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TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Twin Associates, LC dba EVitamins

Serial No. 77443720

Thomas Randazzo, Esq. for Twin Associates, LC dba
EVitamins.

Steven W. Jackson, Trademark Examining Attorney, Law Office
107 (J. Leslie Bishop, Managing Attorney).

Before Bucher, Drost, and Zervas, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 9, 2008, applicant Twin Associates, LC dba
EVitamins applied to register the term EVITAMINS (in
standard character form) on the Principal Register for
services identified as "mail order catalog services
featuring vitamins and dietary supplements; on-line retail
store services featuring vitamins and dietary supplements"
in Class 35. The application alleges a date of first use
anywhere of March 13, 1999 and a date of first use in

commerce of June 9, 2003. Applicant has provided an amendment to the application that seeks registration under the provision of Section 2(f) of the Trademark Act. 15 U.S.C. § 1052(f).

The examining attorney has refused to register applicant's mark on the grounds that "the proposed mark is generic" (brief at unnumbered p. 3) and the examining attorney found that applicant's "allegation of five years' use coupled with a declaration statement, news stories and other studies, consumer satisfaction surveys, and various website captions are insufficient in this case because the mark, herein, is generic as used in connection with the identified services" (Brief at 14). 15 U.S.C. § 1052(f). In addition to these issues, the examining attorney initially refused to register applicant's mark on the ground that it is merely descriptive and applicant, even while submitting its declaration of acquired distinctiveness, has continued to argue that its mark is not merely descriptive. See Response dated January 19, 2009 at 5 ("Alternatively, if the Examiner is not persuaded to withdraw his 'merely descriptive' refusal for registration, then the mark should be allowed to proceed to registration on the Principal Register pursuant to Section 2(f)"); and Applicant's Brief at 7. Therefore, we view

applicant's offer to seek registration under the provision of Section 2(f) as an alternative argument and the descriptiveness of applicant's mark remains an issue in this appeal. TMEP § 1212.02(c) (6th ed. Oct. 2009) ("An applicant may argue the merits of an examining attorney's refusal and, in the alternative, claim that the matter sought to be registered has acquired distinctiveness under §2(f). Unlike the situation in which an applicant initially seeks registration under §2(f) or amends its application without objection, the alternative claim does not constitute a concession that the matter sought to be registered is not inherently distinctive").¹

The examining attorney has also objected to applicant's brief to the extent that "with its brief [p. 14] an additional list of registrations that were not properly made of record" was submitted. Examining Attorney's Brief at 2. On page 14 of applicant's brief, there is a list of sixteen marks: EFAUCETS, EINSURANCE, EHEALTH, EMEDICAL, ECARD, EBILLING, EPHARMACY, EHELP, ESERVICE, ETRAVEL, EPLANS, ESCIENCE, EFLORIST, ENEWS, EDENTIST and EMEDICINE. This identical list appeared in

¹ "The generic name of a thing is in fact the ultimate in descriptiveness." *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

applicant's January 19, 2009 response at 4-5 and applicant's April 9, 2009 response at 3. The examining attorney's February 23, 2009 Office action (p. 3) noted that applicant "has made reference to a number of third-party registrations... Third-party registrations are not conclusive on the issue of descriptiveness or genericness." Normally, we do not consider a list of registrations, particularly one submitted with an appeal brief. See, e.g., *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record"); *In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR printout with its appeal brief, however, is an untimely submission of this evidence"). However, in this case, the examining attorney did not advise applicant of the proper way to make third-party registrations of record. Under these circumstances, we consider the examining attorney's objection to this type of evidence to be waived. *In re Broyhill Furniture Industries*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001):

Although the Examining Attorney, in her brief, has objected to such evidence "as being unsupported" in that a mere listing of third-party registrations "is not credible evidence of the existence" thereof and that copies of such registrations or their electronic equivalents, in the form of printouts from the electronic records of the United States Patent and

Trademark Office, need to be submitted in order to make the registrations properly of record," the objection is considered to have been waived since it was not interposed in response to applicant's reliance on such listing in its response to the initial Office Action.

See also TBMP § 1207.03 (2d ed. rev. 2004):

Copies of third-party registrations that are submitted with an applicant's brief may be considered in certain circumstances, even if the examining attorney objects to the registrations or does not discuss them in the examining attorney's brief. If the applicant, during the prosecution of the application, provided a listing of third-party registrations, without also submitting actual copies of the registrations, and the examining attorney did not object or otherwise advise applicant that a listing is insufficient to make such registrations of record at a point when the applicant could cure the insufficiency, the examining attorney will be deemed to have waived any objection as to improper form.

