

**THIS OPINION IS
NOT A PRECEDENT
OF THE TTAB**

Hearing:
June 15, 2017

Mailed:
July 10, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Neumann

Serial No. 86535369

John C. Thomas III of Beck & Thomas, P.C.,
for Kimberly Dawn Neumann.

Corinne Kleinman, Trademark Examining Attorney,¹ Law Office 122
John Lincoski, Managing Attorney.

Before Taylor, Ritchie, and Lykos, Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Kimberly Dawn Neumann (“Applicant”) filed an application to register on the Principal Register the mark FITDATE, in standard character format, for

¹ The case was reassigned at the briefing stage. It was argued at oral hearing by Xheneta Ademi.

“dating services,” in International Class 45.² The Trademark Examining Attorney refused registration on the ground that the applied-for mark is merely descriptive of the services pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). The Examining Attorney also requested information under Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b). When the refusals were made final, Applicant filed this appeal and filed a request for reconsideration, which was denied. The appeal was resumed and is fully briefed. Applicant requested an oral hearing, which was presided over by this panel.

Information Requirement

With the May 22, 2015 Office Action, the Examining Attorney issued an information requirement, stating the following:

Due to the descriptive nature of the applied-for mark, applicant must provide the following information regarding the services and wording appearing in the mark:

(1) Brochures, advertisements and pertinent screenshots of applicant’s website as it relates to the services. Merely stating that information about the services is available on applicant’s website is insufficient to make the information of record.

If these materials are unavailable, applicant should submit similar documentation for services of the same type, explaining how its own product or services will differ. If the services feature new technology and information regarding competing services is not available, applicant must provide a detailed factual description of the services. For services, the factual information must make clear what the services are and how they are rendered, salient features, and prospective customers and

² Serial No. 86535369, filed on February 14, 2015, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s assertion of a bona fide intent to use the mark in commerce.

channels of trade. Conclusory statements will not satisfy this requirement; and

(2) Applicant must respond to the following questions: Are the services designed for, marketed to, intended for use by, or otherwise referencing physically fit consumers, fitness, or fit as it pertains to exercise and physical activity.

Applicant responded in the November 23, 2015 Response to Office Action that the information requested is “not available at this time” and that “Applicant is unaware of any competing businesses.” With regard to the question, Applicant responded: “Without revealing confidential business information at this point, a fitness component is contemplated as part of the dating service.”

The information requirement was made final in the Final Office Action on December 15, 2016, with the following questions asked:

- 1) Are the services designed for, marketed to, intended for use by, or otherwise referencing physically fit consumers, fitness, or “fit” as it pertains to exercise and physical activity?
- 2) Does applicant organize, arrange, or otherwise provide fit dates for its consumers?
- 3) What significance does the term “FIT” have to applicant’s dating services?

Applicant responded to this with the June 16, 2016 Request for Reconsideration as follows:

Applicant has no materials at this time to provide.

Answers to questions:

- 1) Are the services designed for, marketed to, intended for use by or otherwise referencing physically fit consumers, fitness, or “fit” as it pertains to exercise and physical activity?

Yes, the services are dating services and designed to be used for any one dating including those who are physically fit and exercise.

- 2) Does applicant organize, arrange, or otherwise provide fit dates for its consumers?

At the current time Applicant does not provide fit dates. Applicant is also unsure of what Examiner is referring to as fit dates.

- 3) What significance does the term “FIT” have to applicant’s dating services?

As explained above and previously, FIT can have multiple meanings. The right fit date. It also can mean exercise.

The information requirement was again reiterated with the July 6, 2016 Denial of Request for Reconsideration. We note that “[t]he Office may require the applicant to furnish such information ... as may be reasonably necessary to the proper examination of the application.” Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b). Applicant was thus required to respond to the Examining Attorney’s proper request for information under 37 C.F.R. § 2.61(b). *See In re AOP LLC*, 107 USPQ2d 1644, 1650 (TTAB 2013). *See also In re Cheezwhse.com Inc.*, 85 USPQ2d 1917, 1919 (TTAB 2008) (information requirement proper in intent to use case); *In re DTI Partnership LLP*, 67 USPQ2d 1699, 1701 (TTAB 2003). We find, nevertheless, that Applicant’s response to the requirement and questions was adequate. *See In re*

Emergency Alert Sols. Grp., LLC, 122 USPQ2d 1088, 1095 (TTAB 2017) (finding that “Applicant was reasonably forthcoming in its responses, and did not withhold the required *information*.” (emphasis in original)).

