

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
October 25, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Milo Shammas*

Serial No. 77758863

Sandra Lee Lipkin of Law Offices of Sandy Lipkin for Milo Shammas.

Sara Benjamin, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

Before Zervas, Bergsman and Lykos, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Milo Shammas (“applicant”) filed a use based application to register on the Principal Register the mark PROBIOTIC, in standard character form, for the following goods in Class 1 (hereinafter “fertilizer”):

Ammonium chloride fertilizer; Ammonium nitrate fertilizer; Ammonium sulphate fertilizer; Blood powder; Bone meal; Brewers' grain; Calcined potassium fertilizer; Calcium silicate fertilizer; Calcium superphosphate fertilizer; Chemical fertilizers; Chemically converted compound fertilizers; Compost; Double or triple superphosphate fertilizer; Fertilizers; Fertilizers and manures; Fertilizers for agricultural use; Fertilizers for domestic use; Fertilizing preparations; Leaf mold; Manganese fertilizer; Marine fertilizer; Mixed fertilizers;

Natural fertilizers; Non-chemical bio-fertilizers; Omplex fertilizers; Peat; Potassium chloride fertilizer; Potassium sulphate fertilizer; Rice bran; Sodium nitrate fertilizer; Thomas phosphatic fertilizer; Urea fertilizer.

During the prosecution of the application, applicant amended the application to seek registration under Section 2(f) claiming that the term PROBIOTIC has acquired distinctiveness.

The Trademark Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(1), on the ground that PROBIOTIC for fertilizer is generic. In the event that applicant's mark is not generic, the Trademark Examining Attorney refused registration on the grounds that applicant's mark is merely descriptive and because the term PROBIOTIC as used by applicant has not acquired distinctiveness.

#### Preliminary Issues

##### A. Evidence attached to applicant's brief.

Applicant attached eight (8) exhibits to its brief. The Trademark Examining Attorney lodged an objection to the evidence submitted with applicant's brief on the ground that the evidence attached to applicant's brief was not timely filed.

Trademark Rule 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal to remand the application for further examination.

Because applicant did not request the Board to suspend the appeal to remand the application for further examination, the objection is sustained to the extent that the Board will not consider the evidence attached to applicant's brief if it was not previously made of record. However, we will consider the dictionary definition attached as Exhibit H because we will take judicial notice of dictionary definitions.

B. Applicant's California Trademark Registration.

Applicant submitted a copy of his California registration (Registration No. 107837) for the mark PROBIOTIC for "Fertilizers, soil amendments, biological inoculants."<sup>1</sup> This registration has little probative value for us. While applicant's mark may have been registered under California law, it is the federal statute and the cases interpreting it by which we must evaluate the registrability of applicant's mark. *In re Vico Products Manufacturing Co., Inc.*, 229 USPQ 364, 370 (TTAB 1985); *In re Craigmyle*, 224 USPQ 791, 794 (TTAB 1984) (California trademark registration is not controlling on the question of federal registrability).

Whether the term PROBIOTIC is generic?

When a proposed mark is refused registration as generic, the examining attorney has the burden of proving genericness by "clear evidence" thereof. *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).

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<sup>1</sup> Applicant's August 30, 2010 response.

The critical issue is to determine whether the record shows that members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods in question. *H. Marvin Ginn Corp. v. International Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *In re Women's Publishing Co. Inc.*, 23 USPQ2d 1876, 1877 (TTAB 1992). Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *Ginn*, 228 USPQ at 530. 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. *See Merrill Lynch*, 4 USPQ2d at 1143; *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

We begin by finding that the genus of the goods at issue in this case is adequately defined by the description of goods – fertilizer. Applicant agrees as evidenced by his argument that “the relevant public does NOT understand the designation of the word ‘probiotic’ to refer to the class or genus of goods at issue, which are soils and fertilizers.”<sup>2</sup> (Emphasis in the original).

We now to turn to the second inquiry, the public’s understanding of the term PROBIOTIC when used in connection with fertilizer.

