

**This Opinion is Not a
Precedent of the TTAB**

Mailed: October 4, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vitamin Shoppe Procurement Services, Inc.

Serial Nos. 86905555, 86905614, 86905620, 86905628

James E. Rosini, Jeremy S. Boczko, Susan A. Smith, William M. Merone of Hunton Andrews Kurth LLP for Vitamin Shoppe Procurement Services, Inc.

Mark S. Tratos, Trademark Examining Attorney, Law Office 113,
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Before Thurmon, Deputy Chief Administrative Trademark Judge, Greenbaum and Goodman, Administrative Trademark Judges.

Opinion by Thurmon, Deputy Chief Administrative Trademark Judge:

These consolidated appeals present a single issue—whether the phrase THE VITAMIN SHOPPE is generic for the goods and services identified in the applications and must be disclaimed.¹ Applicant seeks registration of four different composite

¹ We consolidated these appeals upon motion by the Applicant because they involve common issues of law and fact with similar records. 10 TTABVUE 1; see also *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1102 (TTAB 2018); *In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012). Citations are to the record in Application Serial No. 86905555 unless otherwise noted.

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify documents by title and date. Specific citations are to the page number in the .pdf version of the TSDR records. References to the briefs and other materials in the appeal record refer to the Board's TTABVUE docket system.

marks, but each mark includes the phrase in question, and Applicant has asserted a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. §1052(f), as to the phrase in each application.² The Examining Attorney found the phrase THE VITAMIN SHOPPE generic and required a disclaimer under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a). Applicant refused to enter the disclaimer and appealed from the requirement. We find the phrase THE VITAMIN SHOPPE is generic and, therefore, affirm the disclaimer requirement and the refusal to register in the absence of such a disclaimer in each application.

I. The Applications and the Record

Applicant seeks registration of the four marks shown below.



(the '555 application)³



(the '614 application)⁴

² Applicant disclaimed the word VITAMIN in each application, but the Examining Attorney required disclaimer of the phrase THE VITAMIN SHOPPE.

³ Application Serial No. 86905555 was filed on February 11, 2016, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as March 24, 2014 (Class 5 goods) and April 8, 2014 (Class 35 services). "The mark consists of a stylized letter 'V' which fades from yellow to orange and the wording 'THE VITAMIN SHOPPE' in blue with 'THE VITAMIN' above 'SHOPPE'." "The color(s) blue, yellow and orange is/are claimed as a feature of the mark."

⁴ Application Serial No. 86905614 was filed on February 11, 2016, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as October, 2012. "The mark consists of a stylized letter 'V' and the wording 'THE VITAMIN SHOPPE EVERY BODY MATTERS'." "Color is not claimed as a feature of the mark."



(the '620 application)⁵



(the '628 application)⁶

The '555, '620, and '628 applications identify the following goods:

Veterinary preparations, namely, vitamins, nutritional supplements, preparations for aiding digestion and preventing and treating gas, preparations for treatment of hip and joint pain, and calming and anxiety nutritional supplements; dietetic food and nutritional substances, namely, vitamins, minerals, dietary and nutritional supplements for weight loss, diet, sports nutrition, body building, muscle gain and training; dietary supplement drinks, namely, nutritional supplements for bodybuilding; dietary supplements in the nature of weight loss powders; nutritional supplements in the form of non-fruit meal replacement bars and powders and nutritional supplements in the form of non-chocolate meal replacement bars and powders; chocolate-based meal replacement powders for weight loss purposes; nutritional supplement meal replacement powders for boosting energy; food for babies; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides in International Class 5.

The '555 and '628 applications identify the following services:

Retail store services, mail order catalog services and online retail store services provided via a global computer network featuring vitamins, vitamin, mineral, dietary and

⁵ Application Serial No. 86905620 was filed on February 11, 2016, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as August 1, 2012 (Class 5 goods) and October, 2012 (Class 35 services). "The mark consists of a stylized letter 'V' and the wording 'THEVITAMINSHOPPE' written horizontally." "Color is not claimed as a feature of the mark."

⁶ Application Serial No. 86905628 was filed on February 11, 2016, based upon Applicant's claim of first use anywhere and use in commerce since at least as early as March 24, 2014 (Class 5 goods) and April 8, 2014 (Class 35 services). "The mark consists of a stylized letter 'V' and the wording 'THEVITAMIN' written above the wording 'SHOPPE'." "Color is not claimed as a feature of the mark."

nutritional supplements, weight loss supplements, foods, beverages and sports performance drinks; promoting public awareness of health and nutrition in International Class 35.

The '614 application identifies the following services:

Retail store services featuring health products in the nature of vitamins, minerals, dietary and nutritional supplements, complementary and alternative medicine products, herbal products, aromatherapy products; Retail store services featuring fitness products in the nature of vitamins, minerals, dietary and nutritional supplements, complementary and alternative medicine products, herbal products, aromatherapy products; Retail store services featuring nutrition products in the nature of vitamins, minerals, dietary and nutritional supplements; Retail store services featuring sports nutrition products in the nature of vitamins, minerals, dietary and nutritional supplements; Retail store services featuring weight management products in the nature of vitamins, minerals, dietary and nutritional supplements; Retail store services featuring beauty products in the nature of skin care, oral care, hand and body care, hair care, facial care, and sun care products; Retail store services featuring pet care products in the nature of hip and joint care, digestive and gas care, vitamins, nutritional supplements and calming and anxiety products; mail order catalog services featuring health products in the nature of vitamins, minerals, dietary and nutritional supplements, complementary and alternative medicine products, herbal products, aromatherapy products; mail order catalog services featuring fitness products in the nature of vitamins, minerals, dietary and nutritional supplements, complementary and alternative medicine products, herbal products, aromatherapy products; mail order catalog services featuring nutrition products in the nature of vitamins, minerals, dietary and nutritional supplements; mail order catalog services featuring sports nutrition products in the nature of vitamins, minerals, dietary and nutritional supplements; mail order catalog services featuring weight management products in the nature of vitamins, minerals, dietary and nutritional supplements; mail order catalog services featuring beauty products in

the nature of skin care, oral care, hand and body care, hair care, facial care, and sun care products; mail order catalog services featuring pet care products in the nature of hip and joint care, digestive and gas care, vitamins, nutritional supplements and calming and anxiety products in International Class 35.

