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

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

HERSHEY CHOCOLATE & CONFECTIONERY
CORPORATION and THE HERSHEY COMPANY,

Opposers,

v.

KENNETH B. WIESEN,

Applicant.

Opposition No. 91200575

OPPOSERS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Opposers Hershey Chocolate & Confectionery Corporation and The Hershey Company (together, “Hershey”) move, under Fed. R. Civ. P. 56 and 37 C.F.R. § 2.127, for summary judgment in this opposition proceeding against applicant Kenneth B. Wiesen. The parties have completed discovery, and there are no genuine issues of material fact at issue in this proceeding.

FACTS

Hershey is the largest North American manufacturer of quality chocolate and non-chocolate confectionery products and the owner of numerous trademarks for candy, chocolate, and related products. Hershey Consolidated Notice of Opposition (“Opposition”) ¶ 1. Since at least as early as 2005, Hershey has used continuously the trademark MILKSHAKE in connection with a variety of candy products, including certain of its Kit Kat chocolate candy bars and its Whoppers candy. Opposition ¶ 2; Declaration of Paul C. Llewellyn (“Llewellyn Decl.”) Exh. A. As of this proceeding, Hershey is the only entity to use MILKSHAKE on candy, and there is no evidence of any significant third party use, advertising, or sales of any candy using the word MILKSHAKE as a designation of source.

Over the past seven years, Hershey’s MILKSHAKE-branded candy products have been sold in retail stores and by online retailers throughout the United States, including in national retail chains such as Wal-Mart, Target, Kroger, Safeway, Walgreens, CVS, Dollar General, and Family Dollar, and Hershey has earned revenues of approximately \$31.5 million for sales of such candy, having sold approximately 29.5 million units thereof. Declaration of Craig Kinderwater (“Kinderwater Decl.”) ¶¶ 4–5. Hershey and its customers have spent approximately \$4 million in advertising and marketing Hershey’s MILKSHAKE-branded candy, including in trade promotions, sales materials, merchandising, and promotion packaging. Kinderwater Decl. ¶ 6.

A typical package bearing Hershey's MILKSHAKE mark, sold throughout the United States, appears below:¹



Hershey's Whoppers Milkshake candy is typically sold to retail consumers for \$1.00 and \$2.39 for 4 oz. Theater Boxes and 10 oz. Cartons, respectively. Kinderwater Decl. ¶ 7. Hershey also sells Robin Egg versions of its Whoppers candy, and its Robin Egg Milkshake candy was sold to retail consumers for \$2.39 to \$2.59 for 10 oz. packaged candy bags. Kinderwater Decl. ¶ 8. Hershey also sold a limited edition Kit Kat Milkshake candy bar that was priced at \$0.69 to \$0.99 for 1.5 oz. standard bars for retail consumers. Kinderwater Decl. ¶ 9.

Despite Hershey's extensive, exclusive, and ongoing use of the MILKSHAKE trademark on candy products, Applicant submitted a trademark application for MILKSHAKE (Serial No. 85/221,585) on January 19, 2011 for "Candy; Candy bars; Candy with caramel; Candy with cocoa; Chocolate candies" and a trademark application for MILK SHAKE (Serial No. 85/210,942) on January 5, 2011 for "Candy; Candy bars." Opposition ¶ 4; Applicant's Answer

¹ Kinderwater Decl. Exh. A.

to Notice of Opposition (“Answer”) ¶ 4. Applicant’s applications both were published for opposition on June 14, 2011. Answer, Introductory Paragraph.

Applicant has testified that he chose the MILKSHAKE trademark as part of an effort to reintroduce a MILKSHAKE-branded candy bar developed, manufactured, and sold by Hershey’s predecessors-in-interest to the MILKSHAKE trademark, Hollywood Candy Company (also known as Hollywood Brands) and Leaf,² and that he understood Hollywood Candy Company and Leaf previously had registered MILKSHAKE and MILK SHAKE trademarks for such candy bars. Llewellyn Decl. Exh. B (Excerpts from Deposition of Kenneth B. Wiesen, July 31, 2012) (“Wiesen Depo.”), 28:25–30:7, 46:13–48:5 & 61:13–19; Llewellyn Decl. Exh. C (Applicant’s Response to Opposers’ First Set of Interrogatories (“Applicant’s Interrog. Responses”)), Response No. 6. Although applicant has yet to use the MILKSHAKE or MILK SHAKE trademarks, subject to the ruling of the Board in this proceeding, he purportedly intends to develop, have manufactured, and sell a facsimile of Hollywood Candy/Leaf’s Milkshake candy bar to consumers through candy distributors and brokers who would then sell the candy bar through the Internet and the general retail market, including supermarket chains, “mom and pop stores,” and other channels in which Hershey’s products are also sold. Wiesen Depo. 54:20–61:8; Applicant’s Interrog. Responses, Response No. 9. Despite these plans, applicant has never

² The U.S. Patent and Trademark Office has previously registered Hollywood Brands and Leaf’s MILKSHAKE trademarks. Llewellyn Decl. Exh. F (HRSHY00000001 (Reg. No. 1,273,766 for MILKSHAKE (Stylized), registered April 10, 1984 for “candy” in International Class 30, owned by Hollywood Brands, Inc.); HRSHY00000003 (Reg. No. 1,669,640 for MILKSHAKE, registered December 24, 1991 for “candy” in International Class 30, owned by Leaf, Inc.); HRSHY00000017 (Reg. No. 261,488 for MILK SHAKE (Stylized), registered on September 17, 1929 for “candy bars” in International Class 30, owned by Hollywood Brands, Inc.)). Hershey obtained the MILKSHAKE and MILK SHAKE trademarks when Hershey acquired the Leaf North American operations in 1996; Leaf had acquired Hollywood Brands, Inc., the registered owner of two MILKSHAKE trademarks, in 1988.

sought, nor has he received, any permission or other authorization from Hershey or its predecessors-in-interest to use the MILKSHAKE trademark—or any marks similar thereto—in connection with any products, much less candy products. Nor has applicant ever sought or received any permission or other authorization by Hershey or its predecessors-in-interest to develop, manufacture, market, distribute, or sell a copy of the Milkshake candy bar, or have any of the foregoing done on his behalf.

LEGAL STANDARDS

A. SUMMARY JUDGMENT STANDARD

The Board should grant summary judgment “where the movant shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.” *Motorola Mobility, Inc. v. Nextel Commc’ns, Inc.*, 2012 WL 2588577, at *2 (TTAB June 18, 2012); *see also T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 1374 (Fed. Cir. 1996); Fed. R. Civ. P. 56(a). This standard does not require that the movant demonstrate that there are no factual disputes whatsoever. Rather, “[b]y its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original).

B. STANDARD FOR REFUSING REGISTRATION OF A MARK

Under Section 2(d) of the Lanham Act, the U.S. Patent and Trademark Office should refuse registration of an applied-for mark if that proposed mark

so resembles . . . a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

Citigroup Inc. v. Capital City Bank Grp., Inc., 637 F.3d 1344, 1349 (Fed. Cir. 2011) (quoting 15 U.S.C. § 1052(d)). In other words, a party opposing registration of the applicant’s mark must demonstrate that (1) it owns a protectable trademark, (2) it has prior rights in and to the mark, and (3) that the applicant’s mark is likely to cause confusion or mistake as to the origin, source, sponsorship, or affiliation of the applicant’s goods.

ARGUMENT

As demonstrated below, there are no genuine issues of material fact in this opposition. Applicant’s proposed MILKSHAKE and MILK SHAKE marks infringe Hershey’s prior and superior rights in and to the MILKSHAKE trademark for candy products.

A. HERSHEY OWNS A PROTECTABLE TRADEMARK

1. Hershey Plainly Has Used Its MILKSHAKE Mark in Commerce

An opposer’s prior rights may arise “from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (Fed. Cir. 2002) (internal citations omitted).

Hershey has used the MILKSHAKE trademark extensively on at least five different candy products since 2005: Whoppers Milkshake – Strawberry; Whoppers Milkshake – Vanilla; Whoppers Milkshake – Orange Crème; Kit Kat Milkshake; and Whoppers Robin Eggs Milkshake – Strawberry. Hershey has sold approximately 29.5 million units of candy products branded with the MILKSHAKE mark since 2005 in retail channels throughout the United States, generating \$31.5 million in wholesale revenue. Kinderwater Decl. ¶ 5.

Applicant applied for the MILKSHAKE and MILK SHAKE trademarks in 2011, six years after Hershey first began using its MILKSHAKE mark. Notably, Applicant’s applications

were filed on an intent-to-use basis, and Applicant has testified that he has not yet used either proposed trademark. Wiesen Depo. 61:9–12; Applicant’s Interrog. Responses, Response No. 5.

Hershey’s prior rights in and to the MILKSHAKE trademark are clear and not in any genuine dispute.

2. Hershey’s MILKSHAKE Mark Is Inherently Distinctive and, Thus, Protectable

Trademarks fall along a spectrum of distinctiveness, from non-distinctive “generic” marks up to inherently distinctive suggestive, arbitrary, and fanciful marks. *See* 2 McCarthy on Trademarks & Unfair Competition § 11:2 (4th ed. 2012) (“McCarthy”); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) (“following the classic formulation set out by Judge Friendly” and noting that suggestive, arbitrary and fanciful marks “are deemed inherently distinctive and are entitled to protection”).

Applicant has asserted in his Answer to Notice of Opposition (“Answer”) that Hershey’s MILKSHAKE trademark is “merely descriptive.” Answer ¶¶ 2, 11 & 12. However, the undisputed facts confirm that Hershey’s MILKSHAKE trademark is at least suggestive, rather than merely descriptive, of Hershey’s candy products bearing the mark.

(a) Hershey’s MILKSHAKE Trademark is Clearly Suggestive, and Does Not Merely Describe Hershey’s Candy Products

A trademark is suggestive if, when the goods are encountered under the mark, a multi-stage reasoning process, or “some operation of the imagination,” “thought and perception is required [to reach] a conclusion as to the nature of the goods.” *In re Abcor Dev. Corp.*, 588 F.2d 811, 814, 200 USPQ 215, 218 (CCPA 1978); *see also Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1033 (9th Cir. 2010) (“[T]he imagination test is [the] primary criterion for evaluating’ whether a mark is suggestive.”) (internal citations omitted); *In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 525 (CCPA 1980) (“[A] mark is suggestive if

imagination, thought, or perception is required to reach a conclusion on the nature of the goods or services.”); *In re Mayer-Beaton Corp.*, 223 USPQ 1347 (TTAB 1984); 2 McCarthy § 11:19.

The Board has recognized that when a mental leap is required to connect the mark to the goods, the mark passes the imagination test and is suggestive. *Fortune Dynamic, Inc.*, 618 F.3d at 1033; *see also Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999) (concluding that plaintiff’s “MOVIEBUFF” mark is not descriptive, but, rather, is “suggestive—and thus strong enough to warrant trademark protection—because it requires a mental leap from the mark to the product”); *Airco Inc. v. Air Prods. & Chems., Inc.*, 196 USPQ 832, 835 (TTAB 1977).

On the other hand, a mark is “merely descriptive” if it “forthwith conveys an *immediate* idea of the ingredients, qualities or characteristics” of the goods and/or services at issue. *In re Abcor Dev. Corp.*, 588 F.2d at 814, 200 USPQ at 218 (emphasis added); *see also Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11 (2d Cir. 1976); 2 McCarthy §§ 11:16, 11:19. The mark must immediately convey information as to the qualities, features, or characteristics of the goods and/or services with a “degree of particularity.” *Plus Prods. v. Med. Modalities Assocs., Inc.*, 211 USPQ 1199, 1204–05 (TTAB 1981); *see also Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 699–700 (2d Cir. 1961) (“Unless a word gives some reasonably accurate—some tolerably distinct knowledge—as to what the product is made of, it is not descriptive within the meaning of trademark terminology.”).

In determining whether a mark is suggestive or merely descriptive, the mark must not be evaluated in the abstract, but, rather, must be “applied to the [goods]” involved. *In re Abcor Dev. Corp.*, 588 F.2d at 814, 200 USPQ at 218; *In re Bright Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979); *see also* 2 McCarthy § 11:16 (advising that, when determining whether a mark is

“merely descriptive,” one must not consider the mark “in a vacuum,” but, rather, assess the descriptiveness of the mark in the context of the “goods or services for which registration is sought”). A term that could be deemed merely descriptive for a particular product or service may be suggestive or arbitrary for another product or service, even if the goods could be considered related. 2 McCarthy § 11:71 (noting that “apple” would be considered “arbitrary when used on personal computers, suggestive when used in ‘Apple-A-Day’ on vitamin tablets, descriptive when used in ‘Tomapple’ for combination tomato-apple juice and generic when used on apples”); *see also* *Abercrombie & Fitch Co.*, 537 F.2d at 12–14 (concluding that “safari” was generic when used on safari services and on certain clothing, such as “Safari hat” and “Safari jacket,” but was suggestive when used on ice chests, axes, tents, and smoking tobacco as “a way of conveying to affluent patrons . . . a romantic notion of high style, coupled with an attractive foreign allusion”); *In re The Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994).

Among the factors the Board considers when evaluating whether a mark is suggestive or merely descriptive are dictionary definitions,³ the testimony of linguistics experts⁴ and third-party usage.⁵ As discussed in further detail below, Hershey’s MILKSHAKE mark is not “merely descriptive” of Hershey’s candy products for several reasons: (1) Hershey’s MILKSHAKE-branded candy products are not milkshakes, (2) there is no milkshake “flavor” that Hershey’s mark immediately describes, and (3) there is no need for third parties to use the mark, and the

³ *See, e.g., In re Patent & Trademark Servs. Inc.*, 49 USPQ2d 1537, 1538–39 (TTAB 1998).

⁴ *See, e.g., Labor Ready, Inc. v. Randstad Gen. Partner (US) LLC*, 2008 WL 853835, at *5–6 (TTAB Jan. 23, 2008).

⁵ *See, e.g., Aluminum Fabricating Co. of Pittsburgh v. Season-All Window Corp.*, 259 F.2d 314, 315–16 (2d Cir. 1958).

USPTO previously has registered MILKSHAKE as an inherently distinctive mark for candy (in registrations owned by Hershey’s predecessors-in-interest that are no longer in force).

(i) *Dictionary Definitions*

Both parties’ discovery responses have included definitions of “milkshake” that make clear that the word does not immediately convey information as to the qualities, features, or characteristics of Hershey’s MILKSHAKE-branded candy products, much less do so with any “degree of particularity”:

- “a thoroughly shaken or blended drink made of milk, a flavoring syrup, and often ice cream” (Llewellyn Decl. Exh. D (Expert Report of Geoffrey Nunberg (“Nunberg Report”)) ¶ 21 (citing Merriam-Webster’s *Collegiate*));
- “a cold drink made of milk, a sweet flavouring, and typically ice cream, mixed together as by shaking or whisking until smooth and frothy” (Nunberg Report ¶ 21 (citing *Oxford English Dictionary*));
- “a drink made of milk and usually ice cream and a flavour such as fruit or chocolate, mixed quickly together until it is full of bubbles” (Nunberg Report ¶ 21 (citing *Cambridge Advanced Learner’s Dictionary & Thesaurus*));
- “1. A beverage made of milk, flavoring, and ice cream, shaken or whipped until foamy. 2. A beverage made of milk and flavored syrup, whipped until foamy.” (Nunberg Report ¶ 21 (citing *American Heritage Dictionary, Fifth Edition*));
- “1. Cold milk drink a cold drink made by whisking or blending milk, flavoring and usually ice cream. 2. flavored milk in New England, a drink made of milk and flavored syrup that is whipped until it is frothy.” (Nunberg Report ¶ 21 (citing *Encarta World English Dictionary*));
- “a cold drink made of milk, a sweet flavoring such as fruit or chocolate, and typically ice cream, whisked until it is frothy” (Nunberg Report ¶ 21 (citing *Oxford American Dictionary, Second Edition*));
- “a cold drink made of milk, ice cream, and flavored syrup, blended together” (Nunberg Report ¶ 21 (citing Robert Allen Palmatier, *Food: A Dictionary of Literal and Nonliteral Terms* (2000)));

- “MILKSHAKE or MILK SHAKE, also called SHAKE, is as cold frothy drink of milk, ice cream, and flavoring made by shaking or whipping” (Nunberg Report ¶ 21 (citing Barbara Ann Kipfe, *The Culinarian: A Kitchen Desk Reference* (2011)));
- “A milkshake is a sweet, cold beverage which is made from milk, ice cream or iced milk, and flavorings or sweeteners such as fruit syrup or chocolate sauce.” (Nunberg Report ¶ 21 (citing Wikipedia); Llewellyn Decl. Exh. E); and
- “1. frothy drink of milk and flavoring and sometimes fruit or ice cream” (Llewellyn Decl. Exh. E (citing dictionary.sensagent.com/Milkshake/en-en/)).

The definitions submitted by both parties clearly define “milkshake” as a beverage, typically made from a combination of milk, ice cream, and some type of flavoring agent. Applicant himself has testified that a milkshake is a beverage and that he would define a “milkshake” in the same way as it is defined in the *Merriam-Webster* dictionary. Wiesen Depo. 65:24–67:20. Put simply, Hershey’s candy products are not beverages made from milk, ice cream, and flavoring, and, thus, the MILKSHAKE trademark is not merely descriptive as applied to Hershey’s goods.

(ii) Expert Opinion

Hershey retained Geoffrey Nunberg, a professor of linguistics at the University of California, Berkeley,⁶ to opine from a linguistic and lexicographical standpoint the meaning of Hershey’s MILKSHAKE trademark as used on Hershey’s candy products. Nunberg Report ¶ 1. Professor Nunberg principally specializes in semantics, the study of the meanings of words and expressions, and pragmatics, the study of the way language is interpreted in context. Nunberg Report ¶ 6.

⁶ Professor Nunberg’s further qualifications can be found in his expert report. See Llewellyn Decl. Exh. D ¶¶ 5–10 & Exh. A.

Professor Nunberg reviewed the information and documents produced during the discovery period, and concluded in his unrebutted expert report that Hershey’s MILKSHAKE trademark “can only be a suggestive mark.” Nunberg Report at 21. More specifically, Professor Nunberg explains that under any standard meaning, the term “milkshake” conveys neither a flavor nor a “mouth feel” of a candy product, noting that milkshakes have no flavor of their own, but are made *with* flavoring agents (as supported by each and every one of the definitions noted above), and that “the mouth feel of a solid candy consumed at room temperature will not be identical or even very similar to that of a chilled liquid preparation,” such as a literal milkshake. Nunberg Report ¶ 27. Rather, Professor Nunberg observes that the term “milkshake” conveys socio-historical connotations unrelated to “gustatory associations,” “evoking the old-time soda fountain and the wholesome Norman Rockwell culture it stands in for, as memorialized in numerous popular culture references from the 1940s to the present day.” Nunberg Report ¶ 36. Based on the foregoing, Professor Nunberg concluded that Hershey’s MILKSHAKE trademark, as used on Hershey’s candy products, “is not ‘merely descriptive’ or for that matter descriptive at all,” rather, “it can only be a suggestive mark.” Nunberg Report at 21.

Thus, the term “milkshake” as applied to *milkshake and similar beverage products* is descriptive. However, when MILKSHAKE is applied to candy products, it can in no way be considered merely descriptive of such products. Rather, as Professor Nunberg notes, the term “milkshake” is “deserving of that much-overused word ‘iconic’” and “evokes a rich stream of images and memories surrounding the consumption of sweets and sweet drinks in old-timey surroundings,” iconic imagery that is “particularly vivid when the name is associated with a product such as a confection or candy bar, which is closely connected to the setting that the word evokes.” Nunberg Report ¶ 40. Consumers must engage in a multi-stage reasoning process in

order to ascribe such significance to the mark MILKSHAKE as applied to Hershey's candy products. As such, Hershey's mark is suggestive.

(iii) Third Party Usage

The conclusion that MILKSHAKE is not merely descriptive of Hershey's candy products is buttressed by the fact that MILKSHAKE does not appear to be needed by others in order to describe candy products, and applicant has not provided any evidence to the contrary, having produced no evidence of use of the MILKSHAKE trademark on candy. *See Minn. Mining & Mfg. Co. v. Johnson & Johnson*, 454 F.2d 1179, 1180 (CCPA 1972) (SKINVISIBLE for transparent medical adhesive tape is not needed by competitors "to use the language in the normal way" and, thus, was not "merely descriptive," but, rather, suggestive); *Sperry Rand Corp. v. Sunbeam Corp.*, 442 F.2d 979, 980 (CCPA 1971) (LEKTRONIC for electric shavers not needed by competitors); *Aluminum Fabricating Co. of Pittsburgh*, 259 F.2d at 317 (SEASON-ALL unlike the term ALL-SEASON is not merely descriptive of aluminum storm doors and windows).

Indeed, contrary to applicant's assertion that the MILKSHAKE trademark is merely descriptive, the USPTO itself has found that MILKSHAKE can serve as a trademark for candy and has registered MILKSHAKE for candy products in the past, without requiring proof of acquired distinctiveness. Thus, the USPTO registered MILK SHAKE for "candy bars" in 1929, MILKSHAKE for "candy" in 1984, and MILKSHAKE for "candy" in 1991, for Hollywood Brands, Inc. and Leaf, Inc., Hershey's predecessors-in-interest, without requiring any disclaimers or proof of secondary meaning. Llewellyn Decl. Exh. F. If "milkshake" was merely descriptive of candy, as Applicant contends, the USPTO would not have registered such a mark for candy, much less issued three such registrations.

Similarly, the USPTO allowed the registration of the mark STRAWBERRY MILKSHAKE for “scented and/or fragranced 3-in-1 hair shampoo, hair conditioner and body wash” in 2005, also without requiring the owner to disclaim the term “milkshake” (though, notably, the USPTO did require disclaimer of the term “strawberry”), and without requiring the owner to provide evidence of secondary meaning. Llewellyn Decl. Exh. G.

What is more, applicant himself seeks registration of MILKSHAKE for candy products, a fact that belies any assertion by applicant that the mark is merely descriptive for such products. Applicant, who himself contends that MILKSHAKE is registrable for candy products, should be estopped from asserting the contrary in this proceeding.⁷

As applied to Hershey’s candy products, the MILKSHAKE trademark is not merely descriptive.

(b) Even If Hershey’s MILKSHAKE Trademark Is Merely Descriptive, It Has Acquired Distinctiveness, and Is Protectable

Even assuming, *arguendo*, that Hershey’s MILKSHAKE trademark is “merely descriptive,” Hershey has established secondary meaning in that mark. Marks that are deemed “merely descriptive,” may still be protected if they have acquired distinctiveness through use in commerce.

