

<p>This Opinion is Not a Precedent of the TTAB</p>

Hearing: October 25, 2022

Mailed: February 15, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re PT Medisafe Technologies

Serial No. 88083209

Perry R. Clark of Law Offices of Perry R. Clark,
for PT Medisafe Technologies

Christopher M. Law, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

Before Heasley, Lynch, and English,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Preliminary Matters

PT Medisafe Technologies (“Applicant”) seeks to register the color mark shown below on the Principal Register with a claim of acquired distinctiveness, or in the alternative, on the Supplemental Register for “Chloroprene medical examination gloves sold only to authorized resellers” in International Class 10.¹

¹ Application Serial No. 88083209 was filed August 17, 2018, based on an allegation of use of in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). Applicant amended the application on March 9, 2021 to seek registration on the Supplemental Register “[s]hould the evidence submitted in support of this registration be found insufficient with



According to the current description in the application, “[t]he mark consists of the color dark green (Pantone 3285 c) as applied to the entire surface of the goods which consist of chloroprene examination gloves. The matter shown in the drawing in broken lines serves only to show positioning of the mark and no claim is made to it.” The color “dark green (Pantone 3285 c)” is claimed as a feature of the mark.²

The Examining Attorney finally refused registration of the mark on the Principal Register as generic and therefore incapable of distinguishing the identified goods under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052 and 1127, or in

respect to acquired distinctiveness.” March 9, 2021 Request for Reconsideration at TSDR 13. In the initial application, Applicant identified its goods as “medical examination gloves,” but in its March 9, 2021 Request for Reconsideration, Applicant amended the identification to its current iteration that limits the material composition of the medical examination gloves, and indicates that they are “sold only to authorized resellers.”

² In the initial application, Applicant described its mark as “the color green as applied to the entire surface of the goods which consist of chloroprene examination gloves.” Applicant subsequently amended the description to “the color green Pantone 3255C, Pantone 3285C, or Pantone 359U applied to gloves.” January 30, 2019 Response to Office Action at 3. Applicant next amended the description to “the color dark green (Pantone 3285 c) as applied to the entire surface of the goods which consist of chloroprene examination gloves.” April 20, 2020 Response to Suspension Inquiry. Applicant amended the description of the mark to its current iteration in the August 6, 2020 Response to Office Action.

the alternative on the Supplemental Register under Trademark Act Sections 23(c) and 45, 15 U.S.C. §§ 1091(c) and 1127. The Examining Attorney also finally refused registration of the mark on the Principal Register for lack of inherent distinctiveness and insufficient proof of acquired distinctiveness under Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051, 1052 and 1127.³

Applicant has appealed the refusals, and the appeal has been fully briefed.

II. Genericness

A. Legal Background

A generic proposed mark “cannot be registered as a trademark because such a [proposed mark] cannot function as an indication of source.” *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 35 USPQ2d 1554, 1557 (Fed. Cir. 1995). The references in the Trademark Act to “generic name” apply to proposed trade dress marks, including color marks. *See Sunrise Jewelry Mfg. Corp. v. Fred S.A.*, 175 F.3d 1322, 50 USPQ2d 1532, 1535 (Fed. Cir. 1999) (“the term ‘generic name’ as used in 15 U.S.C. Section 1064(3), must be read expansively to encompass anything that has the

³ The prosecution history also included a request for reconsideration by Applicant, which the Examining Attorney denied, and a request for remand by the Examining Attorney, which the Board granted. Applicant previously filed a motion to revoke the remand, and the Board denied the motion in an order dated October 7, 2021. 13 TTABVUE; *see also* 17 TTABVUE. Applicant spends a substantial portion of its Supplemental Brief rehashing the same arguments as in its motion, contending that the Board should not have found good cause to remand the application. 18 TTABVUE 20-25. We decline to revisit the denied motion and entertain what essentially constitutes an extremely late request for reconsideration of the Board’s 2021 order. *Cf.* Trademark Rule 2.127(b), 37 C.F.R. § 2.127(b) (“Any request for reconsideration or modification of an order or decision issued on a motion must be filed within one month from the date thereof.”); Trademark Rule 2.144, 37 C.F.R. § 2.144 (“Any request for rehearing or reconsideration, or modification of the decision, must be filed within one month from the date of the decision.”).

potential but fails to serve as an indicator of source, such as names, words, symbols, devices, or trade dress”); *Milwaukee Elec. Tool Corp. v. Freud Am., Inc.*, 2019 USPQ2d 460354, at *17 (TTAB 2019) (applying the genericness analysis to color marks). A generic proposed mark cannot acquire distinctiveness. *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018); *see also USPTO v. Booking.com B.V.*, 591 U.S. ___, 140 S. Ct. 2298, 207 L. Ed. 2d 738, 2020 USPQ2d 10729, at *2 (2020).

Whether a proposed mark is generic rests on its primary significance to the relevant public. *In re Am. Fertility Soc’y*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991). The relevant public is the purchasing or consuming public for the identified goods. *Magic Wand*, 19 USPQ2d at 1553. In this context, we consider whether the proposed trade dress mark is “so common in the industry that it cannot be said to identify a particular source.” *In re Odd Sox LLC*, 2019 USPQ2d 370879, at *6 (TTAB 2019) (quoting *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1555 (TTAB 2009) (generic product design unregistrable)); *see also Sunrise Jewelry*, 50 USPQ2d at 1535-36 (noting that trade dress can be considered generic if it “consists of the shape of a product that conforms to a well-established industry custom”) (citation omitted). The applicable test is a slight variation on the genericness test for word marks. We use a two-step inquiry:

we first consider the genus of goods or services at issue, and second consider whether the color sought to be registered or retained on the register is understood by the relevant

public primarily as a category or type of trade dress for that genus of goods or services.

Milwaukee Elec. Tool Corp., 2019 USPQ2d 460354, at *7-8 (citations omitted).

Applicant insists that because the evidence does not show that its proposed color mark “refers to the genus,” it should not be considered generic.⁴ To the extent Applicant implies that *Milwaukee Elec. Tool Corp.* “is not consistent with the Lanham Act and Supreme Court precedent on genericness,”⁵ we disagree because, as explained above, the statute encompasses trade dress and does not require an attempt to narrowly apply a test from caselaw on word marks. “Accordingly, we will identify the appropriate genus of goods and then determine whether the color [at issue] is so common within the relevant genus that consumers would primarily associate it with the genus rather than as indicating a unique source of goods within the genus.” *Id.* at *8 (citing *Sunrise Jewelry*, 50 USPQ2d at 1536).

The Examining Attorney must establish that a proposed mark is generic. *In re Hotels.com, L.P.*, 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). “Evidence of the public’s understanding of the [proposed mark] may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Merrill Lynch*, 4 USPQ2d at 1143; *see also In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1634 (Fed. Cir. 2016).

⁴ 18 TTABVUE 15 (Applicant’s Supplemental Brief).

⁵ *Id.* at 19.

B. Genus

Applicant and the Examining Attorney dispute the proper genus. The Examining Attorney contends that Applicant's original identification, the broader category of "medical examination gloves," serves as the appropriate genus. According to the Examining Attorney, the chloroprene "modifier and trade channel language do not alter the essential nature of applicant's goods, which are medical examination gloves,"⁶ and were added to the identification "in order to avoid a likely finding of genericness."⁷ The Examining Attorney points to third-party characterization of Applicant's goods as "Healthcare Gloves," "Exam Gloves," "Exam Grade Gloves," "Medical Gloves," "Gloves," and "Disposable Gloves," as proof that goods such as Applicant's are considered "medical examination gloves."⁸ As additional support, the Examining Attorney emphasizes that Applicant's Executive Vice President's declaration repeatedly refers to Applicant's "protective gloves," "gloves," and "glove products."⁹

Applicant, on the other hand, contends that its current identification, "chloroprene medical examination gloves sold only to authorized resellers," is the proper genus, because the identification of goods **must** establish the genus.¹⁰ According to dictionary evidence in the record, chloroprene is "a colorless liquid C₄H₅Cl used

⁶ 20 TTABVUE 9 (Examining Attorney's Brief).

