

THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B

Mailed: December 19, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Light Sciences Oncology, Inc.

Serial No. 78775491

Lorraine Linford of Seed IP Law Group PLLC for Light
Sciences Oncology, Inc.

Joanna Dukovcic, Trademark Examining Attorney, Law Office
101 (Ronald R. Sussman, Managing Attorney).

Before Seeherman, Hohein and Kuhlke, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Light Sciences Oncology, Inc., applicant, has filed an
application to register the mark VASCULAR RECONDITIONING
(in standard character form) on the Principal Register for
"pharmaceuticals, namely, energy-activated compounds used
for treatment of cardiovascular systems" in International
Class 5 and "catheters" in International Class 10.¹

¹ Application Serial No. 78775491, filed on December 16, 2005,
under Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b),
alleging a bona fide intention to use the mark in commerce.

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The examining attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C.

§1052(e)(1), on the ground that applicant's mark is merely descriptive of its goods. After the examining attorney made the descriptiveness refusal final, applicant filed a request for reconsideration. Upon the examining attorney's denial of the request for reconsideration, applicant filed this appeal. Both applicant and the examining attorney have filed briefs. We affirm the refusal to register.

"A mark is merely descriptive if it 'consist[s] merely of words descriptive of the qualities, ingredients or characteristics of' the goods or services related to the mark." *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004), quoting, *Estate of P.D. Beckwith, Inc. v. Commissioner*, 252 U.S. 538, 543 (1920). See also *In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a significant quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is not

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necessary, in order to find a mark merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant ingredient, quality, characteristic, function, feature, purpose or use of the goods or services. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

Further, it is well-established that the determination of mere descriptiveness must be made not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978).

Finally, while a combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning, In re Colonial Stores, Inc., 394 F.2d 549, 157 USPQ 382 (CCPA 1968), the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. In re Associated Theatre Clubs Co., 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its descriptive significance in relation to the goods or services, the combination results

in a composite that is itself descriptive. In re Oppedahl & Larson LLP, supra.

It is the examining attorney's position that "when the proposed mark is applied to the applicant's goods, the user is immediately informed that the purpose of both the pharmaceuticals and the catheters is for VASCULAR RECONDITIONING, or restoring parts of the cardiovascular system to good condition." Br. p. 5. In support of her position, the examining attorney submitted the following definitions for the words "recondition" and "reconditioning" from Bartleby.com and dictionary.com:

Recondition - To restore to good condition, especially by repairing, renovating, or rebuilding.

Reconditioning - To restore to good condition, especially by repairing, renovating or rebuilding.

We further take judicial notice of the following dictionary definition from The American Heritage Dictionary of the English Language (4th ed. 2006) of the word "vascular":²

Vascular adj. Of, characterized by, or containing vessels that carry or circulate fluids, such as blood, lymph, or sap, through the body of an animal or plant.

² The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

In addition, she submitted printouts of webpages from various websites retrieved from the Internet where the words "reconditioning" and "vascular" are used by third parties in various medical contexts, including the cardiovascular field. A few examples are highlighted below:

Cardiac Rehabilitation includes exercise classes for **re-conditioning** after a cardiac event, pulmonary **reconditioning** and **reconditioning** for patients with peripheral **vascular** disease.
www.dmcares.com;

This figure does not include sepsis related to peripheral vascular or pulmonary artery catheters. It is, therefore, not surprising that **vascular catheters** are a major source of nosocomial sepsis and contribute to the majority of nosocomial cases of septicemia due to ...
www.meditheses.com;

Gastroenterology ... The division conducts basic research in the following areas ... Splanchnic blood flow, tissue ischemia, **reconditioning**, and regulation of blood flow. www.intmed.vcu.edu;
and

A new method for ex vivo evaluation, with the potential for **reconditioning** of marginal and nonacceptable lungs, has been developed.
Ats.stsnetjournals.org.

In addition, the examining attorney submitted an excerpt from applicant's website:

Vascular Reconditioning, Inc. ... **Vascular Reconditioning** (VRI) is developing a new coronary atherosclerosis treatment for interventional cardiologists to treat vulnerable plaque, the underlying cause of heart attacks ... VRI is preparing to compete the extensive preclinical

evaluation of the cardiovascular properties of Litx already undertaken with the objective of initiating clinical trials of Litx as an interventional **vascular reconditioning** procedure to treat vulnerable plaque in patients with coronary artery disease. www.lightsciences.com.

