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

Proceeding	85365741
Applicant	SAVVIER, LP
Applied for Mark	TABATA BOOTCAMP
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Trademark App. Serial No. 85/365741

) **Examiner: Edward Fennessy**

Filed: July 7, 2011

) **Docket No. 021542.0373T1US**

Applicant: Savvier, LP

) **Services: Educational services namely, conducting live classroom and on-line seminars and workshops for introducing professional fitness instructors to training protocols in the field of fitness.**

Mark: TABATA BOOTCAMP

APPLICANT'S APPEAL BRIEF

This Appeal Brief is in response to the office action mailed December 12, 2014, hereinafter, referred to as "the Office Action." An index of cases cited is appended hereto in Appendix 1. The Exhibit numbers 1 through 9 mentioned herein are the Exhibits attached to the response dated February 19, 2014. Exhibits 10, 11, 12, and 13 including Exhibits 12A and 12B attached to Exhibit 12, are the Exhibits included with the response dated September 19, 2014. Exhibits 14, 15 and 16 are Exhibits attached to the Request for Reconsideration filed March 30, 2015.

In accordance with Rule, 1203.01 (Note 10), the most probative Exhibits are as follows. Exhibit 4, the TABATA BOOTCAMP training manual, which immediately tells the Board the protocols to which Applicant introduces professional fitness instructors. Exhibits that demonstrate acquired distinctiveness of the TABATA BOOTCAMP TRADEMARK which include: Exhibits 1, 2 and 11, which describe some of the advertising used to familiarize professional fitness instructors with the TABATA BOOTCAMP services; Exhibits 3, 3A, 3B, 3C1, 3C2, 3C3 which describe the TABATA BOOTCAMP Survey of Dr. David Stewart; and Exhibits 14 and 15 in which an independent third party acknowledges that TABATA BOOTCAMP is a "known brand" in the fitness industry. Exhibits 12, and 12A, and 16, which describe some of Applicant's trademark enforcement efforts illustrating the exclusivity of the TABATA BOOTCAMP TRADEMARK.

Applicant had prepared an Appeal Brief that responded in order to each statement of the Office Action, but was fifty-six pages in length. In response to a motion for leave to exceed the twenty-five page limit for appeal briefs, the Board has instructed us to keep the brief to twenty-five pages. Therefore, Applicant's choosing not to respond to certain statements made by the Examining Attorney should not be treated as a concession of such statements.

I. Executive Summary

The Office Action has two fundamental flaws: (1) It never analyzes the evidence and law in terms of the actual description of services; i.e., in connection with *Educational services namely, conducting live classroom and on-line seminars and workshops for introducing professional fitness instructors to training protocols in the field of fitness*; and (2) It never seriously considers the Stewart Survey and other evidence of acquired distinctiveness in terms of the relevant law of acquired distinctiveness.

II. Facts

When Applicant applied for registration of its TABATA BOOTCAMP mark, no other party was using the term *Tabata* in a fitness trademark, and, in fact few people were familiar with the term *Tabata*. Exhibit 1, §20; Exhibit 2, §§15 and 16. In early 2011, Applicant and its collaborator Mindy Mylrea introduced a new type of educational program designed for professional fitness instructors. The new program included instruction in the science of aerobic and anaerobic fitness, instruction in how to teach high intensity interval training, referred to herein and in the fitness field as HIIT, instruction in nutrition and behavioral change strategies, instruction in how to perform a body/fitness assessment, and instruction in many more protocols useful to assist the professional fitness instructor in creating, building and teaching his/her own fitness program, even including assistance in building a fitness web site.¹ Exhibit 4. Applicant and its collaborator called the program TABATA BOOTCAMPTM, and on July 7, 2011 filed

¹ The program is more fully described in a sixty-seven page instruction manual provided to trainees, a copy of which was attached to the February 19, 2014 response as Exhibit 4.

two US trademark applications, the present application and Application Serial No. 85/365730 for TABATA BOOTCAMP in class 9 for **Pre-recorded audio tapes, video tapes, DVDs featuring 30 minute and one hour, in-home instruction in the field of fitness.** The latter application has been allowed and the TABATA BOOTCAMP mark has been registered on the Supplemental Register in class 9 as United States Trademark Registration No. 4573797.

