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Subject: U.S. TRADEMARK APPLICATION NO. 86156209 - EARLY HEART ATTACK CARE - N/A - EXAMINER BRIEF

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# UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86156209

**MARK:** EARLY HEART ATTACK CARE



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

**TTAB INFORMATION:**

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

**APPLICANT:** Society of Cardiovascular Patient Care

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

N/A

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## **EXAMINING ATTORNEY'S APPEAL BRIEF**

### INTRODUCTION

Applicant has appealed the examining attorney's final refusal to register the proposed mark, EARLY HEART ATTACK CARE, for the following services in International Class 35:

"Promoting collaboration within the scientific, research and provider communities to achieve advances in the field of recognition, evaluation, and treatment of early heart attack symptoms; Promoting public awareness of recognition, evaluation, and treatment of early heart attack symptoms; Promoting public interest and awareness of recognition, evaluation, and treatment of early heart attack symptoms"

The trademark examining attorney<sup>1</sup> refused registration on the Principal Register pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e), on the grounds that the mark is merely descriptive of the services. The trademark examining attorney also refused registration on the Principal Register on the grounds that applicant's evidence is insufficient to overcome the refusal pursuant to Section 2(f), 15 U.S.C. §1052(f).

#### **STATEMENT OF FACTS**

The applicant filed this application on January 2, 2014, seeking to register the mark EARLY HEART ATTACK CARE for the services "Promoting collaboration within the scientific, research and provider communities to achieve advances in the field of recognition, evaluation, and treatment of early heart attack symptoms; Promoting public awareness of recognition, evaluation, and treatment of early heart attack symptoms; Promoting public interest and awareness of recognition, evaluation, and treatment of early heart attack symptoms" on the Principal Register.

In the first Office Action, issued April 6, 2014, the trademark examining attorney refused registration under Section 2(e)(1) of the Trademark Act and issued a requirement to provide an

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<sup>1</sup> On August 24, 2015, this case was reassigned to the below-referenced trademark examining attorney.

acceptable specimen of use. The trademark examining attorney advised applicant that it may respond by amending to the Supplemental Register or by amending to seek registration under Trademark Act Section 2(f). The trademark examining attorney further advised applicant that an allegation of acquired distinctiveness based solely on use would be insufficient evidence of distinctiveness because applicant's mark is highly descriptive of its services.

On April 21, 2014, applicant submitted arguments and evidence in response to the Section 2(e)(1) Refusal and provided a substitute specimen of use. The substitute specimen satisfied the requirement for an acceptable specimen, but the Section 2(e)(1) refusal was maintained and made final in a Final Office Action, issued on May 6, 2014. Applicant was again advised of its options to amend to the Supplemental Register or registration under Section 2(f), as well as the necessity of additional evidence to support a Section 2(f) claim.

On June 13, 2014, applicant requested reconsideration of the May 6, 2014 Final Office Action and submitted a claim of acquired distinctiveness under Section 2(f), based on (1) at least five years of substantially continuous and exclusive use in commerce, (2) ownership of a prior registration, U.S. Registration No. 2092920, for the same mark for related services, and (3) based on evidence. Because applicant's claim of acquired distinctiveness raised a new issue, the trademark examining attorney issued a second non-final Office Action on July 16, 2014, maintaining and continuing the Section 2(e)(1) refusal and explaining that applicant's claim of acquired distinctiveness was insufficient to overcome the refusal. The trademark examining attorney advised applicant that it may submit additional evidence of distinctiveness or amend to the Supplemental Register.

On January 8, 2015, applicant responded the July 16, 2014 Office Action with additional arguments and evidence. On January 26, 2015, the trademark examining attorney issued a second Final Office Action refusing registration under Section 2(e)(1) of the Trademark Act and rejecting applicant's

claim of acquired distinctiveness under Section 2(f), finding that none of the bases for acquired distinctiveness were sufficient to overcome the Section 2(e)(1) refusal.

On April 8, 2015, applicant requested reconsideration after the January 26, 2015 Final Office Action, submitting a declaration from applicant's CEO. The trademark examining attorney denied reconsideration on April 24, 2015. Applicant again requested reconsideration on July 1, 2015, providing additional Internet evidence. The trademark examining attorney denied reconsideration on July 14, 2015. On July 15, 2015, applicant requested reconsideration a third time, arguing against the evidence the examining attorney submitted in support of the refusal. The applicant filed its notice of appeal on July 25, 2015.

The Trademark Trial and Appeal Board remanded the application to the trademark examining attorney, who denied the third request for reconsideration on August 16, 2015. Proceedings were resumed on August 19, 2015, and applicant filed its appeal brief on October 16, 2015. Applicant's appeal brief was forward to the examining attorney on October 20, 2015.

#### **PRELIMINARY MATTERS - OBJECTION TO NEW EVIDENCE**

Applicant has submitted new evidence with its appeal brief. Specifically, applicant has submitted a copy of its canceled registration, U.S. Registration No. 2092920, for the mark E.H.A.C. EARLY HEART ATTACK CARE RECOGNITION AND RESPONSE CHEST PAIN CENTER in Exhibit A, and eight third-party registrations in Exhibit D. The examining attorney objects to the new evidence.

