

This Opinion is Not a  
Precedent of the TTAB

Mailed: October 22, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Rock Creek Cattle Company, Ltd.*  
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Serial No. 90439051  
Serial No. 90439338  
(Consolidated)  
—————

Michael E. Rowan and Katherine Keating of Bryan Cave Leighton Paisner LLP for  
Rock Creek Cattle Company, Ltd.

Kristin Z. Wu, Trademark Examining Attorney,<sup>1</sup> Law Office 114,  
Nicole Nguyen, Managing Attorney.

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

Opinion by Larkin, Administrative Trademark Judge:

Rock Creek Cattle Company, Ltd. (“Applicant”) seeks registration on the Principal Register of the standard-character mark ROCK CREEK CATTLE COMPANY and the composite word-and-design mark shown below

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<sup>1</sup> The applications were initially examined by Trademark Examining Attorney Diane Collopy, but were reassigned during prosecution to Trademark Examining Attorney Wu, who issued the final refusals to register from which these appeals were taken and filed the appeal brief of the United States Patent and Trademark Office (“USPTO”). We will refer to them both as the “Examining Attorney.”



both for “Real estate development services, namely, development of a private luxury resort property; real estate development” in International Class 37.<sup>2</sup>

The Trademark Examining Attorney has refused registration of both marks under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), on the ground that the wording CATTLE COMPANY in Applicant’s marks is “merely descriptive” of the services identified in the applications within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), and must be disclaimed.

When the Examining Attorney made the refusals final, Applicant appealed and requested reconsideration, which was denied. The appeals were consolidated and have been fully briefed.<sup>3</sup> We reverse the refusals to register.<sup>4</sup>

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<sup>2</sup> Application Serial No. 90439051 to register the word mark and Application Serial No. 90439338 to register the composite mark were both filed on December 31, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed first use of each mark anywhere and first use of each mark in commerce at least as early as June 1, 2006.

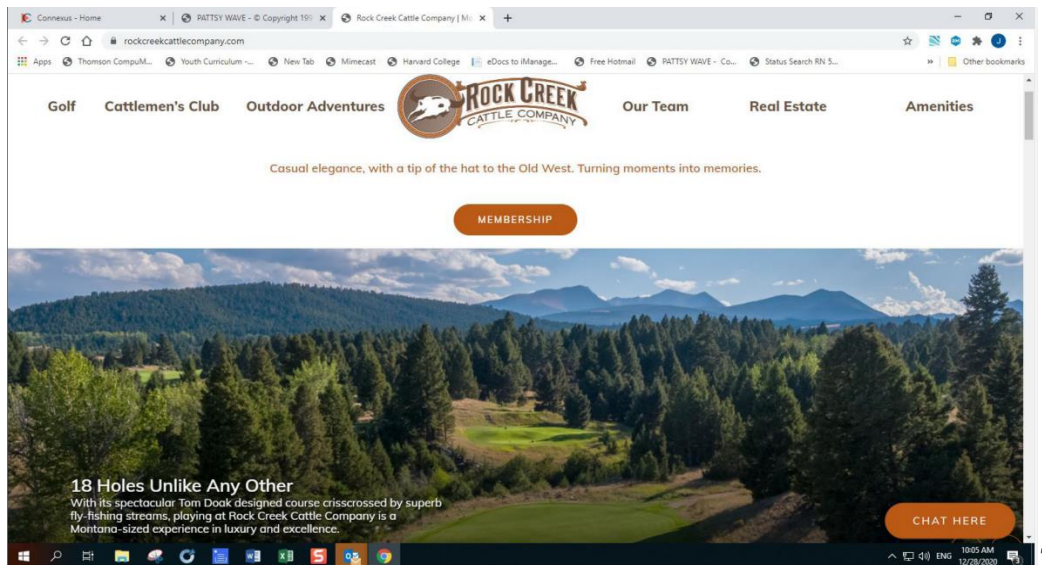
<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 WL 2853282, at \*1 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Following the consolidation of the appeals, Applicant and the Examining Attorney filed the same briefs in both appeals. Applicant’s appeal brief appears at 9 TTABVUE and its reply brief appears at 12 TTABVUE. The Examining Attorney’s brief appears at 11 TTABVUE.

<sup>4</sup> The citation form in this opinion is in a form provided in Section 101.03(a) of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs

## I. Prosecution History and Record on Appeal<sup>5</sup>

We briefly summarize below the prosecution histories of the applications to provide background to our disposition of the issue in these consolidated appeals.

Applicant applied to register both marks based on the same specimen of use, which Applicant described as “screenshots from Applicant’s website bearing the mark to advertise its real estate development services, namely, development of a private luxury property; real estate development.”<sup>6</sup> We display below the homepage from Applicant’s specimen from its website at rockcreekcattlecompany.com:



and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites the Westlaw legal database (“WL”) and, in the initial full citation of a case, also identifies the number of the Board proceeding. The Board’s decisions issued since 2008 are available in TTABVUE and many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading Room by entering the same information. Practitioners should also adhere to the citation practice set forth in TBMP § 101.03(a).

<sup>5</sup> Citations in this opinion to the application records are to pages in the USPTO’s Trademark Status & Document Retrieval (“TSDR”) database. The records are effectively identical.

