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

Proceeding	91200575
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Attachments	Opposition to Applicant's Motion to Compel Disclosure.pdf ( 18 pages )(793271 bytes ) Declaration of Paul Llewellyn ISO Opposition to Applicant's Motion to Compel.pdf ( 5 pages )(170113 bytes ) Exh A to Llewellyn Declaration.pdf ( 6 pages )(314520 bytes ) Exh B to Llewellyn Declaration.pdf ( 12 pages )(805912 bytes ) Exh C to Llewellyn Declaration.pdf ( 5 pages )(29154 bytes ) Exh D to Llewellyn Declaration.pdf ( 4 pages )(125090 bytes ) Exh E to Llewellyn Declaration.pdf ( 5 pages )(85490 bytes ) Exh F to Llewellyn Declaration.pdf ( 5 pages )(175436 bytes ) Exh G to Llewellyn Declaration.pdf ( 33 pages )(1196764 bytes ) Exh H to Llewellyn Declaration.pdf ( 3 pages )(15902 bytes ) Exh I to Llewellyn Declaration.pdf ( 8 pages )(5760015 bytes ) Exh J pt 1 to Llewellyn Declaration.pdf ( 8 pages )(5797080 bytes ) Exh J pt 2 to Llewellyn Declaration.pdf ( 10 pages )(6738931 bytes )

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

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HERSHEY CHOCOLATE & CONFECTIONERY  
CORPORATION and THE HERSHEY COMPANY,

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v.  
Opposers,

Opposition No. 91200575

:

KENNETH B. WIESEN,

Applicant.

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**OPPOSITION TO APPLICANT’S MOTION TO COMPEL DISCLOSURE**

**I. INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 37 and Section 2.120(e) of Title 37 of the Code of Federal Regulations, opposers Hershey Chocolate & Confectionery Corporation and The Hershey Company (collectively, “Hershey”) hereby oppose Applicant, Kenneth B. Wiesen’s (“Applicant”) Motion to Compel Disclosure<sup>1</sup> (the “Motion to Compel”) on the grounds that Applicant has failed to comply with the Board’s express orders dated March 8, 2012 and October 10, 2012 to engage in good faith discussions to resolve the discovery disputes at issue, and seeks discovery that is not relevant to the pending Opposition proceeding, and seeks discovery that, particularly in light of the discovery already provided, is overbroad and unduly burdensome.

**II. BACKGROUND & FACTS**

Since at least as early as 2005, Hershey has used continuously the trademark MILKSHAKE in connection with a variety of candy products, including certain of its Kit Kat

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<sup>1</sup> Although Applicant’s motion is captioned as a Motion to Compel Disclosure, it appears from the substance of the motion itself that Applicant intended to serve a Motion to Compel Discovery.

chocolate candy bars and its Whoppers candy, throughout the United States. Hershey Consolidated Notice of Opposition (“Opposition”) ¶ 1. Despite Hershey’s extensive, exclusive, and ongoing use of the MILKSHAKE trademark on candy products, Applicant submitted trademark applications for MILKSHAKE (Serial No. 85/221,585) and MILK SHAKE (Serial No. 85/210,942) for a variety of candy products, including candy and candy bars, on an intent-to-use basis, but not on a Section 2(f) basis. Opposition ¶ 4; Applicant’s Answer to Notice of Opposition (“Answer”) ¶ 4. In other words, Applicant did not believe he needed to demonstrate that his proposed marks had acquired secondary meaning, intimating that Applicant believed his proposed MILKSHAKE and MILK SHAKE trademarks are not descriptive of candy products. Nevertheless, in response to Hershey’s Opposition against Applicant’s applications, Applicant argues that Hershey’s use of “MILKSHAKE” does not constitute trademark use. Thus, Applicant asserts that one of the issues before the Board is whether consumers perceive Hershey’s use of the term “MILKSHAKE” as trademark use.

Applicant propounded his First Set of Interrogatories (the “Interrogatories”) and Applicant’s First Set of Requests for Production of Documents and Things (the “Document Requests”) on Hershey on January 20, 2012 via first class mail. Hershey timely served General Objections to the Interrogatories and the Document Requests on the grounds that (1) the number of Applicant’s Interrogatories exceeded the limit imposed by Federal Rule of Civil Procedure 33 and Section 2.120(d)(1) of Title 37 of the Code of Federal Regulations; (2) Applicant had failed to timely serve any objections or responses to Hershey’s First Set of Requests for Production of Documents and Things; and (3) Applicant had failed to timely serve his Initial Disclosures on Hershey, and had failed to serve them before propounding the Document Requests and

Interrogatories on Hershey.<sup>2</sup> Declaration of Paul C. Llewellyn In Support of Hershey's Opposition to Applicant's Motion to Compel Disclosure ("Llewellyn Decl.") ¶¶ 2-3.

On March 8, 2012, the Trademark Trial and Appeal Board (the "Board") resolved the Initial Disclosures issue, in an Order (Docket #10) that expressly directs that "a motion to compel will not be entertained and good faith will not be found where the parties have failed to previously conduct at least one telephone conference to resolve the issue." (Emphasis added.)

On March 21, 2012, Hershey promptly served responses and objections to Applicant's Document Requests. Llewellyn Decl. ¶ 4.

After Applicant amended his Interrogatories to comply with the number limitation imposed by the Federal Rules and Trademark Rules, and served his amended Interrogatories on Hershey on March 9, 2012 via first class mail, Hershey timely served responses and objections to Applicant's amended Interrogatories on April 13, 2012. *Id.* ¶ 5.

In connection with responding to Applicant's Document Requests, conducted an extensive document collection and review. Among other things, Hershey ran a very broad search of its trademark and marketing files and the files of sixteen document custodians, including a search of electronically stored information ("ESI"), for search terms that included "milkshake" and "milk shake," and Hershey collected and reviewed over 1,500 documents totaling several thousands of pages. *Id.* ¶ 6. These extensive document production efforts and the related costs of collecting, reviewing, and producing ESI cost over forty thousand dollars. *Id.* ¶ 7.

After completing review of the documents, on May 4, 2012, Hershey produced all documents responsive to Applicant's Document Requests, subject to redactions for privileged material and redactions of highly confidential business information relating to products not at

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<sup>2</sup> Pursuant to 37 C.F.R. § 2.120(a)(3), a party must serve initial disclosures on the other party before it can propound discovery requests on such other party.



issue in this case, and subject to Hershey's objections. *Id.* ¶ 8. Hershey produced these documents immediately after Applicant agreed that Hershey's documents would be treated as covered by the proposed protective order that the parties had submitted to the Board, notwithstanding that the protective order had not yet been entered by the Board. *Id.*

Among other things, Hershey's documents included specimens showing Hershey's use of its MILKSHAKE trademark on packaging distributed for retail sale; marketing and sales documents regarding the varieties of MILKSHAKE-branded products sold by Hershey; documents relating to product concepts for MILKSHAKE-branded products; and packaging showing the ingredients listing for MILKSHAKE-branded products.

On June 4, 2012, nearly three months after Hershey served its document responses and objections, nearly two months after Hershey served its responses and objections to Applicant's amended Interrogatories, and a full month after Hershey produced documents, Applicant sent counsel for Hershey a letter objecting to Hershey's document production and interrogatory responses, and requesting further documents and responses, as well as demanding that Hershey identify which documents produced were responsive to which discovery requests (the "June 4, 2012 Letter"). *Id.* ¶ 9 & Exh. A.

In an effort to resolve the discovery issues quickly, counsel for Hershey responded to Applicant's June 4, 2012 Letter within three days, explaining in detail, among other things, the validity of Hershey's responses and objections under the Board's rules and federal practice, and Hershey's right to redact certain documents on the basis of attorney-client privilege, as well as providing Applicant with a comprehensive chart setting forth (1) the Document Requests and Interrogatories to which Hershey stated it would produce responsive, non-privileged documents,

if any, and (2) the Bates numbers for the documents responsive to each such Document Request and Interrogatory (the “June 7, 2012 Letter”).<sup>3</sup> *Id.* ¶ 10 & Exh. B.

The June 7, 2012 Letter also invited Applicant to contact counsel for Hershey if he wished to discuss his discovery issues further. *See id.* Exh. B. Moreover, on June 12, 2012, counsel for Hershey sent an e-mail to Applicant regarding the exchange of discovery letters, expressly inviting Applicant to meet and confer regarding the discovery issues:

“With your first letter and mine framing the issues, perhaps it makes more sense to have a phone call to discuss at this stage? I think that might help to narrow any points of dispute that remain.”

*Id.* ¶ 11 & Exh. C. However, Applicant did not take Hershey’s counsel up on the proposal for a phone call to meet and confer. Instead, one month later, on July 6, 2012, Applicant sent counsel for Hershey another letter advising that Applicant “remain[ed] unsatisfied with” Hershey’s discovery responses (the “July 6, 2012 Letter”) (Llewellyn Decl. Exh. D). Applicant claimed Hershey provided “non-responses” or “skipp[ed] ... responses” due to the fact that Hershey’s document production allegedly did not contain documents responsive to certain of Applicant’s Document Requests. *Id.* Exh. D. However, as Hershey advised Applicant in its responses to the Document Requests and in its June 7, 2012 Letter:

- (1) Hershey would produce (and produced) documents in response only *if* it found any non-privileged documents that were responsive to a particular Document Request. The fact that Hershey, in its extensive review of its documents (as discussed *supra*), did not find non-privileged documents that were responsive to certain of Applicant’s Document Requests does not mean that Hershey was non-responsive.
- (2) Since numerous of Applicant’s Document Requests are duplicative of or overlap with other Document Requests to which Hershey responded, Hershey referred

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<sup>3</sup> Hershey prepared and provided this chart to Applicant, despite the fact that it had no obligation to do so, in the hopes that doing so would help put Applicant’s discovery concerns to rest. As noted in the June 7, 2012 Letter, 37 C.F.R. § 2.120(d)(2) and Fed. R. Civ. Proc. 34(b)(2)(E) only require the producing party to produce documents as they are kept in the usual course of business, and do not impose any additional requirement to identify which document(s) respond to which discovery request(s).

Applicant back to its earlier responses and documents produced in connection therewith.

*Id.* ¶ 12 & Exh. B.

Within two weeks, on July 20, 2012, counsel for Hershey again responded to Applicant, in detail, addressing each of Applicant's concerns, including those noted above, and attaching a privilege log to identify the documents withheld or redacted due to privilege (the "July 20, 2012 Letter"). Hershey's July 20, 2012 Letter again invited Applicant to contact Hershey's counsel to discuss his discovery concerns. *Id.* ¶ 13 & Exh. E.

Over the course of the next two and a half months, Applicant did not respond in any manner to Hershey's July 20, 2012 Letter, and provided no indication that Applicant still objected to Hershey's discovery responses. *Id.* ¶ 14.

To the contrary, it was not until October 4, 2012, during a telephonic hearing with the Board on a separate issue (specifically, Hershey's Motion to Strike Applicant's Expert Disclosure) when Applicant again raised concerns regarding Hershey's discovery responses. *Id.*

Following the October 4, 2012 hearing, in an Order dated October 10, 2012, the Board ordered the parties to engage in good faith discussions regarding any outstanding discovery issues. The Board's October 10, 2012 Order (Docket #19) expressly directed that "applicant is free to file a motion to compel after making the requisite good faith effort to resolve the discovery dispute that is the subject of his motion," and specifically defining "good faith efforts" as not only "correspondence ... detailing each of the perceived deficiencies in opposers' responses," but also "a good faith meeting between the parties to try to resolve the discovery dispute." (Emphasis added.)

On October 26, 2012, Applicant sent another letter to counsel for Hershey (the "October 26, 2012 Letter"). Llewellyn Decl. ¶ 15 & Exh. F. The substance of the October 26, 2012 Letter

is virtually identical to Applicant's July 6, 2012 Letter and contains no acknowledgment that Hershey had responded to Applicant's July 6, 2012 Letter with its July 20, 2012 Letter. *See id.* Exhs. D & F. To the contrary, it completely ignored Hershey's July 20, 2012 Letter, effectively placing discussions of the discovery dispute back four months. Despite this fact, and despite the Board's two prior Orders expressly mandating a meet and confer to resolve discovery issues, Applicant's cover e-mail with its October 26, 2012 Letter referred to his letter as "*my last 'Good Faith' attempt to resolve our discovery issues.*" *Id.* Exh. F (emphasis added).

Nonetheless, Hershey's counsel responded to Applicant's October 26, 2012 Letter within two weeks, on November 8, 2012 (the "November 8, 2012 Letter"), noting that Hershey already had addressed each of the points raised in Applicant's October 26, 2012 Letter in Hershey's July 20, 2012 Letter. *Id.* ¶ 16 & Exh. G. Hershey's November 8, 2012 Letter again explained to Applicant the reasons it did not produce the irrelevant and/or privileged documents Applicant had requested, and attached copies of the correspondence exchanged thus far between the parties with respect to Applicant's discovery issues. *See id.* Hershey also once again *expressly offered to meet and confer* with Applicant in order to narrow the scope of any remaining disputes, stating:

As I stated in our previous letters in response to your discovery concerns, we remain willing to confer with you in order to narrow the scope of any dispute. While you did not choose to attempt such a conversation previously, please do not hesitate to contact me if you have any questions or wish to discuss these matters further.

*Id.*

Applicant did not respond further to Hershey, or otherwise make efforts to resolve these discovery issues. *Id.* ¶ 17. Over the course of the next two months, Applicant did not send a

letter in reply, Applicant did not accept Hershey's invitation to meet and confer, and Applicant did not call counsel for Hershey. *Id.*

Instead, Applicant finally contacted Hershey on December 20, 2012, but only to request a one-week extension of time to file the instant Motion to Compel. *Id.* ¶ 18 & Exh. H.

### **III. ARGUMENT**

Most significantly, none of the information and documents sought in Applicant's Motion to Compel have any bearing on any issue in dispute in this Opposition proceeding. For that reason alone, the Board should deny Applicant's Motion to Compel. Applicant's requests also suffer from the fact that they are overly broad and unduly burdensome. As a preliminary matter, however, the Board should deny Applicant's Motion to Compel for the simple reason that Applicant has failed repeatedly to engage in the good faith discovery discussions mandated by the Board and the Trademark Rules prior to filing this Motion.

#### **A. Applicant Has Not Acted in Good Faith**

As an initial matter, Applicant has failed to engage in a good faith effort to resolve the discovery dispute, disregarding even the Board's express mandate to do so, which specifically defined what efforts would be considered "good faith" in nature. The Board's March 8, 2012 Order expressly states that "a motion to compel will not be entertained and good faith will not be found where the parties have failed to previously conduct at least one telephone conference to resolve the issue." (Emphasis added.) The Board reiterated this mandate when it issued its October 10, 2012 Order, noting that "applicant is free to file a motion to compel after making the requisite good faith effort to resolve the discovery dispute that is the subject of his motion," and specifically defining "good faith efforts" as not only "correspondence ... detailing each of the perceived deficiencies in opposers' responses," but also "a good faith meeting between the parties to try to resolve the discovery dispute." *See also Sentrol, Inc. v. Sentex Sys., Inc.*, 231

U.S.P.Q. 666, 667 (T.T.A.B. 1986) (noting that, “where the parties disagree as to the propriety of certain requests for discovery, they are under an obligation to get together and attempt in good faith to resolve their differences”).

As noted above in Section II, at no time during the course of this proceeding has Applicant responded to Hershey’s numerous proposals to meet and confer to address Applicant’s discovery concerns, or made any efforts himself to comply with the Board’s express orders that the parties meet and confer. Indeed, Hershey specifically invited Applicant to discuss his concerns at least three times, in the June 20, 2012 Letter, the July 7, 2012 Letter, and the November 8, 2012 Letter. Despite these repeated invitations, and the Board’s clear and express orders regarding good faith meetings, Applicant declined to engage in such efforts.

What is more, Applicant’s October 26, 2012 Letter – his “last ‘Good Faith’ attempt to resolve [the] discovery issues” – is essentially identical to his July 6, 2012 Letter, utterly ignoring Hershey’s July 20, 2012 Letter responding to each point of Applicant’s July 6, 2012 Letter. Either Applicant failed to review the July 20, 2012 Letter, or Applicant affirmatively chose to ignore the July 20, 2012 Letter (as well as his own July 6, 2012 Letter) in a slapdash effort to demonstrate “good faith” in order to file the present Motion to Compel. In either case, it demonstrates a sustained refusal by Applicant to comply with the Board’s orders to resolve these disputes with good faith efforts and without engaging the Board unnecessarily.

For these reasons, the Board should not entertain Applicant’s Motion to Compel, and the Motion should be denied.

**B. The Discovery that Applicant Seeks to Compel Is Irrelevant to this Opposition**

The Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) provides that “[e]ach party has a duty ... to make a good faith effort to seek only such discovery as is proper

and relevant to the specific issues involved in the proceeding.” TBMP § 402.01, at 400-21 (2012) (emphasis added); *see also Luehrmann v. Kwik Kopy Corp.*, 2 U.S.P.Q.2d 1303, 1305 (T.T.A.B. 1987) (same); *Sentrol, Inc.*, 231 U.S.P.Q. at 667 (same). Here, however, Applicant seeks to compel the production of information and documents that do not relate to consumer understanding of the term MILKSHAKE – the only issue relevant to Applicant’s theory that Hershey purportedly did not use MILKSHAKE in a trademark manner.

Applicant claims that Hershey does not have priority of use to support its opposition to Applicant’s registration of his proposed MILKSHAKE and MILK SHAKE trademarks because, according to Applicant, Hershey’s use of the mark allegedly is a non-trademark use, *see* Motion to Compel ¶ 5, and “solely the use of a merely descriptive, common term,” *see* Answer ¶¶ 11-12. In this Motion to Compel, however, Applicant seeks information relevant not to how Hershey uses its MILKSHAKE trademark in commerce, with consumers, but, rather, internal technical documents discussing, for example, the technical specifications of ingredients of Hershey’s products and internal product development and testing. As discussed below in Section III.C, the remainder of Applicant’s requests seek documents Hershey has already produced.

As courts and this Board have repeatedly held, it is well-settled in trademark law that the “descriptiveness of a mark, when applied to the goods or services involved, is to be determined from the standpoint of the average prospective purchaser.” *In re Abcor Development Corp.*, 588 F.2d 811, 814 (C.C.P.A. 1978); *see also Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 699 (2d Cir. 1961) (“In determining whether a claimed trademark is descriptive at the time of its adoption, its meaning to a nonpurchasing segment of the population is not important. The critical question is whether the mark is descriptive to the prospective purchasers of the article.”) (internal citation omitted); *DuoProSS Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d

1247, 103 U.S.P.Q.2d 1753 (Fed. Cir. 2012) (“The commercial impression that a mark conveys must be viewed through the eyes of a consumer.”); *In re Thomas Nelson, Inc.*, 97 U.S.P.Q.2d 1712, 2011 WL 481341, at \*3 (T.T.A.B. Jan. 28, 2011) (“determining whether consumers would perceive [the term] as a trademark or as a description of the [goods bearing said term]”) (emphasis added).

The courts have clarified further that the test for descriptiveness is not based on what “persons in the trade,” namely, those working in the industry at issue, “understand the term to be.” *Anheuser-Busch Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 638 (8th Cir. 1984) (holding that, even if the mark “has been used in some descriptive manner by persons in the trade, it is immaterial if consumers do not perceive [the mark] to be a generic or descriptive term for [the products bearing the mark]”). The reason the perception of tradepersons is “irrelevant” is due to the fact that, under trademark law, “a mark primarily functions to indicate a single quality control source of the goods or services involved, and this is meaningful only to prospective purchasers or patrons.” *In re Abcor Development Corp.*, 588 F.2d 811, 814 n.15 (C.C.P.A. 1978).