⁷ *Id.* at 11.

⁸ *Id.* at 9 (citing to the application record regarding third-party characterizations of Applicant's goods).

⁹ *Id.* at 10 (citing to the Taneja Declaration).

¹⁰ 21 TTABVUE 3-4 (Applicant's Reply Brief).

especially in making neoprene by polymerization.”¹¹ Applicant emphasizes that there is no allegation that it uses its proposed mark on a broader range of gloves than what is specified in the current identification, nor that the trade channel restriction is inaccurate. According to Applicant, therefore the identification absolutely must serve as the genus, and that any contention otherwise “is based on an incorrect recitation of Federal Circuit caselaw.”¹²

As background information on the broader and more specific categories of goods, the record reflects that medical gloves are personal protective equipment used for various purposes, including in medical exams and procedures to protect the wearer and patient from infection and illness.¹³ The evidence also shows that there are several types of medical examination gloves, and the main types appear to be vinyl, latex, nitrile and chloroprene/neoprene.¹⁴ Chloroprene and neoprene refer to the same material composition for gloves.¹⁵ The various material compositions of gloves have different properties that may render them more or less well-suited to particular tasks. Websites in the record that sell exam gloves tend to include information that compares and contrasts the different materials, and suggests with what types of uses the materials might be most appropriate. For example, chloroprene gloves generally

¹¹ February 16, 2022 Office Action at TSDR 2 (merriam-webster.com).

¹² 21 TTABVUE 3 (Applicant’s Reply Brief).

¹³ September 7, 2021 Office Action at TSDR 78 (fda.gov).

¹⁴ *Id.* at 38-39 (benco.com); *id.* at 44-45 (mercedesscientific.com); *id.* at 58 (sunlinesupply.com); *id.* at 66-67 (hallofcare.com).

¹⁵ September 7, 2021 Office Action at TSDR 38 (benco.com), 46 (mercedesscientific.com), 66 (hallofcare.com).

are described as more durable and chemical-resistant, so they often are preferred for administering chemotherapy, whereas nitrile gloves are described as a light weight general-purpose alternative to latex, which has more significant allergy risks.¹⁶

Because the identification of goods in an application defines the scope of rights that will be accorded the owner of any resulting registration under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), generally “a proper genericness inquiry focuses on the description of [goods] set forth in the [application or] certificate of registration.” *Cordua Rests.*, 118 USPQ2d at 1636 (quoting *Magic Wand*, 19 USPQ2d at 1552). In *Cordua Rests.*, the Federal Circuit indicated that the “correct approach” is to focus on the identification in the application, in that case for restaurant services, and noted it was erroneous (harmlessly so, in that case) for the Board to rely on the applicant’s narrower actual services, a particular type of restaurant, as the genus. Nonetheless, Federal Circuit precedent allows for extrinsic evidence to inform the interpretation of terms in the identification. For example, in *In re Reed Elsevier Props.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380-81 (Fed. Cir. 2007), the Court approved the Board’s use of a genus based on the identification of services, but construed the identification by considering Applicant’s website through which the services were provided, and other use in the same industry of the matter (in that case, terminology) in the mark.

Given the emphasis on the identification of goods, we define the genus as chloroprene medical examination gloves. Applicant has represented that it “does not

¹⁶ September 7, 2021 Office Action at TSDR 45-46 (mercedesscientific.com), 57-58 (sunlinesupply.arnoldsofficefurniture.com), 66-67 (hallofcare.com).

use the identified color on other products,” i.e. on gloves with other material compositions, so we do not conclude that Applicant carved out non-chloroprene gloves despite use of the proposed mark in connection with such goods.¹⁷ Rather, Applicant’s narrowing of the identification to chloroprene medical examination gloves seems to accurately reflect its actual use of the proposed mark. Also, as noted above, the material composition of medical examination gloves appears to have significance in the industry, so Applicant’s specificity as to chloroprene is not a distinction without a difference. We note that Applicant’s amendment to limit its identification came in the wake of the Examining Attorney’s genericness evidence showing similarly-colored dark green nitrile medical examination gloves. Because nitrile examination gloves fall outside the amended identification and the genus, we do not discuss such evidence, and as Applicant’s counsel acknowledged at the oral hearing, any registration issuing with its amended identification would not establish rights against non-chloroprene gloves.

¹⁷ Nonetheless, we note that Applicant itself repeatedly characterized the relevant industry more broadly, as including medical examination gloves with material compositions other than chloroprene. When asked to provide photos and ads “showing competitive goods in applicant’s industry,” Applicant referred the Examining Attorney to Amazon search results for “green nitrile gloves.” January 30, 2019 Response to Office Action at TSDR 10-16. Applicant also relies on third-party applications and registrations as evidence of the use of color in its industry, including gloves that are identified as “disposable latex and synthetic gloves,” “disposable nitrile gloves,” “gloves for medical and surgical uses,” “gloves for medical and dental use, made of nitrile.” January 30, 2019 Response to Office Action at TSDR 24-30. Thus, Applicant categorizes its industry and its competitors broadly as medical gloves and explicitly includes manufacturers and sellers of medical gloves of various compositions like latex and nitrile, not just chloroprene. Applicant’s marketing materials for its identified chloroprene gloves refer to the goods as “A glove that combines the best of Nitrile and Natural Latex.” April 20, 2020 Response to Suspension Inquiry at TSDR 44.

We acknowledge the additional limitation in the identification, “sold only to authorized resellers.” A reseller is one who “sell[s] again” or “sell[s] (a product or service) to the public or to an end user, especially as an authorized dealer.”¹⁸ We consider the limitation as an indication that Applicant’s trade channels involve selling its goods to persons or entities that will resell the gloves. Mr. Taneja, Applicant’s Executive Vice President, Customer Strategies, testified that Applicant has “approximately 30 resellers nationwide,”¹⁹ and that “Applicant’s customers are resellers that sell its gloves ... to health care equipment distributors nationwide.”²⁰ Mr. Lanham, Applicant’s Executive Vice President, Customer & Product Strategies, testified that “[o]ur six most significant customers in the United States market are CSC, Benco, TNT, Darby, Henry Schein, and Tranzonic.”²¹ However, the identification does not reflect, nor did Applicant provide evidence, that “authorized resellers” restricts the nature or type of entity or person who could be a consumer of Applicant’s identified goods.

Ultimately, this indeterminate limitation cannot limit the scope of the genus to Applicant’s own products, for obvious reasons. Giving credence to such a limitation to “authorized resellers” necessarily would limit the universe of chloroprene medical examination gloves under evidentiary consideration to Applicant’s own products. Thus, for purposes of the genus, this limitation is similar to the hypothetical addition

¹⁸ February 16, 2022 Office Action at 3 (ahdictionary.com).

¹⁹ April 20, 2020 Response to Suspension Inquiry at 24 (Taneja Declaration).

²⁰ April 20, 2020 Response to Suspension Inquiry at 24 (Taneja Declaration).

²¹ March 9, 2021 Request for Reconsideration at TSDR 65.

of “sold to my customers,” and crediting the “authorized resellers” limitation would exclude any third-party chloroprene medical examination gloves of the identical color. *Cf. In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (TTAB did not err by disregarding a limitation in the identification that the goods were “all associated with” the applicant because the limitation was not meaningful and did not alter the nature of the goods or their trade channels). Limiting the genus to goods sold to Applicant’s authorized resellers would foreclose relevant evidence to prove that chloroprene medical gloves in the color in question are common in the industry and come from numerous sources. Apparently, this is Applicant’s intention because, after proposing to confine the genus to goods sold to its authorized resellers, Applicant posits that “there is simply no authority for the proposition that an applicant’s use of a mark on its own goods would support a finding of genericness.”²² This limitation, particularly when the nature of Applicant’s so-called “authorized resellers” is completely open-ended and subject to change, cannot be relied on to restrict the genus only to Applicant’s goods.

