

<p><b>This Opinion is Not a Precedent of the TTAB</b></p>
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Mailed: October 31, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Sirius Products, Inc.*

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Serial No. 85199591  
Serial No. 85199615

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Cheryl L. Anderson of CR Miles P.C. for Sirius Products, Inc.

Ingrid C. Eulin, Trademark Examining Attorney, Law Office 111,  
Robert Lorenzo, Managing Attorney.

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Before Seeherman, Bergsman and Hightower,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Sirius Products, Inc. (“Applicant”) seeks registration on the Principal Register of  
the mark WATERLESS BATH (in standard characters) for

Pet shampoo and conditioner, in International Class 3;<sup>1</sup> and

Medicated pet shampoo, in International Class 5.<sup>2</sup>

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<sup>1</sup> Application Serial No. 85199591 was filed on December 16, 2010 based upon Applicant’s claim of first use anywhere and in commerce since at least as early as December 31, 1999. In its December 7, 2011 response to an Office action, Applicant amended the filing basis to intent-to-use pursuant to Section 1(b) of the Trademark Act of 1946, 15 U.S.C. § 1052(b). Subsequently, on August 18, 2013, Applicant filed an amendment to allege use, again claiming December 31, 1999 as its first use dates.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act of 1946, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark WATERLESS BATH for pet shampoo and conditioner and medicated pet shampoo is merely descriptive. According to the Trademark Examining Attorney, "consumers perceive the combined wording as identifying pet grooming products that are used [to] cleanse or wash animals without need of water submersion/saturation."<sup>3</sup> Applicant contested the descriptiveness refusal and, in the alternative, claimed that its mark had acquired distinctiveness in accordance with Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). The Trademark Examining Attorney rejected Applicant's claim of acquired distinctiveness, arguing that the evidence of acquired distinctiveness submitted by Applicant is insufficient in view of the highly descriptive or generic nature of Applicant's mark.<sup>4</sup>

When the refusals were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed. We affirm the refusals to register.

Because the marks in the applications are identical, the goods are closely related, and the records are essentially identical, we consolidate the appeals.

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<sup>2</sup> Application Serial No. 85199615 was filed on December 16, 2010, based upon Applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. Applicant subsequently filed an amendment to allege use claiming first use of its mark anywhere and in commerce at least as early as December 31, 1999.

<sup>3</sup> Trademark Examining Attorney Brief, p. 4 (unnumbered).

<sup>4</sup> Trademark Examining Attorney Brief, p. 6 (unnumbered).

References to the record are to application Serial No. 85199591 unless otherwise indicated.

I. Whether WATERLESS BATH is generic?

According to the Trademark Examining Attorney, “[t]he proposed mark ‘WATERLESS BATH’ is highly descriptive and appears to be a generic mark comprised of the combined generic terms ‘waterless’ and ‘bath.’”<sup>5</sup>

The evidence shows that in the context of pet shampoo and conditioner, the “WATERLESS” element immediately tells consumers that the goods do not require water submersion or saturation. The plain meaning of the term conveys that water is not required. ... In addition, the ‘BATH’ element immediately tells consumers that the goods are for washing or cleaning the body. ... The combination retains its descriptive and generic significance as the evidence shows that consumers perceive the combined wording as identifying pet grooming products that are used to cleanse or wash animals without the need of water submersion/saturation. In other words, the goods are used to provide bathing that no longer limits the experience to submersion in liquid in a bath tub. Thus here, the wording retains its highly descriptive and possibly generic meaning.<sup>6</sup>

Applicant, on the other hand, argues that WATERLESS BATH is an incongruous term and, therefore, not descriptive or generic, because “the term ‘bath’ is most commonly understood as the act of soaking, dipping or immersion for the purpose of cleaning” and “waterless” means without water and, therefore, a bath without water is a contradiction.<sup>7</sup>

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<sup>5</sup> Trademark Examining Attorney’s Brief, p. 4 (unnumbered).

<sup>6</sup> Trademark Examining Attorney’s Brief, p. 4 (unnumbered).