The record in an application should be complete prior to the filing of an appeal. 37 C.F.R. §2.142(d); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). The Trademark Trial and Appeal Board generally does not take judicial notice of third-party registrations. *In re Ruffin Gaming LLC*, 66 USPQ2d 1924, 1925 n.3 (TTAB 2002); *In re Carolina Apparel*, 48 USPQ2d 1542, 1543 n.2 (TTAB 1998); TBMP

§§1208.02, 1208.04; TMEP §710.03; *see* Fed. R. Evid. 201; 37 C.F.R. §§2.122(a), 2.142(d). To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO's automated systems, prior to appeal. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006); *In re Ruffin Gaming*, 66 USPQ2d at 1925 n.3; TBMP §1208.02; TMEP §710.03. Applicant's prior registration and the third-party registrations were not made part of the record prior to appeal. Accordingly, the trademark examining attorney requests that the Board disregard applicant's cancelled registration and the third-party registrations submitted by applicant with its appeal brief.

### ISSUES

The issues on appeal are (1) whether the mark EARLY HEART ATTACK CARE is merely descriptive of applicant's services pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. Section 1052(e)(1), and (2) whether applicant's evidence of acquired distinctiveness pursuant to Section 2(f), 15 U.S.C. 1052(f) is sufficient to allow registration on the Principal Register under Section 2(f).

### ARGUMENT

#### **I. The Applied-For Mark Merely Describes the Purpose and Subject Matter of Applicant's Services**

Applicant's mark, EARLY HEART ATTACK CARE, merely describes a feature and purpose of applicant's services, namely, that the services promote treatment and close attention to heart attack symptoms as soon as they appear. A mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant's services. TMEP §1209.01(b); *see, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Steelbuilding.com*, 415

F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005) (citing *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543 (1920)).

**A. The Individual Terms in the Mark and the Composite Phrase Merely Describe Applicant’s Services**

Generally, if the individual components of a mark retain their descriptive meaning in relation to the services, the combination results in a composite mark that is itself descriptive and not registrable. *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012); TMEP §1209.03(d); *see, e.g., In re Cannon Safe, Inc.*, 116 USPQ2d 1348, 1351 (TTAB 2015) (holding SMART SERIES merely descriptive of metal gun safes, because “each component term retains its merely descriptive significance in relation to the goods, resulting in a mark that is also merely descriptive”); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of beds, mattresses, box springs, and pillows where the evidence showed that the term “BREATHABLE” retained its ordinary dictionary meaning when combined with the term “MATTRESS” and the resulting combination was used in the relevant industry in a descriptive sense); *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1663 (TTAB 1988) (holding GROUP SALES BOX OFFICE merely descriptive of theater ticket sales services, because such wording “is nothing more than a combination of the two common descriptive terms most applicable to applicant’s services which in combination achieve no different status but remain a common descriptive compound expression”).

Only where the combination of descriptive terms creates a unitary mark with a unique, incongruous, or otherwise nondescriptive meaning in relation to the services is the combined mark registrable. *See In re Colonial Stores, Inc.*, 394 F.2d 549, 551, 157 USPQ 382, 384 (C.C.P.A. 1968); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1162-63 (TTAB 2013).

In this case, both the individual components and the composite result are descriptive of applicant’s services and do not create a unique, incongruous, or nondescriptive meaning in relation to

the services. Applicant's mark consists of three elements: the term EARLY, the compound noun HEART ATTACK, and the term CARE. The term EARLY means "of or occurring near the beginning of a given series, period of time, or course of events."<sup>2</sup> The compound noun HEART ATTACK refers to a potentially fatal condition that occurs when "a blood clot blocks the flow of blood through a coronary artery — a blood vessel that feeds blood to a part of the heart muscle."<sup>3</sup> The term CARE means "attentive assistance or treatment to those in need" and "close attention, as in doing something well or avoiding harm."<sup>4</sup> When combined as a phrase, EARLY HEART ATTACK CARE conveys its descriptive meaning: treatment and attention at the beginning of a serious cardiac event. Applicant's services consist of promoting public awareness of and interest in recognizing, evaluating, and treating "early heart attack symptoms." Therefore, the applied-for mark, EARLY HEART ATTACK CARE, immediately conveys the subject matter and purpose of applicant's services. Moreover, applicant's own website uses the phrase in a descriptive manner. Applicant's website states that:

EHAC is a public awareness campaign intended to educate the public about the signs of an **impending heart attack** and that these signs and symptoms **can occur days or weeks before** the actual event. These **early symptoms** need to be recognized and **treated** to avoid the damage caused by a full-blown heart attack. ... We want them to take the pledge and commit to educating others. They are encouraged to take the 20-minute course and we urge them to deputize at least 50 fellow hospital employees to commit to **early heart attack care** and stand up for the cause hospital-wide, which we will count on our official tally (now more than 10,000 strong).<sup>5</sup> (emphasis added)

