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Precedent of the TTAB

Mailed: June 9, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Original Pickle Shot, Inc.

Serial No. 88409422

Tracy P. Jong of Tracy Jong Law Firm,
for The Original Pickle Shot, Inc.

Andrew Leaser, Trademark Examining Attorney, Law Office 117,
Hellen M. Bryan-Johnson, Managing Attorney.

Before Wellington, Lykos, and Heasley,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

The Original Pickle Shot, Inc. (“Applicant”) seeks registration on the Principal Register of the mark PICKLESHOT (in standard characters) for “alcoholic beverages, except beer,” in International Class 33.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark on the ground that “pickle shot” is the widely-known name of an alcoholic beverage,

¹ Application Serial No. 88409422 was filed on April 30, 2019, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

rendering it generic under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, or merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). Applicant maintains that its applied-for mark is neither generic nor merely descriptive, and argues in the alternative that if it is merely descriptive, it has acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. We affirm the refusal to register.

I. Genericness

A. Applicable Law

Section 2 of the Trademark Act provides for registration on the Principal Register of marks “by which the goods of the applicant may be distinguished from the goods of others....” 15 U.S.C. § 1052. This is consonant with the definition of a trademark, which acts to identify and distinguish goods from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. 15 U.S.C. § 1127.

“A generic name--the name of a class of products or services--is ineligible for federal trademark registration.” *U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298, 2020 USPQ2d 10729, *2 (2020). Generic terms are “by definition incapable of indicating source, are the antithesis of trademarks, and can never attain trademark status.” *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) *quoted in In re Cordua Rests., Inc.* 823 F.3d

594, 118 USPQ2d 1632, 1634 (Fed. Cir. 2016). The examining attorney has the burden of proving that a term is generic by clear evidence. *In re Nordic Naturals, Inc.*, 755 F.3d 1340, 111 USPQ2d 1495, 1498 (Fed. Cir. 2014). TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1209.01(c)(i) (Oct. 2018).

“There is a two-part test used to determine whether a designation is generic: (1) what is the genus of goods or services at issue; and (2) does the relevant public understand the designation primarily to refer to that genus of goods or services? *H. Marvin Ginn Corp. v. Int’l Assn. of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).” *Int’l Dairy Foods Ass’n v. Interprofession du Gruyère and Syndicat Interprofessionnel du Gruyère*, 2020 USPQ2d 10892, at *11 (TTAB 2020). The genus of the goods typically is determined by focusing on the identification of goods in the subject application. *Id.* at *12. Here, the Examining Attorney and Applicant accept the identification of goods in this case—“alcoholic beverages, except beer”—as the genus.² We concur. The relevant public is purchasers of the identified alcoholic beverages. *Id.*; *In re James Haden, M.D., P.A.*, 2019 USPQ2d 467424, *2 (TTAB 2019) (“The relevant public for a genericness determination refers to the purchasing or consuming public for the identified goods or services.”).

The issue, then, is whether this relevant public would perceive the applied-for mark “as the name of a class or, instead, as a term capable of distinguishing among members of the class.” *USPTO v. Booking.com*, 2020 USPQ2d 10729, at *7. “Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade

² Examining Attorney’s brief, 9 TTABVUE 8, Applicant’s reply brief, 12 TTABVUE 6.

journals, newspapers and other publications.” *Royal Crown Co., Inc. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018).

B. The Examining Attorney’s and Applicant’s Arguments and Evidence

To show that the relevant public would understand that “PickleShot” is a type of alcoholic beverage, the Examining Attorney first adduces a definition from the Urban Dictionary: “pickle shot”: “Double shot: one part vodka, one part pickle juice.” E.g., “I’m so hungover from those pickle shots last night!”³

To this he adds internet articles showing common use of “pickle shot” for vodka or tequila combined with pickle juice as a mixed drink or a chaser:

- “The **Pickle Shot** at Kung Fu Saloon”—“The Austin import’s claim to boozy fame is its **pickle shot** ...



A double-deck of trouble, it comes in two glasses, one for pickle juice, the other for Tito’s Vodka. ...In addition to the **pickle shot** and sake cocktails and bombs you can procure now, Kung Fu Saloon plans to serve food in the near future but presently allows guests to order in pizza and such.”⁴

“Kung Fu Saloon is a Texas-based bar and restaurant with locations in Austin, Houston, Dallas, Fort Worth, and Nashville. And they’ve been

³ UrbanDictionary.com, Dec. 18, 2019 Office Action at 7.

⁴ TheDallasDiva.com, July 12, 2019 Office Action at 11.

serving up pickle shots ... since opening their Downtown Austin location in 2009.”⁵

- San Antonio Current— “Puckering Up to Pickles: Where to Find Pickle-infused Snacks and Drinks in San Antonio”

“**Pickle Shots** at HiTones // Billed as ‘**the original pickle shot**’ on its website, the St. Mary’s music venue’s go-to libation may not be fancy, but a salted rim combined with the dual bite of pickle juice and high-proof alcohol makes for a bracing bar experience.”⁶

- Rebecca Creek Distillery—

Perfect Pickle Shot Recipe Made w/ Enchanted Rock Vodka

Perfect Pickle Shot Recipe

A nice sweet drink is good most of the time. Other times vodka on the rocks works for us. But in some cases, you need a kick-start or rejuvenation to bring to your party.

Introducing the perfect **pickle shot** recipe. Put this bad boy



Share this post

[1 part Enchanted Rock Vodka, 1 part pickle juice, chile salt, sliced pickles].”⁷

⁵ “Everybody Was Pickle Shot Fighting...at Kung Fu Saloon” Venueblog.tripleseat.com, Nov. 2, 2020 Office Action at 70.

⁶ SACurrent.com Dec. 18, 2019 Office Action at 10. *See also* HiTonesSA.com, July 12, 2019 Office Action at 12.

⁷ RebeccaCreekDistillery.com, July 12, 2019 Office Action at 13.

