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Sent: 7/22/2015 8:41:59 PM

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Subject: U.S. TRADEMARK APPLICATION NO. 85365741 - TABATA BOOTCAMP - 421542.10171 -  
EXAMINER BRIEF

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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85365741

MARK: TABATA BOOTCAMP



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: SAVVIER, LP

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

421542.10171

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## **EXAMINING ATTORNEY'S APPEAL BRIEF**

### **STATEMENT OF THE ISSUES**

The first issue on appeal is whether the applicant's proposed mark, TABATA BOOTCAMP,<sup>1</sup> is generic in relation to applicant's high intensity physical fitness training services specifically featuring a type of fitness training known as "tabata."

The second issue on appeal is whether the applicant's Section 2(f) claim is valid and sufficient given the highly descriptive significance of the wording in the mark.<sup>2</sup>

The third issue on appeal is whether applicant's specimen of use shows the mark in use in commerce for the identified services given that it does not reference or suggest the services.<sup>3</sup>

### **STATEMENT OF THE FACTS**

On July 7, 2011, applicant Savvier, LP applied for registration of the mark TABATA BOOTCAMP on the Principal Register in standard character form, with no disclaimer, for: *"[e]ducational services namely, conducting live classroom and on-line seminars and workshops for introducing professional fitness instructors to training protocols in the field of fitness."*

On October 26, 2011, the examining attorney refused registration in accordance with Trademark Act Section 2(e)(1) on the grounds that the applied-for mark merely describes applicant's services.<sup>4</sup> On February 7, 2012, the applicant filed an amendment to allege use and a response to the Office action, disclaiming exclusive rights to the term "boot camp" and requesting an amendment of the application to seek registration on the Supplemental Register.

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<sup>1</sup> Although most dictionaries indicate that the word "boot camp" is correctly spelled as two words, the mark and much of the third party use reflected in the evidence or record shows this wording spelled as one word, i.e., "bootcamp."

<sup>2</sup> Since no amount of purported proof that a generic term has acquired secondary meaning can transform that term into a registrable trademark or service mark, this issue is rendered moot if the Board finds that the mark is generic for applicant's type of physical fitness training services.

<sup>3</sup> Registration was also refused on the grounds that the wording in applicant's proposed mark is merely informational because it constitutes a common term that is widely used in the marketplace and by those in applicant's industry to refer merely to the subject matter of the services. Since the vast majority of the evidence of record predominantly reflects generic use, this refusal is subsumed by the other refusals and is hereby withdrawn.

<sup>4</sup> A refusal in the alternative under Trademark Act Section 2(a) and a related requirement for consent were subsequently withdrawn when it became clearer from the evidence that the primary significance of the term "tabata" was as a reference to a specific type of physical fitness training.

On April 10, 2012, the examining attorney refused registration on the Supplemental Register on the grounds that the mark is generic for applicant's named services. On October 10, 2012, the applicant responded to the Office action, acknowledging that the term "'Tabata' is generic" but claiming that "bootcamp" is merely descriptive of its services.<sup>5</sup>

On November 13, 2012, the examining attorney issued a final Office action. On May 13, 2013, applicant filed an appeal and a request for reconsideration in which applicant objected to the manner in which the Office's computer system attaches evidence to Office actions,<sup>6</sup> and reasserted its claim that the mark is eligible for registration on the Supplemental Register.<sup>7</sup>

On Aug. 19, 2013, the examining attorney additionally refused registration on the grounds that the specimens of use do not show the applied-for mark in use in commerce. On February 19, 2014, applicant responded to the Office action and asserted a claim of acquired distinctiveness, thereby raising a new issue requiring a new non-final Office action.

On March 19, 2014, the examining attorney rejected applicant's Section 2(f) claim based on the lack of support for such a claim and the voluminous evidence of record to the contrary. On September 9, 2014, applicant responded, claiming among other things, that the applicant's mark was not generic

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<sup>5</sup> Resp. of Oct. 10, 2012, paras 3 and 4 ("Applicant agrees with the Examiner that "tabata" is generic, and "bootcamp" is descriptive of the recited goods." [sic]).

<sup>6</sup> It was later determined that applicant's counsel's difficulties were associated with his attempts to open evidence attachments in the firm's e-mail system rather than opening such documents online using the link provided in the Office actions, and were unrelated to the content of the actions. See file note of Mar. 20, 2014.

<sup>7</sup> Applicant's counsel also asserted by telephone that the applicant could render the mark eligible for registration by disclaiming both words in its standard character mark. This assertion was addressed with counsel by telephone and is not repeated in applicant's brief, and therefore is not addressed here. See File note of April 12, 2013; *Pilates, Inc. v. Georgetown Bodyworks Deep Muscle Massage Centers, Inc.*, 157 F. Supp. 2d 75 (D.D.C. 2001) (cannot disclaim each of the generic names "Pilates" and "Studio" and register the composite "Pilates Studio" as a mark for exercise instruction services.); T.M.E.P. 1213.06 (2002 rev.); *Pilates Method Alliance, Inc. v. Pilates, Inc.*, 2004 WL 1576475 (T.T.A.B. 2004) ("Pilates Studio" is a generic name for fitness instruction and for providing exercise facilities.).

for applicant's Class 41 services because applicant's similar mark had been allowed registration on the Supplemental Register for applicant's related Class 9 goods.<sup>8</sup>

On December 12, 2014, the examining attorney issued a subsequent final Office action, thereby returning jurisdiction to the Board to hear the applicant's appeal. On March 30, 2015, applicant filed an untimely second request for reconsideration.

## **ARGUMENT**

### **A. The Wording in the Mark is Generic for Applicant's Type of Training Services.**

#### **1. The test for genericness under Section 23(c) is met for "tabata" and "bootcamp."**

Using a term as an adjective does not prevent that term from being generic if the adjective refers to the relevant genus or category of goods and/or services. TMEP §1209.01(c)(ii). Thus an adjective may be generic if it denotes a narrower subcategory of the identified goods and/or services. *See, e.g., In re Northland Aluminum Prods. Inc.*, 777 F.2d 1556, 1560, 227 USPQ 961, 964 (Fed. Cir. 1985) (holding BUNDT generic for ring cake mix; i.e., the subcategory "bundt cakes"); *Sheetz of Del., Inc. v. Doctor's Assocs. Inc.*, 108 USPQ2d 1341, 1366 (TTAB 2013) (holding FOOTLONG generic for sandwiches; i.e., the subcategory "footlong sandwiches").

Moreover, marks that describe the subject matter of seminars or workshops have been held incapable for such educational services. *See In re The Am. Acad. of Facial Plastic & Reconstructive Surgery*, 64 USPQ2d 1748 (TTAB 2002) (holding FACIAL PLASTIC SURGERY generic for training, association and collective membership services); *In re Inst. Investor, Inc.*, 229 USPQ 614 (TTAB 1986) (holding INTERNATIONAL BANKING INSTITUTE for organizing seminars for bank leaders of major countries incapable); *In re Harcourt Brace Jovanovich, Inc.*, 222 USPQ 820 (TTAB 1984) (holding LAW &

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<sup>8</sup> Applicant subsequently filed a preliminary amendment to supplement its response after the response deadline.

