

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 6, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Bristol-Myers Squibb Company
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Serial No. 90536031
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Xiomara Triana, Attorney of Record,
for Bristol-Myers Squibb Company.

David Collier, Trademark Examining Attorney, Law Office 109,
Michael Kazazian, Managing Attorney.

—
Before Lynch, Coggins, and Johnson,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Bristol-Myers Squibb Company (“Applicant”) seeks registration on the Principal

Register of the composite word-and-design mark  for

Printed matter, namely, brochures and pamphlets in the
field of cancer, in International Class 16; and

Medical information services, in International Class 44.¹

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¹ Application Serial No. 90536031 was filed February 19, 2021, with no specification of a filing basis, but later amended to seek registration under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce. Second March 15, 2022 Response to Office Action at 2-3 (amending basis).

The Trademark Examining Attorney refused registration under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), on the ground that the wording in Applicant's mark (i.e., A CHANCE TO LIVE LONGER) must be disclaimed because, as applied to the goods and services in the application, it is unregistrable matter under Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§ 1051-1053 & 1127, because "it is a commonplace term, message, or expression widely used by a variety of sources that merely conveys an ordinary, familiar, well-recognized concept or sentiment and would not be perceived as distinguishing the goods and/or services and identifying their source."²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for

On August 24, 2022, Applicant filed an Amendment to Allege Use (AAU), and amended the Section 1(b) filing basis to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on an allegation of first use anywhere and in commerce since at least as early as August 24, 2022. The application as originally filed also identified pharmaceutical goods in Class 5 which were deleted by Applicant after the Examining Attorney determined that the specimen accompanying the AAU did not show use of the mark for the Class 5 goods. August 31, 2022 Office Action at 2 (specimen refusal); February 27, 2023 Response to Office Action at 1 (class deleted).

According to the application: "The mark consists of the stylized words 'A CHANCE TO LIVE LONGER' in blue with a diagonal streak of gray below the 'L' in 'LIVE' and a diagonal streak of orange and blue above the 'V' in 'LIVE'." The colors blue, gray, and orange are claimed as a feature of the mark.

Citations to the prosecution record refer to the .pdf version of the TSDR system; citations to the briefs in the appeal record refer to the TTABVUE docket system. *See, e.g., In re Seminole Tribe of Fla.*, 2023 USPQ2d 631, at *1 n.1 (TTAB 2023).

² March 24, 2022 Final Office Action at 2. *See also* September 21, 2023 Denial of Reconsideration at 2 (the wording "is commonly used in applicant's particular trade or industry to impart information about the goods and would not be perceived as distinguishing the goods and identifying their source; thus[,] the wording does not function as a mark").

reconsideration, the appeal was resumed. The case is now fully briefed. We affirm the refusal to register in the absence of the required disclaimer.

I. Evidentiary Issue

Applicant objects as “irrelevant and erroneous” to the twenty-two pages of website printouts attached to the Examining Attorney’s brief. 13 TTABVUE 2 (objection); 10 TTABVUE 11-32 (Internet printouts). The objection is sustained. The website material appears to have been submitted in error and has no relevance to this appeal. We give this material no further consideration.

II. Disclaimer Requirement Refusal

Under Section 6(a) of the Trademark Act, “[t]he Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” 15 U.S.C. § 1056(a). A disclaimer is a statement that the applicant does not claim the exclusive right to use a specified element of the mark. *See* TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1213 (May 2024).

[A] disclaimer of a component of a composite mark amounts merely to a statement that, in so far as that particular registration is concerned, no rights are being asserted in the disclaimed component standing alone, but rights are asserted in the composite; and the particular registration represents only such rights as flow from the use of the composite mark.

In re La. Fish Fry Prods., 797 F.3d 1332, 116 USPQ2d 1262, 1267 (Fed. Cir. 2015) (Newman, Circuit Judge, concurring) (quoting *Sprague Elec. Co. v. Erie Resistor Corp.*, 101 USPQ 486, 486-87 (Comm’r Pats. 1954)). The purpose of a disclaimer is to permit the registration of a mark that is registrable as a whole but contains matter that

would not be registrable standing alone, without creating a false impression of the extent of the registrant's right with respect to certain elements in the mark. TMEP § 1213. An unregistrable component of a registrable mark may, for example, include matter that does not indicate source, such as commonly used, merely informational wording that fails to function as a trademark. *See* TMEP § 1213.03(a) (“Unregistrable Components” in General); TMEP § 1202.04 (Informational Matter). Failure to provide the required disclaimer constitutes a ground for refusing registration. *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1088-89 (Fed. Cir. 2005).