- Topsy Bartender collection of cocktail recipes—

PICKLE SHOT



PICKLE SHOT
1 Part Tequila
1 Part Pickle Juice
Garnish: Pickle Slice

8

- Phoenix New Times—

Palo Verde Lounge's **Pickle Shot** (or the Tijuana Hooker)—
“A shot of crappy well tequila with a half-shot pickle juice Chaser might sound disgusting, but the brininess of the juice completely cuts the burn of the tequila. Plus, you can spice your **pickle shot** up with hot sauce, thus getting the disturbingly named Tijuana Hooker. PV's **pickle shot** runs \$3.50 per go, so you might find yourself under the table quickly.”⁹

⁸ TopsyBartender.com, July 12, 2019 Office Action at 16.

⁹ PhoenixNewTimes.com, Dec. 18, 2019 Office Action at 9.

- RogerOnTheRadio tweet—



10

- WestMulberry (Austin, Texas)—

Pickle Shot

Started at Kung Fu, this shot includes equal parts pickle juice and tito's vodka

If you like spice add a dash of tabasco



11

¹⁰ Twitter.com/rogerontheradio, Dec. 18 Office Action at 13.

¹¹ WestMulberry.com, Dec. 18, 2019 Office Action at 14.

- Baltimore Business Journal—

Restaurateur opening a new restaurant “said he’s planning a **pickle shot** with house-made pickle juice....”¹²

- College Wanderlust—

“How to make the best **pickle shots**: Easy recipe”

Pickle Shot Recipe



Pickle shots are one of my favorite shot recipes. They are simple and delicious. They can also be made on the fly because most of these ingredients can be found in every kitchen.

Ingredients for Pickle Shots

- Pickle Juice
- Hot Sauce
- Vodka
- Ice

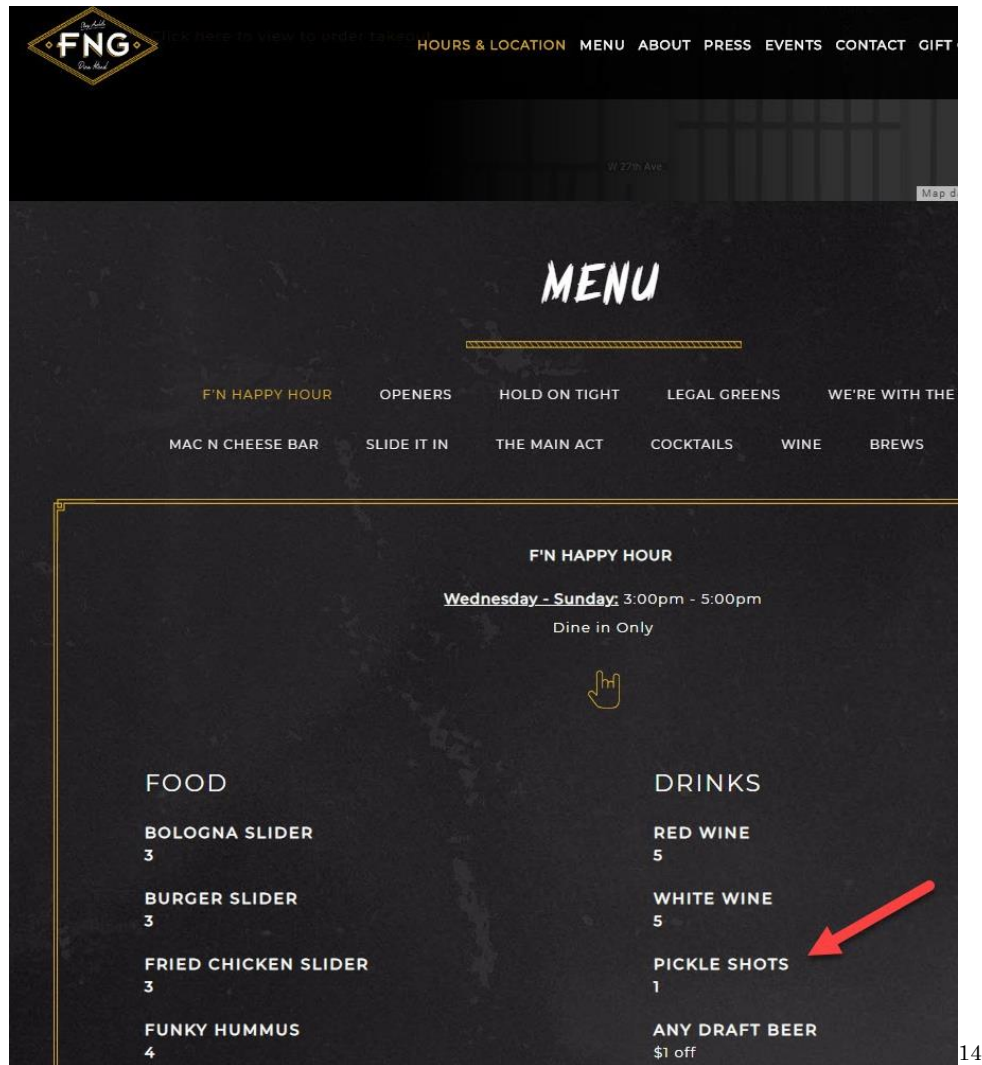


13

¹² Baltimore Business Journal 6/19/2019, June 8, 2020 Office Action at 23-24.

¹³ CollegeWanderlust.com, June 8, 2020 Office Action at 28-30.


- FNG Restaurant menu (Denver, Colorado)—



The Examining Attorney also submits an article about a pub operated by Applicant's husband-and-wife principals:

“Pickle shots’ Ocean City restaurant serves about 100,000 a year”

¹⁴ FNGRestaurant.com June 8, 2020 Office Action at 68.



Buy Photo

(Photo: Staff photo by Meg Ryan)

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Looking for an alcoholic drink that's different from your typical bar order? Look no further than **pickle shots**.