Finally, the '620 application identifies the following services:

Retail store services, mail order catalog services and online retail store services providing via a global computer network featuring vitamins, vitamin, mineral, dietary and nutritional supplements, weight loss supplements, foods, beverages and sports performance drinks in International Class 35.

Though a number of issues arose during examination of these four applications, from the first Office Action, a requirement to disclaim "THE VITAMIN SHOPPE" was presented and continued.⁷ In the first Office Action, this phrase was found merely descriptive and a disclaimer was required.⁸ Applicant responded by claiming the phrase "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."⁹ Applicant also argued that it owned five existing trademark registrations that included this phrase and that the Office had accepted proof of

⁷ Office Actions dated May 18, 2016, January 16, 2017, August 16, 2017, and March 25, 2018. These dates are for the '555, '620, and '628 applications. The '614 application began with an initial Office Action on May 18, 2016, but subsequent Office Actions were issued on December 18, 2016, July 18, 2017, and February 24, 2018. In all of these Office Actions, the Applicant was required to disclaim "THE VITAMIN SHOPPE."

⁸ Office Action dated May 18, 2016.

⁹ Response to Office Action dated November 17, 2016.

acquired distinctiveness under Section 2(f) in each of the applications that led to those registrations.¹⁰

The Examining Attorney found Applicant's Section 2(f) evidence and arguments insufficient "because the mark is highly descriptive, if not generic, of the services."¹¹ Applicant responded with substantial evidence of use and promotion of its marks that include THE VITAMIN SHOPPE.¹² The Examining Attorney then rejected Applicant's claim of acquired distinctiveness finding the phrase was generic for the goods and services.¹³ Because the phrase was found generic, "additional evidence [of acquired distinctiveness] would not overcome the disclaimer requirement."¹⁴

¹⁰ *Id.*

¹¹ Office Action dated January 16, 2017 ('555, '620, and '628 applications) and December 18, 2016 ('614 application). The Office Actions for the '555, '620, and '628 applications also found the phrase highly descriptive or generic for the goods identified in those applications because "it is merely the common commercial name of the goods and the common commercial name of the place in which those goods are sold."

¹² Responses to Office Action dated July 17, 2017 ('555, '620, and '628 applications) and June 16, 2017 ('614 application).

¹³ Office Actions dated August 16, 2017 ('555, '620, and '628 applications) and July 18, 2017 ('614 application). Because these Office Actions marked the first time the phrase THE VITAMIN SHOPPE was found generic during the prosecution of these four applications, the Office Actions were made non-final.

¹⁴ *Id.* We treat the Examining Attorney's failure to make a separate alternative determination about whether the Section 2(f) evidence of record would be sufficient to overcome the disclaimer requirement as a concession that the evidence would be sufficient to establish distinctiveness. See TMEP § 1212.02(i) (2018). Cf. *In re Dietrich*, 91 USPQ2d 1622, 1625 (TTAB 2009) (Board held that an examining attorney had "effectively conceded that, assuming the mark is not functional, applicant's evidence is sufficient to establish that the mark has acquired distinctiveness," where the examining attorney rejected the applicant's § 2(f) claim on the ground that applicant's bicycle wheel configuration was functional and thus unregistrable even under § 2(f), but did not specifically address the sufficiency of the § 2(f) evidence or the question of whether the mark would be registrable under § 2(f) if it were ultimately found to be nonfunctional). Thus, if, on appeal, the phrase THE VITAMIN SHOPPE ultimately is found not to be generic, each of the marks would register with a § 2(f)

Applicant responded with arguments that the phrase was not generic and a disclaimer of the word VITAMIN,¹⁵ but the Examining Attorney rejected those arguments, found the disclaimer insufficient, and made the disclaimer requirement final based on the finding that the phrase was generic.¹⁶

Applicant submitted Requests for Reconsideration that included arguments and a survey purporting to show that THE VITAMIN SHOPPE was not generic for the goods and services.¹⁷ Notices of Appeal were filed with the Board on the same day.¹⁸ The Examining Attorney denied the Requests for Reconsideration¹⁹ and the appeals were consolidated upon motion by Applicant.²⁰ The appeals have been fully briefed.

II. The Phrase “THE VITAMIN SHOPPE” Is Generic

The only issue presented by these appeals is whether THE VITAMIN SHOPPE is generic for the goods and services identified in the four applications and therefore must be disclaimed. Failure to comply with a disclaimer requirement is a ground for refusal of registration. *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1954 (TTAB 2006).

claim as to THE VITAMIN SHOPPE and a disclaimer of VITAMIN, and no further proceedings before this Board would be needed.

¹⁵ Responses to Office Action dated February 16, 2018 ('555, '620, and '628 applications) and January 18, 2018 ('614 application).

¹⁶ Office Actions dated March 25, 2018 ('555, '620, and '628 applications) and February 24, 2018 ('614 application).

¹⁷ Requests for Reconsideration after Final Office Action dated September 21, 2018 ('555, '620, and '628 applications) and August 24, 2018 ('614 application).

¹⁸ 1 TTABVUE.

¹⁹ 4 TTABVUE.

²⁰ 10, 11 TTABVUE.

Applicant's disclaimer of the word VITAMIN is insufficient if the full phrase THE VITAMIN SHOPPE is generic.

Consumer understanding is the measure of whether a term or phrase is generic, as Judge Learned Hand explained almost 100 years ago:

What do the buyers understand by the word for whose use the parties are contending? If they understand by it only the kind of goods sold, them, I take it, it makes no difference whatever what efforts the plaintiff has made to get them to understand more.

Bayer Co. v. United Drug Co., 272 F. 505, 509 (S.D.N.Y. 1921) (finding aspirin a generic term because consumers "did not understand by the word anything more than a kind of drug"). "The test is thus one of meaning to the usual buyer or other relevant members of the public." *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

To determine "whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered or retained on the register understood by the relevant public primarily to refer to that genus of goods or services?" *Id.* "[I]n registration proceedings the PTO always bears the burden of proving genericness by clear and convincing evidence." *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (citing *In re Hotels.com, L.P.*, 573 F.3d 1300, 1301 (Fed. Cir. 2009)).

The genus is determined by the goods and services identified in the applications. *Cordua Rests.*, 118 USPQ2d at 1636. Three of the applications identify goods in Class 5 and retail services in Class 35, while one application identifies only retail services

in Class 35. Applicant refers to its business as “health and wellness stores,” and then lists many types of goods sold in its stores.²¹ The list provided in Applicant’s brief substantially matches the goods identified in the ’555, ’620, and ’628 applications. We find the genus for Applicant’s services is a health and wellness store that primarily sells dietary and nutritional supplements.