A. Unregistrable Matter, Failure to Indicate Source

The Trademark Act conditions the registrability of any matter on its ability to distinguish an applicant's goods and services from those of others. *In re Go & Assocs., LLC*, 90 F.4th 1354, 2023 USPQ2d 1337, at *2 (Fed. Cir. 2024) (citing 15 U.S.C. §§ 1052, 1053). Wording that does not identify and distinguish the goods and services of the applicant from those of others, as well as indicate the source of those goods and services, is subject to disclaimer. *Id.* (quoting 15 U.S.C. § 1127; and citing *Jack Daniel's Prods., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 2023 USPQ2d 677, at *5 (20203)) (cleaned up); *see also In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1264 (Fed. Cir. 2015) (“The PTO can condition the registration of a larger mark on an applicant's disclaimer of an ‘unregistrable component of a mark otherwise registrable.’”).

The more commonly a phrase is used, the less likely that it will be recognized by purchasers as source-indicating. *In re Brunetti*, 2022 USPQ2d 764, at *12 (TTAB

2022) (citing *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)); *see also In re Mayweather Promotions*, 2020 USPQ2d 11298, at *3 (TTAB 2020) (“Widely used commonplace messages are those that merely convey ordinary, familiar concepts or sentiments and will be understood as conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function.”). “Matter may be merely informational and fail to function as a trademark if it is a common term or phrase that consumers of the goods or services identified in the application are accustomed to seeing used by various sources to convey ordinary, familiar, or generally understood concepts or sentiments. Such widely used messages will be understood as merely conveying the ordinary concept or sentiment normally associated with them, rather than serving any source-indicating function.” *Brunetti*, 2022 USPQ2d 764, at *12.

The critical inquiry in determining whether matter proposed as a mark can function as a trademark or service mark is how the relevant public perceives the phrase sought to be registered. *In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 2022 USPQ2d 115, at *2 (Fed. Cir. 2022) (“In analyzing whether a proposed mark functions as a source identifier,” the Board focuses on “consumer perception.”); *Univ. of Ky. v. 40-0, LLC*, 2021 USPQ2d 253, at *25 (TTAB 2021) (citing *In re Greenwood*, 2020 USPQ2d 11439, at *2 (TTAB 2020)); *see also In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1459 (TTAB 1998) (critical element is the impression the phrase makes on the relevant public). “Where the evidence suggests that the ordinary consumer would take the words at their ordinary meaning rather than read into them

some special meaning distinguishing the goods and services from similar goods and services of others, then the words fail to function as a mark.” *Brunetti*, 2022 USPQ2d 764, at *12 (quoting *In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, at *3 (TTAB 2019)). “The totality of the evidence must be sufficient to show that the phrase sought to be registered is used in such a way that it cannot be attributed to a single source of the goods or services at issue.” *In re Black Card LLC*, 2023 USPQ2d 1376, at *3 (TTAB 2023).

Evidence of the public’s perception may come from any competent source, such as dictionaries, newspapers, and other publications. *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015). “It is well settled that articles obtained from the Internet, websites, and blog posts are admissible as evidence of information available to the consuming public and of the way in which a term is being used or would be understood by the relevant public.” *In re Wal-Mart Stores*, 129 USPQ2d 1148, 1156 (TTAB 2019). When there are no limitations on the channels of trade or classes of consumers of the goods and services identified in the application, the relevant consuming public comprises all potential purchasers of such goods and services. *Univ. of Ky.*, 2021 USPQ2d 253, at *25 (citing *Mayweather Promotions*, 2020 USPQ2d 11298, at *3).

B. The Examining Attorney’s Evidence and Argument

The Examining Attorney argues that the wording A CHANCE TO LIVE LONGER in Applicant’s mark must be disclaimed “because it is a commonly used term, message, or expression, widely used by a variety of sources that merely conveys an

ordinary, familiar, well-recognized concept or sentiment in [A]pplicant’s particular trade or industry, which imparts information about the goods and/or services, and would not be perceived as distinguishing the goods and/or services and identifying their source; thus,” he concludes, “the wording does not function as a mark.”³

To support this position, the Examining Attorney made of record evidence from more than twenty varied sources showing use of A CHANCE TO LIVER LONGER (with or without the initial “a”) in the medical context, and particularly for cancer-related information.⁴ Examples include the following (emphasis in bold added for ease of reading):

