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

Ex parte appeal no.	88960633
Appellant	Uman Diagnostics AB
Applied for mark	NF-LIGHT
Correspondence address	KIRA KHANH MCCARTHY WOLF GREENFIELD & SACKS PC 600 ATLANTIC AVENUE BOSTON, MA 02210 UNITED STATES Primary email: cxltrademarks@wolfgreenfield.com Secondary email(s): kkmtrademarks@wolfgreenfield.com 617-646-8000
Submission	Appeal brief
Attachments	Q0052.20013US01.Ex Parte Appeal.88960633.pdf(77248 bytes)
Appealed class	Class 001. First Use: Dec 31, 2012 First Use In Commerce: Dec 31, 2012 All goods and services in the class are appealed, namely: Specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions
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Date	04/22/2022

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

Applicant: Uman Diagnostics AB	Examining Attorney:
Serial No.: 88/960633	Lyal Fox
Filed: June 11, 2020	Law Office: 113
Mark: NF-LIGHT	

APPLICANT'S BRIEF ON APPEAL

I. INTRODUCTION

This is an appeal from the Official Action of March 17, 2021, which refusal was maintained after the Examining Attorney twice denied reconsideration to register Applicant's mark NF-LIGHT for "specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions" in International Class 1.

II. SUMMARY OF THE PROCEEDINGS

On June 11, 2020, Applicant filed the present application for NF-LIGHT for "kits and reagents for detecting analytes in human and animal samples" claiming acquired distinctiveness under § 2(f) of the Trademark Act, 15 U.S.C. § 1052(f) based on a statement of five or more years' exclusive use (37 C.F.R. § 2.41). The application was assigned Application Serial No. 88/960,633. On September 17, 2020, the Examining Attorney initially refused registration of the application contending the mark was generic under §§ 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, 1127. More specifically, the Examining Attorney claimed that NF is an abbreviation for

"neurofilament," and that Applicant "uses the mark, NL-LIGHT [sic], as an abbreviated form of NEUROFILAMENT LIGHT, and that the applicant's goods are specifically for 'quantification of (<3 hours) of neurofilament light in cerebrospinal fluid,' for the purposes of detecting neurological conditions." Non-Final Office Action dated Sep. 17, 2020 at pp. 2-3. In the alternative, the Examining Attorney denied registration of Applicant's mark, deeming it to be merely descriptive under § 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). The Examining Attorney also rejected Applicant's claim of acquired distinctiveness under § 2(f), 15 U.S.C. § 1052(f). Finally, the Examining Attorney required that Applicant amend the description of its goods to clarify the underlying identification.

On March 17, 2021, Applicant timely responded to the Non-Final Office Action asserting that its mark is not generic for the applied-for goods because NF-LIGHT is a coined term and not an abbreviation of "neurofilament light." Instead, in Applicant's industry "neurofilament light" is abbreviated as NfL or NEFL, and not NF-LIGHT. Response to Non-Final Office Action dated Mar. 17, 2021 at p. 12. Applicant also argued that its mark is at-most suggestive and had acquired distinctiveness because it is recognized as the gold standard for specimen analysis kits used within Applicant's industry to detect neurological diseases and disorders. Finally, Applicant amended the identification of its goods to "specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples."

The Examining Attorney made final the refusal to register on March 27, 2021 maintaining the genericness refusal and, the mere descriptiveness refusal (in the

alternative), and rejected Applicant's claim of acquired distinctiveness as insufficient. The Examining Attorney also required further specificity with respect to Applicant's identification of goods.

On September 27, 2021, Applicant timely filed a Notice of Appeal and Request for Reconsideration of the final refusal. In its Request for Reconsideration, Applicant maintained that NF-LIGHT is not generic as applied to Applicant's goods because the relevant purchasing public – researchers and scientists – perceive NF-LIGHT as a source indicator and not as an abbreviation for "neurofilament light." Applicant identified dozens of third-party uses of NF-LIGHT as a source indicator for Applicant's goods. Applicant also amended the identification of its goods to "specimen analysis kits containing medical diagnostic reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions."

