

This Opinion Is Not a
Precedent of the TTAB

Hearing: March 11, 2021

Mailed: April 14, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Grupo Bimbo, S.A.B. de C.V.
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Application Serial No. 87408465
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Jeffrey A. Handelman, Andrew J. Avsec, and Virginia W. Marino of Brinks Gilson & Lione for Grupo Bimbo, S.A.B. de C.V.

Tamara Hudson, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.
—

Before Mermelstein, Bergsman and Lebow, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Grupo Bimbo, S.A.B. de C.V. (Applicant) seeks registration on the Principal Register of the term ARTESANO, in standard character form, for goods amended to read as “pre-packaged sliced bread,” in International Class 30.¹ Applicant included a translation of the word ARTESANO as “craftsman.”

¹ Serial No. 87408465 filed April 12, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of its mark anywhere and in commerce as of August 31, 2015.

The Examining Attorney refused to register ARTESANO under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051-1052 and 1127, on the ground that ARTESANO for “pre-packaged sliced bread” is generic and, in the alternative, that it is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and has not acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

The Examining Attorney contends, in essence, that the English translation of “Artesano” is “artisan” and that artisan bread is a type of bread. Applicant contends to the contrary that the doctrine of foreign equivalents does not apply because consumers will not translate “Artesano” to “artisan” when making their purchasing decisions and the evidence shows that ARTESANO is inherently distinctive. Nevertheless, Applicant amended its application to seek registration, in the alternative, under Section 2(f) of the Trademark Act.

I. Whether ARTESANO is generic.

“A generic name—the name of a class of products or services—is ineligible for federal trademark registration.” *U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 2020 USPQ2d 10729, *1 (2020). A generic term “is the common descriptive name of a class of goods or services.” *Royal Crown Cola v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term to be protected to refer to the genus of

goods or services in question.” *Royal Crown Cola*, 127 USPQ2d at 1046 (quoting *Marvin Ginn*, 228 USPQ at 530).

When the USPTO refuses to register a proposed mark on the ground that it is a generic term, the examining attorney has the burden of proving genericness. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016). The Federal Circuit has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or class) of goods or services at issue? Second, does the relevant public understand the term at issue primarily to refer to that genus of goods? *Marvin Ginn*, 228 USPQ at 530. The relevant public’s perception is the chief consideration in determining whether a term is generic. *See Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015). We may consider evidence of how the public understands a term from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Id.* at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)).

With respect to the first part of the *Marvin Ginn* inquiry, we may define the genus by the goods identified in the application: “pre-packaged sliced bread.” *See In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (finding the description of services properly defined the genus of the services); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (a proper genericness inquiry focuses on the identification set forth in the application or certificate of registration).

Although Applicant, in its brief, did not expressly address the genus of the goods at issue, Applicant's arguments imply that the genus of the goods are "pre-packaged sliced bread."² For example,

- Applicant argues, "the term ARTESANO has no generic or descriptive meaning in relation to the applied-for-goods – pre-packaged sliced bread."³

- Applicant argues, "the Examining Attorney has failed to provide competent evidence, much less clear evidence, that Applicant's mark ARTESANO is generic for pre-packaged sliced bread."⁴ and

- Applicant submitted a survey testing consumer perceptions of the ARTESANO mark that purportedly "establishes that the primary significance that consumers of pre-packaged sliced bread place on the ARTESANO mark is as a **brand name** and not as a generic or common name."⁵

The Examining Attorney contends, "the application identifies the goods as 'pre-packaged sliced bread,' which adequately defines the genus at issue...." Examining

² Applicant originally sought to register ARTESANO for "bread," but amended the identification of goods to "pre-packaged sliced bread" (November 4, 2019 Response to Office Action (TSDR 19 and 31)) after the Examining Attorney refused to register ARTESANO on the ground that it is generic. May 2, 2019 Office Action.

³ Applicant's Brief, p. 4 (9 TTABVUE 5).

⁴ Applicant's Brief, p. 10 (9 TTABVUE 11).

⁵ *Id.* at p. 11 (9 TTABVUE 12). Applicant's survey expert explains that he "conducted a survey asking customers and potential customers of pre-packaged sliced bread to identify if they considered ARTESANO as a common name or a brand name." November 4, 2019 Response to Office Action (TSDR 58).

References to the examination record refer to the USPTO Trademarks Status and Document Retrieval system (TSDR) by page number in the downloadable .pdf format.

Attorney's Brief (11 TTABVUE 5). We agree that there is no reason to deviate from the identification of goods to determine the genus.

The second part of the *Marvin Ginn* test evaluates whether the relevant public understands that the term Applicant seeks to register primarily refers to that genus of goods. The relevant public is the purchasing public for the identified goods. *Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013). Because the genus of goods at issue is "pre-packaged sliced bread," the relevant public is ordinary consumers.

We now turn to how the public perceives the term ARTESANO.

A. The definitions of "Artesano," "Artisan," and "Artisan Bread."

The Examining Attorney and Applicant submitted the following translations of the term "Artesano" and its definitions:

- The Google Translate website (translate.google.com/#en/es/ARTISAN) (English/Spanish) defines "Artesano" as "craftsman, artisan, handicraftsman, tradesman";⁶
- The Spanish Dictionary website (spanishdict.com) defines "Artesano" as "craftsman," "artisan," "handmade," "handcrafted," and "produced using traditional methods";⁷
- The Linguee Dictionary website (linguee.com/Spanish-English) defines "Artesano" as "craftsman" and "artisan";⁸

⁶ June 26, 2017 Office Action (TSDR 6).

⁷ *Id.* at TSDR 7.

⁸ June 5, 2020 Request for Reconsideration (TSDR 94).

- The Delicias de España website (tiendadelicias.com) advertises EL ARTESANO fig bread with almonds with a definition of “El Artesano.”

El Artesano – means “artisan” in Spanish – lives up to its name by making varieties of Turrone and marzipan using the knowledge and experience handed down by various generations of nougat craftsmen in Jijona (Alicante).⁹

- Applicant submitted a translation of the term “Artesano” by Madeline Newman Rios, a Spanish to English translator certified by the American Translator’s Association, an Official Spanish Court Interpreter certified by the Administrative Office of the United States Courts and the Judicial Counsel of California, and a Spanish Translator approved by the Superior Court of Los Angeles. According to Ms. Rios, the English translation of the Spanish term “Artesano” is “craftsman.”¹⁰

- Applicant submitted copies of five third-party registrations incorporating the word “Artesano” and translating “Artesano” as “artisan,” and three translating “Artesano” as “artisan” or “craftsman.”¹¹

We take judicial notice of the following definitions of “Artisan”:¹²

⁹ January 16, 2018 Office Action (TSDR 5-6). *See also* AmigoFoods.com selling the same product. *Id.* at TSDR 8-9.

Applicant submitted a copy of Registration No. 2850006 for the mark EL ARTESANO and design for “marzipan, nougat, shortbread, sugared almonds, caramels, candy, and sweetmeats.” February 28, 2019 Response to Office Action (TSDR 454).

¹⁰ December 21, 2017 Response to Office Action (TSDR 11).

¹¹ February 28, 2019 Response to Office Action (TSDR 445-470). We did not include in our consideration the copy of Registration No. 4627132 for the mark ARTEZANOS that did not include a translation. *Id.* at TSDR 465.

We considered Serial No. 88089752 for the mark ARTESANO (TSDR 463), which issued as Registration No. 5753444 on May 14, 2019.

¹² The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*,

- The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines “Artisan”

as follows:

- 1 : a worker who practices a trade or handicraft: CRAFTSPERSON // a skilled artisan
- 2 : a person or company that produces something (such as cheese or wine) in limited quantities often using traditional methods – often used before another noun // artisan breads¹³

- The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines “Craftsman,” inter alia, as “a worker who practices a trade or handicraft.”¹⁴

The Examining Attorney and Applicant submitted the following definitions of the term “Artisan bread”:

- The Bread Experience website (breadexperience.com) defines “Artisan Breads” as “hand-crafted, hearth-baked loaves.”¹⁵
- The Recipe Tips website (recipetips.com), under “Basic Breads,” defines “artisan bread” as “different types of bread that are prepared by a skilled baker and are handcrafted through each step of the process.”¹⁶

128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

¹³ Merriam-Webster.com accessed March 3, 2021.

¹⁴ Merriam-Webster.com accessed March 4, 2021. The Merriam-Webster Thesaurus (merriam-webster.com) (accessed March 4, 2021) lists “craftsman” as a synonym for “artisan.”

¹⁵ June 26, 2017 Office Action (TSDR 23).

¹⁶ May 2, 2019 Office Action (TSDR 56-57).

