

**This Opinion is Not a
Precedent of the TTAB**

Mailed: March 7, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nuclear Care Partners, LLC

Serial No. 85578775

Patricia Lee of Hutchison & Steffen LLC,
for Nuclear Care Partners, LLC.

William T. Verhosek, Trademark Examining Attorney, Law Office 114,
K. Margaret Le, Managing Attorney.

Before Bucher, Mermelstein and Hightower,
Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Nuclear Care Partners, LLC (“applicant”) seeks registration on the Principal
Register of the following mark:



for services recited as follows:

health care; holistic health services; home health care
services; home nursing aid services; home-visit nursing
care; providing assistance, fitness evaluation and

consultation to individuals to help them make health, wellness and nutritional changes in their daily living to improve health; providing health information; providing in-person holistic health care services; providing limited in-home personal medical services for individuals including checking vital signs, medication compliance and individual hygiene, scheduling doctor appointments, picking up prescriptions, checking medical equipment and supplies, and providing online information related to these personal medical services in Int. Class 44.¹

Although this application was approved for publication in July 2012, the examining attorney subsequently withdrew the application and refused registration absent the addition of a disclaimer of the word “Nuclear,” arguing that the term is deceptively misdescriptive of the involved services under Section 2(e)(1) of the Act. Applicant’s failure to comply with this disclaimer requirement is the sole basis for the outstanding refusal to register this composite mark. *See In re Slokevage*, 441 F.3d 957, 78 USPQ2d 1395, 1399-1400 (Fed. Cir. 2006); and *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). After the examining attorney made the refusal final, applicant appealed to this Board.

We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address several evidentiary matters. The examining attorney has objected to eight of ten new exhibits that

¹ Application Serial No. 85578775 was filed on March 23, 2012, based upon applicant’s claim of first use anywhere and use in commerce since at least as early as April 1, 2011. Based upon a first Office Action Examiner’s Amendment (June 29, 2012), applicant agreed to the following disclaimer: No claim is made to the exclusive right to use the words “Care Partners” and the nursing symbol of a white cross within a red heart apart from the mark as shown.

applicant submitted with its appeal brief. As argued by the examining attorney, the record in an application should be complete prior to the filing of an appeal. 37 C.F.R. § 2.142(d); and TBMP §§ 1203.02(e), 1207.01 (June 2013). Because applicant's new evidence was untimely submitted during an appeal, the examining attorney requests that we disregard this evidence. *See In re Luxuria s.r.o.*, 100 USPQ2d 1146, 1147-48 (TTAB 2011); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011); and *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n.32, 1769 (TTAB 2011)

In response, applicant argues that inasmuch as the examining attorney in his brief relied upon two dictionary entries also submitted for the first time with applicant's appeal brief,² we should deem the objections to the other eight as having been waived.

We disagree with applicant on this point. If the examining attorney had objected to all ten exhibits, we would have sustained his objection to the other eight and would then have taken judicial notice of the dictionary definition entries anyway. Accordingly, having disregarded this late-submitted evidence from the record, we do not have benefit of the materials about applicant's role in providing services exclusively for patients who were former DOE employees being helped under a federal program for those involved in cleanup in the nation's nuclear weapons complex.

² From <http://www.merriam-webster.com/>, THE MERRIAM-WEBSTER DICTIONARY, the definitions of "nuclear family" (Ex. D) and "nuclear" Ex. H).

Inasmuch as we have disregarded these eight tardy submissions, the contents of screen-prints from applicant's website and third-party websites are not of record.³

II. The applicable law

The test for deceptive misdescriptiveness has two parts. First we must determine if the matter sought to be registered misdescribes the goods. If so, then we must ask if it is also deceptive, that is, if anyone is likely to believe the misrepresentation. *In re Berman Bros. Harlem Furniture Inc.*, 26 USPQ2d 1514, 1515 (TTAB 1993), citing *In re Budge Manufacturing Co., Inc.*, 857 F.2d 773, 8 USPQ2d 1259 (Fed. Cir. 1988); and *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984).