Applicant uses the phrase to describe the purpose of a public awareness campaign to identify and treat the early symptoms of heart attacks. Similarly, applicant's website uses the phrase to describe a

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<sup>2</sup> See Examining Attorney's Outgoing Office Action dated April 6, 2014 at p. 2 (citing *The American Heritage Dictionary*)

<sup>3</sup> See Examining Attorney's Outgoing Office Action dated April 6, 2014 at p. 4 (citing the Mayo Clinic's website, [www.mayoclinic.org](http://www.mayoclinic.org))

<sup>4</sup> See Examining Attorney's Outgoing Office Action dated April 6, 2014 at pp. 7-8 (citing *The American Heritage Dictionary*)

<sup>5</sup> See Examining Attorney's Outgoing Office Action dated May 6, 2014 at pp. 5, 8 (citing [www.scpcp.org/index.php/education/ehac/](http://www.scpcp.org/index.php/education/ehac/))

hospital's role and an individual's role in providing information about "early heart attack care"

(emphasis added):

- To achieve Chest Pain Center Accreditation, the hospital engaged in rigorous evaluation by the Society of Cardiovascular Patient Care for its ability to **assess, diagnose and treat** patients who may be experiencing **symptoms that indicate** heart disease or a **heart attack**. Processes have been put in place that meet strict criteria aimed at:
  - **Detecting and treating** symptoms that may lead to a heart attack, thus **avoiding a heart attack** and therefore avoiding heart damage.
  - Providing the community with education and information regarding **early heart attack care** to improve wellness and the quality of life.<sup>6</sup>
- "This material has been utilized at Health Fairs in three counties as well as distributed to several physicians' offices from a variety of specialties. Rhonda goes above and beyond to help people know what to do with **early heart attack care** every day." Kelly Marion, MSN, RN<sup>7</sup>

Based upon applicant's use of the phrase on its own website, consumers are unlikely to understand that the phrase "early heart attack care" is a source identifier for applicant's services. Material obtained from applicant's website is acceptable as competent evidence. *See In re N.V. Organon*, 79 USPQ2d 1639, 1642-43 (TTAB 2006); *In re Promo Ink*, 78 USPQ2d 1301, 1302-03 (TTAB 2006); *In re A La Vieille Russie Inc.*, 60 USPQ2d 1895, 1898 (TTAB 2001); TBMP §1208.03; TMEP §710.01(b). Mere intent that a word, design, symbol, or slogan function as a trademark, or the fact that such designation appears on the specimen, is not enough in and of itself to make it a trademark. *See In re Manco, Inc.*, 24 USPQ2d 1938, 1941 (TTAB 1992) (citing *In re Remington Prods. Inc.*, 3 USPQ2d 1714, 1715 (TTAB 1987)). In the context of applicant's use of the mark, purchasers are likely to see the mark as merely describing the nature of information relating to recognition and treatment of signs and symptoms appearing at the beginning of a heart attack.

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<sup>6</sup> See Examining Attorney's Outgoing Office Action dated May 6, 2014 at pp. 9-10 (citing <http://www.scpcp.org/index.php/news-menu/news/313-january-2014-emory-johns-creek-hospital>)

<sup>7</sup> See Examining Attorney's Outgoing Office Action dated May 6, 2014 at p. 12 (citing <http://www.scpcp.org/index.php/news-menu/news/232-july-wells-nominated-for-ehac-person-of-the-year>)

Based on the dictionary definitions of the individual terms in the mark, applicant's own identification, and applicant's website, the mark is merely descriptive because it immediately conveys a feature and purpose of the services.

**B. Third Parties Commonly Use the Phrase EARLY HEART ATTACK CARE to Describe the Subject of Similar Services**

Consumers are accustomed to encountering the phrase EARLY HEART ATTACK CARE when used to describe the subject matter and purpose of educational events, seminars, speeches, and health information. A mark that describes the subject matter of a seminar, conference, or workshop has been held merely descriptive for such educational services. *See In re The Am. Acad. of Facial Plastic & Reconstructive Surgery*, 64 USPQ2d 1748 (TTAB 2002) (holding FACIAL PLASTIC SURGERY generic for training, association and collective membership services); *In re Inst. Investor, Inc.*, 229 USPQ 614 (TTAB 1986) (holding INTERNATIONAL BANKING INSTITUTE for organizing seminars for bank leaders of major countries incapable); *In re Harcourt Brace Jovanovich, Inc.*, 222 USPQ 820 (TTAB 1984) (holding LAW & BUSINESS incapable of distinguishing the services of arranging and conducting seminars in the field of business law); *see also* TMEP §1209.01(b). The record in this case contains excerpts from numerous articles from the Lexis-Nexis® database that show third parties using the applied-for mark to describe the attention and treatment, or care, given to early heart attack symptoms.<sup>8</sup> For example (emphasis added in all excerpts):

- The guest speech will be by Union Hospital Clinton about **early heart attack care**. This will include information on the beginning signs and symptoms of a heart attack and the benefits of activating emergency medical services and receiving early treatment. (The Tribune Star, IN)<sup>9</sup>
- "These early symptoms may be mild or fleeting," Karenko said. "It can be easy to dismiss the symptoms; however, contacting a doctor right away can be the first step in receiving