BUSINESS incapable of distinguishing the services of arranging and conducting seminars in the field of business law); *In re Nat'l Shooting Sports Found., Inc.*, 219 USPQ 1018 (TTAB 1983) (holding SHOOTING, HUNTING, OUTDOOR TRADE SHOW & CONFERENCE incapable for trade show); *see also* TMEP §1209.01(b).

Determining whether a mark is generic requires a two-step inquiry:

- (1) What is the genus of goods and/or services at issue?
- (2) Does the relevant public understand the designation primarily to refer to that genus of goods and/or services?

*H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d at 989-90, 228 USPQ at 530; *In re Meridian Rack & Pinion*, 114 USPQ2d 1462, 1463 (TTAB 2015) (citing *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 1363, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009)).

Here, the wording “tabata bootcamp” is generic because it describes the genus and the subject matter of applicant’s physical fitness training services, and the relevant public understands this wording to refer to the applicant’s type of services, namely, high-intensity training or boot camps of the “tabata” type.

**2. Internet, article, and third-party registration evidence shows that the term “tabata” is generic for a type of fitness training.**

The record shows that the word “tabata” in the mark refers to a form of high intensity interval fitness training named after researcher Izumi Tabata. For example, Wikipedia describes tabata as “a popular regimen based on a 1996 study...” Office action, Oct. 26, 2011, p. 78. Applicant concedes this definition in its brief and likens the term “tabata” to the term “pilates,” which the Board has found to be

generic for fitness instruction. Br. pp. 13 and 15; *Pilates Method Alliance, Inc. v. Pilates, Inc.*, 2004 WL 1576475 (T.T.A.B. 2004). The evidence also includes pages from the following Internet sites:

- a) <http://tabatatraining.org> (“**Tabata is a basic form of workout**”). Office action, Oct. 26, 2011, p. 55.
- b) <http://www.intervaltraining.net/tabata.html> (“**Tabata interval training is the single most effective type of high intensity interval training**”). Office action, Oct. 26, 2011, p. 69.
- c) *Fit for purpose, with Sam Taylor Tabata Training*, Birmingham Post, July 14, 2011, 1<sup>st</sup> ed. (“**Tabata is a form of interval training**”). Office action, April 10, 2012, p. 2.
- d) *Tabata’s short, high-intensity interval routine an aerobic boost*; Super fit by the seconds: Health and Fitness, San Francisco Chronicle, Aug. 15, 2011, final ed. (“high-intensity interval training and static stretching. The high intensity part is modeled after **a protocol called Tabata**”). Office action, April 10, 2012, p. 4.
- e) <http://fitness.stackexchange.com/search?q=tabata> (“**Tabata is a HIIT [high-intensity interval training] method**”). Sub. final Office action, Dec. 12, 2015, pp. 246-249.

Third-party registrations featuring goods and/or services the same as or similar to an applicant’s goods and/or services are probative evidence on the issue of descriptiveness where the relevant word or term is disclaimed, registered under Trademark Act Section 2(f) based on acquired distinctiveness, or registered on the Supplemental Register. *See e.g. Inst. Nat’l des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 1581-82, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992).

Here, the third-party registrations of record include registrations in which the word “tabata” has been disclaimed where it is synonymous with the type of services provided. These include applicant’s registrations for the marks TREAD TABATA and TABATA MAMA,<sup>9</sup> both for fitness instruction, and with a disclaimer of exclusive rights in the term “tabata.”

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<sup>9</sup> U.S. Registration Nos. 4385822 and 4419717.

**3. The evidence shows that the term “boot camp” is generic for high intensity physical fitness training services.**

Substantial evidence of record shows that the wording “boot camp” (also spelled “bootcamp” in the evidence) refers to intense physical fitness training or exercise completed over a relatively short duration. For example, *Oxford English Dictionary* defines a “boot camp” as “a short, intensive, and rigorous course of training.” Office action, Mar. 19, 2014, p. 392. Applicant concedes this definition in its brief. Br. p. 13. This evidence also includes pages from the following Internet sites:

***Boot camps in general:***

- a) <http://ptofitness.org/group-exercise/class-descriptions/>, (describing a boot camp as “[a] circuit training workout” and **tabata** as “[h]igh-intensity interval training”); <http://www.professionalfitnessmanagement.com/> (the USPTO gym is run by “a fitness and wellness industry firm.”). Sub. final Office action, Dec. 12, 2015, pp. 176-177, 265-270.
- b) <http://webcache.googleusercontent.com/search?q=cache:Va6sLlih-f8J:elementsofexercise.com/crossfit-bootcamp-new/+&cd=1&hl=en&ct=clnk&gl=us> (“**Boot Camp workouts are one of the fastest-growing strength-and-conditioning-training trends** in America. It’s a vigorous workout that combines strength training, aerobics and gymnastics all in one so that you become fitter than ever imagined. Boot Camp offers an interesting balance of Intensity, Effort, Community, and Coaching, and is one of the best ways to do physical training in a group setting.”). Sub. final Office action, Dec. 12, 2015, p. 366.
- c) <http://www.xsportfitness.com/groupfitness/description.html>, (“**Bootcamp** A popular interval class that mixes calisthenics and body weight exercises with cardio and strength training.”). Sub. final Office action, Dec. 12, 2015, p. 267.
- f) [www.ymcadc.cfm?bit=02&core=01](http://www.ymcadc.cfm?bit=02&core=01), (“**Bootcamp** The class will utilize different types of training, from body weight and boxing-style exercises to boot camp and athletic-style exercises...”). Sub. final Office action, Dec. 12, 2015, pp. 271-273.
- g) [www.ballyfitness.com/achieve-your-goals/group-exercise.aspx](http://www.ballyfitness.com/achieve-your-goals/group-exercise.aspx), (“BOSU Boot Camp” offered). Sub. final Office action, Dec. 12, 2015, pp. 284-285.

**Bootcamp videos on DVD or online:**

- h) <http://www.gohastings.com/1/1/141151-pilates-bootcamp-dvd-upc-066805308307.html>, (Pilates Bootcamp DVD). Office action Mar. 19, 2014, p. 8.
- i) <http://ashleyturner.org/shop/>, (YOGA BOOTCAMP). Office action Mar. 19, 2014, p. 92.
- j) <http://www.bestbuy.com/site/10-minute-solution-kickbox-bootcamp-dvd/7316647.p?id=1465160&skuld=7316647>, (“10 Minute Solution: Kickbox Bootcamp (DVD) 2005”). Office action Mar. 19, 2014, p. 115.