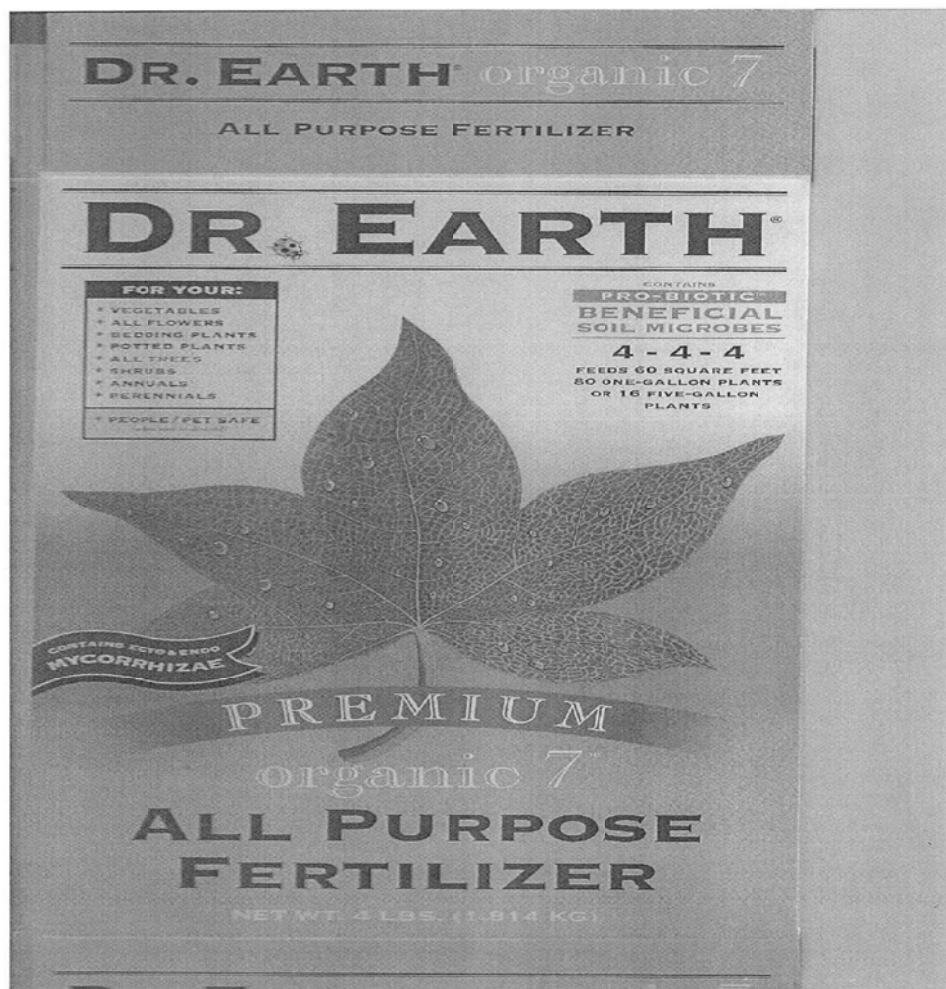
As noted above, the evidentiary burden of establishing that a term is generic rests with the USPTO and the showing must be based on clear evidence. *Merrill*

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<sup>2</sup> Applicant’s Brief, p. 5.

*Lynch*, 4 USPQ2d at 1143. Based on the record described below, we find that there is clear evidence to support a finding that the relevant public, when it considers PROBIOTIC in conjunction with fertilizer, readily understands the term to identify a type of fertilizer. We have considered the following evidence:

1. Applicant's counsel stated that "While it is in fact true that some probiotic elements are present in the fertilizer, the word probiotic is not specific to any ingredient."<sup>3</sup> See a sample of applicant's use of the mark below.<sup>4</sup>



<sup>3</sup> August 30, 2010

<sup>4</sup> Applicant's April 11, 2011 response.

2. The dictionary definition of “Probiotic” is a “substance containing beneficial microorganisms: a substance containing live microorganisms that claims to be beneficial to humans and animals, e.g. by restoring the balance of microflora in the digestive tract.”<sup>5</sup>

3. The *Wikipedia* entry for probiotic (April 5, 2011) provides the following information:<sup>6</sup>

Probiotics are live microorganisms thought to be beneficial to the host organism. ...

