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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Atara Biotherapuetics, Inc.
v.
Allogene Therapeutics, Inc.

Opposition No. 91247175
Opposition No. 91247177

Jesse A. Salen of Sheppard Mullin Richter & Hampton, LLP,
for Atara Biotherapeutics, Inc.

Thomas L. Holt and Jacob P. Dini of Perkins Coie LLP,
for Allogene Therapeutics, Inc.

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

Opinion by Bergsman, Administrative Trademark Judge:

Allogene Therapeutics, Inc. ("Applicant") seeks registration on the Principal Register of the marks ALLOCAR T (standard characters) and AUTOCAR T (standard characters) both for "pharmaceutical preparations, namely, preparations for use in

the treatment of cancer and tumors; pharmaceutical and biological preparations for immunotherapy, including T Cell therapy," in International Class 5.[1]

Atara Biotherapeutics, Inc. ("Opposer") filed Notices of Opposition to the registration of Applicant's marks under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). Opposer pleaded the following allegations:[2]

- Opposer "is a leading off-the-shelf, allogeneic [and autologous] T-cell immunotherapy company developing novel treatments for patients with cancer, autoimmune and viral diseases";[3]
- Opposer "together with others in the pharmaceutical industry, often uses [sic] the terms 'CAR T," "allogeneic CAR T' [or autologous CAR T], and "allo CAR T" [or auto CAR T] to describe its allogeneic [autologous] CAR T immunotherapies, cell lines, and technology";[4]
- The terms allo-CAR-T and auto-CAR-T have been used in literature to describe immunotherapies based on allogeneic and autologous CAR-T cells;[5]

[1] Application Serial No. 88117993 for the mark ALLOCAR T (Opposition No. 91247175) and application Serial No. 88117972 for the mark AUTOCAR T (Opposition No. 91247177) were filed on September 14, 2018, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's assertion of a bona fide intention to use the marks in commerce.

[2] Opposer also alleges that Applicant's marks are generic and should be refused registration under Section 23 of the Trademark Act, 15 U.S.C. § 1091).

[3] Notices of Opposition ¶ 2 (1 TTABVUE 4).

[4] Notices of Opposition ¶ 4 (1 TTABVUE 4).

[5] Notices of Opposition ¶ 5 (1 TTABVUE 4).

- Applicant intends to use the terms alloCAR T and autoCAR T to describe therapies and pharmaceutical preparations that incorporate or use allogeneic or autologous CAR T cells;[6] and

- Applicant uses the terms alloCAR T and autoCAR T to describe a quality or characteristic of its goods, namely, that such goods employ allogeneic or autologous chimeric antigen receptor T cells (CAR T).[7]

Applicant, in its Answers, denies the salient allegations of the Notices of Opposition.

In its October 31, 2019 order, the Board granted Applicant's motion to consolidate the oppositions (9 TTABVUE).[8] Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings. A copy of the decision shall be placed in each proceeding file.

When we cite to the record, we refer to the record in Opposition No. 91245175 in TTABVUE, the Board's online docket system by docket entry and page number (e.g., 32 TTABVUE 19).

[6] Notice of Opposition ¶ 13 (1 TTABVUE 7) (Opposition No. 91247175); Notice of Opposition ¶ 12 (1 TTABVUE 7) (Opposition No. 91247177).

[7] Notice of Opposition ¶ 14 (1 TTABVUE 9) (Opposition No. 9147175); Notice of Opposition ¶ 13 (1 TTABVUE 7) (Opposition No. 91247177).

[8] 14 TTABVUE.

I. Procedural background

On December 11, 2020, Opposer filed a motion for summary judgment.[9] On June 1, 2021, the Board denied the motion for summary judgment and recommended the parties consider the Accelerated Case Resolution process.[10]

On August 12, 2021, the parties filed a stipulation to resolve the proceedings through the Accelerated Case Resolution Process.[11] The parties further agreed to the following:

- The testimony and evidence the parties introduced in support and against Opposer's motion for summary judgment is part of the record for the final decision;
- The parties contemporaneously may introduce a supplemental declaration of one additional fact witness;
- After the introduce their supplemental declarations, each party contemporaneously may introduce a rebuttal declaration; and
- The parties will produce for deposition any witness who introduces a supplemental or rebuttal declaration.[12]

II. Evidentiary Issue

Before proceeding to the merits of the Opposer's claim, we address an evidentiary matter. Opposer, in an appendix to its ACR Rebuttal Brief, lodged a number of

[9] 28 TTABVUE.

[10] 33 TTABVUE 9.

[11] 35 TTABVUE.

[12] 35 TTABVUE 4.

objections to Applicant's testimony and evidence.[13] None of Applicant's testimony or other evidence Opposer seeks to exclude is outcome determinative. Board proceedings are heard by Administrative Trademark Judges, not lay jurors who might be easily misled, confused, or prejudiced by flawed evidence. *Cf. Harris v. Rivera*, 454 U.S. 339, 346 (1981) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."). Given these facts, coupled with the number of objections, we see no compelling reason to discuss the specific objections. Suffice it to say, we have considered all of the testimony and exhibits submitted by both parties. In doing so, we have kept in mind the various objections raised by Opposer and we have accorded whatever probative value the subject testimony and evidence merit. *See Krause v. Krause Publ'n Inc.*, 76 USPQ2d 1904, 1907 (TTAB 2005) ("[w]here we have relied on testimony to which respondent objected, it should be apparent to the parties that we have deemed the material both admissible and probative to the extent indicated in the opinion.").

III. The record

The record includes the pleadings, and under Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application files, as well as the following materials:[14]

[13] 40 TTABVUE 12-27.

[14] Therefore, it was not necessary for Opposer and Applicant to introduce Applicant's applications. 28 TTABVUE 30-34 and 64-79 and 30 TTABVUE 39-106.

In addition, "[w]hen evidence has been made of record by one party in accordance with these rules, it may be referred to by any party for any purpose permitted by the Federal Rules of Evidence." Trademark Rule 2.122(a), 37 C.F.R. § 2.122(a). Thus, it is not necessary for the parties to introduce testimony and evidence multiple times (e.g., multiple copies of the Bernatchez Expert Report).

A. Opposer's testimony and evidence in support of its motion for summary judgment

- Excerpts from the discovery deposition of Christine Cassiano (July 22, 2020), Applicant's Chief Communications Officer;[15]
- Applicant's responses to Opposer's amended first set of amended interrogatories (Nos. 1-23);[16]
- Opposer's expert report of Dr. Scott R. Burger, M.D.;[17]
- Applicant's expert report of Dr. Chantale Bernatchez, Ph.D.;[18]
- Excerpts from the discovery deposition of Dr. Chantale Bernatchez (October 2, 2020);[19]
- Copies of scientific articles;[20]
- Excerpts from the discovery deposition of Dr. Scott R. Burger (August 20, 2020);[21]

The parties could also have introduced a cleaner more concise record by introducing one copy of the Cassiano, Kresnak, Zamorodian, and Bernatchez discovery depositions instead of multiple copies multiple times.

[15] 28 TTABVUE 37-62.

[16] 28 TTABVUE 81-104 and 309-332. Opposer introduced Applicant's interrogatory responses twice. In addition, Applicant introduced Applicant's interrogatory responses a third time. 30 TTABVUE 530-553.

[17] 28 TTABVUE 106-155.

[18] 28 TTABVUE 157-203. Applicant introduced the expert report of Dr. Bernatchez a second time at 30 TTABVUE 167-213 and third time at 39 TTABVUE 133-179.

Dr. Bernatchez is an expert in the fields of immunology, tumor immunology, immunotherapy of cancer, T-cell biology, T-cell receptor signaling, and T-cell therapy. Bernatchez Expert Report ¶ 18 (39 TTABVUE 142).