**Other types of boot camps:**

- k) <http://www.slideshare.net/fitnessfreakaustralia/types-of-bootcamp>, (slideshow entitled “Types of Boot Camps,” and describing: “**teen bootcamp**,” “**aqua bootcamp**,” and “**salsa bootcamp**,” for example.). Sub. final Office action, Dec. 12, 2015, pp. 97-108.
- l) [http://www.ehow.com/list\\_7275982\\_types-boot-camps.html](http://www.ehow.com/list_7275982_types-boot-camps.html), (“While the term “boot camp” applies primarily to a basic training camp for the army or marine corps, its usage has expanded to mean any kind of intense training program or any program that involves strict, military-style discipline.”). Sub. final Office action, Dec. 12, 2015, p. 109.
- m) <http://www.healthworksfitness.com/small-group-training/bootcamp/>, (“**We offer various types of bootcamps** including Kettlebells, Sports Conditioning, Boxing and Basic Training. At Healthworks there is **a bootcamp for everyone.**”). Sub. final Office action, Dec. 12, 2015, p. 113.
- n) <http://sportsmedicine.about.com/od/sampleworkouts/a/FitnessBootcamp.htm>, (“**A fitness boot camp is type of outdoor group exercise** class that mixes traditional calisthenic and body weight exercises with interval training and strength training. While there are a variety of styles of fitness boot camps, most are designed in a way that pushes the participants harder than they'd push themselves and, in that way, resemble a military boot camp.”). Sub. final Office action, Dec. 12, 2015, pp. 115-117.
- o) <http://www.martialtribe.ca>, (“Declare war on your extra pounds with our FITNESS **Kickboxing Bootcamp!**”). Sub. final Office action, Dec. 12, 2015, pp. 125-131.
- p) <http://www.angiemillerfitness.com/buy-online/kettlebell-bootcamp-dvd/>, (“**Kettlebell Bootcamp**”). Sub. final Office action, Dec. 12, 2015, pp. 132-133.

Third-party registrations on the Supplemental Register with the term “bootcamp” or “boot camp” disclaimed show that this term has been found to be generic for physical fitness training services.

These registrations include the following:<sup>10</sup>

- A. TEXAS BOOT CAMP, for conducting physical fitness classes, Reg. No. 4133397;
- B. ANNAPOLIS BOOT-CAMP, for physical fitness training, Reg. No. 4103374;
- C. BROOKLYN BRIDGE BOOT CAMP, for physical fitness training, Reg. No. 4014188;
- D. THE ORIGINAL BOOT CAMP, fitness training, Reg. No. 4412358; and
- E. SOCAL FITNESS BOOT CAMP FOR WOMEN, for fitness instruction, Reg. No. 3600548.

Office action of Mar. 19, 2014.

Moreover, third-party registrations show the use of various forms of the term “boot camp” in identifications of services to describe a *type* of physical fitness training, namely, high-intensity fitness training. These numerous registrations include the following examples:<sup>11</sup>

- a. No. 3770672 CORE ATHLETICA, (for “...physical fitness training services, namely, physical fitness **bootcamp**”);
- b. No. 4649823, MASTERING THE CORE, (for “...**boot camps** in the field of core strength training and skill sets, physical fitness, motivation-training...”);
- c. Nos. 4451031 and 4451030, URBAN UJ JUNGLE (for “...exercise boot camps” et al.);
- d. No. 4424785, DEBRA STEFAN FITNESS, (for “boot camps in the field of fitness”);
- e. No. 4433928, FITNESS ADDICTION, (for “boot camps,” “fitness classes,” et al.); and
- f. No. 4240485, FITCULTURE, (for “fitness boot camps and fitness obstacle courses”);

Sub. final Office action, December 12, 2014, pp. 389-466.

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<sup>10</sup> The applicant attached copies of Office actions pertaining to some of these marks in its response of Sept. 19, 2014, in support of its claim that the mark is eligible for registration. However, unlike the applicant’s mark, each of these marks contains matter that was found to be eligible for registration on the Supplemental Register.

<sup>11</sup> Such registrations in evidence also include: Reg. Nos. 4256110, 4538446, 4343176, 4412577, 4650558, 4600811, 4461644, 4371382, 4429487, 4141794, 4128377, 4048460, 4101322, 4061464, 3531255, 3834166, 3908791, 3630816, 4139175, 4131258, 4283481, 3872484, 3601671 3994134. Sub. final Office action, Dec. 12, 2014, pp. 389-466.

The term “fitness boot camps” also appears as an entry in the *U.S. Acceptable Identification of Goods and Services Manual*.<sup>12</sup> Therefore, the Office formally recognizes the term “boot camp(s)” as an acceptable genus for physical fitness services in Class 41. See TMEP §1402.04. Finally, the applicant has acknowledged that, “[t]he term ‘bootcamp’ generally is just one of many ways to describe an intense course of training” and is “widely used.” Resp. May 13, 2013, (emphasis added).

Thus, the class or **genus** of the services is bootcamp(s), while the **species** or specific type of services is tabata, or collectively, boot camps of the tabata type. The relevant public understands these designations to primarily refer to this class or genus of services and this species or type because, as the evidence shows, the term “tabata” is widely used to refer to a type of interval training and the term “boot camp” is widely used to refer to high-intensity fitness training.

**4. The combined wording “tabata bootcamp” is generic for applicant’s physical fitness training services featuring high-intensity training or tabata.**

Generally, if the individual components of a mark retain their descriptive meaning in relation to the goods and/or services, the combination results in a composite mark that is itself descriptive and not registrable. *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012); TMEP §1209.03(d); *see, e.g., In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of beds, mattresses, box springs, and pillows where the evidence showed that the term “BREATHABLE” retained its ordinary dictionary meaning when combined with the term “MATTRESS” and the resulting combination was used in the relevant industry in a descriptive sense).

In this case, both the individual components and the composite result are generic for applicant’s services. Specifically, combining the words “tabata,” and “bootcamp” does not create a unique,

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<sup>12</sup> <http://tess2.uspto.gov/netahtml/tidm.html>, visited on Dec. 12, 2014; Sub. final Office action, Dec. 12, 2015, p. 388.

incongruous, or non-descriptive meaning in relation to the services. Therefore, the mark as a whole is generic and the test for genericness under Trademark Act Section 23(c) is met.

The following evidence shows Internet and article usage of this **combined wording** to refer to a type of boot camp, that is, physical fitness training of the tabata type.