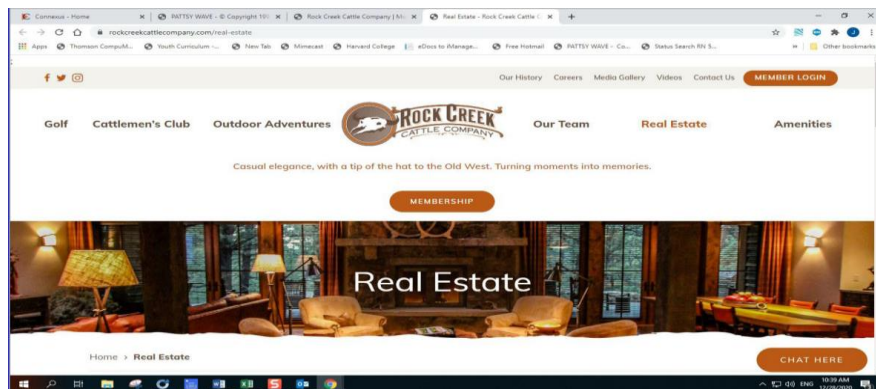
<sup>6</sup> December 31, 2020 Applications at TSDR 1.

<sup>7</sup> *Id.* at TSDR 3.

The masthead of the homepage displays several links, including one captioned “Real Estate.”

The second page of the specimen encourages visitors to “Explore & Discover Nature’s Beauty Mark” and welcomes visitors to “Rock Creek Cattle Company, a 30,000 acre historic Montana working cattle ranch, traversed by streams and framed by mountains.”<sup>8</sup> It offers “the Western lifestyle lived to the fullest, with diverse homestead offerings ranging from one acre to 110 acres, along with luxury Cabins and Cottages built along Rock Creek that embrace the grandeur of their setting.”<sup>9</sup> The third page of the specimens displays available cabins and cottages with prices.<sup>10</sup> This page also states that “Rock Creek Cattle Company is comprised of Doak Golf Course as well as the Cattlemen’s Club and The Creek Club Fitness Center.”<sup>11</sup>

We reproduce below a page captioned “Real Estate” that is reached through the “Real Estate” link on the masthead of Applicant’s website:



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<sup>8</sup> *Id.* at TSDR 4.

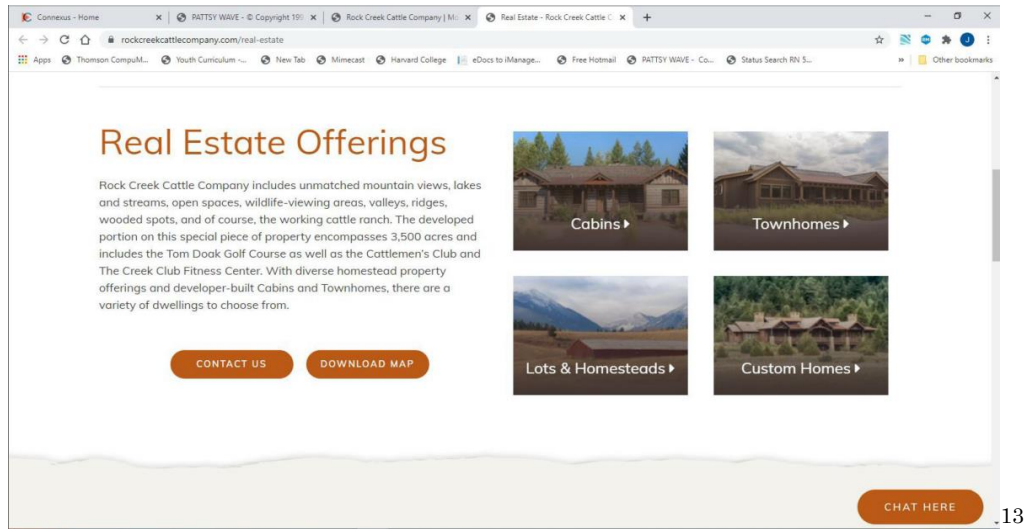
<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at TSDR 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at TSDR 8.

We display below a second page captioned “Real Estate Offerings”:



This page states that “Rock Creek Cattle Company includes unmatched mountain views, lakes and streams, open spaces, wildlife-viewing areas, valleys, ridges, wooded spots, and of course, the working cattle ranch,” and refers to the “developed portion of the property” and “diverse homestead property offerings and developer-built Cabins and Townhomes,” which offer “a variety of dwellings to choose from.” The final two pages of the specimen are maps, one of which is captioned “Development Site Map.”<sup>14</sup>

The Examining Attorney initially refused registration of Applicant’s marks based on likelihood of confusion with a registered mark and the inadequacy of the specimens.<sup>15</sup> Each specimen refusal was based on the Examining Attorney’s

<sup>13</sup> *Id.* at TSDR 9.

<sup>14</sup> *Id.* at TSDR 14.

