

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 26, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Health New England, Inc.
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Serial No. 86871517
—

Nicholas J. Tuccillo of Grogan, Tuccillo & Vanderleeden, LLP,
for Health New England, Inc.

Cynthia R. Smith, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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

Opinion by Coggins, Administrative Trademark Judge:

Health New England, Inc. (“Applicant”) seeks registration on the Principal

Register of the composite word and design mark  Health New England | Be Healthy

(with a claim of acquired distinctiveness as to HEALTH NEW ENGLAND) for
“underwriting insurance for prepaid health care” in International Class 36, and

“health care in the nature of health maintenance organizations” in International Class 44.¹

I. Evidentiary Issue

Applicant attached to its brief two screen shots of subpages from Applicant’s website, neither of which had been submitted previously. *See* Brief, Exhibits A and B (4 TTABVUE 5-8). The Examining Attorney objected to the new material. Examiner’s Brief, unnumbered p. 3 (7 TTABVUE 4). Because the evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board, the Examining Attorney’s objection to the website subpage evidence first submitted with the appeal brief is sustained. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014). Accordingly, we give no consideration to the website subpage evidence submitted for the first time with Applicant’s brief, or any arguments related thereto.

II. Background

Applicant initially based the application on its allegation of a bona fide intent to use the mark in commerce; and, after a notice of allowance issued, Applicant filed a

¹ Application Serial No. 86871517 filed on January 11, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce. The application contains the following description of the mark: “The mark consists of two concave wings touching one another at opposing ends forming an irregular oval to the left of the wording ‘HEALTH NEW ENGLAND’. To the right is a vertical bar preceding the wording ‘BE HEALTHY’. Color is not claimed as a feature of the mark.”

statement of use with the specimen shown below (the “Original Specimen”)² described as a “website page”³:



The Trademark Examining Attorney refused registration under Sections 1 and 45 of the Trademark Act, 15 U.S.C. §§ 1051 and 1127, on the ground that the specimen does not show the mark in use in commerce in connection with the Class 36 or 44 services specified in the Statement of Use because “the specimen makes no reference to insurance underwriting or health maintenance organizations.”⁴ In response thereto, Applicant made no argument nor provided any explanation, but submitted

² March 22, 2018 Statement of Use at TSDR 5. All citations to TSDR are to the downloadable .pdf version of the document.

³ *Id.* at TSDR 1.

⁴ April 11, 2018 Office Action at TSDR 2.

the following substitute specimens (the “Substitute Specimens”)⁵ each described as a “website page showing services”⁶:



Be Healthy™

We've got you covered! Be Healthy™ provides coverage for the same services as MassHealth, plus more!

- Personal attention when you receive care.
- Prescription drugs and over-the-counter medications – same copays as MassHealth!
- OB-GYN, family planning and prenatal care
- Pediatric care and well-child checkups
- X-rays and lab tests
- Chiropractic care
- Vision care
- And lots more!

healthnewengland.org/behealthy

Scan the QR code with your smartphone to go to the Be Healthy™ website. You can also follow Health New England on Facebook and Twitter.

We're here when you need us!

- Award-winning customer service
- Hassle-free access to care – no referrals for in-plan doctors
- A bilingual nurse line – 24 hours a day, 7 days a week
- Assistance with medical transportation (when eligible), so you don't miss appointments
- Help filling out Eligibility Review Forms (ERVs), so you don't lose your coverage

Plus FREE Extra Benefits!

- \$50 wellness reimbursement allowance (\$200 for a family of four)
- HNEPlus discount program
- FREE dental kit upon request
- FREE extras for moms and kids

*No copay for MassHealth members under the age of 21 for a list of these exceptions, copay amounts or for more information on our pharmacy benefit, call Health New England Be Healthy™ or visit healthnewengland.org/behealthy.

Your Local MassHealth Plan

Health New England
Where you matter.

To learn more about Health New England Be Healthy™ and all the benefits offered to members, call us at (800) 786-9999 or TTY 781, Monday-Friday, 8:00 a.m. - 6:00 p.m., or visit healthnewengland.org/behealthy.

To become an Health New England Be Healthy™ member or to learn more about all of your health plan options, call the MassHealth Customer Service Center at (800) 841-2900 or TTY (800) 497-4648, Monday - Friday, 8:30 a.m. - 5:00 p.m.