- a) <http://www.marshallcampusrec.com/fitness>, (“**TABATA Boot Camps** are becoming the most popular workout for today’s busy people”). Office action, Aug. 19, 2013, p. 44.
- b) <http://www.seattleu.edu/events>, (Title: “**Tabata Bootcamp**” Description: “Tabata Interval training was developed...”). Office action, Aug. 19, 2013, p. 59.
- c) <http://fitnesscanbefun.com/2012>, (“Coming Soon! **Tabata Boot Camps!**”). Office action, Aug. 19, 2013, p. 69.
- d) <http://prezi.com/lrizi2kowsbn/tabata-bootcamp/>, (“No equipment is necessary to complete what could be considered a **tabata bootcamp**...I’m on a study on 12 men & women performing a **40 minute tabata bootcamp**”). Sub. final Office action, Dec. 12, 2015, p. 2.
- e) <http://livefromlaquinta.com/2013/09/19/time-tabata/>, (“I teach a **Tabata Bootcamp** and am always looking for different combos to share with them.”). Sub. final Office action, Dec. 12, 2015, pp. 7, 13.
- f) <http://bfit4lifeministries.org/2013/12/06/tabata-bootcamp/>, (“Have you done a **Tabata workout or done a Tabata Bootcamp** before?”). Sub. final Office action, Dec. 12, 2015, p. 29.
- g) <http://www.nutritionnutontherun.com/2013/12/18/tree-trimming-tabata-workout/>, (“I teach a **Tabata Bootcamp** and here are some goodies that really get us going...”). Sub. final Office action, Dec. 12, 2015, pp. 241-245.
- h) [http://www.yelp.com/biz\\_photos/white-fox-fitness-scottsdale?select=RdUnnFjgtoKJRfph1SLLvA#RdUnnFjgtoKJRfph1SLLvA](http://www.yelp.com/biz_photos/white-fox-fitness-scottsdale?select=RdUnnFjgtoKJRfph1SLLvA#RdUnnFjgtoKJRfph1SLLvA), (“We are more than **just a Tabata bootcamp**” Sub. final Office action, Dec. 12, 2015, pp. 171-172.
- i) <http://powerofmovement.co/testimonials/>, (“I hired Leslie to do a **Tabata Bootcamp** for my company...”). Sub. final Office action, Dec. 12, 2015, p. 50, pp. 173-175.
- j) <http://bootcampideas.com/tabata-sprint-and-strength-bootcamp/>, (“**Tabata Sprint and Strength Bootcamp**”). Sub. final Office action, Dec. 12, 2015, pp. 187-190.
- k) <http://badassfitness.typepad.com/badass-fitness/2012/04/all-tabata-bootcamp-burn-it-out.html>, (“**All-Tabata Bootcamp**”). Sub. final Office action, Dec. 12, 2015, pp. 192-194.

- l) <http://newarkfitnessbootcamp.com/boot-camp/>, (“Exercise **Tabata Boot Camp is a sustainable fitness and eating program** that truly changes people’s lives! Based on the most current HIIT (High Interval Intensity Training) research... **Through my Tabata Bootcamp** you will be given the tools to make real changes in your lifestyle...”). Sub. final Office action, Dec. 12, 2015, pp. 195-196.
- m) <http://nwatabatabootcamp.com/>, (“**Welcome to NWA Tabata Bootcamp. This fitness program** offers small group training...that will focus on strength and High Intensity Interval Training (HIIT) based cardio training. **NWA Tabata Bootcamp is for all fitness** levels, sizes, and ages.”). Sub. final Office action, Dec. 12, 2015, p. 197.
- n) <http://avltrailrunner78.blogspot.com/>, (“I have enjoyed wearing mine in a 5k road race, at a **YMCA Tabata bootcamp**”). Sub. final Office action, Dec. 12, 2015, pp. 210-229.
- o) <http://community.runnersworld.com/topic/achilles-tendonitis-how-do-i-know-that-i-am-recovering?reply=60124974646768529>, (“Also started more cross training - **did a tabata bootcamp**” [sic]). Sub. final Office action, Dec. 12, 2015, pp. 230-235.
- p) <http://www.indystar.com/article/D2/20131007/COMM/310070095>, (“Ankeny Community Education will **hold a Tabata Bootcamp Mondays through Thursday**”). Sub. final Office action, Dec. 12, 2015, pp. 236-238.
- q) <http://www.trainwithtamara.com/testimonials/>, (“Thank you for starting up a **Tabata Bootcamp** in Ithaca.”). Sub. final Office action, Dec. 12, 2015, p. 239.
- r) <http://smashstarmedia.com/pro-clients>, (“Change your life and body with a **Tabata Bootcamp!**”). Sub. final Office action, Dec. 12, 2015, p. 240.
- s) *Three hot fitness trends for 2013*, AFP-RELAXNEWS, Oct. 28, 2012, (“And because it offers valid, proven fitness benefits, **Tabata-style interval training** will start popping up in boot camp classes, kettlebell formats, and spinning workouts this year....It’s caught on like wildfire,” says Assael, who, after reading about **Tabata a year ago, incorporated it into her exercise boot camps and then broke it out into a class of its own.**”). Sub. final Office action, Dec. 12, 2015, pp. 259-262.
- t) <http://www.pinterest.com/trainerjanewarr/trainer-jane-bootcamps-tabata-bootcamps/>, (“Trainer Jane indoor and outdoor Bootcamps and **TABATA Bootcamps**”). Sub. final Office action, Dec. 12, 2015, p. 345.
- u) [www.meetup.com/Tabata-STYLE-BOOTCAMPS/member/6215889/](http://www.meetup.com/Tabata-STYLE-BOOTCAMPS/member/6215889/), (“**TABATA STYLE BOOTCAMPS**”). Sub. final Office action, Dec. 12, 2015, p. 373.