We further find that the genus for the goods includes the types of products Applicant sells in its health and wellness stores. When Applicant uses the phrase THE VITAMIN SHOPPE as part of its composite marks on goods, the mark refers to the name of the store in which the goods are sold.²² When used on goods, the marks shown in the ’555, ’620, and ’628 applications are house marks that identify the store in which the goods are sold, as the specimens submitted with these applications show:

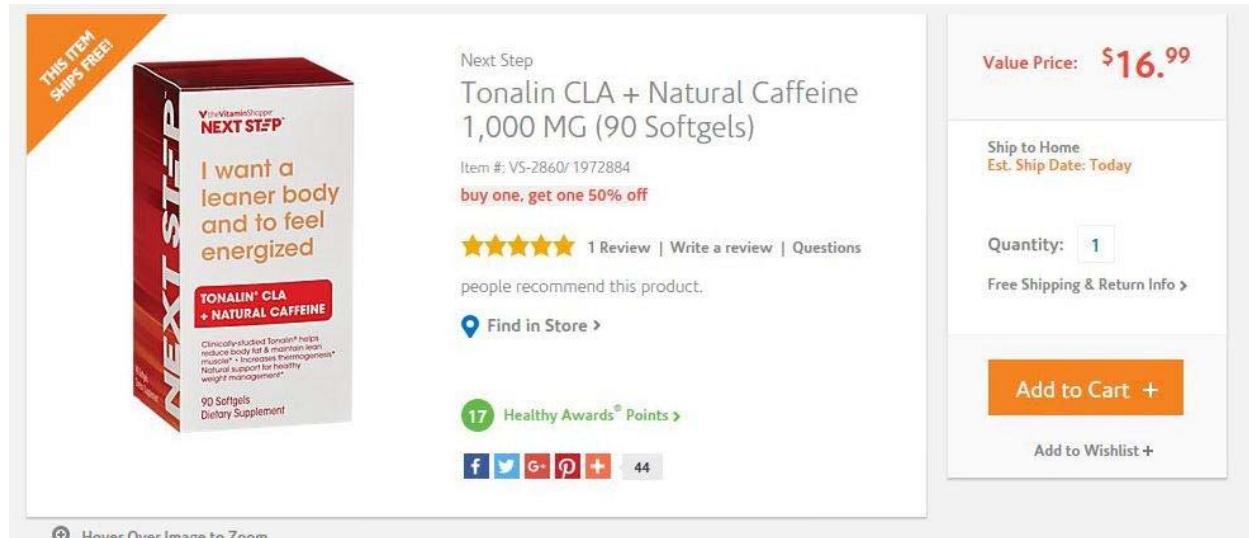
the ’555 and ’628 application specimen



²¹ 13 TTABVUE 3-4. Applicant’s survey expert identified the relevant business as “a store that primarily sells dietary or nutritional supplements, such as vitamins, minerals, or weight management products.” Request for Reconsideration dated September 21, 2018 at 24, 41.

²² ’555 Application specimen (showing such uses of the mark on goods).

the '620 application specimen



The sole issue, therefore, is whether THE VITAMIN SHOPPE is generic for the type of stores Applicant operates and at least some of the goods identified in the applications. *See In re Analog Devices, Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988) (A registration can be cancelled if the registered mark has become generic for any or all of the goods identified), *aff'd without pub. op.*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989). The evidence of record shows clearly and convincingly that the phrase "vitamin shop" is generic for Applicant's stores, as we explain in the following part of this decision. The addition of the word "the" to "vitamin shop" does not alter the generic meaning, and at most would refer to a specific vitamin shop (e.g., the vitamin shop at Fifth and Main). Cf. *In re Comput. Store, Inc.*, 211 USPQ 72, 74-75 (TTAB 1981) (THE COMPUTER STORE is the common descriptive name for computer-related services).

Because the three versions on Applicant's mark used on goods constitute uses as a house mark, it follows that if the phrase THE VITAMIN SHOPPE is generic for the

type of store operated by Applicant, the phrase is also generic when used on the goods at issue here. *See In re The Paint Products Co.*, 8 USPQ.2d 1863, 1866 (TTAB 1988) (“PAINT PRODUCTS CO.’ is no more registrable for goods emanating from a company that sells paint products than it would be as a service mark for the retail paint store services offered by such a company.”).

We turn now to the evidence supporting our findings.

A. Evidence of Generic Use and Understanding of “Vitamin Shop”

The Examining Attorney submitted almost 100 examples of generic use of the phrase “vitamin shop.”²³ These uses come from a wide variety of contexts, including news reports, business reports, and books. In every instance, the phrase “vitamin shop” is used generically. The following examples are illustrative.

- A Corpus Christ, Texas television station’s website reported that “local vitamin shop owner found guilty.”²⁴
- Another television station’s website reported, “Car crashes into vitamin shop.”²⁵
- An online article from Fitness magazine stated “walking into a vitamin shop or just perusing the supplement aisle at your drugstore can be pretty overwhelming ...;”²⁶

²³ Office Action dated August 16, 2017 at 18-118 ('555, '620, and '628 applications). The same evidence was provided in an Office Action dated July 18, 2017 ('614 application). In the remainder of this decisions, citations to this evidence are to the Office Action dated August 16, 2017.

²⁴ *Id.* at 21.

²⁵ *Id.* at 27.

²⁶ *Id.* at 29.

- An article on a website titled Rocco's Medical Technology is captioned "What Can You Find at a Vitamin Shop?" This article has six more generic uses of "vitamin shop" on the first page.²⁷
- An online article from the Del Mar Times states "many simply walk into a vitamin shop and stock up ...";²⁸
- An online notice from the Athens Banner-Herald described a new Kroger Marketplace store would "will also feature a Starbucks, a vitamin shop, a drive-through pharmacy, a floral shop and an expanded cheese shop."²⁹
- An article in the Milwaukee Journal Sentinel states "walk into vitamin shops or supplement stores ...";³⁰
- An Arizona Republic article discussing the origins of the Smoothie King business, explained "founder Steve Kahnau opened a vitamin shop called Town and Country in New Orleans."³¹
- A Newark Star-Ledger article discussing possible retail businesses explained they might "include a vitamin shop, a sneaker and athletic apparel shop, a men's and women's clothing store and other boutique shops."³²
- A New York Post crime blotter article stated, "A GNC vitamins shop was held up in Morris Park ..."³³

²⁷ *Id.* at 31.