A merely descriptive mark has acquired distinctiveness when “the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005). When evaluating whether a mark has acquired distinctiveness, the Board may examine,

⁷ Indeed, applicant has asserted in discovery that his intended MILKSHAKE candy product will have the same purported “milkshake flavor” that he asserts that Hershey’s product has. Wiesen Depo. at 74:7–75:6 & 93:21–94:17. Nonetheless, applicant apparently contends that Hershey’s mark is not protectable and his identical proposed marks are registrable.

among other things, length and exclusivity of use, sales success, evidence of copying by others, advertising expenditures, and unsolicited media coverage. *Id.* at 1300. “[N]o single factor is determinative.” *Id.*

As noted in above (pp. 1–2), Hershey has continuously and exclusively used the MILKSHAKE trademark for candy products for over five years, since 2005, a time period that is considered *prima facie* evidence of acquired distinctiveness. 15 U.S.C. § 1052(f) (“The Director may accept as *prima facie* evidence that the mark has become distinctive, as used on or in connection with the applicant’s goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.”); *see also In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125 (Fed. Cir. 1985). Moreover, Hershey has sold over \$31.5 million dollars of its MILKSHAKE-branded products, which have been re-sold by retailers to consumers throughout the United States. The Board has repeatedly found acquired distinctiveness even with fewer sales over a shorter period of time. *See, e.g., Fabiano’s Sweet Shoppe, LLC v. Fabiano’s Homemade Candies, Inc.*, 2005 WL 548063, at *8 (TTAB Feb. 24, 2005) (finding \$3.5 million in sales spread out over 20 years to be sufficient evidence that the mark has acquired distinctiveness); *In re Homes & Land Publ’g Corp.*, 24 USPQ2d 1717, 1718–19 (TTAB 1992) (finding a mark achieved secondary meaning where sales of the product bearing the mark amounted to over \$3.5 million in a two-year period). Thus, even if the Board were to determine that Hershey’s suggestive MILKSHAKE mark is merely descriptive, the evidence clearly demonstrates that the mark has acquired distinctiveness and is, thus, protectable and enforceable against second-comers such as Applicant.

B. THERE IS CLEAR LIKELIHOOD OF CONFUSION BETWEEN HERSHEY'S MILKSHAKE TRADEMARK AND APPLICANT'S APPLIED-FOR MARKS

Finally, application of the confusion standard of Section 2(d) of the Lanham Act to the undisputed facts confirms that the balance of the likelihood of confusion factors weighs in Hershey's favor.

Whether likelihood of confusion exists is evaluated by applying the factors set forth in *In re E.I. DuPont DeNemours & Co.*, namely:

- (1) The similarity of the marks as to appearance, sound, connotation, and commercial impression when viewed in their entirety;
- (2) The similarity and nature of the goods or services as described in an application or registration, or in connection with which a prior mark is in use;
- (3) The similarity of established, likely-to-continue trade channels;
- (4) The conditions under which and buyers to whom sales of the goods or services are made (*i.e.*, "impulse" versus careful, sophisticated purchasing);
- (5) The fame and/or strength of the prior mark based on evidence of sales, advertising, and length of use;
- (6) The number and nature of similar marks in use on similar goods;
- (7) The nature and extent of any actual confusion;
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion;
- (9) The variety of goods on which a mark is or is not used;
- (10) The market interface between applicant and the owner of a prior mark;
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods;
- (12) The extent of potential confusion (*i.e.*, whether it is *de minimis* or substantial);
and
- (13) Any other established fact probative of the effect of use.

476 F.2d 1357, 1361 (CCPA 1973) (cited in *Recot, Inc. v. Becton*, 214 F.3d 1322, 1326–27 (Fed. Cir. 2000)).

Nevertheless, the Federal Circuit and the TTAB have both advised that a claimant need not establish that each and every factor weighs in its favor since “[n]ot all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346 (Fed. Cir. 2010); *see also Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1241 (Fed. Cir. 2004) (holding that the Board and the Federal Circuit need only consider relevant factors). As such, the Board “‘may focus . . . on dispositive factors, such as similarity of the marks and relatedness of the goods.’” *Herbko Int’l, Inc.*, 308 F.3d at 1164–65 (quoting *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001)). Moreover, any “reasonable doubt as to the likelihood of confusion” should be “resolved against the newcomer, ‘for the newcomer has the opportunity of avoiding confusion, and is charged with the obligation to do so.’” *In re Mighty Leaf Tea*, 601 F.3d at 1346 (quoting *In re Shell Oil Co.*, 992 F.2d 1204, 1209 (Fed. Cir. 1993)).

Here, the application of the relevant *DuPont* factors overwhelmingly shows that there is a likelihood of confusion between Hershey’s MILKSHAKE trademark and applicant’s proposed MILKSHAKE and MILK SHAKE trademarks. Hershey’s mark is strong and enforceable; applicant’s marks are identical to Hershey’s mark and the parties’ marks are the only MILKSHAKE marks used on candy; Hershey’s and applicant’s marks would be used on identical or extremely similar goods that are advertised and sold in many of the same channels; the products of both parties are low-cost items and purchasers often devote little care and consideration when purchasing such products; and applicant has acted in bad faith. Applicant’s proposed unauthorized use of MILKSHAKE and MILK SHAKE would plainly create a

likelihood of consumer confusion as to the source, origin, sponsorship, license, or approval with the candy bearing Hershey's MILKSHAKE mark.

1. Similarity of the Marks

There is no dispute that applicant's MILKSHAKE and MILK SHAKE marks are identical to Hershey's MILKSHAKE trademark.

2. Similarity of the Goods

There is no dispute that both Hershey and applicant use (or intend to use, in applicant's case) the MILKSHAKE trademark on candy products. The fact that the goods at issue are identical, particularly when combined with the fact that the marks at issue are also identical, weighs strongly in favor of a finding of likelihood of confusion.

3. Similarity of Marketing Channels Used

In instances where the parties have not set restrictions on channels of trade in their applications and/or registrations, "goods and services are presumed to travel in the same channels of trade to the same class of purchasers." *Hewlett Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268 (Fed. Cir. 2002). The Board should assume that use of the mark will include "all normal and usual channels of trade and methods of distribution" for the types of products at issue. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 1042-43 (Fed. Cir. 1983). In particular, where the products are closely related or overlap, the Board should assume that they would be sold in the *same* channels of trade to the *same* ordinary consumers. *See Venture Out Props. LLC v. Wynn Resorts Holdings LLC*, 81 USPQ2d 1887, 1894 (TTAB 2007) ("Because the services are clearly related, they would be offered in the same channels of trade and offered to the same classes of consumers . . ."); *see also Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1913 (TTAB 2000) ("Because the goods are legally identical, they must also be deemed to be sold in the same channels of trade to the same classes of customers.").

Hershey advertises its MILKSHAKE-branded candy across a wide range of national media, including trade promotions, sales materials, merchandising, and promotion packaging, and sells such candy in retail stores and through online retailers, including through national retail chains such as Wal-Mart, Target, Kroger, Safeway, Walgreens, CVS, Dollar General, and Family Dollar. Kinderwater Decl. ¶ 4. As mentioned above, applicant has indicated that, should he proceed with his revival of the Milkshake candy bar, he plans to market and sell the candy in the same stores and channels that sell Hershey's current MILKSHAKE-branded candy (e.g., retail stores). Wiesen Depo. 54:20–61:8; Applicant's Interrog. Responses, Response No. 9. In addition, in light of the fact that both parties use or intend to use the MILKSHAKE trademark on the same types of goods, the Board should assume that the parties' products will be sold in the same channels of trade to the same types of consumers.

Accordingly, this factor weighs in Hershey's favor.

4. Type of Goods & the Degree of Care Likely to Be Exercised by the Purchaser

Where, as here, the products at issue “are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) (citing *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146 (Fed. Cir. 1985); *Hunt Foods & Indus., Inc. v. Gerson Stewart Corp.*, 367 F.2d 431, 434 (CCPA 1966)). Courts have found that consumers are more likely to “confuse the origin of the foods in hasty, economically painless, transactions.” *Recot, Inc.*, 214 F.3d at 1329; *see also Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 672 (Fed. Cir. 1984) (holding that individuals who purchase “relatively inexpensive, comestible goods subject to frequent replacement . . . have been held to a lesser standard of purchasing care”) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 1296 (CCPA 1974)).

Candy is often an unplanned purchase. Retailers place candy displays near the checkout counters knowing that candy is frequently an impulse buy added on to a planned purchase. The Board has recognized the impulsive nature of such candy purchases on several occasions. *In re Summit Entm't, LLC*, 2011 WL 3969888, at *4 (TTAB Aug. 24, 2011) (non-precedential) (“Candy has long been considered to be an impulse purchase.”); *In re Shoemaker’s Candies, Inc.*, 222 USPQ 326, 328 (TTAB 1984) (candy is a low cost impulse type item which would not ordinarily be purchased with a great degree of care); *Paul F. Beich Co. v. J & J Oven Co.*, 147 USPQ 162, 164 (TTAB 1965) (candy falls within the category of snack items which generally are purchased on impulse with little or no discrimination).⁸

As noted above, Hershey’s MILKSHAKE-branded candy retails for anywhere from \$0.69 to \$2.59 (Kinderwater Decl. ¶¶ 7–9), and applicant has testified that his proposed MILKSHAKE-branded candy would be sold in similar retail channels and, thus, would likely retail for a similar price. Wiesen Depo. 54:20–61:8; Applicant’s Interrog. Responses, Response No. 9. Potential consumers of such inexpensive candy are not likely to exercise a high degree of care when making their purchasing decision. As such, there is no genuine dispute that the

⁸ *Accord, e.g., AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1544 (11th Cir. 1986) (“[i]ce cream novelties are an impulse item that consumers purchase without a great deal of care”); *Beer Nuts v. Clover Club Foods Co.*, 805 F.2d 920, 926–27 (10th Cir. 1986) (“relatively inexpensive snack foods” that are often “purchased as impulse items” are “purchased with little care and are thus likely to be confused”); *Masterfoods USA v. Arcor USA, Inc.*, 230 F. Supp. 2d 302, 312 (W.D.N.Y. 2002) (“[T]he candies here are relatively inexpensive and purchased primarily without a great deal of thought. Often they are purchased by children and purchased on impulse. Mars, therefore, cannot rely on the sophistication and deliberation of candy purchasers to quickly discern that [the products] are not from the same manufacturer.”); *Tootsie Roll Indus., Inc. v. Sathers, Inc.*, 666 F. Supp. 655, 659 (D. Del. 1987) (“[C]andies such as those at issue here are not expensive items of commerce which are purchased only after careful thought, deliberation and inspection. Instead, the items in question are ‘impulse items’ frequently purchased by harried shoppers. In such a context, the likelihood of confusion is substantial.”) (emphasis added; citation omitted).

parties' products are inexpensive and consumers thereof are unlikely to exercise any degree of care in purchasing such products. This factor favors Hershey.

5. Strength of the Mark: Hershey's MILKSHAKE Trademark Is Strong

The fame of a mark may be measured in a number of ways, including “by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Citigroup Inc.*, 637 F.3d at 1355 (citing *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002)). As discussed above (pp. 1–2), Hershey has sold its MILKSHAKE-branded candy throughout the United States, and reaped revenues in excess of \$31.5 million since it began using the mark eight years ago, in 2005. As a result of Hershey's long use, promotion and advertising of Hershey's MILKSHAKE trademark and MILKSHAKE-branded candy products, as well as the mark's inherently distinctive nature, the MILKSHAKE trademark has become associated in the minds of consumers with Hershey's candy products and of the goodwill associated with those products. Thus, Hershey's MILKSHAKE mark is a strong and distinctive mark entitled to “a broad level of protection.” *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053 (Fed. Cir. 2012) (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1375 (Fed. Cir. 2005)).

6. Number and Nature of Similar Marks Used on Similar Goods

As noted above (pp. 12–13), applicant has failed to point to any evidence of any third-party use of MILKSHAKE or any similar marks on candy or confectionary products.

It is well-settled that evidence of the mere existence of third party marks, without proof of the extent to which the marks are actually promoted and used, should be given little or no weight. *See, e.g., Palm Bay Imports*, 396 F.3d at 1373 (third-party use in industry publications “does not suffice” to show weakness because there was no “evidence of the consuming public's

awareness” of the marks); *In re Mighty Leaf Tea*, 601 F.3d at 1347 (trademark applicant “provided no evidence of the actual use of these third-party marks,” and when evaluating likelihood of confusion, “more is required than a showing of the existence of various marks”). In any event, applicant has offered virtually no evidence of the extent of any actual usage of the term “milkshake” as a trademark by third parties, proffering only four images retrieved from the Internet with no proof of the extent that the third parties’ products have been seen by consumers or used in actual sales, or that they are in current use. In fact, applicant himself either has not seen these products in actual use in commerce himself, or can only offer vague assertions of having seen such products, without any specific proof of such claims. Wiesen Depo. 115:4–125:14.

In addition, applicant’s reference to the use of the term “milkshake” *other than as a trademark* does not in any way affect the strength of Hershey’s MILKSHAKE trademark. *See, e.g.*, 2 McCarthy § 11:46. Applicant has produced documents showing Hershey’s use of the term “milkshake” in connection with milkshakes and milkshake-like beverages, but these uses are not trademark uses, and, thus, do not affect the strength of Hershey’s MILKSHAKE trademark for candy.

Given the absence of use of the MILKSHAKE trademark in the candy industry, this factor also weighs in favor of a finding of likelihood of confusion, because consumers will be used to associating the MILKSHAKE trademark only with Hershey’s candy.

7. Evidence of Actual Confusion

The absence of evidence showing actual confusion is relevant only if the applicant has already made use of the applied-for mark in such a way that could create such confusion. Here, applicant has applied for the MILKSHAKE and MILK SHAKE marks on an intent-to-use basis and has not yet made use of the applied-for marks in commerce. As a result, there has been no

opportunity for actual confusion to arise. Accordingly, this factor is neutral. *See, e.g., Motion Picture Ass’n of Am., Inc. v. Respect Sportswear, Inc.*, 83 USPQ2d 1555 (TTAB 2007) (holding that actual confusion factor was “neutral” where “applicant ha[d] not introduced any evidence of the extent of its use of the applied-for mark”).⁹

8. Balancing the Factors

The likelihood of confusion factors all weigh in favor of Hershey or are neutral—none weigh in favor of applicant. As such, there is no genuine issue of material fact as to the likelihood of confusion between Hershey’s MILKSHAKE mark and applicant’s proposed MILKSHAKE and MILK SHAKE marks.

CONCLUSION

The discovery conducted and produced by the parties paints a clear picture. Hershey has valid and superior rights in and to the MILKSHAKE trademark for candy products. If registered, applicant’s identical marks, intended for use on the same goods and for marketing, distribution, and sale through the same channels of trade to consumers who are accustomed to exercising a low degree of care when purchasing such products, will cause source confusion amongst the consuming public. Many actual and potential purchaser and consumers, upon encountering applicant’s infringing use, advertising, and promotion, are likely to mistakenly believe that Hershey has in some way licensed, approved, or sponsored applicant’s Milkshake

⁹ In any event, the test under Section 2(d) of the Lanham Act is likelihood of confusion, and any “lack of evidence of actual confusion carries little weight.” *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003) (citing *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 964 (CCPA 1965)); *see also Herbko Int’l, Inc.*, 308 F.3d at 1165 (“While evidence of actual confusion factors into the *DuPont* analysis, the test under [Section 2(d) of the Lanham Act] is likelihood of confusion, not actual confusion. Hence, a showing of actual confusion is not necessary to establish a likelihood of confusion.”); *Coca-Cola Co. v. Clay*, 324 F.2d 198, 199 (CCPA 1963) (“It is not necessary, however, to prove instances of actual confusion or mistake; it is sufficient if the mere likelihood thereof is established.”) (internal citations omitted).

candy bar, or that applicant's product is in some way affiliated with or related to Hershey's MILKSHAKE-branded candy products.

There being no genuine issue of material fact, Hershey respectfully requests that the Board grant Hershey's motion for summary judgment and refuse registration of applicant's infringing MILKSHAKE and MILK SHAKE trademarks.

Dated: July 22, 2013
New York, New York

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Attorneys for Opposers

CERTIFICATE OF SERVICE

I certify that, on July 22, 2013, I caused the foregoing OPPOSERS' MOTION FOR SUMMARY JUDGMENT to be served by email and by U.S. first-class mail, postage prepaid, upon the following correspondent of record for applicant:

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/s/ Kyle D. Gooch

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

HERSHEY CHOCOLATE & CONFECTIONERY
CORPORATION and THE HERSHEY COMPANY,

Opposers,

v.

KENNETH B. WIESEN,

Applicant.

Opposition No. 91200575

**DECLARATION OF PAUL C. LLEWELLYN
IN SUPPORT OF OPPOSERS' MOTION FOR SUMMARY JUDGMENT**

I, Paul C. Llewellyn, declare:

1. I am a member of the law firm of Kaye Scholer LLP and counsel for opposers Hershey Chocolate & Confectionery Corporation and The Hershey Company (together, "Hershey") in this proceeding. I make this declaration to provide the Board with documents in support of Hershey's Motion for Summary Judgment.

2. Attached as **Exhibit A** is a true and correct copy of Hershey's trademark application for MILKSHAKE, produced to Kenneth B. Wiesen ("Applicant") in the course of this proceeding and Bates-stamped HRSHY00000529-532.

3. Attached as **Exhibit B** is a true and correct copy of excerpts of the final transcript of the Deposition of Kenneth B. Wiesen, conducted on July 31, 2012.

4. Attached as **Exhibit C** is a true and correct copy of Applicant's Response to Opposers' First Set of Interrogatories, dated February 10, 2012.

5. Attached as **Exhibit D** is a true and correct copy of the Expert Report of Geoffrey Nunberg, Hershey's expert witness in this proceeding, served on Applicant by first class mail and email (to wiesenlaw@gmail.com) on July 9, 2012.

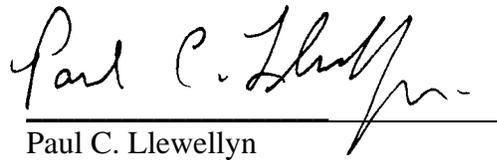
6. Attached as **Exhibit E** is a true and correct copy of a document containing a definition of and an excerpt from the Wikipedia entry for "milkshake," produced by Applicant and Bates-stamped 36.

7. Attached as **Exhibit F** are true and correct copies of the registration certificates for Hollywood Brands, Inc. and Leaf, Inc.'s MILKSHAKE and MILK SHAKE trademarks for candy products, produced by Opposers in this proceeding and Bates-stamped HRSHY00000001, HRSHY00000003, and HRSHY00000017.

8. Attached as **Exhibit G** is a true and correct copy of the registration certificate for the STRAWBERRY MILKSHAKE trademark (Registration No. 2,938,416), produced by Opposers in this proceeding and Bates-stamped HRSHY00000714.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York, New York on this 22nd day of July, 2013.


Paul C. Llewellyn

CERTIFICATE OF SERVICE

I certify that, on July 22, 2013, I caused the foregoing DECLARATION OF PAUL C. LLEWELLYN IN SUPPORT OF OPPOSERS' MOTION FOR SUMMARY JUDGMENT to be served by email and by U.S. first-class mail, postage prepaid, upon the following correspondent of record for applicant:

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/s/ Kyle D. Gooch

EXHIBIT A

PTO Form 1478 (Rev 9/2006)

OMB No. 0651-0009 (Exp 12/31/2011)

Trademark/Service Mark Application, Principal Register TEAS Plus Application

*NOTE: Data fields with the * are mandatory. The wording "(if applicable)" appears where the field is only mandatory under the facts of the particular application.*

The table below presents the data as entered.

Input Field	Entered
TEAS Plus	YES
MARK INFORMATION	
*MARK	mark.jpg
*STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	MILKSHAKE
*MARK STATEMENT	The mark consists of standard characters, without claim to any particular font, style, size, or color.
APPLICANT INFORMATION	
*OWNER OF MARK	Hershey Chocolate & Confectionery Corporation
*STREET	4860 Robb Street Suite 204
*CITY	Wheat Ridge
*STATE (Required for U.S. applicants)	Colorado
*COUNTRY	United States
*ZIP/POSTAL CODE (Required for U.S. applicants only)	80033
PHONE	717-534-7911
FAX	717-534-7549
EMAIL ADDRESS	lduquette@hersheys.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
LEGAL ENTITY INFORMATION	
*TYPE	CORPORATION
* STATE/COUNTRY OF INCORPORATION	Delaware
GOODS AND/OR SERVICES AND BASIS INFORMATION	

*INTERNATIONAL CLASS	030
IDENTIFICATION	Candy
*FILING BASIS	SECTION 1(a)
FIRST USE ANYWHERE DATE	At least as early as 12/21/2005
FIRST USE IN COMMERCE DATE	At least as early as 12/21/2005
SPECIMEN FILE NAME(S)	spec-168133237-110400601 . _MILKSHAKE_20100921.jpg
SPECIMEN DESCRIPTION	mark in use on candy packaging

ADDITIONAL STATEMENTS INFORMATION

*TRANSLATION
(if applicable)

*TRANSLITERATION
(if applicable)

*CLAIMED PRIOR REGISTRATION
(if applicable)

*CONSENT (NAME/LIKENESS)
(if applicable)

*CONCURRENT USE CLAIM
(if applicable)

CORRESPONDENCE INFORMATION

*NAME	Lois B. Duquette
FIRM NAME	The Hershey Company
*STREET	100 Crystal A Drive
*CITY	Hershey
*STATE (Required for U.S. applicants)	Pennsylvania
*COUNTRY	United States
*ZIP/POSTAL CODE	17033
PHONE	717-534-7911
FAX	717-534-7549
*EMAIL ADDRESS	lduquette@hersheys.com
*AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes

FEE INFORMATION

NUMBER OF CLASSES	1
FEE PER CLASS	275
*TOTAL FEE PAID	275

SIGNATURE INFORMATION

* **SIGNATORY'S NAME** Lois B. Duquette

* **SIGNATORY'S POSITION** Assistant Secretary and Attorney of Record, Member PA State Bar

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Naturally and Artificially Flavored
MALTED MILK BALLS

NET WT 4 OZ 113g

EXHIBIT B

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

-----X
HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION
AND HERSHEY COMPANY,

Opposers,

v. Opposition No.: 912005757

KENNETH B. WIESEN,

Applicant.

-----X

July 31, 2012
11:32 a.m.

Deposition of KENNETH B. WIESEN,
held at Kenneth B. Wiesen, Esq., One Old Country
Road, Carle Place, New York, pursuant to Notice,
before Nicole Cannistraci, a Notary Public
within and for the State of New York.

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A p p e a r a n c e s :

KAYE SCHOLER LLP
Attorneys for Opposer
425 Park Avenue
New York, New York 10022-3598
BY: PAUL C. LLEWELLYN, ESQ.

KENNETH B. WIESEN, ESQ.
Pro Se for Applicant
One Old Country Road, Suite 360b
Carle Place, New York 11514

1 Kenneth B. Wiesen

2 familiar --

3 A. Because malted milk --

4 Q. Did it taste like malt, did it
5 have a malt taste to it?

6 A. When I had the Milkshake bar, I
7 never had malt before. The milkshakes that I
8 had when I was a kid never had malt in it. I
9 know that was a popular way of making the
10 milkshake. So I didn't know when I had it what
11 malt was. I never even had a malted milk ball.

12 Q. When you say the milkshakes you
13 had when you were a kid, when you said that, you
14 were referring to the beverage milkshake?

