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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re PHNJ, LLC

Serial Nos. 85690501 and 85981798

Lisa D. Taylor and Denis F. Driscoll of Inglesino, Wyciskala & Taylor, LLC for PHNJ, LLC.

Tina L. Snapp, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).

Before Rogers, Chief Administrative Trademark Judge, and Greenbaum and Adlin, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

PHNJ, LLC (“Applicant”) seeks registration of the mark shown below

MEMORY CARE LIVING

for “Management of health care clinics for others” in International Class 35 (the “Class 35 Services”)¹ and “Geriatric health care management services; Health care;

¹ Application Serial No. 85690501, filed July 30, 2012, claiming first use anywhere on December 16, 2011 and first use in commerce on January 4, 2012 (the “Parent

Health care services, namely, disease management programs; Managed health care services; Nursing care; Nursing homes; Nursing services” in International Class 44 (the “Class 44 Services”).² The Examining Attorney refused registration on the ground that Applicant’s mark is merely descriptive of the identified services under Section 2(e)(1) of the Act. After the refusal became final, Applicant appealed, and Applicant and the Examining Attorney filed briefs and appeared at an oral hearing.

The Evidence

The Examining Attorney relies on evidence that “memory care,” “living” and/or “memory care living” are widely used by third-parties to describe Applicant’s Class 35 Services or Class 44 Services, or services closely-related thereto. For example:

In the “waterfordseniorliving.com” website, the words “**MEMORY CARE**” appear under the WATERFORD SENIOR LIVING mark and logo, to the right of which is the tagline “Welcome to a New Standard in **Memory Care.**” The accompanying text states: “At **Waterford Memory Care**, we understand the difficulty of selecting an assisted living facility for someone suffering with the effects or Alzheimer’s or a related dementia. You should know that those with memory loss can have fulfilling, happy lives ... Our new, specially designed, 29-unit

Application”). The Parent Application includes a color claim reflected in the following description of the mark: “The mark consists of the words ‘Memory Care Living’ in blue (pantone 2767) in the font Optimus Princeps Semi Bold, all in small capitals; the first letter of each word is capitalized.”

² Application Serial No. 85981798, which was divided from the Parent Application pursuant to Applicant’s request of February 24, 2014, and which includes the same color claim and description of the mark (the “Child Application”). Applicant did not file its Request to Divide until after it appealed the refusal of registration and Applicant and the Examining Attorney filed briefs addressing both classes of goods. Applicant should have filed the Request to Divide with the Board. TMEP § 1110.09 (2014).

complex offers a complete solution for **memory care living** and treatment.”

The “seniorlivingonline.com” website listing for **Ivy Ridge Living Memory Care** states “A NEW ERA IN **MEMORY CARE HAS ARRIVED!**” and “Every detail designed to create the ideal **memory care living** environment.”

The “mnseniorsonline.com” website, under the heading “**St Cloud Memory Care**” states “A **memory care living** environment is designed for people who suffer from some form of memory loss that ultimately makes it unsafe for them to continue to stay at home without any kind of assistance ... a **memory care facility** allows a person who is experiencing some form of memory loss to maintain a level of independence ... with professional staff on hand to assist them with their day to day lives.”

The Texas State Veterans Homes section of the “sears-methodist.org” website, under the heading “**Memory Care**” states “The **memory care** program at our Texas State Veterans Homes provide (sic) safety and security for veterans experiencing memory loss ... The **memory care living** areas are bright and cheery”

The Nine Mile Creek Senior Living website (“ninemilesenior.com”), under the heading “**Memory Care**,” states “This warm and welcoming area is specially designed for those with Alzheimer’s disease and other forms of memory loss.” The site states that “Creekside **Memory Care** services include ... Secure **memory care living**.”

The “arborlakesseniorliving.com” website states that “Arbor Lakes Senior Living provides seniors with arrangements for independent, assisted or **memory care living**.”

A screenshot of a Youtube video about GracePointe Assisted Living & **Memory Care** bears the heading “Typical **Memory Care** Studio Suite.”