²⁸ *Id.* at 34.

²⁹ *Id.* at 35.

³⁰ *Id.* at 37.

³¹ *Id.* at 38.

³² *Id.* at 39.

³³ *Id.* at 40. This use appears to refer to a store from the GNC chain as a "vitamins shop," which is a generic use for the same type of store operated by Applicant. *See infra* Part C.2. (discussion of survey offered by Applicant, where the survey noted that GNC was the leading chain in Applicant's business segment). *See also* Office Action dated August 16, 2017 at 45 (referring to "a GNC vitamin shop"); 51 ("I had been living in GNC vitamin shops ..."); 58 ("GNC's chain of vitamin shops"); 89 ("a GNC vitamin shop").

- An Orange County Register article stated, “While working in retail, at vitamin shops and inside gyms, ...”³⁴
- A Tampa Tribune article stated, “before we began to fortify milk with vitamin D and open vitamin shops ...”³⁵
- A New York Times article stated “Popular weight-loss and workout supplements on sale in hundreds of vitamin shops across the nation contain a chemical nearly identical to amphetamine ...”³⁶
- A San Diego Union-Tribune article referred to “a credit union; vitamin shop; and pet supplies shop.”³⁷
- A Sun-Sentinel article stated, “Rod Paille, a lifelong parishoner who owns a vitamin shop just a couple of blocks from St. Mary’s ...”³⁸
- A person interviewed in an article in the Arkansas Democrat-Gazette explained that you would never find tobacco or alcohol products “at a vitamin shop.”³⁹
- A Newark Star-Ledger article stated, “Look for lucuma powder and coconut nectar in a vitamin shop or health food store.”⁴⁰
- An Orange County Register article stated, “Some of Thomas Licata’s earliest memories are of working in his father’s health food and vitamin shop ...”⁴¹
- An article in The Oregonian explained that protein power is “found in the nutrition section of most natural food stores as well as well-stocked vitamin shops ...”⁴²

³⁴ *Id.* at 42.

³⁵ *Id.* at 43.

³⁶ *Id.* at 44.

³⁷ *Id.* at 46.

³⁸ *Id.* at 49.

³⁹ *Id.* at 52.

⁴⁰ *Id.* at 54.

⁴¹ *Id.* at 55.

⁴² *Id.* at 56.

- A New York Times article refers to a person who “found a part-time job at a vitamin shop.”⁴³
- A Baltimore Sun article mentioned that supplements aiming to improve sexual performance “are available at drugstores, groceries and vitamin shops ...”⁴⁴
- A Tampa Tribune article described a person as “a 31-year-old vitamin shop owner from Idaho ...”⁴⁵
- A San Diego Union-Tribune article explained that a product “is sold in drugstores, vitamin shops and some department stores ...”⁴⁶
- A Newsday article referred to businesses as “the hair braiding places, the shoe stores, the vitamin shops.”⁴⁷

The evidence of record contains dozens more examples of generic uses of “vitamin shop” similar to those shown above. These come from all sorts of articles, but in every instance “vitamin shop” (or the plural form) is used generically to identify a type of retail store. The examples that specifically refer to GNC vitamin shops leave no doubt that these uses relate to the same type of business operated by Applicant.⁴⁸

This evidence clearly and convincingly shows that a vitamin shop is a type of store. Applicant does not seriously dispute this fact, noting the “reams of evidence of third party use of ‘vitamin shop’ ...”⁴⁹ Applicant argues that this evidence comes from the

⁴³ *Id.* at 57.

⁴⁴ *Id.* at 59.

⁴⁵ *Id.* at 66.

⁴⁶ *Id.* at 74.

⁴⁷ *Id.* at 102.

⁴⁸ See *supra* n.32.

⁴⁹ 13 TTABVUE 20.

“depths of the Internet and the Nexis database,”⁵⁰ but offers no evidence to refute or contradict the extensive evidence of generic use of the phrase “vitamin shop.”⁵¹

Applicant makes two arguments in its attempt to overcome the overwhelming evidence that “vitamin shop” is generic for the identified goods and services. First, Applicant argues that “shoppe” is different enough from “shop” for consumers to have different understandings of “vitamin shop” and “vitamin shoppe.” Second, Applicant offers a survey that purports to show that “The Vitamin Shoppe” is not generic.

B. Shoppe and Shop

Applicant makes much of the fact that its mark includes the word “shoppe” rather than “shop.”⁵² This argument proves too much, because even the evidence most favorable to Applicant shows that shoppe is a generic term for a shop or store. Oxford English dictionary, for example, defines shoppe as “a deliberately archaic spelling of shop, used in the hopes of imbuing a store with old-fashioned charm or quaintness.”⁵³ The American Heritage dictionary defines shoppe as “a variant of shop.”⁵⁴ Merriam-Webster dictionary does not even include a separate entry for the word shoppe, but instead lists it as an alternative spelling of shop.⁵⁵

⁵⁰ *Id.* at 8.

⁵¹ The Examining Attorney also presented evidence the terms “vitamin” and “shop” are generic. Office Action dated August 16, 2017 at 11-17. Applicant does not appear to contest this point, but instead argues that the composite phrase “The Vitamin Shoppe” is not generic. 13 TTABVUE 20-21.

⁵² 13 TTABVUE 18-19.

⁵³ (North American English edition) Office Action dated August 16, 2017 at 14.

⁵⁴ Office Action dated May 18, 2016 at 10.

⁵⁵ *Id.* at 9.

Applicant argues that “shoppe” is “a deliberately archaic spelling of shop for quaint effect, i.e., as a proper noun or trademark/trade name.”⁵⁶ One of the dictionary definitions, the Oxford English dictionary, supports the first part of this assertion, but there is no evidence showing that “shoppe” is used as a proper noun or as a trademark. In addition, there is no evidence that Applicant’s stores are old-fashioned or quaint. It follows, therefore, that Applicant is either using the word “shoppe” in a misleading way or that it merely uses “shoppe” as a different spelling of “shop.” There is no evidence to support an inference that consumers understand the word “shoppe” as used by Applicant to mean anything other than a shop or store.

