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Subject: TRADEMARK APPLICATION NO. 76659576 - STRENGTH IN DATA - 42-091-999

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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/659576

MARK: STRENGTH IN DATA

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CORRESPONDENT'S REFERENCE/DOCKET NO:
42-091-999

CORRESPONDENT E-MAIL ADDRESS:

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http://www.uspto.gov/web/offices/dcom/ttab/index.html

EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the Final Refusal to register the trademark, STRENGTH IN DATA, for use on:

> Printed matter, namely, advertising and promotional materials in the nature of newsletters, pamphlets and brochures in the field of health care and pharmaceuticals, in class 16

GROUND FOR REFUSAL

The examining attorney refuses registration of the proposed trademark on the Principal Register, pursuant to Sections 1, 2 and 45 of the Trademark Act, because the specimen submitted does not show use of the mark on the goods identified in the application. 15 U.S.C. §§ 1051 – 1052, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56; TMEP §§ 904, 904.07(a)

ISSUE PRESENTED

Whether the specimens submitted show use of the mark on "printed matter, namely, advertising and promotional materials in the nature of newsletters, pamphlets and brochures in the field of health care and pharmaceuticals," or are merely advertising for applicant's pharmaceutical products, within the meaning of Section 45 of the Trademark Act.

STATEMENT OF FACTS

Applicant filed an application to register the trademark STRENGTH IN DATA, on May 1, 2006, based on an intent to use the mark in commerce under section 1(b) of the Trademark Act, for use on:

> Pharmaceutical preparations for treatment of cancer, in class 5,
>
> Printed Matter, namely, advertising and promotional information materials in the nature of newsletters, pamphlets and brochures in the field of health care and pharmaceuticals, in class 16, and
>
> Pharmaceutical research and development services, in class 42

On October 4, 2006, the examining attorney approved the application for publication. The application was published, and the Office issued a Notice of Allowance on February 27, 2007. Applicant filed a Statement of Use on July 6, 2007, at which time applicant amended the application to delete the goods in class 5 and services in class 42 from the application. After this, the application proceeded only for the goods identified above in class 16.

The examining attorney initially refused the specimen for being an advertisement for applicant's pharmaceutical products. Applicant then provided a substitute specimen. The examining attorney refused the substitute specimen and made the requirement

FINAL. After this, applicant filed a request for reconsideration on August 22, 2008,[1] followed by an appeal of the refusal. The examining attorney then denied the request for reconsideration, after which applicant petitioned the Board for a remand of the case to the examining for reconsideration of additional evidence. The additional evidence comprised pages applicant indicated it submitted previously as specimens that were not properly entered into the record. The examining attorney reviewed the additional evidence, but maintained the refusal. The proceedings were then resumed and applicant filed its brief on February 23, 2009.

ANALYSIS

The specimens submitted are not acceptable because they do not show the trademark on the goods identified in the application, in accordance with well-settled trademark law and policy. The specimens do not show use of the mark on brochures in the field of health care and pharmaceuticals, but are merely advertising material about applicant's branded pharmaceutical product.

Generally, for items transported in commerce to be "goods in trade" they must have utility to others as the type of product named in the application. *In re Douglas Aircraft Co., Inc.*, 123 USPQ 271 (TTAB 1959). In this case, applicant's specimens are not the goods identified in the application, but are merely advertising material for applicant's pharmaceutical products. This application presents identical facts in all relevant aspects to the facts raised in *Douglas Aircraft*. In *Douglas Aircraft*, the Board held that materials used only to advertise, explain and publicize the goods in which

[1] Applicant identified this correspondence as a "RESPONSE TO FINAL OFFICE ACTION." However, procedurally this was treated as a request for reconsideration of the Final Refusal.

applicant deals will not constitute "goods" themselves within the meaning contemplated by the Statute. *Id.*

Applicant asks the office to recognize and treat the specimens as the goods themselves because they include information. To treat these as discrete goods in commerce would mean that any advertising material that provides a bare minimum of information would be goods in trade, rather than printed advertising material.