Applicant’s Motion to Compel, however, seeks production not of documents relating to consumer perception, but to internal trade use, which, as set forth above, has no bearing on any issue in this matter. More specifically, Applicant requests further responses to the following categories of Interrogatories and Document Requests in his Motion to Compel:

- (1) internal ingredient lists and “identification certificates” (a term which Applicant failed to define anywhere in his discovery requests);
- (2) “flavor rankings, testing, results, or preferences created and maintained or used by [Hershey] in the development, maintenance and modification of [Hershey’s candy products]” (emphasis added);



- (3) “internal flavor memoranda”<sup>4</sup> (emphasis added);
- (4) “documents which discuss and/or make reference to focus or sampling groups and testing for the development of the flavors, characteristics and tasting of the various candy products including but not limited to the Whopper and KitKat products”<sup>5</sup> (emphasis added);
- (5) “[p]roduct labeling and specific identification of the natural and artificial flavoring contained in the Kit Kat Chocolate Milkshake as referenced in Hershey 0525 and 0527,” which Applicant acknowledges are both “internal memoranda from [Hershey]” (emphasis added);
- (6) “documents which evaluate, discuss and make reference to the ‘malt flavor addition’ for the KitKat Milkshake as reference [sic] in Hershey’s 0498,” which are internal e-mails;
- (7) “documents which evaluate, discuss and/or make reference to the consideration and/or concept testing of the flavors vanilla milkshake and orange creme milkshake”;
- (8) “documents which evaluate, discuss and/or make reference to the findings and to the flavor evaluations, including Milkshake”; and
- (9) “all communications, graphics and documents form [sic] and to American Color Packaging which discusses, evaluates or makes reference to the terms and graphics ‘KitKat Milkshake,’ ‘Whoppers Milkshake vanilla,’ ‘Whoppers Milkshake orange creme,’ ‘Whoppers Milkshake strawberry,’ ‘Whoppers Robin Eggs Milkshake strawberry,’” a demand which Applicant acknowledges is “focused on the actual creation of the marks in relationship to the wrappers in question.”

The common thread through all of these requests is the fact that all of these documents are internal development and manufacturing documents that have no bearing on consumer perception of the “MILKSHAKE” trademark as such mark is used in commerce, in other words, on the candy products themselves, as sold to the public. Rather, each of these requests seek

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<sup>4</sup> Note that Applicant’s Motion to Compel includes the incorrect Interrogatory No. 9, though it includes Hershey’s response to the correct Interrogatory No. 9. For the record, Interrogatory No. 9 requests the following: “Identify all internal flavor memoranda for the research, development and modification of the flavor or flavor profile of each various ‘candy product’ and all documents which list all flavors of the various ‘candy products’ which were identified by Opposers in response to interrogatory 3, including but not limited to the specimen submitted in [sic] the Opposers’ Mark.”

<sup>5</sup> Applicant protests Hershey’s objection to this Document Request as being duplicative of others of Applicant’s Document Requests, including Document Request No. 25. However, the text of Document Request No. 25, which is quite broad, belies Applicant’s protestations: “Copies of all documents for the development, testing and modification for the ‘various candy products’ including but not limited to the Whopper and KitKat products.”

evidence of Hershey's employees' use of the term "milkshake," whether with other Hershey employees or with vendors contributing to the development of the products and/or the packaging therefor. None of these requests seek documents that pertain to consumers' perception of the mark or the MILKSHAKE-branded candy products. As Hershey advised Applicant in Hershey's November 8, 2012 Letter, to the extent Applicant is seeking evidence of use of the term "milkshake" by Hershey employees, such documents are wholly irrelevant to the dispute at issue" in this Opposition. *See* Exh. G.

Moreover, Hershey produced to Applicant numerous documents that show what is relevant here – the public use by Hershey of the term "MILKSHAKE" – namely, packaging and advertising. For example, Hershey produced MILKSHAKE-branded candy wrappers and packaging in response to Applicant's Document Request No. 24 (*see* Llewellyn Decl. ¶ 19 & Exh. I (HRSHY00000532, 543-44, 630, 631, 632, & 634)), which Applicant concedes. Motion to Compel ¶ 22. Although Applicant advises emphatically that he is NOT requesting "wrappers" (Motion to Compel ¶ 18), and seems to complain that Hershey produced wrappers listing product ingredients (*id.* ¶ 18), as courts have held, such documents are precisely the type of evidence used to gauge consumer perception of a mark: "Evidence of the context in which a mark is used on labels, packages, or in advertising material directed to the goods is probative of the reaction of prospective purchasers of the mark." *In re Abcor Development Corp.*, 588 F.2d 811, 814 (C.C.P.A. 1978).

Because Applicant's Motion to Compel seeks production of internal documents that are not probative of consumer perception of Hershey's use of its MILKSHAKE trademark, or any of the other issues before the Board, the Board should deny Applicant's motion.

**C. Applicant's Requests Are Vague, Ambiguous, Overbroad, and Unduly Burdensome**

The Document Requests and Interrogatories set forth in Applicant's Motion to Compel are also overbroad and unduly burdensome, particularly given the lack of relevance and given the discovery already provided to Applicant by Hershey, and in many instances are too vague and ambiguous to respond to.

As set forth above, Hershey already has incurred tens of thousands of dollars in connection with discovery in this matter, and has produced the only documents relevant to the issue of consumer understanding of Hershey's MILKSHAKE trademark.

What is more, Applicant's discovery requests seek information regarding types of documents that Applicant fails to define and which have no established meaning in the food industry, such as "flavor rankings" and "internal flavor memoranda." *See* Motion to Compel ¶¶ 12 & 15 for Applicant's Interrogatory No. 8 and Hershey's Response to Applicant's Interrogatory No. 9.<sup>6</sup> As Applicant acknowledges in his Motion to Compel, Hershey advised in its Response to Interrogatory No. 9 that Hershey found the phrase "internal flavor memoranda" to be "vague, ambiguous, overbroad, and unduly burdensome," but Applicant made no effort to provide Hershey with a proposed definition of that phrase. Without such a definition, the phrase remains vague and ambiguous, and, as such, a search for information and/or documents that might be responsive to this request would require Hershey to guess at what Applicant seeks, making an attempt at compliance with this Interrogatory unduly burdensome for Hershey.

Applicant's Document Response No. 24 requests "[c]opies of all documents listing the flavoring and flavor characteristics and flavor ingredients in the 'various candy products' included but not limited to Whopper and KitKat products." Motion to Compel ¶ 20. Applicant's

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<sup>6</sup> The correct Interrogatory No. 9 is noted, *supra*, in footnote 4 of Section III.A.

Document Request No. 27 requests “[c]opies of all documents which discuss and/or make reference to focus or sampling groups and testing for the development of the flavors, characteristics and tasting of the various candy products including but not limited to the Whopper and KitKat products.” Motion to Compel ¶ 22. As discussed above, Hershey has already produced numerous documents listing the ingredients of its MILKSHAKE-branded products. Moreover, Hershey has also produced summaries and results of focus group testing. *See, e.g.*, Llewellyn Decl. ¶ 20 & Exh. J (HRSHY00000566-82). Hershey already conducted a broad and thorough search for all documents referring to “milkshake” or “milk shake,” and produced documents responsive to Applicant’s Document Requests (subject to Hershey’s objections thereto). Applicant’s demand for further documents despite Hershey’s extensive and good faith efforts in responding to these Document Requests places an undue burden on Hershey.

A review of the remainder of the Document Requests identified in the Motion to Compel reveals a similar problem. Each of Applicant’s Document Requests from his Second Set of Requests for Production of Documents and Things requests documents that Hershey has already searched for, reviewed, and, where relevant and non-privileged, produced to Applicant.

Hershey has expended considerable resources in the course of searching for, collecting, reviewing, and producing documents in this Opposition. As noted above in Section II, Hershey’s document collection efforts were very broad in scope, pulling documents from numerous custodians, and then searching for “milkshake” or “milk shake” within those documents. Such searches would have yielded every document in Hershey’s possession that referred to the mark and candy products at issue in this Opposition. Thus, requiring further document searches, collection, review, and production pursuant to Applicant’s requests in his Motion to Compel

would not only be a fruitless effort, it would also cause Hershey to incur as much as an additional twenty-five thousand dollars, rendering such requests unduly burdensome for Hershey, particularly when weighed against the irrelevance of the discovery sought (*see* Section III.B, *supra*).

Compelling Hershey to respond to such vague, ambiguous, overbroad, and unduly burdensome discovery requests, particularly when Applicant has made absolutely no effort to clarify and/or narrow his requests, and has declined repeated invitations to meet and confer, would be decidedly inequitable. As such, the Board should deny Applicant's Motion to Compel on this ground as well.

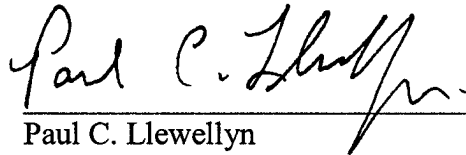
#### **IV. CONCLUSION**

Hershey responded to Applicant's discovery requests and discovery letters quickly and in good faith, and invited Applicant to meet and confer in order to clarify and narrow Applicant's requests and address Applicant's discovery concerns. Applicant has made no commensurate effort, but, rather, flatly ignores the Board's orders to meet and confer, drags his feet on completing discovery, and repeatedly makes broad, sweeping claims of insufficient discovery responses in the hopes that crying wolf alone will convince the Board that one exists. Hershey respectfully submits that the Board should not allow Applicant to engage in and benefit from such practices.

\* \* \*

For all of the foregoing reasons, Applicant's Motion to Compel should be denied.

Date: January 31, 2013  
New York, New York



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Telephone: (650) 319-4500

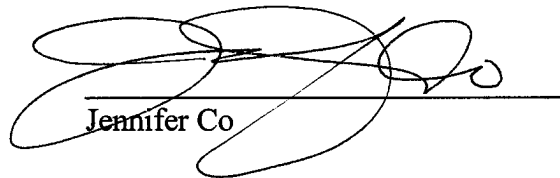
John P. Rynkiewicz  
KAYE SCHOLER LLP  
The McPherson Building  
901 Fifteenth Street, N.W.  
Washington, DC 20005  
Telephone: (202) 682-3500

*Attorneys for Opposers*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he caused the foregoing OPPOSITION TO APPLICANT'S MOTION TO COMPEL DISCLOSURE to be served this 31<sup>st</sup> day of January, 2013, by e-mail and by U.S. first class mail, postage prepaid, upon the following correspondent of record for Applicant:

KENNETH B. WIESEN  
1 OLD COUNTRY RD.  
SUITE 360-B  
CARLE PLACE, NY 11514  
wiesenlaw@gmail.com

  
Jennifer Co

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

	x	
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HERSHEY CHOCOLATE & CONFECTIONERY	:	
CORPORATION and THE HERSHEY COMPANY,	:	
	:	
Opposers,	:	Opposition No. 91200575
v.	:	
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	
	:	
<hr style="border-top: 1px dashed black;"/>		
	x	

**DECLARATION OF PAUL C. LLEWELLYN IN SUPPORT OF OPPOSERS’  
OPPOSITION TO APPLICANT’S MOTION TO COMPEL DISCLOSURE**

I, Paul C. Llewellyn, declare:

1. I am a partner at the law firm of Kaye Scholer LLP and counsel for Opposers Hershey Chocolate & Confectionery Corporation and The Hershey Company (“Hershey”). I make this declaration based upon my personal knowledge and the documents attached hereto.
2. On February 27, 2012, Hershey served its General Objections to Applicant’s First Set of Requests for Production of Documents and Things on the grounds that Applicant had failed to timely serve objections or responses to Hershey’s First Set of Requests for Production of Documents and Things, and Applicant had failed to timely serve initial disclosures on Hershey.
3. On February 27, 2012, Hershey served its General Objections to Applicant’s First Set of Interrogatories on the same grounds as noted above in Paragraph 2 of this Declaration, and



on the grounds that the interrogatories propounded by Applicant exceeded the numerical limit imposed to Fed. R. Civ. P. 33 and 37 C.F.R. § 2.120(d)(1).

4. On March 21, 2012, after the Trademark Trial and Appeal Board (the “Board”) resolved the issue regarding Applicant’s Initial Disclosures on March 8, 2012, Hershey promptly served responses and objections to Applicant’s Document Requests.

5. On April 13, 2012, Hershey timely served responses and objections to Applicant’s Amended First Set of Interrogatories, which were served on Hershey’s counsel on March 9, 2012 via first class mail.

6. In connection with responding to Applicant’s Document Requests, Hershey conducted an extensive document collection and review. Among other things, Hershey ran a very broad search of its trademark and marketing files and the files of sixteen custodians, including electronically stored information (“ESI”), for search terms that included “milkshake” and “milk shake.” The search yielded over 1,500 documents totaling several thousands of pages.

7. Hershey incurred over forty thousand dollars in connection with the collection, review, and production of documents, including ESI, in this Opposition proceeding.

8. After completing review of the documents, on May 4, 2012, Hershey produced all documents responsive to Applicant’s Document Requests, subject to redactions for privileged material and redactions of highly confidential business information relating to products not at issue in this case, and subject to Hershey’s objections. Hershey produced these documents immediately after Applicant agreed that Hershey’s documents would be treated as covered by the proposed protective order that the parties had submitted to the Board, notwithstanding the fact that the protective order had not yet been entered by the Board.

9. Attached hereto as **Exhibit A** is a true and correct copy of Applicant's June 4, 2012 letter to me raising issues with respect to Hershey's discovery responses.

10. Attached hereto as **Exhibit B** is a true and correct copy of my June 7, 2012 letter to Applicant addressing Applicant's discovery issues, together with a chart setting forth Hershey's discovery responses, categorized by Applicant's discovery requests.

11. Attached hereto as **Exhibit C** is a true and correct copy of my June 12, 2012 e-mail to Applicant regarding the exchange of discovery letters and suggesting a phone call to discuss same.

12. Attached hereto as **Exhibit D** is a true and correct copy of Applicant's July 6, 2012 letter to me concerning discovery issues.

13. Attached hereto as **Exhibit E** is a true and correct copy of my July 20, 2012 letter to Applicant addressing the issues raised in Applicant's July 6, 2012 letter and again inviting Applicant to contact me regarding Applicant's discovery concerns, together with the privilege log referenced in my letter.

14. Between July 20, 2012 to October 4, 2012, I received no response from Applicant to my July 20, 2012 letter, and no communications from Applicant indicating that Applicant still objected to Hershey's discovery responses. It was not until October 4, 2012, during a telephonic hearing with the Board on a separate issue (specifically, Hershey's Motion to Strike Applicant's Expert Disclosure) when Applicant again raised concerns regarding Hershey's discovery responses.

15. Attached hereto as **Exhibit F** is a true and correct copy of Applicant's October 26, 2012 letter to me concerning the exact same discovery issues raised in Applicant's July 6, 2012 letter.

16. Attached hereto as **Exhibit G** is a true and correct copy of my November 8, 2012 letter again addressing the discovery issues previously addressed in my July 20, 2012 letter to Applicant, attaching copies of the correspondence exchanged up through that point between me and Applicant, and again expressly offering to meet and confer with Applicant in order to narrow the scope of any remaining discovery issues.

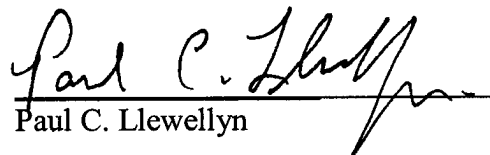
17. Between November 8, 2012 and December 20, 2012, I received no response from Applicant to my November 8, 2012 letter, and no communications from Applicant indicating that Applicant still objected to Hershey's discovery responses.

18. On December 20, 2012, Applicant e-mailed me to request a one-week extension of time to file a Motion to Compel. Attached hereto as **Exhibit H** is a true and correct copy of Applicant's December 20, 2012 e-mail to me.

19. Attached hereto as **Exhibit I** are true and correct copies of Hershey's documents produced to Applicant and Bates-numbered HRSHY00000532, 543-44, 630, 631, 632, and 634.

20. Attached hereto as **Exhibit J** is a true and correct copy of Hershey's document produced to Applicant and Bates-numbered HRSHY00000566-82.

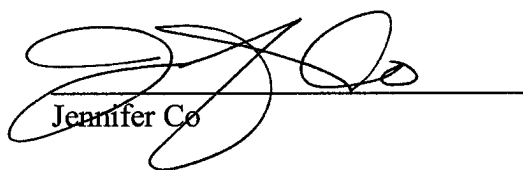
I declare under penalty of perjury that the foregoing is true and correct. Executed in New York, New York, this 31st day of January, 2013.

  
Paul C. Llewellyn

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of January, 2013, I caused a true and correct copy of this DECLARATION OF PAUL C. LLEWELLYN IN SUPPORT OF OPPOSERS' OPPOSITION TO APPLICANT'S MOTION TO COMPEL DISCLOSURE to be served by email and by United States first class mail, postage prepaid, upon the following:

KENNETH B. WIESEN  
1 OLD COUNTRY RD.  
SUITE 360-B  
CARLE PLACE, NY 11514  
wiesenlaw@gmail.com

  
Jennifer Co

# **EXHIBIT A**

**KENNETH B. WIESEN**  
**1 OLD COUNTRY ROAD, STE. 360B**  
**CARLE PLACE, NY 11514**  
**516-742-2212**

June 4, 2012

Paul C. Llewellyn, Esq.  
KAYE SCHOLER, LLP  
425 Park Avenue  
New York, New York 10022

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Dear Mr. Llewellyn:

This letter shall serve as our Notice of Objection to your production of documents, your responses to Applicant's First Set of Request for Production of Documents and Things and your response to Applicant's First Set of Interrogatories.

At the outset, please be advised that I object to the Notice of Deposition of the Applicant only to the extent that I would request adequate and complete responses to my request for production of documents and my request for amended first set of interrogatories prior to submitting to a deposition.

**RESPONSES TO DEMAND FOR DOCUMENTS:**

Regarding Opposer's First Amended Responses dated March 21, 2012 to Applicant's First Set of Requests for Production for Documents and Things, paragraphs 2, 3, 4, 5, 6, 7, 8 9, 10, 11, 14, 16, 22, 23, 24, 25, 31, 32, 34 and 38, no documents were provided. Opposers state in each of the above paragraph that "Hershey will produce responsive documents..." along with or a part of Opposers' actual production of documents. However, upon receipt and review of your May 4, 2012 production of documents in CD-ROM form, bait stamped pages 001 through 076, none of the 706 documents were delineated as responding to any demand let alone to any particular paragraph of Applicant's Demand for Production of Documents. This is unacceptable as there is no way for Applicant to ascertain which, if any, documents apply to each of our specific demands.

June 4, 2012

Re: Hershey Chocolate v. Kenneth B. Wiesen

We request that Opposers either produce documents specific to each demand and clearly delineate as such or provide a supplemental or amended response to Applicant's First Set of Requests for Production of Documents and Things which clearly delineates which documents (by referring to Hershey's bate stamped numbered documents) apply to or are responsive to each of Applicant's demands.

Moreover, Applicant reserves its right to object to Opposers' First Amended Objections and Responses to Applicant's First Set of Requests for Production of Documents and Things until such time as we are in a position to be able to adequately cross-reference the documents to which Opposers purport are responsive to each of our demands.

In regard to Hershey's objection to Applicant's First Set of Requests for Production of Documents and Things, paragraph 1, 17 and 18, these demands are almost duplicative of Hershey's Demands upon Applicant and therefore objections to such demands are suspect. Accordingly, we would ask Hershey to respond to these demands.

Regarding demand number 13, we do not agree with Hershey's objections that the request is compound, vague and ambiguous. Moreover, by referring Applicant to Hershey's response to demand requests numbers 2 and 31, Hershey is further complicating any attempt to match up documents produced by Opposers to the demands made by Applicant. Hershey's responses to document requests numbers 2 and 31, likewise claim that Hershey will produce documents in its possession concerning such demand, however, other than providing the CD-ROM containing 706 bate stamped pages, there is no way for Applicant to cross-reference the documents disclosed to the specific demands made. Thus, we again request, that Hershey either provide documents specific to each demand or provide an amended for supplemental response to Applicant's First Set of Requests for Production of Documents and Things by referencing the specific bate stamped numbers that Hershey claims is responsive to each of Applicant's demands.

