

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing: January 26, 2023

Mailed: January 30, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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*In re Nicholas Shane Kouns,
dba, Advanced Illness Management Services*

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Application Serial No. 88390117
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Thomas J. Speiss, III of Buchalater PC,
for Nicholas Shane Kouns.

Joanna Scleidorovich, Trademark Examining Attorney, Law Office 128,
Travis Wheatley, Managing Attorney

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Before Bergsman, Shaw, and Johnson,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Nicholas Shane Kouns (“Applicant”) seeks registration on the Principal Register of the mark ADVANCED ILLNESS MANAGEMENT SERVICES (in standard characters) for “Downloadable computer application software for mobile phones, namely, software for authorising [sic] access to data bases; Downloadable computer software for authorising [sic] access to data bases,” in International Class 9.¹ In the

¹ Application Serial No. 88390117 was filed on April 17, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1052(a), based upon Applicant’s asserted first use anywhere and use in commerce since at least as early as August 16, 2016. In response to the Examining

application as filed, Applicant disclaims the exclusive right to use the term “Advanced Illness Management.”

The Examining Attorney refused to register Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that ADVANCED ILLNESS MANAGEMENT SERVICES, used in connection with the applied-for goods, is merely descriptive. According to the Examining Attorney, “when consumers encounter the wording ‘ADVANCED ILLNESS MANAGEMENT SERVICES’ in connection with applicant’s software, they will immediately understand that the purpose of the software is to authorize access to databases featuring patient medical records as well as tools for the management of medical services in patients with an advanced illness.”²

When we cite the prosecution history, we refer to the USPTO Trademark Status and Document Retrieval (TSDR) system in the downloadable .pdf format. When we cite to the briefs, we refer to TTABVUE, the Board’s docketing system, by docket entry followed by the page number (e.g., 8 TTABVUE 5).

I. Preliminary Issues

Before proceeding to the merits of the refusal, we address two preliminary issues.

Attorney’s requirement that Applicant submit a substitute specimen showing use of the mark in connection with the applied-for goods, Applicant amended the filing basis of his application to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). December 31, 2019 Response to Office Action.

We also note that Applicant initially identified himself as a limited liability company. *See* Preliminary Issues, Section (A) below.

² Examining Attorney’s Brief (8 TTABVUE 5).

A. Issues on Appeal

In the introduction of her brief, the Examining Attorney states that Applicant has appealed the final refusal to register ADVANCED ILLNESS MANAGEMENT SERVICES on the ground that it is merely descriptive and “[a]lso on appeal is the question of whether applicant’s entity type should be listed as an individual or a limited liability company, which must be resolved pursuant to 37 C.F.R. §§2.32(a)(2), (a)3(i)-(ii), 2.61(b).”³ However, the Examining Attorney did not identify the discrepancy in Applicant’s type of entity in the issue section of her appeal brief, nor did she refer to it again in the body of her brief.⁴

The Examining Attorney required Applicant to clarify whether Applicant is an individual or a limited liability company in the November 2, 2021 Office Action (TSDR 2). Applicant did not respond to the requirement in his May 2, 2022 Response to Office Action. The Examining Attorney repeated the requirement in the June 1, 2022 “Subsequent Final Office Action” (TSDR 5). In its brief, Applicant identified Applicant as an individual and stated that he will correct the entity type.⁵ In her brief, the Examining Attorney “accepts applicant’s entity type clarification that application should be identified as an individual and not a limited liability company.”⁶

³ Examining Attorney’s Brief (8 TTABVUE 1).

⁴ Examining Attorney’s Brief (8 TTABVUE 2). Nor did the Examining Attorney refer to the resolution of Applicant’s entity type as an issue at the oral hearing.

⁵ Applicant’s Brief, p. 14 (6 TTABVUE 15).

⁶ Examining Attorney’s Brief (8 TTABVUE 2).

Under the circumstances described above, the Examining Attorney failed to raise the discrepancy of Applicant's entity type as an issue on appeal.