- v) <https://www.facebook.com/events/264297660391359/>, (“There are **3 new Tabata Bootcamps** starting next week!”). Sub. final Office action, Dec. 12, 2015, p. 348.
- w) <https://facebook.com/KYABC/posts/1015274181149465>, (“Tomorrow looks great for a **tabata bootcamp** 7 a.m...”). Sub. final Office action, Dec. 12, 2015, p. 499.
- x) <http://fitnesscanbfun.com/2012/coming-soon-tabata-boot-camps/>, (“Fitness B Fun will soon be offering **Tabata Boot Camps!** What is a Tabata? A Tabata round consists of 20 second of intense effort...”). Office action, Aug. 19, 2013, p. 69.
- y) <http://www.seattleu.edu/detail.asp?sID=57677>, (“[Course] Title: **Tabata Boot Camp**”). Office action, Aug. 19, 2013, p. 59.
- z) <http://sassymomfitness.com/skypercise-small-tabata-bootcamps/>, (“Skypercise Small **Tabata Bootcamps**”). Sub. final Office action, Dec. 12, 2015, p. 375.
- aa) <http://www.purebodystudios.com/fitness-bootcamps.html>, (“**The Tabata boot camp** is based on High Intensity Interval Training (HIIT); Pure Body Fitness Studio's fitness bootcamps, **Tabata bootcamps**, and March Aerobics bootcamps follow a scientifically proven, circuit-style format”). Sub. final Office action, Dec. 12, 2015, pp. 379-383.
- bb) [http://www.elitefittrainer.com/10Day\\_TABATA\\_BC\\_Flyer.pdf](http://www.elitefittrainer.com/10Day_TABATA_BC_Flyer.pdf), (“10-Day **TABATA BOOT CAMP... Tabata Bootcamps** offer the newest and most unique approach to hit the fitness world...”). Sub. final Office action, Dec. 12, 2015, p. 387.
- cc) <http://www.fitnessblender.com/v/workout-detail/Happy-Healthy-Strong-Body-Boot-Camp-Strength-and-Cardio-Tabata-Workout/g7/>, (“To get the most out of **this bootcamp tabata** workout, we want you to select as heavy of a weight as you can with proper form”). Sub. final Office action, Dec. 12, 2015, pp. 468.
- dd) <http://fitnesscanbfun.com/2012/06/>, (“Looking for new ways to exercise? \* **Indoor & Outdoor Tabata Boot Camps** \* Beach Yoga \* Virtual Training \* Kickboxing \* Interval Training Contact us today to begin your journey to a healthier lifestyle...”). Sub. final Office action, Dec. 12, 2015, pp. 477-478.
- ee) [http://m.annistonstar.com/life/article\\_3254e6e4-f375-11e3-a5b8-001a4bcf887a.html?mode=jgm](http://m.annistonstar.com/life/article_3254e6e4-f375-11e3-a5b8-001a4bcf887a.html?mode=jgm), (“There are **Tabata boot camps and all kinds of Tabata classes** and certifications available in every type of fitness...”). Sub. final Office action, Dec. 12, 2015, pp. 479-480.

- ff) <http://natalieveras.com/lunchtime-tabatas/>, (“Lunchtime **Tabata Boot Camp...Tabata Boot Camp** is a 6 week Boot Camp that is based on High Intensity interval Training (HIIT) using..”). Sub. final Office action, Dec. 12, 2015, p. 481.
- gg) <http://www.augustamagazine.com/Augusta-Magazine/January-2013/Live-Fit-Live-Healthy/>, (“The Kroc Center and Oxygen Fitness offer **Tabata boot camps...**”). Sub. final Office action, Dec. 12, 2015, p. 488.
- hh) <http://www.juneau.org/personnel/documents/JuneauFitnessCentersFeb2014.pdf>, (“You can purchase a punch card from her for \$5 off of the normal price, and \$20 off of her **Tabata Boot camps.**”). Sub. final Office action, Dec. 12, 2015, p. 492.
- ii) <http://dallas.craigslist.org/ndf/hab/4740627835.html>, (“This fitness exercise tubing is used in **Tabata boot camps.**”). Sub. final Office action, Dec. 12, 2015, p. 494.
- jj) <http://www.texashealthhuguley.org/news/short-on-time-not-a-problem-at-huguley-fitness-center>, (“Huguley Fitness Center is excited to offer a **Tabata Boot Camp** for those looking for results but are short on time. Tabata Boot Camp is a four week outdoor boot camp that will begin on February 12 and run through March 7. **Tabata is a form of high intensity interval training** that is designed to produce results more quickly than traditional moderate training.”(emphasis added)). Sub. final Office action, Dec. 12, 2015, p. 500.

##### **5. The genus and species of applicant’s services are described by the combined wording**

###### **“tabata bootcamp.”**

Applicant’s services consist of seminars and workshops for introducing fitness instructors to training protocols in the field of fitness. Pages from applicant’s Internet site show that applicant’s seminars and workshops include high-intensity physical fitness training. Office action, Aug. 19, 2013, pp. 216 and 474 (describing applicant’s business model as consisting of training trainers in providing tabata boot camps to individual consumers and charging fees to use the wording “tabata bootcamps” and applicant’s written materials and software.).

Other promotional materials likewise show that applicant’s services for trainers specifically include physical fitness training. Office action, Aug. 19, 2013, p. 262 (depicting applicant providing

physical fitness training to instructors as part of its tabata bootcamp training). Moreover, applicant has specifically acknowledged that its services include high-intensity physical fitness training in its responses to questions posed by the examining attorney:

- 1) Question: Do applicant's seminar and workout services consist of or include physical fitness training or instruction for trainers?  
Answer: They introduce professional instructors to training protocols in the field of fitness. **Some of these training protocols are introduced by the instructors actually doing physical fitness exercises** while being instructed on how to train others in the exercises.
- 2) Question: Does this physical fitness training for trainers consist of or include high-intensity exercises and/or workouts?  
Answer: **Yes.**

Resp. Feb. 19, 2014, p. 13 (emphasis added).

Finally, trainers who have participated in applicant's training describe it as including a physical fitness training component. Sub. final Office action, Dec. 12, 2015, p. 28 ("I loved that throughout the class not only did we workout but had an opportunity to interact with others...I could literally feel the after-burn and heat in my body hours after the class ended...").

As a result, the term "tabata bootcamp" merely describes the genus and species of applicant's seminars and workshops, and cannot serve as an indication of their source.

#### **6. Policy reasons weigh heavily against registration.**

Two major reasons for not protecting merely descriptive and generic marks are (1) to prevent the owner of a descriptive mark from inhibiting competition in the marketplace and (2) to avoid the possibility of costly infringement suits brought by the trademark or service mark owner. *In re Abcor Dev. Corp.*, 588 F.2d 811, 813, 200 USPQ 215, 217 (C.C.P.A. 1978); TMEP §1209. "Competitors unable to use a common term that describes or designates their product [or service] are at a significant disadvantage

when communicating to potential customers the nature and characteristics of the product [or service].”  
*Boston Duck Tours LP v. Super Duck Tours LLC*, 531 F.3d 1, 87 USPQ2d 1385, 1392 (1st Cir. 2008).

Here, if applicant is permitted to register the applied-for mark, competition in the marketplace for physical fitness training services would be inhibited, thereby setting the stage for costly infringement suits and potentially higher costs for the consumers of these services. In fact, the applicant has already noted that it engages in litigation and other aggressive efforts to prevent third parties from using the terms in the mark, apparently including use of these terms in a merely descriptive manner rather than as trademarks or service marks. Resp. Mar. 30, 2015, pp. 6-14, (noting applicant searches for and sends cease and desist letters to parties that have not paid a fee.).

Therefore, because the applied-for mark is generic for applicant’s services and is necessary to accurately describe such services, registration would be inconsistent with the letter and the intent of the Trademark Act. Trademark Act Sections 2(e)(1), 23(c), 15 U.S.C. §§1052(e)(1), 1091(c); see TMEP §§1209.01(b), 1209.03 *et seq.*

**7. Applicant’s claim that it has not acknowledged that the term “tabata” is generic is contradicted by applicant’s written responses of record.**

Applicant claims in its brief that it has not conceded that the term tabata is generic. However, as noted above, applicant conceded in its response dated October 10, 2012, that the term “Tabata” is generic for applicant’s physical fitness training services. Resp. Oct. 10, 2012, p. 1 (“**[T]he Applicant agrees with the Examiner that “tabata” is generic.**”). Applicant further stated that:

In the fitness field, the term “tabata” is a generic term for a form of high intensity fitness training. Also, in the fitness field, the term “boot camp” is descriptive of training conducted by gyms, personal trainers, and former military personnel.

