THIS OPINION IS NOT A PRECEDENT OF THE T.T.A.B.

Hearing:
January 20, 2010

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Eddy Packing Co., Inc.
v.
HEB Grocery Company

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Cancellation No. 92041545

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Ted D. Lee of Gunn, Lee & Cave, P.C. for Eddy Packing Co., Inc.

Kirt S. O'Neill of Akin Gump Strauss Hauer & Feld LLP for HEB Grocery Company.

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Before Bucher, Mermelstein and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

HEB Grocery Company ("respondent") is the owner of Registration No. 2633427 on the Supplemental Register for the mark FULLY COOKED, in typed drawing form, for "prepared entrees consisting primarily of meat," in Class 29.

Eddy Packing Co., Inc. ("petitioner") filed a petition to cancel respondent's registration on the ground that the term FULLY COOKED when used in connection with "prepared entrees consisting primarily of meat" is generic. Petitioner also alleged that respondent committed fraud when it filed its application to register FULLY COOKED, as well

as alleging priority of use and likelihood of confusion.[1] Respondent denied the salient allegations in the petition for cancellation.

Preliminary Issues

A. Improper designation of confidential information.

The stipulated protective order applicable in this proceeding covers information that "may be considered confidential, a trade secret, or commercially sensitive by a party or witness."[2] The order provides for three levels of protection:

1. Confidential;

2. Highly confidential; and

3. Trade secret/commercially sensitive.

Fed. R. Civ. P. 26(c)(7) protects confidential, trade secret, and commercially sensitive information by allowing a party to limit the access to trade secret or other confidential information or by permitting the information to be revealed only in a designated way. The Advisory Committee Notes to the 1970 Amendment explain that the Rule does not provide complete immunity against disclosure; rather, in each case, the need for privacy must be weighed

[1] Because petitioner presented no arguments in support of its priority of use and likelihood of confusion claim in its brief, we deem petitioner to have waived it, and we have given it no consideration. *See Liberty & Co., Ltd. v. Liberty Trouser Co., Inc.*, 216 USPQ 65, 66, n.9 (TTAB 1982).

[2] August 19, 2004 stipulated protective agreement between the parties.

against the need for disclosure. Accordingly, information that is confidential or that imparts private information may require a different level of protection than information that may be considered a trade secret or commercially sensitive.[3] In this regard, the parties were specifically advised that only confidential and trade secret information should be designated confidential.[4]

Nevertheless, during discovery and trial, respondent improperly designated testimony and exhibits as "confidential" or as "trade secret/commercially sensitive." For example, petitioner's exhibit No. 61, respondent's responses and objections to petitioner's second set of interrogatories, included the following questions the answers to which were designated by respondent as "trade secret/commercially sensitive":

> Interrogatory No. 29: Please state whether Registrant is aware of the sale, distribution, or otherwise availability of third party (sic) products with labels, advertisements, packaging, or promotional goods bearing the terms (sic) FULLY COOKED in Registrant's stores.
>
> Interrogatory No. 30: Please identify each third party whose products are sold, distributed, or otherwise made

[3] A "trade secret" is defined as "a formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors." In essence, a "trade secret" derives its value "from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use." Black's Law Dictionary (8th ed. 2004).
[4] The Board's November 29, 2004 order.

> available in any of Respondent's stores with labels, advertising, packaging, or promotional goods with such products bearing the terms (sic) FULLY COOKED.
>
> Interrogatory No. 31: Please indicate how long Registrant has been selling, distributing, or otherwise making available in any of Respondent's stores third party (sic) products with labels, advertisements, packaging, or promotional goods bearing the terms (sic) FULLY COOKED.
>
> Interrogatory No. 33:[5] Please state whether Registrant is aware of any third parties using or having used the terms (sic) FULLY COOKED in association with any food products. If so, for each usage (A) identify the third party; (B) identify the product; (C) identify the date of first use by the third party; (D) identify the date Registrant first became aware of such usage; (E) state whether Registrant contends that such usage causes a likelihood of confusion with Registrant's alleged FULLY COOKED mark; (F) identify any action taken against third party; (G) identify all documents relating to or referring to such usage, including but not limited to letters sent to/from the third party.

We fail to see how interrogatory Nos. 29-31 and 33 involve "confidential," let alone "trade secret/commercially sensitive," information. These interrogatories simply inquire as to whether respondent is aware of its sales of third-party "fully cooked" products and, if so, identify the third parties, the time period for which respondent sold the

[5] Interrogatory No. 32 inquired about respondent's sales of third-party products with labels displaying the term FULLY COOKED. While sales information may be designated as confidential, we fail to see how it comprises a trade secret.

third-party "fully cooked" products, and whether respondent believed that any of the third-party uses of "fully cooked" products were likely to cause confusion.

Another example of overzealous designation occurred during the discovery deposition of Dr. Molly McAdams, one of respondent's vice presidents. Respondent designated Dr. McAdams' testimony regarding the organizational structure of respondent as "trade secret/commercially sensitive" and required petitioner's corporate representative to leave the deposition. Even though respondent is not a publicly traded corporation, we fail to see how the organizational structure of the company is commercially sensitive. Respondent also designated as "confidential" Dr. McAdams' testimony regarding protests respondent made regarding the use of the term FULLY COOKED, including the protest letter to petitioner. We fail to see how nonprivileged communications to a party and to third parties rises to the level of confidential matter.

Respondent's over-designation of testimony and evidence as confidential and commercially sensitive is a recipe for disaster because it is not clear to us what is intended to be truly confidential or a trade secret. Therefore, in rendering our decision, we will not be bound by respondent's designations. Board proceedings are designed to be public and the improper designation of materials as confidential

thwarts that intention. It is more difficult to make findings of fact, apply the facts to the law, and write decisions that make sense when the facts may not be discussed. The Board needs to be able to discuss the evidence of record, unless there is an overriding need for confidentiality, so that the parties and reviewing court will know the basis of the Board's decision. Therefore, in this opinion, we will treat only testimony and evidence that is truly confidential and commercially sensitive as such.

B. Respondent's motion to strike petitioner's sixth notice of reliance.

During its testimony period, respondent introduced excerpts from the discovery deposition of Ronald Beeman, petitioner's President and Rule 30(b)(6) witness. During rebuttal, petitioner introduced excerpts from that same deposition pursuant to Trademark Rule 2.120(j) asserting that the portions proffered by petitioner "should be in fairness considered so as to make not misleading the portions offered by Registrant."

