

**THIS OPINION IS NOT A
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Mailed: September 2, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Momentum Insights, Inc.

Serial No. 77815534

C. Brandon Browning of Maynard Cooper & Gale PC for
Momentum Insights, Inc.

Ramona Ortiga Palmer, Trademark Examining Attorney, Law
Office 117 (Brett Golden, Managing Attorney).

Before Bucher, Cataldo, and Lykos,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Momentum Insights, Inc. has filed application Serial
No. 77815534 to register on the Principal Register under
Section 1(b) of the Trademark Act the mark FRIENDS & FAMILY
REWARDS PROGRAM in standard characters ("REWARDS PROGRAM"
disclaimed) for "on-line web site that enables business
management, tracking and registration of referral sources
in the field of motor vehicle sales" in International Class

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of a feature or quality of applicant's services.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed main briefs on the issue under appeal.

Evidentiary Issues

Before turning to the substantive ground for refusal, we note that applicant has submitted 15 exhibits with its brief. Exhibits 1-9 consist of materials that previously were made of record by applicant during prosecution of the involved application, namely, printouts of third-party registrations from the United States Patent and Trademark Office (USPTO) Trademark Electronic Search System (TESS). As such, the materials comprising Exhibits 1-9 are at best duplicative and cumulative of evidence timely made of record, and thus need not and should not be resubmitted. *See, e.g., Life Zone, Inc. v. Middleman Group, Inc.*, 87 USPQ2d 1953 (TTAB 2008).

Exhibits 10-15 consist of "true and correct copies of the specimens printed from the Trademark Office TDR system"¹

¹ Applicant's brief, p. 9.

for six of the above noted third-party registrations "illustrating trademarks which are not merely descriptive"² (emphasis in original). However, exhibits 10-15 were not previously made of record during examination of the involved application. The examining attorney neither objected to exhibits 10-15 nor did she address them in her brief or otherwise treat them as being of record.³

Trademark Rule 2.142(d) provides the following:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

The Board may consider evidence submitted after appeal despite its untimeliness, if the non-offering party (1) does not object to the evidence and (2) discusses the evidence or otherwise treats it as being of record. See TMEP §710.01(c) (7th ed. 2010); and TBMP §1207.03 (3rd ed. 2011) and the cases cited therein. Because applicant did

² Id.

³ In her brief, the examining attorney discussed the third-party registrations comprising exhibits 1-9, but not the asserted specimens comprising exhibits 10-15.

not request that the Board suspend the appeal and remand the application for further examination and because the examining attorney did not discuss the late-filed exhibits 10-15 or otherwise treat them as being of record, we do not give this evidence any consideration.⁴

Issue on Appeal

As noted above, the issue on appeal in this case is whether applicant's mark, FRIENDS & FAMILY REWARD PROGRAM, merely describes a function, feature or characteristic of the services recited in the involved application.

Applicant contends that its FRIENDS & FAMILY REWARDS PROGRAM mark is suggestive because "the phrase can create, in the minds of consumers, a multitude of meanings, and none of these meanings immediately tell consumers [what] applicant's services are..."⁵ Applicant further argues that it is not a retailer and its services "are not a rewards program"⁶ but rather "include providing an on-line web site to motor vehicle dealerships that enables the dealerships to manage, track and register their referral sources."⁷ Applicant argues that, as a result, the examining attorney's Internet evidence "directed to advertisements by

⁴ We note in any event that the materials comprising exhibits 10-15 are not outcome determinative.

⁵ Applicant's brief, p. 5.

⁶ Id. at 6.

⁷ Id.

retailers of shutters, tea, [and] water systems of their various incentive plans is misplaced"⁸ and that such evidence does not establish that applicant's mark merely describes its services.

As noted above, in support of its arguments applicant submitted during examination TESS copies of nine use-based, third-party registrations for marks containing the terms REWARDS PROGRAM or PROGRAM for various goods and services. Three are cancelled under Section 8 of the Trademark Act and thus have no probative value. See *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] cancelled registration does not provide constructive notice of anything"). The six live registrations, all of which are registered on the Principal Register without amendment to seek registration under Trademark Act Section 2(f), are displayed below:

Reg. No. 3403580 ALLERGYREWARDS PROGRAM and design
(PROGRAM disclaimed) for

printed materials, namely, brochures, pamphlets, leaflets, and booklets featuring health information about respiratory disorders and treatments therefor; and

health information services, namely, providing information on respiratory diseases and disorders and the treatment of respiratory diseases and/or

⁸ Id.

