

**This Opinion is Not a  
Precedent of the TTAB**

Hearing: June 25, 2015

Mailed: August 18, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re J.T. Posey Company*  
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Serial No. 85206911  
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James A. Hendricks of Hendricks, Slavin & Holmes LLP  
for J.T. Posey Company.

Josette M. Beverly, Trademark Examining Attorney, Law Office 115,  
John Lincoski, Managing Attorney.

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Before Kuhlke, Bergsman and Greenbaum,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

J.T. Posey Company (“Applicant”) seeks registration on the Principal Register of  
the mark SKINSLEEVES (in standard characters) for

Medical devices, namely, non-compression fabric covers  
for legs and noncompression fabric covers for arms, non-  
compression fabric covers for skin protection of a patient's  
limb such as a leg or an arm, non-compression knitted  
skin coverings to be used for protection of the legs or arms  
of patients who have fragile skin that may be prone to

tears and abrasions; protective fabric medical coverings  
for wound prevention, in International Class 10.<sup>1</sup>

After the refusal of registration was made final under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), Applicant, in the alternative, sought registration under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). In response, the Trademark Examining Attorney refused registration of Applicant's mark on the ground that the mark is generic as to the goods and therefore incapable of distinguishing them from those of others under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). Alternatively, the Trademark Examining Attorney maintained the refusal to register Applicant's mark on the ground that Applicant's mark is merely descriptive and held that the evidence of acquired distinctiveness is insufficient.

#### I. Preliminary Issue

On August 10, 2013, Applicant appealed the refusals to register its mark and it also filed a request for reconsideration. In denying the request for reconsideration, the Trademark Examining Attorney cited *inter alia* three third-party websites that referenced the term "Skin Sleeves" (*i.e.*, Horizon Healthcare Supply, Kinship Comfort Brands, and RehabMart.com).<sup>2</sup> During the prosecution of this appeal, Applicant requested that the third parties cease their use of the term "skin sleeves."

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<sup>1</sup> Application Serial No. 85206911 was filed on December 28, 2010, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. On April 30, 2012, Applicant filed an Amendment to Allege Use, claiming first use anywhere and first use in commerce on August 13, 2004. The Amendment to Allege Use was accepted on July 10, 2012.

<sup>2</sup> 5 and 6 TTABVUE and 8 TTABVUE 9.

Applicant contends that the third parties agreed to stop using the term “skin sleeves” and that their acquiescence to Applicant’s demand is “highly relevant to the registrability of Applicant's trademark, and that it nullifies three important pieces of evidence that did not exist prior to the present Appeal.”<sup>3</sup> Accordingly, Applicant filed a request for remand so that the Trademark Examining Attorney could consider the fact that the third parties stopped using the term “skin sleeves.”<sup>4</sup> In an order dated March 28, 2014, the Board granted the request for remand.<sup>5</sup>

On May 15, 2014, the Trademark Examining Attorney filed a Supplemental Appeal Brief in which she maintained the refusals to register Applicant’s mark.<sup>6</sup> The Trademark Examining Attorney “disagree[d] with the applicant’s conclusion that any discontinued use of the wording ‘skin sleeves’ or any variations thereof is evidence that the applicant’s mark is not generic.”<sup>7</sup> In addition, the Trademark Examining Attorney asserted that Kinship Comfort Brands still used the term “skin sleeves” on its website and speculated as to why Horizon Healthcare Supply and RehabMart.com may have removed “skin sleeves” from their websites.

In its Reply Brief, Applicant reiterated that the third parties discontinued their use of the term “skin sleeves” in response to Applicant’s request.<sup>8</sup>

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<sup>3</sup> 15 TTABVUE 3.

<sup>4</sup> 15 TTABVUE.

<sup>5</sup> 18 TTABVUE. The Order allowed the Trademark Examining Attorney to submit additional evidence.

<sup>6</sup> 21-24 TTABVUE.

<sup>7</sup> 24 TTABVUE 5-6.

<sup>8</sup> 27 TTABVUE 2 and 5.

... the fact that Kinship Comfort Brands changed some of their webpages but not all of their webpages as Applicant requested was either an oversight on their part or intentional. However, Kinship Comfort Brands has made all of the corrections they originally agreed to. ... There is no reason for the Office to suggest that the statements in Applicant's papers were not credible or to speculate about possible other reasons for these third parties to change the marketing of their product.<sup>9</sup>

Assuming Applicant is correct and that the third parties stopped using the term “skin sleeves” in response to Applicant’s protest, the acquiescence by the third parties, without more, can be viewed as simply a desire to avoid litigation rather than as a concession that the mark has acquired distinctiveness. *See, e.g., In re Wella Corp.*, 565 F.2d 143, 196 USPQ 7, 8 n.2 (C.C.P.A. 1977) (“Appellant argues that various letters (of record) from competitors indicating their discontinuance of use of its mark upon threat of legal action are evidence of its distinctiveness, but we agree with the TTAB that such evidence shows a desire of competitors to avoid litigation rather than distinctiveness of the mark.”); *In re Consol. Cigar Corp.*, 13 USPQ2d 1481, 1483 (TTAB 1989) (“Evidence that competitors may have agreed to discontinue use of WHIFFS upon threat of legal action by applicant shows a desire by those competitors to avoid litigation, rather than distinctiveness of WHIFFS.”). *But see In re America Online Inc.*, 77 USPQ2d 1618, 1622-1623 (TTAB 2006) (Board noted applicant’s evidence of publisher’s acknowledgment not to use applicant’s mark and found trademark recognition by publishers). Nevertheless, we will not

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<sup>9</sup> 27 TTABVUE 5. We do not consider the attachments to Applicant’s Reply Brief nor statements referencing the attachments in the Reply Brief as the Board directed Applicant not to file any additional evidence with its Reply Brief. 15 TTABVUE 2.

consider the use of “skin sleeves” by Horizon Healthcare Supply, Kinship Comfort Brands, and RehabMart.com in the evaluation of the evidence because they have purportedly ceased using that term in advertising.