We note, too, that the words “shoppe” and “shop” sound exactly the same. The phonetic equivalent of a generic term may likewise be found generic, *see, e.g., In re Stanbel Inc.*, 16 USPQ2d 1469 (TTAB 1990) (ICE PAK for reusable ice substitute the equivalent of the generic “ice pack”) *aff’d without pub. op.*, 20 USPQ2d 1319 (Fed. Cir. 1991), and we find that if “vitamin shop” is generic, then the identically sounding “vitamin shoppe” is also generic. One reason generic terms are not protected as trademarks is to ensure competitors have access to the words they need to identify the type of goods or services they offer. *Dranoff-Perlstein Assocs. v. Sklar*, 967 F.2d 852, 857 (3d Cir. 1992) (“Generic terms are denied trademark protection because granting one firm their exclusive use would place competitors at a serious competitive disadvantage.”). To extend Applicant’s trademark rights to the phrase “The Vitamin

⁵⁶ 13 TTABVUE 19.

Shoppe” would create doubts concerning the rights of competitors to refer to their businesses as vitamin shops.

Applicant’s argument boils down to a claim that it uses as a mark THE VITAMIN SHOPPE for a vitamin shop, or perhaps more accurately, for a chain of many vitamin shops. Some consumers may understand the phrase “The Vitamin Shoppe,” as used by Applicant, as a trademark or as part of composite trademarks Applicant uses for its chain of vitamin shops. Indeed, the evidence submitted by the Examining Attorney includes at least two articles in which “vitamin shop” was used generically while “The Vitamin Shoppe” was used to identify Applicant. A 1993 article in the New York Times refers to “The Vitamin Shoppe” as a “Manhattan-based vitamin shop ...”⁵⁷ Another article initially refers generically to “pharmacies and vitamin shops,” but later refers specifically to “The Vitamin Shoppe, a national retail chain ...”⁵⁸ These documents show that some consumers may understand “The Vitamin Shoppe” as a trademark for a chain of vitamin shops. We found only two examples to support this view, which is not enough to indicate that the primary meaning of “The Vitamin Shoppe” is as a trademark.⁵⁹

⁵⁷ Office Action dated August 16, 2017 at 116.

⁵⁸ *Id.* at 61.

⁵⁹ It must be noted that we found a number of references to “GNC vitamin shops,” which confirms that the generic uses of “vitamin shop” were referencing the type of business that offers the goods and services identified in the four pending applications. *See supra* n.31. One of the two references to The Vitamin Shoppe is from 1993 and is of very limited probative value here.

Applicant owns six trademark registrations that include the phrase “The Vitamin Shoppe,” including two registrations for this phrase alone. The validity of those registrations is not at issue here, and the USPTO is required to evaluate Applicant’s current “trademark applications for compliance with each and every eligibility requirement, including non-genericness ...” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016). In the *Cordua Restaurants* case, the applicant sought registration of a stylized version of the word “Churrascos,” but registration was refused on the ground that the word is generic. 118 USPQ2d at 1633-34. The applicant owned a registration for the same word in standard characters and argued that this prior registration was evidence the word was not generic. The Federal Circuit disagreed because “this proceeding does not involve a challenge to the ‘321 Registration and the CHURRASCOS word mark.” *Id.* at 1634. The court explained that “whether or not the term “churrascos” was generic when it was registered, we, like the Board, must evaluate the evidence in the present record to determine whether there is sufficient evidence to establish that it is ineligible.” *Id.* at 1635. The same reasoning applies here.

Applicant also argues that the Examining Attorney’s decision “boils down to a claim that all of the registrations previously issued by the Office to Applicant were simply wrong.”⁶⁰ That is incorrect, as shown by the Federal Circuit’s analysis in the *Cordua Restaurants* case. We are required to apply the statutory rules to each application and cannot treat a decision in a prior examination as binding on the

⁶⁰ 13 TTABVUE 8.

examination of later applications. The sole question presented to the Board in these appeals is whether the phrase “The Vitamin Shoppe” is generic for the goods and services identified in the four applications. Based on the evidence of record, we find that it is. It is irrelevant that Applicant obtained prior registrations of marks that included the same phrase without having to disclaim the phrase. *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

Applicant also notes that numerous marks with the word “shoppe” have been registered without a requirement that this term be disclaimed.⁶¹ The question presented here is whether the phrase “The Vitamin Shoppe” is generic for Applicant’s goods and services. Use of the word “shoppe” in other registered trademarks does not shed light on this issue. Again, it is well settled that each case must be decided on its own facts, based on the particular mark, the particular goods or services, and the particular record in each application. *In re Nett Designs*, 57 USPQ2d at 1566.

⁶¹ 13 TTABVUE 21 (referring to “evidence of 70 live registrations of SHOPPE marks where SHOPPE was not even disclaimed”).

C. The Survey Evidence Is Irrelevant, Ambiguous and Inconclusive

Applicant submitted a Thermos-style survey that it claims shows the phrase “The Vitamin Shoppe” is a trademark.⁶² We begin by noting that the phrase “The Vitamin Shoppe” consists of an article (the) and two generic terms (vitamin and shoppe). Applicant argues that the phrase as a whole is a distinctive trademark, but this is not a scenario where a coined term or phrase is alleged to have become generic.⁶³ This case presents the opposite question—whether a generic phrase has become a distinctive mark.

We have held that consumer surveys are irrelevant in this context.

Surveys might help in determining whether a designation that started life as a mark now is understood to be the thing itself, but they can have no probative value where the issue is the meaning of terms as a lexical matter. Where, as here, the question is not whether a term has become generic through common use, consumer surveys are not relevant.

In re Hikari Sales USA, Inc., 2019 USPQ2d 111514, *41 (TTAB 2019); *see also Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 124 USPQ2d 1184, 1196 (TTAB 2017). Based on these precedents, we are inclined to give little, if any, weight to the survey offered by Applicant.

The evidence of consumer use in the record shows that the phrase “the vitamin shop” is generic. Applicant points out that none of this evidence shows use of the

⁶² Request for Reconsideration dated September 21, 2018 at 12-57. We discuss this survey below.