As an initial matter, applicant has argued in its section (B) that applicant's specimens constitute "Goods in Trade," focusing on the issue of whether applicant received payment for these materials. The examining attorney at no time indicated that applicant's success or failure to require payment for the brochures triggered this refusal. The examining attorney concedes that whether the printed materials are "sold" or whether they are "transported" is of no consequence. Whether or not payment has ever been made in exchange for the materials is not a fact on the record. The issue here is whether the specimen shows use of the mark on the goods identified. Accordingly, the examining attorney will not further address applicant's arguments in section (B) of its brief, pages 8 through 11, but agrees with applicant that whether or not the specimens were exchanged for currency or other value is not an issue.

The goods identified in this application, as of the filing of the statement of use, are:

> PRINTED MATTER, NAMELY, ADVERTISING AND PROMOTIONAL INFORMATION MATERIALS IN THE NATURE OF NEWSLETTERS, PAMPHLETS AND BROCHURES IN THE FIELD OF HEALTH CARE AND PHARMACEUTICALS (in International Class 16)

Generally, an applicant must submit a specimen showing the trademark in use in commerce for each class of goods identified in the application Trademark Act Sections 1, 2 and 45 15 U.S.C. §§1051 - 1052, 1127; 37 C.F.R. §§2.56, 2.88(b)(2); TMEP §§904, 904.07(a), 1109.09(b). Acceptable specimens for goods include tags, labels, instruction manuals, containers, photographs that show the mark on the goods or packaging, or displays associated with the goods at their point of sale. TMEP §§904.03 *et seq*. This list is not exclusive, but representative.

In the case of publications, like brochures, the specimen might be the brochure itself with the trademark printed on it. However, advertising brochures are generally not acceptable as specimens for goods. TMEP §904.04(b), (citing *In re MediaShare Corp*., 43 U.S.P.Q.2d 1304 (TTAB 1997); *In re Bright of Am., Inc.*, 205 U.S.P.Q. 63, 71 (TTAB 1979)). Moreover, ancillary or collateral items that an applicant uses in conducting its daily business are not generally "goods in trade" because they are not distributed to consumers for their use, but are distributed for the benefit of an applicant. *See In re Shareholders Data Corp*., 495 F.2d 1360, 1361, 181 U.S.P.Q. 722, 723 (C.C.P.A. 1974); TMEP §§ 904.04(b), 1202.06.

In this case, applicant's specimens have the trademark printed directly on them. Accordingly, the issue is not whether the mark is printed on the specimen submitted, but whether the specimen submitted is in the nature of the goods identified in the application. The examining attorney asserts that the goods are not informational "brochures in the field of healthcare and pharmaceuticals" provided for the benefit of others, but are advertising brochures promoting applicant's pharmaceuticals. These are not goods in commerce because their purpose is purely promotional. In the same way that a company

advertising its own goods is not providing advertising services, providing printed advertising material about one's own goods would not be providing goods in commerce. *See Gay Toys, Inc. v. McDonald's Corp.*, 585 F.2d 1067, 199 USPQ 722 (C.C.P.A. 1978); *Paramount Pictures Corp. v. White*, 31 USPQ2d 1768 (TTAB 1994), aff'd, 108 F.3d 1392 (Fed. Cir. 1997); *In re Douglas Aircraft Co., Inc.*, 123 USPQ 271 (TTAB 1959); In re United Merchants & Mfrs., Inc., 154 USPQ 625 (TTAB 1967) *cf. In re Radio Corp. of Am.*, 205 F.2d 180, 98 USPQ 157 (C.C.P.A. 1953); *In re SCM Corp.*, 209 USPQ 278 (TTAB 1980); *Ex parte Wembley, Inc.*, 111 USPQ 386 (Comm'r Pats. 1956); *In re Snap-On Tools Corp.*, 159 USPQ 254 (TTAB 1968).

Applicant asserts that its specimens are "informational brochures." The examining attorney agrees that there is information contained within the text of the written materials. However, anything that is printed (text or images) conveys information of some sort. It is the nature of the information that defines the nature of the printed matter. In this case, applicant has not argued that the specimen is a newsletter[2], probably because there is nothing in the information provided that would constitute news. A newsletter would, by its intrinsic nature, need to convey some type of news. While the requirements for material to constitute "informational brochures" may not be even as minimally narrow as "newsletters," a brochure on "healthcare and pharmaceuticals" would need to contain information of some general applicability in the fields of "healthcare and pharmaceuticals" rather than information on one specific pharmaceutical, a single health condition and how the pharmaceutical can be used to treat that one condition. In this case, all of the materials point to a specific pharmaceutical, ERBITUX, and how it is used to

[2] Neither has applicant argued in its brief that the goods are "pamphlets."

treat head and neck cancer. This is the nature of an advertisement, to promote product.[3] An informational brochure on healthcare and pharmaceuticals would have general health information on diagnosis, symptoms or perhaps lifestyle changes triggered by a disease or condition. No information of a general, non-promotional nature appears in the specimens.