## II. Whether SKINSLEEVEs Is Generic?

When a proposed mark is refused registration as generic, the Trademark Examining Attorney has the burden of proving genericness by “clear evidence.” *See In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

There is a two-part test used to determine whether a designation is generic: (1) what is the genus of goods at issue? and (2) does the relevant public understand the designation primarily to refer to that genus of goods? *H. Marvin Ginn Corp. v. Int’l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986). *See also Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1829 (Fed. Cir. 2015) (“there is only one legal standard for genericness: the two-part test set forth in *Marvin Ginn*.”). The public’s perception is the primary consideration in determining whether a term is generic. *Loglan Inst. Inc. v. Logical Language Group Inc.*, 902 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). Evidence of the public’s understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers and other publications. *Princeton Vanguard*, 114 USPQ2d at 1830;

*Loglan Inst.*, 22 USPQ2d at 1533; *Dan Robbins & Associates, Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979).

A. *The genus of the goods at issue.*

As noted above, Applicant is seeking to register its mark SKINSLEEVEES for the following goods:

Medical devices, namely, non-compression fabric covers for legs and noncompression fabric covers for arms, non-compression fabric covers for skin protection of a patient's limb such as a leg or an arm, non-compression knitted skin coverings to be used for protection of the legs or arms of patients who have fragile skin that may be prone to tears and abrasions; protective fabric medical coverings for wound prevention.

In her Brief, the Trademark Examining Attorney asserts that the genus is “skin coverings” because Applicant and third parties refer to the goods as “skin coverings.” Further, the Trademark Examining Attorney contends that “skin coverings” encompasses the more specific subcategory of “non-compression fabric covers for skin protection.”<sup>10</sup> We note, however, that in her analysis of whether the relevant public understands SKINSLEEVEES to refer to that genus of goods, the Trademark Examining Attorney contends that SKINSLEEVEES is “used in the medical industry to identify a type of skin protective covering.”<sup>11</sup>

Applicant, in its brief, does not clearly identify what it perceives as the genus of the goods; rather, it criticizes the genus as identified by the Trademark Examining

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<sup>10</sup> 14 TTABVUE 5-6.

<sup>11</sup> 14 TTABVUE 12. Further, in her the February 12, 2013 Office Action, the Trademark Examining Attorney identified the genus of the goods as “non-compression fabric covers for skin protection.”

Attorney.<sup>12</sup> However, in its Reply Brief, Applicant apparently adopted the position that the genus of goods at issue in this case is defined by Applicant's identification of goods.<sup>13</sup>

Applicant's website describes the "Posey SkinSleeves™ Protector" as a "[v]ersatile non-compression skin covering that offers a discrete way to protect your patient's fragile skin from tears, bruises and abrasions." It is "intended to fit as a comfort product" and is recommended for use by "[p]atients with fragile skin prone to tears and abrasions; patients who disrupt IV and/or wound sites."<sup>14</sup> This description of Applicant's product is corroborated by other evidence relied upon by the Trademark Examining Attorney. *See, e.g.*, "Nursing assisting: essentials for long-term care" by Barbara Acello (books.google.com) ("Skin Sleeves offer excellent skin protection against skin tears and bruises.");<sup>15</sup> Patterson Medical website (Pattersonmedical.com) ("acts as a second skin, preventing cuts and abrasions.");<sup>16</sup> Limbkeepers (limbkeepers.com) ("There are many factors that contribute to fragile skin, wound care management, post surgery healing, chemotherapy treatment, burn recovery, medication induced skin disorders, sun damage, and the normal aging process. ... When worn under clothing, Limbkeepers sleeves add another layer of padded protection to give these vulnerable areas of fragile skin.").<sup>17</sup>

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<sup>12</sup> 12 TTABVUE 10-11.

<sup>13</sup> 16 TTABVUE 8.

<sup>14</sup> Trademark Examining Attorney's Supplemental Brief (May 15, 2014). 21 TTABVUE 3.

<sup>15</sup> March 30, 2011 Office Action.

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

<sup>17</sup> 21 TTABVUE 2 and 22 TTABVUE 7.

Finally, in the declarations that Applicant submitted to prove acquired distinctiveness, the declarants referred to Applicant's products as "patient protection products."<sup>18</sup>

Based on the description of goods and the evidence in the record, we find that the genus of the goods is medical protective fabric skin coverings for wound prevention.<sup>19</sup> See *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) ("In determining the meaning of 'information exchange about legal services' as defined by Reed's application, the board appropriately reviewed the *www.lawyers.com* website for context, to inform its understanding of the term."); *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005) (the Court examined Applicant's website to understand the meaning of terms for which coverage was sought and thereby define the genus of covered services).

*B. The relevant public.*

The second part of the genericness test is whether the relevant public understands the designation primarily to refer to that class of goods. The relevant public for a genericness determination is the purchasing or consuming public for the class of goods. *Magic Wand Inc. v. RDB Inc.*, 19 USPQ2d at 1553 (citing *In re Montrachet S.A.*, 878 F.2d 375, 11 USPQ2d 1393, 1394 (Fed. Cir. 1989)); *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143

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<sup>18</sup> January 8, 2013 Response to an Office Action.

<sup>19</sup> In its January 8, 2013 Response to an Office Action, Applicant asserted that "protective fabric medical coverings for wound protection' may be more suitable definitions [sic] of the genus in the present case."

At the oral hearing, the Board engaged Applicant and the Trademark Examining Attorney in a discussion regarding the genus.

(Fed. Cir. 1987); *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 228 USPQ at 530; *Dan Robbins & Assocs., Inc. v. Questor Corp.*, 202 USPQ at 105 (CCPA 1979).

