

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

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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 Fisher

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Serial No. 85496960

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Jaconda Wagner of Wagner Law LLC for Mark A. Fisher.

Sophia S. Kim, Trademark Examining Attorney, Law Office 106  
(Mary I. Sparrow, Managing Attorney).

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Before Seeherman, Kuhlke and Masiello, Administrative  
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Mark A. Fisher, a U.S. citizen, has appealed from the refusal of the trademark examining attorney to register ABDOMINAL ELEVATOR, in standard characters, with the word ELEVATOR disclaimed, as a trademark for "Surgical and medical apparatus and instruments for use in general surgery; Surgical devices and instruments; Surgical instruments and apparatus."<sup>1</sup>

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<sup>1</sup> Application Serial No. 85496960, filed December 16, 2011, based on Section 1(b) of the Trademark Act (intent-to-use).

Registration has been refused pursuant to 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 his identified goods. In support of this refusal, the examining attorney made of record several definitions for "elevator," including the following:

<anatomy> An instrument for raising a depressed portion of a bone.  
Mondofacto, [www.mondofacto.com](http://www.mondofacto.com)

A surgical instrument used to elevate tissues or to raise a sunken part, such as a depressed fragment of bone.  
The American Heritage Medical Dictionary, © 2007.

An instrument for elevating tissues for removing osseous fragments or roots of teeth.  
Dorland's Medical Dictionary for Health Consumers  
© 2007

The latter two definitions were reported in The Free Dictionary by Farlex, <http://medical-dictionary.the freedictionary.com>

The examining attorney also submitted a definition of "abdominal," meaning "of or relating to the abdomen." Reported at Yahoo! Education, <http://education.yahoo.com>.

Applicant has explained that "the ABDOMINAL ELEVATOR is a surgically sterile pannus retractor that retracts and retains the pannus while providing a completely sterile field with an unobstructed view of the incision site for the physician." Response filed September 27, 2012, p. 1. In his brief, he provided further information as disclosed

in his patent application, namely that the goods provide "an unobstructed view of the incision site along the abdomen for the medical staff," TTABVue p. 6, although the patent application itself was never submitted.<sup>2</sup> An abdominal pannus, as described by a third-party patent submitted by applicant, is "an overhanging flap of abdominal tissue consisting of skin, fat, and sometimes contents of the internal abdomen." This can develop in "obese patients with large body habitus." Patent Application Pub. No. US2010/0145155A1.

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered to be merely descriptive; rather, it is sufficient that the term describes one significant attribute, function or property

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<sup>2</sup> In his response applicant stated that he explained his device in his pending patent application 13/303,149. In his brief he provided the further information that the application has now been published, No. 2013133668A1.

of the goods or services. In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); In re MBAssociates, 180 USPQ 338 (TTAB 1973). 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 the 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, if the mark is descriptive of any of the goods or services for which registration is sought, it is proper to refuse registration as to the entire class. In re Analog Devices Inc., 6 USPQ2d 1808 (TTAB 1988), aff'd without pub. op., 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

Applicant's own statement shows that his goods are used in the area of the abdomen ("an unobstructed view of the incision site along the abdomen"). One definition of "elevator" submitted by the examining attorney, "a surgical instrument used to elevate tissues," directly describes what applicant's identified goods do, and also shows that "elevator" is a generic term for such an instrument. Moreover, we note that applicant disclaimed the word

ELEVATOR in response to the examining attorney's statement that, if applicant amended his application to the Supplemental Register<sup>3</sup> or sought registration pursuant to Section 2(f), he would have to disclaim ELEVATOR "because such wording appears to be generic in the context of applicant's goods." Office action mailed March 29, 2012. Although applicant did not amend his application to the Supplemental Register, or make a Section 2(f) claim, he did provide the disclaimer in response to this statement by the examining attorney, indicating that he agreed that ELEVATOR is generic or, at least, descriptive.

When ABDOMINAL and ELEVATOR, with their respective definitions, are combined to form the mark ABDOMINAL ELEVATOR, the mark immediately and directly tells relevant consumers that the goods are used to elevate abdominal tissue.

