

**THIS OPINION IS NOT A
PRECEDENT OF
THE T.T.A.B.**

Mailed: November 15, 2010

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dr. Joseph Smith

Serial No. 77378967

Mark Levy of Hinman, Howard & Kattell, LLP for Dr. Joseph Smith.

Barbara Gaynor, Trademark Examining Attorney, Law Office 115 (John T. Lincoski, Jr., Managing Attorney).

Before Seeherman, Kuhlke and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Dr. Joseph Smith has applied to register the mark FIRSTAIDE in standard characters on the Principal Register with a claim of acquired distinctiveness under Section 2(f) for the following goods (emphasis added):

Adhesive bandages; Adhesive for bandages for skin wounds; Adhesive tapes for medical purposes; Bandages for dressings; Bandages for skin wounds; Medical adhesive tape; Medical adhesives for binding wounds; Menstruation bandages; Self adhesive dressings; Surgical bandages; Anti-infective products for veterinary use; Deodorizing products, namely, all purpose deodorizer preparations for household, commercial

and industrial use; Dermatological pharmaceutical products; Dietary and nutritionally fortified food products adapted for medical use; **First aid kits; First aid kits for domestic or other non-professional use**; Herbal products, namely, aromatherapy packs containing herbs used for relief from headaches, insomnia and sinus discomfort; Nutritional supplements in lotion form sold as a component of nutritional skin care products; Parapharmaceutical products for use in dermatology; Pharmaceutical preparations, namely, a blood clotting aid and delivery system for use in human and veterinary medicine; Pharmaceutical products and preparations against dry skin caused by pregnancy; Pharmaceutical products and preparations for hydrating the skin during pregnancy; Pharmaceutical products and preparations for pregnancy blemishes; Pharmaceutical products and preparations for preventing skin blemishes during pregnancy; Pharmaceutical products and preparations to prevent stretch marks; Pharmaceutical products and preparations to prevent swelling in the legs; Pharmaceutical products for ophthalmological use; Pharmaceutical products for skin care for animals; Pharmaceutical products for the treatment of bone diseases; Pharmaceutical products for the treatment of viral and infectious diseases, for the treatment of cancer; Pharmaceutical products for treating respiratory diseases and asthma; Products and preparations for cleansing the skin for medical use; **Topical first aid gel**; Cotton for medical purposes; Cotton sticks for medical purposes; Cotton swabs for medical purposes; Cotton wool for medical purposes; Antibiotic creams; Antibiotic handwash; Antibiotic ointments; Antibiotic preparations; Antibiotic tablets; Antibiotics; Antifungal creams for medical use; Corn and callus creams; Hydrocortisone cream; Medicated skin care preparations, namely, creams, lotions, gels, toners, cleaners and peels; Medicinal creams for skin care; Mixed antibiotic preparations; Multipurpose medicated antibiotic cream, analgesic balm and mentholated salve; Pharmaceutical preparations for the prevention and treatment of ocular disorders or diseases,

for the treatment of bacteria-based diseases, and for the treatment of diabetes, and anti-infective preparations, antiviral preparations, antibiotics, antifungal preparations and vaccines

in International Class 5.¹

Procedural History

The trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's proposed mark is merely descriptive of a feature or quality of applicant's goods, and that the evidence submitted with the application is insufficient to establish acquired distinctiveness under Section 2(f).² In response, applicant submitted additional evidence of acquired distinctiveness in support of his claim under

¹ Application Serial No. 77378967 was filed January 23, 2008, based upon applicant's assertion of December 15, 2002 as the date of first use of the mark anywhere and in commerce in connection with the goods. Applicant submitted a claim of acquired distinctiveness under Trademark Act Section 2(f) based upon his assertion of substantially exclusive and continuous use of the mark for at least five years prior to the declaration, and his ownership of Registration No. 2926217 for the mark shown below for "Bandages for skin wounds; surgical bandages; cotton swabs for medical purposes; gauze; medicated dental floss; sanitary napkins; sanitary cream, namely, multipurpose medicated antibiotic cream; sanitary tape, namely, medical adhesive tape; antiseptic spray and solution," in International Class 5, with a disclaimer of "FIRST AID."



