were also asked whether they would use the term "three card poker" to refer to any of the same choices. The survey methodology, however, failed to follow the *Teflon* protocol because it did not ask any screening questions to ensure that respondents were capable of distinguishing between brand and common names. In applicant's survey, the only guidance respondents were provided was the following narrative:

A common name is a name that is used to refer to an entire class of items. For example, the common name for NIKE brand products might be shoes.

Equally problematic, respondents were not eliminated if they failed to understand the distinction.

By contrast, in the Board's recently decided case of *In re Country Music Ass'n, Inc.*, __ USPQ2d __ Application Serial Nos. 78906900 and 78901341 (TTAB October 25, 2011), respondents were screened in the following manner to ensure their understanding of this conceptual distinction:

The interviewer explained to the qualified survey respondents the conceptual distinction between a "brand or proprietary name" and "common name" using the following example: "By brand or proprietary name, I mean a name like 'Bank of America' which is used by one company or organization; by a 'common name' I mean a name like 'safe deposit box' which is used by a number of different companies or organizations. Ford Declaration, ¶ 14. Respondents were then asked two questions to test their ability to distinguish brand or proprietary names from common names: (1) Do you understand the name "National Football League" to be a brand or proprietary name or common term? (2) Do you understand the name "high school football" to be a brand or proprietary name or common term? One hundred persons were deemed qualified and interviewed after completion of the screening process. These qualified respondents were then given a list of terms and asked whether they were brand or common names.

In addition, applicant's potential survey choices were poorly worded. In lieu of directly asking respondents whether a term constituted a "brand" or "proprietary" name, respondents were instead asked whether a term referred to a "specific type of poker." The survey did not state that "specific type of poker" meant brand or proprietary name, and in fact, no explanation of the meaning of the term was supplied. Applicant

then argued that positive responses that "three card poker" referred primarily to a "specific type of poker" constituted evidence that respondents perceived the term as a brand or proprietary name. We disagree with this conclusion, and in fact find that such responses support the contrary finding that the term "three card poker" constitutes a generic term for a type of poker game. As such, the survey results do not favor applicant.

In sum, we find that despite some evidence of licensed and trademark use in the record, the examining attorney has met her burden of establishing that the term "three card poker" is generic for live games of chance in gaming establishments, namely, a variation of the game of poker. See e.g., *In re International Business Machines Corporation*, 81 USPQ2d 1677, 1684 (TTAB 2006) (finding significant evidence of generic use is not offset by applicant's evidence that shows proper trademark use by applicant).

IV. *Acquired Distinctiveness*

In view of our finding, the term "three card poker" cannot be registered under Section 2(f) of the Act. However, in the event that it is ultimately determined on any appeal from this decision that the mark is not generic, we will also address the issue of acquired distinctiveness. Applicant's request that the application be registered under the provisions of Section 2(f) is an admission that the mark is not inherently distinctive. We

add that the evidence amply demonstrates that the mark, if it is not generic, is highly descriptive. Applicant has the burden of establishing that its mark has become distinctive, and that the more descriptive the term, the greater the evidentiary burden to establish acquired distinctiveness.¹² See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988); *In re Bongrain International (American) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990).

Having carefully reviewed the evidence of record, we find that applicant's evidence of acquired distinctiveness is insufficient to establish a prima facie showing thereof. At the outset, we note applicant's continuous use since September 1995. Clark Declaration, ¶¶ 5-6. To the extent, if any, applicant asserts in its brief that this length of time is sufficient alone to prove acquired distinctiveness, given the highly descriptive nature of the mark, we disagree. Further evidence would be required.

Applicant states that it has annual gross revenues of \$30-40 million, and that its annual promotional and marketing expenditures total \$100,000. Clark Declaration, ¶ 28. Applicant also points to sponsorship of tournaments, promotional activities at trade shows and unsolicited media coverage in

¹² Despite the examining attorney's effective concession of the issue, we must make our own assessment of applicant's evidence.

trade journals as well as ownership of other registrations using the term THREE CARD POKER. Clark Declaration, ¶ 25. In addition, applicant submits that its web site usage (700 hits per day) supports a finding of acquired distinctiveness. Clark Declaration, ¶ 30. Although applicant's evidence demonstrates the success and popularity of the game, it is insufficient to demonstrate that the mark has acquired distinctiveness. See e.g., *In re Pennzoil Products Co.*, 20 USPQ2d 1753, 1760-61 (TTAB 1991). Given the highly descriptive nature of the term THREE CARD POKER, we would need to see a great deal more evidence (especially in the form of direct evidence from ultimate consumers) than what applicant has submitted in order to find that the designation has become distinctive of applicant's services.

Decision: The refusal under Section 2(e)(1) of the Act on the ground that the proposed mark is generic is affirmed; the refusal under Section 2(e)(1) of the Act on the ground that the mark is merely descriptive and the Section 2(f) showing is insufficient to establish acquired distinctiveness are likewise affirmed.