B. Late-filed evidence

Applicant attached to its brief a copy of a third-party registration and a dictionary definition of the word "service."⁷ The Examining Attorney, in her brief, objects to the third-party registration on the ground that it was not timely filed.⁸ Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that the record in an application should be complete prior to the filing of an appeal. Because the third-party registration was not timely filed, we sustain the Examining Attorney's objection and give the third-party registration no consideration.

II. Whether ADVANCED ILLNESS MANAGEMENT SERVICES is merely descriptive.

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 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). A mark is "merely descriptive" within the meaning of Section 2(e)(1) if it conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d

⁷ Applicant's Brief Exhibits 1 and 2 (6 TTABVUE 18-23).

⁸ Examining Attorney's Brief (8 TTABVUE 7).

1217, 1219 (Fed. Cir. 2012); *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017). “A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods.” *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 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 because of the manner of its use or intended use,’” *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)), 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 . . . 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)).

In determining how the relevant consuming public perceives Applicant’s proposed mark in connection with its identified goods, we may consider any competent source, including dictionary definitions and Applicant’s own advertising material and explanatory text. *See N.C. Lottery*, 123 USPQ2d at 1709-10; *Bayer*, 82 USPQ2d at

1831. 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 are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

B. Facts

Advanced illness management services are designed for patients with very serious illnesses.⁹ The goal of advanced illness management is “to improve patient and family satisfaction, increase quality of care, reduce inefficiencies and increase care coordination.”¹⁰

The goal is to help people understand their options when facing serious illness and give them the opportunity to receive the type of care they want at home, with the hospital or nursing home as a last option.¹¹

“End of life care,’ ‘serious illness’ or ‘advanced illness’ are some of the terms used to categorize the set of services for patients and families during the course of illness.”¹² “The Coalition to Transform Advanced Care (CTAC) defines advanced illness as ‘occurring when one or more conditions become serious enough that general

⁹ Kadlec website (Kadlec.org) attached to the January 22, 2020 Office Action (TSDR 56). *See also* AmeraCare Family Hospice & Home Health (ameracare.com) attached to the August 31, 2020 Office Action (TSDR 6) (“Advanced Illness Management, also known as AIM, is care for people that have serious chronic illnesses.”); St. Charles Health System (stcharleshealthcare.org), *id.* at TSDR 18 (“Advanced Illness Management: Helping to relieve the pain, symptoms and stress of serious illness and focus on quality of life.”).

¹⁰ American Hospital Association (aha.org) attached to the July 2, 2019 Office Action (TSDR 6).

¹¹ VNA of Care New England (vnacarenewengland.org) attached to the January 22, 2020 Office Action (TSDR 58).

¹² American Hospital Association (aha.org) attached to the July 2, 2019 Office Action (TSDR 5).

health and functioning decline, and treatments begin to lose their impact. This is a process that continues to the end of life.”¹³

Advanced illness management services are for “patients and families who suffer from a chronic, complex, and/or potentially life-limiting condition that may be accompanied by one or more of the following issues:

- Burdensome symptoms (i.e., pain, nausea, vomiting, seizures, etc.)
- Burdensome treatments
- Frequent hospitalizations
- Requiring assistance with care coordination because a complex condition is

causing fragmented care and/or challenges with communication between multiple healthcare providers.”¹⁴

Advanced illness management may have the following two components:

- First, nurse practitioners oversee the care of patients with advanced illness. The nurse practitioners teach home health nurses how to help patients manage their symptoms and engage patients in discussions about what matters most to them as they face serious illness.
- Then, for patients with complex medical needs, the program extends palliative care into the community, providing nurse practitioner house calls to patients whose general health and function has declined as a result of one or more serious illnesses. Nurse practitioners enhance communication with the primary care provider, and can assess and treat patients in the home.¹⁵

¹³ *Id.*

¹⁴ Nationwide Childrens’ Hospital (nationwidechildrens.org) attached to the January 22, 2020 Office Action (TSDR 63).

¹⁵ VNA of Care New England (vnacarenewengland.org) attached to the January 22, 2020 Office Action (TSDR 58).