² In addition, the examining attorney advised applicant that his improper disclaimer of all of the wording in the mark would be deleted; and required additional information from applicant regarding his proposed concurrent use claim. Applicant subsequently withdrew the concurrent use claim.

Trademark Act Section 2(f). The examining attorney then refused registration under Trademark Act Section 2(e)(1) on the ground that the proposed mark is generic.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Arguments of Applicant and the Examining Attorney

Applicant sets forth several arguments in favor of registration of his mark. In support of his position that FIRSTAIDE is not a generic term for his goods, applicant argues that "first aid" is a service in the form of emergency medical treatment "directed toward an individual who is presumably awaiting further medical care."³ However, applicant contends that his "product is not a service provided by an outside source, but a tangible good intended for use in situations that do not necessarily require further medical assistance and one that can presumably be used even on oneself [sic]."⁴ Applicant further argues that a "first aide" may be thought of as an individual who provides "first aid." Thus, applicant argues that regardless of the meaning of "first aid" in relation to providing emergency medical services, FIRSTAIDE is not a generic term as applied to applicant's goods. Applicant

³ Applicant's brief. p. 5.

⁴ Id.

also raises the related argument that simply because first aid kits contain goods identified by the FIRSTAIDE designation such as adhesive bandages, it does not necessarily follow that FIRSTAIDE, as used for adhesive bandages and other such goods, is generic therefor.

Finally, despite seeking registration under Section 2(f), by which applicant concedes that his mark is not inherently distinctive, applicant argues that "FIRSTAIDE may be established as a distinctive mark, and so not 'merely descriptive.'"⁵ While acknowledging that FIRSTAIDE "is phonetically equivalent to 'first aid,'"⁶ applicant nonetheless asserts that his "product, however, is easily accessible to consumers and is not found behind registers. Thus, the mark virtually is never pronounced."⁷ Applicant argues that, as a result, the phonetic equivalence of FIRSTAIDE to "first aid" is less significant than the visual distinctiveness of FIRSTAIDE "by virtue of the combination of the words 'first' and 'aide.'"⁸ In view of the foregoing, applicant contends that FIRSTAIDE does not

⁵ Id. at p. 9.

⁶ Id. at p. 10.

⁷ Id.

⁸ Id.

describe the identified goods, but merely suggests a quality thereof.⁹

The examining attorney argues that "first aid" is "emergency treatment administered to a sick person before professional medical care is available;"¹⁰ that a "first aid kit" is "a standard collection of first aid supplies for treatment of minor injuries or stabilization of major injuries;"¹¹ and that applicant's goods include "first aid kits" as well as items commonly contained therein. Thus, the examining attorney argues, FIRSTAIDE is generic as applied to such goods, in spite of its novel spelling.

The examining attorney argues in the alternative that FIRSTAIDE merely describes a function, feature, quality or use of applicant's goods; and that by seeking registration under Section 2(f), applicant has conceded as much.

Finally, the examining attorney argues that the designation FIRSTAIDE is incapable of acquiring distinctiveness and is unregistrable under Trademark Act

⁹ Again, it is noted that by seeking registration under Section 2(f), applicant has conceded that his mark is not inherently distinctive. Nonetheless, applicant argues in his brief on appeal that his mark is inherently distinctive and does not present any arguments with regard to the sufficiency of his claim of acquired distinctiveness under Section 2(f).

¹⁰ *The American Heritage Dictionary of the English Language*, (4th ed., 2000) submitted with the examining attorney's May 5, 2008 and January 11, 2009 Office actions.

Section 2(f); and that, in the event FIRSTAIDE is not found to be generic, applicant has submitted insufficient evidence that his mark has acquired distinctiveness to be registrable under Section 2(f).