MemberMatters
The online newsletter for Health New England Be Healthy™ members

Health New England
Where you matter.
Spring Issue | March 2016

Visit our HNETalk member news site to read these articles for Be Healthy™ members:

- New service for Be Healthy™ members with autism
- How to avoid asthma triggers in your home
- Shop at farmers markets and save
- Are you having a baby?
- Talk to a doctor 24/7 with Teladoc™
- Events
- Benefits reminder
- Enroll online
- Affirmative statement regarding incentives

If you do not have online access, call Member Services at (800) 786-9999, Monday-Friday, 8:00 a.m. to 6:00 p.m., to get a copy of the articles.

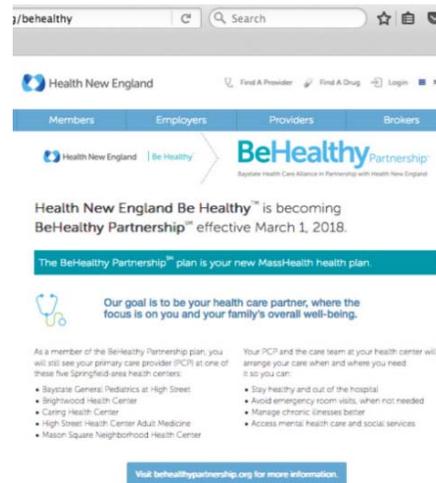
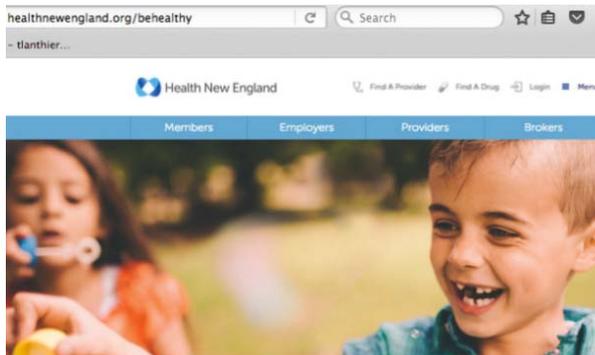
Go to HNETalk.com/member or scan the QR code to read the articles for Be Healthy™ members.

⁵ April 16, 2018 Response to Office Action at TSDR 6-7.

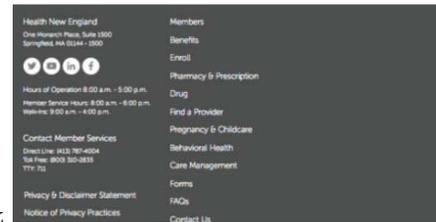
⁶ *Id.* at TSDR 1, 2. Although Applicant described each of these specimens as coming from a website, the Examining Attorney characterized them as “a paper pamphlet and cover of an online newsletter,” respectively. See Examiner’s Brief, unnumbered p. 4 (7 TTABVUE 5). Based on the layout, content, and QR code, these appear to be print advertisements.

The Examining Attorney rejected the substitute specimens and made final the refusal under Sections 1 and 45 as to the services in both classes. Specifically, the Examining Attorney explained that the substitute specimens “[do] not show proper use of the . . . mark in commerce,” noted that the elements of the composite mark appeared “spatially separated to such a degree that they each appear as separate and distinct marks” on the Substitute Specimens, and concluded that “the mark in the drawing is not a substantially exact representation of the mark on the specimen[s].”⁷

When the refusal was made final, Applicant appealed, requested reconsideration, and submitted two additional specimens for each class, excerpted below (the “Reconsideration Specimens”). For Class 44:⁸



