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Mailed:  
May 24, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Louisiana Fish Fry Products, Ltd.*  
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Serial No. 77816809  
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R. Bennett Ford, Jr. of Roy, Kiesel, Ford, Doody & Thurman for Louisiana Fish Fry Products, Ltd.

Amy L. Kertgate, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).  
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Before Kuhlke, Bergsman and Lykos, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Louisiana Fish Fry Products, Ltd. (“applicant”) filed a use-based application to register on the Principal Register the mark LOUISIANA FISH FRY PRODUCTS BRING THE TASTE OF LOUISIANA HOME and design, shown below, for goods ultimately identified as “marinade; sauce mixes, namely, barbecue shrimp sauce mix; remoulade dressing; cocktail sauce, seafood sauce; tartar sauce; gumbo filé; and cayenne pepper,” in Class 30.



Applicant disclaimed the exclusive right to use “EST. 1982” and claimed that LOUISIANA FISH FRY PRODUCTS and the pictorial representation of the State of Louisiana had acquired distinctiveness in accordance with Section 2(f) of the Trademark Act of 1946. Applicant also claimed ownership of the following registrations:

1. Registration No. 2794015 on the Principal Register for the same mark as in the application at issue for “cajun blackened seasoning,” in Class 30.<sup>1</sup> Applicant disclaimed the exclusive right to use “Fish Fry Products” and “Est. 1982” and with a claim of acquired distinctiveness pursuant to Section 2(f) in part as to the word “LOUISIANA” and the map of the State of Louisiana.

2. Registration No. 2827057 on the Principal Register for the same mark as in the application at issue without the fleur de lis for “seasonings, namely, crawfish, crab and shrimp boil; mixes, namely, dirty rice mix consisting primarily of rice and also containing vegetables; etouffee mix consisting primarily of flour, seasonings, and also containing vegetables; gravy mix; gumbo mix consisting primarily of flour seasonings and also containing onions; jambalaya mix consisting

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<sup>1</sup> Issued December 16, 2003; renewed.

primarily of packaged rice and spices; red beans and rice mix consisting primarily of rice, beans, seasoning, and also containing vegetables; shrimp creole mix consisting primarily of flour and seasonings and also containing vegetables; and cobbler mix consisting primarily of sugar, flour, leavening and spices,” in Class 30.<sup>2</sup> Applicant disclaimed the exclusive right to use “Products” and “Est. 1982” and claimed acquired distinctiveness in part as to the word “LOUISIANA” and the map of the state of Louisiana. 3. Registration No. 2827571 on the Principal Register for the same mark as in the application at issue without the fleur de lis for “hush puppy mix, seasoned batter mixes, namely, fish fry, chicken fry, and shrimp fry, baking seasonings for chicken and fish,” in Class 30.<sup>3</sup> Applicant disclaimed the exclusive right to use “Fish Fry Products” and “Est. 1982” and claimed acquired distinctiveness in part as to the word “LOUISIANA” and the map of the state of Louisiana.

During the prosecution of its application, applicant also claimed ownership of the following registrations:

1. Registration No. 2801892 for the mark LOUISIANA FISH FRY PRODUCTS, in standard character form, for *inter alia*, seasonings and sauces, in Class 30.<sup>4</sup> Applicant claimed that “Louisiana” had acquired distinctiveness and disclaimed the exclusive right to use “Products.”

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<sup>2</sup> Issued March 30, 2004; Sections 8 and 15 affidavits accepted and acknowledged.

<sup>3</sup> Issued March 30, 2004; Sections 8 and 15 affidavits accepted and acknowledged.

<sup>4</sup> Issued January 6, 2004; renewed.

2. Registration No. 2827058 for the mark LOUISIANA FISH FRY PRODUCTS and design, shown below, for “cocktail sauce, tartar sauce, seafood sauce and remoulade dressing,” in Class 30.<sup>5</sup> Applicant claimed that “Louisiana” had acquired distinctiveness and disclaimed the exclusive right to use “Products.”



The Trademark Examining Attorney accepted the Section 2(f) claim of acquired distinctiveness as to LOUISIANA and the map of Louisiana but refused registration on the grounds that the term “Fish Fry Products” engenders a separate commercial impression and must be disclaimed under Sections 2(e)(1) and 6 of the Trademark Act because the term “Fish Fry Products” as used by applicant is either generic or because it is merely descriptive and it has not acquired distinctiveness.

We consider the disclaimer requirement first.

A. Whether the term “Fish Fry Products” should be disclaimed under Sections 2(e)(1) and 6 of the Trademark Act?

According to the Trademark Examining Attorney, “[a]pplicant has been required to enter a disclaimer of the term ‘FISH FRY PRODUCTS’ apart from the mark as shown because this term when used in connection with the goods in the

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<sup>5</sup> Issued March 30, 2004; Sections 8 and 15 affidavits accepted and acknowledged.

application, is generic and therefore unregistrable under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).”<sup>6</sup>

Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a) reads, in relevant part, as follows:

The Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.