III. The evidence of record

In the initial refusal issued on August 1, 2012, the examining attorney relied totally upon an entry for "Nuclear Medicine" from Wikipedia. With the final action of February 11, 2013, the examining attorney made of record pages of screen-prints from third-party websites which contained the following excerpts:

³ In its reply brief, applicant takes the position that "... it is axiomatic that the examining attorney should check applicant's own website for information about the goods/services," citing to *In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006). However, in the *Promo Ink* case, the issue was whether the website of that intent-to-use applicant was properly submitted into the record by the examining attorney in the face of applicant's opposition. The inverse of this situation is not true, namely, the examining attorney is not mandated by the rules to check applicant's website during *ex parte* examination or the prosecution of an appeal.

Second, as to screen-prints from applicant's website and from third-party websites, we find that applicant has not provided a satisfactory explanation as to why these copies could not have been made of record prior to the filing of the appeal. Given the late stage of the appeal at which these documents were submitted, we find that applicant has not shown good cause to remand its application so that the examining attorney could have considered this evidence. *See* TBMP § 1207.02 (June 2013).

General Nuclear Medicine



The shortest distance to diagnosis

Fast and easy to use, BrightView's customizable yet automated acquisition capabilities and tech-friendly design make it perfect for streamlining patient studies. Philips BrightView SPECT system offers a wide range of innovations to help healthcare providers manage patient care.

BrightView includes Philips exclusive CloseUp technologies, which generate higher resolution images by minimizing the distance between the detectors and the patient. While the system's ultra-thin pallet and exceptionally small cardiac dead space also help improve both bone and cardiac image resolution.

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THE NATIONAL ACADEMIES **IN FOCUS**

Fall 2007 Vol. 7 No. 3

The Nuclear Medicine Renaissance





Innovation Holds Promise for Improving Health Care

Groundbreaking research over the last few years has opened the door for doctors to tailor individualized treatment to a person's genetic profile, an approach known as personalized medicine. As this fledgling field grows, a key to unlocking its full potential may lie in a discipline that has existed 50 years. It's called nuclear medicine and uses imaging devices and radioactive biochemical compounds to diagnose and treat diseases.

Nearly 20 million nuclear medicine procedures are carried out each year in the United States to diagnose cancers, cardiovascular diseases, and certain neurological disorders -- as well as to treat several cancers, like breast and thyroid, by delivering doses of radiation to tumor cells in the hope of eradicating them. Nuclear imaging devices work by tracking radioactive chemicals that are swallowed, inhaled, or injected into the body. One common imaging tool is positron emission tomography (PET), which detects cancer sites anywhere in the body. PET is growing faster than any other imaging procedure and has proved less traumatic to patients who would otherwise require surgery or a biopsy to determine a malignancy... .

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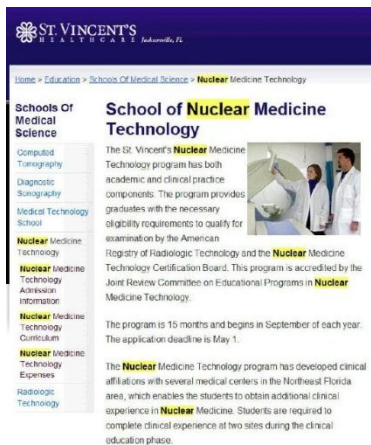
 	<h3>Nuclear Medicine/PET Scanning</h3> <p>Nuclear medicine is a medical specialty that uses safe, painless, cost-effective techniques to document the structure and function of organs inside the body. An integral part of patient care at Christiana Care Health System, nuclear medicine is used in the diagnosis and management of diseases.</p> <p>Nuclear medicine uses a very small amount of radioactive materials—called radiopharmaceuticals—to diagnose and treat disease. Radiopharmaceuticals are substances that are attached to specific organs, bones or tissues. The radiopharmaceuticals emit gamma rays that can be detected externally by special types of cameras: gamma or PET cameras. These cameras work in conjunction with computers to form images that provide data and information about the area of the body being imaged.</p>
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⁴ http://www.healthcare.philips.com/us_en/products/nuclearmedicine/spectclinicalsegments/generalnuclear.wpd

⁵ http://www.infocusmagazine.org/7.3/hs_nuclear_medicine.html

⁶ <http://www.christianacare.org/nuclearpet>



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Role of Nurses in Daily Nuclear Medicine

Abstract: The aim of this study is to demonstrate the role of nurses during daily nuclear medicine procedures and to discuss the influence of nurses in quality of patient care, patient preparation and radiation safety in nuclear medicine. ...