We add that, while we will consider the objection to be waived, we "will not consider more than the information provided by applicant. Thus, if applicant has provided only a list of registration numbers and marks, the list will have very limited probative value." TBMP § 1208.02. In effect, there is little weight that we can give this list of marks with no additional information. We have no information about the status of the marks and we cannot confirm that they are in fact registered. See, e.g., *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] cancelled registration does not provide constructive notice

of anything"); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002) ("While applicant also submitted a copy of a third-party application ..., such has no probative value other than as evidence that the application was filed"). Indeed, without a registration number, it would be difficult to discern which of several possible registrations for some of the marks applicant may be referencing.

However, we can respond to applicant's rhetorical question regarding one of the sixteen marks in applicant's list: "Or why would ETRAVEL not be deemed generic with respect to any travel agent offering on-line travel-related services?" Applicant's Brief at 14. The board addressed this specific mark in an earlier case and answered applicant's general question concerning why "e-" formative marks on the register (assuming they were made of record), including the ETRAVEL mark, did not mean that an applicant's mark was not merely descriptive. *In re Styleclick.com Inc.*, 57 USPQ2d 1445, 1447-48 (TTAB 2000):

We have reviewed the numerous third-party registrations of record which issued on the Principal Register. The marks which are most analogous to applicant's include the following: E-STAMP for "postage and mailing system computer software"; E-TRAVEL for "travel information services, namely providing travel information by means of computer data base"; E-MORTGAGE for "computerized loan approval

services, namely, on-line financing and mortgage banking services wherein a borrower submits an application for a mortgage loan via a computer on-line service or a global computer network"; E-FARES for "providing computerized travel information, namely, airline information retrieval services"; and E-INSURE for "providing insurance information concerning insurance products and services."

These registrations offer little help in making a determination of the merits in this appeal. While uniform treatment under the Trademark Act is an administrative goal, our task in this appeal is to determine, based on the record before us, whether applicant's mark is merely descriptive. As often noted by the Board, each case must be decided on its own merits. We are not privy to the records in the files of the cited registrations and, moreover, the determination of registrability of particular marks by the Trademark Examining Groups cannot control the result in another case involving a different mark for different goods and/or services.

Having said the above, it certainly does appear that the Office has in the past not always taken the same position with respect to marks of the nature of applicant's as the Examining Attorney urges in the present case. Office practice has resulted in inconsistent treatment of "e-" prefix marks which are similar in nature to applicant's. In trying to understand this situation, we would make the point that, with each passing day, the Internet becomes more pervasive in American daily life. Many Internet words, such as "e-mail" and "e-commerce," have made their way into the general language. We note that most of the third-party registrations relied upon by applicant were issued in 1997-1998, with a few issuing in 1999. While, by most standards, one to three years in the past would be viewed as "recent," a year or two is an eternity in "Internet time," given the rapid advancement of the Internet into every facet of daily life (most especially, e-mail). Only "recently," the Internet meaning of the "e-" prefix may have been known only by those few who were then accessing the Internet. We have no doubt that in the year 2000, the meaning of the "e-" prefix is commonly recognized and understood by virtually everyone as a designation for the Internet.

Descriptiveness

We now address the question of whether the mark EVITAMINS is merely descriptive. A mark is merely descriptive if it immediately conveys "knowledge of a quality, feature, function, or characteristics of the goods or services." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). See also *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and *In re Quik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). To be "merely descriptive," a term need only describe a single significant quality or property of the goods. *Gyulay*, 3 USPQ2d at 1009 (Fed. Cir. 1987) and *Meehanite Metal Corp. v. Int'l Nickel Co.*, 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959). Mere descriptiveness of a mark is not considered in the abstract, but in relation to the particular goods or services for which registration is sought. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).²

² Applicant argues that the examining attorney "has failed to meet his burden by clear evidence." Brief at 7. While the examining attorney has the burden to show that applicant's mark is merely descriptive, the examining attorney is not required to show that the mark is merely descriptive by clear evidence. See *Bayer*, 82 USPQ2d at 1831 ("The examining attorney has the burden to establish that a mark is merely descriptive").