The “tabitha.org” website indicates that GracePointe Assisted Living & **Memory Care Suites** provides “warm, comfortable and compassionate assisted living, with specialized services for individuals in need of **memory care.**”

An article from Digital Journal entitled “**Memory Care Living’s** ‘Longest Day’ Event Raises \$2,500 for Alzheimer’s Association” indicates that **Memory Care Living** is “a provider of specialized housing and care for older adults with Alzheimer’s or dementia”

The “seniorhomes.com” website identifies 11 “**memory care facilities**” in Sarasota, Florida and under the heading “**Memory Care Center**” lists articles and resources related to “**memory care,**” Alzheimer’s, cognitive decline and dementia.

The “oak-meadows.org” website, under the OAK MEADOWS logo, includes the term “**memory care,**” and the listing for “The Woods – **Memory Care**” states “The Woods is a secure, home-like environment where dedicated staff provides 24/7 personalized **memory care assisted living.**”

The “cardon.us” website, under the heading “Person-centered **Memory Care** designed to comfort,” states “CarDon communities offer memory-impaired residents with outstanding **memory care** support in specially designed centers at our communities. Our compassionate staff is uniquely experienced and skilled at caring for people at the earliest to advanced stages of memory impairment, Alzheimer’s disease, or other dementia. Safety, stability, and comfort in the **memory care living** environment are critical to providing quality care. Our **memory care** staff celebrates the spirit and individual abilities of each resident ... Special efforts are taken to know each **memory care resident**”

The “ecumenmeadows.org” website, under the heading “Innovative Leader in **Memory Care**” states “Ecumen is a leader in **memory care.** We currently offer **memory care living** options ... that serves people living with behavioral challenges of Alzheimer’s disease”

A posting on the Yardi Corporate Blog (“yardi.com”) concerning Bloom Senior Living states “In the rapidly growing market for residential **memory care** services ... Ruth’s [who suffered from Alzheimer’s disease] experience has also inspired a unique **memory care living** model at Bloom’s Bluffon”

A North Denver Tribune article (“northdenvertribune.com”) entitled “New LoDo senior living with independent, assisted and **memory care**” states that the facility will offer “a full range of independent, assisted and **memory care living** choices.”

An Oregon Live article (“oregonlive.com”) entitled “Forest Grove’s Jennings McCall adds **memory care** services for residents with dementia” states “The new 14-bed **memory care living** wing at Jennings McCall Center will allow the retirement community to provide specialized care for residents with dementia and Alzheimer’s” and “All caregivers at the **memory care** facility will be specially trained to work with Alzheimer’s and other dementia patients, Purdy said. It’s a service that is in high demand for the country’s large aging population, she added.”

The Harbor at Harmony Crossing website (“harboratharmonycrossing.com”), under the heading “**Memory Care**” states “We are passionate about celebrating the life stories of our **memory care** residents. We focus on helping them stay connected to the people and the life they love ... Our **memory care living spaces** are specially designed to allow residents to transition easily between activities in a fully secure and safe residence.”

