

This Opinion is Not a
Precedent of the TTAB

Mailed: January 15, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Reproductive Medicine Associates of New Jersey, LLC

—
Serial No. 87042698
—

Harris A. Wolin of Myers Wolin LLC,
for Reproductive Medicine Associates of New Jersey, LLC

John T. Billings, Trademark Examining Attorney, Law Office 113,¹
Odette Bonnet, Managing Attorney.²

—
Before Ritchie, Lykos, and Kuczma,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Reproductive Medicine Associates of New Jersey, LLC (“Applicant”) seeks to register on the Principal Register the standard character mark ARTEMIS for “Computer software platforms for use by fertility healthcare providers for the purpose of accessing patient electronic medical records” in International Class 9 and “Platform as a service (PAAS) featuring computer software platforms for use by

¹ Trademark Examining Attorney N. Gretchen Ulrich handled the prosecution of the application. The appeal brief was written by Examining Attorney John T. Billings.

² Ms. Bonnet has since retired from the Trademark Office.

fertility healthcare providers for the purposes of accessing patient electronic medical records” in International Class 42.³

Registration was refused as to both classes under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the registered mark ARTEMIS HEALTH also in standard characters on the Principal Register with HEALTH disclaimed for “Software as a service (SAAS) services featuring software, namely, for analysis, monitoring, report generation, planning, risk and expense management and decision making regarding health care information and utilization of employees” in International Class 42,⁴ that it is likely to cause confusion or mistake or to deceive.

Applicant’s appeal of the final refusal is fully briefed.⁵ For the reasons explained below, we reverse the refusal to register as to both classes of goods and services.

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). There is no mechanical test for determining likelihood of confusion and “each

³ Application Serial No. 87042698, filed May 19, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

⁴ Registration No. 5037107, registered September 6, 2016.

⁵ As per Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), the Board has not considered the Internet evidence Applicant submitted with its reply brief not properly made of record during prosecution. *See, e.g., In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1165 n.3 (TTAB 2013) (new evidence submitted with reply brief is “untimely and therefore not part of the record for this case”); *In re HSB Solomon Associates LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) (printouts submitted with reply brief not considered).

case must be decided on its own facts.” *du Pont*, 177 USPQ at 567. In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks, the first *du Pont* factor, and the similarities between the goods and service, the second factor. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). As will become evident in the discussion below, the second *du Pont* factor, supported by the third and fourth, plays a critical role in this appeal.

To state the obvious, the marks ARTEMIS and ARTEMIS HEALTH, when compared in their entirety, are similar in appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). Indeed, Applicant did not address this first *du Pont* factor in its brief. “Artemis,” the name of “a Greek moon goddess often portrayed as a virgin huntress,”⁶ is arbitrary in relation to Applicant’s and Registrant’s goods and services. With regard to the cited mark, we note that “it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.” *Palm Bay Imps.*, 73 USPQ2d at 1692. *See also Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). In addition, the descriptive word HEALTH in Registrant’s mark is disclaimed. Disclaimed matter that is descriptive of or generic for a registrant’s services is

⁶ The Board grants the Examining Attorney’s request to take judicial notice of the definition of “Artemis” obtained from the online version of *Merriam-Webster Dictionary*. *See In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016) (judicial notice of definitions from Merriam-Webster Online Dictionary at www.merriam-webster.com).

typically less significant or less dominant when comparing marks. *See In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 224 USPQ at 752. We therefore find that the dominant portion of the cited mark ARTEMIS HEALTH is ARTEMIS, making it highly similar to Applicant's mark consisting solely of this arbitrary term. *See, e.g., Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (finding BENGAL LANCER and design and BENGAL confusingly similar).