The examining attorney has submitted dictionary evidence regarding the following terms:

"e-" - The prefix "e-." with or without the hyphen, may be attached to anything that has moved from the physical world to its electronic alternative, such as "e-mail" and "e-commerce." "E" words have become synonymous with the Internet.
www.thefreedictionary.com

Vitamin - organic substance essential to nutrition: an organic substance essential in small quantities to the metabolism in most animals. Vitamins are found in minute quantities, in some cases are produced by the body, and are also produced synthetically.
<http://encarta.msn.com>

The examining attorney has also submitted evidence that vitamins are sold online.

Here are some considerations when buying discount vitamins on the internet.
www.welshhealth.com

You can find most major brands of vitamins at your local drug or grocery store. In addition, many companies sell vitamins on the Internet.
<http://ezinearticles.com>

Purchase your vitamins on the Internet: As a general rule of thumb, buying on the Internet can save you some big bucks.
www.savingadvice.com

Welcome to our Vitamin Store Directory. Here you can find online vitamin stores selling discount vitamins and natural vitamin supplements.
www.savewithgreen.com

Vitamins and Minerals
www.mydiscountvitaminonline.com

Vitamin Stores Online
There are many vitamin stores online that offer much lower prices than their offline competitors...

Vitacost.com...
DrWhitaker.com...
Xtend-Life.com...
www.quick-weight-loss-methods.com

Applicant's services include "on-line retail store services featuring vitamins and dietary supplements." Applicant argues that its "services, in their totality, are on-line selling of vitamins, herbal products, body-building supplements, bath and beauty products, pet products, sexual aids, anxiety remedies, and weight loss products, with vitamins being just one of many products offered by Applicant." Brief at 8. "Our predecessor court... has stated that 'registration should be refused if the mark is descriptive of any of the goods for which registration is sought.'" *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005), quoting, *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 47 (CCPA 1975). See also *In re Analog Devices Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd*, 10 USPQ2d 1879 (Fed. Cir. 1989) (unpublished). While vitamins are not the only product that applicant's online store sells, it appears to be one of the featured items. See, e.g., *Michigan Muscle & Fitness* (eVitamins - Michigan's Largest Online Vitamin and Supplement Superstore"). We point out that even if vitamins were not the principal or featured items of applicant's online

store, a mark that describes items that are sold as part of the identified retail services would likely still be merely descriptive. *In re Pencils, Inc.*, 9 USPQ2d 1410, 1411 (TTAB 1988) ("We agree with applicant that the sale of pencils is not the central characteristic of applicant's services. Nevertheless, pencils are significant stationery/office supply items that are typically sold in a store of applicant's type, that is, a stationery and office supply store. While applicant's stores may carry a variety of products, pencils are one of those products, and, thus, the term 'pencils' is merely descriptive as applied to retail stationery and office supply services").

We add that the "fact that applicant may be the first and possibly the only one to utilize this notation in connection with its services cannot alone alter the basic descriptive significance of the term and bestow trademark rights therein." *In re Gould*, 173 USPQ 243, 245 (TTAB 1972). See also *Styleclick.com*, 57 USPQ2d at 1448 (TTAB 2000) ("That applicant may be the first or only entity using E FASHION is not dispositive").

In this case, when we consider the mark in its entirety, we are convinced that when prospective purchasers encounter the mark EVITAMINS for the online sale of vitamins, they will immediately understand that it merely

describes that applicant's services involve selling vitamins on the internet. *Styleclick.com.*, 57 USPQ2d at 1448 ("In sum, 'e-,' when used as a prefix in the manner of applicant's mark, has the generally recognized meaning of 'electronic' in terms of computers and the Internet. When this non-source-identifying prefix is coupled with the descriptive word 'fashion,' the mark E FASHION, as a whole, is merely descriptive for applicant's goods and/or services"). See also *In re SPX Corp.*, 63 USPQ2d 1592, 1596 (TTAB 2002) ("Nor does the addition of the prefix 'E-' change the merely descriptive significance of the mark as a whole. The dictionary definitions submitted by the Examining Attorney show that this prefix indicates the electronic or internet nature of an item or service"). Therefore, we find that applicant's mark EVITAMINS is merely descriptive when used in association with services that include selling vitamins online.