Therefore, we conclude that “chloroprene medical examination gloves” appropriately expresses the genus of goods at issue.

C. Public Understanding

We next consider whether the relevant public understands the dark green color identified by Applicant, as applied to the entire surface of chloroprene medical

²² 18 TTABVUE 17 (Applicant’s Supplemental Brief).

examination gloves, primarily as a category or type of trade dress for such goods. The relevant public for a genericness determination is the purchasing or consuming public for the genus of goods at issue. *Loglan Inst. Inc. v. Logical Language Grp. Inc.*, 962 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). The record suggests that consumers of chloroprene medical examination gloves include a broad range of the general public and industry, such as “caregivers, food handlers, dentists and other professionals,”²³ healthcare personnel and institutions,²⁴ research laboratories,²⁵ food processing facilities,²⁶ and people who want gloves for “general cleaning tasks.”²⁷ Thus, all such people or businesses who do or may purchase chloroprene medical examination gloves constitute the relevant public. *See Magic Wand*, 19 USPQ2d at 1552-53.

The record includes background information, with which the relevant public likely would be familiar, regarding the use of color generally in the medical examination glove industry. According to an article on the Mercedes Scientific website:

Medical gloves are available in various colors. While this may be a matter of personal preference for some, others use different glove hues for color-coding. For example, a facility might choose blue nitrile gloves to set them apart from white or clear latex ones. Colorful gloves can also help staff detect punctures or tears easier if they wear a darker glove over a light one. White gloves may be preferred to show contaminants better.

²³ September 7, 2021 Office Action at TSDR 56 (sunlinesupply.arnoldsofficefurniture.com).

²⁴ *Id.*

²⁵ September 7, 2021 Office Action at TSDR 43 (mercedesscientific.com).

²⁶ *Id.* at 50.

²⁷ *Id.* at 53.

You might use varying glove colors in a laboratory to help prevent cross-contamination.²⁸

In response to an information requirement regarding competitor use of the subject color or other colors, Applicant stated, in part, that “the use of color, including green in gloves is common. These colors are used as trademarks.”²⁹ Applicant’s Executive Vice President provided internally inconsistent testimony about this alleged practice in the industry. First, he stated, “[t]he colors **purple**, blue, white, and nude for gloves are common in the glove industry. These colors are considered standard colors in Applicant’s industry and are not used as source identifiers.”³⁰ Immediately afterward in the same declaration, however, he cited to third-party examples of “identifiable colors as a source identifier for their gloves,” and he described two of the examples as registrations “for the color **purple** as applied to” gloves.³¹

In any event, while Applicant concedes that the use of the color green is common for medical gloves, it maintains that its use of the shade of green specified in its application can and does serve as a source-indicator.

1. Examining Attorney’s Evidence of Genericness

The record contains voluminous evidence under third-party marks of chloroprene/neoprene medical examination gloves in the same or nearly the same dark green color as in Applicant’s proposed mark. Competitors’ use of the trade dress

²⁸ September 7, 2021 Office Action at TSDR 50 (mercedesscientific.com).

²⁹ January 30, 2019 Response to Office Action at TSDR 10.

³⁰ April 20, 2020 Response to Suspension Inquiry at TSDR 21 (Taneja Declaration) (emphasis added).

³¹ *Id.*

at issue for the genus of the goods can be evidence of genericness. *See Sunrise Jewelry*, 50 USPQ2d at 1535-36 (trade dress that is shown to conform to an established industry standard is generic); *Stuart Spector Designs*, 94 USPQ2d at 1555 (trade dress is generic if “the design is, at a minimum, so common in the industry that it cannot be said to identify a particular source.”).

For some – but not all – of the examples provided by the Examining Attorney, Applicant submitted declaration evidence that the gloves “were manufactured by Applicant and sold to its customers.”³² While we set those out separately below, contrary to Applicant’s contention, we consider them relevant to the genericness assessment. The relevant consumer – even including Applicant’s unspecified “authorized resellers” – could be exposed to Applicant’s gloves that appear under a large number of third-party marks without identifying Applicant as the source or manufacturer. “Generally, when a company sells a product to third parties for re-sale under the third parties’ marks rather than under the manufacturer’s mark, that circumstance cripples any attempt to show that consumers uniquely associate the product’s trade dress with one source, i.e., the manufacturer.” *Poly-America, L.P. v. Illinois Tool Works Inc.*, 124 USPQ2d 1508, 1520 n.48 (TTAB 2017) (citations omitted); *see also Mine Safety Appliances Co. v. Elec. Storage Battery Co.*, 405 F.2d 901, 160 USPQ 413, 415 (CCPA 1969); *In re Hillerich & Bradsby Co.*, 204 F.2d 287, 97 USPQ 451, 454 (CCPA 1953).

³² *See* March 9, 2021 Request for Reconsideration at TSDR 64; *see also* January 13, 2022 Response to Office Action at TSDR 6-8.

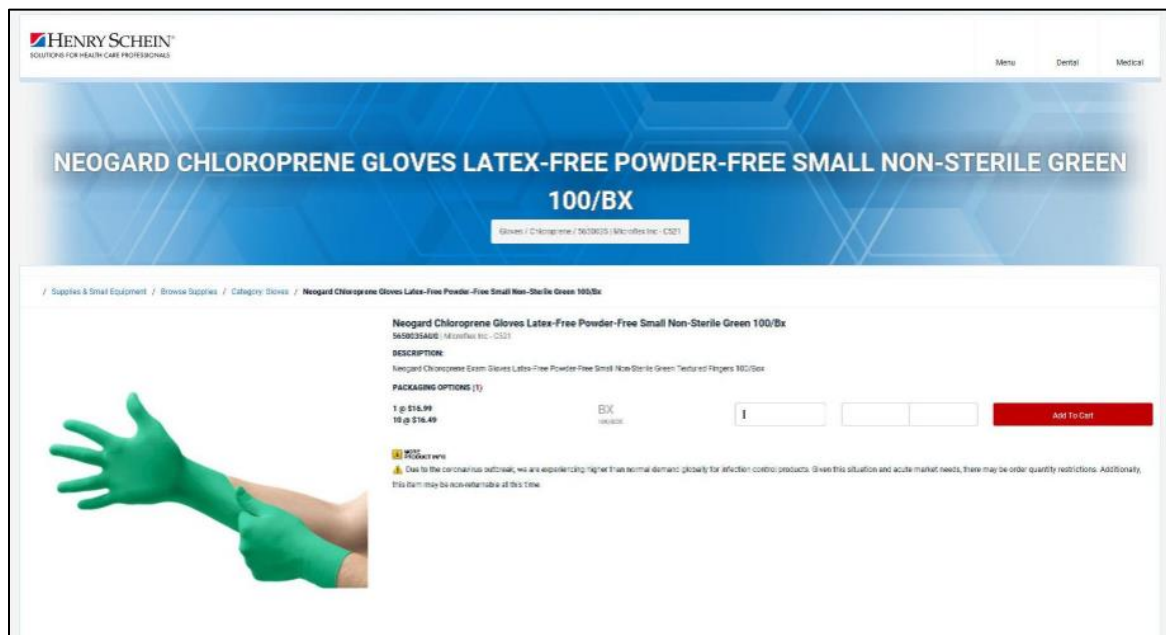
This principle applies in the context of color marks: “When [] a party has sold its own goods, bearing a color which it asserts has become distinctive of its goods, to third parties for resale to the consuming public as the products of those third parties, such practice detracts even further from the alleged distinctiveness of the color as that party’s trademark.” *British Seagull Ltd. v. Brunswick Corp.*, 28 USPQ2d 1197, 1203 (TTAB 1993), *aff’d* 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1999). Therefore, given that Applicant’s identically-colored chloroprene medical examination gloves are offered to consumers under a wide variety of third-party marks, with no evidence of identifying Applicant as the source of the gloves, these examples are relevant to the genericness determination.