Specifically, the specimens provided are discussed here, on a page-by-page basis.

SPECIMEN SUBMITTED JULY 6, 2007

The first page of the specimen submitted on July 6, 2007 (TICRS[4], Specimens 07/06/2007 Page 1) is a cover page of the materials. The majority of the text[5] on this page reads:

> ERBITUX® (Cetuximab), in combination with radiation therapy (RT), is indicated for the treatment of locally or regionally advanced squamous cell carcinoma of the head and neck (SCCHN). ERBITUX as a single agent is indicated for the treatment of patients with recurrent or metastatic squamous cell carcinoma of the head and neck for whom prior platinum-based therapy has failed.

This wording identifies applicant's product, by its trademark and the FDA-approved generic for the drug, and identifies its treatment benefits. This information is certainly useful with regard to the treatment of head and neck cancer, but provides virtually no

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[3] The length of applicant's advertising materials has never been raised as a factor in determining whether the specimens are "brochures" or advertisements. The examining attorney asserts that advertising material can be of almost any size or length. The amount of information and the space necessary to communicate the information should not be relevant to the determination of whether or not something is advertising. Content should determine the nature of the goods.

[4] The USPTO Records are kept in a software application known by the acronym TICRS. The identical information is available to the public on the USPTO internet web site under the Trademark Document Retrieval system.

[5] The examining attorney notes that the trademark STRENGTH IN DATA appears on this first page and on other pages submitted. Because the issue is not whether the trademark appears on the specimens, but the nature of the specimens, the examining attorney does not address the presence or absence of the trademark in this brief, with regard to any of the specimens. However, the examining attorney notes that if the trademark appears on any page of a shorter publication, that use may be considered trademark use as to the entire publication, in appropriate cases.

general information on symptoms, standard treatments, diagnosis or other possible therapies.

The second page of this specimen (TICRS Specimens 07/06/2007 Page 2) is mostly graphs, and text explaining the graphs, showing survival rates over a period of months for patients in a clinical trial. In the trial patients received either radiation treatment alone or radiation treatment combined with ERBITUX. The graph compares survival rates of these groups of patients, and shows that survival rates were mostly better for patients using the combined therapy. While this information might be considered important to a patient or clinician, this clearly is intended to sell ERBITUX. The graphs do not provide information on other alternative treatment options or even a survival rate of a control group that received no treatment.

Applicant in its brief, page 4, indicates that the materials provided "indicated many possible treatments available to the patients." The examining attorney notes that there are not "many possible treatments" identified on this page, but merely a comparison of two types of treatment, one of which is the treatment including ERBITUX, one not. Again, this information is not generally useful in the discussion of treatment of the condition discussed, but merely supports a conclusion that applicant's goods would be the best treatment option in combination with radiation therapy. The examining attorney suspects that various trials were conducted[6]. General information on this pharmaceutical would contain information on the favorable, the unfavorable and the inconclusive trials, to establish thorough methodology. However, discussing unsuccessful or inconclusive

[6] It would seem logical that at some time in the testing, this drug would be tested to determine whether it alone could be a successful therapy. If a drug would obviate the need for radiation therapy or surgery, it could be expected to be hugely profitable. If such a clinical trial was conducted, no information on it appears in the specimens.

trials is counterproductive in advertising. Accordingly, the lack of information on all trials militates toward a finding that the goods are advertising.

The third page of the specimen submitted on July 6, 2007 (TICRS Specimens 07/06/2007 Page 3) is another set of graphs that appear to be similar to those on the previous page. The text below the graphs reads, in part:

> No Difference in Radiation Dose Delivered
> There were no differences between the 2 treatment groups in the mean and median doses of radiation therapy delivered to patients
> 90% of the patients treated with ERBITUX received all planned doses
> (footnotes omitted)

Again this information does not constitute a discussion of "many possible treatment options," but merely touts applicant's goods as the best therapy, as any advertising would.