<sup>7</sup> Applicant’s December 18, 2013 Brief, pp. 10-11. *See also* Applicant’s Supplemental Brief, p. 11 and Applicant’s Reply Brief, p. 3.

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

The issue before us is to determine whether the record shows that 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). That is, the public’s perception is the primary consideration in determining whether a term is generic. *Loglan Inst. Inc. v. Logical Language Group Inc.*, 902 F.2d 1038, 22 USPQ2d 1531, 1533 (Fed. Cir. 1992). 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 *Loglan Inst. Inc.*, 22 USPQ2d at 1533; *Merrill Lynch*, 4 USPQ2d at 1143; *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985).

A. The genus of the goods at issue.

We begin by finding that the genus of the goods at issue in this case is pet shampoo and conditioner and medicated pet shampoo. *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (“[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration.”). *See also In re Trek 2000 Int’l Ltd.*, 97 USPQ2d 1106, 1112 (TTAB 2010) (“the genus of goods at issue in this case is adequately defined by applicant's identification of goods...”).

B. The relevant public.

The second part of the genericness test is whether the relevant public understands the designation primarily to refer to that class of goods. The relevant public for a determination of whether a term is generic is the purchasing or consuming public for the class of goods. *Magic Wand Inc.*, 19 USPQ2d at 1553 (citing *In re Montrachet S.A.*, 878 F.2d 375, 11 USPQ2d 1393, 1394 (Fed. Cir. 1989)); *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 4 USPQ2d at 1143; *H. Marvin Ginn Corp.*, 228 USPQ at 530; *Dan Robbins & Assocs., Inc. v. Questor Corp.*, 599 F.2d 1009, 202 USPQ 100, 105 (CCPA 1979). We find that the relevant public consists of pet owners who groom their pets or pet groomers who wash pets for others.

C. Public perception.

To determine how the relevant purchasers understand the meaning of the term WATERLESS BATH when used in connection with pet shampoo and conditioner

and medicated pet shampoo, we have considered all the evidence that has been made of record during the prosecution of these applications, including dictionary definitions, Applicant's use of the term WATERLESS BATH, and third-party use of the term WATERLESS BATH.

1. Definitions.

"Waterless" is defined as "lacking or destitute of water: Dry" and "not requiring water."<sup>8</sup>

"Bath" is defined as "a washing or soaking (as in water or steam) of all or part of the body" and "water used for bathing."<sup>9</sup>

2. Applicant's use of the term WATERLESS BATH.

Displayed below are labels Applicant submitted as its specimen of use for Application Serial No. 85199591 for pet shampoo and conditioner.



<sup>8</sup> Merriam-Webster online dictionary (m-w.com) attached to the Applicant's August 25, 2013 response to an Office action. See also Dictionary.com based on the **RANDOM HOUSE DICTIONARY** (2013) attached to Applicant's August 25, 2013 response to an Office action.

<sup>9</sup> Merriam-Webster online dictionary (m-w.com) attached to the Applicant's August 25, 2013 response to an Office action. See also The Free Dictionary (freedictionary.com) based on **THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE** (4th ed. 2009), Dictionary.com based on the **RANDOM HOUSE DICTIONARY** (2013) attached to Applicant's August 25, 2013 response to an Office action.

Applicant also submitted the label on the left as a substitute specimen in Application Serial No. 85199615 for “medicated pet shampoo.”<sup>10</sup> In application Serial No. 85199615, Applicant included the back of the label, which is shown below:



3. Third-party use of the term WATERLESS BATH.

a. September 30, 2013 Office action

1. eHow.com

*“How to Give a Dog a Waterless Bath”* by Lori Lapierre (posted October 15, 2012) is a news article posted on the eHow.com website instructing dog owners on how to give a dog “a waterless bath in between grooming appointments, either by using a

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<sup>10</sup> Applicant’s February 22, 2014 response to Office action in Application Serial No. 85199615.

special product made specifically for that purpose, or items you may already have in your household.”<sup>11</sup>

2. The Daily Puppy (dogcare.dailypuppy.com)

*“How to Give a Dog a Waterless Bath”* by Susan Revermann (undated) is a news article providing instructions for giving a dog a “waterless bath.”<sup>12</sup> The author provides the following tip:

Instead of purchasing a waterless bath product, sprinkle some baking soda on your dog’s coat to help remove excess oil and odor. Rub it into his skin and then brush it out.