Respondent filed a motion to strike petitioner's notice of reliance on excerpts from Mr. Beeman's discovery deposition because petitioner's notice of reliance "merely parrots the language of Rule 2.120(j)(4) and makes the vague, conclusory, and generalized assertion that *all* portions of the deposition submitted by Registrant '*may* be

taken out of context.'"[6] (Emphasis in the original). In addition, respondent asserts that some of the testimony petitioner proffered is unrelated to the testimony introduced by respondent.

In opposition to respondent's motion, petitioner contends that its excerpts provide the background necessary to review the testimony introduced by respondent.

Trademark Rule 2.120(j)(4) provides that if only part of a deposition is introduced into evidence by the party entitled to offer the deposition into evidence, the adverse party may introduce any other part of the deposition which should in fairness be considered so as to make not misleading what was originally offered. In such a case, the "notice of reliance filed by the adverse party must be supported by a written statement explaining why the adverse party needs to rely on each additional part listed in its notice of reliance, failing which the Board may refuse to consider the additional parts." Trademark Rule 2.120(j)(4); *see also* TBMP §704.09 (2nd ed. rev. 2004).

Petitioner failed to comply with the requirements of the rule because it did not explain why it needed to rely on the additional excerpts of Mr. Beeman's deposition. Furthermore, having reviewed petitioner's designated excerpts, we fail to see how they clarify the excerpts

[6] Respondent's motion, p. 2.

introduced by respondent and how they are relevant to the issues before us.

In view of the foregoing, respondent's motion to strike petitioner's sixth notice of reliance is granted and we will not give the excerpts of Mr. Beeman's deposition designated by petitioner any further consideration.

The Record

By operation of Trademark Rule 2.122, 37 CFR §2.122, the record includes the pleadings and the registration file of respondent's mark.[7] The record also includes the following testimony and evidence:

A. Petitioner's Evidence.

1. Testimony deposition of Dr. Barbara J. Masters, DVM, an expert witness in the field of federal regulations regarding meat and poultry, with attached exhibits.

2. Testimony deposition of Jason E. McKinnie, a law clerk for petitioner's counsel, with attached exhibits.

3. Testimony deposition of Ronald Beeman, petitioner's President, with attached exhibits.

4. A notice of reliance pursuant to Rule 2.122(e) introducing state statutes and federal rules and regulations purporting to show the generic use of the term FULLY COOKED.

[7] Thus, it was unnecessary for petitioner to introduce the registration file through a separate notice of reliance.

5. A notice of reliance pursuant to Rule 2.120(j)(3)(i) introducing respondent's responses and objections to petitioner's written discovery.[8]

6. A notice of reliance pursuant to Rule 2.122(e) introducing the following items:

a. The file history for respondent's Registration No. 2653225 for the mark FULLY COOKED and design for "prepared entrees consisting primarily of meat";

b. Copies of third-party registrations and applications with the term "fully-cooked" used to modify food products in the description of goods;

c. Copies of third-party registrations and applications where the mark includes the term "fully cooked" with a disclaimer of the exclusive right to use the term "fully cooked";

d. Copies of three registrations owned by respondent where the mark includes the term

[8] Petitioner's attempt to rely on responses to requests for the production of documents is half-baked. Trademark Rule 2.120(j)(3)(ii) prohibits the introduction of documents obtained under Fed. R. Civ. P. 34 through a notice of reliance alone, except to the extent that they are admissible pursuant to Rule 2.122(e).

"fully cooked" with a disclaimer of the exclusive right use that term;

e. A copy of an opposition file (91183597) in which respondent filed a notice of opposition against the registration of the mark FULLY COOKED and design for "frozen, prepared or packaged entrees consisting primarily of meat, fish, poultry or vegetables";

f. Copies of two patents that use the term "fully cooked";

g. Excerpts from various dictionaries, trade periodicals and magazines that use the term "fully cooked."

7. A notice of reliance on respondent's responses to petitioner's requests for admission pursuant to Rule 2.120(j)(3)(i) comprising photographs of third-party labels for products displaying the term "fully cooked" sold in respondent's stores.

8. A notice of reliance on excerpts from the discovery deposition of Dr. Molly McAdams, one of respondent's vice presidents and a designated Rule 30(b)(6) witness, with attached exhibits.

B. Respondent's testimony and evidence.

1. A notice of reliance on copies of the following registrations owned by respondent prepared by the U.S.

Patent and Trademark Office showing the current title to and status of the registrations listed below:[9]

a. Registration No. 2574425 for the composite mark shown below, for "cooked ground beef prepared with sloppy joe sauce." Respondent disclaimed the exclusive right to use "fully cooked sloppy joes."

b. Registration No. 2653225 for the composite mark shown below for "prepared entrees consisting primarily of meat." Respondent disclaimed the exclusive right to use "fully cooked."

c. Registration No. 2727628 for the mark H-E-B FULLY COOKED SEASONED BEEF CRUMBLES, in typed drawing form, for "cooked ground beef."

[9] Because Registration No. 2633427 for the mark FULLY COOKED is automatically of record, it was not necessary for respondent to introduce it into evidence.

Respondent disclaimed the exclusive right to use "fully cooked seasoned beef crumbles."

2. A notice of reliance on a copy of Registration No. 2285564 registered under the provisions of Section 2(f) of the Trademark Act and owned by petitioner for the mark TASTY BRAND for "processed meats, fresh sausage, and smoked sausage" prepared by the U.S. Patent and Trademark Office showing the current title and status to the registration. Petitioner disclaimed the exclusive right to use "brand."

3. A notice of reliance pursuant to Trademark Rule 2.122(e) on a copy of the file history for Registration No. 2727628 for the mark H-E-B FULLY COOKED SEASONED CRUMBLES.

4. A notice of reliance on petitioner's response to respondent's interrogatory No. 9.

5. A notice of reliance on excerpts from the discovery deposition of Ronald Beeman, petitioner's President and a Rule 30(b)(6) witness, with attached exhibits.

6. A notice of reliance pursuant to Rule 2.120(j)(5) on documents respondent produced in response to interrogatories that petitioner did not include in its notices of reliance which respondent contends should in fairness be considered so as to not make respondent's interrogatory answers misleading.