On October 18, 2021, the Examining Attorney denied Applicant's Request for Reconsideration, and on October 21, 2021 the Trademark Trial and Appeal Board ("TTAB" or "the Board") issued an Order resuming this appeal. On December 20, 2021, Applicant submitted a second Request for Remand seeking suspension of the appeal so that Applicant could reclassify the identified goods and submit additional evidence in support of registration. Applicant amended the identification of goods to "specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions" in International Class 1.

On December 28, 2021, the Board granted Applicant's request and restored jurisdiction to the Examining Attorney. On January 18, 2022, the Examining Attorney accepted Applicant's amendment reclassifying its goods, but maintained the genericness and descriptiveness refusals.

On January 24, 2022, jurisdiction was restored to the Board, and the Board granted Applicant until March 25, 2022 to file its brief.

III. ARGUMENT

The Examining Attorney contends that NF-LIGHT for "specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions" is generic and is not capable of indicating source. In the alternative, the Examining Attorney maintains that Applicant's mark is merely descriptive, rejecting Applicant's claim of acquired distinctiveness under § 2(f). In this appeal, Applicant demonstrates that the Examining Attorney's refusal to register the mark NF-LIGHT on the grounds of genericness and mere descriptiveness are wrong, and should be reversed.

A. SECTIONS 1, 2 & 45 REFUSAL – GENERIC

i. Applicant's Mark Is Not Generic As Applied To Its Goods Because The Relevant Purchasing Public Does Not Understand NF-LIGHT Primarily As A Common Or Class Name

A term is generic if the relevant purchasing public understands the term primarily as the common or class name for the goods. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001). A two-part test is used to determine whether a term is generic. First, the genus of goods at issue must be established and

second, to be deemed generic, the relevant public must understand the term primarily to refer to that genus of goods. *Id. citing H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 728 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). Any doubt on the issue of genericness is to be resolved in favor of the applicant. *In re Waverly Inc.*, 27 USPQ2d 1620, 1624 (TTAB 1993). When a proposed mark is refused registration as generic, the Trademark Examining Attorney has the burden of proving genericness by "clear evidence." *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

Here, it is undisputed that the genus of goods at issue is defined as "specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions." Thus, the next step in the genericness analysis is to determine whether the relevant public understands the designation NF-LIGHT to refer to that genus of goods. Applicant submits that relevant consumers do not understand NF-LIGHT as the common or class name for Applicant's goods.

Neurofilament light, abbreviated in Applicant's industry as NfL or NEFL, is a naturally occurring protein indicative of neuronal (i.e., nerve cell damage). Request for Reconsideration dated Sep. 27, 2021 at p. 9. The substance being analyzed using reagents and assays as the "target analyte." *Id.* The target analyte, in this case NfL or NEFL, is analyzed using reagents and assays such as Applicant's NF-LIGHT product. Neurofilament light is ***not*** an interchangeable term for the **reagents and assays** contained in Applicant's specimen analysis kits.

Applicant's goods provided under the NF-LIGHT mark are manufactured in and for a highly specialized field and are marketed to extremely sophisticated purchasers who exercise a high degree of care in their purchasing decisions. The goods are used not by ordinary consumers, but by medical and clinical researchers in labs and institutions, as clearly delineated in the identification of goods. The medical and clinical research conducted by these individuals are highly regulated under the U.S. Food Drug and Cosmetic Act, the Clinical Laboratory Improvements Act, the Declaration of Helsinki, and similar laws and regulations. Response to Non-Final Office Action dated Mar. 17, 2021 at p. 11. The medical and clinical researchers using Applicant's products (i.e., the "relevant public"), operate in a highly regulated and technical field at the cutting edge of research on neuronal diseases such as Alzheimer's disease, multiple sclerosis, traumatic brain injury, and amyotrophic lateral sclerosis.