15 A. Yes.

16 Q. And you're saying that the
17 milkshake beverages that you had as a kid
18 weren't malted milkshakes, so --

19 A. No. They were ice cream, milk and
20 flavoring blended up.

21 Q. So you hadn't experienced the
22 taste of malt before when you first tried the
23 Milkshake bar?

24 A. That's correct.

25 Q. As you conducted this research and

1 Kenneth B. Wiesen
2 talked to people about this old Milkshake brand,
3 did you come to some conclusion that Milkshake
4 might be a brand that still had some trademark
5 significance among candy buyers?

6 A. My experience at trademark is
7 limited. I never thought of it in that way. I
8 did become aware and have learned over time that
9 you surely need to secure trademark in order to
10 pursue a product, but I only thought of it as a
11 name because if you're going to bring out a
12 product that people would recognize as the
13 product of their youth, they have to associate
14 it with the name and the look and the name of
15 the bar. And the look of the label had
16 "Milkshake" on it. So I was interested in the
17 name because of its association with the candy
18 bar and how I'd be able to relate it to the
19 public, not necessarily in relationship to a
20 trademark.

21 Q. Well, you thought it was a name
22 that had some brand appeal among candy bars,
23 right?

24 A. By saying "yes," I would be
25 adopting your term. Brand appeal? I thought

1 Kenneth B. Wiesen

2 that the Milkshake bar and the name Milkshake
3 would have significance to a certain group of
4 candy consumers.

5 Q. What group of candy consumers?

6 A. People that remember the Milkshake
7 bar.

8 Q. And you hoped that there were
9 enough of them that you could launch a
10 successful product, right?

11 A. Well, I never really got to that
12 point. I never really got to the point of
13 establishing whether there are enough there to
14 launch a monetarily successful product.

15 Q. Have you formed a company to
16 launch a milkshake product?

17 A. No, other than my personal
18 pursuits. I have not formed a legal entity.

19 MR. LLEWELLYN: Okay. Let me ask
20 you to take a look at -- I'm going to
21 mark a few exhibits here and I have -- I
22 guess we'll mark these as three separate
23 exhibits, Nicole.

24 (Two color photocopies of pink and
25 blue MilkShake malted milk bar wrappers

1 Kenneth B. Wiesen
2 at this plant in Centralia that's referred to in
3 the article?

4 A. Yes.

5 Q. And in conducting research, you --
6 did you get in touch with anybody that had
7 worked at the plant in Centralia?

8 A. I think I got in touch with
9 somebody whose father had worked there, but the
10 guy was old. He didn't have any recollection.
11 I may have spoken to somebody, but it didn't
12 bear much fruit, if any.

13 Q. Were you attempting to determine
14 what the formula was for the old Milkshake
15 product?

16 A. I was attempting to determine
17 everything I could find out about the bar: the
18 formulation, images, historical information, you
19 know, interesting stories relating to the candy.
20 Because these were -- what I find retro candy
21 people love, they love to delve into everything
22 about their favorite candy just as with Bonomo
23 fans. I was casting a broad net. One of those
24 factors was I would a love to have found the
25 actual formulation, because if I was going to

1 Kenneth B. Wiesen

2 produce the candy, I want to produce it as it
3 was and as fans remember it when they think of
4 the Milkshake Bar.

5 Q. Did you find the formulation?

6 A. I think I ultimately did speak to
7 somebody that did have the formulation, but not
8 through this pursuit.

9 Q. Who do you remember speaking to
10 who had the formulation?

11 A. An old candy expert. I can't
12 remember his name. I don't remember his name.

13 Q. Do you have any e-mails or
14 correspondence with him?

15 A. I may.

16 Q. Do you have the formulation
17 written down somewhere?

18 A. I hope so. If I got it I surely
19 would have.

20 Q. The person that you spoke with
21 whose name you don't remember about the
22 formulation, do you know if they had worked at
23 the Leaf plant?

24 A. I think the person worked at Leaf
25 or Hollywood.

1 Kenneth B. Wiesen

2 Q. Hollywood was the predecessor to
3 Leaf?

4 A. I'm not sure which way it goes,
5 but they were -- one was first, one was second.

6 Q. Do you remember asking this person
7 how it is they had the formulation for the old
8 Milkshake product?

9 A. I don't think I ever asked that or
10 found that answer. I don't think that was
11 something that I cared to know how they knew it.
12 I was very interested to find out all the
13 information they had about the history of the
14 product and the formulation and the procedure
15 for making the product.

16 Q. Do you remember talking to that
17 person about why the product was called
18 Milkshake?

19 A. No.

20 Q. Apart from that person, do you
21 recall ever talking or corresponding with
22 anybody else who worked at Hollywood or Leaf in
23 connection with the old Milkshake product?

24 A. I think I spoke to a number of
25 people over the years, but nobody that offered

1 Kenneth B. Wiesen
2 the examiner did and when I did that or even
3 said to them that the examiner made -- said I
4 can do it for you, it was done and it went
5 through.

6 Q. Okay. I guess I want to know as
7 you sit here today, do you have any
8 understanding as to why you had to disclaim
9 anything?

10 A. Yeah, because milk is too common
11 of a term to try to trademark and, therefore --
12 and the same thing with shake, separate from a
13 particular term that identifies the product and
14 people would associate with the product, so --
15 otherwise I would not have been allowed the
16 mark. That's my general understanding. I was
17 doing it solely because I was trying to use the
18 term milkshake and that was a condition
19 precedent to properly file it.

20 Q. Now, it's fair to say that you
21 planned to sell milkshake branded candy or candy
22 bars to the general retail market, right?

23 A. It's fair to say that I planned, I
24 would say more accurately hoped, to try to
25 revive the milkshake bar and have it sold to

1 Kenneth B. Wiesen

2 consumers.

3 Q. And you hoped to sell it to
4 consumers in similar channels to that where
5 you're selling the Turkish taffy product now,
6 right?

7 A. No. I had not thought about the
8 channels that I was going to use on a new
9 product. That would be -- I would be faced with
10 a whole new set of circumstances if I was ever
11 successful in being able to get the milkshake
12 bar out to the public. I would consider those
13 factors as it went. It would be a completely
14 new venture.

15 Q. As you sit here today, have you
16 made any determination about what channels of
17 trade you would sell a milkshake bar in?

18 A. You're using a terminology that
19 has a significance relative to trademark so I
20 would have to say I don't understand those
21 terminologies, so I can't answer the question.

22 Q. What don't you understand?

23 A. "The classes of trade."

24 Q. No. My question is what channels
25 of trade?

1 Kenneth B. Wiesen

2 A. Channels of trade or classes of
3 trade.

4 Q. Well, we talked before about what
5 retail channels you sell the Turkish taffy
6 product in, right?

7 A. Correct.

8 Q. And you mentioned supermarket
9 chains and you mentioned CVS, for example,
10 right; is that right?

11 A. Yeah.

12 Q. And you mentioned mom and pop
13 stores?

14 A. Yeah.

15 Q. You mentioned nostalgic candy
16 shops?

17 A. Yeah.

18 Q. Do you have any plan to sell
19 milkshake candy bars in any of those same retail
20 outlets?

21 A. I don't have any plans. I haven't
22 acquired the -- I've been challenged on my right
23 to use the mark so I haven't gone any further
24 with production, with formulation, with
25 wrapping, with bar codes, with distribution,

1 Kenneth B. Wiesen
2 with retail. So these things are put on hold.
3 So do I have expectations on how I would go
4 about it? Yes. But plans, no.

5 Q. All right. What are your
6 expectations?

7 A. My expectation is if I was able to
8 acquire and defeat this challenge, that I would
9 attempt to find a contract manufacturer that
10 would produce a bar that looked spot on or as
11 close as possible with the requirements of the
12 labeling that exists now to produce a bar that
13 is in form, shape, taste, look both in the
14 wrapper and the bar to be what the milkshake was
15 to the recollection of all those people who used
16 to eat and recall the milkshake bar and to
17 produce it as a revival. And then to market it
18 to candy distributors and brokers and see where
19 they're going to ultimately successfully sell
20 it, in what particular channels that you
21 described, whether it's on the Internet, whether
22 it's mom and pop stores, whether they are going
23 to be successful in getting it in chains. That
24 would be my general plan.

25 Q. So if that plan came to fruition

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Kenneth B. Wiesen

it's certainly possible that your milkshake
branded candy bar in the future might be sold in
the same types of stores that Turkish taffy is
sold in today?

A. I would say anything is possible.

Q. It's possible that it might be
sold in supermarket chains right?

A. I think anything is possible.

Q. Can you take a look at what we're
marking Plaintiff's Exhibit 6 which is
applicant's first interrogatories dated
February 10, 2012.

(Applicant's response to opposers'
First Set of Interrogatories marked
Plaintiff's Exhibit 6 for
identification.)

Q. Do you recognize Plaintiff's
Exhibit 6 as your interrogatory responses in
this case?

A. I didn't.

Q. You drafted these yourself?

A. Yes.

Q. Do you see number nine on page 2?

A. Yes.

1 Kenneth B. Wiesen

2 Q. Do you see where you wrote "It is
3 applicant's intent to sell the candy goods in
4 the general retail market in Internet sales as
5 well as potentially advertise and promote same
6 through the Internet and other print, television
7 or radio media."?

8 A. Yes.

9 Q. Did I read that right?

10 A. As far as I could see up.

11 Q. Is that an accurate statement with
12 respect to your intent concerning your milkshake
13 branded candy bars?

14 A. I think it was an accurate
15 statement as to what my intent was.

16 Q. Did there come a time since
17 February 10th, 2012, when you changed your
18 intent?

19 A. Well, I think that my intent is
20 modified in recognizing the enormity of the time
21 and delay that is going to be created by the
22 litigation that's ensued by Hershey, the road
23 blocks that they have put before me.

24 Q. So because of this proceeding that
25 we're here for today, if ultimately you prevail

1 Kenneth B. Wiesen
2 and you launch a milkshake branded candy bar,
3 it's no longer going to be your intent to sell
4 the candy goods branded Milkshake in the general
5 retail market?

6 A. Are you looking for me to confirm
7 your statement?

8 Q. I'm asking you a question.

9 A. That was hardly the form of a
10 question.

11 Q. Well, on February 10th of this
12 year, Mr. Wiesen, you said it was your intent to
13 sell milkshake branded bars in the general
14 retail market and you're now telling me it's no
15 longer your intent?

16 A. I didn't say that.

17 Q. Is it currently your intent if you
18 prevail in this proceeding to sell milkshake
19 branded candy bars in the general retail market?

20 A. It would be my hope and
21 expectation to do so.

22 Q. Would it be your hope and
23 expectation to also sell those candy bars
24 online?

25 A. Yes.

1 Kenneth B. Wiesen

2 Q. And you would hope to advertise
3 those products in the channels that are listed
4 here in your interrogatory response nine?

5 A. Well, it would be something that I
6 would hope to do. I -- recognizing the costs
7 associated, I don't know if it's a realistic --
8 if it's realistic.

9 Q. Have you made any use of the
10 milkshake mark in connection with any goods to
11 date?

12 A. No.

13 Q. You're aware, I take it, that
14 milkshake, the mark, either is one word or two,
15 had previously been registered by either
16 Hollywood or Leaf in the past with respect to
17 these older milkshake bars that we looked at
18 earlier, right?

19 A. Yes.

20 Q. I'm going to ask you to take a
21 look at what we're going to mark as Plaintiff's
22 Exhibits 7, 8 and 9. Seven is U.S. trademark
23 registration number 261,488. Eight is U.S.
24 trademark registration number 1273766 and nine
25 is trademark registration number 1669640.

1 Kenneth B. Wiesen
2 three registrations that are reflected in
3 Plaintiff's Exhibit 7, 8 or 9 without asking
4 concede you to that these are or were
5 registrations are you aware of any federal
6 trademark registrations for any marks containing
7 milkshake either in one or two words for any
8 candy products?

9 A. I think that I registered and I
10 think Hershey has subsequently registered after
11 mine, milkshake.

12 Q. Those are applications that you're
13 referring to?

14 A. Applications, yes.

15 Q. Putting aside those applications,
16 are you aware of any registrations that contain
17 the word milkshake either in one or two words
18 for any candy products?

19 A. I'm not aware or unaware of it. I
20 have no knowledge.

21 Q. As you sit here now, you can't
22 identify any, correct?

23 A. No, I cannot.

24 Q. We talked a little bit about what
25 a milk shake was before and I think you said the

1 Kenneth B. Wiesen
2 word milkshake referred to at least in one
3 sentence a beverage contained milk and ice cream
4 and flavoring; is that right?

5 A. Correct, blended beverage.

6 Q. Blended beverage?

7 A. Yeah.

8 Q. Have you ever looked at any
9 dictionary definitions of milkshake?

10 A. I think so, yes.

11 Q. In fact, you have a definition in
12 your interrogatory responses that we marked as
13 Plaintiff's Exhibit 6, right? You want to take
14 a look at that?

15 A. I don't know. The document speaks
16 for itself.

17 Q. Well, indulge me. If you turn to
18 page 2 of Plaintiff's Exhibit 6, you stated
19 according to the Miriam Webster Dictionary, the
20 word "milkshake" is defined as "A thoroughly
21 shaken or blended drink made of milk flavoring
22 syrup and often ice cream. First known use in
23 1889." Right?

24 A. That's what it says.

25 Q. And that's what you wrote,

1 Kenneth B. Wiesen

2 correct?

3 A. Correct.

4 Q. What's the consistency of the
5 milkshake in your mind?

6 A. Consistency of the milkshake drink
7 or the milk candy bar?

8 Q. Looking at the definition of
9 milkshake that we just read that's in your
10 interrogatory response from the dictionary, it's
11 your -- is it correct that that's defining a
12 beverage that's a liquid, right?

13 A. That's correct.

14 Q. What are the characteristics in
15 your mind of that beverage?

16 A. Of the beverage?

17 Q. How would you describe it?

18 A. I think would describe it as the
19 same way this is described by the Miriam Webster
20 dictionary.

21 Q. Does it have malted milk in it or
22 malt?

23 A. Does what have?

24 Q. The milkshake beverage that you
25 define in your interrogatory response?

1 Kenneth B. Wiesen
2 characteristics of the Milkshake bar which, as I
3 described, tastes duplicate of -- except for the
4 coldness and the fact that one's a drink,
5 somebody would get a milkshake in an
6 old-fashioned ice cream parlor.

7 Q. So what you call a milkshake
8 flavor that you say that the old bars had, you
9 would hope that your bar would have that same
10 sort of flavor; is that right?

11 A. Well, I would say flavor or
12 characteristic, because the word "flavor" can be
13 used interchangeably with a mouth feel
14 characteristic taste and also a -- an added
15 flavoring. Like you can have a -- like you have
16 here, and I know it's not marked yet, but
17 strawberry milkshake. So to me that would be a
18 characteristic of a milkshake with added
19 strawberry flavoring. That's why I note the
20 word "flavor" can have dual meaning.

21 Q. So if we just stick with the word
22 "characteristic," you described, you testified
23 that the old Milkshake branded candy bar had a
24 milkshake characteristic to it, right?

25 A. Yes.

1 Kenneth B. Wiesen

2 Q. And is it correct that if you
3 succeed in this proceeding, that you would hope
4 to launch a bar that you're going to call
5 "Milkshake" that has similar characteristic?

6 A. Similar or same.

7 Q. Again, in your view that's a
8 characteristic that you would call a milkshake
9 kind of characteristic?

10 A. I think that's a fairly accurate
11 description.

12 Q. Can you take a look at what we've
13 marked as Plaintiff's Exhibit 10? These are
14 documents from your production that were labeled
15 pages 5, 22, 25, 72, 73 and 24. I put these
16 together because I have common questions about
17 them and I want to speed this along rather than
18 to mark too many exhibits.

19 If you look at the first page of
20 Plaintiff's Exhibit 10 which is marked page 5 in
21 your numbering, do you see that?

22 A. Yeah.

23 Q. You see there is a picture of a
24 bottle and underneath it it says "Hershey's milk
25 and milkshakes"?

1 Kenneth B. Wiesen

2 Q. It doesn't say the milkshake is a
3 flavoring, right?

4 A. It says "artificial and natural
5 flavor," so it doesn't describe the flavoring,
6 doesn't specify the type of flavor.

7 Q. Have you tasted this product?

8 A. No.

9 Q. You tasted a different version of
10 Hershey's Whoppers product, right?

11 A. I would assume that it's different
12 because this one says "strawberry" on it. The
13 one I had wasn't strawberry in color or taste.

14 Q. The one you tasted, did it taste
15 like it had a malt flavor to it?

16 A. I described to you the flavor of
17 it as best I can. I can't add to that
18 description.

19 Q. Is it your contention -- let me
20 withdraw that.

21 You see the word "milkshake" on
22 Plaintiff's Exhibit 12 and on Plaintiff's
23 Exhibit 11, right?

24 A. Yes.

25 Q. Now, is it your contention that

1 Kenneth B. Wiesen
2 the word "milkshake" on those packages describes
3 some characteristic or quality or an ingredient
4 of the product?

5 A. Absolutely.

6 Q. What characteristic or quality or
7 ingredient does, in your view, does the word
8 "milkshake" describe with respect to this
9 product that's depicted in Plaintiff's
10 Exhibits 11 and 12?

11 A. It's my contention that Hershey is
12 attempting to suggest that their Whopper, this
13 particular version of the Whopper, tastes like a
14 strawberry milkshake, referring to that
15 characteristic and taste of an ice cream, milk
16 and frothy drink that America is so familiar
17 with.

18 Q. Do you have any survey evidence
19 regarding how consumers interpret the use of
20 milkshake on the Hershey's Whoppers packages
21 that we've looked at?

22 A. I have no survey evidence of
23 anything.

24 Q. Are you aware of any such survey
25 evidence?

1 Kenneth B. Wiesen

2 Plaintiff's Exhibit 17, right?

3 A. As far as I know.

4 Q. Can you take a look at what we've
5 marked as Plaintiff's Exhibit 18? You'll see
6 this is your Bates nos. 14, 15, 16 and 17 on it?

7 A. Yes.

8 Q. Looking at the first page, 14,
9 where did you obtain the image that's on page 14
10 of Plaintiff's Exhibit 18?

11 A. I would assume the Internet.

12 Q. Did you get it yourself?

13 A. What do you mean?

14 Q. Did you get the image off the
15 Internet yourself?

16 A. Yeah.

17 Q. Do you know if this product was
18 ever actually for sale?

19 A. I would assume it was.

20 Q. This shows what appears to be a
21 Nabisco Oreo package, right?

22 A. Yes.

23 Q. You think you got the image off
24 the Internet, right?

25 A. I would say almost for sure I got

1 Kenneth B. Wiesen

2 it off the Internet.

3 Q. Have you ever seen this product in
4 a store?

5 A. I don't know.

6 Q. Do you know if it was ever
7 actually for sale in a store?

8 A. I don't know.

9 Q. Assuming it was ever in a store, I
10 take it you don't have any evidence as to how
11 widely it was sold or how much of it was sold,
12 right?

13 A. I do not have that information.

14 Q. Do you know if Nabisco ever
15 claimed any trademark rights in the word
16 "milkshake" or "strawberry milkshake" or
17 "strawberry milkshake cream"?

18 A. I have no information either way
19 relative to that.

20 Q. The product is a cookie that's
21 shown on that package, right?

22 A. Yes.

23 Q. Now, the next page, 15, do you
24 know where you got this image?

25 A. Same.

1 Kenneth B. Wiesen

2 Q. You think you got it off the
3 Internet?

4 A. Yes.

5 Q. And it shows a Kellogg's Pop Tarts
6 package, right?

7 A. Correct.

8 Q. And do you know if this product
9 has actually ever been sold in a store in the
10 United States?

11 A. I believe so.

12 Q. Have you ever bought it?

13 A. No, but I've seen it.

14 Q. You've seen it in a store?

15 A. Yes.

16 Q. What store?

17 A. Supermarket.

18 Q. What supermarket?

19 A. I don't recall.

20 Q. When?

21 A. I don't recall.

22 Q. Do you know if it's still for
23 sale?

24 A. I don't know.

25 Q. Do you know how many units of this

- 1 Kenneth B. Wiesen
- 2 product Kellogg's has ever sold?
- 3 A. No.
- 4 Q. It's a breakfast pastry, right?
- 5 A. I wouldn't call it that.
- 6 Q. What's that?
- 7 A. I would not call it that.
- 8 Q. What would you call it?
- 9 A. A Pop Tart.
- 10 Q. What's a Pop Tart?
- 11 A. It's a sweet -- it's a
- 12 sweet delight. I think it's something unto
- 13 itself.
- 14 Q. You would agree with me that it's
- 15 pastry-like, correct?
- 16 A. No.
- 17 Q. What do you think it's made of?
- 18 A. I would say it's made out of
- 19 ice -- whatever the icing is on it, probably
- 20 confectionery material covering it. The middle
- 21 of it is sugar and flavoring and the -- under
- 22 the icing is probably some type of flour.
- 23 Q. Some sort of flour shell that the
- 24 flavoring is in, right?
- 25 A. Yes.

1 Kenneth B. Wiesen

2 Q. And you put that in a toaster
3 sometimes if you want to eat it warm?

4 A. Some people do.

5 Q. And a lot of people eat it for
6 breakfast?

7 A. I don't know that.

8 Q. Are you aware that it's marketed
9 by Kellogg's as a breakfast food?

10 A. Really? I would be shocked, but I
11 wouldn't put anything past the American
12 consumers to eat something like this for
13 breakfast. I know my kids wouldn't be --
14 wouldn't be allowed to eat something like this
15 for breakfast.

16 Q. Do you know what aisle it's sold
17 in in the supermarket?

18 A. What aisle?

19 Q. Do you know -- let me withdraw
20 that.

21 Do you know what aisle Kellogg's
22 Pop Tarts in general are sold in the
23 supermarket?

24 A. I don't even know that they're
25 sold in a general aisle.

1 Kenneth B. Wiesen

2 Q. Are they sold -- have you ever
3 seen Kellogg's Pop Tarts sold in the candy aisle
4 next to candy products in a supermarket?

5 A. I don't know. I can't answer the
6 question. I couldn't answer it.

7 Q. If you look at 16, can you tell
8 me -- you see this is a -- this is page 16 from
9 Plaintiff's Exhibit 17. You see it says Quaker
10 "Chewy Pool Time Vanilla Shake"?

11 A. Yes.

12 Q. This is a package -- it appears to
13 be a package for a granola bar product; is that
14 right? If you look in the lower right-hand
15 corner under the number 10, you can faintly make
16 out "granola bars," right?

17 A. No.

18 Q. You can't see that?

19 A. No. I can see the "A." That
20 could be -- and an L. It could be "granola." I
21 can't make out the word underneath it.

22 Q. Well, do you know what product it
23 is that this package on page 16 for?

24 A. It's the typical candy bar that
25 people are trying to present as a healthy candy

1 Kenneth B. Wiesen

2 bar, which is a common marketing tool that's
3 used in the industry these days.

4 Q. Where did you get the image of the
5 Quaker page?

6 A. Off the Internet.

7 Q. Have you ever bought this product?

8 A. No.

9 Q. Have you seen it in a store?

10 A. I don't know, I don't know.

11 Q. So but you're telling me -- let me
12 withdraw that.

13 If you haven't seen the product in
14 the store and you never bought the product --

15 A. I didn't say that.

16 Q. If you don't know if you've ever
17 seen the product in the store and you don't
18 believe you've bought the product, I guess what
19 I'm asking you is do you know what this product
20 is or are you just speculating based on the
21 image you're looking at?