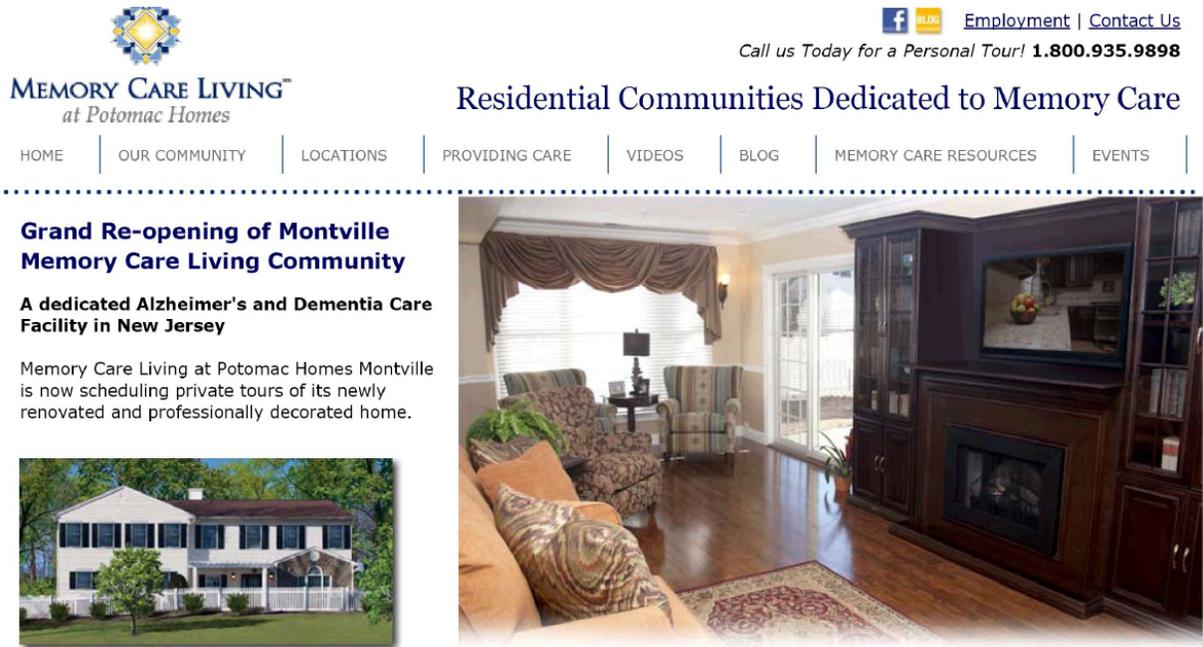
An article on the “bizjournals.com” website entitled “LaSalle Group plans 28K sf **memory care** center in Woodstock” states that the center will “care for people with Alzheimer’s and dementia” and that “LaSalle has a 26,000 square foot **memory care living** ceneter (sic) in Suwanee.”

A post on the “comversations.com” website entitled “Riverpoint of Kerrville Assisted Living and **Memory Care Community**” includes photographs of the “**memory care living and dining room**” and refers to the “**memory care wing.**”

The “valleyviewstates.org” website indicates that it “offers a purposeful **memory care living** environment, keeping your family members close to home” and refers to the “Pearls of Life **Memory Care Program.**”

Office Actions of November 14, 2012 and August 19, 2013 (emphasis supplied).

The Examining Attorney points out that Applicant itself uses the terms “memory care” and “memory care living” in the same manner as these third-parties, as shown in Applicant’s specimen of use:



The screenshot displays the website for Memory Care Living at Potomac Homes. The header includes the company logo, a navigation menu with links for HOME, OUR COMMUNITY, LOCATIONS, PROVIDING CARE, VIDEOS, BLOG, MEMORY CARE RESOURCES, and EVENTS, and social media icons for Facebook and Blog. A call to action reads "Call us Today for a Personal Tour! 1.800.935.9898". The main heading is "Residential Communities Dedicated to Memory Care". The featured article is titled "Grand Re-opening of Montville Memory Care Living Community" and describes it as "A dedicated Alzheimer's and Dementia Care Facility in New Jersey". The article text states: "Memory Care Living at Potomac Homes Montville is now scheduling private tours of its newly renovated and professionally decorated home." Below the text are two images: one of the exterior of the Montville facility and another of an interior living room with a fireplace and large windows.

Our Montville home has 15 private bedrooms where the resident can relax and still be completely under the supervision of expert caregivers in dementia-related issues. And our memory care living community is completely secured inside and out with 24/7 electronic alarm systems to prevent off-site wandering. So you can sleep soundly at night knowing that your loved one is safe.