Applicant has poured over \$1,000,000² into developing and promoting the TABATA BOOTCAMP mark, and Mindy Mylrea has poured her life into building the business. Ms. Mylrea was already a well-known and award-winning fitness instructor. She has taught TABATA BOOTCAMP Seminars, TABATA BOOTCAMP Trainings and the TABATA BOOTCAMP program at over 30 conventions per year, where attendance at such conventions averages between 700 and 3,000 fitness instructors per convention. Teaching at a convention typically takes four or more days of Ms. Mylrea's time. The seminars are typically one-and-a-half hour sessions designed to stimulate interest in the Tabata Bootcamp Trainings and Program. The Tabata Bootcamp Trainings are typically 8-hour long courses in which Mrs. Mylrea teaches certified fitness instructors to lead the 8-week Tabata Bootcamp Program, which they subsequently offer to their clients in live workout sessions. The conventions typically are scheduled over a weekend. Ms. Mylrea usually gets there on Wednesday to set up the class space and booth. Each convention attendee receives a Tabata Bootcamp flyer in the convention welcome pack. Ms. Mylrea teaches the full 8-hour Tabata Bootcamp Training on Thursday and the Tabata Bootcamp Seminar sessions on Friday, Saturday, and Sunday. The conventions also advertise her sessions and trainings prior to the event and take registrations. In addition, information technology specialists at Applicant create web pages announcing the seminars and send eblasts to the relevant group of purchasers. Applicant has advertised TABATA BOOTCAMP in full page ads for the past three years in the major fitness magazines that target fitness instruction professionals. At the conventions, when Ms. Mylrea is not teaching, she works the booth, and others work the booth when she is teaching. At the booth, future trainings are

² The figure is now over \$2,000,000 since this appeal was filed.

advertised and TABATA BOOTCAMP-branded clothing and DVDs are sold. Ms. Mylrea also personally leads Tabata Bootcamp Programs for Savvier fitness clients at the conventions and, outside the conventions, all around the USA, usually at fitness centers. Typically, in addition to the convention trainings, she has taught two to three additional Tabata Bootcamp Trainings per month for the last three years. At each fitness center, the Tabata Bootcamp Course is advertised in advance by flyers, postings on bulletin boards and Internet sites, and announcements at aerobics classes and other functions at the fitness center. She has taught the TABATA BOOTCAMP Course at more than five-hundred fitness centers in the United States. Applicant and Ms. Mylrea have trained more than 27,000 people in the TABATA BOOTCAMP trainings and certified and licensed more than 4,000 professional instructors to teach the Tabata Bootcamp fitness protocols. See Exhibits 1, 2 and 11.

Ms. Mylrea won the 2013 CanFitPro Specialty Presenter of the Year for her TABATA BOOTCAMP trainings and the ECA World Fitness Association (one of the largest U.S. Fitness conferences) awarded the TABATA BOOTCAMP program as the Most Impactful Fitness Program in the industry in 2013. Exhibit 2, §§ 18. Ms. Mylrea and her TABATA BOOTCAMP program have been the subject of articles in fitness magazines, and have placed full page ads in many fitness journals including IDEA Fitness Journal, American Fitness, On Fitness, and Club Business International. Exhibit 2, §11. Ms. Mylrea was named 2015 Personal Fitness Professional (PFP) Magazine Trainer of the Year. PFP Trainer of the Year is a joint award presented by PFP and Club Industry. PFP is one of the leading magazines for professionals in the fitness industry. Club Industry is one of the leading tradeshows for health club owners and fitness professionals. The award states “Mindy is the founder of known brands including ...Tabata Bootcamp.” Exhibit 15, §§4 – 11.

As a result of Applicant’s activities summarized above, as shown by a professional survey (hereinafter, the Stewart Survey) performed in complete accordance with the US trademark law by Dr. David W. Stewart, a highly respected psychologist and marketing expert, by at least December 2, 2013, TABATA BOOTCAMP had become recognized as a trademark by 93.8% of United States professional

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fitness instructors who have been instructing for at last two years. Exhibit 3, §25, and supporting Exhibits 3A, 3B, 3C1, 3C2, 3C3, and 3D. The details of the Stewart Survey will be discussed in Section III A.1. below.

It is important to note that the relevant group of purchasers, i.e., professional fitness instructors, is relatively small, approximately 250,000 members (Exhibit 2, §12). Because of the small size of the relevant group, the focusing of the publicity on this group, and the large amount of advertising, Applicant has been able to reach most of these instructors, and reached many of them multiple times. (Exhibit 2, §12.)

III. Argument

III.A. Evidence of Acquired Distinctiveness

The Trademark Act, §1052(f) states: "...nothing shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce."

We will show in Section III.B. below, that the Examining Attorney has not made out a prima facie case. But, if the Board decides that the Examiner has made out a prima facie case, the TABATA BOOTCAMP mark is still registrable based on acquired distinctiveness.

"Evidence of acquired distinctiveness can overcome a rejection for lack of distinctiveness. If a proposed mark is not inherently distinctive, it may be registered on the Principal Register only upon proof of acquired distinctiveness, or "secondary meaning," that is, proof that it has become distinctive as applied to the applicant's goods or services in commerce. If the applicant establishes ... that the matter in question has acquired distinctiveness as a mark in relation to the named goods or services, then the mark is registrable on the Principal Register under §2(f) of the Trademark Act, 15 U.S.C. 1052(f)." TMEP §1212. See also, *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F. Supp. 129, 133, 173 USPQ 820, 823 (S.D.N.Y. 1972).