Applicant submits that the relevant public in respect of the applicable goods is comprised primarily of medical professionals, who are skilled and experienced in the relevant medical field of patient safety, as well as suppliers of medical products and distributors. The product is predominantly applied to patients by nurses with medical training and expertise. Due to the nature of medical goods, selecting a particular product to purchase requires considerable analysis and evaluation of the merits of a particular product and its suitability for the specific purpose or application. These medical professionals are skilled and discerning individuals, with specialized knowledge of the relevant products, capable of identifying the applied-for mark as the source of origin for Applicant's goods.<sup>20</sup>

The Trademark Examining Attorney apparently agrees. As previously noted, the Trademark Examining Attorney contends that SKINSLEEVEES is "used in the medical industry to identify a type of skin protective covering."<sup>21</sup>

In view of the foregoing, we find that the relevant public consists of medical professionals specifically charged with patient safety.<sup>22</sup>

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<sup>20</sup> January 8, 2013 Response to an Office Action. To prove acquired distinctiveness, Applicant submitted declarations from a patient safety coordinator, a manager of a home medical supply company, four registered nurses, and a nurse supervisor. January 8, 2013 Response to an Office Action.

<sup>21</sup> 14 TTABVUE 12.

<sup>22</sup> We do not discount the fact that the ultimate customer might include the patient him or herself or a family member (e.g., perhaps a doctor advises the patient that their skin is sensitive and to buy a medical protective fabric skin coverings for wound protection). However, there is no record evidence addressing this possibility.

*C. Public perception*

To determine how the relevant purchasers understand the meaning of the term SKINSLEEVES when used in connection with medical protective fabric skin coverings for wound prevention, we have considered dictionary definitions, Applicant's use of SKINSLEEVES, and third-party use of that term, as well as how third parties refer to similar products. The analysis of the evidence focuses on the term "skin sleeve" and variations thereof.

*1. Dictionary definitions*

There are no dictionary definitions for the term SKINSLEEVES or "Skin Sleeve[s]." Further, there was no entry for SKINSLEEVES or "skin sleeve" in the *Wikipedia* website list of terms with a "skin" prefix (*e.g.*, skin-care, skin & bones, skin cancer, skinflint, *etc.*).<sup>23</sup>

The word "skin" is defined as "the outer layer of a person's or animal's body."<sup>24</sup>

The word "sleeve" is defined as "the part of a piece of clothing that covers your arm" or "a paper or plastic cover that protects something such as a record or book."<sup>25</sup>

*2. Applicant's use of SKINSLEEVES*

In response to an information request by the Trademark Examining Attorney, Applicant submitted excerpts from its website advertising its SKINSLEEVES

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<sup>23</sup> Applicant's August 12, 2013 Response to an Office Action; 4 TTABVUE 73-80. TTABVUE incorrectly lists the filing date as August 10, 2013.

<sup>24</sup> **MACMILLAN DICTIONARY** (American English) (macmillandictionary.com) (2009-2011) attached to the March 30, 2011 Office Action.

<sup>25</sup> *Id.* See also *Dictionary.com* derived from **THE RANDOM HOUSE DICTIONARY** (2015) ("the part of a garment that covers the arm, varying in form and length but commonly tubular."). 4 TTABVUE 36.

medical protective fabric skin coverings for wound prevention.<sup>26</sup> The following examples are representative:



\* \* \*

**FITTING GUIDELINES**

SkinSleeves are intended to fit as a comfort product. Actual fit will depend on individual anthropometric measurements and patient comfort level. Posey regular SkinSleeves will stretch up to 100% in size (combination of both width and length). Padded sizes have limited stretchability.

**Posey SkinSleeves™**

INDICATIONS: Patients with fragile skin prone to tears and abrasions; patients who disrupt IV and/or wound sites.

In the website, Applicant displays a sizing chart classifying its SKINSLEEVES as “Arm Sleeves” and “Leg Sleeves,” thus, indicating that the word “sleeves” is a descriptive, if not generic, term when used in connection with medical protective fabric skin coverings for wound prevention.<sup>27</sup>

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<sup>26</sup> September 30, 2011 Response to an Office Action.

<sup>27</sup> See also the Skil-Craft Corporation advertisement for its GERI-SLEEVES medical protective fabric skin coverings for wound prevention and the CarePathways.com website advertising the Western Medical GLEN-SLEEVE II Arm Protector medical protective fabric skin coverings for wound prevention [September 30, 2011 Response to an Office Action]; “Preventing and Treating Skin Tears,” Cynthia A. Fleck (nursingcenter.com 2007) (“The use of protective sleeves or elastic tubular support bandages that come on a roll is cost-effective and practical.”) [January 8, 2013 Response to an Office Action]; CompressionSleevesForArms.com explains that compression sleeves are “elastic garments that exert pressure on limbs.”; Medline.com advertises “protective arm/leg sleeves,” “Dermasaver Sleeves, Tyvek Sleeves and WBP Sleeves; AllDayMedical.com advertises the sale of GERIGLOVE Arm Protector which is described as “a knit arm-sleeve that shapes to the natural contour of the arm.”; ParentGivingStore.com advertises the sale of a “protective arm sleeve” “designed to reduce or eliminate skin tears or sheers by providing a protective sleeve over the user’s skin”; Dermasver.com advertises skin protection products identifying competitive products as “limb sleeves” and “fabric sleeves.” [February 12, 2013 Office Action].



**Published nursing protocols on skin tear prevention recommend that your patients “add a layer of protection.”\***

\*Baranoski, S, Skin tears: Staying on guard against the enemy of frail skin. Nursing 2003 3:14-20 Oct. 2003.