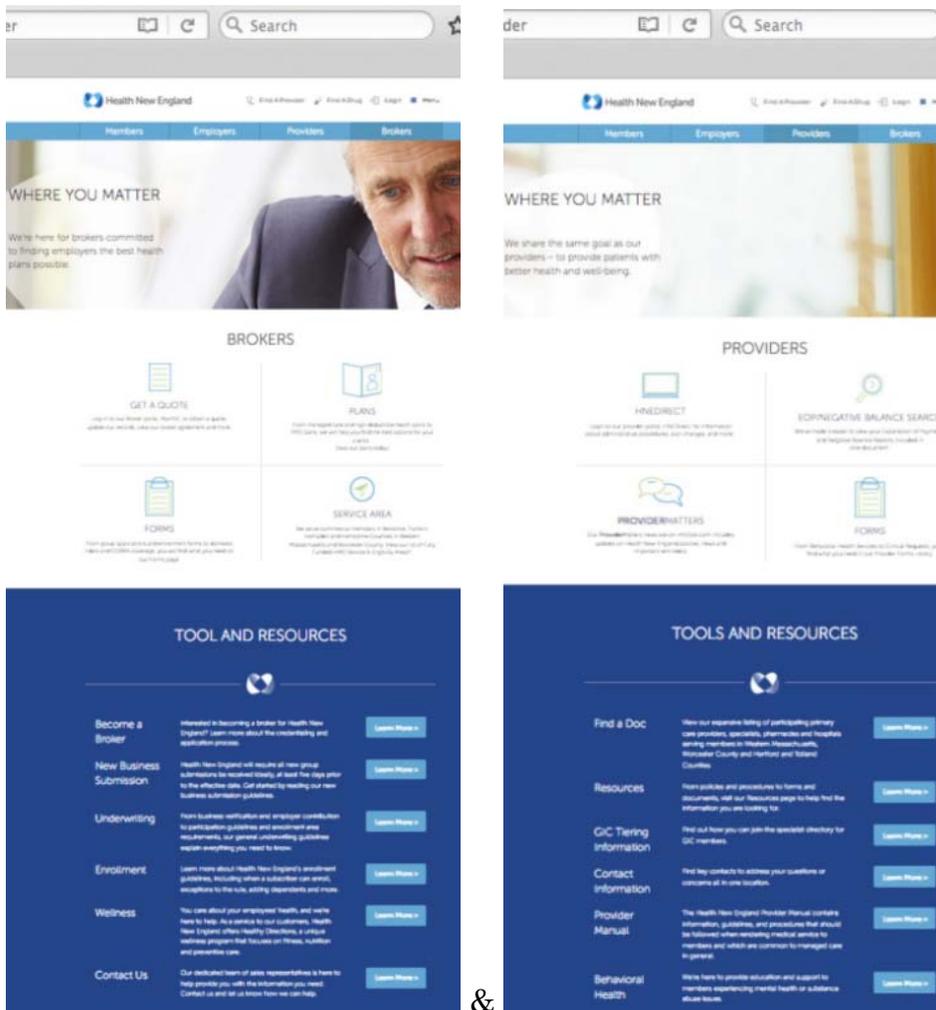
&



⁷ April 26, 2018 Office Action at TSDR 2.

⁸ October 26, 2018 Request for Reconsideration at TSDR 9-10.

Applicant argued that the Class 44 Reconsideration Specimens “show the mark in close association with clickable links and information relating to . . . operation of [Applicant’s] Health Maintenance Organization, as offered through [its] BEHealthy Partnership program.”⁹ And for Class 36:¹⁰



Applicant argued that the Class 36 Reconsideration Specimens “are accessed through” the first Class 44 specimen (above left), and “[a]lthough” the mark is “not

⁹ *Id.* at TSDR 1.

¹⁰ *Id.* at TSDR 7-8.

present on” the Class 36 “specimens . . . directly, [Applicant’s] mark is reflected on the [preceding] source page” (i.e., the first Class 44 specimen, above left) “where the top-level links to [the Class 36] specimens . . . are located. Thus . . . customers would . . . be presented with [Applicant’s] mark as a necessary stop to delving further into the myriad of services offered by Applicant[], including the underwriting services accessed via the ‘broker’ or ‘provider’ links, as shown in” the Class 44 Reconsideration Specimens above.¹¹

The Examining Attorney granted the request for reconsideration as to Class 44, but denied the request as to Class 36, finding Applicant’s analysis and arguments unpersuasive for Class 36 and that the “mark does not appear on the [Class 36 Reconsideration Specimens].”¹² Thereafter, the appeal was resumed. As explained below, we affirm the refusal to register for Class 36.

III. Applicable Law

“The Trademark Act ‘provides for registration of a mark based on use of the mark in commerce.’” *In re Yarnell Ice Cream, LLC*, 2019 USPQ2d 265039, *12 (TTAB 2019) (quoting *In re Siny Corp.*, 920 F.3d 1331, 2019 USPQ2d 127099, *2 (Fed. Cir. 2019)). Under Section 45 of the Trademark Act, 15 U.S.C. § 1127, a service mark is used in commerce “when it is used or displayed in the sale or advertising of services.” “A service mark specimen must show the mark as used in the sale or advertising of the services.” Trademark Rule 2.56(b)(2), 37 C.F.R. § 2.56(b)(2). An acceptable specimen

¹¹ *Id.* at TSDR 1.