In support of her position, the examining attorney has submitted the above-noted definitions of "first aid" and "first aid kit." The examining attorney further has submitted evidence from commercial, informational and government Internet websites indicating that the term "first aid" is widely used to refer to kits containing items used to provide emergency treatment of injuries and illnesses to humans and pets. The following examples are illustrative (emphasis added to reflect goods identified in the involved application):

A well-stocked **first-aid kit**, kept within easy reach, is a necessity in every home. Having supplies gathered ahead of time will help you handle an emergency at a moment's notice. You should keep one **first-aid kit** in your home and one in each car. Also be sure to bring a **first-aid kit** on family vacations. Include the following in each of your **first-aid kits**:

- first-aid manual
- sterile gauze
- adhesive tape**
- adhesive bandages in several sizes**
- elastic bandage**
- antiseptic wipes**

¹¹ http://en.wictionary.org/wiki/first_aid_kit, submitted with the examining attorney's May 5, 2008 and January 11, 2009 Office actions.

soap
antibiotic cream (triple-antibiotic ointment)
antiseptic solution (like hydrogen peroxide)
hydrocortisone cream (1%)
acetaminophen and ibuprofen
extra prescription medications (if the family is going on vacation)
tweezers
sharp scissors
safety pins
disposable instant cold packs
calamine lotion
alcohol wipes or ethyl alcohol
thermometer
plastic gloves (at least 2 pairs)
flashlight and extra batteries
mouthpiece for administering CPR (can be obtained from your local Red Cross)
your list of emergency phone numbers
blanket (stored nearby);¹²

The Red Cross recommends that all **first aid kits** for a family of four include the following:

- 2 absorbent **compress dressings** (5 x 9 inches)
- 25 **adhesive bandages** (assorted sizes)
- 1 **adhesive cloth tape** (10 yards x 1 inch)
- 5 **antibiotic ointment** packets (approximately 1 gram)
- 5 **antiseptic wipe** packets
- 2 packets of aspirin (81 mg each)
- 1 blanket (space blanket)
- 1 breathing barrier (with one-way valve)
- 1 instant cold compress
- 2 pair of nonlatex gloves (size: large)
- 2 **hydrocortisone ointment** packets (approximately 1 gram each)
- Scissors
- 1 **roller bandage** (3 inches wide)
- 1 **roller bandage** (4 inches wide)
- 5 sterile gauze pads (3 x 3 inches)
- 5 sterile gauze pads (4 x 4 inches)
- Oral thermometer (non-mercury/nonglass)
- 2 triangular **bandages**
- Tweezers

¹² www.kidshealth.org

- First aid instruction booklet;¹³

First Aid Kits - Medical Supplies - Information & Resources

Leaders in first aid supply, personal protection products, disaster preparedness and medical supplies for commercial, industrial and residential use with loads of additional information and resources for your company or organization. When it comes to **first aid**, 1stAidSupplies.com is a nationwide leader offering quality **first aid kits** and supply. Our **first aid kits** and cabinets meet or exceed OSHA standards and are available for commercial offices, job sites, homes, and vehicles with all the essentials medical supplies in case an emergency occurs. Refills for all **first aid kits** and cabinets are available.

Within our **first aid** and medical supplies you will find products for burn care, bloodborne pathogens, CPR and AED products, eye care, ointments, antiseptics, pain relief products, over the counter medications, trauma kits, disaster preparedness and survival products, search and rescue tools, storage containers, protective equipment including gloves, exam gloves, ear protection, head and body protection, respirators and face masks, safety glasses and so much more;¹⁴ and

Assemble a first aid kit for your home and one for each car. A **first aid kit** should include:

- **Sterile adhesive bandages** in assorted sizes
- 2-inch sterile gauze pads (4-6)
- 4-inch sterile gauze pads (4-6)
- **Hypoallergenic adhesive tape**
- **Triangular bandages** (3)
- 2-inch sterile **roller bandages** (3 rolls)
- 3-inch sterile **roller bandages** (3 rolls)
- Scissors
- Tweezers

¹³ www.redcross.org

¹⁴ www.1staidsupplies.com

- Needle
 - Moistened towelettes
 - **Antiseptic**
 - Thermometer
 - Tongue blades (2)
 - Tube of petroleum jelly or other lubricant
 - Assorted sizes of safety pins
 - Cleansing agent/soap
 - Latex gloves (2 pair) Sunscreen
- Non-prescription drugs
- Aspirin or nonaspirin pain reliever
 - Anti-diarrhea medication
 - Antacid (for stomach upset)
 - Syrup of Ipecac (use to induce vomiting if advised by the Poison Control Center)
 - Laxative
 - Activated charcoal (use if advised by the Poison Control Center).¹⁵