3. Pets.thenest.com

*“How to Give a Dog a Waterless Bath”* by Sarah Dray (undated) features a photograph of a dog with the legend “Doggie in need of a bath? Water is not always the answer!” The introductory sentences read as follows:

Some dogs will do whatever it takes to stay away from water, making bath time a challenge. If that’s the case, you can get the fresh smell of a clean dog with a waterless bath – as long as your dog cooperates throughout the process.

4. Amazon.com

Amazon.com advertises the sale of the following products:

- a. Natural Chemistry Waterless Bath;<sup>13</sup>
- b. Fresh Dog Waterless Bath Foam Shampoo for Dogs and

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<sup>11</sup> See also the eHow.com article entitled “Dry Dog Bathing” referencing the Lapierre posting attached to the August 1, 2012 Office action.

<sup>12</sup> Although this article has the same title as the previous article posted on the eHow.com website, they are different articles.

<sup>13</sup> Natural Chemistry Waterless Bath is also sold by Meijer (Meijer.com) whose website excerpt is attached to the August 1, 2012 Office action.



Puppies;

- c. Bio-Groom Waterless Bath Shampoo;
- d. A FinePCR Heating/Cooling Waterless Bath Pid Microprocessor Controlled. See the photo of the product below.



5. PetSmart (petsmart.com)

PetSmart advertises the sale of “Veterinarian’s Best Dry Clean Waterless Cat Bath,” “a self-foaming formula that you simply apply to your cat’s coat, massage in, let dry and brush out to clean and remove tangles while leaving your cat smelling fresh.” A photograph of the product is set forth below.



6. Petco.com

Petco.com advertises the sale of Natural Chemistry Waterless Bath for Ferrets & Small Animals.

7. Walmart (Walmart.com)

Walmart advertises the sale of the following products:

- a. Natural Chemistry Waterless Bath Shampoo;
- b. Espree Quick Clean Waterless Bath;
- c. Vets Best Waterless Bath.<sup>14</sup> A photograph of the product is set forth below.



- d. Koolatron Waterless Pet Bath Brush;<sup>15</sup>

8. EntirelyPets.com

EntirelyPets.com advertises the sale of Petzlife Bath Eaze – Waterless Bath Spray. The product “allows you to give your pet a bath without having to fill a tub with water.”

9. AdamBouskila.com: “An informative blog of useful and interesting topics about the pet and animals” provides a “Canine Groomer’s Glossary” (March 18, 2005) identifying a “dry bath” as being “designed to clean the dog without getting him wet; dry baths are normally sprayed or sprinkled on and brushed off after the given amount of time has elapsed.”

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<sup>14</sup> See also the advertisement posted on the National Pet Pharmacy website (nationalpetpharmacy.com) advertising Vets Best Waterless Bath.

<sup>15</sup> See also the Amazon.com posting advertising the Lentek Ionic Waterless Pet Bath and Flea Brush attached to the August 1, 2012 Office action. The Amazon.com review states that the product “silently ‘bathes’ a pet with super-oxygenated molecules.”

B. August 25, 2013 Response to Office action.

Applicant submitted third-party reviews of its products to show that they “are well regarded by consumers in the marketplace ... which reviews also demonstrate that the mark is serving effectively as a source indicator for Applicant’s products.”

1. Walmart reviews

The Walmart website posts eight reviews for Applicant’s products. Not one review refers to WATERLESS BATH; rather, the reviews refer to “this product,” “this spray,” and “Minutegroom.”

2. Viewpoints.com reviews

The Viewpoints website posts five reviews for Applicant’s products. Below is the introduction for the reviews:



The Viewpoints website identifies the brand as “Minute Groom,” not WATERLESS BATH.

