

This Opinion is a  
Precedent of the TTAB

Mailed: June 30, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Hodgdon Powder Company, Inc.*  
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Serial No. 85947962  
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Joseph B. Bowman, Esq. for Hodgdon Powder Company, Inc.

Linda Estrada, Trademark Examining Attorney, Law Office 104,  
Dayna Browne, Managing Attorney.

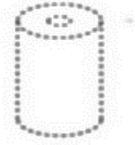
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Before Kuhlke, Bergsman and Hightower,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Hodgdon Powder Company, Inc. (“Applicant”) seeks registration on the Principal Register, under the provisions of Section 2(f) of the Trademark Act of 1946, 15 U.S.C. § 1052(f), of the color white applied to gunpowder for “preformed gunpowder charges for muzzleloading firearms,” in Class 13.<sup>1</sup> The drawing of the mark is set forth below:

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<sup>1</sup> Application Serial No. 85947962 was filed on May 31, 2013, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as July 1, 2008.



The mark is described as follows:

The mark consists of the color white applied to gunpowder. The broken lines depicting the configuration of the goods indicate placement of the mark on the goods and are not part of the mark.

Applicant's assertion that the mark in its application has acquired distinctiveness was initially based on Applicant's claim of substantially exclusive and continuous use of the color white on the goods in commerce for at least the five years immediately before the filing date of the application.

Applicant claimed ownership of Registration No. 3544042 for the mark WHITE HOTS, in standard character form, for the broader identification of "gunpowder."<sup>2</sup>

During the prosecution of its application, Applicant submitted additional evidence to support its claim that the color white used in connection with "preformed gunpowder charges for muzzleloading firearms" has acquired distinctiveness. The Trademark Examining Attorney deemed the evidence of acquired distinctiveness insufficient and refused registration on the ground that the color white used on Applicant's gunpowder products is not inherently distinctive under Sections 1, 2 and

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<sup>2</sup> Registered December 9, 2008; Sections 8 and 15 affidavits accepted and acknowledged.

45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127, and that Applicant's evidence of acquired distinctiveness does not support registration.<sup>3</sup> See *In re Capital Formation Counselors, Inc.*, 219 USPQ 916, 917 n.2 (TTAB 1983) ("Technically, the final refusal should have been one in accordance with Section 2(e)(1) with a finding that applicant's Section 2(f) evidence was insufficient to overcome the Section 2(e)(1) statutory prohibition. Section 2(f) is not a provision on which registration can be refused.")<sup>4</sup>

A product's color standing alone may qualify for trademark protection. *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1162 (1995). However, marks comprised of a single color alone are never inherently distinctive. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (citing *Qualitex Co. v. Jacobson Prods. Co.*, 34 USPQ2d at 1162-63); *In re Thrifty, Inc.*, 274 F.3d 1349, 61 USPQ2d 1121, 1124 (Fed. Cir. 2001).

We cannot find in the basic objectives of trademark law any obvious theoretical objection to the use of color alone as a trademark, where that color has attained "secondary meaning" and therefore identifies and distinguishes a particular brand (and thus indicates its "source").

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<sup>3</sup> According to the Trademark Manual of Examining Procedure, a color mark "should be refused registration because it is merely ornamentation and, therefore, does not function as a trademark, as required by §§1, 2, and 45 of the Trademark Act, 15 U.S.C. §§1051, 1052, and 1127." TMEP § 1202.05(a) (April 2016).

<sup>4</sup> See *Cold War Museum Inc. v. Cold War Air Museum Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive.").

*Qualitex Co. v. Jacobson Prods. Co.*, 34 USPQ2d at 1163. The greater the descriptiveness or non-distinctiveness of the proposed mark, the greater the burden on an applicant to demonstrate acquired distinctiveness. See *Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 6 USPQ2d at 1008 (“the greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning”). *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 424 (Fed. Cir. 1985) (“By their nature color marks carry a difficult burden in demonstrating distinctiveness and trademark character.”); *In re Lorillard Licensing Co.*, 99 USPQ2d 1312, 1316 (TTAB 2011).

Some background about gunpowder is helpful in determining whether the color white has acquired distinctiveness. “Gunpowder” is “an explosive mixture, as of potassium nitrate, sulfur, and charcoal, used in shells and cartridges, in fireworks, for blasting, etc.”<sup>5</sup> According to John Nosler, Executive Vice President/COO of Nosler, Inc., the owner of Registration No. 3949709 for the mark comprising white tip bullets, which was cited as a bar to the registration of Applicant’s mark in a refusal that was withdrawn during prosecution, “gunpowder has always been gray or black.”<sup>6</sup> Gunpowder is also referred to as black powder.

