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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Juvent Medical, Inc.[1]

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Serial No. 78873139

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David M. Carter of Carter, DeLuca, Farrell & Schmidt, LLP for Juvent Medical, Inc.

Edward Fennessy, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

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Before Seeherman, Drost, and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 1, 2006, applicant, Juvent Medical, Inc., filed an intent-to-use application to register the mark OSTEO PLATFORM, in standard character form, on the Principal Register for goods identified as "medical apparatus, namely, vibration plates for therapeutic purposes" in Class 10. Serial No. 78873139.

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[1] A change of name to Juvent Medical, Inc. from Juvent, Inc. was recorded on March 26, 2008. Reel/Frame No. 3747/0167.

The examining attorney[2] refused to register applicant's mark on the ground that the mark would be merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), if it were used with applicant's goods. The examining attorney argues that "the word 'osteo' is a well-known word of Greek origin which means 'bone.'" Brief at unnumbered p. 3. Furthermore, applicant's "plates comprise a vibrating platform designed and intended to treat bone conditions." *Id.* at 9.

In response, applicant argues that: (1) inasmuch as "the term OSTEO is derived from the Greek language, it is not likely that all consumers are well versed in the Greek language to instantaneously come to the conclusion that the term OSTEO is a Greek term of or relating to bone;" (2) several trademarks are registered for the term OSTEO without a disclaimer of the term; and (3) "by doing research of the goods on Applicant's website … it is evident that the descriptiveness of the mark is not being determined on the basis of the goods or services *as set forth in the application* and requires imagination, thought and perception to reach a conclusion as to the nature of

[2] The present examining attorney was not the original examining attorney in the case.

the goods." Brief at 10.[3] Applicant argues that "linking 'OSTEO' and 'PLATFORM' creates an impressive sounding composite non-sequitur, which, by definition, cannot 'describe' the goods it is accused of describing." Brief at 12.

After the examining attorney made the refusal final, applicant filed a request for reconsideration and appealed to this board.

"A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). *See also In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003). "Descriptiveness of a mark is not considered in the abstract. Rather, it is considered in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use." *Bayer*, 82 USPQ2d at 1831. *See also In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ

[3] Applicant has apparently attached the entire record in this application to its brief. This was unnecessary and confusing.

215, 218 (CCPA 1978) ("Appellant's abstract test is deficient – not only in denying consideration of evidence of the advertising materials directed to its goods, but in failing to require consideration of its mark 'when applied to the goods' as required by statute").

We begin by looking at the evidence in this case. We take judicial notice[4] of the English meaning of the term "Osteo-" as "a combining form meaning 'bone' used in the formation of words." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). Inasmuch as the term "osteo-" is a recognized term in English, the determination here does not depend on how well versed in Greek potential purchasers are.

Both applicant and registrant have submitted several registrations to show how the Office has treated the term "Osteo" in the past. Third-party registrations can be used in the same manner as a dictionary definition to illustrate how the term is perceived in the trade or industry. *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006) ("As shown by the examining attorney's evidence, the term 'SOLUTIONS' has been regarded as merely descriptive in a

[4] *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).

number of third-party marks, the registrations of which include disclaimers of the term 'SOLUTIONS.' *See General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1277 (TTAB 1972) ('Although the registrations are not evidence of use, the registrations show the sense in which the term 'fiber' is employed in the marketplace, similar to a dictionary definition')." *Accord In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987) ("[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this proper, limited manner, 'third party registrations are similar to dictionaries showing how language is generally used.' 1 McCarthy, Trademarks and Unfair Competition, § 11:26 at p. 516 (2d ed. 1984)").

The examining attorney's registrations include: Registration No. 2647420 (OSTEO RELIEF for herbal dietary supplements, Supplemental Register, "Osteo" disclaimed); No. 2458597 (OSTEO VITAL for supplements, "Osteo" disclaimed); No. 2501441 (CLINICIAN'S CHOICE OSTEO GARD for supplements, "Osteo" disclaimed); No. 3121063 (OSTEO MATRIX for supplements, "Osteo" disclaimed); 2719413 (OSTEO PEAK for supplements, "Osteo" disclaimed); No. 2911814 (OSTEO

SYMMETRY for courses in the fields of physical and massage therapy, "Osteo" disclaimed); and No. 3197532 (OSTEO FUSION for supplements, "Osteo" disclaimed).