7. Testimony of Judith Quick, an expert witness on federal food labeling requirements, with attached exhibits.

Standing

"The facts regarding standing . . . are part of a petitioner's case and must be affirmatively proved. Accordingly, [petitioner] is not entitled to standing solely because of the allegations in its petition." *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). To prove its standing to cancel the registration of an allegedly generic term, a plaintiff need only show it is engaged in the manufacture or sale of the same or related goods as those listed in the respondent's registration; that is, that plaintiff has the right to use the term in a descriptive or generic manner. *Nature's Way v. Nature's Herbs,* 9 USPQ2d 2077, 2080 (TTAB 1989); *Ferro Corp. v. SCM Corp.*, 219 USPQ 346, 352 (TTAB 1983); *see also Binney & Smith Inc. v. Magic Marker Industries, Inc.*, 222 USPQ 1003, 1010 (TTAB 1984). Inasmuch as petitioner sells processed meats, such as smoked sausage, smoked meats, smoked turkey, and barbecue and marinated meats, and has been displaying the term "fully cooked" on labels to describe some of its products since the 1970s, petitioner has established its standing.[10]

[10] Beeman Testimony Dep., p. 14.

Genericness

There is a two-part test used to determine whether a designation is generic: (1) what is the genus of goods at issue? and (2) does the relevant public understand the designation primarily to refer to that genus of goods? *H. Marvin Ginn Corp. v. Int'l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 990, 228 USPQ 528, 530 (Fed. Cir. 1986). The public's perception is the primary consideration in determining whether a term is generic. *Loglan Inst. Inc. v. Logical Language Group Inc.*, 902 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). Evidence of the public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *Loglan Inst.* 22 USPQ2d at 1533; *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979).

A. The genus of goods at issue.

The broad general category of goods involved here is food; specifically, prepared foods. While the goods identified in the subject application are "prepared entrees consisting primarily of meat," the evidence of record shows that the term "fully cooked" has been used to describe a wide variety of prepared food products, including meat, poultry, vegetables, fish, pasta and rice.[11] In fact, Dr.

[11] *See e.g.*, Quick Dep., pp. 82-87; Masters' Dep., pp. 187-191.

McAdams, one of respondent's vice presidents, testified that respondent's products that display the term "fully cooked" are not exclusively meat products.[12]

> A. Our HEB FULLY COOKED products are primarily cooked meat products but not exclusively.
>
> * * *
>
> Q. Are they fully-cooked-type products?
>
> A. As I said, under the HEB FULLY COOKED brand, we sell fully cooked meats, which would be fully-cooked-type products. But we also sell other products under that brand, so it's not exclusively.
>
> Q. Okay. Going to switch subjects. What other type products do you have that you label as fully cooked that is (sic) not a fully-cooked-type product?
>
> A. One of the other products that you looked at was - - we have HEB FULLY COOKED sausage, egg, and cheese biscuits that include bread, eggs, meat.[13]

Also, we note respondent's objection to written discovery requests regarding its use of the term "fully cooked" on the ground that they were unduly burdensome. Respondent explained that it "has used the FULLY COOKED mark on a wide variety of goods and cannot, without undue burden,

[12] McAdams Dep., p. 147.
[13] McAdams Dep., p. 147.

determine each and every type or article of merchandise on which the mark has ever been used."[14]

With respect to our finding that the genus of the goods at issue is prepared foods, respondent contends that the genus of the goods falls within the narrower category of "prepared entrees consisting primarily of meat" as set forth in its description of goods. However, the identification of goods in the registration does not necessarily dictate the genus of the goods in the genericness analysis. The description of goods in the registration or application may fall within a broader or narrower category. *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1897 (TTAB 2001) (RUSSIANART for "dealership services in the field of fine art, antiques, furniture and jewelry" falls within the category of Russian art); *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1197 (TTAB 1998) (ATTIC for "automatic sprinklers for fire protection" falls within the narrower category of sprinklers for fire protection of attics); *Stromgren Supports Inc. v. Bike Athletic Co.*, 43 USPQ2d 1100, 1106 (TTAB 1997) (COMPRESSION for "elastic athletic garments and outerwear, namely, sports girdles" falls within the category of sports medicine products including compression shorts or girdles); *In re Analog*

[14] Respondent's responses to petitioner's interrogatory Nos. 5-8, 11.

Devices, Inc., 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989) (unpublished) (ANALOG DEVICES for a laundry list of electronic products falls within the category or class of goods having analog capability). The key in the analysis is that the term at issue must be generic for the items in the description of goods.

Respondent's reliance on *Henri's Food v. Tasty Snacks,* 817 F.2d 1303, 2 USPQ2d 1856 (7th Cir. 1987) is misplaced. In *Henri's Food,* the Court of Appeals held that "tasty" is not a category of salad dressing; that is, it does not "classify the noun to which it is attached." 2 USPQ2d at 1858. On the other hand, in this case, Judith Quick, respondent's expert witness consistently testified that "fully cooked" describes how food has been processed,[15] thus, likening "fully cooked" to "light" or "lite" which denotes a type of beer.

In view of the foregoing we find that the genus of the goods involved is prepared foods.

B. The relevant public.

The second part of the generic test is whether the relevant public understand the designation primarily to refer to that class of goods. The relevant public for a

[15] Quick Dep., pp. 29, 30, 32, 33, 34, 37, 38, 84, 85, 88, 146, 169.

genericness determination is the purchasing or consuming public for the identified goods. *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1553 (Fed. Cir. 1991). Respondent's description of goods is "prepared entrees consisting primarily of meat." Because there are no restrictions or limitations to the channels of trade or classes of consumers, the relevant or consuming public comprises ordinary consumers, as well as food retailers, such as grocery stores. In this regard, we note that respondent is a chain of retail grocery stores that sells food products labeled as "fully cooked" purchased from third parties.[16] Thus, respondent is a purchaser of food products labeled as fully cooked. With respect to petitioner, Mr. Beeman, petitioner's President, testified that petitioner sells its prepared meat products to retailers, such as Kroger's, Brookshire Brothers, F & S Gourmet, Golden Valley and respondent, to other meat companies, and to institutional food service companies, such as hotels, restaurants, schools, and hospitals.[17]

In view of the foregoing, we find that the relevant public comprises ordinary consumers, institutional purchasers, food retailers and meat companies.

