

This Opinion is Not a  
Precedent of the TTAB

Mailed: July 24, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Dana Redden*

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Serial No. 97299114  
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Christopher Bennett of Technology-Innovation-Law  
for Dana Redden.

Rebecca Ruiz, Trademark Examining Attorney, Law Office 113  
Myriah Habeeb, Managing Attorney.

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Before Shaw, Adlin and Casagrande, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Dana Redden seeks a Principal Register registration, under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), for the proposed mark SOLAR CONCIERGE, in standard characters (“SOLAR” disclaimed), for “financial consultation in the field of financing of solar energy projects and financial consulting regarding solar energy,” in International Class 36.<sup>1</sup> In her application, as filed, Applicant: (1) claimed that the entire proposed mark has acquired distinctiveness

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<sup>1</sup> Application Serial No. 97299114, filed March 7, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based first use dates of December 2011.

under Section 2(f) based on her alleged “substantially exclusive and continuous use of the mark” for “at least the five years immediately before” the application’s filing date; (2) disclaimed “SOLAR” apart from the mark as shown; and (3) asserted ownership of Supplemental Register Registration No. 5537582 for the same mark for “solar energy consulting services, namely, consulting concerning the financing of solar energy projects and financial consulting regarding solar energy.”

The Examining Attorney refused registration on the ground that the proposed mark is merely descriptive of the identified services under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and has not acquired distinctiveness under Section 2(f). After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. Applicant and the Examining Attorney filed briefs.

#### **I. Untimely and Improperly Introduced Evidence Excluded**

During prosecution Applicant submitted a list of hyperlinks, as well as materials printed from the Internet. September 12, 2023 Request for Reconsideration 5-24.<sup>2</sup> Some of the Internet printouts include the date they were accessed and URL, and some do not. The Examining Attorney informed Applicant that the hyperlinks are “not sufficient to introduce the underlying webpages into the record,” and explained the proper way to introduce Internet materials. November 7, 2023 Denial of Request for Reconsideration TSDR 2. In addition, the Examining Attorney informed Applicant that the alleged Google search results cited in her Request for Reconsideration would

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<sup>2</sup> Citations to the application file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system’s online database, by page number, in the downloadable .pdf format.

not be considered because they were not introduced into evidence. *Id.* However, Applicant took no action to supplement the record until filing new evidence with her Appeal Brief. 6 TTABVUE 6-10.<sup>3</sup>

The Examining Attorney’s objections to the hyperlinks and Internet materials improperly introduced into evidence, and to the evidence Applicant submitted for the first time with her Appeal Brief, 8 TTABVUE 9-10, are sustained. *In re I-Coat Co.*, Ser. No. 86802467, 2018 WL 2753196, at \*3 (TTAB 2018) (“[W]e will no longer consider Internet evidence filed by an applicant in an *ex parte* proceeding to be properly of record unless the URL and access or print date has been identified”); *In re Olin Corp.*, Ser. No. 86651083, 2017 WL 4217176, at \*5 n.15 (TTAB 2017) (“Because the information displayed at a link’s Internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record.”); Trademark Rule 2.142(d) (“The record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.”).

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<sup>3</sup> Citations to the appeal record are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Case citations in this opinion are in a form provided in the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the Westlaw (WL) database. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

## II. Evidence and Arguments

The Examining Attorney relies on a dictionary definition indicating that “solar” means “of, derived from, relating to, or caused by the sun.”<sup>4</sup> December 24, 2022 Office Action TSDR 6. In addition, we take judicial notice that “concierge” means “a person or service that provides assistance with personal business.”<sup>5</sup>

The Examining Attorney also relies on third-party service mark or trade name uses of “solar concierge” in connection with solar energy consultation services, including solar energy financial consultation services. For example, LG’s “Solar Concierge” provides access to “expert energy advisors” who assist customers in installing solar panels, and provides an “online tool” focused on minimizing the cost of solar energy systems, as shown below:



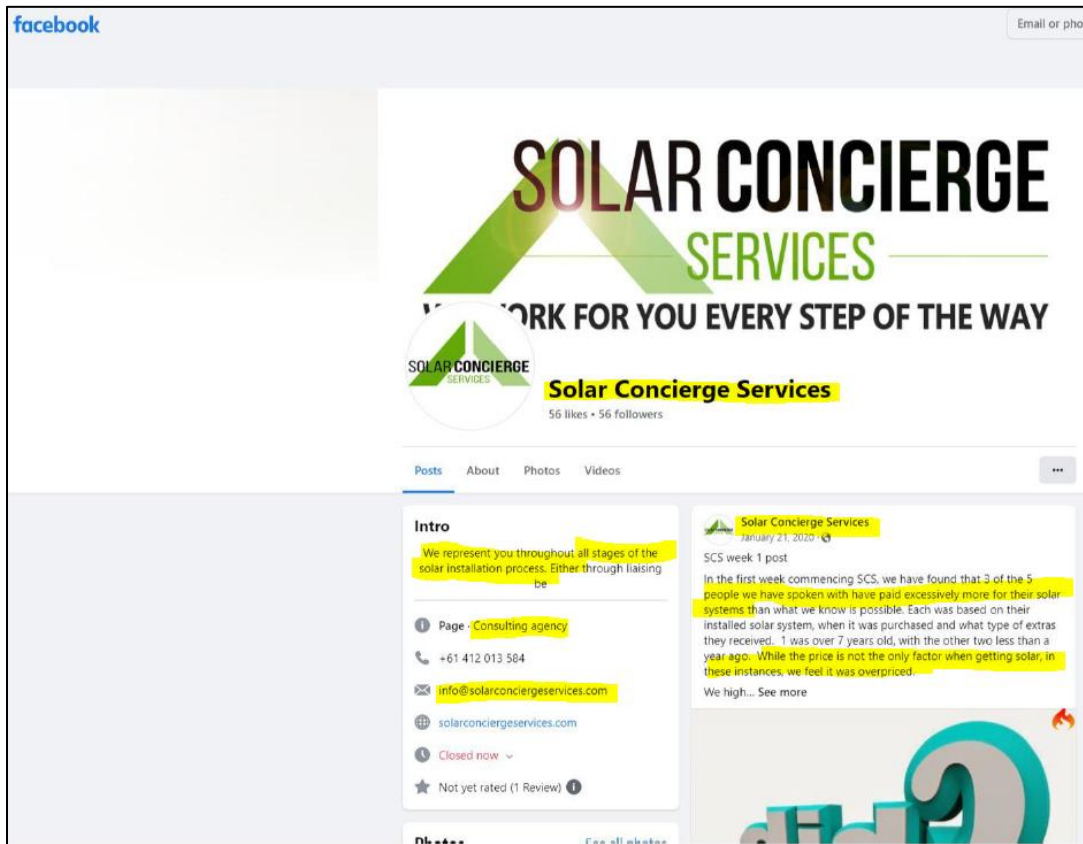
*Id.* at 28 (highlighting added).

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<sup>4</sup> <https://www.merriam-webster.com/dictionary/solar>.

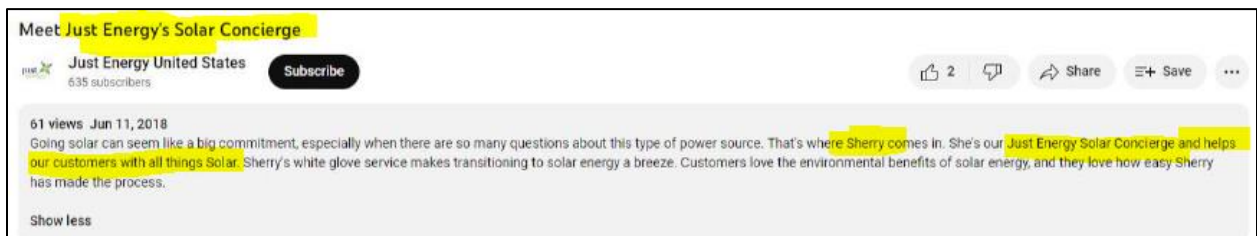
<sup>5</sup> <https://www.merriam-webster.com/dictionary/concierge>. The Board may take judicial notice of dictionary definitions. *In re Cordua Rests. LP*, Ser. No. 85214191, 2014 WL 1390504, at \*2 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594 (Fed. Cir. 2016); *Threshold TV Inc. v. Metronome Enters. Inc.*, Opp. No. 91152662, 2010 WL 3164750, at \*6 n.14 (TTAB 2010). The Examining Attorney contends that this definition was included with the December 24, 2022 Office Action, but it was not. Applicant does not dispute the accuracy of either definition.