In addition, the examining attorney has submitted copies of fourteen third-party registrations for marks that identify goods including first aid kits and their components in which the term "first aid" is disclaimed. The following examples are illustrative: Reg. No. 1771033 for the mark FIRST AID ONLY and design (FIRST AID disclaimed); Reg. No. 3208452 for the mark CPR SAVERS & FIRST AID SUPPLY and design (CPR and FIRST AID SUPPLY disclaimed); Reg. No. 3259101 for the mark FIRST AID EXCHANGE (FIRST AID disclaimed); and Reg. No. 3437405 for the mark FIRST AID...MADE FUN! (FIRST AID disclaimed).

¹⁵ www.fema.gov

Issues on Appeal

The issues on appeal are (1) whether the term FIRSTAIDE is generic for applicant's goods; and, alternatively (2) if such term is not generic, whether it is merely descriptive thereof or whether it has acquired distinctiveness.

Genericness

A term is generic and not a mark if it refers to the class, genus or category of goods and/or services on or in connection with which it is used. See *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001), citing *H. Marvin Ginn Corp. v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986). The test for determining whether a mark is generic is its primary significance to the relevant public. See Section 14(3) of the Act. See also *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and *H. Marvin Ginn Corp.*, *supra*. It further is settled that if the proposed mark is held generic for any of the goods identified in a class of an involved application, registration properly is refused as to all of the goods in that International Class. See *In re Analog Devices Inc.*, 6

USPQ2d 1808, 1810 (TTAB 1988), *aff'd without pub. op.* 10
USPQ2d 1879 (Fed. Cir. 1989).

The examining attorney has the burden of establishing by clear evidence that a mark is generic and thus unregistrable. See *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987). Evidence of the relevant public's understanding of a term may be obtained from any competent source, including testimony, surveys, dictionaries, trade journals, newspapers, and other publications. See *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985). In determining whether or not the designation FIRSTAIDE is generic, we must also consider applicant's evidence of acquired distinctiveness, since this evidence also touches on the public perception of this designation.

The determination of whether a term is generic involves a two-part inquiry: First, what is the category or class of the goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that category of goods or services? See *H. Marvin Ginn Corp.*, *supra*. With respect to the first part of the inquiry, we find, in this case, that the genus of goods is adequately defined by applicant's identification of goods.

With respect to the second part of the inquiry, the evidence of record, excerpted above, is replete with references to "first aid kit" as a commonly recognized term for a collection of items used to provide immediate care of wounds and illnesses. The evidence of record further establishes that "first aid" is commonly recognized as the activity of providing emergency care of wounds and illnesses. Thus, we find that "first aid" is a term of art with a clearly and widely understood meaning related to applicant's goods.¹⁶ We further find the term "first aid" to be generic as applied to the goods identified in the subject application.

Moreover, we find that the term FIRSTAIDE likewise is generic as applied to the "First aid kits; First aid kits for domestic or other non-professional use" identified in the application. Applicant's designation FIRSTAIDE is

¹⁶ Because "first aid" has been shown to be used as a generic unitary term of art in the relevant field, we need not consider the generic significance of the words "first" and "aid" alone. See *In re Shiva Corp.*, 48 USPQ2d 1957 (TTAB 1998) [TARIFF MANAGEMENT found to be a unitary term used in the trade to describe computer programs for selecting least expensive long distance carrier]. For the same reason it is unnecessary for us to engage in a determination of whether FIRSTAIDE, which is a truncated and novel spelling of "first aid," is a compound word or phrase for purposes of analyzing the examining attorney's burden of proof. See *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111-1112 (Fed. Cir. 1987); and *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832, 1837 (Fed. Cir. 1999).