A disclaimer is a statement that the applicant or registrant does not claim the exclusive right to use a specified element or elements of the mark in a trademark application or registration. The significance of a disclaimer is conveyed in the following statement:

As used in trademark registrations, a disclaimer of a component of a composite mark amounts merely to a statement that, in so far as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.

*Sprague Electric Co. v. Erie Resistor Corp.*, 101 USPQ 486, 486-87 (Comm’r Pats. 1954).

The Trademark Office may require a disclaimer as a condition of registration if the term in the mark is generic with respect to at least some of the goods in the genus, and registration is properly refused in the absence of a disclaimer. *In re Greenliant Systems Ltd.*, 97 USPQ2d 1078, 1082 (TTAB 2010), *citing In re Analog Devices, Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff’d without pub. op.*, 871 F.2d

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<sup>6</sup> Trademark Examining Attorney Brief, p. 4 (unnumbered).

1097, 10 USPQ2d 1879 (Fed. Cir. 1989) (registration is properly refused if the subject matter for registration is generic of any one of the goods for which registration is sought); and *In re Creative Goldsmiths of Wash., Inc.*, 229 USPQ 766, 768 (TTAB 1986) (“[I]t is within the discretion of an Examining Attorney to require the disclaimer of an unregistrable component (such as a common descriptive, or generic, name) of a composite mark sought to be registered on the Principal Register under the provisions of Section 2(f).”).

Failure to comply with a requirement for a disclaimer is a basis on which to refuse registration. *See In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399-1400 (Fed. Cir. 2006); *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Omaha Nat’l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 47 (C.C.P.A. 1975); *In re Nat’l Presto Indus., Inc.*, 197 USPQ 188, 190 (TTAB 1977); *In re Pendleton Tool Indus., Inc.*, 157 USPQ 114, 115 (TTAB 1968).

When a proposed mark is refused registration as generic, or a disclaimer is required on that basis, the examining attorney has the burden of proving genericness by "clear evidence" thereof. *See In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); and *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987).

The issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to

refer to the category or class of goods in question. *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *In re Women's Publishing Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992). Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *Ginn*, 228 USPQ at 530. Evidence of the public’s understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *See Merrill Lynch*, 4 USPQ2d at 1143; *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We begin by finding that the genus of the goods at issue in this case is sauces, marinades and spices. *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (“[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.”).

Turning to the second inquiry, how the public understands the term, the relevant public consists of ordinary consumers who eat fried fish.

As noted above, the evidentiary burden of establishing that a term is generic rests with the USPTO and the showing must be based on clear evidence. *Merrill Lynch*, 4 USPQ2d at 1143.

Based on the record described below, we find that there is clear evidence to support a finding that the relevant public, when it considers FISH FRY PRODUCTS in conjunction with sauces, marinades and spices, readily understands the term to identify a type of sauce, marinade or spice used for fish fries.

A “fish fry” is defined as follows:

1. A cookout or other meal at which fried fish is the main course.
2. A piece of fried fish.<sup>7</sup>

Applicant used the term “fish fry” in its Registration No. 2827571 to identify “seasoned batter mix mixes, namely, fish fry, chicken fry and shrimp fry.”

The word “product” is defined, *inter alia*, as follows:

- (1): something produced; *especially*: COMMODITY (2): something ... that is marketed or sold as a commodity.<sup>8</sup>

Thus, the meaning of the term “fish fry products” is a commodity sold or used with fried fish. The combination of the term “fish fry” with the word “products” does not have an incongruous meaning or form a unique commercial as applied to applicant’s goods such that the term “Fish Fry Products” loses its ordinary meaning.

In her August 8, 2012 Office action, the Trademark Examining Attorney submitted the evidence set forth below to prove that “fish fry” is commonly used to

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<sup>7</sup> *Yahoo! Education* (yahoo.com). See also *MSN Encarta Dictionary* (encarta.msn.com) (“a meal with deep-fried fish as the main course”); *Merriam-Webster Online* (merriam-webster.com) (“a picnic or supper featuring fried fish”; “fried fish”) (March 22, 2010 Office action). (December 14, 2009 Office action).

<sup>8</sup> *Merriam-Webster Online* (merriam-webster.com). See also *MSN Encarta Dictionary* (encarta.msn.com) (“company’s goods or services: the goods or services produced by a company”). (March 22, 2010 Office action).



identify fried fish and dinners featuring fried fish. The evidence also highlights the sauces, marinades and spices associated with fish fries.