Pickles Pub, located at 706 Philadelphia Ave. in Ocean City, made a name for itself serving up its infamous **pickle shot**, an intoxicating combination of pickle juice and vodka. Customers love it so much owners Justin and Brittney Acita decided to bottle it for fans of the drink to enjoy at home.

"It's a unique flavor," Justin Acita said.

The couple took over the bar in 2015 and learned about the pub's **pickle shot** from its founding owners.

Justin Acita explained one morning the original owners of Pickles Pub woke up hungover and were looking for a cure. They decided to take shots of pickle juice and Jose Cuervo, a tequila brand.

The recipe later evolved into vodka and pickle juice.

The Acitas originally sourced their pickle juice from a business in Camden, New Jersey. Today, the restaurant uses the same product from the same business, but now sourced through Sysco.

Justin Acita said Pickles Pub serves up about 100,000 **pickle shots** a year. The restaurant also serves it up in various cocktails including its Bloody Mary and a martini.

"We need to make this happen," Brittney Acita said.

After testing nine different batches, the Acitas said they found the bottled formula that tasted exactly like the shots in Pickles Pub. Brittney Acita said the task was left to Justin Acita as she's expecting their third child.

The bottled **pickle shot** uses the same pickle juice and gets its green color naturally. And if you believe it, Brittney Acita said the shot is known to prevent hangovers with the salt from the pickle brine.

Customers can purchase the bottled **pickle shots** at Pickles Pub, 8th Street Liquors and some other liquor stores around Ocean City. To order a shot, customers can head to Pickles Pub, Hooper's Crab House, Backshore Brewing Company, Hammerheads Bar & Grill and Taphouse Bar and Grille locations.

Brittney Acita said they're currently focused on distributing the product in Ocean City and its surrounding area for the first year. Afterward, they want to expand across state lines and are already getting requests for it.

15

¹⁵ Salisbury Daily Times, Sept. 12, 2018, July 12, 2019 Office Action at 14-15. *See also* OceanCityToday.com 9/21/2018 "Pickles Pub Owners bottle bar's famous Pickle Shot", Nov. 2, 2020 Office Action at 55-58.

To further indicate the genericness of “pickle shot,” the Examining Attorney points to Applicant’s Supplemental Register registration of THE ORIGINAL PICKLE SHOT for the same goods, “alcoholic beverages except beers.” According to the prosecution history for that Supplemental Registration, the Examining Attorney examining the application for that mark advised that he would amend it to the Supplemental Register, “[h]owever, it does still need a disclaimer of PICKLE SHOT, which is a generic term.” The disclaimer was agreed to.¹⁶ So that Supplemental registration issued on Feb. 12, 2019, disclaiming “PICKLE SHOT.”¹⁷

The Examining Attorney finds based on the totality of this evidence that Applicant’s proposed mark, PICKLESHOT, is generic for the identified goods, as the relevant consuming public would understand that it names a type of alcoholic drink composed of pickle juice mixed with vodka or tequila.¹⁸

Applicant argues that the Examining Attorney has not met his burden of proving by clear evidence that the proposed mark is generic.¹⁹ (Citing *Nordic Naturals*, 111 USPQ2d at 1498.) It notes that the genus of goods, “alcoholic beverages, except beer,” “includes wines, sakes, ciders, perries, spiked seltzers and other beverages, and a wide variety of other alcoholic beverages. Applicant does not believe that Examiner

¹⁶ Examining Attorney’s note to the file, 12/31/2018, Nov. 2, 2020 Office Action at 62.

¹⁷ Reg. No. 5677108.

¹⁸ Examining Attorney’s brief, 11 TTABVUE 10.

¹⁹ Applicant’s brief, 9 TTABVUE 7; Applicant’s reply brief, 12 TTABVUE 7. Applicant’s appeal brief does not conform to the requirements of Trademark Rule 2.126(a)(1), 37 C.F.R. §2.126(a)(1), which requires all briefs submitted to be double-spaced. *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §1203.01 (2020). Its reply brief complies, however.

has proven that the relevant public understands the designation primarily refers to that genus of goods.”²⁰ Furthermore, Applicant argues, “SHOT” “refers to a serving size of a product, it is not generic of the genus of applicant’s goods. ... A shot can be an energy beverage, a snack product, a coffee beverage, an immunity beverage, a soup preparation or a vape product.”²¹

Furthermore, Applicant notes, the article about its pub, “*Pickle Shots? Ocean City Restaurant Serves about 100,000 a year*”,²² may use the term “pickle shots” repeatedly, in lower case, to refer to the alcoholic beverage, but “at no point directly quotes [Applicant’s principals] Brittney or Justin Acita using the term PICKLESHOT generically.”²³ And another article about Applicant’s pub, “*Pickles Pub Owners bottle bar’s famous Pickle Shot*”, consistently capitalizes “Pickle Shot.”²⁴

As for its disclaimer of “PICKLE SHOT” in its Supplemental Register registration for THE ORIGINAL PICKLE SHOT, Applicant observes that trademark rights are not static, and eligibility for registration must be determined on the basis of the facts and evidence of record that exist at the time registration is sought. (Citing *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 213 USPQ 9 (CCPA 1982)). “As such” Applicant contends, any disclaimer in Applicant’s registration should not be considered, and the current Application should be evaluated based on the facts at

²⁰ Applicant’s reply brief, 12 TTABVUE 6-7.

²¹ Applicant’s brief, 9 TTABVUE 8.

²² Salisbury Daily Times, Sept. 12, 2018, July 12, 2019 Office Action at 14-15.

²³ Applicant’s reply brief, 12 TTABVUE 7.