The excerpts from the reviews below are representative of the reviews posted on the Viewpoints website:

I have a beautiful Pekingese just look in my photos. So when I was thinking of products to buy for bathing him I

came across some waterless bath spray at walmart. It is made by a company called Minute Groom and its called Waterless Bath.

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I found this Minute Groom Waterless Bath at Petsmart and I love this product.

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We purchased the Minute Groom Minute Groom [sic] Waterless Bath for Dogs in hopes that this would solve our problem. While this is a very helpful tool it isn't perfect. The waterless bath is basically a glorified pet deodorizer. ... All you have to do is spray the waterless bath on the dogs and rub it in with a cloth.

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This is the only waterless bath solution that actually works. ... So at the end of the day when the dogs come in and snuggle up with the family "waterless bath" puts my mind to ease."

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This Waterless Bath from Minute Groom is one you can rely on between grooming appointments or baths at home. ... I just spray him with the Waterless Bath, rub it into his fur and he smells fresh and clean again.

### 3. QVC reviews

The QVC website reports that 15 reviews have been posted but Applicant submitted 12. One review refers to the "Minute Groom Waterless Pet Bath" and "Minute Groom"; one review refers to "Waterless Shampoo"; the remaining reviews did not refer to the name of the product except to say things like "this," "this stuff," and "it."

C. August 1, 2012 Office action

1. LifeTips (cat.lifetips.com)

The LifeTips website includes “Cat Care and Grooming Tips,” a list of 27 cat care and grooming tips provided by the editors of the website. One of the tips is “A waterless bath for kitty.”

Cats Bathing – No Water – If your cat or kitten absolutely cannot tolerate being wet, try using a waterless or powder shampoo or give your cat a sponge bath with a damp towel.

Remember, the younger a cat is when you begin to bathe her, the more likely it will be that she will come to enjoy the occasional bath.

2. Angelfire.com posts an article entitled “The Secret Behind

Why Dogs Run Around After Baths.” The article provides the following information:

One way to keep your dog clean without the dripping wet mess is to give them a waterless bath. Pet stores sell product that you can rub into the coat and then brush out. It doesn't require any water. Since using this product seems more like giving a massage to your dog, they aren't likely to feel that they were controlled and are less likely to run around and get dirty immediately afterward.

3. Answers (wiki.answers.com)

The question posed was “How about waterless bath for puppies?” The answer posted was “They make a dry shampoo for dogs call your vet and ask him/her where to get it from.”

4. EasyHowToTips.com posted an article entitled

“Homemade Flea Bath for Dogs” (May 27, 2011). In the section entitled “Waterless

Flea Bath,” the author writes that “[t]o give dogs a waterless bath, sprinkle on baking soda and brush off the excess and then use a flea comb.”

5. The Pet Shop blog by Andrea Martin (thepetshop@news-record.com) posted questions and answers entitled “Training Tails: Wintertime baths and aggressive behavior.”

Q. I have two dogs and they stink. It’s too cold to give them a bath outside. Is there anything I can spray on them until the weather gets warmer?

A. There are waterless baths made for dogs that you can get at the pet store or at your vet. There are also doggie wet wipes that you can wipe them down with. Either of these would help to freshen your dog until his next bath.

6. Off The Leash S.D. website (offtheleashsd.wordpress.com) posted an article entitled “Maddy The Cat Gets A Waterless Bath” (March 28, 2011). The author writes about how hard it is to bathe her cat so she has been looking for a “waterless bath.”

At the Menard’s store I found the perfect waterless bath. Its [sic] Persuasions Laid Back Cat from Sergeant’s. It is a foaming shampoo designed for cats with attitude, according to the label.

7. The Partnership for Animal Welfare, Inc. website (paw-rescue.org) posted instructions about bathing and shampooing dogs. The organization instructed readers that between baths “to give your pet a waterless bath, sprinkle on baking soda and brush off the excess.”

8. The Petit Jean Bunnies website ([petitjeanbunnies.com](http://petitjeanbunnies.com)) posts frequently asked questions about pet rabbits. One of the questions about bathing rabbits is set forth below:

Is it okay to give my bunny a bath?