In this highly specialized, medical research field, the abbreviation for "neurofilament light" is NfL or NEFL, ***not*** NF-LIGHT. This fact is confirmed by the multitude of peer-reviewed journal articles that have been previously made of record. *See* Response to Non-Final Office Action dated Mar. 17, 2021, Exhibits A through I, pp. 20-105; Request for Reconsideration dated Sep. 27, 2021, Exhibits A through D, pp. 18-49; Second Request for Reconsideration dated Dec. 20, 2021, Exhibits A through I and K through X, pp. 23-102 and 106-369. Indeed, the Examining Attorney's own evidence confirms that the relevant public refers to "neurofilament light" as NfL or NEFL. *See* Non-Final Office Action dated Sep. 17, 2020 at pp. 8, 10-17 and Final Office Action dated Mar. 27, 2021 at pp. 12-24.

Moreover, in the industry for goods such as Applicant's specimen analysis kits, the relevant consumers describe the reagents and assays (i.e., the goods) by stating the product brand name (i.e., the trademark) followed by the name of the target analyte and then the generic designation of the type of kits. The table immediately below demonstrates, by referencing examples the Examining Attorney cited to in the Non-Final and Final Office Actions issued in this case, how products such as Applicant's are labeled in the medical research industry:

Reference	**Product**	**Trademark**	**Target Protein/Analyte**	**Generic Descriptor**
Office Action dated Sep. 17, 2020 at p. 15	LifeSpan Biosciences NF-L / NEFL ELISA Kit	LifeSpan Biosciences	NF-L / NEFL	ELISA Kit
Office Action dated Sep. 17, 2020 at p. 15	Biomatik Human Neurofilament Light Polypeptide (NEFL) ELISA Kit	Biomatik	Human Neurofilament, Light Polypeptide (NEFL)	ELISA Kit
Office Action dated Sep. 17, 2020 at p. 15	MyBioSource.com Canine Neuofilament light polypeptide (NEFL) ELISA Kit	MyBioSource.com	Canine Neurofilament light polypeptide (NEFL)	ELISA Kit
Office Action dated Sep. 17, 2020 at p. 15	Aviva Systems Biology NEFL High Sensitivity ELISA Kit	Aviva Systems Biology	NEFL	High Sensitivity ELISA Kit
Office Action dated Sep. 17, 2020 at p. 16	"MagQu" Neurofilament light IMR Reagent	MagQu	Neurofilament light	IMR Reagent
Office Action dated Mar. 27, 2021 at p. 12	Elabscience Human NEFL (Neurofilament Light Polypeptide) ELISA Kit	Elabscience	Human NEFL (Neurofilament Light Polypeptide)	ELISA Kit
Office Action dated Mar. 27, 2021 at p. 16	Aviva Systems Biology Human Nfl Elisa Kita	Aviva Systems Biology	Human NfL	Elisa Kit
Office Action dated Mar. 27, 2021 at p. 16	Biobyt Human Neurofilament Light Elisa Kit	Biorbyt	Human Neurofilament Light	Elisa Kit
Office Action dated Mar. 27, 2021 at p. 20	Myriad RBM's Ultrasensitive Simoa™ NF-L Immunoassay	Myriad RBM's Ultrasensitive Simoa™	NF-LF	Immunoassay

This same formatting is used by Applicant for its product:

Reference	Product	Trademark	Target Protein/Analyte	Generic Descriptor
Office Action dated Mar. 27, 2021 at p. 9	NF-LIGHT Neurofilament light ELISA	NF-LIGHT	Neurofilament light	ELISA