22 A. I'm not speculating. I'm telling
23 you what my opinion is. If you want to couch it
24 as speculation, you can do that another time.

25 Q. Have you ever held the product in

1 Kenneth B. Wiesen

2 your hand?

3 A. No.

4 Q. Do you have any basis to dispute
5 Quaker markets it as a granola bar on this
6 package?

7 A. I'm not answering that question in
8 that form.

9 Q. Do you have any basis to dispute
10 that Quaker markets this product as a granola
11 bar?

12 A. I have no idea either way how they
13 market their products.

14 Q. Do you know if this product that's
15 on page 16 of Plaintiff's Exhibit 17 has ever
16 been sold in a store in the United States?

17 A. I would assume so, but I have no
18 specific knowledge.

19 Q. And do you know if it has ever
20 been sold, do you know if it still is for sale?

21 A. I don't know the answer either
22 way.

23 Q. And if it has ever been sold, do
24 you know how many units of it Quaker has sold?

25 A. No, I don't know.

1 Kenneth B. Wiesen

2 Q. Do you know if -- referring back
3 to page 15, as well, do you know if Kellogg's
4 has ever claimed any trademark rights in the
5 word "milkshake" or "strawberry milkshake"?

6 A. I wouldn't know either way.

7 Q. What about Quaker, do you know if
8 Quaker has claimed any rights in the word
9 "milkshake"?

10 A. I don't know either way.

11 Q. If you look at the next page,
12 page 17, Plaintiff's Exhibit 17, you see this
13 appears to be a page for Yoplait GoGurt Portable
14 Lowfat Yogurt, do you see that?

15 A. Yes, I see it.

16 Q. Where did you get this image?

17 A. From the Internet.

18 Q. And have you ever bought this
19 product?

20 A. I believe so.

21 Q. Why did you buy it?

22 A. Supermarket.

23 Q. And do you remember where in the
24 supermarket it was located?

25 A. No.

1 Kenneth B. Wiesen

2 Q. Was it with other yogurt products?

3 A. I have no idea.

4 Q. Was it in the candy aisle?

5 A. I don't know.

6 Q. Do you know if this product is
7 still for sale?

8 A. I have no idea.

9 Q. And do you know how many units of
10 it have ever been sold, right?

11 A. I have no knowledge of that.

12 Q. Do you know if Yoplait has ever
13 claimed any trademark rights in the word
14 "milkshake"?

15 A. I don't know. I can't answer.

16 Q. I think I asked this but just to
17 be sure, this product is a single serve yogurt
18 product, right?

19 A. I wouldn't know that.

20 Q. Well, you said you bought it. So
21 I'm asking you based on your knowledge of having
22 bought this product, you think you bought it,
23 based on that, do you know what the product is?

24 A. It's -- when you refer to "single
25 serve," what do you mean by that?

1 Kenneth B. Wiesen

2 Q. Do you have any understanding of
3 what the -- what the phrase "single serve" is as
4 used in the food industry?

5 A. No.

6 Q. What about "single serving"?

7 A. I know what a serving is, but
8 single in connection to it, I don't know what
9 that means.

10 Q. You would agree with me this is a
11 yogurt product, right?

12 A. That's -- when I got it, I thought
13 of it as a yogurt product and when I look at it,
14 it represents itself as a yogurt product.

15 Q. Now, we looked at some Hershey
16 products that were these Whoppers products that
17 say "milkshake" on the page, Exhibits 11 and 12,
18 right?

19 A. Yes.

20 Q. You would agree with me, I assume,
21 that those are candy products, correct?

22 A. You want to ask me a question,
23 I'll answer it rather than affirm your
24 statement.

25 Q. Would you agree with me these are

EXHIBIT C

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

-----X

HERSHEY CHOCOLATE & CONFECTIONERY
CORPORATION and THE HERSHEY COMPANY,

Opposers,

v

KENNETH B. WIESEN,

Applicant.

Opposition No.
91200575

Serial Nos.
85/221,585 & 85/210,942

-----X

APPLICANT'S RESPONSE TO OPPOSERS' FIRST SET OF INTERROGATORIES

1. Kenneth B. Wiesen, Applicant.
2. My general practice and procedure was to examine the USPTO website, review the Internet and at times obtain outside investigation to do other and further inquiry.
3. Applicant is an individual. I am involved in a number of businesses. Pursuit of the mark at issue was in Applicant's individual capacity and pursued for the purpose of re-introducing a nostalgic candy back into the US Candy Market.
4. All communications between Applicant and USPTO and/or Trademark Trial and Appeals Board have been through filing of application, forms, motions, etc. all of which are part of the record. The other communications, routine telephone calls to check on dates or technical questions regarding the filing of documents of which Applicant does not have copies, nor specifics of the dates and when the communications were made. Other telephone communications have been with the presence of the attorney for Opposers regarding motions and discovery conferences. Applicant also filed a Letter of Protest regarding Hershey's mark.

5. Applicant's mark was filed on a 1B Application for Intent to Use and has not had a "first use" within Applicant's understanding of its meaning under Definition "K" of these Interrogatories.

6. It is Applicant's intent to utilize the applied for mark to return a well-known candy back to the market known as the "MilkShake Bar" and in general for confectionery and candy products.

7. Applicant, Kenneth B. Wiesen.

8. It would be purely speculative to offer each advertising or marketing channel or medium through which Applicant intends to use the mark, however, they would be typical of those to circulate the word that the candy identified as "MilkShake" is back in the market and available to consumers, including the Internet.

9. It is Applicant's intent to sell the candy goods in the general retail market and Internet sales, as well as potentially advertise and promote same through the Internet and other print, television or radio media.

10. Applicant objects to this demand as it calls for legal conclusions, however, over Applicant's objections, Applicant responds based upon the definition of "Hershey's mark" as being the specimen of the "Whoppers" candy product box specimen submitted along with Hershey's application.

11. According to the Miriam Webster Dictionary, the word "milkshake" is defined as:

"A thoroughly shaken or blended drink made of milk, flavoring syrup, and often ice cream – first known use in 1889."

The term "milkshake" is often used in the food industry to describe a taste, character or flavor. As established by the guidelines of the USPTO, the determination of whether a mark is

merely descriptive is considered in relationship to the identified goods and not in the abstract. The specimen filed by applicant, for the Milkshake Trademark bearing Serial number 85257980 is a confectionary label for a well-known candy, “WHOPPERS”. Whoppers has been in commerce in the candy marketplace since 1949 as revealed in Serial number 72378772 filed December 15, 1970 by Opposers’ predecessor.

The dominant graphic on the specimen for MILKSHAKE (85257980) is the trademark “WHOPPERS.” Other than the informational words on this specimen (wrapper) listing natural and artificial flavors and the weight of the product there are three descriptive words or phrases on the label, in addition to “Whoppers”, which are: “**milkshake**,” “**strawberry**” and “**malted milkballs.**”

Opposers present this “WHOPPERS” wrapper with the word “MILKSHAKE” on it, as evidence of their claim of use of the mark in commerce sufficient to satisfy the requirements for a 1(a) use-based application. The word “MILKSHAKE” as incorporated into the specimen, does not however, distinguish the goods upon which it is used from the goods or services of others. Contrarily as demonstrated from an examination of the specimen and as compared to the evidence, the term “MILKSHAKE” used on the Whoppers specimen is non-distinctive and merely describes the taste, flavor and/or characteristic of the goods.

The word “strawberry” on the Whopper label is combined with an image of an actual strawberry. The word “milkshake” is notably smaller than the identifying, distinctive word, “WHOPPERS” as well as smaller than the descriptive word “strawberry”. The word “Milkshake” is combined with a clear image of a milkshake container filled with a milkshake drink (a frothy milk & ice-cream drink) with a distinct strawberry color and with an inserted strawberry colored, striped straw.

As indicated by the USPTO, a mark is merely descriptive under Trademark Act Section 2(e)(1), (15U.S.P.C. 1052(e)(1)), if it describes and ingredient, quality, characteristic, function, feature, purpose or use of the relevant series. Thus, from examination of the specimen, as discussed above, and in applying the rules established by the USPTO , the word “Milkshake” on the specimen is solely descriptive of a flavor, taste and characteristic of the Whoppers candy and not a prior use in-commerce of a Mark.

The specimen offered by applicant (the Whoppers candy box) is and has been sold by the Opposers (Hershey) in many flavors as evidenced by a search of the internet. These flavors include Blueberry, Vanilla milkshake, Orange Creme milkshake, Peanut Butter, Original and Strawberry milkshake (the specimen offered by Opposers). This is clear evidence that registrant uses the word “milkshake” on the “Whoppers” product as a device merely to describe flavor and characteristic of the Whopper candy. Moreover, use of the word Milkshake in combination with the words vanilla, orange creme & strawberry further evidences that Opposers’ specimen is demonstrative of the word “Milkshake” used to describe a taste, flavor & characteristic of the “Whopper” confectionery product.

Similarly, Opposers (Hershey) have sold other products using the descriptive term “Milkshake” in the same fashion as in the “Whoppers” Candy. Review of the internet clearly evidences that Hershey sells a product known as “KitKat” in coffee, white chocolate, orange creme, mint and milkshake flavors, These labels further demonstrate that registrant’s use of the word “milkshake”, not just in the specimen but in other products they sell, is merely descriptive of flavor and characteristic of their candy products.

Further evidence of use of the word “milkshake” as a merely descriptive term is another Hershey product known as “Robin Eggs.” Opposers sell “Robin Eggs” both original flavor and

strawberry milkshake flavor. The use of the word “Milkshake” on this product is almost duplicative of Opposers use of the word “milkshake” on the specimen. The Robin Eggs label reveals that the word, “Milkshake,” is designed as well as revealed as a descriptive word for taste, flavor and characteristic of the goods offered. The Robbins Eggs is but a further example of Opposers’ intent in direct and clear conflict with their filing basis and is also not an in-commerce use of a distinctive mark appropriate for a 1(a) filing.

Most notably, Opposers’ (Hershey) own website further reveals that Opposers conceded that the use of the term “milkshake” on their products is merely a descriptive use of a common food term for some of their candies. Specifically, Opposers’ website demonstrates that Opposers’ use of the word milkshake is for the purposes of identifying the “**flavor**” of their products. The word “milkshake” was listed on their website at the time of their alleged use in commerce of the mark, as an identified and categorized flavor. Such identification was not limited to the “Whoppers” product but at least one other similar candy product known as the “Kit-Kat” bar. Opposers own website further demonstrates that the trademarked candy product “Whoppers” was offered in the limited edition flavor of “strawberry milkshake” in May of 2005, and Opposers’ trademarked candy product “KitKat” was offered in the limited edition flavor of “milkshake” in January of 2006, and Opposers candy product Robin Eggs was offered in a strawberry milkshake flavor in December, 2007 and in Opposers’ trademarked candy product, “Whoppers” was also offered in the limited edition flavor of vanilla milkshake in June of 2005.

In the food industry, the term “milkshake” can readily be used as a merely descriptive term for taste, flavor, and characteristic of products in the exact fashion that applicant’s specimen uses the term. For example, Nabisco sells a product identified as Oreo. The Oreo has been sold in its original flavor, as well as other flavors, including “strawberry milkshake.”

Similarly, Kellogg sells a product known as “Pop Tarts” in multiple flavors including: strawberry milkshake. Quaker also sells a product known as “Chewy” in a vanilla milkshake flavor. A popular national flavor yogurt company, Red Mango, similarly sells a strawberry milkshake flavor of their product where the identification for taste, flavor and characteristic mirrors Opposers’ use the term on their product. There are numerous other examples of the use of the term “milkshake” which when compared with the Opposers’ use further demonstrates that Opposers’ use was merely a common use in the food industry as merely describing the taste, flavor and/or characteristic of the food product.

These other products are further evidence that the word “milkshake” has been commonly used in the food industry in the exact fashion of the registrant’s specimen not as use of a distinctive mark in-commerce but rather a merely descriptive term for flavor, taste and/or characteristic of a food product.

Collectively, the evidence demonstrates, in no uncertain terms, that Opposers’ use of the term does not distinguish the goods upon which it is used from the goods or services of others and contrarily demonstrates the use of the term “milkshake” as describing the taste, flavor and/or characteristic of the confectionery goods upon which it is offered.

12. Applicant is unaware of any communications between himself and Hershey concerning Applicant’s mark except for conversations and written communications between Applicant and Hershey’s counsel.

13. This Interrogatory is inapplicable as Applicant’s mark is an intent to use mark and described in previous interrogatory response as not yet been used in commerce.

14. This Interrogatory is overly broad as such inquiry can include conversations that Applicant has had with family and friends in normal conversation. The Interrogatory can also

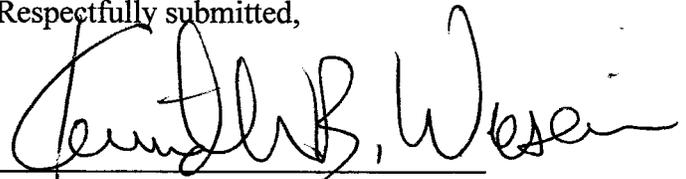
involve purchasing or inquiries about Hershey's products that have no relationship to the mark and opposition. Applicant did have communications with Hershey via a third party regarding the fraudulent specimens submitted by Hershey in relationship to their prior MilkShake mark. However, in light of the Court's ruling regarding this matter, Applicant will limit his response. Applicant has also had communications with Hershey's counsel regarding the proceeding and mark.

15. Applicant, Kenneth B. Wiesen.

16. Applicant may call an expert in the confectionery field, advertising and promotion of food products and media. It is expected that such witnesses will testify that the use of the term "milkshake" by Opposers would give the impression to a consumer of the products does not distinguish the goods upon which it is used from the goods or services of others and contrarily demonstrate the use of the term "milkshake" as describing the taste, flavor and/or characteristic of the confectionery goods upon which it is offered. Further note that the use is similar if not duplicative the standard use by other companies similarly situated to Opposers to describe the taste flavor and/or characteristic of a food product. Plaintiff has not yet identified the specific expert(s) and will supplement this interrogatory when he does.

Dated: February 10, 2012

Respectfully submitted,



Kenneth B. Wiesen, Applicant
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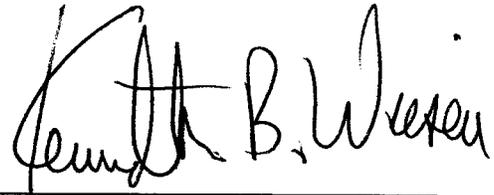
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused the foregoing APPLICANT'S RESPONSE TO OPPOSERS' FIRST SET OF INTERROGATORIES to be served this 10th day of February, 2012, by U.S. first class mail, postage prepaid, upon the following correspondent of record for Applicant:

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Attorneys for Opposers



KENNETH B. WIESEN

EXHIBIT D

Expert Report of Geoffrey Nunberg

Hershey Chocolate & Confectionery Corp and the Hershey Company v. Kenneth B. Wiesen

July 2, 2012

Scope of Retention and Qualifications

Scope of Assignment

1. Kaye Scholer LLP has retained me as an expert witness. I have been asked to give my opinion from a linguistic and lexicographical standpoint as to the distinctiveness of Hershey's MILKSHAKE mark, as used on WHOPPERS candy, KIT KAT bar, and ROBIN EGGS candy.
2. In the course of preparing this opinion, I have reviewed various documents, including Applicant's Answer to Notice of Opposition; Applicant's First Set of Requests for Production of Documents; Applicant's Response to Opposers' First Set of Interrogatories; Applicant's Response to Opposers' First Set of Requests for Production of Documents and Things and Exhibits; Opposers' Notice of Opposition; Opposers' First Set of Interrogatories; Opposers' Responses to Applicant's Amended First Set of Interrogatories; Opposers' First Set of Requests for Production of Documents & Things; and Hershey production Bates Nos. HRSHY0001-00706.
3. I have also consulted various dictionaries, databases, books, articles, and other sources, as referenced herein.
4. As I continue to review additional information, I reserve the right to supplement, revise, or further explain the opinions set forth in this report.

Qualifications

5. I hold a B.A. from Columbia College, an M.A. in Linguistics from the University of Pennsylvania and a Ph.D. in Linguistics from the City University of New York. I am currently an Adjunct Full Professor at the School of Information at the University of California at Berkeley, where I teach courses on language and on media and information

technologies and serve also on the faculty of the Cognitive Science program. I have also held teaching positions at UCLA and Stanford University and have held Visiting Lectureships at the University of Naples, the University of Texas, and Princeton University. When on the linguistics faculty at Stanford, I taught graduate and undergraduate courses in semantics and pragmatics, lexicography, the structure of written language, and in other language-related areas. I worked for many years as Principal Scientist at the Xerox Palo Alto Research Center.

6. My principal areas of linguistic specialization are semantics, the study of the meanings of words and expressions, and pragmatics, the study of the way language is interpreted in context. I have also worked extensively in lexicography, the compilation of dictionaries.
7. I have published numerous papers in refereed journals and other publications on various aspects of linguistics. Among these are many papers on word meaning and lexicography. I am also the author of several books on semantics and the use of language.
8. I am a regular contributor of commentaries on language to the National Public Radio program "Fresh Air" and have written regularly appearing features on language for *The New York Times* in its Sunday Week in Review section. My articles and commentaries have also appeared in publications including *Fortune*, *Forbes*, *The Atlantic*, *The American Prospect*, *The Los Angeles Times*, *The Washington Post*, *The San Francisco Chronicle*, and several European periodicals. I have written a number of general-interest articles on language and the law, chiefly for *American Lawyer* and *California Lawyer*, including articles on the use of dictionaries and linguistic evidence in legal proceedings.
9. I am chairman emeritus of the Usage Panel of the *American Heritage Dictionary* and have for many years been a consultant to the dictionary regarding matters of definition, usage, and other lexicographical questions. I have taught graduate-level courses in lexicography and related topics at Stanford University and at the Summer Institute of the Linguistic Society of America.
10. I have served as an expert witness in a number of civil, criminal, and trademark cases, including cases before the TTAB of the USPTO, and have been qualified as an expert in matters of word meaning and in Internet search technologies.
11. I am being compensated for my work on this matter at an hourly rate of \$450 for preparing this declaration and for deposition and trial testimony.
12. I have attached my curriculum vitae, which includes a list of my publications and the cases in which I have given trial or deposition testimony since 2008, as Exhibit A to this report.

13. I am not an attorney and have no specialized legal training or expertise, nor do I have any specialized knowledge about candy or the candy industry. In what follows I will speak to the historical and contemporary ordinary-language meanings of words as evidenced in dictionaries and the other sources that linguists and lexicographers use in determining word meaning, according to the techniques of lexicography and linguistic semantics. I note in this connection Professor McCarthy's assertion (*McCarthy on Trademarks & Unfair Competition* § 11:29, 4th ed. 2012) that "The testimony of experts on the meaning of words—lexicographers—is relevant evidence of the probable descriptive or suggestive meaning attached to a word by the public."
14. I have been asked to determine whether the MILKSHAKE mark is arbitrary, suggestive or descriptive on the spectrum of distinctiveness. I will take this question up in several stages: first by examining the treatment of milkshake in contemporary dictionaries; then by considering what role, if any, the word plays in conveying the characteristics of the products to which it is attached; and finally, by considering the sociohistorical connotations of the word.

On the Spectrum of Distinctiveness

15. As I noted, I am not an attorney. On the basis of my work on trademark cases and my other research, I am, however, familiar with the spectrum of distinctiveness and the considerations relevant to determining the place of a mark on that spectrum. By way of background, I assume the following:
16. Trademarks are categorized on a spectrum of increasing distinctiveness: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful. See *McCarthy on Trademarks & Unfair Competition* § 11:2 (4th ed. 2012); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) ("following the classic formulation set out by Judge Friendly"); *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 1332 (Fed. Cir. 2003). Marks that are suggestive, arbitrary, or fanciful "are deemed inherently distinctive and entitled to protection." *Two Pesos, Inc.*, 505 U.S. at 768 (noting that "their intrinsic nature serves to identify a particular source of a product"); see also *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1350-51 (Fed. Cir. 2010) (also setting forth the scale of distinctiveness).
17. A trademark that is "merely descriptive" is one that "directly" or "immediately conveys information about [the] nature" of the goods or services bearing the mark. *McCarthy on Trademarks & Unfair Competition* §§ 11:16 & 11:19 (4th ed. 2012); see also *In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005); *In re Application of Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 525 (C.C.P.A. 1980); *In re Patent & Trademark Servs. Inc.*,

49 U.S.P.Q.2d 1537, 1539 (T.T.A.B. 1998); *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 699 (2d Cir. 1961) (“Unless a word gives some reasonably accurate - some tolerably distinct knowledge - as to what the product is made of, it is not descriptive within the meaning of trademark terminology.”). McCarthy has advised that, when determining whether a mark is “merely descriptive,” one must not consider the mark “in a vacuum,” but, rather, assess the descriptiveness of the mark in the context of the “goods or services for which registration is sought.” *McCarthy on Trademarks & Unfair Competition* § 11:16 (4th ed. 2012).

18. In contrast, a trademark is deemed suggestive “[i]f information about the product or service given by the designation is indirect or vague, requiring imagination and thought to get information about the product or service.” *McCarthy on Trademarks & Unfair Competition* § 11:19 (4th ed. 2012); *see also Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1033 (9th Cir. 2010) (“[T]he imagination test is [the] primary criterion for evaluating whether a mark is suggestive.”) (internal citations omitted); *In re Application of Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 525 (C.C.P.A. 1980) (“[A] mark is suggestive if imagination, thought, or perception is required to reach a conclusion on the nature of the goods or services.”). If a mental leap is required to connect the mark to the product, the mark passes the imagination test and is suggestive. *Fortune Dynamic, Inc.*, 618 F.3d at 1033; *see also Brookfield Communications, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1059 (9th Cir. 1993) (concluding that plaintiff’s “MOVIEBUFF” mark is not descriptive, but, rather, is “suggestive – and thus strong enough to warrant trademark protection – because it requires a mental leap from the mark to the product”).
19. A term that could be deemed merely descriptive for a particular product or service may be suggestive or arbitrary for another product or service. *McCarthy on Trademarks & Unfair Competition* § 11:71 (4th ed. 2012) (noting that “apple” would be considered “arbitrary when used on personal computers, suggestive when used in ‘Apple-A-Day’ on vitamin tablets, descriptive when used in ‘Tomapple’ for combination tomato-apple juice and generic when used on apples”); *see also Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 14 (2d Cir. 1976) (concluding that “safari” was generic when used on safari services and on certain clothing, such as “Safari hat” and “Safari jacket,” but was suggestive when used on ice chests, axes, tents, and smoking tobacco as “a way of conveying to affluent patrons ... a romantic notion of high style, coupled with an attractive foreign allusion”),” but was suggestive when used on ice chests, axes, tents, and smoking tobacco as

“a way of conveying to affluent patrons ... a romantic notion of high style, coupled with an attractive foreign allusion”).

20. On the basis of these assumptions, taken in concert with the observations offered below, I will show that the term *milkshake* can only be regarded as suggestive when it is used in the name of a variety of candy product.