⁶³ Applicant concedes this point. 13 TTABVUE 10 (noting that this is not “a case where the question is whether a coined or arbitrary mark has become generic”). Applicant argues the phrase “The Vitamin Shoppe” is descriptive, not generic.

phrase “The Vitamin Shoppe” in a generic fashion.⁶⁴ Dictionary evidence covers that gap by showing that “shoppe” is a different spelling of “shop” and that any different meaning of the “shoppe” variant is not relevant here. In short, the other evidence of record shows clearly and convincingly that “The Vitamin Shoppe” is generic for the goods and services identified in the applications at issue here.

Though our precedents hold that a survey is not relevant here, for the sake of completeness, we will evaluate Applicant’s survey to determine whether it sheds any light on the issues before us. We begin with a general discussion of the type of survey Applicant’s expert conducted and then turn to the details of the survey.

1. The Thermos Survey Format

Applicant retained Dr. Brian Robertson, who conducted a Thermos-type survey. In this type of survey, participants are asked what they would call a particular type of product or service.⁶⁵ In the original Thermos survey, potential participants were first asked the screener question: “Are you familiar with the type of container that is used to keep liquids, like soup, coffee, tea and lemonade, hot or cold for a period of time?” *Thermos Prods. Co. v. Aladdin Indus.*, 207 F. Supp. 9, 21 n.8 (D. Conn. 1962).

Those who answered yes were then asked the following key questions:

- If you were going to buy one of these containers tomorrow—that is, the type that keeps food and beverages hot or cold—what type of store would you select to make your purchase? What would you ask for—that is, what would you tell the clerk you wanted?

⁶⁴ 13 TTABVUE 20-21.

⁶⁵ Vincent N. Palladino, *Assessing Trademark Significance: Genericness, Secondary Meaning and Surveys*, 92 TRADEMARK REP. 857 (2002).

- Can you think of any other words that you would use to ask for a container that keeps liquids hot or cold?
- If you were going to describe one of these containers to a friend of yours—what words would come to your mind first to describe a container that keeps liquids hot or cold?
- What do you call this (these) containers?

Id. Participants in the Thermos survey were later asked the following two brand-related questions:

- Do you know the names of any manufacturers who make these containers that keep liquids [sic] hot or cold?
- Can you name any trade-marks or brand names that are used on these containers?

Id.

The first series of questions was included to elicit from participants generic terms for the product, while the two follow-up questions were used to elicit brand responses that could be used to eliminate brand responses given to the first series of questions. For example, if a participant responded with “thermos” or “thermos bottle” to one or more of the first questions, that might mean the word thermos was used and understood as a generic term by the respondent. But if the same person later listed “Thermos” as a manufacturer or a brand for the product, such a response might suggest the participant was not providing a generic term in response to the first series of questions.⁶⁶

⁶⁶ *Id.* at 874-75.

Before we turn to Applicant's survey, there are certain characteristics of the Thermos survey format worth noting. First, if there are a number of alternative generic terms for the product or service at issue, a Thermos survey is likely to underestimate the degree of generic meaning of some, and perhaps all, the generic terms.⁶⁷ Thus, the Thermos-type survey can lead to inconclusive results when there are more than a few possible generic terms for the goods or services. For example, high results for one generic term are not evidence that other terms that produced lower response rates are not also generic. *See, e.g., Nestle Co. v. Chester's Mkt., Inc.*, 571 F. Supp. 763, 776 (“All the Sorensen study could prove was that chocolate chip is a generic term just as a similar study in the Thermos case proved that thermos is a generic term. ... Surely the [Thermos] study did not prove that vacuum bottle is not a generic term, as in this case it did not prove that Toll House is not a generic term for cookies.”).

Second, the brand-related follow up questions in the Thermos survey are not always effective at reducing ambiguity because respondents may use a term generically in response to all questions in the survey.⁶⁸ A Thermos-type survey can be useful in identifying potentially generic terms, and it may even help show which generic terms are more frequently used by consumers. Beyond that, a Thermos survey may prove nothing.

⁶⁷ *Id.*

⁶⁸ Palladino, 92 TRADEMARK REP at 874-75.

Applicant argues the Thermos survey may overstate the generic nature of dual use trademarks.⁶⁹ A dual use mark, as the phrase is used here, refers to a trademark that some, perhaps most, consumers understand to be a brand, but that is also widely used as a generic term. A Thermos survey may not work well for such marks because of the poor differentiation between the questions intended to elicit generic responses and those intended to elicit brand responses. In a dual use scenario, many consumers may offer the dual use mark as a response to all the questions. Differences in response rates may not mean much in this situation, but may merely confirm that the mark is used generically by some consumers and understood as a brand by some consumers.

These appeals do not present dual use or hybrid marks. The marks typically identified as examples of this phenomenon include COKE, JELLO, KLEENEX and BAND-AID.⁷⁰ All of these marks began life as trademarks. Perhaps some consumers also use these marks as generic terms in some contexts. The present appeals, however, raise a different issue. The phrase “the vitamin shop” is clearly generic, but Applicant argues that a different spelling of the phrase (i.e., “The Vitamin Shoppe”) is not generic. If Applicant is correct, then it is **not** a dual use scenario, but rather one where consumers differentiate between “the vitamin shop” and “The Vitamin

⁶⁹ 13 TTABVUE 12 (“The principal drawback of a ‘Thermos’ study is that consumers familiar with a brand name for a good or service ‘may answer [the question] with the trademark and drop what they consider to be a generic name, because it’s so obvious to them.’”) (citing MCCARTHY, § 12:15). Applicant used the Coke trademark as an example of a dual use mark, but offered no evidence about actual consumer understanding or use of the Coke mark.

⁷⁰ See, e.g., Ralph H. Folsom and Larry L. Teply, *Trademarked Generic Words*, 89 YALE LAW J. 1323, 1344-45 (1980) (using KLEENEX, COKE and BAND-AID as examples of hybrid trademarks); *E.I. duPont de Nemours & Co. v. Yoshida International, Inc.*, 393 F. Supp. 502, 185 USPQ 597, 616 (EDNY 1975) (the Teflon survey used COKE and JELLO marks).

Shoppe.” That is not what happens in a dual use or hybrid mark scenario where exactly the same word is allegedly used as a brand and a generic term. There is no reason to believe that a Thermos-type survey would overstate the generic results for the phrase “The Vitamin Shoppe.” In fact, the opposite is true. As we explained above, a Thermos-type survey may undercount the genericness of this phrase if there are a number of generic terms for the type of store operated by Applicant. We find that outcome more likely than the undercounting suggested by Applicant, particularly given some of the other flaws with Dr. Robertson’s survey. The fact that credible arguments can be made for both overstating and understating results illustrates the inherent ambiguity in the Thermos-type survey format.

