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

Proceeding	77816809
Applicant	Louisiana Fish Fry Products, Ltd.
Applied for Mark	EST. 1982 LOUISIANA FISH FRY PRODUCTS BRING THE TA
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Date	02/14/2013

**IN THE UNITED STATES  
PATENT AND TRADEMARK OFFICE**

IN RE APPLICATION OF: Louisiana Fish Fry Products, Ltd.

MARK: Est. 1982 Louisiana Fish Fry Products Bring the Taste of Louisiana Home!

SERIAL NO.: 77/816809 EXAMINER: Kergate, Amy L.

FILED: August 31, 2009 LAW OFFICE: 113

DOCKET NO.: 10030.028

**APPLICANT'S REPLY BRIEF**

**TABLE OF AUTHORITIES**

In re Wm B. Coleman Co.  
93 USPQ2d 2019 (TTAB 2010). . . . . 3

In re Merrill Lynch, Pierce, Fenner & Smith, Inc.  
4 USPQ2d 1141, 1143 (Fed Cir. 1987). . . . . 4

In re Cent. Sprinkler Co.  
49 USPQ2d 1194, 1196 (TTAB 1998). . . . . 5

In re Northland Aluminum Prods. Inc.  
227 USPQ 961, 964 (Fed. Cir. 1985). . . . . 5

In re Candy Bouquet Int’l, Inc.  
73 USPQ2d 1883, 1888 (TTAB 2004). . . . . 6

In re American Fertility Society  
188 F.3d 1341, 1347 (Fed. Cir. 1999). . . . . 7

15 U.S.C. § 1056(b). . . . . 8

TMEP § 1213.11. . . . . 8

T.M.E.P. § 1209. . . . . 8

Applicant files this reply brief after receiving the Examining Attorney's Appeal Brief in the above referenced manner and in accordance with 37 C.F.R. § 2.142(b)(1).

### **Argument**

#### **I. The Examiner's definition of the genus is incorrect.**

The examiner stated that an applied-for mark may be found generic where the identification is broadly worded and encompasses the narrower category of goods named in the mark. The examiner's argument is that applicant's identification of the class of goods, marinades, sauces and spices, is broadly worded and encompasses the narrower category of goods named in the mark, "Fish Fry Products." However, applicant's position is now and always has been that marinades, sauces, and spices is a narrow category of goods and that "Fish Fry Products" is a broad category of goods which contains not only marinades, sauces and spices but also batter, fish, oils, cooking utensils, serving pieces, beer, colas, desserts, and many other things which can be associated with fried fish or fish fries.

The examiner's argument is based upon several Board decisions; however, in the cited decisions, the Board was presented with facts that are the mirror opposite of the facts in the present matter. In those decisions, the board found marks to be generic when a broad identification of goods encompassed a narrow mark, not when a narrow identification of goods could potentially be encompassed by a broad mark, the situation in the present matter. For instance, the examiner relied upon *In re Wm B. Coleman Co.*, where the Board found that "Electric Candle Company" was generic for electric candles, a subcategory of applicant's broadly worded goods, "lighting fixtures."<sup>1</sup> In stark contrast, applicant's mark, "Fish Fry

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<sup>1</sup> 93 USPQ2d 2019 (TTAB 2010).

Products” is not a subcategory of “marinades, sauces, and spices;” rather, “marinades, sauces, and spices” could be a subcategory of “Fish Fry Products.”

Applicant also notes that the examiner yet again misstates applicant’s identification of goods and services in her brief. The examiner incorrectly states that applicant had identified the goods at issue as “marinades, sauces, and spices for use on or with fried fish or fish fries.” Examiner’s Brief at p. 2. However, crucially and at the core of this discrepancy is applicant’s unwavering assertion and intention that the goods at issue are all “marinades, sauces, and spices” not merely those intended for use on or with fried fish.