1. Eleven articles from the LexisNexis database using the term “fish fry” to identify fried fish meals. The following articles are representative:

a. *Milwaukee Journal Sentinel* (March 3, 2000)

Where to cast your line for a different bit of fish

\* \* \*

So generally speaking, our search for fish fries with a twist found that your fried fish is safe in Milwaukee – thought it sometimes gets updated and redefined with spices and marinades.

b. *Chicago Sun Times* (April 23, 2010)

Solid entertainment; Little Bucharest Bistro puts a new twist on Old World fare

\* \* \*

Revolution Brewing Taps Into Beer Frenzy

\* \* \*

The frites with the fish were quite good, too, but the roasted red pepper remoulade and the honey jalapeno slaw were even better, elevating this rather simple fish fry to another level of deliciousness.

c. *Star Tribune* (Minneapolis) (March 11, 2012)

Deals of the week

Food

Famous Dave’s (16 participating Twin Cities locations ...) has entered the all-you-can-eat fish fry business on Fridays, now through April 8. The menu: cod fried in

cornmeal-lager beer, a spicy pickle tartar sauce, cornbread muffins and a choice of two sides, for \$14.99.

2. Evidence from Internet websites.

a. On July 6, 2011, the *Al Dente Blog* (aldenteblog.com) posted

“The Utica Edition: Fish Fry, Not Just For Friday Nights.”

If you grew up in Utica, it wasn’t until you left that you realized many of the foods you were accustomed to couldn’t be found in other parts of the country. Tomato pie is just one example. Friday night fish fry is another.

Now, fish fry is by no means unique to Utica. You can find it all around Upstate New York, if not much of the Northeast. ...

In Utica [sic] fish fry includes fried haddock, french fries (or sometimes a baked potato), cole slaw and tartar sauce.

The readers posted comments regarding their experiences with “fish fries.”

b. Ray’s Butcher Shoppe (raysbutchershoppe.com) advertised a “Friday Fish Fry Carryout.” “All buckets and dinners include tartar or seafood sauce.”

c. An article about “fish fry” in Albany posted August 23, 2011 on the *All Over Albany* magazine website (alloveralbany.com) entitled “Fish Fry at Gene’s.”

As a primer to those unfamiliar with the form, there are three fish fry sauces: tartar, cocktail and chili.

3. Recipes using the term “fish fry.”

a. Recipe posted on the Indian food blog (recipes-indianfood.blogspot.com)

### Pan Fried Indian Fish Fry Recipe

Fish fry recipe is a simple and heart healthy recipe made with marinated fish filets, fried on a non-stick pan over medium heat. In this fish fry recipe I have used the Tilapia fish.

The recipe include a recipe for fish marinade

b. Recipe posted on the Sinful Curry website ([sinfulcurry.com](http://sinfulcurry.com)) for

“Pan Roasted Salmon/Kerala Fish Fry.”<sup>9</sup>

... This is a staple for most meat eating Malayalees and we usually have a number of ways of cooking it. But I find the ‘Kerala fish fry’ to be the tastiest and easiest of them all.

There are five basic ingredients for this fried fish marinade: ginger, garlic, chili, turmeric and salt.

c. A recipe for Malvani Fish Fry, including a marinade, posted on Niya’s World website ([nyasworld.blogspot.com](http://nyasworld.blogspot.com)). One of the three posted comments was “Yummy fish fry ... crisp.”

d. A “Homemade Fried Catfish –Fish Fry Recipe,” including a marinade, posted on the *FindItRecipe.com* website (“Perfect for a summer fish-fry.”).

e. A recipe for “Beer Battered Fish Fry With Homemade Tartar Sauce” posted on the *GroupRecipes.com* website.

Our friends on the lake had a fish fry a couple of weeks ago, and the fish was great!. This is his recipe. The tartar sauce is what was made in my house growing up,

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<sup>9</sup> See also *Pazham Pappadam Payasam* website ([cookingwithkairalisisters.com](http://cookingwithkairalisisters.com)) for a “Kerala style Masala Tilapia fry” (“Fish fry is something that seafood lovers cannot resist” and “if you like the fish fry a little tangy add about a ½ tsp tamarind paste along with the marinade.”).

every time we had fish, whether it was frozen fish sticks or sole!

f. Rachael Ray posted a recipe for “Fish Fry with Tartar Sauce” on her website *RachaelRayShow.com*.

g. The *IHaveTheRecipeForThat.com* website posted (July 9, 2011) a recipe for “Homemade Cocktail Sauce for your Fish Fry.”

This time of year I always see people in the grocery store buying jars of cocktail sauce. I like to assume that they have gotten back from an exciting deep sea fishing trip and are cooking up their fresh catch and having a fish fry.

In her March 22, 2010 Office action, the Trademark Examining Attorney submitted the evidence listed below to prove that marinades, sauces and spices are an integral part of fried fish recipes.

a. The *Wikipedia.com* entry for “Rémoulade” which states that rémoulade “is now more often used as an accompaniment to seafood dishes, especially pan-fried breaded fish fillets.” See also entry for “Rémoulade Sauce Recipe” posted on the *Life123.com* website (“It has become popular to use rémoulade with fish dishes, especially sole and other breaded and fried fish.”).

b. A recipe for “Fried Fish Marinated in Garlic, Vinegar, Oregano, and Cumin” posted on the October 2002 issue of the *Bon Appétit* magazine (epicurious.com).