[16] McAdams Dep., pp. 95-96; respondent's responses to petitioner's interrogatory Nos. 29-33.
[17] Beeman Testimony Dep., pp. 17-19, 91-95.

C. Public perception.

1. Dictionary and Glossary Definitions.

At the outset of our analysis regarding public perception, we take judicial notice of the definitions of the words comprising the term "fully cooked."

> **fully** *adv.* **1.** entirely or wholly.[18]
>
> **cook** *v.t.* **1.** to prepare (food) by the use of heat, as by boiling, baking or roasting.[19]

We find that the term "fully cooked" retains the meaning of its component parts. This conclusion finds support in the testimony of Judith Quick, respondent's expert witness, who testified unequivocally that the meaning of the term "'fully cooked' is self-evident. 'Fully cooked' means fully cooked."[20] "The words 'fully cooked' means (sic) that the product has been cooked sufficiently to render it safe to eat. I think that's well understood by people in general."[21]

We also not the following definitions made of record:

> **ham** . . . Hams are available fully cooked, partially smoked or uncooked. Those that are **fully-cooked** are heated to an internal temperature of 148°F or above, **partially cooked** hams to at least

[18] The Random House Dictionary of the English Language (Unabridged), p. 775 (2nd ed. 1987). The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).
[19] *Id.* at 445.
[20] Quick Dep., p. 94.
[21] Quick Dep., p. 190.

> 137°F (which kills the trichina parasite). … Fully cooked hams, sometimes labeled "heat-and-serve" or "ready-to-eat," do not require additional cooking and may be eaten cold or heated until warm. (Emphasis in the original).

Herbst, Food Lover's Companion: Comprehensive Definitions of Nearly 6000 Food, Drink and Culinary Terms, (2001).[22]

> **Fully Cooked**
> Fully cooked products need no further cooking. The product is fully cooked in the plant, and it can be reheated or eaten directly from the package. Also known as ready-to-eat.

USDA, Food Safety and Inspection Service website (fsis.usda.gov), Glossary.[23]

> Ready To Eat: a product that has been heated to a minimum temperature of 148°F. and has characteristics of a fully cooked material.

MPI Guideline No. 6: A Glossary of Meat and Poultry Industry Terms from the U.S. Department of Agriculture, Food Safety and Quality Service, Meat and Poultry Inspection Program (1977).[24]

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[22] Petitioner's notice of reliance Exhibit 38; McKinnie Dep., Exhibit 139; *see also foodnetwork.com* website encyclopedia discussion regarding "country-cured ham" based on the definition in The Food Lover's Companion. (McKinnie Dep., Exhibit 140).

[23] Quick Dep., pp. 55-56, "Petitioner's Exhibit Number 128," Attachment 1. In discussing this definition, Ms. Quick opined that fully cooked "is not the generic term. It's a description of the processing that may have been applied to a particular product." (Quick Dep., p. 56). *See also* Master's Dep., pp. 70-71, petitioner's exhibit 109, attachment 1.

2. Respondent's use of "fully cooked."

Respondent markets prepared meat entrees under the HEB FULLY COOKED trademark.[25]

> Q. Who was the brand manager for fully cooked when you started?
>
> A. The - - Are you referring to HEB Fully Cooked?
>
> Q. Yes, ma'am.
>
> A. The brand manager was Dan Hoffmeister.
>
> Q. Is there some other fully cooked other than HEB?
>
> A. Fully cooked is our brand, the mark, HEB FULLY COOKED, and so I always refer to it as our brand. Just like HEB, I wouldn't abbreviate it. So I was just asking for clarification.
>
> * * *
>
> Q. Now, was fully cooked being used by HEB at the time that you started there?
>
> A. The brand?
>
> Q. The term "fully cooked," was it being used?
>
> A. HEB FULLY COOKED was an established brand when I started working for HEB.
>
> Q. When you say an "established brand," what makes it a brand?

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[24] Petitioner's Notice of Reliance, Exhibit 59; *see also* Quick Dep., pp. 56-57, "Petitioner's Exhibit Number 128," Attachment 2; Master's Dep., p. 72, petitioner's exhibit 109, attachment 2.
[25] McAdams Dep., p. 17.

* * *

A. The - - Several things. It's really the way you treat the product. We treat our brands as distinctive brands. We have several brands under my area of responsibility now. In the case of HEB FULLY COOKED, we established it with a very strong trade dress or look for the package. We aggressively grew the brand very consistently. We have brand standards associated with it. And so just like any national brand that any of us would interact with, we employ the same mechanism for establishing brand equity and a brand presence.

Q. Okay. Now you indicated for it to be a brand, it was the way you treat the product. I think those were your words. How is it that you treated the product that you think fully cooked constitutes a brand?

A. Well in the case of HEB FULLY COOKED, we have a very consistent lock up[26] that has not been altered since we established the brand. First products hit shelf (sic) in 1996. … We've maintained that that look and lock up with all of our packaging. We advertise, we aggressively develop products under the brand of HEB FULLY COOKED.

* * *

And so in this case of HEB, we have a lock up that looks like a red pill and with HEB FULLY COOKED, HEB appears over, above and to the upper left-hand corner, and fully cooked is in a swoosh underneath it.

[26] "Lock up" is the term that Dr. McAdams used to describe the way the brand logo appears on packaging. (McAdams Dep., p. 19).

[27]

Q. Let me ask you this: Then on every product that you refer to as your fully cooked brand, would HEB appear next to the words "fully cooked"?

A. On our packaging, HEB appears next to "fully cooked."

Q. Okay. So you would have HEB, then you would have fully cooked, then you would have a product description?

A. We have - - With all the HEB FULLY COOKED brand products, it says - - it will have HEB, the fully cooked name for our registered trademark, and then there'll be a description of what the product is in the bag.

Q. Uh-huh.

A. Or, I'm sorry, in the package.

Q. So every place that you use fully cooked, then you always have HEB right adjacent to it?

A. If we use HEB FULLY COOKED as its brand.

Q. You don't ever use fully cooked by itself without the HEB right adjacent to it, do you?

[27] We insert this excerpt of respondent's packaging to illustrate Dr. McAdams' testimony. The label was an exhibit from respondent's application to register H-E-B FULLY COOKED SEASONED BEEF CRUMBLES (Reg. No. 2727628). (Respondent's notice of reliance). We did not use the labels attached to the McAdams deposition because they are illegible.