2. Applicant’s Thermos-Type Survey

There are several differences between Applicant’s survey and the original Thermos survey. In the original Thermos survey, participants were asked four different questions that might produce a generic term in response. That repetition gave participants four opportunities to offer a generic term, which might reduce the undercounting problem noted above. In the Thermos survey, participants also were asked if they could think of any other words for the product. The original Thermos survey used a number of questions to elicit generic responses from respondents.

The survey conducted by Dr. Robertson asked only one operative question: “What do you generally call the type of store that primarily sells dietary or nutritional

supplements?”⁷¹ No follow ups or probes were used. No other questions were included to elicit additional generic terms from participants. In the Robertson survey, respondents were given only one chance to provide a possibly generic response. See, e.g., *Elliot v. Google Inc.*, 45 F. Supp. 3d 1156, 1169 (D. Ariz. 2014) (criticizing a Thermos-type survey that “asked only one substantive question”).

There is nothing inherently wrong with Dr. Robertson’s structure, but it does increase the survey’s tendency to underestimate generic responses. For example, what if there are five generic terms consumers often use to identify this type of store? If each of these terms is used with equal frequency, Dr. Robertson’s survey should produce about a 20% response rate for each of those generic terms. What if one of those terms is used more often by consumers than the other four generic terms. We might get substantially higher results for the more popular term than for the others.

Dr. Robertson’s survey was conducted online. We do not have the actual responses, but from the explanation in his report, we assume participants typed in an answer to

⁷¹ Request for Reconsideration dated September 21, 2018 at 25, 41. Dr. Robertson used the following screening question: “Are you familiar with, or have you ever shopped at, a store that primarily sells dietary or nutritional supplement, such as vitamins, minerals, or weight management products?” *Id.* at 24. This screening question is too broad. Mere familiarity with stores that sell these types of products does not make one a relevant consumer of Applicant’s goods and services. Indeed, of the 407 participants who answered yes to the screener question, only 342 reported that they had ever shopped in such a store. That means 65 persons screened into this survey may not have been relevant consumers, because we only know that they were familiar with such stores. Familiarity does not make one an actual or prospective customer. Other consumers may be familiar with stores that sell goods they would never buy. It was error to include persons who were merely familiar with the type of store operated by Applicant. We cannot tell what impact this error had on the survey, but it is another reason to question the reliability of the resulting data.

the operative question.⁷² Dr. Robertson's report shows that 5.2% of participants answered the operative question with "Vitamin Shoppe or Vitamin Shop."⁷³ How many participants actually responded with "Vitamin Shoppe"? Dr. Robertson does not say. The other evidence of record shows widespread generic use of "vitamin shop," so it would be helpful to know what specific answers were given to this question. Dr. Robertson should not have combined all such responses into the category of "Vitamin Shoppe or Vitamin Shop," given that Applicant argues one of these phrases is a brand (Vitamin Shoppe) but effectively concedes the other may be generic (vitamin shop).

We also note that another 8.4% of participants answered "Vitamin Store" to the operative question.⁷⁴ Because the question used the term "store," we believe that responses of "vitamin store" should be combined with the "vitamin shop" responses.⁷⁵ Indeed, since Applicant admits to the "reams" of evidence showing that "vitamin shop" is generic,⁷⁶ why didn't Dr. Robertson combine responses of "vitamin shop" and "vitamin store," then compare those combined responses to participants who answered "Vitamin Shoppe" to the operative question? That comparison would be helpful in determining what, if anything, Dr. Robertson's survey proves.

⁷² *Id.* at 22 (explaining the survey methodology). As explained below, the omission of actual survey responses raises additional questions about the reliability of Dr. Robertson's conclusions.

⁷³ *Id.* at 43.

⁷⁴ *Id.*

⁷⁵ The dictionary definitions in the record all indicate that a "shop" and a "shoppe" are types of stores. *See supra* notes 52-54.

⁷⁶ 13 TTABVUE 20.

We read the Robertson survey as showing 13.6% of respondents provided an answer to the operative question that is consistent with the evidence of record showing that the phrase “vitamin shop” is generic. The highest “generic” response rate was 24.6% for the group that included responses with “health” plus some other term.⁷⁷ Responses that included “nutrition” plus some other term were 7.6%.⁷⁸ These results are striking for two reasons.

First, these groupings show that Dr. Robertson combined all responses that included “health” into a single category. He also combined all responses that included “nutrition” into a single category. But he put responses that included “vitamin” into two categories. When we combine the “vitamin” responses, we get a 13.6% response rate, which is almost double that for the “nutrition” responses. The operative question included the word “nutritional” but did not include the word “vitamin,” which makes the different results even more striking.⁷⁹ On balance, we find the responses to the operative question appear consistent with the other evidence of record. That is, Applicant’s survey results are consistent with the phrase “vitamin shop” being generic. Dr. Robertson’s summary of the responses to the operative question follow.⁸⁰

⁷⁷ Request for Reconsideration dated September 21, 2018 at 43.

⁷⁸ *Id.*

⁷⁹ The screening question included the word “vitamins,” but the operative question did not. We do not suggest this had a huge impact, but it does highlight the importance of the difference between the “vitamin” and “nutrition” responses to the operative question.

⁸⁰ *Id.* at 25.

| | % |
|---|-----|
| Health, health store, health food store, health and wellness | 25% |
| GNC | 17% |
| Vitamin Store | 8% |
| Nutrition, nutrition store, nutritional store, nutritional supplement store | 8% |
| Vitamin Shoppe or Vitamin Shop | 5% |
| General Nutrition | <1% |
| Other | 26% |
| Cannot identify by name any stores that primarily sell dietary or nutritional supplements | 11% |

The follow-up brand-related questions do little to change our view of this evidence.

In the original Thermos study, two brand-related follow up questions were used. Both were open-ended, not leading. Dr. Robertson again deviated from the Thermos model. After asking his single operative question—that is, the one quoted above—he asked, “Can you identify by name any examples of this type of store? Which store names do you know?”⁸¹ We cannot help but wonder why Dr. Robertson used an open-ended question that allows for multiple responses here, but sought only a single response to the operative question that was designed to elicit generic responses. Whether intended or not, this structure is likely to understate generic responses and overstate brand responses.

