

This Opinion is Not a
Precedent of the TTAB

Mailed: December 19, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re PolarityTE, Inc.
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Serial No. 87259174
Serial No. 87259218
Serial No. 87259227
Serial No. 87260627
Serial No. 87260650
Serial No. 87260658
Serial No. 87260683
—

Tsan Abrahamson of Cobalt LLP,
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Before Bergsman, Kuczma and Larkin,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

¹ Application Serial Nos. 87259174 and 87259218.

² Application Serial Nos. 87259227, 87260627, 87260650, 87260658, and 87260683.

PolarityTE, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character marks listed below for

Biological tissue grafts; Implantable scaffolds comprising living tissue for enhancing therapy; Implantable scaffolds comprising living tissue for maintaining tissue contour, in Class 5; and

Prosthetic tissues for parietal, visceral and vascular use, in Class 10.

- **AdiposeTE**, Serial No. 87259174, filed December 6, 2016;
- **BowelTE** Serial No. 87259218, filed December 6, 2016;
- **LiverTE**, Serial No. 87259227, filed December 6, 2016;
- **CorneaTE**, Serial No. 87260627, filed December 7, 2016;
- **RetinaTE**, Serial No. 87260650, filed December 7, 2016;
- **BladderTE**, Serial No. 87260658, filed December 7, 2016; and
- **UrethraTE**, Serial No. 87260683, filed December 7, 2016.

The applications were filed under the provisions of Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s bona fide intent to use the marks in commerce. Applicant disclaimed the exclusive right to use the terms “Adipose” and “Bowel.”

The Examining Attorneys refused registration of Applicant’s marks under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 2(e)(1), on the ground that the marks are merely descriptive because they are comprised of two descriptive terms that retain their descriptive significance when combined and used in connection with the products identified in Applicant’s descriptions of goods.

These appeals present common questions of law and fact and the records are substantially similar. Therefore, in the interest of judicial economy, we consolidate the cases and decide them in this single opinion. *See In re Tapco Int'l Corp.*, 122 USPQ2d 1369, 1369 n.1 (TTAB 2017); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1214 (2018). We have considered all arguments and evidence filed in each case.

Citations to the record and briefs are to the file history and TTABVUE file in Serial No. 87259174 unless otherwise indicated. Citations to the TSDR database are to the downloadable .pdf format.

We affirm the refusal to register as to each application.

I. Preliminary Issues

A. Legibility of evidence.

In Serial Nos. 87259174 and 87259218, the Examining Attorney submitted an excerpt from the Advanced Science News website (advancedsciencenews.com).³ However, a substantial portion of the left-hand side of the excerpt was missing, including the relevant portion of the document referring to the terms “tissue engineering” and “TE.” If evidence is not legible, we cannot consider it.⁴ *Cf.* Trademark Rule 2.126(a)(2), 37 C.F.R. § 2.126(a)(2) (“Exhibits pertaining to an electronic submission must be made electronically as an attachment to the

³ March 9, 2017 Office Action (TSDR 7-9).

⁴ The other applications have a legible copy of the document. *See e.g.*, Serial No. 87259227, March 14, 2017 Office Action at TSDR 8.

submission and must be clear and legible.”); *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013) (citing *Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1404 (TTAB 1998) (“It is reasonable to assume that it is opposer’s responsibility to review the documents it submits as evidence to ensure that such submissions meet certain basic requirements, such as that they are legible....”)), *aff’d*, 565F. App’x 900 (Fed. Cir. 2014) (mem.); *Weider Publ’ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d1347, 1351-52 (TTAB 2014) (duty of the party making submissions to the Board via ESTTA to ensure that they have been entered into the trial record), *appeal dismissed per stipulation*, No. 14-1461 (Fed. Cir. Oct.10, 2014).

B. Citations to URLs.

In its Requests for Reconsideration, Applicant argues that the letters “TE” have multiple meanings in the medical and clinical fields, listing the possible meanings with citations to various websites purportedly to corroborate Applicant’s argument.⁵ However, Applicant did not provide copies of those websites. Providing only a website address or hyperlink to Internet materials is insufficient to make such materials of record. *In re Olin Corp.*, 124 USPQ2d 1327, 1332 n.15 (TTAB 2017); *In re Powermat Inc.*, 105 USPQ2d 1789, 1791 (TTAB 2013); *In re HSB Solomon Assocs. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012). Because of the transitory nature of Internet postings, websites referenced only by address or hyperlinks may be modified or

⁵ 4 TTABVUE 7.

deleted at a later date without notification. *See Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010). Accordingly, Applicant's arguments are not as persuasive as they could have been because they lack this evidentiary support.

II. Whether Applicant's marks are merely descriptive?

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 goods of the applicant is merely descriptive . . . of them." 15 U.S.C. § 1052(e)(1). A term is "merely descriptive" within the meaning of Section 2(e)(1) if it "immediately conveys knowledge of a quality, feature, function, or characteristic 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 AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)). "On the other hand, if one must exercise mature thought or follow a multi-stage reasoning process in order to determine what product or service characteristics the term indicates, the term is suggestive rather than merely descriptive." *In re Tennis in the Round, Inc.*, 199 USPQ 496, 498 (TTAB 1978); *see also In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983); *In re Universal Water Sys., Inc.*, 209 USPQ 165, 166 (TTAB 1980).