Applicant criticizes the website evidence because “there is no evidence that any of the products identified by the Examining Attorney have actually been purchased by anyone – much less in what quantities or by consumers in the United States,”³³ but this type of evidentiary showing by an Examining Attorney is unnecessary. *See In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1631-32 (Fed. Cir. 2003) (recognizing different evidentiary standards in ex parte cases, given that the USPTO “is an agency of limited resources”). This type of website evidence is regularly relied on, and in this case, regardless of the extent of actual purchases, or in some instances, indications that products are temporarily out-of-stock, websites available to U.S. consumers tend to reflect consumer exposure to their contents. *See Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011) (Internet printouts “on their face,

³³ 21 TTABVUE 6 (Applicant’s Reply Brief).

show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein”). Thus, we find the evidence relevant to and probative of the inquiry in this case.

For the following examples the Examining Attorney introduced of dark green chloroprene gloves under various third-party marks, Applicant claims to be the manufacturer,³⁴ although the third-party websites do not so indicate:



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³⁴ March 9, 2021 Request for Reconsideration at TSDR 65-73, 80; January 13, 2022 Response to Office Action at TSDR 7.

³⁵ September 9, 2020 Office Action at TSDR 4 (henryschein.com).

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³⁶ May 19, 2020 Office Action at TSDR 18 (kingpintattoosupply.com).



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³⁷ May 19, 2020 Office Action at TSDR 25 (dhpionline.com). We note that this screenshot shows the manufacturer as "Clinical Supply Company," even though Applicant claims to have manufactured these gloves. March 9, 2021 Request for Reconsideration at TSDR 80 (Lanham Declaration).

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³⁸ September 9, 2020 Office Action at TSDR 20 (shopping.medexpressgloves.com).

https://harmony-cr.com/gloves-and-finger-cots/duraskin-12-green-8-mil-chloroprene-gloves/lb2012w

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³⁹ May 19, 2020 Office Action at TSDR 27 (harmony-cr.com).

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Product Details
Powder-free neoprene examination gloves.

- Textured fingertip finish
- Beaded cuff
- Ambidextrous
- Green color
- Thickness: at palm 3.1 mils; at fingertip 4.3 mils
- 100 gloves per box
- 10 boxes in a case

40

⁴⁰ September 9, 2020 Office Action at TSDR 24 (safcodental.com).

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The Liberty DURASKIN™ 2011W Chloroprene Micro-Textured Powder-Free 6 Mil Green Disposable Gloves offers superior hand protection in various environments. They are ideal for use in food processing plants, laboratories and other industrial environments. These chloroprene gloves are uniquely designed for a natural fit which inhibits hand fatigue and a micro-textured finish for maximum grip in wet or dry conditions. They are ambidextrous for easy wear on either hand and they feature a long 9" cuff for wrist protection. These latex-free 6-mil, nitrile gloves are ISO 9001 factory approved and they comply with federal regulations for food processing.

- Complies with federal food processing regulations
- 6-mil chloroprene gloves offer superior hand protection in various industrial environments
- Micro-textured for maximum grip in wet or dry conditions
- 9-inch cuff offers wrist protection
- ISO 9001 factory approved for industrial use
- Disposable, economic option to promote hygiene and prevent cross-contamination

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⁴¹ May 19, 2020 Office Action at TSDR (hantover.com).



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⁴² May 19, 2020 Office Action at TSDR 34 (labmart.com).



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⁴³ May 19, 2020 Office Action at TSDR 36 (glovesamerica.com).



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Ansell

NeoTouch Green Neoprene Powder-Free Lab-Exam Gloves, Textured Fingertips

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DESCRIPTION

NeoTouch creates a new category in disposable gloves for its comfort, durability and chemical resistance. The first neoprene single-use gloves for industrial usage. An alternative to natural rubber latex that protects against Type I allergies. Excellent resistance to acids, bases and alcohols. Exclusive formulation provides superior comfort. Exam grade Food grade - complies with FDA food handling requirements (21 CFR 177.2600)

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PRODUCT DETAIL		
<p>25-201-L</p> <p>Mfr. No. 385681</p> <p>Description</p> <p>Gloves, Ansell, Neo Touch, Green Neoprene Powderfree, Textured Fingertips, Beaded Cuff, 13 mil, Long Length 12", Large, 100 per box, 10 boxes per case, 1000EA/CS</p>	<p>List Price/Quantity</p> <p>\$369.57 /CS</p> <p>(1000/CS)</p>	<p>Total</p> <p>\$0.00</p>
<p>25-201-M</p>	<p>List Price/Quantity</p>	<p>Total</p>

44

⁴⁴ September 9, 2020 Office Action at TSDR 2 (thomassci.com).

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PowerChem™ PC-079-095-GR Neoprene Exam Gloves, SW®

Supplier: [SW Safety Solutions](#)

When the situation calls for high performance, these neoprene gloves provide superior resistance to chemicals, punctures, and abrasions with a secure grip for handling small parts and slippery objects.

- Pure neoprene prevents latex allergic reactions
- Textured surface delivers excellent grip
- Ergonomic design for comfort
- Optimal thickness for durability and tactile sensitivity
- Powder-free to prevent contamination
- Tear-resistant beaded cuff eases donning

The SW difference: 100% air inspected, 75% less residue, consistent tip to cuff.

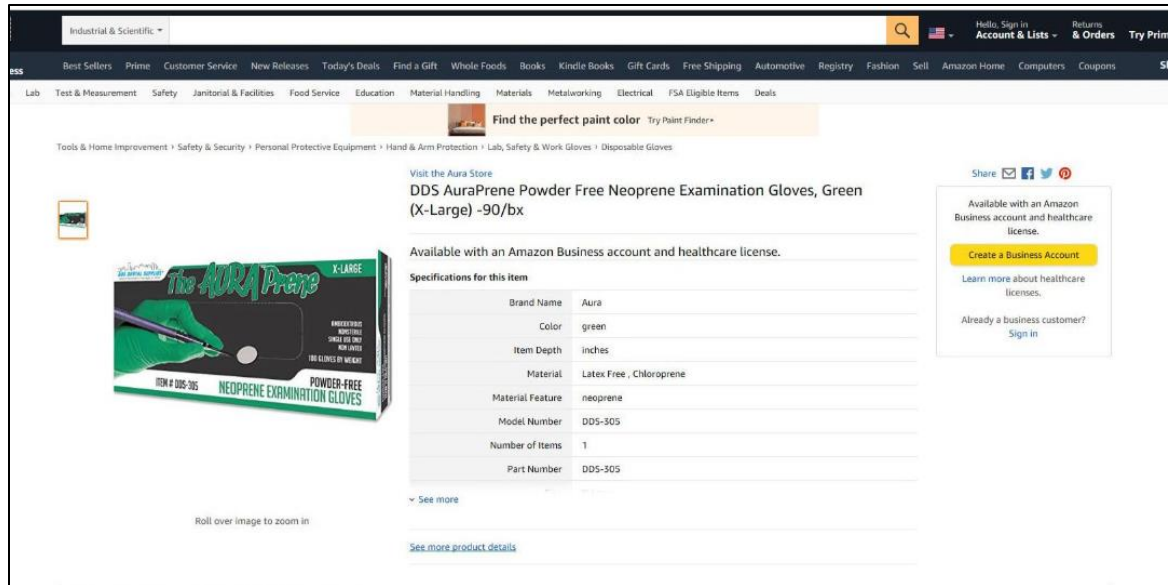
Born of SW® manufacturing capabilities... [More Product Information](#)

