Mailed: February 27, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michele DeSimone

Serial No. 87808309

Brian A. Lincer of The Internicola Law Firm, for Michele DeSimone.

Andrea Hack, Trademark Examining Attorney, Law Office 108,
Kathryn E. Coward, Managing Attorney.

Before Zervas, Wellington, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Michele DeSimone ("Applicant") seeks registration on the Principal Register of the standard character mark THE SENSORY STUDIO (STUDIO disclaimed) for "Occupational therapy services; Speech therapy services; Behavioral health services; Listening therapy services; Play therapy services; Psychological services, namely, providing therapeutic services to children with special needs and their families;

Psychological testing; Speech and language therapy services; Speech pathology therapy services; Stress reduction therapy," in International Class 44.[1]

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of the services identified in the application.

Applicant appealed when the Examining Attorney made the refusal final. The case is fully briefed.[2] We affirm the refusal to register.

I. Record on Appeal[3]

The record on appeal includes Applicant's specimen of use, third-party webpages displaying "The Sensory Studio" or "Sensory Studio," or the word "sensory" combined with other words, and used in connection with what the Examining Attorney describes as "other types of workspaces dedicated to the senses, including spaces for occupational and behavioral therapies such as those provided by the applicant,"[4] or "a space offered for those with sensory challenges to calm their sensory overload, to

[1] Application Serial No. 87808309 was filed on February 23, 2018 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claimed first use of the mark and first use of the mark in commerce at least as early as March 1, 2016.

[2] Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

[3] Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

[4] June 8, 2018 Office Action at TSDR 1-28. Many of these webpages are from websites of companies and organizations located in the United Kingdom. *Id.* at TSDR 8-10, 14-15, 19-22, 27-28. In the absence of evidence that they have been exposed to United States consumers, we have given them no consideration.

work on skills, and to integrate into the population,"[5] dictionary definitions of "sensory,"[6] and "studio,"[7] and a Wikipedia entry for "sensory room."[8]

II. Mere Descriptiveness Refusal

A. Applicable Law

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of "a mark which, (1) when used on or in connection with the goods [or services] of the applicant is merely descriptive . . . of them," unless the mark has been shown to have acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).[9] A mark is "merely descriptive" within the meaning of § 2(e)(1) "if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought." *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017) (citing *In re Bayer Aktiengesellschaft*,

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[5] December 13, 2018 Final Office Action at TSDR 1-64, 67-73. A few of these pages are also from the websites of companies and organizations located in the United Kingdom, *id.* at TSDR 42-45, and we have given them no consideration for the reasons discussed above. We have considered pages from the online US edition of *The Guardian*, a United Kingdom publication. *Id.* at TSDR 37-40.

[6] June 8, 2018 Office Action at TSDR 29 (THE AMERICAN HERITAGE DICTIONARY).

[7] *Id.* at TSDR 31 (THE AMERICAN HERITAGE DICTIONARY). Applicant also attached a dictionary definition of the word "studio" to her appeal brief. 4 TTABVUE 15 (MERRIAM-WEBSTER DICTIONARY). The Examining Attorney addressed this definition in her brief, 6 TTABVUE 12, so we will consider it for whatever probative value it may have. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") Section 1207.03 (June 2019) ("Evidence submitted after appeal, without a granted request to suspend and remand for additional evidence . . . may be considered by the Board, despite its untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record.").

[8] *Id.* at TSDR 65-66.

[9] Applicant does not claim that if the proposed mark is found to be merely descriptive, it is registrable because it has acquired distinctiveness.

488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). "A mark need not immediately convey an idea of each and every specific feature of the goods [or services] in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods [or services]." *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)).

Whether a mark is merely descriptive is "evaluated 'in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use,'" *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *Bayer*, 82 USPQ2d at 1831), and "not in the abstract or on the basis of guesswork." *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Abcor Dev. Corp*., 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). We ask "whether someone who knows what the goods and services are will understand the mark to convey information about them." *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive, and not merely descriptive, if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant's proposed mark includes the words SENSORY and STUDIO preceded by the definite article THE. We "must consider the *commercial impression* of a mark as a whole.'" *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS,* 103 USPQ2d at 1757 (citation omitted)). "In considering [a] mark as a whole, [we] 'may not dissect the mark into isolated elements,' without 'consider[ing] . . . the entire mark,'" *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757), but we "may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components." *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, we are "required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive." *DuoProSS*, 103 USPQ2d at 1758. We will focus on the words SENSORY and STUDIO because the definite article THE is not a distinctive term and adds no source-identifying significance to Applicant's proposed mark. *See In re The Place, Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (holding that the mark THE GREATEST BAR was merely descriptive of restaurant and bar services).

If SENSORY and STUDIO are individually descriptive of the identified services, we must then determine whether their combination "conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts." *Fat Boys*, 118 USPQ2d at 1515-16 (quoting *Oppedahl & Larson*, 71 USPQ2d at 1372). If each component instead "retains its merely descriptive significance in relation to the [services], the combination results in a composite that is itself merely descriptive."

Id. at 1516 (citing *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002)); *see also In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953-55 (TTAB 2018).

"'Evidence of the public's understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.'" *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. The Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). "These sources may include [w]ebsites, publications and use 'in labels, packages, or in advertising material directed to the goods [or services].'" *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218).

"It is the Examining Attorney's burden to show, *prima facie*, that a mark is merely descriptive of an applicant's goods or services." *Fat Boys*, 118 USPQ2d at 1513 (citing *Gyulay*, 3 USPQ2d at 1010). "If such a showing is made, the burden of rebuttal shifts to the applicant." *Id.* (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). "The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant." *Id.*

B. Summary of Applicant's and the Examining Attorney's Arguments

1. Applicant's Arguments

Applicant argues that her proposed mark is suggestive rather than descriptive because "a consumer would need to conduct multi-tiered analysis to connect 'a place for the senses' to sensory specific therapy for children," 4 TTABVUE 9, and because "it would require a consumer or patient to conduct a multi-tiered analysis to connect

the particular services offered by Applicant and the Mark itself." *Id.* at 10. According to Applicant, "[t]he operative word of the Mark is 'Sensory,'" which "can be used in a litany of different businesses relating to the senses, many of which do not offer therapeutic services." *Id.* Applicant argues that a "consumer must use his or her impression to reach the conclusion that The Sensory Studio provides therapeutic services for one's senses." *Id*.