Generally this dish is served in Andalusia as part of a mixed fish fry, but it’s wonderful on it’s [sic] own. The marinade makes the fish flavorful and succulent.

c. A “Marinated Fried Fish” recipe posted on the *PepperFool.com* website.

d. The first ten of 184 listings from a search for “fish marinades” in the *Cooks.com* website. *See also* the list of sauce recipes for meat and fish posted on the Southern Food section of the *About.com* website.

e. A “Buttermilk Marinated Fried Catfish Recipe” posted on the *Cookingfishmonger.com* website.

f. A “Cornmeal Fried Catfish with Rémooulade Recipe” posted on the *Chow.com* website. This recipe explains that “Rémooulade is a mayonnaise loaded with flavor. ... Though it is normally served with fried-fish dishes such as our Cornmeal Fried Catfish, we also like it with boiled shellfish or mixed into a potato salad.”

g. A recipe for “Oven-Fried Catfish with Rémooulade Sauce” posted on the July 2007 issue of *Gourmet* magazine (epicurious.com).

h. An article entitled “How to Make a Dipping Sauce for Fish and Seafood” posted on the *eHow.com* website. The author recommends the sauce with baked, broiled or fried fish.

i. An advertisement for the sale of individual portions of “Cocktail Sauce” posted on the *WebRestaurantStore.com* website. It is a “House blend Seafood Cocktail Sauce” that is promoted for use with “fried shrimp, fried fish, oysters, and crab cakes.”

j. A recipe for “Cajun Cuisine (Fried Catfish With Cajun Seafood Sauce)” posed on the *Cooks.com* website.

k. Emeril Lagasse's recipe for "Fried Fish Fingers with Tartar Sauce" posted on the *FoodNetwork.com* website. The recipe notes that "Pan-Crispy Fish with Crawfish Sauce" is a similar recipe. *See also* the "Fried Fish, Tartar Sauce, French Fries and Hushpuppies" recipe posted on the *BigOven.com* website; "How to Make Fried Fish and Tartar Sauce at Home" posted on the *eHow.com* website.

m. The fried fish recipes posted on the *Whatscookinginamerica.com*, *Gameandfishingrecipes.com*, *CookingLouisiana.com*, *Channel4.com* and the *eHow.com* websites list cayenne pepper as an essential ingredient for the fish batter.

In her October 25, 2010 Office action, the Trademark Examining Attorney submitted 23 news articles demonstrating the use of sauces, marinades and spices in connection with fried fish. The following articles are representative:

a. The Columbus Dispatch (March 4, 2010)

Offshoot falls short of mark for Cincinnati classic

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Several pieces of battered, deep-fried cod (Ted's fish fry, \$17.50) are enhanced by an excellent tartar sauce with horseradish overtones.

b. *St. Louis Post-Dispatch* (April 2, 2004)

Fish Fries Offer a Place For Gab and Grub

Parishioners Bond in Lenten Tradition

\* \* \*

... Her personal but thorough survey of the area's many fish purveyors earned her a splash at the St. Louis

Review, the newspaper of the St. Louis Archdiocese, which in 199 called her the “fish fry aficionado.”

Stretch, 56, grew up in Glasgow Village and prefers the traditional squared cod portion to the baked filets that some places serve to accommodate changing tastes. But she doesn’t want her fried fish to taste greasy. And she likes homemade cocktail sauce and anything else that the fish-fry volunteer armies don’t pour from cans.

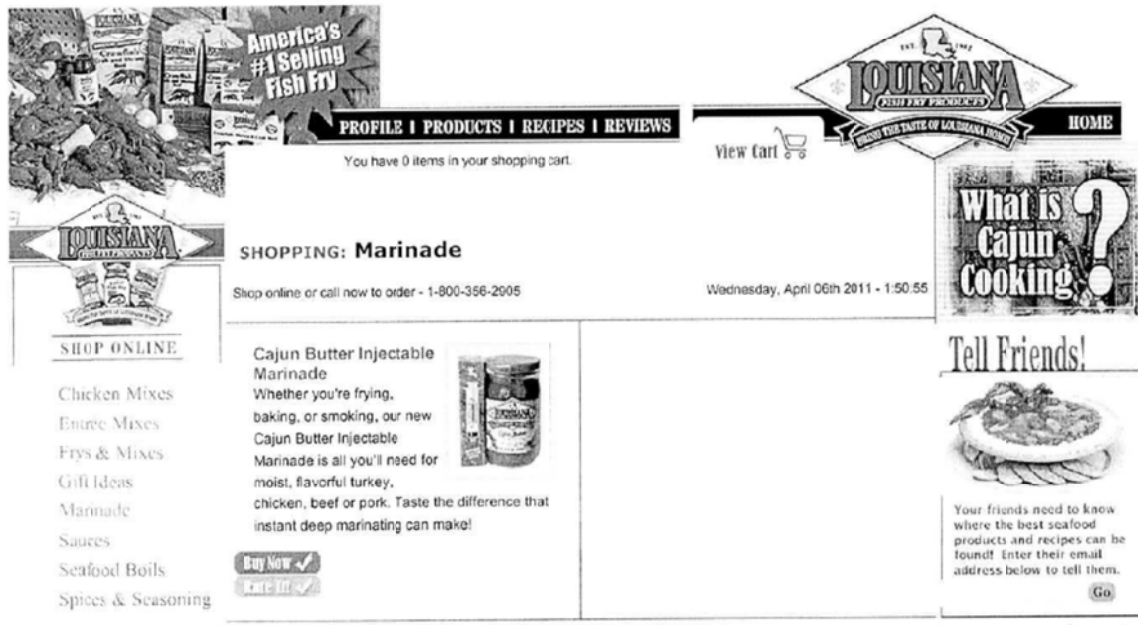
c. *The Boston Globe* (March 5, 2008)