To even further compound the confusion, Opposers refer Applicant to two and three lawyers of other responses in order to somehow weave its way through the maze of ultimate non-response. For example, in Hershey's response number 17, Hershey refers Applicant to Hershey's response to document request number 13 and 31. In response number 13, Hershey refers Applicant to Hershey's response number 2 and back to number 31. And ultimately, in response number 2, Hershey claims that it will produce documents in its possession allegedly responsive to the demands, but again, other than the CD-ROM containing unreferenced bate stamped 706 pages, nothing has been provided. In response to Applicant's request number 19, Hershey refers Applicant to response number 6. In response number 6, Hershey again claims it will produce representative samples.

Page 3

June 4, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Of note, in addition to our objection that no documents have been provided or there is no way for Applicant to determine which documents that have been provided apply, to the specific demands, Applicant further objects to Hershey's claim that it will choose to provide "representative" samples as opposed to the documents requested.

Hershey's response number 20 refers Applicant to Hershey's response number 6. Again, Hershey's response number 6 states it will produce representative examples, however, Hershey has not yet identified which of its bate stamped documents, if any, are responsive to both of those demands. Similarly, in response to document request number 21, Hershey again refers Applicant to response number 6.

Response to document request number 26 also refers Applicant to response to request number 6 and 23. Since response numbers 6 and 23 both indicate Hershey will produce documents, we have the same inability to cross-reference and determine which, if any, documents are responsive to these specific demands.

Response number 27 refers Applicant to Hershey's response numbers 23 and 25, (paragraphs 23 and 25 both claim Hershey will produce documents in its possession). Similarly, response to request for document numbers 29, 30, 33, 39, 42, 44, 46, 47 and 48 all refer Applicant to other paragraphs, some of which claim that Hershey will produce documents. We demand specific reference responses to each paragraph and the documents produced or further documents to be produced.

In regard to Hershey's responses to document requests numbers 40 and 41, Hershey claims that these demands are irrelevant, vague and ambiguous, overbroad and unduly burdensome. We disagree with Hershey's position. It is Applicant's claim that Hershey routinely uses the term Milkshake as a descriptive word for the flavor and characteristic of the food/confectionary product. It is further Applicant's position that the use of the word Milkshake as claimed by Hershey as a trademark use is duplicative of the way it used the term Milkshake in its other products and therefore is proof of Applicant's position and therefore relevant to the proceedings. Therefore, Applicant repeats its demand for a response to these paragraphs

In regard to paragraph number 43, Hershey's objection that the demand is vague, ambiguous, overbroad, unduly burdensome and calling for a legal conclusion is simply an attempt to evade. Since it is uncontested that Hershey claims that it has used the term Milkshake other than as claimed as a trademark on products as a descriptive word rather than a trademark use, Applicant simply asks for production of the labels, wrappers, display boxes, and point of sale displays, where the term Milkshake was used as such descriptive term. Accordingly, we request that Hershey respond to this document demand.



June 4, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

In response to document request number 49, Hershey refers Applicant to documents Hershey has produced and will produce in “this” Opposition. This is extremely broad and vague and offers Applicant no point of reference. As previously demanded, Applicant requests that Opposers either provide the document(s) specific to this request or provide a specific response to this paragraph by referencing only those documents (referenced by bates stamped number) that specifically are responsive to this demand.

#### **CD-ROM DOCUMENT DISCLOSURE**

1. Documents 079 through 160, 162 through 326, 328 through 409, and 671 through 706 contain full sheets of paper which simply contain the bates stamped number, the word “non-responsive” and the words “highly confidential.” There is no indication what the subject matter of the document is, nor what paragraph number or numbers of the First Set of Requests for Production of Documents and Things they are referencing. Pursuant to the stipulated Order we are entitled to access to documents marked highly confidential and accordingly demand access to same.
2. Bates stamped numbers 004, 005, 009, 061, 062, 558, 560, 583, 613, and 617 contain redacted portions which have an imprinted word “privileged” on it. There is no category in the protective Order for such marking. If you claim another basis for non-disclosure, please provide the specifics of your claim for each document.
3. A number of the documents appear to be copies of electronic transmissions but may not contain the attachments that are indicated as attached in the documents. Specifically, 044, 063, 066, 075, 078, 161, 327, 410, 414, 417, 435, 451, 467, 477, 493, 585, 587, 594 and 670. If the attachments were provided as documents, please identify the bates stamped numbers that are those attachments. If those attachments are not provided, kindly provide those attachments.

#### **RESPONSES TO INTERROGATORIES**

Regarding Hershey’s objections and responses to Applicant’s Amended First Set of Interrogatories, response number 3 refers Applicant to documents Hershey will produce in response to Applicant’s First Set of Requests for Production of Documents and Things. As per our position stated earlier, such response offers no point of reference for Applicant. We request that Hershey supplement their response to specifically identify the document(s) that Hershey refers to in response to interrogatory number 3.

Page 5

June 4, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

In response to interrogatories numbers 4, 5, 6, 9 11, 14, 15, 16, 17, 18, 19, 20, 22, and 23, again Hershey refers Applicant to documents Hershey will produce in response to Request for Documents and Things. The Applicant demands that Hershey provide a specific response identifying each document.

As we have a limited time to complete discovery, we ask Hershey to respond to this communication as soon as possible so that we can meet the discovery deadline limitations of the Trademark Trial & Appeal Board. We note that Hershey's production of documents was extensively delayed even beyond the time period in which Hershey claims that it was delayed because it was waiting for Applicant's agreement of confidentiality.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Kenneth B. Wiesen", is written over the typed name.

KENNETH B WIESEN

KBW/lc

# **EXHIBIT B**

June 7, 2012

**VIA EMAIL (wiesenlaw@gmail.com)  
AND FIRST CLASS MAIL**

Kenneth Wiesen, Esq.  
1 Old Country Road, Suite 360-B  
Carle Place, NY 11514

**Re: *Hershey Chocolate & Confectionery Corp., et al. v. Wiesen*  
TTAB No. 91200575**

Dear Mr. Wiesen:

We are in receipt of your letter of June 4, 2012 objecting to Hershey Chocolate & Confectionery Corp. and The Hershey Company's (collectively, "Hershey") production of documents and responses to your First Set of Requests for Production of Documents and Things (the "Document Requests") and Amended First Set of Interrogatories (the "Amended Interrogatories"). We have reviewed these objections and, in the spirit of cooperation and in the interest of moving discovery along expeditiously, we address them below.

First, pursuant to 37 C.F.R. § 2.120(d)(2) and Fed. R. Civ. Proc. 34(b)(2)(E), Hershey was only required to produce documents as they are kept in the usual course of business, and it did so; there is no additional requirement to identify each document that responds to each request. Nevertheless, attached to this letter is a chart setting forth (1) the Document Requests and Amended Interrogatories in response to which Hershey stated it would produce responsive, non-privileged documents, if any, and (2) the Bates numbers for the documents responding to each Document Request and Amended Interrogatory.<sup>1</sup> We believe this chart addresses the bulk of the objections in your June 4th letter.

Second, Hershey stands by and reiterates the objections it raised in response to the Document Requests, including, without limitation, Document Request Nos. 1, 13, 17, 18, 40, 41, 43, and 49, as valid and appropriate objections to such Document Requests. Moreover, Hershey did, in fact, produce copies of representative samples of labels of milk-based beverage products that bear the term "milkshake." See, e.g., Bates Nos. HRSY00000613-HRSY00000620. We

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<sup>1</sup> Although we have attempted to identify each document that responds to each document request, this effort is necessarily imperfect, particularly given the number of document requests with overlapping subjects.

are nevertheless happy to discuss with you the issue of production of such labels after you have reviewed those we've produced, and to discuss any specific concerns that you have about any specific objections to a particular Document Request.

Third, as is common and standard practice in discovery responses, Hershey's responses and objections to certain Document Requests referenced its responses and objections to other Document Requests due to the fact that said Document Requests are, to a large extent, overlapping or duplicative.

Fourth, with respect to your concern regarding the production of "representative samples," the Trademark Trial and Appeal Board ("TTAB" or the "Board") has held repeatedly that a party to an Opposition proceeding may produce representative samples of documents in instances where the respondent's task of production would otherwise be unduly burdensome. *See, e.g., Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 U.S.P.Q. 147, 148 & 149 (T.T.A.B. 1985) ("A reasonably representative sample of some items is sufficient where there are so many items as to make the responding party's task burdensome."); *Mack Trucks, Inc. v. Monroe Auto Equip. Co.*, 181 U.S.P.Q. 286, 288 (T.T.A.B. 1974) (concluding that "[o]pposer's objections concerning the unduly burdensome nature of the matter sought by applicant are well taken," and, therefore, "opposer need furnish only representative samples of its advertisements"). Given the sheer quantity of documents (including copies of labels, boxes, wrappers, etc.) at a company the size of Hershey, it would be unduly burdensome for Hershey to collect and produce all such copies. Thus, it is reasonable for Hershey to produce representative samples, as it has done.

Fifth, with respect to your question about redactions in certain documents, the documents stamped Bates Nos. 79-160, 162-326, 328-409, and 671-706 contain sales data for numerous products that are entirely unrelated to this Opposition, and Hershey is not required to produce such information. Given the highly confidential nature of such sales data, as well as the fact that you are a potential competitor without outside counsel to shield you from such competitively sensitive information, Hershey is entitled to redact such non-responsive information as it has done in its production.

Sixth, the documents stamped Bates Nos. 4, 5, 9, 61, 62, 558, 560, 583, 613, and 617 contain information protected by attorney-client privilege and/or attorney work product privilege, hence the redaction for privilege in accordance with federal and TTAB rules.

Seventh, with respect to your question regarding email attachments, because we have produced documents as they are kept in the usual course of business, any attachments to e-mails directly follow the e-mail in question.

Lastly, we object to your characterization of Hershey's document production as "extensively delayed." We advised you via e-mail on March 21, 2012 that Hershey would not produce documents until a protective order was entered by the TTAB, and we suggested that we use the TTAB form protective order, which we provided to you in that same e-mail. Only after

Kenneth Wiesen, Esq.

- 3 -

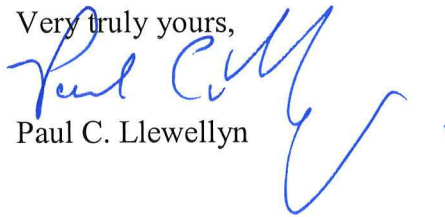
June 7, 2012

our April 16, 2012 e-mail following up on the status of your review and execution of said protective order, did we finally receive the signed protective order from you on April 18, 2012. Subsequently, in an effort to expedite matters, Hershey did not wait for the Board to enter the protective order, but, rather, went ahead and produced documents on May 4, 2012, after you agreed via e-mail that same day, that Hershey's documents would be treated as covered by the protective order as submitted to the TTAB, regardless of whether that order had been entered by the Board as of the date of production.

In view of the foregoing, we would like to agree upon a date for your deposition, which we previously noticed for June 14, 2012. Can you please advise whether that date is acceptable, or, alternatively, provide dates later in June that would work for you?

Please do not hesitate to contact me if you have any questions or wish to discuss these matters further.

Very truly yours,



Paul C. Llewellyn

PCL:ms  
Attachment

**HERSHEY/WIESEN - RESPONSES TO DOC REQUESTS & INTERROGATORIES**

<b>DOCUMENT REQUEST NO.</b>	<b>INTERROGATORY NO.</b>	<b>BATES NOS.</b>
DOC REQUEST NO. 2		1 3 6-8 9 10-16 17 32 36 37 529-532
DOC REQUEST NO. 3		
DOC REQUEST NO. 4		533-542
DOC REQUEST NO. 5	INTERROGATORY 3(a)	2 4 18 19 61 62 525-526 583-584
DOC REQUEST NO. 6	INTERROGATORY 3(b)	495-496 529-532 543-544 562-564 565-582 621-622 623 626-629 630 631

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		632 633 634 635 637-645 646-658 659 660 661-668 669 670-706
DOC REQUEST NO. 7		
DOC REQUEST NO. 8	INTERROGATORY 6 INTERROGATORY 18	31 33-35 38-43 44-50 51-55 56-60 61 62 63-65 66-68 69-71 72-74 75-77 78-160 161-243 244-326 327-409 410-413 414-416 417-419



DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		420-434 435-450 451-466 467-476 477-486 491 492 562-564 565-582 621-622 623 624 625 626-629 630 631 632 633 634 635 637-645 646-658 659 660 661-668 669 670-706
DOC REQUEST NO. 9		24-30 33-35 44-50 594-606 607-612

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		621-622
DOC REQUEST NO. 10	INTERROGATORY 18	33-35 562-564 565-582 594-606 607-612 621-622 623 626-629
DOC REQUEST NO. 11	INTERROGATORY 4 INTERROGATORY 11 INTERROGATORY 15 INTERROGATORY 23	24-30 38-43 44-50 51-55 56-60 410-413 420-434 435-450 451-466 467-476 477-486 565-582 594-606 607-612 621-622 637-645 646-658
DOC REQUEST NO. 14		
DOC REQUEST NO. 16		

<b>DOCUMENT REQUEST NO.</b>	<b>INTERROGATORY NO.</b>	<b>BATES NOS.</b>
DOC REQUEST NO. 20	INTERROGATORY 3(b)	495-496 529-532 543-544 562-564 565-582 621-622 623 626-629 630 631 632 633 634 635 637-645 646-658 659 660 661-668 669 670-706
DOC REQUEST NO. 21	INTERROGATORY 3(b) INTERROGATORY 19	
DOC REQUEST NO. 22	INTERROGATORY 4 INTERROGATORY 11 INTERROGATORY 15 INTERROGATORY 23	2 18 19 20-23 24-30 33-35 38-43 44-50 51-55

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		56-60 63-65 66-68 69-71 72-74 75-77 78-160 161-243 244-326 327-409 410-413 414-416 417-419 420-434 435-450 451-466 467-476 477-486 562-564 565-582 594-606 621-622 637-645 646-658 661-668 670-706
DOC REQUEST NO. 23		495-496 545-546 547-548 553-554 555 556

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		561 624 625 633 659 660 669
DOC REQUEST NO. 24	INTERROGATORY 5 INTERROGATORY 9	525-526 527-528 543-544 545-546 547-548 553-554
DOC REQUEST NO. 25	INTERROGATORY 9	497-500 501-512 513-524 565-582 626-629 637-645 646-658
DOC REQUEST NO. 26		
DOC REQUEST NO. 28	INTERROGATORY 14	See production generally.
DOC REQUEST NO. 31	INTERROGATORY 16 INTERROGATORY 22	See production generally.
DOC REQUEST NO. 32	INTERROGATORY 17	5 31 487 488 489 490 491

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		492 493 494 497-500 549-550 551-552 557-558 559-560
DOC REQUEST NO. 34		
DOC REQUEST NO. 38	INTERROGATORY 20	

# **EXHIBIT C**

## Co, Jennifer

---

**From:** Llewellyn, Paul  
**Sent:** Tuesday, June 12, 2012 2:14 PM  
**To:** 'KENNETH WIESEN'  
**Cc:** Co, Jennifer  
**Subject:** RE: Hershey v. Wiesen / deposition date

Dear Ken -

With your first letter and mine framing the issues, perhaps it makes more sense to have a phone call to discuss at this stage? I think that might help to narrow any points of dispute that remain.

As for your deposition, my impression from your correspondence last week was that you would not be appearing on June 14 so at this point I would prefer to reschedule on a mutually agreeable date. I will address the issue of location separately after I have had a chance to consult on my end.

Thanks,

Paul

Sent with Good (www.good.com)

-----Original Message-----

**From:** KENNETH WIESEN [[wiesenlaw@gmail.com](mailto:wiesenlaw@gmail.com)]  
**Sent:** Tuesday, June 12, 2012 02:28 PM Eastern Standard Time  
**To:** Llewellyn, Paul  
**Subject:** Re: Hershey v. Wiesen / deposition date

Paul,

I received your letter and have started going through the chart supplied. It is my preliminary opinion that Hershey has not been compliant with the disclosure as you claim. I will go through the chart and provide a letter setting forth my position in detail.

Regarding the deposition I would prefer to submit to a deposition at my office in Carle Place. Please advise if you would be willing to conduct it at my office.

Ken Wiesen

On Tue, Jun 12, 2012 at 12:42 PM, Llewellyn, Paul <[PLlewellyn@kayescholer.com](mailto:PLlewellyn@kayescholer.com)> wrote:

Dear Ken –

I returned your phone call last Thursday and left a message with your assistant, and, as you know, we sent you a letter on Friday responding to your letter Hershey's discovery responses. In light of your email below and the fact that I have



not heard back from you, however, I am assuming that this Thursday's noticed deposition date is not going to hold and that we will be rescheduling your deposition. Please let me know immediately if that is not the case.

Thanks,

Paul

Paul C. Llewellyn

**KAYE SCHOLER LLP**

425 Park Avenue | New York, New York 10022

T: [+1 212.836.7828](tel:+12128367828) | F: [+1 212.836.6463](tel:+12128366463)

[PLlewellyn@kayescholer.com](mailto:PLlewellyn@kayescholer.com) | [www.kayescholer.com](http://www.kayescholer.com)

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**From:** KENNETH WIESEN [mailto:[wiesenlaw@gmail.com](mailto:wiesenlaw@gmail.com)]

**Sent:** Monday, June 04, 2012 1:40 PM

**To:** Llewellyn, Paul

**Subject:** Re: Hershey v. Wiesen / deposition date

Paul,

I have no issue with submitting to a deposition but I prefer to submit following adequate disclosure from Opposer. In that regard see my letter attached hereto which sets forth the specifics of my objections, position and requests relative to opposers responses to interros, responses to demands for documents and opposers document submission.

Let's set up a telephone call to discuss these discovery issues to see if we can resolve without the request for intervention from the Trial and Appeals Board. please advise at your first opportunity.

Ken Wiesen

1 Old Country Rd

Suite 360-B

Carle Place, NY 11514

[516-835-1500](tel:516-835-1500)

On Fri, Jun 1, 2012 at 12:38 PM, Llewellyn, Paul <[PLlewellyn@kayescholer.com](mailto:PLlewellyn@kayescholer.com)> wrote:

Dear Mr. Wiesen -

As you know, we noticed your deposition for June 14 (see attached). For planning purposes, I wanted to touch base with you and confirm that that date will work. If not, please let me know so that we can work out an alternate date.

Thank you,

Paul

Paul C. Llewellyn

Kaye Scholer LLP

425 Park Avenue

New York, NY 10022

[212 836 7828](tel:212-836-7828) voice

[212 836 6463](tel:212-836-6463) fax

[917 991 2364](tel:917-991-2364) cell

---

**From:** Llewellyn, Paul  
**Sent:** Monday, May 21, 2012 2:56 PM  
**To:** Kenny Wiesen  
**Cc:** Co, Jennifer; Eischeid, John  
**Subject:** Hershey v. Wiesen

Dear Mr. Wiesen –

Please see the attached, which is also being sent today by first class mail.