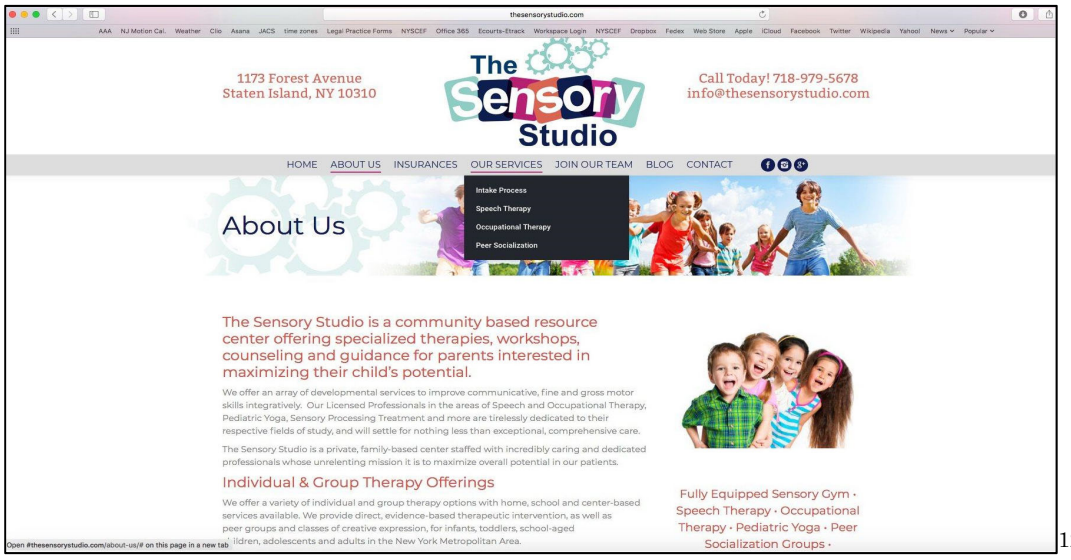
Applicant also argues that her proposed mark "presents an incongruity to consumers as applied to the services offered." *Id.* at 12. She argues that "there are [sic] a plethora of other services that could be offered under the Mark," and an "incongruity presents itself because of the word 'studio,'" *id.* at 13, which has multiple dictionary definitions. *Id*. She further argues that "therapeutic services are not traditionally associated with the word 'studio,'" *id.*, as evidenced by the dictionary definitions, and that "'The Sensory Studio,' may be more closely associated with a movie theater." *Id.* Applicant explains on reply that she "is arguing that its [sic] Mark would not instantaneously suggest the services offered under the Mark." 7 TTABVUE 8.

Applicant further argues on reply that even if the proposed mark "immediately conveyed the idea of therapeutic services, it does not do so with any degree of particularity" because it "does not indicate any specific kind, or kinds, o[f] therapy offered, to whom the therapy services are provided, or towards which senses the services are catered." *Id.* at 6. Applicant criticizes the Examining Attorney's evidence of third-party use of "Sensory Studio" or a similar term because the services with

which the terms are used are different from Applicant's, *id.* at 7, arguing that "the fact that there are many other businesses that use the phrasing 'Sensory Studio' for services unrelated to therapy creates doubt as to the descriptiveness of the Mark" that must be resolved in her favor. *Id.* at 9. Applicant also "asserts that there is no competitive need to use the composite mark 'Sensory Studio.'" *Id.* at 10.

2. The Examining Attorney's Arguments

The Examining Attorney argues that "both the individual words in the mark and the composite result of the words in the applicant's mark are descriptive of applicant's services." 6 TTABVUE 6. She cites a dictionary definition of "sensory" as "of or relating to the senses or sensation,"[10] and argues that "studio" refers "to a dedicated space for performing an activity." *Id.*[11] She bases several of her arguments on Applicant's specimen, which we reproduce below:



[12]

[10] June 8, 2018 Office Action at TSDR 29 (THE AMERICAN HERITAGE DICTIONARY).

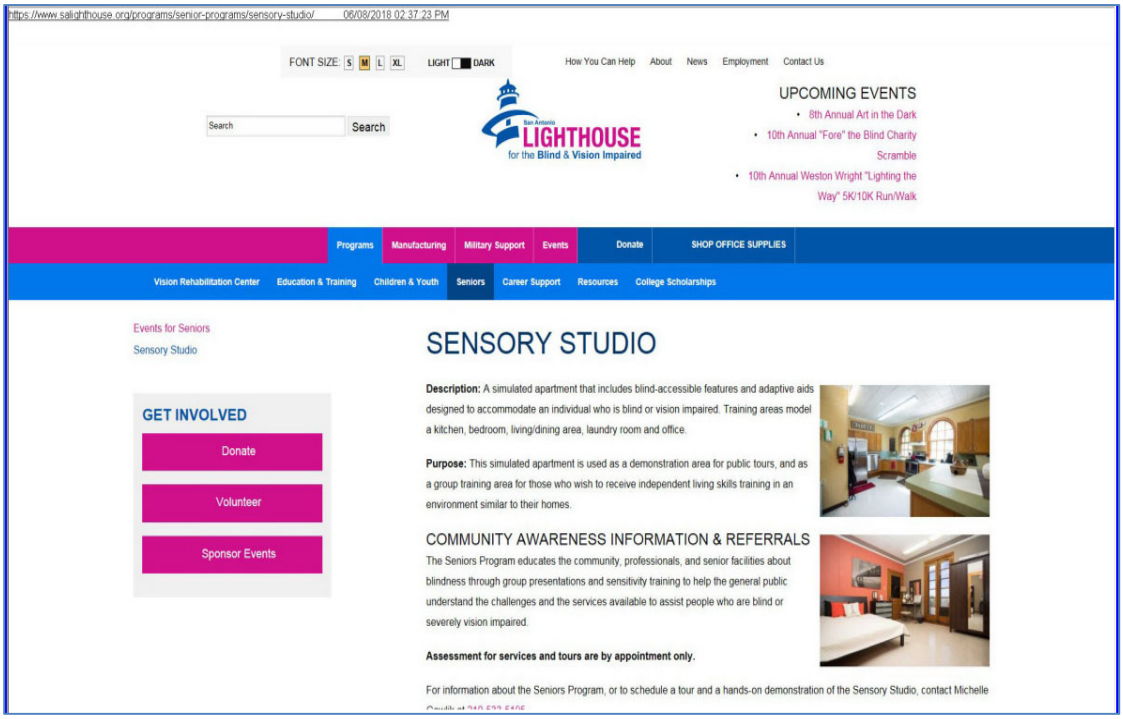
[11] *Id.* at 31.