Good Food, Drink, Music Are On The Playlist

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The Highland fish fry is a piece of moist, perfectly fried catfish served with hush puppies and remoulade. There’s also craveable po’ boy of blackened catfish on baguette, served with sweet house-made pickles. There’s a bit of heat to it from the cayenne, but it tastes downright mild beside a bowl of curried goat stew on jasmine rice ...

In its April 28, 2011 response to an Office action, applicant submitted an excerpt from its website Applicant’s website (louisianafishfry.com) shown below. The website displays the terms “Louisiana Fish Fry Shopping” and “America’s #1 Selling Fish Fry” and advertises products for fish fries, namely, sauces, marinades and spices.



The screenshot shows the Louisiana Fish Fry website. At the top left, there's a banner for "America's #1 Selling Fish Fry". Below it, a navigation bar includes "PROFILE | PRODUCTS | RECIPES | REVIEWS". A shopping cart icon indicates "You have 0 items in your shopping cart." and a "View Cart" link. The main header features the "LOUISIANA FISH FRY" logo with the tagline "BRING THE TASTE OF LOUISIANA HOME" and a "HOME" link. On the left, a "SHOP ONLINE" section lists categories: Chicken Mixes, Entree Mixes, Frys & Mixes, Gift Ideas, Marinade, Sauces, Seafood Boils, and Spices & Seasoning. The main content area is titled "SHOPPING: Marinade" and includes the text "Shop online or call now to order - 1-800-356-2905" and the date "Wednesday, April 06th 2011 - 1:50:55". A product listing for "Cajun Butter Injectable Marinade" is shown, describing it as a versatile marinade for frying, baking, or smoking. To the right, there's a "What is Cajun Cooking?" section with a large question mark and a "Tell Friends!" section with a photo of a dish and a "Go" button.

The Rex Fine Foods website (rexfoods.com) advertises that company's spices and seasonings for use at fish fries (*i.e.*, fish fry products).



Cajun Supermarket (cajunsupermarket.com) also advertises sauces and spices. Cajun Supermarket promotes itself as follows:

Welcome to the Internet's premier source for All Louisiana Cajun & Creole, goods and accessories. We specialize in offering the most sought after Louisiana products.



There is no dispute that the term “Fish Fry” is a unitary term that means fried fish. The issue before us, therefore, centers on the effect of the addition of the word “Products” to the term “Fish Fry.” The word “products” as used in the term “Fish Fry Products” carries its dictionary definition and is without any source-identifying capability. *See In re Paint Products Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988) (“[P]urchasers encountering the words ‘PAINT PRODUCTS CO.’ on the goods for which registration is sought [paints and coatings] would view those words not as a trademark, but in their ordinary dictionary sense; a company that sells paint products [and] because it describes the goods of any company selling such products, the phase should remain available for applicant's competitors”). *See also In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) (the word “press” in the mark PSYCHOLOGY PRESS is in the nature of entity designation which is incapable of serving a source-indicating function). Therefore, FISH FRY PRODUCTS is the combination of two generic terms, “Fish Fry” and “Products,” joined to create a compound term. *See In re Wm. B. Coleman Co.*, 93 USPQ2d 2019, 2025 (TTAB 2010); *In re Eddie Z's Blinds and Drapery, Inc.*, 74 USPQ2d 1037, 1041-42 (TTAB 2005). In this case, the separate terms retain their generic significance when joined together to form the compound term that has “a meaning identical to the meaning common usage would ascribe to those words as a compound.” *In re Wm. B. Coleman Co.*, 93 USPQ2d at 2025, *quoting In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111-12 (Fed. Cir. 1987). Accordingly,

consumers will perceive the term in its ordinary dictionary sense as commodities used for preparing and eating fried fish.

Even if we treat FISH FRY PRODUCTS as a phrase, rather than a compound term, the record continues to support finding that FISH FRY PRODUCTS is generic when used in connection with sauces, marinades and spices for fried fish even in the absence of evidence that applicant's competitors use the term FISH FRY PRODUCTS. *See In re Nat'l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983) (SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE held apt descriptive name for conducting and arranging trade shows in the hunting, shooting, and outdoor sports products field even though applicant was the only user of the term). The evidence noted above establishes that FISH FRY PRODUCTS identifies the type of sauces, marinades and spices applicant is selling (*i.e.*, sauces, marinades and spices used with fried fish).