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<sup>8</sup> *See* Examining Attorney's Outgoing Office Action dated April 6, 2014 at p. 1, Final Office Action dated May 6, 2014 at p. 1, and Examining Attorney's Final Office Action dated January 26, 2015, 2014 at p. 1 (all entries located below the response guidelines at the end of the Office Actions)

<sup>9</sup> *See* Examining Attorney's Outgoing Office Action dated April 6, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

appropriate **early heart attack care** that includes measures that treat underlying conditions, and can be administered before the heart is damaged by a heart attack.” (Grand Rapid Press, MI)<sup>10</sup>

- “When employees know the signs and symptoms of heart attack and what to do about them, they become advocates for **early heart attack care**, not just at work but in every part of their lives,” Moore said. (The Community Common, OH)<sup>11</sup>
- In addition to presentations by Sperry and Dr. James Freilich on heart attack signs and symptoms and **early heart attack care**, wellness life coach and health educator Jessica Bowling will speak about fighting heart disease and Kelly Clement will talk about her personal experience. (Warren Sentinel, VA)<sup>12</sup>
- The Hays Medical Center stroke and heart education team provided information about **early heart attack care**. As a part of its awareness campaign, information was provided on early heart attack awareness and to call 911 instead of driving to the emergency room. (The Hays Daily News, KS)<sup>13</sup>
- So the event will be actually built around the flow of what happens if you do have an emergency event and how we take care of you. From **early heart attack care** within the community, CPR and 911, to the 911 Bartow EMS dispatch, then coming into our ER and how we take care of you there. And then the cath lab will have a booth, talking about what we do in an emergency situation. (The Daily Tribune News, Cartersville, GA)<sup>14</sup>

Material obtained from computerized text-search databases, such as LexisNexis®, is generally accepted as competent evidence. *See In re Lamb-Weston Inc.*, 54 USPQ2d 1190, 1192 (TTAB 2000) (accepting LexisNexis® evidence to show descriptiveness).

These article excerpts show use of the composite phrase EARLY HEART ATTACK CARE in newspapers throughout the country to describe attention to and treatment of early symptoms of heart attacks. Consumers have been exposed to the applied-for mark in multiple contexts and from multiple sources. Accordingly, consumers will immediately understand the mark as merely describing the purpose and subject matter of applicant’s promotional services. Therefore, the evidence of record

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<sup>10</sup> See Examining Attorney’s Outgoing Office Action dated April 6, 2014 at p. 1 and Examining Attorney’s Final Office Action dated January 26, 2015, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

<sup>11</sup> See Examining Attorney’s Outgoing Office Action dated April 6, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

<sup>12</sup> See Examining Attorney’s Final Office Action dated May 6, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

<sup>13</sup> See Examining Attorney’s Final Office Action dated January 26, 2015, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

<sup>14</sup> See Examining Attorney’s Outgoing Office Action dated April 6, 2014 at p. 1 and Examining Attorney’s Final Office Action dated January 26, 2015, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

supports the conclusion that the applied-for mark, EARLY HEART ATTACK CARE, merely describes applicant's services.

**C. Applicant's Arguments Are Not Persuasive and Do Not Overcome the Descriptiveness of the Mark**

Applicant contends that the mark suggests but does not describe applicant's services. A mark is suggestive if some imagination, thought, or perception is needed to understand the nature of the services described in the mark; whereas a descriptive term immediately and directly conveys some information about the services. *See Stoncor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 1332, 111 USPQ2d 1649, 1652 (Fed. Cir. 2014) (citing *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1251-52, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012)); TMEP §1209.01(a). Applicant states that the mark is suggestive because "it is impossible for a consumer to identify the nature of the EARLY HEART ATTACK CARE services."<sup>15</sup> However, this is not the standard. "Whether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). The question is not whether someone presented only with the mark could guess what the services are, but "whether someone who knows what the goods and[or] services are will understand the mark to convey information about them." *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)); *In re Franklin Cnty. Historical Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012).

Applicant asserts that its consumers are "medical and healthcare professionals" who are "highly educated," as well as individuals who attend applicant's events and read its materials,<sup>16</sup> suggesting that such consumers have a higher level of knowledge or sophistication. This deduction relies on limitations

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<sup>15</sup> See Applicant's Appellate Brief at p. 6.

<sup>16</sup> *Id.* at pp. 4-5.

not found in applicant's description of its services. In this case, applicant's identification is without restriction as to nature, type, channel of trade, or class of purchasers. It is presumed, then, that applicant's services travel in all normal channels of trade, and are available to the general public. See, e.g. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1268, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). The fact that some of applicant's consumers are highly educated does not diminish the descriptiveness of the mark. Moreover, even if the relevant consumers work in the medical industry or attend applicant's events, they would need no imagination to understand that the purpose and subject of applicant's services is the recognition, evaluation, and treatment of early heart attack symptoms. In fact, because of their familiarity with the subject matter, they are more likely to understand the mark as merely describing a feature of the services.