- The Artisana Bread website (artisanabread.com) advertises craftsmen using traditional techniques to make its handcrafted artisanal bread. We reproduce below the ARTISANA bread trademark displayed on the website:



What is an artisan? And why choose Artisana Bread?

An artisan is a craftsman who has worked hard to perfect their craft. When baking, an artisan produces bread and other baked goods using traditional techniques.¹⁷

- The MultiGrains Bakery website (multigrainsbakeries.com) explains the meaning of artisan bread.

What is Artisan Bread?

Artisan bread is best described by thinking about the person who makes the bread. An artisan baker is a craftsperson who is trained to the highest ability to mix, ferment, shape and bake a hand crafted loaf of bread. ...

How to tell True Artisan Bread from one that is called Artisan. Begin by looking at the ingredients. True Artisan Breads usually only include flour, water[,] salt and yeast. ... When you choose an[] Artisan Bread you are buying one of the oldest most basic foods there is. Like centuries ago, these breads didn't need chemicals to make them great and they still don't today.¹⁸

¹⁷ January 16, 2018 Office Action (TSDR 21). The Merriam-Webster Dictionary (merriam-webster.com) (accessed March 4, 2021) defines “artisanal,” inter alia, as “of, relating to, or characteristic of an artisan” and “produced in limited quantities by an artisan through the use of traditional methods.”

¹⁸ August 28, 2018 Office Action (TSDR 6).

- The FoodBusinessNews website (foodbusinessnews.net), in an article titled “Artisan bread renaissance” (February 16, 2016), quotes a bakery owner who describes artisan bread as follows:

“When a typical consumer thinks of an ‘artisan’ baker, they think small batch, hand-made breads made by a baker with flour up to his elbows, working alone. While there’s certainly truth to that, I also think it’s part of the myth that’s out there.”¹⁹

The article goes on to explain that

In reality, a baker doesn’t have to be – and most likely isn’t – working alone when producing an artisan bread. It does have to do with the process, such as starters and sours, longer fermentation times and cold proofing, which result in defined flavor, texture and crumb structure.²⁰

The article also notes:

“Bread that is placed on the table at the beginning of a meal really sends a message to diners about the quality level that the rest of experience is going to be,” Mr. Whann said. “It establishes the bar.”

Because of this, many artisan bread bakers pair their products very strategically, based on the sandwich, entrée or needs of the restaurant.²¹

- The Prager Bros. website (pragerbrothers.com) explains, “at least one part of the production must be performed by hand for a bread to be considered ‘artisan.’... Baking artisan bread is a long labor intensive process which demands extensive knowledge and attention to detail.”²²

¹⁹ August 28, 2018 Office Action (TSDR 11).

²⁰ *Id.*

²¹ August 28, 2018 Office Action (TSDR 8).

²² May 2, 2019 Office Action (TSDR 23).

- The Harris Teeter website (harristeeter.com) provides the following information:

What Is Artisan Bread?

There are NO short-cuts to creating true, rustic artisan bread.

Naturally leavened, handmade bread is anchored in tradition, using only the simplest of ingredients: flour, water, and an agent for fermentation. No two naturally leavened loaves are exactly the same. As the founder of the nation's number-one bread company, La Brea Bakery, Nancy Silverton believes "A beautiful loaf, burnished on the outside, has a solid but not impenetrable crust, subtly blistered with tiny fermentation bubbles that say, this is a loaf of integrity, a loaf made with care and time."²³

B. Applicant's use of ARTESANO

Applicant primarily uses ARTESANO in the manner of a trademark. The specimen filed with the application displaying ARTESANO as set forth below is representative:



The Sara Lee Bread website (saraleebread.com) advertises Applicant's ARTESANO BREAD as "an Artisan style bread"²⁴ and the packaging displays it as

²³ May 2, 2019 Office Action (TSDR 71).

²⁴ June 26, 2017 Office Action (TSDR 91). *See also* Lia Arakelian Decl. Exhibit A attached to Applicant's December 21, 2017 Response to Office Action (TSDR 18-19).

“Artesano Style Bread.” We produce a copy of Applicant’s “Artesano Style Bread” packaging below:²⁵



Applicant also advertises “Artesano Style Bread” on a coupon reproduced below:²⁶



Lia Arakelian, Applicant’s Associate Brand Manager for ARTESANO Breads testified that the above-identified coupon is representative of print advertisements

²⁵ Lia Arakelian Decl. Exhibit B attached to Applicant’s December 21, 2017 Response to Office Action (TSDR 32, 34, 36).

²⁶ Lia Arakelian Decl. Exhibit C attached to Applicant’s December 21, 2017 Response to Office Action (TSDR 42). *See also* Benjamin Buch Decl. ¶7 and Exhibit 3 attached to Applicant’s November 4, 2019 Response to Office Action (TSDR 187 and 209). Mr. Buch is the Senior Brand Manager for ARESANO Breads.

that have circulated to over 98 million U.S. consumers.²⁷

C. Third-party use of ARTESANO.

• As noted above, the Delicias de España website (tiendadelicias.com)²⁸ and the AmigoFoods.com website sell EL ARTESANO Spanish breads.²⁹

El Artesano Pan de Datiles con Nueces [date bread with nuts] is made using the knowledge and experience handed down by various generations of nougat craftsmen in Jijona (Alicante), Spain.

El Artesano manufactures their products traditionally, without the addition of preservatives or coloring agents which could spoil the flavor of their high quality varieties of nougat and marzipan.³⁰

• La Panaderia (lapanaderia.com) advertises the sale of two types of bread: “Dulce & Artesano.”³¹



Come in, grab your tongs and charola, browse the bread and fill your tray and your heart with wonderful

²⁷ Lia Arakelian Decl. ¶7 attached to Applicant’s December 21, 2017 Response to Office Action (TSDR 14).

²⁸ January 16, 2018 Office Action (TSDR 5-6).

²⁹ *Id.* at TSDR 8-9.

³⁰ *Id.*

³¹ *Id.* at TSDR 11.

handcrafted **Pan Dulce or Pan Artesano**. Then meet us at the checkout station. (Emphasis added).

- Artisana Bread (artisanabread.com) produces “hand-crafted artisanal breads.”³²
- Walmart.com advertises the sale of Sara Lee Artesano Style [bread].³³
- Applicant submitted a list of Internet search results selected from a Google search for “artesano bread.”³⁴ The results include a link to “People also ask ... What is Artesano style bread?” The Google search results also include links to target.com, bakingbusiness.com, fooducate.com, wegmans.com, villagio.com, and meijer.com advertising “Artesano style bread.”³⁵
- Catalina Castravet, “Homemade French Toast,” Sweet & Savory Meals website (sweetandsavorymeals.com) asks and answers

What is the best bread for french toast?

You can use any bread you like, some of our personal favorites are:

- Brioche ...
- Challah ...
- Any plain white slices of bread.
- Artesano bread – its [sic] also nice if the bread is a few days old, or slightly stale.
- Pullman loaf ...

³² *Id.* at TSDR 17-22.

³³ *Id.* at TSDR 27.

³⁴ February 28, 2019 Response to Office Action (TSDR 441).

³⁵ *Id.* at TSDR 442-443.

• French bread ...³⁶

• Applicant submitted copies of 90 articles retrieved from a LexisNexis search for ARTESANO purportedly limited to the United States and the food and beverage industry.³⁷ The writers use the term “Artesano” to refer to the following:

- Applicant’s product;³⁸
- Third-party trademarks for a variety of goods and services other than bread (e.g., ARTESANO VINO TAPAS Y MAS at artesano-restaurant.com, Artesano Meadery, El Artesano restaurant, Artesano Cervecero, etc.);³⁹
- The word “artisan” (Artesano Market Days “aimed to highlight a rich cultural awareness for hand-crafted artesano work”);⁴⁰
- A type of bread (“each sandwich bread slices, artesano or equivalent.”);⁴¹

³⁶ December 5, 2019 Office Action (TSDR 74).

³⁷ November 4, 2019 Response to Office Action (TSDR 252-631). We did not consider the articles at TSDR 518 and 549 because they are in German. We did not consider the articles at TSDR 601 and 621 because they are in Spanish and there is no evidence or indication that U.S. consumers access them.

³⁸ *Id.* at TSDR 279, 288, 309, 311, 315, 348, 350, 351, 352, 352, 355, 357, 360, 362, 363, 487, 522, 530, 537, 543, 553, 555, 557, 563, 568, 569, 572, 590, 604, 607, 609, 612, 613, 615, 617, 619, 620, and 630.

³⁹ *Id.* at TSDR 270, 278, 282, 292, 293, 300, 307, 322, 326, 331, 333, 335, 338, 339, 340, 344, 345, 480, 484, 507, 510, 511, 515, 531, 533, 535, 536, 539, 562, 565, 573, 575, 577, 580, 583, 588, 591, 595, 598, 603, 606, 625, and 628.