<sup>15</sup> July 19, 2021 Office Actions at TSDR 1. The likelihood of confusion and specimen refusals were eventually withdrawn and are not before us. We will not summarize evidence directed only to those refusals.

argument that “the specimen does not show a direct association between the mark and services in that there is no reference to development services. Applicant’s specimen shows real estate listings, but these appear to be mere advertisements indicating that properties in the community are available.”<sup>16</sup>

The Examining Attorney also required a disclaimer of the words CATTLE COMPANY on the grounds that the “wording ‘CATTLE’ is defined as ‘domesticated quadrupeds held as property or raised for use,’” Applicant’s specimen of use “indicates that these services are rendered on or in connection with an active cattle ranch,” and “the wording immediately conveys a feature or characteristic of what applicant provides, rather than their source.”<sup>17</sup> The Examining Attorney made of record a dictionary definition of “cattle,”<sup>18</sup> and a Wikipedia entry captioned “Real estate development.”<sup>19</sup>

Applicant responded to the Office Actions by arguing against the likelihood of confusion and specimen refusals, as well as the disclaimer requirement.<sup>20</sup> Applicant made of record USPTO electronic records regarding a third-party registration of a mark containing the words “Cattle Co.,”<sup>21</sup> and third-party registrations of various

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<sup>16</sup> July 19, 2021 Office Actions at TSDR 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at TSDR 6.

<sup>19</sup> *Id.* at TSDR 11.

<sup>20</sup> January 19, 2022 Responses to Office Actions at TSDR 2-23.

<sup>21</sup> *Id.* at TSDR 100-02 (SHOULDA-BIN-A-COWBOY LAND & CATTLE CO. (“LAND” and “CO.” disclaimed) for various real estate services).

BULL-formative marks, without a disclaimer of the words “CATTLE” or “BULL.”<sup>22</sup> Applicant also noted that it “did not disclaim ‘CATTLE’ in its prior registration (Reg. No. 3,274,129).”<sup>23</sup>

The Examining Attorney then made the disclaimer refusals final in both cases,<sup>24</sup> and made the specimen refusal final in Serial No. 90439338 to register Applicant’s composite mark.<sup>25</sup> The Examining Attorney made of record a dictionary definition of the word “company,”<sup>26</sup> and third-party webpages that the Examining Attorney claimed establish that “CATTLE and COMPANY are commonly used terms in the real estate industry to describe types of properties and business organizations.”<sup>27</sup>

Applicant appealed and requested reconsideration in both cases. In its Request for Reconsideration in application Serial No. 90439338, Applicant made of record more detailed development site maps, which we reproduce below:

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<sup>22</sup> *Id.* at TSDR 103-144.

<sup>23</sup> *Id.* at TSDR 19. The registration number cited by Applicant contains a typographical error. Applicant has provided the correct registration number (3724129) (the “’129 Registration”) in its appeal brief. 9 TTABVUE 12. Applicant did not make the ’129 Registration of record during prosecution, but the Examining Attorney acknowledges in her brief that Applicant owned a “prior registration of the mark ROCK CREEK CATTLE COMPANY, U.S. Registration No. 3724129, for which Applicant provided a disclaimer of COMPANY, but not CATTLE . . .” 11 TTABVUE 11. “Although this registration was not made of record, because the Examining Attorney referred to the registration in briefing the appeal, we treat the registration as though it is of record.” *In re Int’l Watchman, Inc.*, Ser. No. 87302907, 2021 WL 5755146, at \*13 n.49 (TTAB 2021). The ’129 Registration issued in 2009 and shows the composite word-and-design mark shown in application Serial No. 90439338 for Class 37 services identified as “real estate development services, namely, development of a private luxury resort property.” The ’129 Registration was cancelled in 2020 when Applicant did not renew it.

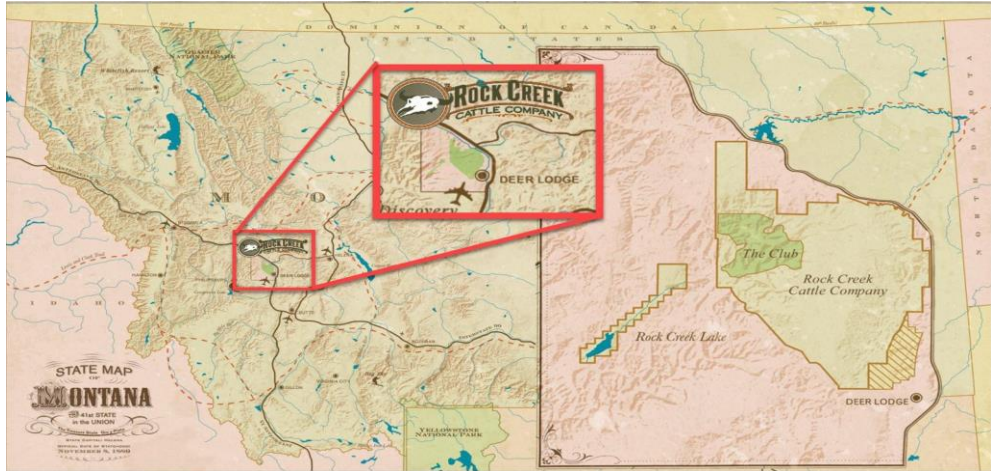
<sup>24</sup> November 23, 2022 Final Office Actions at TSDR 1.

<sup>25</sup> *Id.* at TSDR 1 (Serial No. 90439338).

