

ESTTA Tracking number: **ESTTA642789**

Filing date: **12/05/2014**

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

Proceeding	77684321
Applicant	Johnson & Johnson
Applied for Mark	BEST FOR BABY
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Submission	Reply to Examiner's Brief
Attachments	77684321 Reply to Examiner's Brief.pdf(117843 bytes)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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TRADEMARK: BEST FOR BABY

APPLICANT: Johnson & Johnson

SERIAL NO.: 77/684321

FILED: March 5, 2009

REPLY TO EXAMINER'S BRIEF

The Brief filed by the Examining Attorney on November 6, 2014 is itself a persuasive (and perhaps dispositive) argument as to why point-of-sale coupons are proper specimens. Each and every point presented by the Examining Attorney is literally self-refuting:

- Her argument that the point-of-sale coupons submitted as specimens are not available at the point-of-sale is negated by the fact that the coupons are provided to the consumer in the very store in which they can be redeemed – *at the point-of-sale*. A consumer can receive the coupon after purchase and immediately step back into the store and purchase the product depicted on the coupon, in the exact spot where they stand. Moreover, the coupon is part of the purchasing process itself – it is the instrument through which a purchase is induced and executed. One could hardly imagine a more direct connection to the purchasing process than a point-of-sale coupon.
- Similarly, Applicant's coupon specimen provides the means for purchasing the goods from information listed on the coupon – far more so than in other specimens deemed acceptable in the past. The coupon specimen depicts an image and a description of the products for sale, along with the store location where the goods can be purchased (a store, incidentally, where the customer is physically located at that exact moment). Just as a banner or shelf-talker encourages a customer to make a purchase and provides information for the consumer to do so, Applicant's coupon offers potential consumers everything they need to know to make a purchasing decision and motivates them to

purchase Applicant's goods. The Examining Attorney's assertions to the contrary are distinctions without a difference.

Furthermore, in all instances where a display associated with the goods was found acceptable in the past, the consumer, armed with the information necessary to purchase the goods, must still take the additional step of making the purchase. For instance, the *Lands' End* court explained that in the catalog as a display, "a customer can...make a decision to purchase by filling out the sales form and sending it in or calling in a purchase by phone." 24 U.S.P.Q.2d at 1316. If a catalog has a phone number or website address, the consumer still has to make the phone call or visit the website to purchase the item. The *catalog* does not order or purchase the goods as though a piece of artificial intelligence – *the consumer does*. Likewise, the point-of-sale coupon lists the retailer where the consumer can purchase the item, and the consumer takes the next step and visits the retailer to order or purchase the goods. In this way, the coupon provides the means for ordering or purchasing the goods, just as other acceptable specimens do.

In her troubled attempt to distinguish the *Lands' End* case, the Examining Attorney states that "applicant's coupons are unlike the *Lands' End* catalog in that a customer cannot make a decision to purchase by filling out the coupon, sending the coupon to Johnson & Johnson or using the coupon to call in a purchase by phone. Nor, can the consumer order the product from either of the stores shown on the coupon." *Examiner's Brief at 9*. However, these statements are inaccurate – the consumer can *of course* order or purchase the product from either of the stores shown on the coupon by visiting the retailer and purchasing the goods. The *Lands' End* case makes no distinction as to how the purchase must be made, e.g. by phone, online, or from a brick-and-mortar store; therefore, the Examining Attorney's argument is contradicted by the entire point of the coupon itself.

In this case, the Examining Attorney fails to acknowledge the changing landscape for purchasers and how this landscape affects trademark owners. Behavior-based point-of-sale coupon dispensing machines are relatively new, and are part of the extraordinary growth of

innovative technologies in the couponing space in recent years. Point-of-sale coupons are integral to the consumer experience of a brand, and if affirmed, this rejection will create uncertainty in the future in connection with new coupon and purchasing technologies. Moreover, there is little question that a point-of-sale coupon is very much of a piece with the types of consumer displays that have rightfully been viewed as proper specimens. As such, the Board should reverse the Examining Attorney's rejection and permit the application to proceed to registration.

Respectfully submitted,



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Date: December 5, 2014

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