- Erleada (pharmaceutical product website) – “Clinical study results[:] . . . In mCSPC [metastatic castration-sensitive prostate cancer], ERLEADA® gave certain men **a chance to live longer.**” This source explains the results of a clinical study and advertises a “33% REDUCED RISK OF DEATH” when ERLEADA (apalutamide) prescription medication was used.⁵
- Janssen Medical Cloud (Janssen pharmaceutical company) – “Treat early to give your mHSPC [metastatic hormone-sensitive prostate cancer] patients the **chance to live longer.**” “Treating early with ERLEADA® + ADT gives your mHSPC patients the **chance to live longer.**” “Treating early with ERLEADA® + ADT delays disease progression in mHSPC patients and gives them the **chance to live longer** vs. placebo + ADT.” This source explains that use of a certain drug therapy “can extend life and offer additional clinical benefits,” provides “[r]eduction in risk of death at almost 4 years,” and may “delay progression” of cancer.⁶

³ 10 TTABVUE 3.

⁴ See 10 TTABVUE 4-7 (third-party excerpts listed in brief).

⁵ March 24, 2022 Final Office Action at 5-9 (erleada.com).

⁶ September 21, 2023 Denial of Reconsideration at 26-32 (janssenmedicalcloud.pt). “Information originating on foreign websites that are accessible to the United States public may be relevant to discern United States consumer impression of a proposed mark.” *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007) (considering foreign information sources in connection with pharmaceutical products based on the “growing” use

- Inside NOVA (news article) – “The Side-Out Foundation: Giving those with metastatic breast cancer **a chance to live longer**” (headline). This source explains that “[m]etastatic breast cancer does not have a cure. However, there have been incredible strides in helping people affected with this disease live longer lives.” “The foundation focuses on using precision medicine to help those with the disease live longer with progression-free survival. This approach gave [a founder’s mother] an extra six years of life.”⁷
- Baptist Health (blog from Baptist Health South Florida) – Fighting Back Against Ovarian Cancer: Lilimay Stokes-Prospere says of hyperthermic intraperitoneal chemotherapy (“an innovative chemotherapy approach to reduce the recurrence of ovarian cancer”) that “[t]his treatment gives me **a chance to live longer**.” This source details one patient’s fight against ovarian cancer with “the most aggressive treatment possible.”⁸
- Memorial Sloan Kettering Cancer Center (cancer treatment and research institution) – Chemotherapy for Mesothelioma. “Chemotherapy drugs we use for pleural mesothelioma are: pemetrexed (Alimta®), cisplatin (Platinol®), bevacizumab (Avastin®). Studies show that treatment with these three drugs can improve your **chance to live longer** and healthier.” This source explains chemotherapy used for mesothelioma, a cancer of thin layer of tissue covering many internal organs.⁹
- University of Colorado Department of Surgery (university tweet) – “Today we have a much better multi-modal treatment, much more effective chemotherapy, and together with surgery it gives #PancreaticCancer patients a greater **chance to live longer**.”¹⁰
- Erbitux (pharmaceutical product website) – “Combining ERBITUX with radiation therapy (RT) may offer you **a chance to live longer**.” “Results of the clinical study showed that combining ERBITUX with RT gave more people the opportunity for a longer life compared to RT alone.” This source explains the results of a clinical study about locally advanced squamous cell

of the internet “as a resource for news, medical research results, and general medical information.”).

⁷ March 24, 2022 Final Office Action at 10-15 (insidenova.com).

⁸ March 24, 2022 Final Office Action at 16-18; and September 21, 2023 Denial of Reconsideration at 104-108 (baptisthealth.net).

⁹ March 24, 2022 Final Office Action at 22-24 (mskcc.org).

¹⁰ March 24, 2022 Final Office Action at 25 (twitter.com).

carcinoma of the head and neck, and states that combining treatments “gave more people the opportunity for a longer life,” and that “[h]alf of the patients on ERBITUX with RT were still alive at 4.1 years compared to 2.4 years with RT alone, which is an improvement of about 1.6 years.”¹¹