\* \* \*

The “probiotics” was first introduced in 1953 by Werner Kollath. ... Contrasting antibiotics, probiotics were defined as microbially derived factors that stimulate the growth of other microorganisms. In 1989, Roy Fuller suggested a definition of probiotics which has been widely used: “*A live microbial feed supplement which beneficially affects the host animal by improving its intestinal microbial balance.*” (Emphasis in the original).

4. The *Probiotic.org* website webpage entitled “Soil Probiotic.”<sup>7</sup>

Soil probiotics are commonly known as soil-based organisms (SBO’s). SBOs are referred to a [sic] probiotics because they are beneficial bacteria that live in the soil.

5. An article posted on the *SeaChar.org* website (July 18, 2010) entitled “Solutions for Deforestation to Reduce Global Warming.”<sup>8</sup>

Probiotics for soil is a method of using friendly bacteria on the soil to bring back the symbiotic relationships that create “breathing” for the entire agroforest floor. The definition given by the FAQ/WHO, probiotics are: ‘[sic]

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<sup>5</sup> Ecarta.msn.com attached to the September 14, 2009 Office action.

<sup>6</sup> April 11, 2011 response. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1636 n.4, 6, 7 (TTAB 2009) (considering Wikipedia evidence attached to Office action and applicant’s response).

<sup>7</sup> September 16, 2011 Office action

<sup>8</sup> September 16, 2011 Office action.

Live microorganisms which when administered in adequate amounts confer a health benefit on the host' [sic].

\* \* \*

Reforestation reconditions the soil of formerly barren land. Agroforestry is the solution that offers infrastructure through agroforestry communities. It introduces biodiversity, something that the original forests used to thrive upon. It is where probiotics works with biochar to sequester carbon, hold good bacteria and create a colony of microorganisms that sustainably nurture the soil and the flora.

6. *LactoPAFI.com* website posting an article written by Philippine Vice-Governor Greg Sanchez (April 13, 2009) entitled "GregoGro Probiotic Fertilizer: Restoring the fertility of the soil."<sup>9</sup>

Founder of the Lactobacillus Pafi Techo Resources Corporation, the first probiotic manufacturer in the Philippines, has not been shrinking to find [sic] solution that somehow could ease the burden of the Mother Earth.

A deepen [sic] thorough study has been spawned in the LBPTRC's modern laboratory to accurately produce probiotic fertilizer to replace the disastrous chemicals and inorganic fertilizers to the land and to rejuvenate microorganism [sic] by way of applying natural, organic fertilizers to recover the ailing agricultural land and bring back its normal bounty of fertility, harmless to the environment and produce a bountiful production to feed the increasing population in the country and the world.

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<sup>9</sup> September 14, 2009 Office action. This is a website for a company in the Philippines. Under appropriate circumstances, the Board will consider web pages posted abroad as evidence of how a term will be perceived. See *In re Remacle*, 66 USPQ2d 1222 (TTAB 2002) (Board found that professionals in certain fields, such as medicine, engineering, computers and telecommunications would be likely to monitor developments in their fields without regard to national boundaries, and that the internet facilitates such distribution of knowledge, so evidence from an English language web site in Great Britain held admissible). Cf. *In re Cell Therapeutics, Inc.*, 67 USPQ2d 1795 (TTAB 2003). We find that farmers and other scientists interested in developments in fertilizers may turn to foreign websites when researching developments and products.

\* \* \*

GregGo is scientifically manufactured by LBPTRC, a probiotic natural organic fertilizer, that contains a complete and lasting substance for the land, to enhance the fertility of the soil and to protect the ecological system on earth.

7. An article posted on the *Energy Farms Network* website (energyfarms.net) entitled “All Natural, Probiotic Fertilizer.” The article discusses a liquid used to fertilize plants at a South American farm: “The preparation uses mixtures of nitrogen rich plants (legumes) and animal wastes to generate a probiotic organic fertilizer.”<sup>10</sup>

8. An article posted on the *PRWeb.com* website (October 29, 2010) entitled “Go Green Without Going Broke with New Technology – Natural, Probiotic, & Enzymatic FertilizeIt Products from the FertilizerStore.com.”<sup>11</sup>

New technology in the organic fertilizer industry is based on probiotics and natural enzymes instead of chemicals.  
...

