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Mailed: September 2, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Breathing Center, LLC

Serial No. 85433600

Matthew H. Swyers, The Swyers Law Firm PLLC, for Breathing Center LLC.

Kristin M. Dahling, Trademark Examining Attorney,¹ Law Office 113 (Odette Bonnet, Managing Attorney).

Before Seeherman, Ritchie, and Lykos,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Breathing Center LLC (“Applicant”) filed an application to register on the Principal Register the mark BREATHING NORMALIZATION² in standard character format for the following goods and services:

1. “Digital materials, namely, DVDs and downloadable videos featuring health improvement,” in International Class 9;
2. “Books in the field of health improvement; manuals in the field of

¹ The case was re-assigned to this Examining Attorney after the appeal was filed.

- health improvement,” in International Class 16;
3. “Education services, namely, providing on-line classes, seminars and workshops in the field of health improvement; educational services, namely, conducting classes, seminars and workshops in the field of health improvement,” in International Class 41; and
 4. “Health care services, namely, wellness programs,” in International Class 44.

The Examining Attorney has refused registration of the application under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that it is merely descriptive of the applied-for goods. The Examining Attorney also refused registration on the ground that Applicant did not adequately respond to, or comply with, a request for information concerning its goods and services, pursuant to 37 C.F.R. § 2.61(b). When both of the refusals were made final, Applicant filed an appeal. After the appeal was filed, the newly-appointed Examining Attorney requested remand in order to submit more evidence. The evidence was entered, the refusal made final, and the appeal reinstated. The Examining Attorney and Applicant each filed briefs. Upon careful consideration of the relevant arguments and evidence, we affirm both refusals to register.

² Application No. 85433600, filed September 28, 2011, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use in commerce.

Section 2(e)(1)

We first consider the refusal as to whether Applicant's mark is merely descriptive under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). 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. *See, e.g., In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012), quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963, 82 USPQ2d 1828 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 1217, 3 USPQ2d 1009, (Fed. Cir. 1987); and *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012), Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Moreover, it is settled that "[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them." *In*

re Tower Tech Inc., 64 USPQ2d 1314, 1316-17 (TTAB 2002); *See also In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985).

The Examining Attorney argues that the applied-for mark BREATHING NORMALIZATION describes a feature or characteristic of Applicant's goods and services, namely that they help consumers improve their health by emphasizing, among other things, the normalization of breathing. A composite of descriptive terms is registrable only if it has a separate, non-descriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive of bakery products). Accordingly, we look to the plain meaning of the words.

Both parties submitted definitions of the terms "breathing" and "normalization," including the following:

From Applicant:³

breathing: 1. the act of a person or other animal that breathes; respiration; 2. a single breath;

*Dictionary.com*⁴ (2012)

breathing: respiring.

Thesaurus.com (2012)

Normalization/normalize: 1. To make normal.

Dictionary.com (2012)

normalization: standardization; the imposition of standards or regulations.

Synonyms.net (2012)

³ These definitions were all included with Applicant's May 7, 2012 Response to Office Action.

⁴ This definition was submitted by both Applicant and the Examining Attorney.

From the Examining Attorney:⁵

breathing: 1.a. The act or process of respiration; b. a single breath.

The American Heritage Dictionary (2012); *ahdictionary.com*

normalization: the use of physiological and anatomic mechanisms in a therapeutic context to promote the body's own health restoration and homeostatic responses.

http://medical-dictionary.thefreedictionary.com (2012)

normalize/normalization: 1. To make normal, especially to cause to conform to a standard or norm;

The American Heritage Dictionary; *ahdictionary.com* (2012)

The Examining Attorney also submitted evidence of third-party use of the terms “breathing” and “normalization” to show that they are used in connection with health improvement and wellness programs. Examples include the following:

After adenotonsillectomy in children with no significant comorbidity, a meta-analysis has shown improvement in breathing across all of the included studies and complete **normalization** of night-time **breathing** in 83 percent of patients.

Haymarket Business Publications, June 24, 2011. Attached to May 24, 2013 Re-issued Final Office Action, p.1.

If dietary approaches and lifestyle modifications have failed, bariatric surgery may be considered. Buchwald et al. systematically evaluated the literature on bariatric surgery. They found substantial improvements in sleep-disordered **breathing**, with **normalization** in the vast majority of patients. . . . They found that dental appliances were superior to UPPP, both in the reduction of apneas and **normalization of breathing** disturbances.