The crux of this appeal therefore involves a comparison of the goods and services as they are identified in the involved application and cited registration, the second *du Pont* factor. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002). Our analysis is complicated by the fact that the precise nature of Registrant's SAAS is unclear. Applicant and the Examining Attorney offer dueling interpretations regarding the scope and intended users of Registrant's identified services. The Examining Attorney contends that the final portion of Registrant's identification, "... decision making regarding health care information and utilization of employees," denotes two separate and distinct SAAS designed for entirely different functions and consumers. In the Examining Attorney's view, a proper reading of Applicant's services includes not one, but two separate services: (1) "Software as a service (SAAS)

services featuring software, namely, for analysis, monitoring, report generation, planning, risk and expense management and decision making regarding health care information,” and (2) “Software as a service (SAAS) services featuring software, namely, for analysis, monitoring, report generation, planning, risk and expense management and decision making regarding utilization of employees.” Examining Attorney’s Brief, 6 TTABVUE 18. Consistent with this reading, the Examining Attorney’s third-party registration and Internet evidence concentrates on the “first” SAAS identified in the cited registration.

By contrast, Applicant interprets the identification in the cited registration as limited to use by employers to manage employee benefit costs, making the function distinct from Applicant’s computer software platforms and PAAS which are meant to be used by fertility healthcare providers and physicians to manage individual patient medical records. According to Applicant, the intended consumers of Applicant’s and Registrant’s goods and services “face divergent legal requirements, ethical responsibilities, and technological needs; their offerings are clearly not interchangeable.” Applicant’s Brief, p. 5; 4 TTABVUE 6. In Applicant’s view, the only common characteristic shared by the involved goods and services is that “they both run on computers and relate tangentially to healthcare.” *Id.* at 6; 4 TTABVUE 7.

The grammatical structure of Registrant’s identification is not a model of clarity. In addition, the services are technical in nature. For these reasons, it is appropriate to examine extrinsic evidence to determine the exact function and scope of Registrant’s identified SAAS. If an identification of goods or services is technical or

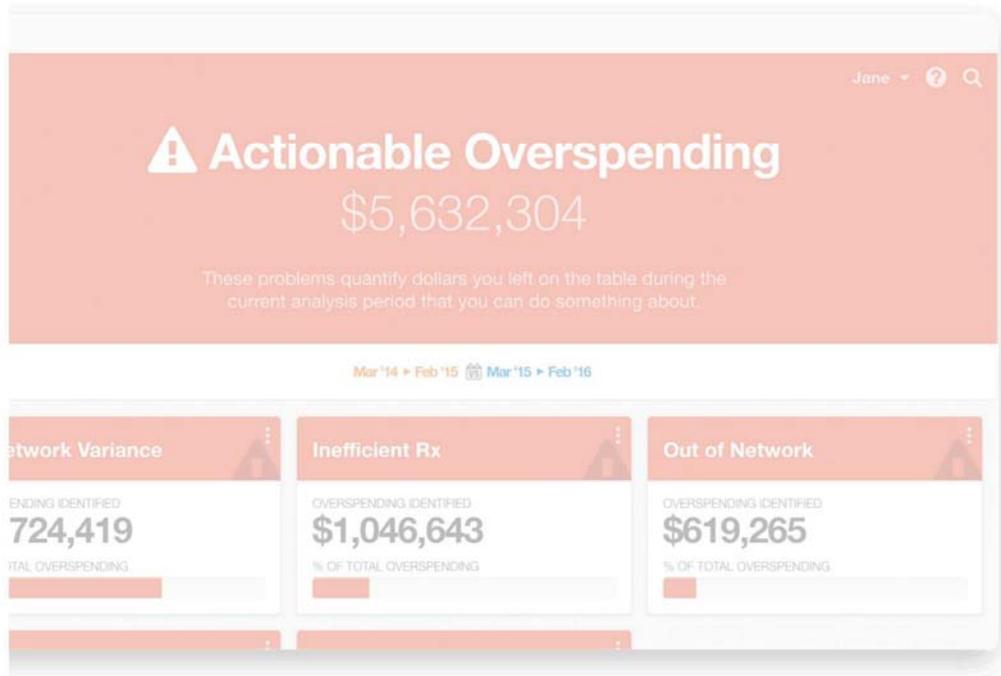
vague and requires clarification, extrinsic evidence of use may be considered to determine the meaning of the identification. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010) (citing *In re Trackmobile*, 15 USPQ2d 1152, 1154 (TTAB 1990)). When confronted with a vague identification, the Board in *Trackmobile* cautioned that