Paul

Paul C. Llewellyn

**KAYE SCHOLER LLP**

425 Park Avenue | New York, New York 10022

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\* \* \* \*

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with Treasury Department regulations, we inform you that any U.S. federal tax advice contained in this correspondence (including any attachments) is not intended or written to be used, and cannot be used for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

\* \* \* \*

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with Treasury Department regulations, we inform you that any U.S. federal tax advice contained in this correspondence (including any attachments) is not intended or written to be used, and cannot be used for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

# **EXHIBIT D**

**KENNETH B. WIESEN  
1 OLD COUNTRY ROAD, STE. 360B  
CARLE PLACE, NY 11514  
516-742-2212**

July 6, 2012

Paul C. Llewellyn, Esq.  
KAYE SCHOLER, LLP  
425 Park Avenue  
New York, New York 10022

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Dear Mr. Llewellyn:

I am in receipt of your communication dated June 7, 2012. It is my belief that your reliance on 37C.F.R. Section 2.120(b)(2) and Fed. R. Civ. Proc. 34(b)(2)(E) is misplaced. My objections were relative to your response to demands and not the formatting of your production of documents. It seems evident that you were aware of the actual basis for Applicant's objections by your agreement to serve the chart which purports to set forth which of Opposer's documents responded to which of Applicant's demands and interrogatories. However, after review of the chart and comparison of the documents to the demands/interrogatories, we remain unsatisfied with your responses to demands for interrogatories and production of documents as set forth below.

The following list corresponds to the number of applicant's document request dated January 20, 2012 and sets forth our objection to opposer's responses.

2. The bait stamped numbers identified in your chart for demand #2 all refer to documents regarding the filing and trademark searches. None of the documents deal with the conception, creation, selection, nor design of opposer's mark.
3. No response was given to demand number 3.
5. Hershey 04, 061 and 062 shows claimed privileged redactions which are again objected to by Applicant. Unless we can seek some compromise, Applicant shall seek intervention regarding the claimed privileged material. Hershey 02, 018 and 019 are duplicate documents.
7. No response was given to demand number 7.

July 6, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

24. Applicant objects to opposer's response to item number 24, in that the documents provided are simply ingredients listed on the wrappers and are not ready identification of the flavors used in the various candy products.

26. Applicant objects to opposer's non-response to this item. Since the Kit Kat wrappers and Whopper wrappers contain a strawberry drink graphic it is axiomatic that opposer would have documents which proffer, discuss, evaluate, or review such graphic.

27. Applicant objects to opposer's skipping this response.

31. Applicant objects to opposer's failure to respond to this demand other than statement "see production generally."

39. thru 49. Applicant objects to opposer's failure to respond to these demands for production.

**REGARDING OPPOSER'S RESPONSE TO APPLICANT'S  
AMENDED INTERROGATORIES**

The following shall be broken down by interrogatory number and Applicant's comments and objections to Opposer's responses and objections:

Interrogatories #5, #8 and #9: Applicant objects to opposer's non-response. As opposers are well aware it is applicant's position that the word "milkshake" contained on Hershey products was a flavor or characteristic term and not a mark. Thus, it is applicant's position that the specific identification of the flavor ingredients and production of "identification certificates" for each milkshake product is not only discoverable but in applicant's position is directly on point to the dispositive issue.

Interrogatory #6: Applicant objects to opposer's response "*KitKat and Whopper's candies have include **at least** the following flavors.*" Applicant requests that a comprehensive list be provided.

Interrogatories #4, #16 and #22: Applicant objects to opposer's non-response to these interrogatories and further objects to the general reference to documents as "*see production generally.*" It is also noted that the chart fails to offer any ready reference to documents.

Page 3.

July 6, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Interrogatory #17: Applicant objects to opposer's response to interrogatory #17 as failing to provide a specific response as an interrogatory. Applicant further objects to the references to documents in that the documents referenced do not provide an adequate response. For example, document number 5 which is referenced is entirely privileged and omitted. Document number 31 provides no information at all. Item #47 appears to be part of an ongoing email which in its isolated form only provides limited information.

Interrogatory #19, #20 and #21 are not responded to and no references are given to documents which purport to indirectly respond to these interrogatories as claimed in the interrogatory responses.

Kindly advise at your first opportunity of your willingness or lack thereof to comply with our requests.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth B. Wiesen", with a large, sweeping flourish at the end.

KENNETH B. WIESEN

KBW/lc

# **EXHIBIT E**



July 20, 2012

**VIA EMAIL (wiesenlaw@gmail.com)**

Kenneth Wiesen, Esq.  
1 Old Country Road, Suite 360-B  
Carle Place, NY 11514

**Re: *Hershey Chocolate & Confectionery Corp., et al. v. Wiesen*  
TTAB No. 91200575**

Dear Mr. Wiesen:

We are in receipt of your letter of July 6, 2012 with further objections to Hershey Chocolate & Confectionery Corp. and The Hershey Company's (collectively, "Hershey") production of documents and responses to your First Set of Requests for Production of Documents and Things (the "Document Requests") and Amended First Set of Interrogatories (the "Amended Interrogatories"). We have reviewed these additional objections and, in the spirit of cooperation and in the interest of moving discovery along expeditiously, we address them below.

First, as a general matter, Hershey has acted in good faith throughout the discovery process. Hershey's objections to your Document Requests and Amended Interrogatories were all valid and appropriate under federal law and the Trademark Trial and Appeal Board ("TTAB") rules of procedure. Subject to these objections, Hershey conducted a diligent search of the documents of sixteen custodians, reviewed thousands documents, and produced responsive documents consistent with its obligations under federal law and TTAB rules. Much of your letter appears to reflect your disappointment that Hershey does not have documents that you would like it to have, rather than any actual deficiency in Hershey's responses or document production.

Second, the nature of your objection in the first paragraph of your letter is not clear. Both 37 C.F.R. § 2.120(**d**)(2)<sup>1</sup> and Fed. R. Civ. Proc. 34(b)(2)(E) are directly applicable to your objection to Hershey producing documents without identifying which document responds to each request, and you appear to acknowledge that that was your objection later in that same

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<sup>1</sup> Not § 2.120(**b**)(2), as you state.

paragraph. Put simply, you objected that we did not identify which documents responded to which Document Requests and Amended Interrogatories, and we addressed that issue with the chart that we provided.

Third, with respect to your objection to Hershey's production in response to Document Request No. 2, as you are aware, and as noted in Bates No. HRSY00000003, the MILKSHAKE trademark was originally adopted by Hershey's predecessor-in-interest in the 1920s, almost 100 years ago. Given that length of time and the change of ownership, documents concerning the conception, creation, selection, and design of the MILKSHAKE trademark may not have come into Hershey's possession. Hershey conducted a reasonable search of likely custodians and has produced the documents in its possession relevant to this case regarding its MILKSHAKE trademark.

Fourth, with respect to your objection to Hershey's response to Document Request Nos. 3, 7, and 26, and Amended Interrogatory Nos. 19, 20, and 21, although Hershey advised that it would produce any documents in its possession that were responsive to those requests, this response was subject to Hershey's General Objection G to Document Requests. General Objection G clearly states that "[a] response that Hershey will produce documents responsive to any individual Document Request does not imply that Hershey has located any responsive documents, but only that Hershey will produce such responsive non-privileged documents as it locates through good faith efforts and reasonable diligence." Hershey conducted a good faith and reasonably diligent search for documents and information responsive to each Document Request and Interrogatory, and did not find any relevant, non-privileged documents responsive to those discovery requests.

Fifth, as we advised in our June 7, 2012 letter, the documents stamped Bates Nos. 4, 61, and 62 contain information protected by attorney-client privilege and/or attorney work product privilege, hence the redaction for privilege in accordance with federal and TTAB rules. Although we will not produce these privileged documents unredacted, we do attach a privilege log for these documents.

Sixth, with respect to your objection to Hershey's response to Document Request No. 24 and Amended Interrogatory Nos. 5, 8, and 9, as you acknowledge, the wrappers list the ingredients of each of the products bearing the MILKSHAKE mark. To the extent you seek specific and detailed formulations of the flavors used in the MILKSHAKE-branded products, such information is not relevant to the issues in this proceeding. Moreover, such formulations are trade secrets and Hershey is entitled to protect such information against disclosure, particularly to a potential competitor.

Seventh, and similarly, with respect to your objection to Hershey's response to Amended Interrogatory No. 6, Hershey made a good faith effort to collect a list of all recent flavors (or varieties) of Hershey's Kit Kat bars and Whoppers candy. Hershey cannot guarantee that the list of flavors or varieties provided in response to Interrogatory No. 6 is exhaustive and includes

Kenneth Wiesen, Esq.

- 3 -

July 20, 2012

every flavor or variety, including limited edition products, released in the United States. Furthermore, a list of all flavors or varieties of Hershey's Kit Kat bars and Whoppers candy is not relevant to your allegation that Hershey's MILKSHAKE trademark is descriptive.

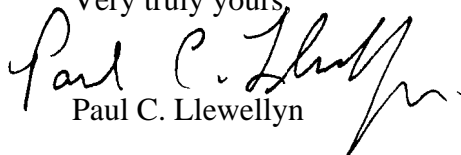
Eighth, with respect to your objection to Hershey's response to Document Request No. 27, Hershey did not "skip" this Document Request. Rather, Hershey referred you to its responses to Document Request Nos. 23 and 25, because Document Request No. 27 is duplicative of those two Document Requests. Likewise, Hershey's responses to Document Request Nos. 39 through 49 stated clear and reasonable objections to those requests and, in the case of Document Request Nos. 39, 42, 44, and 46-48, referred you to Hershey's responses to other Document Requests since they are duplicative of or overlap with those other Document Requests. It is common and standard practice in discovery responses to refer to responses and objections to other discovery requests where such discovery requests are overlapping or duplicative, and we see no basis for your objections in this regard.

Ninth, Hershey's chart identifying documents responsive to your Document Requests and Amended Interrogatories advised "see production generally" in response to Document Request No. 31 and Amended Interrogatory Nos. 16 and 22 because it is Hershey's position that the documents produced generally support Hershey's position that its MILKSHAKE trademark is protectable and not merely descriptive. In addition, Hershey did provide specific Bates references in response to Amended Interrogatory No. 4 – please see page 4 of the chart attached to our June 7, 2012 letter.

Tenth, with respect to your objection that Hershey's response to Amended Interrogatory No. 17 "fail[ed] to provide a specific response," you acknowledge that Hershey has identified documents responsive to that Amended Interrogatory. Accordingly, we see no basis for this objection.

Please do not hesitate to contact me if you have any questions or wish to discuss these matters further.

Very truly yours,



Paul C. Llewellyn

PCL:jlc  
Attachment

## **Hershey Chocolate & Confectionery Corporation and The Hershey Company Redactions Privilege Log**

*Hershey v. Wiesen* (TTAB Opposition No.: 91200575)

No.	Bates No.	Date Modified / Sent	From	To	CC	Privilege Description	Privilege Basis
1.	HRSHY00000004	March 4, 2011	Diane Kamp**	Susan Wise		E-mail from Diane Kamp** to Susan Wise containing attorney-client communication regarding first use of MILKSHAKE on Kit Kat products.	Attorney-Client Communication  Attorney Work Product
2.	HRSHY00000061	March 4, 2011	E-mails 1 & 3: Diane Kamp**  E-mail 2: Susan Wise  E-mail 4: Lois Duquette*	E-mail 1: Susan Wise  E-mails 2 & 4: Diane Kamp**  E-mail 3: Lois Duquette*		Sequence of four e-mails between Lois Duquette*, Diane Kamp**, and Susan Wise containing attorney-client communication regarding and reflecting legal analysis regarding first use of MILKSHAKE on Kit Kat products.	Attorney-Client Communication  Attorney Work Product
3.	HRSHY00000062	March 4, 2011	E-mails 1 & 3: Diane Kamp**  E-mail 2: Susan Wise	E-mail 1: Susan Wise  E-mail 2: Diane Kamp**  E-mail 3: Lois Duquette*		Sequence of three e-mails between Lois Duquette*, Diane Kamp**, and Susan Wise containing attorney-client communication regarding and reflecting legal analysis regarding first use of MILKSHAKE on Kit Kat products.	Attorney-Client Communication  Attorney Work Product

\* Denotes an attorney acting on Hershey's behalf.

\*\* Denotes a paralegal or an attorney's administrative assistant acting on Hershey's behalf.

60830657.DOCX

# **EXHIBIT F**

## Co, Jennifer

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**From:** Llewellyn, Paul  
**Sent:** Friday, October 26, 2012 1:17 PM  
**To:** Co, Jennifer  
**Subject:** FW: Good Faith Letter Re: Milkshake TAB: 91200575  
**Attachments:** 20121026150833.pdf

Sent with Good ([www.good.com](http://www.good.com))

-----Original Message-----

**From:** KENNETH WIESEN [[wiesenlaw@gmail.com](mailto:wiesenlaw@gmail.com)]  
**Sent:** Friday, October 26, 2012 04:14 PM Eastern Standard Time  
**To:** Llewellyn, Paul; Llewellyn, Paul  
**Subject:** Good Faith Letter Re: Milkshake TAB: 91200575

Dear Mr. Llewellyn,

As per the instructions of Mr. Kim attached hereto is my last "Good Faith" attempt to resolve our discovery issues. The matters raised in this letter attached have been previously raised with you.

Ken Wiesen  
1 Old Country Road  
Carle Place, NY 11514  
516-742-2212

**KENNETH B. WIESEN**  
**1 OLD COUNTRY ROAD, STE. 360B**  
**CARLE PLACE, NY 11514**  
**516-742-2212**

October 26, 2012

Paul C. Llewellyn, Esq.  
KAYE SCHOLER, LLP  
425 Park Avenue  
New York, New York 10022

**Re: Hershey Chocolate v. Kenneth B. Wiesen**  
**TTAB: 91200575**

Dear Mr. Llewellyn:

Pursuant to the Trademark Trial and Appeal Board's Interlocutory Attorney, Mr. Kim, kindly consider this communication our additional good faith attempt to resolve discovery issues.

As you know, Applicant served an Amended Applicant's First Set of Interrogatories, Applicant's First Set of Requests for Production of Documents and Things and Applicant's Second Set of Requests for Production of Documents and Things. As stated in my June 4<sup>th</sup>, 2012 and July 5<sup>th</sup>, 2012 communications, we remain unsatisfied with you Response to Demands for Interrogatories and Production of Documents. Below is a list of Discovery and Responses that we seek:

**AMENDED FIRST SET OF INTERROGATORIES**

*(The following shall be broken down by interrogatory number and Applicant's comments and objections to Opposers' responses and objections.)*

Interrogatories #5, #8 and #9: Applicant objects to opposers' non-response. As opposers are well aware it is applicant's position that the word "milkshake" contained on Hershey products was a flavor or characteristic term and not a mark. Thus, it is applicant's position that the specific identification of the flavor ingredients and production of "identification certificates" for each milkshake product is not only discoverable but in applicant's position is directly on point to the dispositive issue.

October 26, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**  
**TTAB: 91200575**

Interrogatory #6: Applicant objects to opposers' response "*KitKat and Whopper's candies have include at least the following flavors.*" Applicant requests that a comprehensive list of the flavors be provided.

Interrogatories #4, #16 and #22: Applicant objects to opposers' non-response to these interrogatories and further objects to the general reference to documents as "*see production generally.*" It is also noted that the chart [chart supplied along with Kaye Scholer's letter of June 7<sup>th</sup>, 2012] fails to offer any ready reference to documents.

Interrogatory #17: Applicant objects to opposers' response to interrogatory #17 as failing to provide a specific response as an interrogatory. Applicant further objects to the references to documents in that the documents referenced do not provide an adequate response. For example, document number 5 which is referenced is entirely privileged and omitted. Document number 31 provides no information at all. Item #47 appears to be part of an ongoing email which in its isolated form only provides limited information.

Interrogatory #19, #20 and #21 are not responded to and no references are given to documents which purport to serve as a response to these interrogatories as claimed in Opposers' interrogatory responses.

**APPLICANT'S SECOND SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND THINGS**

*[Of note, references to bait stamped numbers listed as Hershey number # are references to the set of documents produced by Hershey and the term "chart" references the chart supplied by Opposers along with its June 7<sup>th</sup>, 2012 communication.]*

A. Regarding response to D&I #2: The bait stamped numbers identified in your chart for demand #2 all refer to documents regarding the filing and trademark searches. None of the documents deal with the conception, creation, selection, nor design of opposers' mark.

B. Regarding response to Amended D&I #3: No response was given to demand.



Page 3

October 26, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

**TTAB: 91200575**

C. Regarding response to Amended D&I #5: Opposers' form objections are without merit. Applicant seeks a response. Moreover, the documents referred to by Opposers in its chart are inadequate as a response. Additionally, Hershey 04, 061 and 062 are offered as responses to this demand but then are redacted as privileged.

D. Regarding response to Amended D&I #7: No response was given to the demand.

E. Regarding response to Amended D&I #24: Opposers' form objections are without merit. Applicant seeks a response. Moreover, the documents referred to by Opposers in its chart are inadequate as a response. Applicant objects to opposers' chart reference in that the documents provided are simply ingredients listed on the wrappers and are not the flavor ingredients used in the various candy products.

F. Regarding response to Amended D&I #26: Opposers' form objections are without merit. Applicant seeks a response. Moreover, the documents referred to by Opposers in its chart are inadequate as a response. Applicant objects to opposers' non-response to this item. Since the Kit Kat wrappers and Whopper wrappers contain a strawberry drink graphic it is axiomatic that opposers would have documents which proffer, discuss, evaluate, or review such graphic.

G. Regarding response to Amended D&I #27: Applicant objects to opposers' skipping this response.

H. Regarding response to Amended D&I #31: Applicant objects to opposers' failure to respond to this demand other than statement "see production generally."

I. Regarding response to Amended D&I #39 to 49: Applicant objects to opposers' failure to respond to these demands for production.

Kindly advise at your very first opportunity of your willingness or lack thereof to comply with our requests as we will seek relief from the Court as per the directives of the Interlocutory Attorney should Opposers continue to be unwilling to provide responses to the Interrogatories and Discovery as set forth in this communication.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth B. Wiesen", with a stylized flourish at the end.

KENNETH B. WIESEN

KBW/lc

# **EXHIBIT G**

# KAYE SCHOLER LLP

Paul C. Llewellyn  
212.836.7828  
pllewellyn@kayescholer.com  
425 Park Avenue  
New York, New York 10022-3598  
212.836.8000  
Fax 212.836.6463  
www.kayescholer.com

November 8, 2012

**VIA EMAIL (wiesenlaw@gmail.com)**

Kenneth Wiesen, Esq.  
1 Old Country Road, Suite 360-B  
Carle Place, NY 11514

**Re: *Hershey Chocolate & Confectionery Corp., et al. v. Wiesen*  
TTAB No. 91200575**

Dear Mr. Wiesen:

We are in receipt of your letter of October 26, 2012 with objections to Hershey Chocolate & Confectionery Corp. and The Hershey Company's (collectively, "Hershey") production of documents and responses to your First Set of Requests for Production of Documents and Things (the "Document Requests") and Amended First Set of Interrogatories (the "Amended Interrogatories").

As a preliminary matter, we note that your so-called "good faith" letter is simply a clone of your July 6, 2012 letter regarding these same issues (attached hereto as Exhibit A), and entirely ignores our July 20, 2012 response thereto (attached hereto as Exhibit B), in which we addressed your objections at length. Thus, your copied-and-pasted October 26, 2012 letter simply ignores our detailed responses to precisely the same issues that you raised three months ago, and hardly constitutes a good-faith effort to resolve the issues that you have raised.

Nevertheless, in the spirit of cooperation and in the interest of moving this proceeding along expeditiously, we again respond to your objections below and, for your further reference, attach our earlier letters addressing the same in detail.

First, as we explained in our July 20, 2012 letter, Hershey has acted in good faith throughout the discovery process. Hershey's objections to your Document Requests and Amended Interrogatories were all valid and appropriate under federal law and the Trademark Trial and Appeal Board ("TTAB") rules of procedure. Subject to these objections, Hershey conducted a diligent search of the documents of sixteen custodians, reviewed thousands documents, and produced responsive documents consistent with its obligations under federal law and TTAB rules. Much of your letter appears to reflect your disappointment that Hershey does not have documents that you would like it to have, rather than any actual deficiency in Hershey's responses or document production.