**II. The examiner has not met her burden of showing genericness by clear evidence because she has not identified why “Fish Fry Products” is a key feature of “marinades, sauces, and spices.”**

The examiner relies upon the premise that a word or term that is the name of a key feature or use of the goods can be generic for those goods and thus incapable of distinguishing source. Examiner’s Brief at p. 4. The examiner’s argument is missing two crucial elements: an explanation of the guidelines for differentiating a “key” use from a mere potential use and evidence that the particular alleged key feature, use on or with fried fish, renders the mark, “Fish Fry Products” generic for “marinades, sauces and spices.” The examiner bears the burden of proving these and all elements of genericness by clear evidence,<sup>2</sup> and because of the lack of connection between this alleged key feature and the goods at issue, the examiner has not met that burden.

In the present matter, the examiner is not claiming that “Fish Fry Products” is the generic name for “marinades, sauces, and spices;” the examiner is claiming that “Fried Fish Products” is

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<sup>2</sup> In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 4 USPQ2d 1141, 1143 (Fed Cir. 1987).

a key feature for “marinades, sauces, and spices.” In her appeal brief, the examiner has merely cited references from an internet search showing some of the goods and services can be used on or with fried fish, which applicant has admitted. However, one potential use out of dozens if not hundreds of potential uses is not a key feature because that would mean the mark was generic for dozens of things, the complete opposite intent of the genericness body of law. At the very least, the examiner has provided neither evidence, let alone clear evidence, that the public understands or uses “Fish Fry Products” for other items nor evidence to show what percentage of internet searches or other relevant evidence yields “marinades, sauces, and spices” used on or with fried fish and what percentage of internet searches yields “marinades, sauces or spices” used on other items.

Cases cited by the examiner shed light on the distinction of a use as a key feature of the goods at issue in a genericness refusal, although few if any of the cases use the term, “key feature.” The Board determined that “ATTIC” was generic for sprinklers because the “only evidence of record (that is, the one page of product literature) relating to applicant’s particular sprinklers indicates that the sprinklers at issue are for placement and use in one place, that is, in the attic.”<sup>3</sup> Further, the Board determined that “BUNDT” was generic for cake mix citing as one of the most persuasive reasons that common usage of the term “BUNDT” as a type of cake predated the applicant’s first use by more than 20 years.<sup>4</sup> In yet another finding of genericness, the Board determined that “CANDY BOUQUET” was generic for “gift packages of candy

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<sup>3</sup> See *In re Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1196 (TTAB 1998).

<sup>4</sup> *In re Northland Aluminum Prods. Inc.*, 227 USPQ 961, 964 (Fed. Cir. 1985).

because purchasers of candy and sellers of candy were using the exact term to refer to “gift packages of candy.”<sup>5</sup>

Applicant’s “marinades, sauces, and spices” are not designed for use on one item. Applicant has been using the mark, “FISH FRY PRODUCTS,” for over thirty years, and the examiner has not presented any senior user. The examiner has not presented any members of the public using the exact mark, “FISH FRY PRODUCTS,” to refer to “marinades, sauces, and spices.” Therefore, the examiner has not met her burden of showing by clear evidence that applicant’s mark, “FISH FRY PRODUCTS,” is generic for “marinades, sauces, and spices.”

**III. The public does not primarily understand “FISH FRY PRODUCTS” to be the genus name of “marinades, sauces, and spices.”**

The final inquiry in a genericness analysis is whether the relevant public primarily understands the mark to be the genus name of the goods at issue. In the present matter, the examiner has presented evidence that “marinades, sauces, and spices” can be used on or with fried fish. However, the examiner has presented no evidence that the public would ask for “FISH FRY PRODUCTS” when purchasing “marinades, sauces, and spices.” The examiner has presented no evidence because no evidence exists.

The examiner’s argument leads to irrational and illogical results. If “FISH FRY PRODUCTS” is generic for “marinades, sauces, and spices,” it is also generic for lemon, soda, plates, forks, and every conceivable vegetable or starch because all of those things can potentially be used on or with fried fish. Obviously, the public does not primarily understand “FISH FRY PRODUCTS” to be lemon, soda, plates, forks, or vegetables or starches. In the same

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<sup>5</sup> In re Candy Bouquet Int’l, Inc., 73 USPQ2d 1883, 1888 (TTAB 2004).

vein, the examiner has not shown by clear evidence that the public understands “FISH FRY PRODUCTS” to be “marinades, sauces, and spices.”