Applicant asserts that the Examining Attorney has provided "no evidence" that consumers will immediately understand that applicant provides collaboration and public awareness services,<sup>17</sup> but the record provides ample evidence that the mark merely describes the purpose and subject of applicant's collaboration and public awareness services. It is well-settled that a mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant's services. TMEP §1209.01(b); see, e.g., *In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)). While the mark may not include the wording "collaboration" or "public awareness," the phrase EARLY HEART ATTACK CARE describes the purpose of those services, as applicant's identification and website demonstrate. A mark does not need to be merely descriptive of all the services specified in an application. *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *In re Franklin Cnty. Historical Soc'y*, 104 USPQ2d 1085, 1089 (TTAB 2012). "A

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<sup>17</sup> *Id.* at p. 6.

descriptiveness refusal is proper “if the mark is descriptive of any of the services for which registration is sought.”” *In re The Chamber of Commerce of the U.S.*, 675 F.3d at 1300, 102 USPQ2d at 1219 (quoting *In re Stereotaxis Inc.*, 429 F.3d 1039, 1040, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)).

Applicant further contends that “the precise combination of the terms EARLY HEART ATTACK CARE ... is unique and distinctive.”<sup>18</sup> The evidence belies this contention. The record contains over twenty examples of the composite phrase EARLY HEART ATTACK CARE in general use to describe attention to and treatment of early heart attack symptoms. Specifically, the example from the *Tribune Star* describes information about early heart attack care as “beginning signs and symptoms of a heart attack.”<sup>19</sup> An article excerpt from the *Warren Sentinel* discusses early heart attack care in the context of “heart attack signs and symptoms.”<sup>20</sup> And early heart attack care, along with managing risk factors, was the subject of a speech given by a medical director of cardiovascular services.<sup>21</sup> Therefore, the evidence clearly shows that the phrase EARLY HEART ATTACK CARE is neither unique nor distinctive, and that it refers to the recognition, evaluation, and treatment of early heart attack symptoms.

Applicant states that the Examining Attorney’s interpretation of the mark as the “‘care’ given to ‘early heart attack’ symptoms” is inaccurate, because the services promote “recognition of **pre-heart attack conditions** in order to **avoid** the need to care for early heart attack symptoms,”<sup>22</sup> and that “the term CARE is too vague and generalized to be merely descriptive.”<sup>23</sup> Applicant’s argument contorts the plain meaning of the words in the mark. Applicant’s own identification includes the wording “recognition, evaluation, and treatment of early heart attack symptoms.” As discussed above, the term

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<sup>18</sup> *Id.* at p. 5.

<sup>19</sup> See Examining Attorney’s Outgoing Office Action dated April 6, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

<sup>20</sup> See Examining Attorney’s Outgoing Office Action dated April 6, 2014 at p. 1 (located below the response guidelines at the end of the Office Action) and Examining Attorney’s Final Office Action dated January 26, 2015, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

<sup>21</sup> See Examining Attorney’s Final Office Action dated January 26, 2015, 2014 at p. 1 (located below the response guidelines at the end of the Office Action)

<sup>22</sup> Applicant’s Appellate Brief at p. 6.

<sup>23</sup> *Id.* at pp. 5-6.

CARE means “attentive assistance or treatment to those in need” and “close attention, as in doing something well or avoiding harm.”<sup>24</sup> The dictionary’s example following this definition is: “a hospital that provides emergency **care**.”<sup>25</sup> As the example demonstrates, the word CARE has a recognized meaning that applies to applicant’s services and to the medical field in general, and this meaning encompasses the concept of providing attentive assistance to avoid harm. Thus, the Examining Attorney’s interpretation is accurate and reflects the relevant consumers’ understanding of the phrase. The fact that CARE might have additional meanings does not avoid the descriptive meaning. Descriptiveness is considered in relation to the relevant services. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). “That a term may have other meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)); TMEP §1209.03(e).

Applicant argues that its mark does not provide sufficient information about its services, asserting that the descriptiveness of an individual term does not mean its use in the mark is descriptive. Applicant relies on *In re Investors Trust*, 1996 TTAB LEXIS 397 (Serial No. 74437008, TTAB 1996) as support for this claim. However, that case is distinguishable from the instant case because the Trademark Trial and Appeal Board found no evidence in the record of third parties using the applied-for mark, INVESTORS TRUST, to describe similar services. Here, the record is replete with examples of third parties using the complete phrase EARLY HEART ATTACK CARE descriptively in the context of promoting public awareness of signs, symptoms, and procedures to follow if early heart attack symptoms appear.

Applicant’s arguments fail to overcome the conclusion that the applied-for mark EARLY HEART ATTACK CARE immediately describes a feature and subject of applicant’s services, and therefore, the mark is merely descriptive.