Conclusion: Nurses perform an important role in various tasks in assisting the technologists and physicians to carry out daily nuclear medicine procedures. Nurses are essential in providing quality patient care and saving patient's lives during an emergency in nuclear medicine. Nurses also are a key role in alleviating the anxiety and fear of the patient, especially children, regarding the procedure. In taking care of oncology patients, nurses with knowledge of new technologies including PET, PET/CT scanning and Radio immunotherapy, better educate the patients about new advances in the diagnosis and treatment of cancer. Nurses with special training in radiation safety educate patients and other personnel the effects of radiation and exposure during pregnancy.

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⁷ <http://www.jaxhealth.com/education/School-of-Medical-Science/nuclear-medicine-technology/>

⁸ <http://www.snm.org/index.cfm?PageID=3106> as accessed by the examining attorney on February 7, 2013.

⁹ This is the first page of a blog for nurses, located at <http://allnurses.com/radiology-nursing/rn-nuclear-medicine-204785.html> as accessed by the examining attorney on February 7, 2013.

¹⁰ V. Vijayakumar, E. Briscoe, S. Vijayakumar. *Role of Nurses in Daily Nuclear Medicine*. THE INTERNET JOURNAL OF NUCLEAR MEDICINE. 2006 Volume 3 Number 2, located at <http://www.ispub.com/> on February 7, 2013, by the examining attorney.

The Job

A nuclear medicine nurse carries out many of the traditional nursing activities; assessment, physical care, emotional support, patient education, and treatments/medications. Specialty knowledge and skills required include the ability to assist with radiology equipment and to prepare radiopharmaceutical substances.

Duties of Nuclear Medicine nursing include, but are not limited to:

- Patient assessment and care prior to and subsequent to procedure, including documentation of the same
- Set-up and administration of pre-, intra-, and post-procedure medications as ordered by the physician
- Utilization of advanced nursing skills to maintain patient stability pre-, intra-, and post- procedure
- Response to emergency situations within the department

Working in the field of nuclear medicine has its pros and cons. As an occupation that exposes workers to radiation, it may be a poor choice for those with lowered immunities. As a high-paying occupation with a good career outlook, it's a wise choice for those candidates hoping to pursue a field with job security and good pay. New nuclear technology is being created on an ongoing basis, so the field will continue to grow as the technology is enhanced. Getting into nuclear medicine nursing may be an ideal career path for those interested in working in an ever-changing field that offers potential for many new technology and learning experiences.¹¹

IV. Arguments of the examining attorney and of applicant.

Applicant contends that it has been using this mark in connection with its home health nursing agency services, which caters exclusively to former workers in the nuclear weapons complex (NWC), National Nuclear Security Administration (NNSA), of the Department of Energy (DOE), who qualify for no-cost in-home medical benefits because they have been diagnosed with work-related illnesses. Accordingly, applicant argues that the term “Nuclear” as used by applicant references the type of work once performed by its patients in cleaning up nuclear weapons sites. Second, applicant argues that it was also chosen because it plays on the reference to the “Nuclear” families – the place where applicant’s teams of nurse practitioners provide in-home health care services.

¹¹ <http://online.umary.edu/nursing-journal/resources/should-i-pursue-a-nursing-career-in-nuclear-medicine-2>

Applicant points out that its “Nuclear Care Partners” mark suggests characteristics of its consumers – the persons who would consume its services. Applicant is not engaged in the business of providing diagnosis and treatment through use of radioactive substances (or in the business of nursing associated with nuclear medicine). Hence, applicant takes the position that it requires some imagination on the part of the consumer in order to understand the nature of services being offered. Accordingly, applicant concludes, the word “Nuclear” is not in any way descriptive of the type of services associated with the mark.

As to the question of whether consumers are likely to believe the misrepresentation, applicant argues that the examining attorney has simply employed circular logic (e.g., the term “Nuclear” misdescribes the services provided, *ergo*, consumers will likely believe the misrepresentation).

By contrast, the examining attorney contends that inasmuch as applicant’s recited services involve health care, the words “Nuclear Care” will be perceived as signifying something about the health care industry. “Nuclear medicine” names a specific field in the health care industry – a medical specialty involving the application of radioactive substances in the diagnosis and treatment of disease – and a field that requires, for example, nursing and other personal care services. Because applicant is not involved in the field of nuclear medicine, the examining attorney reasons, the term “Nuclear” as included in applicant’s composite mark is deceptively misdescriptive of its services.

