

This Opinion is not a  
Precedent of the TTAB

Mailed: December 28, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Larsen Medical, LLC*  
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Serial No. 86841192  
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Jerry C. Harris, Jr. of Wick Phillips Gould & Martin, LLP,  
for Larsen Medical, LLC.

Jacob Vigil, Trademark Examining Attorney, Law Office 103,  
Stacy Wahlberg, Managing Attorney.

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Before Kuczma, Lynch, and Lebow,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Larsen Medical, LLC (“Applicant”) seeks registration on the Principal Register of  
the mark THE CARDIO GROUP (in standard characters) for:

Retail store services featuring medical devices, in  
International Class 35; and

Medical training and teaching; Providing a web site  
featuring non-downloadable instructional videos in the  
field of plethysmography, in International Class 41.<sup>1</sup>

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<sup>1</sup> Application Serial No. 86841192 was filed on December 7, 2015, based upon Applicant’s claim of first use anywhere and first use in commerce by a predecessor-in-title inuring to the benefit of Applicant, since at least as early as February 10, 2011. Section 1(a) of the

The Trademark Examining Attorney refused registration of Applicant's mark: (1) under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of Applicant's services because it describes a feature of the services and (2) because the specimens do not show the proposed mark in use in commerce in International Classes 35 and 41 pursuant to Trademark Act Sections 1 and 45, 15 U.S.C. §§ 1051 and 1127.

After the Trademark Examining Attorney made the refusals final, Applicant appealed to this Board. The appeal is fully briefed. We affirm the refusals to register.

### **I. Descriptiveness Under Section 2(e)(1)**

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 services of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1). For a term to be merely descriptive within the meaning of § 2(e)(1), it is not necessary that the term describe each feature of the services, only that it immediately conveys knowledge of a quality, feature, function, characteristic or purpose or use of the goods or services with which it is used. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *see also In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (quoting *In re Oppedahl & Larson LLP*,

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Trademark Act, 15 U.S.C. § 1051(a). Although Applicant disclaimed "THE CARDIO GROUP" in its September 30, 2016 Response to Office Action, the Examining Attorney did not enter the disclaimer noting in his October 14, 2016 Suspension Notice that Applicant may not disclaim the entirety of the mark in an application for registration on the Principal Register.

373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987).

Determining the descriptiveness of a mark under § 2(e)(1) of the Trademark Act is done in relation to an applicant's goods or services, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *See In re Chamber of Commerce*, 102 USPQ2d at 1219 (citing *In re Bayer*, 82 USPQ2d at 1831). In other words, the question is not whether someone presented only with the proposed mark THE CARDIO GROUP could guess the services listed in the identification. Rather, the question is whether someone who knows what the services are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)); *In re Swatch Group Mgmt. Services AG*, 110 USPQ2d 1751, 1762 n.54 (TTAB 2014).

Because THE CARDIO GROUP is a composite mark, it is permissible to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive. *See DuoProSS Meditech v. Inviro Medical*, 103 USPQ2d at 1758; *In re Oppedahl & Larson*, 71 USPQ2d at 1372 (citing *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985)).

Looking first at the components of the mark, the Examining Attorney argues that the components are individually descriptive with respect to Applicant's services and retain their descriptive meanings when combined.

The term “cardio” is a prefix referring to the heart or a short form of the term “cardiovascular” which also refers to the heart.<sup>2</sup> Inasmuch as Applicant’s services provided under the proposed mark THE CARDIO GROUP are rendered in connection with medical devices marketed as “Helping Hearts One Beat at a Time,”<sup>3</sup> related medical training and teaching, and a website featuring videos in the field of plethysmography,<sup>4</sup> “cardio” has a descriptive meaning and connotation. *See In re Reed Elsevier Props.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (Appropriate to consider the applicant’s website to provide context for and inform the

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<sup>2</sup> Definition of “cardio-“: *pref.* Heart: cardiovascular; “cardio“: *informal: adj.* Cardiovascular, *n.* Exercise that increases heart rate. <<https://www.ahdictionary.com/word/search.html?q=cardio&submit.x=0&submit.y=0>>, American Heritage® Dictionary of the English Language, Fifth Edition copyright © 2015 by Houghton Mifflin Harcourt Publishing Company, attached to March 31, 2016 Priority Action at TSDR 9.

Page references to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system.

