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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 Motion Fitness

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Serial No. 85627683

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Matthew H. Swyers of The Swyers Law Firm PLLC for Motion Fitness.

Caitlin Watts-FitzGerald, Trademark Examining Attorney, Law Office 111 (Robert L. Lorenzo, Managing Attorney).

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Before Grendel, Kuhlke and Adlin, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Motion Fitness ("applicant") seeks registration on the Principal Register of the mark ACTIVE GAMING (in standard character form) for Class 41 services identified in the application as "educational services, namely, conducting programs in the field of health and fitness."[1]

[1] Application Serial No. 85627683, filed on May 16, 2012. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a). October 8, 2008 is alleged in

The Trademark Examining Attorney has issued a final refusal to register applicant's mark, on the ground that it is merely descriptive of the services identified in the application. *See* Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).

Applicant has appealed the final refusal.

After careful consideration of all of the evidence of record and the arguments of counsel, we AFFIRM the Section 2(e)(1) refusal.

Trademark Act Section 2(e)(1) prohibits registration on the Principal Register of a mark which "when used on or in connection with the goods [and/or services] of the applicant is merely descriptive or deceptively misdescriptive of them...."

A term is considered to be 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 In re Chamber of Commerce of the United States of America,* 675 F.3d 1297, 102 USPQ2d 1217 (Fed. Cir. 2012); *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007); *In re Gyulay,* 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). "On the other

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the application to be the date of first use of the mark and first use of the mark in commerce.

hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 497 (TTAB 1978); *see also In re Shutts*, 217 USPQ 363 (TTAB 1983).

To recount, applicant seeks to register the mark ACTIVE GAMING for "educational services, namely, conducting programs in the field of health and fitness."

The record establishes that "active" is defined, inter alia, as "being in physical motion," and "involving or requiring physical exertion and energy: *an active workout at the gym*."[2]

The record also establishes that "gaming" is defined, inter alia, as "the playing of games, especially video games."[3]

Based on these dictionary definitions, we find that the words "active" and "gaming," when considered separately and when combined into the term "active gaming," directly and immediately describe a key feature, function and/or

[2] http://education.yahoo.com/reference/dictionary/entry/active. (Sept. 6, 2012 Office action.)

[3] http://education.yahoo.com/reference/dictionary/entry/gaming. (Sept. 6, 2012 Office action.)

purpose of applicant's services, in which participants combine video gaming and physical activity.

In this regard as to the nature of applicant's services, Exh. A to applicant's March 5, 2013 response to Office action is the affidavit of applicant's president, Edwin Kasanders. At paragraph 2 of the affidavit, Mr. Kasanders describes applicant's services as follows: "Our mark ACTIVE GAMING is used exclusively in connection with educational services that create programs in the field of health and fitness, namely physical activity based gaming. Users are able to engage in the technology games they enjoy while being physically active."

Similarly, Exh. 4 to Mr. Kasanders' affidavit is a printout of pages from applicant's website. Text from the webpages includes the following: "What is Active Gaming? Active Gaming, also known as 'Exergaming,' combines the use of technology in the form of a game with physical activity. Children are able to engage in the technology games they enjoy, such as video games, while being physically active."

Moreover, these excerpts from applicant's website show that applicant itself uses "active gaming" in what clearly is a merely descriptive manner. For example, one page states: "There are three generic categories of active games: Exergames/Active Gaming, Interactive Fitness

Activities, and Active Learning Games." Thus, applicant uses "Active Gaming" as a descriptive term for a category of "active games," along with the equally descriptive or generic terms "Interactive Fitness Activities" and "Active Learning Games."

Similarly, one of the webpages includes the following text under the heading "Our Concept": "We help bring the pieces of *active gaming* together for our customers. … Our experience in the *active gaming* market, design, manufacturing and distribution allow us a view into these products and services." (Emphasis added.) This same page also includes the text: "The *active gaming* products we design and deliver must fit into what we call our 'Interactive Fitness and Engagement Guidelines.'" (Emphasis added.)

We find that this evidence of applicant's own usage of "active gaming" in a merely descriptive manner is persuasive evidence of mere descriptiveness. *See In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1112 (Fed. Cir. 1987); *In re Phoseon Tech. Inc.*, 103 USPQ2d 1822, 1825 (TTAB 2012); *In re Personal Counselors, Inc.*, 184 USPQ 761 (TTAB 1974).

Applicant argues:

> The Applicant contends that the usage as described by the Examining Attorney is not representative of the complete manner in which the applicant intends to use its mark. The examining attorney misreads and takes too narrow a view as to the subject matter and scope of the Applicant's activities. The description of the mark's services per the subject Application is as follows: "educational services, namely, conducting programs in the field of health and fitness." The Applicant's ACTIVE GAMING mark is not merely a reference to actively playing video games as the Examiner suggests.

(Applicant's Brief at 6.)

It is settled, however, that it is not necessary that the term in question describe all of the purposes, functions, characteristics or features of the goods or services to be deemed merely descriptive; it is enough if the term describes one significant function, attribute, or property. *See In re Chamber of Commerce, supra*, 102 USPQ2d at 1219; *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). Thus, even if applicant's educational services might include elements other than "active gaming," the term nonetheless is merely descriptive of this key feature of applicant's services. The mark therefore is merely descriptive of applicant's services for purposes of Section 2(e)(1).

Applicant also argues:

> In the instance of ACTIVE GAMING, the consumer would require a degree of imagination to draw a connection

> of the term ACTIVE GAMING with Applicant's services by virtue of the fact that the term ACTIVE GAMING does not immediately conjure a universal assumption of 'educational fitness services.' Some degree of imagination is required to equate the term ACTIVE GAMING with the Applicant's services.

(Applicant's Brief at 6-7.) Similarly, applicant argues: "… the relevant consuming public would not form an immediate impression of the features, functions, qualities or characteristics of the goods [sic – services] offered by Applicant by mere sight of the mark." (Id.)

It is settled, however, that the determination of whether a term is merely descriptive must be made in relation to the goods or services for which registration is sought, not in the abstract. *See In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Finisar Corp.*, 78 USPQ2d 1618, 1620 (TTAB 2006). Thus, "[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." *DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012), *quoting from In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). We find that consumers who are familiar with the nature of applicant's services

would immediately understand the merely descriptive significance of the designation ACTIVE GAMING in relation to those services.

In summary, we find that applicant's mark ACTIVE GAMING is merely descriptive of applicant's services identified as "educational services, namely conducting programs in the field of health and fitness." We have considered all of applicant's arguments to the contrary, including any not specifically discussed in this opinion, but we are not persuaded by them.

Decision: The Section 2(e)(1) refusal of registration is AFFIRMED.