Evidence that is useful in establishing acquired distinctiveness and secondary meaning includes advertising and promotional expenditures (TMEP §1212.06(b)), survey evidence, (TMEP §1212.06(d)), the manner and use of the mark, and a showing that the mark is exclusive.

III.A.1. The Stewart Survey Shows Without Doubt That TABATA BOOTCAMP Has Acquired Secondary Meaning Among The Relevant Group of Consumers For Applicant’s Services.

“As the Ninth Circuit remarked, ‘[a]n expert survey of purchasers can provide the most persuasive evidence of secondary meaning.’” *McCarthy on Trademarks*, §32:190, at page 32-488. “To establish secondary meaning, it must be shown that the *primary* significance of the term in the minds of the consuming public is not the product but the producer (citing *Kellogg Corp. v. National Biscuit Co.*, 305 U.S. 111, 118, 39 USPQ 296, 299 (1938)... This may be an anonymous producer, since consumers often buy goods without knowing the personal identity or actual name of the manufacturer.” *Ralston, supra*, 173 USPQ at 133.

The Stewart Survey was based on the responses of 339 certified fitness instructors or personal trainers who have been teaching in the United States for at least two years. Exhibit 3, page 9, §16, and Exhibit 3C1. Exhibit 3D provides a summary of the tabulations for all questions asked in both the screener and main questionnaires. In response to the question about whether “Tabata Bootcamp” is a brand name or common name, 318 respondents (93.8%) indicated that it is a brand name. In response to the question about how they use the “Tabata Bootcamp” name 225 of the respondents (65.5%) indicated that they use it mainly as a brand name and another 87 respondents (25.7%) indicated that they use it as both a brand name and a common name. Thus, 91.2% of the respondents indicated that use the “Tabata Bootcamp” name as a brand name at least some of the time. Exhibit 3, pp. 13-14. Since the group surveyed, certified fitness instructors or personal trainers teaching in the United States, is identical to the group to which the description of services is directed, i.e., professional fitness instructors, the Stewart Survey is the strongest evidence possible that the present mark is allowable.

McCarthy on Trademarks summarizes various percentages of survey respondents that have been determined by courts to be insufficient to show secondary meaning and which have been sufficient to prove secondary meaning:

One court held that survey evidence that 25% of respondents associated plaintiff's designation with a single source was insufficient proof of secondary meaning. Similarly, a survey which showed only 10% of the sample gave trademark significance to a descriptive term was held insufficient proof of secondary meaning in the term.

Higher percentages have been held to prove or support proof of secondary meaning in a designation...Generally, figures over 50% are regarded as clearly sufficient. However, figures of 46% and 37% have also been found to be sufficient.

McCarthy on Trademarks, §32:190 at page 32-489 – 491.

With 93.8% of the respondents indicating that “Tabata Bootcamp” is a brand name, it is no wonder that in view of the above results of the survey and the law with regard to percentages, Dr. Stewart concluded:

The results of the survey provide overwhelming evidence that the name “Tabata Bootcamp” is regarded as a brand name by certified fitness instructors and personal trainers who have been teaching in the United States for at least two years. Since these individuals are the market for the products and services associated with Tabata Bootcamp, the results of the survey make it very clear that the name has acquired strong secondary meaning in the market place.

Exhibit 3, p. 14.

Applicant fully supported the survey with appropriate background information approved of by the TTAB and courts. A statistical analysis was performed that, in the most extreme case, the sample population was within approximately plus or minus 5.4% of the true population statistics ninety-five percent (95%) of the time. Exhibit 3, §16, p.9. Exhibit 3A is detailed curriculum vitae of Dr. Stewart, who designed the survey, showing him to be highly qualified and one of the most experienced survey experts in the United States. The Exhibits also included a Survey Screener (Exhibit 3C1) to make sure that the respondents were individuals within the relevant market for the services in the description of services in this application. Two different questionnaires were used in which the positions of the answers to the questions were reversed so that any effect of the positioning would be neutralized. The Exhibits also provide a detailed tabulation of the responses (Exhibit 3D) showing the absolute numbers of respondents that answered each question in a particular way and breaking down the numbers by gender and age, which tabulation provides information that can illuminate any bias in the questions. The Exhibits also include the instructions for the interviewers and supervisors (Exhibit 3B), so that any bias in these instructions could be examined. None of this background information was discussed by the Examining Attorney.