Genericness

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence." *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). "The critical issue in genericness cases is whether members of the relevant public primarily

use or understand the term sought to be protected to refer to the genus of goods or services in question." *H. Marvin Ginn*, 228 USPQ at 530. The Federal Circuit went on to explain that:

Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?

Id. See also *In re 1800Mattress.com IP, LLC.*, No. 2009-1188, slip op. at 5 (Fed. Cir. Nov. 6, 2009).

Regarding the first factor, we agree with applicant that "the genus of the goods and/or services at issue is undisputed to be the sale of vitamins and vitamin-related products." Applicant's Brief at 10.

"Next, we must determine the relevant public for applicant's goods." *In re Active Ankle Systems Inc.*, 83 USPQ2d 1532, 1536 (TTAB 2007). Here, the evidence shows that the relevant purchasers of online retail vitamin store services would be the general public. The question now is whether members of the relevant public would understand the term EVITAMINS to refer to that genus. *Marvin Ginn*, 228 USPQ at 530. "Evidence of the public's understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in

dictionaries, trade journals, newspapers, and other publications." *Merrill Lynch*, 4 USPQ2d at 1143. See also *In re Reed Elsevier Properties Inc.*, 482 F.2d 1376, 82 USPQ2d 1378, 1381 (Fed. Cir. 2007) (LAWYERS.COM held generic):

Moreover, in determining what the relevant public would understand LAWYERS.COM to mean, the board considered eight websites containing "lawyer.com" or "lawyers.com" in the domain name, e.g., www.massachusetts-lawyers.com, www.truckerlawyers.com, and www.medialawyer.com. It discussed the services provided by these websites in order to illuminate what services the relevant public would understand a website operating under Reed's mark to provide. These websites are competent sources under *In re Merrill Lynch*, 828 F.2d at 1570, and they provide substantial evidence to support the board's finding.

The examining attorney argues that the "Board has repeatedly held that when the 'e' prefix, with or without the hyphen, is coupled with a generic word or term for electronic goods and/or services, then the entire mark is generic." Brief at 7. The examining attorney relies on *re Int'l Business Machines Corp.*, 81 USPQ2d 1677 (TTAB 2006) (ESERVER generic for computer hardware and operating software that allow network connectivity) and *Continental Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385 (TTAB 1999) (ETICKET generic for computerized reservation and ticketing of transportation services). However, in those two cases, there was significant use of the terms

ESERVER or electronic server and ETICKET or electronic ticket by others. *Int'l Business Machines*, 81 USPQ2d at 1683 ("The evidence discussed above includes strong evidence from a variety of sources that 'eserver' or 'e-server' is a server with Internet applications"); *Continental*, 53 USPQ2d at 1393 ("These articles evidence widespread use and understanding of 'e-ticket' and its variations as generic names for a class of airline ticketing and reservation services").

We point out that a term may be generic even if applicant is the only entity using the term. *Clairol, Inc. v. Roux Distributing Co.*, 280 F.2d 863, 126 USPQ 397, 398 (CCPA 1960) ("The exhibits and testimony convince us that the only significance of 'hair color bath' to the consuming public is that these words are the generic name for the product and that as such they do not indicate the source or origin of the goods... [e]ven though 'color bath' may have been a novel way of describing a liquid for coloring hair"); and *In re Central Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) ("We agree with the Examining Attorney that if a purchaser were seeking to buy sprinklers for an attic, it would be reasonable to refer to such products as 'attic' sprinklers. The fact that applicant may be the first or the only one using ATTIC in connection with

sprinklers is not dispositive"). Furthermore, we can consider the individual terms in the mark to determine if the entire mark is generic. See *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1535 (Fed. Cir. 2009) ("We agree with the TTAB that for the mark here at issue [HOTELS.COM], the generic term 'hotels' did not lose its generic character by placement in the domain name HOTELS.COM").

However, we have relatively little evidence in this case to show that the term EVITAMINS is generic. We merely have the fact that applicant sells vitamins online and that "e-" is a term that is defined as referring to the electronic equivalent of some thing or service. We have no evidence that the term or even an equivalent term is used to refer to applicant's services or similar services. In order to find a term to be a generic term, we need clear evidence. Under this heightened standard, we hesitate to find that EVITAMINS is a generic term for online retail stores services selling vitamins. Therefore, we reverse the examining attorney's refusal to register the mark on the ground that the mark is generic. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1423 (Fed. Cir. 2005) ("That evidence shows that "steel building" is generic, but does not address directly the composite term STEELBUILDING").