Resp. Oct. 10, 2012, p. 1.

Also, applicant's response dated February 7, 2012, included a disclaimer of the term "bootcamp" and an amendment to the Supplemental Register, further confirming that "bootcamp" is the genus for a *type* of physical fitness training. Moreover, applicant's own use of the term "tabata bootcamp" and use by its licensees include use as the genus and type of applicant's services, that is, to a type of high-intensity physical fitness program. These uses include:<sup>13</sup>

- 1) <http://webcache.googleusercontent.com/search?q=cache:zmTTqz-bwQJ:thebellydancestudio.com>, ("The phones at The Belly Dance Studio have been ringing a lot with ladies wanting MORE **TABATA BOOTCAMPS**;" comment by licensee). Sub. final Office action, Dec. 12, 2015, p. 385 (emphasis in original).
- 2) <http://www.tabatabootcamp.com/clubs-and-group-x.php>, ("...the extreme sense of accomplishment that students feel, each time they accomplish a **Tabata Bootcamp**," (comment by industry expert quoted on applicant's Internet site); "**Tabata falls in the category of H.I.I.T. high intensity interval training**....This **technique** discovered by Dr. Izumi Tabata in Tokyo gives you maximum benefits in a short period of time...Have you done a Tabata workout or done a Tabata Bootcamp before?"; (comment by applicant's licensee)). Sub. final Office action, Dec. 12, 2015, pp. 26, 29.
- 3) <http://members.tabatabootcamp.com/forum/info-send-out-about-tabata-bootcamps>, ("Info to send out about **Tabata Bootcamps**...I want to send them some information on what all a **Tabata Bootcamp** entails"; comment by applicant's licensee). Sub. final Office action, Dec. 12, 2015, p. 384.
- 4) <http://adealhub.com/deals/tabata-boot-camp-highly-effective-training-session-for-rs-350-only-instead-of-rs-500-by-ifit-fitness-studio/>, ("How does a **Tabata Bootcamp work**?"; comment by applicant's licensee). Sub. final Office action, Dec. 12, 2015, pp. 33, 198-202, (Showing applicant providing high-intensity physical fitness training as part of its services).

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<sup>13</sup> Applicant's services are provided to customers under the name "Savvier Fitness." Sub. final Office action, Dec. 12, 2015, p. 296.

Therefore, applicant's responses and use of the words "tabata bootcamp" further underscore the genericness of this wording for the applicant's services, making it ineligible for registration.

**8. Whether applicant may have been among the first to use the term "tabata bootcamp" in the physical fitness industry is unsubstantiated and irrelevant.**

Applicant claims that the combined wording tabata bootcamp is not generic because this exact wording is not already used in the fitness industry, making the applicant among the first to use the term. This argument has been repeatedly addressed and rejected by the Trademark Trial and Appeal Board. The fact that an applicant may be among the first and only user(s) of a generic designation is not dispositive on the issue of genericness where, as here, the evidence shows that the word or term is generic. *See In re Greenliant Sys. Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010); *In re Nat'l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983); TMEP §1209.03(c). The test is not whether someone else has used or attempted to register the generic wording at issue, but whether consumers would understand the terms to refer to the type and content – rather than the source – of applicant's services. Here, the record makes it clear that the term "tabata bootcamp" is in widespread use to refer to a *type* of physical fitness training service, and consumers understand this wording to refer to such training. Moreover, applicant's contention that the term "tabata bootcamp" is not used by others to refer to fitness training is contradicted by applicant's responses, which refer to third party use. Resp. March 30, 2015, pp. 6-14, (applicant searches for these terms and sends cease and desist letters to parties who have not paid a fee.).<sup>14</sup>

**9. The mark describes applicant's training services in the field of physical fitness even though such services are provided to trainers.**

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<sup>14</sup> Although the evidence of third party use dates back to 2011, applicant claims that these users "copied" its mark. Br. p. 11. However, this claim is unsupported by evidence and is somewhat dubious given the evidence of record.

Applicant also claims that the term “bootcamp” is not generic for applicant’s boot camps because applicant’s seminars and workshops are provided to trainers who provide or intend to provide boot camps to others.<sup>15</sup> But the fact that students of applicant’s boot camps are trainers does not diminish the generic significance of the term “bootcamp.”

As discussed above, the evidence of record shows that applicant’s boot camps consist of or include the same kind of high-intensity physical exercises provided to students who are not trainers. Furthermore, both applicant’s training sessions and comparable fitness training sessions provided by third parties are commonly referred to as “boot camps.” Office action Aug. 19, 2013, p. 209. In fact, the evidence shows that the term “boot camp” is also widely used to indicate a type of training provided specifically to trainers. This evidence includes the following:

- 1) <https://foursquare.com> – (“Elite **Trainers Bootcamp**”). Office action, Aug. 19, 2013, p. 340.
- 2) <http://www.youtube.com/watch>, (Helsinki Core **Trainers Bootcamp** goes Nike Blast 2012). Office action, Aug. 19, 2013, p. 338.
- 3) <https://www.facebook.com/media/set/>, (“AMAZING **Trainers’ Bootcamp**”). Office action, Aug. 19, 2013, p. 337.
- 4) Acefitness.org, (“Research has shown that HIIT – whether in the **form of** CrossFit, P90X or **Tabata** – improves cardiovascular fitness...” “**Tabata for Trainers: How to Safely Train Client Using This High-Intensity Approach**”). Sub. final Office action, Dec. 12, 2015, pp. 330-341.
- 5) <http://ymlp.com/zdHH1N>, (360 **bootcamp workouts for bootcamp trainers** by real bootcamp trainers!). Office action, Aug. 19, 2013, p. 331.
- 6) <http://www.blacktigerclub.com>, (**Bootcamp for Fitness Trainers**). Office action, Aug. 19, 2013, p. 326.

Thus, the fact that a bootcamp is provided to fitness trainers does not render the term “tabata bootcamp” any less generic for bootcamp-type tabata fitness training services.

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<sup>15</sup> This argument is a modification of applicant’s earlier argument that the term “bootcamp” would be generic for physical fitness training only if the training was provided to military recruits. Resp. May 13, 2013, p. 1.