Applicant argues that its products are not limited to fried fish and, in fact, some of the products would ordinarily not be used on fried fish.<sup>10</sup> However, if a mark is found generic for one of several products listed in the description of goods, registration will be refused for that entire class of goods. *See In re Quik-Print Copy Shop, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980) ("Registration will be denied if a mark is merely descriptive of any of the goods or services for which registration is sought."); *In re theDotCommunications Network LLC*, 101 USPQ2d 1062, 1068 (TTAB 2011).

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<sup>10</sup> Applicant's Brief, p. 7. *See also* Applicant's Reply Brief, pp. 3-4.

Applicant also argues that although “Fish Fry” may be generic for fried fish batter that does not make it generic for sauces, marinades or spices.<sup>11</sup> However, applicant’s mark is FISH FRY PRODUCTS, not just “Fish Fry,” and the meaning and commercial impression engendered by the mark in its entirety are commodities (*i.e.*, sauces, marinades and spices) used in connection with fried fish.

In view of the foregoing, we find that the relevant public will understand FISH FRY PRODUCTS to refer to sauces, marinades and spices used in connection with preparing and eating fried fish. FISH FRY PRODUCTS is, therefore, incapable of identifying the source of such products because it is a term that purchasers will understand and will use to refer to as a type of product. As such, it must be left available for use by other companies that sell sauces, marinades and spices. Accordingly, the exclusive use of FISH FRY PRODUCTS must be disclaimed.

B. Whether the term “Fish Fry Products” has acquired distinctiveness?

If, on appeal, it should be found that FISH FRY PRODUCTS is not generic for any of the identified goods, it may nonetheless be considered at least descriptive of the goods and, if so, unregistrable in the absence of a showing of acquired distinctiveness. Accordingly, we now consider in detail applicant’s evidence of acquired distinctiveness.

In finding above that the designation FISH FRY PRODUCTS is incapable of being a source identifier for applicant’s goods (*i.e.*, sauces, marinades, and spices),

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<sup>11</sup> Applicant’s Brief, pp. 8-9.

we considered all of the evidence touching on the public perception of this designation, including the evidence of acquired distinctiveness. In this section of our opinion, we consider the evidence of acquired distinctiveness only with regard to whether it would be sufficient to allow registration of applicant's mark without a disclaimer, if FISH FRY PRODUCTS ultimately is found merely descriptive but not generic. Under such circumstances, applicant has the burden to establish a *prima facie* case of acquired distinctiveness. *See Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988).

The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (C.C.P.A. 1970); *In re Hehr Mfg. Co.*, 279 F.2d 526, 528, 126 USPQ 381, 383 (C.C.P.A. 1960); *In re Gammon Reel, Inc.*, 227 USPQ 729, 730 (TTAB 1985). Typically, more evidence is required where a mark is so highly descriptive, that purchasers seeing the matter in relation to the named goods would be less likely to believe that it indicates source in any one party. *See, e.g., In re Bongrain Int'l Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *In re Seaman & Assocs., Inc.*, 1 USPQ2d 1657, 1659 (TTAB 1986); *In re Packaging Specialists, Inc.*, 221 USPQ 917, 919 (TTAB 1984).

Applicant submitted the evidence listed below to prove that FISH FRY PRODUCTS has acquired distinctiveness.

A. February 2, 2010 response to Office action.

1. Declaration of William Pizzolato, applicant's President, attesting that the term FISH FRY PRODUCTS as acquired distinctiveness through applicant's substantially exclusive and continuous use of FISH FRY PRODUCTS for at least five years preceding the date of the declaration. Because of the highly descriptive nature of the term FISH FRY PRODUCTS, a declaration of applicant's substantially exclusive and continuous use of the term for five years will not be sufficient to establish distinctiveness. *See In re Kalmbach Publ'g Co.*, 14 USPQ2d 1490 (TTAB 1989) (holding applicant's sole evidence of acquired distinctiveness, a claim of use since 1975, insufficient to establish that the highly descriptive, if not generic, designation RADIO CONTROL BUYERS GUIDE had become distinctive of applicant's magazines); *In re Gray Inc.*, 3 USPQ2d 1558, 1559 (TTAB 1987) ("[T]o support registration of PROTECTIVE EQUIPMENT [for burglar and fire alarms and burglar and fire alarm surveillance services] on the Principal Register a showing considerably stronger than a prima facie statement of five years' substantially exclusive use is required."); *cf. In re Synergistics Research Corp.*, 218 USPQ 165 (TTAB 1983) (holding applicant's declaration of five years' use sufficient to support registrability under §2(f) of BALL DARTS for equipment sold as a unit for playing a target game, in view of lack of evidence that the term is highly descriptive (e.g., no dictionary evidence of any meaning of BALL DARTS and no evidence of use of the term by competitors or the public)).