[12] February 23, 2018 Application at TSDR 3.

The Examining Attorney further argues that Applicant's "identification of services lists various therapy services, and the specimen indicates that the therapeutic services include a 'sensory gym' and involve 'sensory processing treatment," *id.*, and that the specimen "also indicates that the services are provided in a 'resource center' and that applicant provides 'center-based services,'" such that the word "'STUDIO' in the mark merely denotes that applicant's services are provided in a space devoted to a particular activity, namely, sensory therapy." *Id.* She contends that the "combination of the words, 'THE SENSORY STUDIO', merely indicates a dedicated space devoted to the senses," and that the specimen "shows that the services are provided in a dedicated space and focus on treatments for the senses or sensory processing." *Id.* at 7.

The Examining Attorney also points to multiple third-party webpages that she claims show "that 'SENSORY STUDIO' is commonly used wording indicating a space offered for those with sensory challenges to calm their sensory overload and work on sensory processing skills in order to integrate more fully into the general population." *Id.* We reproduce below the pertinent portions of a number of the webpages that display the terms "The Sensory Studio" or "Sensory Studio":[13]

[13] As discussed above, the record also contains webpages displaying terms such as "Sensory Room." We find these to be less probative of the possible descriptiveness of THE SENSORY STUDIO than the webpages displaying the proposed mark or a close equivalent.

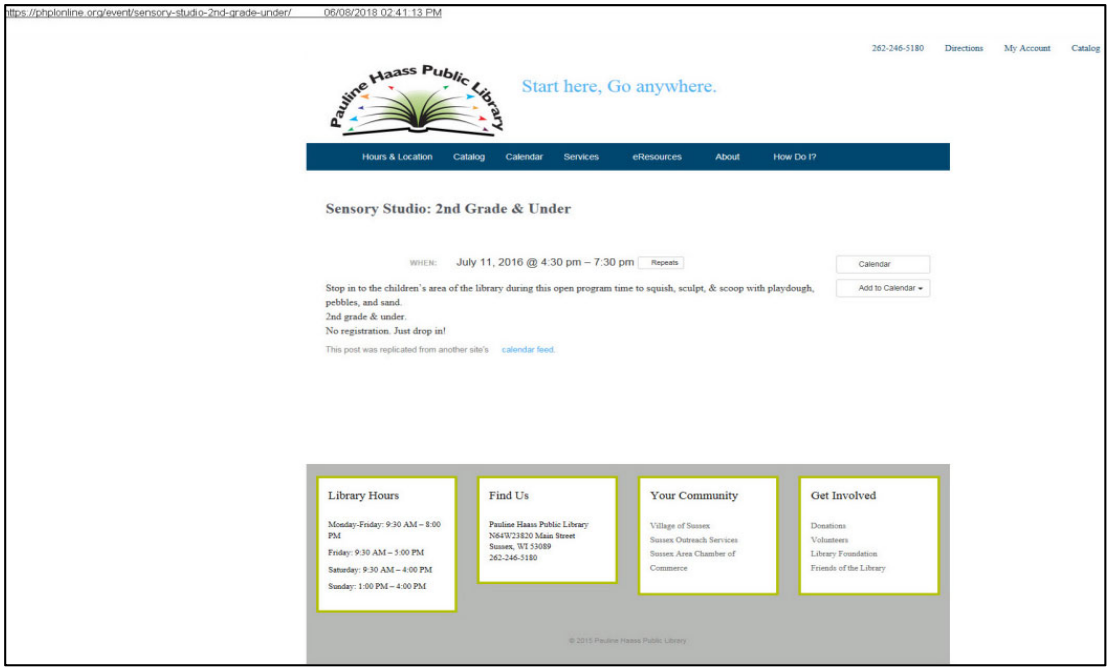


[14]

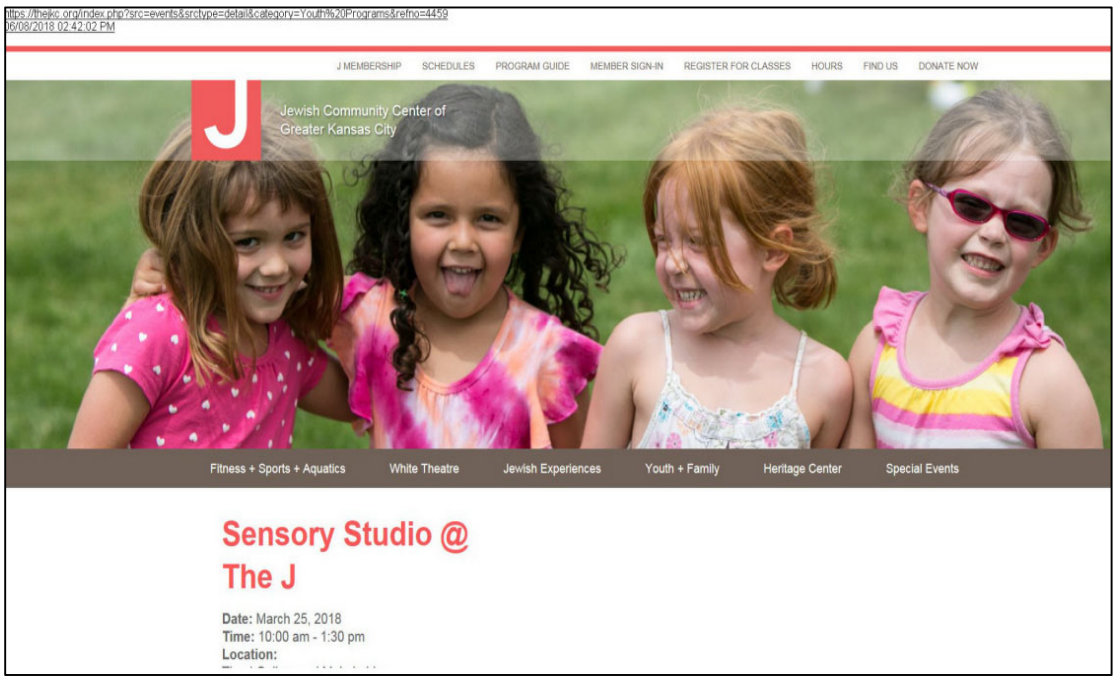
[15]

