

This Opinion is Not a
Precedent of the TTAB

Mailed: September 27, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re David Alpan DDS MSD Ltd.
—

Serial No. 90078211
—

Justin Cross of HamiltonCross, LLP,
for David Alpan DDS MSD Ltd.

Andrea Saunders, Trademark Examining Attorney, Law Office 117,
Cynthia Tripi, Managing Attorney.

—
Before Lykos, Adlin, and Dunn,
Administrative Trademark Judges.

Opinion by Dunn, Administrative Trademark Judge:

David Alpan DDS MSD Ltd. (Applicant) seeks registration on the Principal Register, with a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), of the mark AESTHETIC ORTHODONTICS (in standard characters, ORTHODONTICS disclaimed) for “Orthodontic services” in International Class 44.¹ The application as filed included the statement that the mark has become

¹ Application Serial No. 90078211 filed on July 28, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as May 15, 1999, and its claim of acquired distinctiveness.

distinctive of the services through the applicant's substantially exclusive and continuous use of the mark in commerce for at least the five years prior to the statement.

The Trademark Examining Attorney refused registration of Applicant's proposed mark AESTHETIC ORTHODONTICS on the ground that it is generic as applied to the orthodontic services under Trademark Sections 1, 2, 3, and 45, 15 U.S.C. §§ 15 U.S.C. §§1051, 1052, 1053, and 1127, and, in the alternative, merely descriptive without sufficient evidence of acquired distinctiveness to support registration under Trademark Act Sections 2(e)(1), (f), and 45; 15 U.S.C. §§ 1052(e)(1), (f), and 1127.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Issues

Applicant objects to consideration of third-party orthodontists' websites as not competent to demonstrate the perception of orthodontics clients "because [the websites] function to be searchable rather than to provide human understanding."² Applicant offers no legal authority to support this objection. Whether or not they are also searchable or informative, the websites are offered to demonstrate how orthodontics clients encounter the term "aesthetic orthodontics," and are competent for that purpose. See *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1048 (Fed. Cir. 2018) ("evidence of competitive use, evidence that other

² 9 TTABVue 9.

companies use ZERO in combination with their own soft drink marks” considered competent evidence of consumer perception). The objection is overruled.

Applicant also objects to consideration of articles in foreign medical journals and the webpages of foreign orthodontists as not demonstrating the perception of the relevant (United States) public.³ Information originating on foreign websites or in foreign news publications that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007). The probative value, if any, of foreign information sources must be evaluated on a case-by-case basis. *Id.* Here, the Examining Attorney fails to explain how the evidence from foreign sources is relevant to U.S. consumers of orthodontic services. The objection is sustained.

II. Genericness

A proposed mark is generic if it refers to the class or category of goods and/or services on or in connection with which it is used. *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001) (citing *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986)(“*Marvin Ginn*”). Such a term can never attain trademark status because “[t]o allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold ... would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1634 (Fed. Cir. 2016); *In re Merrill Lynch, Pierce, Fenner, and*

³ 9 TTABVUE 11, 12, 14, 16, 18,

Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) *quoted in Dial-A-Mattress*, 57 USPQ2d at 1810.

Whether a particular term is generic is a question of fact. *In re Hotels.com LP*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009). Resolution of that question depends on the primary significance of the term to the relevant public. “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *Marvin Ginn*, 228 USPQ at 530). An inquiry into the public’s understanding of a mark requires consideration of the mark as a whole. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005).

The genericness inquiry is a two-part test: “First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (quoting *Marvin Ginn*, 228 USPQ at 530); *see Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1483 (TTAB 2017).