¹² November 19, 2018 Request for Reconsideration Denied in Part at TSDR 1.

must show “some direct association between the offer of services and the mark sought to be registered therefor.” *In re Universal Oil Prods. Co.*, 476 F.2d 653, 177 USPQ 456, 457 (CCPA 1973). “For specimens showing the mark in advertising the services, ‘[i]n order to create the required ‘direct association,’ the specimen must not only contain a reference to the service, but also the mark must be used on the specimen to identify the service and its source.” *In re WAY Media, Inc.*, 118 USPQ2d 1687 (TTAB 2016) (quoting *In re Osmotica Holdings Corp.*, 95 USPQ2d 1666, 1668 (TTAB 2010)). A specimen that shows “only the mark with no reference to, or association with, the services does not show service mark usage.” *In re Pitney Bowes, Inc.*, 125 USPQ2d 1417, 1419 (TTAB 2018).

“To determine whether a mark is used in connection with the services described in the [statement of use], a key consideration is the perception of the user.” *In re JobDiva, Inc.*, 843 F.3d 936, 121 USPQ2d 1122, 1126 (Fed. Cir. 2016). The evidence is reviewed to determine whether use of the mark “sufficiently creates in the minds of purchasers an association between the mark” and the applied-for services. *Id.* (quoting *In re Ancor Holdings LLC*, 79 USPQ2d 1218, 1221 (TTAB 2006)). We may consider an applicant’s explanations as to how the specimen is used, along with any other available evidence in the record that shows how the mark is actually used. *See In re Cardio Grp., LLC*, 2019 USPQ2d 227232, *2 (TTAB 2019) (“Both precedent and examination guidance make clear that in assessing the specimens, consideration must be given not only to the information provided by the specimen itself, but also to any explanations offered by Applicant clarifying the nature, content, or context of use

of the specimen that are consistent with what the specimen itself shows.”); *In re Int’l Envtl. Corp.*, 230 USPQ 688, 691 (TTAB 1986).

To assess whether the specimens of record make a direct association or reference to the Class 36 services, we first look to the nature of the “underwriting insurance for prepaid health care” services. Underwriting is “[t]he process of determining a person’s insurability in terms of life, liability, home, and other insurance policies and whether it will accept an application for insurance;”¹³ and “[i]nsurance: [e]valuate a risk to assume the liability for specified future events and to match the risk with appropriate rate of premium.”¹⁴ According to Applicant, “[a]s is readily understood by insurance brokers for any type of insurance, selling insurance policies to any customer necessarily involves submitting an application for coverage on behalf of such customer, which is reviewed by an underwriter to determine whether the prospective customer meets eligibility requirements, etc.”¹⁵

A. Original Specimen

The Examining Attorney argues that the Original Specimen, submitted March 22, 2018, “fails to directly reference any services” and characterizes “the manner in which the mark is displayed” (i.e., prominently conveying that “Health New England Be

¹³ THE FREE DICTIONARY, medical-dictionary.thefreedictionary.com/underwriting (accessed September 24, 2019). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018); *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).

¹⁴ BUSINESS DICTIONARY, businessdictionary.com/definition/underwrite (accessed September 24, 2019).

¹⁵ 4 TTABVUE 2-3.

Healthy is becoming BeHealthy Partnership effective March 1, 2018”) as “inform[ing] the consumer that [the mark] is no longer in use, or that the relevant services are no longer provided under the mark.” Examiner’s Brief, unnumbered p. 4 (9 TTABVUE 5). Although Applicant does not mention the Original Specimen in its brief, and therefore appears to concede that this specimen does not show use of the mark in commerce for the Class 36 services, for completeness we review that specimen.