**Indications:** Patients with fragile skin; to protect IV / wound sites and skin from tears and abrasions.



3. *Third-party use of SKINSLEEVES or “skin sleeves”*

(i) March 30, 2011 Office Action<sup>28</sup>

a. Prosthetics Research Specialists, Inc. ([prostheticsresearch.com](http://prostheticsresearch.com))

advertises the sale of “U-Flate” Skin Sleeves as coverings for prosthetic limbs.<sup>29</sup>

PRS has again accomplished what prosthetists have requested:

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<sup>28</sup> The Trademark Examining Attorney submitted an excerpt from the website of Patterson Medical ([Pattersonmedical.com](http://Pattersonmedical.com)). Patterson Medical is an authorized dealer of Applicant’s products and, therefore, that company’s use of “Skin Sleeves” is trademark use on behalf of Applicant. September 30, 2011 Response to an Office Action.

<sup>29</sup> Applicant argues that this third-party use is not relevant because it is not a fabric cover for skin protection. “Prostheses are an entirely different market and product line from patient safety products.” September 30, 2011 Response to an Office Action. While we agree with Applicant that the exhibit does not show use of the term “skin sleeve” in connection with a fabric cover for skin protection, we nevertheless find that this exhibit is relevant to show how consumers perceive the term “skin sleeve.”

- A shrinkable skin sleeve
- An improved foot to ankle section
- A slick skin surface

b. **NURSING ASSISTING: ESSENTIALS FOR LONG-TERM CARE** by Barbara Acello (books.google.com) references the term “skin sleeves” for skin protection.<sup>30</sup>



**FIGURE 11-22** Skin sleeves offer excellent skin protection against skin tears and bruises. Leg protectors are also available. (Courtesy of Skil-Care Corporation, Yonkers, NY (800) 431-2972)

c. 3B Scientific (a3bs.com) references the term “skin sleeves” in connection with an infant training arm for practicing intravenous injections.<sup>31</sup>

(ii) July 8, 2012 Office Action<sup>32</sup>

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<sup>30</sup> Applicant argues that the reference to “skin sleeves” in “one Nursing [sic] book is an anomaly that is not representative of reality.” Applicant asserts that this book was published in 2004 and that the same author has not used the term “skin sleeves” in her other books. September 30, 2011 Response to an Office Action.

<sup>31</sup> Applicant argues that this third-party use is not relevant because it is not a fabric cover for skin protection. January 8, 2013 Response to an Office Action. We agree with Applicant’s objection to this exhibit because the third party is using the term to identify a “skin sleeve” placed on a manikin so that nurses and doctors may practice inserting a needle into a baby’s arm. We, nevertheless, find that this exhibit is relevant to show how consumers perceive the term “skin sleeves.”

<sup>32</sup> Applicant argues that the two articles submitted in the July 8, 2012 Office Action “are simply isolated instances of improper use of a variation on Applicant’s mark and do not show that either SKIN SLEEVES or the applied-for mark is generic. These articles must be considered in relation to the vast number of scholarly articles and publications on the subject of skin tears.” January 8, 2013 Response to an Office Action. To support this argument, Applicant submitted eight articles regarding skin tears that do not reference the

- a. “Skin tears: prevention and treatment,” by JY Wick and GR Zanni  
(Consult Pharm 2008) (PubMed.gov).

**Abstract**

While skin tears are common among the elderly in general, and residents of long-term care facilities in particular, there has been limited research into their treatment. ... Plans to prevent skin tears that employ *skin sleeves*, padded side rails, gentle skin cleansers, moisturizing lotions, as well as staff education, can decrease by half the number of skin tears incurred in a long-term care facility. (Emphasis added).

- b. “Skin tears; understanding problem leads to prevention, proper care”  
by Diane Krasner (thefreelibrary.com) (2010).

In the United States alone there are more than 1.5 million skin tears per year in institutionalized adults. ...

Prevention strategies

... Use protective clothing and devices. Long sleeved shirts, stockings, and clothing modifications are effective strategies for skin tears. *Skin sleeves* and leg protectors are useful prevention devices, especially for individuals who experience recurring skin tears. (Emphasis added).

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term “skin sleeves”; rather the articles reference stockinettes, protective sleeves, elastic tubular support bandages, and protective dressings. The Trademark Examining Attorney also introduced an article entitled “Evidence Of Safety: Matching Limb Protection Sleeves With Tourniquet Cuffs” posted on the Tourniquets.org Blog (March 4, 2013) attached to the September 12, 2013 Office Action; 7 TTABVUE 2. The medical protective fabric skin coverings for wound prevention were referred to as “limb protection sleeves” and “stockinettes.” We find that these articles are relevant for what they show on their face (*i.e.*, that two authors used the term “skin sleeve” to identify a medical protective fabric skin coverings for wound protection).

We further note that the two articles submitted by the Trademark Examining Attorney were published after Applicant’s August 13, 2004 dates of first use which may reflect misuse or misunderstanding regarding trademarks and/or product names on the part of the authors writing about medical protective fabric skin coverings for wound protection.

(iii) May 15, 2014 Trademark Examining Attorney's Supplemental Brief<sup>33</sup>

The Trademark Examining Attorney introduced two exhibits that we find show use of the term "skin sleeves" in connection with Applicant's products. Tri-State Surgical Supply & Equipment (tristatesurgical.com) is advertising the sale of Applicant's products because it uses Applicant's product in the accompanying photograph.<sup>34</sup> Diller Medical Inc. (dillermedical.com) is advertising the sale of Applicant's products as it identifies Applicant as the source of the "Skin Sleeves." Diller Medical also advertises "Skin Sleeve" by New York Orthopedic. However, the photograph for that product is the same photograph used by Kinship Comfort Products, which company has agreed to stop using the term SKINSLEEVES.