Expert Review of Respiratory Medicine, June 2009. Attached to May 24, 2013 Re-issued Final Office Action, p.1.

⁵ These definitions were included with either the January 18, 2012 Office Action or the June 12, 2012 Final Office Action.

Remember to keep your stomach tight and your face relaxed, and to breathe normally (if you catch yourself holding your breath, count your repetitions aloud to **normalize** your **breathing**). Whenever you stretch, imagine breathing into the body part you're targeting as if inflating a balloon. You want to think of directing the oxygen into that area, giving you an open, tension-free feeling. We also recommend that you make walking 30 minutes a day a part of your life. O, The Oprah Magazine, April 1, 2007. Attached to May 24, 2013 Re-issued Final Office Action, p.1.

The effects of self-regulation include: improved blood flow in Raynaud's disease; **normalization** of **breathing** in panic attacks; reduced muscle tension in headaches; reduction of blood pressure. Pediatric News, December 1, 2001. Attached to May 24, 2013 Re-issued Final Office Action, p.1.

Normalization of breathing and the consequent disappearance of asthma, heart disease, diabetes, cancer, and many other conditions are serious and fundamental personal projects.
Normalbreathing.com. Attached to May 24, 2013 Re-issued Final Office Action, p.3.

Success with Joels Blog for your Future Freedom: Exactly why **breathing normalization** is necessary for persons with depression: . . . Diminished blood CO₂ content is a result of hyperventilation. Consequently, these Russian clinical doctors showed that main signs of depressive disorder can be solved with **breathing normalization**. In fact, it is proven by medical science that lighter and slower breathing boosts CO₂ levels in the arterial blood. *Successwithjoels.com*. Attached to May 24, 2013 Re-issued Final Office Action, p.15-16.

The Examining Attorney also noted Applicant itself uses the words descriptively on its website when referring to its goods and services, stating that “the **normalization** of **breathing** leads to significant improvement in the functioning of immune, nervous, digestive, respiratory, and other bodily systems . . .” The Examining Attorney further submitted several customer

reviews that refer to Applicant's goods and services descriptively as "breathing normalization."⁶

Applicant argues that its applied-for mark is not merely descriptive of its goods and services because the mark does not create an "instant association" with the goods and services. (appl's brief at 7). Applicant references thirteen third-party registrations that include either the term "BREATHING" or "NORMALIZATION" or derivatives of those words, on the Principal Register, and which do not include disclaimers or claims of acquired distinctiveness. These are AMERICAN BREATHING ASSOCIATION (Registration No. 2,163,265); BREATHING DISORDERS SERVICES, INC., and design (Registration No. 3,006,976); BREATHING, MADE EASIER (Registration No. 2,179,987); BETTER BREATHING (Registration No. 1,977,286); BREATHE EASY (Registration No. 1,683,760); RESPIRA MEDICAL, and design (Registration No. 3,970,030); THE BREATHABLE BODY (Registration No. 3,047,940); BREATHE FREELY SLEEP SOUNDLY (Registration No. 4,043,137); BreathSpec (Registration No. 3,984,231) SOFT TISSUE NORMALIZATION (Registration No. 2,920,400); BIO NORMALIZER, and design (Registration No. 3,267,355); NORMALIZER-3 (Registration No. 3,264,172); and NORMALIZER (Registration No. 1,372,571). However, only three or four of the registrations are for similar goods and services as those identified in Applicant's application. This is

⁶ Reviews dated January 15, 2013 and January 17, 2013. Attached to the May 24, 2013 Re-issued Final Office Action, p.20.

hardly evidence of an Office policy or practice. We also note that some of the marks are slogans, and Office practice does not require a disclaimer of words in unitary marks. Furthermore, we are not privy to the records of any of the registrations, and our precedent dictates that each case must be decided on its own merits. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“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”).

It is clear that the applied-for mark conveys information about the goods and services. We have no doubt that a consumer would understand “BREATHING NORMALIZATION,” used in connection with Applicant's goods and services, as directly conveying information about them, namely, that they help consumers improve their health by emphasizing, among other things, the normalization of breathing. *See In re Tower Tech Inc.*, 64 USPQ2d at 1316-17; *see also In re Conductive Services, Inc.*, 220 USPQ 84, 86 (TTAB 1983). Therefore, we find that the mark is merely descriptive of the identified goods and services, and we affirm this refusal to register.