SPECIFICATIONS

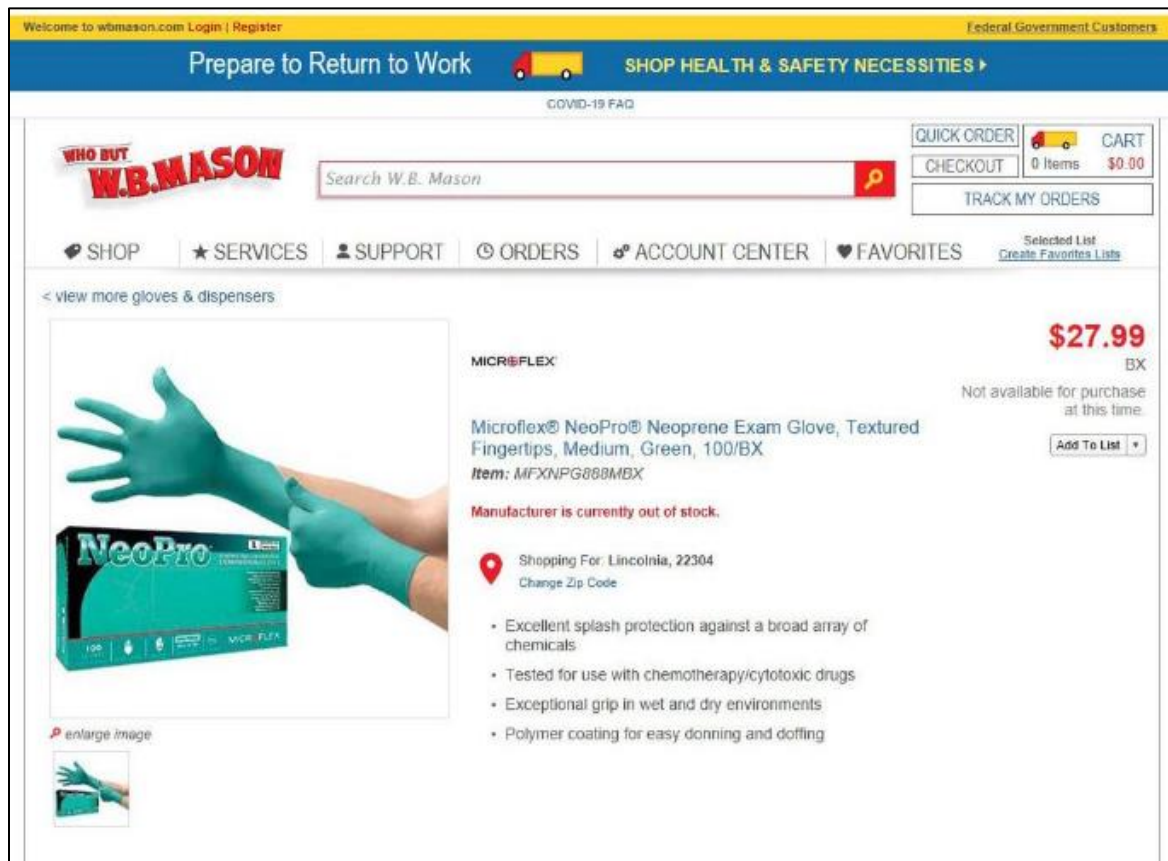
Model	PC-079-095-GR
Ambidextrous/Hand-specific	Ambidextrous
Disposable/Reusable	Disposable
Latex/latex-free	Latex-Free

45

⁴⁵ September 9, 2020 Office Action at TSDR 5 (us.vwr.com). We note that this screenshot shows the statement, “Born of SW® manufacturing capabilities,” even though Applicant claims to have manufactured these gloves. March 9, 2021 Request for Reconsideration at TSDR 66.




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⁴⁶ September 9, 2020 Office Action at TSDR 10 (amazon.com).

⁴⁷ September 9, 2020 Office Action at TSDR 15 (wbmason.com).




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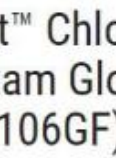
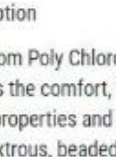
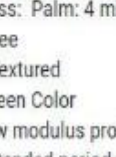
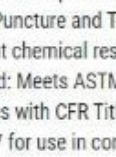


Verdant™ Chloroprene Powder Free Exam Gloves, 4 mil, Green (GL-CR106GF)

Product Description

- Made from Poly Chloroprene Synthetic Polymer
- Provides the comfort, feel and tactile sensitivity of latex and barrier properties and strength of Nitrile Gloves
- Ambidextrous, beaded cuff, single use/disposable
- Thickness: Palm: 4 mil; Finger 5.10 mil
- Latex Free
- Finger Textured
- Lime Green Color
- Very Low modulus provides superior dexterity and comfortable to wear extended period with minimum fatigue
- Strong Puncture and Tearing Resistance
- Excellent chemical resistance to many solvents, alcohol, oils
- Standard: Meets ASTM D6977
- Complies with CFR Title 21 Indirect Food Additive Regulations Part 177 for use in contact with food
- Non Sterile

Not available for sale in Canada

SIZE

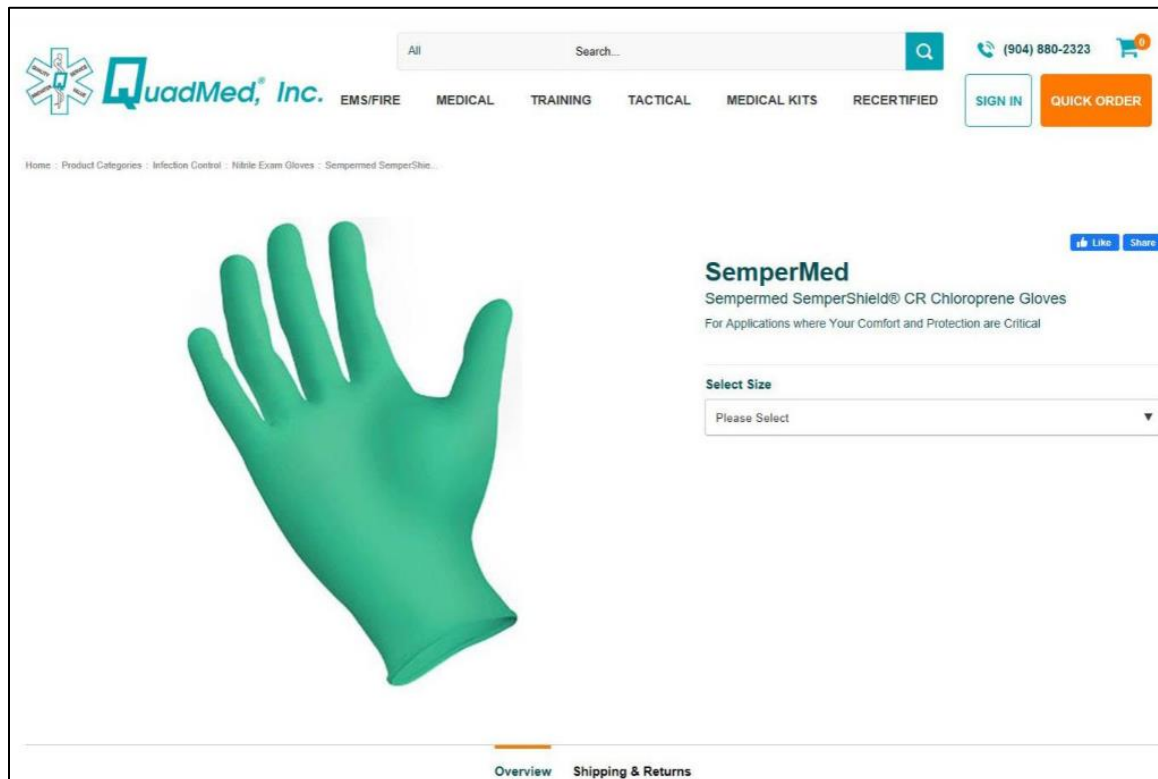
X-Small (GL-CR106GFXS)

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⁴⁹ September 9, 2020 Office Action at TSDR 36 (hospeco.com).