A. Genus

“[A] proper genericness inquiry focuses on the description of services set forth in the [application or] certificate of registration.” *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991). In this case, the recitation of services is

“orthodontic services,” and we find the recitation of services in the application to be an adequate definition of the genus at issue. Applicant and the Examining Attorney agreed during examination and briefing that the genus encompasses the sub-genus of “orthodontic services for cosmetic or beauty purposes” as opposed to “orthodontics for functional purposes.”⁴ See *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1043 (Fed. Cir. 2018) (“the Board found that the proper genus of the goods is ‘the broad category of soft drinks (and sports and energy drinks), which encompasses the narrower category of soft drinks (and sports and energy drinks) containing minimal or no calories.’”); *In re Cordua Rests., Inc.*, 118 USPQ2d at 1638 (“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.”).

B. Public Perception of the proposed mark AESTHETIC ORTHODONTICS

We next determine whether the relevant public understands the proposed mark AESTHETIC ORTHODONTICS primarily to refer to “orthodontic services for cosmetic or beauty purposes.” The relevant public for a genericness determination refers to the purchasing or consuming public for the identified goods or services. *Magic Wand Inc. v. RDB Inc.*, 19 USPQ2d at 1553; *In re James Haden, MD, PA*, 2019 USPQ2d 467424, *2 (TTAB 2019). Here, the relevant public consists of the general public who seek orthodontic services for cosmetic or beauty purposes.

⁴ 9 TTABVUE 8; 11 TTABVUE 7.

Evidence of the relevant public's understanding of the designation may be obtained from any competent source. *In re Cordua Rests., Inc.*, 118 USPQ2d at 1634. Competent sources may include purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers, and other publications. *In re Merrill Lynch, Fenner, and Smith*, 4 USPQ2d at 1143; *In re Virtual Independent Paralegals, LLC*, 2019 USPQ2d 111512, at *2 (TTAB 2019). Evidence that competitors have used particular words as the name of their goods or services is persuasive evidence that those words would be perceived by purchasers as a generic designation for the goods or services. See *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 35 USPQ2d 1554, 1558 (Fed. Cir. 1995) ("The cases have recognized that competitor use is evidence of genericness."); *In re Hikari Sales USA, Inc.*, 2019 USPQ2d 111514, at *9 (TTAB 2019) ("We find probative the generic uses of the term 'algae wafers' by competitors."); *In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010) ("examples of competitors and commentators using the term NAND drive as a category or type of product is persuasive evidence that the relevant consumers perceive the term as generic"). Applicant's own specimens and promotional materials are also competent sources to show genericness. See *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987); *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1958 (TTAB 2018).

The terms AESTHETIC and ORTHODONTIC are defined as follows:⁵

⁵ February 24, 2021 Office Action TSDR 9-24, citing *Merriam-Webster* online dictionary. Applicant requests that the Board take judicial notice of the definitions. 9 TTABVUE 23-25.

AESTHETIC

adjective

variants: *also* **US esthetic or aesthetical or US esthetical**

1a: of, relating to, or dealing with aesthetics or the beautiful

b: ARTISTIC

c: pleasing in appearance: ATTRACTIVE...

2: appreciative of, responsive to, or zealous about the beautiful *also:* responsive to or appreciative of what is pleasurable to the senses

3: done or made to improve a person's appearance or to correct defects in a person's appearance

noun

1: aesthetics: a branch of philosophy dealing with the nature of beauty, art, and taste and with the creation and appreciation of beauty

2: a particular theory or conception of beauty or art: a particular taste for or approach to what is pleasing to the senses and especially sight

3: aesthetics also esthetics plural: a pleasing appearance or effect: BEAUTY

ORTHODONTICS

noun

1: a branch of dentistry dealing with irregularities of the teeth (such as malocclusion) and their correction (as by braces)

There is no question that the term ORTHODONTICS, which appears in the recitation of services, is generic as applied to orthodontic services. *In re Johanna Farms, Inc.*, 222 USPQ 607, 609 (TTAB 1984) (“The term ‘yogurt’ is concededly the name of the goods. That fact is uncontrovertible where, as here, the same term has been used in the identification of goods for which registration is sought.”). Moreover, Applicant disclaimed ORTHODONTICS in its application, and because the registration is sought under Section 2(f), this constitutes a concession that the term is generic. *See, e.g., Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107

It is not clear why Applicant made the request, which is denied as moot. Applicant's brief refers to the same definitions that the Examining Attorney placed in the record.