To make matters worse, we don’t know what specific answers were given to the open-ended follow-up question because Dr. Robertson again only identified the

⁸¹ *Id.* at 26, 41.

combined “Vitamin Shoppe or Vitamin Shop” responses.⁸² Dr. Robertson effectively treats all of these responses as brand answers, but does not provide the raw data that would allow us to determine how many participants actually answered “Vitamin Shoppe.” If most of the responses in this group answered “vitamin shop,” then it is impossible to determine what they meant by that response. We suspect, given the other evidence of record, that many, perhaps most, of the respondents in the “Vitamin Shoppe or Vitamin Shop” category answered “vitamin shop” to both the operative question and to the open-ended brand question. If so, the results are completely ambiguous.⁸³

Dr. Robertson didn’t stop with this more open-ended brand-related question. He went on to ask a series of leading questions about specific companies in the relevant market. Participants were asked, “Are you familiar with _____ (a store that primarily sells dietary or nutritional supplements)?” The following store names were used with this question: Better Day, General Nutrition Center or GNC, Nutrishop, and The Vitamin Shoppe. Note that in this instance, the online form would have provided the name “The Vitamin Shoppe” to participants. Over 68% of respondents said yes, they were familiar with The Vitamin Shoppe.

⁸² *Id.* at 43.

⁸³ These problems go to the heart of the conclusions offered by Dr. Robertson, because he used the alleged brand responses in “Vitamin Shoppe or Vitamin Shop” group to eliminate almost all the generic responses from the same group. *Id.* at 20, 26-27. If most of the responses in these groups were “vitamin shop,” then Dr. Robertson’s analysis is deeply flawed. Because we do not have the data needed to evaluate this critical issue, we cannot determine whether Dr. Robertson’s primary conclusions are entitled to any weight.

This result provides some support for Applicant's position. If 68% of relevant consumers are familiar with The Vitamin Shoppe stores, that is evidence the phrase is distinctive. There are, however, a number of reasons to question this result. First, if 68% of participants were familiar with The Vitamin Shoppe, why did only 21% identify "Vitamin Shoppe or Vitamin Shop" as a name of this type of store? In fact, we don't even know what portion of the 21% actually gave "Vitamin Shoppe" as an answer to the open-ended store name question. Some, maybe most, answered "vitamin shop" to that question. But even if nearly all used "Vitamin Shoppe" in response to that question, why were more than three times more persons familiar with the store name when prompted?

There are other somewhat perplexing results from Dr. Robertson's survey. For example, when asked how often they shopped at The Vitamin Shoppe, 251 respondents answered that they had shopped at a The Vitamin Shoppe store within the last year.⁸⁴ Yet when asked for names of this type of store, only 86 respondents gave "Vitamin Shoppe or Vitamin Shop" as an answer. It seems strange that only about a third of the persons who had shopped at the store in the last year named it when asked.

There is one explanation for these responses. Perhaps many of the respondents used "Vitamin Shoppe or Vitamin Shop" generically throughout this survey. Perhaps many participants did not take any note of the different spelling in the leading question "Are you familiar with The Vitamin Shoppe (a store that primarily sells

⁸⁴ *Id.* at 52.

dietary or nutritional supplements)?” Participants had already been asked the same question three times (i.e., with three other store names used) before they were presented with this one, and the two immediately prior versions of this question included store names that were not familiar to most participants.⁸⁵ Perhaps by that point in this online survey participants were not reading carefully enough to notice, or to place much significance upon, the different spelling of the word “Shoppe” in this leading question.

We give little weight to the Robertson survey. We treat the 68% of respondents who expressed familiarity with The Vitamin Shoppe stores as some evidence supporting Applicant’s position. But given the survey’s flaws, the lack of data concerning actual responses given to the survey questions, and the inconsistencies in the results, we find this evidence falls far short of raising doubts as to the genericness of the phrase “The Vitamin Shoppe.”

D. The Disclaimer Requirement and Applicant’s Longstanding Trademark Use

Applicant uses the phrase “The Vitamin Shoppe” as part of composite marks for its stores and for many of the goods sold in those stores. Applicant has used “The Vitamin Shoppe” for over 40 years and argues that its brand must be distinctive as a result of such long use and promotion.⁸⁶ However, even long and successful use of a

⁸⁵ *Id.* at 46-47.

⁸⁶ 13 TTABVUE 3-4.

term does not automatically convert a generic term into a non-generic term. *In re Helena Rubinstein, Inc.*, 410 F.2d 438, 161 USPQ 606, 609 (CCPA 1969).

The disclaimer requirement imposed here was appropriate, because Applicant does not have exclusive rights in the phrase “The Vitamin Shoppe.” To allow registration without a disclaimer would place Applicant’s competitors at risk if they identify their stores a “vitamin shop,” or “the vitamin shop.” That result is unacceptable given the evidence of record.

The predecessor of our primary reviewing court noted long ago the risk one takes when it uses a generic term to identify its goods or services.

While it is always distressing to contemplate a situation in which money has been invested in a promotion in the mistaken belief that trademark rights of value are being created, merchants act at their peril in attempting, by advertising, to convert common descriptive names, which belong to the public, to their own exclusive use. Even though they succeed in the creation of de facto secondary meaning, due to lack of competition or other happenstance, the law respecting registration will not give it any effect.

Weiss Noodle Co. v. Golden Cracknel and Specialty Co., 290 F.2d 845, 129 USPQ 411, 414 (CCPA 1961) (the alleged mark was “a hyphenated, phonetically spelled version of the Hungarian word” for the goods). Applicant’s use of the generic phrase “The Vitamin Shoppe” for over 40 years does not make the phrase distinctive. *In re Cordua Rests., Inc.*, 118 USPQ2d at 1632. If Applicant wants to register its composite marks, it must disclaim “The Vitamin Shoppe” rather than just “Vitamin” in each application.

Decision: The refusals to register based on Applicant's refusal to enter the required disclaimer in the '555, '614, '620, and '628 applications are affirmed. However, this decision will be set aside if Applicant submits the required disclaimer in each application to the Board within 30 days from the date of this decision. Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g).⁸⁷

⁸⁷ The proper format for the disclaimer in each application is: "No claim is made to the exclusive right to use THE VITAMIN SHOPPE apart from the mark as shown." See TMEP § 1213.08(a)(i).