Although the article at TSDR 531 is in Spanish, it is from El Latino San Diego with a San Diego, California dateline. We assume that the readership of the publication are Spanish language speakers in San Diego, California. However, Applicant did not provide an English translation of the article. A news article in a language other than English generally has no probative value. *See Swiss Watch Int’l Inc. v. Federation of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1734 n.8 (TTAB 2012) (citing *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1405 (TTAB 1998)). Accordingly, we do not consider that news article.

⁴⁰ *Id.* at TSDR 275, 491, 495, 496, and 502.

⁴¹ *Id.* at TSDR 290.

- A street name;⁴²
- Artisan cheese (Queso D.O. Manchego artesano Dehesa de Los Llanos Curado).⁴³

D. Third-party use of Artisan Bread.

• “Five-Minute Artisan Bread” is a recipe posted on the Splendid Table website (splendidtable.org). We reproduce below a photograph of the artisan bread made from this recipe to give the readers an idea what artisan bread looks like.⁴⁴ The photograph is representative of other images of artisan bread.



• The Bread Experience website (breadexperience.com) explains that “Artisan Breads are hand-crafted, hearth-baked loaves,” and lists various “Artisan Bread Recipes,” for example:⁴⁵


⁴² *Id.* at TSDR 314.

⁴³ *Id.* at TSDR 459.

⁴⁴ June 26, 2017 Office Action (TSDR 13).

⁴⁵ *Id.* at TSDR 23-24 and 30.

Artisan bread recipes to inspire beautiful loaves



Artisan Loaf (Boule)

Free form round loaf (boule) adapted from the Artisan Bread in Five Minutes master formula.

What is Your Favorite Artisan Bread Recipe?

Do you love to bake a special bread? Share your favorite recipe and we'll highlight it on the site for other home bakers to enjoy.

- “No-Knead Crusty Artisan Bread,” The Comfort Kitchen website (thecomfortkitchen.com).⁴⁶

One of my most reader-tested and approved recipes! This crusty, fluffy artisan bread needs only 4 ingredients and 5 minutes to come together ... you won't believe how easy and delicious it is.

- Alison May, in her article, “Traveling Crusty Artisan Bread: A Passionate Bread Aficionado Shares Her Journey,” on the King Arthur Flour website (blog.kingarthurfLOUR.com) (March 28, 2014), provides her artisan bread experience.⁴⁷

⁴⁶ *Id.* at 34.

⁴⁷ *Id.* at TSDR 46-79.

I love to cook, but at that time didn't bake; and figured, "How hard could it be"? So I started with something I thought would be easy: baguettes.

[Ha]! Little did I know that baguettes are considered the most difficult bread to bake, and "the art of artisan breads."⁴⁸

My mission is to show home bakers and wannabe home bakers that they can bake fabulous artisan bread at home, and that this bread will be better than 95% of the bread they buy in bakeries. ...

I call the following loaf "Traveling Crusty Artisan Bread," because it can be made almost anywhere without special equipment. ...

Crusty artisan bread has only four ingredients ...⁴⁹

There are millions of books on the subject of bread and baking, but I've found the following four books to be the most useful, and have them listed in order of complexity and detail with the simplest first:

Baking Artisan Bread, 10 Expert Formulas for Baking Better Breads at Home, by Ciril Hitz.⁵⁰

- AllRecipes website posts a recipe for "No-Knead Artisan Style Bread."⁵¹

⁴⁸ *Id.* at TSDR 47.

⁴⁹ *Id.* at TSDR 52.

⁵⁰ *Id.* at TSDR 70.

⁵¹ *Id.* at TSDR 80. Even though the website excerpt displayed neither the URL nor the date the Examining Attorney accessed the website, we may consider it because Applicant did not object. See *In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1586 (TTAB 2018) (if an examining attorney fails to include the website URL and the date that the webpage was accessed but the applicant fails to lodge an objection on that ground, then the Board will consider the website for whatever probative value it may have).

- The Williams Sonoma website (williams-sonoma.com) advertises an “Artisan Bread Sampler” consisting of Ciabatta, Olive, Garlic, and Pugliese loaves. The advertisement describes its garlic loaf as a “Savory artisan sourdough blended with oven-roasted garlic and extra-virgin olive oil.”⁵²

- The Gold Crust Baking Company, Inc. website (goldcrust.com) advertises Alpine Gruyere, Ciabatta, and Honey Grain loaves as “Artisan Breads.”

Artisan Breads

In true old world-style, our handmade artisan breads are allowed to undergo a natural fermentation process, giving these first-class loaves their distinctive taste and texture.⁵³

- The Walmart website (Walmart.com) advertises the sale of “Pepperidge Farm Artisan Bread Italian Loaf with Sesame Seeds.”⁵⁴

- The Send Bread website (sendbread.com) advertises “Artisan Breads,” including Apple Cinnamon, Baby Spinach, Onion & Garlic Ciabatta, Chocolate, and Olive, among others.⁵⁵

- The La Brea Bakery website (labreabakery.com) advertises “Our Artisan Breads.”⁵⁶

E. Third-party registrations for artisan bread.

The Examining Attorney submitted copies of seven registrations that include

⁵² *Id.* at TSDR 85.

⁵³ *Id.* at TSDR 88.

⁵⁴ January 16, 2018 Office Action (TSDR 26).

⁵⁵ *Id.* at TSDR 29-30. *See also* May 2, 2019 Office Action (TSDR 33).

⁵⁶ *Id.* at TSDR 31.

“artisan bread” in the description of goods or services.⁵⁷ The appearance of a term in the description of goods or services may be probative of the fact that the term is generic or merely descriptive. *See In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) (use of the word “Psychology” in the identification of goods is evidence that the word is merely descriptive).

F. Media references to Artisan Bread.

- Marne Stetton, in her article, “A History Of Bread In America,” on the Saveur website (saveur.com) (April 22, 2012) reports that in 2001, “The Bakers and Confectionary Union Local 3 opened the Artisan Baking Center in Queens, New York; it’s now an incubator for start-up bread businesses that sell the likes of Finnish ryes ruis and hand-ground blue corn tortillas.”⁵⁸

- In 2017, Product of Year USA, purported by Applicant to be the world’s largest consumer-voted award for product innovation, named Applicant’s ARTESANO bread as the “Best Specialty Bread” of the year.⁵⁹ The Product of Year recognition, reproduced below, identifies Applicant’s ARTESANO bread as “Artisan style bread.”



⁵⁷ May 2, 2019 Office Action (TSDR 35-53).

⁵⁸ May 2, 2019 Office Action (TSDR 81).

⁵⁹ Lia Arakelian Decl. ¶12 and Exhibit F attached to Applicant’s December 21, 2017 Response to Office Action (TSDR 15 and 54).

G. Applicant's Teflon survey

Applicant commissioned the Berkeley Research Group to conduct a survey on the term ARTESANO to determine whether consumers understand the term ARTESANO as functioning as a brand or as a generic term for the goods in question.⁶⁰ The survey employed the Teflon format for assessing whether a term is generic. There were 299 completed survey interviews. We reproduce the survey results below:⁶¹

Table 6: Survey Results – Number of Respondents

Name	Brand Name	Common Name	Don't Know	Total
Wonder	283	12	4	299
Sourdough	14	284	1	299
Sunbeam	286	6	7	299
Artesano	165	71	63	299
Butternut	65	217	17	299
Honey Wheat	21	274	4	299
Pumpernickel	22	272	5	299

Table 7: Survey Results – Percentage of Respondents

Name	Brand Name ²²	Common Name ²³	Don't Know	Total
Wonder	94.6%	4.0%	1.3%	100.0%
Sourdough	4.7%	95.0%	0.3%	100.0%
Sunbeam	95.7%	2.0%	2.3%	100.0%
Artesano	55.2%	23.7%	21.1%	100.0%
Butternut	21.7%	72.6%	5.7%	100.0%
Honey Wheat	7.0%	91.6%	1.3%	100.0%
Pumpernickel	7.4%	91.0%	1.7%	100.0%

⁶⁰ November 4, 2019 Response to Office Action Exhibit A (TSDR 55-184).

⁶¹ Stec Decl. attached to the November 4, 2019 Response to Office Action (TSDR 67-68).