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disorders to patients, physicians, pharmacists
and other healthcare professionals;

Reg. No. 3221185 STORE AND SCORE! REWARDS PROGRAMS

(REWARDS PROGRAM disclaimed) for

promoting the goods of others by means of a
customer loyalty and incentive award program,
customer incentive award program, namely, a
customer loyalty program that provides
merchandise benefits, discounts or free goods and
services or upgraded services to reward repeat
customers; promotional program to reward customer
loyalty featuring the products of others as
awards;

Reg. No. 3008344 FRIENDSHIP REWARDS PROGRAM (REWARDS

PROGRAM disclaimed) for

referrals in the field of vacation real estate
time-sharing at resorts and hotels through the
administration of a reward program enabling
current customers to obtain benefits;

Reg. No. 1966099 EARN AS YOU LEARN LEARN AS YOU EARN

PROGRAM (PROGRAM disclaimed) for

educational services, namely conducting programs
and courses of instruction at the primary level
designed to enhance skills in all school subjects
and incorporating non-monetary rewards;

Reg. No. 2477382 NORTHERN FRIENDS REWARDS PROGRAM (REWARDS

PROGRAM disclaimed) for

customer loyalty reward program, namely,
promoting the goods and services of retail stores
featuring clothing, footwear, accessories,
jewelry and cosmetics through incentives in the
nature of coupons, the distribution of purchase
points, and discount prices; and

Ser. No. 77815534

Reg. No. 2535550 PARTNERSHIP REWARDS PROGRAM (REWARDS PROGRAM disclaimed) for

medical product promotional program namely promoting medical product sales through an incentive award program for enrolled product distributors.

The examining attorney maintains that the mark merely describes a feature or quality of the services. In support of the refusal, the examining attorney has made of record the following dictionary definitions of the terms comprising applicant's mark: FRIEND - "one attached to another by affection or esteem, acquaintance;"⁹ FAMILY - "a group of individuals living under one roof and usually under one head, household;"¹⁰ REWARD - "something that is given in return for good or evil done or received or that is offered or given for some service or attainment"¹¹ and PROGRAM - a system of procedures or activities that has a specific purpose."¹²

The examining attorney further has made of record advertisements retrieved from Internet commercial and informational webpages displaying the terms FRIENDS &

⁹ *Merriam-Webster OnLine Dictionary*, (2009), merriam-webster.com.

¹⁰ *Id.* We hereby grant the examining attorney's request to take judicial notice of this definition, submitted for the first time with her appeal brief. See *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006). See also *In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1030 n.4 (TTAB 2007).

¹¹ *Id.*

¹² *Encarta World English Dictionary*, (2009).

FAMILY REWARDS PROGRAM used in connection with various services. The following examples are illustrative:

Canadian AutoWorld
Referral program spurs sales
Performance Hyundai has been using the Friends and Family Rewards program for about a year and a half.
The web-based Friends and Family Rewards program was launched quietly in 2008 and news is starting to spread. ...
(canadianautoworld.ca)

Friends & Family Program
BONUS REWARDS
Your loyalty deserves exceptional rewards and recognition - that's why we designed the Friends & Family Rewards program. Cruise Direct Online appreciates your business and the opportunity to assist you with planning your cruise vacation. We would like to reward your continued loyalty. For select cruises, our Friends & Family Travel Rewards Program rewards up to \$500.00 "Cash Back" for guests who book a cruise with us. ...
(cruisedirectonline.com)

Friends & Family Rewards Program
While we know you will find your ownership rewarding in countless ways, the Friends & Family Rewards Program makes it even better. By enrolling (it's free) you will be eligible for additional discounts only extended to Friends and Family Rewards Program members. Additionally, you can share your ownership experience with your friends and family while earning Reward Dollars. It's fun, free and a win - win opportunity for everyone!
(breckenridgegrandvacations.com)

PuriTeam's Friends & Family Rewards Program
Welcome to PuriTeam's Family and Friends Rewards Program. You've cared enough about your family's

health to improve your home's water systems and/or air quality, so why not spread the word? If you refer a friend or family member that makes a purchase at PuriTeam, we'll send you both a rebate check in the mail!
(puriteam.com)

Friends and Family Rewards is an exciting program where customers get paid cash rewards or reward points, when they refer friends, family members and associates, that buy a vehicle from your dealership.

Most dealerships say they use a referral program, but a quick question, do you have a system for managing these valuable prospects that has the potential of generating over 30% of your sales...profitably?