[14] June 8, 2018 Office Action at TSDR 2.

[15] *Id.* at TSDR 4.



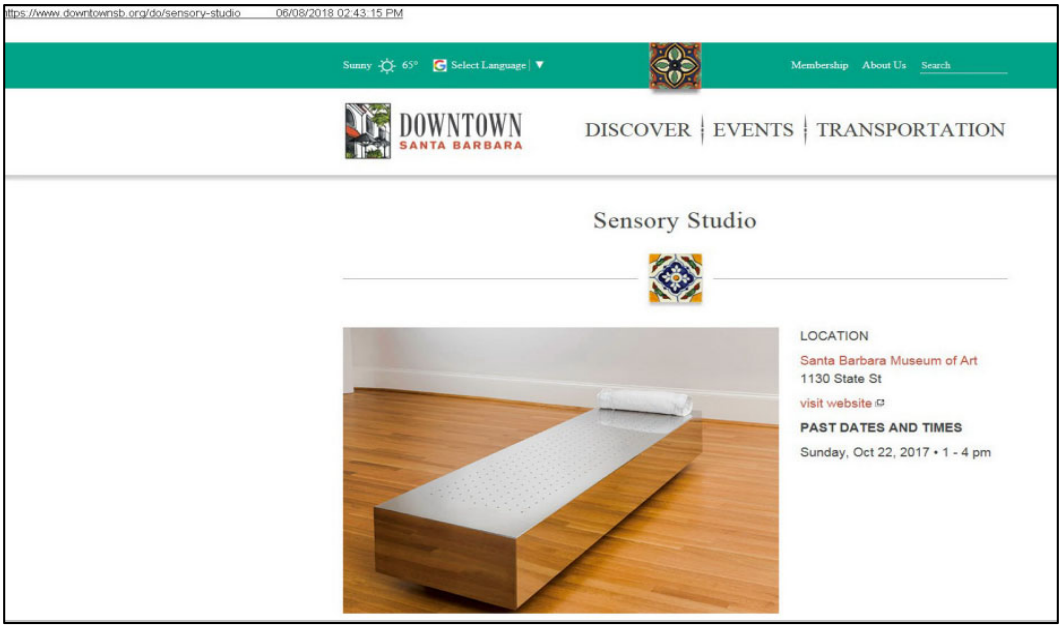
16



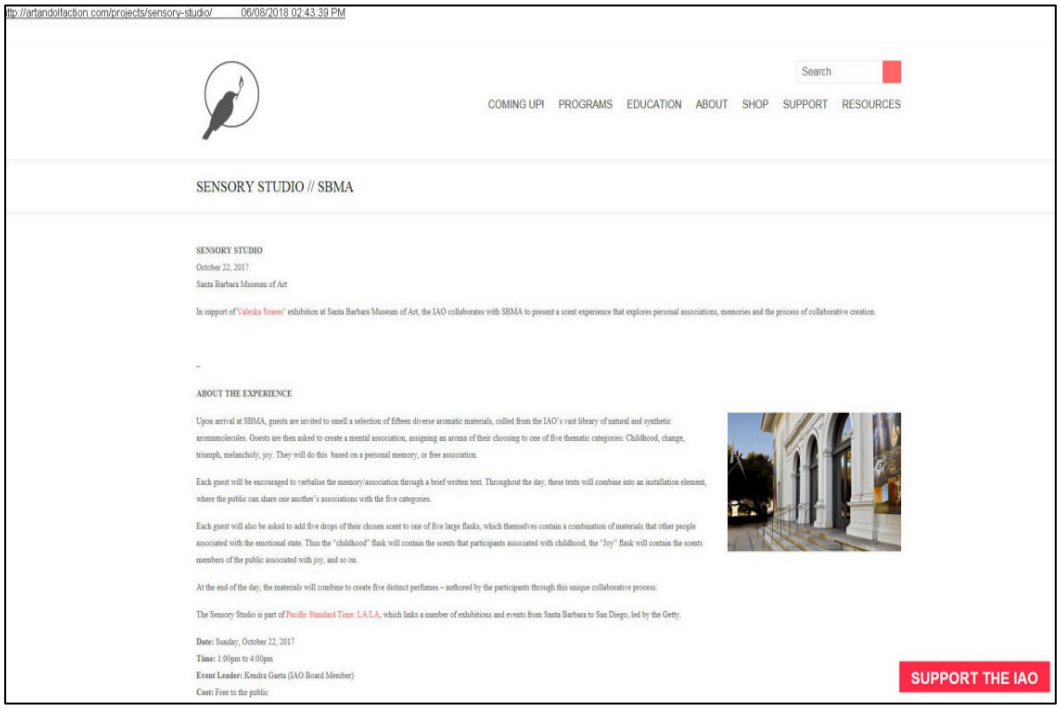
17

[16] *Id.* at TSDR 16.

[17] *Id.* at TSDR 17.