<sup>3</sup> See specimens filed with application showing prominent use of “Helping Hearts One Beat at a Time” (TSDR 1, 3-4, 6-8, 11, 12-14) and referring to Applicant’s Max Pulse “Cardiovascular & Autonomic Nervous System (ANS) Screening Device” which provides measurements to assess overall cardiovascular and ANS wellness, and lists various factors that the test analyzes including, Heart Rate Variability and Mean Heart Rate. (TSDR 3, 6, 8, 14).

<sup>4</sup> The Board may take judicial notice of dictionary definitions, including online dictionaries and encyclopedias that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016):

Definition of plethysmograph: an instrument for determining and registering variations in the size of an organ, limb, or part resulting from changes in the amount of blood present or passing through it. <[merriam-webster.com/dictionary/plethysmograph](http://merriam-webster.com/dictionary/plethysmograph)>, Merriam-Webster Unabridged © 2020 Merriam-Webster, Incorporated. 12/14/2020.

Definition of plethysmography: measuring and recording changes in volume of an organ or other part of the body by a plethysmograph. <[medical-dictionary.thefreedictionary.com/plethysmography](http://medical-dictionary.thefreedictionary.com/plethysmography)>, Farlex Partner Medical Dictionary © Farlex 2012; A method of assessing the volume of blood flowing through a limb or other body part by measuring the change in volume, using strain gauges, air cuffs, impedance electrodes or other methods. <[medical-dictionary.thefreedictionary.com/electrical+impedance+plethysmography](http://medical-dictionary.thefreedictionary.com/electrical+impedance+plethysmography)>, Collins Dictionary of Medicine, © Robert M. Youngson 2004, 2005. 12/14/2020.

understanding of the identification); *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005) (examining the subject website in order to understand the meaning of terms in the mark).

According to the Examining Attorney, “group” refers to an assemblage of persons, or things, gathered together.<sup>5</sup> Additionally, the Examining Attorney notes that the term “group” when used in a mark is commonly considered generic for a provider of services.<sup>6</sup> While “group” may be considered generic of the source of the services, the question is whether “group” is merely descriptive of Applicant’s services. *In re Recreational Equipment, Inc.*, 2020 USPQ2d 11386 \*5 (TTAB 2020). Looking at Applicant’s specimens, use of “group” in the applied for mark conveys not only that “THE CARDIO GROUP” refers to a cardio medical group as the source of the retail and training services, it also describes features of the services. Applicant’s training and products are selected or backed by medical experts in cardiology and are

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<sup>5</sup> Definition of “group”: n. An assemblage of persons or objects gathered or located together; an aggregation: a group of dinner guests; a group of buildings near the road. <<https://www.ahdictionary.com/word/search.html?q=group&submit.x=0&submit.y=0>>, American Heritage® Dictionary of the English Language, attached to March 31, 2016 Priority Action at TSDR 10; additionally, we take judicial notice of another definition of “group”: [noun] 1 any collection or assemblage of persons or things; cluster; aggregation: a group of protesters; a remarkable group of paintings. <[dictionary.com/browse/group](https://www.randomhouse.com/dictionary.com/browse/group)>, based on the Random House Unabridged Dictionary, © Random House, Inc. 2020.

<sup>6</sup> See Registration Nos. 4910237, 4872197, 4929290, 4872269 and 4903124, registered on the Supplemental Register, with disclaimers of the term “GROUP.” Copies of Registrations attached to March 31, 2016 Priority Action at TSDR 12-25. For applicants seeking registration on the Supplemental Register, a disclaimer is only required if a component of the mark is incapable of becoming a trademark, e.g., generic. *In re Carolyn’s Candies, Inc.*, 206 USPQ 356, 359-60 (TTAB 1980).

marketed to “assist health-care practitioners, technicians, and individuals in the early detection of cardiovascular related issues.”<sup>7</sup>

Turning to the term “THE,” the Examining Attorney argues that it is a term having no meaning of its own as it is a definite article preceding the nouns “CARDIO” and “GROUP” to denote particular persons or things.<sup>8</sup>