Dictionary Definitions of *Milkshake*

21. Both general-purpose dictionaries and specialized food dictionaries define *milkshake* only as type of drink to which a flavor is added:

a thoroughly shaken or blended drink made of milk, a flavoring syrup, and often ice cream” Merriam-Webster’s *Collegiate*

orig. *U.S.* a cold drink made of milk, a sweet flavouring, and typically ice cream, mixed together as by shaking or whisking until smooth and frothy. *Oxford English Dictionary*

a drink made of milk and usually ice cream and a flavour such as fruit or chocolate, mixed quickly together until it is full of bubbles. *Cambridge Advanced Learner's Dictionary & Thesaurus*

1. A beverage made of milk, flavoring, and ice cream, shaken or whipped until foamy.

2. A beverage made of milk and flavored syrup, whipped until foamy. *American Heritage Dictionary, Fifth Edition*

1. Cold milk drink a cold drink made by whisking or blending milk, flavoring and usually ice cream. 2. flavored milk in New England, a drink made of milk and flavored syrup that is whipped until it is frothy. *Encarta World English Dictionary*

a cold drink made of milk, a sweet flavoring such as fruit or chocolate, and typically ice cream, whisked until it is frothy. *Oxford American Dictionary, Second Edition*

a cold drink made of milk, ice cream, and flavored syrup, blended together. Robert Allen Palmatier, *Food: A Dictionary of Literal and Nonliteral Terms, 2000*

MILKSHAKE or MILK SHAKE, also called SHAKE, is a cold frothy drink of milk, ice cream, and flavoring made by shaking or whipping. Barbara Ann Kipfe, *The Culinarian: A Kitchen Desk Reference, 2011.*

A milkshake is a sweet, cold beverage which is made from milk, ice cream or iced milk, and *flavorings or sweeteners such as fruit syrup or chocolate sauce.* Wikipedia

There is some variation here; some dictionaries make ice cream an essential ingredient and others say it is “typically” used; some speak of “whisking,” some of “blending,” and some of “mixing”; and some note regional variants in which a “milkshake” does not contain ice cream. This reflects partly just differences in defining style and partly variation in how

people think of the drink (for one thing, the definition has changed since the 1880s when “milkshakes” were first introduced; and even in the modern America of national advertising and chain restaurants, food names are subject to a good deal of regional variation). But no dictionary I am aware of defines *milkshake* as anything other than the name of a drink or beverage. Moreover, despite this variation, all of the definitions refer to a flavor that is added in the preparation of the drink. In this regard their treatment of *milkshake* contrasts with that of words for agents whose use as a flavoring is given specific mention:

butterscotch a candy made from brown sugar, butter, corn syrup, and water; also : the flavor of such candy. Merriam-Webster

horehound a : an Old World bitter perennial mint (*Marrubium vulgare*) with downy leaves b : an extract or confection made from the dried leaves and flowering tops of this plant. Merriam-Webster

vanilla 1a : vanilla bean b : a commercially important extract of the vanilla bean that is used especially as a flavoring. Merriam-Webster

In its application to the characteristics of a kind of candy, accordingly, *milkshake* cannot be merely descriptive of the product and could only be functioning in a figurative or connotative way.¹

Descriptiveness of *milkshake*

22. Applicant states (Answer to Notice of Opposition, p.1) that the “merely descriptive word ‘MILKSHAKE’ ... merely describes the taste, flavor, and/or characteristic of the candy product.” But as applied to a variety of candy, *milkshake* is not descriptive in the trademark sense of the term.
23. Note that names of flavors and analogous sensory categories (fragrances and colors, for example), like the names of other goods and services, can fall anywhere on the spectrum of distinctiveness. Consider, e.g., the commercial names of ice-cream varieties. These names can be merely descriptive, for example when they denote the agent from which the characteristic flavoring is derived, as with *strawberry* or *pistachio*, or when they describe the manner of composition of several flavors (as with *vanilla-chocolate swirl*). But variety names can also fall in the suggestive or arbitrary ranges of the scale.

Arguably suggestive variety names include Ben and Jerry’s Dublin Mudslide (“Irish Cream Liqueur Ice Cream with Chocolate Chocolate Chip Cookies and a Coffee Fudge Swirl”) and

¹ By “connotative” I mean that the name evokes a social or historical setting, as the marks Lorna Doone and Safari do. See below for discussion.

Half Baked (“Chocolate & Vanilla Low Fat Frozen Yogurts with Fudgey Brownies & Chocolate Chip Cookie Dough). At the cost of a considerable leap of the imagination, these names may vaguely suggest a variety’s color and consistency (“mudslide”), its contents (“half baked” may suggest a product that contains cookies or brownies) or its festive appearance and coloring (“America’s birthday cake”). But none of them could be said to give “a reasonably accurate or tolerably distinct knowledge of the characteristics of a product,” as McCarthy defines the category of descriptive terms. Not even the most imaginative consumer, asked to predict the specific composition of a new ice-cream product that was designated simply “Half-Baked” by its manufacturer, would be able to respond “Well, to me it says Chocolate & Vanilla, Low Fat Frozen Yogurts with Fudgey Brownies & Chocolate Chip Cookie Dough.”

Other ice-cream variety names come closer to arbitrary on the spectrum of distinctiveness, such as Ben and Jerry’s Chubby Hubby (“Fudge Covered Peanut Butter Filled Pretzels in Vanilla Malt Ice Cream Rippled with Fudge & Peanut Butter”) and Everything But The (“A Collision of Chocolate & Vanilla Ice Creams with HEATH® Bar Chunks, White Chocolatey Chunks, Peanut Butter Cups & Chocolatey-Covered Almonds”), as well as Baskin-Robbins’ Love Potion # 31 (“... white chocolate flavored and raspberry ice creams, a raspberry ribbon, chocolate chips, and raspberry-filled chocolate flavored hearts”). Some of these might give an inkling as to the nature of the product (“Everything But The” presumably contains a number of ingredients). But no leap of the imagination will enable one to get from the name to a clear idea of what particular variety of ice cream it denotes.

24. Note that in many of these compound names, one element functions descriptively and another functions suggestively or arbitrarily. Thus in Baskin-Robbins’ Baseball Nut variety, “nut” *describes* one ingredient and “baseball” *suggests* the colors and compositions of the others (vanilla ice cream with berry-flavored stripes that vaguely evoke a baseball’s seams). With such names, we would have to categorize the entire mark according to the status of its least descriptive constituent. With an ice-cream product called Chocolate Fantasy, for example, *chocolate* may be descriptive of the flavor of the product, but *fantasy* is at best suggestive of some further property that distinguishes it from other varieties like Chocolate Fudge or Chocolate Mint. Thus the name as a whole can only suggest the relevant characteristics of the product. (Cf McCarthy, 11:26: “If a composite mark is not 100%

descriptive, then the mark as a whole is not ‘merely’ descriptive.”)²

The Functions of *Milkshake*

25. Applicant claims (Responses to First Set of Interrogatories, p. 5) that

...Opposers’ (Hershey) own website further reveals that Opposers conceded that the use of the term “milkshake” on their products is merely a descriptive use of a common food term for some of their candies. Opposers’ use of the word milkshake is for the purposes of identifying the “flavor” of their products. The word “milkshake” was listed on their website at the time of their alleged use in commerce of the mark, as an identified and categorized flavor.... Opposers’ own website further demonstrates that the trademarked candy product “Whoppers” was offered in the limited edition flavor of “milkshake” in January of 2006, and Opposers’ candy product Robin Eggs was offered in a strawberry milkshake in January of 2006....

This passage contains a number of misstatements and confusions. First, nothing on Hershey’s website “concedes” that the term *milkshake* is a “descriptive use of a common food term”; indeed, none of these words, or their synonyms, appears anywhere in the site in reference to the product’s name. Applicant apparently believes that these conclusions follow from the use of the word to “identify the ‘flavor’ of their products,” which is taken to entail, apparently, that milkshake as “identified and categorized flavor.” If that means that *milkshake* is used as a product name, it is correct but uninformative. “Identifying” is what product names *do*, but as I note above, they can accomplish that in any number of ways.³

26. Moreover, it is unclear here what Applicant means by “flavor.” It should be noted that in reference to food products like candy and ice cream, *flavor* can have two senses. In its narrow sense, it denotes “The element in the taste of a substance which depends on the co-operation of the sense of smell,” as the *Oxford English Dictionary* puts it, as with, e.g., chocolate, peach, etc. In a looser sense, it refers simply to a distinct product variety that can

² This point mirrors a linguistic principle. If a compound expression is not wholly compositional—i.e., if the meaning of the whole is not entirely derivable from the composition of the meanings of its parts—then it is an idiom, even if not all of its constituents are used idiomatically. Thus, e.g., a flashlight is a light, but not simply any light that flashes, and a lifeguard is not simply anyone who guards people’s lives; both these expressions are idiomatic and require distinct lexical entries of their own.

³ As can words of any sort. The proper name Albert Pujols identifies a certain baseball player but doesn’t describe him. By the same token, the common noun *moonwalk* identifies a certain dance step and evokes the impression it creates without describing it, just as the noun phrase *dark horse* connotes a participant in a race or competition but doesn’t describe his role. No one unfamiliar with these collocations could guess what specifically they refer to.

be characterized in a number of ways: by specifying one or more flavors in the narrow sense (“peach”), by specifying a manner of preparation or composition (“ripple,” “whipped”), by specifying a “mouth feel” as food scientists call it—i.e., sensory properties including viscosity, texture, and consistency (“crunchy,” “gooey,” etc.) or by some combination of these and other attributes (“frozen,” “low-cal”). In that looser sense of the word, for example, the ice-cream “flavors” sold by Baskin Robbins include America’s Birthday Cake, described as “Strawberry. Candy. Cake flavor. Confetti-topped cake pieces. Blue whipped cream.” But that is obviously not a description of a flavor in the narrow sense of the term; it is not analogous, to “chocolate” or “strawberry.”⁴

In the end, then, Applicant’s claims in the paragraph cited above amount only to saying that Hershey uses *milkshake* as part of the name of one of its candy varieties.

The Suggestiveness of Milkshake

27. As we will see below, it is not a foregone conclusion that *milkshake* conveys anything about the characteristics of the product in whose name it appears. But to the extent that it can be linked to some feature of a candy or food variety, it cannot be as a flavor in the narrow sense of the term. We don’t associate any particular flavor with milkshakes as such, which can be made with various flavoring agents, as all of the dictionary definitions of the word indicate. Note moreover that Hershey’s use of the word has been generally accompanied by specific flavor designations, such as *strawberry*, *orange cream*, *peanut butter*, and *vanilla*. If *milkshake* conveys anything more than that to the consumer, it is by way of vaguely evoking a mouth feel. But that cannot be the mouth feel associated with an actual (literal) milkshake. Inasmuch as mouth feel arises from a combination of features like consistency, temperature, and texture, the mouth feel of a solid candy consumed a room temperature will not be identical or even very similar to that of a chilled liquid preparation. If someone were to describe a crime scene by saying, “The floor was covered with some unknown substance of the consistency of a milkshake,” no one would infer that consistency of the substance in question was like that of a Kit Kat bar or a Whoppers candy.
28. The mapping between the sensations of drinking a milkshake and eating a piece of candy is best understood in terms of the widely studied phenomenon of synaesthesia, that is, the

⁴ In this report I have tried to restrict my use of *flavor* to the narrow sense of the word, and to speak of “varieties” instead of “flavors” in the broad sense of the term.

association of sensations from different sensory modalities or domains.⁵ Thus musical tones may evoke colors—F# is felt as red, for example. Similarly, color names can evoke sensations of taste (the word *blue* tastes “inky”), as may temperatures (cf confection products with names containing *winter*, *cool*, etc.).⁶ In the same way, the consistency of a milkshake beverage might evoke some features of the consistencies of a certain range of solid candy products, or at least rule some out. *Milkshake* would presumably not bring to mind the mouth feel of rock candy, for example; attached to such a product, it would not even have a claim to being suggestive.

29. Any association between milkshakes and the characteristics of a solid candy product will be necessarily ill-defined, due to vagueness in both the source (i.e., the point of departure of a metaphor) and the target (the thing to which the metaphor is applied). For the first, we note that *milkshake* is itself a vague term, subject to considerable variation. For many, the category includes malted milk, for example; for others, a malted and a milkshake are distinct categories of drink. (Google reports 288,000 hits for “a malted milkshake” and around 55,000 for strings of the type “a malt or a milkshake” and “a milkshake or a malt.”)⁷ Moreover, while milkshakes themselves are typically made with ice-cream, they originally

⁵ Synaesthesia has been studied from linguistic, psychological and neurophysiological perspectives, often in concert, since these approaches are obviously interconnected. See, e.g., the article on “Synaesthesia” in Keith Brown, *The Concise Encyclopedia of Semantics* (Elsevier, 2009) and the article on “Synaesthesia and Language” in Harry A. Whitaker, *Concise Encyclopedia of Brain and Language*, (Elsevier, 2009).

⁶ See Anne Treisman, “Synaesthesia: Implications for Attention, Binding, and Consciousness,” in Lynn C. Robertson, Noam Sagiv, eds., *Synesthesia: Perspectives from Cognitive Neuroscience*, (Oxford, 2005).

⁷ The string ["a milkshake or malt" OR "a malt or milkshake" OR "a malted milk or milkshake" OR "a milkshake or malted milk"] gets 42,000 reported hits; ["a milkshake or a malt" OR "a malt or a milkshake" OR "a malted milk or a milkshake" OR "a milkshake or a malted milk"] gets another 12,200. These figures should be regarded only as approximate (see below for more on this), but for our purposes it is enough to observe that both phrasal types are quite common. Note also that the greater reported frequency of “a malted milkshake” is not significant here, since it is not syntactically parallel to coordinations like “a milkshake or a malt.”

didn't contain any, and to many that ingredient is still not an essential component.⁸ And even ice-cream-based milkshakes will vary considerably in their sensory properties, depending on the relative quantities of milk & ice cream, in addition to variations based on the fat and sugar content of those two ingredients and other considerations.⁹ Thus a mention of "milkshake" will convey quite different, and necessarily vague, impressions of mouth feel depending on what specific drink or drinks the word connotes to the hearer.

30. Moreover, there is no precise mapping from whatever sensory impression of a liquid is conveyed by *milkshake* and the mouth feels of a range of solid food products. It will be a matter of variable subjective judgment whether *milkshake* suggests, e.g., the mouth feel of a nougat product like a Three Musketeers or Milky Way bar, which are manifestly distinct both from each other and from the mouth feel of either the varieties of Whoppers candy or KitKat bar to which Hershey has attached the label in the past. And whatever mouth feel *milkshake* evokes when attached to a Kit Kat bar, say, will necessarily be wholly distinct from the mouth feel of a Nabisco Oreo cookie, a Kellogg's Pop-Tart or a Quaker's Chewy Granola Bar, to varieties of all of which the milkshake label has also been attached. A term that can be applied to so wide a range of mouth feels cannot possibly be said to identify any one of them. Indeed, the synaesthetic mapping between the mouth feel of a milkshake and that of a solid food ultimately becomes so indeterminate that *milkshake* can only convey a vague notion of gustatory pleasure. As the mapping between sensory domains becomes wholly uninformative, the term itself passes from suggestive to arbitrary. (An example is ICE CREAM chewing gum, a mark that the TTAB in described in 1972 as "so incongruous and ludicrous as to be arbitrary." *Borden Inc. v. Topps Chewing Gum, Inc.* 173 U.S.P.Q

⁸ See, e.g., John F. Mariani, *The Encyclopedia of American Food and Drink* (Lebhar-Friedman, 1999), p. 206; Anne Cooper Funderburg, *Sundae Best: A History of Soda Fountains* (Bowling Green State University Popular Press, 2002), pp. 51-52; and Andrew F. Smith, *The Oxford Companion to American Food and Drink* (Oxford, 2007), p. 390. Note that in New England and other parts of the East, a "milkshake" is made only with milk and syrup, while what others would call a milkshake is generally called a frappe or frappé, or in some areas a cabinet; see the dictionary definitions cited above.

⁹ See, e.g., J. X Guinard, et al. "Sugar and Fat Effects on Sensory Properties of Ice Cream," *Journal of Food Science* 62:5, September 1997, 1087-1094; Monique M. Raats and Richard Shepherd, "Free Choice Profiling of Milks and other Products Prepared with Milks of Different Fat Contents," *Journal of Sensory Studies* 7:3, September 1992, 179-203. Chris Clarke, *The Science Of Ice Cream* (Royal Society of Chemistry, 2004), pp. 128ff.

447.) For these reasons *milkshake* cannot be considered to be descriptive when attached to any of the products with which Hershey has associated the name.

“Standard” Use of Milkshake

31. In light of its use in connection with various food products, Applicant describes Opposers’ *milkshake* as used by Opposers as “a common use in the food industry as merely describing the taste, flavor, and/or characteristic of the food product” (Applicant’s Response, p. 7). Later, he speaks of the “**standard** use by other companies similarly situated to Opposers to describe the taste flavor and/or characteristic of a food product” (Applicant’s Response, p. 7; emphasis mine).
32. The fact that *milkshake* has been used as a label or part of a label for several varieties of solid food products does not entail that it is descriptive, much less “merely descriptive,” in these uses. Indeed, as we have seen, *milkshake* could not possibly be descriptive of all of these varieties, which are distinct in mouth feel and composition. In this regard we can contrast *milkshake* with a flavor name like *chocolate*. Suppose one gives a subject a chocolate candy bar and then asks him or her to identify the varieties of Pop Tarts, yoghurt, granola bars, and cookies that have the “same flavor.” We would expect that the subject would be reasonably adept at this task. It is because of the consistency of identification of flavors from one product type to the next that we can generalize about them: if my wife expresses a dislike for chocolate ice cream there is a very good chance she will not like other products designated chocolate, either, and will remonstrate with me if I bring home chocolate cake or candy—“You know I don’t like chocolate!” By contrast, there is no reason to suppose that subjects given a “milkshake” candy and asked to pick out the varieties of Pop Tarts, yoghurts, granola bars and cookies that have the “same flavor” or “taste the same” will be able to do so with any cross-subjective reliability. Knowing that someone likes Pop Tarts designated “milkshake” is not informative when it comes to guessing his or her preferences in candy bars or yoghurt.
33. It is for this reason that one cannot assert, as Applicant has, that *milkshake* is a “standard” term in the food industry. Leaving aside that the legal test is “merely descriptive,” and not “standard,” to qualify as a standard, it is not sufficient that a term be commonly used; it must also have a consistent meaning or value. (Thus one would say that the terms *ton* and *mile* were in common use as units of measure long before either of them was standardized. Cf the OED: “Having the prescribed or normal size, amount, power, degree of quality, etc.) By way of example, we may consider the way *milkshake* is used in the names of paint colors. Kelly-Moore offers a color called Milk Shake that I would describe as roughly the color that

Crayola used to call “flesh,” while Benjamin Moore offers a Milkshake color that would be described as a warm taupe. From the mere fact that the name *milkshake* is used by several paint companies for very different colors, no one would say that is a “standard” color name, nor would anyone say that these uses are “merely descriptive.” (A homeowner who leaves a note for a painter asking that his bedroom be painted milkshake, with no further specification, and then goes away on a vacation will get no more than he deserves on his return.)

In short, the fact that *milkshake* is used in the names of various solid food products has no bearing on whether it is merely descriptive as applied to Hershey’s candy products.

Consumer Perceptions of *Milkshake*

34. In any event, the status of *milkshake* as an industry term is not directly relevant here; what matters is whether consumers perceive it to merely describe some characteristic or quality of the product on which it is used. In this connection, we observe that people almost never use *milkshake* to identify a flavor of candy. A Google search on “milkshake-flavored candy” turns up exactly 25 hits, representing 4 distinct sites containing original content (See Exhibit B).¹⁰ Of those four, one, dietfacts.com, reproduces the nutrition information from a package of the Whoppers Milkshake-Strawberry candy variety, and the other three contain third-party mentions, of which one is a reference to Whoppers candy, one to an unidentified type of candy, and one a metaphorical reference to “milkshake flavored candy cupcakes,” where *milkshake* doesn’t actually modify *candy*:

I love Whoopers [sic] Strawberry Milkshake flavored candy and LOVE ICE CREAM but the doctor told me to slow down on the sweets.¹¹

About the time I turned thirteen... I began buying chocolate candy bars by the pack, chocolate chip cookies by the handful, little chocolate cakes by the box, ice cream bars by the carton, and even an occasional chocolate covered milkshake-flavored candy bar for a change of taste.¹²

¹⁰ Of the hits, 4 contain duplicate content from a single site and 18 are “scrapers sites” that have lifted random content from other websites in an effort to optimize search engine rankings—either “badware” sites (“this site may harm your computer”) or other sites with Polish, Dutch, Brazilian, and German domain names that are trying to lure visitors who will click on their ads. (See http://en.wikipedia.org/wiki/Scrapper_site)

¹¹ <http://amycrazy-wonderfulworld.blogspot.com/>

¹² <http://www.goodreads.com/story/show/259963-caffeine-makes-me-bleed-and-how-it-can-poison-you-too>

That's what type of music we're talking about right?, Psychedelic Trance? Everything else is just milkshake flavored candy cupcakes, like the smell of your underoo droors.¹³

Those results contrast dramatically with the results of searches on analogous strings containing genuine flavor names (e.g., “chocolate flavored candy”), which turn up tens or hundreds of thousands of hits depending on the popularity of the flavor.¹⁴

Social Connotations of “Milkshake”

35. It should be borne in mind, moreover, that what *milkshake* conveys may have little or nothing to do with the characteristics of the product it is attached to. In determining the degree of arbitrariness of a trademark, one must take into account the social, literary, or historical associations of the name. Names like Robert Burns Cigars and Lorna Doone cookies may not tell the consumer anything about the characteristics of the products they're attached to, but they do valuable semantic work nonetheless. Here again the example of paint color names is instructive. Benjamin Moore's list of colors includes Limousine, Vail, and Debutante. No one could confidently pin those names even to a range of colors—is Debutante a rose, a mauve, a pink?—but they nonetheless convey a sense of up-market allure.¹⁵ It may be difficult to decide if such marks are arbitrary or suggestive, particularly since the majority of marks carry some whiff of suggestivity (see McCarthy, 11:65, citing the Court of Customs and Patent Appeals). But they are clearly not “merely descriptive.” In this regard, recall the conclusion of the Second Circuit, cited above, that “safari” was suggestive when used on ice chests, axes, tents, and smoking tobacco as “a way of conveying to affluent patrons ... a romantic notion of high style, coupled with an attractive foreign allusion.”