Finally, Exhibit 3, the Report of Dr. Stewart, lists all the requirements that the courts and literature have recommended for a survey to be valid, and shows that the survey met all of these requirements. These include the fact that the study was designed and conducted in accordance with established principles of survey research and is consistent with guidelines for survey research offered in litigation as articulated in the *Manual for Complex Litigation*,³ including the following elements:

- A. The population was properly chosen and defined;
- B. The sample chosen was representative of that population;

³ *Manual for Complex Litigation*, Fourth Edition, §11.493.

- C. The data gathered were accurately reported;
- D. The data were analyzed in accordance with accepted statistical principles;
- E. The questions asked were clear and not leading;
- F. The survey was conducted by qualified persons following proper interview procedures; and
- G. The process was conducted so as to ensure objectivity (e.g., the study was “double blind”).

In addition, the design of the survey followed the design of the well-known Teflon approach to the determination of genericness.⁴

Applicant provided the Examining Attorney with a vast amount of information regarding the survey, which demonstrates that it is well-constructed and well-founded and eminently persuasive on the issue of genericness.

III.A.2. Applicant’s Use Of “TABATA BOOTCAMP” Is Substantially Exclusive.

In the 10th paragraph of the “GENERIC REFUSAL” section of the Office Action dated November 13, 2012, the Examining Attorney cited ten Internet sites claiming that these sites showed third party use of the trademark TABATA BOOTCAMP. In the Request for Reconsideration dated May 13, 2012 (“2012 Request for Reconsideration”), Applicant showed that seven of the ten were licensees of Applicant and that Applicant was contacting the others to demand that they cease using the mark. See §§ 5-7 of the Declaration of Jeff Tuller Dated May 15, 2013 which is the last Exhibit attached to the 2012

⁴ E. Deborah Jay (2009), “Genericness Surveys in Trademark Disputes: Evolution of Species,” *Trademark Reporter*, 99 (September – October), 1118 – 1164).

Request for Reconsideration. The Examiner then issued three office actions in quick succession, July 3, July 13, and August 19, 2013. In the Office Action of August 19, 2013 in the section entitled “REFUSAL OF REGISTRATION UNDER TRADEMARK ACT SECTIONS 1, 2, 3 AND 45”, third paragraph, the Examiner alleged that there were Internet cites showing third party uses, without specifically indicating any such sites. Realizing that because Applicant has several thousand licensees and is continuously certifying and licensing additional professional fitness instructors, Applicant showed that it is continuously policing its mark, and that all uses of the mark on the Internet were uses by either Applicant or its Licenses, and that all non-authorized users of the mark had been contacted and had either taken a license or ceased uses of the mark. *See Exhibit 2, Supplemental Declaration of Jeff Tuller, §6.* In the Office Action of March 19, 2014, in the fifth paragraph before the “REQUEST FOR ADDITIONAL INFORMATION”, the Examiner again alleged that “This evidence indicates that applicant’s use of the wording in the mark is not substantially exclusive” without citing any specific evidence. In its response filed September 19, 2014, Applicant showed that it had successfully policed its TABATA BOOTCAMP mark against all unauthorized users, and had even obtained a Federal District Court injunction against use of the mark by the one unauthorized user which had not ceased use, and that this user had then ceased use. Exhibits 12, 12A, 12B, and 13.

The Examiner has cited new alleged non-authorized Internet uses in the instant Office Action, although this time actually citing specific Internet sites. In Exhibit 16 attached to the Request For Reconsideration submitted March 30, 2015, Applicant submitted a Second Supplemental Declaration of Kate Jordan to counter these allegations, whereby it was confirmed that more than 80% of the websites were actually licensed users or blogs about licensed users, approximately 10% were sites that did not even use the TABATA BOOTCAMP trademark at all, and only three were unlicensed uses which have all ceased use as a result of Applicant’s policing. If the Examiner should submit additional specific sites, Applicant asserts that Applicant will continue to police its mark as stated in the previous declarations as long as necessary.

The refusal by the Examiner based on a discontinued uses of TABATA BOOTCAMP by others is a Catch 22 type of refusal, since it is the refusal of registration of the mark that is motivating others to use the mark. Further, copying of a mark is actually evidence of secondary meaning. *Shen Mfg. Co. v. Suncrest Mills, Inc.*, 673 F. Supp. 1199, 1203, 4 USPQ2d 1438, 1441 (S.D.N.Y 1987); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 448, 228 USPQ 705, 724 (4th Cir. 1986).

III.A.3. Other Evidence of Secondary Meaning

The facts discussed in Section II above, show that the large number of advertisements, and convention and magazine exposure, including the training of tens of thousands or trainers who will go out and multiply the efforts, all focused on a relatively small number of relevant purchasers, has been sufficient to establish a recognition of the mark in the marketplace. It is no wonder that trademark recognition is such a high amount of the relevant population. The evidence the Examiner has shown of the copying of the mark and Applicant's showing of the rapid acquiescence of the copiers to Applicant's trademark rights and cessation of use by these copiers is an indication of recognition of the trademark among the relevant users.

