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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77357357
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Response to Office Action of June 2, 2008.  
Attorney Docket: FLEXS-019T

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Applicants:	FlexSCAN, Inc.	)	Law Office: 113	
		)		
Serial No.:	77/357,357	)	Examining	Khanh M. Le
		)	Attorney	
Filed:	December 20, 2007	)		
		)		
For:	APERTURE HEALTH	)		

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**APPELLANT'S APPEAL BRIEF ON EX PARTE APPEAL**

Assistant Commissioner for Trademarks  
Post Office Box 1451  
Alexandria, Virginia 22313-1451

Dear Sir/Madam:

Appellant respectfully submits the following in support of registration of its mark.

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## **INTRODUCTION**

Applicant, flexSCAN Inc., appeals from the Examining Attorney's refusal to register the mark APERTURE HEALTH ("Applicant's Mark") under §2(d) of the Lanham Act, 15 U.S.C. § 1052(d), based on the presence of U.S. Registration No. 2,551,971 for the mark APERTURE ("Registrant's Mark").

Applicant respectfully submits that no likelihood of confusion exists between Applicant's Mark and Registrant's Mark, and that in reaching the opposite conclusion, the Examining Attorney improperly dissected Applicant's Mark and discounted the significance of the inclusion of the term HEALTH, thus violating the anti-dissection rule and precluding an examination based on the entirety of the mark. Furthermore, Applicant asserts the Examining Attorney erroneously concluded that customers would likely suppose Applicant's and Registrant's services emanated from the same source, despite the complete exclusivity of the markets, channels of trade, and differences present between services covered by the respective marks.

For these and the following reasons, the determination of the Examining Attorney refusing registrations must be reversed.

## **STATEMENT OF FACTS**

FlexSCAN Inc., Applicant, is a Nevada corporation based in Mission Viejo, California. Applicant is an innovator of corporate health and wellness programs since 2002. Applicant's mission is to empower America's workforce to take more control of their health and wellness, inform them so they make better choices, and reward them for taking steps toward leading healthier lives.

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On December 20, 2007, Applicant filed an application for registration of APERTURE HEALTH. During prosecution of the subject application, the description of services was amended to read: “providing health care services, namely, wellness programs; providing personal medical information to individuals and organizations”, in International Class 44.

The Examining Attorney, on March 27, 2008, refused registration under § 2(d) of the Lanham Act citing to the presence of U.S Registration No. 2,551,971 for APERTURE, for services described as, “Computerized health care provider, data management and health care provider information management, in the fields of health care and insurance,” in International Class 35 and “Physician credential verification services,” in International Class 42.

On June 2, 2008 the Examining Attorney made final his refusal based upon the presence of Registration ‘971. This appeal follows.

### **ARGUMENT**

Factors to be considered when assessing likelihood of confusion include:

- (1) The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use of similar goods.

- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
- (10) The market interface between applicant and the owner of a prior mark.
- (11) The extent to which applicant has a right to exclude others from user of its mark on its goods.
- (12) The extent of potential confusion, i.e., whether *de minimis* or substantial.
- (13) Any other established fact probative of the effect of use.

*In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973).

In the instant matter, the Examining Attorney considered most relevant the first two factors: similarity or dissimilarity of the marks and goods and services. Applicant respectfully submits that the Examining Attorney erred in his evaluation of factors 1 and 2, and prejudicially neglected any consideration of factors 3, 4, and 8.

Though Applicant’s Mark and the Registrant’s Mark may both include the term APERTURE, this fact alone is not dispositive of likelihood of confusion. “*Per Se*” rules relating to likelihood of confusion have been struck down as being too inflexible as contrary to trademark law, where each case must be decided based on its own facts and circumstances. *See In re Quadram Corp.*, 228 USPQ 863, 865 (TTAB 1985); *In re Sydel Lingerie Co., Inc.*, 197 USPQ 629 (TTAB 1977).