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<sup>24</sup> See Examining Attorney’s Outgoing Office Action dated April 6, 2014 at pp. 7-8 (citing *The American Heritage Dictionary*)

<sup>25</sup> See Examining Attorney’s Outgoing Office Action dated April 6, 2014, at p. 8. (emphasis added)

**II. Applicant's Mark Has Not Acquired Distinctiveness, and It Is Not Eligible for Registration on the Principal Register under Section 2(f)**

Applicant has asserted acquired distinctiveness based on its alleged exclusive use of the mark since 1991, and based on the evidence of record. The Examining Attorney's evidence clearly demonstrates that the applicant has not had substantially exclusive use of the phrase EARLY HEART ATTACK CARE in relation to its identified services. Applicant's evidence is not sufficient to show acquired distinctiveness because, as the Examining Attorney's evidence of record demonstrates, applicant's mark is of a highly descriptive nature. See 15 U.S.C. §1052(e)(1), (f); *In re MetPath, Inc.*, 1 USPQ2d 1750, 1751-52 (TTAB 1986); TMEP §1212.04(a).

When asserting a Trademark Act Section 2(f) claim, the applicant has the burden of proving that a mark has acquired distinctiveness. *Yamaha Int'l Corp. v. Yoshino Gakki Co.*, 840 F.2d 1572, 1578-79, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988); *In re Meyer & Wenthe, Inc.*, 267 F.2d 945, 948, 122 USPQ 372, 375 (C.C.P.A. 1959); TMEP §1212.01. Thus, applicant must establish that the purchasing public has come to view the proposed mark as an indicator of origin.

The following factors are generally considered when determining whether a proposed mark has acquired distinctiveness based on extrinsic evidence: (1) length and exclusivity of use of the mark in the United States by applicant; (2) the type, expense, and amount of advertising of the mark in the United States; and (3) applicant's efforts in the United States to associate the mark with the source of the services, such as unsolicited media coverage and consumer studies. See *In re Steelbuilding.com*, 415 F.3d 1293, 1300, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); *Bd. of Trs. of Univ. of Ala. v. Pitts, Jr.*, 107 USPQ2d 2001, 2016 (TTAB 2013). A showing of acquired distinctiveness need not consider all of these factors, and no single factor is determinative. *In re Steelbuilding.com*, 415 F.3d at 1300, 75 USPQ2d at 1424; see TMEP §§1212.06 *et seq.*

Evidence of acquired distinctiveness may include specific dollar sales under the mark, advertising figures, samples of advertising, consumer or dealer statements of recognition of the mark as a source identifier, affidavits, and any other evidence that establishes the distinctiveness of the mark as an indicator of source. See 37 C.F.R. §2.41(a)(3); *In re Ideal Indus., Inc.*, 508 F.2d 1336, 1339-40, 184 USPQ 487, 489-90 (C.C.P.A. 1975); *In re Instant Transactions Corp. of Am.*, 201 USPQ 957, 958-59 (TTAB 1979); TMEP §§1212.06 *et seq.*

Allegations of sales and advertising expenditures do not per se establish that a term has acquired significance as a mark. An applicant must also provide the actual advertising material so that the examining attorney can determine how the term is used, the commercial impression created by such use, and the significance the term would have to prospective purchasers. TMEP §1212.06(b); see *In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999); *In re Packaging Specialists, Inc.*, 221 USPQ 917, 920 (TTAB 1984).

The ultimate test in determining acquisition of distinctiveness under Trademark Act Section 2(f) is not applicant's efforts, but applicant's success in educating the public to associate the claimed mark with a single source. TMEP §1212.06(b); see *In re Packaging Specialists*, 221 USPQ at 920; *In re Redken Labs, Inc.*, 170 USPQ 526 (TTAB 1971).

Applicant's evidence of acquired distinctiveness fails to show that purchasers understand the mark as indicating a single source for the identified services. In support of its claim of acquired distinctiveness, applicant has submitted the following evidence:

Applicant's Uses of the Mark

- Pages from applicant’s website and promotional materials<sup>26</sup>
- Print-outs from Applicant’s Facebook® page<sup>27</sup>
- A declaration by applicant’s chief executive officer, Wil Mick, which includes a list of institutions accredited by applicant<sup>28</sup>
- Applicant’s Wikipedia® Page<sup>29</sup>

### Search Engine Results

- Lists of Google® and Yahoo!® Search Engine results<sup>30</sup>

### Third-Party Websites

- Printouts from various hospitals and medical centers across the country featuring general information on “Early Heart Attack Care”<sup>31</sup>

Applicant’s copious evidence does not show that applicant has made substantially exclusive use of the phrase EARLY HEART ATTACK CARE in connection with promoting collaboration and public awareness of the recognition, evaluation, and treatment of early heart attack symptoms.

First, applicant’s own use of the applied-for mark, in screen shots of applicant’s websites and applicant’s Facebook® page, while informative, does not establish that a term has acquired significance as a service mark. For instance, the use of the phrase on the Deputy Heart Attack website is in the title of an article, “How Powerful Is the Early Heart Attack Care Movement in the United States?”<sup>32</sup> In this context, purchasers will understand the phrase as indicating only the subject of the article and the

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<sup>26</sup> See Applicant’s Incoming Response dated June 13, 2014 at p. 7-13; Applicant’s Incoming Response dated January 8, 2015 at 2-9; and Applicant’s Incoming Response dated July 1, 2015 at p. 5.