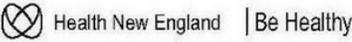
A broker is “one who acts as an intermediary: such as . . . an agent who negotiates contracts of purchase and sale (as of real estate, commodities, or securities).”¹⁶ The single word “brokers” on the Original Specimen does not indicate that Applicant underwrites insurance for prepaid health care, and would not be perceived as a reference to underwriting services. There is no reference to insurance services in general or underwriting services specifically; and the jump from a one-word occurrence of “brokers” to underwriting insurance for prepaid health care is unsupported. The Original Specimen contains no reference that would create an association between underwriting services and the mark, which appears only once on this specimen and far removed from the “brokers” link. Accordingly, we find a lack of association on the Original Specimen between the mark  Health New England | Be Healthy and any underwriting service offered by Applicant.¹⁷

¹⁶ MERRIAM-WEBSTER, meriam-webster.com/dictionary/broker (accessed September 24, 2019).

¹⁷ Moreover, we note that the Original Specimen was submitted March 22, 2018. We agree with the Examining Attorney’s assessment that the statement on this specimen that “Health New England Be Healthy is becoming BeHealthy Partnership effective March 1, 2018” – a date prior to submission of the specimen – leads prospective consumers to perceive either

B. Substitute Specimens

The Examining Attorney observes that “[n]either of the [Substitute Specimens] display the applied-for mark . . . itself, or in connection with insurance underwriting services.” Examiner’s Brief, unnumbered p. 4 (9 TTABVUE 5). Although Applicant does not mention the Substitute Specimens in its brief, and therefore appears to concede that these specimens do not show use of the mark in commerce for the Class 36 services, for completeness we review these specimens.

The mark does not appear on the Substitute Specimens; therefore, these specimens do not and cannot show use of the mark in commerce for any service. Accordingly, we find a lack of association on the Substitute Specimens between the mark  and any underwriting service offered by Applicant.

C. Reconsideration Specimens

The Examining Attorney observes that Applicant submitted “four screenshots from [A]pplicant’s website. Two screenshots [submitted for Class 44] reference the mark and state that it is no longer in use effective March 1, 2018. The other two screenshots [submitted for Class 36] fail to show use of the applied-for mark in connection with the relevant services.” Examiner’s Brief, unnumbered p. 4 (9 TTABVUE 5). Applicant contends that the first Class 44 Reconsideration Specimen prominently shows the mark on Applicant’s webpage and contains a link titled “brokers.” Based on those two elements, Applicant argues:

that Applicant no longer uses the mark or that the advertised services are no longer provided under the mark.

[A]ll brokers understand that underwriting is an inherent part of obtaining insurance for a client. In the present case, therefore, insurance brokers visiting the Applicant's website and seeing the brokers link expect that insurance underwriting services are part of the services offered by the Applicant.

Brief, p. 2 (7 TTABVUE 3). Applicant also argues that the first Class 36 Reconsideration Specimen is "the Brokers subpage that is displayed when following the 'BROKERS' link" from the first Class 44 Reconsideration Specimen, and, "[n]otably, the Brokers subpage clearly shows the link/term 'Underwriting' under the 'Tools and Resources' section." *Id.*, p. 2 (7 TTABVUE 3).

We note initially that Applicant's mark is not present on either of the Class 36 Reconsideration Specimens. We also note that the word "underwriting" appears on the first Class 36 Reconsideration Specimen (i.e., the "brokers" subpage). The smaller text next to the word "underwriting" is unclear due to the quality of the image submitted by Applicant.¹⁸

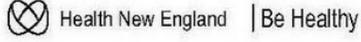
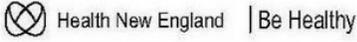
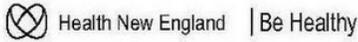
As with the Original Specimen, the single word "brokers" on the Class 44 Reconsideration Specimens does not indicate that Applicant underwrites insurance for prepaid health care, and would not be perceived as a reference to underwriting services. There is no reference to underwriting services specifically on this webpage; and the jump from a one-word occurrence of "brokers" to underwriting insurance for prepaid health care is unsupported. Applicant provided no evidence to support its

¹⁸ Applicant "has a duty to ensure that the evidence it submits is legible." *See Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc. dba Watermark Cruises*, 107 USPQ2d 1750, 1758 (TTAB 2013).

assertions relating to what brokers visiting Applicant's website would understand or expect. See *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) ("Attorney argument is no substitute for evidence.")). On this record, the Class 44 Reconsideration Specimens by themselves contain no reference that would create an association between underwriting services and the mark.