Unlike for the previous examples, Applicant has **not claimed** to be the manufacturer of the following examples of dark green chloroprene gloves under various third-party marks:



50

⁵⁰ May 19, 2020 Office Action at TSDR 28 (quadmed.com).

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Chemotherapy-Approved Gloves
Case of 2000
By: Innovative Healthcare Corporation



Innovative Healthcare Corporation 194052 Chemotherapy-Approved Gloves

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Latex Free

- Manufactured from synthetic polychloroprene polymer
- Alternative to latex, without allergenic risks
- Exceptional softness and elasticity for wearer's comfort
- Excellent strength
- Tested for use with chemotherapy drugs
- Textured for improved grip
- 9.5" long
- Aqua green color
- Compliant with ASTM standards
- Available in a variety of sizes


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⁵¹ May 19, 2020 Office Action at TSDR 21 (quickmedical.com).

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Safco Chloroprene Green

Safco
(Made in Malaysia.)



Product Details


Powder-free chloroprene examination gloves.

Safco's chloroprene gloves give you comfort and tactile sensitivity comparable to latex, without the risk of allergic reactions to latex proteins. Superb elasticity. High tensile strength.

- Textured fingertip finish
- Beaded cuff
- Ambidextrous
- Green color
- Thickness: at palm 2.4 mils; at fingertip 3.5 mils
- 100 gloves per box
- 10 boxes in a case

52

⁵² May 19, 2020 Office Action at TSDR 31 (safcodental.com).


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Categories: [Personal Protective Equipment \(PPE\)](#) : [Gloves](#)



Patterson® Chloroprene Examination Gloves – Powder Free, Latex Free, 200/Box - Patterson Dental Supply

Chloroprene Examination Gloves offer durability and comfort, which is especially beneficial during periods of extended wear.

- Latex free
- Textured
- Single use only
- Nonsterile
- Ambidextrous

Additional Resources:

- [Patterson® Chloroprene Glove Specifications](#)

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⁵³ May 19, 2020 Office Action at TSDR 16 (pattersondental.com).

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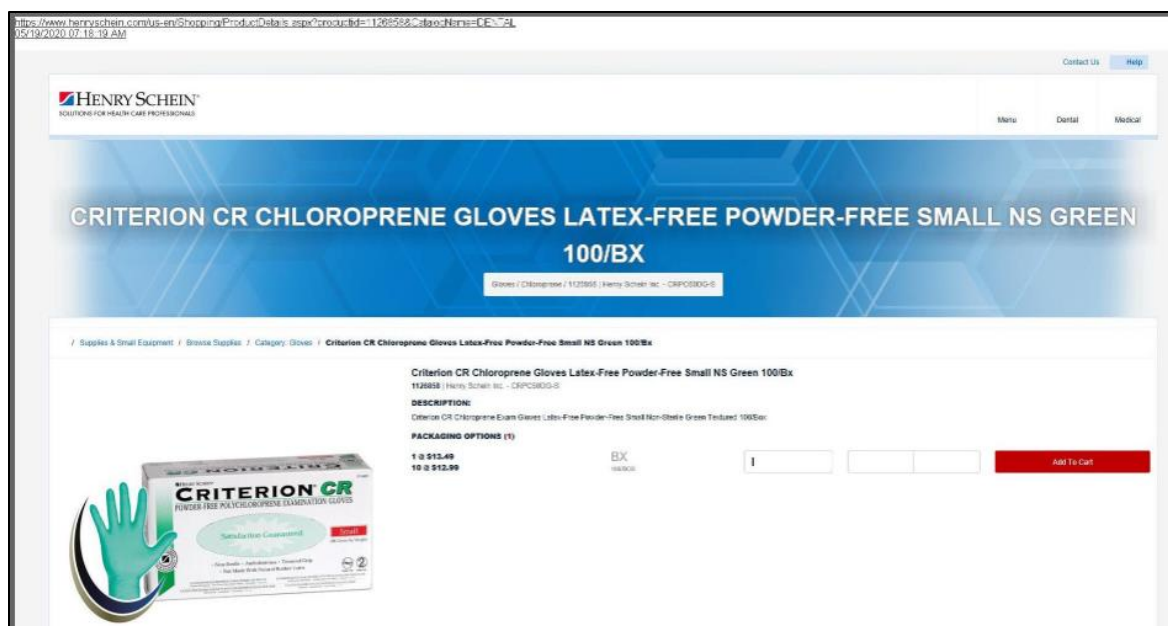
CHLOROPRENE ACCELERATOR FREE SURGICAL GLOVE

Type	Chloroprene Examination Glove, Online Single Chlorinated, Non-sterile
Material	Chloroprene
Colour	Green
Design & Features	Ambidextrous, finger textured, beaded cuff
Storage	The gloves shall maintain their properties when stored in a dry condition. Avoid direct sunlight
Shelf-life	3 years from the date of manufacturing

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⁵⁴ September 9, 2020 Office Action at TSDR 29 (topglove.com).



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⁵⁵ May 19, 2020 Office Action at TSDR 14 (henryschein.com).

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100ct TruFit™ Ultra Thin Chloroprene Gloves, Green

Item #TF-ULTRAG

\$29.29 - \$29.79

Glove Size

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Quantity

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⁵⁶ February 16, 2022 Office Action at 10 (youngspecialties.com).


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Reflection® Polychloroprene Powder Free Exam Gloves



SmartPractice

Temporary Customer Limit: 1 case per brand per week (until further notice)

Polychloroprene gloves provide a superior fit that gives Reflection Polychloroprene Exam Gloves the excellent comfort and fit latex-wearers prefer due to it's unique formulation with superior elasticity. Revolutionary super-stretch technology offers the tactile sensitivity of latex that is not typically found with non-latex materials. Free of natural rubber Latex, ideal for patients or staff who may be allergic to NRL proteins. Unique green color helps quickly identify the product as non-latex.