The fourth page of this specimen (TICRS Specimens 07/06/2007 Page 4) is a page titled "Important Safety Information." On this page, there are seven major bullet points. In each of the major bullet points, the trademark ERBITUX is identified. In four of the bullet points, ERBITUX is named on the first line of text. On three ERBITUX is named on the second line of text. While this information may be important safety information, it is not safety information about cancer generally, or safety information about radiation therapy generally, but it is specific information related to safety of applicant's product. Again, this is information of a type that customarily is provided in advertising for pharmaceuticals, but not information on health care or pharmaceuticals generally.

On the fifth page of this specimen (TICRS Specimens 07/06/2007 Page 5) the "Important Safety Information" continues, with four additional major bullet points. Each

of these show the trademark ERBITUX on the first line of the text of the information provided. The lower half of this page begins with "ERBITUX Did Not Exacerbate Grades 1-4 RT-Related Toxicities of Mucositis/Stomatitis" (footnote omitted). This is followed by a discussion of these related toxicities, and comparisons of treatment with radiation alone versus radiation treatment combined with ERBITUX. It shows percentages of what the examining attorney believes are "toxicities." This data, if correct, would indicate that treatment with ERBITUX is no more toxic than treatment without. While this information may be important when deciding whether to prescribe a treatment including ERBITUX or not, it is not general "health care and pharmaceuticals" information.

The final page of this specimen (TICRS Specimens 07/06/2007 Page 6) begins with the phrases "Locally or Regionally Advanced Head and Neck Cancer" and "His Treatment: ERBITUX + RT" "His Life: Extended"[7] followed by a summary of the product usage information contained on the other pages, dosage information and more product safety information. Finally, there is information on "ERBITUX Reimbursement Support" and contact information on the manufacturer of ERBITUX.

In summary, the information contained on all of these pages amounts only to product-specific information that consumers would find on any advertising materials for pharmaceutical products, specifically, the reasons for selecting a product, its advantages, the lack of disadvantages in the product combined with some memorable slogans and

[7] Similar wording appears on the first page of the specimen. The examining attorney believes that this is a common rhetorical device used in advertising, to open and close with a message that consumers will recall when thinking of the goods. This too would militate toward finding that the specimen is advertising.

photos of attractive models representing individuals who have used the product with satisfaction.[8]

SPECIMEN SUBMITTED JANUARY 18, 2008

The two pages submitted on January 18, 2008 2007 (TICRS Specimens 01/18/2008 Page 1 and Page 2) are brief and provide little information. The first page identifies information as "Indications[9]" and repeats the bulk of the text quoted above from the first page of the July 6, 2007 specimen. It also has some images and the trademark STRENGTH IN DATA. The second page repeats these same "Indications," identifies that the ERBITUX product "is the only anti-EFGR agent referenced within the NCCN practice guidelines for the treatment of head and neck cancer," and provides information on available dosages.

This information again cannot be characterized as anything more than advertising for applicant's products. The information provided is only relevant as it relates to the use of one pharmaceutical for a specific condition. The causes, nature of, symptoms of that health condition are not mentioned or even hinted at. There are no alternative types of treatment discussed. The information provided is only valuable to one who is already familiar with head and neck cancers, diagnosis and standard treatments for it, and may be interested in one new drug treatment. This information and its possible value only promotional. It identifies the use of the goods for the consideration of possible customers who might recognize value in the goods based on the information in the advertisement.

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[8] The image of an avuncular white-haired man holding a photograph with a silhouette of a man and a boy fishing against a backdrop of a sunset can only be characterized as "aspirational," suggesting the lifestyle of a happy former cancer patient. However, this is not in any way healthcare or pharmaceutical information.

[9] The examining attorney understands that in this context, the word "indications" means a diagnosis that warrants using a particular pharmaceutical.

SPECIMEN SUBMITTED AUGUST 22, 2008

The first page submitted on August 22, 2008 (TICRS Incoming Page 9) is titled "FOR THE TREATMENT OF HEAD AND NECK CANCER A CASE FOR ERBITUX." The subtitle reads "Appropriate Candidates for Therapy." This page repeats the information provided as "Indications" on the January 18 specimens, also found on the first page of the July 6 specimens. The page also includes photographs of two models looking perhaps sanguine, likely representing patients who have successfully used the ERBITUX treatment.