The Newegg.com website advertises the sale of "Arm Protector, Skin Sleeves, 6 pair/cases." The manufacturer of the fabric is identified as De Royal.<sup>35</sup>

4. *Other generic terms for medical protective fabric skin coverings for wound protection.*<sup>36</sup>

Skil-Care Corporation uses the trademark GERI-SLEEVES and the generic term "stockinet."<sup>37</sup> Skil-Care Corporation also uses the term "skin protectors."<sup>38</sup>

Western Medical uses the trademark GLEN-SLEEVE II and the generic term "arm protector."<sup>39</sup>

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<sup>33</sup> Pursuant to the Board's March 28, 2014 Order, the Trademark Examining Attorney was permitted to include evidence with her Supplemental Brief.

<sup>34</sup> 23 TTABVUE 3.

<sup>35</sup> 22 TTABVUE 4-5.

<sup>36</sup> See also footnote 29 *supra*.

<sup>37</sup> September 30, 2011 Response to an Office Action.

<sup>38</sup> January 8, 2013 Response to an Office Action.

The WinHealth website (win-health.com) advertises the sale of DermaSaver Arm Protectors.<sup>40</sup> The DermaSaver products are also referred to as “arm tubes.” AllDayMedical (alldaymedical.com) advertises the sale of a GERIGLOVE Arm Protector manufactured by Preventative Products, Inc.<sup>41</sup> and Sock Science (socks-science.com) advertises the sale of Sock Science “arm sleeves.”<sup>42</sup>

MacMed Healthcare (macmedhealthcare.com) advertises the sale of SKIN PROTECTAS “an easy-to-wear, moisture transporting anti-friction tube.”<sup>43</sup>

The MEDLINE.com website advertises the sale of “protective sleeves” by several different manufacturers/suppliers. For example, the website advertised the sale of MEDLINE protective arm/leg sleeves, Dermasaver Sleeves by Sammons Preston, Skinsleeves by Posey Company, Sterile Isoclean Tyvek Sleeves by Dupont, Skin Protector Sleeves by EM Adams, PE Coated Polypropylene Sleeves by Safety Zone, Glen-Sleeve Arm Protectors by Derma Sciences, Ready-To-Wear Armsleeves by BSN Medical, Skil-Care Geri-Sleeves by Alimed, and Elastic Sleeve by BPSP Company.<sup>44</sup>

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<sup>39</sup> September 30, 2011 Response to an Office Action

<sup>40</sup> January 8, 2013 Response to an Office Action.

<sup>41</sup> January 8, 2013 Response to an Office Action. *See also* the February 12, 2013 Office Action.

<sup>42</sup> September 12, 2013 Office Action; 8 TTABVUE 10.

<sup>43</sup> January 8, 2013 Response to an Office Action.

<sup>44</sup> February 12, 2013 Office Action.

The ParentGivingStore website (parentgiving.com) advertises the sale of a “Protective Arm Sleeve” “designed to reduce or eliminate skin tears or sheers by providing a protective sleeve over the user’s skin.”<sup>45</sup>

The DermaSaver website (dermasaver.com) refers to its “skin protection products” as “limb sleeves” and specifically advertises “DermaSaver Skin Tubes™,” which it differentiates from “traditional fabric sleeves and stockings.”<sup>46</sup>

The Delfi Medical Innovations Inc. website (delfimedical.com) website advertises fabric covers for skin protection as “limb protection sleeves.”<sup>47</sup>

### *C. Analysis*

Applicant’s mark SKINSLEEVES is a compound word similar in construction to the term SCREENWIPE in *Gould*. The applicant in *Gould* sought to register the mark SCREENWIPE for “pre-moistened, anti-static cloth for cleaning computer and television screens.” The court found that “Gould’s own submissions provided the most damaging evidence that its alleged mark is generic and would be perceived by the purchasing public as merely a common name for its goods rather than a mark identifying the good’s source.” 5 USPQ2d at 1112. Gould described its product as “a ... wipe ... for ... screens.” *Id.* Given this admission, the court noted that the “compound immediately and unequivocally describes the purpose, function and nature of the goods as Gould itself tells us.” *Id.* (“Gould has simply joined the two most pertinent and individually generic terms applicable to its product, and then

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<sup>45</sup> February 12, 2013 Office Action.

<sup>46</sup> February 12, 2013 Office Action.

<sup>47</sup> September 12, 2013 Office Action; 5 TTABVUE 4.

attempts to appropriate the ordinary compound thus created as its trademark.”). In that context, where the mark in its entirety has exactly the same meaning as the individual words, the court stated that “the PTO has satisfied its evidentiary burden if, as it did in this case, it produces evidence ... that the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound.” *Id.* at 1111-1112. Because “the terms remain as generic in the compound as individually,” the court concluded that the compound itself was generic. *Id.* at 1112.

In this case, however, Applicant has not described its products as “a ... sleeve ... of ... skin,” “a skin-like sleeve,” “a sleeve for skin,” or anything remotely close thereto. Further, unlike SCREENWIPE in *Gould*, SKINSLEEVEES when considered in its entirety, does not have a generally recognized meaning: that is, it is not the recognized name of anything. Accordingly, we may not rely on the dictionary definitions alone because they do not provide clear evidence that the term SKINSLEEVEES or Skin Sleeves is a generic term for fabric covers for skin protection.