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The Examining Attorney also relies on a number of third-party Principal Register registrations for marks which include the terms “memory care” and/or “living” in which those terms are disclaimed, as follows:

<u>Mark/Owner</u>	<u>Reg. No.</u>	<u>Goods/Services</u>	<u>Disclaimer(s)</u>
SUITE LIVING SENIOR MEMORY CARE & Design/ Toti Intellectual LLC	3880927	Providing long-term care facilities; providing memory care services; skilled nursing care	“senior memory care”
CLARITY POINTE MEMORY CARE ASSISTED “LIVING” NEIGHBORHOODS OUR DIFFERENCE IS CLEAR & Design/ Thomas Schaffler	4005876	Providing assisted living facilities for Alzheimer’s and dementia patients	“memory care assisted ‘living’ neighborhoods”
HOPE ASSISTED LIVING & MEMORY CARE CENTER/ Assisted Care Developers, LLC	4078120	Health-care services for individuals afflicted with dementia Personal care assistance of daily living, such as bathing, grooming and personal mobility for individuals afflicted with dementia	“assisted living & memory care center”
NEW DAWN MEMORY CARE/ New Dawn Assisted Living Holding Company, LLC	4241935	Providing assisted living facilities	“memory care”
AUGUSTE’S COTTAGE MEMORY CARE CENTER & Design/ The Health and Hospital Corp. of Marion County Corp. Indiana	2688361	Residential community services, namely, long-term assisted-living care and accommodations for others	“memory care center”

KEEPSAKE VILLAGE PREMIER MEMORY CARE (Stylized)/ Hearth Management, LLC	3571022	Providing assisted living facilities to Alzheimer and dementia patients	“village premier memory care”
MEMORY CARE HOME SOLUTIONS/ Memory Care Home Solutions	3320631	Training and education services in the nature of classes, seminars and in-home mentoring in the field of Alzheimer’s healthcare for families and caregivers of persons with Alzheimer’s disease and other memory disorders ...	“memory care home”
AVALON MEMORY CARE/ Avalon Residential Care Homes, Inc.	4336304	Providing assisted living facilities	“memory care”
MASTERPIECE LIVING & Design/ Masterpiece Living, L.L.C.	2692525	Retirement and assisted living services ...	“living”
WESTMONT LIVING & Design/ Westmont Living, Inc.	3772478	“retirement housing and assisted living facilities Nursing homes, home health care, skilled nursing care, and providing outpatient rehabilitation facilities; home health care for seniors	“living”
GOLDEN LIVING CENTERS (Stylized) Golden Gate National Senior Care LLC	3799530	Healthcare	“living centers”
SOLSTICE LIVING SOLUTIONS/ Solstice Living Solutions, Inc.	3998974	Medical services for residents in private homes and senior living facilities; medical assistance services, namely, providing	“living solutions”

		<p>assistance with daily living activities to residents in senior living facilities</p> <p>In-home support services to senior persons, namely, geriatric care management services and personal affairs management services in the nature of the coordination of necessary services and care for older individuals</p>	
<p>WESLEY ENHANCED LIVING & Design/ Evangelical Services for the Aging, Inc.</p>	3141348	<p>Providing living services to the elderly, namely, personal care assistance of activities of daily living, such as bathing, grooming and personal mobility for mentally or physically challenged people</p> <p>Providing living services to the elderly, namely, nursing care</p>	“living”
<p>ERICKSON LIVING & Design/ Erickson Living Management, LLC</p>	3991043	<p>Life care retirement home services</p>	“living”
<p>RADIANT SENIOR LIVING/ Radiant Senior Living, Inc.</p>	4164457	<p>“retirement homes; providing independent living facilities, assisted living facilities, and elder care, namely, respite care”</p>	“senior living”
<p>THE SPRINGS LIVING & Design/ The Springs Living, LLC</p>	4233404	<p>“providing independent living residences and living facilities; providing assisted living facilities; elder care, namely, providing respite care and memory care facilities”</p> <p>Providing respite care and memory care facilities</p>	“living”

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Office Actions of November 14, 2012 and May 23, 2013. In addition, the Examining Attorney points out that Applicant owns a Supplemental Register registration which is entirely duplicative of Applicant's involved (and now divided) application, in which Applicant disclaimed "memory care." Office Action of May 23, 2013; Examining Attorney's Appeal Brief at 3.