In sum, Applicant's survey results show that 55.2% of respondents identified ARTESANO as a brand name for the relevant goods, whereas only 23.7% identified it as a common name.⁶²

H. Media recognition of Applicant's ARTESANO bread.⁶³

- On April 3, 2017, IRI Growth Summit announced in its 2016 New Product Pacesetters Report that ARTESANO was one of the "Top 10 Food and Beverage Brands."⁶⁴

- Nielsen's 2018 Top 25 Breakthrough Innovations list for the U.S. market includes "Sara Lee® Artesano™ Original & Golden Wheat Bakery Bread."⁶⁵

Beyond Nielsen's requirements for distinctiveness, relevance and endurance, this year, the criteria for Breakthrough success was expanded to include a broader set of strategies that successful brands employed, honoring the best execution of each. The result: a list of products that reflect strong, distinct qualities such as mass potential,

⁶² Dr. Stec declared that with respect to respondents identifying ARTESANO as a brand name, "the sampling error derived from a sample size of 299 is 5.7%." *Id.* n.22 (TSDR 68). In addition, the sampling error for respondents identifying ARTESANO as a generic term or common name is 4%. *Id.* n.23 (TSDR 68). Thus, according to the survey, with a sampling error of 5.7%, it is likely that as many as 60.9% and as few as 49.5% of population may perceive ARTESANO as a brand name. Likewise, as many as 27.7% and as few as 19.7% are likely to perceive ARTESANO as a common name. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1831 n.23 (TTAB 2015) ("[A] confidence interval may be useful in considering survey results (at least when a random sample is chosen), particularly when the sample size is somewhat small.") (citing *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993) ("[I]n the case of a particular scientific technique, the court should ordinarily consider the known or potential rate of error.") and *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*, 32 USPQ2d 1001, 1006 (S.D.N.Y. 1994) (not reported in F. Supp.) ("[O]ne must employ statistical confidence tests when making a claim regarding the projectability of a sample or survey result in order to infuse that result with any meaning.")).

⁶³ *See also* Product of Year USA "Best Specialty Bread" of the year discussed above.

⁶⁴ Benjamin Buch Decl. ¶12 and Exhibit 6 attached to the November 4, 2019 Response to Office Action (TSDR 189 and 221).

⁶⁵ Benjamin Buch Decl. ¶15 and Exhibit 8 attached to the November 4, 2019 Response to Office Action (TSDR 190 and 231-234).

longevity, brand incrementality, category distinction and appeal toward a specific consumer target.⁶⁶

I. Miscellaneous Evidence

- Applicant submitted copies of 18 foreign trademark registrations for ARTESANO for bread in different Spanish speaking countries,⁶⁷ purportedly to show that ARTESANO is distinctive and that the doctrine of foreign equivalents is inapplicable;⁶⁸ and

- Applicant submitted the Wikipedia.org entries for the “List of American breads”⁶⁹ and the “List of breads.”⁷⁰ The Wikipedia entries do not identify artisan as a type of bread.

J. Analysis

1. Artesano is the foreign equivalent of artisan.

The foreign equivalent of a merely descriptive or generic English word is no more registrable than the English word itself despite the fact that the public may not be

⁶⁶ *Id.* at TSDR 231.

⁶⁷ February 28, 2019 Response to Office Action (TSDR 474-495).

⁶⁸ *Id.* at TSDR 504 and 510. Applicant argues that “[t]he registrations of ARTESANO in Spanish speaking countries undercuts the Examining Attorney’s reliance on the Doctrine of Foreign Equivalents as support for the position that the mark is generic. To wit, if trademark offices throughout the Spanish-speaking world have found the ARTESANO mark to be distinctive and registrable for the same bread products, there is no basis for the USPTO’s refusal of registration here.” *Id.* at 510-11. However, decisions from foreign trademark offices, based on different laws, have no real probative value in determining entitlement to registration in the U.S. *See, e.g., In re Bayer A.G.*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (“[E]vidence of registration of ASPIRINA in another country is of little value to our analysis of its entitlement to protection in the United States” because “[e]ach country that recognizes some form of trademark protection will have its own body of law and will evaluate a registration request in light of evidence of consumer perception in that country.”).

⁶⁹ February 28, 2019 Office Action (TSDR 27-29).

⁷⁰ *Id.* at TSDR 30-54.

familiar with the foreign term. In other words, we make no distinction between English terms and their foreign equivalents with respect to registrability. *See Cordua Rests.*, 118 USPQ2d at 1637, and *In re Spirits Int'l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1491 (Fed. Cir. 2009) (both quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005) (“Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as the similarity of connotation in order to ascertain confusing similarity with English word marks.”)).

But “[w]hen it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied.” *Palm Bay Imps.*, 73 USPQ2d at 1696. *See also Spirits Int'l*, 90 USPQ2d at 1491-92. For example, according to the Federal Circuit, “it is improbable that the average American consumer would stop and translate ‘VUEVE’ into ‘widow’” when used on wine. *Palm Bay Imps.*, 73 USPQ2d at 1696 (affirming the Board’s holding that an appreciable number of purchasers are unlikely to be aware that “Vueve” means “widow,” are unlikely to translate the marks into English, and will perceive only that the marks have the same French-sounding word).

Similarly, CORDON BLEU has such a well-established meaning that the literal translation is irrelevant inasmuch as French speakers will not translate it. *Cont'l Nut Co. v. Cordon Bleu*, 494 F.2d 1397, 181 USPQ 647, 648 (CCPA 1974) (although the

English translation of CORDON BLEU is blue ribbon, the terms project different commercial impressions and would not be equated as identical expressions).

Finally, there may be many non-English marks consumers will not translate in context but instead accept at face value, including those familiar with the literal meaning of the mark in the non-English language. As the Board stated in *In re Tia Maria, Inc.*, 188 USPQ 524, 525-26 (TTAB 1975) (finding consumers will not translate AUNT MARY'S for canned fruits and vegetables into TIA MARIA for restaurant services or vice versa):

[T]here are foreign expressions that even those familiar with the language will not translate, accepting the term as it is, and situations arise in the market-place which make it unfeasible or even unlikely that purchasers will translate the brand names or labels appearing on canned foods and other like products.

In this appeal, the resemblance between ARTESANO and the word "Artisan" is so evident in both sound and appearance that the average American consumer will automatically translate ARTESANO and equate ARTESANO and the word "artisan." See *In re Optica Int'l*, 196 USPQ 775, 777 (TTAB 1977) (OPTIQUE is the French equivalent of the English word "Optic"); *In re Jacqueline Cochran, Inc.*, 196 USPQ 715, 716 (TTAB 1977) (AIROMATIQUE, although a misspelling of the French word "Aromatique," is the French equivalent of the English word "Aromatic"). See also *In re Sambado & Son Inc.*, 45 USPQ2d 1312, 1316 (TTAB 1997) (FRUTTA FRESCA is the equivalent of the generic term "fresh fruit"); *In re Coney Island Bredzel Co.*, 199 USPQ 45, 47 (TTAB 1978) (BREDZEL, a misspelling of the German word "Brezel," is the equivalent of the English word "Pretzel").

Applicant contends the doctrine of foreign equivalents does not apply because ARTESANO has an alternative meaning – “craftsman.”⁷¹ However, the Spanish-English dictionaries discussed above define “Artesano” as an artisan or craftsman. The MERRIAM-WEBSTER DICTIONARY defines “artisan” and “craftsman” as “a worker who practices a trade or handicraft.”⁷² In addition, the MERRIAM-WEBSTER THESAURUS identifies “artisan” and “craftsman” as synonyms.⁷³ The distinction between “artisan” and “craftsman” is not a material difference. This is not a case like *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976), where the Board found that although the English equivalent of LA POSADA is “the inn,” LA POSADA also “carries the added implication of a home or dwelling, and thus has a connotative flavor which is slightly different from that of the words ‘the inn.’” *See also In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 112-113 (Fed. Cir. 1983) (finding “second chance” is not an exact translation of “repêchage” and, therefore, when comparing REPÊCHAGE for skin care products and SECOND CHANCE for face creams and toiletries, the terms are not equivalent); *In re Buckner Enter. Corp.*, 6 USPQ2d 1316, 1317 (TTAB 1987) (finding PALOMA and DOVE are not exact synonyms because “paloma” has a broader meaning than the English word “dove” in that “paloma” also means “pigeon”).

⁷¹ Applicant’s Brief, p. 15 (9 TTABVUE 16).

⁷² Merriam-Webster.com accessed March and 4, 2021.

⁷³ Merriam-webster.com accessed March 4, 2021.

Applicant asserts there is no evidence that the ordinary American consumer will translate “Artesano” into the English word “artisan” or “craftsman.”⁷⁴

[F]or the Doctrine [of Foreign Equivalents] to apply, there must be evidence that ordinary American consumers will stop and translate. The record fails to establish this element as well.⁷⁵

We disagree. The term ARTESANO in connection with “pre-packaged sliced bread” does not fall into one of the exceptions to the doctrine of foreign equivalents. First, the term ARTESANO does not have such a well-established meaning in the U.S. that even Spanish speakers would forego translating it.⁷⁶ For example, ARTESANO may not be as common as the Spanish word “casa” that is immediately familiar to and understood by those with even a minimal grasp of Spanish and needs no translation. Second, as shown by the use of the term “Artisan Bread,” the English translation of the term ARTESANO is relevant to consumers purchasing handcrafted

⁷⁴ Applicant’s Brief, pp. 15-16 (9 TTABVUE 16-17).