A third-party solar energy consulting agency identifies itself as “Solar Concierge Services.” It advertises on Facebook with commentary about the price of solar systems, as shown below:



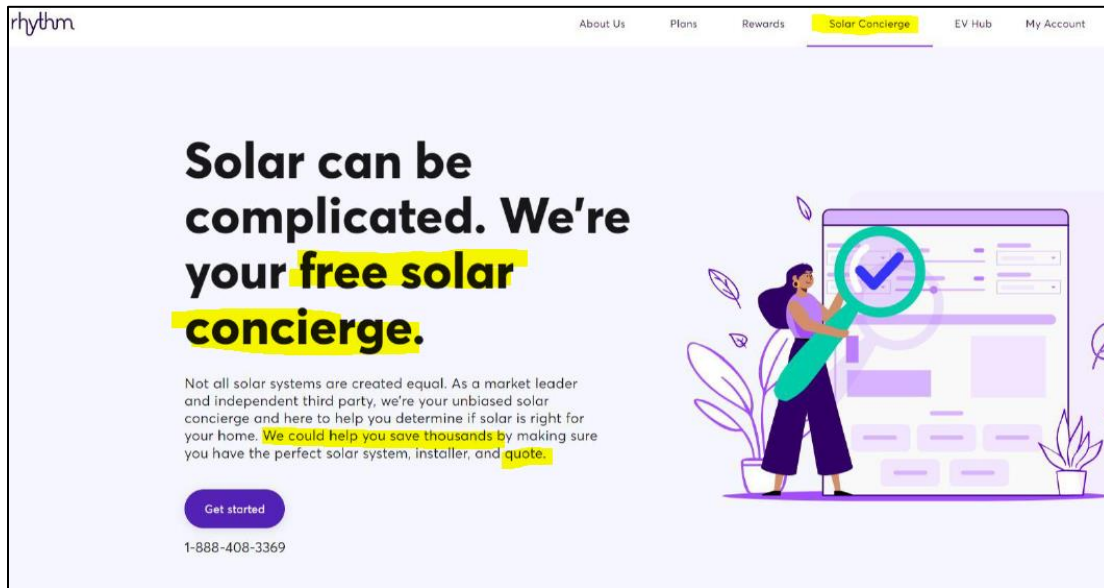
*Id.* at 13 (highlighting added).

Just Energy offers its own “Solar Concierge,” named “Sherry,” that helps customers “with all things Solar,” as shown below:

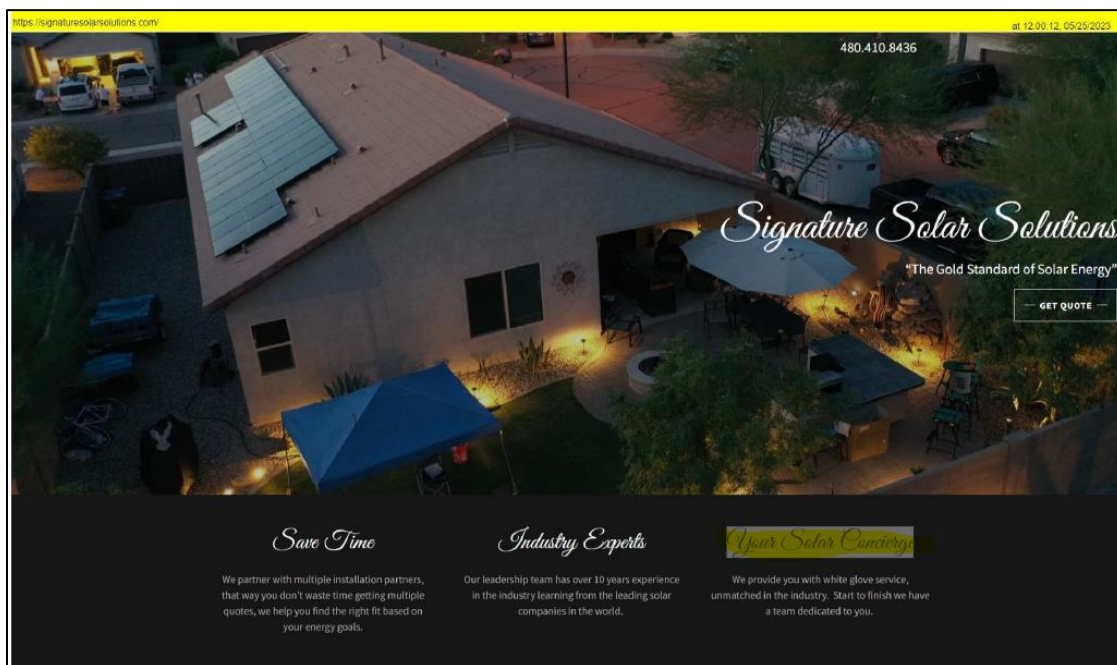


June 12, 2023 Office Action TSDR 9 (highlighting added).

Other third parties use “solar concierge” or “concierge” descriptively in connection with solar energy consulting services. For example, Rhythm Energy promotes itself as “your free solar concierge,” that “could help you save thousands,” as shown below:



December 24, 2022 Office Action TSDR 18 (highlighting added). Signature Solar Solutions bills itself as “Your Solar Concierge,” as shown below:



*Id.* at 38 (highlighting added). In addition:

Solar4 Causes is “a veteran-owned **solar concierge service**” that offers to “help reduce your electricity bill,” and provide “energy savings.” *Id.* at 36 (emphasis added).

Shine Solar provides its “customers with a **personal solar concierge** to help answer any of their questions,” and one of its customers appreciated that “[t]heir original proposal for how much money I would save has been spot on.” June 12, 2023 Office Action TSDR 15, 16 (emphasis added).

Peachtree Heating, Air Conditioning & Plumbing offers a “**Solar Concierge Team**” to assist with “solar energy installation.” *Id.* at 20 (emphasis added).

Go Solar Power’s “trained **solar concierge team** will fill you in on the solar installation process so that you know what to expect when installation begins.” *Id.* at 24.

Momentum Solar offers a “**concierge**” service that serves as “one point of contact for the entire solar installation process.” *Id.* at 32-33 (emphasis added).

LGCY Power assigns its customers “a dedicated Solar Consultant who will act as your own **personal solar concierge**, going over all of your options, answering all of your important questions, and making sure you have an outstanding experience.” *Id.* at 44.

An article on the Raise Green website states “Lumen Energy wants to revolutionize how small-scale commercial and industrial (C&I) solar energy systems are financed and installed across the United States. Lumen aims to be the first major ‘**solar concierge**’ service allowing customers to ...” *Id.* at 60 (emphasis added).

HomeWorx bills itself as a “**solar concierge**” and obtains “bids from multiple installers to get you the best deal.” *Id.* at 64 (emphasis added).

The Examining Attorney argues, based on this evidence, that the proposed mark “immediately conveys to consumers that applicant’s services are geared towards

providing assistance to others in the field of solar energy.” 8 TTABVUE 5. The Examining Attorney points out that according to Applicant’s specimen, Applicant, like most or all of the third parties discussed above, “represent[s] the client throughout the entire process of implementing solar” and serves as “a professional guide from project evaluation to project implementation.” *Id.* Furthermore, “the terms SOLAR CONCIERGE and/or CONCIERGE are commonly used in the industry to refer to assistance services, including financial consultation services, in the field of solar energy.” *Id.*

As for Applicant’s Section 2(f) claim, the Examining Attorney argues that Applicant’s use and advertising of the proposed mark since 2012 is insufficient by itself to establish that such a highly descriptive mark has acquired distinctiveness. 8 TTABVUE 9-11. Specifically, Applicant’s evidence does not show that the proposed mark “is actually known and recognized by consumers as a source indicator,” especially when there is so much third-party use of the proposed mark.