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<sup>5</sup> Dictionary.com based on the *Random House Dictionary* (2016). 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), including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, \_\_\_F.3d \_\_\_, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

<sup>6</sup> Nosler Declaration attached to the August 22, 2014 Response.

**Gunpowder**, any of several low-explosive mixtures used as propelling charges in guns and as blasting agents in mining. The first such explosive was black powder, which consists of a mixture of saltpetre (potassium nitrate), sulfur, and charcoal. ... Black powder is relatively insensitive to shock and friction and must be ignited by flame or heat. Though it has largely been supplanted by smokeless powder as a propellant for ammunition in guns, black powder is still widely used for ignition charges, primers, fuses, and blank-fire charges in military ammunition. With varied proportions of ingredients, it is also used in fireworks, time fuses, signals, squibs, and sparring charges for practice bombs.<sup>7</sup>

In response to a series of questions posed by the Trademark Examining Attorney under Trademark Rule 2.61(b), 37 CFR § 2.61(b), Applicant explained that gunpowder is typically black or grey and that the white color of Applicant's gunpowder serves no purpose other than to identify Applicant's product. The relevant queries and responses are:

(1) An explanation as to whether the identified color serves any purpose as used on the goods;

The color white serves no purpose other than to identify gunpowder manufactured by [Applicant].

(2) An explanation as to whether the identified color is a natural by-product of the manufacturing process for the goods;

No, the natural by-product in the manufacturing of gunpowder produces a black or grey product.

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<sup>7</sup> "Gunpowder," *Encyclopaedia Britannica* (November 17, 2014). The Board may take judicial notice of information from encyclopedias. *B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 6 USPQ2d 1719, 1721 (Fed. Cir. 1988) ("dictionaries and encyclopedias may be consulted"); *Productos Lacteos Tocumbo S.A. de C.V. v. Paletteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 n.61 (TTAB 2011); *In re Broyhill Furniture Industries Inc.*, 60 USPQ2d 1511, 1514 n.4 (TTAB 2001) (dictionary entries and other standard reference works).

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(5) An explanation as to the use of the identified color in applicants [sic] industry and any other similar use of color in applicants [sic] industry;

Other than Applicant's use of the color white, there is no known use of the color white for gunpowder from the time gunpowder, also commonly known as black powder, was first developed by Chinese alchemists in the 9<sup>th</sup> Century until today. For hundreds of years, therefore, gunpowder has always been black or gray in color.

\* \* \*

(7) An explanation as to whether competitors produce the goods in the identified colors and in colors other than the identified color;

The gunpowders produced by competitors are the traditional black or gray colors. No competitors produce a white gunpowder.<sup>8</sup>

Applicant also explained that the color white is not functional when used in connection with gunpowder.<sup>9</sup> Accordingly, white gunpowder is an anomaly contrary to consumers' expectations regarding the appearance of the product.

Applicant's evidence of acquired distinctiveness includes the following:

1. The declaration filed as part of the application attesting to Applicant's substantially exclusive and continuous use of the color white in connection with "preformed gunpowder charges for muzzleloading firearms" for at least the five years preceding the filing date of the application;

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<sup>8</sup> January 22, 2014 Response.

<sup>9</sup> August 22, 2014 Response.

2. Applicant conducted an informal survey at the SHOT trade show in Las Vegas in January 2014.<sup>10</sup> The survey asked respondents attending the trade show the following questions:
  - a. How many companies make a white gunpowder?
  - b. Which of these companies make a white gunpowder: Goex, Hodgdon/IMR, Schuetzen/Swiss, Western Powder Buckhorn 209, Alliant/Black Mag, or American Pioneer/Shockey's Gold? and
  - c. Are you a muzzleloader shooter?

Applicant reported that “just over 90% of the survey respondents listed the numeral ‘1’ in response to the first question ... and the same percentage of respondents also correctly checked only the entry for ‘Hodgdon/IMR’ [Applicant] in response to the second question.

3. Chris Hodgdon, Applicant’s Sales/Public Relations Manager, attested to the following facts:
  - a. Applicant, through its IMR Powder Division, introduced white gunpowder under the trademark WHITE HOTS on July 1, 2008;<sup>11</sup>
  - b. Applicant’s packaging advertises that WHITE HOTS is “The Only White Gunpowder.” A copy of the package is depicted below:<sup>12</sup>

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<sup>10</sup> January 22, 2014 Response.

<sup>11</sup> Hodgdon Decl. ¶3 (January 22, 2014 Response).

<sup>12</sup> *Id.* at ¶5 and Exhibit B.