[19] 28 TTABVUE 205-231.

[20] 28 TTABVUE 233-265 and 278-303.

[21] 28 TTABVUE 267-276.

- A document posted on Applicant's website <allogene.com> "Science" page;[22] and
- Declaration of Mark Kresnak, Opposer's Vice President of Intellectual Property.[23]

B. Applicant's testimony and evidence in opposition to the motion for summary judgment

- Excerpt from Applicant's website <allogene.com>;[24]
- Excerpts from the discovery deposition of Christine Cassiano (July 22, 2020);[25]
- Excerpt from Applicant's website "Investor Relations" page;[26]
- Copies of scientific articles;[27]
- Excerpt from Applicant's website's "Pipeline" page;[28]
- Excerpts from third-party websites;[29]
- Excerpt from Opposer's website <atarabio.com>;[30]
- Excerpt from Applicant's website's "About us" page;[31]

[22] 28 TTABVUE 305-307. Applicant introduced this document a second time at 30 TTABVUE 143-145.

[23] 28 TTABVUE 333-335.

[24] 30 TTABVUE 35-37.

[25] 30 TTABVUE 108-141.

[26] 30 TTABVUE 147-150. Applicant introduced a more extensive copy of this document at 30 TTABVUE 660-722 and a third copy at 39 TTABVUE 128-131.

[27] 30 TTABVUE 152-156, 215-300 and 638-647. Applicant introduced the article posted at 30 TTABVUE 152-156, a second time at 30 TTABVUE 633-637, and a third time at 40 TTABVUE 94-98.

[28] 30 TTABVUE 158-165.

[29] 30 TTABVUE 302-410, 511-528, and 568-624; 31 TTABVUE 110-194.

[30] 30 TTABVUE 412-506.

[31] 30 TTABVUE 508-509.

- Applicant's responses to Opposer's amended first set of interrogatories;[32]

- Excerpt from the National Cancer Institute Dictionary of Cancer Terms <cancer.gov/publications/dictionaries/cancer-terms>;[33]

- Excerpt from Applicant's website's "Science" page;[34]

- Excerpt from Applicant's website's "News Center" page;[35]

- Excerpt from Applicant's Twitter account;[36]

- Excerpt from Applicant's LinkedIn account;[37] and

- Online news articles.[38]

C. Opposer's reply testimony and evidence in support of its motion for summary judgment[39]

- Excerpts from the discovery deposition of Dr. Chantale Bernatchez (October 2, 2020) that supplement the previous excerpts from her deposition;[40]

- An excerpt from Applicant's website's "About us" page that is different from the excerpt introduced by Applicant;[41] and

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[32] 30 TTABVUE 530-553.

[33] 30 TTABVUE 555-566.

[34] 30 TTABVUE 626-632 and 648-649.

[35] 30 TTABVUE 650-659.

[36] 31 TTABVUE 3-66.

[37] 31 TTABVUE 67-108.

[38] 31 TTABVUE 196-274.

[39] Although Opposer's reply testimony and evidence was stricken by the Board for exceeding the page limit, 33 TTABVUE 2, the parties stipulated that the reply is part of the record. 35 TTABVUE 3.

[40] 32 TTABVUE 21-29.

[41] 32 TTABVUE 31-32.

- A copy of one of Applicant's marketing brochures.[42]

D. Opposer's ACR testimony and evidence to supplement the summary judgment record

- Excerpts from the discovery deposition of Christine Cassiano (December 21, 2021);[43]

- Excerpts from the discovery deposition of Mark Kresnak (December 8, 2021);[44]

- Excerpts from the discovery deposition of Nazy Zomorodian, Director of Genitourinary Clinical Trials Unit and Assistant Professor and Nurse Practitioner for the Department of Urology at the David Geffen School of Medicine at the University of California, Los Angeles, and a consultant for Applicant (December 3, 2021);[45]

- Testimony declaration of Mark Kresnak;[46] and

- "Rebuttal testimony declaration of Mark Kresnak."[47]

E. Applicant's ACR testimony and evidence to supplement its summary judgment record

- "Rebuttal declaration of Christine Cassiano";[48]

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[42] 32 TTABVUE 34-35.

[43] 38 TTABVUE 20-39.

[44] 38 TTABVUE 41-59.

[45] 38 TTABVUE 61-80. Nazy Zamorodian has been trained to administer CAR T therapies in both clinical trial and commercially approved settings with direct experience with cancer patients who are candidates to receive immune oncology treatments. Zamorodian Supplemental Decl. ¶ 4 (39 TTABVUE 89).

[46] 38 TTABVUE 81-295.

[47] 38 TTABVUE 296-299.

[48] 39 TTABVUE 21-43.

- Excerpts from the discovery deposition of Mark Kresnak (December 8, 2021);[49]
- Excerpts from the discovery deposition of Christine Cassiano (December 21, 2021);[50]
- "Supplemental declaration of Nazy Zamorodian";[51]
- Excerpts from the discovery deposition of Christine Cassiano (July 22, 2020);[52]
- Excerpts from the discovery deposition of Chantale Bernatchez (October 2, 2020);[53] and
- A copy of the FDA "Informed Consent Draft Guidance for IRBs, Clinical Investigators, and Sponsors" (fda.gov/regulatoary-information/).[54]

F. Opposer's Rebuttal ACR testimony and evidence to supplement the summary judgment record

- Excerpts from the discovery deposition of Nazy Zamorodian.[55]

IV. Entitlement to a statutory cause of action

To establish entitlement to a statutory cause of action under Sections 13 or 14 of the Trademark Act, a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, *3 (Fed. Cir. 2020); *see also*

[49] 39 TTABVUE 46-70.
[50] 39 TTABVUE 73-86.
[51] 39 TTABVUE 88-92.
[52] 39 TTABVUE 101-126.
[53] 39 TTABVUE 181-190.
[54] 39 TTABVUE 191-241.
[55] 40 TTABVUE 32-43.

Empresa Cubana Del Tabaco v. Gen. Cigar Co., 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

It is sufficient, for purposes of entitlement to a statutory cause of action under Section 2(e)(1), that the opposer plead and prove that it is engaged in the manufacture or sale of services similar or closely related to those of the applicant (i.e., is in a position to use the involved alleged merely descriptive term to describe its services). *DeWalt, Inc. v. Magna Power Tool Corp.,* 289 F.2d 656, 129 USPQ 275, 280 (CCPA 1961) (entitlement to a statutory cause of action established where an opposer "is one who has a sufficient interest in using the [allegedly] descriptive term in its business."); *Kellogg Co. v. Gen. Mills Inc.*, 82 USPQ2d 1766, 1767 (TTAB 2007) (acknowledging that a commercial interest in an allegedly descriptive term is sufficient to establish standing); *James River Petroleum Inc. v. Petro Stopping Ctrs. L.P.,* 57 USPQ2d 1249, 1251 (TTAB 2000); *Mars Money Sys. v. Coin Acceptors, Inc.*, 217 USPQ 285, 287 (TTAB 1983).

Opposer is an immunotherapy company that develops treatments for patients with cancer, autoimmune, and viral diseases, including chimeric antigen receptor T-cell allogeneic and autologous immunotherapies.[56] Since 2014, Opposer has partnered with various medical institutions such as Memorial Sloan Kettering Cancer Center and the Moffitt Cancer Center to research and develop allogeneic and

[56] Kresnak Decl. ¶ 2 (38 TTABVUE 81-82).

autologous CAR T cell therapies for the treatment of cancers and persistent viral infections.[57] Opposer has numerous allogeneic and autologous CAR T therapies in clinical development.[58] It plans to use the terms "allo CAR T" and "auto CAR T" to describe its allogeneic and autologous immunotherapies.[59]

This testimony is sufficient to prove Opposer is entitled to a statutory cause of action. In addition, Applicant did not challenge Opposer's entitlement to bring these oppositions.

