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

Proceeding	77443720
Applicant	Twin Associates, LC
Applied for Mark	EVITAMINS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APPLICANT:	Twin Associates, LC)	EX PARTE APPEAL
)	
MARK:	EVITAMINS)	APPELLANT'S RESPONSE
)	<u>TO EXAMINER'S BRIEF</u>
SERIAL NO.:	77/443720)	
)	
FILING DATE:	April 9, 2008)	

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I. INTRODUCTION

Based on the arguments set forth below and in the Appellant's Appeal Brief, which are incorporated herein by reference, Applicant respectfully disagrees with the Trademark Examining Attorney and maintains its contention that the mark is not generic, has attained acquired distinctiveness through Applicant's exclusive and continuous use in interstate commerce for over 6 years, and that the Appellant has presented sufficient evidence to support its claim of acquired distinctiveness. The Examiner has failed to rebut the prima facie evidence presented by Applicant, failed to rebut the proofs presented by the Applicant, and failed to present its own evidence to refute Applicant's claims of acquired distinctiveness. Thus, the mark is eligible for registration on the Principal Register under Section 2(f) of the Trademark Act. The Examining Attorney's determinations should be reversed and the application remanded for publication.

The Description of the Record, Statement of the Issues, and Recitation of Facts set forth in the Appellant's Brief are reaffirmed and incorporated herein by reference.

II. ARGUMENT

A. EVITAMINS IS NEITHER MERELY DESCRIPTIVE NOR GENERIC

It is respectfully suggested that the record established by the Examiner in this case does not sustain the high burden of proof required to show that a mark is generic. 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. The Examining Attorney has not presented clear evidence that **EVITAMINS** is generic for electronic or online sales of vitamin products. The term used by Applicant for its mark is not generic, and thus registrable under Section 2(f) of the Trademark Act based upon the prima facie evidence of Applicant and the consistent and proper use of the mark by the Applicant.

B. EVITAMINS HAS ACQUIRED DISTINCTIVENESS

Applicant submitted evidence that its **EVITAMINS** mark has acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). To establish acquired distinctiveness as set forth under

Section 2(f), Applicant submitted a verified statement that the mark had become distinctive of the services by reason of substantially exclusive and continuous use in commerce for at least five years prior to a claim of distinctiveness and submitted actual evidence of acquired distinctiveness.

In support of its contention that the EVITAMINS mark has acquired distinctiveness, Applicant submitted the Declaration of Thomas Wick who attested that Applicant has used the EVITAMINS mark continuously and exclusively for at least five years prior to the claim of distinctiveness, which itself is prima facie evidence of acquired distinctiveness. *See* 15 U.S.C. § 1052(f); *see also In re Owens-Corning Fiberglass Corp.*, 774 F.2d 11, 16 (Fed. Cir. 1985).

The Examiner makes unsupported statements and simply recites caselaw holdings “that the applicant must establish that the purchasing public has come to view the proposed mark as an indicator of origin.” [pg. 14 of Examiner’s Brief]. The Applicant has clearly met its burden of proof and shown that the purchasing public has come to view EVITAMINS as an indicator of origin so that it has acquired distinctiveness. However, the Examiner has not produced one shred of evidence to rebut this proof. The Examiner has made self-serving statements that are not supported by either facts or evidence and, as such, are insufficient to rebut either the proof or the presumption. The Examiner could not, and did not, rebut Applicant’s proof that EVITAMINS is a source of goods and has acquired distinctiveness for its mark.

Applicant submitted evidence that is prima facie to establish that its mark has become distinctive of its business. The evidence of acquired distinctiveness included the Declaration of its president, Thomas Wick, who attested to first use of the mark in connection with the business since about 2003 and that EVITAMINS spends tens, and sometimes hundreds, of thousands of dollars in advertising each year (see EXHIBIT 1 in Applicant’s response to the first Office Action). The Examiner’s response to this evidence is that the “proffered claims of significant advertising expenditures merely indicate that it has enjoyed commercial success.” [pg. 15 of Examiner’s Brief]. Is that supposed to be the Examiner’s rebuttal of the evidence produced by the Applicant? The Examiner did not even consider the entire body of evidence produced by the Applicant taken as a whole. If he had done so, he would have clearly seen that

EVITAMINS has established itself as a **source** of goods and has acquired distinctiveness. The world of websites and internet-based companies has changed the way companies conduct business and advertise. In fact, commercially successful internet-based companies may not have to advertise at all. In fact, commercially successful internet-based companies may have other businesses **paying them** to advertise on their website. To infer that the expenditure of advertising dollars may be insufficient is an archaic notion in today's business and internet-based world. The Examiner could not, and did not, rebut Applicant's proof that EVITAMINS is a **source** of goods and has acquired distinctiveness for its mark.