The record provides us with four examples of some variation of “skin sleeve” used as a generic term for medical protective fabric skin coverings for wound protection:

1. **NURSING ASSISTING: ESSENTIALS FOR LONG-TERM CARE** by Barbara Acello (2004);
2. “Skin tears: prevention and treatment,” by JY Wick and GR Zanni (2008);

3. “Skin tears; understanding problem leads to prevention, proper care” by Diane Krasner (2010); and

4. The Newegg.com website advertising the sale of “Arm Protector, Skin Sleeves, 6 pair/cases” manufactured by De Royal.

As noted above, the Trademark Examining Attorney has the burden of proof and genericness must be shown by clear evidence. *In re Hotels.com*, 91 USPQ2d at 1533. Furthermore, any doubts must be resolved in Applicant’s favor. *In re Tennis Industry Association*, 102 USPQ2d 1671, 1680 (TTAB 2012); *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005). Genericness is a fact-intensive determination and the Board's conclusion must be governed by the record which is presented to it. On balance we find that the Trademark Examining Attorney has not met her difficult burden of establishing by clear evidence that the designation SKINSLEEVEES is generic for the genus of medical protective fabric skin coverings for wound prevention. In this regard, we note the paucity of evidence (four examples) showing “skin sleeves” or variations thereof displayed generically, including only one use by a third party competitor. Further, two of the three scholarly articles regarding skin tears that used the term “skin sleeves” were published after Applicant’s first use of that term as a trademark.<sup>48</sup> Also, Applicant asserts that the author of the third work has not used the term “skin sleeves” in subsequent publications. Finally, the record includes examples of third-party use of

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<sup>48</sup> According to Gary Platzman, Applicant’s Vice President of Sales & Marketing, Applicant “has been using the SKINSLEEVEES trademark for patient protectors for more than ten years.” Platzman Declaration ¶2, attached to the September 30, 2011 Response to an Office Action.

the term SKINSLEEVEES in reference to Applicant's goods, i.e., trademark use. The paucity of evidence of generic usage, countered by evidence of trademark usage, does not show, by clear evidence, that medical professionals view and use the term SKINSLEEVEES as a generic term for medical protective fabric skin coverings for wound prevention. *See In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 4 USPQ2d at 1143 (there was no clear evidence that the financial community used CASH MANAGEMENT ACCOUNT as a "generic, common descriptive term for the brokerage services to which Merrill Lynch first applied the term," and there was no evidence of record that the term had been used before being introduced by Merrill Lynch). *See also In re Ferrero S.p.A.*, 24 USPQ2d 1155, 1157 (TTAB 1992) ("Common sense leads us to conclude that if a term is generic for a type of a product that has been on the market for decades, evidence of its use by others in the marketplace should be available and should be considered.").

Thus, based on the entirety of the record before us, we have doubt about whether SKINSLEEVEES is perceived by the relevant public as a generic name for medical protective fabric skin coverings for wound prevention. Such doubt must be resolved in Applicant's favor. *See In re Tennis Industry Association*, 102 USPQ2d at 1680 (five examples found to be insufficient evidence that TENNIS INDUSTRY ASSOCIATION was generic).

### III. Whether SKINSLEEVEES Is Merely Descriptive?

A term is merely descriptive of goods within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic,

feature, function, purpose or use of the goods or services. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012). *See also, In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a mark or a component of a mark is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). A term need not immediately convey an idea of each and every specific feature of the goods or services in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of them. *See In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). This requires consideration of the context in which the mark is used or intended to be used in connection with those goods or services, and the possible significance that the mark would have to the average purchaser of the goods in the marketplace. *See In re Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219; *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007); *In re Abcor Dev. Corp.*, 200 USPQ at 218; *In re Venture Lending Assocs.*, 226 USPQ 285 (TTAB 1985). The question is not whether someone presented only with the mark could guess the products listed in the description of goods. Rather, the question is whether someone who knows what the products are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d

1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002). See also *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on the question of whether the combination of terms evokes a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (quoting *Estate of P.D. Beckwith, Inc. v. Commissioner*, 252 U.S. 538, 543 (1920). See also *In re Tower Tech, Inc.*, 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry). However, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, non-descriptive meaning, or if the composite has a unique or incongruous meaning as applied to the goods or services. See *In re Colonial Stores*

*Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE for “bakery products”); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). Thus, we must consider the issue of descriptiveness by looking at the mark in its entirety.

“On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive.” *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978). *See also In re Shutts*, 217 USPQ at 364-65; *In re Universal Water Systems, Inc.*, 209 USPQ 165, 166 (TTAB 1980). In this regard, “incongruity is one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark.” *In re Shutts*, 217 USPQ at 365. *See also In re Tennis in the Round, Inc.*, 199 USPQ at 498 (the association of applicant’s mark TENNIS IN THE ROUND with the phrase “theater-in-the-round” creates an incongruity because applicant’s services do not involve a tennis court in the middle of an auditorium). On the spectrum of distinctiveness, the dividing line between merely descriptive and suggestive is a fine one. *In re Gyulay*, 3 USPQ2d at 1010. *See also In re Recovery, Inc.*, 196 USPQ 830, 831 (TTAB 1977).

The Trademark Examining Attorney, relying on the evidence to prove that SKINSLEEVEES is generic, argues that because she has established that SKINSLEEVEES is generic for Applicant’s goods, the mark is also merely

descriptive. *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 228 USPQ at 530 (quoting *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 847, 129 USPQ 411, 413 (C.C.P.A. 1961), “[t]he name of a thing is in fact the ultimate in descriptiveness.”).<sup>49</sup> However, in the first Office Action (March 30, 2011), the Trademark Examining Attorney based the descriptiveness refusal on the following logic:

The wording “skin” is defined as “1. the outer layer of a person’s or animal’s body.” *See attached dictionary excerpt, Macmillan.com*. The wording “sleeves” is defined as “2a. paper or plastic cover that protects something.” *Id.* The combined wording “skin sleeves” is used in the medical industry to describe a protective skin coverings [sic].

Therefore, the mark SKINSLEEVEES, as applied to the identified goods merely describes that the applicant’s goods feature skin sleeve coverings. Accordingly, the proposed mark is merely descriptive, and registration is refused on the Principal Register under Section 2(e)(1).