- Thin feel for improved tactile sensitivity
- Superior stretch and fit with no NRL proteins
- Powder free, with polymer coating for easy donning
- Textured grip for improved tactile sensitivity
- 100 gloves in a box; 12 boxes to a case.
- Ambidextrous, Medical-grade, non-sterile, single use. Meets or exceeds ASTM standards

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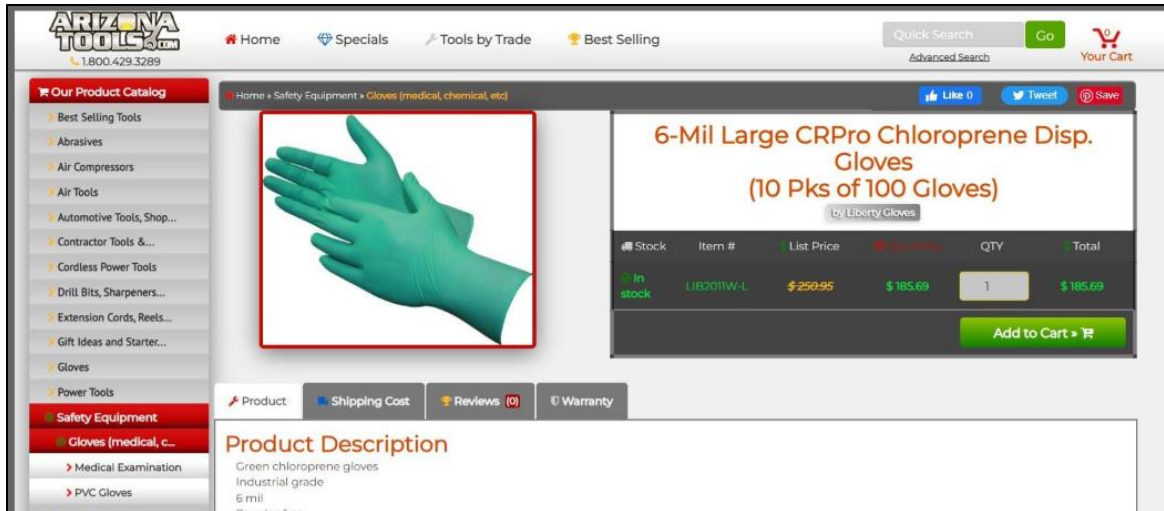
Le Soothe® Sapphire™ Polychloroprene Powder Free Exam Gloves

SmartPractice | \$17.19/bx

Product	Availability	Price			
X-Small, Reflection Green Polychloroprene Exam Gloves Item #: 433061	In Stock Ships within 24 hours from SmartPractice	Qty	Each	Extended	
		12	\$17.19	\$206.28	<input type="button" value="Add to Cart"/>
100 gloves in a box, 12 boxes to a case.					Shopping List
Requires a State License					
X-Small, Reflection Green Polychloroprene Exam Gloves Item #: 433061BX	In Stock Ships within 24 hours from SmartPractice	Qty	Each	Extended	
		1	\$17.19	\$17.19	<input type="button" value="Add to Cart"/>
100/bx		6	\$17.19	\$103.14	<input type="button" value="Add to Cart"/>
Requires a State License					

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⁵⁷ February 16, 2022 Office Action at TSDR 11 (thedentalbox.com).



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⁵⁸ February 16, 2022 Office Action at TSDR 12 (arizonatools.com).

⁵⁹ February 16, 2022 Office Action at TSDR 14 (toolsid.com).

2. Applicant's Evidence

Applicant contends that the existence of “gloves made of a variety of colors, including for example, light gray, lavender, clear, and blue,” weighs against the genericness of Applicant's proposed color mark.⁶⁰ That is, because there are many different colors of medical examination gloves, no particular color could be generic for the genus.

Applicant also submitted third-party statements in responses to Office actions from the prosecution histories of other applications for proposed color marks for gloves, and Applicant maintains they show that others in its industry made representations that the proposed color marks were source-indicating, or that color was used for source-indication in the glove industry.⁶¹ However, statements made by third-party trademark applicants pertaining to other colors and other types of gloves are not probative of the consumer perception of Applicant's proposed mark in this case. There is no question that color marks generally are capable of serving as source-indicators – that is not the ground for refusal here. Rather, the relevant inquiry focuses on the consumer perception of the particular color at issue as to the genus set by Applicant's identified goods.

Turning to evidence regarding the color at issue, Applicant submitted two customer declarations, identical in substance, stating in part that “[a]lthough various shades of green are used on disposable medical examination gloves,” the declarants

⁶⁰ 18 TTABVUE 15.

⁶¹ *E.g.*, March 9, 2021 Request for Reconsideration at TSDR 3-5 and accompanying attachments.

recognize Applicant “as the sole source of gloves with the distinctive dark green Pantone 3285C color.”⁶² The declarations do not address how close any of the other “various shades of green ... used on disposable medical examination gloves” come to Applicant’s proposed color mark. We give these declarations some probative weight, but do not find them sufficiently representative or convincing of the relevant consumer perception of the proposed mark in general to carry much weight. The declarations are few in number, identical in form (which, while not fatal, makes them less persuasive), and relatively conclusory. *See, e.g., In re OEP Enters.*, 2019 USPQ2d 309323, at *64-66 (TTAB 2019) (discounting four reseller declarations based in part on similar reasons); *see also In re Pohl-Boskamp GmbH & Co. KG*, 106 USPQ2d 1042, 1051 (TTAB 2013) (criticizing form declarations that “merely assert[ed] that applicant’s product is the only one in the marketplace having a peppermint flavor or scent,” which was contradicted by the record, and that “each declarant is himself or herself familiar with applicant’s product and associates its scent with applicant alone”).

Applicant’s so-called “survey” evidence also lacks persuasiveness. The “survey” in this case was conducted by Applicant’s counsel, who offers no credentials for conducting surveys, through the online “Survey Monkey” platform.⁶³ According to counsel’s declaration, he sent six respondents a questionnaire that included “a copy

⁶² August 6, 2020 Response to Office Action at TSDR 6-14 (Cohen and Maloney Declarations).

⁶³ March 9, 2021 Request for Reconsideration at TSDR 74-79 (Clark Declaration).

of the specimen filed with the Application,” and he summarized his results of the three responses received in the following table:

Question	Response 1	Response 2	Response 3
How long have you purchased the Medisafe dark green chloroprene glove, shown below? ²	“Over 6 years”	“13”	“at least 7 years, probably more”
Is the dark green shade used by Medisafe distinctive among manufacturers of chloroprene gloves?	Yes	No	Yes
Would you question whether Medisafe was the actual source of a particular lot of dark green chloroprene gloves if those gloves did not use Medisafe’s usual shade of dark green?	Yes	Yes	Yes
When you see Medisafe’s dark green chloroprene gloves what does that signify to you?	“A quality glove / a happy customer”	“quality”	“QUALITY. I know they came from Medisafe and I know they are high quality. This is because Medisafe has taken many years to perfect chloroprene disposable gloves.”

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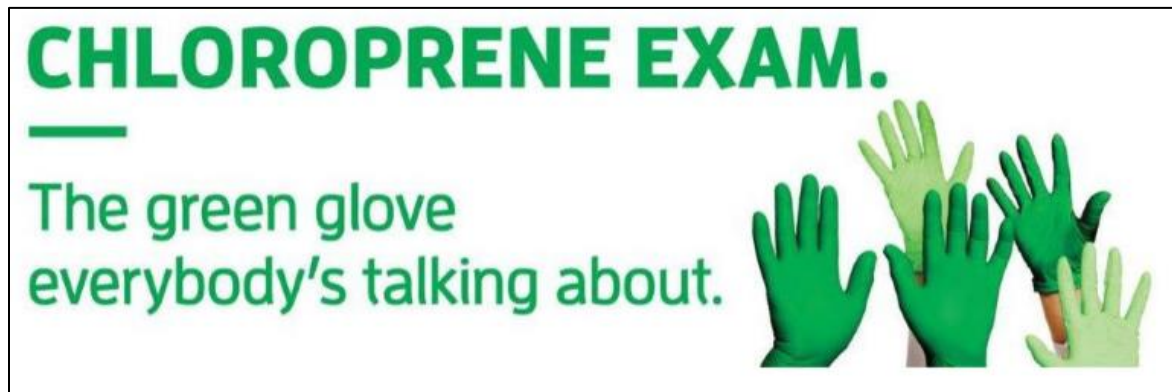
⁶⁴ March 9, 2021 Request for Reconsideration at TSDR 75 (Clark Declaration).

As the Supreme Court has noted, trademark surveys “can be helpful evidence of consumer perception but require care in their design and interpretation.” *U.S. Patent & Trademark Office v. Booking.com*, 2020 USPQ2d 10729, at *7 n.6 (citation omitted). The flaws in Applicant’s survey evidence are too numerous to detail, but we will highlight some of the more glaring problems.