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CHICAGO • FRANKFURT • LONDON • LOS ANGELES • NEW YORK • PALO ALTO • SHANGHAI • WASHINGTON, DC • WEST PALM BEACH

Second, with respect to your objection to Hershey's responses to Amended Interrogatory Nos. 5, 8, and 9 and Document Request No. 24, as you acknowledge in both your July 6, 2012 and October 26, 2012 letters, the wrappers list the ingredients of each of the products bearing the MILKSHAKE mark. As we explained in our July 20, 2012 letter, to the extent you seek specific and detailed formulations of the flavors used in the MILKSHAKE-branded products, such information is not relevant to the issues in this proceeding: As set forth below, the relevant issue here is the meaning of the term MILKSHAKE to consumers, and there is absolutely no evidence in this proceeding that the technical formulation of Hershey's products has any bearing on consumer understanding. Moreover, such formulations are trade secrets and Hershey is entitled to protect such information against disclosure, particularly to a potential competitor.

To the extent you are seeking evidence of use of the term "milkshake" by Hershey employees, such documents are wholly irrelevant to the dispute at issue here. Notwithstanding the fact that Hershey consistently uses "MILKSHAKE" as a trademark for its candy products, both on the packaging and in advertising, the distinctiveness and protectability of trademarks depends upon *consumer* perception of the mark, not internal company use thereof. *See, e.g., In re Abcor Development Corp.*, 588 F.2d 811, 814 (C.C.P.A. 1978) ("[D]escriptiveness of a mark, when applied to the goods or services involved, is to be determined from the standpoint of the average prospective purchaser."); *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 699 (2d Cir. 1961) ("In determining whether a claimed trademark is descriptive at the time of its adoption, its meaning to a nonpurchasing segment of the population is not important. The critical question is whether the mark is descriptive to the prospective purchasers of the article."); *Anheuser-Busch Inc. v. Stroh Brewery Co.*, 750 F.2d 631, 638 (8th Cir. 1984) ("The test ... is what consumers, not persons in the trade, understand the term to be.").

Third, with respect to your objection to Hershey's response to Amended Interrogatory No. 6, we also explained in our July 20, 2012 letter that Hershey made a reasonable, good faith effort to collect a list of all recent flavors of Hershey's Kit Kat bars and Whoppers candy. Upon further review, and in an effort to address your concerns, we have conducted further investigation and we hereby supplement the response to Amended Interrogatory No. 6 to include the following additional flavors:

WHOPPERS: Orange Crème Malted Milk Balls, Vanilla Malted Milk Balls and Blueberry Malted Milk Balls.

KIT KAT: Orange & Crème, Chocolate Mocha, Inside Out, Coffee, Mint, Caramel.

At the same time, while we are reasonably certain that this list is complete, Hershey cannot guarantee that the list of flavors provided in response to Interrogatory No. 6 is exhaustive and includes every flavor or variety, including limited edition products, released in the United States since 2005. Furthermore, a list of all flavors of Hershey's Kit Kat bars and Whoppers candy is not relevant to your allegation that Hershey's MILKSHAKE trademark is merely descriptive.

Fourth, you object that Hershey's chart identifying documents responsive to your Amended Interrogatories and Document Requests (which we prepared in response to your request in your letter dated June 4, 2012, attached hereto as Exhibit C), advised "see production generally" with respect to Amended Interrogatory Nos. 16 and 22 and Document Request No. 31. These very broad requests relate generally to Hershey's position that MILKSHAKE is protectable as a trademark.<sup>1</sup> As we again explained in our July 20, 2012 letter, we believe that the response provided in Hershey's chart is appropriate, because it is Hershey's position that the documents it has produced generally support Hershey's position that its MILKSHAKE trademark is protectable and not merely descriptive, and it would be unreasonably burdensome to require Hershey to identify in any greater detail each specific document in its production that it believes supports the broad proposition that the mark is protectable and not merely descriptive. To the extent that you suggest that Hershey should individually list each document in its production, we think that that request would be unreasonable and unduly burdensome. In addition, as we noted in our July 20, 2012 letter, Hershey did provide specific Bates references in response to Amended Interrogatory No. 4<sup>2</sup> – please see page 4 of the chart attached to our June 7, 2012 letter (attached hereto as Exhibit D).

Fifth, with respect to your objection that Hershey's response to Amended Interrogatory No. 17 "fail[ed] to provide a specific response," we noted in our July 20, 2012 letter that you

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<sup>1</sup> Amended Interrogatory No. 16 states "Identify all documents concerning, reflecting or purporting to support any assertion by Hershey that Hershey's mark was not descriptive, was enforceable and/or protected and/or was not used to relate to the consumers the taste, flavor and/or characteristic of the 'various candy products' including, but not limited to the specimen submitted with Opposers' Mark."

Amended Interrogatory No. 22 states "Identify all documents which support Hershey's contention of 'the mark's inherently distinctive nature' as alleged by Opposers in its Notice of opposition paragraph 3."

Document Request No. 31 states "Copies of all documents containing, concerning, reflecting or purporting to support any assertion by Hershey that Hershey's mark was not descriptive, was enforceable and/or protected and/or was not used to relate to the consumers of the product taste, flavor and/or characteristic of the 'various candy products' including, but not limited to the product submitted as a specimen with Opposers' Mark."

<sup>2</sup> Amended Interrogatory No. 4 states "Separately identify each 'promotion and advertising' for each 'candy product' identified in response to Interrogatory number 3 and all other marketing, sales and product brochures, price lists, supply sheets, sell sheets, marketing catalogs, parts and specification sheets and any other sales and advertising documents which specifically has the term 'MilkShake' contained therein."

acknowledge that Hershey has identified documents responsive to that Amended Interrogatory. Accordingly, we see no basis for this objection.

Sixth, with respect to your objection to Hershey's responses to Amended Interrogatory Nos. 19, 20, and 21, and Document Request Nos. 3, 7, and 26, although Hershey advised that it would produce any documents in its possession that were responsive to those requests, this response was subject to Hershey's General Objection G to Document Requests. General Objection G clearly states that "[a] response that Hershey will produce documents responsive to any individual Document Request does not imply that Hershey has located any responsive documents, but only that Hershey will produce such responsive non-privileged documents as it locates through good faith efforts and reasonable diligence." Hershey conducted a good faith and reasonably diligent search for documents and information responsive to each Document Request and Interrogatory, and did not find any relevant, non-privileged documents responsive to those discovery requests. Again, we explained this in our July 20, 2012 letter, which you entirely ignore.

Seventh, with respect to your objection to Hershey's production in response to Document Request No. 2, as you are aware, and as noted in Bates No. HRSY00000003, the MILKSHAKE trademark was originally adopted by Hershey's predecessor-in-interest in the 1920s, almost 100 years ago. Given that length of time and the change of ownership, documents concerning the conception, creation, selection, and design of the MILKSHAKE trademark may not have come into Hershey's possession. Hershey conducted a reasonable search of likely custodians and has produced the documents in its possession relevant to this case regarding its MILKSHAKE trademark. Again, this was explained in our July 20, 2012 letter.

Eighth, as we advised in our June 7, 2012 letter and in our July 20, 2012 letter, the documents stamped Bates Nos. 4, 61, and 62 contain information protected by attorney-client privilege and/or attorney work product privilege, hence the redaction for privilege in accordance with federal and TTAB rules. Although we will not produce these privileged documents unredacted, we provided a privilege log for these documents with our July 20, 2012 letter (see Exhibit B), which you simply ignore.

Ninth, with respect to your objection to Hershey's response to Document Request No. 27, Hershey did not "skip" this Document Request. Rather (as, again, our July 20, 2012 letter explained), Hershey referred you to its responses to Document Request Nos. 23 and 25, because Document Request No. 27 is entirely duplicative of those two Document Requests. Likewise, Hershey's responses to Document Request Nos. 39 through 49 stated clear and reasonable objections to those requests and, in the case of Document Request Nos. 39, 42, 44, and 46-48, referred you to Hershey's responses to other Document Requests since they are duplicative of or overlap with those other Document Requests. It is common and standard practice in discovery responses to refer to responses and objections to other discovery requests where such discovery requests are overlapping or duplicative, and we see no basis for your objections in this regard.

KAYE SCHOLER LLP

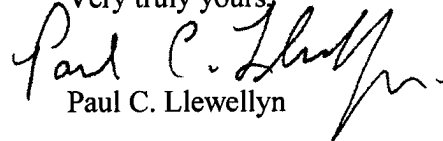
Kenneth Wiesen, Esq.

- 5 -

November 8, 2012

As I stated in our previous letters in response to your discovery concerns, we remain willing to confer with you in order to narrow the scope of any dispute. While you did not choose to attempt such a conversation previously, please do not hesitate to contact me if you have any questions or wish to discuss these matters further.

Very truly yours,

  
Paul C. Llewellyn

Attachments

60952096 DCCX

CHICAGO • FRANKFURT • LONDON • LOS ANGELES • NEW YORK • PALO ALTO • SHANGHAI • WASHINGTON, DC • WEST PALM BEACH

# **EXHIBIT A**



**KENNETH B. WIESEN**  
**1 OLD COUNTRY ROAD, STE. 360B**  
**CARLE PLACE, NY 11514**  
**516-742-2212**

July 6, 2012

Paul C. Llewellyn, Esq.  
KAYE SCHOLER, LLP  
425 Park Avenue  
New York, New York 10022

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Dear Mr. Llewellyn:

I am in receipt of your communication dated June 7, 2012. It is my belief that your reliance on 37C.F.R. Section 2.120(b)(2) and Fed. R. Civ. Proc. 34(b)(2)(E) is misplaced. My objections were relative to your response to demands and not the formatting of your production of documents. It seems evident that you were aware of the actual basis for Applicant's objections by your agreement to serve the chart which purports to set forth which of Opposer's documents responded to which of Applicant's demands and interrogatories. However, after review of the chart and comparison of the documents to the demands/interrogatories, we remain unsatisfied with your responses to demands for interrogatories and production of documents as set forth below.

The following list corresponds to the number of applicant's document request dated January 20, 2012 and sets forth our objection to opposer's responses.

2. The bait stamped numbers identified in your chart for demand #2 all refer to documents regarding the filing and trademark searches. None of the documents deal with the conception, creation, selection, nor design of opposer's mark.
3. No response was given to demand number 3.
5. Hershey 04, 061 and 062 shows claimed privileged redactions which are again objected to by Applicant. Unless we can seek some compromise, Applicant shall seek intervention regarding the claimed privileged material. Hershey 02, 018 and 019 are duplicate documents.
7. No response was given to demand number 7.

July 6, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

24. Applicant objects to opposer's response to item number 24, in that the documents provided are simply ingredients listed on the wrappers and are not ready identification of the flavors used in the various candy products.

26. Applicant objects to opposer's non-response to this item. Since the Kit Kat wrappers and Whopper wrappers contain a strawberry drink graphic it is axiomatic that opposer would have documents which proffer, discuss, evaluate, or review such graphic.

27. Applicant objects to opposer's skipping this response.

31. Applicant objects to opposer's failure to respond to this demand other than statement "see production generally."

39. thru 49. Applicant objects to opposer's failure to respond to these demands for production.

**REGARDING OPPOSER'S RESPONSE TO APPLICANT'S  
AMENDED INTERROGATORIES**

The following shall be broken down by interrogatory number and Applicant's comments and objections to Opposer's responses and objections:

Interrogatories #5, #8 and #9: Applicant objects to opposer's non-response. As opposers are well aware it is applicant's position that the word "milkshake" contained on Hershey products was a flavor or characteristic term and not a mark. Thus, it is applicant's position that the specific identification of the flavor ingredients and production of "identification certificates" for each milkshake product is not only discoverable but in applicant's position is directly on point to the dispositive issue.

Interrogatory #6: Applicant objects to opposer's response "*KitKat and Whopper's candies have include at least the following flavors.*" Applicant requests that a comprehensive list be provided.

Interrogatories #4, #16 and #22: Applicant objects to opposer's non-response to these interrogatories and further objects to the general reference to documents as "*see production generally.*" It is also noted that the chart fails to offer any ready reference to documents.

Page 3.

July 6, 2012

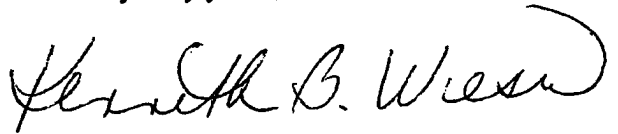
**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Interrogatory #17: Applicant objects to opposer's response to interrogatory #17 as failing to provide a specific response as an interrogatory. Applicant further objects to the references to documents in that the documents referenced do not provide an adequate response. For example, document number 5 which is referenced is entirely privileged and omitted. Document number 31 provides no information at all. Item #47 appears to be part of an ongoing email which in its isolated form only provides limited information.

Interrogatory #19, #20 and #21 are not responded to and no references are given to documents which purport to indirectly respond to these interrogatories as claimed in the interrogatory responses.

Kindly advise at your first opportunity of your willingness or lack thereof to comply with our requests.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth B. Wiesen", with a large, sweeping flourish at the end.

KENNETH B. WIESEN

KBW/lc

## **EXHIBIT B**

# KAYE SCHOLER LLP

Paul C. Llewellyn  
212.836.7828  
pllewellyn@kayescholer.com  
425 Park Avenue  
New York, New York 10022-3598  
212.836.8000  
Fax 212.836.6463  
www.kayescholer.com

July 20, 2012

**VIA EMAIL (wiesenlaw@gmail.com)**

Kenneth Wiesen, Esq.  
1 Old Country Road, Suite 360-B  
Carle Place, NY 11514

**Re: *Hershey Chocolate & Confectionery Corp., et al. v. Wiesen*  
TTAB No. 91200575**

Dear Mr. Wiesen:

We are in receipt of your letter of July 6, 2012 with further objections to Hershey Chocolate & Confectionery Corp. and The Hershey Company's (collectively, "Hershey") production of documents and responses to your First Set of Requests for Production of Documents and Things (the "Document Requests") and Amended First Set of Interrogatories (the "Amended Interrogatories"). We have reviewed these additional objections and, in the spirit of cooperation and in the interest of moving discovery along expeditiously, we address them below.

First, as a general matter, Hershey has acted in good faith throughout the discovery process. Hershey's objections to your Document Requests and Amended Interrogatories were all valid and appropriate under federal law and the Trademark Trial and Appeal Board ("TTAB") rules of procedure. Subject to these objections, Hershey conducted a diligent search of the documents of sixteen custodians, reviewed thousands documents, and produced responsive documents consistent with its obligations under federal law and TTAB rules. Much of your letter appears to reflect your disappointment that Hershey does not have documents that you would like it to have, rather than any actual deficiency in Hershey's responses or document production.

Second, the nature of your objection in the first paragraph of your letter is not clear. Both 37 C.F.R. § 2.120(d)(2)<sup>1</sup> and Fed. R. Civ. Proc. 34(b)(2)(E) are directly applicable to your objection to Hershey producing documents without identifying which document responds to each request, and you appear to acknowledge that that was your objection later in that same

---

<sup>1</sup> Not § 2.120(b)(2), as you state.

paragraph. Put simply, you objected that we did not identify which documents responded to which Document Requests and Amended Interrogatories, and we addressed that issue with the chart that we provided.

Third, with respect to your objection to Hershey's production in response to Document Request No. 2, as you are aware, and as noted in Bates No. HRSY00000003, the MILKSHAKE trademark was originally adopted by Hershey's predecessor-in-interest in the 1920s, almost 100 years ago. Given that length of time and the change of ownership, documents concerning the conception, creation, selection, and design of the MILKSHAKE trademark may not have come into Hershey's possession. Hershey conducted a reasonable search of likely custodians and has produced the documents in its possession relevant to this case regarding its MILKSHAKE trademark.

Fourth, with respect to your objection to Hershey's response to Document Request Nos. 3, 7, and 26, and Amended Interrogatory Nos. 19, 20, and 21, although Hershey advised that it would produce any documents in its possession that were responsive to those requests, this response was subject to Hershey's General Objection G to Document Requests. General Objection G clearly states that "[a] response that Hershey will produce documents responsive to any individual Document Request does not imply that Hershey has located any responsive documents, but only that Hershey will produce such responsive non-privileged documents as it locates through good faith efforts and reasonable diligence." Hershey conducted a good faith and reasonably diligent search for documents and information responsive to each Document Request and Interrogatory, and did not find any relevant, non-privileged documents responsive to those discovery requests.

Fifth, as we advised in our June 7, 2012 letter, the documents stamped Bates Nos. 4, 61, and 62 contain information protected by attorney-client privilege and/or attorney work product privilege, hence the redaction for privilege in accordance with federal and TTAB rules. Although we will not produce these privileged documents unredacted, we do attach a privilege log for these documents.

Sixth, with respect to your objection to Hershey's response to Document Request No. 24 and Amended Interrogatory Nos. 5, 8, and 9, as you acknowledge, the wrappers list the ingredients of each of the products bearing the MILKSHAKE mark. To the extent you seek specific and detailed formulations of the flavors used in the MILKSHAKE-branded products, such information is not relevant to the issues in this proceeding. Moreover, such formulations are trade secrets and Hershey is entitled to protect such information against disclosure, particularly to a potential competitor.

Seventh, and similarly, with respect to your objection to Hershey's response to Amended Interrogatory No. 6, Hershey made a good faith effort to collect a list of all recent flavors (or varieties) of Hershey's Kit Kat bars and Whoppers candy. Hershey cannot guarantee that the list of flavors or varieties provided in response to Interrogatory No. 6 is exhaustive and includes

every flavor or variety, including limited edition products, released in the United States. Furthermore, a list of all flavors or varieties of Hershey's Kit Kat bars and Whoppers candy is not relevant to your allegation that Hershey's MILKSHAKE trademark is descriptive.

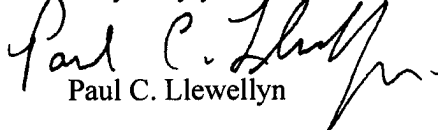
Eighth, with respect to your objection to Hershey's response to Document Request No. 27, Hershey did not "skip" this Document Request. Rather, Hershey referred you to its responses to Document Request Nos. 23 and 25, because Document Request No. 27 is duplicative of those two Document Requests. Likewise, Hershey's responses to Document Request Nos. 39 through 49 stated clear and reasonable objections to those requests and, in the case of Document Request Nos. 39, 42, 44, and 46-48, referred you to Hershey's responses to other Document Requests since they are duplicative of or overlap with those other Document Requests. It is common and standard practice in discovery responses to refer to responses and objections to other discovery requests where such discovery requests are overlapping or duplicative, and we see no basis for your objections in this regard.

Ninth, Hershey's chart identifying documents responsive to your Document Requests and Amended Interrogatories advised "see production generally" in response to Document Request No. 31 and Amended Interrogatory Nos. 16 and 22 because it is Hershey's position that the documents produced generally support Hershey's position that its MILKSHAKE trademark is protectable and not merely descriptive. In addition, Hershey did provide specific Bates references in response to Amended Interrogatory No. 4 – please see page 4 of the chart attached to our June 7, 2012 letter.

Tenth, with respect to your objection that Hershey's response to Amended Interrogatory No. 17 "fail[ed] to provide a specific response," you acknowledge that Hershey has identified documents responsive to that Amended Interrogatory. Accordingly, we see no basis for this objection.

Please do not hesitate to contact me if you have any questions or wish to discuss these matters further.