Applicant argues that SKINSLEEVEES “is illusory and suggestive and only indirectly references Applicant’s goods [medical protective fabric skin coverings for wound prevention], and is therefore not ‘merely descriptive.’”<sup>50</sup> Applicant explains that SKINSLEEVEES is not the common or usual way of describing the goods and that, therefore, the compound term SKINSLEEVEES conveys no immediate meaning. In other words, “common usage would lead one to first think ‘SKINSLEEVEES’ means a sleeve made of skin” and, therefore, “[a] thought process

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<sup>49</sup> 14 TTABVUE 12.

<sup>50</sup> 12 TTABVUE 21.

is required to the conclusion that the mark makes an indirect reference to the character of the goods.”<sup>51</sup>

As we noted in the discussion regarding Applicant’s use of the term SKINSLEEVEES *infra*, the word “sleeves” is descriptive, if not generic, when used in connection with protective fabric skin coverings for wound prevention. In that discussion, we referenced Applicant’s use of “Arm Sleeves” and “Leg Sleeves,” as well as numerous third-party references to sleeves (*e.g.*, GERI-SLEEVEES, GLEN SLEEVE II Arm Protectors, limb sleeves, and fabric sleeves, *etc.*).<sup>52</sup>

The question we face, then, is whether “skin” when coupled with the descriptive term “sleeves” creates a trademark or merely describes a sleeve with particular, readily understood attributes. *In re Sun Microsystems, Inc.*, 59 USPQ2d at 1086. As indicated above, the issue of whether a mark is merely descriptive is determined by whether someone who knows what the products are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d at 1317). In other words, we need to determine what the term SKINSLEEVEES used in connection with medical protective fabric skin coverings for wound prevention conveys to medical professionals in charge of patient safety?

We find that the mark SKINSLEEVEES when used in connection with medical protective fabric skin coverings for wound prevention immediately engenders the commercial impression of “sleeves for skin,” not “sleeves of skin.” *See In re*

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<sup>51</sup> 12 TTABVUE 22.

<sup>52</sup> *See* footnote 26.

*Entenmann's, Inc.*, 15 USPQ2d 1750, 1751 (TTAB 1990), *aff'd in opinion not for publication*, Appeal No. 90-1495 (Fed. Cir. February 13, 1991) (finding OATNUT for bread to be merely descriptive even though there is no such thing as oat nuts because to be merely descriptive, the mark does not have to describe the products with absolute exactness). Our finding of fact is corroborated by the Prosthetics Research Specialists, Inc. ([prostheticsresearch.com](http://prostheticsresearch.com)) and 3B Scientific websites.<sup>53</sup> Prosthetics Research Specialists, Inc. advertises the sale of "U-Flate" Skin Sleeves as coverings for prosthetic limbs (*i.e.*, "a shrinkable skin sleeve"). The 3B Scientific website advertises that "Life/form® Difficult Access Infant IV & IO skin sleeves have been developed to fit over the arms and legs of most infant training products." While these two companies are not using the term "skin sleeves" to identify Applicant's goods, coverings for prosthetic limbs and limb covers for manikins used for practicing medical procedures are sufficiently analogous to Applicant's products to provide insight as to how medical professionals perceive Applicant's mark.

Further, the wide third-party use of the word "sleeve" in connection with medical protective fabric skin coverings for wound prevention demonstrates that medical professionals are accustomed to seeing, in connection with medical protective fabric skin coverings for wound prevention, the word "sleeve" preceded by another descriptive term (*e.g.*, arm, leg, and limb). Thus when confronted with the term SKINSLEEVEs, they would perceive a sleeve for skin.

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<sup>53</sup> March 30, 2011 Office Action.

The fact that SKINSLEEVEES does not appear in a dictionary is not determinative. See *In re Sun Microsystems Inc.*, 59 USPQ2d at 1087; *In re Orleans Wines Ltd.*, 196 USPQ 516 (TTAB 1977). Likewise, the fact that Applicant may be the first entity using the phrase SKINSLEEVEES is not dispositive where, as here, the term unequivocally projects a merely descriptive connotation. See *In re MBAssociates*, 180 USPQ 338, 339 (TTAB 1973). Moreover, it is not necessary that the term be in common usage in the particular industry before it can be found merely descriptive. See *In re Sun Microsystems Inc.*, 59 USPQ2d at 1087; *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018, 1020 (TTAB 1983). Anyone marketing medical protective fabric skin coverings for wound prevention should have the right to use the term “skin sleeves” to describe their products.<sup>54</sup> In this regard, we note the three academic works referenced in our previous analysis of whether SKINSLEEVEES is a generic term as probative that medical professionals used the term “skin sleeves” to describe medical protective fabric skin coverings for wound prevention.

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<sup>54</sup> The combination of the words “skin” and “sleeves” to form Applicant’s mark does not evoke a new and unique commercial impression. Numerous cases have held that combining two words which as a whole are merely descriptive of the goods or services into a single term does not avoid a finding of mere descriptiveness for the combined term. See, e.g., *Minn. Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470, 472 (TTAB 1967) (“[i]t is almost too well established to cite cases for the proposition that an otherwise merely descriptive term is not made any less so by merely omitting spaces between the words”). Cf. *Seaguard Corp. v. Seaward International, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are “essentially identical”); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (“there can be little doubt that the marks [BEEFMASTER for restaurant services and BEEF MASTER for frankfurters and bologna] are practically identical and indeed applicant has not argued otherwise.”)

In sum, we find that prospective customers for medical protective fabric skin coverings for wound prevention, if confronted with SKINSLEEVES used in conjunction therewith, would, without need of thought, imagination or perception, be immediately apprised of the nature of Applicant's goods and, therefore, find that SKINSLEEVES is merely descriptive.