Adding the term “the” to a descriptive or generic terms, like “cardio” and “group” generally does not add any source-indicating significance or otherwise affect the term’s descriptiveness or genericness. *See In re The Place Inc.*, 76 USPQ2d 1467, 1468 (TTAB 2005) (holding THE GREATEST BAR merely descriptive of restaurant and bar services; “the definite article THE . . . add[s] no source-indicating significance to the mark as a whole”); *Conde Nast Publ’ns Inc. v. Redbook Publ’g Co.*, 217 USPQ 356, 357, 360 (TTAB 1983) (holding THE MAGAZINE FOR YOUNG WOMEN a “common descriptive or ‘generic’ name of a class or type of magazine” and incapable of indicating source; “[t]he fact that the slogan also includes the article ‘The’ is insignificant. This word cannot serve as an indication of origin, even if applicant’s magazine were the only magazine for young women.”); *In re The Computer Store, Inc.*, 211 USPQ 72, 74-75 (TTAB 1981) (holding THE COMPUTER STORE merely descriptive of, and the common descriptive name for, computer-related services); *see also In re G. D. Searle & Co.*, 143 USPQ 220 (TTAB 1964), *aff’d*, 360 F.2d 1966, 149

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<sup>7</sup> See specimen filed with application at TSDR 3.

<sup>8</sup> Definition of “the”: def. art. 1. Used before singular or plural nouns and noun phrases that denote particular, specified persons or things: the baby, the dress I wore. <<https://www.ahdictionary.com/word/search.html?q=the&submit.x=0&submit.y=0>>, American Heritage® Dictionary of the English Language, attached to March 31, 2016 Priority Action at TSDR 11.

USPQ 619 (CCPA 1966) (holding “THE PILL” a common descriptive name for pharmaceutical preparations in tablet form, and thus does not serve as an indicator of source or origin in applicant). Nothing in Applicant’s mark or the record suggests that “THE” has any other meaning or significance in this context than as a mere definite article. In view of the descriptiveness of the term “CARDIO” and the genericness of the term “GROUP,” the word “THE” does not add any source-indicating significance to Applicant’s mark.

Applicant responds that its applied-for mark is not merely descriptive of its services because the wording THE CARDIO GROUP does not retain the meaning of each of the words associated with creating the mark. It also contends that because there is no definition listed for “the cardio group” on [www.merriam-webster.com/dictionary](http://www.merriam-webster.com/dictionary), “consumers could have latitude to interpret its meaning.”<sup>9</sup>

Applicant’s “negative” dictionary evidence from the Merriam-Webster dictionary, i.e., evidence showing that there is no dictionary definition, for the entire mark THE CARDIO GROUP does not matter. It is fundamental that a mark does not have to appear in a dictionary in order for it to be merely descriptive of Applicant’s services. *In re Thomas Collators, Inc.*, 158 USPQ 297, 298 (TTAB 1968).

The dictionary evidence submitted by the Examining Attorney shows Applicant’s proposed mark to be comprised of descriptive or generic words for Applicant’s

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<sup>9</sup> Applicant’s Appeal Brief p. 7 (4 TTABVUE 8) citing “[s]ee *Merriam-Webster-the cardio group*, available online at: <<https://www.merriamwebster.com/dictionary/the%20cardio%20group>> (last visited July 23, 2020).”

References to the briefs on appeal refer to the Board’s TTABVUE docket system.

services. As shown above, not only are the components of the applied-for mark descriptive, they retain their descriptive meanings in relation to Applicant's services when combined, resulting in a composite mark that is itself descriptive and not registrable. Under these circumstances, the absence of dictionary entries for the mark does not dictate that we find it to be a suggestive mark, rather than a descriptive term. *See In re Petroglyph Games Inc.*, 91 USPQ2d 1332, 1341 (TTAB 2009) (the absence of BATTLECAM from the dictionary applicant references does not dictate . . . that we find the term to be a fanciful mark, rather than a descriptive term); *In re Mine Safety Appliances Co.*, 66 USPQ2d 1694, 1697 (TTAB 2002) (WORKMASK found descriptive despite absence of any evidence composite term appeared in dictionaries); *In re Energy Prods. of Idaho*, 13 USPQ2d 2049, 2052 (TTAB 1989) ("The absence of [WASTE-TO-ENERGY] from the dictionary is not, contrary to applicant's argument, 'persuasive evidence' that the term is not merely descriptive of applicant's services.").

Contrary to Applicant's argument, Applicant's proposed mark does not constitute a unitary mark with a unique, incongruous or otherwise non-descriptive meaning in relationship to its services.<sup>10</sup> While a combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, non-descriptive meaning, the mere combination of descriptive words does not necessarily create a non-descriptive word or phrase. *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382, 384 (CCPA 1968); *In re Assoc'd Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB

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<sup>10</sup> Applicant's Appeal Brief p. 7 (4 TTABVUE 8).