## **B. The Mark Cannot Have Acquired Distinctiveness from Limited, Non-exclusive Use.**

### **1. Applicant's use is insufficient and non-exclusive.**

When asserting a Trademark Act Section 2(f) claim, the burden of proving that a mark has acquired distinctiveness is on the applicant. *Yamaha Int'l Corp. v. Yoshino Gakki Co.*, 840 F.2d 1572, 1578-79, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988); *In re Meyer & Wenthe, Inc.*, 267 F.2d 945, 948, 122 USPQ 372, 375 (C.C.P.A. 1959); TMEP §1212.01. Thus, applicant must establish that the purchasing public has come to view the proposed mark as an indicator of origin. Here, even if the mark were found to be capable of distinctiveness, applicant has a heavy burden because the mark is highly descriptive of the primary feature and subject matter of applicant's services.

An allegation of five years' use is insufficient to show acquired distinctiveness where an applied-for mark is highly descriptive of an applicant's goods and/or services. *In re Kalmbach Publ'g Co.*, 14 USPQ2d 1490, 1492 (TTAB 1989); TMEP §1212.05(a). Here, applicant's dates of use indicate a date of first use of January 6, 2012. This limited use of the mark does not support acquired distinctiveness. Moreover, the evidence of use of the wording "tabata bootcamp" discussed above and acknowledged in applicant's discussion of its enforcement efforts shows that applicant's use of the mark has not been substantially exclusive.

Applicant's claim that it has spent significant sums on advertising using the wording in the mark is also of little probative value because there is no evidence in the record concerning advertising budgets and practices in the fitness industry that would permit a comparative assessment of the significance of applicant's expenditures. Br. p. 3. Applicant's claims concerning sales are also unsupported by evidence and therefore do not establish distinctiveness. *In re Ennco Display Systems*

*Inc.*, 56 USPQ2d 1279, 1285 (TTAB 2000) (Applicant's sales may only demonstrate the growing popularity of the product, not consumer recognition of the trademark.).

**2. Applicant's survey results are inconclusive at best and soundly refuted by the overwhelming evidence of genericness.**

Applicant's claim that its survey shows that the mark is not generic and that it has acquired distinctiveness is untenable. App. Brief. p. 7. The survey was written by a psychologist who teaches marketing and was conducted at two fitness training conferences at which the applicant was a vendor. The survey is flawed for several reasons.

First, the universe of respondents is too narrow. Applicant limited the respondents to "certified fitness instructors or personal trainers" between the ages of "18 and 55" who had "been teaching at least two year." [sic] Resp. Feb. 19, 2014, pp. 36, 38, 91. However, applicant's identification of services contains no such limitations on the channels of trade and merely indicates that its seminars and workshops are provided to professional fitness instructors. Applicant's promotional materials also do not suggest any limitation to those with any particular length of experience or certification as trainers. Moreover, applicant's services are intended to facilitate the provision of physical fitness training to end consumers. Br. p. 15. Therefore, the relevant public also includes uncertified instructors and other end consumers, and the survey should have taken their use and understanding of the wording in the mark into account. *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Second, the survey does not meet the basic requirement established by *Jacob Zimmerman v. National Assoc. of Realtors* that the respondents understand the difference between a "common name" and a "brand name." *Jacob Zimmerman v. National Assoc. of Realtors*, 70 U.S.P.Q.2d 1425, 2004 WL 763936 (T.T.A.B. 2004) (defects in the structure and administration of a Teflon-type survey resulted in

the survey being accorded “very little weight.”). The results show that many respondents could not distinguish between generic terms and trademarks and were not able to apply this legal distinction to the wording at issue. Resp. Feb. 19, 2014, pp. 119-123. For example, a total of 13.5% of respondents said they use the word “butter” either as a brand name or as both a common name and a brand name, while a total of 12.3% said they use the word “computer” either as a brand name or as both a common name and a brand name.<sup>16</sup> Resp. Feb. 19, 2014, p. 121.

The survey provided respondents with the option to state that terms were both brand names and common names, which may have given respondents the incorrect understanding that a generic term for a product or service can also function as a trademark for that product or service. Also, the survey compares arguably well-known marks to the proposed mark. These include DOMINO’S, LITTLE CAESAR’S, FOLGER’S, MICROSOFT, and KRAFT. The results suggest that some respondents may have merely recognized the fame of these terms without understanding their significance as marks. Resp. Feb. 19, 2014, pp. 105-106.

Moreover, it is uncertain from the results whether the respondents understood the difference between “brand names” and “common names” in relation to specific goods and services because this information was not provided to respondents.<sup>17</sup> Resp. Feb. 19, 2014, pp. 28-42; *cf. Sheetz of Delaware, Inc. v. Doctors Associates Inc.*, 108 U.S.P.Q.2d 1341, 1360–1366, 2013 WL 5315963 (T.T.A.B. 2013)

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<sup>16</sup> Many respondents even seem to have been confused by the significance of the word BOSU, a mark apparently used in applicant’s fitness industry: more than 36% of respondents said that they use the mark either as a common name or as both a common name and a brand name. Respondents even had difficulty recognizing as brand names marks that are arguably well-known. For instance, a total of 13.6% of respondents said they use the term NIKE either as a common name or as both a common name and a brand name, and a remarkable 15.9% said that they use the mark MICROSOFT as either a common name or as both a common name and a brand name. Resp. Feb. 19, 2014, p. 121-122 (survey questionnaire). Although no standard error or other statistical measurements of reliability were provided with the survey, these results point to obvious confusion among respondents and suggest unreliable results.

<sup>17</sup> The survey asks respondents to assess whether a term is a common name or generic name but fails to specify the goods or services for which the term may be generic, leaving respondents to guess at the potential significance of a term with insufficient information. For instance, the word “butter” would be generic for a dairy-based spread but not for unrelated goods such as sneakers. It’s also unclear why almost no respondents chose “I don’t know” as their response to any of the questions, which may indicate interviewer error or bias. Resp. Feb. 19, 2014, pp. 105-106.

("[W]e cannot be sure how many of the respondents actually understood the difference between a brand name and a common name."). All of these factors may have contributed to the respondents' apparent confusion.

Third, the fact that the applicant prominently displayed promotional materials as a vendor at the fitness conferences where the survey was conducted may have further tainted the results.<sup>18</sup> As the Board noted in *Sheetz*, exposure to promotional efforts may lead respondents to mistake a generic term for a brand name.<sup>19</sup> *Sheetz of Delaware, Inc. v. Doctors Associates Inc.*, 108 U.S.P.Q.2d 1341, 1360–1366, 2013 WL 5315963 (T.T.A.B. 2013) (Applicant's extensive advertising campaign may have created buyer association with a generic term.); *Continental Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385, 1395 (TTAB 2000) (Even if one has achieved recognition of a generic term through marketing, the term is still not entitled to protection because it would deprive competitors of the right to call goods or services by their name.). Here, applicant has acknowledged that thousands of conference attendees had "contact" with the mark at the conventions. Resp. Feb. 19, 2014, p. 22, (Applicant estimated that "approximately 500-5000 people at each convention" had "contact" with its proposed mark.).