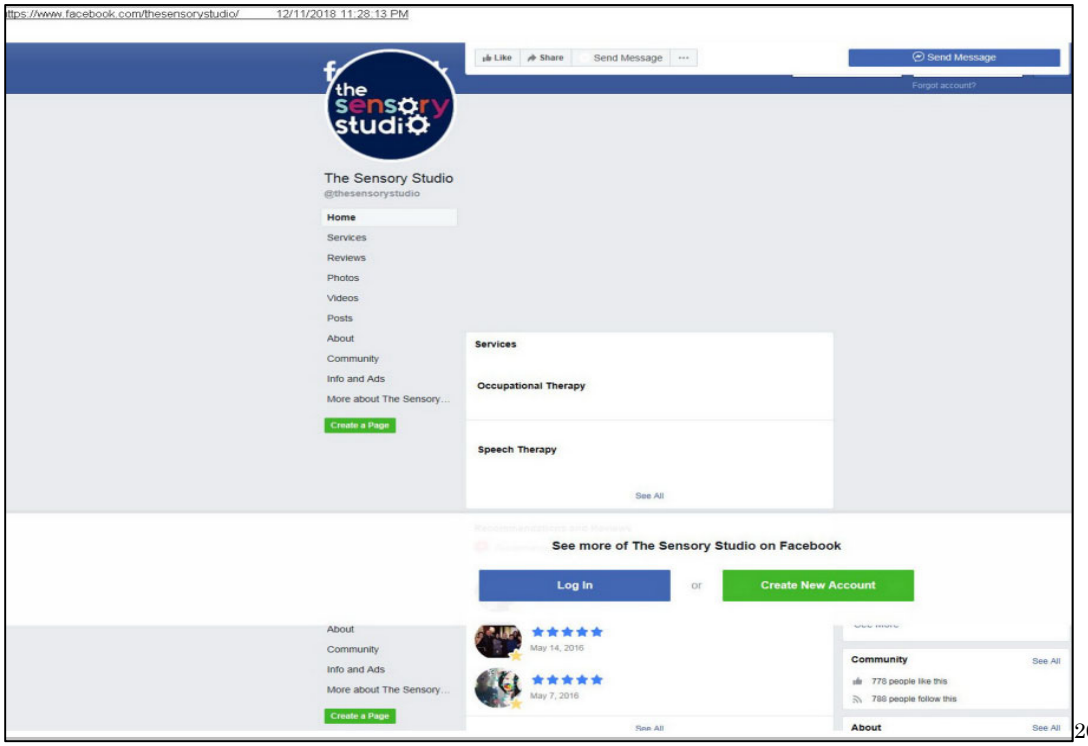
[18]



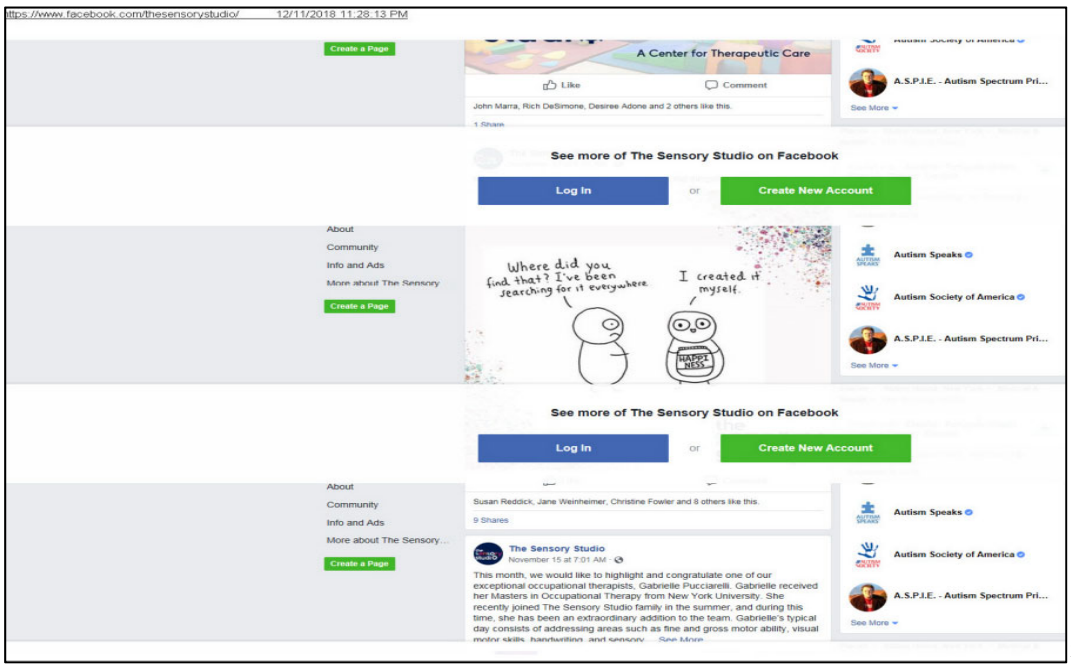
[19]

[18] *Id.* at TSDR 23.

[19] *Id.* at TSDR 25.