Whether a mark is merely descriptive is determined in relation to the goods or services for which registration is sought, not in the abstract or on the basis of guesswork, and we must consider "the context in which [the mark] is being used, 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 or intended use." *In re Chamber*

of Commerce of the U.S., 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831). In other words, we evaluate whether someone who knows what the goods or 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); *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002).

When two or more merely descriptive terms are combined, the determination of whether the combined mark also has a merely descriptive significance turns on whether the combination of terms evokes a non-descriptive commercial impression. If each component retains its merely descriptive significance in relation to the goods or services, the combination results in a composite that is itself merely descriptive. *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004) (quoting *Estate of Beckwith, Inc. v. Commr.*, 252 U.S. 538, 543 (1920)); *see also Tower Tech*, 64 USPQ2d at 1318 (SMARTTOWER merely descriptive of commercial and industrial cooling towers); *In re Sun Microsystems Inc.*, 59 USPQ2d 1084 (TTAB 2001) (AGENTBEANS merely descriptive of computer programs for use in developing and deploying application programs); *In re Putman Publ'g. Co.*, 39 USPQ2d 2021 (TTAB 1996) (FOOD & BEVERAGE ONLINE merely descriptive of news and information services in the food processing industry).

On the other hand, a mark comprising a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a non-descriptive meaning, or if the composite has an incongruous meaning as applied to the goods or services. *See In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382

(CCPA 1968) (SUGAR & SPICE for “bakery products”); *Shutts*, 217 USPQ 363 (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs”). In this regard, “incongruity is one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark.” *Id.* at 365; *see also Tennis in the Round*, 199 USPQ at 498 (the association of applicant’s mark TENNIS IN THE ROUND with the phrase “theater-in-the-round” creates an incongruity because applicant’s services do not involve a tennis court in the middle of an auditorium). Thus, we must consider the issue of descriptiveness by looking at the mark in its entirety.

The letters “TE” forming the suffix of the marks sought to be registered are the abbreviation for the term “Tissue Engineering.” “Tissue Engineering” is defined as “a regenerative medicine approach whereby a scaffold is generated, seeded with stem cells, and is used to replace an organ or part of an organ.”⁶ *See also*,

- Wikipedia.org⁷

Tissue Engineering

Tissue Engineering (TE) is the premise for the artificial production of biological tissues by the directed cultivation of cells in order to replace or regenerate diseased tissue in a patient.

⁶ Serial No. 87259227, April 26, 2018 Denial of Request for Reconsideration (6 TTABVUE 130).

⁷ March 9, 2017 Office Action (TSDR 5).

- Nature.com⁸ (emphasis added)

Complexity in biomaterials for tissue engineering

Introduction

A human embryo in its first eight weeks of life undergoes an extraordinary transformation from a single cell to a 3-cm-long fetus with a bearing heart, gut, nervous system, and limbs with fingers and toes. This progression involves massive growth, physical folds and twists, and myriad cellular and molecular events of breathtaking complexity; **yet it is the ultimate goal of tissue engineering (TE) to recreate some of these processes in microcosm to replace and regenerate tissue.** At last the field has entered a period of fruition, and seems set to realize its potential to treat a multitude of debilitating and deadly conditions such as myocardial infraction, spinal injury, osteoarthritis, diabetes, liver cirrhosis and retinopathy. The general strategy is usually to seed cells within a scaffold, a structural device that defines the geometry of the replacement tissue and provides environmental cues that promote tissue regeneration. TE skin equivalents have been in clinical use since 1997 (internal citation omitted) and a fast-growing arsenal of replacement devices is in clinical trials or already approved as therapies for tissues including cartilage, bone, blood vessels and pancreas (internal citation omitted). In two recent high-profile studies, seven patients benefitted from TE bladders, and a 30-year-old woman became the first person to receive a TE tracheal segment, a procedure that saved her left lung.

- Advances in Surgery (advancesurgery.com)⁹

Tissue Engineering (TE) is a rapidly growing, interdisciplinary field that is devoted to the manufacture of intact tissue and organ constructs by imitating natural biological development.

⁸ *Id.* at TSDR 11.

⁹ October 5, 2017 Office Action (TSDR 12).

- Journal of Bioengineering and Bioelectronics (omicsonline.org)¹⁰

Current Application of Tissue Engineering in Biomedicine

* * *

Abstract

Tissue Engineering (TE) is a scientific field mainly focused on the development of tissue and organ substitutes by controlling biological, biophysical and/or biometric parameters in the laboratory. The results correspond, in most cases, to the elaboration of three-dimensional cellular constructs with properties more similar to natural tissues than classical monolayer cultures.

- John Hopkins University (jhu.pure.elsevier.com)¹¹

Oxygen delivering biomaterials for tissue engineering

Abstract

Tissue engineering (TE) has provided promising strategies for regenerating tissue defects, but few TE approaches have been translated for clinical applications. One major barrier in TE is providing adequate oxygen supply to implanted tissue scaffolds, since oxygen diffusion from surrounding vasculature in vivo is limited to the periphery of the scaffolds. Moreover, oxygen is also an important signaling molecule for controlling stem cell differentiation within TE scaffolds.