phonetically equivalent to "first aid." Applicant has not introduced evidence to support his contention that his mark will be perceived as an assistant who performs emergency wound care, or otherwise will be perceived as anything other than a slight misspelling of "first aid." That is to say, the fact that FIRSTAIDE is a telescoped, slightly misspelled version of "first aid" does not result in its being understood as anything other than the generic term. The addition or change in one letter normally does not transform a generic designation into a source indicator. *See, e.g., In re Stanbel, Inc.*, 16 USPQ2d 1469 (TTAB 1990), *aff'd without pub. op.*, 20 USPQ2d 1319 (Fed. Cir. 1991) [where the record established that the term "ice pack" was a generic designation for a "nontoxic reusable ice substitute for use in food and beverage coolers," applicant's asserted mark ICE PAK was held generic and, therefore, unregistrable].

The misspelling here still results in a proposed mark that is the phonetic equivalent of the generic term and appears nearly the same. In view of the phonetic equivalence and visual similarity, and given the commonly understood meaning of the term "first aid," we have no doubt that the two terms would be viewed as having the same meaning. In other words, applicant's use of the term

FIRSTAIDE would be understood by relevant purchasers as primarily naming a category of kits, namely, first aid kits.

We acknowledge that "first aid" or "FIRSTAIDE," in connection with applicant's goods, acts as an adjective rather than a noun. Although it is sometimes argued that generic terms must be nouns, and that terms used as adjectives are descriptive rather than generic, that is not the law. *See Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628 (TTAB 1998), citing 2 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition*, Section 12:10 (4th ed. 1997) ["A rule of thumb sometimes forwarded as distinguishing a generic name from a descriptive term is that generic names are nouns and descriptive terms are adjectives. However, this 'part of speech' test does not accurately describe the case law results."].

Here, we recognize that "first aid" is a noun when used as the name of the activity of providing emergency treatment to a sick or injured individual, and is an adjective when used in connection with the kits that themselves are used in the performance of such activities. This adjectival use, however, does not remove the term FIRSTAIDE from being generic when used in connection with

first aid kits of the type sold by applicant. See *Micro Motion Inc., supra*.

In short, "first aid" or FIRSTAIDE is the name of a category or class of kit. In this case, because the term FIRSTAIDE directly names the most important or central aspect or purpose of certain of applicant's goods, namely, that they are used to perform emergency treatment of injuries, or "first aid," this term is generic and should be freely available for use by competitors. See, for example, *In re Sun Oil Co.*, 426 F.2d 401, 165 USPQ 718 (CCPA 1970) [CUSTOMBLENDED for gasoline held generic because category of gasoline was blended personally for the motorist]; *In re Helena Rubinstein, Inc.*, 410 F.2d 438, 161 USPQ 606 (CCPA 1969) [PASTEURIZED for face cream held generic]; *In re Central Sprinkler Company*, 49 USPQ2d 1194 (TTAB 1998) [ATTIC for automatic sprinklers for fire protection of attics held generic]; and *In re Reckitt & Colman, North America Inc.*, 18 USPQ2d 1389 (TTAB 1991) [PERMA PRESS for soil and stain removers held generic].

And, as noted above, because FIRSTAIDE is generic as to certain of the goods applicant offers under its mark, the mark is unregistrable. See *In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd without pub. op.*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989); and *In re*

Ser No. 77378967

Allen Electric and Equipment Co., 458 F.2d 1404, 173 USPQ 689, 690 (CCPA 1972) [genericness is determined on the basis of the goods and/or services identified in the involved application].

Applicant's ownership of the previously issued Registration No. 2926217 for the mark

FirstAide

for "Bandages for skin wounds; surgical bandages; cotton swabs for medical purposes; gauze; medicated dental floss; sanitary napkins; sanitary cream, namely, multipurpose medicated antibiotic cream; sanitary tape, namely, medical adhesive tape; antiseptic spray and solution" does not compel a different result herein, particularly given the disclaimer of all of the wording, namely, FIRSTAIDE, therein.

We have also considered the evidence submitted by applicant in support of his claim of acquired distinctiveness, inasmuch as that evidence also touches on the public perception of the applied-for term. As discussed in more detail below, we find this evidence lacking in demonstrating that FIRSTAIDE is perceived as a trademark and not as a generic term.