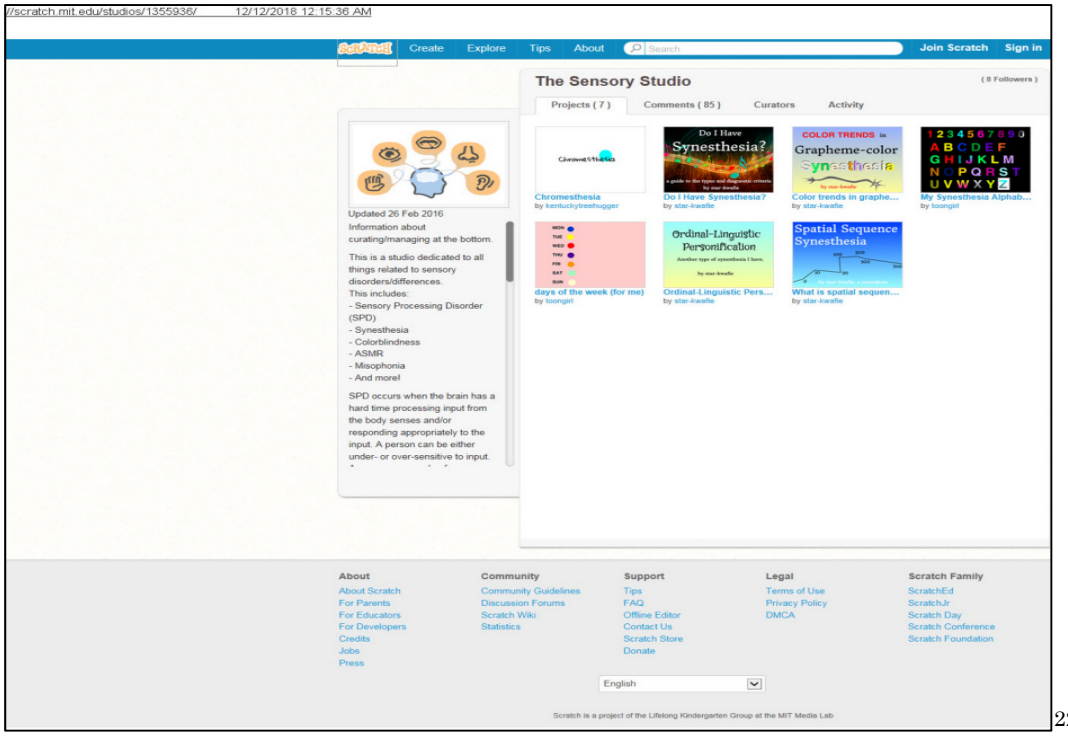
[20]



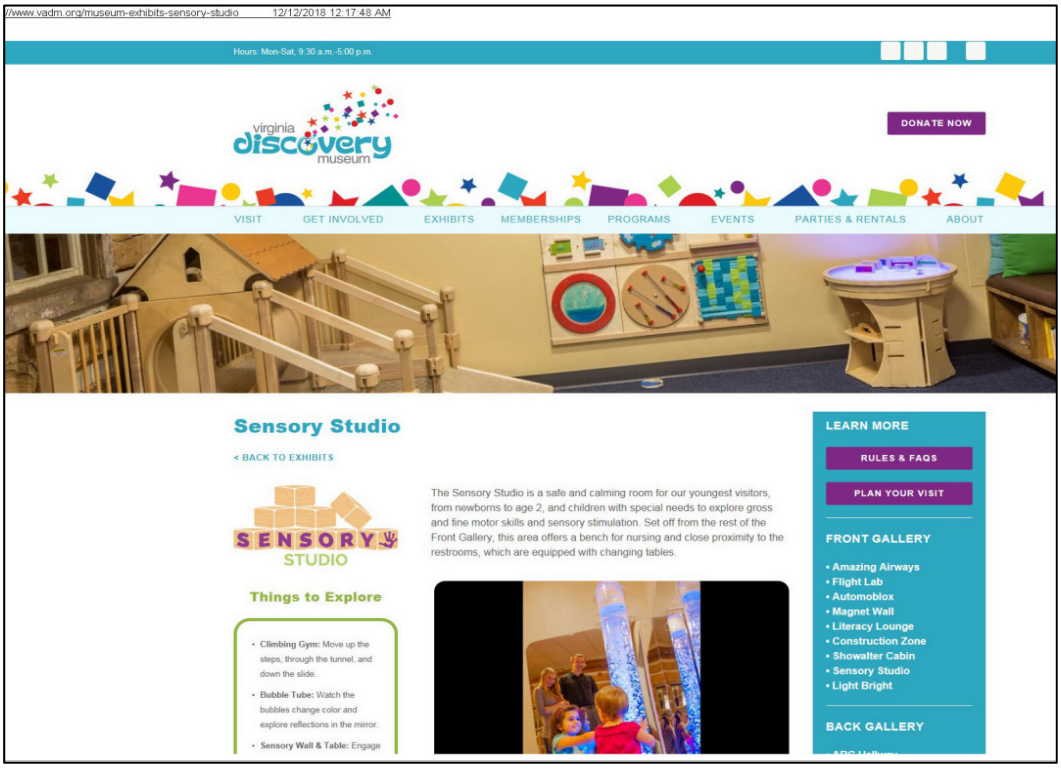
[21]

[20] December 12, 2018 Final Office Action at TSDR 2.

[21] *Id.* at TSDR 11.



[22]



[23]

[22] *Id.* at TSDR 41.

[23] *Id.* at TSDR 46.

The Examining Attorney argues that this "evidence clearly shows that consumers are familiar with 'SENSORY' spaces due to the widespread use of similar wording by others," and that based on this evidence "consumers will have an immediate understanding of the nature and benefits of applicant's services based on applicant's mark." 6 TTABVUE 11. She contends that the fact that "the sensory spaces offered by others may address a variety of sensory needs . . . does not obviate the fact that these spaces labeled as 'sensory' spaces address sensory needs." *Id.* at 11-12. She concludes that "consumers who know that applicant is providing therapy will understand 'THE SENSORY STUDIO' to be a dedicated space where the therapy provided addresses sensory needs." *Id.* at 12.

The Examining Attorney rejects Applicant's claim that the proposed mark is incongruous because the fact that "'STUDIO' is *more* commonly used to describe an artist's workroom does not mean that consumers would not understand 'STUDIO' as referencing a dedicated space for non-artistic activities." *Id.* She argues that "[i]t is clear from the evidence of third party usage of 'SENSORY STUDIO' . . . that the vernacular usage of 'STUDIO' is not limited to artists' workspaces, but used to indicate a dedicated workspace for a variety of activities." *Id.* at 12-13. According to the Examining Attorney, "consumers will quickly and easily assume that 'THE SENSORY STUDIO' merely denotes what services applicant offers and for what purpose, namely, a therapeutic space dedicated to addressing sensory processing conditions." *Id.* at 13.

Finally, the Examining Attorney argues that

> the competitive need for "SENSORY STUDIO" to be available in the marketplace to denote the nature of therapeutic services is apparent based on the widespread usage of this wording by third parties for services highly similar to the applicant's listed services. Should the refusal not be upheld, competition in the marketplace will be greatly impacted and the potential for costly infringement suits will be increased.