Here, as in *Emergency Alert*, we find that Applicant reasonably responded to the questions asked by the Examining Attorney. As to the other information requested, Applicant, with her intent to use application, responded repeatedly that such information was not available. The information provided by Applicant, as discussed, *infra*, was sufficient to properly consider her application and the refusal under Section 2(e)(1). Thus, we deem the information requirement to have been satisfied, and the refusal based on Rule 2.61(b) is reversed.

Mere Descriptiveness

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. *See In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) and *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or

services for which registration is sought, the context in which it is being used on or in connection with those goods or services, 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. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). That a term may have other meanings in different contexts is not controlling. *Id.* Moreover, it is settled that “[t]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them.” *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002). *See also In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985). On the other hand, if a mark requires imagination, thought and perception to ascertain the nature of the goods or services, then the mark is suggestive. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd*, 695 F.3d 1247, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012) (citing *In re Abcor Dev. Corp.*, 200 USPQ 215).

A composite of descriptive terms is registrable only if it has a separate, non-descriptive meaning. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (holding SUGAR & SPICE not merely descriptive of bakery products). The Examining Attorney argues that the applied-for mark

FITDATE is descriptive because it describes a significant attribute of applicant's dating services and the purpose of the intended audience, that is, that they will likely be going on a date involving a fitness activity. The following relevant definitions are of record:

fit: suitable for a specified purpose; physically healthy and strong.

Examples of *fit* in a sentence 1) Patients are encourage to get *fit*.
2) Are you *fit* enough to walk there?³

date: a social engagement between two persons that often has a romantic character.⁴

The Examining Attorney submitted a number of third-party web pages that refer to the concept of a "fit date" as referring descriptively to a romantic encounter involving a fitness activity. Examples include the following:

5 Fun and Fit Date Ideas: There is nothing wrong with getting hot sweaty [sic] on the first date, or even the third or fourth . . . with fun fitness dates of course! Going out on a fit date can be exciting and healthy in more ways than one.⁵

Top "9" Fit Date Ideas: Valentine's Day is becoming so much more than assorted chocolates, doily hearts and mushy cards. Studies show that fit couples enjoy participating in fit activities, and Valentines Day is no exception. . . . Be careful, the following "fit" date suggestions are known to boost heart rates, burn calories, tone bodies and increase overall appeal.⁶

New Idea for Valentines: A Fit Date: Valentines Day is almost here, which means a lot of high-calorie romantic dinners and

³ Merriam-webster.com. Attached to June 16, 2016 Request for Reconsideration, at 39-40.

⁴ <http://beta.merriam-webster.com>. Attached to December 16, 2015 Final Office Action, at 20.

⁵ <http://singleandlivingfab.com>. Attached to December 15, 2015 Office Action, at 3.

⁶ <http://fitnessgalore.net>. Attached to December 15, 2015 Office Action, at 6.

heart-shaped boxes full of sugary bon-bons. Tradition is nice, but for health-conscience people like us, this particular holiday seriously needs an update. This year, why not go for a romantic outing that has zero calories and literally gets the heart pumping? Invite your valentine on a fit date.⁷

Women's Fitness: Fun First Dates with Fitness: . . . With dating sites like Fitness Singles and Fitness Date Club you can eliminate first date jitters and find your future workout partner with a fit date.⁸

Top 10: Get Fit Date Ideas: . . . Once the sporty portion is over, wind down with some healthy grub that matches/complements your activity.⁹

Find Fit Dates: So you are into fitness, but you are single. Would you like to find a partner with an active lifestyle? Find Fit Dates can assist you in finding your match.¹⁰

Fitdates: starts here: Have Fun and Get a Workout With a Single From FitDates: Do you enjoy working out? If you do and would like to meet other health enthused singles, then there is no place better to start your search than Fit Dates. . . . You don't need to be in the best physical condition to join. You just need the aspiration to stay fit.¹¹

Fun Fit Dates: . . . The new trend for dating is Fun Fit Dates.¹²

Running to Eat: . . . What are fit dates? They are dates that are about getting your heart moving and being active.¹³

⁷ <http://blog.kokofitclub.com>. Attached to December 15, 2015 Office Action, at 12.

⁸ Eligiblemagazine.com. Attached to December 15, 2015 Office Action, at 14.

⁹ <http://www.askmen.com>. Attached to July 6, 2016 Denial of Request for Reconsideration, at 2.

¹⁰ <https://www.findfitdates.com>. Attached to July 6, 2016 Denial of Request for Reconsideration, at 19.

¹¹ <http://www.fitdates.com>. Attached to July 6, 2016 Denial of Request for Reconsideration, at 22.

¹² <http://woolx.com>. Attached to July 6, 2016 Denial of Request for Reconsideration, at 24.