A. In what - - I need more information about that.

Q. On any of your packaging.

A. As a brand?

Q. I didn't say as a brand. On any of your packaging for your food products where you say "fully cooked," do you ever have fully cooked where you don't have HEB right adjacent to it?

A. Are you asking, using the words "fully cooked" as, say, abstract describers of a product?

Q. Well, is - - Are you saying that fully cooked could be used as an abstract describer of a product?

A. I'm trying to get clarification of your question.

Q. Well, you were referring to fully cooked as an abstract describer of a product, what do you mean by that?

A. I'm trying to get clarification if when we are using our brand, HEB FULLY COOKED, then, in fact, yes HEB appears next to the words "fully cooked."

Q. Okay. So every time that you use fully cooked as what you consider to be a brand, HEB is always adjacent to it?

A. On the packaging, yes.

Q. Now, what is it about the way the brand logo goes on the packaging, and those were your words, what is about that that you think qualifies you to - - for some protection?

A. We have a very distinctive look, and we've built a very strong franchise in cooked meats under the brand HEB FULLY COOKED.

Q. What - - I'm a little confused.

A. Okay.

Q. What's the distinctive look, that's what I'm trying to figure out?

A. I believe that you have copies of our packages. And we have a very distinctive shape of our logo, much like Nike swoosh, it's a very distinctive look.

Q. So referring to kind of the banner, the flowing banner, it is that what you're referring to?

A. Yes, I am. We also have the other elements of the look that are raised letters of the F and the C.

Q. Okay. Okay. So you think in terms of the banner and the raised F and the raised C and HEB being adjacent to it, you think of all that as being your look?

A. That's the way that we deploy the look now, absolutely.

Q. Okay. And that's what you think that [respondent] is entitled to some protection on?

A. Yes.[28]

Dr. McAdams reiterated that "[t]he trademark, as we use it, is HEB FULLY COOKED."[29] She subsequently explained that

[28] McAdams Dep., pp. 17-22.
[29] McAdams Dep., p. 31.

HEB is the primary brand and that "fully cooked" is a subbrand.[30]

> Q. [H]ow do you think that the words "fully cooked" go from being descriptive to being a brand?
>
> * * *
>
> A. We have established fully cooked as a subbrand within [respondent], and we established that over ten years ago. We've been very aggressive in marketing and growing the fully cooked brand. Now, the descriptive words "fully cooked" to indicate a cooked status, particularly in meat, they will appear on packages even throughout our store. There's numerous examples where we see "fully cooked" throughout our store. And in that case, it's used in an entirely descriptive sense. The way that we use it, we use it in a distinctive sense as a brand.[31]

Dr. McAdams further testified regarding a sign hanging in the aisle of one of respondent's stores that said "fully cooked meats." She explained that it was a "navigational sign" at the meat case identifying the location of prepared meats, not just HEB FULLY COOKED entrees.[32]

[30] McAdams Dep., p. 33, 44.
[31] McAdams Dep., p. 44.
[32] McAdams Dep., pp. 125-126. Dr. McAdams also explained that this was not the preferred practice and that respondent was trying to more consistently promote the "Fully Cooked" brand. (McAdams Dep., pp. 127-128).

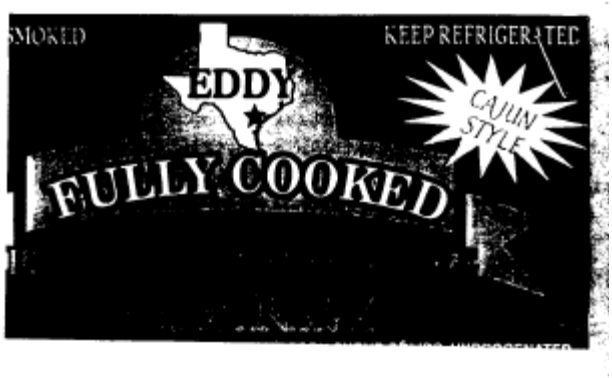
Dr. McAdams testified that respondent adopted "Fully Cooked" as a trademark because it "resonated" with consumers.[33]

> We have - - we have knowledge that when we showed our customers packaging, they were – - they were able to understand what the product was and understand the benefits that products under HEB FULLY COOKED offered them. And so that's how I would determine that it resonated with customers.[34]

3. Petitioner's use of the term "fully cooked."

Petitioner explains that it places the term "fully cooked" on its packaging "because 'Fully Cooked' is the generic term for a category of food products defined by the USDA and all those products meet the requirements set forth by the USDA for the cooking procedure of their product."[35] Sample labels for petitioner's products are reproduced below.[36]

[33] McAdams Dep., p. 78.
[34] *Id.*
[35] Beeman Dep., p. 18.
[36] Beeman Dep., Exhibit 146.



4. Use of "fully cooked" by third parties.

Respondent sells products produced by numerous third parties displaying the term "fully cooked" on labels. The third-party companies include Oscar Mayer, Eckrich, Hillshire Farm, Ball Park Brand, Butterball, Land O' Lakes, Hormel, Jimmy Dean and others.[37] Representative samples of packaging displaying the term "fully cooked" from the third-party products sold in respondent's stores are set forth below.

[37] Respondent's responses to petitioner's first set of requests for admission; respondent's responses to petitioner's interrogatory Nos. 29-33; McAdams Dep., pp. 34, 43-44, 121, 128-129.

Despite the simultaneous third-party use of "fully cooked," in and out of respondent's stores, respondent is not aware of any reported instances of source confusion based on the use of the term "fully cooked."[38]

The May 2007 issue of *The National Provisioner* magazine, a trade journal for food manufacturers, featured a

[38] McAdams Dep., p. 167; Respondent's response to Interrogatory No. 21. The dollar amount of respondent's sales and third-party sales of products labeled as "fully cooked" has been designated "commercially sensitive" and, therefore, we will only refer to the figures generally. Suffice it to say that the figures are extensive, thereby demonstrating there has been an ample opportunity for confusion to arise.

cover story regarding Pilgrim's Pride entry into manufacturing prepared foods titled "FULLY COOKED COMMITMENT."[39] The article featured the following excerpts (emphasis added):

> The Waco plant originally was built around 1990 by Plantation Foods. It started off as two-line plant that produced **fully cooked**, sliced meat.
>
> * * *
>
> It processes about three million pounds of **fully cooked** product per week.
>
> * * *
>
> The products were the first **fully cooked** poultry product to qualify for the American Heart Association (AHA) seal, meaning the products are approved as heart-healthy by the AHA.
>
> * * *
>
> The raw and **fully cooked** sections of the plant are completely segregated, down to the bathrooms, break room and locker rooms, for biosecurity purposes.