Id. at 14.

C. Analysis of Refusal

As discussed above, we must "examine the meaning of each component [of the mark] individually, and then determine whether the mark as a whole is merely descriptive." *DuoProSS*, 103 USPQ2d at 1758. We begin with the noun STUDIO.

When she filed her application, Applicant voluntarily disclaimed the exclusive right to use STUDIO,[24] thus conceding that the word is merely descriptive of one or more of the services identified in the application.[25] *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 n.4 (TTAB 1988) ("By its disclaimer of the word LITE, applicant has conceded that the term is merely descriptive as used in connection with applicant's goods."). Nevertheless, Applicant argues that her proposed mark "presents an incongruity to consumers as applied to the services offered," 4 TTABVUE 12,[26] "because of the word 'studio,'" which has multiple meanings. *Id.* at

[24] February 23, 2018 Application at TSDR 1.

[25] There are numerous services identified in the application, but the refusal to register may be affirmed as to the entire application if the proposed mark "immediately conveys information about one feature or characteristic of at least one of the designated services within" the application. *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1220 (citing *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005)).

[26] We discuss Applicant's incongruity argument in more detail below.

13. Applicant claims that "therapeutic services are not traditionally associated with the word 'studio,' as evidenced by the . . . dictionary definitions," *id.*, and that "'The Sensory Studio,' may be more closely associated with a movie theater." *Id.*

Applicant is correct that "studio" has multiple meanings, 4 TTABVUE 15, but we must assess whether the word is descriptive when it appears in the proposed mark from the standpoint of a consumer who knows that the mark is used in connection with the various services identified in the application, *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219, and in the commercial context of Applicant's use. *N.C. Lottery*, 123 USPQ2d at 1709-10. On the basis of Applicant's voluntary disclaimer of STUDIO, her use of STUDIO in her specimen,[27] and the third-party uses of "Studio" in connection with therapy services,[28] we find that when STUDIO is used in the proposed mark, it does not refer to a movie theater or to any of the other types of artistic studios listed in the dictionary definitions, but rather to what Applicant's specimen calls her "community based resource center" where she provides her therapy services.

The fact that STUDIO "may have other meanings in different contexts is not controlling," *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1597 (TTAB 2018), and, "[i]n any event, '[i]t is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered as merely descriptive.'" *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (RECOIL found to

[27] February 23, 2018 Application at TSDR 3.

[28] December 12, 2018 Final Office Action at TSDR 2-17, 46.

"immediately convey information regarding the ability of [medical and athletic cohesive tape] to rebound or return to its original length or close to it" even though record contained six dictionary definitions of the word) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)). The word STUDIO in the proposed mark immediately and unequivocally describes the dedicated venue at which Applicant renders her therapy services.

Combined with the definite article THE, the adjective SENSORY in the proposed mark modifies STUDIO. Applicant acknowledges that the test for descriptiveness "is whether a customer, knowing the exact type of services or products offered by Applicant, will understand the Mark to relay any of the characteristics or quality of the services or products," 4 TTABVUE 9 (citing *DuoProSS*), but argues that SENSORY, which she calls "[t]he operative word of the Mark," *id.* at 10, "can be used in a litany of different businesses relating to the senses, many of which do not offer therapeutic services." *Id.* These include "sensory deprivation experiences, movie theaters for sensory sensitive individuals, a botanical garden, video games, and essential oils and candles." *Id.* Applicant contends that the "variety of the services and experiences potentially offered under the 'sensory' moniker is too vast to permit a customer to make a direct connection between Applicant's mark and the services offered." *Id.* She concludes that a "consumer must use his or her imagination to reach the conclusion that The Sensory Studio provides therapeutic services for one's senses," *id.*, because "[t]he word 'sensory' can be used to describe special types of

movie theaters, gardens, art installations, consumer goods, and places where one can experience sensory deprivation." *Id.* at 10-11.

Applicant's arguments that "sensory" has a vague meaning that does not permit "a customer to make a direct connection between Applicant's mark and the services offered," *id.* at 10, such that the services cannot be identified from the mark alone, address the wrong question. "[T]he question is not whether someone presented only with the mark could guess the goods or services listed in the identification. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them." *Mecca Grade Growers*, 125 USPQ2d at 1953.

When the proper question is asked, we agree with the Examining Attorney that the word "'SENSORY" in the mark merely denotes a significant type of therapy service provided." 6 TTABVUE 6. Applicant's services include "therapeutic services to children with special needs and their families" and "play therapy services." These broadly identified services are prominently referred to in Applicant's specimen:

[29]

[29] February 23, 2018 Application at TSDR 3.

A consumer who knows that Applicant provides these services and who views the use of the word "Sensory" in Applicant's specimen in references to "Sensory Processing Treatment" and a "Fully Equipped Sensory Gym" would immediately understand that the word describes "specialized therapies, workshops, counseling and guidance,"[30] including "Sensory Processing Treatment" and the use of the "Sensory Gym," that feature therapies "[o]f or relating to the senses or sensation."[31] Like the word STUDIO, the word SENSORY is merely descriptive of one or more of the identified services.

Having concluded that the individual elements of the proposed mark are descriptive, we must determine whether their combination "conveys any distinctive source-identifying impression contrary to the descriptiveness of the individual parts." *Fat Boys*, 118 USPQ2d at 1515-16 (quotation omitted). Applicant argues that it does because

> [a] consumer must use his or her imagination to reach the conclusion that The Sensory Studio provides therapeutic services for one's senses. . . . When a consumer sees the term "The Sensory Studio" he or she must gather more information and engage in critical thinking before a determination can be made as to which of these services are offered.

4 TTABVUE 10. According to Applicant, the mark as a whole "is suggestive because, due to the vagueness of the Mark, a vast number of services and products could be offered under the Mark itself, or similar monikers and . . . it requires a multi-stage

[30] *Id.*

[31] June 8, 2018 Office Action at TSDR 29 (THE AMERICAN HERITAGE DICTIONARY).

reasoning process to associate the Mark with the applied-for services." *Id.* at 14 (citing *In re Global Growers Foods Co.*, Serial No. 87036671 (TTAB November 9, 2017)).

