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Precedent of the TTAB

Mailed: October 24, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re LDM Group, LLC

Serial No. 97184496

Bridget Hoy of Lewis Rice LLC, for LDM Group, LLC

Teague Avent, Trademark Examining Attorney, Law Office 125,
Robin Mittler, Managing Attorney.

Before Zervas, Johnson and Bradley,
Administrative Trademark Judges.

Opinion by Bradley, Administrative Trademark Judge:

LDM Group, LLC ("Applicant") seeks registration on the Principal Register of the proposed standard-character mark PHYSICIANCARE for the following services (collectively, "Applicant's Identified Services"):

> Healthcare business administration services in the nature of providing a website featuring technology allowing user to manage and deliver clinically-relevant communications on behalf of pharmaceutical and medical device manufacturers to physicians and other healthcare providers via a nationwide computer network of electronic health records providers; Providing medical and support

> information, namely, application service provider featuring application programming interface (API) software for data transfer representing prescriber educational messages to physicians and other healthcare providers through the management and delivery of clinically relevant communications on behalf of pharmaceutical and medical device manufacturers via a nationwide computer network of electronic health records providers in International Class 42.[1]

The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant's mark is merely descriptive of the applied for services. After the Examining Attorney made the refusal final, Applicant appealed to the Board and requested reconsideration. The Examining Attorney found that the request for reconsideration raised a new issue regarding Applicant's identification of services and issued a non-final Office Action that superseded the previous Final Office Action. After the Applicant responded and resolved the identification of services issue, the Examining Attorney issued a subsequent Final Office Action, which maintained the merely descriptiveness refusal under Section 2(e)(1). The appeal was resumed and both Applicant and the Examining Attorney filed briefs. We reverse the refusal to register.

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[1] Application Serial No. 97184496 was filed on Dec. 22, 2021, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use anywhere and first use in commerce since at least as early as November 2011. As originally filed, the application covered services in International Classes 35 and 44. During prosecution, Applicant amended and reclassified its services in response to the Examining Attorney's office actions.

Citations in this opinion to the briefs and other materials in the appeal docket refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 TTAB LEXIS 199, at *4 n.1 (TTAB 2020). Page references to the application file refer to the online database of the USPTO's Trademark Status & Document Retrieval ("TSDR") system. All citations to documents contained in the TSDR database are to the downloaded .pdf versions of the documents.

I. Mere Descriptiveness Refusal

A. Applicable Law

Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), 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 acquired distinctiveness under Section 2(f) of the Act.[2] A term is "merely descriptive" within the meaning of Section 2(e)(1) if it "immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Chamber of Com. of the U.S.*, 675 F.3d 1297, 1300 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 963 (Fed. Cir. 2007)).[3] The "immediate idea" of such information "must be conveyed forthwith with a 'degree of particularity.'" *Goodyear Tire & Rubber Co. v. Cont'l Gen. Tire, Inc.*, Opp. No. 91118372, 2003 TTAB LEXIS 277, at *8 (TTAB 2003) (citations omitted).

In contrast, a mark is suggestive if it "requires imagination, thought and perception to reach a conclusion as to the nature of the goods [or services] . . . ." *In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 TTAB LEXIS 150, at *11 (TTAB 2016) (quoting *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327,

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[2] Applicant has not asserted acquired distinctiveness.

[3] As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, citations in this opinion are in a form provided in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Lexis legal database. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

1332 (Fed. Cir. 2014)). "[I]f one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Phoseon Tech., Inc.*, Ser. No. 77963815, 2012 TTAB LEXIS 306, at *4-5 (TTAB 2012) (citation omitted). A suggestive mark is "considered to be inherently distinctive, and thus automatically qualifies for trademark protection under 15 U.S.C. § 1051." *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340 (Fed. Cir. 2004).

Determining whether a mark is descriptive is "evaluated 'in relation to the particular goods [or services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use.'" *Chamber of Com.*, 675 F.3d at 1300 (quoting *Bayer AG*, 488 F.3d at 963-64). Descriptiveness is not considered "in the abstract or on the basis of guesswork." *Fat Boys Water Sports*, 2016 TTAB LEXIS 150, at *4 (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 814 (CCPA 1978)). We ask "whether someone who knows what the . . . services are will understand the mark to convey information about them." *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 974 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254 (Fed. Cir. 2012) (internal quotation omitted)).