Jason McKinnie, a law clerk for petitioner's counsel, introduced numerous documents obtained from the Internet showing the use of "fully cooked" in connection with prepared foods. A representative sample of the exhibits to the McKinnie deposition are described below.

(a) Aidells and Kelly, The Complete Meat Cookbook, p. 394 (1999) references "Fully Cooked Supermarket Hams." The

[39] Petitioner's notice of reliance Exhibit 72.

authors state that "[t]he vast majority of these hams will be labeled 'fully cooked' or 'ready to eat.'"[40]

(b) Schmidt, Chef's Book of Formulas, Yields and Sizes, p. 237 (3rd ed. 2003) references the use of the term "fully cooked" in connection with whole smoked ham:

> Available both fully cooked, referred to as *ready-to-eat*, and uncooked. Most smoked ham on the market is fully cooked.[41] (Emphasis in the original).

(c) *al fresco Fully-Cooked Dinner Chicken Sausage,* an article in the *Bite of the Best* website at www.bitofthebest.com appearing on August 27, 2008 references "fully cooked Buffalo Style and Sweet Apple sausages." "Since these are fully cooked, they'll be ready in minutes."[42]

(d) *Why do eggs have to be fully cooked to avoid foodborne illness?* is an article in the Mississippi State University website at msucares.com regarding the proper storage and cooking of eggs.[43]

(e) *Hamburgers at home: fully cooked patties offer up benefits beyond convenience* an article published in the AllBusiness website at www.allbusiness.com on August 1, 2003 originally from *Stagnito's New Products Magazine* states that "[a] combination of factors, including safety concerns,

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[40] McKinnie Dep., Exhibit 139
[41] *Id.*
[42] *Id.* at Exhibit 136.
[43] *Id.*

convenience and a population that has neither the skills nor the desire to fix food, has meat processors scrambling to promote fully cooked beef patties."[44]

(f) *Fully cooked and fresh meat: keeping fresh ideas on track and new concepts cooking gives meat processors a full plate* an article published in the AllBusiness website at www.allbusiness.com on August 1, 2002 originally published in *The National Provisioner* reports that the National Cattlemen's Beef Association is "looking beyond the refrigerated heat-and-serve category for fully-cooked beef items and into the deli and frozen categories."[45]

5. Use of "fully cooked" in the USPTO.

Petitioner introduced copies of six registrations and eleven applications that include the term "fully-cooked" in the description of goods.[46] The following registrations are representative of the use of "fully cooked" in the description of goods:

[44] *Id.*
[45] *Id.*
[46] Petitioner's notice of reliance Exhibits 3-19. Generally, an application is evidence only that the application has been filed. However, in this case, we note that the applications indicate that applicants have used the term "fully cooked" in the description of goods to identify their products. Unlike the case with a registration, language in a pending application does not indicate that such wording is acceptable to the USPTO, but it does show use of the term by those in the food industry to identify their goods.

a. Registration No. 2254458 for the mark TIMBER RIDGE FARMS and design for "foods, namely, ready-to-cook meats and fully-cooked meats."

b. Registration No. 3108568 for the mark DEERFIELD FARMS and design for "milk, sliced cheese, and fully-cooked and canned meat products."

c. Registration No. 3033594 for the mark JTM for, *inter alia,* "fully-cooked, pre-portioned meat products, namely, sausage links, rib patties, burgers, beef patties, Salisbury steak, meatloaf, meatballs, pork breakfast patties, pork rib, Italian sausage."

Petitioner introduced copies of nine registrations with marks that include the term "fully cooked" with a disclaimer of the exclusive right to use "fully cooked."[47]

Petitioner introduced by notice of reliance copies of two patents that use the term "fully cooked" in connection with a type of preparation for meat. U.S. Patent No. 5945152 is for a "method of preparing a fully-cooked semi-moist shelf stable meat product." "[T]his invention relates to a method comprising a series of pasteurization and mixing steps whereby the resulting fully-cooked meat product, with a taste and texture similar to that of freshly-cooked meat,

[47] Petitioner's notice of reliance Exhibits 20-28.

remains free from pathogen-causing levels of bacteria and can be stored for an extended period without refrigeration due to inherent anti-microbial properties."[48]

U.S. Patent No. 6051264 is for a "method of dry curing and processing pork bellies to provide fully cooked bacon." "The method of the present invention employs a single heating step that both fully cooks a dry cure seasoning coated pork belly and achieves the necessary weight reduction to meet the regulatory definition for fully cooked bacon."[49]

Petitioner introduced three additional patents using the term "fully cooked" through the deposition of Jason McKinnie:[50]

(a) Patent No. 5908648 for a "method of producing fully cooked and breaded bone-in poultry product";

(b) Patent No. 6242032 for "fully cooked, shelf stable or frozen noodles"; and

(c) Patent No. 5902629 for a "method for processing grain and legume fully-cooked powders and snacks."

6. Expert testimony.

Each party proffered the testimony of an expert witness: Barbara Masters, petitioner's witness, an expert on regulatory compliance in the meat and poultry industry,

[48] Petitioner's notice of reliance Exhibit 36.
[49] Petitioner's notice of reliance Exhibit 37.
[50] McKinnie Dep., Exhibit 138.

and Judith Quick, respondent's witness, an expert on food labeling regulations. We considered Dr. Masters' testimony with respect to how the term "fully cooked" is used in the meat and poultry industry,[51] and we considered Ms. Quick's testimony with respect to rules and regulations for the use of the term "fully cooked" on packaging.[52] The testimony of both experts is relevant and helpful for the reason set forth by Ms. Quick:

> Because the federal regulations dictate the kind of terms that must be used for the name of the product and because the label is what appears in front of consumers, I think the influence of the product name on the labels is overwhelming.[53]

Not surprisingly, each witness supported the position of the party on whose behalf she appeared. Because an expert may testify as to the ultimate issue before the Board, both witnesses offered opinions as to whether the term "fully cooked" is generic. We find this testimony is of limited, if any, probative value and we will not substitute it for our findings of fact.[54] *Freedom Fed. S&L Ass'n v. Heritage Federal S&L Ass'n,* 210 USPQ 227, 230 n.1

[51] Dr. Masters testified that she was testifying about the regulatory aspects of "full-cooked." (Master's Dep., p. 137).
[52] Ms. Quick identified herself as "an expert on federal food labeling requirements." (Quick Dep., pp. 94-96).
[53] Quick Dep., p. 13.
[54] In this regard, we note that Ms. Quick testified that she is an expert on federal food labeling requirements, not public perception. (Quick Dep., pp. 94-97).