\* \* \*

These green fertilizers give the soil a probiotic jump start to do what they would do naturally. ...

\* \* \*

This technology and use of probiotic, natural, and enzymatic products is particularly applicable to the agriculture industry.

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<sup>10</sup> September 19, 2009 Office action.

<sup>11</sup> February 24, 2011 Office action.

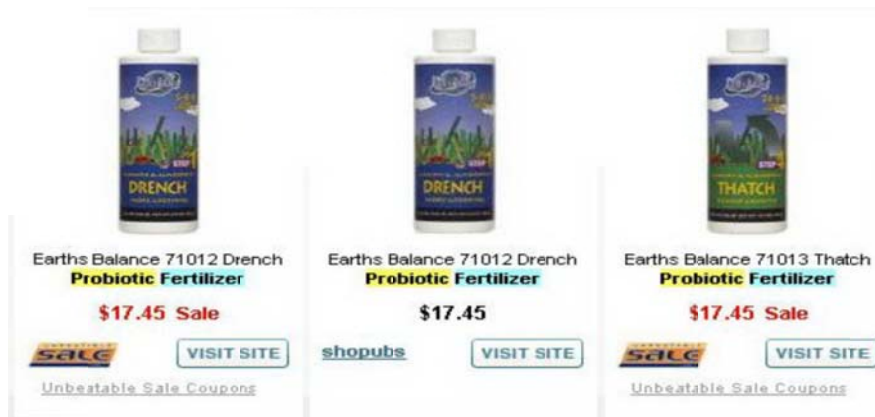


9. *EarthsBalance.com* website describing its “Probiotic Fertilizer Supplements.”<sup>12</sup> The “Probiotic Fertilizer Supplements” are listed as a subcategory of “Planet Products” along with “Natural Fertilizers.”

Many chemicals and fertilizers commonly applied to manage turf conditions disrupt and destroy the natural microbial population of the soil. Organic and non-organic fertilizer alone cannot provide soil microbial balance. Similarly, no biological solution by itself can maintain nutritional balance.

*Soil microbes* break down fertilizers in a highly systematic manner. Nor one bacterium or fungus accomplishes this task alone. This being said, it is apparent that a good fertilization program should include a sound microbial system, complementary to the nutritional need of the lawn. Use as part of our *Probiotic Lawn Program* to stimulate the vital reactions in the soil and plant. (Emphasis in the original).

The Earths Balance products are sold on the *TheFind.com* website.<sup>13</sup>



10. The *GardenCenterMagazine.com* website advertising the sale of SURYA natural probiotic fertilizer products.<sup>14</sup>

<sup>12</sup> September 14, 2009 Office action. See also *TheFind.com* website advertising the sale of Earths Balance DRENCH Probiotic Fertilizer.

<sup>13</sup> May 24, 2011 Office action.

<sup>14</sup> May 24, 2011 Office action.

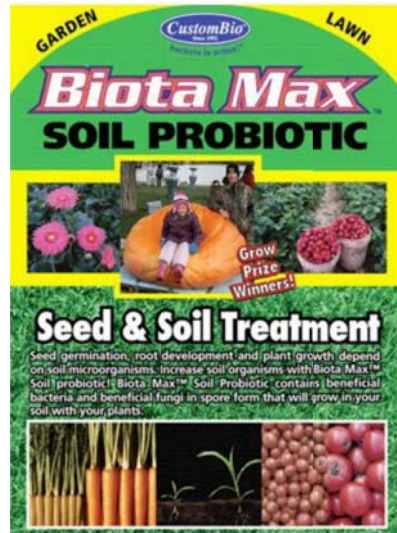
Surya's organic, all-natural probiotics offer a greener, healthier way to grow beautiful, more bountiful plants.