USPQ2d 1750, 1762 (TTAB 2013) (“respondent’s disclaimer of the individual word TOURS in its Section 2(f) registration constitutes a tacit admission that this individual term is generic for the identified services), *aff’d*, 565 F. App’x 900 (Fed. Cir. 2014).

The question we address is whether the proposed mark “aesthetic orthodontics,” when considered as a whole, is perceived as naming “orthodontic services,” or a sub-genus thereof (such as orthodontics for cosmetic purposes). The record includes examples of usage of “aesthetic orthodontics” from: (i) website advertisements of orthodontists; (ii) lectures and articles directed to orthodontic professionals and clients; and (iii) Applicant’s uses:

(i) orthodontist advertisements

Legacy Dental
A Caring Positive Experience
Invisible Smile Alterations: The New Age of **Aesthetic Orthodontics**

...

However, orthodontics does not only mean the clunky metal braces that most people think it does. Nowadays, orthodontic technology has advanced, yielding more **aesthetic orthodontic** options.⁶

Buccieri Orthodontics
Dr Heather Buccieri

...

Specializing in quality, **aesthetic orthodontics** is what we do, and it is all we do. ... Buccieri Orthodontics wants to welcome you and your family to our practice, where **aesthetic orthodontic** care is provided with the highest level of specialty training available and delivered using the latest technological advances to achieve exceptional results. ...Your orthodontic experience may include:

Clear Braces
Invisalign clear aligners for teens and adults⁷

⁶ September 9, 2020 Office Action TSDR 19-20.

⁷ September 9, 2020 Office Action TSDR 42-43, 45.

L. Sean Mullins Orthodontics

...

**AESTHETIC ORTHODONTIC TREATMENT WITH CLARITY™
ADVANCED**

Aesthetic orthodontic treatment options are one of our claims to fame, and we have put together an ultra-**aesthetic** treatment option with traditional braces that works great for patients who are not candidates for Invisalign®. ... While we do offer traditional metal braces, we have a better, more up-to-date option with Clarity Advanced **aesthetic** braces. Clarity Advanced braces work as well as traditional metal braces but have the advantage of outstanding **aesthetics**.⁸

Tisseront Orthodontics

...

Tisseront Orthodontics stands out as an excellent provider of **aesthetic orthodontics**. ... Our trusted oral health specialists are trained in **aesthetic orthodontic** procedures like Invisalign and lingual braces, ensuring your smile isn't hidden. ... Tisseront Orthodontics in Reston, VA specializes in **aesthetic orthodontics** (lingual braces, Invisalign, and clear braces) for both children and adults.⁹

Kunik Orthodontics

For more than 25 years Dr Kunik has practiced **aesthetic orthodontics** in the Austin area with over 17,000 orthodontic cases completed, our practice has the experience to deliver the most comfortable and timely Invisalign® treatment possible.¹⁰

Ora R. Canter, DDS
Orthodontics

... Our orthodontic services include:

Aesthetic Orthodontics

- Clear Brackets
- Invisalign teen
- Invisalign
- Self-Litigating Braces¹¹

Aesthetic Orthodontic Care, PC

⁸ September 9, 2020 Office Action TSDR 47-48.

⁹ February 24, 2021 Office Action TSDR 55-57.

¹⁰ February 24, 2021 Office Action TSDR 61.

¹¹ February 24, 2021 Office Action TSDR 65-66.

Dr. Johanna Jenkins, DDS

...