Where, as here, "two or more merely descriptive terms are combined, 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." *Phoseon Tech.*, 2012 TTAB LEXIS 306, at *3. A mark comprising a combination of merely descriptive components is registrable "if the composite has a bizarre or incongruous meaning as applied to the goods or services," *In re Omniome, Inc.*, Ser. No. 87661190, 2019 TTAB LEXIS 414, at *12 (TTAB 2019) (citations omitted), or "whose import would not be grasped without some measure of imagination and 'mental pause.'" *In re Shutts*, Ser. No. 73245440, 1983 TTAB LEXIS 150, at *6 (TTAB 1983). We may consider the meaning of each component word separately in the course of evaluating the mark as a whole. *See DuoProSS Meditech*, 695 F.3d at 1253 (in evaluating descriptiveness "[t]he Board . . . may ascertain the meaning and weight of each of the components that makes up the mark").

B. Summary of Arguments and Evidence

1. Examining Attorney

The Examining Attorney argues that the individual component terms of Applicant's mark, "physician" and "care," are both descriptive in relation to Applicant's Identified Services. Specifically, the Examining Attorney asserts that "physician" means "a health professional who provides care" based on the following evidence:

- WebMD, defining a physician as a doctor who engages in providing a variety of care and informational services.[4]
- Wikipedia, defining a physician as a "health professional who practices medicine, which is concerned with promoting, maintaining, or restoring

[4] 8 TTABVUE 2-3 (citing June 8, 2023 Office Action at 46-47).

> health through the study, diagnosis, prognosis and treatment of disease, injury, and other physical and mental impairments."[5]

Accordingly, the Examining Attorney states that the term "physician" is descriptive of a characteristic of applicant's services, namely, "technology that allows users to 'manage and deliver clinically-relevant communications on behalf of pharmaceutical and medical device manufacturers to physicians', as applicant identifies in its identification of services."[6] Additionally, the Examining Attorney asserts that "care" means "healthcare" based on evidence including:

- A definition of "CARE" as the "responsibility for or attention to health, well-being, and safety // under a doctor's care – see also HEALTH CARE";[7]
- A Wikipedia entry showing that care is used to describe health care;[8] and
- The Washington State Health Care Authority, identifying different forms of care, such as "primary care", "pediatric care", and "vision care."[9]

Accordingly, the Examining Attorney states the term "care" describes a characteristic of Applicant's Identified Services that provides "'clinically-relevant communications', containing medical information, to physicians to assist in rendering care, or healthcare."[10]

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[5] 8 TTABVUE 3 (citing June 8, 2023 Office Action at 53).

[6] 8 TTABVUE 3.

[7] 8 TTABVUE 3 (citing the MERRIAM-WEBSTER DICTIONARY in the September 27, 2022 Office Action at 6).

[8] 8 TTABVUE 3 (citing June 8, 2023 Office Action at 7-11).

[9] 8 TTABVUE 3 (citing June 8, 2023 Office Action at 14). The Examining Attorney also cited evidence of the meaning of "care" consistent with these definitions from the Agency for Healthcare Research and Quality, National Library of Medicine, Texas Health and Human Services, CA.gov Department of Managed Health Care, and Medline Plus. 8 TTABVUE 3.

[10] 8 TTABVUE 3.

The Examining Attorney further argues that the combined wording PHYSICIANCARE does not "create a unique, incongruous, or nondescriptive meaning," but rather retains the descriptive meaning of the individual terms in "refer[ring] to how applicant's healthcare related software and technology services are for assisting physicians in providing care to patients."[11]

2. Applicant

Applicant argues that its mark cannot be descriptive because it is not providing a medical service, and points to the Examining Attorney's "concession" that Applicant's services "do[] not appear to be a medical service but rather some technological service."[12] Applicant explains that as shown in its specimens and marketing materials,[13] its "digital communication service" "transmits messages from pharmaceutical and device manufacturers so that health care providers may view the messages in their EHR[14] programs and ultimately influence patient adherence to

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[11] 8 TTABVUE 3.

[12] June 8, 2023 Office Action at 5; 6 TTABVUE 4-7; 9 TTABVUE 3.

[13] *See, e.g.,* September 7, 2023 Specimen at 18-23.

[14] "EHR" is an electronic health record system. April 19, 2023 Response to Office Action at 45. *See also* June 8, 2023 Office Action at 11 (Wikipedia entry for "health care" identifying an "EHR" as a "health information technology component[]" and defining "Electronic health record (EHR)" as "[a]n EHR contains a patient's comprehensive medical history, and may include records from multiple providers.").

prescriptions and make care affordable."[15] But Applicant emphasizes that it is "neither caring for physicians, nor is [Applicant] providing the care of a physician."[16]