It is quite possible for no likelihood confusion to exist even between marks which may appear similar in the abstract, where the respective goods or services to which the marks are

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applied are such that prospective customers are not likely to assume that those goods or services share a common source. In this case, the inclusion of the term HEALTH in Applicant's Mark, the differences between the particular services covered by Applicant's and Registrant's Marks and the sophistication of the respective consumers make confusion unlikely.

### **FACTOR 1: THE MARKS ARE DISSIMILAR**

Simply because the respective marks share the APERTURE term is insufficient to support a finding of likelihood of confusion, as the presence of common words is not sufficient to establish that marks are confusingly similar, even when the common words constitute the dominant portion of the marks being compared. *See General Mills, Inc. Kellogg Co.*, 824 F.2d 622, 627 (8th Cir. 1987) ("The use of identical, even dominant, words in common does not automatically mean that two marks are similar."); *Freedom Savings and Loan Ass'n v. Way*, 757 F.2d 1176, 1183 (11th Cir. 1985) (establishing that two marks are not automatically deemed similar because they incorporate an identical word, even if the identical word is the dominant portion of each of the marks). The foregoing cases clearly establish that two marks may be found not confusingly similar, even when such marks share dominant words and are associated with identical or related services.

When properly examined in its entirety, Applicant's Mark APERTURE HEALTH differs sharply from Registrant's mark APERTURE in appearance, sound, connotation and commercial impression. Applicant asserts that in discounting the significance of the term HEALTH, the Examining Attorney violated the anti-dissection rule and improperly found confusion among the Marks likely.

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The Examining Attorney in his Final Office Action stated, “applicant’s argument that the word ‘aperture’ has a different connotation when paired with the word ‘health’ is not persuasive, especially given the descriptive nature of the word ‘health’.” Accordingly, Applicant respectfully submits that the foregoing assertion constitutes an improper violation of the anti-dissection rule as to Applicant’s Mark. It is improper to dissect a mark when considering whether there is a likelihood of confusion. *Massy Junior College, Inc. v. Fashion Inst. Of Tech.*, 492 F.2d 1399, 181 USPQ 272 (CCPA 1974). It is axiomatic that marks must be considered in their entireties in resolving the issue of confusing similarity.” *In re 1776, Inc.*, 223 USPQ 186, 187 (TTAB 1984); *see also In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985). Dissection of marks is particularly inappropriate as the marks should be viewed in their entirety. *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Center*, 109 F.3d 275, 283 (6th Cir. 1997).

Applicant’s Mark includes the term HEALTH. The addition of this term results in the overall Mark having a different sound and appearance, and a different overall commercial impression. A common definition of the term HEALTH is “the condition of being sound in body, mind, or spirit.”<sup>1</sup> The term connotes the general condition of the body and one’s general well being. *Id.*

To Applicant’s target consumer audience, the term HEALTH relates to one’s overall medical condition and generally one’s state of well being. APERTURE alone does not carry any such connotation. Rather, APERTURE in this context connotes an opening, as a hole, slit, crack, gap, etc.”<sup>2</sup> Applicant’s proposed mark, APERTURE HEALTH, is different from

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<sup>1</sup> *Merriam-WebsterOnline Dictionary* (Accessible at: <http://www.merriam-webster.com/dictionary/health>) (Accessed on June 25, 2008).

<sup>2</sup> [www.dictionary.com](http://www.dictionary.com)

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Registrant's mark because it is a compound mark including multiple words. When coupled with the word "health," the word "aperture" has a different meaning than the above-definition in relation to the cited mark. In particular, Applicant submits the word "aperture," used in the context of the proposed mark, means "a device that controls the amount of light admitted."<sup>3</sup> Therefore, Applicant's Mark in its entirety implies a meaning of shedding light on your health or enlightening a consumer about their health, which is very different from the connotation of "an opening", created by Registrant's Mark. Consumers may view such differences in meaning and connotation to distinguish the source of the services. As such, Applicant respectfully asserts that the differences in connotation weigh against a likelihood of confusion.