Dr. Jenkins and her the staff at **Aesthetic Orthodontic Care** [have] two convenient locations in North Metro Atlanta, offering several different orthodontic braces options to give you the perfect smile without the obvious metal showing. Clear braces are one example. These braces use brackets that are tooth colored to hold the wire and move your teeth. Invisalign braces, many [times] referred to as “invisible braces” use a series of clear plastic trays to move and straighten your teeth.¹²

Claudia Torok DDS, MS

Orthodontics & Dentofacial Orthopedics Specialist

Aesthetic Orthodontics

Facially driven, **aesthetic orthodontics** can transform your smile while boosting your confidence and self-esteem. At Torok Orthodontics, the caring team proudly offers **aesthetic orthodontics** at two convenient locations in Santa Monica and the Westchester neighborhood of Los Angeles, California. ...

Aesthetic Orthodontics Q & A

What is aesthetic orthodontics?

Aesthetic orthodontics refers to facially driven treatments that complement your unique lifestyle and facial structure.

Are there different types of **aesthetic orthodontics**?

Torok Orthodontics offers several types of **aesthetic orthodontics**, including ... Lingual braces ... Aesthetic braces ... Temporary anchorage devices (TAOs) ... Clear aligners ... Minimally invasive surgery ...

What type of **aesthetic orthodontics** treatment is right for me?

Only a qualified orthodontist can determine the **aesthetic orthodontics** treatment that’s right for you. ... To schedule your **aesthetic orthodontics** appointment at Torok Orthodontics.¹³

Dr. Mark Weinberg

Orthodontist

...

Dr. Mark Weinberg can create the smile you’ve always wanted, with **aesthetic orthodontics** for adults. ... Dr. Weinberg’s **aesthetic orthodontics** for adults includes: Invisalign ... ceramic braces...¹⁴

Ora Dentistry

...

¹² September 9, 2020 Office Action TSDR 11-13.

¹³ February 24, 2021 Office Action TSDR 44-46.

¹⁴ February 24, 2021 Office Action TSDR 47.

At Ora Dentistry, we offer **aesthetic orthodontics** that are discrete and effective to improve the beauty and health of your smile. ... Most people, both adults and teens, do not relish the thought of wearing metal braces that are extremely noticeable. Instead, we offer clear aligners that can fix your dental issues without gleaming metal every time you smile.¹⁵

Safari Dental & Orthodontics

Our doctors at Safari Dental are pleased to offer clear braces for a more discreet, **aesthetic orthodontic** option. ... We are pleased to offer clear braces to help you more **aesthetically** achieve the straight, healthy smile you deserve.¹⁶

ii. lectures and articles

Course: **Aesthetic Orthodontics** with Symetri

This webinar reviews the fundamentals of Straight-Wire Mechanics including appliance selection and proper bracket placement. ... Particular attention will be given to achieving successful and predictable ceramic bracket removal. ...

Presentation: Dr. Mark Coreil¹⁷

UT Health San Antonio Continuing Dental Education

POSTPONED: Contemporary **Aesthetic** Treatment Options: An Overview of Self-Ligating Aesthetic Bracket Systems & A Review of Early Orthodontic Treatment Indications

Lecture Course May 31, 2019

Course overview

AESTHETIC BRACKET SYSTEMS

We are confronted to be familiar with these new **orthodontic aesthetic treatment options** in order to be able to fulfill market demands

- An increasing interest for non-traditional **aesthetic orthodontics** in both adults & teenagers
- to improve facial **aesthetics** & quality of life
- 1 in 5 people in orthodontic care is an adult, up 60% from 10 years ago¹⁸

Health & Wellness Magazine

South Palm Beach edition

Aesthetic Orthodontic Treatment: It's Hidden!

¹⁵ February 24, 2021 Office Action TSDR 49-50.

¹⁶ February 24, 2021 Office Action TSDR 81.

¹⁷ September 9, 2020 Office Action TSDR 61-62.

¹⁸ February 24, 2021 Office Action TSDR 38.

... Most patients treated with metallic or silver braces can now be treated with a variety of less noticeable alternatives, for example, ceramic braces, lingual braces and clear aligners.¹⁹

Decisions in Dentistry, January 2019
The Journal of Multidisciplinary Care
Esthetic Orthodontic Treatment

Clear aligner therapy and lingually positioned appliances present **esthetic** alternatives to orthodontic treatment with traditional braces....