²⁴ OceanCityToday.com 9/21/2018 “Pickles Pub Owners bottle bar’s famous Pickle Shot”, Nov. 2, 2020 Office Action at 55-58.

hand.²⁵

Moreover, the Examining Attorney's evidence is far from "clear" as to the relevant public's understanding of "pickle shot," Applicant insists, stating "A shot of alcoholic beverage, followed by a shot of pickle juice, is actually commonly referred to as a 'pickleback' shot."²⁶ "[I]n fact, the *The Dallas Diva* article presented by Examiner refers to a vodka shot with a pickle juice chaser."²⁷ This and other Office Action evidence conflate the mixed drink with the chaser, Applicant notes, so "it cannot be said that everyone uses the term in the same manner to refer to the same thing and that the term fails to have a common general understanding and meaning. It does not qualify as generic."²⁸

In fact, Applicant cites a *Wikipedia* definition of "pickleback" as "a type of shot wherein a shot of whiskey is chased by a shot of pickle brine...."²⁹ The *Wikipedia* article contained, at that time, an eyebrow-raising entry: "Although confused sometimes, the 'pickleback' is different than the 'pickleshotTM' created by Pickles PubTM in Maryland in 1989. The 'pickleshotTM' is an alcoholic vodka spirit bottled by The Original Pickle Shot®."³⁰ (That particular entry has since been deleted from the *Wikipedia* article.)

²⁵ Applicant's reply brief, 12 TTABVUE 5-6.

²⁶ May 18, 2020 Response to Office Action at 6, 15, citing *inter alia* The Urban Dictionary, UrbanDictionary.com.

²⁷ Applicant's reply brief, 12 TTABVUE 7; TheDallasDiva.com, July 12, 2019 Office Action at 11.

²⁸ Applicant's brief, 7 TTABVUE 7.

²⁹ En.wikipedia.org, Dec. 9, 2019 Response to Office Action at 22.

³⁰ *Id.*

C. Evidentiary Issues

The Examining Attorney justifiably questions the credibility to be accorded to the Wikipedia entry for “pickleback”:

As for applicant’s Wikipedia® evidence, the Board has noted that “[t]here are inherent problems regarding the reliability of Wikipedia entries because Wikipedia is a collaborative website that permits anyone to edit the entries.” *In re IP Carrier Consulting Grp.*, 84 USPQ2d 1028, 1032–33 (TTAB 2007). The Wikipedia page applicant submitted includes no citations to support the claims concerning the “pickleshot” described therein, and therefore it must be presumed (absent any data to the contrary) that applicant itself (or someone associated with applicant) edited this page to include this information. As such, this Wikipedia page has, at best, “limited probative value.” TMEP §710.01(b).³¹

We concur. While *Wikipedia* articles can carry some probative value, “entries, especially newer entries and recent edits, may contain significant misinformation, false or debatable information, ‘unencyclopedic’ content, unexpected oversights and omissions, vandalism, or unchecked information that requires removal.” *In re IP Carrier Consulting Grp.*, 84 USPQ2d at 1032. The sentences quoted above are redolent of self-interest, and were later removed. The Board is not obliged to accept unquestioningly such obvious assertions on the ultimate issue of whether Applicant’s proposed mark would be perceived as a mark. *Cf. Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1482-83 (TTAB 2017). So we accord Applicant’s quoted language from *Wikipedia* no probative value.

Applicant ripostes that some of the Examining Attorney’s evidence, such as the definition of “pickle shot” taken from the *Urban Dictionary*, suffers from the same

³¹ Dec. 18, 2019 Office Action at 4.

inherent reliability problems as *Wikipedia*, as it is a collaborative website that permits anyone to edit entries.³² Applicant, however, cites to the *Urban Dictionary* itself.³³ So does the Board from time to time. *See, e.g., Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, *10 n. 50 (TTAB 2020). The *Urban Dictionary*'s definition of "pickle shot" as a "double shot: one part vodka, one part pickle juice" corresponds with the term's usage in the marketplace—witness the Examining Attorney's cited articles and websites. So we accord it appropriate probative value.

The Examining Attorney objects that some of Applicant's evidence submitted during prosecution consisted of webpages that lacked the dates of downloading and complete URL addresses. (Citing *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018) and TBMP §1208.03.)³⁴ Specifically, Applicant's first Response to Office Action, filed on December 9, 2019, submitted the aforementioned Wikipedia article about pickle shots,³⁵ and two articles about Applicant's pub: "*Pickle shots? Ocean City restaurant serves about 100,000 a year,*"³⁶ and "*Pickles Pub owners bottle bar's famous Pickle Shot*"³⁷. The Examining Attorney does not object to the admissibility of these particular webpages.³⁸

³² Applicant's reply brief, 12 TTABVUE 7.

³³ UrbanDictionary.com (definition of "pickleback"), May 18, 2020 Response to Office Action at 15.

³⁴ Examining Attorney's brief, 11 TTABVUE 4-5.

³⁵ Dec. 9, 2019 Response to Office Action at 22.

³⁶ DelmarvaNow.com Sept. 12, 2018, accessed Dec. 6, 2019, Dec. 9, 2019 Response to Office Action at 24-26.

³⁷ OceanCityToday.com, Sept. 21, 2018, accessed Dec. 6, 2019, Dec. 9, 2019 Response to Office Action at 27-29.

³⁸ Examining Attorney's brief, 11 TTABVUE 4-5.

However, Applicant's December 9, 2019 Response to Office Action also submitted webpages from YourDictionary.com, Dictionary.com, TheOriginalPickleShot.com, and PicklesOC.com, none of which have dates of downloading.³⁹ The Examining Attorney did not object to these webpages in his next Office Action, of December 18, 2019.

Applicant points out that "The examining attorney must object to the evidence in the first Office action following the submission of the evidence and advise the applicant how to properly make the Internet evidence of record." *Quoting In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018). Otherwise, the Board may consider the objection waived. *Id.* Applicant accordingly asks that we consider this objection to the evidence submitted in its December 9, 2019 Response to Office Action waived.⁴⁰ We concur, and will consider this evidence for what it is worth.

However, in its next Response to Office Action, submitted on May 18, 2020, Applicant continued to submit webpages without proper dates of downloading.⁴¹ The Examining Attorney timely objected to their admissibility in the next Office Action, and explained how Applicant could properly introduce this evidence.⁴² Applicant did not do so, so the Examining Attorney maintained his objection on request for reconsideration,⁴³ and on appeal.⁴⁴ Applicant does not challenge this objection to its

³⁹ Dec. 9, 2019 Response to Office Action at 11-12, 20-21.