For its part, Applicant relies on evidence that it "manages twelve (12) licensed Alzheimer's boarding homes throughout New Jersey," but "does not own any of the buildings at which it manages the provision of healthcare, nor does [Applicant] share any principals with the owners of these properties." Rather, Applicant "provides a turnkey service to the owner of each property as a licensed Alzheimer's residence." Office Action response of April 23, 2013 and Exs. A-C. Furthermore, Applicant displays the involved mark on signage outside of the Alzheimer's boarding homes it manages. *Id.* Ex. D (Certification of Lisa D. Taylor, Applicant's attorney, and Appendixes A and B thereto). Finally, Applicant points out that in response to a search of "memory care living," the Google, Yahoo and Bing Internet search engines each display a link to Applicant's website as the first unpaid or "organic" (as opposed to paid) search result. Office Action response of July 26, 2013 Ex. A. However, the remaining search results are links to dementia-care service providers which are apparently unrelated to Applicant.

Decision

A mark is deemed to be merely descriptive, within the meaning of Section 2(e)(1), if it "immediately conveys knowledge of a quality, feature, function, or

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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) (quoting *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009)); and *In re Abcor Development*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). A mark need not immediately convey an idea of each and every specific feature of the services in order to be considered merely descriptive; rather, it is sufficient that the mark describes one significant attribute, function or property of the services. *In re Chamber of Commerce of the United States of America*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); and *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Whether a mark is merely descriptive is determined not in the abstract, but in relation to the services for which registration is sought, the context in which it is being used on or in connection with the services, and the possible significance that the mark would have to the average purchaser of the services because of the manner of its use. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). 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).

When two or more merely descriptive terms are combined, the determination of whether the composite mark also has a merely descriptive significance turns on whether the combination of terms evokes a new and unique commercial impression.

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If each component retains its merely descriptive significance in relation to the services, the combination results in a composite that is itself merely descriptive. *See e.g., In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents, and for tracking the status of the records by means of the Internet); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332 (TTAB 2009) (BATTLECAM merely descriptive for computer game software); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (URBANHOUSING merely descriptive of real estate brokerage, real estate consultation and real estate listing services); *In re Tower Tech*, 64 USPQ2d at 1314 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publishing Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

Here, the evidence leaves no doubt that the composite mark MEMORY CARE LIVING is merely descriptive of Applicant's services. Indeed, the Examining Attorney's evidence reveals that a large number of health care clinics and service providers focused on geriatric care, nursing homes and nursing care providers use "memory care" to describe geriatric and nursing care services provided to seniors with Alzheimer's disease or other forms of dementia or memory loss. Most of these facilities offer homes or "living" spaces to seniors, and most of these service

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providers operate in homes or living spaces dedicated to seniors in need of “memory care.” In fact, the evidence reveals that Applicant’s entire mark as a whole -- “memory care living” -- is itself a widely-used and understood term which describes living arrangements provided to seniors with dementia or memory loss.³ Furthermore, Applicant itself uses both “memory care” and “memory care living” descriptively,⁴ which further establishes the descriptiveness of “memory care living.” *In re Hunter Fan Co.*, 78 USPQ2d 1474, 1476 (TTAB 2006) (“applicant’s own use of the term ERGONOMIC ... highlights the descriptive nature of this term ...”). Finally, the Principal Register registrations in which “memory care” or “living” are disclaimed provide further evidence that these terms are both descriptive. *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 & n.1 (Fed. Cir. 1987).⁵

In short, “memory care living” describes facilities and services provided to people suffering from dementia, and does not convey “any distinctive source-

³ Third-parties which use “memory care” descriptively include Waterford Senior Living, Ivy Ridge Living Memory Care, St Cloud Memory Care, Texas State Veterans Homes, Nine Mile Creek Senior Living, Arbor Lakes Senior Living, GracePoint Assisted Living Memory Care, Memory Care Living, The Woods, CarDon, Ecumen, Bloom Senior Living, Jennings McCall Center, The Harbor at Harmony Crossing, Riverpoint of Kerrville Assisted Living and Memory Care Community and Valley View Estates. All of these providers with the exception of GracePointe Assisted Living & Memory Care and The Woods also use “memory care living” descriptively, and The Woods uses “memory care assisted living” descriptively, which is also evidence of the widespread descriptive use of “memory care living” and variations thereof.