As shown in the tables above, in Applicant's industry, companies manufacturing products similar to those of Applicant utilize a very particular naming convention. This common form for product names is expected by the highly sophisticated researchers and scientists purchasing these products. The product listings all include non-trademark usage of the target analyte by referring only generically to the analyte. Uniformly, these products refer to "neurofilament light" (or the abbreviations NfL or NEFL) as the target analyte. None of the references to third-party products shows use of Applicant's mark, NF-LIGHT, as an abbreviation for the target analyte or as a generic term to describe the diagnostic kits used to detect the target analyte. This clearly demonstrates that the relevant public understands the important distinction between trademark usage and reference to the target analyte. When referring to the particular product, common usage in the industry is to include the target analyte immediately followed by a generic descriptor (e.g., neurofilament light ELISA Kit). In cases where a trademark is used to identify the source of a particular product used to detect a target analyte, Applicant's industry states the trademark first, the target analyte second, and the generic description of the product last. Applicant's industry clearly conforms to a particular naming convention when referring to their products, especially considering how critical the goods at issue are in the medical research industry, and how the highly sophisticated, relevant public is exposed to, understands, and expects consistent usage in this manner.

Furthermore, Applicant has made of record declarations signed by members of Applicant's industry which confirm that the relevant public understands NF-LIGHT as a source indicator. These signatories include Niklas Norgren, Vice President, Managing Director of Uman Diagnositcs AB and Jens Kuhle, Head of the Multiple Sclerosis Centre, Senior Physician of University Hospital Basel. Request for Reconsideration dated Sep. 27, 2021 at pp. 67-73. Of particular note is Mr. Kuhle's declaration which states "[t]he mark NF-LIGHT refers to Uman's products for detecting the Nf-L protein" and further that Applicant's products "are widely recognized by researchers and biopharmaceutical and diagnostic companies world-wide as the premier solution for detecting Nf-L to advance the development of diagnostic tests and treatments for neurodegenerative conditions such as multiple sclerosis, Alzheimer's, and traumatic brain injury." *Id.* at pp. 72-73.

This evidence makes clear that the relevant public understands that NF-LIGHT is not an abbreviation for neurofilament light, but instead perceives it as a trademark used to identify the source of Applicant's products.

ii. The Evidence Submitted By The Examining Attorney Is Insufficient To Support A Genericness Refusal

The examining attorney has the burden of proving that a term is generic by "clear evidence." *Merrill Lynch*, 4 USPQ2d at 1143. The Federal Circuit has held that the United States Patent & Trademark Office ("USPTO") failed to meet its burden of showing a proposed mark is generic in cases where there is a "mixed record" of usage. *Id.* ("The mixture of usages unearthed by the NEXIS computerized retrieval service does not show, by clear evidence, that the financial community views and uses the term CASH

MANAGEMENT ACCOUNT as a generic, common descriptive term for the brokerage services to which Merrill Lynch first applied the term.").

A similar failure to provide clear evidence of genericness on the part of the Office also occurred in *In re Am. Online, Inc.*, 77 USPQ2d 1618 (TTAB 2006). There, the TTAB concluded, due to the mixed record in that case, that the Examining Attorney failed to establish, by clear evidence, that members of the relevant purchasing public would understand INSTANT MESSENGER as generic for telecommunication services. While the Examining Attorney in *Am. Online* submitted "significant evidence" to support the genericness refusal, "the evidence of generic use [was] offset by [the] applicant's evidence that shows not only a significant amount of proper trademark use but also trademark recognition by customers, publishers, and third parties." *Id.* at 1623.

Here, Applicant has provided the USPTO with at least **23** pieces of evidence of third parties clearly referencing NF-LIGHT in connection with the products provided by Applicant. It is worth emphasizing that the references submitted by Applicant that demonstrate clear trademark use of NF-LIGHT are highly probative because they are written by leading authors in Applicant's industry and are published in well regarded, peer-reviewed journals. Authors of these publications are also the researchers that purchase Applicant's NF-LIGHT goods (i.e., the "relevant public"). The highly respected and prestigious nature of the journals which, along with the skills and knowledge of their authors, only adds to the probative value of this evidence. Indeed, it is the nature of these journals that accuracy and precision when referencing the products used by these researchers in their studies are not only important – they are essential. These journals carefully call out NF-LIGHT as Applicant's mark. For instance,

Applicant's evidence includes publications from *Neurology*, the leading source for medical and clinical researchers within Applicant's field. Second Request for Reconsideration dated Dec. 20, 2021 at p. 18. Other journals included as evidence include *Neurology: Neuroimmunology & Neuroinflammation*, *Nature Communications*, *The Multiple Sclerosis Journal*, *The Journal of Immunological Methods*, *Amyotrophic Lateral Sclerosis and Frontotemporal Degeneration*, *Alzheimer's Research and Therapy*, and *BioCompare*. These are the most prestigious and highly regarded, peer-reviewed journals within Applicant's industry and they all refer to NF-LIGHT as a source indicator for Applicant's products.