⁴⁰ Applicant's reply brief, 12 TTABVUE 4-5.

⁴¹ Applicant's May 18, 2020 Response to Office Action at 11-14, 16, 21-38, 42.

⁴² June 8, 2020 Office Action at 5.

⁴³ Nov. 2, 2020 Office Action (denial of request for reconsideration) at 4.

⁴⁴ Examining Attorney's brief, 11 TTABVUE 4-5.

May 18, 2020 webpage evidence on appeal. We accordingly sustain the objection and give no consideration to the webpage evidence adduced by Applicant in that Response to Office Action. We do however, consider the online dictionary evidence Applicant adduced in that Response to Office Action,⁴⁵ as we may take judicial notice of such dictionary definitions. *Int'l Dairy Foods Ass'n v. Interprofession du Gruyère and Syndicat Interprofessionnel du Gruyère*, 2020 USPQ2d 10892, at * 17 n.115.

D. Analysis-Genericness

Based on the evidence of record, we find that PICKLESHOT is generic for a type of alcoholic beverage. The term need not encompass all alcoholic beverages to be generic. “[A] term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole. Thus, the term ‘pizzeria’ would be generic for restaurant services, even though the public understands the term to refer to a particular sub-group or type of restaurant rather than to all restaurants.” *In re Cordua Rests.*, 118 USPQ2d at 1638 *cited in Royal Crown v. Coca-Cola*, 127 USPQ2d at 1046-47. Indeed, the Examining Attorney’s evidence shows that a “pickle shot” is a recognized cocktail recipe.⁴⁶ *See, e.g., In re Heublein, Inc.*, 146 USPQ 671, 671-72 (TTAB 1965) (agreeing with examining attorney that “CAN-CAN” is a recognized name for a particular type of alcoholic cocktail, and therefore cannot function as a

⁴⁵ Merriam-Webster.com, Dictionary.com, Dictionary.Cambridge.org, MacMillan Dictionary.com, May 18, 2020 Response to Office Action at 15, 17-20.

⁴⁶ *See “Perfect Pickle Shot Recipe”* RebeccaCreekDistillery.com, July 12, 2019 Office Action at 13; *“Pickle Shot”* in *“Tipsy Bartender collection of cocktail recipes”* TipsyBartender.com, July 12, 2019 Office Action at 16; *“Pickle Shot Recipe”* CollegeWanderlust.com, June 8, 2020 Office Action at 28-30.

trademark to distinguish applicant's goods from those of others.”).

Even though “SHOT” may have other meanings in other contexts, we must consider how the relevant public perceives PICKLESHOT in its entirety. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1832-33 (Fed. Cir. 2015). The absence of a space between PICKLE and SHOT does not affect this perception. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987) (affirming Board's finding that SCREENWIPE is a generic composite of the “commonly used generic term” WIPE coupled with the word SCREEN).

The evidence shows that the relevant public, adult purchasers of alcoholic beverages, would perceive PICKLESHOT as the name of a type of alcoholic beverage. The term has entered the lexicon with such frequency that it is defined in the *Urban Dictionary*⁴⁷—a source on which Applicant relies, as well.⁴⁸ The fact that a vodka-and-pickle juice chaser may also be called a “pickleback”⁴⁹ is not controlling, as both terms name the drink, not its source.

Nor is the term's absence from other dictionaries controlling.⁵⁰ *In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1603 (TTAB 2014). The evidence demonstrates broad and common use of the term by bars and restaurants in their advertising and menus. *See In re Odd Sox LLC*, 2019 USPQ2d 370879, *7 (TTAB 2019) (“Cases have recognized that competitor use is evidence of genericness”) (quoting *Stuart Spector*

⁴⁷ UrbanDictionary.com, Dec. 18, 2019 Office Action at 7.

⁴⁸ May 18, 2020 Response to Office Action at 6, 15, citing *inter alia* The Urban Dictionary, UrbanDictionary.com.

⁴⁹ *Id.*

⁵⁰ May 18, 2020 Response to Office Action at 17-20, citing Merriam-Webster.com, Dictionary.com, Dictionary.Cambridge.org, and MacMillanDictionary.com.

Designs, Ltd. v. Fender Musical Instruments Corp., 94 USPQ2d 1549, 1555 (TTAB 2009)). “[E]vidence 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 and services.” *Continental Airlines, Inc. v. United Air Lines, Inc.*, 53 USPQ2d 1385, 1395 (TTAB 1999). Some, in fact, claim that they originated the drink, or that it is their claim to fame, just as Applicant claims. Press coverage has followed suit, treating “pickle shot” as nothing more than a type of mixed drink.

Finally, Applicant disclaimed “PICKLE SHOT” in its Supplemental Register registration for the same goods, “alcoholic beverages except beer,” thereby implying that the term is generic. *In re the Consumer Prot. Firm Pllc*, 2021 USPQ2d 238, *23-24 (TTAB 2021) (“Applicant disclaimed FIRM.COM on the Supplemental Register and therefore has conceded it is generic.”) (citing TMEP § 1213.03(a)); *see also In re Haden*, 2019 USPQ2d 467424, at *5 (“Generic matter must be disclaimed to permit registration on the Supplemental Register.”). That Supplemental Register registration issued on February 12, 2019,⁵¹ and the evidence shows no change from the term’s generic usage over the last two years. As the Board observed in a similar case, “noting applicant’s disclaimer ... apart from the mark as a whole [on the Supplemental Register], the genericness of the term as applied to the goods cannot seriously be questioned.” *In re Bonni Keller Collections Ltd.*, 6 USPQ2d 1224, 1226 (TTAB 1987).

⁵¹ Reg. No. 5677108.

We find accordingly that the applied-for mark is generic for the identified goods and therefore unregistrable.

