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P-3856-3

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: THE EYECARE FOUNDATION, INC.

MARK: THE EYE CANCER FOUNDATION

SERIAL NO.: 76/701,339

FILED: January 25, 2010

EXAMINER: Elissa Garber Kon, Examining Attorney, Law Office 106

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NOTICE OF APPEAL
AND
BRIEF OF APPLICANT

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Sir

NOTICE OF APPEAL

Applicant appeals the final refusal issued/mailed May 27, 2010 and herewith requests charging Deposit Account No. 01-1174 for payment of the appeal fee of $100, a duplicate copy of this request being submitted herewith to implement this request.

BRIEF OF APPLICANT

1. Preliminary Comments

Applicant is the owner of U.S. Registration No. 2786259 for the mark THE EYECARE FOUNDATION for goods classified in IC 36 and 44, the same goods of the above-captioned application (underlining added for emphasis).

Applicant now seeks registration of THE EYE CANCER FOUNDATION (again underlining added for emphasis).

07-23-2010

The final refusal as previously noted issued/mailed May 27, 2010, which is significant because the Trademark Attorney did not make of record any dictionary definition prior thereto. Instead, dictionary definitions were attempted to be made of record after the final refusal.

Applicant submits that the post-final refusal dictionary definitions should not be considered by the Board as constituting an untimely attempt to expand the record on appeal.

2. The Issue on Appeal

Dispositive of the issue on appeal is whether "eye diseases" is understood by the public to include "eye cancer", applicant contending in the negative based on the record on appeal.

3. The Record on Appeal

A. The record on appeal establishes that "eye cancer" is rare as stated in the below paste-on from the USPTO evidence of record:

> **Uveal Melanoma:** A rare **eye cancer** that develops within a structure in the **eye** called the uvea. The uvea contains pigment (color) producing cells called melanocytes. When these cells become cancerous, the **cancer** is called melanoma. The uvea is divided into three parts: the iris, ciliary body, and the choroid. The most common location for this type of **cancer** to develop is the choroid (choroidal melanoma), which is the back part of the **eye** under the retina.
>
> Individuals may not have any symptoms at the time of diagnosis. Some may experience loss of vision, blurry vision, flashes and floaters (an object in the field of vision).
>
> **Conjunctival Melanoma:** A rare **eye cancer** of the conjunctiva, the mucous membrane lining of the eyelid. While melanoma is most commonly found on the skin, it can also occur inside the **eye** as well as on the surface of the **eye** and eyelids.
>
> Conjunctival melanomas usually develop as a pigmented (dark) area on the conjunctiva. The **cancer** may also arise from a freckle or nevus on the conjunctiva or can appear on healthy tissue.

In sharp contrast to "eye cancer" being rare, more prevalent are the non-cancerous "eye diseases" of the below:

CHOROIDAL HEMANGIOMA
CHOROIDAL MELANOMA
CHOROIDAL METASTASIS
CHOROIDAL NEVUS
CONJUCTIVAL TUMORS
EYELID TUMORS
IRIS TUMORS
LYMPHOMA/LEUKEMIA
MELANOCYTOMA
ORBITAL TUMORS

B. The record on appeal establishes that "eye diseases" are, as stated, more prevalent non-cancerous eye conditions of the below paste-ons:

CHOROIDAL HEMANGIOMA

A hemangioma is a tumor comprised of blood vessels and can grow within the choroid, the blood vessel layer beneath the retina. Choroidal hemangiomas are not cancers and never metastasize. However, if the hemangioma is located in the area of central vision of the **eye** it can leak fluid that causes a retinal detachment and visual function may be affected.

Many choroidal hemangiomas can be safely monitored by your **eye** doctor without the need of further treatment. Photographs can be used to document evidence of growth or leakage and the need for treatment. Treatment options may include photodynamic therapy, laser photocoagulation to decrease the amount of fluid leakage, or low doses of external beam radiation therapy.

CHOROIDAL MELANOMA

Like a raised freckle on the skin, a nevus can occur inside the **eye**. And, like a skin nevus, a choroidal freckle can become malignant, so should be closely monitored. A choroidal nevus should be examined by an ophthalmologist every four to six months to check if the pigmentation or size of the nevus has changed. In most cases, the only treatment recommended is close observation and monitoring by an ocular oncologist.