There is a great demand for **esthetic orthodontic** approaches to achieve tooth movement and bite correction, particularly now that adults constitute approximately one-half of orthodontic patients.²⁰

Dentistry Today

An Aesthetic Orthodontic Treatment Option: Fabrication and Applications

... Another development in this area, the Clear Aligner, can also move the teeth easily without braces. Because it is transparent and removable, patients of all ages can use it, especially if they want **an aesthetic orthodontic** option.²¹

describes some of the effective solutions to these problems that will not impair the patient from an aesthetic point of view during the treatment phase.²²

(iii) Applicant's uses

Applicant's specimen of use states:²³

A Prettier Smile.

A More Confident You.

Braces have come a long way ... they're more comfortable, more efficient, and less noticeable – some are even invisible! Just ask Dr. David Alpan of **Aesthetic Orthodontics**. He offers new ways to straighter teeth like these: Invisalign, a series of clear, removable plastic aligners...

¹⁹ September 9, 2020 Office Action TSDR 79-81.

²⁰ September 9, 2020 Office Action TSDR 24, 26. As set forth earlier, the dictionary definition defines “esthetic” as a variant of “aesthetic.” We find that the variant spelling does not create a different commercial impression but will be recognized as “aesthetic.” *Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711 (Fed. Cir. 1997) (The designation “is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law, and the registrations are therefore invalid.”).

²¹ February 24, 2021 Office Action TSDR 68.

²² September 9, 2020 Office Action TSDR 7.

²³ July 28, 2020 Application.

Half clear and half metal, [Damon 3 brackets] are less noticeable than regular braces...

Using robotic technology, custom made brackets and wires are made to fit on the tongue (lingual) side of your teeth so they are hidden.

Want to make a Fashion Statement? Dr. David can give you gold braces, mini stainless steel braces, or invisible braces (braces or Invisilign).

A press release for Applicant states:²⁴

LAS VEGAS, NEVADA- Dr David Alpan offers Incognito Hidden Braces, the kind that go on the back of the teeth, for adults and teenagers ... The number one reason patients like Incognito is their **aesthetic** characteristics. Since they go on the tongue side, or back side, of the teeth, they are virtually invisible to others.

An online advertisement for Applicant states:²⁵

Alpan Orthodontics of Beverly Hills is committed to creating healthy balanced teeth, bites and to improve facial **aesthetics**.

This evidence more than amply shows that the relevant public perceives Applicant's proposed mark AESTHETIC ORTHODONTICS primarily to refer to orthodontic services for cosmetic purposes.

Applicant argues that these examples of the use of the term "aesthetic orthodontics" in the orthodontics industry either do not indicate clearly what is meant, or do not show generic use of the term for services, but for goods.²⁶ We disagree.²⁷ Both the trade articles devoted to orthodontists and the general articles geared to consumers make clear that the term "aesthetic orthodontics" is readily

²⁴ February 24, 2021 Office Action TSDR 30.

²⁵ February 24, 2021 Office Action TSDR 34.

²⁶ 9 TTABVUE 10, 19-20.

²⁷ We disagree as to the cited evidence. There are a few examples of use of the term AESTHETIC ORTHODONTICS in the record which are not accompanied by enough information to determine how the term would be perceived, and so we did not include them.

understood as a type of orthodontics addressing concerns about how an orthodontic patient looks.

In addition, where an orthodontist's website lists "Aesthetic Orthodontics" and then the different available orthodontic methods (ceramic braces, lingual braces and clear aligners), the orthodontist is explaining the different tools used in performing aesthetic orthodontics services. While the examples show that new straightening tools are integral to offering aesthetic orthodontics, the examples also make clear that the "treatment," "options," "care," "technology," and "procedures" of aesthetic orthodontics refer to the expert action, requiring specialty training, in applying the new straightening tools to each client.