1988). Generally, if the individual components of a mark retain their descriptive meaning in relation to the services, the combination results in a composite mark that is itself descriptive and not registrable. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing *In re Tower Tech*, 64 USPQ2d at 1317-18); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1162-63 (TTAB 2013). We find no new and unique commercial impression from the combination of words in this case. Inasmuch as THE CARDIO GROUP describes features or functions of Applicant's cardiovascular and heart health services and goods, it is merely descriptive of Applicant's services.

Applicant argues that "a consumer viewing the mark in its entirety will not immediately recognize what the mark stands for. For example, internet evidence shows that the term 'cardio group' could refer to an exercise group or event, describing the activities of someone performing some type of cardiovascular exercise."<sup>11</sup> Contending that consumers would not immediately be aware what THE CARDIO GROUP stands for because it could be subject to different interpretations, and only vaguely suggests the nature of the services provided, Applicant further argues that consumers would need to undergo a multi-stage research and reasoning process in

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<sup>11</sup> Applicant's Appeal Brief p. 7 (4 TTABVUE 8). It is noted that Applicant cited to the *Macomb Community College Archived Class Catalog*, available online at: [http://ecatalog.macomb.edu/preview\\_course\\_nopop.php?catoid=33&coid=41885](http://ecatalog.macomb.edu/preview_course_nopop.php?catoid=33&coid=41885) (last visited July 23, 2020) (Describing activities relating to a "Cardio Group Fitness" class). Applicant's Appeal Brief pp. 7-8 (4 TTABVUE 8-9). Because this evidence was not introduced during prosecution of its application, its citation in Applicant's appeal brief is untimely, and we have given it no consideration in our decision. *In re Jimmy Moore, LLC*, 119 USPQ2d 1764, 1766-67 (TTAB 2016) (excluding as untimely the first page of the applicant's patent submitted with its appeal brief).

order to understand what goods or services are provided in Applicant's mark; therefore, Applicant's mark THE CARDIO GROUP should be considered suggestive of its services.<sup>12</sup>

The fact that a term may have different meanings in other contexts is not controlling on the question of descriptiveness. It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive. *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1105 (TTAB 2018); *In re Franklin County Histor. Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012) ("That a term may have other meanings in different contexts is not controlling."); *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984). A term need not be merely descriptive of all features of the goods or services, it is enough that it is merely descriptive of only one significant feature. *In re Oppedahl & Larson*, 71 USPQ2d at 1371 ("[A] mark may be merely descriptive even if it does not describe the 'full scope and extent' of the applicant's goods or services."); *In re Fat Boys*, 118 USPQ2d at 1513 (citing *In re Gyulay*, 3 USPQ2d at 1010).

As the excerpts from Applicant's website submitted as its specimens clearly show, the word "cardio," a prefix referring to the heart or a short form of the term "cardiovascular,"<sup>13</sup> immediately conveys information about Applicant's services.<sup>14</sup>

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<sup>12</sup> Applicant's Appeal Brief p. 8 (4 TTABVUE 9).

<sup>13</sup> See footnote 2.

<sup>14</sup> See Applicant's specimens filed December 7, 2015 at TSDR 3, 6, 8, 14 referring to "Cardiovascular & Autonomic Nervous System (ANS) Screening Device" and "the use of plethysmography as a diagnostic and prognostic tool for early warning signs of cardiovascular disease . . . ." Applicant's test analyzes "reduced cardiovascular autonomic function, as

Despite the foregoing, Applicant contends that THE CARDIO GROUP is a suggestive mark. A mark is suggestive if some imagination, thought, or perception is needed to understand the nature of the goods or services described in the mark; whereas a descriptive term immediately and directly conveys some information about the goods and/or services. *See StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1652 (Fed. Cir. 2014) (citing *DuoProSS v. Inviro*, 103 USPQ2d at 1755); *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978).

Both the individual components and the composite result are descriptive of Applicant's services and do not create a unique, incongruous, or non-descriptive meaning in relation to the services. The evidence shows that the terms within the proposed mark, particularly the term "CARDIO," have significance in the medical field as they relate to monitoring heart health and performance and are used in a descriptive sense in the heart-related medical industry. As such, the relevant customers are familiar with and accustomed to seeing these terms in the medical field. The combination of the wording in the proposed mark does not lend itself to any other meaning or significance other than identifying features of Applicant's services. No novel spellings or unique juxtapositions are apparent in the mark to support a finding of a non-descriptive or suggestive meaning. Thus, the combination of the

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measured by heart rate variability [HRV] . . ." relating to the assessment of patient's "overall cardiovascular and ANS wellness."