Acquired Distinctiveness

The last issue is applicant's claim that its mark, which we have held not to be generic, has acquired distinctiveness. On this issue, applicant has the burden of proving that its mark has acquired distinctiveness. *In re Hollywood Brands, Inc.*, 214 F.2d 139, 102 USPQ 294, 295 (CCPA 1954) ("[T]here is no doubt that Congress intended that the burden of proof [under Section 2(f)] should rest upon the applicant"). "[L]ogically that standard becomes more difficult as the mark's descriptiveness increases." *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988). In this case, applicant's mark is EVITAMINS for services that include the online retail store services featuring vitamins. Inasmuch as the definition of the term "e-" includes providing the electronic alternative of something and that "e-" is "synonymous with the Internet," we conclude that applicant's mark is highly descriptive for its services of selling vitamins online or on the internet. As such, applicant has a higher burden to show that its mark has acquired distinctiveness.

Applicant has submitted evidence to show that its mark has acquired distinctiveness or that it is not generic.³

This evidence includes: It "has used the EVITAMINS mark in connection with its business for over 5 years." Wicks dec.

¶ 4. It has the following advertising expenditures (*Id.*

¶ 5):

2005 - \$55,000
2006 - \$136,000
2007 - \$165,000
2008 - \$70,000

Additionally, applicant records 4,000,000 to 6,000,000 visitors to its website each month and that it has advertised in such magazines as *Muscle & Fitness Magazine*, *Michigan Muscle*, *Crain's Detroit Business*,⁴ and *First Magazine* and also on various search engines (Yahoo! Marketing, PriceGrabber.com, and Google).⁵ *Id.* ¶¶ 7-9.

We point out that applicant's advertising figures are relatively modest. Furthermore, there is no context for the sales or advertising figures. Even sales figures without a context are not very persuasive. *Target Brands*

³ See *Int'l Business Machines*, 81 USPQ2d at 1684 n.11 (TTAB 2006) ("However, because in determining whether a term is generic we must look to all the evidence of record, including evidence of acquired distinctiveness, we have considered the evidence for this purpose").

⁴ This article indicates that applicant had \$3.8 million in sales.

⁵ The fact that applicant advertises in its own "eVitamins House Catalog," without additional evidence, is not particularly significant.

Inc. v. Hughes, 85 USPQ2d 1676, 1681 (TTAB 2007) (emphasis added) ("The sales figures for 14 years, *standing alone and without any context in the trade*, are not so impressive as to elevate applicant's highly descriptive designation to the status of a distinctive mark"). See also *In re Noon Hour Food Products Inc.*, 88 USPQ2d 1172, 1181 (TTAB 2008) ("Applicant has provided no information about the volume of its sales under this alleged mark, the amount of money that applicant has expended in promoting its cheese products under the designation sought to be registered, or what market share it has for its version of a Swedish, farm-type, cow's-milk cheese sold in the United States. Finally, applicant has provided no direct evidence that the majority of the relevant consumers of its cheese view the term 'Bond-Ost' as a source-identifier"). Even if these sales and advertising figures were more significant, the board has held that:

Applicant's long use and revenues suggest that applicant has enjoyed a degree of business success. Nonetheless, this evidence demonstrates only the popularity of applicant's services, not that the relevant customers of such services have come to view the designation LENS as applicant's source-identifying service 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).

In re Lens.com Inc., 83 USPQ2d 1444, 1448 (TTAB 2007). See also *In re Howard S. Leight and Associates Inc.*, 39 USPQ2d

1058, 1060 (TTAB 1996) ("The evidence submitted by applicant (sales figures, advertising expenditures and customer letters) demonstrates the popularity of applicant's coral earplugs, not that the relevant consumers have come to view coral as applicant's trademark").

Regarding the number of visitors to its website, we are not persuaded that this evidence is strong support for applicant's argument that its mark has acquired distinctiveness. See *DeGidio v. West Group Corp.*, 355 F.3d 506, 69 USPQ2d 1538, 1543 (6th Cir. 2004) (In discounting affidavits from visitors to a website, the court noted: "Mere use of a website does not equal identification with a particular provider"). See also *555-1212.com Inc. v. Communication House Int'l Inc.*, 157 F.Supp.2d 1084, 59 USPQ2d 1453, 1459 (N.D. Cal. 2001) ("The Media Metrix report only provides that a large number of Internet users visited plaintiff's website. It does not provide any reasonable inference to conclude that these users perceive plaintiff's domain name as a brand name instead of a merely descriptive Internet address"). Similarly here, we have no evidence to conclude how these visitors arrived at applicant's website and how many of them recognize applicant's term as a trademark.