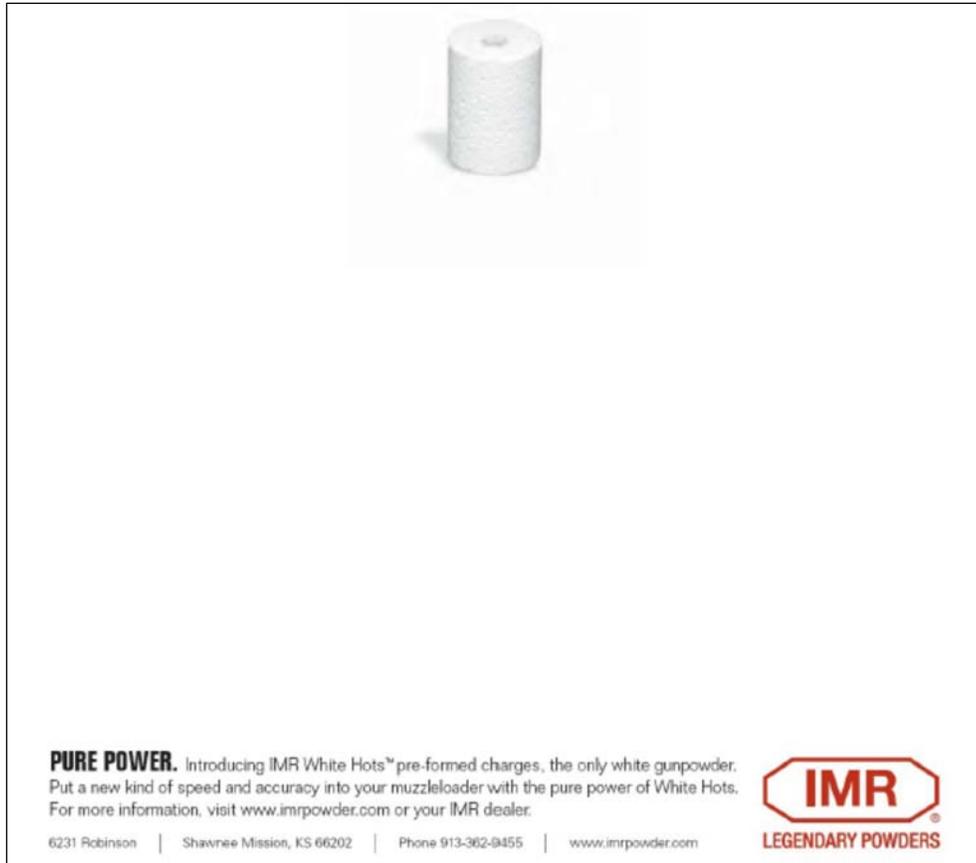


c. Applicant’s advertising touts that it sells “the only white gunpowder.”<sup>13</sup> In 2009, the advertisement shown below appeared in magazines targeting participants in shooting sports resulting in more than 6 million consumer impressions based on the circulation from those magazines. Applicant’s advertising expenditures for those advertisements were “in excess of \$140,000.”<sup>14</sup>

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<sup>13</sup> *Id.* at ¶6 and Exhibit C.

<sup>14</sup> *Id.* at ¶7 and Exhibit C.



- d. Subsequently, the above-noted advertisement appeared in fewer magazines but it still accounted for 3.5 million consumer impressions in 2010, 1.5 million consumer impressions in 2011, 1.6 million consumer impressions in 2012, and 1.8 million consumer impressions in 2013;<sup>15</sup>
- e. From 2010 through 2013, Applicant spent \$40,000, \$24,000, \$28,000, and \$34,000 respectively for the print advertising discussed supra;<sup>16</sup>
- f. From 2009 through 2011, Applicant ran a television advertisement on *Buckmasters TV*, *the Jackie Bushman Show*, and on various shows on *The*

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<sup>15</sup> *Id.* at ¶¶8-11.

<sup>16</sup> *Id.*

*Outdoor Channel* “showing the white gunpowder being loaded into a firearm” with the audio “The mark of pure power. Put the only white gunpowder in your muzzle loader. New White Hots from IMR.”<sup>17</sup> The television commercial created 1.2 million consumer impressions in each year it was aired;<sup>18</sup>

- g. Applicant has distributed more than 2,000 color brochures for its WHITE HOTS “preformed gunpowder charges for muzzleloading firearms” at sporting events, shooting, hunting, and outdoor trade shows and NRA annual meetings. The inside panel displayed below features the advertising tagline “The Only White Gunpowder.”<sup>19</sup>

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<sup>17</sup> *Id.* at ¶¶12-13.

<sup>18</sup> *Id.* at ¶¶13-15.