Applicant has similarly submitted third-party registrations to support its position that its mark is not merely descriptive. *See* Registration No. 2716560 (OSTEO-EDGE for supplements); No. 2762662 (OSTEO-AIDE for supplements); No. 2588169 (OSTEO-SIZE for supplements); No. 2450167 (OSTEO-SITE for a bone biopsy/infusion needle); No. 2621670 (OSTEO-PIN for bioresorbable pins used in oral surgery and procedures); No. 2599865 (OSTEO PROTECT for vitamins); No. 1405669 (OSTEOGRAF for syringes and hydroxylapatite non-resorbable bone grafting materials); No. 1593781 (OSTEOTECH for human bone and related tissue for use in grafts); and Nos. 1557819 and 1556682 (OSTEOCURE and OSTEOCARE for bone growth stimulation device).[5]

Interestingly, among applicant's submitted registrations is No. 3197532 for the mark OSTEO FUSION for supplements and it contains a disclaimer of the word "Osteo."

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[5] We have not considered applicant's submitted canceled registrations because a "canceled registration does not provide constructive notice of anything." *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989).

Both applicant's and the examining attorney's registrations are not very persuasive. The examining attorney's registrations are mostly for dietary supplements or vitamins, which are not the goods at issue here; although they do provide at least some indication that the term "osteo" would have some descriptive significance for vitamins and supplements that apparently promote bone health. Applicant's registrations, on the other hand, are mostly for hyphenated words or terms without spaces. In these cases, a disclaimer of a descriptive term would not be appropriate. TMEP § 1213.05(a) (5th ed. rev. September 2007)("If a compound word mark consists of an unregistrable component and a registrable component combined into a single word, no disclaimer of the unregistrable component of the compound word will be required") and § 1213.05(a)(ii) ("When a compound word is formed by hyphenating two words or terms, one of which would be unregistrable alone, no disclaimer is necessary"). The second word in most of these registrations is often not necessarily descriptive so an amendment to the Supplemental Register or a disclaimer would not be appropriate. We add that, to the extent that there are some registrations that could have been treated differently, these marks are not

before us for adjudication. As the Federal Circuit has explained:

> The Board must decide each case on its own merits. *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1127, 227 USPQ 417, 424 (Fed. Cir. 1985). 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.
>
> Needless to say, this court encourages the PTO to achieve a uniform standard for assessing registrability of marks. Nonetheless, the Board (and this court in its limited review) must assess each mark on the record of public perception submitted with the application. Accordingly, this court finds little persuasive value in the registrations that Nett Designs submitted to the examiner or in the list of registered marks Nett Designs attempted to submit to the Board.

In re Nett Designs Inc., 236 F.2d 1229, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). *See also In re Hotels.com L.P.*, 87 USPQ2d 1100, 1108 (TTAB 2008) ("Nor do these third-party registrations establish that there is an Office practice holding such marks are generally registrable").

The examining attorney has also submitted internet evidence (emphasis added) to show that the term "platform" is used in relation to various types of vibrating machines that are used for medical and exercise purposes.

> Take Charge of Your Bones
> Renee Newman
> Chapter 12 - Vibrating **Platform** Therapy
> Promising Results for Lay People
> Making Vibration Therapy Safe
> http://avoidboneloss.com

The Osteoporosis Research Group is currently engaged in two interdisciplinary interventional studies in the area of sports and health with focus on osteoporosis research…

In a second study, the Erlanger Longitudinal Vibrations Study (ELVIS), the impact of "whole body vibrations" applied by a vibration **platform** is analyzed. 50 women over 65 years old take part in a defined rehab training program in which the strengthening of the legs is done on vibration **platforms…**
www.imp.uni-erlangen.de

Osteoporosis: Device may help prevent bone loss in the frail

Weight-bearing exercise is one of the principal recommendations for preventing and treating the loss of bone density that can lead to osteoporosis. However, exercise isn't always possible, particularly for the frail.