The second page of this specimen (TICRS Incoming Page 10) states that

> ERBITUX is the only monoclonal antibody approved as a single agent in platinum-refractory recurrent/metastatic head and neck cancer.

This statement is followed by information on a "phase II trial" of the drug, results of the trial and statement of the common adverse reactions to the drug.

The third page of this specimen (TICRS Incoming Page 10) is largely blank, but with contact information and general safety warnings.

As a whole the specimens submitted on August 22, 2008 provide little information at all. The information provided again merely promotes the use of applicant's product.

SPECIMEN SUBMITTED NOVEMBER 13, 2008

The materials submitted with the request for remand, as specimens on November 13, 2008, pages 24 through 35 of the TTABVUE[10] documents (applicant's numbered specimen pages 000009 through 000020) were submitted in conjunction with a request for remand to the examining attorney. Applicant alleged that these materials, comprising twelve pages, were originally submitted with the Statement of Use on July 6, 2007. In fact, to the best of the examining attorney's ability to compare the first six pages of these November 13 submissions with the July 6 specimens discloses that these pages are identical. Accordingly, these pages will not be re-analyzed here. The remaining six pages comprise what appear to be FDA-required information for pharmaceuticals, including information on "clinical pharmacology," "clinical studies," "indications and usage" and other information all relating back to ERBITUX. Applicant has not specifically addressed any of this information in its analysis of the specimens and the examining attorney will not provide a lengthy analysis of an additional six pages of what appear to be FDA-required, fine-print. However, even a cursory review reveals that the information provided on these pages is nothing that is not found on all advertising materials for pharmaceuticals, and would not support a conclusion that these goods are brochures on health care and pharmaceuticals.

The materials submitted on November 13, 2008, pages 42 through 49 of the TTABVUE documents (applicant's numbered specimen pages 000027 through 000034) appear for the first time in the record in the request for remand.[11] Applicant has excerpted

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[10] The TTAB Records are kept in a software application known by the acronym TTABVUE. The information is available to the public and to USPTO officials alike on this one internet web site. Applicant and the Board should be able to find the materials discussed by using the TTABVUE cite with the page numbers provided.

[11] The examining attorney acknowledges that applicant asserts that these materials were submitted originally with earlier paper submissions and that it was office error in scanning or attaching the documents that prevented them from being available for review earlier. The examining attorney had no means to

and discussed these materials in its brief on applicant's numbered page 5. While applicant provides the first two paragraphs of a block of text, the third paragraph is notably missing. This paragraph provides the conclusion of the text introduction and also addresses the purpose of the materials:

> This algorithm provides a general view of the treatment approaches for patients with locally advanced head and neck cancer who, at diagnosis or after surgery, are candidates for radiation-based therapy, and the role of ERBITUS (Cetuximab) in this setting. It also outlines the integration of ERBITUX in the management of those with recurrent or metastatic disease.

Accordingly, while some information on head and neck cancer and its treatment is addressed in the materials quoted by applicant, this information is only provided as background for the "sales pitch" regarding ERBITUX. Again, no other treatment options are discussed and only the bare minimum of general information about the disease is provided. The focus is selling the product.

Applicant's discussion of these materials continues on applicant's brief, page 6, with a quote from the materials (TTABVUE page 45, applicant's numbered page 000030) that discusses "Locally or Regionally Advanced Disease." This page discusses what appear to be basic treatment protocols. It identifies "surgeon's experience" and "objective factors" as effecting the "operability" of tumors, but provides no discussion of these elements nor how a surgeon or patient would determine "operability." It merely identifies the factors. This information is of little use to either a patient or a doctor other than to make the case for ERBITUX.[12]

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confirm whether particular specimens were complete. Until applicant reviewed the Office's records online, no one questioned the completeness of the record. Accordingly, while the specimens may have been submitted earlier, their first appearance of these materials *in the record* is on November 13, 2008.

[12] The Board might note that in fact, the first page of one of the brochures submitted on November 13, 2008 (found at TTABVUE page 64, applicant's numbered page 000049) is titled "A Case for ERBITUX."