(TTAB 1981) (the Board must independently evaluate the evidence and arrive at its own conclusions); *see also Fisons Ltd. v. UAD Labs., Inc.*, 219 USPQ 661, 663 (TTAB 1983); *Mennen Co. v. Yamanouchi Pharm. Co., Ltd.*, 203 USPQ 302, 305 (TTAB 1979).

a. The expert testimony of Judith Quick.

Ms. Quick testified that when the term "fully cooked" appears on a food package, it describes how the product has been processed[55] (*i.e.*, fully cooked).[56]

> "Fully cooked" is being used as a descriptive term to explain to the consumer prior to the purchase that - - about a certain amount of processing that has been done to the product. It also leaves the consumer with information, in a general sense, how much preparation they're going to need to do at home before they can consume the product safely.[57]

Accordingly, any companies whose food products have met the time and temperature cooking requirements set by the USDA may use the term "fully cooked" on their labels.[58]

Ms. Quick's testimony regarding the label for Perdue chicken breast cutlets is noteworthy for the way Ms. Quick analyzed terms appearing on the package label.[59]

> The next page is a copy of a label for Perdue chicken breast cutlets. The

[55] Quick Dep., pp. 29, 30, 32, 33, 34, 37, 38, 84, 85, 88, 146, 169.
[56] Quick Dep., p. 28.
[57] Quick Dep., p. 31.
[58] Quick Dep., p. 168
[59] Most of the labels attached to the deposition were illegible.

> standard of identity [common or usual name for the product] that's involved in this particular case is the chicken breast standard. "Cutlet" is a description to let the consumer know that it is not the entire, intact chicken breast. The label also includes the term "baked" - - and it's real fuzzy, but I think this says "fully cooked" down near the bottom. That would be a description of the processing that's been applied to the product as well as the term "baked" being a description of the processing that's been applied. The generic term, product name, is chicken breast cutlets.[60]

Based on Ms. Quick's testimony, the generic term or product name is "chicken breast cutlets" and the terms "baked" and "fully cooked" merely describe the processing applied to the product. If "fully cooked" and "baked" are the same type of terms (*i.e.*, a description of the processing) and they are not generic terms, then the logical extension of respondent's position as articulated by Ms. Quick is that the word "baked," as well as "fully cooked," could be appropriated as a trademark for prepared foods (*i.e.*, BAKED brand chicken breast cutlets) assuming secondary meaning could be shown.[61]

[60] Quick Dep., pp. 37-38.

[61] We note that Dr. Masters testified that according to the FSIS directives, the word "baked" is not a generic term because it falls within the category of "fully cooked" processing. (Masters' Dep., p. 164). Later Dr. Masters testified that although she was not asked to opine as to whether the word "baked" is generic, she was not aware that it was defined as a regulatory word. (Masters' Dep., p. 169).

With respect to the use of the term "fully cooked" by the Federal Food Safety Inspection Service, Ms. Quick testified that the term "fully cooked" as used on labels for food products means "fully cooked, safe to eat, without further preparation."[62] Terms such as "ready to cook," "cooked," "ready to serve," or "ready to eat" may be used in lieu of "fully cooked."[63]

Ms. Quick offered her conclusion that assuming petitioner met the federal requirements for labeling its products as fully cooked, there was no reason it could not label them as such.

> Q. Assuming that [petitioner] meets the heat requirements and the time requirements for its meat entrees, do you see any reason why [petitioner] could not refer to its products as "fully cooked"?
>
> A. I believe that FSIS would approve his (sic) label bearing that term if he (sic) met the minimum requirements for a fully cooked product.
>
> Q. So your opinion is that [petitioner] could use the term "fully cooked" for its products?"
>
> * * *
>
> A. USDA would approve the label and therefore it could be applied to federally inspected meat and poultry product.
>
> * * *

[62] Quick Dep., pp. 42-43.
[63] Quick Dep., pp. 46-48; *see also* Master's Dep., pp. 106-107. 140-141, 146; Beeman Dep., p. 10.

> Q. Well, as an expert witness testifying in this case, if products by [petitioner] met the time and temperature requirement, do you have an opinion as to whether they (sic) could use "fully cooked" on their labels?
>
> * * *
>
> A. In my opinion, the label would be approved by FSIS and could be applied at a federally inspected plant.
>
> Q. So that's a yes you believe they (sic) could use or no they (sic) couldn't use it?
>
> * * *
>
> A. We could go through this all day. The label would be approved by the USDA and could be applied.
>
> * * *
>
> I believe they (sic) could use the label. Whether or not they would then run into some kinds of complications or problems because of a trademark violation goes beyond what I'm prepared to discuss.[64]

b. The expert testimony of Dr. Barbara Masters.

Dr. Masters opined that "fully cooked" is a category of food products that are prepared in such a way as to be ready-to-eat without the need for any further preparation.[65]

[64] Quick Dep., pp. 200-202; *see also* Master's Dep., p. 107 ("An establishment cannot put 'fully-cooked' on a label if they (sic) are not in compliance with FSIS regulations").
[65] Masters Dep., pp. 66-67, 105-106.

In other words, "fully cooked" is a broad category that "includes products that have been fully prepared and can be consumed by the public without further preparation."[66]

Discussion

Based on the record before us, we find that the term "fully cooked" identifies a type or category of prepared foods and that the relevant public understands the term "fully cooked" to refer to that class of products which includes "prepared entrees consisting primarily of meat." The commonly understood meaning of the term "fully cooked," petitioner's uses and third-party uses, all demonstrate that purchasers understand that the term "fully cooked" identifies a category of food processing. However, it is respondent's own use of that term, as well as the testimony of respondent's expert witness, that really cooks respondent's goose. Judith Quick clearly identifies "fully cooked" as a category of processed foods and she testifies that every competitor should be able to use it if it meets the labeling requirements.