Thorough step-by-step training on this system guides your sales people through the process and generates confidence that translates into profitable referral selling.
(friendsandfamilyrewards.com)

In addition, the examining attorney has made of record summaries of the results of her search of "FRIENDS & FAMILY REWARDS PROGRAM and "FRIENDS & FAMILY REWARDS" on the GOOGLE search engine. However, we find that these summaries are of very limited probative value. First, the results summaries are truncated to such an extent that they contain insufficient information upon which we may ascertain the nature of the use, if any, of the terms comprising applicant's involved mark. Truncated results from search engines are entitled to little weight. *In re*

Bayer Aktiengesellschaft, 488 F.3d 960, 82 USPQ2d 1828,
1833 (Fed. Cir. 2007):

Bayer asserts that the list of GOOGLE search result summaries is of lesser probative value than evidence that provides the context within which a term is used. We agree. Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link—may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations.

Similarly, in this case the proffered Google search summaries do not provide sufficient context for us to discern the extent to which the use of FRIENDS & FAMILY REWARDS PROGRAM or FRIENDS & FAMILY REWARDS is trademark use or otherwise is relevant to our determination of the descriptiveness thereof.

Second, even with the limited context provided in the search summaries, it is clear that most uses of FRIENDS & FAMILY REWARDS PROGRAM are in connection with goods or services unrelated to the services at issue herein. As a result, the search summaries are not particularly useful as evidentiary support for the refusal to register

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, feature or

characteristic thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. See Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052. See also *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. Moreover, whether a term is merely descriptive is determined not in the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

In the instant case, the evidence made of record by the examining attorney is insufficient to support a finding that, as applied to applicant's services, the mark FRIENDS & FAMILY REWARDS PROGRAM would immediately describe, without conjecture or speculation, a significant characteristic or feature of an "on-line web site that enables business management, tracking and registration of

referral sources in the field of motor vehicle sales.”

We agree with the examining attorney that excerpts from articles taken from the Internet may be competent evidence in an *ex parte* proceeding of how a mark may be perceived by the public. See *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002). In this case, however, the sole instance in which FRIENDS & FAMILY REWARDS PROGRAM clearly is used in connection with an automobile sales referral program comes from an article posted on a Canadian auto sales website concerning a St. Catherine's, Ontario auto dealer. There is nothing in the record to indicate either that the service discussed therein is available in the United States or that consumers in the United States are familiar with the use of FRIENDS & FAMILY REWARDS PROGRAM as applied to applicant's services. See, for example, *In re Consolidated Cigar Corp.*, 13 USPQ2d 1481 (TTAB 1989). The remaining Internet articles use various permutations of FRIENDS & FAMILY REWARDS PROGRAM in connection with a number of services unrelated to those identified in the involved application.

The dictionary definitions of record support a finding that FRIENDS & FAMILY REWARDS PROGRAM describes a system of procedures for the purpose of giving to members of a household or those attached by esteem or affection

something in return for some service or attainment. That is to say, the mark merely describes a program of rewards for friends and family. However, as applicant notes, its services are not a rewards program. Rather, applicant provides an Internet website enabling a user to manage, track and register sources of referrals of automobile sales. Its disclaimer of REWARDS PROGRAM notwithstanding, the terms comprising applicant's mark do not, as defined, merely describe the services identified thereby. Such definitions, while perhaps suggesting a characteristic of applicant's services, do not immediately describe such a characteristic or feature thereof. Thus, the dictionary definitions, even viewed in the context of the Internet evidence, fail to support a finding that FRIENDS & FAMILY REWARDS PROGRAM merely describes the identified services.

The third-party registrations submitted by applicant are of little help in determining the registrability of the mark at issue in this case. The third-party registrations tend to support its position that the USPTO has registered a number of marks containing the disclaimed terms REWARDS PROGRAM or PROGRAM. However, the registrations provide little support for registration of applicant's involved mark. Further, and as often noted by the Board, each case must be decided on its own set of facts, and we are not

privity to the facts involved with these registrations. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court."] See also *In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001).

In short, the evidence submitted by the examining attorney falls somewhat short of demonstrating that FRIENDS & FAMILY REWARDS PROGRAM merely describes a feature or characteristic of applicant's recited services.

Finally, if doubt exists as to whether a term is merely descriptive, it is the practice of this Board to resolve doubts in favor of the applicant and pass the application to publication. See *In re Gourmet Bakers Inc.*, 173 USPQ 565 (TTAB 1972). In this way, anyone who believes that the term is, in fact, descriptive, may oppose and present evidence on this issue to the Board.

Decision: The examining attorney's refusal of registration is reversed. Accordingly, the involved application will be forwarded for registration in due course.