The Examining Attorney wrongly objected to these exhibits arguing that Applicant "has provided screenshots or printouts of scientific articles from online webpages that do not specify the date it was downloaded or accessed and the complete URL." Denial of Request for Reconsideration dated Jan. 18, 2022. The Examining Attorney is incorrect. The evidence submitted by Applicant are not screenshots from online webpages, but are instead downloaded articles from peer-reviewed journals within Applicant's industry. Indeed, many of the articles submitted as evidence had to be purchased by Applicant in order to access them. Regardless, "in an ex parte proceeding the Board tolerates some relaxation of the technical requirements for evidence and focuses instead on the spirit and essence of the rules of evidence." TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1208 (2021). Thus, the Examining Attorney's objection is meritless and should be overruled.

iii. Notoriety of Applicant's NF-LIGHT Product As The Leading Brand of NfL Antibodies Led To The Purchase Of Applicant By Quanterix Corporation

Applicant was founded in 2006 and focuses on developing reagents for use in enzyme-linked immunosorbent assays that are commonly known in the industry as ELISA tests. ELISA tests are used to detect proteins and other analytes. A "target analyte" is the substance measured by an ELISA kit. Antibodies are critical components used in ELISA tests, and antibodies react with target analytes in the sample being analyzed so that antibodies with strong performance characteristics lead to ELISA assays with superior sensitivity (i.e., the ability to detect the analyte) and specificity (i.e., the ability to detect the target analyte to the exclusion of other substances). Request for Reconsideration dated Sep. 27, 2021 at pp. 68-69.

Applicant's products detect the neurofilament light protein that is generated in the human brain. Medical and clinical researchers have discovered that NfL is a marker for neurodegenerative diseases such as Alzheimer's disease, multiple sclerosis, and traumatic brain injury. Applicant coined the mark NF-LIGHT and has been using it as a trademark for it is kits containing reagents and assays since at least November 13, 2012. Applicant's breakthrough antibodies have been used to carry out the latest research on neuronal diseases. Applicant's antibodies are widely recognized by researchers and biopharmaceutical and diagnostic companies world-wide as the premier solution for detecting NfL to advance the development of diagnostic tests and treatments for neurodegenerative conditions such as Alzheimer's, multiple sclerosis, and traumatic brain injury. *Id.*

Applicant's NF-LIGHT antibodies and reagents were initially used to test for NfL in cerebrospinal fluid ("CSF"). CSF is the fluid that surrounds the spinal cord which doctors obtain through spinal taps. Spinal taps are invasive and uncomfortable

procedures, which limits their widespread adoption in medical research and testing. However, small amounts of NfL pass through the blood-brain barrier from CSF into the bloodstream and other bodily fluids. Blood tests are simpler, and more widely used medical procedures compared to spinal taps. While the concentration of NfL in the human bloodstream is typically too low to be detected using conventional ELISA tests, Applicant's NF-LIGHT antibodies and reagents allows for the testing of NfL through human blood. *Id.*

Founded in 2007, Quanterix Corporation develops ultra-sensitive ELISA technology marketed under the trademark SIMOA®. Quanterix's SIMOA technology builds on conventional ELISA chemistries, but is up to 1,000 times more sensitive than conventional ELISA, thereby allowing researchers to use Uman's NF-LIGHT antibodies to conduct cutting-edge medical research to detect NfL, not only in CSF, but in the bloodstream. This developed new avenues for research into and potential treatments for some of the world's most debilitating neurodegenerative diseases. The innovative research carried out using Applicant's NF-LIGHT products and described in the world's leading, peer-reviewed journals are just a few examples of the research and notoriety of Applicant's NF-LIGHT products. *Id.* at 69-70.