In addition, Exhibits 14 and 15 show that independent third parties that are highly reputable in the fitness industry, Personal Fitness Professional Magazine and Club Industry, have recognized that TABATA BOOTCAMP is a brand name.

III.B. Response to the Examiner's Evidence and Arguments

III. B. 1. GENERIC REFUSAL

The Examining Attorney recites the two-step inquiry for genericness recited in case law, but never applies it to the actual services recited in the application. Instead, he recites several pages of evidence for the meanings of *TABATA* and *BOOTCAMP* and decides that *TABATA* is "a form of high intensity interval fitness training named after the researcher Izumi Tabata" (first paragraph at the top of

page 3 of the Office Action, just before the bold heading **Tabata**) and *BOOTCAMP* means “intense physical fitness training or exercise typically completed over a short duration.” (Fourth paragraph on page 4 of the Office Action, just before the bold heading **Boot Camps**). For sake of argument, we will accept these definitions.

It is immediately clear that, if these are the definitions of *TABATA* and *BOOTCAMP*, neither of the words alone or together are generic for **Educational services namely, conducting live classroom and on-line seminars and workshops for introducing professional fitness instructors to training protocols in the field of fitness** because the meaning of the words *TABATA* and *BOOTCAMP* as specified by the Examining Attorney does not tell a person what Applicant’s services are in the same way that the trademarks in the case law recited in this section of the Office Action immediately tell a person what the services are.

The present case is on all fours with the fact situation in *Janes v Watson*. In that case, the court stated:

The Court agrees with Defendant and Judge Primomo that the words Fine Art Studio Online could be generic if used in connection with an Internet-based art studio/gallery. The essence of FineArtStudioOnline's services, however, are website creation tools and hosting services that enable users to create their own online art gallery. Defendant's current website, www.fineartstudioonline.com, succinctly describes the offered services ...While an online art gallery is the ultimate product created through FineArtStudioOnline, it is not the essential service being offered. The Court finds FineArtStudioOnline is not a generic mark.

Janes v. Watson, 82 USPQ2d 1906, 1913 (W.D. Texas 2006).

Here, the Examiner insists that Applicant's services are "physical fitness training consisting of tabata boot camps"⁵, and, as such, the mark is generic. However, Applicant's description of services is "Educational services namely, conducting live classroom and on-line seminars and workshops for introducing professional fitness instructors to training protocols in the field of fitness," and this is the essence of Applicant's services. (Exhibit 4). Just as in *Janes*, even assuming for the sake of argument that the terms TABATA and BOOTCAMP when put together *could be* generic if used in connection with high-intensity workout classes, the essence of Applicant's services here are training services for fitness instructors to enable them to offer fitness classes following specific exercise protocols. While physical fitness may be an end result of the TABATA BOOTCAMP experience, this is not the essential service being offered by Applicant to its fitness instructor customer base. Thus, TABATA BOOTCAMP is not generic for Applicant's services.

It is clear that the Examining Attorney thinks that Applicant's services to be leading exercise routines, like aerobics at your local gym. They are not. If one reads the sixty-seven page manual (Exhibit 4), one sees that TABATA BOOTCAMP IS an eight-week-long transformational course for persons already certified as professional fitness instructors (Exhibit 11, §4) that has redefined the way professional fitness instructors think about their profession. Once this is understood, everything in this Appeal falls into place including: why such a phenomenal percentage of fitness instructors (93.8%) recognize TABATA BOOTCAMP as a trademark (Exhibit 3, §25); and why the TABATA BOOTCAMP course and its creator have won so many honors from the fitness industry (Exhibit 1 §§14, 15, Exhibits 14 and 15).

Under this heading the Examining Attorney also argues that the disclaimer of *TABATA* in the registrations for TABATA MAMA (US Reg. No. 4419717 in class 41) and TREAD TABATA (Reg. No. 4385822 in class 41), and the registration of TABATA PRO (4344533) on the Supplemental Register

⁵ See, for example, the paragraph under the heading "*Applicant's Services*" on page 14 of the Office Action.

(*without* disclaimers), is evidence of the genericness of *TABATA*. Actually, these registrations are evidence that *TABATA* is *not* generic for the services listed in Applicant's application. The services for *TABATA MAMA* are "conducting fitness classes" for post-natal parents (Exhibits 5A and 5B), and the services in *TREAD TABATA* are "fitness class services" performed on a treadmill (Exhibits 7A and 7B). Applicant's application does not cover "fitness class services," which are directed towards fitness class attendees, but rather cover educational programs for fitness trainers themselves. The mark is simply not generic for these services. Moreover, the *TABATA PRO* registration is a perfect example of how Applicant's mark is not generic. The goods for *TABATA PRO* consist of software for timing Tabata trainings. These goods, like Applicant's services under the current application, are not fitness classes. This explains why the registrant for *TABATA PRO* was not required to disclaim any element of the *TABATA PRO* mark. The "fitness class services" description for the other two marks explains the disclaimers in the other two marks.