... when the description of goods for a cited registration is somewhat unclear, as is the case herein, it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade. (internal citations omitted). ... it is not proper to rely simply upon abstract reasoning to give this somewhat vague term a broad meaning absent countervailing extrinsic evidence showing that it is entitled to such a broad meaning.

15 USPQ2d at 1154. To that end, we highlight the following excerpts from Registrant's website at www.artemishealth.com properly made of record by Applicant during prosecution:

2/23/2017

Artemis Health | Unlock the power of your benefits data.



Identify problems in your programs.

Let us show you where dollars are being left on the table, or go exploring for yourself. It's easy to choose your own adventure in Artemis.

The Apps you'll use:

- Actionable Overspending
- Explore

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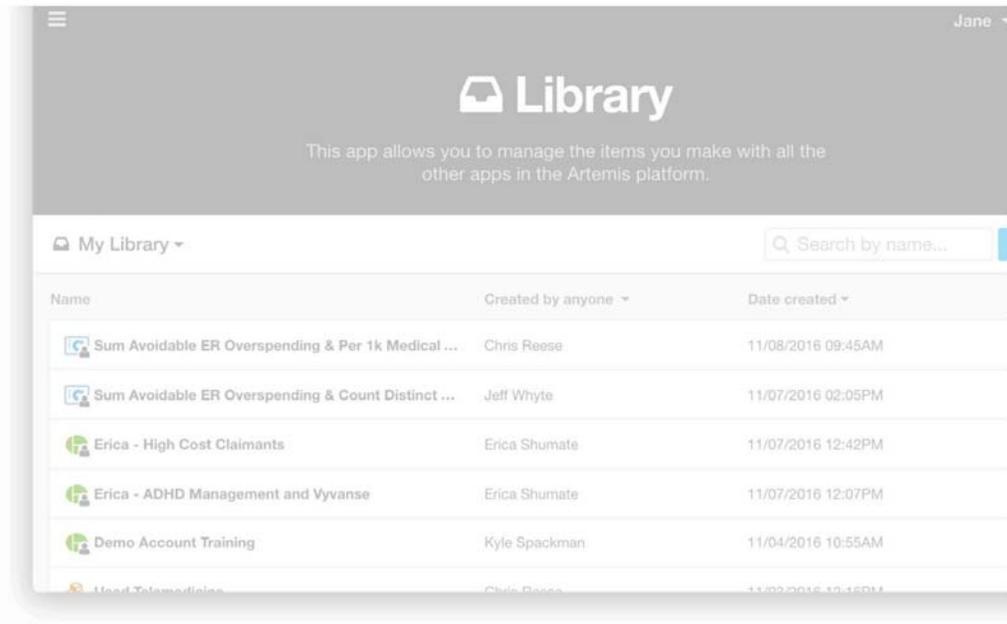
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2/23/2017

Artemis Health | Unlock the power of your benefits data.



Share findings with the right people.

We've made it simple and secure to share the right data with the right people. Now you can worry about which story to tell, not how to tell it.