On June 26, 2019, Quanterix Corporation announced that it would acquire Uman Diagnositics AB for a total purchase price of $22.5 million. *Id.* at pp. 50-53. Quanterix Corporation specifically targeted Applicant as the "World's Leading" antibody supplier specifically to combine Applicant's antibodies with Quanterix's technology to create remarkably innovative analysis kits used by top researchers and scientists around the

world. The notoriety of Applicant's NF-LIGHT products was a major factor in the sale of Applicant's company. *Id.*

As a result, NfL has seen dramatic growth as a neurological biomarker since the development of assays that can reliably measure NfL in blood using Uman's NF-LIGHT antibodies and Quanterix's SIMOA technology. This innovation allowed research, previously limited primarily to CSF, to expand significantly and has led many of the world's foremost neurology researchers and clinicians to conclude that NfL may be one of the most clinically relevant brain biomarkers available today. Due to the significant efforts by Uman and Quanterix, Applicant's NF-LIGHT product remains the best-in-class for highly sensitive and specific NfL detection in blood serum or plasma. *Id.* at p. 70.

In sum, because the relevant public does not perceive NF-LIGHT primarily as a common or class name for Applicant's goods, coupled with the notoriety of Applicant's NF-LIGHT product, the Examining Attorney has not met his burden of establishing, by clear evidence, that a genericness refusal is proper. Since any doubt regarding the issue of genericness should be resolved on an applicant's behalf, the Board should reverse the refusal to register based on §§ 1, 2, and 45 of the Trademark Act.

B. SECTION 2(e)(1) REFUSAL – MERELY DESCRIPTIVE

The Examining Attorney has, in the alternative, refused registration under Trademark Act § 2(e)(1) on the ground that NF-LIGHT is merely descriptive of Applicant's goods. The Examining Attorney improperly concluded that the wording NF-LIGHT is descriptive "of the purpose of the applied-for goods, namely, that the applicant's reagents, assays, and kits are used to detect NEUROFILAMENT LIGHT [sic]." Final Office Action dated Mar. 27, 2021 at p. 5. This mere descriptiveness refusal

is improper for the reasons discussed in the preceding sections (incorporated herein by reference), demonstrating that NF-LIGHT is a trademark, not a descriptor, in the medical research field. Furthermore, NF-LIGHT is a play on words that requires mature thought and multi-stage reasoning to determine whether it has any meaning as applied to Applicant's goods.

i. Applicant's Mark Is At-Most Suggestive And Therefore Is Registrable As A Distinctive Trademark

As discussed above, NF-LIGHT is recognized as a source indicator by relevant consumers, and therefore it cannot be refused registration as being merely descriptive. However, even without such proof of consumer recognition, the § 2(e)(1) refusal cannot stand.

NF-LIGHT, as used in connection with Applicant's goods, is at-most suggestive. More specifically, NF-LIGHT does not describe any feature or characteristic of Applicant's goods with the immediacy and the required degree of particularity to support a § 2(e)(1) refusal. *Dial-A-Mattress*, 57 USPQ2d at 1812.

"It is well settled that a term is considered to be merely descriptive of goods . . . if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods . . ." *In re Styleclick.com, Inc.*, 58 USPQ2d 1523, 1525 (TTAB 2001). The determination of whether a mark is merely descriptive must be made in relation to the goods for which registration is sought, not in the abstract. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). Suggestive marks are those that, when applied to the goods at issue, require imagination, thought, or perception to reach a conclusion as to the nature of those goods. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d

4, 189 USPQ 759, 765 (2d Cir. 1976). In other words, "[i]f the mental leap between the word and the product's attribute is not almost instantaneous, this strongly indicates suggestiveness, not descriptiveness." *Nautilus Grp., Inc. v. ICON Health and Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173, 1181 (Fed. Cir. 2004). "[A]ny doubt with respect to the issue of descriptiveness should be resolved in applicant's behalf." *In re Grand Metropolitan Foodservice, Inc.*, 30 USPQ2d 1974, 1976 (TTAB 1994).