V. Analysis

A. Is the word “Nuclear” in applicant’s composite mark misdescriptive of the character of the services?

The first prong of our misdescriptive inquiry under Section 2(e)(1) of the Act involves a consideration of whether the matter at issue is deceptively misdescriptive in connection with the recited services. Specifically, does the word “Nuclear” misdescribe a significant aspect of applicant’s services, which aspect the services plausibly possess but in fact do not. *See In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002).

We take judicial notice of the following definitions, some submitted by applicant and other based on our own research:¹²

nuclear *adjective* /'nukliər/

- 1 relating to energy produced by changing the structure of the central part of an atom
nuclear power/energy, a nuclear power plant, the nuclear industry, nuclear waste
 - a. relating to weapons that use energy produced in this way
nuclear weapons/arms, nuclear bombs/missiles, a nuclear war/attack, those in favor of nuclear disarmament
- 2 PHYSICS relating to the central part of an atom
 - a. relating to or forming the nucleus of a living cell

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nu·cle·ar *adjective* \ˈnü-klē-ər, ˈnyü-, ÷-kyə-lər\

- 1 : of, relating to, or constituting a nucleus
- 2 a: of or relating to the atomic nucleus <**nuclear** reaction> <**nuclear** physics>
 - b: used in or produced by a nuclear reaction (as fission) <**nuclear** fuel> <**nuclear** waste> <**nuclear** energy>
 - c (1): being a weapon whose destructive power derives from an uncontrolled nuclear reaction
 - (2): of, produced by, or involving nuclear weapons <the **nuclear** age> <**nuclear** war>
 - (3): armed with nuclear weapons <**nuclear** powers>
 - d: of, relating to, or powered by nuclear energy <a **nuclear** submarine> <the **nuclear** debate> <a **nuclear** plant>

¹² The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *see* FED. R. EVID. 201(c)(1).

¹³ <http://www.macmillandictionary.com/dictionary/american/nuclear>

NUCLEAR (Medical Dictionary)

- 1 : of, relating to, or constituting a nucleus
 - 2 : of, relating to, or utilizing the atomic nucleus, atomic energy, the atomic bomb, or atomic power¹⁴
-

Nuclear: nu·cle·ar /'n(y)ooklēər, -kli(ə)r *adjective*

1. of or relating to the nucleus of an atom.
 - 1.1. denoting, relating to, or powered by the energy released in nuclear fission or fusion: *nuclear energy, nuclear submarines*
 - 1.2. denoting, possessing, or involving weapons using nuclear energy: *a nuclear bomb, nuclear nations*
 2. *Biology* of or relating to the nucleus of a cell: *nuclear DNA*¹⁵
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nuclear family *noun*

: the part of a family that includes only the father, mother, and children¹⁶

nuclear medicine *noun* (Medical Dictionary)

: a branch of medicine dealing with the use of radioactive materials in the diagnosis and treatment of disease¹⁷

nuclear medicine *noun*

diagnostic and therapeutic medical techniques using radionuclides or radioisotopes.¹⁸

These definitions show that “nuclear” can mean various things, depending upon the context. To determine the appropriate context, we look to the involved recitation of services. The leading term in applicant’s listing of services is merely “health care.” By contrast, in the event that applicant’s services were limited to something like “in-home nursing care services provided exclusively to former workers in the nuclear weapons complex,” we might reach a different result herein. In this

¹⁴ <http://www.merriam-webster.com/dictionary/nuclear?show=0&t=1392401045>.

¹⁵ http://www.oxforddictionaries.com/us/definition/american_english/nuclear?q=nuclear

¹⁶ <http://www.merriam-webster.com/dictionary/nuclear%20family> In further support of its position herein, applicant argues that its choice of the word “Nuclear” serves as a double entendre, evocative of its family-oriented entity. We find nothing in the record to support this contention.