Bunnies are quite good a [sic] cleaning themselves, however, if you find that your bunny needs a bath I recommend using waterless bath solution. You should actually avoid giving your bunny a bath at all costs since it can be quite harmful to your bunny. A waterless bath is quick and easy and leaves your bunny with soft clean and good smelling fur. You can purchase one that is for dogs and cats, they work just as well on rabbits. When purchasing waterless bath solution, make sure it is non-toxic and will not harm your bunny when they lick their fur.

9. Puritan's Pride ([puritan.com](http://puritan.com)), a mail order and online vitamin retailer, advertises a PET ORGANICS FAST BATH "Waterless Bath for Dogs."

Fast Bath allows your cat or dog to have a waterless bath in just minutes.

D. Analysis.

As pointed out above, Applicant argues that WATERLESS BATH is an incongruous term because "the term 'bath' is most commonly understood as the act of soaking, dipping or immersion for the purpose of cleaning" and "waterless" means without water and, therefore, a bath without water is a contradiction.<sup>16</sup> While that might be true in the abstract, when WATERLESS BATH is used in connection with pet shampoo and conditioner and medicated pet shampoo, the evidence shows that

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<sup>16</sup> Applicant's December 18, 2013 Brief, pp. 10-11. *See also* Applicant's Supplemental Brief, p. 11 and Applicant's Reply Brief, p. 3.

consumers perceive WATERLESS BATH to be a synonym for a dry bath or cleaning without water. *See In re Rosemount Inc.*, 86 USPQ2d 1436, 1439 (TTAB 2008) (“It is well established that we must look to the meaning of the term within the context of the identified goods.”).

The articles/blog entries about pet grooming use the term WATERLESS BATH for a dry bath or a means of cleaning pets without water. For example, the three articles entitled “How to give your dog a waterless bath” provide instructions to pet owners as to how to give a dog a dry bath or clean a dog without using water, the LifeTips website posting entitled “Cat Care and Grooming Tips” includes a tip for “[a] waterless bath for kitty,” and The Pet Shop blog advises that “[t]here are waterless baths made for dogs that you can get at the pet store or at your vet.”

Competitors use the term “waterless bath” to refer to their spray or powder products used to give pets a dry bath. *See, e.g.*, Natural Chemistry Waterless Bath, Bio-Groom Waterless Bath Shampoo, Espree Quick Clean Waterless Bath, Vets Best Waterless Bath, and Petzlife Bath Eaze – Waterless Bath Spray. As we said in *Continental Airlines Inc. v. United Airlines Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999), “evidence of competitors’ use of particular words as the name of their goods or services is, of course, persuasive evidence that those words would be perceived by purchasers as a generic designation for the goods or services” (citation omitted). *See also Corbin v. Gould*, 133 U.S. 308, 313-14 (1890) (where those in the tea business used the term “Tycoon” to describe a class of teas, the term was incapable of protection, and instead was “a term which all men engaged in the tea business had



an equal right to use, and which belonged to no one individual, either as a trademark or a trade label. It belonged to the public, as the common property of the trade ....”).

Some of the reviews Applicant submitted refer to “waterless bath” as the product (e.g., “I came across some waterless bath spray at Walmart,” “The waterless bath is basically a glorified pet deodorizer,” and “This is the only waterless bath solution that actually works”).

Even Applicant uses the term WATERLESS BATH on its labels as the generic name of its product. Our primary reviewing court and its predecessor have made clear that the way an applicant uses an alleged mark (or a component term in a mark) on the goods or in connection with its services, or in promotional materials or packaging, is relevant to whether consumers will perceive the alleged mark as an indicator of source or instead as generic. *See, e.g., In re Reed Elsevier Properties Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380-81 (Fed. Cir. 2007); *In re Water Gremlin Co.*, 635 F.2d 841, 208 USPQ 89, 92 (CCPA 1980). *See also In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1590 n.22 (TTAB 2014).