11. Marshall Pet Products website (marshallpet.com) advertising the sale of GWhiz lawn treatment for treating lawn burns caused by dog urine.<sup>15</sup>

#### WE HAVE THE SOLUTIONS

If you are using a high salt fertilizer N (nitrogen) P (phosphorous), K (potassium), from chemical sources and herbicides you would improve the soil conditions by using organic and probiotic fertilizer programs designed to reduce the build up [sic] of salts in the soil. We have a probiotic lawn program available that would help to detoxify your soil [www.earthbalance.com](http://www.earthbalance.com) and we also have a product called Dogonit that will help the yellow spots heal more rapidly.

12. The *BiotaMax.com* website advertising the sale of Biota Max Soil Probiotic.<sup>16</sup> “Biota Max is an all-natural soil probiotic.”



13. The *AnConBio-Services.com* website advertising its “unique patented TECHNOLOGY called ‘PROBIOTICS’ a method of growing that minimizes the use

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<sup>15</sup> May 24, 2011 Office action.

<sup>16</sup> May 24, 2011 Office action.

of pesticides, herbicides and chemicals by bringing to the soil, ‘the THIRD ELEMENT’ in agronomy, macrobiotics.” AnCon Bio-Services sells “a patented fertilizer called PROBIOTIC 1F/1G.”<sup>17</sup>

14. The *MaterialScienceOrganics.com* website webpage for “Soil Probiotics.”<sup>18</sup>

#### Soil Probiotics: Organic Growing

By breaking down dead organic matter, microbes process nutrients for plant use. Without microbes you have dead soil or at best soil that is producing less than its full potential. Our soil probiotics are scientific blends of microbes and minerals formulated to restore soil fertility and process a more desirable product in more abundance.

\* \* \*

Our soil probiotics are of the highest quality for organic growing. ...

15. The *SCIProbiotics.com* website advertising the sale of SCD Probiotics Soil Enrichment.<sup>19</sup>

Probiotics provide sustainable options for improved agricultural/environmental performance.

All living systems – including soil, plants, and trees – have a microbial ecology that can be managed and improved by the constant delivery of SCD Probiotics. Regenerating good bacteria produces a microbial ecology where beneficial bacteria dominate harmful bacteria, creating a healthier, more vibrant environment.

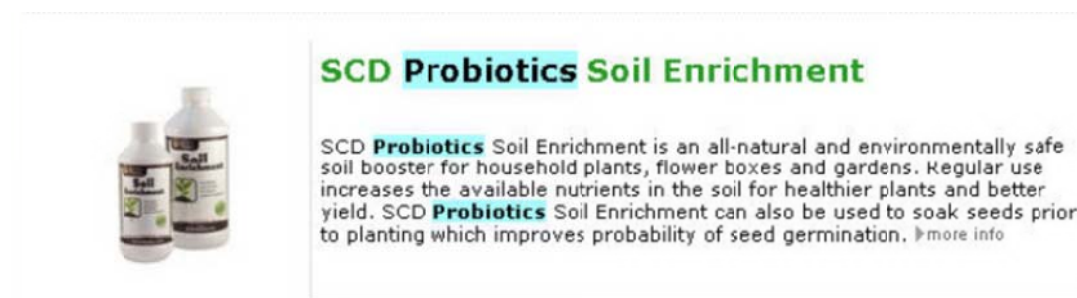
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<sup>17</sup> May 24, 2011 Office action.

<sup>18</sup> September 16, 2011 Office action.

<sup>19</sup> September 16, 2011 Office action.



16. The *InnovativeProbiotics.com* website.<sup>20</sup>

Probiotics –

Providing sustainable solutions for improved business performance

The benefits of probiotics that consumers discovery in their personal use can also be found when used in large-scale agricultural, industrial or commercial applications.

Here is a peek at some of the possibilities:

Agricultural Uses:

- Improved crop performance
- Improved nutritional uptake
- Improved seed germination
- Accelerated composting in large-scale applications ...
- Odor control in livestock areas

17. The *SoilSoup.com* website advertising its product for treating stressed tree roots.<sup>21</sup>

Products: Probiotics

SoulSoup Probiotic is a mildly acidic solution that is used to treat stressed tree roots.

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<sup>20</sup> September 16, 2011 Office action.