The Apps you'll use:



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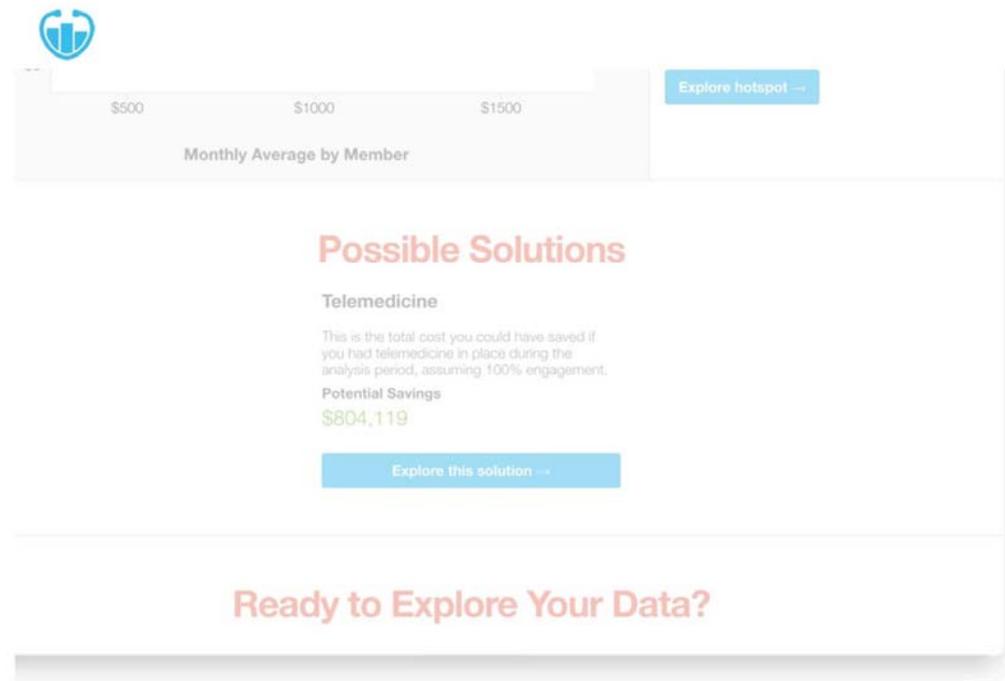
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2/23/2017

Artemis Health | Unlock the power of your benefits data.



Find solutions to problems.

Not sure what to do next? We got your back. We'll help you to find the right solutions to improve your program's bottom line.

The Apps you'll use:

-  New Program Savings
-  Explore

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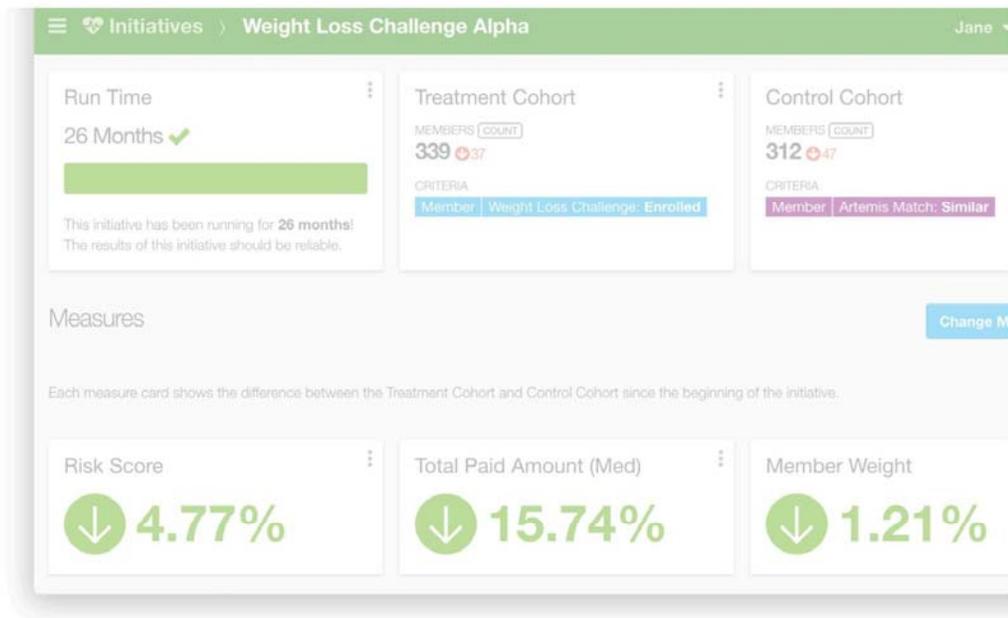
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Artemis Health | Unlock the power of your benefits data.