Applicant displays the term WATERLESS BATH in close proximity to the house mark MINUTE GROOM, with no other term that would act as the name of the product, or identify what the product is. Thus the label engenders the commercial impression that this is MINUTE GROOM brand waterless bath. For example, see the back of Applicant’s medicated shampoo label, shown below:



The front of the label, shown below, engenders a similar commercial impression.



Simply put, although Applicant has identified its goods in its applications as “pet shampoo and “conditioner” and “medicated pet shampoo,” on the products that it offers to its customers it calls its goods “waterless bath,” thus informing its customers that “waterless bath” is the name of its products.

Applicant argues that “[i]t is both legally permissible and a common commercial practice for products to display more than one trademark on their packaging, including combinations of house marks, product marks, and tag lines (phrases).”<sup>17</sup> While nothing precludes an owner from using more than one mark on a product or requires the owner to use a mark by itself, *see In re Holiday Inns, Inc.*, 223 USPQ 149, 151 (TTAB 1984); *General Foods Corp. v. Ito Yokado Co., Ltd.*, 219 USPQ 822 (TTAB 1983), as Applicant uses the term on its labels, WATERLESS BATH would be perceived as the generic name of its pet shampoo and conditioner and medicated pet shampoo, rather than as a trademark indicating the source of the product. *Cf. In re Morganroth*, 208 USPQ 284, 287 (TTAB 1980) (“Wishing does not make a trademark or service mark be.”).

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<sup>17</sup> Applicant’s Reply Brief, p. 6.

Applicant argues that the Trademark Examining Attorney failed to submit any dictionary definitions for the term WATERLESS BATH.<sup>18</sup> However, it is well settled that the fact that a term is not found in the dictionary is not controlling on the question of registrability where, as in the present case, such term has a well understood and recognized meaning. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987) (SCREENWIPE held generic even though there was no dictionary definition of the compound term); *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 108 USPQ2d 1949, 1959 (TTAB 2013) (PRETZEL CRISPS held generic even though there was no dictionary definition); *In re Dairimetics, Ltd.*, 169 USPQ 572, 573 (TTAB 1971) (ROSE MILK refused registration on the Supplemental Register even though there was no dictionary definition of ROSE MILK).

Applicant also argues that the evidence submitted is not sufficient to show that WATERLESS BATH is perceived as a generic term because the Trademark Examining Attorney submitted only a “handful” of articles and third-party uses referring to WATERLESS BATH as a type of product.<sup>19</sup> We disagree. As discussed above, there is substantial evidence that the term WATERLESS BATH is commonly used by pet grooming writers/bloggers and pet grooming product manufacturers to reference a dry bath grooming product for pets. *Compare In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 4 USPQ2d at 1143 (USPTO failed to show that the financial community views and uses the term CASH MANAGEMENT ACCOUNT as a

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<sup>18</sup> Applicant’s Supplemental Brief, p. 15.

<sup>19</sup> Applicant’s Reply Brief, p. 5.

generic term where a substantial composite of the evidence showed the use of that term was by appellant).

Finally, Applicant argues that the Trademark Examining Attorney did not submit any evidence of any other “waterless bath”-formative marks registered in the USPTO, thus concluding that “competitors apparently do not perceive the Mark as being available for their use.”<sup>20</sup> We do not find this argument persuasive. It is more likely that competitors have not registered the term WATERLESS BATH because they perceive it to be a generic term and therefore that they recognize that there would be no point in attempting to register it, or possibly that any third-party application to register the term has been refused. As noted above, third parties use WATERLESS BATH as a generic term to refer to their products (*e.g.*, Natural Chemistry Waterless Bath, Vet’s Best Waterless Bath, Bio-Groom Waterless Bath Shampoo, *etc.*).

In view of the foregoing, we find that WATERLESS BATH is generic for pet shampoo and conditioner and medicated pet shampoo.