<sup>21</sup> September 16, 2011 Office action.

18. A copy of U.S. Patent 6252826 for a “Probiotic soil additive composition and method.”<sup>22</sup>

The invention includes probiotic soil additive compositions including pulverized alfalfa, a wetting agent, granular humate ore, and a calcium source for promoting healthy plant growth without pesticides.

The examples of competitors’ use of the term “Probiotics” as the technology behind their products is persuasive evidence that the relevant consumers perceive the term as generic (*e.g.*, Earth Balance Probiotic Fertilizer Supplements, Biota Max Soil Probiotic, and SCD Probiotics Soil Enrichment) and that competitors need to use the term. *Continental Airlines Inc. v. United Airlines Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999). Furthermore, the articles about soil treatment identify probiotics as soil based organisms that are beneficial bacteria that live in the soil, a method of using friendly bacteria on the soil, and organic fertilizer and demonstrate that those writing about fertilizers perceive the term PROBIOTIC as the technology or method of using friendly bacteria on the soil as an ingredient of fertilizer.

Applicant himself uses the term PROBIOTIC as a generic term to identify an ingredient of his fertilizer.



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<sup>22</sup> Derived from *FreePatentsOnline.com* attached to the September 16, 2011 Office action.

The commercial impression conveyed by applicant's package is that the fertilizer brand is DR. EARTH and that Pro-Biotic Beneficial Soil Microbes are its ingredients.

Applicant argues that he conceived of the use of the term PROBIOTICS in connection with fertilizers<sup>23</sup> and that "[a]ny association of the term with fertilizers did not exist prior to applicant's use of it."<sup>24</sup> The fact that an applicant may be the first or only user of a generic designation does not justify registration if the only significance conveyed by the term is that of the category of the goods. *See In re Greenliant Systems Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010); *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018, 1020 (TTAB 1983) (SHOOTING, HUNTING, OUTDOOR TRADE SHOW AND CONFERENCE held apt descriptive name for conducting and arranging trade shows in the hunting, shooting, and outdoor sports products field). *See also In re BetaBatt Inc.*, 89 USPQ2d 1152, 1156 (TTAB 2008) ("the fact that applicant may be the first and only user of a merely descriptive term does not justify registration if the only significance conveyed by the term is merely descriptive."). The evidence noted above indicates that significance of the term PROBIOTICS as a method of using soil based microbes in fertilizers.

Furthermore, the determination of whether a term is capable of functioning as a mark is made at the time of registration. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("the proposer time for measuring inherent distinctiveness is at the time of registration."). *See also*

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<sup>23</sup> Applicant's Brief, p. 1.

<sup>24</sup> Applicant's Brief, p. 4.

*Remington Prods. Inc. v. N. Amer. Philips Corp.*, 892 F.2d 1576, 13 USPQ2d 1444, 1449 (Fed. Cir. 1990) (holding that the phrase “travel care” had “gone into the public domain as a category of goods designation in the marketplace by reason of its extensive use as such” by the time the trademark registration was sought, the point at which the descriptiveness of the mark is properly determined). Thus, applicant’s contention that he first used the term in connection with soil and fertilizers and that prior to that time it had never been used in connection with soil and fertilizer has little value.

Applicant asserts that the term PROBIOTIC is not generic because the dictionary definitions identify it as a supplement for living organisms, not for soil and fertilizer.<sup>25</sup> However, the fact that a term has evolved beyond its dictionary meaning does not make it registrable. It is well settled that the fact that a term is not found in a dictionary is not controlling on the question of registrability if the examining attorney can show, as she did in this case, that the term has a well understood and recognized meaning. *See In re Central Counties Bank*, 209 USPQ 884, 888 (TTAB 1981); *In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977).

Finally, as noted above, applicant’s counsel stated that “While it is in fact true that some probiotic elements are present in the fertilizer, the word probiotic is not specific to any ingredient.”<sup>26</sup> This argument is without merit. *See In re Hubbard Milling Co.*, 6 USPQ 1239 (TTAB 1987). In *Hubbard*, the Board rejected applicant’s argument that MINERAL-LYX for “molasses-based animal feed

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<sup>25</sup> Applicant’s Brief, pp. 5-6.