II. Mere Descriptiveness and Acquired Distinctiveness

Confronted with the Examining Attorney's refusal based on genericness, Applicant argued that its applied-for mark "does not qualify as generic. At most, it is descriptive."⁵² Now, confronted with the Examining Attorney's refusal based on mere descriptiveness, Applicant argues that (A) its applied-for mark is not merely descriptive, and (B) in the alternative, if it is found to be merely descriptive, it has acquired distinctiveness.

Addressing these issues for the sake of completeness, we find that the proposed mark is highly descriptive, and has not acquired distinctiveness.

A. Mere Descriptiveness

Section 2(e)(1) of the Trademark Act precludes registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1) in the absence of acquired distinctiveness. A term is merely descriptive of goods, within the meaning of Section 2(e)(1), if it immediately conveys knowledge of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015).

Applicant contends that PICKLESHOT "does not immediately convey to one

⁵² Applicant's brief, 9 TTABVue 7 (citation and internal punctuation omitted).

encountering it the nature of Applicant's goods. ... Applicant's mark is in fact suggestive because imagination, thought, or perception is required to reach a conclusion on the nature of the goods or services."⁵³ Specifically, it argues, "users encountering the mark 'PICKLESHOT' ... would have difficulty in ascertaining the nature of the goods that the mark represents, a pickle flavored vodka."⁵⁴ "'Shot' does not describe a feature of Applicant's goods, it is simply suggestive of a serving size in which Applicant's product might be enjoyed."⁵⁵

Applicant's attempted dissection of its proposed mark is once again unavailing. As the Examining Attorney correctly observes, and as the Board has made clear, "Whether a mark is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use." *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1102 (TTAB 2018). Our primary reviewing court, the Court of Appeals for the Federal Circuit, has stated that "When determining whether a mark is merely descriptive, the [TTAB] must consider the commercial impression of a mark as a whole,' 'viewed through the eyes of a consumer.' ... The TTAB should 'consider the mark in relation to the goods for which it is registered,' asking 'whether someone who knows what the goods ... are will understand the mark to convey information about them.'" *Real Foods Pty Ltd. v. Frito-Lay North America, Inc.*, 906

⁵³ Applicant's reply brief, 12 TTABVUE 8.

⁵⁴ Applicant's brief, 9 TTABVUE 8.

⁵⁵ *Id.*

F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012)).

Here, as the above evidence demonstrates, bars and restaurants commonly use “pickle shot” to describe a combination of vodka or tequila with pickle juice, and media coverage has promulgated this usage among the general populace. So the relevant public, adult purchasers of alcoholic beverages, have been exposed to the term, and a purchaser who knows what Applicant’s goods are is likely to understand PICKLESHOT to convey information about them.

As noted, Applicant’s disclaimer of PICKLE SHOT from its Supplemental Register registration for THE ORIGINAL PICKLE SHOT tacitly acknowledges that the term is generic. Similarly, Applicant has disclaimed “PICKLE SHOT” from its other pending application—to register SALTY BILL’S PICKLE SHOT on the Principal Register for identical goods, “alcoholic beverages except beers.”⁵⁶ That disclaimer of PICKLE SHOT tacitly concedes the term is, at least, merely descriptive. *See Real Foods v. Frito-Lay*, 128 USPQ2d at 1375 (“Real Foods disclaimed the terms ‘corn’ and ‘rice’ in its proposed marks... thereby recognizing the descriptive function of these terms....”); *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1442 (TTAB 2005) (“it has long been held that the disclaimer of a term is an admission of the merely descriptive nature of that term, as applied to the goods or services in connection with which it is registered”). The co-pending application, also based on intent-to-use, was filed in June 2020, was published for opposition in October of that year, and was issued a notice of allowance in December of that year. Hence, Applicant’s Supplemental

⁵⁶ App. Ser. No. 90005745.

Register registration and co-pending application are contemporaneous with its present Application, and corroborate the merely descriptive nature of “PICKLE SHOT.”⁵⁷

Applicant claims that PICKLESHOT is a double entendre: “The term ‘Pickle’ or ‘Pickled’ is slang for drunk. The use of the term ‘PICKLE’ in Applicant’s mark is intended to convey information about the potency of its product, an alcoholic beverage. ... As a whole, Applicant argues that the mark ‘PICKLESHOT’ conveys an impression of an intoxicating beverage, which can be consumed in a small serving size.”⁵⁸

That, however, is not a double entendre. A “double entendre” is defined as “ambiguity of meaning arising from language that lends itself to more than one interpretation.” *In re The Place Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993)). “For trademark purposes, a ‘double entendre’ is an expression that has a double connotation or significance as applied to the goods or services.” TMEP § 1213.05(c), *cited in In re Calphalon Corp.*, 122 USPQ2d 1153, 1163 (TTAB 2017).

The multiple interpretations that make an expression a double entendre must be associations that the public would make fairly readily, and must be readily apparent from the mark itself. *In re Malhotra*, 128 USPQ2d at 1105; *In re Calphalon*, 122

⁵⁷ Once again, Applicant’s omission of a space between “PICKLE” and “SHOT” in the current Application does not render the term any less descriptive. *See Minnesota Mining & Mfg. Co. v. Addressograph-Multigraph Corp.*, 155 USPQ 470, 472 (TTAB 1967) (“It is almost too well established to cite cases for the proposition that an otherwise merely descriptive term is not made any less so by merely omitting spaces between the words.”).

⁵⁸ Applicant’s brief, 9 TTABVUE 9.

USPQ2d at 1163-64. Moreover, “The mark that comprises the ‘double entendre’ will not be refused registration as merely descriptive **if one of its meanings is not merely descriptive in relation to the goods or services.**” TMEP § 1213.05(c) (emphasis added).

In this case, the record shows that “pickle shot” is commonly and invariably used to describe a drink combining pickle juice with a distilled spirit. There is no indication that consumers would readily dissect the term into its constituent words in order to reach a different interpretation. Moreover, the interpretation Applicant proffers is itself merely descriptive, as it immediately conveys knowledge of a characteristic of the goods: an intoxicating beverage that can be consumed in a small serving size. The term is thus not a “double entendre.”