- Kisqali (pharmaceutical product website) – “OTHER WAYS TO DESCRIBE OVERALL SURVIVAL - Live longer, More time to live, **A chance to live longer.**” This source explains that “[i]mproved overall survival is a promising result that some women with HR+, HER2- metastatic breast cancer (mBC) are seeing in clinical trials, so it’s important to understand what exactly the term means.” As demonstrated by this source, overall survival is described as “a chance to live longer.”¹²
- Xconomy (news article) – “The FDA gave Bristol an ‘accelerated’ approval, on a thinner body of evidence than the agency typically requires. In a clinical study, 13 of 109 SCLC patients (12 percent) who failed two prior treatments responded to nivolumab for a median of 17.9 months. That’s a common theme with immunotherapy: Just a fraction of patients respond, but when they do, those responses can last, giving people at least **a chance to live a longer** than previously thought possible.” This source discusses Applicant’s immunotherapy for small cell lung cancer.¹³
- Xconomy (news article) – “Immunotherapy Is Now Here For Breast Cancer. What Are Its Prospects?” “Drugs that rev up a patient’s immune system have changed how we treat cancers of the skin, lung, and more, offering people whose tumors have spread **a chance to live longer** than ever thought possible.”¹⁴
- Wall Street Journal (opinion letter) – “PBM [pharmacy-benefit managers] Practices Drive up Costs for RX Drugs.” “Most drugs merely offer hope or the possibility of life extension. All of us have a finite lifespan and drugs (or medical care) may adjust it somewhat. Interestingly, and blatantly, some new cancer drugs introduced in recent years honestly promote the marginal, uncertain benefits of ‘**a chance to live longer**’ in their television advertising.” This source opines that life-extension drugs often carry extraordinary prices that may not match their value.¹⁵

¹¹ March 24, 2022 Final Office Action at 26-27 (erbitux.com).

¹² March 24, 2022 Final Office Action at 30-33 (us.kisqali.com).

¹³ March 24, 2022 Final Office Action at 34-35 (xconomy.com).

¹⁴ March 24, 2022 Final Office Action at 39 (xconomy.com).

¹⁵ March 24, 2022 Final Office Action at 36-38 (wsj.com).

- Jevtana (pharmaceutical product website) – “JEVTANA has been shown to help men live longer . . . EXTENDS LIFE[.] JEVTANA offers men with mCRPC **a chance to live longer.**” This source advertises a prescription anti-cancer medicine developed to specifically treat advanced prostate cancer.¹⁶
- Vyxeos (pharmaceutical product website) – “VYXEOS provides **a chance to live longer** and allow you to spend less time connected to intravenous (IV) infusion line during treatment compared to standard chemotherapy treatment.” This source advertises an intravenous chemotherapy used for the treatment of certain types of acute myeloid leukemia.¹⁷
- Reid Health (blog) – “Low dose CT scans are giving patients with lung cancer a valuable head start on treatment and **a chance to live longer.**” This source explains the benefits of cancer screenings and informs the reader that “[i]f clinicians find lung cancer before it spreads, . . . patients have a 60% chance of living at least five years.”¹⁸
- The University of Texas MD Anderson Cancer Center (university news release) – “Combination immunotherapy treatment effective before lung cancer surgery.” “This study builds on the growing evidence that combination immunotherapy has a role in the neoadjuvant setting for this patient population,” said Tina Cascone, M.D., Ph.D., assistant professor of Thoracic/Head and Neck Medical Oncology. “Ultimately, we want to give patients **a chance to live longer** without their cancer returning.” This source summarizes Phase II clinical trial findings.¹⁹
- Scientific American (news article) – “Never Too Old to Fight Cancer.” “A young patient may be willing to tolerate extreme side effects and long hospitalizations for **a chance to live longer.** For an elderly patient, having to enter a nursing home because of side effects might seem like a fate worse than dying. . . . As elderly survivors like my father can attest, having lived many years in no way disqualifies you from gunning for more time.” This source examines how best to treat the soaring number of elderly patients with cancer.²⁰

¹⁶ September 21, 2023 Denial of Reconsideration at 5-12 (jevtana.com).

¹⁷ September 21, 2023 Denial of Reconsideration at 13-17 (vyxeos.com).

¹⁸ September 21, 2023 Denial of Reconsideration at 18-21 (reidhealth.org).

¹⁹ September 21, 2023 Denial of Reconsideration at 62-64 (mdanderson.org).

²⁰ September 21, 2023 Denial of Reconsideration at 67-73 (scientificamerican.com).

The Examining Attorney argues that “[g]iven the extensive informational use of this wording by third parties, the public would not view it as indicating source and would not recognize it as a trademark or service mark.”²¹

Turning to Applicant’s own specimens, the Examining Attorney argues that the wording at issue is used as “factual information based on science and medicine” as demonstrated by the surrounding explanation “with factual medical data” that “bolsters the claim of a chance to live longer” and “indicates that patients do live longer when using [Applicant’s] pharmaceuticals. As such, people would understand the wording merely to mean that the medical information provided by the applicant, relating to the applicant’s pharmaceuticals, will give people with cancer a chance to live longer than they might without the applicant’s pharmaceuticals.”²² An excerpt from Applicant’s specimens is reproduced below.²³

In a study of 793 previously untreated patients whose tumors tested positive for PD-L1, 396 were given OPDIVO + YERVOY and 397 were given platinum-based chemotherapy.