V. Whether Applicant's marks are 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 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

[57] Kresnak Decl. ¶ 4 (38 TTABVUE 82).

[58] Kresnak Decl. ¶ 5 (38 TTABVUE 82).

[59] Kresnak Decl. ¶¶ 2 and 5 (38 TTABVUE 81-83).

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)).

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.

> If one must exercise mature thought or follow a multi-stage reasoning process in order to determine what characteristics the term identifies, the term is suggestive rather than merely descriptive.

In re Tennis in the Round, Inc., 199 USPQ 496, 497 (TTAB 1978).

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. The issue before us is whether consumers perceive the terms ALLOCAR T and AUTOCAR T to be abbreviations for "Allogeneic CAR T" and "Autologous CAR T" therapies.

"A word, term, or letters that are a recognized abbreviation for the goods or services in the application also is merely descriptive." *In re BetaBatt, Inc.*, 89 USPQ2d 1152, 1155 (TTAB 2008). *See also Foremost Dairies, Inc. v. Borden Co.*, 156 USPQ 153, 154 (TTAB 1967); *Calgon Corp. v. Hooker Chem. Corp.*, 151 USPQ 359, 360 (TTAB 1966). However, not all abbreviations are necessarily merely descriptive.

> While each case must be decided on the basis of the particular facts involved, ... as a general rule, initials cannot be considered descriptive unless they have become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith.

Modern Optics, Inc. v. Univis Lens Co., 234 F.2d 504, 110 USPQ2 293, 295 (CCPA 1956).

Accordingly, for an abbreviation to be merely descriptive of an applicant's goods or services, the Board has to find the following:

1. The abbreviation is generally understood to be a shortened form for certain words in the relevant field;

2. The words represented by the abbreviation are merely descriptive of the goods or services listed in the application; and

3. A relevant consumer viewing the abbreviation in connection with the applicant's goods or services would recognize it as such.

BetaBatt, Inc., 89 USPQ2d at 1154 (citing *In re Harco Corp.*, 220 USPQ 1075, 1076 (TTAB 1984)).

B. Facts

Allogeneic CAR T and Autologous CAR T are "new generation" immunotherapies for blood cancer and solid tumors.[60] CAR T cells are "chimeric antibody T cells."[61] "A CAR is a chimeric antigen receptor."[62] "Chimeric antigen receptor-T-cell (CAR T-cell) therapy is a type of gene-modified cell therapy in which immune cells known as T-cells … are genetically altered to make them more effective at identifying and killing tumor cells."[63]

Autologous CAR T cells are produced from a patient's own body cells and are given back to the patient.[64] Allogeneic CAR T cells are produced from third-party healthy

[60] Zamorodian Discovery Dep. (December 3, 2021), p. 10 (40 TTABVUE 41).

[61] Zamorodian Discovery Dep. (December 3, 2021), p. 10 (40 TTABVUE 41).

[62] Kresnak Discovery Dep. (December 8, 2021), p. 26 (39 TTABVUE 53); Bernatchez Discovery Dep. (October 2, 2020), p. 14 (39 TTABVUE 190); Zamorodian Discovery Dep. (December 3, 2021), p. 68 (39 TTABVUE 75).

[63] Burger Expert Report ¶ 34 (28 TTABVUE 116).

[64] Zamorodian Discovery Dep. (December 3, 2021), pp. 10-11 (40 TTABVUE 41-42); Cassiano Rebuttal Testimony Decl. ¶ 5 (39 TTABVUE 22); Kresnak Discovery Dep. (December 8, 2021), p. 27 (39 TTABVUE 54); Cassiano Discovery Dep. (July 22, 2020), p. 64 (39 TTABVUE 124); Bernatchez Expert Report ¶ 35 (39 TTABVUE 145); Burger Expert Report ¶ 30 (28 TTABVUE 114) ("Because the patient's cells are used, autologous products are compatible with the patient's immune system.").

donors and may be given to any patient.[65] CAR T cells were used in lab experiments as early as 2010 and were given to patients beginning in 2012.[66]

Allogeneic and autologous CAR T therapies are administered in highly specialized academic centers and hospitals because they are intravenously administered in a controlled environment to monitor for side effects.[67]

> Because auto CAR T and allo CAR T therapies are exceptionally complex living therapies. They're living cells. And for allo CAR T therapies, a hospital -- a physician in a hospital must do HLA typing of the patient and must compare the HLA profile of the patient to the allo CAR T cells that are available for treatment of the patient and the physician must make a determination based upon HLA matching and the percentage of HLA matching between the cell line and the patient as to which individual allo CAR cell is most appropriate for administration to that particular patient. That is a capability that is only available in highly specialized academic centers and hospitals.[68]

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[65] Zamorodian Discovery Dep. (December 3, 2021), pp. 10-11 (40 TTABVUE 41-42); Cassiano Rebuttal Testimony Decl. ¶ 4 (39 TTABVUE 22); Kresnak Discovery Dep. (December 8, 2021), p. 27 (39 TTABVUE 54); Bernatchez Expert Report ¶ 35 (39 TTABVUE 145); Burger Expert Report ¶ 31 (28 TTABVUE 115) ("In allogeneic cell therapy, a healthy donor serves as the cell source.").

[66] Zamorodian Discovery Dep. (December 3, 2021), p. 12 (40 TTABVUE 43).

[67] Kresnak Discovery Dep. (December 8, 2021), pp. 39-40 (39 TTABVUE 66-67); Zamorodian Supplemental Testimony Decl. ¶ 6 (39 TTABVUE 90).

[68] Kresnak Discovery Dep. (December 8, 2021), p. 39 (39 TTABVUE 66). *See also* Zamorodian Supplemental Testimony Decl. ¶ 6 (39 TTABVUE 90) (CAR T therapy administration centers require particular storage capabilities to store the CAR T cells and special equipment to manage side effects); Cassiano Discovery Dep. (July 22, 2020), p. 47 (39 TTABVUE 114) ("[C]ell therapy is a living, breathing product."); Zamorodian Discovery Dep. (December 3, 2021), p. 54 (38 TTABVUE 67) (CAR T therapies have "high profile side effects" that are treated in intensive care units) and p. 60 (39 TTABVUE 69) (CAR T therapy products are frozen and have to be thawed before administration); Bernatchez Discovery Dep. (October 2, 2020), p. 29 (32 TTABVUE 29) (the stem cell transplant or the cell therapy unit receives the cell therapy treatment and those units administer the treatment).

Applicant "intends to market its allogeneic CAR T therapies to cancer patients, oncologists, and other medical professionals."[69] Applicant and other drug companies market directly to patients and their caregivers to educate them about the therapies by providing accurate information with terminology they can understand.[70] Likewise, Opposer intends to market to hospitals, physicians and oncologists to make them aware of Opposer's autologous and allogeneic CAR T therapies.[71]

Only a small subset of patients recognize CAR T as an immunotherapy for cancer treatment.[72] Therefore, according to Opposer, the "average purchaser" for its allogeneic and autologous CAR T therapies is the person making the determination whether a patient is amenable to treatment with the CAR T therapy.[73]

> So in this case, it will be a physician who will make the final call as to whether the patient will be prescribed and will be treated with the particular allo CAR T or auto CAR T product. So that's what I mean by the fact that the

[69] Cassiano Rebuttal Testimony Decl. ¶ 7 (39 TTABVUE 22). *See also* Cassiano Discovery Dep. (December 21, 2021), p. 182 (39 TTABVUE 85).

[70] Cassiano Rebuttal Testimony Decl. ¶ 8 (39 TTABVUE 22-23).