In addition to the different connotations, Applicant submits that the marks are also different with respect to their appearance and sound, which further mitigates confusion. The sound and appearance of APERTURE differ from the sound and appearance of APERTURE HEALTH. In particular, the proposed mark includes the word "health," which is not included in the cited mark. Not only does this create a mark with two words whereas Registrant's Mark is only one word, it also results in a mark which is longer in both appearance and sound from the cited mark.

Applicant further illustrates the difference in sound by comparing the number of syllables included in each mark. The cited APERTURE mark includes three syllables, whereas the proposed APERTURE HEALTH mark includes four syllables. A difference in syllables phonetically distinguishes the mark and tends to weigh against a finding of likelihood of confusion. *See W.L. Gore & Associates Inc. v. Johnson & Johnson*, 36 USPQ2d 1552, 1556 (D.

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<sup>3</sup> *Id.*

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Del. 1995) (where the court used a difference in the number of syllables to weigh against a finding of likelihood of confusion).

Therefore, Applicant asserts that the above-mentioned differences in appearance, sound, meaning and connotation sufficiently distinguish the proposed mark from the cited mark so as not to create a likelihood of confusion.

## **FACTOR 2: THE GOODS AND SERVICES ARE DISSIMILAR**

Applicant's services are completely distinct from Registrant's because, unlike Registrant, Applicant does not provide computerized health care provider data management and health care provider information management, in the fields of health care and insurance; nor does Applicant provide physician credential verification services. Applicant's services, in contrast, are specifically offered for providing health care services, namely, wellness programs; and for providing personal medical information to individuals and organizations. Applicant's services are further distinguished by the fact that they are marketed to individuals and employers.

The services offered under the Registrant's Mark are an exclusively computer-based services enhanced with data mining capabilities in Class 35 and are specifically tailored solely for health care providers. As such, these services are critical for back end operations for health care providers such as hospitals or even insurance companies. Furthermore, Registrant's services for providing physician credentialing verification services are not marketed to employers or individuals, as these groups do not have a need for such industry specific information. Whereas, hospitals, insurance companies, government agencies, or physician groups may find physician credentialing services pertinent.

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Applicant's services, in stark contrast, consist of live informative media outlets adapted to empower individuals and workforces alike to take more control of their health and wellness, inform them so they make better choices, and reward them for taking steps toward leading healthier lives. Due to the critical nature of one's health and well being, the services covered by Registrant's APERTURE Mark simply do not meet the needs of Applicant's targeted market. In no way does data or information management for healthcare providers, or physician verification services provide individuals or employers with important health and wellness information.

Applicant respectfully submits that the Examining Attorney's assertion was incomplete in remarking, "the applicant also provides medical information to organizations, which might include health care providers." Although the Applicant may provide its services to health care providers, it will be provided to health care providers in their capacity as employers. More specifically, Applicant may provide employers with personal medical information of its employees, so that employers may monitor the well being and success of its work force. Additionally, with this information along with information on wellness programs, employers, such as healthcare providers in their capacity as employers, may bolster and promote the well being of their workforce and so that their employees are able to make informed, educated decisions regarding their health. In no way does Applicant provide computerized data and information management services for health care providers, or physician credential verification services, as does the Registrant. Specifically, Applicant and Registrant provide different services to different intended audiences. As such, Applicant fails to see how the provision of providing wellness program information to individuals and employers could be misconstrued as computerized data and information management for health care providers or physician credentialing services.