¹³ <http://restaurantcritic-lenlen.blogspot.com>. Attached to July 6, 2016 Denial of Request for Reconsideration, at 27.

We note in this regard that Applicant also stated in response to the request for information that “a fitness component is contemplated as part of the dating service.”¹⁴

Applicant argues in response that FITDATE is not merely descriptive because it has two possible meanings 1) two persons on a date in which the two persons are the right “fit” for each other and thus on a date that fits them; and 2) two people on a date that involves a physical activity.¹⁵ The examples given by the Examining Attorney refer to the second meaning. With regard to the first, Applicant provided the following examples of third-party use:

Right Fit Dating Event: At this event you will learn: . . . What it takes to meet men who are the right fit for you.¹⁶

Is a Boston Dating Service The Right Fit For A Executive?: Are you curious as to whether a Boston Dating service is for you? The answer is yes: a dating service is an excellent opportunity for any single individual – if it is the *right* service.¹⁷

Right Fit Dating: Panel Discussion with Q&A: “Cyber Safety Sext Education.”¹⁸

The Right “Fit” – Dating Series 3¹⁹

¹⁴ November 23, 2015 Response to Office Action.

¹⁵ 9 TTABVUE 6.

¹⁶ <http://www.linkholistic.com>. Attached to June 16, 2016 Request for Reconsideration, at 6.

¹⁷ <http://jallenmatch.com>. Attached to June 16, 2016 Request for Reconsideration, at 8.

¹⁸ <http://www.heatherdugan.com>. Attached to June 16, 2016 Request for Reconsideration, at 10.

¹⁹ <https://www.youtube.com>. Attached to June 16, 2016 Request for Reconsideration, at 11.

Paxton/Patterson Blog: Finding the Right Fit: An Online Dating Approach: . . . Reflecting on my personal experience with online dating, signing up involves the completion of a profile, much like a job application.²⁰

The problem with Applicant's arguments is that even if we consider these two possible meanings of a FITDATE as meaning either one in which there is a suitable match or one in which a couple goes on a romantic encounter involving a fitness activity, both the plain meaning of the terms and the third party evidence, including that submitted by Applicant, shows both meanings to be merely descriptive. *Cf. In re Colonial Stores, Inc.*, 157 USPQ at 385.

Applicant further argues that other marks including the term "FIT" or "DATE" for the same or similar services have been allowed to register on the Principal Register without a disclaimer or a claim of acquired distinctiveness. These include BLAKEFIT (Registration No. 4892509); SMARTENFIT (Registration No. 4890446); BLUESTATEDATE (Registration No. 4325983); REDSTATEDATE (Registration No. 4325984); SMARTDATE (Registration No. 3888002); PARANORMAL DATE (Registration No. 4844804); and DRINKDATE (Registration No. 4831347). We note that a final one cited by Applicant, DINNERDATE (Registration No. 4137126) was actually registered on the Supplemental Register (others are cancelled and thus not relevant to any analysis). We note further that some of the registrations are for sufficiently different services or have sufficiently different marks as to justify different outcomes. Finally, though, we note that the USPTO must examine

²⁰ <http://www.paxtonpatterson.com>. Attached to June 16, 2016 Request for

each application on its own merits based on the record in the application under consideration and neither the USPTO's examining attorneys nor the Board are bound by the decisions of other examining attorneys in other applications. *See In re Cordua Restaurants, Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“The PTO is required to examine all trademark applications for compliance with each and every eligibility requirement”); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Even if all of the third-party registrations should have been refused registration . . . , such errors do not bind the USPTO to improperly register Applicant's marks.”) (citation omitted); *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs' application, the PTO's allowance of such prior registrations does not bind the Board or this court.”). Accordingly, these third-party registrations are ultimately unavailing in our analysis.

Overall, based on the plain meaning of the term as a whole as well as the third-party evidence and Applicant's own statements, we find that Applicant's composite term FITDATE, when viewed in relation to Applicant's dating services, immediately conveys that Applicant's dating services may include as a feature dates that involve a fitness aspect. Alternatively, Applicant's services will be understood as helping consumers find a suitable match. Both meanings are merely descriptive. While doubt is resolved for

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Applicant, we have no doubt that consumers require no imagination, thought or perception to arrive at this conclusion. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd*, 103 USPQ2d at 1755. Therefore, we find that the proposed mark is merely descriptive of the identified services, and we affirm this refusal to register.

Decision: The information requirement pursuant to Rule 2.61(b) is deemed to be satisfied and the refusal is reversed. However, the Board affirms the refusal to register under Section 2(e)(1).