⁷⁵ *Id.* at TSDR 16.

⁷⁶ There is no question that Spanish is a common, modern language spoken or understood by an appreciable number of U.S. consumers. According to data released by the U.S. Census Bureau in 2015, Spanish is the second most common language in the United States after English, with more than 37 million people speaking Spanish at home, 21 million of whom also speak English “very well.” See “Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for the United States: 2009-2013,” at <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>.

Because the U.S. Census is a standard reference, we may, and do, take judicial notice of this information. *In re Olin Corp.*, 124 USPQ2d 1327, 1331 n.12 (TTAB 2017). See also *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127 (TTAB 2015) (taking judicial notice of census information that “after English, Spanish is the most commonly spoken language in the United States, and that over 12% of the United States population speaks Spanish.”); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1648 (TTAB 2008), finding “Spanish is the second most common language in the United States after English” and, therefore, “by any standard, the Spanish language is spoken or understood by an appreciable [number] of U.S. consumers who also speak or understand English.”

bread. Thus, the commercial context in which ARTESANO is used does not create an exception to the doctrine of foreign equivalents but, rather, a context in which the connotation of artisan will be quite natural. As noted within, the similarity between ARTESANO and “artisan” is so evident that the ordinary consumer will automatically translate ARTESANO into the English word “Artisan.” Thus, the commercial setting in which Applicant is using ARTESANO encourages consumers to translate that word into its English equivalent. *See Bayer A.G.*, 82 USPQ2d at 1831 (affirming the Board’s finding that ASPIRINA and aspirin are sufficiently close in appearance, sound, and meaning that “[t]he mere addition of the letter ‘A’ at the end of the generic term ‘aspirin’ is simply insufficient to transform ASPIRINA into an inherently distinctive mark for analgesics” and that “[a]dding an ‘a’ to aspirin results in virtually no distinction with respect to the visual impressions of the terms.”).

Because ARTESANO is a common Spanish word, the doctrine of foreign equivalents is applicable, and the definition of ARTESANO is “artisan,” we consider the translation when we analyze whether ARTESANO is a generic term for “pre-packaged sliced bread.”

2. Artisan bread is a type of bread.

The evidence discussed above proves that artisan bread is a type of bread (i.e., handcrafted bread).⁷⁷

⁷⁷ At the oral hearing, Applicant agreed that it would not object to a third party describing its bread as “artisan bread,” but Applicant would not go so far as to concede that artisan bread is a generic term for a type of bread.

The Examining Attorney submitted evidence defining artisan bread as handcrafted bread. *See, e.g.,*

- The Bread Experience website (breadexperience.com) defines “Artisan Breads” as “hand-crafted, hearth-baked loaves.”⁷⁸

- “Basic Breads,” RecipeTips.com defines “artisan bread” as “different types of bread that are prepared by a skilled baker and are handcrafted through each step of the process.”⁷⁹

- The Prager Bros. website (pragerbrothers.com) explains, “at least one part of the production must be performed by hand for a bread to be considered ‘artisan.’”⁸⁰

- Applicant’s Product of Year USA exhibit that named Applicant’s ARTESANO bread as the “Best Specialty Bread” of the year identified Applicant’s ARTESANO bread as “Artisan style bread.”⁸¹

The Examining Attorney submitted numerous recipes for baking “artisan bread.” *See, e.g.,*

- “Five-Minute Artisan Bread” is a recipe posted on the Splendid Table website (splendidtable.org).⁸²

- “Artisan Bread Recipes,” Bread Experience website (breadexperience.com).⁸³

⁷⁸ June 26, 2017 Office Action (TSDR 23).

⁷⁹ May 2, 2019 Office Action (TSDR 57).

⁸⁰ May 2, 2019 Office Action (TSDR 23).

⁸¹ Lia Arakelian Decl. ¶12 and Exhibit F attached to Applicant’s December 21, 2017 Response to Office Action (TSDR 15 and 54).

⁸² June 26, 2017 Office Action (TSDR 13).

⁸³ *Id.* at TSDR 23-24 and 30.

- “No-Knead Crusty Artisan Bread,” The Comfort Kitchen website (thecomfortkitchen.com).⁸⁴

The Examining Attorney introduced examples of third parties advertising the sale of “artisan bread.” *See, e.g.,*

- The Williams Sonoma website (williams-sonoma.com) advertises an “Artisan Bread Sampler.”⁸⁵

- The Gold Crust Baking Company, Inc. website (goldcrust.com) advertises “Artisan Breads.”⁸⁶

- The Walmart website (Walmart.com) advertises the sale of “Pepperidge Farm Artisan Bread Italian Loaf with Sesame Seeds.”⁸⁷

- The Send Bread website (sendbread.com) advertises “Artisan Breads.”⁸⁸

- The La Brea Bakery website (labreabakery.com) advertises “Our Artisan Breads.”⁸⁹

The Examining Attorney submitted copies of seven registrations that include “artisan bread” in the description of goods or services.⁹⁰

⁸⁴ *Id.* at 34.

⁸⁵ *Id.* at TSDR 85.

⁸⁶ *Id.* at TSDR 88.

⁸⁷ January 16, 2018 Office Action (TSDR 26).

⁸⁸ *Id.* at TSDR 29-30. *See also* May 2, 2019 Office Action (TSDR 33).

⁸⁹ *Id.* at TSDR 31.

⁹⁰ May 2, 2019 Office Action (TSDR 35-53).

Applicant’s evidence derived from Wikipedia.org providing the “List of American breads”⁹¹ and the “List of breads,”⁹² neither of which identify artisan bread, does not persuade us that artisan bread is not a type of bread. The Wikipedia.org entries identify types of bread (e.g., Adobe bread, Amish friendship bread, Banana bread, etc.), not how bakers make those breads. However, if a baker makes one of the Wikipedia.org-identified breads by hand, it may be an artisan bread because a bread may be both a rye bread and an artisan bread. There can be more than one generic term for a particular genus of goods or services (e.g., a rye bread and an artisan rye bread). Any term that the relevant public understands to refer to the genus is generic. *In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009) (“We also disagree with Dial-A-Mattress’s assertion that there can only be one generic term, which is ‘online mattress stores.’ Instead, any term that the relevant public understands to refer to the genus of ‘online retail store services in the field of mattresses, beds, and bedding’ is generic.”); *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718, 719 (CCPA 1970) (Rich, J., concurring) (“All of the generic names for a product belong in the public domain”); *Roselux Chem. Co., Inc. v. Parsons Ammonia Co., Inc.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962) (a product may have more than one common descriptive name); *In re Women’s Publ’g Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992) (“A product may have more than one generic name and all the generic names belong in the public domain and are unregistrable.”).

⁹¹ February 28, 2019 Office Action (TSDR 27-29).

⁹² *Id.* at TSDR 30-54.

3. The probative value of Applicant's survey.

As noted above, Applicant commissioned a Teflon survey to determine whether consumers understand the term ARTESANO as functioning as a brand or as a generic term for “pre-packaged sliced bread.”⁹³ Applicant's survey results show that 55.2% of respondents identified ARTESANO as a brand name for the relevant goods (with a 5.7% margin of error), whereas only 23.7% identified it as a common name (with a 4% margin of error).

In a detailed analysis regarding the probative value of Teflon surveys, the Board found that Teflon surveys are ineffective at determining the true weight of public perception where the purported trademark owner previously did not control the term at issue as a coined or arbitrary term. In other words, the survey results may reflect “de facto secondary meaning.”⁹⁴ *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1202-03 (TTAB 2017) (citing *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 129 USPQ 411, 414 (CCPA 1961) (“Even though they

⁹³ November 4, 2019 Response to Office Action Exhibit A (TSDR 55-184).