[71] Kresnak Discovery Dep. (December 8, 2021), p. 34 (39 TTABVUE 61). Even after a drug receives FDA approval, Opposer will continue to market it to researchers because FDA approval is applicable to a single therapeutic indication but there may other therapeutic indications that fall outside of the scope of the approval. Kresnak Discovery Dep. (December 8, 2021), p. 36 (39 TTABVUE 63).

[72] Zamorodian Discovery Dep. (December 3, 2021), pp 62 and 65-66 (38 TTABVUE 71 and 74-75).

[73] Kresnak Discovery Dep. (December 8, 2021), p. 37 (39 TTABVUE 64). Opposer discounts the entity actually paying for the therapy as an "average purchaser" because in almost all cases that will be an insurance company. Kresnak Discovery Dep. (December 8, 2021), p. 38 (39 TTABVUE 65). *See also* Bernatchez Discovery Dep. (October 2, 2020), p.28 (32 TTABVUE 28) (once approved by the FDA, oncologists will prescribe CAR T therapies).

> physician, or the researcher in the case of a clinical trial, will be the average purchaser.[74]

Of course, "[a] patient always will have the right to say yes or no as to whether they want to take a drug that is recommended for them by their doctor."[75]

Thus, the relevant purchasers are medical professionals. Nevertheless, drug companies will market directly to patients to encourage them to ask their medical professional to prescribe a specific drug.[76]

To date, no allogeneic CAR T therapies have obtained FDA approval. However, at least two autologous CAR T therapies, Kymriah and Yescarta, have FDA approval.

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[74] Kresnak Discovery Dep. (December 8, 2021), p. 37 (39 TTABVUE 64). *See also* Zamorodian Discovery Dep. (December 3, 2021), p. 55 (38 TTABVUE 68) (a patient can ask his or her doctor to prescribe a CAR T therapy, but "[a]ll of the cancer treatments have to be prescribed by licensed physicians, nurse practitioners or physician assistants.") and p. 71 (38 TTABVUE 78) (it is up to the medical practitioner to decide what therapy is appropriate for the patient based on the stage of his or her cancer).

[75] Kresnak Discovery Dep. (December 8,2021), p. 38 (39 TTABVUE 65); Zamorodian Discovery Dep. (December 3, 2021), p. 69 (38 TTABVUE 76).

[76] Applicant argues that Opposer's contention that Applicant's target market is limited to researchers, physicians, and other medical professionals, to the exclusion of patients, is incorrect because patients are part of the target market. Applicant's Opposition to Opposer's Motion for Summary Judgment, pp. 1 and 6-9 (30 TTABVUE 7 and 12-15); Applicant's ACR Brief, pp. 1-4 (39 TTABVUE 5-8); Applicant's ACR Rebuttal Brief, pp. 1-4 (41 TTABVUE 5-8). Applicant's argument is misplaced. "Descriptiveness must be 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 *Bayer AG*, 82 USPQ2d at 1831). Because the pharmaceutical preparations at issue must be prescribed by a medical professional, a medical professional is an average purchaser for these products. At best, a patient can ask his or her doctor whether these pharmaceutical preparations are right for the patient. As Nazy Zamorodian, Applicant's consultant, testified only a small subset of patients are familiar with specific immunotherapy treatments. Zamorodian Discovery Dep. (December 3, 2021), pp. 62-65 (38 TTABVUE 71-74). Thus, Applicant argues we must determine whether the applied-for mark is descriptive based on the least sophisticated possible consumer to the exclusion of other purchasers.

The companies that make these drugs advertise directly to consumers.[77] The marketing materials attached to the Cassiano declaration do not refer to either autologous CAR T or AutoCAR T therapy. The materials refer to CAR-T cell therapy. According to Dr. Bernatchez, when a person in the field uses the term CAR T cell, that person is referring to autologous CAR T cells because "the use of the term 'CAR T' generally implies autologous CAR T-cell product, even without specifying that the T-cells are not from an autologous source."[78]

According to Christine Cassiano, Applicant's Chief Communications Officer, Applicant adopted ALLOCAR T as its trademark in conjunction with its stock market ticker symbol ALLO.[79]

> So ALLO became nomenclature in terms of what [Applicant] would use and identified for all of our clinical trial candidates, our ticker symbol and our process, which is where ALLOCAR T came into being.[80]

According to Cassiano, "Allo" in ALLOCAR T does not stand for allogeneic.[81]

With respect to AUTOCAR T, Applicant selected a mark that provides

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[77] Cassiano Rebuttal Testimony Decl. ¶ 10 and Exhibits A-D (39 TTABVUE 23 and 26-43); Cassiano Discovery Dep. (December 21, 2021), p. 179 (39 TTABVUE 82); Burger Expert Report ¶ 35 (28 TTABVUE 117).

[78] Bernatchez Expert Report ¶ 36 (39 TTABVUE 145). *See also* Bernatchez Discovery Dep., p. 12 (39 TTABVUE 188) (CAR T was developed as an autologous therapy and because for a long time it was the only CAR T therapy, it is a given that CAR T refers to autologous CAR T therapy).

[79] Cassiano Discovery Dep. (July 22, 2020), pp. 29-31 (39 TTABVUE 104-106). The deposition testimony was a rambling, fairly incomprehensible answer to a relatively simple question.

[80] Cassiano Discovery Dep. (July 22, 2020), p. 31 (39 TTABVUE 106).

[81] Cassiano Discovery Dep. (July 22, 2020), p. 33 (39 TTABVUE 108). *See also* Cassiano Discovery Dep. (July 22, 2020), p. 35 (39 TTABVUE 110) ("[W]e definitely refer to Allogene as ALLO because that's our ticker symbol."); *id.* at p. 48 (39 TTABVUE 115 (ALLO has nothing to do with allogeneic, "it has to do with Allogene"); *id.* at p. 84 (28 TTABVUE 60)

nomenclature for Applicant's autologous process.[82] Cassiano insists that "Auto" has nothing to do with autologous; it reflects Applicant's process.[83]

> It would be an abbreviation for what we're doing with our manufacturing process and how we want to distinguish it. … It would be an abbreviation for our process and what we're doing."[84]

Cassiano testified that Applicant would not use ALLO CAR T to identify its autologous CAR T therapy products.[85] She further testified that Applicant "would use the phrase 'ALLOCAR T' to describe [Applicant's] process for allogeneic CAR T therapy. And [Applicant] would use the phrase 'AUTOCAR T' to describe our process by which we might do autologous cell therapy."[86] The use of AlloCAR T or AutoCAR T is based on the process by which Applicant makes the CAR T cell therapy.[87]

To the extent we understand Cassiano's testimony, Applicant adopted the "allo" part of its mark ALLOCAR T to reflect its corporate name, Allogene, and its ticker symbol, and not as an abbreviation of allogeneic even though Allogene appears to be a shortened form of allogeneic. With respect to AUTOCAR T, Applicant adopted the "auto" part of its mark AUTOCAR T to reflect "the nomenclature for Applicant's autologous process," and not as an abbreviation for autologous. We do not find

("The ALLO is an abbreviation for Allogene and what we are doing within Allogene and our process.").

[82] Cassiano Discovery Dep. (July 22, 2020), p. 34 (39 TTABVUE 109).

[83] Cassiano Discovery Dep. (July 22, 2020), p. 49 (39 TTABVUE 116).

[84] Cassiano Discovery Dep. (July 22, 2020), pp. 84-85 (28 TTABVUE 60-61).

[85] Cassiano Discovery Dep. (July 22, 2020), p. 65 (39 TTABVUE 125).

[86] Cassiano Discovery Dep. (July 22, 2020), p. 67 (28 TTABVUE 57).

[87] Cassiano Discovery Dep. (July 22, 2020), p. 67 (28 TTABVUE 57).

Cassiano's testimony credible, nor would relevant consumers be aware of the specifics of Applicant's "nomenclature.".