Despite Applicant's argument to the contrary, this is not a "mixed record" case.²⁸ Applicant merely argues that the evidence is "mixed" because Applicant construes it as indicating that there are "aesthetic orthodontics" devices as well as "aesthetic orthodontics" services. This is not what is meant by a "mixed record" for assessing genericness. If the evidence of record, when viewed in its totality, constitutes a mixed use of a term as both the generic name of the services and as a source indicator for such services, then such evidence would not demonstrate that the primary significance of the term is the generic name of the services. *See In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). Here, the record does not include third party uses as a service mark.

²⁸ 9 TTABVUE 10, 29.

Applicant also argues that the evidence is not direct proof of consumer perception because the evidence is created by or for orthodontists; and there is no proof that orthodontic clients use the phrase “aesthetic orthodontics.” Applicant submits a lengthy printout showing no results from a search for the term “aesthetic orthodontics” on the ArchWired.com Metal Mouth Message Board, and contends that this constitutes direct evidence that the relevant public does not perceive the term AESTHETIC ORTHODONTICS as the generic term for a sub-genus of orthodontic services.²⁹ We are not convinced that the members of a group self-described as “metal mouth” are the relevant consumers of orthodontic services for cosmetic purposes. Their choice of name indicates they are likely consumers of conventional orthodontic services using metal, i.e. visible, braces. Moreover, the consumer choice not to use a term when posting messages is not the same as having no perception of the term when it is employed by the provider of the services identified by the term. As indicated above, the use by competitors of a term is competent evidence that the term is generic. *Royal Crown Co. v. Coca-Cola Co., supra.*

We are not persuaded by Applicant’s argument that, even if the term was generic for orthodontic services for cosmetic purposes, Applicant’s services are not limited to those services and so the term is not generic as applied to its non-cosmetic orthodontic services.³⁰ As discussed, orthodontic services for cosmetic purposes are encompassed by the more general orthodontic services listed in Applicant’s recitation of services.

²⁹ February 2, 2021 Response TSDR 14-68.

³⁰ 9 TTABVUE 21.

In corroboration, we note that, as set forth above, Applicant's own uses of AESTHETIC ORTHODONTICS advertise that the teeth straightening will be "less noticeable," "hidden," and "invisible."

In view of the evidence of record, we find that the Examining Attorney has carried her burden of demonstrating that members of the relevant public primarily understand "aesthetic orthodontics" to refer to the identified "orthodontic services," including orthodontic services for cosmetic purposes. *See In re Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) ([T]his term is generic and should be freely available for use by competitors.).

The refusal of registration on the ground that the proposed mark AESTHETIC ORTHODONTICS is generic as applied to Applicant's services is affirmed.

III. Descriptiveness and Acquired Distinctiveness

A. Descriptiveness

As set forth earlier, Applicant seeks registration under Section 2(f), with a disclaimer of ORTHODONTICS. A claim of distinctiveness under Section 2(f), whether made in the application as filed or in a subsequent amendment, is construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. *See Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive.");

Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (“Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of distinctiveness as an established fact.”). Applicant did not assert this claim in the alternative. Accordingly, we need not further address Applicant’s assertions in its brief³¹ that the mark AESTHETIC ORTHODONTICS is not merely descriptive of “orthodontic services.”

B. Acquired Distinctiveness

In general, to establish that a term has acquired distinctiveness, an applicant must show that in the minds of the public, the primary significance of the term is to identify the source of the service rather than the service itself. *In re La. Fish Fry Prods., Ltd.*, 116 USPQ2d at 1265 (Fed. Cir. 2015). In determining whether an applicant has demonstrated acquired distinctiveness of a proposed mark for its services, the Board examines the evidence of record, including any evidence of advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, or consumer studies. No single fact is determinative. *In re Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009).