In view of the common use of “pickle shot” for alcoholic beverages of this sort, we find that PICKLESHOT is, if not generic, highly descriptive of the qualities, ingredients, and characteristics of Applicant’s goods. *See In re TriVita, Inc.*, 114 USPQ2d at 1575.

B. Acquired Distinctiveness

Applicant argues in the alternative that PICKLESHOT has acquired distinctiveness as a source indicator. 15 U.S.C. § 1052(f). “To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005) (citing *Qualitex Co. v. Jacobson Prods. Inc.*, 514 U.S. 159, 34 USPQ2d 1161 (1995)). Because we have found

the proposed mark highly descriptive, Applicant's burden of establishing acquired distinctiveness under Section 2(f) is "commensurately high." *Virtual Independent Paralegals*, 2019 USPQ2d 111512, at *11 (TTAB 2019).

In fact, Applicant's burden is even higher—or heavier—because it bases its Application on its intent to use the proposed mark under Section 1(b) of the Trademark Act. 15 U.S.C. § 1051(b). *See In re Olin Corp.*, 124 USPQ2d 1327, 1335 (TTAB 2017) ("We emphasize that, by the very nature of the inquiry, Section 1(b) applicants face a heavy burden in establishing that their mark will acquire distinctiveness when use commences."). To meet this burden, Applicant must show that the "same mark acquired distinctiveness for sufficiently similar or related goods, and that this acquired distinctiveness will transfer to the goods specified in the application when the mark is used in connection with them." *Id.* at 1333. It may show that the same mark has acquired distinctiveness in three ways:

(i) ownership of a prior registration for the same mark for related goods or services, (ii) a prima facie claim of acquired distinctiveness based on five years use of the same mark with related goods or services or (iii) actual evidence of acquired distinctiveness for the same mark with respect to the other goods or services.

Id. at 1333 (citing *In re Binion*, 93 USPQ2d 1531, 1538 (TTAB 2009) and TMEP § 1212.09(a)).

These three modes of proof track Trademark Rule 2.41, which sets forth ways of proving distinctiveness under Section 2(f). 37 C.F.R. § 2.41(a). The first mode is ownership of one or more active prior registrations for the same mark on the Principal Register. 37 C.F.R. § 2.41(a)(1). Applicant claims that its mark in Registration No. 5677108 for:

THE ORIGINAL PICKLE SHOT is the “same mark” as PICKLESHOT for acquired distinctiveness purposes. Applicant argues that any distinctiveness that Applicant’s mark ‘The Original Pickle Shot’ might possess as applied to distilled spirits [in prior registration] would more than likely carry over to its additional products in the same product line.⁵⁹

As the Examining Attorney correctly notes, however, there are several problems with this claim.

First, the prior registration must be on the **Principal** Register. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001) (“...Trademark Rule 2.41(b) provides that ‘[i]n appropriate cases, ownership of one or more prior registrations on the Principal Register or under the Act of 1905 of the same mark may be accepted as prima facie evidence of distinctiveness.”). Applicant’s registration is on the Supplemental Register, which simply means that the mark, as a whole, is “capable of distinguishing applicant’s goods.” 15 U.S.C. § 1091(a). “[A] party may not base a claim of acquired distinctiveness under Section 2(f) of the Trademark Act on ownership of a registration issued on the Supplemental Register.” *In re SnoWizard, Inc.*, 129 USPQ2d 1001, 1005 n.10 (TTAB 2018).

Second, as noted, Applicant’s Supplemental Register registration for THE ORIGINAL PICKLE SHOT disclaims “PICKLE SHOT.” That tacitly concedes that the disclaimed term is incapable of distinguishing Applicant’s goods. *In re the Consumer Prot. Firm*, 2021 USPQ2d 238, at *23-24.

And third, PICKLESHOT is not the “same mark” as THE ORIGINAL PICKLE SHOT. A proposed mark is the ‘same mark’ as a previously-registered mark under

⁵⁹ Applicant’s reply brief, 12 TTABVUE 9.

Trademark Rule 2.41(a)(1) if it is the ‘legal equivalent’ of that mark—that is, if it creates the same, continuing commercial impression such that relevant consumers would consider them both the same mark. *In re Dial-A-Mattress*, 57 USPQ2d at 1812 quoted in *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1273-74 (TTAB 2016). Under this standard, two marks can be very similar, yet still not be the “same mark.” *E.g.*, *In re Binion*, 93 USPQ2d 1531, 1539 (TTAB 2009) (finding BINION and BINION’S are not the legal equivalents of the registered marks JACK BINION and JACK BINION’S); *In re Nielsen Bus. Media, Inc.*, 93 USPQ2d 1545, 1547-48 (TTAB 2010) (finding THE BOLLYWOOD REPORTER is not the legal equivalent of the registered mark THE HOLLYWOOD REPORTER). *See generally* TMEP §1212.04(a). By this exacting standard, PICKLESHOT is not the legal equivalent of THE ORIGINAL PICKLE SHOT.

Consequently, Applicant’s Supplemental Register registration does not prove the acquired distinctiveness of its applied-for mark, PICKLESHOT.

There is some dispute about whether the other two ways of showing acquired distinctiveness set forth in Trademark Rule 2.41(a) (2) and (3) apply to intent-to-use applications. *See In re Olin*, 124 USPQ2d at 1340 (Lykos, concurring). Because Applicant has raised arguments under these provisions, we address them in turn.

Trademark Rule 2.41(a)(2) provides that:

In appropriate cases, if a trademark or service mark is said to have become distinctive of the applicant’s goods or services by reason of the applicant’s substantially exclusive and continuous use of the mark in commerce for the five years before the date on which the claim of distinctiveness is made, a showing by way of verified statements in the application may be accepted as prima facie evidence of distinctiveness; however, further evidence may be required.

37 C.F.R. § 2.41(a).

This rule tracks the statutory language in Section 2(f), which provides that:

The Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made.