Applicant abbreviates allogeneic chimeric antigen receptor T cell as AlloCAR T as shown below:

> CORPORATE PROFILE
>
> Allogene Therapeutics is a clinical stage biotechnology company leading the development of allogeneic chimeric antigen receptor T cell (AlloCAR T™) therapies for cancer.[88]

In the "About Us" section of its website, Applicant uses AlloCAR T as follows:

> Through our R&D partnerships with Servier and Cellectis, we are leveraging our technology platform of AlloCAR T™ therapy, also known as AlloCars™, enhanced by Cellectis' TALEN® gene editing technology to advance our portfolio of cancer therapies.[89]

Applicant uses AlloCAR T and AutoCAR T in the marketing brochure below:[90]

Allogene is a clinical stage biotechnology company pioneering the development of allogeneic chimeric antigen receptor T cell (AlloCAR T™) therapies for cancer. Allogeneic CAR T therapies are engineered from the T cells of healthy donors. These "off-the-shelf" CAR T therapies enhanced by gene editing could be the next most important breakthrough in the field.

Allogene is attempting to overcome the limitations of autologous CAR T (AutoCAR T™) therapies by creating allogeneic CAR T cell therapies (AlloCAR T™ or AlloCARs™). Unlike AutoCAR T™, AlloCAR T™ therapy uses T cells from healthy donors, modified using gene editing to limit an immune response when given to a patient different than the donor. These therapies are then stored in cryopreserved vials for "on-demand" delivery to patients.

AlloCAR T™ therapy has the potential to revolutionize cancer treatment by improving:

[88] 39 TTABVUE 128.

[89] 32 TTABVUE 31.

[90] 32 TTABVUE 34.

Applicant posts the following on its Twitter account:[91]

In the "Science" section of its website, Applicant introduces its AutoCAR T therapy as shown below:[92]

Elsewhere on the website, Applicant differentiates between autologous and allogeneic CAR T therapy explaining that "Unlike autologous cell therapy, AlloCAR T™ therapy uses T cells from healthy donors."[93]

[91] 31 TTABVUE 3.

[92] 32 TTABVUE 143.

[93] 30 TTABVUE 144.

In a January 2, 2020 press release posted on its website, Applicant refers to AlloCAR T as follows:

> Allogene Therapeutics, Inc. (Nasdaq: ALLO), a clinical-stage biotechnology company pioneering the development of allogeneic chimeric antigen receptor T cell (AlloCAR T™) therapies for cancer, today announced that David Chang, M.D., Ph.D., President, Chief Executive Officer, and Co-Founder, will present at the 38th Annual J.P. Morgan Healthcare Conference on Monday, January 13, 2020 at 8:30 a.m. Pacific Time.[94]

The following third-party media citations listed below are illustrative of how the media refers to AlloCAR T:

- A news article posted on the Impact Financial News (June 23, 2020), reported "In a publication published on Molecular Therapy showcasing the potential of ALLO-819, a research AlloCAR T therapy aiming at the FLT3 therapy as a novel treatment in the field of acute myeloid leukemia (AML), [Applicant], a biotechnology company at the clinical stage pathway the development of CAR allogeneic treatment for the disease."[95]

- Theflyonthewall.com website (June 22, 2020) posted that "[Applicant] announced that preclinical findings supporting DLL3-targeted AlloCAR T therapy in small lung cancer, or SCLC, and inducible TurboCAR technology were presented in poster sessions at the virtual American Association for Cancer Research annual meeting."[96] On May 20, 2020, that website posted that "in the overall efficacy analysis

[94] 31 TTABVUE 149.

[95] 31 TTABVUE 198.

[96] 31 TTABVUE 196.

are three patients who were refractory to prior autologous CAR T therapy. These patients were also refractory to AlloCAR T therapy" and that "ALLO-501A is a next generation anti-CD19 AlloCAR T devoid of the rituximab recognition domains found in ALLO-501."[97]

● M2 Pharma (September 26, 2018) reported that Applicant "is advancing its AlloCAR T cell portfolio, which includes rights to 16 preclinical CAR T cell therapy targets and US rights to UCART19, an AlloCAR T cell therapy candidate that is being developed for the treatment of CD19-expressing hematological malignancies."[98]

Opposer's expert Dr. David Burger, in his expert report, provides examples of AlloCAR T used descriptively. The following are representative:

● A blog post from the Anthony Nolan Trust, a British organization supporting cell therapy refers to AlloCAR T descriptively:

> This is why scientists are now striving to develop a new kind of CAR-T therapy, known as 'allo' CAR T therapy, because it's created using T cells from volunteer donors.[99]

● "'Allo-CAR-T' is a section header in a report on the 2019 Next Generation CAR & T Cell Therapies Conference. … the report concludes by saying that 'Overall, great strides are being made to address the safety of CAR-T, working on the allo-CAR-T platforms."[100]

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[97] 31 TTABVUE 199-200. *See also* 31 TTABVUE 201 (Applicant reported "the potential for ALLO-819, an investigational AlloCAR T therapy targeting FLT3 as a novel treatment for acute myeloid leukemia.").

[98] 31 TTABVUE 204.

[99] Burger Expert Report ¶ 42 (28 TTABVUE 119-120).

[100] Burger Expert Report ¶ 43 (28 TTABVUE 120).

- "Allo CAR-T" appears multiple times in a presentation by Humanigen, including four times on a single slide (Figure 4),14 and CRISPR Therapeutics refers to "our allo CAR-T programs" (Figure 5)."[101]

- An article published in the journal *Bone Marrow Transplant* opens with the sentence "The source of CAR T cells can be autologous (autoCAR) or allogeneic (alloCAR)."[102]

- In an article from 2019, Poseida Therapeutics discusses an improved manufacturing process for their allogeneic CAR-T cell product, and includes the statement "large-scale manufacturing of significant doses of potent allo CAR-T products has been challenging for the field."[103]

Opposer purportedly uses "'auto CAR T' in the published literature from [Opposer] in published articles" and in its "communications with [Opposer's] academic partners and with physicians who are running clinical trials on [Opposer's] auto CAR T programs."[104] Opposer's academic partners include Memorial Sloan Kettering and Moffitt Cancer Center.[105] However, Opposer did not introduce any such published articles or communications.[106] So there is no misunderstanding, Opposer stated that

[101] Burger Expert Report ¶ 44 (28 TTABVUE 120).

[102] Burger Expert Report ¶ 48 (28 TTABVUE 123).

[103] Burger Expert Report ¶ 50 (28 TTABVUE 124).

[104] Kresnak Discovery Dep. (December 8, 2021), p. 25 (39 TTABVUE 52).

[105] Kresnak Discovery Dep. (December 8, 2021), p. 27 (39 TTABVUE 54).

[106] Opposer, in its brief in support of its motion for summary judgment, states that it "uses, and will continue to use the terms 'CAR T,' 'allogeneic CAR T,' 'allo CAR T,' 'autologous CAR T,' and 'auto CAR T' to describe these products in commerce including in its marketing materials." Opposer's motion for summary judgment, p. 6 (28 TTABVUE 11) (citing Kresnak Decl. ¶ 5 and ATA2321, ATA2431, ATA2271, ATA3721, and ATA3219). The ATA designated

it uses auto CAR T in published literature, but it did not introduce any examples of such use.[107]

To counter the findings in Dr. Burger's expert report, Applicant's expert witness Dr. Chantale Bernatchez searched the PubMed website (pubmed.com) for the terms "CAR T," "Allocar T" and "Autocar T." PubMed is a free search engine for peer-reviewed biomedical and life sciences literature developed and maintained by the National Center for Biotechnology Information, at the U.S. National Library of Medicine, located at the National Institutes of Health.[108] Dr. Bernatchez retrieved the following results:

- The PubMed search for "CAR T" retrieved 3,438 articles;[109]
- The PubMed search for "Allocar T" retrieved two articles: (i) an article published by Applicant and (ii) Hu, Y., et al., "A retrospective comparison of allogeneic and autologous chimeric antigen receptor T-cell therapy targeting CD19 in patients with

documents are not further identified or introduced as exhibits to the motion or the Kresnak declaration.