A CHANCE TO LIVE LONGER™

IN THE PRIMARY ANALYSIS (MINIMUM FOLLOW-UP OF 29.3 MONTHS)
OPDIVO + YERVOY reduced the risk of dying by 21% compared to platinum-based chemotherapy. Half of the patients on OPDIVO + YERVOY were alive at 17.1 months compared to 14.9 months on platinum-based chemotherapy.

AT 4 YEARS (FOLLOW-UP DATA)

29% of OPDIVO + YERVOY patients were alive **AND** **18%** of platinum-based chemotherapy patients were alive

The analysis at each of these time points was not designed to show a difference between OPDIVO + YERVOY and chemotherapy

OPDIVO + YERVOY will not work for everyone. Individual results may vary.

²¹ 10 TTABVUE 7.

²² 10 TTABVUE 8.

²³ August 24, 2022 Amendment to Allege Use at 10.

In this specimen excerpt, the proposed mark is preceded and followed by medical information about pharmaceuticals that “reduced the risk of dying.” The Examining attorney argues that when viewing A CHANCE TO LIVE LONGER “directly in connection with case studies that demonstrate life expectancy of patients using [Applicant’s] pharmaceuticals . . . people would understand the wording merely to mean that . . . people with cancer [will have] a chance to live longer than they might without the applicant’s pharmaceuticals.”²⁴ Evidence of public perception of a phrase may be obtained “from Applicant’s own specimen of use and any explanatory text included therein.” *In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1953 (TTAB 2018) (citing *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017)).

In addition, the Examining Attorney made of record Applicant’s press release (excerpted below) in which one medical professional is quoted using the exact wording of the proposed mark in a way that merely imparts information about Applicant’s pharmaceutical goods, and two other medical professionals advance the same idea with similar language:²⁵

Adam Lenkowsky, general manager and head, U.S., Oncology, Immunology, Cardiovascular, Bristol Myers Squibb, says “This second approval of an Opdivo + Yervoy-based combination for the first-line treatment of advanced NSCLC now gives more patients access to a dual immunotherapy approach that can be administered with or

²⁴ 10 TTABVUE 8.

²⁵ March 24, 2022 Final Office Action at 28-29 (news.bms.com), Bristol Myers Squibb press release, May 26, 2020, “U.S. Food and Drug Administration Approves Opdivo® (nivolumab) + Yervoy® (ipilimumab) Combined with Limited Chemotherapy as First-Line Treatment of Metastatic or Recurrent Non-Small Cell Lung Cancer”.

without limited chemotherapy, depending on the patient and their PD-L1 status, and the possibility of **a chance to live longer.**”

David P. Carbone, MD, PhD, CheckMate -9LA investigator and Director of the James Thoracic Oncology Center at The Ohio State University, commenting on “dual immunotherapy-based approaches in cancer and the potential impact on patients’ long-term outcomes,” says “[w]ith today’s [FDA] approval, more patients now have access to an Opdivo + Yervoy-based option and **a chance at a longer life.**”

Andrea Ferris, president and chief executive officer, LUNGeVity, says “[t]oday’s announcement is welcome news as it provides a new dual immunotherapy-based option for previously untreated patients searching for a treatment that may help **extend their lives.**”

The Examining Attorney argues that third-party use of the informational phrase A CHANCE TO LIVE LONGER referenced above, coupled with Applicant’s own use of the phrase as informational on the specimens of record, demonstrate that relevant consumers would not perceive the wording A CHANCE TO LIVE LONGER as distinguishing goods or services and identifying their source, because the wording is merely informational and commonly used in the medical field, particularly in relation to cancer treatment.²⁶

C. Applicant’s Evidence and Argument

Applicant contends that the phrase A CHANCE TO LIVE LONGER is capable of functioning as a trademark, and bases its position on three main arguments.

²⁶ 10 TTABVUE 8.