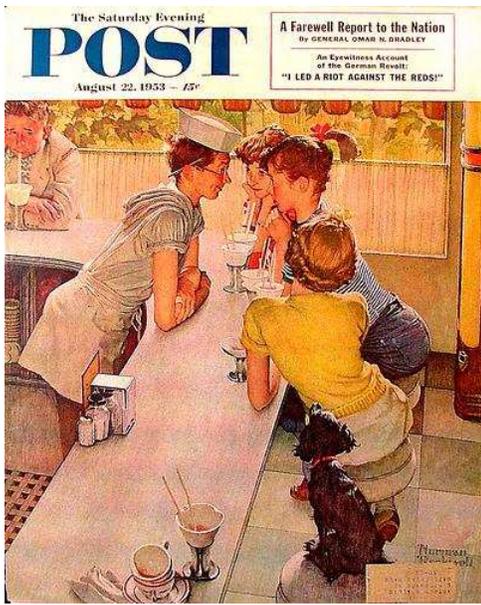
¹³ <http://forum.isratrance.com/a-brief-survey-do-you-like-darkpsy/page10/>

¹⁴ Google reports 2,080,000 hits for “mint flavored candy,” 812,000 hits for “strawberry flavored candy,” and 598,000 hits for “lemon flavored candy.” It returns smaller but still significant hit counts for less canonical flavors: 84,000 for “cinnamon flavored candy” and 124,000 for “coconut flavored candy,” and 44,000 for “ginger flavored candy.” Those figures should not be regarded as precise; owing to limitations in Google's hit-count estimation algorithm, hit counts much in excess of the 1000 or so that Google actually returns can be off by as much as an order of magnitude. But it is safe to conclude that the actual hit counts for these flavors all number in the thousands, in contrast to the handful for “milkshake flavored candy”; since the hit count returned by Google for the latter is far less than 1000 it can be considered accurate. (It should be noted that Google does not distinguish between hyphenated and nonhyphenated strings when they are in quotation marks; i.e., between “milkshake flavored” and “milkshake-flavored.”) The phrase “milkshake flavored candy” has never appeared in any of the newspaper and wire-service stories indexed on Nexis.

¹⁵ The names denote, respectively, a cool gray, a light gray, and a light beige.

36. The term *milkshake* is analogous to these others. It has rich connotations that are independent of its gustatory associations, in evoking the old-time soda fountain and the wholesome Norman Rockwell culture it stands in for, as memorialized in numerous popular culture references from the 1940s to the present day. Say “milkshake,” and one might recall any number of images—scenes from Bosko’s Soda Fountain, Andy Hardy movies, and Archie comics; the young George Bailey in *It’s a Wonderful Life*; James Dean and Natalie Wood in *Rebel Without a Cause*; Lana Turner being discovered over a milkshake at Schwab’s Drugstore or Joan Crawford enjoying one there; a Norman Rockwell *Saturday Evening Post* cover or an episode from *The Lucy Show*; scenes from *Happy Days*, Woody Allen’s *Manhattan* or *Sesame Street*; more recently, scenes from *Shallow Hal* or *Saturday Night Live*, as illustrated in the following images:







37. By the same token, the word milkshake could recall songs like Jerry Lee Lewis's 1957 "Milkshake Mademoiselle," later covered by artists including Sha Na Na:¹⁶

Down to the drugstore, to be with the crowd,
A candy soda pop for cryin' out loud,
All day long, sittin' on a stool,
Drinking milkshakes again, she giggles like a fool.

She's a milkshake mademoiselle
Cool as she can be,
She's a milkshake mademoiselle
Whooooo, what she do to me.

Or to a (much) younger generation, it could bring to mind Smosh's 2006 "Milkshake"
("Milkshakes are my favorite things in the world"), which has been covered by several other
artists:¹⁷

¹⁶ <http://www.youtube.com/watch?v=SFYzm4SvWkc>

¹⁷ <http://www.smosh.com/category/tags/milkshake>



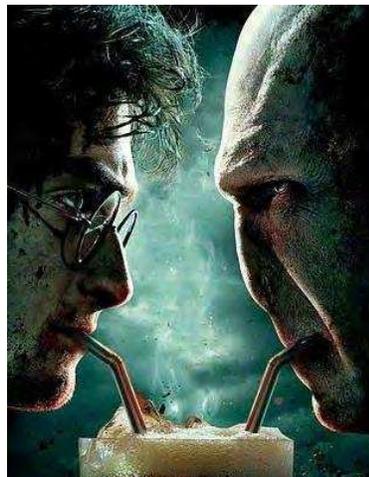
In Kelis's 2005 hip hop hit "Milkshake" (also widely covered), the word is used in an nonspecific but suggestively metaphorical way ("my milkshake brings all the boys to the yard"), but with clear references to the historical setting in the album cover and music video:



38. Those sociohistorical associations have often been exploited by advertisers; for example Time-Life uses an image of a milkshake to evoke the music of the 1950's on the cover of its Malt Shop Memories CD, as do other oldies compilations:



39. It is hard to think of anything more suggestive of the innocence of first love than sharing a milkshake with one's sweetheart, which is what makes that image a compelling symbol for rapprochements between antagonists once considered irreconcilable:¹⁸



40. It is safe to say, then, that the milkshake is deserving of that much-overused word “iconic”; it evokes a rich stream of images and memories surrounding the consumption of sweets and sweet drinks in old-timey surroundings. Those images are particularly vivid when the name is associated with a product such as a confection or candy bar, which is closely connected to the setting that the word evokes.

41. Most people have fond and vivid memories of the candy bars they consumed in their youth and childhood (which is what has made possible the successful revival of old candy brands). But it is not just that candy bars and milkshakes are invested with a great deal of

¹⁸ Cf. “Apple's Tim Cook and Samsung's Choi Gee-sung will meet in San Francisco today to discuss a potential settlement in the all-out patent battle the two companies are currently engaged in....They will spend two days hashing things out, though chances are slim that it will end in the two sharing a milkshake and braiding each other's hair.” Gizmodo, May 21, 2012, at bit.ly/OdBE1f

nostalgia; it is also a nostalgia for the very same locales. Both now and formerly, the places where one consumes milkshakes have also been typically places where one buys candy, which moreover are thought of as the focus of sociability among the young people of a community.

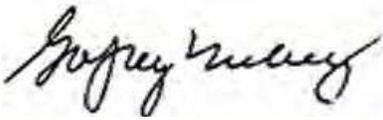


42. In short, the social and emotional connotations evoked by *milkshake* cannot help but color the consumer's perception of a candy product, just as *safari* adds connotations of romance to tents or smoking tobacco. Thus the word *milkshake* could *never* be "purely descriptive" of a candy product's characteristics, whatever they were. And indeed, there is no reason why the consumer must be able to derive any specific information about the food product's characteristics from the name *milkshake* before it can do its connotative

work, no more than *safari* needs to provide us with any information about the characteristics of the tents it is attached to.

Conclusion:

On the basis of the observations offered here, I conclude that as used by Opposers, *milkshake* is not “merely descriptive” or for that matter descriptive at all as applied to Hershey’s products: it can only be a suggestive mark.



Signed

July 2, 2012

EXHIBIT A

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Curriculum Vitae

March, 2012

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Education:

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- 1971-1972 Department of Linguistics, Graduate School of Arts and Sciences,
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- 1969-1971 School of General Studies, Columbia University. 1971: B.A. awarded
- 1962-1964 Columbia College, Columbia University

Positions:

- 2005- Adjunct Full Professor, School of Information, University of California at Berkeley
- 2004 Visiting lecturer, School of Information Management and Systems, University of California at Berkeley
- 2002-2003 Marta Sutton Weeks Fellow, Stanford Humanities Center
- 2001- Senior Researcher, Center for the Study of Language and Information, Stanford University
- 1999 Fulbright Distinguished Chair, University of Naples
- 1986-2001 Xerox Corporation, Corporate Research and Technology.
1995-2002, Principal Scientist, Xerox Palo Alto Research Center
1993-1995. Senior Research Scientist, Rank Xerox Research Centre, Grenoble, France
1986-1993, Senior Research scientist, Xerox Palo Alto Research Center
- 1988-present Consulting Full Professor, Department of Linguistics, Stanford University
- 1980-1985 Visiting Assistant Professor, Department of Linguistics, Stanford University.
Researcher, Center for the Study of Language and Information
- 1979-1980 Assistant Professor, Department of Linguistics, U.C.L.A.
- 1978-1979 Fulbright Lecturer, University of Rome
- 1977-1978 Postdoctoral Fellow, Institute for Human Learning, University of California at Berkeley
- 1976-1977 Instructor, Department of English, Brooklyn College of C.U.N.Y.

1975-1976 Instructor, Department of Anthropology, Hunter College of C.U.N.Y.

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2009 Member of Faculty, Linguistic Society of America Summer Institute, University of California at Berkeley

1984-2001 Associate, Center for the Study of Language and Information, Stanford University

1992-present Membre Associé, Institut Jean Nicod (Centre de Recherche en Epistémologie Appliquée) (CNRS), Paris

1991 Member of Faculty, Linguistic Society of America Summer Institute, University of California at Santa Cruz

1999-present Member of Board of Trustees, Center for Applied Linguistics

1999-2002 Member of Steering Committee, Coalition for Networked Information

1998-2003 Member of Scientific Board, Università degli Studi, San Marino

1998-2002 Member of Advisory Board, Ecole Nationale des Sciences de l'Information et des Bibliothèques, Lyon.

1987-1995 Affiliated Research Scientist, Institute for Research on Learning, Palo Alto, California

Fellowships, Grants, Awards, and Special Lectureships:

2007-08 Townsend Fellow, Townsend Humanities Center, University of California at Berkeley

2002-03 Martha Sutton Weeks fellowship, Stanford Humanities Center.

2002 Fellow, Council of the Humanities, Princeton University.

1999 Language and the Public Interest Prize, Linguistic Society of America

1998-99 Fulbright Distinguished Chair, University of Naples

1998 Harry Ransom Distinguished Visiting Humanities Professorship, University of Texas

1989 Xerox Corporate Research Group Award for Excellence in Science and Technology

1977-78 NIMH Postdoctoral Fellowship, Institute for Human Learning, University of California, Berkeley

1976-77 NSF Dissertation Grant

Areas of Specialization

Linguistics and Natural Language:

- Semantics and pragmatics, lexical semantics and lexicography
- Structures and genres of written language
- Normative grammar and language criticism
- Language policy (US and comparative)
- Text classification technologies
- Language and politics

Technology and communication (history and theory)

Courses Taught

Graduate and undergraduate courses in semantics and pragmatics, language policy, discourse analysis, structure and history of English, language and literature, language and politics, cultural implications of digital technologies, history of information technologies

Books and Monographs:

Ascent of the A-Word, to appear from PublicAffairs, July 2012.

The Years of Talking Dangerously, PublicAffairs, 2009.

Talking Right, PublicAffairs. 2006.

Named as one of the ten best nonfiction books of 2006 by *Washington Monthly*. Hungarian edition, 2009.

Going Nuclear: Language, Politics, and Culture in a Confrontational Age. Public Affairs, 2004.

Named as one of the ten best nonfiction books of 2004 by Amazon.com; one of ten best books of 2004 by the San Jose *Mercury News*; best language book of 2004 by the Hartford *Courant*; one of ten best language books of the year by the *Chicago Tribune* and the *Boston Globe*.

The Way We Talk Now, Houghton Mifflin, 2001.

The Future of the Book. (ed.). University of California Press. 1996. Published in Spanish as *El Futuro del Libro*, Ediciones Paidós, Barcelona.

Punctuation: An Exercise in the Linguistics of Written Language. CSLI and University of Chicago Press, 1990. Reprinted 1995. Second edition, 2001.

The Pragmatics of Reference (dissertation) Indiana University Linguistics Club, 1978.

Selected scholarly Articles, Research, and Shorter Publications:

What's proper about proper names? (in prep)

On Derogative Words (in prep)

Counting on Google Books, *The Chronicle of Higher Education Review*, Dec. 16, 2010.

Google's Book Search: A Disaster for Scholars. *The Chronicle of Higher Education Review*, August 31, 2009; reprinted in Spanish in *Texturas* (Spain), Dec. 2009.

Disclosure of Work for Hire. *International Journal of Speech, Language, and the Law*, Volume 16, Number 2, 2010.

The Shadow of Language. *Versus: Review of semiotic studies*, 2009:103.

Thinking About the Government, *The American Prospect*, April, 2005.

Privatization and the English Language, *The American Prospect*, February, 2005.

Indexical Descriptions and Descriptive Indexicals, in *Descriptions and Beyond: An Interdisciplinary Collection of Essays on Definite and Indefinite Descriptions and Other Related Phenomena*, Marga Reimer and Anne Bezuidenhout, eds., Oxford University Press, 2005.

The Internet: A New Babel? in Tony Judt and Denis Lacorne, eds., *The Politics of Language: Language, Nation, and State*. Palgrave, 2004.

The Bloody Crossroads of Grammar and Politics, in Stephen Pinker, ed., *Best Science and Nature Writing, 2004*. Houghton Mifflin, 2004.

The Liberal Label, *The American Prospect*, September, 2003.

- The Pragmatics of Deferred Reference, article in *The Handbook of Pragmatics*, Laurence Horn and Gregory Ward, eds. Blackwell, 2003.
- Authoritativeness Grading, Estimation and Sorting (with Francine Chen and Ayman Farahat), in Proceedings of the Twenty-Fifth Annual International ACM-SIGIR Conference on Research and Development in Information Retrieval, 2002.
- Do You Know What it Means to Miss New Orleans? Philology and Semantics: *Linguistics and Philosophy*, 25, 5-6, December, 2002.
- Punctuation and Text-Category Indicators (with Edward Briscoe and Rodney Huddleston), chapter of *The Cambridge Grammar of English*, Rodney Huddleston and Geoffrey K. Pullum, eds., Cambridge University Press. 2002.
- The Internet Filter Farce. *The American Prospect*, January 1, 2001.
- Will the Internet Speak English? *The American Prospect*, March 27, 2000.
Reprinted in the *Guardian*, November 2000.
Reprinted in *The Economics of Language*, ed. D. Lambertson, Edward Elgar Publishing, to appear.
- Usage in the *American Heritage Dictionary*, introductory essay to the *American Heritage Dictionary*, Fourth Edition, 2000.
- The Persistence of English, introductory essay to the *Norton Anthology of English Literature*, Seventh edition, M. H. Abrams and Stephen Greenblatt, eds., Norton Publishing, 1999.
- Les Enjeux Linguistiques d'Internet, *Critique Internationale*, 1999, 4.
Reprinted in *Le Multilinguisme et le Traitement de L'information*, F. Segond, ed., Editions Hermes, 2002.
- Will Libraries Survive? *The American Prospect*, November-December, 1998.
- L'Avenir des Bibliothèques Numériques. Actes du Colloque, "Le livre a-t-il un avenir?," Doc Forum, Lyon, 1998
- Double Standards [the Ebonics controversy] *Natural Language and Linguistic Theory*, 15, 3. 1997.
- Lingo jingo: Why English-only is a mistake. *The American Prospect*, July, 1997.
Reprinted in Fred Pincus and Howard Erlich, eds., *Race and Ethnic Conflict: Contending Views on Prejudice, Discrimination, and Ethnoviolence*, Westview Press, 1988.
Reprinted in Rebecca Wheeler, ed., *Language Alive*, Praeger, 1998.
Reprinted in Barbara Mori, ed. *STAND: Race and Ethnicity*, CourseWise Publishing, Bellevue, Ia, 1999.
- Automatic Classification of Genre (with Hinrich Schütze and Brett Kessler), Proceedings of The Annual Meeting, Association for Computational Linguistics, 1997.
- L'Amérique par la Langue. *Cahiers de Médiologie*, April, 1997.
- The View from Section Z [Linguistics as a science] *Natural Language and Linguistic Theory*, 14, 2. 1996.
- Snowblind [On linguistic relativism]. *Natural Language and Linguistic Theory*, 14, 1. 1996
- Farewell to the Information Age, in *The Future of the Book*, Geoffrey Nunberg, ed., University of California Press, 1996.
- Gimcrack nation [Electronic discussion lists] *Natural Language and Linguistic Theory*, 13, 4. 1995.
Reprinted (as "To Delete or Not to Delete") in *Lingua Franca*, January, 1996.

- The Future of Multilingualism and Multilingual Technologies (with Annie Zaenen). In *Computational Linguistics in the Netherlands*, 1995.
- Les Langues du Discours Electronique. In Actes du colloque "Langues et Sciences en Europe", Roger Chartier and Pietro Corsi, eds., Ecole des Hautes Etudes en Sciences Sociales, Paris, November 1994.
Reprinted in *Alliages*, December 1995.
Reprinted in Italian, as Impigliati nella rete, *Sapere*, June, 1995.
- Angels in America [Linguistic nativism], *Natural Language and Linguistic Theory*, 13, 2, 1995.
- Meanings and Theories. In J.Klavans, ed., Proceedings of AAAI Symposium on the Lexicon, March 1995.
- A Touch of Crass: The popularizers we deserve, *Natural Language and Linguistic Theory*, 13, 1, 1995.
- Transfers of Meaning. *Journal of Semantics*, Winter, 1995.
- Les Télétheques. In Actes du Colloque "Va-t-on vivre par l'écran interposé?", Institut National de l'Audiovisuel, Paris, 1994, ed. Régis Debray.
- Idioms (with Ivan Sag and Thomas Wasow). *Language*, 70: 3, September, 1994.
- The Places of Books in the Age of Electronic Reproduction. *Representations* 24, Spring, 1993.
Reprinted in *Future Libraries*, R. Howard Bloch and Carla Hesse, eds., University of California Press, 1994.
- Indexicality and Deixis. *Linguistics and Philosophy*, 16: 1, 1993.
- Text, Form, and Genre. Screening Words: Proceedings of 8th Annual Conference of Waterloo Center for the New OED, University of Waterloo, 1992
- Systematic Polysemy in Lexicology and Lexicography (with Annie Zaenen). Hannu Tommola, Krista Varantola, Tarja Salmi-Tolonen and Jürgen Schopp, eds., Proceedings of Euralex II, University of Tampere, Tampere, Finland, 1992.
Reprinted in French translation in *Linguistique Française*, June, 1996
- Two Kinds of Indexicality. Chris Barker and David Dowty, eds. *Semantics and Linguistic Theory II*, Ohio State, 1992.
- Usage in the Dictionary. Introduction to the *American Heritage Dictionary*, Third Edition. Houghton Mifflin, 1992.
- Reimagining America. James Crawford, ed. *Language Loyalties. A Sourcebook on the Official-Language Movement*. The University of Chicago Press, 1992.
- The Official-English Movement. Karen Adams and Daniel Brink, eds., *Perspectives on Official English*, New York: Mouton, 1990.
- From Criticism to Reference. *International Journal of Lexicography*, 3:1. 1990.
- The Field of Linguistics. Publication of the Linguistic Society of America, 1990.
- Indexicality in Contexts. Xerox PARC Tech Report, 1990.
- What the Usage Panel Thinks. L. Michaels and C. Ricks, eds., *The State of the Language*. University of California Press, 1990.
- Linguists and the Official Language Movement. *Language*, 66:3, September, 1989.
- Common-Sense Semantics and the Lexicon. Proceedings of the Third Conference on Theoretical Issues in Natural-Language Processing, 1987.
- Prosaic and Poetic Metaphors. Proceedings of the Third Conference on Theoretical Issues in Natural-Language Processing, 1987.

- Contextualizing Individuation: "The same F." Papers from the Third West Coast Conference on Formal Linguistics, CSLI Publications, Stanford University, 1984.
- Idioms: An Interim Report (with Thomas Wasow and Ivan Sag). Proceedings of the Plenary Sessions, XIIIth International Congress of Linguists. Tokyo, 1982.
- English and Good English. Introduction to *The American Heritage Dictionary*, Second College Edition. Boston: Houghton-Mifflin, 1982.
- Validating Pragmatic Explanations. P. Cole, ed., *Radical Pragmatics*. New York: Academic Press, 1981.
- The Reversal of a Reported Merger in Eighteenth-Century English. W. Labov, ed., *Locating Language in Space and Time*. New York: Academic Press, 1980.
- Upper-class Speech in New York City. T. Shopen, ed., *Variation in the Structure and Use of English*. Boston: Newbury, 1980.
- The Non-uniqueness of Semantic Solutions: Polysemy. *Linguistics and Philosophy*, 3:1, 1979.
- Slang, Usage-conditions and l'Arbitraire du Signe. Papers from the Parasession on the Lexicon. Chicago: Chicago Linguistics Society, 1978.
- Inferring Quantification in Generic Sentences (with Chiahua Pan). Proceedings of the Eleventh Annual Meeting, Chicago Linguistic Society. Chicago: Chicago Linguistics Society, 1975.
- Syntactic Relations in Types and Tokens, in Proceedings of the Tenth Annual Meeting, Chicago Linguistic Society. Chicago: Chicago Linguistics Society, 1974.
- Two Problematic Mergers (with William Labov). W. Labov, M. Yaeger, and R. Steiner, *The Quantificational Study of Sound Change in Progress*. Philadelphia: U.S. Regional Survey, 1974.

Selected Book Reviews:

- Review of *The You Are What You Speak*, by Robert Lane Green, *The New York Times Book Review*, April 1, 2011.
- Review of *The Information*, by James Gleick, *The New York Times Book Review*, March 18, 2011.
- Review of *The Power of Babel*, by John McWhorter, the *Los Angeles Times Book Review*, February 24, 2002.
- Review of *Language and the Internet*, by David Crystal. *Nature*, January 15, 2002..
- Review of *The Scientific Voice*, by Scott Montgomery, *Science*, September 20, 1996. Reprinted in Katherine Livingstone, ed., *Scientifically Yours*. Groupe Lavoisier, Paris, 1997.
- Story time (commentary on "About Design," by J. S. Brown and Paul Duguid). *Human-Computer Interaction*, Winter, 1994.
- Review of *Language of the Underworld*, by David Maurer. *The New York Times Book Review*, April 9, 1982.
- Review of *The Psychology of Literacy*, by Sylvia Scribner and Michael Cole. *The New York Times Book Review*, December 13, 1981.
- Review of *Beyond the Letter*, by Israel Scheffler. *The Philosophical Review*, 1981:2.
- Review of *Forms of Talk*, by Erving Goffman. *The New York Times Book Review*, March 10, 1981.

Electronic Publications:

Time line of the history of information, for the Encyclopedia Britannica, CD-ROM version.

The Field of Linguistics: Web project for the Linguistic Society of America. Co-editor, with Thomas Wasow. See <http://www.lsad.org/flxtitlepg.html>

Regular contributor to the blog Language Log and *The New Republic's* Open University blog.

General-Interest Articles and Regularly Appearing Features:

Regular op-ed pieces, *Los Angeles Times*, 2006-2007.

Regular commentaries on language and politics, Sunday *New York Times* Week in Review section, 2002-2006

Regular language commentaries, "Fresh Air," National Public Radio, 1989-present. Individual "Fresh Air" pieces published in various magazines in US and Europe.

Regular "Letter from America" features, BBC4, 2004-2005

Bimonthly features on language and the law for *California Lawyer*, 2000-2002

"Topic... Comment." Quarterly column, *Natural Language and Linguistic Theory*. 1994-1998.

Other commentaries and opinion pieces in the *Washington Post*, the *Los Angeles Times*, the *San Jose Mercury News*, *Newsday*, the *San Francisco Chronicle*, and the *Chicago Tribune*.

General interest articles in *The Atlantic*, *Forbes ASAP*, *Fortune*, *American Lawyer*, and *The American Prospect*.