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Furthermore, when determining whether one mark is likely to cause confusion with another, the likelihood that there will be confusion must be strong. The mere possibility that some consumers will be confused is not enough. *Vitek Sys., Inc. Abbott Labs.*, 675 F.2d 190, 192 (8th Cir. 1982). See also *HMH Publ'g Co., Inc. v. Brincat*, 504 F.2d 713, 717 (9th Cir. 1974). The issue is not the mere theoretical possibility of confusion, deception or mistake, or with *de minimis* situations, but with the practicalities of the commercial world. *In re Massey-Ferguson Inc.*, 222 USPQ 367 (TTAB 1983); *Witco Chem. Co., Inc. v. Whitfield Chem. Co., Inc.*, 164 USPQ 43 (CCPA 1969). As stated in *Lever Bros. Co. v. Am. Bakeries Co.*, 693 F.2d 251, 253 (2d Cir. 1982), the “crucial issue is whether there exists a likelihood that an appreciable number or ordinary prudent purchasers will be misled, or simply confused, as to the source of the goods in question.” See also *Gen. Adjustment Bureau, Inc. v. Gen. Ins Adjustment Co., Inc.*, 381 F.2d 991, 993 (10th Cir. 1967). Here it is quite unlikely that an appreciable number of purchasers would assume that the services of the foregoing parties are related, let alone encounter and be confused by the presence of APERTURE computerized data management for health care providers or physician credentialing services and APERTURE HEALTH wellness programs.

The Examining Attorney puts forward the argument that third party registrations<sup>4</sup> and websites with use of marks in connection with the same or similar goods and or services as those of Applicant and Registrant have probative value to the extent that they serve to suggest that the services featured here are of a kind that may emanate from a single source. Applicant respectfully submits that the Examining Attorney’s reliance on this argument is misplaced. The Board has long held that third party registrations covering all products in question are not very

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<sup>4</sup> The Examining Attorney put forward three registered marks in the Final Office Action: 1) U.S. Registration No. 2,727,749 for PRIVACOMP owned by Orthonetx, Inc; 2) U.S. Registration No. 3,401,473 for Carehere owned by Carehere LLC; and 3) U.S. Registration No. 3,334,545 for MEDICALERT owned by Medic Alert Foundation United States, Inc.

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persuasive corroborating evidence in support of a finding of a likelihood of confusion absent of sales or advertising. *In re H & H Products*, 228 USPQ 711 (TTAB 1986). *In re Mucky Duck Mustard Co., Inc.*, which the Examining Attorney cites in support, actually makes the point that bare evidence of such registrations means little. 6 USPQ2d 1467 (TTAB 1988).

The Board in *Mucky Duck* was presented with fifteen “third-party applications and registrations which cover both restaurant services and mustard,” but gave “little weight” to the majority of them, though admitting that they “may nevertheless have some probative value.” *Id.* at 1470 n.6. The Board discounted eleven of the fifteen registrations because they evidenced little “serious intent to use the marks shown therein the United States on all of the listed goods and services.” *Id.* Two of the fifteen it discounted because they “were issued to Saks & Company and to Knott’s Berry Farm, owners of a large department store and an amusement or theme center, respectively, where a wide variety of goods and services are sold.” *Id.*

Here, one of the third party registered marks the Examining Attorney relied upon to “establish” that Applicant’s and Registrant’s goods and services are of the type which might emanate from the same source relate to Carehere, LLC. (“Carehere”). Applicant submits that under *Mucky Duck* these marks should be discounted because Carehere is a one-stop shop for health care just as Saks & Company is for retail goods and Knott’s Berry Farm is for goods and services accompanying these parks.<sup>5</sup> As such, it would not be surprising for almost anything under the sun relating to healthcare to be offered under the Carehere mark. Additionally, none of the three cited third party registrations provide any mention or reference to physician credential verification services in their statement of goods and services, as does the Registrant.

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<sup>5</sup> In addition to the evidence about Carehere which appears on the record from its registration, Applicant directs the Board’s attention to Carehere’s website, in which the full range of its business is made manifest: <http://www.carehere.com>.

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Even if the Board were to give “some probative value” to the third party registrations and websites, in *Mucky Duck* there remained two registered marks which the Board did not discount. The Board, still, however, did not rely on third-party registrations in the body of its opinion, and went out of its way to emphasize how little credit it gave them. *Mucky Duck*, 6 USPQ2d at 1470 n.6. In the case at bar, it is clearly error for Applicant’s registration to be refused as to third party registrations or websites which do not show, in any event, that Registrant’s and Applicant’s services are of the type which emanate from a single source.

