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

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| Proceeding | 85729823 |
| Applicant | Birds Eye Foods LLC |
| Applied for Mark | BIRDS EYE SAVORY SKILLETS |
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| Submission | Reply Brief |
| Attachments | BIRDS EYE SAVORY SKILLETS.pdf(117389 bytes ) |
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| Date | 07/07/2014 |

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

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|---|---|---|---|
| Applicant: | Birds Eye Foods LLC | | |
| Mark: | BIRDS EYE SAVORY SKILLETS | | |
| Serial No. | 85/729,823 | Examining Atty: | Nicole Nguyen |
| Filed: | September 14, 2012 | Law Office: | 107 |
| Int'l Class | 29, 30 | | |

Commissioner for Trademarks
P.O. Box 1451
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## APPLICANT'S REPLY BRIEF

Applicant submits this Reply Brief pursuant to TBMP § 1203.02(c), in response to the Examining Attorney's Appeal Brief dated June 16, 2014. Applicant briefly responds to the points raised by the Examining Attorney in the Appeal Brief as follows.

## ARGUMENT

What does "savory skillets" mean? How can skillets be savory? These are questions that "SAVORY SKILLETS" begs, but the answer eludes when considering the phrase in context of the relevant goods: frozen entrées. When determining whether a mark or phrase is merely descriptive, the Board must consider the commercial impression of a mark or phrase as a whole. *In re Dial-A-Mattress Operating Corp.*, 57 U.S.P.Q.2d 1807, 1811 (Fed. Cir. 2001). Because a mark or phrase must be considered as a whole, the Board may not "dissect" the mark into isolated elements. *Id.* By dissecting it, it can be argued that the two terms individually have some descriptive significance as relates to the goods in the application. Along these lines, the Examining Attorney stated:

> In this case, both the individual components and the composite result are descriptive of applicant's goods and/or services and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods and/or services. Specifically, in the context of the applicant's goods, the term "SAVORY" directly references the flavor of the

> food, and the term "SKILLET" directly references both the manner of preparation and a type of meal. When used in combination, these terms do not form any incongruity or cause the consumer to make a mental leap in understanding the meaning of the term because the alternate definitions of each term are not applicable in the context of the applicant's goods.
>
> *Examining Attorney's Appeal Brief* at p. 5.

In stating this, the Examining Attorney makes the assumption that consumers understand "SKILLETS" to refer to a type of prepared frozen entrée, while case law and the Examining Attorney's evidence demonstrate otherwise. The Examining Attorney's "*complete* definition" of "SKILLET" includes (1) a frying pan, or (2) a small kettle or pot usually having three or four often long feet and used for cooking on the hearth. *Examining Attorney's Appeal Brief* at p. 8. Nowhere in this dictionary definition is "SKILLETS" defined as a type of frozen entrée. See also *Silver Skillet Food Prod. Co. v. Carnation Co.,* 159 U.S.P.Q. 47, 47-48 (TTAB 1968), which held that "SKILLETS" is arbitrary with respect to "canned and *frozen prepared foods*."

The Examining Attorney did provide a modicum of support for the statement that "'*skillet meal' is commonly used in the food industry to describe one-pot or one-pan meals ...*" *Examining Attorney's Appeal Brief* at p. 4. However, the record does not support the assumption that consumers will make the intuitive leap to understand "SKILLET" to mean "skillet meal." If this intuitive leap is not supported by evidence, it is mere supposition.

Further, the Examining Attorney argues that the "addition of the adjective 'SAVORY' to the descriptive term 'SKILLETS' merely describes the flavor of the frozen meals, and does not change the overall meaning of the term as a whole." *Examining Attorney's Appeal Brief* at p. 6. Merely stating that the addition of "SAVORY" to "SKILLETS" does not change the overall meaning is not enough. The Examining Attorney asserts that consumers will understand "SKILLETS" to mean "skillet meals" and that "SAVORY SKILLETS" refers to meals that are "pungent, not sweet." However, the Examining Attorney's evidence shows that "SAVORY" modifies a term that according to the dictionary definitions refers to a cooking vessel.

The cases upon which the Examining Attorney relies for this proposition are easily distinguishable from the instant case. In *In re Andes Candies Inc*., 178 USPQ 156 (C.C.P.A. 1973), the court determined that the CRÈME DE MENTHE mark for chocolate covered mint candy was descriptive because the consuming public would expect the candy to taste like crème de menthe liquor. Similarly, in *In re International Salt Company*, 171 U.S.P.Q. 832 (TTAB 1971), the Board decided the mark CHUNKY CHEESE was descriptive of a salad dressing that included chunky cheese as an ingredient.

The Examining Attorney's reliance on these cases is misplaced. Even if "SAVORY" is immediately perceived as a flavor or ingredient of Applicant's goods, both the CRÈME DE MENTHE and CHUNKY CHEESE marks are comprised *only* of a flavor and/or ingredient designator, while "SAVORY SKILLETS" contains an additional word – SKILLETS – which significantly impacts the commercial impression of the mark, and creates incongruity, as "SAVORY" modifies the term "SKILLETS." By relying on these cases, the Examining Attorney is inappropriately dissecting "SAVORY SKILLETS," and ignoring the distinctive commercial impression the phrase as a whole evokes.

The Examining Attorney has not established that the phrase "SAVORY SKILLETS" in its entirety has a recognized meaning. The Examining Attorney's argument that the screenshots from MargiesDreamDiner.com and SunfieldRestaurant.com demonstrate that the terms "'skillet' and 'savory skillet' are commonly used as descriptive terms by the food industry for goods that are the same or similar to the applicant's goods" is weak. *Examining Attorney's Appeal Brief* at p. 7. Merely because two webpages include the terms "SAVORY SKILLETS" together as a heading does not mean that Applicant's mark is descriptive. Moreover, these references are of little probative value as they are isolated, relate to restaurant items and services, and exhibit hallmark trademark usage. See TMEP § 904.03(i)(B)(1) (stating that a mark is more likely to be perceived as a trademark if it is prominently displayed and the mark is in larger front size than the surrounding text). Aside from these two restaurant excerpts, the Examining Attorney has provided no additional evidence demonstrating that the phrase

"SAVORY SKILLETS" has been adopted into the vernacular of the trade or that it has a readily understood meaning to the average purchaser.

To support a requirement for a disclaimer on the basis of mere descriptiveness, the Examining Attorney must find more than simply some connection between the phrase and the goods and services. The relationship must be such that it conveys a readily understood meaning of the goods to the average purchaser. *In re Intelligent Medical Systems, Inc.*, 5 U.S.P.Q.2d 1674 (TTAB 1987; *Holiday Inns, Inc. v. Monolith Enterprises*, 212 U.S.P.Q. 949 (TTAB 1981).

The Examining Attorney's evidence is insufficient in quantity. The evidence that the Examining Attorney did provide does not clearly support the Examining Attorney's contentions, but rather, is a mixture of trademark and non-trademark usages, and a mixture of uses of "skillets" and "skillet meals." This evidence does not satisfy the burden of establishing a prima facie case of descriptiveness.

Finally, with regard to the Examining Attorney's objection to the third party registrations referenced in Applicant's Appeal Brief, these are merely five of the eight third party registrations that Applicant referenced in the response to the first Office Action that Applicant filed on July 15, 2013.

Because all doubts regarding descriptiveness are to be resolved in an applicant's favor, this case calls for a reversal of the Examining Attorney's refusal.

Date: July 7, 2014

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