2. Applicant claimed ownership of the following registrations:

a. Registration No. 2794015 for the same mark as in the application at issue for “cajun blackened seasoning.” Applicant disclaimed the exclusive right to use “Fish Fry Products” and “Est. 1982” and claimed that LOUISIANA and the map of LOUISIANA had acquired distinctiveness.

b. Registration No. 2827057 for the same mark as in the application at issue without the fleur de lis for “seasonings, namely, crawfish, crab and shrimp boil; mixes, namely, dirty rice mix consisting primarily of rice and also containing vegetables; etouffee mix consisting primarily of flour, seasonings, and also containing vegetables; gravy mix; gumbo mix consisting primarily of flour seasonings and also containing onions; jambalaya mix consisting primarily of packaged rice and spices; red beans and rice mix consisting primarily of rice, beans, seasoning, and also containing vegetables; shrimp creole mix consisting primarily of flour and seasonings and also containing vegetables; and cobbler mix consisting primarily of sugar, flour, leavening and spices.” Applicant disclaimed the exclusive right to use “Products” and “Est. 1982” and claimed that LOUISIANA and the map of LOUISIANA had acquired distinctiveness.

c. Registration No. 2827571 for the same mark as in the application at issue without the fleur de lis for “hush puppy mix, seasoned batter mixes, namely, fish fry, chicken fry, and shrimp fry, baking seasonings for chicken and fish.” Applicant disclaimed the exclusive right to use “Fish Fry Products” and

“Est. 1982” and claimed that LOUISIANA and the map of LOUISIANA had acquired distinctiveness.

B. April 28, 2011 response to Office action.

1. Applicant claimed ownership of the following registrations:

a. Registration No. 2801892 for the mark LOUISIANA FISH FRY PRODUCTS, in typed drawing form, for *inter alia*, seasonings and sauces.<sup>12</sup> Applicant claimed that “Louisiana” had acquired distinctiveness and disclaimed the exclusive right to use “Products.”

b. Registration No. 2827058 for the mark LOUISIANA FISH FRY PRODUCTS and design, shown below, for “cocktail sauce, tartar sauce, seafood sauce and remoulade dressing.” Applicant claimed that “Louisiana” had acquired distinctiveness and disclaimed the exclusive right to use “Products.”



With respect to the third-party registrations, the examining attorney has the discretion to determine whether the nature of the mark sought to be registered is such that a claim of ownership of a prior registration for the same or similar goods or services is enough to establish acquired distinctiveness. For example, if the mark sought to be registered is deemed to be highly descriptive of the goods named in the application, the examining attorney may require additional evidence of acquired

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<sup>12</sup> Issued January 6, 2004; renewed

distinctiveness. *See In re Loew's Theatres, Inc.*, 769 F.2d 764, 769, 226 USPQ 865, 869 (Fed. Cir. 1985) (finding claim of ownership of a prior registration insufficient to establish acquired distinctiveness where registration was refused as primarily geographically deceptively misdescriptive).

... [E]ach application for registration of a mark for particular goods must be separately evaluated. Nothing in the statute provides a right *ipso facto* to register a mark for additional goods when items are added to a company's line or substituted for other goods covered by a registration. Nor do the PTO rules afford any greater rights. Under Rule 2.41(b), in appropriate cases, a prior registration on the Principal Register for the same mark "may" be accepted as "evidence" of distinctiveness, but the same rule reserves to the PTO discretion to require additional proof.

*Id.*

If the term for which the applicant seeks to prove distinctiveness was disclaimed in the prior registration, the prior registration may not be accepted as prima facie evidence of acquired distinctiveness because a disclaimer is a statement that the applicant or registrant does not claim the exclusive right to use a specified element of the mark. *Kellogg Co. v. Gen. Mills, Inc.*, 82 USPQ2d 1766, 1771 n.5 (TTAB 2007); *In re Candy Bouquet Int'l, Inc.*, 73 USPQ2d 1883, 1889-90 (TTAB 2004).

In this case, the term FISH FRY PRODUCTS is highly descriptive and, in two of applicant's five registrations, it disclaimed the exclusive right to use the term "Fish Fry Products." While we have considered applicant's prior registrations, we



are unpersuaded as to the sufficiency of this proof standing alone in view of the manner in which the marks are used. *See* the discussion *infra*.

C. December 9, 2011 response to Office action.

Declaration of William Pizzolato, applicant's President, attesting to the following facts:

1. Applicant has used the mark LOUISIANA FISH FRY PRODUCTS in connection with various consumer food products for over thirty years;<sup>13</sup>

2. Applicant has sold in excess of \$100,000,000 worth of consumer food products under the mark LOUISIANA FISH FRY PRODUCTS of which it has sold over \$17,000,000 of product listed in the description of goods of the application at issue since 2007;<sup>14</sup>

3. Applicant's LOUISIANA FISH FRY PRODUCTS in in over 40% of the grocery stores in the United States;<sup>15</sup> and

4. Since 2009, applicant has spent over \$2,400,000 on advertising LOUISIANA FISH FRY PRODUCTS in the United States.<sup>16</sup>

Applicant contends, *inter alia*, that it is the entire phrase "Louisiana Fish Fry Products" that has acquired distinctiveness, not just the phrase "Fish Fry

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<sup>13</sup> Pizzolato Dec. ¶¶3 and 4.