⁹⁴ In *Booking.com*, the Supreme Court held that “[s]ufficient to resolve this case is the undisputed principle that consumer perception demarcates a term's meaning.” *Booking.com*, 140 S. Ct. 2298, 2020 USPQ2d 10729 at *5 n.3. The Court also recognized the principle that “no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise . . . , it cannot deprive competing manufacturers of the product of the right to call an article by its name.” *Id.* at *7 (quoting *Abercrombie & Fitch Co. v. Hunting World Inc.*, 537 F.2d 4, 9, 189 USPQ 759 (2d Cir. 1976)). The sole challenge in *Booking.com* was that “as a rule, combining a generic term with ‘.com’ yields a generic composite.” *Id.* at *9. Thus, the issue of whether the Board erred in its weighing of evidence was not before the Court. *Id.* Sotomayor concurring at *9. Here, in this appeal, the presence of a survey is simply one more piece of evidence to weigh. Thus, the consumer survey, whether or not it may show some consumers perceiving it as a brand, is not, in and of itself, dispositive, and we must consider it in light of the entire record. However, when a term does not begin as arbitrary, the probative value of a survey measuring the distinctiveness, if any, of that term, may be diminished.

succeed in the creation of de facto secondary meaning, due to lack of competition or other happenstance, the law respecting registration will not give it any effect. When the board said “Ha-Lush-Ka” *could not* acquire a secondary meaning it meant that no secondary meaning of *legal significance* could be acquired. It would perhaps be more realistic to say that the descriptive name of a product is unregistrable regardless of acquired secondary meaning.”⁹⁵

As the Board explained in *In re E. I. Kane, Inc.*, 221 USPQ 1203, 1204 (TTAB 1984):

De facto distinctiveness is, of course, attained when an unregistrable term actually acquires secondary meaning through extensive use and promotion. The difference between de facto distinctiveness and so-called de jure distinctiveness is simply that de facto secondary meaning does not entitle a term to protection under the Lanham Act. No matter how much money and effort the user of the term has spent promoting the sale of its products and no matter how much the public has come to recognize the term as an indicator that the products come from the user of the term, the secondary meaning of the term is said to be de facto, and cannot be the basis for registration of a term that is so highly descriptive of the product that it is legally incapable of distinguishing the product from other similar products. *Johnson & Johnson v. Carter-Wallace, Inc.*, [487 F. Supp. 740,] 205 USPQ 827 (S.D.N.Y. 1979). Once a term has been held to be so highly descriptive of the services that it is incapable of becoming distinctive, “registration must be refused under 15 U.S.C. 1052(e)(1) no matter what evidence of alleged ‘secondary meaning’ is adduced; in other words, under the facts of this case the law proscribes the possibility of a de jure ‘secondary meaning,’

⁹⁵ Respondent registered HA-LUSH-KA for “egg noodles; and egg noodle products.” The court found that registration of “the Hungarian name for noodles, ‘haluska’ or its phonetic equivalent in English, whether or not hyphenated, would be contrary to law for no one can be granted the exclusive use of the name of an article, either in our native tongue or its equivalent in any foreign language.” 129 USPQ at 413.

notwithstanding the existence of 15 U.S.C. 1052(f) and a de facto ‘secondary meaning.’” *In re Sun Oil Company*, [426 F.2d 401] 165 USPQ 718 [719] (CCPA 1970) (Rich, Acting Chief Judge, concurring).

See also In re Analog Devices, 871 F.2d 1097, 10 USPQ2d 1879, 1879 (Fed. Cir. 1989) (Applicant’s “evidence shows only that the relevant public may also have come to associate [applicant] with the term ‘analog devices’ even though it is generic. Such evidence does not, indeed cannot, *rebut* genericness.”) (citing *Northland Aluminum Prods.*, 227 USPQ at 964 (“Bundt” common descriptive name for type of cake and evidence of de facto secondary meaning cannot change that result).

The Board’s holding in *Frito-Lay N. Am.* is applicable in this appeal because we have found ARTESANO is the Spanish equivalent of the word “artisan,” and artisan is a generic term for a type of bread. Therefore, ARTESANO is not a coined or arbitrary word Applicant previously used in connection with “pre-packaged sliced bread.” In this regard, we note that Applicant’s evidence of the commercial strength it has developed in its ARTESANO mark, discussed more fully below, may have affected the survey results. While we do not totally discount the survey results because it is relevant evidence as to the issue before us, under the circumstances discussed above, we find that the survey has little probative value in determining whether ARTESANO is a trademark or a generic term. *Booking.com*, 2020 USPQ2d 10729 at *9 (Sotomayer, J., concurring) (“Flaws in a specific survey design, or weaknesses inherent in consumer surveys generally, may limit the probative value of surveys in determining whether a particular mark is descriptive or generic in this context.”).

4. Evidence of ARTESANO as a type of bread.

The following evidence shows ARTESANO used as a type of bread:

- Although Applicant primarily uses ARTESANO as a technical trademark, it has also used “ARTESANO style” on packaging and advertising that creates the commercial impression of an artisan-style bread. We specifically note that Applicant’s declarant stated that the coupon displaying “ARTESANO style bread” is a representative print advertisement that has circulated to over 98 million U.S. consumers.⁹⁶ In addition, Walmart.com advertises the sale of Sara Lee Artesano Style [bread].⁹⁷
- La Panaderia (lapanaderia.com) advertises the selection of “Dulce & Artesano” breads.⁹⁸
- Applicant submitted a list of results from a Google search for “artesanobread.”⁹⁹ The results included a link to “People also ask ... What is Artesano style bread?” The Google search results also included links to target.com, bakingbusiness.com, fooducate.com, wegmans.com, villagio.com, and meijer.com advertising “Artesano style bread.”¹⁰⁰

⁹⁶ Lia Arakelian Decl. ¶7 attached to Applicant’s December 21, 2017 Response to Office Action (TSDR 14). *See also* Benjamin Buch Decl. ¶7 attached to Applicant’s November 4, 2019 Response to Office Action (TSDR 187) (circulated to over 99 million U.S. consumers).

⁹⁷ *Id.* at TSDR 27.

⁹⁸ January 16, 2018 Office Action (TSDR 11).

⁹⁹ February 28, 2019 Response to Office Action (TSDR 441).

¹⁰⁰ *Id.* at TSDR 442-443.

- Catalina Castravet, “Homemade French Toast,” Sweet & Savory Meals website (sweetandsavorymeals.com) identifies “Artesano bread” as a type of bread that can be used to make French toast.¹⁰¹

At the oral hearing, Applicant argued that because Spanish is the second most common language in the United States, if ARTESANO is a generic term for bread, then the record should be “flush” with evidence showing such third-party use. While evidence of third-party use of ARTESANO as a type of bread supports a finding that the term is generic, the paucity of such third-party use does not necessarily prove that it is not a generic term. Third-party use is one type of evidence that may prove that a term is generic. As noted above, we may look to “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Princeton Vanguard*, 114 USPQ2d at 1830 (quoting *Northland Aluminum Prods.*, 227 USPQ at 963).

In sum, the record demonstrates that the primary consumer perception of the term ARTESANO is as the generic term for a type of bread (i.e., traditionally handcrafted bread). Consumers encountering Applicant’s ARTESANO “pre-packaged sliced bread” are likely to perceive it as an artisan style bread, just as Applicant has promoted it as reproduced below:¹⁰²

¹⁰¹ December 5, 2019 Office Action (TSDR 74).

¹⁰² Lia Arakelian Decl. Exhibit B attached to Applicant’s December 21, 2017 Response to Office Action (TSDR 32, 34, 36).



Following full consideration of all the evidence and arguments, we find that consumers perceive the term ARTESANO used in connection with “pre-packaged sliced bread” as the Spanish term artisan. When Applicant uses ARTESANO in connection with “pre-packaged sliced bread,” consumers will perceive that use as artisan bread. Therefore, ARTESANO is a generic term for the identified goods.

II. Whether ARTESANO is merely descriptive and, if so, the degree of descriptiveness.

We now address the alternative ground for refusing to register ARTESANO — that, if ARTESANO is not generic, it nonetheless is merely descriptive and has not acquired distinctiveness. Although we have found ARTESANO to be generic for “pre-packaged sliced bread,” we analyze this alternative ground in the event a reviewing court finds on appeal that ARTESANO is not generic. For this section, we therefore treat ARTESANO as being merely descriptive rather than generic. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d at 1204 (citing *Sheetz*, 108 USPQ2d at 1367).

Implicit in our holding that the evidence before us establishes that ARTESANO is generic for “pre-packaged sliced bread” is a finding that ARTESANO is not only merely descriptive of Applicant’s identified goods, but is highly descriptive of the goods, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 2(e)(1). “The generic

name of a thing is in fact the ultimate in descriptiveness.” *Bellsouth Corp. v. DataNational Corp.* 60 F.3d 1564, 35 USPQ2d 1554, 1557 (Fed. Cir. 1995) (quoting *Marvin Ginn*, 228 USPQ at 530); *Weiss Noodle*, 129 USPQ at 413 (“The name of a thing is the ultimate in descriptiveness. ... It is immaterial that the name is in a foreign language.”). See also *In re Automated Mktg. Sys., Inc.*, 873 F.2d 1451, 11 USPQ2d 1319, 1320 (Fed. Cir. 1989) (after finding SALES FOLLOW-UP for soliciting repeat and referral business for automobile dealership services generic, “the highly descriptive nature of ‘SALES FOLLOW-UP’ outweighed [applicant’s] evidence of acquired distinctiveness.”); *In re Noon Hour Food Prods., Inc.*, 88 USPQ2d 1172 (TTAB 2008) (finding, despite applicant’s claim of use in commerce for almost one hundred years, as well as an “inadvertently cancelled” seventy-year-old registration for the mark BOND-OST for cheese, current evidence clearly showed the mark was generic for the goods, and assuming arguendo that BOND-OST is not generic, that applicant had failed to establish acquired distinctiveness of the highly descriptive mark); *In re Waverly Inc.*, 27 USPQ2d 1620, 1623 (TTAB 1993) (finding MEDICINE not generic, but a highly descriptive term that had acquired distinctiveness, for medical journals).