Applicant's mark NF-LIGHT could be seen as a play on words. One definition of the word "light" is "something that makes things visible or affords illumination." *See* Response to Non-Final Office Action dated Mar. 17, 2021 at p. 17. Therefore, one could easily perceive NF-LIGHT as meaning to shine light on and illuminate the understanding of various neurological diseases and disorders such as Alzheimer's disease, multiple sclerosis, traumatic brain injury, amyotrophic lateral sclerosis, and other neurodegenerative diseases that can be detected by the presence of certain neurological biomarkers. Another applicable interpretation of NF-LIGHT could be that the product is a "flashlight" applied to a neurofilament or NF. *Id.*

NF-LIGHT does not immediately or directly describe Applicant's goods or a characteristic thereof. Medical and clinical researchers (i.e., the "relevant public") encountering Applicant's mark would not immediately think that Applicant's specimen analysis kits contain reagents and assays for detecting NfL/NEFL, but may think Applicant provides tests to detect the presence of other diseases or proteins that would fall within the identification of goods which are not limited to "neurofilament light." For example, there are many known abbreviations for "NF" within the medical industry, including neural fold, neurofibroma, neurofibromatosis, and neurotrophic factor, among

many others. *Id.* Therefore, it is highly unlikely that consumers would instantly discern that Applicant provides a diagnostic kit for the specific detection of NfL/NEFL.

Finally, as fully discussed above, the evidence of record in this case clearly signifies that researchers in the medical research industry know and understand NF-LIGHT as a source indicator for Applicant's goods. Applicant's mark was coined by Applicant and has been exclusively and continuously used by Applicant for the past 8 years. Indeed, Applicant's product is the gold standard for kits used to detect neurological biomarkers indicative of neuronal injury and diseases connected to brain damage. Accordingly, the mark NF-LIGHT is not merely descriptive as applied to Applicant's goods. Moreover, if there was any doubt regarding the issue of descriptiveness, that doubt should be resolved on an applicant's behalf.

C. SECTION 2(f) REFUSAL – INSUFFICIENT CLAIM OF ACQUIRED DISTINCTIVENESS

Applicant respectfully contends that, given the arguments in the preceding sections, its mark NF-LIGHT is inherently distinctive when used in connection with the applied-for goods. In the alternative, and without conceding to the correctness of the mere descriptiveness refusal, Applicant seeks registration under the protection of § 2(f) of the Trademark Act based on five more years' exclusive and continuous use and ample evidence of peer-reviewed recognition of NF-LIGHT as a source indicator within Applicant's industry.

D. SUPPLEMENTAL REGISTER

In the alternative, and without conceding to the correctness of the Examining Attorneys' refusals, Applicant requests to amend the present application to seek registration on the Supplemental Register.

IV. CONCLUSION

The relevant purchasing public perceives NF-LIGHT as a source indicator, not as a common or class name for "specimen analysis kits containing reagents and assays for detecting neurological biomarkers in biological samples, serum, blood, plasma, saliva, and cerebrospinal fluid in human and animal samples used by medical and clinical researchers in labs and institutions." Therefore, the Board should reverse the final refusal to register NF-LIGHT under §§ 1, 2, and 45 of the Trademark Act.

The Board should also reverse the § 2(e)(1) mere descriptiveness refusal for those same reasons, and also because NF-LIGHT does not immediately describe any ingredient, quality, characteristic or feature of Applicant's goods.

Alternatively, Applicant's claim of acquired distinctiveness under § 2(f) should have been accepted and that the mark be allowed to proceed to publication. Finally, should the Board deem Applicant's mark to be merely descriptive, Applicant requests registration of its mark on the Supplemental Register.