For her part, Applicant relies on her website which promotes her SOLAR CONCIERGE services. March 24, 2023 Office Action response TSDR 8-21; September 12, 2023 Request for Reconsideration TSDR 6, 19-24.<sup>6</sup> She points out that proof of substantially exclusive and continuous use of a mark for five years may be accepted as prima facie evidence of distinctiveness, and argues that her use of the proposed

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<sup>6</sup> The Examining Attorney did not object to this evidence. June 12, 2023 Office Action TSDR 5.



mark for the last 12 years should be enough to establish that it has acquired distinctiveness. 6 TTABVue 3-4.

### **III. The Proposed Mark is Merely Descriptive**

We have no doubt that SOLAR CONCIERGE is merely descriptive because it “immediately conveys knowledge of a quality, feature, function, or characteristic” of “financial consulting regarding solar energy.” *In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 1300 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 963 (Fed. Cir. 2007)); *In re Abcor Dev.*, 588 F.2d 811, 813 (CCPA 1978). Specifically, the proposed mark immediately conveys that as a “concierge” in the solar energy field, Applicant provides assistance in connection with acquiring or managing a solar energy system, including related financial issues.

This is clear from the evidence of record, which shows that some of Applicant’s competitors in the field of financial consulting regarding solar energy use the precise composite term Applicant seeks to register – “solar concierge” – in their marks or trade names. For example: Solar Concierge Services is a “consulting agency” that targets consumers who have “paid excessively,” December 24, 2022 Office Action TSDR 13; LG’s Solar Concierge offers “energy advisors” and an “online tool” focused on minimizing the cost of “going solar,” *id.* at 28; and Just Energy’s Solar Concierge assists its customers with “all things solar.” June 12, 2023 Office Action TSDR 9. Moreover, some of Applicant’s other competitors in the solar energy consultation field use “solar concierge” to describe their own solar energy consultation services, including solar energy financial consultation services. December 24, 2022 Office Action 18, 36, 38; June 12, 2023 Office Action TSDR 15, 16, 20, 24, 32-33, 44, 60, 64.

These third-party uses are entirely consistent with the dictionary definitions of “solar” and “concierge.” In fact, when we consider the composite SOLAR CONCIERGE as a whole, we find that not only are “solar” and “concierge” each merely descriptive of Applicant’s services, but when those terms are combined into the proposed mark, the resulting combination does not evoke a non-descriptive commercial impression. To the contrary, the evidence shows that each component retains its merely descriptive significance in relation to the services. Applicant does not suggest any alternative commercial impression resulting from the combination of these immediately descriptive terms. We therefore find that the composite SOLAR CONCIERGE is merely descriptive. *See, e.g., In re Zuma Array Ltd.*, Ser. No. 79288888, 2022 WL 3282655, at \*4 (TTAB 2022) (SMART BEZEL merely descriptive of electronic devices); *In re Fat Boy Water Sports LLC*, Ser. No. 86490930, 2016 WL 3915986, at \*6 (TTAB 2016) (HOUSEBOAT BLOB merely descriptive of inflatable float mattresses).

Finally, it is highly significant that Applicant: (1) disclaimed “SOLAR” apart from the mark as shown, *see Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, Canc. No. 92050879, 2013 WL 5407315, at \*14 (TTAB 2013), *aff’d*, 565 F. App’x 900 (Fed. Cir. 2014); *Bass Pro Trademarks LLC v. Sportsman’s Warehouse Inc.*, Canc. No. 92045000, 2008 WL 927726, at \* 5 (TTAB 2008) (disclaimer is evidence of a term’s descriptiveness); (2) sought registration under Section 2(f) in her original application, *see Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1358 (Fed. Cir. 2009) (where “an applicant seeks registration on the basis of Section 2(f), the

mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive"); and (3) previously registered the same mark on the Supplemental Register for essentially identical services (Registration No. 5537582), *see Perma Ceram Enters. Inc. v. Preco Indus., Ltd.*, Opp. No. 91085234, 1992 WL 156544, at \*3 n.11 (TTAB 1992) (registration of a term on the Supplemental Register may be evidence of descriptiveness).