Also, the substitute specimen pictures a book entitled "No More Heart Disease" by Dr. Louis Ignarro, and patient education brochures entitled "How Healthy is Your Heart?" See Confidential Sales Agreement filed as substitute Specimen on September 30, 2016 at TSDR 2 (along with Applicant's September 30, 2016 Response to Office Action).

wording “THE CARDIO GROUP” does not convey anything different from that of the plain meaning of each term. The proposed mark when used in connection with the specified services conveys information about the services to customers that Applicant’s services feature services and products to monitor and detect heart issues.

Based on the foregoing, and in view of the fact that THE CARDIO GROUP requires no imagination, thought, or perception to arrive at the qualities or characteristics of Applicant’s services, we find Applicant’s proposed mark is merely descriptive. *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); *In re Franklin County*, 104 USPQ2d at 1087.

## **II. Specimens Showing Use in Commerce**

Registration is also refused on the ground that the specimens do not show the applied-for mark in use in commerce for the services in International Classes 35 and 41. An application based on 15 U.S.C. § 1051(a) must include a specimen showing the applied-for mark in use in commerce showing a direct association between the mark and the services for each International Class of services identified in the application. *See* 15 U.S.C. §§ 1051, 1127; 37 C.F.R. §§2.34(a)(1)(iv), 2.56(a), (b)(2) and (c).

We turn first to the specimens Applicant submitted with its application to show use of its applied-for mark for retail store services featuring medical devices in International Class 35: webpages regarding Applicant’s Max Pulse medical device,<sup>15</sup>

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<sup>15</sup> Specimens (submitted with application) at TSDR 1, 3, 4, 6, 8, 11, 13, 14.

a Max Pulse Confidential Purchase Agreement template,<sup>16</sup> a Confidential Sales Agreement template,<sup>17</sup> and a Confidential Sales Addendum template.<sup>18</sup>

Citing the definition of “retail store” in the Merriam-Webster dictionary, i.e., “a place of business . . . in which merchandise is sold primarily to ultimate consumers,”<sup>19</sup> Applicant argues that “retail store services” necessarily include the “selling” of pertinent merchandise. More particularly, Applicant contends “[t]he construction of ‘retail store services’ as including selling is not only consistent with the meaning of ‘retail store’ taken from [sic], it is consistent with the expectation of services associated with retail stores and services obtained when shopping online.”<sup>20</sup> “Clearly, ‘retail store services’ includes those *types of services* that a consumer might expect from a retail store.”<sup>21</sup>

Applicant also contends its specimens not only indicate that THE CARDIO GROUP is being used to identify sales of Max Pulse devices, but other “retail store

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<sup>16</sup> Specimens (submitted with application) at TSDR 2, 5.

<sup>17</sup> Substitute specimen (submitted with September 30, 2016 Response to Office Action) at TSDR 1. As set forth in the Final Office Action, the substitute specimens Applicant submitted with its September 30, 2016 Response to Office Action were not properly verified with a signed declaration and therefore were not accepted.

<sup>18</sup> Substitute specimen (submitted with September 30, 2016 Response to Office Action) at TSDR 2. See footnote above regarding rejection of substitute specimens.

<sup>19</sup> We take judicial notice of Applicant’s definition(s) because it was obtained from a dictionary that is the electronic equivalent of a print reference work. *See In re Premiere Distillery LLC*, 103 USPQ2d 1483, 1484 n. 2 (TTAB 2012); *In re Dietrich*, 91 USPQ2d 1622, 1631 n.15 (TTAB 2009) (judicial notice taken of definition from Merriam-Webster Online Dictionary from merriam-webster.com). *See also Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>20</sup> Applicant’s Appeal Brief pp.10-11 (4 TTABVUE 11-12).