⁴ Applicant touts its “residential communities dedicated to memory care” and refers to the security provided at its “memory care living community” which prevents “off-site wandering.”

⁵ For purposes of this decision only we have not considered Applicant’s Supplemental Register registration of the same mark for the same services to be evidence of the descriptiveness of MEMORY CARE LIVING.

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identifying impression contrary to the descriptiveness of the individual parts.” *In re Oppedahl & Larson*, 71 USPQ2d at 1372. To the contrary, from “the perspective of a prospective purchaser or user” of Applicant’s services, “because ... the combination of the terms does not result in a composite that alters the meaning of either of the elements,” and does not create a double entendre, “refusal on the ground of descriptiveness is appropriate.” *In re Petroglyph Games*, 91 USPQ2d at 1341.

Applicant strenuously argues that the Examining Attorney did not grasp the nature or full scope of Applicant’s services. More specifically, Applicant claims that its business-to-business services include “the re-deploying of distressed and/or underutilized real estate into housing for seniors and other individuals with dementia,” and the marketing thereof, while its business-to-consumer services include “supervision to the actual residents of boarding homes with activities of daily living,” including “monitoring self-administered medication, preparing and serving food, and providing and arranging for entertainment and activities.” Applicant’s Appeal Brief at 2-3. Applicant claims that it “does not provide health care or assisted living services.” *Id.* at 2. This is a red herring, however, because even if MEMORY CARE LIVING was not also descriptive of the services as described in Applicant’s brief, registration of Applicant’s mark must be analyzed with respect to the services “for which registration is sought,” i.e. the Class 35 Services and the Class 44 Services as identified in the application. *In re Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)). Here, the evidence makes clear that

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MEMORY CARE LIVING is merely descriptive of geriatric health care clinics, which are encompassed by the “health care clinics” that Applicant manages (Applicant’s Class 35 services), and geriatric nursing services, which are encompassed by Applicant’s “nursing care” and “nursing services” (Applicant’s Class 44 services). Furthermore, Applicant’s specimen promotes one of its facilities as “a dedicated Alzheimer’s and Dementia Care Facility,” and even if Applicant’s identification of services is inaccurate, if Applicant is issued a registration, it would in the future be entitled to the benefits of registration for the Class 35 Services and Class 44 Services as identified.⁶

Conclusion

While Applicant is correct that we must resolve doubt in its favor, here we have no doubt. The record establishes not only that “memory care living” immediately describes Applicant’s health care clinic, geriatric health care and nursing services provided to individuals with dementia, but also that Applicant’s competitors have a need to (and do) use “memory care living” for Applicant’s services and related services. *See In re Abcor Development*, 200 USPQ at 217 (“The major reasons for not protecting [merely descriptive] marks are ... to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark

⁶ Applicant’s argument that MEMORY CARE LIVING could have multiple meanings and is therefore not merely descriptive is not persuasive. “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Chopper Industries*, 222 USPQ 258, 259 (TTAB 1984); *see also, In re IP Carrier Consulting Group*, 84 USPQ2d 1028, 1034 (TTAB 2007); *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

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when advertising or describing their own products.”). To the extent that Applicant views its business primarily as offering a service to owners of properties to be used for providing this type of care, rather than to the recipients of this type of care, that does not alter our conclusion because even this class of Applicant’s customers would understand the mark to describe the services provided in their properties.

Decision: The refusal to register is affirmed in each class.