It is remarkable that both the above Tabata marks in class 41 were issued on the Principal Register, while the original Tabata mark in the same class, i.e. Applicant's present mark for *TABATA BOOTCAMP*, which was filed more than a year before these marks, has been refused even on the Supplemental Register. Exhibit 1, §21; Exhibits 5A, 5B, 6A, 6B, 7A and 7B.

In this section the Examining Attorney also argues that the following registrations on the Supplemental Register prove that *BOOTCAMP* is generic (the Examining Attorney does not say generic for what, but we assume he meant fitness instruction given to fitness class customers/attendees): *TEXAS BOOT CAMP, for conducting physical fitness classes, Reg. No. 4133397*; *ANNAPOLIS BOOT-CAMP, for physical fitness training, Reg. No. 4103374*; *BROOKLYN BRIDGE BOOT CAMP, for physical fitness training, Reg. No. 4014188*; *THE ORIGINAL BOOT CAMP, fitness training, Reg. No. 4412358*; and *SOCAL FITNESS BOOT CAMP FOR WOMEN, for fitness instruction, Reg. No. 3600548*. The only thing that this evidence supports is that *Boot Camp* *might be* generic for fitness instruction given to fitness class customers/attendees. It does not support the conclusion that *Boot Camp* is generic for Applicant's

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described services, as these services do not include the provision of fitness workout classes (or “boot camps”) as the Examiner has envisioned them.

Third-party use of the wording “tabata bootcamp”:

This has been discussed under section III.A.2 above as further evidence of acquired distinctiveness.

Applicant’s Services

In this section, the Examining Attorney argues that Applicant’s services are Tabata Bootcamps. As explained in ample detail above, Applicant does not offer “bootcamp” services within the meaning ascribed to them by the Examiner. Applicant’s application covers **Educational services namely, conducting live classroom and on-line seminars and workshops for introducing professional fitness instructors to training protocols in the field of fitness**, and not the offering of fitness training classes or “bootcamps.” No trainers attending Applicant’s seminars and workshops would say they were attending a “bootcamp” by any stretch of the imagination; rather they would say that they were attending an educational course for fitness trainers to learn fitness protocols for use with their students and customers.

Applicant’s Claims

Applicant never conceded in its response dated October 10, 2012, that the term *Tabata* is generic for Applicant’s services. *Tabata* had become generic for a form of high intensity interval training, namely the form described in a paper by Izumi Tabata and others.⁶ Applicant further asserted that Izumi Tabata had made no effort to claim ownership of a trademark or to protect his name, and thus, Applicant’s use of the name was similar to the uses of Pilates and Applicant was free to use it. *Pilates Inc. vs. Current Concepts Inc.*, 120 F. Supp. 2d 286, 57 USPQ2nd 1174 (S.D.N.Y. 2000). In great contrast, Applicant

⁶ Tabata; Kouichi Irisawa; Motorki Kouzakii; Kouji Mishimura; Futoshi Ogita; And Motohiko Miachi, *Medicine & Sports & Exercise*, March 1997, Volume 29 – Issue 3-pp 390-395.

applied for the trademark TABATA BOOTCAMP prior to its first use, has aggressively policed its use, and is the exclusive user for the services described in the Applicant's application.

Applicant originally agreed to disclaim the term *Bootcamp*. However, as explained herein, the term is neither descriptive nor generic with respect to the services recited in the application, and as specifically recognized in the Trademark Act, "No disclaimer . . . shall prejudice or affect the applicant's or registrant's rights then existing or thereafter arising in the disclaimed matter . . . if the disclaimed matter be or shall have become distinctive of his goods or services." 15 U.S.C. §1056(b); TMEP §1213.11.

Actually, the Stewart Survey shows that the mark TABATA BOOTCAMP does in fact distinguish Applicant's services for the relevant group of purchasers. The cases cited by the Examiner are not on point because each immediately bring to mind exactly what the respective services were. In contrast, TABATA BOOTCAMP does not immediately bring to mind Applicant's services, except to the extent it has become distinctive.

Some more pertinent case law includes: "The burden of showing a proposed mark is generic remains with the Patent and Trademark Office," noting that "the substantial showing by the Examining attorney that the matter is in fact generic . . . must be based on *clear evidence* of generic use." *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 828 F.2d 1567, 1571, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

"... the Office bears the burden of proof and genericness must be shown by clear evidence. Genericness is a fact-intensive determination and the Board's conclusion must be governed by the record which is presented to it.... It is the record evidence about purchasers' perceptions, however, that controls the determination, not general legal rules or our own subjective opinions." *In re Callaway Golf Co.*, 2001 TTAB LEXIS 599 (TTAB Aug. 9, 2001).