Requirement for Further Information

In the first Office action, dated January 18, 2012, the Examining Attorney noted that further information about the goods and services was required for examination, pursuant to 37 C.F.R. § 2.61(b). The Examining Attorney specifically stated:

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The requested product information should include fact sheets, instruction manuals and/or advertisements. If these materials are unavailable, applicant should submit similar documentation for goods and services of the same type, explaining how its own product will differ. If the goods and services feature new technology and no competing goods and no information regarding competing services is available, applicant must provide a detailed description of the goods and a detailed factual description of the services.

Applicant responded with its Response to Office Action of May 7, 2012 with a one page chart, in the form of a screenshot:

[cont'd next page]

Breathing Normalization™ Programs:

These programs are available to everyone.

Details of the Program	Instant Download	Group Class Online	Session by Session	Individual or Family
Price:	\$149.95 <i>for whole program</i>	\$168	\$65 per hour	\$1,825
	or pay per package: Package 1: \$88.95 Package 2: \$88.95 Package 3: \$88.95 Package 4: \$88.95 Package 5: \$88.95		OR \$745 per 10 sessions (one session free)	
Description:	Don't learn right only by instantly accessing this program online. Complete each section to move onto the next. Each section consists a lecture and demonstrations of breathing exercises.	Learn in an online class setting. Classes are live giving you the opportunity to see and interact with the Breathing Normalization™ Specialist and participants.	Receive private, one-on-one instructions tailored to your specific needs. Learn at your own pace and for as long as you wish. A Breathing Normalization specialist will help you to modify your breathing patterns.	This is our main program and the most effective way to learn the Breathing Normalization™ Method. During this course, a Specialist works one-on-one with the student (or family), constantly adjusting the method to their specific needs. This individual course is for adults and children. Spouses, children and siblings of a man participant are welcome to participate for free.
Location	Online	Online	Online or in person	Online or in person
Time	Any time	See the schedule	We will fit your preferable one hour	We will fit your preferable time frame
Length	At your own pace	10 hours five 2 hour sessions	10 hours is recommended minimum	10 hours five 2 hour sessions
Duration	Learn or return it for as long as you'd like	6 weeks	You choose	2 months
Individual instructions	No	Limited	Yes	Yes
Support via Phone	No	No	No	Yes
Daily contact via Email	No	No	No	Yes

Applicant provided no explanation for the chart, nor any written response to the Examining Attorney's information requirement. In the Final Office Action, dated June 12, 2012, the Examining Attorney stated that the screenshot provided by Applicant was "insufficient," and made final the information requirement. On May 24, 2013, the reassigned Examining Attorney re-issued a Final Office Action, again making final the information requirement, noting: "Failure to respond to a request for information is an additional ground for refusing registration." Applicant did not further respond to the request.

Applicant did not address the request for information in its appeal brief, but noted only that "Applicant filed a cursory response to the refusal to register the mark on May 7, 2012." (appl's brief at 4). The Examining Attorney, however, noted in her brief that the requested information "would enable the examining attorney to further evaluate the registrability of the proposed mark and the applicable grounds for refusal." (EA's brief at unnumbered 12 of 14).

In assessing the acceptability of the refusal, we consider whether the information required by the Examining Attorney was necessary for proper examination, and whether Applicant provided information sufficient to comply with the requirement. *See In re AOP LLC*, 107 USPQ2d 1644, 1651 (TTAB 2013); *In re DTI Partnership LLP*, 67 USPQ2d 1699, 1701 (TTAB

2003); TMEP § 814 (April 2014).

We agree with the Examining Attorney that the requested information was necessary to permit proper examination. The information requested by the Examining Attorney, if provided by Applicant, would have shed light on the nature of its goods and services and their intended use, and would have been helpful for the Examining Attorney to ascertain whether BREATHING NORMALIZATION is merely descriptive of Applicant's identified goods. The information provided in the chart does not fully respond to the information requirement, and does not even relate to the goods and services in all of the classes identified in the application. Accordingly, although we have been able to ascertain from the remaining evidence that Applicant's applied-for mark is merely descriptive of the goods and services in the application, we affirm this refusal as well.

Decision: The Board affirms both the refusal to register the mark BREATHING NORMALIZATION as merely descriptive as well as the requirement to provide further information under 37 C.F.R. § 2.61(b), and registration to Applicant is refused.