A number of these articles and commentaries are available at my Web pages at <http://www-csli.stanford.edu/~nunberg>

Patents and Patent Applications:

A method of determining the authoritativeness of texts using surface features of untagged texts, with Francine Chen and Ayman Farahat. US Patent application, 2002. (3 separate patents)

A method of automatically determining text genres using surface features of untagged texts, with Hinrich Schuetze. US Patent application, 1997.

Processing natural-language text using autonomous punctuational structure (first-named applicant, with Curtis Abbott and Brian Smith). US patent application 07/274,158 (1990) (Patent granted March 1991).

A method for manipulating digital data [natural-language structure editor] (first-named applicant, with Tayloe Stansbury, Curtis Abbott, and Brian Smith). European patent application 89312093.1-. (1989).

Selected Presentations:

On Having a Word, Humanities Center, University of Chicago, Nov. 3, 2011.

Slurs without Semantics, Semantics Workshop, University of Chicago, Nov. 4, 2011. Also at CNRS conference on Context and Interpretation, C erisy-la-Salle, France, June, 2011.

What Future for the Book? UNESCO Conference on the future of the book, Monza, Italy, June, 2011.

- How the Language of Politics is Different, Distinguished Lecture, Symbolic Systems Program, Stanford University, May 3, 2010.
- Google Book Search: The Metadata Problem, Conference on Google Books, UC Berkeley, August 28, 2009.
- Electronic Philology, Computers and the Humanities Lecture Series, Brandeis University, March 6, 2009.
- Spatializations of Digital Discourse, Radcliffe Institute for Advanced Study, Harvard University, March 5, 2009.
- "Bad Words: Expressives and Demonstrations," invited talk, Institut Jean Nicod (Collège de France), Paris, June 13, 2008.
- Vulgar Civilities, Freeman Lecture, University of Massachusetts at Amherst, October 4, 2007.
- The Philology of Civility, Yale Humanities Center, October 3, 2007.
- The Counsel of Words, Barbara Gordon Lecture, Florida International University, March 5, 2007.
- The Future of English, Dean's Symposium Lecture, San Jose State University, April 19, 2007.
- Electronic Philology, Glasscock Center for the Humanities lecture, Texas A&M University, April 21, 2007.
- What Future for Scholarly Monographs?, keynote talk, International Forum of University Publishing, Guadalajara, Mexico, November 2006.
- Determining the Meanings of Words, invited talk, Conference on Language and Law, University of Düsseldorf, Germany, May, 2006.
- What it Means to Speak the Same Language, invited talk, Cognitive Science Program, Rutgers University, March 2006.
- The Shadow Cast by Language upon Truth, keynote talk, Western Humanities Conference, UC Santa Cruz, Oct. 22, 2004
- Linguistic Issues in Trademark Law, invited talk at Midwest Intellectual Property Institute, Sept. 19, 2003.
- The Future of Propaganda, McClatchy Lecture, Stanford University Department of Communication, May 10, 2003.
- Building the Democratic Brand, presentation to U.S. Senate Democratic Caucus, Democratic Leadership Conference, May 1, 2003.
- Language in the Public Eye, plenary talk, American Association of Applied Linguistics, Washington, D.C., March, 2003.
- Language Questions and Questions of Language (two lectures), Princeton Humanities Council, November, 2002.
- Why "Literacy"? Keynote talk, Conference on "Reading Literacy," Harvard Humanities Center, April 12, 2002.
- Can There be an Electronic Dictionary?, invited talk, ATLAN conference, Paris, January 24, 2002.
- The Future of Paper, invited talk, Conference on "The Future of Paper as a Communications Medium," Stockholm, March 20-22, 2001.
- What Language for the Internet?, Keynote Address, Voice and Technology Forum, Santa Clara, CA December 12, 2000

- En Quête de l'Ordre des Livres Numériques, Annual UNESCO Lecture, University of Grenoble, May 10, 2000.
- The Order of Electronic Discourse, Invited Address, Victoria Library Association, Melbourne Australia, February 2000.
- Languages in a Wired World. Conference on "La politique de la langue," Centre d'Etudes et Recherches Internationales, Paris, October 2, 1998.
- The Future of Academic Publishing. Conference on "The Endangered Monograph," Berkeley Humanities Center, April 12, 1998.
- Le Papier et les Nouvelles Technologies de l'Impression. Conference on "Le devenir du papier moderne," Bibliothèque Nationale de France, December, 1997.
- L'Avenir de la Bibliothèque, DocForum, Lyon, November, 1997.
- Individual and Collective Semantics, Conference on the future of semantics, San Marino, November, 1997.
- The Compositionality of Idioms, International Congress of Linguists, Paris, July, 1997.
- Does Cyberspace have Boundaries? Panel on cyberspace and community. University of Indiana, 1997.
- Automatic Classification of Genre (with Hinrich Schütze and Brett Kessler), Annual Meeting, Association for Computational Linguistics, Madrid, 1997.
- Variation in Written-Language Category Structure, keynote talk, ACL Workshop on punctuation and written language, Santa Cruz, CA, June 28, 1996.
- Does the Book have a Future? Commonwealth Club of San Francisco, (broadcast on C-SPAN) June 4, 1996.
- Regular Polysemy and Lexical Representation, plenary talk, Conference on the Lexicon, Courmayeur, Italy, September 6, 1996.
- Underdetermination in the Lexicon, invited talk, conference on Lexical Underdetermination, Berlin, October 27, 1996.
- Are there Universal Language Rights? Invited talk, Conference on Language Legislation and Linguistic Rights, University of Illinois, to be held March 20-23, 1996.
- Language Standards and Language Science. Session on Language Standards and Language Science, Annual Meeting, American Association for the Advancement of Science. To be held February 28, 1996.
- The Technologies of Reputation, Keynote talk, Conference on Literature and Libraries, Columbia University, October 27, 1995.
- Maux d'Archive*: Preservation and access in electronic collections, CARL conference on "Retooling Academic Libraries for the Digital Age," San Francisco, October 21, 1995.
- Les Langues du Discours Electronique. Colloquium on *Sciences et Langues en Europe*, Ecole des Hautes Etudes en Sciences Sociales, Paris, November 14, 1994.
- The once and Future Dictionary. Conference on Dictionaries and Information Technology, Grenoble, October 17-19, 1994.
- Farewell to the Information Age. Conference on the Future of the Book, San Marino, July 28, 1994.
- The Future of the Book. Keynote talk, Annual Meeting, American Association of University Presses, Washington, D. C., June 23, 1994.
- Information in its Place. Plenary talk, Annual meeting, American Society of Information Science, Portland, May 22, 1994.

- Remarques sur les Télétheques, Conference "Va-t-on vivre par l'écran interposé?," University of the Sorbonne, Paris, April 15, 1994.
- Transferts de Signification, Cognitive Science Seminar, Centre de Recherche en Epistémologie Appliquée, CNRS, Paris, Jan 20, 1994.
- The Future of Information, Conference on The Electronic Book: A New Medium?, Grenoble, September 9, 1993.
- Meaning and Metaphor, Invited address, Association for Computational Linguistics, Columbus, Ohio, June 20, 1993.
- Taking Usage Seriously, Invited talk, Dictionary Society of North America, Las Vegas, May, 1993.
- On Predicate Transfer, Invited talk, Conference on Lexical Universals, Dagstuhl, Germany, April, 1993.
- Indexicality and Direct Reference, Conference on Context and Interpretation, Berkeley, March, 1993.
- Dirty Words. Paper given at Special Session of Dickens Society on "Dirt," Modern Language Association, New York City, December, 1992.
- Polysemy in Lexical Description. Conference on Computational Approaches to the Lexicon, Las Cruces, New Mexico; November 2, 1992.
- Text, Form, and Genre, 8th Annual Conference of Waterloo Center for the New OED, Waterloo, Ontario, October, 1992.
- The Shadow of Rruth, Conference on "Inscribing Grammar on Culture," Clark Library, Los Angeles, October, 1992.
- The Compositionality of Phrasal Idioms (with Ivan Sag and Thomas Wasow), Conference on Idioms, Tilburg, Netherlands, September 1992.
- Systematic Polysemy in Lexicology and Lexicography (with Annie Zaenen), Annual Meeting of the European Association of Lexicography (Euralex), Tampere, Finland, August, 1992.
- Indexicality and Deixis, Conference on the Pragmatics of What is Said, Centre de la Recherche en Epistémologie Appliquée, Paris, June, 1992.
- The Places of Books in the Age of Electronic Reproduction, Conference on Future Libraries, University of California, Berkeley, April, 1992.
- Two Kinds of Indexicality, Conference on Semantics and Linguistic Theory, Columbus, Ohio, April, 1992.
- Good Grammar and Good Taste: Eighteenth-century prescriptivism and theories of aesthetics, Annual Meeting, North American Association for the History of Linguistic Science, Philadelphia, January, 1992.
- Le Varietà della Metafora, Conference on Topics in Semantic Theory, Università degli Studi, San Marino, December, 1991.
- The Teaching of Grammar: a historical overview, Special session on Linguistics in the K-12 Curriculum. Annual Meeting, Linguistic Society of America, Chicago, December 28, 1991.
- On Document Genres. Xerox Corporation Symposium on the Document, Stamford, CT, April 15, 1991.
- Usage and Naturalism, Meeting of American Dialect Society, Atlanta, October, 1990.
- Indexicality in Context, CNRS conference on Philosophie et les Sciences Cognitives, Cérisy-la-Salle, France, 1990.

- A survey of Prescriptive Attitudes (with Kristin Hanson), Annual Meeting, Linguistic Society of America, New Orleans, 1988.
- Linguistic Nationalism in the English tradition, Conference on Language Rights and Public Policy, Stanford University April 17-18, 1988.
- American Attitudes toward Second-Language Learning, Annual Meeting, Advocates for Language Learning, San Francisco, 1988.
- What the 'English-only' People are After, Colloquium on the Official Language movement, Roundtable Conference on Languages and Linguistics, Georgetown University, 1987.
- Common-Sense Semantics and Lexical Information, Third Conference on Theoretical Issues in Natural-Language Processing, Las Cruces, NM, 1987.
- Prosaic and Poetic Metaphors, Third Conference on Theoretical Issues in Natural-Language Processing, Las Cruces, NM, 1987.
- What we talk about when we talk about grammar, Annual Meeting, National Council of Teachers of English; Detroit, Michigan, 1985.
- Some Difficulties for Direct-Reference Theories. Conference on "Themes from Kaplan," Stanford University, April, 1984.
- Individuation in Context, Conference on Semantic Theory, Centro Di Studi Linguistici e Semiotici, Urbino, Italy, 1983.
- Why there is no syntax of words, Conference on Morphology and Linguistic Theory, Stanford University, 1983.
- Idiomaticity in Argumentation for Transformational Grammar, (with Ivan Sag and Thomas Wasow), U.C.L.A. Conference on the Extended Standard Theory, 1982.
- 'The same F!' NSF-CNRS Seminar on Discourse Comprehension, Cadarache, France, June, 1982.
- The Compositionality of Idioms, (with Ivan Sag and Thomas Wasow), Annual Meeting, Linguistic Society of America, New York City, 1981.
- The Case for Prescriptive Grammar, Conference on New Ways of Analyzing Linguistic Variation, Ann Arbor, 1981.
- Langue* and Competence: The bases of idealization in linguistics," Colloquium on the Object of Linguistic Theory, Annual Meeting, Linguistic Society of America, San Antonio, 1980.
- What do We Mean by 'The Same Language'? Annual Meeting, Berkeley Linguistics Society, 1980.
- Deferred Interpretation and Direct Reference, Sloan Workshop on Semantics, Asilomar, California, 1980.
- Idealization in syntax and semantics, Conference on Pragmatics, Centro di Studi Linguistici e Semiotici, Urbino, 1979.
- La Metafora nel Lessico, Conference on Metaphor, D.A.M.S., University of Bologna, 1979.
- Methodology and Explanation in Sociolinguistics, First Berkeley Conference on Sociolinguistics, 1978.
- Sociolinguistics and Social History, Conference on Linguistic Variation, S.U.N.Y. at Binghamton, 1976.
- Lexical Ambiguity and Referential Indeterminacy, Annual Meeting, Linguistic Society of America, San Francisco, 1975.

The Semantics of Parenthetical Verbs, Annual Meeting, Linguistic Society of America, New York City, 1974.

English Pro-Complementizers, Annual Meeting, Linguistic Society of America, San Diego, 1973.

The Quantificational Study of a Sound Change in Progress: Social and linguistic setting, Summer Meeting, Linguistic Society of America, Ann Arbor, 1973.

Invited Lectures:

LINGUISTICS DEPARTMENTS

University of Arizona, 1988, 1997

University of British Columbia, 1992

Cambridge University, 1994, 1998

University of California, Berkeley, 1979, 1987, 1993, 1997, 2006

University of Chicago, 2011

Edinburgh University 2002

Florida International University, 2007

Georgetown University, 1985, 2003

University of Grenoble, 1994

University of Illinois, 1989, 1995

University of Kentucky, 1991

University of California at Los Angeles, 1981, 1989

University of California at San Diego, 1997

Massachusetts Institute of Technology, 1986

University of Massachusetts, 2007

University of Naples, 1999

California State University at Northridge, 2003

Ohio State University, 1993

University of Pennsylvania, 1986, 1992

Pitzer College, 1995

Princeton University, 2002

University of Rome, La Sapienza, 1999

Rutgers University, 2006

San Jose State, 1995

University of California, Santa Cruz, 1984, 1991

University of Southern California, 1987

Stanford University, numerous colloquia

University of Strasbourg, 1993

University of Texas at Austin, 1987, 1998

University of Washington, 2004

OTHER DEPARTMENTS AND PROGRAMS

Max-Plank-Gesellschaft, Arbeitsgruppe Strukturelle Grammatik, Berlin 1996

Cognitive Science Program, University of Illinois, 1989

Cognitive Science Program, University of Edinburgh, 1994
Cognitive Science (ICSC), University of Pennsylvania, 1996
Computer Science, Yale University, 1988
Computer Science, Brandeis University, 2009
Computer Science, University of Brighton, 1998
Computer Science, University of Pennsylvania, 1992
Communications, University of Grenoble, 2000
Communications, University of California at San Diego, 2002
Digital Libraries program, University of California, Berkeley, 1996
Digital Libraries program, Stanford University, 1996
English and Rhetoric, University of Southern California, 1987
English, Frei Universität, Berlin
English, University of California at Irvine, 1985
English, University of British Columbia, 1992
English, University of Michigan, 1986
English, Graduate Center of C.U.N.Y., 1998
English, University of California, Santa Cruz, 1984
English, University of Minnesota, 1979
Humanities Center, University of Chicago, 2011
Humanities Center, Yale University, 2007
Humanities Center, Texas A&M University, 2007
Humanities Center, Harvard University, 2003, 2009
Informatics, University of Edinburgh, 2002
Library Science, University of Texas, 1998
Library Science, University of Arizona, 1997
Library Science, University of California at Berkeley, 1992
Library Science, University of California at Los Angeles, 1999
Library Science, San Jose State, 1994
Library, Stanford University, 1992
School of Information Management and Systems, U. C. Berkeley, 1999, 2003
National Foreign Language Center, Washington D.C., 1988
Natural Language Group, Bell Laboratories, 1985
Philosophy, Stanford University, 1983, 1990
Philosophy, University of California at Berkeley, 1980
Philosophy, University of Bologna, 1980
Psychology, The American University, 1996
Radcliffe Institute for Advanced Study, Harvard University, 2009
Istituto di Psicologia, CNR, Rome, 1979, 1983
CNRS, Groupe de Recherche sur la Cognition, Paris, 1992, 1994, 1998
CNRS, Groupe de Recherche sur les Orthographe et Systèmes d'écriture, Paris, 1992
American Association of University Presses, 1994, 1998
DAMS, University of Bologna, 1999

Conferences, Conference Sessions, and Workshops Organized:

Panel on Information Access & Freedom in the Digital Age, School of Information, UC Berkeley, March 20, 2012.

Books Tomorrow, UNESCO conference in Monza, Italy, July 5-7 2011, Member of organizing committee.

The future of academic publishing. Workshop at annual meeting of American Association of University Presses, Berkeley, CA, October 14, 1998.

Does the book have a future? University of California, San Francisco, April 23, 1996.

Genre in Digital Documents. Track of Hawaii International Conference on Systems Science, Maui, Jan 5-7, 1997. Also organized this session for 1998, 1999.

Fencing off the Public Sphere (Envelope technologies and fair use). Xerox PARC, May 5, 1996.

Language Standards and Linguistic Science. Conference session, Annual Meeting, American Association for the Advancement of Science. To be held February 28, 1996.

Conference on the Future of the Book, San Marino, July 28-30, 1994. Co-sponsored by Rank Xerox European Research Centre, Grenoble, and the Center for Cognitive and Semiotic Studies, San Marino. (Co-organizer with Patrizia Violi, University of Bologna.)

Conference on The Electronic Book: A New Medium?, Grenoble, September 9-10, 1993. Co-sponsored by Rank Xerox European Research Centre and the Bibliothèque de France. Also subject of seminar presentation at RXRC inauguration, October 15, 1993.

NSF Conference on Digital Libraries, Xerox Palo Alto Research Center, March 10-11, 1992. (Co-organizer, with David Levy, Xerox PARC, and Y. T. Chien, NSF.)

Workshop on Linguistics and Lexicography, Center for the Study of Language and Information, Stanford University, April 18-19, 1991.

Special session on Linguistics in the K-12 curriculum, Annual Meeting, Linguistic Society of America, Chicago, January 11, 1991. (Co-Organizer with Penelope Eckert, Institute for Research on Learning.)

Conference on Language Rights and Public Policy, Stanford University, April 17-18, 1988. Sponsored by Californians United, ACLU, and NEA. (Co-organizer with Edward Chen, American Civil Liberties Union, and Martha Jimenez, MALDEF.)

Expert testimony since 2008:

The Hershey Company et al. v. Promotion in Motion, Inc., United States District Court, District of New Jersey (deposition; 2009)

Other Professional and Public Activities:

Townsend Center for the Humanities, Faculty Advisory Committee. 2010-

Member of editorial board, *Representations*, 2008-

Member of Board of Trustees, Center for Applied Linguistics, 1999-2004

Member of Steering Committee, Coalition for Networked Information, 1999-2003

Referee of articles or manuscripts: *Language*, *Linguistic Inquiry*, *General Linguistics*, *Linguistics and Philosophy*, *Recherches Linguistiques*, *Natural Language and Linguistic Theory*, *Philosophical Review*, *Synthese*, Yale University Press, Cambridge University Press, Stanford University Press, Oxford University Press, University of Chicago Press, MIT Press, D. Reidel, Sage Publishing.

Perennial reviewer for various program committees (WCCFL, SALT, etc.),
Referee of grant proposals: National Science Foundation (sections on linguistics,
computer science, AI and robotics, psychology); National Foreign Language Center;
National Institute of Mental Health, National Endowment for the Humanities.
Executive Committee, National Coalition for Language Rights (co-founder).
Committee on Political and Social Concerns, Linguistic Society of America, 1990-1997
Usage Editor, *The American Heritage Dictionary*, second edition.
Usage Editor and Chair of Usage Panel, *The American Heritage Dictionary*, third and
fourth editions. Ongoing consultancy with Houghton Mifflin.
Host of programs for City Arts and Lectures, San Francisco (broadcast on NPR), 2001-:
Interviewees include Eavan Boland, A. S. Byatt, Robert Hass, Maxine Hong
Kingston, Michael Ondaatje, Simon Winchester, Tobias Wolff.

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milk shake *noun*

Definition of MILK SHAKE

: a thoroughly shaken or blended
flavoring syrup, and often ice cream

See milk shake defined for kids

First Known Use of MILK SHAKE

1880

A MONTH FOR
CHANGE

100%

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milk, *n.*¹ and *adj.*

Te

View as: [Outline](#) | [Full entry](#)[Quotations: Show](#)**Pronunciation:** Brit. /mɪlk/, U.S. /mɪlk/**Forms:** OE *mealc* (*rare*), OE *meluc* (*rare*), OE *meoloc*, OE *miolc* (*rare*), OE *mioloc* (*rare* ... [\(Show More\)](#))**Etymology:** Cognate with Old Frisian *melok* (West Frisian *molke*), Middle Dutch *mele* (Dutch ... [\(Show More\)](#))**A. *n.*¹****1.**

a. A whitish fluid, rich in fat and protein, secreted by the mammary glands of female mammals (including humans) for the nourishment of their young, and

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milk shake *n.* orig. *U.S.* a cold drink made of milk, a sweet flavouring, and typically ice cream, mixed together as by shaking or whisking until smooth and frothy.

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- 1886 *Atlanta Constit.* 26 May 7/2 Ice cream soda and milk shakes at Beermann's Palace Soda Stand, corner Peachtree and Decatur streets.
- 1937 *Daily Herald* 20 Feb. 11/3 (caption) Mrs.—...sampling a milk shake after she had opened a milk bar in Tottenham Court-road yesterday.
- 1952 'J. TEY' *Singing Sands* xii. 196, I had a coupla bananas and a milk shake in Leicester Square.
- 1988 M. ATWOOD *Cat's Eye* (1989) xlv. 251 We're drinking vanilla milkshakes.

[\(Hide quotations\)](#)

milkshake

noun UK  US  /mɪlk.ʃeɪk/ [C or U]

Definition

a drink made of milk and usually ice cream and a flavour such as fruit or chocolate, mixed quickly together until it is full of bubbles

a *chocolate milkshake*

(Definition of milkshake noun from the Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press)

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Word of the Day

spruce *sb/sth* up

to make someone or something cleaner and tidier or to improve the way they appear generally

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BOSTON NEW YORK

Of course, it was not hard to locate Ukrainian specialties, like the dumplings known as varenyky,

skyline: Ukrainian Orthodox, Russian Orthodox, Armenian Orthodox and Roman Catholic.
CLIFFORD J. LEVY



JOSEPH SYWENKYJ FOR THE NEW YORK TIMES

A
B

milk-man (milk'män') *n.* A man who sells or delivers milk to customers.

milk of magnesia *n.* A milky white aqueous suspension of magnesium hydroxide, $Mg(OH)_2$, used as an antacid and a laxative.

Milk River (milk) A river rising in the Rocky Mountains of northwest Montana and flowing about 1,050 km (650 mi) northward to southern Alberta then east and south back to northern Montana, where it joins the Missouri River.

milk run *n.* *Slang* A routine trip, usually involving stops at many places.

milk shake *n.* **1.** A beverage made of milk, flavoring, and ice cream, shaken or whipped until foamy. Also called *shake*; also called regionally *cabinet*, *frappe*, *velvet*. **2. New England** A beverage made of milk and flavored syrup, whipped until foamy.

milk sickness *n.* **1.** An acute, now rare disease characterized by trembling, vomiting, and severe intestinal pain that affects individuals who eat dairy products or meat from a cow that has fed on white snake-root. **2.** See **tremble** (sense 3a).

milk snake *n.* Any of various subspecies of the king snake *Lampropeltis triangulum*, ranging from the eastern and central United States south to Ecuador and often having red, black, and yellow or white bands. Also called *house snake*, *milk adder*. [From the folk belief that the snakes

The New Oxford American Dictionary

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SECOND EDITION

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OXFORD
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milk-maid /'milk,māɪd/ ▶ *n.* chiefly archaic a girl or woman who milks cows or does other work in a dairy.

milk-man /'milkmen; -,man/ ▶ *n.* (pl. -men) a person who delivers and sells milk.

milk of mag-ne-sia ▶ *n.* a white suspension of hydrated magnesium carbonate in water, used as an antacid or laxative. ▶ from the trademark.