Further, the identical mark, TABATA BOOTCAMP, has been registered by Applicant on the Supplemental Register in class 9 for Pre-recorded audio tapes, video tapes, DVDs featuring 30 minute and one hour, in-home instruction in the field of fitness, which shows it is capable of serving as a trademark.

SECTION 2(f) CLAIM INSUFFICIENT

We discussed the Section 2(f) claim in section III.A. above and showed that it is solid. The Examining attorney's supports his position with erroneous statements and alleged requirements of the law that do not exist. The erroneous statements include: "it is not clear from the survey results whether the respondents understood the difference between a 'brand name' and a 'common name.'" Actually, the survey used a preliminary questionnaire to determine if the respondents understood the difference between a brand name and a common name, and respondents who did not answer these questions correctly were excluded from the remainder of the survey. Exhibit 3, Expert Report of David W. Stewart, page 11, especially §20. See, Exhibits 3C2 and 3C3 for the actual questionnaires. Another erroneous statement is, "The survey results actually show that a significant number of consumers understand the term 'boot camp' to refer to a physical fitness program or routine, i.e. as a generic term." The statement references footnote 4 of the office action which states: "The survey results indicate that more than 25 percent of respondents understand the wording 'Tabata boot camp' to be a generic term." This is incorrect. The Examiner refers to "*Applicant's Response, p. 41*" to support this statement, but there was no page 41 in Applicant's response, and there is no such indication in the survey results. What is more, even if this was true, it would not be significant. In the original "Teflon" survey, 31% of the respondents indicated "Teflon" to be a common name, but the term "Teflon" was held by the court to be a brand name because 68% of the respondents stated it was a brand name. *E.I. DuPont de Nemours & Co. v. Yoshida International, Inc.*, 393 F. Supp. 502, 185 USPQ 597, 615-616 (E.D.N.Y. 1975). Here, 93.8% of the respondents indicated Tabata Bootcamp to be a brand name. Exhibit 3, p. 14.

There are more erroneous statements by the Examiner, and as noted above, we do not address each and every one of them in this brief; however, as the discussion herein establishes, it should be obvious to the Board, and Applicant respectfully submits, that the Examining Attorney's position is not well-supported by the facts or the law.

The incorrect alleged requirements of the law include: "It is not clear from the survey results whether the respondents understood ...whether either type of name (brand name or common name) can constitute a generic term"; and "it is not clear from this survey whether the respondents understood the difference between wording with trademark or service mark significance, descriptive terms, and generic terms, each of which to some extent requires the respondent to form legal conclusions." There is no trademark law relating to whether a survey needs to determine whether respondents understand the differences between trademarks and service marks, descriptive terms, and generic terms, and the Examiner cites no such law. It is also self-contradictory, as on the one hand it complains that the survey did not ask certain questions, and then states that such questions would require the respondent to form legal conclusions.

The cases cited by the Examining attorney also support our Section 2(f) claim. In *Metpath*,⁷ the Board held that "there is nothing in the record evidencing recognition by the public of 'MALE-P.A.P. TEST' as an indication of origin." In that case the mark was highly descriptive and applicant provided only cursory evidence of acquired distinctiveness, whereas here there is substantial evidence showing public recognition the TABATA BOOTCAMP is an indicator of origin. In *Yamaha Int'l Corp. v. Yoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988), the Board recognized the importance of surveys in showing acquired distinctiveness, but held that Yoshino had proved acquired distinctiveness in other ways, and that constant promotional display of the product pictures did contribute to the recognition of the peg head designs in question as source indicators. 6 USPQ2d at 1010. Here, excellent survey

⁷ *In re MetPath, Inc.*, 1 USPQ2d 1750 (TTAB 1986).

results have been presented, and the evidence also includes a showing of constant promotional display of the trademark TABATA BOOTCAMP to the relevant group of consumers. Exhibit 1, §§ 10 – 16. *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750 (TTAB 2013) involved a cancellation proceeding against registration by of ANNAPOLIS TOURS for conducting guided tours of historic districts and other areas of cities. There was no survey evidence. *In re Bongrain Int'l (Am.) Corp.*, 894 F.2d 1316, 1318, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990) no survey evidence was provided and the only evidence of secondary meaning provided was increasing sales. *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989, 228 USPQ 528, 530 (Fed. Cir. 1986) was a cancellation proceeding by the International Association of Fire Chiefs seeking to cancel registration of the name FIRE CHIEF for a magazine directed to the field of fire fighting. The case was remanded to the Board to determine the issue of secondary meaning. The cancellation proceeding eventually was dismissed without prejudice and the mark remained registered on the Principal Register.