Applicant further argues that its proposed mark PHYSICIANCARE "does not convey an **immediate** thought or connection to [Applicant's] technology services transmitting digital communications."[17] Instead, Applicant submits "[a]t worst, PHYSICIANCARE is suggestive of a twice-removed relationship between [Applicant's] services and the ultimate healthcare rendered to a patient."[18] Specifically, Applicant provides its website and application services to pharmaceutical and medical device manufacturers who use the services to provide messages to healthcare providers who then may use such information to render care to a patient.[19] Moreover, Applicant asserts that the "function" of its services "is to provide product information from a pharmaceutical manufacturer to a physician, ***not***

[15] 6 TTABVUE 3, 7. Applicant points in its brief to registrations it owns for two other marks in explaining the nature of its services - Registration No. 3077819 for the mark SCRIPTGUIDE and Registration No. 3178258 for the mark CAREPOINTS. *Id.* at 3-4. Applicant also referenced these two registrations in its request for reconsideration, but it has not submitted any copy or electronic record of the registrations. *See* September 7, 2023 Request for Reconsideration at 9. However, the Examining Attorney has not raised any objection to these registrations after Applicant mentioned them in the request for reconsideration, so we will treat the limited information provided by the Applicant (registration, mark, and identification of services) as of record. *See In re Thomas Nelson, Inc.*, 2011 TTAB LEXIS 9, at *19-20 (TTAB 2011).

[16] 6 TTABVUE 6.

[17] 6 TTABVUE 9 (emphasis in the original).

[18] 6 TTAVUE 8.

[19] 9 TTABVUE 2, 4. April 19, 2023 Response to Office Action at 13-18 (containing marketing materials explaining how the PHYSICIANCARE technology works provided in response to the Examining Attorney's request for additional information in the January 20, 2023 Office Action at 2).

to dictate the care provided to a patient" such that the mark PHYSICIANCARE is not merely descriptive of its "technology or software service."[20]

C. Analysis

Applicant's identification specifies that its services involve the provision of a website and an application programming interface that provides "clinically-relevant communications" and "medical and support information" "to physicians and other healthcare providers." The record and other usage in the healthcare industry demonstrates the use of terms such as healthcare,[21] allergy care,[22] eldercare,[23] pediatric care, and vision care[24] to identify types of care. These terms are constructed of two terms, the latter being the term "care" and the former involving the nature of

[20] 6 TTAVUE 10 (emphasis in the original). *See* December 19, 2022 Response to Office Action at 15-17 (containing a PHYSICIANCARE Specification Sheet directed to pharmaceutical manufacturers); *see also* April 19, 2023 Response to Office Action at 8 (responding to Examining Attorney's request for information that "The typical consumer of Applicant's services are manufacturers of pharmaceuticals and medical devices.").

[21] For example, the Examining Attorney provided the Wikipedia entry for "healthcare" which defined the term as "the improvement of health via the prevention, diagnosis, treatment, amelioration or cure of disease, illness, injury, and other physical and mental impairments in people." June 8, 2023 Office Action at 7.

[22] *See In re Haden*, Ser. No. 87169404, 2019 TTAB LEXIS 387, at *8 (TTAB 2019) ("prospective consumers would therefore understand the phrase ALLERGY CARE to refer to the provision of health care services related to the diagnosis and treatment of allergies") *vacated on other grounds*, 2020 TTAB LEXIS 110 (TTAB 2020).

[23] September 27, 2022 Office Action at 12. MERRIAM-WEBSTER DICTIONARY defines "eldercare" as "the care of older adults and especially the care of an older parent by a son or daughter." (https://www.merriam-webster.com/dictionary/eldercare, accessed October 22, 2024). The Board may take judicial notice of dictionary evidence, *In re Cordua Rests. LP*, Ser. No. 85214191, 2014 TTAB LEXIS 94, at *6 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594 (Fed. Cir. 2016), including from online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *6-9 (TTAB 2006).

[24] June 8, 2023 Office Action at 14 (screenshot of Washington State Health Care Authority identifying pediatric care and vision care as types of care that may be covered by the Apple Health (Medicaid) insurance).

the care or the class of persons to whom the care is provided. Applicant's mark follows a similar construction but deviates by identifying not the class of persons to whom the care is provided (i.e., patients), but the class of persons **providing** the care, namely, physicians. It appears to us, then, that the mark conveys a meaning other than what the Examining Attorney offers. *See, e.g., In re Korn Ferry*, Ser. No. 90890949, 2024 TTAB LEXIS 224, at *25 (TTAB 2024) (reversing descriptiveness refusal because "there is nothing on the face of the mark [KORN FERRY ARCHITECT], in the identifications of services, or in [a]pplicant's specimen, that shows that the word ARCHITECT immediately identifies architects as the consumers to which all or an appreciable number of those services are at least primarily directed").