These materials quoted on page 6 of applicant's brief are perhaps the most compelling of the materials regarding whether the information would make the specimens as "brochures on health care and pharmaceuticals." However, when viewed as a whole and in the context of the entire advertising piece, it is clear that the bare bones information provided is not educational or informative in a general sense but merely provides the minimum background information necessary for encouraging physicians or patients to consider the evidence that supports using ERBITUX.[13]

Additionally, while the goods are identified as "brochures on health care and pharmaceuticals" it is clear that, at best, this specimen discusses only one particular pharmaceutical. A brochure on health care *and* "pharmaceuticals" should identify more than one pharmaceutical treatment option in addition to information on health care. And while applicant has alleged in its brief that other treatment options are discussed in the materials, the only treatment option discussed is using ERBITUX together with radiation therapy in the treatment of head and neck cancer. Even the discussion of "operability," discussed on the materials quoted on applicant's brief pages 5 and 6 argues that surgery is a disfavored treatment option and may not be available in most cases because of the "anatomic complexity of the primary sites" typically involved in this type of cancer. Also, the materials indicate that even after surgery "multimodality treatment," favors using ERBITUX in addition to surgery and radiation therapy. Ultimately, the "take away" from the information provided is that no matter what else one does to treat head and neck cancer, ERBITUX should also be used. This is not a discussion of treatment options. It is merely an advertising piece.

[13] The Board might also note that this specimen's title (found at TTABVUE page 42, applicant's numbered page 000027) is titled "Weigh the Evidence That Supports ERBITUX."

On page 7 of applicant's brief, applicant discusses a chart that also appears for the first time in the November 13, 2008 specimen (TTABVUE page 43, applicant's numbered page 000028). This shows four courses of treatment that apparently may be combined with radiotherapy treatment. Two of these involve ERBITUX. Two do not. Other than identifying the treatments, the non-ERBITUX treatments are not discussed. The ERBITUX-based treatment is discussed in all of the subsequent pages of the specimen, while the non-ERBITUX treatments are only identified on the chart and not discussed further. In fact, on the page subsequent to this chart page (TTABVUE page 44, applicant's numbered page 000029),[14] there are six major bullet points discussing treatment options, elucidating the chart. The trademark ERBITUX appears in each of these bullet points, two out of six times on the first line of text of the bullet point, and the remaining four bullet points no further down in the text than the second line. The trademark ERBITUX often is repeated within each bullet point. In the first bullet point, ERBITUX appears four times in four lines of text.

Finally, applicant's brief quotes the footnote of references appearing at the bottom of this page (TTABVUE page 44, applicant's numbered page 000029). Applicant then concludes that "the specimens provide substantial information on health care and on third-party pharmaceuticals that is generally applicable to the practice of medicine." However, a review of the materials shows that while the references may discuss one other branded pharmaceutical (note 5 appears to identify "Doxitel induction therapy," and note 7 identifies "Taxotere® (doxatel) Injection Concentrate" which appears to be the generic for the compound and the branded version of the same generic) these do not actually

[14] The examining attorney notes that the chart page would appear on page two of the materials, the first left-side inside page, and page 3 would be on the facing right-side page. Therefore, these would be viewed together when the materials are opened like a book.

provide any information on them, but merely are references the materials used to support the promotion of ERBITUX. The remaining references are to other journal articles that also appear to support using ERBITUX, but as footnotes they are not information on the subject but merely references to places where information could be found..

Materials submitted with the request for remand, TTABVUE pages 64 through 81 (applicant's numbered pages 000049 through 000066) comprise materials titled "A Case for ERBITUX" subtitled "Appropriate Candidates for Therapy." These materials provide exactly that, a case supporting use of ERBITUX via the consideration of two fictional patients with hypothetical health histories and photographs of models. These photos appear to be the same ones found in the specimen provided on August 22, 2008.[15] There is one page of discussion of treatment options for each of these fictional patients that may identify alternative treatments. These have large portraits of the models representing the patients and appear to have text that reads "How would you treat this patient?" However, the examining attorney is only guessing at the primary text because the image quality of this specimen is very poor. Any alternative treatment strategies that may be listed below are largely illegible. It is applicant's duty to provide specimens that are legible. Trademark Act Sections 1 and 45, 15 U.S.C. §§1051, 1127; 37 C.F.R. §§2.56, 2.88(b)(2); TMEP §§904, 904.07(a), 1109.09(b). Even if this portion of the submitted materials were legible, it is apparent that the information would refer to ERBITUX in an inducement to purchase the pharmaceutical.