An experimental device may help solve this problem, reports the October 2005 issue of the *Harvard Women's Health Watch*. Research strongly suggests that a few minutes of standing on an oscillating **platform** about the size of a bathroom scale, can do as much for bone density as longer bouts of more typical weight-bearing exercise.
Medicine & Law Weekly, September 14, 2007

Gentle Vibration Prevents Bone Loss…
With his co-workers, Rubin is already testing the effects of a gentle vibration on bone loss in 64 postmenopausal women. Half of them stand on a vibrating **platform** resembling a bathroom scale for 20 minutes daily… The forces involved are so gentle that the women can't tell whether or not the **platform** is vibrating.
www.webmd.com

Whole Body Vibration (known as WBV) is actually the latest frontier in building muscle. Users stand on a vibrating **platform** and perform a series of stands and squats while the machine jostles the body…

The machines were first developed in Russia in the Sixties to help cosmonauts recover bone loss depleted in space, but today's manufacturers claim a

litany of other benefits that fall just short of miraculous. Besides treating osteoporosis, they say, WBV can build muscle, reduce cellulite…
Beauty Flash, September 1, 2007

No less a physical specimen than Madonna herself is said to step onto the $14,000 vibrating **platform** to shape, sculpt and tone…
Proponents say the machine prevents arthritis and improves osteoporosis…
New York Post, July 20, 2006

A new vibration-based fitness fad is sweeping into Massachusetts targeting flabby boomers and weak-boned senior citizens. The pitch this time: Just standing on a vibrating **platform** can strengthen bone and muscle, and exercising on the **platform** can boost athletes' performance… Boston scientists are about to launch a large study to determine whether just 10 minutes a day can reduce osteoporosis.
Boston Globe, July 8, 2006

Vibration Machine – Vitality600 Exercise Platform…
Originally designed for international space programs but now at home in any home gym, benefits attributed to vibration exercise include:
… increased bone density…
A one minute workout on this vibration **platform** burns more energy and creates strength improvements.
www.vitality4life.com.au

Also, the examining attorney included evidence from applicant's website showing that it uses the term "platform" to describe similar devices from applicant.

- Is the Juvent 1000 Dynamic Motion Therapy (DHT) **Platform** easy to use?
… You derive maximum therapeutic benefits simply by standing on the Juvent **Platform** in an upright relaxed stance…

- How does the cost of a Juvent 1000 compare to ongoing drug therapy for osteoporosis?

> The cost is less than chronic osteoporosis drug therapy. The durable Juvent **Platform** is designed to last a lifetime and can be used safely and effectively by all members of the family at risk of low bone density.

In addition, applicant's website (www.juvent.com/ie) indicates that: "Juvent has created a new approach to osteoporosis treatment and prevention. Juvent's Dynamic Motion Therapy (DMT) **Platform** transmits gentle, vertical displacements (vibrations)."

Finally, applicant has submitted Google summary search results for the searches "platform: define" and "osteo platform." Truncated internet search results are not entitled to much weight. *Bayer*, 82 USPQ2d at 1833 ("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"). Here, these search results merely show that the term "platform" can have numerous meanings and that there are few results for the term "osteo platform."

To the extent that applicant argues that others are not using the term OSTEO PLATFORM, we point out that:

> The fact that applicant may be the first and possibly the only one to utilize this notation in connection with its services cannot alone alter the basic descriptive significance of the term and bestow trademark rights therein.

In re Gould, 173 USPQ 243, 245 (TTAB 1972).

The evidence convinces us the term "Osteo" is merely descriptive of a medical apparatus, namely, vibration plates for therapeutic purposes. "Osteo" is defined as a combining term meaning "Bone." In addition to osteoporosis, other English terms with "Osteo" include "osteoanagenesis meaning "regeneration of bone" and "osteoarthritis," which is a "noninflammatory degenerative joint disease occurring chiefly in older persons, characterised by degeneration of the articular cartilage, hypertrophy of bone at the margins and changes in the synovial membrane." Applicant's therapeutic purposes would include strengthening bones or dealing with bone-related problems. In response to the examining attorney's request for information, applicant acknowledged that: "applicant's goods will be used for the treatment and prevention of osteoporosis as well as for addressing the entire musculoskeletal system…" Response dated February 22, 2007 at 5. "Applicant's goods will also be used by astronauts

to help prevent the bone and muscle loss." *Id.* at 6. Applicant identifies, inter alia, the following purposes of its goods:

> a. Prevent bone loss and improve bone density and strength…
>
> d. Prevents and reverses the loss of bone due to osteoporosis
>
> e. Reduces the possibility of spinal or hip fractures
>
> f. Excellent option for those unable or unwilling to take osteoporosis medication.

Id. at 5.

On its website, applicant's Juvent Dynamic Motion Therapy "The Non-Drug Treatment for Osteoporosis" is described as follows:

> Q. Is the Juvent 1000 Dynamic Motion Therapy (DMT) Platform easy to use?
>
> A. The Juvent 1000 is reasonably lightweight (20 lbs./9.4 kg) and portable…
>
> Q. Are there clinical studies and research to support that the Juvent 1000 not only stops osteoporosis but actually helps grow new bones?
>
> A. Clinical studies with the Juvent 1000 show an increase in bone growth averaging 2% per year in the spine and hip…

www.juvent.com/ie.