That a commonly used term such as "fully cooked" is not the type of term generally associated with trademarks is a point not lost on Dr. McAdams, one of respondent's vice presidents, who consistently referred to respondent's trademark as HEB FULLY COOKED. Contrary to respondent's

[66] Masters' Dep., p. 191.

arguments in its brief, Dr. McAdams was quite clear that respondent's brand is HEB FULLY COOKED, not FULLY COOKED. As noted above, Dr. McAdams testified that when respondent uses the term "fully cooked" as trademark, it is always used in conjunction with HEB and in its exclusive trade dress. Furthermore, Dr. McAdams testified that when consumers see the term "fully cooked" on a label "they were able to understand what the product was and understand the benefits that products under HEB FULLY COOKED offered them."[67] Thus, the term "fully cooked" answers the question what are you? McCarthy on Trademarks and Unfair Competition §12.1 (4th ed. 2010) ("A mark answers the buyer's questions 'Who are you?' 'Where do you come from?' … But the name of the product answers the question 'What are you?'"). In this case, a prepared food.

In making the determination that the term "fully cooked" is generic, we readily acknowledge that "fully cooked" is not the name of a food product; rather, it is an adjective describing how food is processed. This adjectival use, however, does not remove "fully cooked" from being generic when used in connection with prepared foods. In this case, because the term "fully cooked" describes a category of processed foods, it should be freely available for use by competitors. *See In re Northland Aluminum Prod.,*

[67] McAdams Dep., p. 78.

Inc., 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985) (BUNDT for coffee cake); *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970) (CUSTOMBLENDED for gasoline held generic because category of gasoline was blended personally for motorist); *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 161 USPQ 606 (CCPA 1969) (PASTEURIZED for face cream held generic); *In re Preformed Line Prod. Co.*, 323 F.2d 1007, 139 USPQ 271 (CCPA 1963) (PREFORMED for preformed electrical equipment held generic); *Servo Corp. of Am. v. Servo-Tek Prod. Co.*, 289 F.2d 437, 126 USPQ 362 (CCPA 1960) (MATCHBOX for toy vehicles held generic because that category of toy cars was sold in matchbox-sized boxes).

Finally, while other terms such as such as "ready to cook," "cooked," "ready to serve," or "ready to eat" may be used in lieu of "fully cooked," it is well-settled that there can be more than one term to name a product. *Roselux Chem. Co. Inc. v. Parsons Ammonia Co., Inc.*, 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962) (a product may have more than one common descriptive name); *see also In re Sun Oil Co.*, 165 USPQ at 719 (Rich, J., concurring) ("*All* of the generic names for a product belong in the public domain")(emphasis in the original).

In view of the foregoing, we find that the term "fully cooked" is generic and, thus, not registrable on the

Supplemental Register. Accordingly, we put respondent's registration on ice.

Fraud

For the sake of completeness, we now turn to the issue of fraud. Petitioner alleged that the registration at issue was fraudulently obtained because respondent "knew of others … that were previously using the term 'fully cooked' to describe their products. [Respondent] was also aware that the terms (sic) 'fully cooked' are generic and/or so highly descriptive as to be incapable of acting as a trademark of the products being offered for sale."[68]

Fraud in obtaining a trademark registration "occurs when an applicant knowingly makes false, material misrepresentations of fact in connection with his application." *Torres v. Cantine Torresella S.R.L.*, 808 F.2d 46, 1 USPQ2d 1483, 1484 (Fed. Cir. 1986). To constitute fraud on the USPTO, the statement must be (1) false, (2) a material representation and (3) made knowingly. *Torres*, 1 USPQ2d at 1484. Furthermore, as this Board has stated, intent is an essential element of a fraud claim:

> Fraud implies some intentional deceitful practice or act designed to obtain something to which the person practicing such deceit would not otherwise be entitled. Specifically, it involves a willful withholding from the Patent and Trademark Office by an applicant or registrant of material information or

[68] Second Amended Petition for Cancellation ¶8.

> fact, which, if disclosed to the Office, would have resulted in the disallowance of the registration sought or to be maintained. Intent to deceive must be "willful". If it can be shown that the statement was a "false misrepresentation" (sic) occasioned by an "honest" misunderstanding, inadvertence, negligent omission or the like rather than one made with a willful intent to deceive, fraud will not be found. Fraud, moreover, will not lie if it can be proven that the statement, though false, was made with a reasonable and honest belief that it was true or that the false statement is not material to the issuance or maintenance of the registration. It thus appears that the very nature of the charge of fraud requires that it be proven "to the hilt" with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party.

First Int'l Svcs. Corp. v. Chuckles Inc., 5 USPQ2d 1628, 1634 (TTAB 1988), *citing Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1043-44 (TTAB 1981); *see also In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1940 (Fed. Cir. 2009) (emphasizing that fraud requires the intent to mislead the PTO).

In its brief, petitioner argues that even though respondent was aware that third parties displayed the term "fully cooked" on their labels, respondent made the false material statement that it is the owner of the mark sought to be registered (*i.e.*, FULLY COOKED) and that no other entity has to the right to use the mark and thereby

committed fraud on the PTO. However, there is simply no evidence that respondent intended to deceive the Trademark Office when it filed or prosecuted its application. It zealously argued that the term was merely descriptive (consistent with its registration on the Supplemental Register), not generic. As explained above, we disagree with respondent's legal conclusion. But in order to prove that respondent committed fraud, petitioner was required to show not only that respondent's statement was literally false, but also that respondent *knew* it to be false. *Am. Sec. Bank v. Am. Sec. & Trust Co.*, 571 F.2d 564, 197 USPQ 65, 67 (CCPA 1978)("Appellant misreads the cited statute and rules. They require the statement of *beliefs* about exclusive rights, not their actual possession. Appellant has produced no evidence impugning appellee's beliefs").

Furthermore, the examining attorney did not rely on respondent's claim to the exclusive right to use the term "fully cooked" because during prosecution of the application the examining attorney referenced numerous newspaper stories regarding "fully cooked entrees" produced by third parties. Thus, the Trademark Office did not rely on respondent's representations at issue in ultimately approving the application for registration. Accordingly, we find that the respondent did not knowingly make false statements with the

intent to deceive the Trademark Office and, therefore, respondent did not commit fraud during the prosecution of the application for registration.

Decision: The petition for cancellation is granted.