Additional evidence of acquired distinctiveness produced by Applicant included news stories and other studies that specifically refer to EVITAMINS by name. (see EXHIBITS 2-8 in Applicant's response to the first Office Action). The Examiner merely states that "the proposed mark, as shown on the news stories and website captions simply reinforces the generic nature of the mark." [pg. 15 of Examiner's Brief]. Where is the Examiner's support for that self-serving statement? How can the proposed mark be deemed "generic" when the context of the news stories is specifically referring to EVITAMINS **specifically and by name** as a **source** of goods? The news stories are **NOT** referring to any generic term nor do they use the term EVITAMINS in any generic fashion. This evidence supports that the mark sought to be registered identifies and distinguishes Applicant as a **source** of goods and has acquired distinctiveness. The Examiner could not, and did not, rebut Applicant's contention that EVITAMINS is a **source** of goods and has acquired distinctiveness for its mark.

Additional evidence of acquired distinctiveness produced by Applicant included a printout of the *Google.com* screen showing some 466,000 hits/links for "evitamins," virtually all of which refer to Applicant's EVITAMINS on-line retail vitamin store (see EXHIBIT 9 in Applicant's response to the first Office Action). Many of these links offer EVITAMINS coupons that are redeemable at the EVITAMINS website on the purchase of a product. The Applicant respectfully requests that the Board take judicial notice of the fact that such coupons are indicative of a **source** of goods. In that regard, EVITAMINS has come to be recognized as a **source** of goods and has acquired distinctiveness. The Examiner could not,

and did not, rebut Applicant's contention that EVITAMINS is a source of goods and has acquired distinctiveness for its mark.

Additional evidence of acquired distinctiveness produced by Applicant included customer satisfaction surveys from on-line sources demonstrating that the relevant consumers understand and recognize EVITAMINS to be Applicant's on-line retail vitamin store (see EXHIBITS 10-12 in Applicant's response to the first Office Action). Bizrate.com states on its website that over 10,000 customers have rated the EVITAMINS business since 2001 (see EXHIBIT 11 in Applicant's response to the first Office Action). The Examiner merely states that "customer satisfaction surveys do not support a claim of acquired distinctiveness." [pg. 15 of Examiner's Brief]. Where is the Examiner's support for that self-serving statement? Is that supposed to be the Examiner's rebuttal of the evidence produced by the Applicant? These Customer Satisfaction Surveys demonstrate that the relevant public does recognize the mark EVITAMINS and identifies, distinguishes, and associates EVITAMINS as a source of goods and has acquired distinctiveness. The Examiner could not, and did not, rebut Applicant's contention that EVITAMINS is a source of goods and has acquired distinctiveness for its mark.

Additional evidence of acquired distinctiveness produced by Applicant included a printout of the *couponcabin.com* screen showing **EVITAMINS** listed with other well-known retailers such as **Macy's**, **Target**, **Kohl's**, **Weight Watchers**, **NBC**, and **GNC** (see EXHIBIT 13 in Applicant's response to the first Office Action). The Examiner does not even mention or refer to this evidence in his Brief. 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. The Examiner could not, and did not, rebut Applicant's contention that Applicant is a source of goods and has acquired distinctiveness for its mark.

The health-conscious consumers that buy and consume vitamins (ie, the relevant consuming public) and businesses incorporating the term "VITAMINS" in their name, have caused the relevant

public to recognize that "EVITAMINS" and numerous other well-known businesses, such as "cheapvitamins.com," "Vitamin Factory," "myvitaminbiz" "Vitamin Shoppe since 1977" and "Vitamin Depot" are capable of operating as source indicators. Additionally, the Examiner did not produce any evidence that competitors use the term "EVITAMINS" to describe their retail vitamin businesses, or on-line retail vitamin businesses in general. The Examiner could not, and did not, rebut Applicant's contention that the relevant public has come to identify the mark exclusively with Applicant's business.

Based on all of the evidence produced by Applicant in this case, the Applicant submitted substantial evidence sufficient to demonstrate secondary meaning pursuant to Section 2(f). The Examiner simply concluded, against the weight of this evidence and the prima facie showing made by Applicant, that the mark does not have acquired distinctiveness. The Examiner cannot rebut the presumption of acquired distinctiveness, based on Applicant's proofs and evidence, by making unsupported statements that the evidence is insufficient. The Examiner's own statements indicate that the amount and character of the evidence depends on the facts of each case. The Examiner has presented no evidence or basis as to why Applicant's proofs or evidence of acquired distinctiveness are not sufficient. The Examiner did not put forth one piece of evidence that any relevant consumer seeing the EVITAMINS mark would be likely to believe that it indicates a source in some third party other than the Applicant.

III. SUMMARY

Based on the arguments set forth in Appellant's Appeal Brief and above, it is respectfully suggested that the record established by the Examiner in this case does not sustain the high burden of proof required to refute Applicant's proof and evidence that the mark, EVITAMINS, has acquired distinctiveness. 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. The Examining Attorney has not presented any evidence that **EVITAMINS** is generic for electronic or online sales of vitamin products. The term EVITAMINS used by Applicant for its mark is not generic, and thus registrable under Section 2(f) of the Trademark Act

based upon the proofs and prima facie evidence of Applicant and the consistent and proper use of the mark by the Applicant. The mark EVITAMINS should be allowed to proceed to registration on the Principal Register pursuant to Section 2(f) of the Trademark Act.

WHEREFORE, for the reasons stated above, Applicant prays that this Board reverse the refusal to register this mark, and pass the application on to publication.

Respectfully submitted,



Dated: September 14, 2009

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