REFUSAL OF REGISTRATION UNDER TRADEMARK ACT SECTIONS 1, 2, 3, AND 45

It is evident on its face that TABATA BOOTCAMP is not a laudatory phrase or slogan like BEST BEER IN AMERICA (*Boston Beer*),⁸ BRAND NAMES FOR LESS (*Melville*),⁹ ONCE A MARINE ALWAYS A MARINE (*Eagle Crest*),¹⁰ NO MORE RHINO'S (*Hulting*).¹¹ In *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861 (TTAB 2006) the mark was rejected because the word SPECTRUM only appeared in an informational statement describing the switches, and never was used in a way that consumers would think of it as a trademark (78 USPQ2d at 1862). That is not the case here, where

⁸ *In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999).

⁹ *In re Melville Corp.*, 228 USPQ 970 (TTAB 1986).

¹⁰ *In re Eagle Crest, Inc.*, 96 USPQ2d 1227 (TTAB 2010).

¹¹ *In re Hulting*, 107 USPQ2d 1175 (TTAB 2013).

TABATA BOOTCAMP is marked with a *TM* and stated to be a trademark as the Examiner noted elsewhere.

Since TABATA BOOTCAMP is not a laudatory term and has been used as a trademark and not just as part of an informational statement, the descriptiveness refusal can be overcome by asserting a Section 2(f) claim and alternatively Applicant can seek registration on the Supplemental Register. See Section II.A. above.

REFUSAL UNDER TRADEMARK ACT SECTIONS 1 and 45

The specimen comprises a document actually used in the classrooms, seminars and workshops at the time of filing of Amendment to Allege Use. See the Amendment to Allege Use and Exhibit 1, Declaration of Mindy Mylrea, §§4 – 6. As explained in §6 of the Declaration, early in the training, Applicant did not have the complete manual of Exhibit 4, but created training sheets on a computer and distributed them, or photocopies of them in the classrooms and workshops. That is exactly what these specimen sheets look like.

“A specimen that shows the mark as used in the course of *rendering or performing* the services is generally acceptable.” TMEP §1301.04(b). (Emphasis in original.) “A specimen for services generally shows the mark used in the sale, *rendering*, or advertising of the services.” See USPTO.gov, “What is a Specimen?”¹² (Emphasis added.) Where the record shows that the mark is used in performing (as opposed to advertising) the services, a reference to the services on the specimen itself may not be necessary. TMEP §1301.04(b). See also *In re Metriplex Inc.*, 23 USPQ2d 1315 (TTAB 1992), which held that computer printouts showing the mark GLOBAL GATEWAY were acceptable to show use of mark to identify data transmission services accessed via computer, because they show use of mark as it appears on computer terminal in the course of rendering the services.

¹² <http://www.uspto.gov/trademark/laws-regulations/specimen-refusal-and-how-overcome-refusal>.

Here, the specimen shows actual use of the trademark, followed by a TM indication, and the materials fit the description of services. Further, the cover page for these protocols clearly shows the trademark. Thus, the specimen submitted shows the mark as used in the course of performing the services. It also shows that the services fall directly within the identification of services in both the application and the Amendment to allege use.

APPLICANT'S OCTOBER 28, 2014 SUPPLEMENTAL RESPONSE IS UNTIMELY

The Examiner did not accept Applicant's Supplemental Response submitting Exhibits 14 and 15¹³ on the grounds that it was untimely, but then proceeded to respond to the submission by stating that it is unpersuasive. In response to the Examiner, Applicant contends that the submission is persuasive, and fully supports Applicant's arguments as set forth herein.

III.D. CONCLUSION

Each refusal of the Office Action having been addressed with solid reference to the Exhibits and case law, we respectfully request that the refusals be reversed and this application be allowed on the principal register. A Proposed Amendment to the Supplemental Register is enclosed should the Board decide that is the better course.

Respectfully submitted,



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¹³ Exhibits 14 and 15 have also been resubmitted with a Request for Reconsideration filed March 30, 2015.

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

Trademark App. Serial No. 85/365741) Examiner: Edward Fennessy

Filed: July 7, 2011) Docket No. 021542.0373T1US

**Applicant: Savvier, LP) Services: Educational services namely,
Mark: TABATA BOOTCAMP conducting live classroom and on-line
seminars and workshops for introducing
professional fitness instructors to training
protocols in the field of fitness.**

PROPOSED AMENDMENT

This Proposed Amendment is filed together with Applicants Appeal Brief is in response to the office action mailed December 12, 2014, hereinafter, referred to as “the Office Action.” This Proposed Amendment is submitted so that, in the event the Board decides that applicants mark, TABATA BOOTCAMP, should not be issued on the Principal Register, but may be registered on the Supplemental Register, in which case it is requested that the Board enter the amendment.

Applicant hereby amends the application to the Supplemental Register.