Nevertheless, Applicant contends, “[t]he ARTESANO mark is inherently distinctive – at a minimum suggestive of the applied-for-goods – and therefore is entitled to registration without any showing of secondary meaning.”¹⁰³ Accordingly,

¹⁰³ Applicant’s Brief, p. 1 (9 TTABVUE 2).

if a reviewing court on appeal finds ARTESANO is not generic, then it is incumbent upon us to determine whether ARTESANO is merely descriptive.

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act precludes registration of a mark on the Principal Register that, when used in connection with an applicant's goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). "A mark is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought." *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)).

We "must consider the mark as a whole and do so **in the context of the goods or services at issue.**" *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (emphasis added); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017). "Whether consumers could guess what the product is from consideration of the mark alone is not the test." *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). Rather, "the question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *DuoProSS*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

As indicated by the evidence discussed above, ARTESANO is the Spanish word for "craftsman" or "artisan" and artisan bread is bread prepared by a skilled baker (i.e., a craftsman or artisan). For example,

- The Recipe Tips website (recipetips.com), under “Basic Breads,” defines “artisan bread” as “different types of bread that are prepared by a skilled baker and are handcrafted through each step of the process.”¹⁰⁴

- The Prager Bros. website (pragerbrothers.com) explains, “at least one part of the production must be performed by hand for a bread to be considered ‘artisan.’... Baking artisan bread is a long labor intensive process which demands extensive knowledge and attention to detail.”¹⁰⁵

- The Harris Teeter website (harristeeter.com) provides the following information:

What Is Artisan Bread?

There are NO short-cuts to creating true, rustic artisan bread.

Naturally leavened, handmade bread is anchored in tradition, using only the simplest of ingredients: flour, water, and an agent for fermentation. No two naturally leavened loaves are exactly the same. As the founder of the nation’s number-one bread company, La Brea Bakery, Nancy Silverton believes “A beautiful loaf, burnished on the outside, has a solid but not impenetrable crust, subtly blistered with tiny fermentation bubbles that say, this is a loaf of integrity, a loaf made with care and time.”¹⁰⁶

The nature of the term ARTESANO is analogous to the nature of the term ASPIRINA analyzed by the Federal Circuit in *Bayer Aketiengesellschaft*, 82 USPQ2d 1828.

In determining whether ASPIRINA is sufficiently similar to aspirin to render it merely descriptive of analgesic goods, the relevant features of the mark are considered including

¹⁰⁴ May 2, 2019 Office Action (TSDR 56-57).

¹⁰⁵ May 2, 2019 Office Action (TSDR 23).

¹⁰⁶ May 2, 2019 Office Action (TSDR 71).

appearance, sound, and meaning. The Board found that ASPIRINA and aspirin are sufficiently close in appearance, sound, and meaning that “[t]he mere addition of the letter ‘A’ at the end of the generic term ‘aspirin’ is simply insufficient to transform ASPIRINA into an inherently distinctive mark for analgesics.” *Final Decision*, slip. op. at 8, 11. Substantial evidence supports this finding. The appearance and meaning of ASPIRINA and aspirin are similar. Adding an “a” to aspirin results in virtually no distinction with respect to the visual impressions of the terms. Importantly, both terms will be used in association with the same analgesic goods in this country. There are, however, some differences in sound. ASPIRINA contains four syllables and aspirin contains two or three syllables (depending on how it is pronounced). ASPIRINA also contains different syllables and the emphasis is on the third syllable for ASPIRINA, whereas the emphasis is on the first syllable for aspirin. When the mark ASPIRINA is considered as a whole, the significant similarities in appearance and meaning of ASPIRINA and aspirin demonstrate that the Board’s finding that ASPIRINA is merely descriptive of analgesic goods is supported by substantial evidence.

82 USPQ2d at 1831-32.

Likewise, in this appeal, the resemblance between ARTESANO and the word “Artisan” is so evident in both sound and appearance that the average American consumer will automatically equate ARTESANO and the word “artisan” and know without multi-step reasoning that the product is an artisan bread.

We find that ARTESANO is highly descriptive of “pre-packaged sliced bread.”

III. Acquired Distinctiveness

Pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), matter that is merely descriptive under Section 2(e)(1) may nonetheless be registered on the Principal Register if it “has become distinctive of the applicant’s goods in commerce.”

Thus, assuming that Applicant’s mark is not generic, Applicant may register its mark

on the Principal Register if Applicant proves that the merely descriptive matter has acquired distinctiveness (also known as “secondary meaning”) as used on Applicant’s goods in commerce. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728-30 (Fed. Cir. 2012); *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1848.

We generally understand acquired distinctiveness to mean an acquired “mental association in buyers’ minds between the alleged mark and a single source of the product.” *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1848 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (4th ed., June 2017 Update)). In analyzing whether the record shows ARTESANO is generic or merely descriptive with a high degree of descriptiveness, we considered all of the evidence of record touching on the public perception of that term as discussed more fully below.

An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness. *See In re Becton, Dickinson & Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1577, 6 USPQ2d 1001, 1005-06 (Fed. Cir. 1988). As noted above, Applicant’s burden increases with the level of descriptiveness. *Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005). *See also In re Bos. Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (“[C]onsidering the highly descriptive nature of the proposed mark, [Applicant] has not met its burden to show that the proposed mark has acquired secondary meaning.”).

Because we have found that the term ARTESANO is highly descriptive of Applicant's goods, Applicant's burden of establishing acquired distinctiveness under Section 2(f) is commensurately high. *See Steelbuilding.com*, 75 USPQ2d at 1424; *In re Bongrain Int'l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *In re Greenliant Sys. Ltd.*, 97 USPQ2d, 1078, 1085 (TTAB 2010).

To establish acquired distinctiveness, Applicant must demonstrate that relevant consumers perceive the proposed mark at issue as identifying the producer or source of the product. *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (acquired distinctiveness exists "when, in the minds of the public, the primary significance of a [proposed mark] is to identify the source of the product rather than the product itself") (citation and internal quotation marks omitted); *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009) ("An applicant must show that the primary significance of the product configuration in the minds of consumers is not the product but the source of that product in order to establish acquired distinctiveness.").

Applicants may show acquired distinctiveness by direct or circumstantial evidence. *Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 128 USPQ2d 1739, 1743 (Fed. Cir. 2018) ("The Board and courts have recognized that both direct and circumstantial evidence may show secondary meaning.") (citation omitted); *In re Ennco Display Sys.*, 56 USPQ2d 1279, 1283 (TTAB 2000). Direct evidence includes testimony, declarations or surveys of consumers as to their state of mind. *Ennco Display Sys.*, 56 USPQ2d at 1283. Circumstantial evidence, on the other hand, is

evidence from which we may infer a consumer association, such as years of use, prior registrations, extensive sales and advertising, unsolicited media coverage, and any similar evidence showing wide exposure of the mark to consumers. *Id.*; *see also Tone Bros. v. Sysco Corp.*, 28 F.3d 1192, 31 USPQ2d 1321 (Fed. Cir. 1994) (listing, as examples of circumstantial evidence, advertising, sales figures, and intentional copying by competitors).

In particular, the Federal Circuit set out factors to consider in assessing whether a mark has acquired distinctiveness, stating as follows:

[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.

Converse, Inc. v. Int'l Trade Comm'n, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018). *See also In re SnowWizard, Inc.*, 129 USPQ2d 1001, 1004-05 (TTAB 2018). On this list, no single factor is determinative and “[a]ll six factors are to be weighed together in determining the existence of secondary meaning.” *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *3 (TTAB 2020) (quoting *Converse*, 128 USPQ2d at 1546); *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009). *See also Ennco Display Sys.*, 56 USPQ2d at 1283 (“Direct evidence [of acquired distinctiveness] includes actual testimony, declarations or surveys of consumers as their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, extensive amount

of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.”).

1. Association of the proposed trademark with a particular source by actual purchasers (typically measured by customer surveys).