Milk River a river that flows for 625 miles (1,000 km) through northwestern Montana and southern Alberta, into the Missouri River. It is the most northwestern part of the Missouri-Mississippi river system.

milk run ▶ *n.* a routine, uneventful journey, esp. by plane.

milk shake (also **milk-shake**) ▶ *n.* a cold drink made of milk, a sweet flavoring such as fruit or chocolate, and typically ice cream, whisked until it is frothy.

milk sick-ness ▶ *n.* a condition of cattle and sheep in the western U.S., caused by eating white snakeroot, which contains a toxic alcohol. It sometimes occurs in humans who have eaten meat or dairy products from affected animals.

milk snake ▶ *n.* a harmless North American constrictor that is typically strongly marked with red and black on yellow or white. It was formerly supposed to suck milk from sleeping cows. • Genus *Lampropeltis*, family Colubridae: several species, in particular *L. triangulum*. Compare with **KING SNAKE**.

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▶ *v.* **1** [*trans*
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Latin m

MILK DRY See Milk a Cash Cow.

MILK GLASS See Milky.

MILK OF HUMAN KINDNESS *the milk of human kindness*. Compassion; mercy. (Shakespeare's *Macbeth*, ca. 1606.) Source: MILK (n). MWCD: O.E. The phrase is from a soliloquy by Lady Macbeth, uttered after she reads a letter from her husband, a general in the army of Duncan, King of Scotland, announcing the King's visit to Macbeth's castle that evening. Lady Macbeth is very ambitious to have her husband replace Duncan as King, but she doubts that he has the nerve to make it happen (Act I, Scene 5): "Yet I do fear thy nature. / It is too full o' th' *milk of human kindness*/To catch the nearest way" [italics added]. The "nearest way," in Lady Macbeth's opinion, would be to assassinate Duncan that night in his sleep. That's exactly what happened, and Macbeth is the one who did it. BDPF; CI; DC; DEI; HND; MDWPO; NSOED.

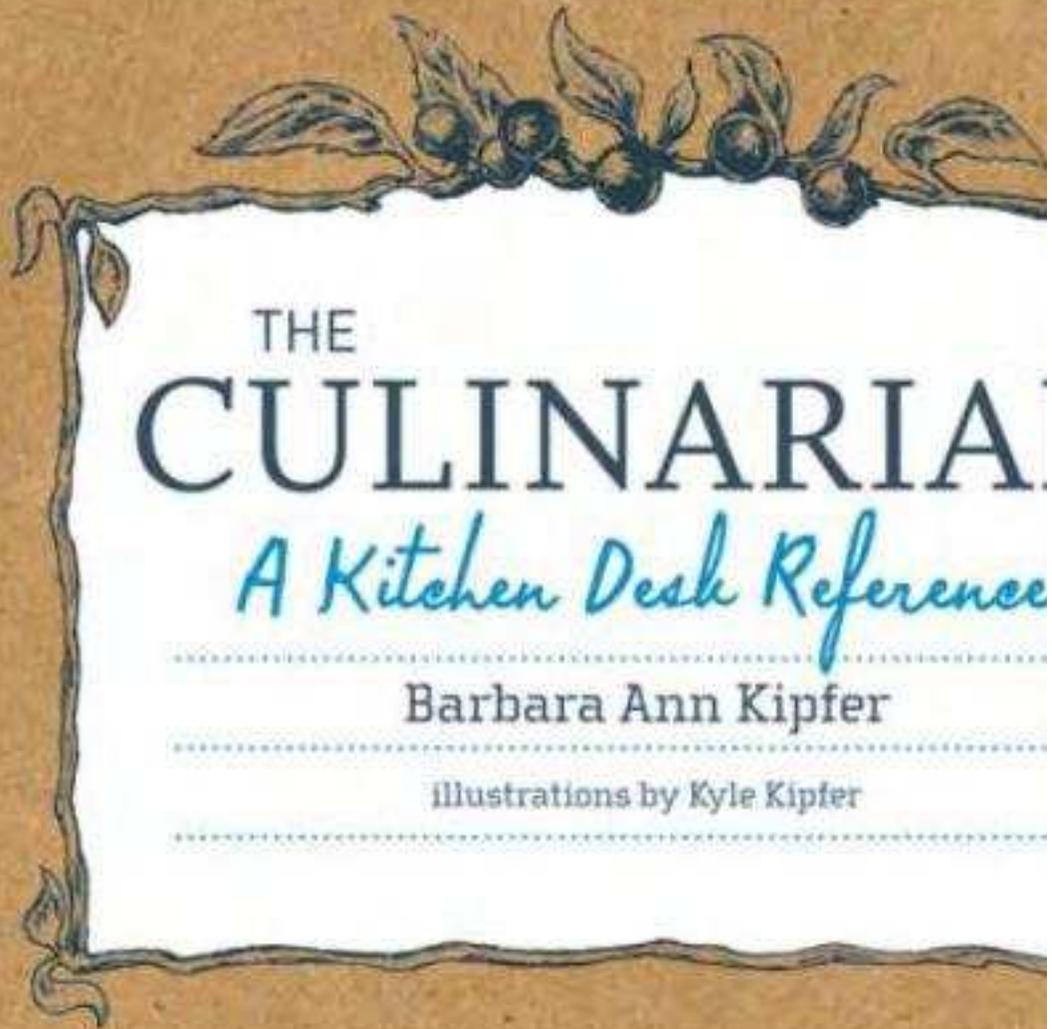
MILK OF MAGNESIA See Milk (n).

MILK RUN *a milk run*. A routine flight of a military or commercial airplane. MWCD: 1925. Source: MILK (n). MWCD: O.E. The metaphor is based on the early morning delivery of milk in the 1920s, involving frequent stops at the homes of regular customers. This routine was first associated with airplane flights to deliver bombs or mail (HDAS: 1944) but was later extended to (1) commercial passenger flights that seem to stop at every airport, (2) passenger trains that seem to stop at every station, (3) buses that seem to stop at every corner, and (4) elevators that seem to stop at every floor. Thus, the meaning of the metaphor has changed gradually from "routine" to "annoyingly slow." BDPF; NSOED; WNWCD.

MILK SHAKE *a milk shake*. A cold drink made of milk, ice cream, and flavored syrup, blended together. MWCD: 1889. Source: MILK (n). MWCD: O.E. The milk shake was already in existence when Horlick's Malted Milk was added to it ca. 1900 to form the *malted milk shake* (q.v.). Since then, the original *milk shake* (no malt) and the *malted milk shake* have competed for popularity, with the "malt" winning out during the first half of the 20th cent. and the "shake" returning strong in the second half. Malts were pretty much limited to two flavors, chocolate and vanilla; shakes also come in those two flavors (called a *mud shake* and a *white cow*, respectively) but now feature many more (e.g., strawberry and maple). A milk shake is also known as a *frappé* (or "frapp"), fr. Fr. *frapper* "to chill." DAFD; DAS; FLC; IHAT; PT.

MILK SNAKE *a milk snake*. A common, harmless, multicolored snake of the Northeastern United States. MWCD: 1800. Source: MILK (n). MWCD: O.E. The

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Barbara Ann Kipfer

illustrations by Kyle Kipfer



MILK POWDER: see DRIED MILK.

MILKSHAKE or **MILK SHAKE**, also called **SHAKE**, is a cold frothy drink made of milk, ice cream, and flavoring made by shaking or whipping. The drink has originated in the United States in the 1880s; regional names are **FRAPPÉ**, and **VELVET**. In New England the term **milkshake** can be used for a whipped drink made of just milk and flavored syrup. The original **milkshakes** include ice cream; they contained milk and flavoring and were shaken up.

MILLE-FEUILLE (pronounced meel-FWEEH) is any puff pastry with multiple layers, filled with custard, whipped cream, fruit, or purée, or a savory puff pastry filling of seafood. The term often refers to a cream-filled rectangle of puff pastry called a **NAPOLEON** and is French for “a thousand leaves.” Traditionally, a mille-feuille is made up of three layers of puff pastry, alternating with two layers of **crème** (French pastry cream or custard), but sometimes whipped cream or jam is used. It is usually glazed with icing or fondant in alternating white (icing) and chocolate (chocolate) strips, and combed.

MILLET is a type of cereal grass (*Panicum miliaceum*) whose small grains are sometimes used for food.

HINT Toasting millet before cooking enhances its naturally bland flavor.

MILLING generally refers to the process or business of grinding grain into flour or meal, or the grinding or crushing of a foodstuff, spice, or herb in a mill. Mills are small machines (for example, a coffee mill or pepper mill). Mills generally have a crank or motor with a blade of some sort and yield a finer product than a mortar and pestle. Mills are also used on smaller, harder foods (grains, herbs, nuts, nutmeg). When buying a pepper mill, make sure it is adjustable for coarseness and has a superhardened or stainless-steel grinding mechanism.

MIMOSA is a cocktail of Champagne and orange juice, so called for its bubbles resembling the flowers of the mimosa shrub.

HINT Make sure to chill both the Champagne and the orange juice at least 1 hour before serving mimosas, and prechill the glasses to help keep the

sas cold. Make sure to serve your mimosas right after pouring them. If you wait too long, the carbonation from the Champagne will dissipate and you will have a flat cocktail. Serving the mimosa in a Champagne flute concentrates the carbonation. For a better mimosa, use freshly squeezed orange juice and a quality dry Champagne.

MINCE is to cut meat or vegetables into very small pieces. The word comes from the French *mincer/mincier*, “to cut up (food) into small pieces.” The effect of mincing is to create a closely bonded mixture of ingredients and a soft or pasty texture.

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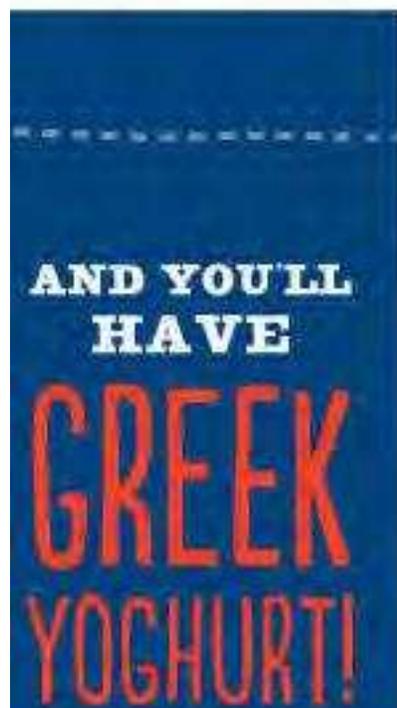


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butterscotch

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but·ter·scotch  *noun* \-skäch\
Definition of BUTTERSCOTCH

Definition of BUTTERSCOTCH

1 : a candy made from brown sugar, butter, and cream; *also* : the flavor of such candy

2 : a moderate yellowish brown

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horehound

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hore·hound  *noun* \hór-ˈhaund

Definition of HOREHOUND

1 a : an Old World bitter perennial mint with downy leaves



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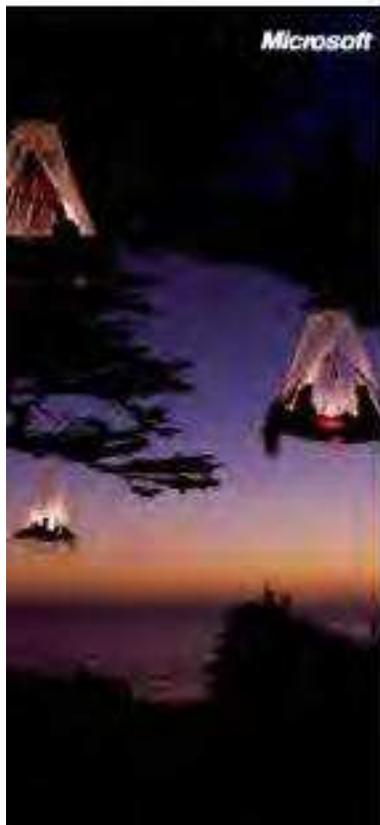
Spanish-English

vanilla



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vanilla

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- 2) vanilla (adjective)
- vanilla bean (noun)
- vanilla grass (noun)

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va·nil·la *noun* \və-'ni-lə, -'ne-

Definition of VANILLA

1 a : VANILLA BEAN

b : a commercially important extract of t
is used especially as a flavoring

ee what you

2 : any of a genus (*vanilla*) of tropical Amer
epiphytic orchids

"milkshake-flavored candy"

Geoff Nunberg

3

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[Whoppers Candy Nutrition Information - Page 7 - Kioski Finansowe](#)

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milkshake (n.)

1. frothy drink of milk and flavoring and sometimes fruit or ice cream

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synonyms

milkshake (n.)

milk shake, shake

phrases

► Cabinet (Milkshake) • Milkshake (artist) • Milkshake (band) • Milkshake (disambiguation) • Milkshake (song) • Milkshake! • Milkshake! Summer

analogical dictionary

- ☞ soft drink [Classe]
- ☞ confiserie (produit à base de sucre) (fr) [Classe]
- ☞ chose froide (fr) [ClasseParExt.]
- ☞ dessert et pâtisserie sucrés (fr) [Classe]
- ☞ chose matérielle inanimée (fr) [Classe...]
- ☞ (milk), (clotting; curdling; solidification) [Thème]
- ☞ (hokey-pokey; ice; ice cream; water ice; sherbert; sherbet; sorbet) [Thème]
- ☞ racine ILC (fr) [Domaine]
- ☞ racine SUMO (fr) [Domaine]
- ☞ alimentation [Domaine]
- ☞ Beverage [Domaine]
- helping, portion, serving [Hyper.]
- drink, imbibe [Dérivé]
 - ☞ milk [Classe]
 - ☞ hokey-pokey; ice; ice cream; water ice; sherbert; sherbet; sorbet [Classe]
 - ☞ alimentation [Domaine]
 - ☞ Beverage [Domaine]
 - drink [Hyper.]
 - ☞ **milkshake (n.)**

Wikipedia

Milkshake

From Wikipedia, the free encyclopedia

For other uses, see [Milkshake \(disambiguation\)](#).

A **milkshake** is a sweet, cold [beverage](#) which is made from [milk](#), [ice cream](#) or [iced milk](#), and flavorings or sweeteners such as [fruit syrup](#) or [chocolate sauce](#). Milkshakes are usually served in a tall glass with a straw, and [whipped cream](#) may be added as a topping. Several popular milkshake flavors include [vanilla](#), [chocolate](#), and [strawberry](#). In some [Commonwealth nations](#) and some parts of [New England](#) in the United States, milkshakes are made without ice cream. In those areas, a milkshake made with ice cream is commonly called a [frappe](#).

Full-service restaurants, [soda fountains](#), and diners usually prepare and mix the shake "by hand" from scoops of ice cream and milk in a [blender](#) or drink mixer using a [stainless steel](#) cup. Most fast food outlets do not make shakes by hand with ice cream, with a few exceptions such as the US chains [Jack in the Box](#) and [Carl's Jr.](#) Instead, they make shakes in automatic milkshake machines which freeze and serve a premade milkshake mixture consisting of milk, a sweetened flavoring agent, and a thickening agent. Some fast-food restaurants such as [Dairy Queen](#) serve milkshakes which are prepared by blending [soft-serve ice cream](#) (or [ice milk](#)) with

EXHIBIT F



Int. Cl.: 30

Prior U.S. Cl.: 46

United States Patent and Trademark Office

Reg. No. 1,273,766

Registered Apr. 10, 1984

TRADEMARK
Principal Register

MilkShake

Hollywood Brands, Inc. (Delaware corporation)
100 S. Poplar
Centralia, Ill. 62801

For: CANDY, in CLASS 30 (U.S. Cl. 46).
First use May 30, 1982; in commerce May 30,
1982.
Owner of U.S. Reg. No. 261,488.

Ser. No. 382,307, filed Aug. 27, 1982.

JESSIE N. MARSHALL, Examining Attorney

HRSHY00000001

Int. Cl.: 30

Prior U.S. Cl.: 46

United States Patent and Trademark Office **Reg. No. 1,669,640**
Registered Dec. 24, 1991

**TRADEMARK
PRINCIPAL REGISTER**

MILKSHAKE

LEAF, INC. (DELAWARE CORPORATION)
2355 WAUKEGAN ROAD
BANNOCKBURN, IL 60015

OWNER OF U.S. REG. NOS. 261,488 AND
1,273,766.

FOR: CANDY, IN CLASS 30 (U.S. CL. 46).
FIRST USE 9-30-1927; IN COMMERCE
9-30-1927.

SER. NO. 74-133,909, FILED 1-28-1991.

WILLIAM P. SHANAHAN, EXAMINING AT-
TORNEY

Int. Cl.: 30

Prior U.S. Cl.: 46

United States Patent and Trademark Office
Renewal

Reg. No. 261,488
Registered Sep. 17, 1929
OG Date Aug. 22, 1989

TRADEMARK
PRINCIPAL REGISTER

**MILK
SHAKE**

HOLLYWOOD BRANDS, INC. (DELA-
WARE CORPORATION)
2355 WAUKEGAN ROAD
BANNOCKBURN, IL 60015, ASSIGNEE
BY MESNE ASSIGNMENT AND
CHANGE OF NAME FROM F. A.
MARTOCCIO COMPANY (MINNESO-
TA CORPORATION), DBA HOLLY-
WOOD CANDY CO., MINNEAPOLIS,
MN

FOR: CANDY BARS, IN CLASS 46
(INT. CL. 30).

FIRST USE 9-0-1927; IN COMMERCE
9-0-1927.

SER. NO. 283,207, FILED 4-29-1929.

*In testimony whereof I have hereunto set my hand
and caused the seal of The Patent and Trademark
Office to be affixed on Aug. 22, 1989.*

COMMISSIONER OF PATENTS AND TRADEMARKS

HRSHY00000017

EXHIBIT G

Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51, and 52

United States Patent and Trademark Office

Reg. No. 2,938,416

Registered Apr. 5, 2005

**TRADEMARK
PRINCIPAL REGISTER**

STRAWBERRY MILKSHAKE

PHILOSOPHY, INC. (ARIZONA CORPORATION)
4602 EAST HAMMOND LANE
PHOENIX, AZ 85034

FOR: SCENTED AND/OR FRAGRANCED 3-IN-1
HAIR SHAMPOO, HAIR CONDITIONER AND
BODY WASH, IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51
AND 52).

FIRST USE 6-1-2001; IN COMMERCE 6-1-2001.

NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE "STRAWBERRY", APART FROM
THE MARK AS SHOWN.

SN 75-579,243, FILED 10-29-1998.

DARRYL SPRUILL, EXAMINING ATTORNEY

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

HERSHEY CHOCOLATE & CONFECTIONERY
CORPORATION and THE HERSHEY COMPANY,

Opposers,

v.

KENNETH B. WIESEN,

Applicant.

Opposition No. 91200575

**DECLARATION OF CRAIG KINDERWATER
IN SUPPORT OF OPPOSERS' MOTION FOR SUMMARY JUDGMENT**

I, Craig Kinderwater, declare:

1. I am a Global Licensing Manager, and previously a Brand Manager, at The Hershey Company ("Hershey"). As a Brand Manager at Hershey, I was responsible for, among other things, certain MILKSHAKE-branded candy products sold by Hershey. I make this declaration based upon my personal knowledge and the business records of Hershey as set forth herein.

2. Hershey has used the MILKSHAKE trademark on candy products for over seven years. Hershey has sold the WHOPPERS MILKSHAKE – Strawberry candy product since 2005, as well as WHOPPERS ROBIN EGG MILKSHAKE – Strawberry and other flavor varieties for WHOPPERS MILKSHAKE. (Hershey has used its MILKSHAKE trademark on at least three Whoppers flavor varieties: Strawberry, Vanilla, and Orange Crème.) I also understand, based on Hershey's records, that Hershey offered a Limited Edition KIT KAT MILKSHAKE candy bar starting in December 2005.

3. Attached as **Exhibit A** are true and correct copies of examples of Hershey's product packaging featuring its MILKSHAKE mark.

4. Hershey's MILKSHAKE-branded candy products are and have been sold in the packaging shown in Exhibit A in retail stores and by online retailers throughout the United States, including in national retail chains such as Wal-Mart, Target, Kroger, Safeway, Walgreens, CVS, Dollar General, and Family Dollar.

5. Over the course of the past seven years, Hershey has earned revenues of approximately \$31.5 million for sales of approximately 29.5 million units of MILKSHAKE-branded candy products, which have been sold in the packaging shown in Exhibit A and similar packaging bearing the MILKSHAKE mark.

6. Since 2005, Hershey and its customers have spent approximately \$4 million for promotions relating to Hershey's MILKSHAKE-branded candy products, including trade promotions, sales materials, merchandising, and promotion packaging.

7. WHOPPERS MILKSHAKE candy products are typically sold to retail consumers for \$1.00 and \$2.39 for 4 oz. Theater Boxes and 10 oz. Cartons, respectively.

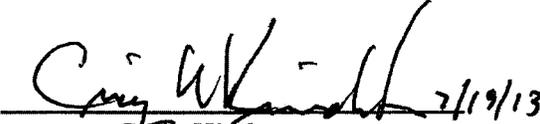
8. WHOPPERS ROBIN EGG MILKSHAKE candy products were typically sold to retail consumers for anywhere from \$2.39 to \$2.59 for 10 oz. packaged candy bags.

9. The Limited Edition KIT KAT MILKSHAKE candy products were typically sold to retail consumers for anywhere from \$0.69 \$0.99 for 1.5 oz. standard bars.

I declare under penalty of perjury that the foregoing is true and correct.

* * *

Executed in Hershey, Pennsylvania on this 19th day of July, 2013.


Craig Kinderwater

CERTIFICATE OF SERVICE

I certify that, on July 22, 2013, I caused the foregoing DECLARATION OF CRAIG KINDERWATER IN SUPPORT OF OPPOSERS' MOTION FOR SUMMARY JUDGMENT to be served by email and by U.S. first-class mail, postage prepaid, upon the following correspondent of record for applicant:

Kenneth B. Wiesen
1 Old Country Rd.
Suite 360-B
Carle Place, NY 11514
wiesenlaw@gmail.com

/s/ Kyle D. Gooch

EXHIBIT A



Naturally and Artificially Flavored
MALTED MILK BALLS

NET WT 4 OZ 113g

TO OPEN

WHOPPERS
MILKSHAKE
**ORANGE
CREME**
MALTED MILK BALLS

WHOPPERS
MILKSHAKE

**ORANGE
CREME**

Naturally and Artificially Flavored

MALTED MILK BALLS



HRSHY00000630

TO OPEN

WHIPPERS
MILKSHAKE
VANILLA
MALTED MILK BALLS

WHIPPERS
MILKSHAKE

VANILLA

Naturally and Artificially Flavored

MALTED MILK BALLS



HRSHY0000631

WHL POPPERS[®]

MILKSHAKE[®]



STRAWBERRY

Naturally and Artificially Flavored

MILK BALLS



NET WT 4 OZ (113g)