[107] If Opposer did, in fact, introduce published literature displaying Opposer's use of auto CAR T, then it is buried in text and we could not find it.

[108] Bernatchez Expert Report ¶¶ 47-50 (39 TTABVUE 149-150).

According to Dr. Bernatchez, "PubMed comprises more than 30 million citations for biomedical articles and is THE absolute reference for the entire scientific community. [Bernatchez] consider[s] PubMed to be the gold-standard of databases and resources for accessing the widest selection of peer-reviewed scientific references." Bernatchez Expert Report ¶ 47 (39 TTABVUE 149).

[109] Bernatchez Expert Report ¶ 48 (39 TTABVUE 149).

relapsed/refractory acute lymphoblastic leukemia." Bone Marrow Transplant, 2019. 54(8): p. 1208-1217;[110] and

- The PubMed search for "Autocar T" retrieved the Y Hu article noted above.[111]

Dr. Bernatchez also conducted PubMed searches for variations of "Allo CAR" or "Allo CAR T" leading to her to this conclusion:

> 66. While some representation of variations on "Allo CAR" or "Allo CAR T" can be found in the literature, most of the articles retrieved while searching for "Allo CAR" (75 PubMed references) and/or "Allo CAR T" (56 PubMed references) refer to CAR T-cell products generated from patients after stem cell transplant. In fact, my examination of the use of the term "allo" in relation to CAR in all 75 references found for "Allo CAR" and all 56 references found for "Allo CAR T" (abstract and title) determined that "allo" was never used in conjunction with the word "CAR" or "CAR T" (i.e. the terms "allo CAR" or "allo CAR T" were never found).[112]

Dr. Bernatchez explained that while "allo" may be an abbreviation for allogeneic in some situations, it has not been used as an abbreviation in connection with chimeric antigen receptor T-cells.

> The chimeric antigen receptor T (CAR T) cells play an antileukemia role, and can be used to treat or prevent relapse by targeting minimal residual disease for patients undergoing **allo**geneic hematopoietic stem cell transplantation (**allo**-HSCT). However, the infusion of **allo**geneic CAR-T-cells may also cause graft-versus-host

[110] Bernatchez Expert Report ¶ 49 (39 TTABVUE 149-150). Opposer's expert Dr. Burger, cited the Y Hu article in his expert report.

Dr. Bernatchez tries to distinguish the use of Allocar in the cited article concluding that the "allo" portion of the term "alloCAR" in this article refers to an allogeneic source thereby pointing out that allo is an abbreviation for allogeneic. Bernatchez Expert Report ¶ 52 (39 TTABVUE 150-151).

[111] Bernatchez Expert Report ¶ 50 (39 TTABVUE 150).

[112] Bernatchez Expert Report ¶ 66 (39 TTABVUE 155).

> disease, which limited their applications during and after **allo**-HSCT. In this review, we discuss the clinical trials that applying CAR-T-cells before **allo**-HSCT and the use of donor-derived CAR-T-cells as conditioning regimen during **allo**-HSCT. At last, we analyzed the effect of donor-derived CAR-T-cells on preventive infusion after **allo**-HSCT.[113]

Accordingly, the first time Applicant's expert witness Dr. Bernatchez heard the term ALLOCAR T, she was able to deduce that the "contraction [allo] meant allogeneic CAR T,"[114] in part because she knew allogeneic can be abbreviated to "allo" in different contexts.[115] Likewise, based on her knowledge of cell therapy in general and that "auto" is a contraction for "autologous," she deduced that AUTOCAR T meant autologous CAR T therapy.[116] Bernatchez testified that the "use of autologous contracted to AUTO dash is used in connection with stem cell therapy."[117]

> In the field of stem cell, it is basically taken for granted that AUTO dash CAR -- AUTO dash SC -- S -- stem cell transplant are -- SCT is autologous or allogeneic stem cell transplant.[118]

Dr. Bernatchez used "allo" and "auto" as abbreviations for allogeneic and autologous in her expert report:

> 30. The occurrence of serious, life-threatening, side effects such as GVHD in patients receiving allogeneic hematopoietic stem cell transplant (HSCT) prompted the cell therapy field to be explicit about the source of cells for SCT. **This resulted in differentiation about the use of autologous or allogeneic HSCT products, which are**

[113] Bernatchez Expert Report ¶ 67 (39 TTABVUE 156).

[114] Bernatchez Discovery Dep. (October 2, 2020), p. 11 (39 TTABVUE 187).

[115] Bernatchez Discovery Dep. (October 2, 2020), p. 12 (39 TTABVUE 188).

[116] Bernatchez Discovery Dep. (October 2, 2020), p. 13 (39 TTABVUE 189).

[117] Bernatchez Discovery Dep. (October 2, 2020), p. 14 (39 TTABVUE 190).

[118] Bernatchez Discovery Dep. (October 2, 2020), p. 14 (39 TTABVUE 190).

> **commonly abbreviated auto-HSCT and allo-HSCT, respectively**.[119] (Emphasis added).

Finally, it is common practice for pharmaceutical companies and medical writers to abbreviate terms. For example, In addition to Opposer and Applicant, Juno, Novartis, Kite, and Celegene are developing allogeneic and autologous CAR T therapies.[120] The marketing materials these companies use abbreviate terms as displayed below:

- Adult R/R Diffuse Large B-cell Lymphoma (DLBCL);[121]
- Acute lymphoblastic leukemia (ALL);[122]
- Cytokine release syndrome (CRS);[123] and
- Risk evaluation and mitigation strategy (REMS).[124]

Likewise, practitioners and academic articles also abbreviate some terms. For example,

- Central nervous system (CNS);[125]
- Graft versus host disease (GVHD);[126]
- Stem cell transplantation (SCT);[127]

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[119] Bernatchez Expert Report ¶ 30 (39 TTABVUE 144).

[120] Kresnak Discovery Dep. (December 8, 2021), pp. 31-32 (39 TTABVUE 58-59).

[121] 39 TTABVUE 26.

[122] 39 TTABVUE 26 and 39.

[123] 39 TTABVUE 26 and 38.

[124] 39 TTABVUE 28 and 38.

[125] 39 TTABVUE 96.

[126] 39 TTABVUE 96. *See also* Bernatchez Expert Report ¶ 29 (39 TTABVUE 144).

[127] Bernatchez Expert Report ¶ 29 (39 TTABVUE 144).

- Hematopoietic stem cell transplant (HSCT);[128]
- Institutional review boards (IRBs);[129] and
- Department of Health and Human Services (HHS).[130]

C. Analysis

There is no dispute that the chimeric antigen receptor-T-cell is abbreviated as CAR T.[131] Therefore, the issue before us is whether "allo" is recognized as an abbreviation for "allogeneic" and "auto" is recognized as an abbreviation for "autologous" and when combined with CAR T whether ALLOCAR T and AUTOCAR T are merely descriptive of Applicant's pharmaceutical preparations for fighting cancer.

For ALLOCAR T and AUTOCAR T to be merely descriptive, we must find the following:

(1) ALLOCAR T is the abbreviation for allogeneic CAR T therapy and AUTOCAR T is the abbreviation for autologous CAR T therapy;

(2) ALLOCAR T and AUTOCAR T are merely descriptive of "pharmaceutical preparations, namely, preparations for use in the treatment of cancer and tumors;

[128] Bernatchez Expert Report ¶ 30 (39 TTABVUE 144).

[129] 39 TTABVUE 195.