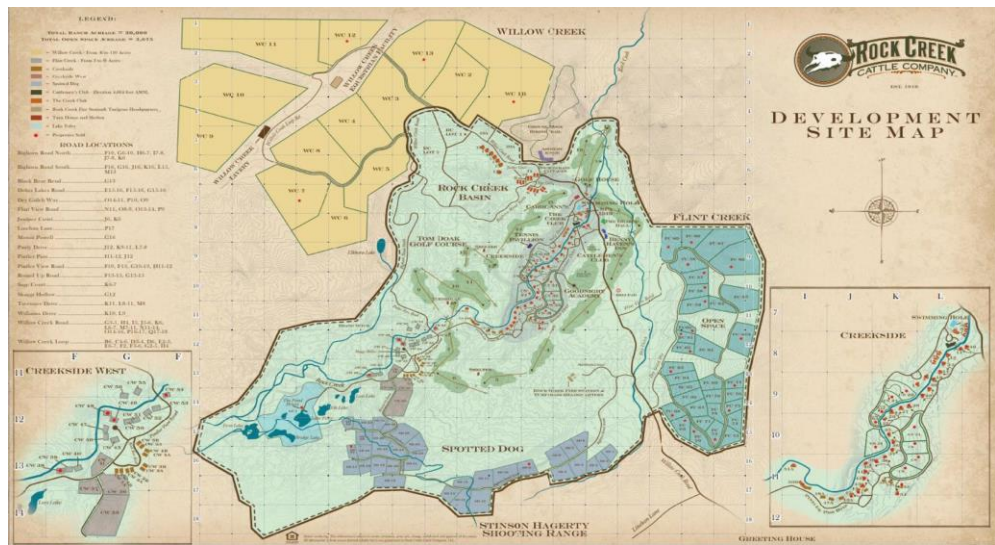
<sup>26</sup> *Id.* at TSDR 2.

<sup>27</sup> *Id.* at TSDR 3-11.





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The Examining Attorney denied Applicant’s Requests for Reconsideration,<sup>30</sup> but withdrew the refusal to register based on the insufficiency of Applicant’s specimen in Serial No. 90439338. The Examining Attorney made of record an additional page from Applicant’s website stating that “Rock Creek Cattle Company is comprised of the 28,000-acre Home Ranch and secluded Rock Creek Lake,” and quoting a

<sup>28</sup> May 23, 2023 Request for Reconsideration at TSDR 7 (Serial No. 90499338).

<sup>29</sup> *Id.* at TSDR 8 (Serial No. 90499338).

<sup>30</sup> October 30, 2023 Denials of Requests for Reconsideration at TSDR 1.



“Member” that “[t]here are many choices for your second home, but where else can you be a part of a 30,000 acre working cattle ranch?;”<sup>31</sup> a third-party LinkedIn page noting a job opening at the Rock Creek Cattle Company and stating that the Rock Creek site “has an actual working cattle ranch inside this vast development;”<sup>32</sup> online articles and third-party webpages mentioning the working cattle ranch on the site of the Rock Creek Cattle Company;<sup>33</sup> and third-party webpages discussing resorts and developments featuring cattle ranching and cattle herding,<sup>34</sup> and real estate development companies.<sup>35</sup>

## **II. Disclaimer Requirement Refusal**

### **A. Applicable Law**

“Under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), an applicant may be required to disclaim an unregistrable component of a mark otherwise registrable. ‘The [USPTO] can condition the registration of a larger mark on an applicant’s disclaimer of an ‘unregistrable component of a mark otherwise registrable.’” *In re Korn Ferry*, Ser. No. 90890949, 2024 WL 3219482, at \*2 (TTAB 2024) (quoting *In re Lego Juris A/S*, Ser. Nos. 88698784 and 88698804, 2022 WL 1744613, at \*2 (TTAB 2022) (internal quotations omitted)). “Failure to provide the required disclaimer constitutes a ground for refusing registration.” *Id.* (quoting *Lego Juris*, 2022 WL

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<sup>31</sup> *Id.* at TSDR 2.

<sup>32</sup> *Id.* at TSDR 3.

<sup>33</sup> *Id.* at TSDR 4-12, 17-19, 25-29.

<sup>34</sup> *Id.* at TSDR 13-15.

<sup>35</sup> *Id.* at TSDR 16, 20-24.

1744613, at \*2 (citing *In re Stereotaxis Inc.*, 429 F.3d 1039, 1041 (Fed. Cir. 2005); *In re Am. Furniture Warehouse Co.*, Ser. No. 86407531, 2018 WL 1942214, at \*2 (TTAB 2018)).

As noted above, the Examining Attorney has required a disclaimer of the wording CATTLE COMPANY in both of Applicant's marks on the ground that it is "merely descriptive" of the services identified in the two applications within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). "Merely descriptive terms may not be registered on the Principal Register in the absence of a showing of acquired distinctiveness under Section 2(f) of the Trademark Act." *Korn Ferry*, 2024 WL 3219482, at \*2. The mere descriptiveness of particular words in a multi-word mark "is assessed in the same manner as the mere descriptiveness of an entire mark." *Id.* (citation omitted).

"A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services." *Id.* (quoting *In re Zuma Array Ltd.*, Ser. No. 79288888, 2022 WL 3282655, at \*3 (TTAB 2022) (internal quotations and citations omitted)). "A term '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].'" *Id.* (internal quotations omitted). "In addition, a term "need not be merely descriptive of all recited goods or services in an

application. A descriptiveness refusal is proper ‘if the mark is descriptive of any of the [services] for which registration is sought.’” *Id.* (internal quotations omitted).