Very truly yours,

  
Paul C. Llewellyn

PCL:jlc  
Attachment

**Hershey Chocolate & Confectionery Corporation and The Hershey Company Redactions Privilege Log**

*Hershey v. Wiesen* (TTAB Opposition No.: 91200575)

No.	Bates No.	Date Modified / Sent	From	To	CC	Privilege Description	Privilege Basis
1.	HRSHY00000004	March 4, 2011	Diane Kamp**	Susan Wise		E-mail from Diane Kamp** to Susan Wise containing attorney-client communication regarding first use of MILKSHAKE on Kit Kat products.	Attorney-Client Communication Attorney Work Product
2.	HRSHY000000061	March 4, 2011	E-mails 1 & 3: Diane Kamp** E-mail 2: Susan Wise E-mail 4: Lois Duquette*	E-mail 1: Susan Wise E-mails 2 & 4: Diane Kamp** E-mail 3: Lois Duquette*		Sequence of four e-mails between Lois Duquette*, Diane Kamp**, and Susan Wise containing attorney-client communication regarding and reflecting legal analysis regarding first use of MILKSHAKE on Kit Kat products.	Attorney-Client Communication Attorney Work Product
3.	HRSHY000000062	March 4, 2011	E-mails 1 & 3: Diane Kamp** E-mail 2: Susan Wise	E-mail 1: Susan Wise E-mail 2: Diane Kamp** E-mail 3: Lois Duquette*		Sequence of three e-mails between Lois Duquette*, Diane Kamp**, and Susan Wise containing attorney-client communication regarding and reflecting legal analysis regarding first use of MILKSHAKE on Kit Kat products.	Attorney-Client Communication Attorney Work Product

\* Denotes an attorney acting on Hershey's behalf.

\*\* Denotes a paralegal or an attorney's administrative assistant acting on Hershey's behalf.

6/18/2015 5:17 PM DOCX



# **EXHIBIT C**

**KENNETH B. WIESEN  
1 OLD COUNTRY ROAD, STE. 360B  
CARLE PLACE, NY 11514  
516-742-2212**

June 4, 2012

Paul C. Llewellyn, Esq.  
KAYE SCHOLER, LLP  
425 Park Avenue  
New York, New York 10022

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Dear Mr. Llewellyn:

This letter shall serve as our Notice of Objection to your production of documents, your responses to Applicant's First Set of Request for Production of Documents and Things and your response to Applicant's First Set of Interrogatories.

At the outset, please be advised that I object to the Notice of Deposition of the Applicant only to the extent that I would request adequate and complete responses to my request for production of documents and my request for amended first set of interrogatories prior to submitting to a deposition.

**RESPONSES TO DEMAND FOR DOCUMENTS:**

Regarding Opposer's First Amended Responses dated March 21, 2012 to Applicant's First Set of Requests for Production for Documents and Things, paragraphs 2, 3, 4, 5, 6, 7, 8 9, 10, 11, 14, 16, 22, 23, 24, 25, 31, 32, 34 and 38, no documents were provided. Opposers state in each of the above paragraph that "Hershey will produce responsive documents..." along with or a part of Opposers' actual production of documents. However, upon receipt and review of your May 4, 2012 production of documents in CD-ROM form, bait stamped pages 001 through 076, none of the 706 documents were delineated as responding to any demand let alone to any particular paragraph of Applicant's Demand for Production of Documents. This is unacceptable as there is no way for Applicant to ascertain which, if any, documents apply to each of our specific demands.

Page 2

June 4, 2012

Re: Hershey Chocolate v. Kenneth B. Wiesen

We request that Opposers either produce documents specific to each demand and clearly delineate as such or provide a supplemental or amended response to Applicant's First Set of Requests for Production of Documents and Things which clearly delineates which documents (by referring to Hershey's bate stamped numbered documents) apply to or are responsive to each of Applicant's demands.

Moreover, Applicant reserves its right to object to Opposers' First Amended Objections and Responses to Applicant's First Set of Requests for Production of Documents and Things until such time as we are in a position to be able to adequately cross-reference the documents to which Opposers purport are responsive to each of our demands.

In regard to Hershey's objection to Applicant's First Set of Requests for Production of Documents and Things, paragraph 1, 17 and 18, these demands are almost duplicative of Hershey's Demands upon Applicant and therefore objections to such demands are suspect. Accordingly, we would ask Hershey to respond to these demands.

Regarding demand number 13, we do not agree with Hershey's objections that the request is compound, vague and ambiguous. Moreover, by referring Applicant to Hershey's response to demand requests numbers 2 and 31, Hershey is further complicating any attempt to match up documents produced by Opposers to the demands made by Applicant. Hershey's responses to document requests numbers 2 and 31, likewise claim that Hershey will produce documents in its possession concerning such demand, however, other than providing the CD-ROM containing 706 bate stamped pages, there is no way for Applicant to cross-reference the documents disclosed to the specific demands made. Thus, we again request, that Hershey either provide documents specific to each demand or provide an amended for supplemental response to Applicant's First Set of Requests for Production of Documents and Things by referencing the specific bate stamped numbers that Hershey claims is responsive to each of Applicant's demands.

To even further compound the confusion, Opposers refer Applicant to two and three lawyers of other responses in order to somehow weave its way through the maze of ultimate non-response. For example, in Hershey's response number 17, Hershey refers Applicant to Hershey's response to document request number 13 and 31. In response number 13, Hershey refers Applicant to Hershey's response number 2 and back to number 31. And ultimately, in response number 2, Hershey claims that it will produce documents in its possession allegedly responsive to the demands, but again, other than the CD-ROM containing unreferenced bate stamped 706 pages, nothing has been provided. In response to Applicant's request number 19, Hershey refers Applicant to response number 6. In response number 6, Hershey again claims it will produce representative samples.

Page 3

June 4, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

Of note, in addition to our objection that no documents have been provided or there is no way for Applicant to determine which documents that have been provided apply, to the specific demands, Applicant further objects to Hershey's claim that it will choose to provide "representative" samples as opposed to the documents requested.

Hershey's response number 20 refers Applicant to Hershey's response number 6. Again, Hershey's response number 6 states it will produce representative examples, however, Hershey has not yet identified which of its bate stamped documents, if any, are responsive to both of those demands. Similarly, in response to document request number 21, Hershey again refers Applicant to response number 6.

Response to document request number 26 also refers Applicant to response to request number 6 and 23. Since response numbers 6 and 23 both indicate Hershey will produce documents, we have the same inability to cross-reference and determine which, if any, documents are responsive to these specific demands.

Response number 27 refers Applicant to Hershey's response numbers 23 and 25, (paragraphs 23 and 25 both claim Hershey will produce documents in its possession). Similarly, response to request for document numbers 29, 30, 33, 39, 42, 44, 46, 47 and 48 all refer Applicant to other paragraphs, some of which claim that Hershey will produce documents. We demand specific reference responses to each paragraph and the documents produced or further documents to be produced.

In regard to Hershey's responses to document requests numbers 40 and 41, Hershey claims that these demands are irrelevant, vague and ambiguous, overbroad and unduly burdensome. We disagree with Hershey's position. It is Applicant's claim that Hershey routinely uses the term Milkshake as a descriptive word for the flavor and characteristic of the food/confectionary product. It is further Applicant's position that the use of the word Milkshake as claimed by Hershey as a trademark use is duplicative of the way it used the term Milkshake in its other products and therefore is proof of Applicant's position and therefore relevant to the proceedings. Therefore, Applicant repeats its demand for a response to these paragraphs

In regard to paragraph number 43, Hershey's objection that the demand is vague, ambiguous, overbroad, unduly burdensome and calling for a legal conclusion is simply an attempt to evade. Since it is uncontested that Hershey claims that it has used the term Milkshake other than as claimed as a trademark on products as a descriptive word rather than a trademark use, Applicant simply asks for production of the labels, wrappers, display boxes, and point of sale displays, where the term Milkshake was used as such descriptive term. Accordingly, we request that Hershey respond to this document demand.

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

In response to document request number 49, Hershey refers Applicant to documents Hershey has produced and will produce in "this" Opposition. This is extremely broad and vague and offers Applicant no point of reference. As previously demanded, Applicant requests that Opposers either provide the document(s) specific to this request or provide a specific response to this paragraph by referencing only those documents (referenced by bates stamped number) that specifically are responsive to this demand.

#### **CD-ROM DOCUMENT DISCLOSURE**

1. Documents 079 through 160, 162 through 326, 328 through 409, and 671 through 706 contain full sheets of paper which simply contain the bates stamped number, the word "non-responsive" and the words "highly confidential." There is no indication what the subject matter of the document is, nor what paragraph number or numbers of the First Set of Requests for Production of Documents and Things they are referencing. Pursuant to the stipulated Order we are entitled to access to documents marked highly confidential and accordingly demand access to same.

2. Bates stamped numbers 004, 005, 009, 061, 062, 558, 560, 583, 613, and 617 contain redacted portions which have an imprinted word "privileged" on it. There is no category in the protective Order for such marking. If you claim another basis for non-disclosure, please provide the specifics of your claim for each document.

3. A number of the documents appear to be copies of electronic transmissions but may not contain the attachments that are indicated as attached in the documents. Specifically, 044, 063, 066, 075, 078, 161, 327, 410, 414, 417, 435, 451, 467, 477, 493, 585, 587, 594 and 670. If the attachments were provided as documents, please identify the bates stamped numbers that are those attachments. If those attachments are not provided, kindly provide those attachments.

#### **RESPONSES TO INTERROGATORIES**

Regarding Hershey's objections and responses to Applicant's Amended First Set of Interrogatories, response number 3 refers Applicant to documents Hershey will produce in response to Applicant's First Set of Requests for Production of Documents and Things. As per our position stated earlier, such response offers no point of reference for Applicant. We request that Hershey supplement their response to specifically identify the document(s) that Hershey refers to in response to interrogatory number 3.

Page 5

June 4, 2012

**Re: Hershey Chocolate v. Kenneth B. Wiesen**

In response to interrogatories numbers 4, 5, 6, 9 11, 14, 15, 16, 17, 18, 19, 20, 22, and 23, again Hershey refers Applicant to documents Hershey will produce in response to Request for Documents and Things. The Applicant demands that Hershey provide a specific response identifying each document.

As we have a limited time to complete discovery, we ask Hershey to respond to this communication as soon as possible so that we can meet the discovery deadline limitations of the Trademark Trial & Appeal Board. We note that Hershey's production of documents was extensively delayed even beyond the time period in which Hershey claims that it was delayed because it was waiting for Applicant's agreement of confidentiality.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth B. Wiesen", written in a cursive style.

KENNETH B WIESEN

KBW/lc

## **EXHIBIT D**

# KAYE SCHOLER LLP

Paul C. Llewellyn  
212.836.7828  
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212.836.8000  
Fax 212.836.6463  
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June 7, 2012

**VIA EMAIL (wiesenlaw@gmail.com)  
AND FIRST CLASS MAIL**

Kenneth Wiesen, Esq.  
1 Old Country Road, Suite 360-B  
Carle Place, NY 11514

**Re: *Hershey Chocolate & Confectionery Corp., et al. v. Wiesen*  
TTAB No. 91200575**

Dear Mr. Wiesen:

We are in receipt of your letter of June 4, 2012 objecting to Hershey Chocolate & Confectionery Corp. and The Hershey Company's (collectively, "Hershey") production of documents and responses to your First Set of Requests for Production of Documents and Things (the "Document Requests") and Amended First Set of Interrogatories (the "Amended Interrogatories"). We have reviewed these objections and, in the spirit of cooperation and in the interest of moving discovery along expeditiously, we address them below.

First, pursuant to 37 C.F.R. § 2.120(d)(2) and Fed. R. Civ. Proc. 34(b)(2)(E), Hershey was only required to produce documents as they are kept in the usual course of business, and it did so; there is no additional requirement to identify each document that responds to each request. Nevertheless, attached to this letter is a chart setting forth (1) the Document Requests and Amended Interrogatories in response to which Hershey stated it would produce responsive, non-privileged documents, if any, and (2) the Bates numbers for the documents responding to each Document Request and Amended Interrogatory.<sup>1</sup> We believe this chart addresses the bulk of the objections in your June 4th letter.

Second, Hershey stands by and reiterates the objections it raised in response to the Document Requests, including, without limitation, Document Request Nos. 1, 13, 17, 18, 40, 41, 43, and 49, as valid and appropriate objections to such Document Requests. Moreover, Hershey did, in fact, produce copies of representative samples of labels of milk-based beverage products that bear the term "milkshake." See, e.g., Bates Nos. HRSHY00000613-HRSHY00000620. We

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<sup>1</sup> Although we have attempted to identify each document that responds to each document request, this effort is necessarily imperfect, particularly given the number of document requests with overlapping subjects.



are nevertheless happy to discuss with you the issue of production of such labels after you have reviewed those we've produced, and to discuss any specific concerns that you have about any specific objections to a particular Document Request.

Third, as is common and standard practice in discovery responses, Hershey's responses and objections to certain Document Requests referenced its responses and objections to other Document Requests due to the fact that said Document Requests are, to a large extent, overlapping or duplicative.

Fourth, with respect to your concern regarding the production of "representative samples," the Trademark Trial and Appeal Board ("TTAB" or the "Board") has held repeatedly that a party to an Opposition proceeding may produce representative samples of documents in instances where the respondent's task of production would otherwise be unduly burdensome. *See, e.g., Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 U.S.P.Q. 147, 148 & 149 (T.T.A.B. 1985) ("A reasonably representative sample of some items is sufficient where there are so many items as to make the responding party's task burdensome."); *Mack Trucks, Inc. v. Monroe Auto Equip. Co.*, 181 U.S.P.Q. 286, 288 (T.T.A.B. 1974) (concluding that "[o]pposer's objections concerning the unduly burdensome nature of the matter sought by applicant are well taken," and, therefore, "opposer need furnish only representative samples of its advertisements"). Given the sheer quantity of documents (including copies of labels, boxes, wrappers, etc.) at a company the size of Hershey, it would be unduly burdensome for Hershey to collect and produce all such copies. Thus, it is reasonable for Hershey to produce representative samples, as it has done.

Fifth, with respect to your question about redactions in certain documents, the documents stamped Bates Nos. 79-160, 162-326, 328-409, and 671-706 contain sales data for numerous products that are entirely unrelated to this Opposition, and Hershey is not required to produce such information. Given the highly confidential nature of such sales data, as well as the fact that you are a potential competitor without outside counsel to shield you from such competitively sensitive information, Hershey is entitled to redact such non-responsive information as it has done in its production.

Sixth, the documents stamped Bates Nos. 4, 5, 9, 61, 62, 558, 560, 583, 613, and 617 contain information protected by attorney-client privilege and/or attorney work product privilege, hence the redaction for privilege in accordance with federal and TTAB rules.

Seventh, with respect to your question regarding email attachments, because we have produced documents as they are kept in the usual course of business, any attachments to e-mails directly follow the e-mail in question.

Lastly, we object to your characterization of Hershey's document production as "extensively delayed." We advised you via e-mail on March 21, 2012 that Hershey would not produce documents until a protective order was entered by the TTAB, and we suggested that we use the TTAB form protective order, which we provided to you in that same e-mail. Only after

Kenneth Wiesen, Esq.

- 3 -

June 7, 2012

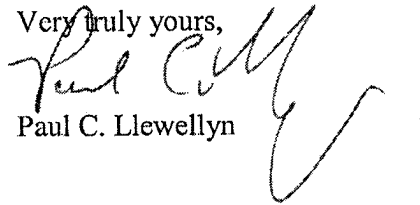
our April 16, 2012 e-mail following up on the status of your review and execution of said protective order, did we finally receive the signed protective order from you on April 18, 2012. Subsequently, in an effort to expedite matters, Hershey did not wait for the Board to enter the protective order, but, rather, went ahead and produced documents on May 4, 2012, after you agreed via e-mail that same day, that Hershey's documents would be treated as covered by the protective order as submitted to the TTAB, regardless of whether that order had been entered by the Board as of the date of production.

In view of the foregoing, we would like to agree upon a date for your deposition, which we previously noticed for June 14, 2012. Can you please advise whether that date is acceptable, or, alternatively, provide dates later in June that would work for you?

Please do not hesitate to contact me if you have any questions or wish to discuss these matters further.

Very truly yours,

Paul C. Llewellyn



PCL:ms  
Attachment

**HERSHEY/WIESEN - RESPONSES TO DOC REQUESTS & INTERROGATORIES**

<b>DOCUMENT REQUEST NO.</b>	<b>INTERROGATORY NO.</b>	<b>BATES NOS.</b>
DOC REQUEST NO. 2		1 3 6-8 9 10-16 17 32 36 37 529-532
DOC REQUEST NO. 3		
DOC REQUEST NO. 4		533-542
DOC REQUEST NO. 5	INTERROGATORY 3(a)	2 4 18 19 61 62 525-526 583-584
DOC REQUEST NO. 6	INTERROGATORY 3(b)	495-496 529-532 543-544 562-564 565-582 621-622 623 626-629 630 631

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		632 633 634 635 637-645 646-658 659 660 661-668 669 670-706
DOC REQUEST NO. 7		
DOC REQUEST NO. 8	INTERROGATORY 6 INTERROGATORY 18	31 33-35 38-43 44-50 51-55 56-60 61 62 63-65 66-68 69-71 72-74 75-77 78-160 161-243 244-326 327-409 410-413 414-416 417-419

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		420-434 435-450 451-466 467-476 477-486 491 492 562-564 565-582 621-622 623 624 625 626-629 630 631 632 633 634 635 637-645 646-658 659 660 661-668 669 670-706
DOC REQUEST NO. 9		24-30 33-35 44-50 594-606 607-612

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		621-622
DOC REQUEST NO. 10	INTERROGATORY 18	33-35 562-564 565-582 594-606 607-612 621-622 623 626-629
DOC REQUEST NO. 11	INTERROGATORY 4 INTERROGATORY 11 INTERROGATORY 15 INTERROGATORY 23	24-30 38-43 44-50 51-55 56-60 410-413 420-434 435-450 451-466 467-476 477-486 565-582 594-606 607-612 621-622 637-645 646-658
DOC REQUEST NO. 14		
DOC REQUEST NO. 16		

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
DOC REQUEST NO. 20	INTERROGATORY 3(b)	495-496 529-532 543-544 562-564 565-582 621-622 623 626-629 630 631 632 633 634 635 637-645 646-658 659 660 661-668 669 670-706
DOC REQUEST NO. 21	INTERROGATORY 3(b) INTERROGATORY 19	
DOC REQUEST NO. 22	INTERROGATORY 4 INTERROGATORY 11 INTERROGATORY 15 INTERROGATORY 23	2 18 19 20-23 24-30 33-35 38-43 44-50 51-55

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		56-60 63-65 66-68 69-71 72-74 75-77 78-160 161-243 244-326 327-409 410-413 414-416 417-419 420-434 435-450 451-466 467-476 477-486 562-564 565-582 594-606 621-622 637-645 646-658 661-668 670-706
DOC REQUEST NO. 23		495-496 545-546 547-548 553-554 555 556



DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		561 624 625 633 659 660 669
DOC REQUEST NO. 24	INTERROGATORY 5 INTERROGATORY 9	525-526 527-528 543-544 545-546 547-548 553-554
DOC REQUEST NO. 25	INTERROGATORY 9	497-500 501-512 513-524 565-582 626-629 637-645 646-658
DOC REQUEST NO. 26		
DOC REQUEST NO. 28	INTERROGATORY 14	See production generally.
DOC REQUEST NO. 31	INTERROGATORY 16 INTERROGATORY 22	See production generally.
DOC REQUEST NO. 32	INTERROGATORY 17	5 31 487 488 489 490 491

DOCUMENT REQUEST NO.	INTERROGATORY NO.	BATES NOS.
		492 493 494 497-500 549-550 551-552 557-558 559-560
DOC REQUEST NO. 34		
DOC REQUEST NO. 38	INTERROGATORY 20	

# **EXHIBIT H**

**Co, Jennifer**

---

**From:** Llewellyn, Paul  
**Sent:** Tuesday, January 29, 2013 1:58 PM  
**To:** Co, Jennifer  
**Subject:** FW: OPPOSITION NO. 91200575 HERSHEY CHOCOLATE & CONFECTIONERY CORP. v. WIESEN

---

**From:** KENNETH WIESEN [<mailto:wiesenlaw@gmail.com>]  
**Sent:** Thursday, December 20, 2012 5:34 AM  
**To:** [richard.kim2@uspto.gov](mailto:richard.kim2@uspto.gov)  
**Cc:** Llewellyn, Paul  
**Subject:** OPPOSITION NO. 91200575 HERSHEY CHOCOLATE & CONFECTIONERY CORP. v. WIESEN

Yong Oh (Richard) Kim

Interlocutory Attorney

Trademark Trial and Appeal Board

U.S. Patent and Trademark Office

P.O. Box 1451

Alexandria, VA 22313-1451

Dear Mr. Kim,

As you know I sought leave to file a motion to compel responses to discovery that was already timely propounded. On October 10, 2012 you issued an order stating in part that: a "motion to compel is timely if filed prior to the commencement of the first testimony period as originally set or as reset. Trademark Rule 2.120(e)(1). As last reset, the first testimony period opens on October 9, 2012. Therefore, applicant is free to file a motion to compel after making the requisite good faith effort to resolve the discovery dispute that is the subject of his motion, and is not required to seek the Board's leave in order to do so."