[130] 39 TTABVUE 195.

[131] Bernatchez Discovery Dep. (October 2, 2020), p. 14 (39 TTABVUE 190) (CAR T means chimeric antigen receptor T-cell); Zamorodian Discovery Dep. (December 3, 2021), pp. 10 and 68 (40 TTABVUE 41 and 75); Kresnak Discovery Dep. (December 8, 2021), p. 26 (39 TTABVUE 53); Burger Expert Report ¶ 34 (28 TTABVUE 116).

pharmaceutical and biological preparations for immunotherapy, including T Cell therapy"; and

(3) relevant consumers recognize the applied-for marks as an abbreviation for those pharmaceutical preparations.

See In re Thomas Nelson, Inc., 97 USPQ2d 1712, 1716 (TTAB 2011).

(1) Whether ALLOCAR T is an abbreviation for allogeneic CAR T therapy and AUTOCAR T is the abbreviation for autologous CAR T therapy

Dr. Bernatchez, Applicant's expert, explained that "allo" may be an abbreviation for allogeneic in some situations[132] and that the "use of autologous contracted to AUTO dash is used in connection with stem cell therapy."[133] Thus, Dr. Bernatchez used "allo" and "auto" as abbreviations for allogeneic and autologous in connection with allogeneic and autologous hematopoietic stem cell transplant in her expert report expressly stating that autologous and allogeneic hematopoietic stem cell transplant produces are commonly abbreviated as auto-HSCT and allo-HSCT.[134]

Consistent with the practice of abbreviating complex terms discussed above, Applicant uses AlloCAR T and AutoCAR T as abbreviations for allogeneic and autologous CAR T therapies. For example,

[132] Bernatchez Expert Report ¶ 67 (39 TTABVUE 156).

[133] Bernatchez Discovery Dep. (October 2, 2020), p. 14 (39 TTABVUE 190).

[134] Bernatchez Expert Report ¶ 30 (39 TTABVUE 144).

● "Allogene Therapeutics is a clinical stage biotechnology company leading the development of allogeneic chimeric antigen receptor T cell (AlloCAR T™) therapies for cancer."[135]

● "Allogene is a clinical stage biotechnology company pioneering the development of allogeneic chimeric antigen receptor T cell (AlloCAR T™) therapies for cancer. … Allogene is attempting to overcome the limitations of autologous CAR T (AutoCAR T™) therapies by creating allogeneic CAR T cell therapies (AlloCAR T™ or AlloCARs™)."[136]

● One immunotherapy approach, called autologous chimeric antigen receptor (CAR) T cell therapy, or AutoCar T™, involves collecting a patient's white blood cells, including T cells, sending them to a manufacturing facility and genetically engineering the T cells to recognize and kill cancer cells.[137] … "Unlike autologous cell therapy, AlloCAR T™ therapy uses T cells from healthy donors."[138]

Third-party media shortens allogeneic CAR T therapy to AlloCAR T. For example,

● Impact Financial News (June 23, 2020)

> In a publication published on Molecular Therapy showcasing the potential of ALLO-819, a research AlloCAR T therapy aiming at the FLT3 therapy as a novel treatment in the field of acute myeloid leukemia (AML), [Applicant], a biotechnology company at the clinical stage pathway the

[135] 39 TTABVUE 128.

[136] 32 TTABVUE 34.

[137] 32 TTABVUE 143.

[138] 30 TTABVUE 144.

> development of CAR allogeneic treatment for the disease.[139]

- Theflyonthewall.com website (June 22, 2020)

> [Applicant] announced that preclinical findings supporting DLL3-targeted AlloCAR T therapy in small lung cancer, or SCLC, and inducible TurboCAR technology were presented in poster sessions at the virtual American Association for Cancer Research annual meeting.[140]

- M2 Pharma (September 26, 2018)

> Allogene is advancing its AlloCAR T cell portfolio, which includes rights to 16 preclinical CAR T cell therapy targets and US rights to UCART19, an AlloCAR T cell therapy candidate that is being developed for the treatment of CD19-expressing hematological malignancies.[141]

Opposer's expert Dr. David Burger, in his expert report, provides examples of AlloCAR T and AutoCAR used as shortened forms of allogeneic CAR T and autologous CAR T therapies. For example,

- "Allo CAR-T" appears multiple times in a presentation by Humanigen, including four times on a single slide (Figure 4),14 and CRISPR Therapeutics refers to "our allo CAR-T programs" (Figure 5)."[142]

- An article published in the journal *Bone Marrow Transplant* opens with the sentence "The source of CAR T cells can be autologous (autoCAR) or allogeneic (alloCAR)."[143]

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[139] 31 TTABVUE 198.

[140] 31 TTABVUE 196.

[141] 31 TTABVUE 204.

[142] Burger Expert Report ¶ 44 (28 TTABVUE 120).

[143] Burger Expert Report ¶ 48 (28 TTABVUE 123).

- In an article from 2019, Poseida Therapeutics discusses an improved manufacturing process for their allogeneic CAR-T cell product, and includes the statement "large-scale manufacturing of significant doses of potent allo CAR-T products has been challenging for the field."[144]

Therefore, we find that ALLOCAR T and AUTOCAR T are abbreviations for allogeneic CAR T and autologous CAR T therapies.

(2) Whether ALLOCAR T and AUTOCAR T are merely descriptive of "pharmaceutical preparations, namely, preparations for use in the treatment of cancer and tumors; pharmaceutical and biological preparations for immunotherapy, including T Cell therapy"

We now turn to whether ALLOCAR T and AUTOCAR T are merely descriptive of "pharmaceutical preparations, namely, preparations for use in the treatment of cancer and tumors; pharmaceutical and biological preparations for immunotherapy, including T Cell therapy." As noted above, there is no dispute that CAR T is an abbreviation for chimeric antigen receptor T cells and we have found that AUTOCAR T and ALLOCAR T are abbreviations for "autologous CAR T" and "allogeneic CAR T" therapies.

"When two or more merely descriptive terms are combined [i.e., auto and CAR T to form AUTOCAR T and allo and CAR T for form ALLOCAR T], the determination of whether the composite also has a merely descriptive significance turns on the question of whether the combination of terms evokes a new and unique commercial impression." *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1823 (TTAB 2012). A mark

[144] Burger Expert Report ¶ 50 (28 TTABVUE 124).

comprising a combination of merely descriptive components is registrable if the combination creates an incongruous expression having the characteristics of a coined or fanciful mark, *see In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 384 (CCPA 1968) (citing *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 131 USPQ 55, 59-60 (2d Cir. 1961)), or "whose import would not be grasped without some measure of imagination and 'mental pause.'" *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983).

However, if each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *See, e.g.*, *In re Oppedahl & Larson*, 373 F.3d 1171, 71 USPQ2d 1370, 1374 (Fed. Cir. 2004) (PATENTS.COM merely descriptive of computer software for managing a database of records that could include patents and for tracking the status of the records by means of the Internet); *see also In re Phoseon Tech.*, 103 USPQ2d at 1823 ("When two or more merely descriptive terms are combined, ... [i]f each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive."). Where the combination of the descriptive words creates no incongruity, no imagination is required to understand the nature of the goods or services, and the composite remains merely descriptive. *In re Copytele Inc.*, 31 USPQ2d 1540, 1542 (TTAB 1994).

We may consider the significance of each element separately in the course of evaluating the mark as a whole. *See DuoProSS Meditech*, 103 USPQ2d at

1757 (noting that "[t]he Board to be sure, can ascertain the meaning and weight of each of the components that makes up the mark.").

Dr. Bernatchez testified that with respect to ALLOCAR T, she knows what allogeneic means, that "it can be abbreviated to ALLO in different contexts,"[145] and that "CAR T have been mostly developed as an autologous type of therapy."[146] Based on her experience she knew that ALLOCAR T referred to autologous CAR T therapy.