The Trios Health provider (trioshealth.org) advertises that its Advanced Illness Management team provides the following assistance:¹⁶

- Reviewing the patient's complete medical history to provide fully informed guidance and support
- Helping patients and families understand all of the realities their unique health situation poses
- Establishing, re-evaluating, and adjusting care and treatment goals based on illness progression, prognosis, and personal wishes
- Discussing all aspects of available care options, including advantages and disadvantages
- Providing patients who are able the opportunity to explore and express personal wishes regarding their health situation and care
- Assisting with the legal aspects of advanced illness care planning, including power of attorney and advance directive documentation
- Working with families to make care decisions for patients who cannot speak for themselves
- Presenting care setting recommendations and facilitating transitions as appropriate
- Infusing faith-related discussions with those who find it helpful to their care process
- Listening to and answering questions with patience, compassion, and transparency.

Applicant's website (<https://aims.healthcare/>) advertises that Applicant "facilitates patient centered Palliative Care and Population Health Services by providing a complete infrastructure consistent with evidence-based protocols and published results."¹⁷ Applicant offers "automated HIPPPAA [sic] compliant self-scheduling for Telemedicine, an encrypted back-end EMR for automated enrollment, and a fully integrated patient 'Medical Vault', in which they keep and curate a

¹⁶ June 1, 2022 Office Action (TSDR 12).

¹⁷ June 1, 2022 Office Action (TSDR 20).

personal EMR Health Record.”¹⁸ Applicant’s web app will allow “patients to access all of their medical records in one place in an easy to use interface.”¹⁹

In response to the Examining Attorney’s request for information, Applicant explained that its “ADVANCED ILLNESS MANAGEMENT SERVICES software goods facilitate patient centered care by making their medical records and goals of care available online across all community domains, so that all health care practitioners (HCPs) treating the patient have simultaneous access to the patient’s complete medical records and treatment goals.”²⁰ For example, Applicant’s specimen of use filed with its application provides the following:

Advanced Illness Management Services, LLC

- Operationalizes Standards of Palliative Care per Medicare, AHA, CAPC, CTAC, and all major insurance carriers²¹

Advanced Illness Management Services “will engage the network regarding pre-existing educational resources and infrastructure,” “provide all necessary guidance regarding regulatory implementation of Patient Care Registry with legacy EMR systems,” and “engage medical director onsite and provide ancillary risk management, educational opportunities, and aid in regulatory credentialing for each provider as warranted.”²²

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ December 31, 2019 Response to Office Action (TSDR 1 and 4).

²¹ Applicant’s application (TSDR 17).

²² *Id.* at TSDR 9.

Nevertheless, Applicant asserts that its software provides database access authorization, not medical services.²³ “There are no medical services provided, and there is no management of patient care.”²⁴ As Applicant explains:

Applicant provides software with highly encrypted security protocols for patients, medical providers, insurance networks, and records staff. The software is a freestanding Electronic Medical Record system, and is not for use in the management of advanced illness, as asserted by the Examining Attorney.

The software does not manage illness or any other medical concern. The software provides access to databases of patient information. For example, a medical records clerk could access the software to review or update the patient’s medical record. There is no management of illness involved in this use of the software. Another example is insurance networks, who may access the software to review medical services for insurance coverage. In this case, the insurance company is not managing an advanced illness, but providing contractual financial support under its health care agreements. A patient may use the software to access a personal medical record, which could be related to illness, injury, or preventative care. Such a patient is not using the software to manage an advanced illness. Providers from all areas of medicine, not merely advanced illness practitioners, can utilize the software to access patient records.

The Applicant’s software is analogous to a key that opens a door. A user utilizes the key in order to open the door and gain access to the room. Once the user opens the door, the software key is no longer engaged, having performed its function. The software does not provide any further features and merely allows the user to open the door. The software does not provide treatment or management of any illness.²⁵

²³ Applicant’s Reply Brief, pp. 4-5 (9 TTABVUE 5-6).

²⁴ *Id.* at 5 (9 TTABVUE 6).

²⁵ *Id.* at 6 (9 TTABVUE 7).