“Whether a term 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 [services] because of the manner of its use or intended use,” *id.* at \*3 (quoting *In re Fallon*, Ser. No. 86882668, 2020 WL 6255423, at \*8 (TTAB 2020) (internal quotation omitted)), and “not in the abstract or on the basis of guesswork.” *Id.* (quoting *Fallon*, 2020 WL 6255423, at \*8 (internal quotation omitted)). “We ask whether someone who knows what the goods and services are will understand the [phrase] to convey information about them.” *Id.* (quoting *Fallon*, 2020 WL 6255423, at \*8 (internal quotation omitted)). “Whether a term ‘is merely descriptive or not is determined from the viewpoint of the relevant purchasing public.” *Id.* (quoting *Zuma Array*, 2022 WL 3282655, at \*4 (internal quotations omitted)). The record shows that the relevant purchasers of the services identified in the applications as “Real estate development services, namely, development of a private luxury resort property” and “real estate development” services are owners of real property who wish to develop their property.<sup>36</sup>

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<sup>36</sup> The involved applications contain two distinct services in Class 37 separated by semicolons. See *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 WL 417620, at \*7 n.35 (TTAB 2023). Although Applicant focuses in its briefs on what it calls its “luxury real estate development services,” 9 TTABVUE 21, 12 TTABVUE 8, the Examining Attorney only needs to show that the phrase CATTLE COMPANY is merely descriptive of one of the two services to require its disclaimer as to the entirety of Class 37 in both applications. *Korn Ferry*, 2024 WL 3219482, at \*3 (citations omitted). The broad and unrestricted identifications of “real estate

“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.” *Id.* (quoting *Zuma Array*, 2022 WL 3282655, at \*4 (internal quotations omitted)). “These sources may include [w]ebsites, publications and use in labels, packages, or in advertising materials directed to the goods [or services].” *Id.* (quoting *Zuma Array*, 2022 WL 3282655, at \*4 (internal quotations omitted)).

## **B. Summary of Arguments**

### **1. The Examining Attorney**

The Examining Attorney’s theory of descriptiveness is that “[t]he wording CATTLE COMPANY in the applied-for ROCK CREEK CATTLE COMPANY marks merely describes Applicant’s real estate development services and is thus an unregistrable component of the mark because CATTLE COMPANY immediately conveys a business that develops real estate featuring nearby domesticated animals.” 11 TTABVUE 3.

The Examining Attorney notes that the word CATTLE means “domesticated quadrupeds held as property or raised for use,” while the word COMPANY means “a business organization that makes money by selling goods or services.” *Id.* at 4 (record citations omitted).<sup>37</sup> The Examining Attorney argues that Applicant’s specimen

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development” services in the applications subsume, but are not limited to, the narrower “real estate development services, namely, development of a private luxury resort property.”

<sup>37</sup> Applicant does not dispute that the word COMPANY should be disclaimed, and offers in its reply brief to disclaim COMPANY on limited remands of the applications to the Examining Attorney in the event that the refusals are reversed. 12 TTABVUE 11.

“further establishes Applicant’s real estate development features domesticated animals: ‘Welcome to Rock Creek Cattle Company, a 30,000 acre historic Montana working cattle ranch, traversed by streams and framed by mountains,’” *id.* at 5 (record citation omitted), and that “Applicant has also acknowledged the descriptive significance of the term CATTLE: ‘Applicant does not contest that its real estate development services are offered on a site that includes an active cattle ranching operation.’” *Id.* (citation omitted). The Examining Attorney further argues that

Applicant’s website touts the cattle ranch as a reason for which consumers seek Applicant’s offerings: “For me and my family, this is Montana perfect. It’s quiet and peaceful here. There are many choices for your second home, but where else you be a part of a 30,000 acre working cattle ranch?”

*Id.* (record citation omitted).

The Examining Attorney also points to Internet evidence “showing numerous third parties describe Applicant’s real estate development as including a cattle ranch,” *id.*, and offering “cattle-related activities at real estate developments . . . .” *Id.* at 6-7.

The Examining Attorney argues that “[t]his evidence demonstrates that consumers are so accustomed to encountering the word CATTLE used in connection with real estate developments that they would immediately, and accurately, understand Applicant’s real estate development services likewise include a property featuring domesticated animals.” *Id.* at 7.

The Examining Attorney concludes that “[t]aken together, and as demonstrated by the evidence provided by the Examining Attorney, the words CATTLE COMPANY

immediately convey a business that develops real estate, which includes nearby grazing cattle, as well as a business that domesticates animals.” *Id.* at 9.

The Examining Attorney rejects Applicant’s third-party registration evidence as evidence that CATTLE COMPANY is not merely descriptive of Applicant’s services. *Id.* at 10-11. The Examining Attorney notes that most of these registration do not contain the word CATTLE, and that several have been cancelled. *Id.*

With respect to Applicant’s previous ’129 Registration, the Examining Attorney argues that the involved applications must be examined on their own records and that she is not bound by the action of the examining attorney who examined the application that matured into the ’129 Registration. *Id.* at 11.