#### IV. Whether SKINSLEEVES has acquired distinctiveness?

The burden of proving that a mark has acquired distinctiveness is on the applicant. *Yamaha Int'l Corp. v. Yoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988). Applicant's evidence of acquired distinctiveness includes the following:

1. The declaration of Gary Platzman, Applicant's Vice President of Sales & Marketing.<sup>55</sup> Mr. Platzman attested to the following facts:

A. Applicant "has been using the mark SKINSLEEVES for patient protectors for more than ten years";

B. Applicant "started marketing the goods with [SKINSLEEVES] at least as early as 1998;

C. Applicant's use of SKINSLEEVES has been substantially exclusive since at least 2004; and

D. Competitors recognize Applicant's trademark rights in the term SKINSLEEVES as demonstrated by their use of terms other than "Skin Sleeves" to

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<sup>55</sup> September 30, 2011 Response to an Office Action.

identify their products (e.g., arm protector, protector, patient protectors, and stockinet);

2. Declarations from seven customers: a patient safety coordinator, a manager of a home medical supply company, four registered nurses, and a nurse supervisor.<sup>56</sup>

All of the declarants attested to the following:

A. They are familiar with “a number of companies that market and sell patient protection products”; and

B. They recognize SKINSLEEVEES as the trademark for Applicant’s products; and

3. Counsel’s statement that “[a]nnual sales figures for products bearing [Applicant’s] trademark in 2010 and 2011 of over 100,000 units per year indicate the prevalence and exposure of Applicant’s SKINSLEEVEES trademark and product in the relevant industry.”<sup>57</sup>

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<sup>56</sup> January 8, 2013 Response to an Office Action. While the declarations of Applicant’s customers are probative, proof of acquired distinctiveness may require more than the existence of a relatively small number (7) of people who associate the mark with Applicant. *See In re The Paint Prods. Co.*, 8 USPQ2d 1863, 1866 (TTAB 1988) (“Because these affidavits were sought and collected by applicant from ten customers who have dealt with applicant for many years, the evidence is not altogether persuasive on the issue of how the average customer for paints perceives the words ‘PAINT PRODUCTS CO.’ in conjunction with paints and coatings.”). *See also Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1723 (TTAB 2010) (finding *inter alia* sixteen declarations of little persuasive value). *Compare In re Bose Corp.*, 216 USPQ 1001, 1005 (TTAB 1983), *aff’d*, 772 F.2d 866, 227 USPQ 1 (Fed. Cir. 1985) (deeming retailer’s statement that he has been in contact with many purchasers of loudspeaker systems of whom a substantial number would recognize the depicted design as originating with applicant competent evidence of secondary meaning).

<sup>57</sup> 12 TTABVUE 24. Applicant has made no actual evidence of record regarding its sales or advertising. We have only Applicant's counsel's statement as to how many units Applicant sold in 2010 and 2011.

In view of the facts that (i) there is no dictionary definition for “skin sleeve,” (ii) with numerous competitors in the field of medical protective fabric skin coverings for wound prevention, there is vague evidence in a website advertisement of only one competitor using that term, and (iii) there are only three academic articles referencing the term “skin sleeves,” we find that SKINSLEEVEES is not so highly descriptive that its registrability under Section 2(f) may not be determined on the basis of Applicant’s declaration of substantially exclusive and continuous use since

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Putting aside whether a declaration from outside counsel could ever qualify as acceptable proof of these sort of facts, we have here no foundational information about counsel's investigation of, or understanding of, applicant's business, that would put him in a position to make statements regarding the marketing of the products at issue, which in this case is essential to our analysis of the registrability of the mark. *Cf. In re Simulations Publications, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975) (where appellant argued that the magazines at issue deal with unrelated subject matter, the court held that “[s]tatements in a brief cannot take the place of evidence.”); *In re Scarbrough*, 500 F.2d 560, 182 USPQ 298, 302 (CCPA 1974) (where patent claims were rejected for the insufficiency of disclosure under Section 112, the response of appellant was argument in lieu of evidence leading the court to hold that “argument of counsel cannot take the place of evidence lacking in the record.”); *In re Vsesoyuzny Ordena Trudovogo Krasnogo Znameni*, 219 USPQ 69, 70 (TTAB 1983) (applicant argued without corroborating evidence that its brochure would be recognized as an offer of services leading the Board to hold that “[u]nfortunately we have no evidence of record to this effect and assertions in briefs are normally not recognized as evidence”); *Spin Physics, Inc. v. Matsushita Electric Industrial Co., Ltd.*, 168 USPQ 605, 607 (TTAB 1970) (“The arguments and opinions of counsel for applicant are wholly insufficient to overcome the facts established by the Sugaya report.”).

*In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014). *Cf. In re DeBaun*, 687 F.2d 459, 214 USPQ 933, 934 n.4 (CCPA 1982) (“we need not evaluate the weight to be given to the attorney's declaration with respect to statements more appropriately made by appellant”); *In re Nat'l Distiller & Chem. Corp.*, 297 F.2d 941, 132 USPQ 271, 274 (CCPA 1962). In any event, we have no idea whether Applicant’s sales are substantial or *de minimis*. Without context, the statement from Applicant’s counsel is of little value.

2004. *See In re Synergistics Research Corp.*, 218 USPQ 165 (TTAB 1983) (holding applicant's declaration of five years' use sufficient to support registrability under §2(f) of BALL DARTS for equipment sold as a unit for playing a target game, in view of lack of evidence that the term is highly descriptive (e.g., no dictionary evidence of any meaning of BALL DARTS and no evidence of use of the term by competitors or the public)).

In view of the foregoing, we find that Applicant has established that SKINSLEEVEES has acquired distinctiveness.

**Decision:** The refusal to register Applicant's mark SKINSLEEVEES on the ground that it is generic is reversed.

Although we affirm the refusal to register Applicant's mark on the ground that it is merely descriptive, the refusal based on Applicant's failure to show acquired distinctiveness is reversed.