## II. Whether WATERLESS BATH is merely descriptive?

Implicit in our holding that the evidence establishes that WATERLESS BATH is generic for Applicant's goods is a holding that WATERLESS BATH is at least merely descriptive of Applicant's goods under Section 2(e)(1). “The generic name of a thing is in fact the ultimate in descriptiveness.” *H. Marvin Ginn Corp.*, 228 USPQ

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<sup>20</sup> Applicant’s Supplemental Brief, p. 16.

at 530. However, for the sake of completeness, we now turn to the issue of whether Applicant's mark is merely descriptive.

Proving that a term is merely descriptive is not as rigorous as proving that it is generic. The Office needs only show that "[a] term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). Whether a particular term is merely descriptive is determined in relation to the goods or services for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002).

As noted above, Applicant argues that the term WATERLESS BATH is incongruous because a bath requires water and, therefore, WATERLESS BATH is suggestive. While that might be true in the abstract, when applied to pet shampoos and conditioners and medicated pet shampoos, the evidence, as discussed above, shows that consumers perceive that term and manufacturers use that term to describe waterless cleaning processes and products for pets.

In its reply brief, Applicant argues that "the term 'waterless' can reasonably be understood by consumers to indicate either a product that does not contain water or one that does not require water for its use. ... As a result, consumers must inquire further to understand the nature of Applicant's products relative to the Mark."<sup>21</sup> We

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<sup>21</sup> Reply Brief, p. 4.

disagree. When the term WATERLESS BATH is used in connection with a pet shampoo and conditioner or a medicated pet shampoo, the term WATERLESS BATH directly imparts to consumers and potential consumers that the shampoo and conditioner is a dry bath, “designed to clean the dog without getting him wet; dry baths are normally sprayed or sprinkled on and brushed off after the given amount of time has elapsed.”<sup>22</sup>

Applicant also argues that it was the first to use the term “Waterless Bath” and that there has been little use by third parties.<sup>23</sup> It is well-settled that the fact that an applicant may be the first and only user of a merely descriptive or generic designation does not justify registration if the only significance conveyed by the term is merely descriptive. *See In re Carlson*, 91 USPQ2d 1198, 1202 (TTAB 2009); *In re BetaBatt Inc.*, 89 USPQ2d 1152, 1156 (TTAB 2008); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001).

We conclude that Applicant’s mark, WATERLESS BATH, will be immediately and directly perceived by consumers as meaning a waterless or dry bath for pets and, therefore, we find that WATERLESS BATH is, at the very least, merely descriptive.

### III. Whether WATERLESS BATH has acquired distinctiveness?

We have found that WATERLESS BATH is a generic term, and therefore it can never acquire distinctiveness. However, for the sake of completeness, we will

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<sup>22</sup> AdamBouskila.com, “Canine Groomer’s Glossary,” attached to the September 30, 2013 Office action.

<sup>23</sup> Applicant’s Supplemental Brief, p. 8.

consider the issue of acquired distinctiveness, assuming, for this purpose, that WATERLESS BATH is highly descriptive, but not generic. Accordingly, we now consider in detail Applicant's claim and evidence of acquired distinctiveness for WATERLESS BATH.

Applicant has argued, in the alternative, that its mark WATERLESS BATH has acquired distinctiveness and, therefore, it may be registered under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). The Court of Appeals for the Federal Circuit, our primary reviewing court, explained the process of establishing acquired distinctiveness as follows:

An evidentiary showing of secondary meaning, adequate to show that a mark has acquired distinctiveness indicating the origin of the goods, includes evidence of the trademark owner's method of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product.

*In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125, 227 USPQ 417, 422 (Fed. Cir. 1985)

Under Trademark Rule 2.41(a), 37 C.F.R. § 2.41(a), an applicant may submit affidavits, declarations under 37 C.F.R. § 2.20, depositions, or other appropriate evidence showing the duration, extent, and nature of the applicant's use of a mark in commerce that may lawfully be regulated by Congress; advertising expenditures in connection with such use; letters or statements from the trade and/or public; or other appropriate evidence tending to show that the mark distinguishes the goods or services.