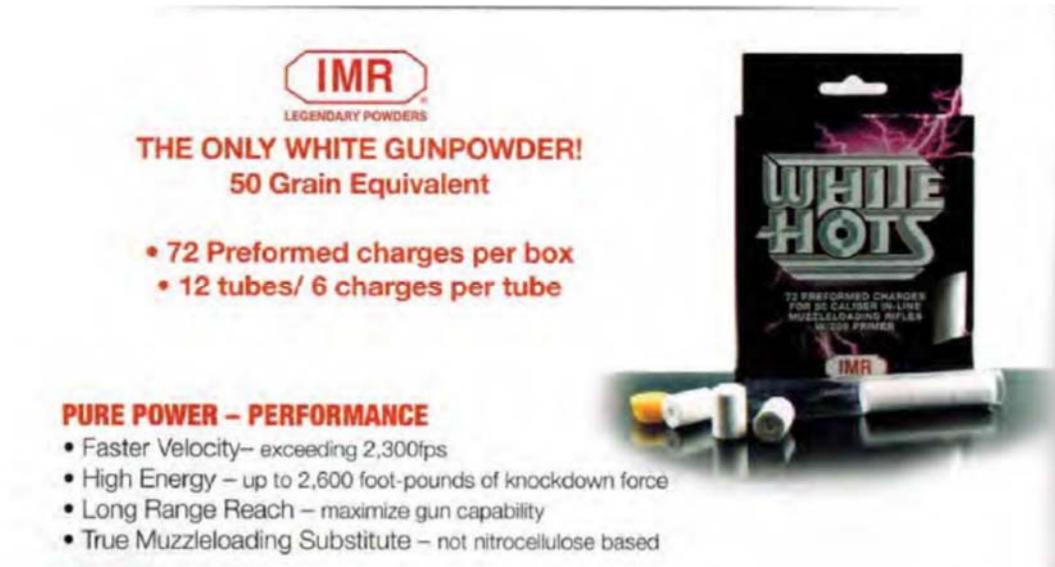
<sup>19</sup> *Id.* at ¶16 and Exhibit E.



h. Applicant has distributed more than 2,000 manuals providing safety information and loading data for its various products at sporting events, shooting, hunting, and outdoor trade shows and NRA annual meetings. The excerpts for Applicant’s WHITE HOTS “preformed gunpowder charges for muzzleloading firearms” features the advertising tagline “The Only White Gunpowder.”<sup>20</sup>



<sup>20</sup> *Id.* at ¶17 and Exhibit F.



- i. Since 2008, Applicant’s sales of white “preformed gunpowder charges for muzzleloading firearms” have exceeded \$3,500,000.<sup>21</sup>

The Trademark Examining Attorney argues that “the evidence does not establish that the relevant public has come to view the proposed mark as a source indicator for the identified goods. The record features little direct evidence that the relevant consumers, to whom Applicant’s goods are directed, view the proposed color mark as a distinctive source indicator for the identified goods.”<sup>22</sup> For example, the Trademark Examining Attorney contends that Applicant’s advertisements are “insufficient as ‘look for’ evidence and do not establish that consumers view the proposed color mark as a source indicator for the identified goods.”<sup>23</sup> To the contrary, according to our review of the record, gunpowder is black or gray, only Applicant manufactures white

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<sup>21</sup> *Id.* at ¶18 (misnumbered as 16).

<sup>22</sup> 6 TTABVUE 11.

<sup>23</sup> 6 TTABVUE 10.

gunpowder, the gunpowder is sold under the word mark WHITE HOTS, and the advertising for Applicant's products features the tagline "The Only White Gunpowder." Accordingly, we find that Applicant's advertising is effective "look for" advertising.

The Trademark Examining Attorney asserts that the informal survey conducted by Applicant at the SHOT trade show in Las Vegas is not persuasive because

- a. Applicant did not submit the completed survey forms;
- b. There is no information regarding the survey methodology;
- c. There is no information about the participants; and
- d. There is no information regarding the number of respondents who participated in the survey.<sup>24</sup>

Because the survey was not professionally conducted according to accepted principles, the survey would not be admissible in an *inter partes* proceeding and, standing alone, it is insufficient to prove that the color white used in connection with "preformed gunpowder charges for muzzleloading firearms" has acquired distinctiveness. But in light of our finding concerning Applicant's detailed evidence of effective "look for" advertising, the invalidity of this "survey" does not matter.

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<sup>24</sup> 6 TTABVUE 10-11.

When we review the totality of the evidence, we find that the color white used in connection with “preformed gunpowder charges for muzzleloading firearms” has acquired distinctiveness.

**Decision:** The refusal to register Applicant’s mark is reversed.