While we gave limited weight to Applicant’s Teflon survey in our analysis of whether ARTESANO is generic, we find that it is probative in determining whether ARTESANO has acquired distinctiveness. *In re Country Music Ass’n, Inc.*, 100 USPQ2d 1824, 1834-35 (TTAB 2011) (finding Teflon-style survey showing 85% of respondent’s categorized COUNTRY MUSIC ASSOCIATION as a brand name to be probative evidence of acquired distinctiveness). *See also Stuart Spector Designs*, 94 USPQ2d at 1571 n.46 (suggesting that a Teflon-style survey would be helpful in analyzing acquired distinctiveness).

Generally, survey results showing over 50% brand recognition are sufficient to establish acquired distinctiveness. *See In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424–25 (Fed. Cir. 1985) (finding 50% probative in establishing acquired distinctiveness given the totality of the evidence); *In re Hehr Mfg. Co.*, 279 F.2d 526, 126 USPQ 381, 382 (CCPA 1960) (survey showing a “majority” of respondents associated mark with a single source sufficient to prove acquired distinctiveness); *In re Raytheon Co.*, 202 USPQ 317, 319-320 (TTAB 1979) (79% of mail questionnaires returned identified plaintiff as the source of the background design); 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §32.190 (5th ed. March 2021 Update) (“Generally, figures over 50% are regarded as clearly

sufficient.”); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1212.06(d) (2018) (“[R]esults over 50% are sufficient to establish secondary meaning.”).

Applicant’s survey results show 55.2% of respondents identified ARTESANO as a brand name for the relevant goods (with a 5.7% margin of error), whereas only 23.7% identified it as a common name (with a 4% margin of error). This evidence supports finding that ARTESANO has acquired distinctiveness.

2. Length, degree, and exclusivity of use.

“Since at least as early as August 2015, [Applicant] has made extensive use of the ARTESANO trademark in connection with pre-packaged sliced bread, which is available for purchase at all major food retailers through the United States.”¹⁰⁷

The record shows that there is one entity using EL ARTESANO for bread and one entity using ARTISANA.

- The Artisana Bread website (artisanabread.com) advertises that craftsmen use traditional techniques to make its handcrafted artisanal bread.

What is an artisan? And why choose Artisana Bread?

An artisan is a craftsman who has worked hard to perfect their craft. When baking, an artisan produces bread and other baked goods using traditional techniques.¹⁰⁸

- El Artesano sells Spanish breads through the Declicias de España website (tiendadelicias.com)¹⁰⁹ and the AmigoFoods.com website.¹¹⁰

¹⁰⁷ Benjamin Buch Decl. ¶2 attached to the November 4, 2019 Response to Office Action (TSDR 186).

¹⁰⁸ June 26, 2017 Office Action (TSDR 21).

¹⁰⁹ January 16, 2018 Office Action (TSDR 5-6).

¹¹⁰ *Id.* at TSDR 8-9.

El Artesano Pan de Datiles con Nueces [date bread with nuts] is made using the knowledge and experience handed down by various generations of nougat craftsmen in Jijona (Alicante), Spain.

El Artesano manufactures their products traditionally, without the addition of preservatives or coloring agents which could spoil the flavor of their high quality varieties of nougat and marzipan.¹¹¹

However, one's use need not be exclusive to prove acquired distinctiveness. *Nestle Co., Inc. v. Joyva Corp.*, 227 USPQ 477, 479 (TTAB 1985). Applicant's use must be "substantially exclusive" which makes an allowance for inconsequential use by others. *See L.D. Kichler Co. v. Davoil, Inc.*, 192 F.3d 1349, 52 USPQ2d 1307, 1309 (Fed. Cir. 1999). Because there are only two other users with no evidence regarding the extent of their use, we find the third-party use inconsequential.¹¹²

We find that Applicant has made substantially exclusive use of ARTESANO since August 2015.

3. Amount and manner of advertising.

Benjamin Buch, Brand Manager for ARTESANO Breads, declared as follows:

- Applicant has spent over \$32 million promoting ARTESANO pre-packaged sliced bread in the U.S.;¹¹³

¹¹¹ *Id.*

¹¹² The acquired distinctiveness analysis presupposes that ARTESANO is not a generic term. A finding that ARTESANO is not generic means that our application of the doctrine of foreign equivalents is not correct and that ARTESANO and "artisan" are not equivalents. Moreover, it means that Applicant's Teflon survey is not evidence of de facto secondary meaning. Thus, we need not concern ourselves with the third-party use of "artisan" that we relied on to find ARTESANO to be generic in determining whether ARTESANO has acquired distinctiveness.

¹¹³ Benjamin Buch Decl. ¶4 attached to the November 4, 2019 Response to Office Action (TSDR 187).

- Applicant markets ARTESANO pre-packaged sliced bread through the SARA LEE Bread website, SARA LEE Facebook, Pinterest, Instagram, and YouTube websites generating over 39 million total consumer impressions;¹¹⁴

- “Since August 2015, [Applicant] has promoted its ARTESANO pre-packaged sliced bread with print advertisements that often include a coupon, and which have circulated to over 99 million U.S. consumers.”¹¹⁵

- “In April 2017, [Applicant] promoted its ARTESANO pre-packaged sliced bread through a prominent National Grilled Cheese Month campaign that resulted in over 160 million consumer impressions. ... As part of this campaign, [Applicant’s ARTESANO pre-packaged sliced bread appeared in nationally televised news reports, including on the *Today Show* and *Good Morning America*. The campaign was also featured in prominent media outlets including but not limited to the *Los Angeles Times* and the *Huffington Post*, referenced in 30 blog spots resulting in 55 million impressions.” Applicant ran the campaign in 2018 with similar results.¹¹⁶

- Food stores that sell ARTESANO bread often feature it in their advertising.¹¹⁷

- Applicant has paid-for advertisements featuring ARTESANO bread on national television resulting in an estimated 198 million impressions.¹¹⁸

¹¹⁴ *Id.* at ¶¶5-6 (TSDR 187).

¹¹⁵ *Id.* at ¶7 (TSDR 187).

¹¹⁶ *Id.* at ¶9 (TSDR 188).

¹¹⁷ *Id.* at ¶10 (TSDR 190).

¹¹⁸ *Id.* at ¶11 (TSDR 190).

Applicant's extensive advertising supports a finding that ARTESANO has acquired distinctiveness.

4. Amount of sales and number of customers.

Benjamin Buch testified that ARTESANO bread sales have generated over \$626 million in retail sales in the U.S., "making it one of the most successful pre-packaged sliced breads in the country,"¹¹⁹ and that "hundreds of millions of loaves of ARTESANO prepacked sliced bread have been sold to consumers" throughout the U.S.¹²⁰

Applicant's sales supports finding ARTESANO has acquired distinctiveness.

5. Intentional copying.

There is no evidence of intentional copying.

6. Unsolicited media coverage of the product embodying the mark.

As discussed above, companies that rate products have recognized Applicant's ARTESANO "pre-packaged sliced bread" as an innovative product.

- On April 3, 2017, IRI Growth Summit announced in its 2016 New Product Pacesetters Report that ARTESANO was one of the "Top 10 Food and Beverage Brands."¹²¹

¹¹⁹ *Id.* at ¶3 (TSDR 186).

¹²⁰ *Id.* at ¶17 (TSDR 190).

¹²¹ Benjamin Buch Decl. ¶12 and Exhibit 6 attached to the November 4, 2019 Response to Office Action (TSDR 189 and 221).

- Nielsen’s 2018 Top 25 Breakthrough Innovations list for the U.S. market includes “Sara Lee® Artesano™ Original & Golden Wheat Bakery Bread.”¹²²

Numerous news publications have referred to Applicant’s ARTESANO bread.¹²³

Unsolicited media coverage that refers to ARTESANO “pre-packaged sliced bread” supports a finding that ARTESANO has acquired distinctiveness.

7. Conclusion.

After considering all of the factors for which there is evidence in determining whether Applicant’s purported mark ARTESANO has acquired distinctiveness, we find that Applicant has met its burden of proving ARTESANO has acquired distinctiveness.

Decision: The refusal to register ARTESANO on the ground that it is generic is affirmed.

The refusal to register ARTESANO on the ground that it is merely descriptive is affirmed.

The refusal to register ARTESANO on the ground that it has not acquired distinctiveness is reversed.

¹²² Benjamin Buch Decl. ¶15 and Exhibit 8 attached to the November 4, 2019 Response to Office Action (TSDR 190 and 231-234).

¹²³ November 4, 2019 Response to Office Action (TSDR 279, 288, 309, 311, 315, 348, 350, 351, 352, 352, 355, 357, 360, 362, 363, 487, 522, 530, 537, 543, 553, 555, 557, 563, 568, 569, 572, 590, 604, 607, 609, 612, 613, 615, 617, 619, 620, and 630).