<sup>27</sup> See Applicant’s Incoming Response dated January 8, 2015 at pp. 10-16 and Applicant’s Incoming Response dated July 1, 2015 at p. 6.

<sup>28</sup> See Applicant’s Incoming Response dated April 8, 2015 at pp. 2-20.

<sup>29</sup> See Applicant’s Incoming Response dated July 1, 2015 at pp. 19-20.

<sup>30</sup> See Applicant’s Incoming Response dated June 13, 2014 at pp. 5-6; Applicant’s Incoming Response dated January 8, 2015 at pp. 17-25; Applicant’s Incoming Response dated April 8, 2015 at pp. 21-29; and Applicant’s Incoming Response dated July 1, 2015 at pp. 2-4.

<sup>31</sup> See Applicant’s Incoming Response dated April 21, 2014 at pp. 2-6; Applicant’s Incoming Response dated June 13, 2014 at pp. 2-4 and 14; Applicant’s Incoming Response dated January 8, 2015 at pp. 26-50; Applicant’s Incoming Response dated July 1, 2015 at pp. 7-18.

<sup>32</sup> See Applicant’s Incoming Response dated June 13, 2014 at pp. 7-8.

common commercial name of a movement, rather than as a source identifier for applicant's services. Similarly, the use of the phrase in connection with "Training Your Community"<sup>33</sup> indicates the subject matter of the training, but it does not appear to indicate source. Applicant's Wikipedia® page uses the phrase in the context of education and an element of an accreditation program,<sup>34</sup> but does not establish that applicant is the sole source of the identified services. Although applicant has submitted some evidence in which the phrase could be perceived as a source identifier, such as its Facebook® page,<sup>35</sup> this evidence supports only applicant's intent to use the phrase in a source-indicating manner; it does not show that the public perceives it as such. The overwhelming evidence of third parties' purely descriptive use of the mark outweighs applicant's instances of non-descriptive use of the mark.

Second, applicant has submitted a Declaration from its Chief Executive Office stating that there are approximately 1,100 member hospitals accredited in EARLY HEART ATTACK CARE, and attaching a list of those hospitals.<sup>36</sup> The declaration also states that the applicant offers an annual Congress to over 400 medical professionals, and that the Congress features course offerings directed at EARLY HEART ATTACK CARE.<sup>37</sup> This evidence establishes that applicant has many accredited programs implementing its services. However, the public does not have access to applicant's member lists, and applicant's evidence does not establish how those accredited programs use or view applicant's mark. Although affidavits or declarations that assert recognition of the mark as a source indicator may be relevant in establishing acquired distinctiveness, the value of the affidavits or declarations depends on the statements made and the identity of the affiant or declarant. *See In re Udor U.S.A. Inc.*, 89 USPQ2d 1978, (TTAB 2009); *In re Dimitri's Inc.*, 9 USPQ2d 1666, 1668 (TTAB 1988). As the declarant is Applicant's own CEO, the declaration does not show that consumers understand EARLY HEART ATTACK CARE

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<sup>33</sup> See Applicant's Incoming Response dated June 13, 2014 at p. 9.

<sup>34</sup> See Applicant's Incoming Response dated July 1, 2015 at pp. 19-20.

<sup>35</sup> See, e.g., Applicant's Incoming Response dated January 8, 2015 at pp. 10-16 and Applicant's Incoming Response dated July 1, 2015 at p. 6.

<sup>36</sup> See Applicant's Incoming Response dated April 8, 2015 at pp. 2-20.

<sup>37</sup> *Id.* at 2.

promotional services emanate exclusively from the applicant. Thus, this evidence provides no insight into the public's recognition of the brand developed through applicant's exclusive and continuous use of EARLY HEART ATTACK CARE.

The Mick Declaration states that "large sums of money have been expended since the early 1990s to advertise and promote EARLY HEART ATTACK CARE SERVICES."<sup>38</sup> However, this statement is vague and unsubstantiated by evidence and is not probative to show that purchasers perceive the phrase as a source identifier for applicant's services.

Third, applicant has submitted numerous pages of search engine results for searches on "early heart attack care" from the Google® and Yahoo!® Internet search engines.<sup>39</sup> This evidence does not show that purchasers understand applicant as the source of EARLY HEART ATTACK CARE services. A search results summary from an Internet search engine has limited probative value because such a list does not show the context in which the term or phrase is used on the listed web pages and may not include sufficient surrounding text to show the context within which the term or phrase is used. TBMP §1208.03; see *In re Bayer AG*, 488 F.3d 960, 967, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007); *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011); *In re Thomas*, 79 USPQ2d 1021, 1026 (TTAB 2006); TMEP §710.01(b). Applicant's lists of search results lack sufficient context, and they provide no evidence of how the proposed mark EARLY HEART ATTACK CARE has acquired distinctiveness by serving to indicate applicant as the source of its identified promotional services.

Fourth, applicant has provided eighteen examples of third-party websites that feature information on EARLY HEART ATTACK CARE. However, in nearly all instances, these examples do not

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<sup>38</sup> *Id.* at 3.