C. Analysis

The Examining Attorney contends that Applicant's intended use of ADVANCED ILLNESS MANAGEMENT SERVICES "describe[s] a purpose of applicant's software, namely, software for authorizing access to databases for use in the management of advanced illnesses in patients."²⁶ "When consumers encounter the wording 'ADVANCED ILLNESS MANAGEMENT SERVICES' in connection with applicant's software, they will immediately understand that the purpose of the software is to authorize access to databases featuring patient medical records as well as tools for the management of medical services in patients with an advanced illness."²⁷

Applicant argues that ADVANCED ILLNESS MANAGEMENT SERVICES does not describe its database access authorization software because the commercial impression engendered by the mark is activities related to treating serious illnesses.²⁸

The Applicant's software provides database access authorization. The Applicant's software does not provide medical services such as advanced illness management services. Merely because the Applicant's mark may be considered descriptive of a Class 042 service, such as software as a service, or a Class 035 medical records service, or even Class 044 medical services, does not make the Applicant's mark descriptive of its actual stated goods, which are computer software.²⁹

When we consider ADVANCED ILLNESS MANAGEMENT SERVICES proposed for use in connection with software for authorizing access to databases, we analyze

²⁶ Examining Attorney's Brief (8 TTABVUE 5).

²⁷ *Id.*

²⁸ Applicant's Brief, p. 6 (6 TTABVUE 7).

²⁹ Applicant's Brief, p. 7 (6 TTABVUE 8).

whether someone familiar with Applicant's database authorization software will understand the mark to convey information about the software. *Real Foods Pty Ltd.*, 128 USPQ2d at 1374 (we ask "whether someone who knows what the goods . . . are will understand the mark to convey information about them."). In other words, we determine how someone familiar with Applicant's software for authorizing access to databases perceives ADVANCED ILLNESS MANAGEMENT SERVICES.

In this appeal, ADVANCED ILLNESS MANAGEMENT SERVICES directly informs us of one intended user (i.e., a provider of advanced illness management services). A term that identifies a group to whom the applicant directs its goods or services is merely descriptive. *See In re Planalytics, Inc.*, 70 USPQ2d 1453 (TTAB 2004) (GASBUYER merely descriptive of risk management services in the field of pricing and purchasing natural gas); *Hunter Publ'g Co. v. Caulfield Publ'g Ltd.*, 1 USPQ2d 1996 (TTAB 1986) (SYSTEMS USER found merely descriptive of a trade journal directed toward users of large data processing systems; evidence sufficient to establish distinctiveness under §2(f)); *In re Camel Mfg. Co., Inc.*, 222 USPQ 1031 (TTAB 1984) (MOUNTAIN CAMPER held merely descriptive of retail mail-order services in the field of outdoor equipment and apparel). *Cf. In re Omaha Nat'l Bank*, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987) (rejecting argument that descriptiveness should be limited to a quality or characteristic of the good or service itself and holding that it includes a designation descriptive of the service provider). As noted above, "Applicant provides software with highly encrypted security protocols

for patients, medical providers, insurance networks, and records staff.”³⁰ Or as explained by Applicant, the software is “a freestanding Electronic Medical Record system.”³¹

Even though providers of advanced illness management services are only one possible intended user of Applicant’s database authorization software, “[a] mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Chamber of Commerce of the U.S.*, 102 USPQ2d at 1219 (“To decide this case, we need only find that NATIONAL CHAMBER immediately conveys information about one feature or characteristic of at least one of the designated services”); *see also In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (a proposed mark “may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s [services]... .”) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)). Thus, the fact that providers of advanced illness management services appear to be only one of a number of possible intended users of Applicant’s database authorization software does not obviate the refusal.

Accordingly, we find that ADVANCED ILLNESS MANAGEMENT SERVICES is merely descriptive.

³⁰ Applicant’s Reply Brief, p. 6 (9 TTABVUE 7).

³¹ *Id.* at 6 (9 TTABVUE 7).

Serial No. 88390117

Decision: We affirm the refusal to register Applicant's mark ADVANCED ILLNESS MANAGEMENT SERVICES.