### **FACTOR 3: THE CHANNELS OF TRADE ARE DISSIMILAR**

While Registrant’s services, computerized health care provider data management and health care provider information management, in the fields of health care and insurance and physician credential verification services, are presumed to move in all normal channels of trade within the health care provider and insurance markets, Applicant’s services are specifically marketed towards employers and all individuals generally. Therefore, although APERTURE HEALTH is marketed to the general public, it is also largely directed towards employers interested in promoting a healthy workplace. As discussed above, there is no overlap in the markets for the two services, as the health care needs for employers to promote the wellness of their employees are vastly different than computerized health care provider data management services. Furthermore, the non-competitive nature of the products is a relevant factor in all cases. *See Curtice-Burns, Inc. v. Northwest Sanitation, Inc.* 189 USPQ 138 (CCPA 1976).

There is little likelihood that the conditions surrounding the marketing of the services would ever be such that they would be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the services come from a common source.

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Consumers are therefore not confronted with these services in a manner which would likely cause confusion.

**FACTOR 4: EMPLOYERS DO NOT IMPULSIVELY ENROLL THEIR EMPLOYEES  
IN HEALTH PLANS**

Consumers for health care services and wellness programs are making highly personal and specialized decisions. Even among the general population, health care planning is a sensitive and confidential matter with a potentially lasting impact on the individual's family and finances, not taken without substantial care. This is even more the case for employers, where a company's reputation and the well being of its workforce require the utmost priority on the part of the employer.

Applicant's APERTURE HEALTH in particular is marketed to the general public at large and sophisticated employers. Likewise, Registrant's Mark is marketed to health care providers. Health care providers are a very sophisticated group and are very discriminating when employing new data management systems in their business operations. As such, computerized data management systems necessitate large and costly implementations thereby requiring health care providers to perform a great deal of due diligence to identify the appropriate candidate system for their needs. Registrant's Mark is also associated with physician credentialing services. As such, the liability involved with and the necessity of such services requires consumers of these services to be sophisticated and thoroughly investigate the source of such services. Applicant's Mark is specifically tailored towards individuals and employers seeking health and wellness programs, hardly the type of crowd that would impulsively select such a product without bothering to discern its origin.

Therefore, consumers of both Registrant's and Applicant's services would invest a great deal of time and resources to discern a certain comfort level prior to engaging in either of their respective services. Given the gravity of these services and the sophistication and discretion of the target audiences, this factor further supports Applicant's assertion that confusion is unlikely.

**FACTOR 8: THE MARKS HAVE COEXISTED WITHOUT ANY HINT OF ACTUAL  
CONFUSION**

No evidence exists on record which even suggests that there has been actual confusion among the marks, despite their mutual coexistence. *Mr. Hero Sandwich Sys., Inc. v. Roman Meal Co.*, 781 F.2d 884, 889 (Fed. Cir. 1986) (lack of confusion despite years of coexistence is evidence that marks are not easily confused). In light of the vastly dissimilar services that are marketed to completely different audiences, it is not surprising that Applicant's and Registrant's Marks have coexisted quietly. There is no reason to believe that this peaceful coexistence will not continue into the future. Confusion among the marks thus continues to be unlikely.

**CONCLUSION**

Applicant has shown that APERTURE HEALTH and the cited APERTURE marks are distinguishable in appearance, sound and meaning, that the services covered by Applicant's and Registrant's Marks are distinguishable and that Applicant's services are targeted to different, knowledgeable, and discrete purchasers. As such, it is submitted that these sophisticated and discerning consumers will continue to be able to distinguish between the APERTURE mark

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present and that the registration of Applicant's APERTURE HEALTH mark will not result in an occurrence or increase in likelihood of confusion.

Respectfully submitted,

Date: 7/7/08 By: 

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