To begin with, trademark surveys typically are conducted by survey experts who follow accepted norms that ensure the reliability of the survey. Otherwise, such surveys generally are not considered. *See, e.g., M2 Software, Inc., a Delaware corporation v. Madacy Ent.*, 421 F.3d 1073, 76 USPQ2d 1161, 1171 (9th Cir. 2005) (“Both district judges properly rejected the M2 Software’s survey because the survey’s creator ‘did not qualify as an expert on designing or analyzing consumer surveys.’”); *Pfizer Inc. v. Sachs*, 652 F. Supp. 2d 512, 92 USPQ2d 1835, 1839 (S.D.N.Y. 2009) (Pro se plaintiff’s ad hoc genericness “survey” was “flawed methodologically” and did not rebut the presumption of validity of plaintiff’s registered mark.); *Valador, Inc. v. HTC Corp.*, 242 F. Supp. 3d 448, 458 (E.D. Va. 2017), *aff’d*, 707 Fed. Appx. 138 (4th Cir. 2017) (Survey excluded because, among other reasons, the survey person was not qualified to conduct a trademark confusion survey). As noted above, the survey here was conducted by Applicant’s counsel, who provides no indication that he qualifies as a consumer survey expert or followed any accepted methodology for such surveys.

Indicative of the methodology problems, the “specimen filed with the Application,” which the survey respondents were shown as the basis for their responses, shows

gloves with various shades of green (see below), and contains extraneous matter such as the tagline “[t]he green glove everybody’s talking about.”



We do not consider this an appropriate survey stimulus for Applicant’s subject mark,



shown in the drawing as .

Another issue with methodology involves the universe of respondents for the survey. A proper survey universe likely would include all potential consumers of chloroprene medical examination gloves, but this survey was limited to a small subset of Applicant’s established customer base. Even apart from the general problem of limiting the universe to Applicant’s own consumers, we note that despite Applicant’s separate representation that it has approximately 30 reseller customers,⁶⁵ the survey declaration indicates that the survey was sent to only six of them, and only three

⁶⁵ April 20, 2020 Response to Suspension Inquiry at 24 (Taneja Declaration)

responded.⁶⁶ The declaration contains no explanation of why and how the six entities were selected. Among the six customers that received the SurveyMonkey invitation was the employer of one of the customer declarants, so it also is unclear whether there is overlap between the three “survey” respondents and the two customer declarants. Ultimately, Applicant has not demonstrated that the survey universe was appropriate.

We also find the survey questions to be inappropriately formulated. The questions already refer to Applicant as the source of the gloves in question, and are otherwise leading, such as the reference to “Medisafe’s **usual** shade of dark green.” Notably, despite the leading, one of the three respondents nonetheless indicated that Applicant’s proposed color mark was **not distinctive** in the industry.

Overall, the survey is so flawed as to be entitled to no probative weight on the issues in this case. *See In re Minnetonka, Inc.*, 212 USPQ 772 (TTAB 1981) (non-*Teflon* survey not persuasive because of survey defects); *Zimmerman v. Nat’l Ass’n of Realtors*, 70 USPQ2d 1425, 1435 (TTAB 2004) (“given all the deficiencies of petitioner’s survey, we accord it very little weight”); *Tea Board of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1894-95 (TTAB 2006) (non-*Teflon* survey did not elicit relevant responses); *Sheetz of Del., Inc. v. Doctors Assocs. Inc.*, 108 USPQ2d 1341, 1360–66 (TTAB 2013) (Applicant’s survey given little weight because of flawed structure).

⁶⁶ March 9, 2021 Request for Reconsideration at TSDR 74-75 (Clark Declaration).

D. Conclusion as to Genericness

The record as a whole clearly demonstrates that consumers of chloroprene medical examination gloves are exposed, under a wide variety of marks and from manufacturers other than Applicant, to such goods in the same color as in Applicant's proposed mark, or in very similar shades of dark green so as to be essentially indistinguishable. We find that the evidence as a whole, including material not specifically excerpted or discussed herein, shows that dark green, in a shade identical or similar to Applicant's, is so common in the chloroprene medical examination glove industry that it cannot identify a single source. The proposed color mark is generic, and cannot serve as a source-indicator.

III. Lack of Inherent Distinctiveness and Insufficient Proof of Acquired Distinctiveness

Applicant has submitted a claim under Section 2(f), or, in the alternative, an amendment to the Supplemental Register. While the genericness determination serves as an absolute bar to registration of Applicant's proposed mark, in the event a different conclusion were to be reached on appeal, we include for completeness an assessment of Applicant's claim of acquired distinctiveness.

Single-color marks, such as this one, are never inherently distinctive. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1068-69 (2000) ("In the case of product design, as in the case of color, we think consumer predisposition to equate the feature with the source does not exist."). The burden of proving acquired distinctiveness for a single-color mark is substantial. *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424 (Fed. Cir. 1985) ("By their nature color

marks carry a difficult burden in demonstrating distinctiveness and trademark character.).

Our ultimate Section 2(f) analysis and determination in this case is based on all of the evidence considered as a whole, under the following six factors:

(1) association of the [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.

In re SnoWizard, Inc., 129 USPQ2d 1001, 1105 (TTAB 2018) (quoting *Converse, Inc. v. Int’l Trade Comm’n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)).

Under the first factor, we discussed Applicant’s so-called survey and its customer declarations above; our assessment of the probative weight to be accorded that evidence applies equally here.

Under the second factor, Applicant offered testimony that it has used the proposed mark for 18 years.⁶⁷ Despite Applicant’s declaration testimony that Applicant is the only manufacturer of gloves in the color at issue,⁶⁸ and that its use is substantially exclusive, the record suggests otherwise. We find that Applicant’s use is far from “substantially exclusive” within the meaning of Section 2(f). *See Sheetz of Del.*, 108 USPQ2d at 1370 (“In this case, the widespread use of ‘Footlong’ demonstrated by this record would itself be sufficient to dispose of applicant’s claim of acquired

⁶⁷ January 30, 2019 Response to Office Action at TSDR 18.

⁶⁸ January 30, 2019 Response to Office Action at TSDR 18.

distinctiveness”); *see also Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”).

Under the third and fourth factors, the evidence submitted by Applicant is not specific to the claimed color at issue, but instead refers to gloves of multiple shades of green with differing Pantone designations. For example, Applicant’s Taneja Declaration testimony regarding sales volume, sales revenue, trade show promotion and advertising expenditures and activities address “Pantone 3255C, Pantone 3285C and Pantone 359U,”⁶⁹ and provides no breakdown specific to the color at issue in this case. Thus, because this evidence does not correlate to the proposed mark at issue, we cannot rely on it to demonstrate that the proposed color mark in particular has achieved significance as a source-indicator.

Under the “intentional copying” factor, while Applicant submitted a couple of articles about counterfeit nitrile medical examination gloves in different colors,⁷⁰ the articles simply do not relate to any alleged copying of the proposed color mark at issue.

Applicant did not point to any evidence under the sixth factor.

⁶⁹ April 20, 2020 Response to Suspension Inquiry at TSDR 23-30

⁷⁰ March 9, 2021 Request for Reconsideration at TSDR 55-60.

Based on our review of the evidence in its entirety, we find that Applicant has failed to meet its burden of proving that consumers seeking chloroprene medical examination gloves would understand the primary significance of the color dark green (Pantone 3285 c) alone as a source-indicator for Applicant and, therefore, it has not acquired distinctiveness.

Decision: The refusal to register Applicant's proposed mark on the Principal or Supplemental Register on the ground that it is generic is affirmed. In the alternative, the refusal to register Applicant's proposed mark on the Principal Register as not inherently distinctive and lacking acquired distinctiveness is affirmed.