The Examining Attorney concludes her brief as follows:

There is sufficient evidence to support a finding that the wording CATTLE COMPANY merely describes a prominent feature and characteristic of Applicant’s real estate development services and conveys information concerning Applicant’s business structure. Applicant advertises its development as including a cattle ranch, Applicant concedes in the application records that its services are offered on a site that also includes a cattle ranch operation, and the evidence indicates purchasers would likely be aware Applicant operates the ranch. The marketplace evidence in the record also demonstrates real estate development properties, including private luxury resort properties, commonly feature cattle such that consumers would readily and accurately understand CATTLE COMPANY refers to the cattle on Applicant’s real estate development. Thus, CATTLE COMPANY is an unregistrable component of the marks pursuant to Trademark Act Sections 2(e)(1), 15 U.S.C. §1052(e)(1), and Trademark Act Section 6(a), 15 U.S.C. §1056(a).

*Id.* at 14.



## 2. Applicant

Applicant's core argument on the merits is that "[n]o disclaimer of 'CATTLE COMPANY' should be required for the Applications because the term is not merely descriptive of Applicant's real estate development services" because "the record evidence falls far short of establishing that the wording 'CATTLE COMPANY' is merely descriptive of Applicant's real estate development services in the minds of relevant consumers" and the "wording 'CATTLE COMPANY' is, instead and at most, suggestive of Applicant's Services." 9 TTABVue 11.

According to Applicant,

the Examining Attorney conflates desired features of the real estate properties resulting from Applicant's development services (*i.e.*, that the custom houses, cabins, and townhomes resulting from Applicant's Services are on the same 30,000-acre property as a separate and independent working cattle ranch), with the actual features of Applicant's development of such properties, which services are completely unrelated to and unimpacted by the cattle ranch, confusing and abstracting away from the correct descriptiveness inquiry, and significantly undermining the Examining Attorney's conclusion.

*Id.*

Applicant further argues that

perpetuated by misleading citations to immaterial and irrelevant third party usage of the wording "CATTLE" to describe disparate real estate brokerage and sale services, hotel and/or restaurant services, "dude" ranch services, cattle ranching services, and/or other unrelated services, the Examining Attorney's conclusion stands on feeble footing and cannot provide the requisite support to find "CATTLE COMPANY" "**immediately** conveys information concerning a feature, quality, or characteristic of the goods or **services for which the registration is sought.**"

*Id.* at 12 (citing *In re N. C. Lottery*, 866 F.3d 1363, 1367 (Fed. Cir. 2017)) (emphasis in bold here in italics and underscoring in Applicant’s brief).

Applicant also argues that “the fact that the mark, or portion thereof, is descriptive of a feature of **the results of using or having used a service**, merely renders it suggestive of the **services, themselves**, not descriptive, as the Examining Attorney erroneously concluded,” *id.* at 13-14 (emphasis in bold here in italics in Applicant’s brief), and that “the wording ‘CATTLE COMPANY’ does not describe Applicant’s development services, which are wholly unrelated to and unaffected by the cattle ranch located elsewhere on its more than 30,000-acre property.” *Id.* at 14. According to Applicant, “as the record evidence makes clear, Applicant does not and has not advertised its real estate **development** services as involving, including, or otherwise implicating the entirely separate cattle ranch,” *id.* (emphasis in bold here in italics in Applicant’s brief), and its “development services, and resulting luxury real estate development, are offered on just over 3,500 acres of developed and to-be developed land **completely separate from** a coexisting, independent cattle ranch on a roughly **30,000-acre property**.” *Id.* at 16 (emphasis in bold here in italics in Applicant’s brief).

Applicant attacks the Examining Attorney’s third-party Internet evidence because it “does not establish that CATTLE and COMPANY are commonly used to describe real estate development services, as opposed to types of properties, *i.e.*, cattle ranches, that can be developed (properties which the record evidence establishes Applicant does not offer).” *Id.* at 17. According to Applicant, these webpages

primarily refer to entities advertising real estate brokerage services (often dealing with brokerage of cattle ranch properties) and/or dude ranch and resort hotel services, all of which appear to include cattle ranching-related recreational services, neither of which are included in Applicant's Services nor, with respect to the latter services, are actually offered by Applicant. Use of the words "CATTLE" and/or "COMPANY" in association with real estate **sale** or **brokerage** services, or with recreational or resort services, does not show that the words are used in connection with real estate **development** services.

*Id.* at 18 (emphasis in bold here in italics in Applicant's brief).

Applicant also argues that the wording CATTLE COMPANY is incongruous in connection with the services identified in the applications, *id.* at 21, because the "wording 'CATTLE COMPANY' evokes thoughts of cattle ranching, cattle rearing, and possibly the processing of cattle into meat, leather, and other consumables," and is "reminiscent of the 'Wild West,' of cowboys and grueling work, toiling in the sun and dirt for long hours," and "[s]uch images stand in stark contrast with Applicant's luxury real estate development services" because the "activities that generally comprise real estate development services (*e.g.*, identifying and acquiring land, securing financing, obtaining surveys and permits, and construction) do not include cattle as an ingredient, quality, characteristic, function, feature, purpose, or other use of the services." *Id.* at 22. According to Applicant, the "presence of cattle elsewhere on Applicant's property cannot transform Applicant's real estate development services into cattle-based services." *Id.*

Finally, Applicant relies on third-party registrations for various real estate services, and its own cancelled '129 Registration,<sup>38</sup> as support for its argument that there is “clear doubt as to whether ‘CATTLE COMPANY’ is merely descriptive of Applicant’s Services.” *Id.* at 24. Applicant urges the Board to reverse the refusals to register based on such doubt. *Id.* at 24-25.