Applicant has made a number of arguments in his appeal brief and reply brief as to why his mark is not merely descriptive, but we do not find them to be persuasive. First, applicant points to one of the definitions of "elevator" as "a dental instrument used to remove teeth or

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<sup>3</sup> Because the application is based on Section 1(b), applicant would have to file an amendment to allege use before he could amend the application to the Supplemental Register.

parts of teeth that cannot be gripped with a forceps or to loosen teeth and roots before using forceps." Brief, TTABVue p. 8. Applicant explains that in this context, the instrument is a blade, which is not the purpose or function of his device.

As stated above, the determination of whether a term is merely descriptive is made in relation to the goods for which registration is sought. When used in connection with devices or apparati that are used to lift an abdominal pannus, consumers will not ascribe to the term the meaning of a dental instrument used to remove teeth or parts of teeth.

Applicant has made a variation of this same argument in saying that "the consumer, a surgeon or surgical nurse, without seeing the device or having a description of it, would not know which version of 'ELEVATOR' was being utilized by the proposed mark given the multiple meanings of 'ELEVATOR' in the surgical context." Brief, TTABVue p. 10. Again, whether a term is merely descriptive is determined not in the abstract. In the context of the goods, consumers would understand "elevator" in ABDOMINAL ELEVATOR to have the meaning of a surgical instrument or device used to elevate abdominal tissue. We point out that, whether or not applicant's particular device is not

made of "steel as is typically the case for surgical instruments," Reply brief, TTABVue p. 3, applicant has identified his goods very broadly in his application, including the items "surgical and medical apparatus and instruments for use in general surgery" and "surgical devices and instruments," and therefore the goods would include surgical instruments made of steel, and surgical instruments used to elevate tissues - which is the definition of an "elevator."

Applicant also asserts that his mark is a double entendre, pointing to the term "elevator speech," which he says is used in the business world to convey "that a speaker must convey relevant information to a listener within the time that it takes to ride an elevator." Brief, TTABVue p. 8. As a result, applicant contends that "elevator" means rapid, swift, instant or prompt, and that with regard to the identified goods, ABDOMINAL ELEVATOR "conveys the convenience and speed with which the abdominal area can be retracted and prepared for surgery." Brief, TTABVue p. 9. Applicant has changed this argument slightly in his reply brief, saying that "This concept of a lift is embodied in the term 'ELEVATOR,' which also serves to connote the speed with which the device is applied in

comparison to the current surgical method for retracting a pannus." Reply brief, TTABVue pp. 3-4.

In order to be considered a double entendre, the mark must have a second, non-descriptive meaning that will be readily apparent to the consumer. In re Brown-Forman Corp., 81 USPQ2d 1284 (TTAB 2006); In re The Place, Inc., 76 USPQ2d 1467 (TTAB 2005). ABDOMINAL ELEVATOR does not have a clear meaning of convenience and speed. In fact, it is not clear to us why the word ELEVATOR per se would connote "speed," nor is the word ELEVATOR the same as ELEVATOR SPEECH. When ELEVATOR is used in combination with ABDOMINAL it strains credulity that a consumer would understand ABDOMINAL ELEVATOR as having the meaning "speed."

Finally, even if we were to treat applicant's goods as being the device he has described in his patent application, and therefore the definition of ELEVATOR as "a surgical instrument used to elevate tissues" may not be the generic name for the goods, the definition of "elevator" as meaning "a person or thing that elevates or raises" is sufficient for us to find that applicant's mark is descriptive.<sup>4</sup> As applicant has explained numerous times in

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<sup>4</sup> Definition taken from Dictionary.com Unabridged, <http://dictionary.reference.com>, based on the Random House



his briefs, his goods are a "mechanism for lifting the pannus." Reply brief, TTABVue p. 3. Thus, consumers would immediately understand, when seeing ABDOMINAL ELEVATOR in connection with applicant's surgical apparatus and devices, that the goods elevate or lift abdominal tissue, and therefore the mark describes the purpose of the goods.

Having considered all the evidence of record, and the examining attorney's and applicant's arguments, including those not directly addressed herein, we find that ABDOMINAL ELEVATOR is merely descriptive of applicant's goods as identified in his application.

Decision: The refusal of registration is affirmed.

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Dictionary, © 2013. The Board may take judicial notice of dictionary definitions, including online dictionaries with regular fixed editions. In re Red Bull GmbH, 78 USPQ2d 1375 (TTAB 2006); University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co, Inc., 213 USPQ 594 (TTAB 1982) aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).