Applicant describes its goods as follows:

Applicant's catheters and energy-activated compounds are highly specialized products used in a unique surgical procedure in which catheters are used to activate a compound through the use of a light emitting diode array. The purpose of the procedure is to prevent restenosis following intervention in the superficial femoral artery in patients with Peripheral Artery Disease (PAD) and to stabilize the formation of vulnerable plaque in patients with coronary artery disease at risk from acute coronary syndromes. This proprietary procedure is enabled by a photoreactive drug that has an affinity with atherosclerotic plaque and sites of vascular injury caused during endovascular intervention. A significant feature of the procedure is that it allows for regional endovascular intervention treatment, whereas prior technology, such as angioplasty and stenting, is more focused. Br. pp. 2-3.

The record in this case clearly supports a finding of mere descriptiveness of the phrase VASCULAR RECONDITIONING. As noted above, we determine the descriptiveness of a term in the context of the goods or services at issue, not in the abstract. In re Chopper Industries, 222 USPQ 258 (TTAB 1984); In re Bright-Crest, Ltd., supra.

Applicant does not dispute that its catheters are vascular catheters. Applicant also has not disputed the descriptive significance of the word "vascular" in

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connection with its goods. In the same manner that the word VASCULAR informs the consumer that the purpose of the goods is for use with blood vessels, the word RECONDITIONING informs the consumer that the goods are designed to recondition or repair the blood vessels. Clearly, these terms separately have a descriptive significance in relation to applicant's goods. The question remains whether combined they present a unique or incongruous combination.

It is applicant's position that:

The term VASCULAR RECONDITIONING does not immediately convey with any "degree of particularity" significant features, qualities or characteristics of applicant's goods (e.g. catheters having a diode array or compounds having an affinity with atherosclerotic plaque) or the purpose for which such goods are used (i.e. to prevent restenosis following intervention in the superficial femoral artery and to stabilize the formation of vulnerable plaque). The term VASCULAR RECONDITIONING is simply too vague to describe applicant's highly specialized goods with any "degree of particularity" and therefore fails to be merely descriptive.

Br. p. 3.

In particular, applicant asserts that the examining attorney's evidence does not support the refusal, noting that the evidence shows the word "reconditioning" being used in a general sense to describe repairing the conditions of various body parts and that evidence of

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general use of the term reconditioning is insufficient to show that the mark as a whole, VASCULAR RECONDITIONING, is merely descriptive of its goods. However, while "reconditioning" may have a more general meaning when used alone, in applicant's mark it is modified by the term VASCULAR, thus, the mark as a whole immediately tells the consumer what body part the goods recondition.

In addition, applicant argues that "[i]f the term VASCULAR RECONIDTIONING were in fact merely descriptive as applied to Applicant's goods or competitors' similar goods, we would expect to see more numerous and more clearly descriptive uses of VASCULAR RECONDITIONING in the press and literature. The lack of evidence showing third-party use of VASCULAR RECONDITIONING to describe any vascular procedure supports the conclusion that VASCULAR RECONDITIONING is not merely descriptive of applicant's goods." Br. p. 4. However, it is well established that the fact that applicant may be the first and only user of a merely descriptive designation does not justify registration if the only significance conveyed by the term is merely descriptive. See *In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018 (TTAB 1983). We further note that applicant has indicated that its goods are used

in a proprietary procedure, which would serve to explain why the phrase is not more widely used.

We find that when combined the terms VASCULAR and RECONDITIONING do not lose their descriptive significance and, in fact, make clear that applicant's goods recondition the vascular system. Thus, we are persuaded by the evidence of record that the words VASCULAR and RECONDITIONING are merely descriptive of applicant's identified goods and that when combined do not present a unique or incongruous meaning. In re Tower Tech, Inc., 64 USPQ2d 1314 (TTAB 2002).

Applicant relies on In re Harrington, 219 USPQ 854 (TTAB 1983), in support of its position that VASCULAR RECONDITIONING is at most suggestive of its goods. In Harrington, the Board found the phrase COLLEGE ACADEMY to be suggestive inasmuch as it could have a variety of possible meanings. This is different from the case before us, where the phrase VASCULAR RECONDITIONING used in connection with applicant's goods has only one meaning, specifically, that of vascular repair or reconditioning.

Looking at the average or ordinary prospective customers of applicant's goods, as we must, In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987), the average consumer of applicant's goods would

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certainly know and be familiar with the terms vascular and reconditioning as used in the medical and cardiovascular fields. Nor would it take any speculation or mental leap to understand that VASCULAR RECONDITIONING describes goods that would recondition a patient's vascular system.

Viewing VASCULAR RECONDITIONING as a whole, we find the evidence of record sets forth a prima facie case that such phrase is merely descriptive. Thus, we are persuaded that when applied to applicant's goods, VASCULAR RECONDITIONING immediately describes, without need for conjecture or speculation, a significant feature or function of applicant's goods. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for prospective consumers of applicant's goods to perceive readily the merely descriptive significance of VASCULAR RECONDITIONING as it pertains to applicant's goods.

Decision: The refusal to register under Section 2(e)(1) is affirmed.