In short, the proposed mark is a common designation

used in the industry to identify kits used for the purpose of providing first aid. The designation FIRSTAIDE is generic and does not and can not function as a trademark to distinguish applicant's goods from those of other first aid kit providers and serve as an indication of origin. The designation sought to be registered should not be subject to exclusive appropriation, but rather should remain free for others in the industry to use in connection with their first aid kits. See *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999).

Therefore, we conclude that the examining attorney has met the substantial burden of establishing that FIRSTAIDE is incapable of identifying and distinguishing the source of the identified goods.

Acquired Distinctiveness

In view of our finding that FIRSTAIDE is generic for applicant's goods, the term cannot be registered under Section 2(f) of the Act. However, in order to render a complete opinion we will also address the issue of acquired distinctiveness. Although applicant has, as noted, argued in his brief that his mark is inherently distinctive, applicant's request that the application be registered under the provisions of Section 2(f) is an admission that the mark is not inherently distinctive. We add that the

evidence amply demonstrates that the mark, if it is not generic, is highly descriptive.

Assuming, arguendo, that FIRSTAIDE is not generic, we turn to a consideration of whether it has acquired distinctiveness as a mark. It is applicant's burden to establish a prima facie case of acquired distinctiveness. *See Yamaha International Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1006 (Fed. Cir. 1988).

Applicant submitted his declaration under Trademark Rule 2.20, stating the following:

(1) applicant owns prior Registration No. 2926217 for the mark **FirstAide** ("first aid" disclaimed) for "Bandages for skin wounds; surgical bandages; cotton swabs for medical purposes; gauze; medicated dental floss; sanitary napkins; sanitary cream, namely, multipurpose medicated antibiotic cream; sanitary tape, namely, medical adhesive tape; antiseptic spray and solution," in International Class 5; and

(2) applicant has made substantially exclusive and continuous use of FIRSTAIDE in commerce in connection with his goods provided under the FIRSTAIDE designation for over five years prior to the date upon which the claim of distinctiveness was made. In addition, applicant submitted

with his November 13, 2008 communication portions of the proceeding file of his involved application; a copy of his prior registration; advertisements and packaging for goods under the FIRSTAIDE designation; and a copy of a University of Wisconsin report on the adhesive properties of bandages used in a water environment for physical therapy.

However, the evidence submitted by applicant fails to show that the relevant customers of his goods have come to view the designation FIRSTAIDE as applicant's source-identifying mark. See *In re Bongrain International Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); and *In re Recorded Books Inc.*, 42 USPQ2d 1275 (TTAB 1997). The issue here is the achievement of distinctiveness, and the evidence falls far short of establishing this. Notably, applicant's evidence fails to indicate any sales or advertising expenditures related to his FIRSTAIDE designation. Of perhaps greater significance, the record is completely devoid of direct evidence that the relevant classes of purchasers of applicant's goods view FIRSTAIDE as a distinctive source indicator therefor.

Accordingly, even if the designation FIRSTAIDE were found to be not generic, but merely descriptive, given the highly descriptive nature of the designation FIRSTAIDE, we would need to see a great deal more evidence (especially in

the form of direct evidence from customers) than what applicant has submitted in order to find that the designation has become distinctive of applicant's goods. That is to say, the greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. See *Yamaha Int'l. Corp. v. Hoshino Gakki Co., supra*; and *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 4 USPQ2d 1141 (Fed. Cir. 1987). The sufficiency of the evidence offered to prove secondary meaning is evaluated in light of the nature of the designation. Highly descriptive terms, for example, are less likely to be perceived as trademarks and more likely to be useful to competing sellers than are less descriptive terms. More substantial evidence of secondary meaning than applicant has provided here is required to establish the distinctiveness of FIRSTAIDE for goods that include first aid kits and first aid supplies.

Decision: The refusal under Section 2(e)(1) of the Act on the ground that the proposed mark is generic is affirmed; the refusal under Section 2(e)(1) of the Act on the ground that the mark is merely descriptive and the Section 2(f) showing is insufficient to establish acquired distinctiveness is likewise affirmed.