In short, based on the evidence of record and the governing law concerning disclaimers, claims of acquired distinctiveness and Supplemental Register registrations, there is no doubt that SOLAR CONCIERGE is merely descriptive. Indeed, it is highly descriptive, as it conveys exactly what dictionary definitions predict it would convey – assisting others in obtaining and managing a solar energy system, including the financial aspects thereof. This is clear from the third-party service mark, trade name and descriptive uses discussed above, and from Applicant's prior Supplemental Register registration, as well as her disclaimer of "SOLAR" and Section 2(f) claim in her original application.

#### **IV. The Proposed Mark Has Not Acquired Distinctiveness**

Applicant argues that SOLAR CONCIERGE is entitled to registration under Section 2(f) of the Trademark Act because it has acquired distinctiveness. In other words, Applicant argues, "in the minds of the public, the primary significance of [the term "SOLAR CONCIERGE"] is to identify the source" of Applicant's services. 15 U.S.C. § 1052(f); *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 1365 (Fed. Cir. 2018) (citation omitted). Applicant bears the burden of establishing acquired distinctiveness. *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 1336 (Fed. Cir. 2015).

“Where a mark sits on a sliding scale of descriptiveness impacts the burden a proposed registrant must bear with respect to its claim of acquired distinctiveness.” *Royal Crown*, 592 F.3d at 1365. Indeed, “the applicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.” *In re Steelbuilding.com*, 415 F.3d 1293, 1300 (Fed. Cir. 2005) (citing *In re Bongrain Int’l. (Am.) Corp.*, 894 F.2d 1316, 1317 (Fed. Cir. 1990)). Here, as explained above, the proposed mark is highly descriptive, and therefore Applicant bears a heavy burden to prove acquired distinctiveness.

In assessing whether Applicant has met her heavy burden for such a highly descriptive proposed mark, we consider any evidence bearing on: “(1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the [service] embodying the mark.” *In re Snowizard, Inc.*, Ser. No. 87134847, 2018 WL 6923620, at \*5 (TTAB 2018) (quoting *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 1120 (Fed. Cir. 2018)). Here, Applicant relies exclusively on her use of the mark for 12 years; she introduced no other evidence. Applicant’s limited evidence falls well short of establishing that “solar concierge,” which is commonly used by third parties, has acquired distinctiveness.

Applicant's use of the term for 12 years is not sufficient to establish that such a highly descriptive mark has acquired distinctiveness. Indeed, despite Applicant's use of the term over the years, there is no evidence that consumers or the media understand "solar concierge" as an identifier of Applicant's services. There is merely evidence that Applicant has used and promoted her proposed mark, unaccompanied by evidence of how widespread the use is, how many consumers have been exposed to the proposed mark, or any indicia of recognition that the proposed mark identifies Applicant's solar energy consultation services. *In re Ennco Display Sys., Inc.*, Ser. No. 74439206, 2000 WL 1160458, at \*6 (TTAB 2000) (while Board may consider evidence of continuous use for more than five years, "the language of the statute is permissive, and the weight to be accorded this kind of evidence depends on the facts and circumstances of the particular case"); *see also La. Fish Fry Prods.*, 797 F.3d at 1337 (rejecting five years use as necessarily sufficient for a highly descriptive mark).

Applicant's modest and unquantified evidence submitted in support of her claim of acquired distinctiveness is easily outweighed by the widespread third-party use of "solar concierge" in the solar energy field. In fact, "[w]hen the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances." *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1403 (Fed. Cir. 1984). Here, the plentiful evidence of third-party service mark, trade name and descriptive use of the same term, coupled with the absence of evidence such as sales

and advertising figures, unsolicited media attention, or quantification of consumer impressions or views of the proposed mark, is fatal. Applicant has failed to demonstrate acquired distinctiveness.

## **V. Conclusion**

The record leaves no doubt that SOLAR CONCIERGE is merely and highly descriptive of financial consulting regarding solar energy, and that it has not acquired distinctiveness. Applicant's competitors should remain free to continue using "solar concierge" in connection with their own services. *See In re Abcor Dev.*, 588 F.2d at 813 ("The major reasons for not protecting [merely descriptive] marks are ... to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.").

**Decision:** The refusal to register Applicant's proposed mark on the Principal Register because it is merely descriptive under Section 2(e)(1) of the Trademark Act, and has not acquired distinctiveness under Section 2(f) of the Act, is affirmed.