The remaining materials largely identify the appropriateness of ERBITUX in treating these different patients, leading to the conclusion that ERBITUX is an

[15] The image quality of these materials is not sufficiently clear to allow more certainty as to their similarity to the earlier-filed specimens.

appropriate (or perhaps the best) treatment option for any head and neck cancer patient. This is a typical goal for advertising, to urge use of the goods. However a brochure on health care and pharmaceuticals would provide a balanced discussion of various treatment options and perhaps in the case of a brochure on cancer, advisories about expected survival rates in a best case scenario.

This specimen concludes with what appears to be the same six pages of FDA-required information and advisories that appear in the pages discussed above (TTABVUE pages 30 through 35, applicant's numbered pages 000015 through 000020).[16]

Materials submitted with the request for remand, TTABVUE pages 84 through 91 (applicant's numbered pages 000069 through 000076) appear to be the same materials submitted on July 6, 2007[17], with the exception of the final two pages. Accordingly, the examining attorney will not repeat analysis provided above. The remaining two pages (TTABVUE pages 90 and 91, applicant's numbered pages 000075 and 000076) are similar to other pages viewed and discussed. They both feature the slogan "Weigh the Evidence That Supports ERBITUX," with little additional information or discussion of health issues.

The final pages of specimens provided with the request for remand (TTABVUE pages 100 through 102, applicant's numbered pages 000085 through 000087), are the same specimens provided on August 22, 2008, and are discussed above.

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[16] The examining attorney has not made a line-by-line comparison of these pages. To the extent that the information here is not identical to other information already discussed, and the differences are relevant, applicant should identify the specific inaccuracies and discuss the examining attorney's error in a reply brief.

[17] In this case, the inability to indicate conclusively whether the first six pages are identical to the six pages put in the record on July 6, 2007 is due to the insufficient image quality of the materials submitted with the request for remand. However, the materials appear to be identical.

Applicant has asserted that the "specimens indicate many possible treatments available to patients," but this assertion is not supported by a review of the many pages of specimens provided. While applicant has probably created recognition for its product through the use of the wording STRENGTH IN DATA, the product to which the recognition would apply is not printed matter in class 16, but is an ethical pharmaceutical. It may be unfortunate that pharmaceutical manufactures have been largely unsuccessful in securing trademark registrations in slogans used in the marketing of their drugs. *See e.g., In re Schiapparelli Searle*, 26 USPQ2d 1520 (TTAB 1993). However, as in *Schiapparelli,* these materials "constitute advertising of applicant's goods,"[18] specifically pharmaceuticals, and are neither specimens supporting use of the mark on the pharmaceuticals nor are they evidence of use of the mark on printed matter in the nature of brochures on health care and pharmaceuticals.

CONCLUSION

For the foregoing reasons, the Examining Attorney respectfully urges the Board to AFFIRM the refusal to register the trademark STRENGTH IN DATA for use on "Printed matter, namely, advertising and promotional materials in the nature of newsletters,

[18] The facts in *In re Schiapparelli Searle* 26 USPQ2d 1520 (TTAB 1993) indicate that the specimens in that case were very similar to the specimens presented here. While the goods in that case were identified as pharmaceuticals, the Board repeatedly referred to them as advertising materials in reaching the conclusion that they were not displays associated with the goods at their point of sale. While the issue here is more directly focused on what makes something advertising rather than a publication in its own right as goods in trade, the *Schiapparelli* issues and opinion anticipated the issue presented here. Had the Board decided that the specimen in *Schiapparelli* functioned as a specimen showing use of the mark on pharmaceuticals, applicant with this application would certainly have sought to register STRENGTH IN DATA as a trademark for pharmaceuticals after filing the Statement of Use, rather than deleting these goods from the application. Additionally, while this specimen may not show trademark use of the wording STRENGTH IN DATA for either pharmaceuticals or publications, this does not mean that applicant cannot provide use of this trademark in a point of sale display or at a trade show for its pharmaceuticals or genuine publications rather than on advertising.

pamphlets and brochures in the field of health care and pharmaceuticals” on the Principal Register, pursuant to Trademark Act Sections 1, 2 and 45.

Respectfully submitted,

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