The Examining Attorney relies on statements from Applicant's specimens to supports its argument that PHYSICIANCARE is merely descriptive. The statements highlighted by the Examining Attorney and other statements from Applicant's specimens and marketing materials include the following examples:

- "PhysicianCare helps prescribers to stay current with the latest clinical information and provide optimal care to their patients without leaving their EHR system workflow."[25]
- "PhysicianCare messages are proven to positively influence prescribers as they make treatment decisions."[26]

[25] April 19, 2023 Response to Office Action at 17.

[26] December 19, 2022 Response to Office Action at 16 (from the "PhysicianCare™ Specification Sheet" attached as Exhibit A to the response).

- "PhysicianCare is a digital communication tool that delivers clinical support messaging . . . in EHR workflow to improve prescriber efficiency and accelerate speed-to-therapy for their patients."[27]
- "Now more than ever, healthcare providers rely on their EHR system for information needed to support prescribing decisions that help patients achieve their best outcome."[28]
- "Relevant drug information positively impacts decision-making while patient savings alerts enable providers to prescribe their first choice with confidence and help patients better afford their medications."[29]

However, these statements confirm the non-descriptive meaning. They inform relevant purchasers (i.e., the pharmaceutical and medical device manufacturers providing the medical and clinical information) that the medical and clinical information transmitted by Applicant's services is used by physicians to care for patients. *See, e.g., Korn Ferry*, 2024 TTAB LEXIS 224, at *24-25 (relying on statements in applicant's specimen in determining relevant "commercial context" of applicant's use and reversing descriptiveness refusal).

In view of the foregoing, we find that purchasers must engage in a multistep analysis to arrive at the meaning proposed by the Examining Attorney. *See Nautilus Grp.,* 372 F.3d at 1340 ("A suggestive mark is one for which 'a consumer must use . . . any type of multistage reasoning to understand the mark's significance . . . .") (citation omitted). The first immediate step is identified by the services in the application, namely, that the "website" and "application programming interface"

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[27] April 19, 2023 Response to Office Action at 13.

[28] April 19, 2023 Response to Office Action at 52-55 (from screenshots of PhysicianCare: Point-of-Care Communications YouTube video).

[29] April 19, 2023 Response to Office Action at 68-71 (from screenshots of PhysicianCare: Point-of-Care Communications YouTube video).

"deliver[] clinically relevant communications" from "pharmaceutical and medical device manufacturers" "to physicians and other healthcare providers."[30] The physician's review of the communications and any subsequent care provided to a patient occur in a second or third step subsequent to the immediate action provided by Applicant's Identified Services. This type of multi-stage reasoning supports that Applicant's mark is suggestive.

Accordingly, Applicant's mark PHYSICIANCARE, when considered in relation to Applicant's Identified Services that provide medical and clinical information from pharmaceutical and medical device manufacturers to physicians in order to provide care for patients, presents an incongruous meaning, or at a minimum one that requires "some measure of imagination and 'mental pause." *Shutts*, 1983 TTAB LEXIS 150, at *6. *See also In re Recovery, Inc.*, Ser. No. 73013798, 1977 TTAB LEXIS 122, at *5 (TTAB 1977) ("to articulate the manner in which the term 'RECOVERY' describes those services, one cannot come up with an immediate response, but rather must engage in a mental process involving imagination, speculation, and possibly stretching the meaning of the word to fit the situation").

II. Conclusion

Upon consideration of the applicable law, the evidence, and the arguments of Applicant and the Examining Attorney, we find that Applicant's proposed mark PHYSICIANCARE, taken as a whole, falls more on the suggestive than the descriptive side of the spectrum, and therefore is not merely descriptive of Applicant's

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Identified Services. We recognize "there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment." *In re Phillips Van Heusen Corp.*, Ser. No. 75664835, 2002 TTAB LEXIS 45, at *14 (TTAB 2002). *See also Nautilus Grp.*, 372 F.3d at 1340 ("The line between descriptive and suggestive marks can be difficult to draw."). To the extent that we have any "doubts . . . as to whether [the] term is descriptive as applied to the . . . services for which registration is sought, . . . [we] resolve doubts in favor of the applicant and pass the mark to publication with the knowledge that a competitor of applicant can come forth and initiate an opposition proceeding in which a more complete record can be established." *In re Stroh Brewery Co.*, Ser. No. 74262791, 1994 TTAB LEXIS 32, at *6 (TTAB 1994). *See also In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 1567, 1571 (Fed. Cir. 1987) (citations omitted) ("It is incumbent on the Board to balance the evidence of public understanding of the mark against the degree of descriptiveness encumbering the mark, and to resolve reasonable doubt in favor of the applicant . . . .").

Decision: We reverse the refusal to register Applicant's proposed mark PHYSICIANCARE for Applicant's Identified Services.