Considering the evidence of record, when prospective purchasers encounter the term "Osteo" on goods that will be used for therapeutic purposes that include preventing and

reversing the loss of bone due to osteoporosis and to improve bone density, they will immediately understand the term to describe this feature.

With regard to the term "platform," applicant has acknowledged that its goods "do involve the use of a platform area on which the users stand." Response dated February 22, 2007 at 5. Applicant uses the term "platform" to refer to its Juvent 1000 medical apparatus. The examining attorney's evidence shows that similar devices that are designed to fight osteoporosis, prevent bone loss, or improve bone density are referred to as "platforms." *See, e.g.*, "Vibrating Platform Therapy," "vibration platform," "a few minutes of standing on an oscillating platform," and "Half of them stand on a vibrating platform resembling a bathroom scale."

In response, applicant argues that the term "platform" "has different meanings depending on how the term is used… The word platform in no way describes a medical apparatus for therapeutic purposes." Brief at 11. It is not a surprise that a common English word can have many meaning and still be merely descriptive of specific goods or services. As a result, we are required to consider descriptiveness in the context of how the term is used in association with the goods or services. It is also not

surprising that "the Examining Attorney has had to go beyond the description of the goods, specifically, by requesting further information ... and doing research on the Appellant's website." Brief at 10. As we discussed earlier, mere descriptiveness "of a mark is not considered in the abstract." *Bayer*, 82 USPQ2d at 1831. In addition, there is nothing unusual about doing research on an applicant's website or with requesting applicant's literature. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987) ("We discern no error or inequity in the Board's use of appellant's catalog as evidence of what it contains, or in the Board's finding that 'apple pie'" refers to the potpourri scent"). Here, applicant acknowledges that its goods have a platform and the evidence shows that similar goods that are designed to prevent bone loss are described by the term platform. Therefore, we cannot agree that the term "platform in no way describes" its goods.

Ultimately, the test of mere descriptiveness is not whether the individual terms describe the goods or services, but rather whether the term as a whole is descriptive. Individually descriptive terms, when combined, may not be merely descriptive. When we view the

term OSTEO PLATFORM, we must obviously consider the combined term in the context in which it is used.

> Similarly, that applicant can take the dictionary definitions of the individual words in the term and come up with a meaning that makes no sense in connection with the services recited in the application does not mandate a different conclusion on the issue of mere descriptiveness. As stated above, the determination of descriptiveness is made in the context of the identified services, and the meaning of "ETHNIC ACCENTS" in connection with applicant's services is clearly that of home furnishings or decorations relating to various ethnicities.

In re Ethnic Home Lifestyles Corp., 70 USPQ2d 1156, 1159 (TTAB 2003). *See also In re Time Solutions Inc.*, 33 USPQ2d 1156, 1158 (TTAB 1994).

> When consumers encounter applicant's mark, YOUR HEALTH INSURANCE MANAGER, used in the context of applicant's advertising, which describes applicant's goods as "new PC software to manage your medical records and health insurance" and lists the various tasks performed by the software programs, as recited above, we have no doubt that the mark will immediately convey to them information concerning a significant feature or function of applicant's programs, namely, that they manage, i.e., handle with skill, personal health insurance matters.

Applicant argues that as "applied to the goods, OSTEO PLATFORM may suggest that the medical apparatus is a 'medical system on which programs or operating systems operate or software program' or 'a set of medical principles or opinions' and not merely a 'raised level surface on which people or things stand.'" Brief at 11-12. However, we must consider the descriptiveness of the mark

in connection with the identified goods. Applicant's goods are "medical apparatus, namely, vibration plates for therapeutic purposes," not computer programs or medical opinions. Applicant has also stated that "the consumer or a health professional may purchase the device." Response dated February 22, 2007 at 6. When these purchasers encounter the mark OSTEO PLATFORM on medical apparatus for therapeutic purpose that is designed to improve bone density and prevent osteoporosis by using a vibrating platform, they will immediately understand that the term describes a feature of goods, *i.e.*, they are platforms to help with bone density problems such as osteoporosis. Therefore, applicant's mark is merely descriptive.

Decision: The refusal to register applicant's mark OSTEO PLATFORM under Section 2(e)(1) of the Trademark Act is affirmed.