Applicant contends that its "brokers" subpage (i.e., the first Class 36 Reconsideration Specimen which does not show the mark) is proximate to its preceding page (i.e., the first Class 44 Reconsideration Specimen which contains the mark) and is displayed when users follow the clickable "brokers" link from that preceding page. As Applicant points out, there is "no requirement that a single webpage of a multi-page website show the mark used in connection with each term of the" recitation of services; rather, the mark and a reference to services shown on separate but proximate webpage can convey the required association. Brief, p. 3 (7 TTABVue 4). Applicant contends that consumers would associate the mark on the first Class 44 Reconsideration Specimen with the reference to underwriting on the first Class 36 Reconsideration Specimen.

Whether Applicant's multiple webpages create such an association between its mark and underwriting services is a question of fact. Cf. *In re Azteca Sys., Inc.*, 102 USPQ2d 1955, 1957 (TTAB 2012) ("Whether a specimen is a display associated with the goods is a question of fact."). Because there is no evidence bearing on the reaction

of the purchasing public to Applicant's use of , we must rely on our own analysis of the webpages to determine whether consumers would perceive  as a service mark identifying Applicant's Class 36 "underwriting insurance for prepaid health care" services. *In re Signal Cos., Inc.*, 228 USPQ 956, 957 (TTAB 1986); *In re Wakefern Food Corp.*, 222 USPQ 76, 77 (TTAB 1984). Although the mark appears on the first webpage (i.e., the Class 44 Reconsideration Specimens), consumers would view it only as a soon-to-be defunct name for what will become BeHealthy Partnership. In addition, Applicant's mark is not used in close proximity to the "brokers" link that leads to a subpage where Applicant refers to underwriting services (but on which it doesn't use the mark or even the BeHealthy Partnership mark). Thus, consumers are unlikely to make an association between  and any content on the linked webpages. Regardless, as noted above, the single word "brokers" on the Class 44 Reconsideration Specimens does not indicate that Applicant underwrites insurance for prepaid health care, would not itself be perceived as a reference to underwriting services, and does not function as an offer to enter into an arrangement for underwriting insurance for prepaid health care.

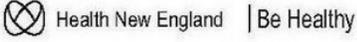
In support of its argument that its offer of underwriting services on the "brokers" subpage creates an association between the mark which appears on a preceding webpage, Applicant points to Example 4 of TMEP § 1301.04(i) (Examples of Acceptable Service-Mark Specimens). Reliance on this example is inapposite. Example 4 involves software as a service (SAAS) services featuring software for use

in staff management and related scheduling tasks, and presents as the specimens an online portal (or launch screen) and a sign-in screen through which one must log in to access the software services. The TMEP explains that the

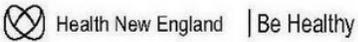
[m]ark-services association is present because the mark appears on the launch screen where it is customary in such industry to place the mark under which the services are offered and such placement is recognized as the introduction of the online services; and the mark also appears on the sign-in screen where it is customary to input credentials to gain access to online services. The context in which the mark is used, i.e., on the title and sign-in screens, creates the mark-services connection (since using such screens is common practice for rendering such services) and implies that the services are available and rendered once the user initiates access to the services by logging in. The launch screen alone is acceptable because it is generally known that such screens are used to initiate the start up of or access to online services. The sign-in screen is also acceptable on its own since it is a generally known means of accessing online services. The mark is also displayed on another screen which shows the mark while the services are being performed and, thus, the proximity of the mark to the services conveys a connection

TMEP § 1301.04(i) (Example 4). This is not the situation with Applicant's straightforward website Reconsideration Specimens. There is no software launch or sign-in screen. The attempt at analogizing a software launch screen for SAAS services to a regular webpage linking to a subpage mentioning underwriting services is flawed.

Upon close consideration of Applicant's Reconsideration Specimens and arguments related thereto, we find that use of the mark on the first page is not associated with reference to the underwriting services on the subpage (where other marks are used) such that users would sufficiently perceive an association between

use of the mark on one page and services on another. Accordingly, we find a lack of association on the Reconsideration Specimens between  and any underwriting service offered by Applicant.

IV. Decision

None of Applicant's specimens demonstrate use of the mark in a manner that creates in the minds of potential customers a direct association between the mark  and the recited Class 36 services. We therefore affirm the refusal to register the mark in Class 36. The application will proceed to registration in due course for the Class 44 services (to which the refusal does not apply).