The kind and amount of evidence necessary to establish that a mark has acquired distinctiveness in relation to goods or services depends on the nature of the mark and the circumstances surrounding the use of the mark in each case. *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1581, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988); *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 829, 166 USPQ 34, 39 (CCPA 1970); *In re Hehr Mfg. Co.*, 279 F.2d 526, 528, 126 USPQ 381, 383 (CCPA 1960); *In re Capital Formation Counselors, Inc.*, 219 USPQ 916, 918 (TTAB 1983). In this case, the mark is highly descriptive, and therefore Applicant has a high burden to meet.

To prove that its WATERLESS BATH mark has acquired distinctiveness, Applicant submitted the declaration of Jeffrey Wycoff, Applicant's Vice President. Mr. Wycoff attested to the following facts:<sup>24</sup>

1. Applicant has been using the mark since at least 1999;
2. Applicant's use of the mark WATERLESS BATH has been substantially exclusive and continuous since at least 2008;
3. Applicant has distributed its WATERLESS BATH pet shampoo and conditioner and medicated pet shampoo nationwide;
4. Applicant has sold its WATERLESS BATH pet shampoo and conditioner and medicated pet shampoo through Walmart, Sam's Club, QVC, and Target, as well as through television infomercials;

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<sup>24</sup> Applicant's August 25, 2013 response to an Office Action.



5. Since 2005, Applicant's annual sales of WATERLESS BATH products have exceeded \$1,000,000;
6. One vendor has purchased up to \$2,000,000 of WATERLESS BATH products;
7. WATERLESS BATH was the bestselling pet product at QVC for seven (7) years; and
8. Applicant's WATERLESS BATH products have received favorable reviews.

We do not find Applicant's evidence to be convincing. First, Applicant's use since 1999, while indicative of its commercial success, is not conclusive or persuasive considering the highly descriptive nature of the mark WATERLESS BATH. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1396 (TTAB 2013) (ten years of use insufficient to prove acquired distinctiveness, only indicative of commercial success); *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, which was deemed "a substantial period but not necessarily conclusive or persuasive"). *See also In re Bongrain International Corp.*, 894 F.2d 1316, 1317 n.4, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990); *Yamaha Int'l Corp.*, 6 USPQ2d at 1005.

Second, contrary to Applicant's claim that its use of the term WATERLESS BATH has been substantially exclusive, the evidence shows that third parties sell WATERLESS BATH products through national retailers such as Amazon.com, Petsmart.com, Petco.com and at Walmart, a retailer identified by Applicant as a

distributor of its WATERLESS BATH products. 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 has not acquired distinctiveness. *In re White Jasmine LLC*, 106 USPQ2d at 1395. *See also Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1403, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances.”); *Nextel Commc’ns, Inc. v. Motorola, Inc.*, 91 USPQ2d 1393, 1408 (TTAB 2009) (finding opposer’s contemporaneous use of the mark in connection with services closely related to applicant’s goods rose to the level necessary to rebut applicant’s contention of substantially exclusive use).

Third, the reviews submitted by Applicant are evidence that its product is a high quality product, not that consumers perceive WATERLESS BATH to be a trademark. None of the reviews posted in the Walmart website references the term WATERLESS BATH; rather, the reviewers refer to “it,” “this spray,” “this product,” and, in one case, “Minutegroom.” Applicant submitted five reviews posted on the Viewpoints.com product review website and 12 reviews posted on the QVC website. The consumer reviews do not establish that consumers perceive WATERLESS BATH to be a trademark.

Fourth, even if Applicant's products are the No. 1 SKU pet product sold by QVC, there is no evidence regarding how many consumers or potential consumers viewed Applicant's infomercials, watched its advertisements on QVC, or purchased product through QVC.

In considering the totality of the evidence submitted by Applicant, we find that the evidence is insufficient to show that the highly descriptive mark WATERLESS BATH has acquired distinctiveness.

**Decision:** The refusals to register Applicant's mark WATERLESS BATH as being generic and merely descriptive pursuant to Section 2(e)(1) of the Trademark Act are affirmed and the refusal to accept Applicant's claim of acquired distinctiveness under Section 2(f) is also affirmed.