Easily track your solutions.

Are your programs delivering the savings or improved health you expected? Artemis gives you a clear picture of how your programs are performing.

The Apps you'll use:



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See August 18, 2017 Response to Office Action pp. 9-13. When we examine the excerpts from Registrant's website, we see that Registrant's identified SAAS is designed to assist employers in tracking the use of employee health care benefits in an effort to more effectively manage and reduce healthcare costs. The data analytics generated by Registrant's software evaluates employee decision-making in connection with employee health benefits, allowing the employer to see the categories of spending that may be high at both the individual employee and group level. For this reason, we disagree with the Examining Attorney's reading of Registrant's identification as setting forth two separate SAAS performing two distinct functions. Rather, Registrant's software is limited to the employer benefits arena, rendering none of the Examining Attorney's supporting evidence relevant. In contrast, Applicant's computer software platform and PAAS are limited to "use by fertility healthcare providers for the purpose of accessing patient electronic medical records" i.e. the actual medical records of individual patients under the care of a fertility healthcare provider. Clearly this falls outside the purview of Registrant's identified SAAS.

The only true similarity between Applicant's and Registrants' goods and services are that they all fall under the general category of computer software. Based on the record, the functions of Applicant's and Registrant's goods and services as identified in the involved application and cited registration are fundamentally different. See, e.g., *In re Princeton Tectonics, Inc.*, 95 USPQ2d 1509, 1510 (TTAB 2010) ("... the mere fact that both types of goods at issue here emit and provide light is not a sufficient

basis for us to conclude that the goods are related. The goods, as identified, are sufficiently different in their uses to require proof that they are related.”). Thus the second *du Pont* factor weighs against finding a likelihood of confusion.

In further regard to Registrant’s identification, as discussed above, we find that the involved goods and services are necessarily marketed in different trade channels to different consumers. Applicant’s and Registrant’s goods and services are not the typical consumer products sold in the traditional wholesale or retail outlets (i.e. brick-and-mortar stores, online websites or retailers) to the average consumer or even the general public. Rather, the products and services at issue here are highly specialized types of computer software. Applicant’s identified computer software platform and PAAS are restricted to “fertility healthcare providers” who presumably are relatively knowledgeable in their field and exercise care when choosing the most appropriate patient health care records software. Likewise, employers shopping for Registrant’s identified SAAS are also expected to exercise a relatively higher degree of care and knowledge when making purchasing decisions. *See, e.g., Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992) (“sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care;” finding no likelihood of confusion resulting from the contemporaneous use of E.D.S. and EDS despite the fact that “the two parties conduct business not only in the same fields but also with some of the same companies.”). Thus, the third and fourth *du Pont* factors also weigh against finding a likelihood of confusion.

In sum, we have carefully considered all of the evidence made of record, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion. The marks are similar in sound, appearance, connotation and commercial impression. However, this is outweighed by the fact that the identifications of the involved application and cited registration show that the involved goods and services are highly specialized and perform different, unrelated functions; that they are marketed in non-overlapping trade channels to different consumers; and that the intended users are relatively knowledgeable and likely to exercise a high degree of care in making purchasing decisions. Simply put, the record before us fails to establish that the circumstances surrounding the marketing of Applicant's and Registrant's goods and services are such that relevant purchasers would mistakenly believe that the respective goods and services originate from the same source, even if the same, inherently distinctive component ARTEMIS is used on both. The mere fact that Applicant's and Registrant's goods and services fall under the same general product category is insufficient alone to show a likelihood of confusion.

Decision: The Section 2(d) refusal to register Applicant's mark is reversed.