I apologize in advance for my lack of understanding and my inability to figure the date out on my own. Would you be kind enough to identify until what date do I or did I have to make that motion once a good faith attempt had been undertaken?

Kenneth Wiesen

# **EXHIBIT I**





HRSHY00000532



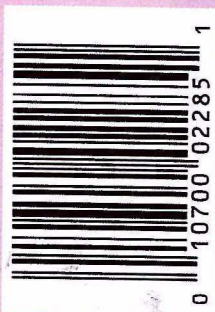
# Nutrition Facts

Serving Size 18 pieces (41 g)  
Servings Per Container about 3

Amount Per Serving		Calories from Fat 70
<b>Calories</b>	190	
		<b>% Daily Value*</b>
<b>Total Fat</b>	8 g	12%
<b>Saturated Fat</b>	8 g	40%
<b>Trans Fat</b>	0 g	
<b>Cholesterol</b>	0 mg	0%
<b>Sodium</b>	80 mg	3%
<b>Total Carbohydrate</b>	30 g	10%
<b>Dietary Fiber</b>	0 g	0%
<b>Sugars</b>	26 g	
<b>Protein</b>	< 1 g	
<b>Vitamin A</b>	0%	<b>Vitamin C</b> 0%
<b>Calcium</b>	4%	<b>Iron</b> 0%
*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:		
<b>Total Fat</b>	Less than 65g	80g
<b>Sat Fat</b>	Less than 20g	25g
<b>Cholesterol</b>	Less than 300mg	300mg
<b>Sodium</b>	Less than 2,400mg	2,400mg
<b>Total Carbohydrate</b>	Less than 300g	375g
<b>Dietary Fiber</b>	25g	30g

INGREDIENTS: SUGAR; PARTIALLY HYDROGENATED PALM KERNEL OIL; WHEY (MILK); CORN SYRUP; CORN SYRUP; MALTED MILK (BARLEY MALT; WHEAT FLOUR; MILK; SALT; SODIUM BICARBONATE); REDUCED PROTEIN WHEY (MILK); CONTAINS 2% OR LESS OF: NATURAL AND ARTIFICIAL FLAVOR; SOY LECITHIN; ARTIFICIAL COLOR (RED 40 LAKE); SORBITAN TRISTEARATE; RESINOUS GLAZE; COCOA; CALCIUM CARBONATE; TAPIOCA DEXTRIN; SALT. © D

Mfd. by **The Hershey Company**  
Hershey, PA 17033-0815, U.S.A.  
QUESTIONS OR COMMENTS ABOUT THIS PRODUCT:  
CALL TOLL-FREE WEEKDAYS 9-4 ET 1-800-468-1714.  
Visit us at [www.hersheys.com](http://www.hersheys.com).







HRSHY00000544



HRSHY00000630





HRSHY00000631

TO OPEN

**WHIPPERS**  
MILKSHAKE  
**VANILLA**  
MALTED MILK BALLS

**WHIPPERS**  
MILKSHAKE

**VANILLA**

Naturally and Artificially Flavored

MALTED MILK BALLS



# WHL POPPERS<sup>®</sup>

MILKSHAKE<sup>®</sup>



STRAWBERRY  
Naturally and Artificially Flavored  
MILK BALLS



NET WT 4 OZ (113g)

# **EXHIBIT J**

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# **Whoppers 6 Cell**

## **Key Measures Report**

The Hershey Company



# Recommendations

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- Original and Line Whoppers Malted Milk Balls concepts realize strong appeal among the rep population and offer consumers a good value for the money. The line of Whoppers exhibits immediate potential and should proceed into further development.
- Heath Bar garners above average key measure ratings within the candy industry and should be developed further to reach their long-term potential.
- Reese's Whoppers, Whoppers Vanilla Milkshake and Whoppers Orange Crème Milkshake struggle among the rep population but have greater potential among various niche markets. The concepts should be considered as niche products for further development.





# Evaluation of Success Criteria

- Reese's Whoppers, Whoppers Vanilla Milkshake and Whoppers Orange Crème Milkshake struggle to meet the minimum success criteria among the rep population but should be considered for niche markets.

	Whoppers Malted Milk Balls Original	Heath Bar Whoppers	Reese's Whoppers	Whoppers Vanilla Milkshake	Whoppers Orange Crème Milkshake	Whoppers Malted Milk Balls Line
Industry Candy Norm						
PI	A	B	B	C	D	A
Value	A	A	B	A	B	A
Uniqueness	D	B	B	B	A	C
Chocolate Norm						
Weighted PI	A	C	D	E	E	A
Value	+	o	o	o	o	+
Uniqueness	-	o	o	o	o	-
Brand Fit T2B	86%	74%	69%	77%	55%	83%
Interested Universe	32.7	27.7	24.2	23.2	19.2	32.7
Future Potential	Immediate	Long-term	Niche	Niche	Niche	Immediate
Recommendation						

## Criteria for Success

- Concept Advantage Index:** Top 40% for Industry Category PI (A or B)
- InfoScore:** Top 40% for Hershey brand norm weighted PI (A or B)
- FutureView:** Immediate, Long-term or niche potential (depending on strategy)
- Must meet or exceed Brand fit norm (+ or o)**
- Must meet or exceed Hershey brand norm for value and uniqueness (+ or o)**



## Recommendations

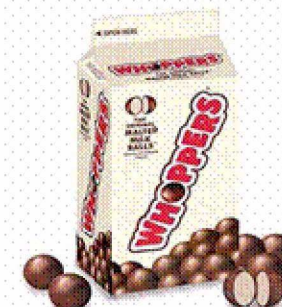
Consumers are satisfied with the current Original Whoppers Malted Milk Balls product and the candy continues to show immediate future potential.

## Success Evaluation Criteria

Industry Candy Norm		
PI	A	Top 20%
Value	A	Top 20%
Uniqueness	D	Bottom 40%
Chocolate Norm		
Weighted PI	A	Top 20%
Value	+	Exceeds
Uniqueness	-	Falls below
Brand Fit	86%	
Interested Universe	32.7	
Future Potential	Immediate	Strong PI among Future Shapers/Makers
Recommendation		Move forward

## WHOPPERS Malted Milk Balls

The Original Malted Milk Balls



WHOPPERS Malted Milk Balls have a crunchy malted milk center and are covered in sweet chocolate flavored candy. A delicious and fun to eat treat, they are great for personal snacking or sharing with family and friends, and are perfect whether you are relaxing at home, catching a movie, or on the run.

WHOPPERS Malted Milk Balls can be found in the confectionery aisle of your favorite store and come in convenient 3.5-ounce mini cartons for \$0.99 and in resealable 12-ounce cartons for \$1.99.

WHOPPERS Malted Milk Balls... The Original Malted Milk Balls

## Data Highlights

May 2007

### Key Measures

- Original Whoppers Malted Milk Balls ranks in the top 20% among chocolate concepts and exceeds the Value norm. Not surprisingly, the concept falls below the Uniqueness norm.
- The Concept Advantage Index greatly exceeds the candy category industry minimum at 171 and Value places at the top of the FYI database.
- The Malted Milk Balls earns strong Purchase Interest among Future Shapers/Makers and the older generations surpass the chocolate norm.

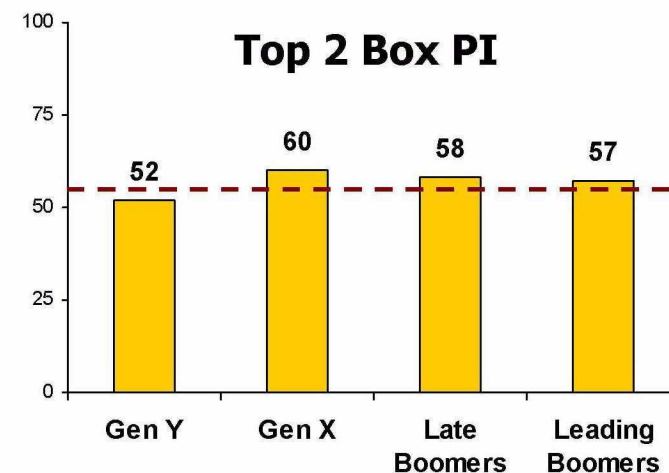
### Key Likes

- Malted chocolate with crunchy center.
- Familiarity and strong liking of Whoppers brand.

### Key Dislikes

- Few dislikes, except among those who do not like the taste of malted milk balls.

## Top 2 Box PI



..... chocolate norm among rep adults 18-64



## Recommendations

Heath Bar Whoppers has strong appeal among Future Shapers/Makers. The product should be developed to realize long-term potential.

## Success Evaluation Criteria

Industry Candy Norm		
PI	B	Top 40%
Value	A	Top 20%
Uniqueness	B	Top 40%
Chocolate Norm		
Weighted PI	C	Middle 20%
Value	o	On par
Uniqueness	o	On par
Brand Fit	74%	
Interested Universe	27.7	
Future Potential	Long-term	Strong PI among Future Shapers/Makers
Recommendation		

Introducing...

**Heath Bar WHOPPERS**  
The Original Malted Milk Balls  
Now Available With a Great Heath Toffee Flavor



WHOPPERS, The Original Malted Milk Balls, teams up with Heath Bar for a totally new taste. Heath Bar WHOPPERS has the same great tasting malted milk centers as Original Whoppers, but is covered in toffee flavored candy. A delicious and fun to eat treat, they are great for personal snacking or sharing with family and friends, and are perfect whether relaxing at home, catching a movie, or on the run.

Heath Bar WHOPPERS can be found in the confectionery aisle of your favorite store and come in convenient 3.5-ounce mini cartons for \$0.99 and in resealable 10-ounce cartons for \$1.99.

Heath Bar WHOPPERS... a delicious new way to enjoy The Original Malted Milk Ball treat.

## Data Highlights

May 2007

### Key Measures

- Heath Bar Whoppers earns average Purchase Interest among chocolate concepts and is on par with the Value and Uniqueness norms.
- The Concept Advantage Index remains above the candy category industry minimum at 146 with Value in the top quintile and Uniqueness in the top 40%.
- 35-54 year olds exhibit stronger appeal for the toffee flavored product.

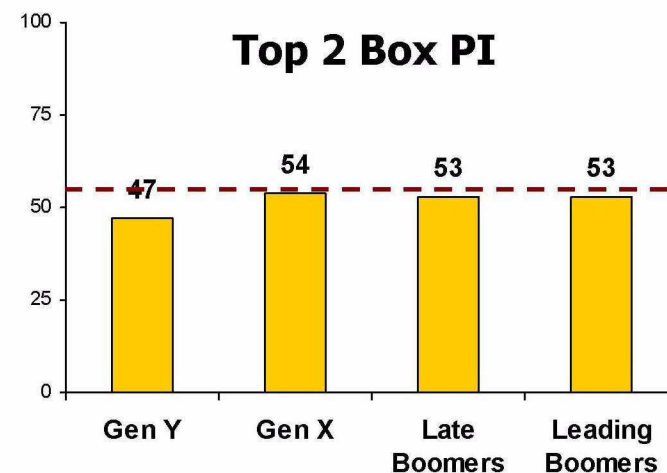
### Key Likes

- Combination of Whoppers and toffee flavored candy.
- Bite size pieces.

### Key Dislikes

- Few dislikes, except among those who do not like malted or toffee flavors.

## Top 2 Box PI



..... chocolate norm among rep adults 18-64





## Recommendations

Reese's Whoppers shows niche appeal among younger consumers and should be considered for further development.

## Success Evaluation Criteria

Industry Candy Norm		
PI	B	Top 40%
Value	B	Top 40%
Uniqueness	B	Top 40%
Chocolate Norm		
Weighted PI	D	Bottom 40%
Value	o	On par
Uniqueness	o	On par
Brand Fit	69%	
Interested Universe	24.2	
Future Potential	Niche	May have more niche potential among younger consumers who show stronger PI.
Recommendation		

Introducing...

**Reese's WHOPPERS**  
The Original Malted Milk Balls  
Now Available With a Great Peanut Butter Flavor



WHOPPERS, The Original Malted Milk Balls, teams up with Reese's for a totally new taste. Reese's WHOPPERS has the same great tasting malted milk centers as Original Whoppers, but is covered in peanut butter flavored candy. A delicious and fun to eat treat, they are great for personal snacking or sharing with family and friends, and are perfect whether you are relaxing at home, catching a movie, or on the run.

Reese's WHOPPERS can be found in the confectionery aisle of your favorite store and come in convenient 3.5-ounce mini cartons for \$0.99 and in resealable 10-ounce cartons for \$1.99.

Reese's WHOPPERS... a delicious new way to enjoy The Original Malted Milk Ball treat.

## Data Highlights

May 2007

### Key Measures

- Reese's Whoppers falls into the bottom 40% (D) among chocolate concepts and is on par with the Value and Uniqueness norms.
- The peanut butter flavored candy earns a strong Concept Advantage Index above the candy category minimum at 125 with all key measures in the top 40%.
- Younger consumers have an affinity for the Reese's brand and show appeal for this unique product idea.

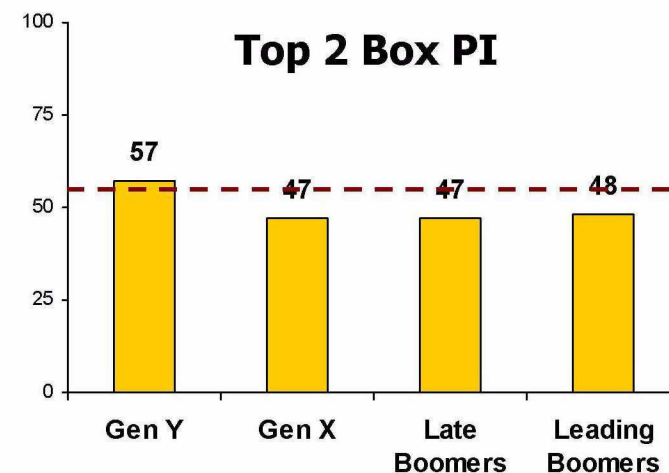
### Key Likes

- Combination of peanut butter and chocolate.
- Affinity for Whoppers and Reese's brands.

### Key Dislikes

- Few dislikes except among those who do not like malted chocolate and peanut butter.

## Top 2 Box PI



..... chocolate norm among rep adults 18-64



## Recommendations

Whoppers Vanilla Milkshake struggles to garner interest among the rep population but may have more potential among households with kids.

## Success Evaluation Criteria

Industry Candy Norm		
PI	C	Middle 20%
Value	A	Top 20%
Uniqueness	B	Top 40%
Chocolate Norm		
Weighted PI	E	Bottom 20%
Value	o	On par
Uniqueness	o	On par
Brand Fit	77%	
Interested Universe	23.2	
Future Potential	Niche	May have more niche potential among hhlds with kids who show stronger PI.
Recommendation		

Introducing...

**WHOPPERS Vanilla Milkshake**  
The Original Malted Milk Balls  
Now Available With a Great Vanilla Milkshake Flavor



WHOPPERS Vanilla Milkshake has the same great tasting malted milk center as Original Whoppers, but is covered in sweet and creamy Vanilla Milkshake flavored candy. A delicious and fun to eat treat, they are great for personal snacking or sharing with family and friends, and are perfect whether you are relaxing at home, catching a movie, or on the run.

WHOPPERS Vanilla Milkshake can be found in the confectionery aisle of your favorite store and come in convenient 3.5-ounce mini cartons for \$0.69 and in resealable 10-ounce cartons for \$1.99.

WHOPPERS Vanilla Milkshake... a delicious new way to enjoy The Original Malted Milk Ball treat.

## Data Highlights

May 2007

### Key Measures

- Whoppers Vanilla Milkshake falls into the bottom quintile (E) among chocolate concepts and is on par with the Value and Uniqueness norms.
- Although consumers indicate the product is a good value for the money, the candy earns average purchase intent ratings among the rep population. The Concept Advantage Index is above the candy minimum at 120.
- Households with kids may offer a niche target market for the product as they exhibit stronger appeal and agree it is a good value for the money.

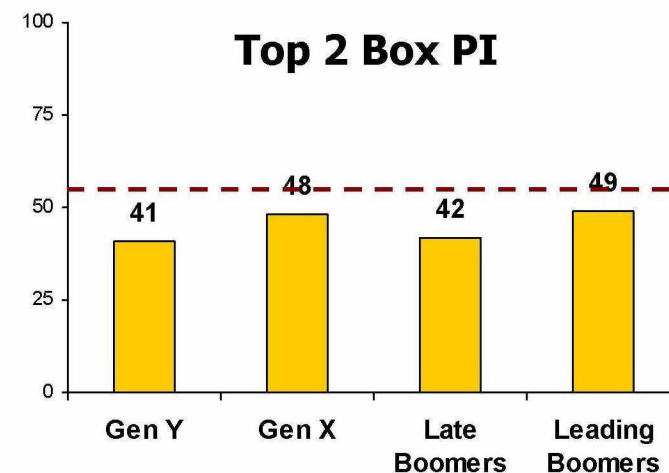
### Key Likes

- Favor Whoppers brand and products.
- Vanilla flavor is new and different.

### Key Dislikes

- Few dislikes except among those who do not like vanilla flavor.

## Top 2 Box PI

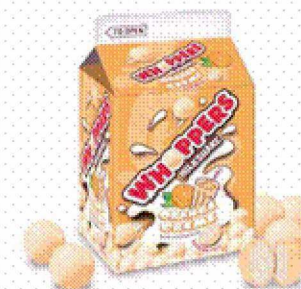


..... chocolate norm among rep adults 18-64





**WHOPPERS Orange Crème Milkshake**  
The Original Malted Milk Balls  
Now With a Great Orange Crème Flavor



WHOPPERS Orange Crème Milkshake has the same great tasting malted milk center as Original Whoppers, but is covered in creamy Orange Crème flavored candy. A delicious and fun to eat treat, they are great for personal snacking or sharing with family and friends, and are perfect whether you are relaxing at home, catching a movie, or on the run.

WHOPPERS Orange Crème Milkshake can be found in the confectionery aisle of your favorite store and come in convenient 3.5-ounce mini cartons for \$0.99 and in resealable 10-ounce cartons for \$1.99.

WHOPPERS Orange Crème Milkshake... a delicious new way to enjoy The Original Malted Milk Ball treat.

## Recommendations

Whoppers Orange Crème Milkshake should not be developed further among the rep population but shows niche potential among older consumers.

## Success Evaluation Criteria

Industry Candy Norm		
PI	D	Bottom 40%
Value	B	Top 40%
Uniqueness	A	Top 20%
Chocolate Norm		
Weighted PI	E	Bottom 20%
Value	o	On par
Uniqueness	o	On par
Brand Fit	55%	
Interested Universe	19.2	
Future Potential	Niche	May have more niche potential older consumers (55+) who
Recommendation		show stronger PI.