**IV. Applicant maintains that its mark, “LOUISIANA FISH FRY PRODUCTS,” has acquired distinctiveness under 15 U.S.C. § 1052(f).**

Applicant disputes the examiner’s contention that “FISH FRY PRODUCTS” is descriptive. As an initial matter, the examiner has again misnamed the goods at issue. In her argument, she has stated yet again that the goods at issue were “marinades, sauces, and spices *for use on fried fish.*” Applicant’s goods and services description includes no mention of fish, fried or otherwise. Many of the goods listed in applicant’s description would rarely, if ever, be used on fish (*e.g.*, filé), and all of the goods in the application can be used with a wide variety of foods. The goods listed in the present application have no more to do with fried fish than they do with lettuce, or potatoes.

Even if “FISH FRY PRODUCTS” were descriptive of applicant’s goods and services, applicant has established acquired distinctiveness. The examiner’s arguments to the contrary fail to address the situation set forth in *In re American Fertility Society*, when a mark within another mark has source identifying capability.<sup>6</sup> The Federal Circuit found that inquiry into the use of the terms within a phrase is not enough when there is a phrase which may have greater meaning than the sum of its parts. In the present matter, “FISH FRY PRODUCTS” is a mark within another mark, “LOUISIANA FISH FRY PRODUCTS,” just as in *In re American Fertility Society*. The examiner has presented no evidence as to the usage of the phrase as a whole and must be tasked with doing so, whether her argument is genericness, descriptiveness, or her very own “highly descriptive” category not found in the Spectrum of Distinctiveness.

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<sup>6</sup> 188 F.3d 1341, 1347, 51 USPQ2d 1832 (Fed. Cir. 1999).



The examiner has also argued that the disclaimers in some of applicant's other registered marks suggest that "FISH FRY PRODUCTS" is descriptive. Applicant reminds the Board that "No disclaimer, including those made under paragraph (d) of section 7 of this Act, shall prejudice or affect the applicant or registrant's rights then existing or thereafter arising in the disclaimed matter, *or his right of registration on another application if the disclaimed matter be or shall have become distinctive of this goods or services.*"<sup>7</sup> (emphasis added) The examiner's arguments to the contrary should be disregarded.

The major reasons for preventing registration of merely descriptive marks are to prevent the owner of a mark from inhibiting competition in the sale of particular goods and to maintain freedom of the public to use the language involved.<sup>8</sup> In the present matter, competition in the sale of marinades, sauces, and spices will not be inhibited by applicant's exclusive use of its mark, "FISH FRY PRODUCTS." In the same vein, the public does not need to use "FISH FRY PRODUCTS" to describe marinades, sauces, and spices because "FISH FRY PRODUCTS" is simply not descriptive of those goods.

Applicant directs the Board to the evidence of acquired distinctiveness submitted with its Appeal Brief and urges to Board to find that "FISH FRY PRODUCTS" is not descriptive of the goods in the application, or in the alternative, to find that applicant has established acquired distinctiveness under §2 (f), such that no disclaimer is required.

### **Conclusion**

For all the foregoing reasons, the examiner erroneously imposed a requirement that applicant disclaim "FISH FRY PRODUCTS" in Application Serial Number 77/816,809 for use

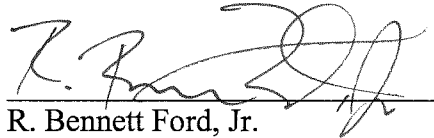
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<sup>7</sup> 15 U.S.C. § 1056(b); TMEP § 1213.11.

<sup>8</sup> T.M.E.P. § 1209.

in connection with “marinade, barbecue shrimp sauce mix, remoulade dressing, cocktail sauce, seafood sauce, tartar sauce, gumbo file, and cayenne pepper” in Class 30. The refusal to register the mark must therefore be reversed and remanded with instructions for the disclaimer requirement to be withdrawn.

Respectfully submitted:



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