Notwithstanding these fatal flaws in the survey, the results nevertheless show that a significant number of respondents understand the term "boot camp" to refer to a physical fitness program or routine, that is, as a generic term and not as an indication of source. Specifically, despite applicant's best efforts to establish a link between the generic terms in the mark and its services, the survey results indicate that a total of 34% of respondents indicated that they use the wording "tabata bootcamp" as

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<sup>18</sup> Applicant's representative, Bruce Myrlea, provided the survey interview table and served as a "contact" for interviewers. The proximity of the table to the applicant's promotional materials is not disclosed in the survey results. However, these conditions may have contributed to any bias in the survey administration. Resp. Feb. 19, 2014, pp. 91-92.

<sup>19</sup> The fact that the applicant was a vendor at the two trade shows at which the data for the survey was obtained makes it possible that respondents were more aware of the applicant's use and/or claim to rights in the wording at issue than they would have been in other contexts. Respondents may have been exposed to applicant's marketing materials at the trade shows or online, or may have been licensees of the applicant or knew a licensee, thereby causing bias. The survey does not provide controls for these variables or a means of eliminating such bias from the results. Office action, July 13, 2013, p. 218; Br. p. 4.

both a brand name and as a common name (25.7%) or solely as a common name (8.3%). Resp. Feb. 19, 2015, pp. 41, 122.

A determination as to whether a term is generic requires analysis of any actual and current use in the marketplace. Although a survey may shed light on how consumers recognize marks used in commerce, it does not show actual use of the wording in the mark in the marketplace as does the evidence of record.<sup>20</sup> This voluminous evidence, summarized above, overwhelmingly shows use of the words “tabata” and “boot camp” and the combined wording “tabata bootcamp” to refer to a type of high-intensity interval fitness training.<sup>21</sup> Applicant’s survey not only fails to refute this evidence but to some degree supports it.

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<sup>20</sup> Applicant’s quote from *McCarthy on Trademarks and Unfair Competition* is taken out of context. Br. p. 7, citing J. McCarthy, *Trademarks & Unfair Competition*, §32:190, p. 32–488 (4th ed. 2012). The relevant portion of Professor McCarthy’s text in its entirety reads:

As the Ninth Circuit remarked, “[a]n expert survey of purchasers can provide the most persuasive evidence of secondary meaning.” [4] Some courts have given broad hints that when the plaintiff has a less than clear case, a survey is necessary to prove secondary meaning.[5] However, survey data is not a requirement, and secondary meaning can be, and most often is, proven by circumstantial evidence.[6]

J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, §32:190, p. 488 (4th ed. 2012).

Thus, a survey is by no means the definitive factor in determining the eligibility of a mark for registration, which if true would effectively transfer responsibility for such legal determinations to survey takers. Moreover, Professor McCarthy’s statements are largely based on the Ninth Circuit’s decision in *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 12 U.S.P.Q.2d 1740 (9<sup>th</sup> Cir. 1989), a trade dress case cited in footnote four. The Ninth Circuit qualified this decision in *Committee for Idaho’s High Desert v. Yost*, 92 F.3d 814, 39 U.S.P.Q.2d 1705 (9<sup>th</sup> Cir. 1996), cited in footnote six. Therefore, this case law should be applied sparingly to the standard character mark at issue here.

<sup>21</sup> In fact, the record appears to be virtually devoid of any unsolicited third party use of the mark to refer to the applicant as a source of the services.

**C. Applicant's Specimen Does Not Show Use of the Mark in Relation to the Named Services.**

Applicant's specimen of use is not acceptable because it does not show the applied-for mark in use in commerce. An application based on Trademark Act Section 1(a) must include a specimen showing the applied-for mark in use in commerce for each class of services. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a).

Here, applicant's statement of use describes the specimen as a "[s]pecimen showing use of trademark on classroom, seminars and workshops." [sic]. The specimen appears to consist of one or more pages from applicant's Internet site and is not acceptable as evidence of actual service mark use because it does not reference or suggest applicant's services. Specifically, the specimen shows the mark used in text that suggests that applicant certifies and supports others in establishing and operating a physical fitness training business:

As a Tabata Bootcamp™ trainer you will be able to guide your bootcampers to true healthy eating and nutritional lifestyle change...

As a Tabata Bootcamp™ trainer your entire web business has been created for you...

As a Tabata Bootcamp™ trainer you want to create a lifestyle change in your bootcampers...

The specimen also features exercise guides and other materials that trainers can use to conduct fitness training. However, the specimen does not mention or suggest that applicant provides seminars and workshops itself. Thus, the specimen fails to show proper use of the applied-for mark in the sale or advertising of the services named in the application.

**D. Applicant's Untimely Correspondence and Evidence are Inadmissible.**

The examining attorney issued a second non-final Office action on March 19, 2014. Applicant responded on September 19, 2014. On October 28, 2014, applicant submitted a second response labeled “preliminary amendment,” to which additional evidence was attached to supplement applicant’s previous response.

The statutory period for response to an office action is six months from the Office action’s date of issuance. 15 U.S.C. §1062(b); 37 C.F.R. §2.62(a). The correspondence of October 28, 2014, was received more than six months after the date on which the Office action was issued.

The examining attorney issued a subsequent final Office action on December 12, 2014, thereby returning jurisdiction to the Board for consideration of applicant’s appeal. 37 C.F.R. §§2.6(a)(18), 2.64(a); TBMP ch. 1200; TMEP §714.04. On March 31, 2015, applicant filed a second request for reconsideration despite the vesting of jurisdiction with the Board and without first requesting a remand from the Board to the examining attorney.

Therefore, applicant’s correspondence of October 28, 2014, and March 31, 2015, and the attachments for both are untimely and should not be considered. However, even if these communications are considered in a light most favorable to applicant’s claims, they are unpersuasive given the considerable evidence of record set forth and discussed herein.

Applicant has also attempted to submit a variety of new evidence with its appeal brief that is too numerous to list. For instance, applicant claims that applicant has spent “two million dollars” on advertising associated with the mark, applicant has trained “tens of thousands of trainers,” and third parties have ceased their use of the words “tabata bootcamp” in recognition of the applicant’s rights.<sup>22</sup> Br. pp. 3 and 11. The record in an application should be complete prior to the filing of an appeal. 37 C.F.R. §2.142(d); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). Because applicant’s new evidence was

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<sup>22</sup> Third parties may have ceased their use of the wording in the mark merely in an effort to avoid litigation.

untimely submitted during the appeal, the trademark examining attorney objects to this evidence and requests that the Board disregard it. See *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A*, 109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

### **CONCLUSION**

The applicant's proposed mark TABATA BOOTCAMP merely describes applicant's type of services and is ineligible for registration. Applicant's Section 2(f) claim is insufficient and its specimen of use fails to show use of the mark for the named services. For the foregoing reasons, the examining attorney respectfully requests that the refusals to register be affirmed.

Respectfully submitted,

/efennessy/

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