<sup>26</sup> Applicant’s August 30, 2010 response.

supplement containing minerals” is not generic because minerals do not comprise the primary ingredients of its blocks and found instead that the term was generic because it “aptly describes applicant’s goods even though minerals comprise only a part of the lick.” 6 USPQ2d at 1240. Likewise, in this case, the relevant consumers are going to understand PROBIOTIC as the genus of goods, namely, a fertilizer utilizing probiotic technology.

In view of the foregoing, we find that the term PROBIOTIC a generic name for a fertilizer using friendly bacteria on the soil producing microbial ecology to bring back the symbiotic relationships in the soil.

Whether the term PROBIOTIC has acquired distinctiveness?

For the sake of completeness, we now turn to the issue of whether, assuming applicant’s use of PROBIOTIC is not generic but merely descriptive, applicant's use of the term PROBIOTIC has acquired distinctiveness. In finding that the designation PROBIOTIC incapable of being a source identifier for applicant's goods (*i.e.*, fertilizer), we have considered all of the evidence touching on the public perception of this designation, including the evidence of acquired distinctiveness. As to acquired distinctiveness, applicant has the 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).

The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (C.C.P.A. 1970); *In re Hehr Mfg. Co.*, 279 F.2d 526, 528, 126



USPQ 381, 383 (C.C.P.A. 1960); *In re Gammon Reel, Inc.*, 227 USPQ 729, 730 (TTAB 1985). Typically, more evidence is required where a mark is so highly descriptive, that purchasers seeing the matter in relation to the named goods would be less likely to believe that it indicates source in any one party. *See, e.g., In re Bongrain Int'l Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *In re Seaman & Assocs., Inc.*, 1 USPQ2d 1657, 1659 (TTAB 1986); *In re Packaging Specialists, Inc.*, 221 USPQ 917, 919 (TTAB 1984). Evidence that third parties in applicant's field use the same or substantially the same wording as the mark, or very similar wording as the mark, as in this case, tends to indicate the mark is at least highly descriptive.

Applicant bases his claim that his use of PROBIOTIC in connection with fertilizers has acquired distinctiveness on his use of that term since at least as early as July 12, 2000.<sup>27</sup> We do not find applicant's evidence to be convincing. First, applicant's use since July 2000, while indicative of some degree of commercial staying power, is not conclusive or persuasive considering the nature of the subject matter sought to be registered and the widespread third-party use of that term. *In re Ennco Display Systems Inc.*, 56 USPQ2d 1279, 1286 (TTAB 2000) (applicant's use of the product designs ranging from seven to seventeen years is insufficient to

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<sup>27</sup> Applicant's June 6, 2011 response. The letter by Mike Amaranthus, PhD., President of Mycorrhizal Applications, Inc., "The leader in mycorrhizal soil and plant inoculants," is not probative as to whether PROBIOTIC has acquired distinctiveness. Although Dr. Amaranthus credits applicant for popularizing PROBIOTIC in connection with fertilizers through applicant's activities since the 1990s, Dr. Amaranthus concludes by commending applicant's "innovative vision that has made probiotic a common word now in the lawn & garden industry." (Applicant's April 11, 2011) response. In other words, Dr. Amaranthus stated that PROBIOTIC is the generic name for a type of fertilizer in the lawn and garden industry.

bestow acquired distinctiveness). *See also In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984) (evidence submitted by applicant held insufficient to establish acquired distinctiveness of PACKAGING SPECIALISTS, INC., for contract packaging services, notwithstanding, *inter alia*, continuous and substantially exclusive use for sixteen years, deemed “a substantial period but not necessarily conclusive or persuasive”).

Applicant did not submit any sales figures, either in dollar or units, market share information, or advertising expenditures. We further note that the record is lacking in any media recognition regarding applicant’s product and how the term PROBIOTIC points uniquely and exclusively to applicant.

To put the matter simply, a good deal more evidence than that offered here is necessary to establish that applicant’s mark PROBIOTIC has acquired distinctiveness.

**Decision:** The refusal to register is affirmed.