15 U.S.C. § 1052(f).

Under this provision, Applicant adduces the declaration of one of its principals, Brittney Acita, who declares that “[t]he mark has become distinctive of the goods through the applicant’s substantially exclusive and continuous use in commerce for at least the five years immediately before the date of this statement.”⁶⁰

Her declaration, however, is unavailing for several reasons. To begin with, her claim of “substantially exclusive” use of the term is conclusory and contradicted by the evidence. *See In re MK Diamond Prods., Inc.*, 2020 USPQ2d 10882, *23-24 (TTAB 2020).⁶¹ As the record evidence shows, this term is used by numerous third-party bars and restaurants. *See In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (“The examples of use of the phrase by others in its descriptive form support the board’s conclusion that the mark had not acquired distinctiveness.”); *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 222 USPQ 939, 940-41 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one

⁶⁰ Brittney Acita declaration, dated Dec. 5, 2019, Applicant’s Dec. 9, 2019 Response to Office Action at 19.

⁶¹ The declaration is also inappropriate and incongruous for an intent-to-use application under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), as it appears to claim use in commerce of the applied-for mark on the goods identified in the application—all of which would be more appropriate for a use-based application under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

(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.”).

Due to this common, highly descriptive usage, “consumers are likely to perceive the term not as a trademark for one company, but rather as common terminology used by different entities in the industry to describe those goods.” *Apollo Medical Extrusion Technologies, Inc. v. Medical Extrusion Technologies, Inc.*, 123 USPQ2d 1844, 1854 (TTAB 2017). Thus, even a longer passage of time could fail to establish secondary meaning in one source. *See, e.g., Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1766 (TTAB 2013) (finding 21 years of continuous use alone insufficient to establish acquired distinctiveness of highly descriptive phrase ANNAPOLIS TOURS). Hence, the Acita declaration fails to establish acquired distinctiveness; further evidence is required. Trademark Rule 2.41(a)(2), 37 C.F.R. § 2.41(a)(2).

Trademark Rule 2.41(a)(3) provides an opportunity to adduce such further evidence in the form of:

...verified statements, depositions, or other appropriate evidence showing duration, extent, and nature of the use in commerce and advertising expenditures in connection therewith (identifying types of media and attaching typical advertisements), and verified statements, letters or statements from the trade or public, or both, or other appropriate evidence of distinctiveness.

37 C.F.R. § 2.41(a)(3).

Applicant claims that:

Since 1989, the Applicant has aggressively promoted the “PICKLESHOT” name and its product through a wide variety of advertising techniques,

including in regional and national newspapers and business magazines, and on the Internet.

...

In addition, Pickles Pub is the originator and creator of the “Pickle Shot”.

...

There have been numerous stories about pickles pub and its “PICKLESHOT” that have appeared in various publications with diverse readership. For example:

- Pickles Pub “PICKLESHOT” was highlighted in an article published on Ocean City Today.
- Delmarvanow published an article detailing Pickles Pub’s “infamous” PICKLESHOT.⁶²

This “further evidence,” such as it is, fails to show acquired distinctiveness under Trademark Rule 2.41(a)(3). Applicant offers no evidence of advertising expenditures, a paltry two articles from regional publications, DelmarvaNow.com⁶³ and OceanCityToday.com,⁶⁴ no survey results, and no third-party affidavits or declarations to support its claim. And it gains no support from the Acita declaration, which provides no specifics to support its assertions. *See In re Olin*, 124 USPQ2d at 1338 (“Applicant introduced no evidence of, for example, advertising expenditures, exclusivity of use, media coverage, survey results, or third-party affidavits asserting source-indicating recognition.”).

Applicant’s assertion that it is the originator and creator of “pickle shot” “does not negate the highly descriptive nature of the wording or suffice to establish acquired distinctiveness in this case.” *Apollo Medical Extrusion Technologies v. Medical*

⁶² Applicant’s brief, 9 TTABVUE 10-11.

⁶³ DelmarvaNow.com Sept. 12, 2018, accessed Dec. 6, 2019, Dec. 9, 2019 Response to Office Action at 24-26.

⁶⁴ OceanCityToday.com, Sept. 21, 2018, accessed Dec. 6, 2019, Dec. 9, 2019 Response to Office Action at 27-29.

Extrusion Technologies, 123 USPQ2d at 1854. *See also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (trademark law does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it first”).

Moreover, the third-party evidence shows other bars or restaurants claiming their own pickle shots as “original,” or “infamous”:

- “The Austin import’s claim to boozy fame is its pickle shot...”⁶⁵
- “Each location has unique drink menus and, of course, the infamous pickle shots.”⁶⁶
- “HiTones prides itself in being the home of the original Pickle and Chamoy shots.”⁶⁷

As the evidence demonstrates, third-party competitors use the term “pickle shot” across the country—from Baltimore, Maryland to Denver, Colorado, from Austin, Texas to Phoenix, Arizona. Given this demonstrable lack of substantial exclusivity, it is apparent that Applicant has not and cannot carry its heavy burden of proving acquired distinctiveness. *In re Olin*, 124 USPQ2d at 1335. “[D]escriptive terms are in the public domain and should be free for use by all who can truthfully employ them to describe their goods. *See Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543-44 ... (1920).” *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001). That adage holds true here.

⁶⁵ TheDallasDiva.com/the-pickle-shot-at-kung-fu-saloon, 7/12/2019, July 12, 2019 Office Action at 11.

⁶⁶ VenueBlog.tripleSeat.com, 11/2/2020, Nov. 2, 2020 Office Action at 72.

⁶⁷ HiTonesSA.com, 7/12/2019, July 12, 2019 Office Action at 12.

III. Conclusion

Applicant's designation, PICKLESHOT, is not a mark "by which the goods of the applicant may be distinguished from the goods of others...." 15 U.S.C. § 1052.

Decision: For the foregoing reasons, the refusal to register Applicant's applied-for mark PICKLESHOT is affirmed on the grounds of genericness and, in the alternative, mere descriptiveness without acquired distinctiveness.