CONJUNCTIVAL TUMORS

Conjunctival tumors are malignant cancers that grow on the outer surface of the **eye**. The most common types of conjunctival tumors are squamous cell carcinoma, malignant melanoma, and lymphoma. Squamous cell carcinomas rarely metastasize, but can invade the area around the **eye** into the orbit and sinuses. Malignant melanomas can start as a nevus (freckle) or can arise as newly formed pigmentation. Lymphoma of the **eye** can be a sign of systemic lymphoma or be confined to the conjunctiva.

Both squamous cell carcinomas and malignant conjunctival melanomas should be removed. Most small conjunctival tumors can be photographed and followed for evidence of growth prior to treatment. Small tumors can be completely removed surgically. In other instances cryotherapy (freezing therapy) may be necessaryor chemotherapy **eye** drops may be used to treat the entire surface of the **eye**.

EYELID TUMORS

Tumors of the eyelid may be benign cysts, inflammation, or malignant skin cancers. The most common type of eyelid **cancer** is basal cell carcinoma. Most basal cell carcinomas can be removed with surgery. If left untreated, these tumors can grow around the **eye** and into the orbit, sinuses and brain. A simple biopsy can determine if an eyelid tumor is malignant. Malignant tumors are completely removed and the eyelid is repaired using plastic surgery techniques. Additional cryotherapy (freezing-therapy) and radiation therapy sometimes are required after surgery.

IRIS TUMORS

Tumors can grow within and behind the iris. Though many iris tumors are cysts or a nevus, malignant melanomas can occur in this area. Most pigmented iris tumors do not grow. They are photographed and monitored with a special slit lamp and high frequency ultrasound to establish a baseline for future comparisons. When an iris tumor is documented to grow, treatment is recommended. Most small iris melanomas can be surgically removed. Radiation plaque therapy or enucleation may be considered for larger iris tumors.

LYMPHOMA/LEUKEMIA

Lymphoma tumors can appear in the eyelid tissue, tear ducts and the **eye** itself. In most patients with large cell non-Hodgkin's lymphoma, the disease is confined to the **eye** and central nervous system. In these patients, symptoms appear in the **eye** an average of two years before they are seen elsewhere. The disease itself as well as treatment, which may include external beam radiation, chemotherapy, or both (chemoradiation) to the central nervous system, can affect visual functioning.

MELANOCYTOMA

This extremely slow-growing tumor usually is found on the surface of the optic disc. Almost all cases of melanocytoma are benign and malignant transformation is rare. It is probably present at birth and typically, there are no symptoms. Under clinical examination and fluorescein angiographic studies, melanocytoma appears as a deeply pigmented area located over the optic disc. In the majority of cases, close observation is recommended and no treatment is required. If malignant transformation does occur, enucleation, may be considered.

ORBITAL TUMORS

Tumors and inflammations can occur behind the **eye**. These tumors often push the **eye** forward causing a bulging of the **eye** called proptosis. The most common causes of proptosis are thyroid **eye** disease and lymphoid tumors. Other tumors include hemangiomas (blood vessel tumors), lachrymal (tear) gland tumors, and growths that extend from the sinuses into the orbit. Though CT scans, MRI's and ultrasounds help in determining the probable diagnosis, most orbital tumors are diagnosed by a biopsy.

When possible, orbital tumors are totally removed. If they cannot be removed or if removal will cause too much damage to other important structures around the **eye**, a piece of tumor may be removed and sent for evaluation. If a tumor cannot be removed during surgery, most orbital tumors can be treated with external beam radiation therapy. Certain rare orbital tumors may require removal of the **eye** and orbital contents. In certain cases, orbital radiotherapy may be used to treat any residual tumor.

4. The Relief Requested

The Trademark Attorney has not made of record any evidentiary support rebutting the public perception of more prevalent non-cancerous "eye diseases" or, stated otherwise, that "eye cancer" is rare and not of public awareness as an eye disease.

Accordingly, it is respectfully requested that the Board grant applicant a similar registration for "The Eye Cancer Foundation" as the USPTO granted applicant for the mark "The Eye Care Foundation".

Respectfully Submitted,

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Dated: July 21, 2010