<sup>14</sup> Pizzolato Dec. ¶¶7 and 9.

<sup>15</sup> Pizzolato Dec. ¶10.

<sup>16</sup> Pizzolato Dec. ¶11.

Products.”<sup>17</sup> However, in the mark sought to be registered, depicted below, “Louisiana” and the term “Fish Fry Products” do not form a unitary whole.



The manner in which the term LOUISIANA FISH FRY PRODUCTS is displayed highlights the name LOUISIANA because it is much larger than any of the other words in the mark. In addition, the term “Fish Fry Products” is displayed in an oval carrier underneath and in much smaller letters than the name LOUISIANA. Thus, the commercial impression engendered by the mark is LOUISIANA style brand “Fish Fry Products.” *See Kellogg Co. v. General Mills Inc.*, 82 USPQ2d at 1772:

Considering connotation and commercial impression, the CINNAMON TOAST portion of the CINNAMON TOAST CRUNCH mark is a unitary term describing a specific type of toast and a cereal flavor. The CRUNCH portion of the mark appears separable from that connotation and connotes a characteristic or texture of cereal. While applicant's claim of acquired distinctiveness in the instant application pertains only to the CINNAMON TOAST portion of the mark, we find this portion of the mark to be unitary and sufficiently separable from the mark as a whole to conclude that the showing of acquired distinctiveness as to the mark as a whole is sufficient to support applicant's partial claim of acquired

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<sup>17</sup> Applicant’s Brief, p. 10.

distinctiveness as to the phrase CINNAMON TOAST for breakfast cereal.

*Cf. In re Magic Muffler Service, Inc.*, 184 USPQ 125, 126 (TTAB 1974) (Vis-à-vis the display of MAGIC MUFFLER SERVICE, “since the designation ‘MUFFLER SERVICE’ is, in essence, a common descriptive designation for applicant’s type of business, it is concluded that the examiner’s holding that ‘MUFFLER SERVICE’ does not properly form part of applicant’s mark and should not have been included as part of the drawing is well founded.”). In other words, the name “Louisiana” is sufficiently distinct from the term “Fish Fry Products” that the two elements are not inseparable; they do not create a single and distinct commercial impression. *See Dena Corp. v. Belvedere International Inc.*, 950 F.2d 15555, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). Because the phrase LOUISIANA FISH FRY PRODUCTS, as displayed in the mark sought to be registered, does not comprise a unitary term, the term “Fish Fry Products” must be disclaimed unless it is found that the term has acquired distinctiveness separate and apart from the name LOUISIANA.

With respect to the term “Fish Fry Products” separate and apart from the name “Louisiana,” we do not find applicant’s evidence of acquired distinctiveness to be convincing. First, all the evidence is directed to the term LOUISIANA FISH FRY PRODUCTS, not FISH FRY PRODUCTS.

Second, applicant’s use for thirty years, while indicative of its commercial success, is not conclusive or persuasive considering the nature of the subject matter sought to be registered. *In re Ennco Display Systems Inc.*, 56 USPQ2d 1279, 1286

(TTAB 2000) (applicant's use of the product designs ranging from seven to seventeen years is insufficient to bestow acquired distinctiveness). *See also In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (evidence submitted by applicant held insufficient to establish acquired distinctiveness of PACKAGING SPECIALISTS, INC., for contract packaging services, notwithstanding, *inter alia*, continuous and substantially exclusive use for sixteen years, deemed "a substantial period but not necessarily conclusive or persuasive").

Likewise, applicant's sales and advertising while extensive do not shed any light on whether consumers perceive the term FISH FRY PRODUCTS as a source indicator since the term is used only in association with the name "Louisiana" that, as indicated above, engenders the commercial impression of LOUISIANA brand "Fish Fry Products."

Finally, the record is lacking in any media recognition regarding applicant's products and how the term FISH FRY PRODUCTS points uniquely and exclusively to applicant.

To put the matter simply, the evidence is not sufficient to establish that FISH FRY PRODUCTS has acquired distinctiveness.

**Decision:** The requirement that applicant disclaim the term FISH FRY PRODUCTS is affirmed and registration to applicant is refused. However, in the event that applicant submits the required disclaimer within thirty (30) days of the

mailing date of this decision, the refusal to register will be set aside and the application will proceed to publication.<sup>18</sup> See Trademark Rule 2.142(g).

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<sup>18</sup> A proper disclaimer reads as follows: "No claim is made to the exclusive right to use FISH FRY PRODUCTS apart from the mark as shown."