These arguments once again incorrectly address whether a consumer "presented only with the mark could guess the goods or services listed in the identification." *Mecca Grade Growers*, 125 USPQ2d at 1953.[32] As discussed above, the proposed mark need not describe all of the identified services, and it "need not immediately convey an idea of each and every specific feature of the [services] in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the [services]." *Fat Boys*, 118 USPQ2d at 1513. A consumer with an understanding of the services provided by Applicant at "The Sensory Studio," including "therapeutic services to children with special needs and their families" and "play therapy services," who is exposed to the use of the proposed mark in Applicant's specimen "would immediately understand the intended meaning of" THE SENSORY STUDIO mark, *N.C. Lottery*, 123 USPQ2d at 1710, namely, a dedicated venue at which Applicant provides senses-based therapies, including those involving "Sensory Processing Treatment" and the use of the "Sensory Gym." Applicant's specimen

[32] Applicant's citation of *Global Growers Foods*, a non-precedential decision, is unavailing. Non-precedential decisions are not binding on the Board, *In re Procter & Gamble Co.,* 105 USPQ2d 1119, 1120-21 (TTAB 2012), but *Global Growers Foods* is readily distinguishable. The Board found in that case that the mark GLOBAL GROWERS for frozen fruits and vegetables was suggestive rather than descriptive because it was "vague and does not immediately identify the source or provider [of the goods] because it is a sweeping, all-inclusive term that does not describe with any particularity the source of the goods." 16 TTABVUE 5 (Serial No. 87036671). The Examining Attorney here does not claim that THE SENSORY STUDIO is merely descriptive because it is "'a term which describes the provider of the goods or services,'" *id.* (quoting *In re Major League Umpires*, 60 USPQ2d 1059, 1060 (TTAB 2001)), but rather because it describes a "significant type of therapy service provided." 6 TTABVUE 6.

"shows that the mark is less an identifier of the source of [the] services and more a description of a feature or characteristic of those . . . services." *Id.* We agree with the Examining Attorney that

> [t]he combination of the words, "THE SENSORY STUDIO", merely indicates a dedicated space devoted to the senses. The specimen shows that the services are provided in a dedicated space and focus on treatments for the senses or sensory processing. Nothing about the combination of the words gives rise to any new, incongruous, or unique use of the words in the mark. Based on definitional evidence and the applicant's specimen alone, it is clear that the mark "THE SENSORY STUDIO" describes features of applicant's services.

6 TTABVUE 7.

We find that the Examining Attorney established a prima facie case that the proposed mark as a whole is merely descriptive of one or more of the identified services, which shifts the burden of rebuttal to Applicant. *Fat Boys*, 118 USPQ2d at 1513. Applicant's several arguments discussed above, including those made on reply, do not rebut the Examining Attorney's prima facie case.

Applicant's incongruity argument misses the mark. "For purposes of Section 2(e)(1), incongruity exists, for example, where a term evokes an immediate association with something unrelated to the goods or services." *In re Calphalon Corp.*, 122 USPQ2d 1153, 1163 (TTAB 2017). Applicant argues on reply that her proposed mark "presents an incongruity because the union of the words 'sensory' and 'studio' creates additional meaning separate from the services offered" and "would not instantaneously suggest the services offered under the Mark." 7 TTABVUE 8. Contrary to Applicant's argument, however, we must assess whether the proposed

mark is incongruous as applied to the services identified in the application, not in the abstract. *Calphalon*, 122 USPQ2d at 1163. As discussed above, there is nothing incongruous about THE SENSORY STUDIO as applied to Applicant's "therapeutic services to children with special needs and their families" and "play therapy services" because it immediately describes that Applicant provides senses-based therapies, including those involving "Sensory Processing Treatment" and the use of the "Sensory Gym."

Applicant also argues on reply that "[e]ven if, as argued by the Examining Attorney, which argument the Applicant disputes, the Mark immediately conveyed the idea of therapeutic services, it does not do so with any degree of particularity." 7 TTABVUE 6. According to Applicant, the proposed mark "does not indicate any specific kind, or kinds, [of] therapy offered, to whom the therapy services are provided, or towards which senses the services are centered." *Id.* This argument, like the others advanced by Applicant, improperly focuses on identifying the services from the mark rather than determining whether the mark tells consumers something sufficiently particular about the known services. Against the backdrop of Applicant's commercial use of the proposed mark on her specimen, we find that the proposed mark describes a feature or characteristic of the identified "therapeutic services to children with special needs and their families" and "play therapy services" with a sufficient degree of particularity.

Applicant also argues on reply "that there is no competitive need to use the composite mark 'Sensory Studio.'" *Id.* at 10. This argument is made in response to the

Examining Attorney's argument that "the competitive need for 'SENSORY STUDIO' to be available in the marketplace to denote the nature of therapeutic services is apparent based on the widespread usage of this wording by third parties for services highly similar to the applicant's listed services." 6 TTABVUE 14. This is a non-issue, however, because "there is no requirement that the Examining Attorney prove that others have used the mark at issue or that they need to use it, although such proof would be highly relevant to an analysis under Section 2(e)(1)." *Fat Boys*, 118 USPQ2d at 1514. "The correct test is whether [THE SENSORY STUDIO] forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the [services]." *Id.* For the reasons discussed above, we find that it does.

Finally, Applicant argues that there is doubt as to the mere descriptiveness of the proposed mark, 7 TTABVUE 9, but on the basis of the record as a whole, we have no doubt that a consumer who knows that Applicant provides "therapeutic services to children with special needs and their families" and "play therapy services," and who is exposed to the use of the proposed mark in Applicant's specimen, would understand that the proposed mark conveys information about the services, namely, that Applicant provides senses-based therapies, including those involving "Sensory Processing Treatment" and the use of the "Sensory Gym," at a dedicated venue.

Decision: The refusal to register is affirmed.