<sup>21</sup> Applicant’s Appeal Brief p. 12 (4 TTABVUE 13).

services” as well. For example, Applicant notes that the Confidential Sales Agreement evidences that THE CARDIO GROUP is being used in commerce in association with sales of the Max Pulse device.<sup>22</sup>

The Examining Attorney contends that the webpage specimens Applicant submitted do not show a direct connection with retail store services; rather, they only show information about a product. Because there is no indication that the products are purchased through the webpage, such as through an electronic “shopping cart,” the webpage does not show online retail store services.<sup>23</sup> Similarly, the Examining Attorney argues, the template agreements submitted by Applicant do not show the provision of retail store services. “While retail stores sell items, not all sales are from retail stores. Third-parties that sell products on Amazon, Etsy, or EBay do not provide retail store services – they provide goods.”<sup>24</sup>

Citing *In re The Cardio Grp., LLC*, 2019 USPQ2d 227232 (TTAB 2019), the Examining Attorney argues that the Board has already considered and rejected this argument with respect to some of the same specimen images involved in the instant case (for identical services to Applicant’s Class 35 services).<sup>25</sup> In *In re The Cardio Grp.*, which as noted by the Examining Attorney, appears to have been pursued by

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<sup>22</sup> Applicant’s Appeal Brief p. 12 (4 TTABVUE 13).

<sup>23</sup> While the subject application is for “retail store services” not “online retail store services” whether the specimens support retail or online retail store services is not determinative and does not impact the outcome of this case.

<sup>24</sup> Examining Attorney’s Brief, 4 TTABVUE 9.

<sup>25</sup> Examining Attorney’s Brief, 4 TTABVUE 10.

Applicant's predecessor-in-interest,<sup>26</sup> the Board found that the specimens did not "show Applicant rendering a retail store service of any type or persuade us that there is an association between THE CARDIO GROUP and design and retail services," noting that the specimens did not suggest physical stores, online stores or catalog retail store services. *Id.* at \*3 n.8. The same is true with respect to the specimens submitted in this case involving the standard character version of the mark at issue in *In re The Cardio Group*.

Taking a closer look at the definition of "retail store" submitted by Applicant, retail store services are provided in "a place of business . . . in which merchandise is sold." Nowhere do Applicant's specimens indicate or advertise that Applicant offers retail store sales or online retail store sales services.<sup>27</sup>

Applicant also contends that with respect to its medical training and teaching, and providing a website featuring non-downloadable instructional videos in the field of plethysmography services in Class 41, the applied-for mark is being used in commerce in association with services provided along with the sale of the "Max Pulse Device" medical devices. Pointing to the Confidential Sales Addendum and the

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<sup>26</sup> Although Applicant did not claim ownership of application Serial No. 86840860, involved in *In re The Cardio Grp.*, that application appears to have been pursued by Applicant's "predecessor in title" referenced in this application when filed. See Examining Attorney's Brief, 4 TTABVUE 10. Curiously, the applicant involved in the ex parte appeal, which application was filed on the same date as the subject application, was identified as The Cardio Group, LLC, at a mailing address identical to Applicant's mailing address, by the same counsel as is representing Applicant in this appeal.

<sup>27</sup> In its September 30, 2016 Response to Office Action, Applicant deleted "on-line retail store services featuring medical devices" and "independent sales representatives in the field of medical devices" from this application.

Confidential Sales Agreement, Applicant argues that they show that its mark is being used in association with “most notably: repairing, replacing, and servicing of the [Max Pulse] medical devices (as evidenced by the inclusion of a ‘Four Month Unconditional Money Back Guarantee’ and the provision of ‘All Future Software Upgrades’) and [Training & Certification] associated with the medical devices,”<sup>28</sup> citing to the substitute specimens filed with its September 30, 2016 Response to Office Action.

Those substitute specimens were not accepted due to the lack of a verified declaration supporting their alleged use. An applicant who files an application under §1(a) of the Trademark Act may submit substitute specimens of the mark as used in connection with the services. However, the applicant must submit a verified statement that the substitute specimen was in use in commerce at least as early as the filing date of the application. Trademark Rules §§ 2.56(a), (b)(2); 2.59(a); 2.86(a)(3), 37 CFR §§ 2.56(a), (b)(2); 2.59(a); 2.86(a)(3). If an applicant cannot provide an acceptable substitute specimen, supported by an affidavit or declaration of use in commerce as of the filing date of the application, the applicant may amend the basis of the application to §1(b). *See* Trademark Rule § 2.35(b)(1), 37 CFR § 2.35(b)(1).