Typically, more evidence is required where a mark is so highly descriptive that purchasers seeing the matter in relation to the named goods or services would be unlikely to believe that it indicates source in any one entity. *Id.* See also *Royal Crown*,

³¹ 9 TTABVUE 4, 25-27. Applicant cites no legal authority for its request (9 TTABVUE 30) that the Section 2(f) claim should not bar argument that the mark is not merely descriptive, plus Applicant made its argument. The argument is unavailing in view of the record evidence that the term AESTHETIC ORTHODONTICS is generic or, in the alternative, highly descriptive of Applicant’s orthodontic services.

127 USPQ2d at 1047. In view of the evidence summarized above that many competing orthodontists use the term AESTHETIC ORTHODONTICS to name their orthodontic services for cosmetic purposes, we find the term highly descriptive of the identified services. *See e.g., In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869 , at *3 (TTAB 2020) (third-party uses of the terms “guaranteed rate,” “guaranteed mortgage rate,” and “guaranteed interest rate” established GUARANTEED RATE is highly descriptive of mortgage-related services).

In support of its claim of acquired distinctiveness, the record includes Applicant’s declaration that accompanied its application averring “The mark has become distinctive of the goods/services through the applicant’s substantially exclusive and continuous use of the mark in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.” The record also includes photographs of AESTHETIC ORTHODONTICS signage on a building, and eleven sample advertisements for Applicant’s services, submitted with Applicant’s response to the refusal.³²

The majority of the advertisements are undated and bear no indicia that they ever were published.³³ The few that indicate publication in “LA STYLE special advertising section,” “Glitter,” “Los Angeles Golfer’s Directory,” and “Los Angeles” lack

³² February 2, 2021 Response TSDR 69-82.

³³ February 2, 2021 Response TSDR 74, 77-82.

information on the size of the audience for the publication.³⁴ For these reasons we can accord the advertisements little probative value in proving acquired distinctiveness.

With respect to the declaration, we agree with the Examining Attorney³⁵ that the evidence of record shows that Applicant's use has not been "substantially exclusive," as the term AESTHETIC ORTHODONTICS is used by several orthodontists offering the identical orthodontic services, including orthodontics for cosmetic purposes. *In re La. Fish Fry Prods., Ltd.*, 116 USPQ2d at 1265 ("Particularly for a mark that is as highly descriptive like FISH FRY PRODUCTS, the Board was within its discretion not to accept Louisiana Fish Fry's alleged five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness."); *Ayoub, Inc. v. ACS Ayoub Carpet Serv.*, 118 USPQ2d 1392, 1404 (TTAB 2016) (finding that, because of widespread third party uses of the surname Ayoub in connection with rug, carpet and flooring businesses, applicant's use of the applied-for mark, AYOUB, was not "substantially exclusive" and thus the mark had not acquired distinctiveness in connection with applicant's identified carpet and rug services).

Otherwise Applicant's showing of acquired distinctiveness consists of mere unsupported attorney argument in its brief regarding its use of the mark for over 22 years; sales success involving "hundreds and hundreds" of patients, and advertising expenditures exceeding \$200,000 over the years the term was in use.³⁶ Such

³⁴ February 2, 2021 Response TSDR 71, 72-73, 75, 76.

³⁵ 11 TTABVUE 20-21.

³⁶ This number conflicts with the prior unsupported assertion that Applicant spent well over \$50,000 on advertising expenditures over 22 years. February 2, 2021 Response TSDR 13.

unsupported statements fall far short of the showing required of a party asserting acquired distinctiveness, and fail to rebut the evidence showing the term AESTHETIC ORTHODONTICS is at best highly descriptive of “orthodontic services.”

Accordingly, we find that Applicant has failed to demonstrate that its applied-for mark has acquired distinctiveness under Section 2(f) of the Act.

IV. Decision

The refusal to register Applicant’s proposed mark AESTHETIC ORTHODONTICS on the ground of genericness is affirmed, as is the alternative refusal on the ground of mere descriptiveness and an insufficient showing of acquired distinctiveness.