> [F]rom what I know of stem cell therapy, I deduced that probably allogeneic was being used. So I know about the development of allogeneic CAR T. So it is possible that this contraction meant allogeneic CAR T.[147]

Likewise, with respect to AUTOCAR T, Dr. Bernatchez testified as follows:

> So, again, from my knowledge of the cell therapy field in general, and by reference to what is done with stem cell therapy, I understood it as meaning -- as AUTO being a contraction for autologous.[148]

Dr. Bernatchez explained further that in the stem cell field, "it is basically taken for granted that AUTO dash CAR - - AUTO dash SC -- S -- stem cell transplant - - SCT is autologous or allogeneic stem cell transplant."[149]

[145] Bernatchez Discovery Dep. (October 2, 2020), p. 12 (39 TTABVUE 188).

[146] Bernatchez Discovery Dep. (October 2, 2020), p. 12 (39 TTABVUE 188).

[147] Bernatchez Discovery Dep. (October 2, 2020), p. 11 (39 TTABVUE 187).

[148] Bernatchez Discovery Dep. (October 2, 2020), p. 13 (39 TTABVUE 189).

[149] Bernatchez Discovery Dep. (October 2, 2020), p. 14 (39 TTABVUE 190). But she had not seen "auto" or "allo" used as an abbreviation in connection with CAR T therapy. *Id.*

Consistent with the practice of abbreviating complex terms, Applicant and others shortened allogeneic CAR T and autologous CAR T to ALLOCAR T and AUTOCAR T. For example,[150]

- "Allogene is a clinical stage biotechnology company pioneering the development of allogeneic chimeric antigen receptor T cell (AlloCAR T™) therapies for cancer. … Allogene is attempting to overcome the limitations of autologous CAR T (AutoCAR T™) therapies by creating allogeneic CAR T cell therapies (AlloCAR T™ or AllCARs™)."[151]

- Impact Financial News (June 23, 2020)

> In a publication published on Molecular Therapy showcasing the potential of ALLO-819, a research AlloCAR T therapy aiming at the FLT3 therapy as a novel treatment in the field of acute myeloid leukemia (AML), [Applicant], a biotechnology company at the clinical stage pathway the development of CAR allogeneic treatment for the disease.[152]

- An article published in the journal *Bone Marrow Transplant* opens with the sentence "The source of CAR T cells can be autologous (autoCAR) or allogeneic (alloCAR)."[153]

A person familiar with chimeric antigen receptor (CAR) T cell therapy (e.g., an oncologist) encountering the term ALLOCAR T used in connection with an

[150] That Dr. Bernatchez did not find all of Dr. Burger's references in her PubMed search means that Dr. Burger's references may not have been posted in the PubMed database.

[151] 32 TTABVUE 34.

[152] 31 TTABVUE 198.

[153] Burger Expert Report ¶ 48 (28 TTABVUE 123).

immunotherapy for treating cancer, will perceive ALLOCAR T as describing an allogeneic CAR T therapy without having to resort to a multistep reasoning process. Likewise, that same person encountering AUTOCAR T in connection with an immunotherapy for treating cancer, will perceive AUTOCAR T as describing an autologous CAR T therapy without having to resort to a multistep reasoning process. Therefore, we find that ALLOCAR T and AUTOCAR T are merely descriptive when used in connection with "pharmaceutical preparations, namely, preparations for use in the treatment of cancer and tumors; pharmaceutical and biological preparations for immunotherapy, including T Cell therapy."

Applicant's use of the ™ symbol does not transform a descriptive term into a trademark. The use of the ™ symbol does not make unregistrable matter a trademark. *In re A La Vielle Russie Inc.,* 60 USPQ2d 1895, 1901(TTAB 2001) ("Applicant's use of the 'SM' symbol is not dispositive, nor does it suffice in this case to transform applicant's use of RUSSIANART, buried as it is amid other informational matter, into service mark use."); *In re Manco Inc.*. 24 USPQ2d 1938, 1942 n. 11 (TTAB 1992) (citing *In re General Foods Corp.,* 177 USPQ 403, 404 n.1 (TTAB 1973) ("The fact that applicant by use of the designation 'TM' on the stickers applied to its containers intends that 'PUDDING TREATS' should function as a trademark to identify and distinguish its goods cannot make it a trademark or serve to indicate that it would be so recognized by purchasers of its goods.")).

Applicant argues that there are alternatives to referring to autologous CAR T and allogeneic CAR T therapies as AUTOCAR T or ALLOCAR T. For example,

> For nearly 10 years before Applicant's existence, the concept of treating cancer patients with cells from healthy donors was commonly referred to as "off-the-shelf" or "universal" cell therapy. Holt Decl., Ex. 9 at ¶ 38, Ex. 10 (2011); Ex. 11 (2011); Ex. 12 (2015); Ex. 13 (2016). "Off-the-shelf" and "universal" were (and remain) the common short-hand descriptors for these kinds of cancer therapies because the use of cells from healthy donors enables the therapies to be made in advance and thus immediately available upon need (e.g., "off-the-shelf") and are note manufactured specifically for each patient (e.g., "universal"). *See, e.g.*, Holt Decl., Exs. 11, 12. These terms continue to be pervasive in the scientific literature discussing allogeneic CAR T cell therapies today. Holt Decl., Ex. 9 at ¶¶ 23, 43, 62–64; Exs. 14–17.[154]

However, "[i]t is fundamental that a product may be identified by more than one descriptive or generic term." *In re Lantech Inc.,* 222 USPQ 977, 978 n.2 (TTAB 1983) (citing *In re Minnetonka, Inc.*, 212 USPQ 772, 781 (TTAB 1981)).

In addition, even if Applicant is the first to use ALLOCAR T and AUTOCAR T in this particular context and no competitor is using ALLOCAR T or AUTOCAR T does not make these terms inherently distinctive trademarks when the only significance projected by the terms is merely descriptive. *See In re Thomas Nelson, Inc.,* 97 USPQ2d at 1717 (citing *In re Hunter Fan Co.*, 78 USPQ2d 1474, 1476 (TTAB 2006) ("[A] word need not be in common use in an industry to be descriptive, and the mere fact that an applicant is the first to use a descriptive term in connection with its goods, does not imbue the term with source-identifying significance.'")); *In re Alpha Analytics Investment Grp. LLC*, 62 USPQ2d 1852, 1856 (TTAB 2002). *See also KP*

[154] Applicant's Brief in Opposition to Opposer's Motion for Summary Judgment, pp. 3-4 (30 TTABVUE 9-10).

Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 72 USPQ2d 1833, 1838 (2004) (trademark law does not countenance someone obtaining "a complete monopoly on use of a descriptive term simply by grabbing it first."); *Clairol, Inc. v. Roux Distrib. Co.*, 280 F.2d 863, 126 USPQ2d 397, 398 (CCPA 1960) (even novel ways of referring to the goods may nonetheless be descriptive).

(3) **Whether relevant consumers recognize the applied-for marks as an abbreviation for those pharmaceutical preparations**

As discussed above in the "Fact Section," the relevant purchaser is primarily a medical professional responsible for prescribing and administering the immunotherapy for treating cancer. That person recognizes AUTOCAR T and ALLOCAR T as an abbreviation for the pharmaceutical preparations as evidenced by Applicant's use of those terms and by the use of those terms by third parties in medical literature.

In view of the foregoing, we find that the terms ALLOCAR T and AUTOCAR T are merely descriptive when used in connection with "pharmaceutical preparations, namely, preparations for use in the treatment of cancer and tumors; pharmaceutical and biological preparations for immunotherapy, including T Cell therapy."

Decision: We sustain the oppositions to the registration of Applicant's marks ALLOCAR T and AUTOCAR T and registration is refused.