First, Applicant argues that the USPTO registered “the identical phrase A CHANCE TO LIVE LONGER” to a third party, thereby demonstrating that the phrase is capable of serving as a trademark.²⁷ In support of this argument, Applicant submitted a TSDR printout of Registration No. 6790349, issued July 12, 2022, for the standard-character mark A CHANCE TO LIVE LONGER for “veterinary liquid nutritional supplement” in Class 5.²⁸

Second, Applicant argues that the phrase A CHANCE TO LIVE LONGER is not a commonplace message and “does not merely convey an informational message.”²⁹ Instead, Applicant posits that the phrase is suggestive and aspirational. In support of this argument, Applicant submitted TESS screenshots and TSDR printouts of fifty third-party registrations for what it calls “analogous slogan marks . . . in the field of health and wellness” which “convey aspirational messages . . . like A CHANCE TO LIVE LONGER does,”³⁰ and “illustrate that the line for determining whether something is a commonplace message is . . . highly subjective.”³¹ Most of the third-party registrations do not identify medical information services, but they are related to the subject of medicine, health, or health care in some way. Examples include the following marks:³² MY BEST LIFE; MANAGING YOUR DIABETES; HELPING TO

²⁷ 8 TTABVUE 5.

²⁸ August 31, 2023 Request for Reconsideration at 33-36.

²⁹ 8 TTABVUE 7. *See also* 13 TTABVUE 6-9.

³⁰ 8 TTABVUE 7-8.

³¹ 8 TTABVUE 10.

³² *See* 8 TTABVUE 8-10 (table listing all marks); March 15, 2022 Response to Office Action at 15-48 (TESS screenshots of registrations); August 31, 2023 Request for Reconsideration at 48-87 (TSDR printouts of registrations).

CURE; BE YOUR BEST SELF; UNDERSTAND CANCER TOGETHER; LIVE BETTER, LIVE LONGER; FEEL HEALTH, LIVE LONGER; LIVE LONGER, STRONGER; LEARN TO LIVE; DECIDE TO LIVE; LOOK TO YOUR FUTURE; TAKING CONTROL OF YOUR DIABETES; TRANSFORMING CANCER OUTCOMES; BUILD A BETTER YOU; MAKE YOU WELL; WE'RE OUTSMARTING CANCER; and LIVE MORE, AGE SMARTER.



Applicant also submitted Internet evidence of third-party uses, within text, of the wording of eleven of the registered third-party marks. Applicant argues that such examples of contextual use are similar to what the Examining Attorney introduced and relied on for the disclaimer requirement of A CHANGE TO LIVE LONGER, and demonstrate “that the Office did not consider these phrases to be merely informational” and it would therefore be “inconsistent treatment to refuse registration here.” The marks with examples of Internet uses are:³³ COMPANION IN CARE, MANAGING YOUR DIABETES, MY BEST LIFE, HELPING TO CURE, TRANSFORMING CANCER OUTCOMES, WE AM TO CURE, IT'S TIME TO GET THE FACTS, MAKE YOU WELL, A PATH TO LIVING, KNOW FOR SURE, and MY LEUKEMIA JOURNEY.

Third, Applicant argues that it uses A CHANCE TO LIVE LONGER in a manner that projects trademark and service mark significance.³⁴ In support of this argument,

³³ 8 TTABVUE 17 (argument). *See also* 8 TTABVUE 11-17 (table listing marks and textual uses); March 15, 2022 Response to Office Action at 49-90 (uses); August 31, 2023 Request for Reconsideration at 90-323 (registrations and uses).

³⁴ 8 TTABVUE 18.

Applicant points to the way the pharmaceutical brand name OPDIVO appears on the specimens along with the proposed mark. As Applicant observes, the “specimen shows that the slogan A CHANCE TO LIVE LONGER is presented in the same stylization and colors, and with the same embedded diagonal-streak design element, as the pharmaceutical brand name to which it relates.”³⁵ Specifically, Applicant refers to the

composite word-and-design mark  which appears on the same specimen with its proposed mark .³⁶ Applicant contends that “[t]he consistency in the brand presentation is calculated to project to consumers that the mark is an indicator of a single source.”³⁷

D. Analysis of the Purchasing Public’s Understanding of A CHANCE TO LIVE LONGER

To determine what the record reveals about the relevant public’s understanding of this wording requires us first to define the relevant public. *See, e.g., Brunetti*, 2022 USPQ2d 764, at *36. The relevant consumer refers to the purchasing or consuming public for the identified goods or services. *See, e.g., In re Team Jesus LLC*, 2020 USPQ2d 11489, at *2 (TTAB 2020). Applicant’s brochures and pamphlets are limited to “the field of cancer,” but Applicant’s medical information services are not limited to any particular medical field or subject. Accordingly, the relevant public for Applicant’s goods comprises all potential consumers interested in brochures and

³⁵ 8 TTABVUE 18.