While Applicant submitted substitute specimens in response to the rejection of the original specimens, Applicant did not submit a verified statement supporting use of the substitute specimens in commerce at least as early as the filing date of the

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<sup>28</sup> Applicant’s Appeal Brief p. 12 (4 TTABVUE 13) referring to the substitute specimens filed with its September 30, 2016 Response to Office Action which were not accepted due to the lack of a verified declaration in support of the use of the substitute specimens.

application.<sup>29</sup> The October 14, 2016 Suspension Notice suspending action on the application notified Applicant that because a signed declaration verifying the substitute specimens was not submitted, the specimen requirement was maintained and continued. The subsequent Final Office Action made the substitute specimen requirement final, advising Applicant that it could respond to the refusal by either submitting a declaration supporting use of the substitute specimens at least as early as the filing date of the application or amend the filing basis to intent to use under § 1(b) of the Trademark Act. In response to the Final Office Action, Applicant filed a Notice of Appeal.

Even if the substitute specimens were properly supported by a declaration supporting their use, they do not support use of the mark in connection with Applicant's services. Neither the Confidential Sales Agreement nor the Confidential Sales Addendum submitted as substitute specimens show use of the mark in connection with retail store services in Class 35; or medical training and teaching, and/or providing a web site featuring non-downloadable instructional videos in the field of plethysmography in Class 41.<sup>30</sup>

Lastly, Applicant argues that its "training video also demonstrates the very kinds of services provided by Applicant, namely, training and certification that provides instructions regarding the use of its products. . . . much like an Apple® store employee

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<sup>29</sup> The September 30, 2016 Response to Office Action signed by Applicant's attorney contained the following statement: The filing Attorney has elected not to submit the signed declaration, believing no supporting declaration is required under the Trademark Rules of Practice.

<sup>30</sup> See September 30, 2016 Response to Office Action at TSDR 6-7.

working at the Genius Bar® would demonstrate the features of a new iPhone to a customer.” Applicant contends its “video” provides a summary of the information that may be obtained through use of Applicant’s products.<sup>31</sup> While Applicant’s “training video” has not been made of record, a few “snapshots” from the “training video” are included as part of its specimens.<sup>32</sup> Based upon the “snapshots” filed as specimens, the training video provides information regarding the data collected by Applicant’s Max Pulse product during a test. Such information is merely promotional information rendered either to prospective customers hoping to make them a customer, or actual customers of Applicant’s services and goods.

Providing general information or instructions as to the purpose and uses of an applicant’s goods or services is merely incidental to the sale of the goods or services, not a separate informational or training service. *See In re Dr. Pepper Co.*, 836 F.2d 508, 5 USPQ2d 1207 (Fed. Cir. 1987) (running of promotional contests is not a registrable service since promotional activity is performed for benefit of seller); *In re Florists’ Transworld Delivery, Inc.*, 119 USPQ2d 1056, 1063 (TTAB 2016) (advertising and promotional activities such as information regarding flowers or conducting promotional events to promote the sale of applicant’s flowers, do not constitute a separately registrable service, but are merely incidental to the production or sale of its goods); *In re Moore Bus. Forms Inc.*, 24 USPQ2d 1638 (TTAB 1992) (paper manufacturer who rates the recycled content and recyclability of its own products is

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<sup>31</sup> Applicant’s Appeal Brief p. 13 (4 TTABVUE 14).

<sup>32</sup> Specimens filed with Application on December 7, 2015 at TSDR 7, 9-10, 12, 15-16; and Substitute specimen filed with September 30, 2016 Response to Office Action, at TSDR 3.

merely providing information about its goods, not rendering a service to others); *In re Reichhold Chems., Inc.*, 167 USPQ 376 (TTAB 1970) (“promoting the sale and use of chemicals” is not a registrable service, where applicant is merely providing “technical bulletins” that contain information about its own products). Therefore, even if the supplemental specimens Applicant submitted were properly verified as being in use as of the application filing date, they do not, on this record, constitute specimens for the services in Class 41. Rather, they show services that are merely incidental to the production or sale of Applicant’s medical device and related goods, i.e., they provide information regarding the device.

### **III. Conclusion**

Applicant’s proposed mark THE CARDIO GROUP is merely descriptive of its cardiovascular and heart health-related services. Additionally, the specimens filed with the application, as well as the substitute specimens that were not supported by a declaration, fail to show use of the applied-for mark in association with Applicant’s services in International Classes 35 and 41.

**Decision:** The refusals to register Applicant’s proposed mark THE CARDIO GROUP under § 2(e)(1) of the Trademark Act, and §§ 1 and 45 of the Trademark Act, are affirmed.