### **C. Analysis of Disclaimer Requirement Refusals**

The Examining Attorney bears the burden of proving that the words CATTLE COMPANY in Applicant’s mark are merely descriptive of at least one of the services identified in the applications. *See, e.g., Zuma Array*, 2022 WL 3282655, at \*5. We must resolve any doubts regarding the mere descriptiveness of the wording in Applicant’s favor. *Korn Ferry*, 2024 WL 3219482, at \*12.

#### **1. Applicant’s Reliance on the '129 Registration and Third-Party Registrations**

As discussed above, Applicant relies in part on the fact that the USPTO previously issued the '129 Registration of the composite mark shown in application Serial No. 90439338 for “real estate development services, namely, development of a private luxury resort property,” one of the two services identified in the current applications, without requiring a disclaimer of the phrase CATTLE COMPANY. In *Korn Ferry*, the applicant relied on the fact that the USPTO had “issued eight registrations for

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<sup>38</sup> In its reply brief, Applicant argues that the USPTO “issued a registration for the same mark and services in 2009,” but “did not require Applicant to disclaim exclusive rights in the word ‘CATTLE.’” 12 TTABVUE 3. Applicant further notes that the '129 Registration “was inadvertently allowed to lapse in 2020” and that the word COMPANY was disclaimed in the '129 Registration. *Id.* at 3 n.1. As noted above, Applicant offers to disclaim the word COMPANY alone in both pending applications.

Applicant’s other marks containing the word ARCHITECT without a disclaimer of that word,” *Korn Ferry*, 2024 WL 3219482, at \*5, but the Board found that this did “not entitle Applicant to a registration of the KORN FERRY ARCHITECT mark without a disclaimer.” *Id.* (citing *Am. Furniture Warehouse*, 2018 WL 1942214, at \*7). But unlike the applicant in *Korn Ferry*, Applicant relies here on the USPTO’s prior issuance of a registration of the same mark for one of the same services for which it again seeks registration in application Serial No. 90439338.<sup>39</sup>

That is a distinction without a difference in result. In *Int’l Watchman*, the applicant sought registration of the mark NATO for canopies and tents, but registration was refused under Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), based on a false suggestion of a connection with the North Atlantic Treaty Organization. One of the arguments that the applicant made against the refusal was that the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) required reversal because the applicant had previously obtained a registration of NATO for explosives and ammunition. *Int’l Watchman*, 2021 WL 5755146, at \*13. During prosecution of the application that matured into the previous registration of NATO, the examining attorney had initially refused registration based on Section 2(a), but withdrew the refusal and allowed the application. *Id.*

The Board rejected the applicant’s argument because the “allowance of a trademark application by an Examining Attorney is not a final decision on the merits

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<sup>39</sup> As noted above, the ’129 Registration did not cover the services broadly identified in the current applications as “real estate development.”

from a prior adjudication and is, therefore, not a basis for res judicata or collateral estoppel.” *Id.* The Board also held more generally that “the USPTO is not bound by a decision of a Trademark Examining Attorney who examined and allowed the application for Applicant’s previously registered mark, based on a different record.” *Id.* (citing *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016) (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement . . . even if the PTO earlier mistakenly registered a similar or identical mark suffering the same defect.”)). As the Board explained in *Int’l Watchman*, “[t]rademark rights are not static, and eligibility for registration must be determined on the basis of the facts and evidence of record that exist at the time registration is sought.” *Id.* (citing *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332 (CCPA 1982); *In re Thunderbird Prods. Corp.*, 406 F.2d 1389 (CCPA 1969)).

As discussed above, the ’129 Registration itself is deemed to be of record, but neither Applicant nor the Examining Attorney discussed the prosecution history of the application that matured into the ’129 Registration. We thus do not know why the USPTO required only a disclaimer of COMPANY, and not CATTLE COMPANY, when it issued the ’129 Registration in 2009 for “real estate development services, namely, development of as private luxury resort property.” We conclude that the USPTO’s issuance of the ’129 Registration for those services without a disclaimer of CATTLE COMPANY does not entitle Applicant ipso facto to another registration of



the composite mark for those services without a disclaimer of CATTLE COMPANY.<sup>40</sup> “We must determine whether Applicant is entitled to . . . registration[s] of [ROCK CREEK CATTLE COMPANY] without a disclaimer of [CATTLE COMPANY] based on the record[s] here and for the specific services identified in [the] application[s].” *Korn Ferry*, 2024 WL 3219482, at \*5.

## 2. The Examining Attorney’s Theory of Mere Descriptiveness

As discussed above, the Examining Attorney’s theory of mere descriptiveness is that “[t]he wording CATTLE COMPANY in the applied-for ROCK CREEK CATTLE COMPANY marks merely describes Applicant’s real estate development services . . . **because CATTLE COMPANY immediately conveys a business that develops real estate featuring nearby domesticated animals.**” 11 TTABVUE 3 (emphasis added).