## Data Highlights

May 2007

### Key Measures

- Whoppers Orange Crème Milkshake falls into the bottom quintile among chocolate concepts and is on par with the Value and Uniqueness norms.
- The Concept Advantage Index falls just below the candy category industry minimum at 97. However Value and Uniqueness are in the top 40% of the FYI category database.
- The product has niche appeal older consumers, specifically those 55+, which show higher purchase interest.

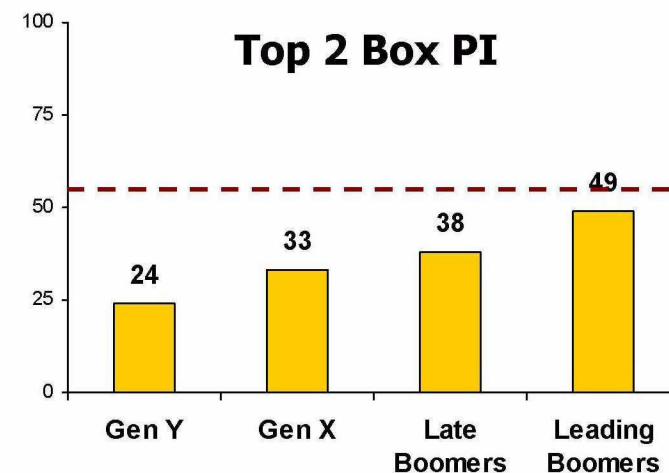
### Key Likes

- Orange crème flavor with malt chocolate.
- Affinity for Whoppers brand and products.

### Key Dislikes

- Few dislikes except among those who do not like orange crème flavor.

## Top 2 Box PI



..... chocolate norm among rep adults 18-64



## Recommendations

Whoppers Malted Milk Balls Line realizes strong Purchase Interest among Future Shapers/Makers and line of Whoppers should be developed further.

## Success Evaluation Criteria

Industry Candy Norm		
PI	A	Top 20%
Value	A	Top 20%
Uniqueness	C	Middle 20%
Chocolate Norm		
Weighted PI	A	Top 20%
Value	+	Exceeds
Uniqueness	-	Falls below
Brand Fit	83%	
Interested Universe	32.7	
Future Potential	Immediate	Strong PI among Future Shapers/Makers
Recommendation		Move forward

## WHOPPERS Malted Milk Balls The Original Malted Milk Balls



WHOPPERS Malted Milk Balls have a crunchy malted milk center and are covered in sweet chocolate flavored candy. A delicious and fun to eat treat, they are great for personal snacking or sharing with family and friends, and are perfect whether you are relaxing at home, catching a movie, or on the run.

Available in the following flavors:

**Original Whoppers** - The Original Malted Milk Balls

**Strawberry Milkshake** - Malted Milk Balls with Strawberry Milkshake Flavor

**Vanilla Milkshake** - Malted Milk Balls with Vanilla Milkshake Flavor

**Orange Crème** - Malted Milk Balls with Orange Crème Flavor

**Reese's Whoppers** - Malted Milk Balls with Peanut Butter Flavor

**Heath Bar Whoppers** - Malted Milk Balls with Toffee Flavor

WHOPPERS Malted Milk Balls can be found in the confectionery aisle of your favorite store and come in convenient 3.5-ounce mini cartons for \$0.99 and in resealable 12-ounce cartons for \$1.99.

WHOPPERS Malted Milk Balls... The Original Malted Milk Balls

## Data Highlights

May 2007

### Key Measures

- Whoppers Malted Milk Balls Line falls into the top quintile (A) among chocolate concepts and exceeds to the Value norm.
- The malted milk ball product earns the highest Concept Advantage Index at 174 with Purchase Interest and Value in the top 20% of the category database.
- Similar to the Original Whoppers, consumers 35+ exhibit a strong appeal for the concept with a line of flavors.

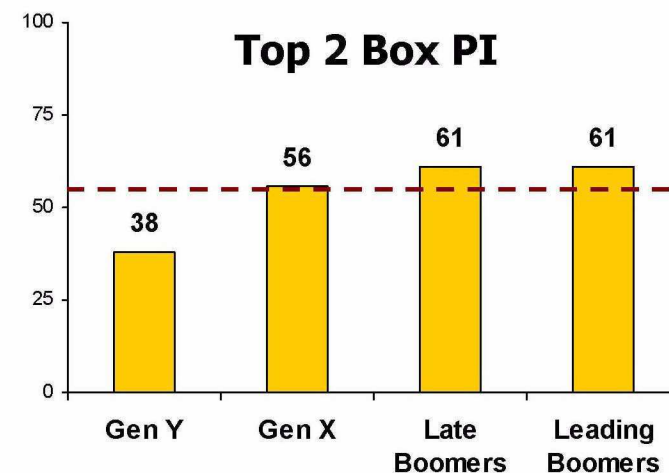
### Key Likes

- Variety of flavors and sizes offered.
- Affinity for Whoppers brand.

### Key Dislikes

- Some flavors are more appealing to consumers than others.

## Top 2 Box PI

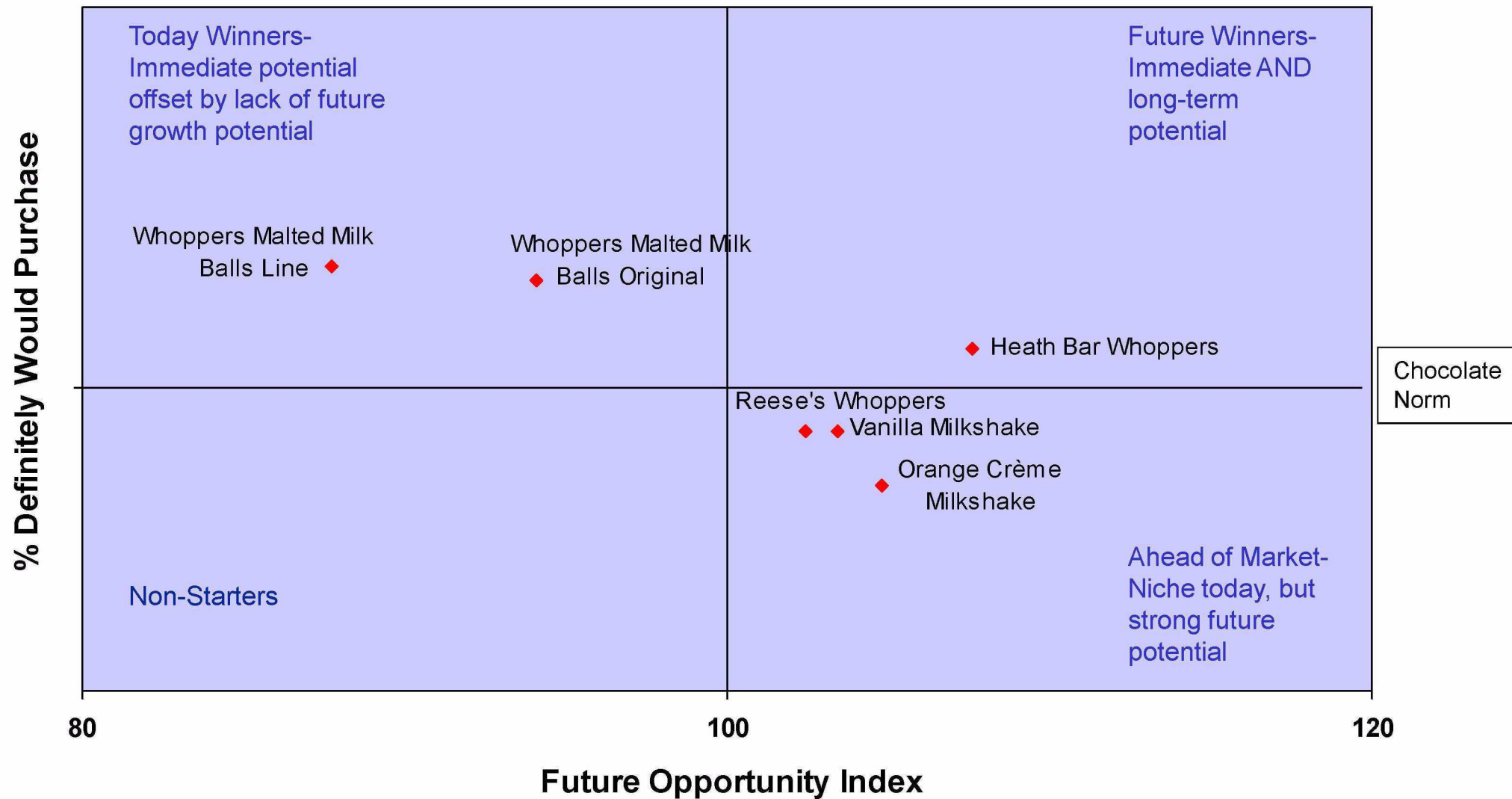


..... chocolate norm among rep adults 18-64



# FUTURE POTENTIAL FutureView

## Future Opportunity Map





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# Appendix



# INDUSTRY COMPARISON

## Concept Advantage Index

- Compared to the candy industry norms, only Whoppers Orange Crème Milkshake falls below the category minimum of 100.
- Although above the minimum, Reese's Whoppers and Whoppers Vanilla Milkshake, earn below average Likeability ratings.

### Concept Advantage Index

#### Purchase Interest

Top20

Top40

Middle20

Bottom40

Bottom20

Top Box

2nd Box

Whoppers Malted Milk Balls (Original)	Heated Bar Whoppers	Reese's Whoppers	Whoppers Vanilla Milkshake	Whoppers Orange Crème Milkshake	Whoppers Malted Milk Balls (Line)
171	146	125	120	97	174

31.1	24.5	19.3	19.0	15.2	31.3
25.6	27.8	29.5	26.1	22.4	26.0

#### Price/Value

Top20

Top40

Middle20

Bottom40

Bottom20

Mean (5pt)

4.03	3.84	3.72	3.79	3.62	3.98

#### Uniqueness

Top20

Top40

Middle20

Bottom40

Bottom20

Mean (5pt)

2.62	3.32	3.37	3.35	3.58	3.08

#### Likeability

Top20

Top40

Middle20

Bottom40

Bottom20

Mean (6pt)

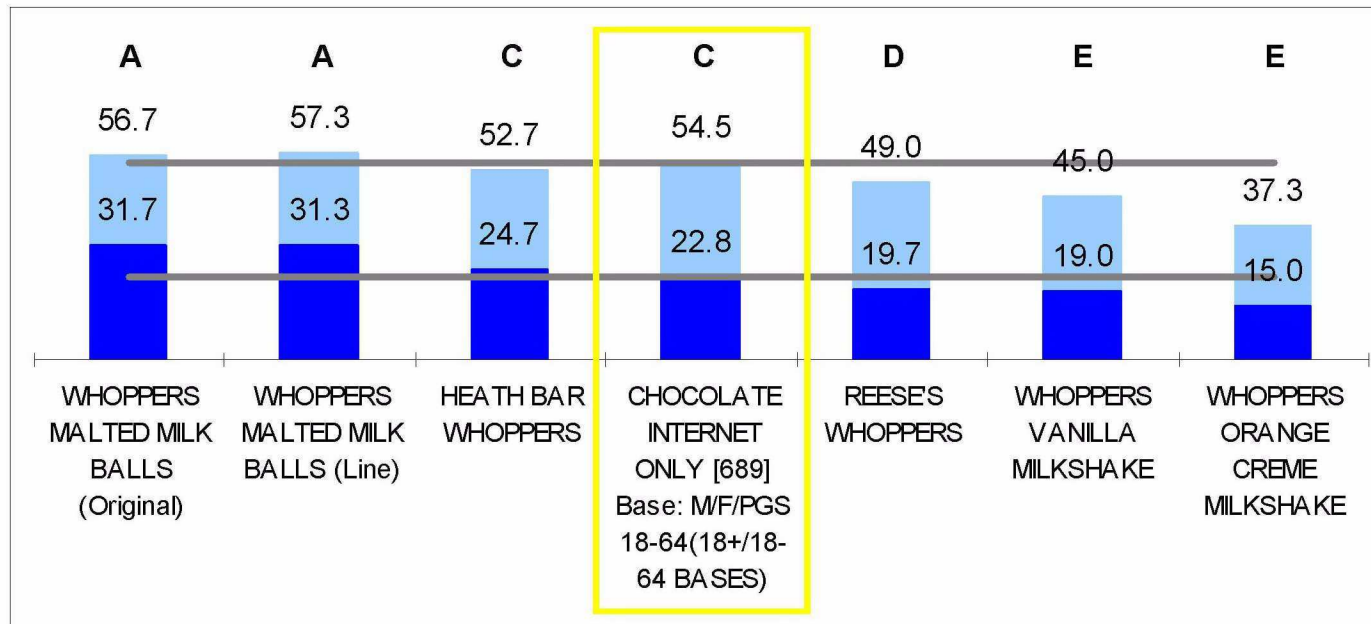
4.44	3.87	3.73	3.61	3.03	4.47



# INTERNAL DATABASE COMPARISON

## Chocolate Norm (M/F 18-64)

- The Whoppers Malted Milk Balls Original and Line concepts earn similar appeal and rank in the top 20% (A) for weighted purchase interest. Both concepts have higher Value and lower Uniqueness ratings.
- The less traditional Whopper flavored concepts place in the lower quintiles for weighted purchase interest.



Key Measure Summary	PI TOP BOX	PI TOP 2 BOX	INT UNIV	Value	UNIQ
WHOPPERS MALTED MILK BALLS (Original)	31.7 H	56.7	32.7 A	4.02 H	2.61 L
WHOPPERS MALTED MILK BALLS (Line)	31.3 H	57.3	32.7 A	3.99 H	3.09 L
HEATH BAR WHOPPERS	24.7	52.7	27.7 C	3.84	3.32
<b>CHOCOLATE INTERNET ONLY [689]</b>	<b>22.8</b>	<b>54.5</b>	<b>27.1 C</b>	<b>3.69</b>	<b>3.47</b>
REESE'S WHOPPERS	19.7	49 L	24.2 D	3.72	3.37
WHOPPERS VANILLA MILKSHAKE	19 L	45 L	23.2 E	3.79	3.35
WHOPPERS ORANGE CREME MILKSHAKE	15 L	37.3 L	19.2 E	3.62	3.58



Source: TNS InfoScore



# Potential Index

- Two of the strongest concepts among the rep population, Original Whoppers Malted Milk Balls and Line concepts, may lead to the most incremental sales.

Concept Product	
Whoppers Malted Milk Balls Line at \$1.99	1,191
Whoppers Malted Milk Balls Original at \$1.99	1,161
Heath Bar Whoppers at \$1.99	765
Whoppers Malted Milk Balls Line at \$.99	593
Reese's Whoppers at \$1.99	581
Whoppers Malted Milk Balls Original at \$.99	578
Whoppers Vanilla Milkshake at \$1.99	538
Whoppers Orange Crème Milkshake at \$1.99	402
Heath Bar Whoppers at \$.99	380
Reese's Whoppers at \$.99	289
Whoppers Vanilla Milkshake at \$.99	268
Whoppers Orange Crème Milkshake at \$.99	200



Source: TNS InfoScore



# Brand Fit

- Consumers indicate Malted Milk Balls Original has a slightly stronger fit with the Whoppers brand than the similar Line concept.
- Whoppers Orange Crème Milkshake has the weakest fit with the Whoppers brand.

	Whoppers Malted Milk Balls (Original) (n=300)	Heath Bar Whoppers (n=300)	Reese's Whoppers (n=300)	Whoppers Vanilla Milkshake (n=300)	Whoppers Orange Crème Milkshake (n=300)	Whoppers Malted Milk Balls (Line) (n=300)
<b>Whoppers Brand Fit</b>						
<b>Positive Brand Fit</b>	86%	74%	69%	77%	55%	83%
<b>Negative Brand Fit</b>	3%	5%	7%	5%	22%	3%



Source: TNS InfoScore





# PI by COT

- Target may offer slightly more opportunity for Heath Bar Whoppers. However, purchase intent is similar across key retailers for Original Whoppers and Reese's Whoppers.
- The three Whoppers concepts exceed the chocolate top box and top 2 box norm ratings.

PI Among Past 4 Week Chocolate Category Shoppers  
(by channel)



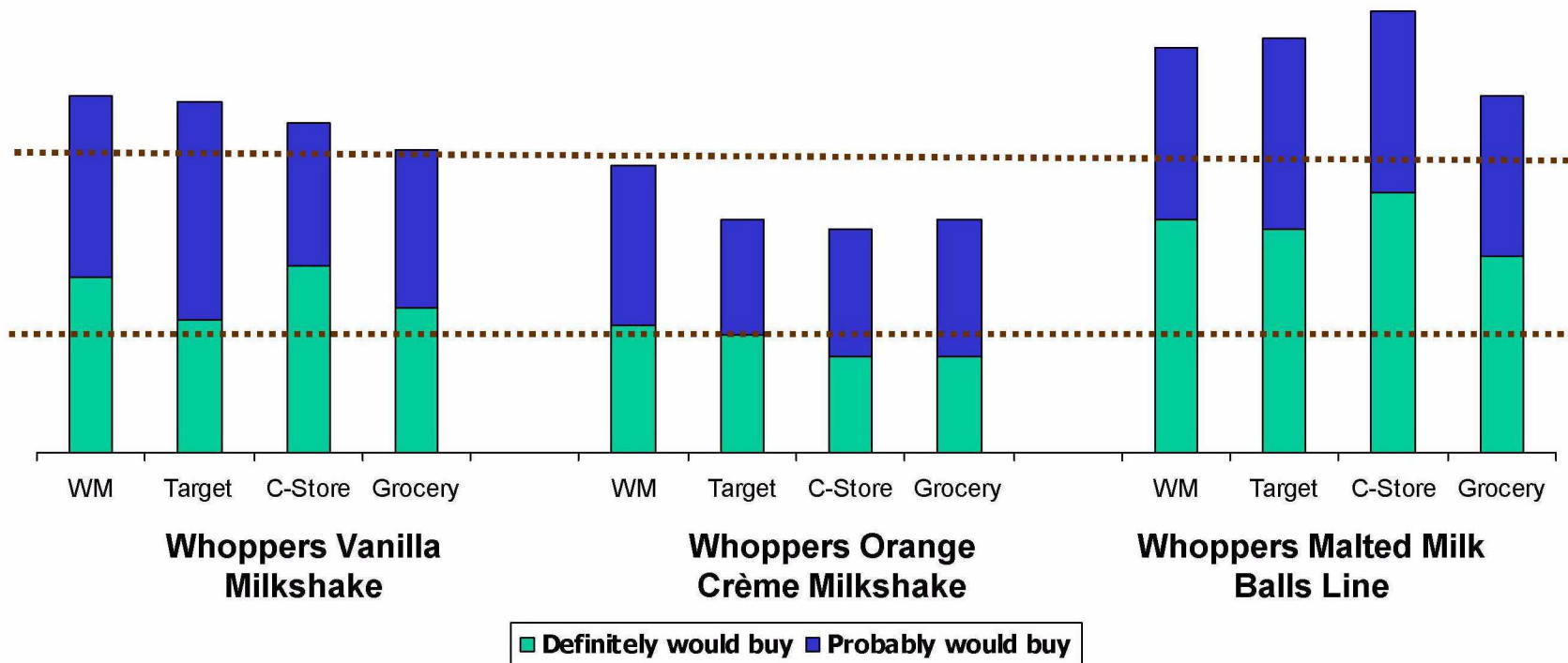
Dashed lines are Chocolate norm for t1b, t2b PI among rep adults.



# PI by COT

- Purchase Interest for the Whoppers Malted Milk Balls Line concept exceeds the chocolate norm and is comparable across retail channel shoppers.

PI Among Past 4 Week Chocolate Category Shoppers  
(by channel)



Dashed lines are Chocolate norm for t1b, t2b PI among rep adults.