¹⁷ <http://www.merriam-webster.com/dictionary/nuclear+medicine?show=0&t=1392418683>

¹⁸ <http://dictionary.reference.com/browse/nuclear+medicine?s=t>

hypothetical context, it would be relevant that in the first dictionary entry *supra*, under the listing of eleven “related dictionary definitions” for the word “nuclear,” most definitions point to nuclear in the context of nuclear energy or weapons. Applicant’s counsel argues in its brief, consistent with the weight of the dictionary entries above, that this connotation also happens to be the sense in which applicant actually uses this term (e.g., nuclear power, nuclear waste, nuclear energy, nuclear fission, nuclear physics, nuclear reactor, nuclear weapon, etc.).

On the other hand, the accumulated evidence from the third-party websites that the examining attorney placed into the record establishes that “nuclear medicine” names a medical specialty within the health care industry involving the application of radioactive substances in the diagnosis and treatment of disease. Moreover, as to the specific health care services applicant emphasizes in its recitation and in its briefing, nurses appear to be key players in providing these services.

Accordingly, we agree with the examining attorney that in the “health care” field generally, the prototypical health care consumer would perceive “nuclear” or “nuclear care” as related to “nuclear medicine.” In this event, the word “Nuclear” misdescribes a significant aspect of applicant’s services, which aspect the services plausibly possess but in fact applicant confirms that they do not, and so the first prong of the misdescriptive inquiry under Section 2(e)(1) of the Act has been met.

B. Are prospective consumers likely to believe the misrepresentation?

Having concluded that the word “Nuclear” misdescribes a significant aspect of applicant’s services, we move then to the second prong of the *Berman Bros. Harlem Furniture / Quady Winery* test, i.e., the question of whether prospective purchasers

are likely to believe the misrepresentation readily conveyed by the term. Urging a negative finding on this query, applicant argues as follows in its brief:

Applicant is an approved Medical Provider with the U.S. Department of labor and patients who are qualified claimants under the Energy Employees Occupational Illness Compensation Program Act, (“EEOICPA”), Division of Coal Mine Workers’ Compensation (“DCMWC”), and the Federal Employees’ Compensation Action, (“FECA”), may receive Applicant's services at no cost. Applicant serves this market exclusively. Applicant secures its patient pool primarily through physician referrals. In instances where there is direct outreach by Applicant, each patient must undergo a rigorous application and qualification process which involves pre-screening to determine eligibility and proof of a Department of Labor Benefits Card.

However, we cannot consider these significant limitations as to the nature of services and conditions of patients inasmuch as they do not appear in applicant’s recitation of services. Rather, in defining the relevant purchasers, applicant’s broad recitation of services points us toward members of the general public who happen to be health care consumers.¹⁹ Accordingly, we find that the proper universe of relevant prospective customers is not the narrow and targeted group of ill persons who are knowledgeable about nuclear issues related to energy, fission, weapons, and waste cleanup. Rather, we must consider whether this misrepresentation would be believed by consumers of “health care,” which group could encompass substantially all members of the general public.

The burden is on the examining attorney to submit sufficient evidence to establish that the term at issue falls within the proscription of the statute. *In re*

¹⁹ Moreover, as discussed *supra* at 3 - 4, we have not considered applicant’s tardy evidence submitted with its appeal brief.

Berman Bros. Harlem Furniture Inc., 26 USPQ2d at 1515. Given the contents of the third-party websites that the examining attorney has placed into the record, we find it is likely that the word “Nuclear” alone (or the two-word phrase “Nuclear Care”) will convey information about “Nuclear Medicine” or “Nuclear Medicine Nursing Care” and hence, prospective consumers are likely to believe the misrepresentation.

VI. Conclusion

We find that the word “Nuclear” misdescribes applicant’s services, and that consumers are likely to believe the misrepresentation.

Decision: The refusal to register applicant’s composite mark absent the addition of a disclaimer of the word “Nuclear” is hereby affirmed given our finding that this term is deceptively misdescriptive under Section 2(e)(1) of the Lanham Act. However, this decision will be set aside if, within thirty (30) days of the mailing date of this decision, applicant submits to the Board a proper disclaimer of the additional word “Nuclear.” *See* Trademark Rule 2.142(g), 37 U.S.C. § 2.142(g); and TBMP § 1218 (June 2013). A proper disclaimer should read as follows:

No claim is made to the exclusive right to use the words “Nuclear Care Partners,” and the nursing symbol of a white cross within a red heart, apart from the mark as shown.