Applicant also argues that "Bizrate.com states on its website that over 10,000 customers have rated the EVITAMINS business since 2000." Brief at 6. Again, we lack a context for applicant's evidence. Also, despite the fact that 10,000 people have reviewed applicant's site, it is not clear that they recognize applicant's EVITAMINS mark as a trademark. The comments at the website are not very helpful in determining whether the people responding to the questions recognized applicant's mark as a service mark. See Response dated January 19, 2009, attachments ("Good experience," "Great," "I ordered the products on Dec. 6 and have not yet received them yet! It took almost two weeks before I received mail that they had been shipped. Most companies ship within 24-48 hours," and "I would like to know why the prices that I purchased online are different from the ones advertised in the [catalog]"). Accord *Steelbuilding.com*, 75 USPQ2d at 1424 ("The Board considered applicant's Internet poll on name recognition... The poll did not attempt to prevent visitors from voting more than once. The poll did not prevent interested parties, such as friends or associates or even employees of the applicant, from voting multiple times to skew the results. In sum, this poll does not even remotely follow the precepts of standard trademark name-recognition polls"). Therefore, we

do not find that this evidence is very persuasive evidence that applicant's mark has acquired distinctiveness.

In addition, applicant argues that its coupons are available along with other retailers such as Macy's and Target at couponcabin.com. Applicant maintains that to "have the name EVITAMINS shown along with these other well-known retailers and household names provides further support for Applicant's contention that the EVITAMINS mark identifies and distinguishes EVITAMINS as a source of goods and has acquired distinctiveness." Reply Brief at 6. However, the simple fact that applicant's coupons are available at the same website where the coupons of well-known retailers are also available provides little support for applicant's argument anymore than the fact that a person's book is available in the same library or bookstore as the works of Shakespeare demonstrates that the person is recognized as a well-known author.

Applicant also argues that there "has been no evidence presented by the Examiner to show that anyone uses the mark *EVITAMINS* to refer to anything other than Applicant's business." Reply Brief at 3. See also Wickes declaration, ¶ 11 ("I am not aware of any other person, company, entity or publication that has used the term EVITAMINS generically in connection with online retail stores that sell vitamins

or health-related products prior to the April 9, 2008 filing date of Applicant's application"). It has attached evidence to show that a "check of the following competitors' website, searching on the keyword 'EVITAMINS' shows conclusively that they do not refer to their products or services generically as 'evitamins.'" Response dated April 9, 2009 at 3 and Exhibits 5-11. However, the fact that applicant may be the only entity using the term does not mean that the applied-for term has acquired distinctiveness. *Accord In re ic! berlin brillen GmbH*, 85 USPQ2d 2021, 2024 (TTAB 2008) (A period of five years substantially exclusive and continuous use held to be "insufficient to establish acquired distinctiveness"); *In re Cabot Corp.*, 15 USPQ2d 1224, 1229 (TTAB 1990) ("The fact that applicant is the first and only one in its specific field to use this type of packaging is not persuasive").

Ultimately, to "establish secondary meaning or 'acquired distinctiveness,' an applicant must show that 'in the minds of the public, the primary significance of a product feature or term is to identify the source of the product [or service] rather than the product [or service] itself.'" *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001), quoting, *Inwood Labs., Inc. v. Ives Labs.*, 456 U.S. 844, 851 n.11,

214 USPQ 1, 4 n.11 (1982). See also *Steelbuilding.com*, 75 USPQ2d at 1423. We add that we have considered all the evidence of record on the issue of acquired distinctiveness in its entirety and not just as separate pieces of evidence. However, considering the descriptiveness of the mark and the evidence of record, we find that applicant has not shown that the primary significance of applicant's mark is to identify the source of applicant's services. Therefore, we conclude that applicant has not shown that its mark has acquired distinctiveness.

Decision: The refusal to register applicant's term EVITAMINS on the ground that it is a generic term for the identified services is reversed. The refusal to register on the ground that applicant's mark is merely descriptive and also that applicant's showing of acquired distinctiveness is insufficient is affirmed.