³⁶ *See* August 24, 2022 Amendment to Allege Use at 9.

³⁷ 8 TTABVUE 18.

pamphlets about cancer, and the relevant public for Applicant's services comprises all potential consumers interested in any medical information.

As discussed above, evidence of the relevant purchasing public's perception of the phrase A CHANCE TO LIVE LONGER may come from any competent source, including Applicant's own materials. *N.C. Lottery*, 123 USPQ2d at 1709-10. We look to the specimens and any other evidence of record showing how the phrase is actually used in the marketplace. *In re Tex. with Love, LLC*, 2020 USPQ2d 11290, at *2 (TTAB 2020) (quoting *Eagle Crest*, 96 USPQ2d at 1229, and noting that "widespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message.").

The commercial context in this appeal shows that consumers of Applicant's goods and services would immediately understand the informational meaning of the commonly used phrase A CHANCE TO LIVE LONGER. The evidence adduced by the Examining Attorney suggests that an ordinary consumer of Applicant's goods and services (i.e., a consumer interested in brochures and pamphlets about cancer, or interested in any medical information) would take the words A CHANCE TO LIVE LONGER at their ordinary meaning rather than read into them some other meaning that would distinguish the goods and services from similar goods and services of others. *See Brunetti*, 2022 USPQ2d 764, at *12; *Ocean Tech.*, 2019 USPQ2d 450686, at *3. Indeed, according to Applicant's own employee Adam Lenkowsky (general manager and head, U.S., Oncology, Immunology, Cardiovascular, at Bristol Myers Squibb), Applicant's cancer-related dual immunotherapy can offer patients "the

possibility of a chance to live longer.”³⁸ *See Wal-Mart Stores*, 129 USPQ2d at 1153-56 (record included evidence of the applicant’s own use of the phrase which informed consumer perception).

Against this backdrop, Applicant’s specimens show that prospective consumers of Applicant’s goods and services will understand the phrase A CHANCE TO LIVE LONGER to refer to the possibility that cancer patients may live longer when using certain treatments that Applicant describes as “FDA approved” and have been demonstrated to “reduce[] the risk of dying.”³⁹ The informational text explaining the nature of certain medication and clinical trial results indicates that consumers would understand that when the phrase A CHANCE TO LIVE LONGER is used in the composite mark, it means that the immunotherapy combination may offer a cancer patient the possibility of living longer than the patient might expect without the treatment. The specimen even describes how the medications work to create that possibility of living longer: “Your immune system activates T cells to protect you from foreign threats, including cancer. . . . With OPDIVO + YERVOY, more active T cells may be able to help seek and destroy cancer cells. Some active T cells generated with YERVOY can become memory T cells, which may help recognize and defend against these threats in the future.”⁴⁰ *See, e.g., N.C. Lottery*, 123 USPQ2d at 1710

³⁸ March 24, 2022 Final Office Action at 28 (Bristol Myers Squibb press release).

³⁹ *See, e.g.*, August 24, 2022 Amendment to Allege Use at 9 (specimen, conveying information about “An FD-approved chemo-free combination of 2 immunotherapies” which “reduced the risk of dying by 21% compared to platinum-based chemotherapy.”).

⁴⁰ August 24, 2022 Amendment to Allege Use at 13.

(commercial context demonstrated consumers would immediately understand the proposed mark where explanatory text accompanying mark was uncomplicated).

The Internet evidence made of record by the Examining Attorney demonstrates common use of the phrase A CHANCE TO LIVE LONGER in context with information about medicine and cancer, and shows that the same meaning of this phrase (i.e., the possibility of living longer) always attaches when informing consumers about pharmaceutical products and procedures related to cancer. When assessing this evidence, our focus is not only on common use of the phrase, but on whether the various uses inform how the phrase would be perceived by consumers of the identified goods or services. *See, e.g., Brunetti*, 2022 USPQ2d 764, at *36 (“Mere commonality . . . is not the test.”); *Wal-Mart Stores*, 129 USPQ2d at 1156 (evidence of widespread usage of the proposed mark across various industries, media articles, and blogs, demonstrated a common meaning applicable to the identified services); *Ocean Tech.*, 2019 USPQ2d 450686, at *3. Here, the Examining Attorney’s evidence is “competent to suggest that upon encountering [the proposed phrase], prospective purchasers familiar with such widespread non-trademark use are unlikely to consider it to indicate the source of Applicant’s goods [and services].” *In re DePorter*, 129 USPQ2d 1298, 1302 (TTAB 2019) (evidence of third-party use demonstrated a consistent meaning related to the Chicago Cubs’ World Series appearance and win after a 108-year drought). This is borne out in Applicant’s specimens in which the wording A CHANCE TO LIVE LONGER conveys its usual meaning, and nothing more.