<sup>39</sup> See Applicant's Incoming Response dated June 13, 2014 at pp. 5-6; Applicant's Incoming Response dated January 8, 2015 at pp. 17-25; Applicant's Incoming Response dated April 8, 2015 at pp. 21-29; and Applicant's Incoming Response dated July 1, 2015 at pp. 2-4.

identify the applicant as the source of the information or promotional services.<sup>40</sup> Applicant asserts that, because the applicant accredited these facilities, this evidence shows use of the applied-for mark in connection with the applicant.<sup>41</sup> On the contrary, applicant's third-party evidence the mark suggests that these accredited programs freely use the wording EARLY HEART ATTACK CARE without reference to the applicant. Accordingly, consumers, who do not have applicant's list of accredited facilities, will not understand that applicant is the source of services promoting public awareness and collaboration in the field of recognition, evaluation, and treatment of early heart attack symptoms.

Applicant also asserts that the Examining Attorney's article excerpts and websites showing descriptive use of the mark are all references to the applicant because they all discuss presentation of EARLY HEART ATTACK CARE programs and services at Applicant's accredited healthcare facilities.<sup>42</sup> Like the applicant's own third party evidence, the Examining Attorney's article excerpts and third party websites make no reference to the applicant. Instead, the Examining Attorney's evidence supports the conclusion that third parties commonly use the phrase to describe attention to and treatment of early heart attack symptoms. Thus, consumers do not perceive the applicant as the single source of the services.

Ultimately, there is no evidence to support the conclusion that applicant's consumers view the proposed mark as indicating the source of applicant's services. Applicant's evidence does not include consumer surveys and other direct evidence from a range of applicant's consumers, unsolicited media coverage, testimony of advertising experts in the relevant field vouching for applicant's brand

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<sup>40</sup> The example from the Tucson Medical Center mentions that Early Heart Attack Care was developed by the Society of Cardiovascular Patient Care. *See* Applicant's Incoming Response dated January 8, 2015 at p. 32. The example from University of Florida Health calls for readers to "Join the Society of Cardiovascular Patient Care in the battle to defeat heart disease..." but does not indicate that applicant is the source of the Early Heart Attack Care information. *See id.* at p. 30. The example from San Joaquin Community Hospital mentions that its Chest Pain Center has partnered with the Society of Chest Pain Centers (applicant's predecessor) to support Early Heart Attack Care, but it does not specify that applicant is the sole source of the promotional services. *See id.* at p. 4.

<sup>41</sup> *See* Applicant's Appellate Brief at pp. 8-9.

<sup>42</sup> *Id.*

recognition, or advertising expenditures and estimated consumer exposure to that advertising. The third-party evidence of record suggests that applicant has not had “exclusive” use of the proposed mark, in light of the number, type, and manner of third party uses of the mark. Without proper control over these third party uses of the proposed mark, applicant’s mark appears to have become more descriptive over time. The simple fact that there are so many instances of highly descriptive uses of “early heart attack care” with no attribution, reference, acknowledgment, or mention of applicant serves as evidence that the general public, which includes medical professionals, persons in the medical community, and patients, does not associate applicant with its identified EARLY HEART ATTACK CARE awareness services. Consequently, applicant’s evidence demonstrates only the popularity of applicant’s services, not that the relevant consumers of such services have come to view the designation EARLY HEART ATTACK CARE as applicant’s source-identifying service mark. *See In re Bongrain International Corp.*, 894 F.2d 1316, 13 USPQ2d 1727 (Fed. Cir. 1990); and *In re Recorded Books Inc.*, 42 USPQ2d 1275 (TTAB 1997).

**III. The Evidence of Record Leaves No Doubt that Applicant’s Mark is Merely Descriptive in the Context of the Identified Services**

Applicant argues that any doubt regarding the mark’s descriptiveness should be resolved on applicant’s behalf. *E.g.*, *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 1571 4 USPQ2d 1141, 1144 (Fed. Cir. 1987); *In re Grand Forest Holdings, Inc.*, 78 USPQ2d 1152, 1156 (TTAB 2006). However, in the present case, the evidence of record leaves no doubt that the mark is merely descriptive.

**CONCLUSION**

The evidence of record demonstrates that the applied-for mark describes applicant’s services, based on the plain meaning of the phrase and applicant’s own descriptive use of the phrase. Also,

numerous third parties use the mark to describe the recognition, evaluation, and treatment of early heart attack symptoms. Therefore, the record supports the conclusion that the mark EARLY HEART ATTACK CARE is merely descriptive of the applicant's services. Furthermore, applicant has not met its burden of showing that the mark has acquired distinctiveness through substantially continuous and exclusive use of the mark because the evidence does not reflect an association with the applicant and shows that third parties freely use the phrase EARLY HEART ATTACK CARE in connection with similar services. For the foregoing reasons, the Examining Attorney respectfully requests that the Board affirm the refusal to register the mark EARLY HEART ATTACK CARE, pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), and that applicant's request for registration on the Principal Register pursuant to Trademark Act Section 2(f), 15 U.S.C. §1052(f), be denied.

Respectfully submitted,

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