The Examining Attorney relies most heavily on Applicant’s own website for proof of the mere descriptiveness of the wording CATTLE COMPANY in the context of the services identified in the applications. *Id.* at 5. Applicant argues that “extrinsic evidence that Applicant’s 30,000-acre property includes a cattle ranch cannot render the phrase ‘CATTLE COMPANY’ merely descriptive of services that on their face are completely unrelated to cattle,” 9 TTABVUE 15, but the Examining Attorney’s reliance on Applicant’s website was entirely appropriate. Applicant’s argument against the use of this “extrinsic evidence” relies on cases involving likelihood of

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<sup>40</sup> Applicant similarly cannot rely on the third-party registration in the record of a mark containing the words CATTLE CO. without a disclaimer of those words. *Korn Ferry*, 2024 WL 3219482, at \*5.

confusion refusals under Section 2(d) in which resort to extrinsic evidence regarding the actual use of marks in connection with the identified goods or services is generally prohibited, *id.* at 14-15 (citations omitted), but in descriptiveness cases, the USPTO “commonly looks to an applicant’s website when it is made of record for possible evidence of descriptive use of a proposed mark.” *In re Berkeley Lights, Inc.*, Ser. No. 88895703, 2022 WL 15733123, at \*5 (TTAB 2022). Indeed, the Federal Circuit has held that “in descriptiveness cases in which there is record evidence of the applicant’s use of the proposed mark, the Board ‘must consider [the] mark in its commercial context to determine the public’s perception.’” *Id.* at \*6 (quoting *N.C. Lottery*, 866 F.3d at 1367). “[P]roof of mere descriptiveness may originate from [an applicant’s] own descriptive use of its proposed mark, or portions thereof . . . in its materials,” *Zuma Array*, 2022 WL 3282655, at \*8 (quoting *In re Omniome, Inc.*, Ser. No. 87661190, 2019 WL 7596207, at \*6 (TTAB 2019)), and “an applicant’s own website and marketing materials may be . . . ‘the most damaging evidence’ in indicating how the relevant purchasing public perceives a term.” *Id.* (quoting *In re Mecca Grade Growers, LLC*, Ser. No. 86358219, 2018 WL 1314995, at \*11 (TTAB 2018) (citing *In re Gould Paper Corp.*, 834 F.2d 1017, 1019 (Fed. Cir. 1987)).

The record here, particularly Applicant’s website, shows that the “real estate development services, namely, development of a private luxury resort property” and “real estate development” services identified in the applications are currently rendered only at a single 30,000-acre residential community in Deer Lodge, Montana that one article in the record states contains 225 lots and cabin sites that can be

developed,<sup>41</sup> as well as several existing features, including a golf course and golf clubhouse and the working cattle ranch.<sup>42</sup> The issuance of registrations of Applicant's marks would, of course, entitle Applicant to the exclusive right to use the marks in commerce in connection with the services identified in the registrations. 15 U.S.C. § 1057(b).

The record leaves us with doubt that prospective purchasers of the identified "real estate development services, namely, development of a private luxury resort property" and "real estate development" services at the Deer Lodge development would understand the wording CATTLE COMPANY to "immediately convey[ ] a business that develops real estate featuring nearby domesticated animals." 11 TTABVue 3. The identified real estate development services are provided with respect to privately owned land located in certain portions of the Deer Lodge development, not with respect to the existing working cattle ranch at the development, and we have difficulty seeing how prospective purchasers of the identified services would understand from the wording CATTLE COMPANY that their privately owned land to be developed (as opposed to the working cattle ranch itself) "featur[es] nearby domesticated animals."

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<sup>41</sup> October 30, 2023 Denials of Request for Reconsideration at TSDR 4.

<sup>42</sup> The Examining Attorney made of record a Wikipedia entry captioned "Real estate development" that defines the term as a "business process encompassing activities that range from the renovation and re-lease of existing buildings to the purchase of raw land and the sale of developed land or parcels to others." July 19, 2021 Office Action at TSDR 11. The Wikipedia entry states that "[r]eal estate developers are the people and companies who coordinate all of these activities, converting ideas from paper to real property." *Id.*

“The Board has frequently acknowledged the ‘fine line between suggestive marks and descriptive terms,’ and given that fine line, in this case we ‘must resolve any doubt in favor of finding the [wording CATTLE COMPANY] suggestive rather than descriptive.” *Korn Ferry*, 2024 WL 3219482, at \*12 (quoting *In re Datapipe, Inc.*, Ser. No. 85173828, 2014 WL 3543477, at \*7 (TTAB 2014)). We hold on this record that the Examining Attorney did not show that the wording CATTLE COMPANY is merely descriptive of either of the services identified in the applications,<sup>43</sup> and it thus need not be disclaimed.

**Decision:** The refusals to register are reversed in both applications. The applications will be remanded to the Examining Attorney for the entry of a disclaimer of COMPANY apart from the marks as shown,<sup>44</sup> and the applications will be published for opposition once the disclaimers have been entered.

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<sup>43</sup> As Applicant acknowledges, the word COMPANY is merely descriptive of the business form of the provider of the services, and must be disclaimed.

<sup>44</sup> The disclaimers should read as follows in each application: “No claim is made to the exclusive right to use COMPANY apart from the mark as shown.”