Applicant's evidence and arguments in response to the Examining Attorney's evidence do not rebut the showing that the phrase A CHANCE TO LIVE LONGER is commonly used in such a way that it cannot be attributed to a single source of the goods or services at issue.

Third-party Registration No. 6790349 for the standard-character mark A CHANCE TO LIVE LONGER, identifying a veterinary nutritional supplement, does not persuade us that the same phrase, when used with medical and cancer-related goods and services identified in the application, would not be perceived as a common, informational phrase by the relevant consumers. Applicant's goods and services are intended for humans seeking medical or cancer information, and we must apply the law to the facts in every case before us, irrespective of what happened to other applications that may have registered. *Team Jesus LLC*, 2020 USPQ2d 11489, at *18. "Our primary reviewing court has long and consistently warned against making factual findings in cases based on allowances by individual examining attorneys in prior cases." *Wal-Mart Stores*, 129 USPQ2d at 1159 (citing *In re Harris-Intertype Corp.*, 518 F.2d 629, 186 USPQ 238, 240 (CCPA 1975), and collecting cases).

Applicant's reliance on third-party registrations, and contextual uses, of different marks consisting of what Applicant calls "aspirational" messages or phrases, is similarly unavailing. The registrations and uses do not undercut the Examining Attorney's evidence of the public perception and common informational meaning of

the phrase A CHANCE TO LIVE LONGER. As applicant recognizes,⁴¹ “[e]ven if some prior registrations had some characteristics similar to [Applicant’s] application, the PTOs allowance of such prior registrations does not bind the board or this court.” *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). “We must assess registrability in each case before us on its own evidentiary record.” *Wal-Mart Stores*, 129 USPQ2d at 1160. Here, our analysis must focus on the particular wording in Applicant’s proposed mark and its use in the marketplace rather than on registrations for other marks conveying different messages, especially when the evidence demonstrates that the phrase A CHANCE TO LIVE LONGER is commonly used in the marketplace to convey a particular informational message. Accordingly, we find that the existence of these third-party registrations (and uses) for different “aspirational” marks for sometimes different services lacks probative force as to consumer perception of A CHANCE TO LIVE LONGER for the applied-for goods and services in light of the specific evidentiary record in this case. *Wal-Mart Stores*, 129 USPQ2d at 1160.


Finally, the fact that Applicant may display A CHANCE TO LIVE LONGER in the manner of a trademark or service mark does not require a different result. The Examining Attorney deemed the proposed mark, with Applicant’s display of stylization and a design element, registrable, but only with a disclaimer of the informational wording. Also, a different result is not required because the question is

⁴¹ 8 TTABVUE 10 (“These third-party cases are not being submitted to serve as binding precedent.”).

whether the proposed phrase is such a commonplace expression that it would not be perceived a source indicator, not the particular mode or manner in which the mark is presented. *Cf. D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (“The fact that Respondent has sometimes displayed I♥DC on hangtags and labels, in a non-ornamental manner that is conventional for the display of trademarks, does not require a different result.”); *Team Jesus*, 2020 USPQ2d 11489, at *5 (same) (quoting *D.C. One Wholesaler*, 120 USPQ2d at 1716).

The totality of the evidence before us in this appeal is sufficient to show that the phrase A CHANCE TO LIVER LONGER is commonly used in such a way that it cannot be attributed to a single source of the goods or services at issue, and therefore must be disclaimed in Applicant’s composite mark. *See Black Card LLC*, 2023 USPQ2d 1376, at *3.

III. Decision

The refusal to register Applicant’s composite mark  based on Applicant’s failure to comply with the requirement under Section 6(a) of the Trademark Act for a disclaimer of the wording A CHANCE TO LIVE LONGER is affirmed. However, Applicant may submit to the Board, within thirty days of the mailing date of this decision, a disclaimer of A CHANCE TO LIVE LONGER to satisfy

the requirement. *See* Trademark Rule 2.142(g), 37 C.F.R. § 2.142(g); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1218 (2024).⁴²

⁴² The disclaimer should take the following form: “No claim is made to the exclusive right to use A CHANCE TO LIVE LONGER apart from the mark as shown.” *See* TMEP § 1213.08(a)(i).