- Genetic Engineering & Biotechnology website (genengnews.com)¹²

Tissue Engineering Revenues Rise

More than half (52%) of the companies comprising tissue engineering (TE) and stem cell industries are revenue-generating, compared to about 21% four years ago,

¹⁰ *Id.* at TSDR 15.

¹¹ *Id.* at 23.

¹² Serial No. 87259227, March 14, 2017 Office Action (TSDR 5).

according to an analysis published in Tissue Engineering Part B.

- Science Direct (sciencedirect.com)¹³

materials today

Biomaterials & scaffolds for tissue engineering

Every day thousands of surgical procedures are performed to replace or repair tissue that has been damaged through disease or trauma. The development field of tissue engineering (TE) aims to regenerate damaged tissues by combining cells from the body with highly porous scaffold biomaterials, which act as templates for tissue regeneration, to guide the growth of the new tissue.

- Gene Therapy (nature.com)¹⁴

Gene Therapy Progress and Prospects: In tissue engineering

Abstract

Tissue engineering (TE) has existed for several years as an area spanning many disciplines, including medicine and engineering. The use of stem cells as a biological basis for TE coupled with advances in material science has opened up an entirely new chapter in medicine and hold the promise of major contributions to the repair, replacement and regeneration of damaged tissue and organs.

- Advanced Science News (advancedsciencenews.com)¹⁵

Regenerative Medicine

Biofunctionalized hydrogels for tissue engineering

The human body is composed of several tissues, playing a specific role in our day-to-day life, e.g., tendon, a fibrous (protein) tissue that mechanically links the hard bone and

¹³ *Id.* at TSDR 6.

¹⁴ *Id.* at TSDR 7.

¹⁵ *Id.* at TSDR 8.

soft muscle. Tissues have an intrinsic property of regeneration when they are damaged, lost, or diseased, however, they are unsuccessful to produce in large volume. In view of this problem, tissue engineering (TE) or tissue regeneration has evolved as a fascinating and interdisciplinary area of research aimed at the development of damaged or diseased tissues.

- ReadCube.com¹⁶

Stem Cells and Tissue Engineering Applications of the Genitourinary Tract

Abstract

* * *

The field of tissue engineering (TE) has evolved substantially over the past four decades into an international area of science that is being investigated in virtually every country in the world.

- Journal of the American College of Surgeons (journalacs.org)¹⁷

Tissue Engineering of Skin

Tissue engineering (TE) and regenerative medicine are a blend of developmental biology, life sciences, and engineering efforts that attempts to address clinical problems.¹⁸

* * *

Goals of Skin Tissue Engineering

The essential goals of skin TE are the effective healing and complete simulation of physiological skin, with close to

¹⁶ Serial No. 87259227, September 26, 2017 Office Action (TSDR 12).

¹⁷ *Id.* at TSDR 13.

¹⁸ *Id.* at TSDR 14.

native mechanical qualities, and lack of host toxicity or immune rejection.¹⁹

The prefixes of the marks, the words Adipose, Bowel, Liver, Cornea, Retina, Bladder, and Urethra, are descriptive anatomical terms.

- Adipose is defined as “of or relating to fat.”²⁰
- Bowel is defined as “the part of your body where feces (solid waste) are formed.”²¹
- Liver is defined as “a large, reddish-brown, glandular organ in the abdominal cavity of vertebrates that secretes bile and is active in the formation of certain blood proteins and in the metabolism of carbohydrates, fats, and proteins.”²²
- Cornea is defined as “the transparent layer from the front of the eye.”²³
- Retina is defined as “the sensory membrane that lines the eye, is composed of several layers including one containing the rods and cones, and functions

¹⁹ *Id.* at TSDR 15.

²⁰ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) attached to the March 9, 2017 Office Action (Serial No. 87659174 (TSDR 29)).

²¹ MACMILLAN DICTIONARY (macmillandictionary.com/dictionary/American/) attached to the October 5, 2017 Office Action (Serial No. 87659218) (TSDR 24); *see also* Merriam-Webster.com attached to the March 9, 2017 Office Action (“one of the divisions of the intestines”) (TSDR 6).

²² AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com) attached to the March 14, 2017 Office Action (Serial No. 87659227 (TSDR 10)); *see also* OXFORD LIVING DICTIONARIES (oxforddictionaries.com) (“A large lobed glandular organ in the abdomen of vertebrates, involved in many metabolic processes.”) (TSDR 12).

²³ OXFORD LIVING DICTIONARIES (oxforddictionaries.com) attached to the March 14, 2017 Office Action (Serial No. 87260627) (TSDR 9); *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com) (“The transparent convex anterior portion of the outer fibrous coat of the eyeball that covers the iris and the pupil and is continuous with the sclera.”) (TSDR 12).

as the immediate instrument of vision by receiving the image formed by the lens and converting it into chemical and nervous signals which reach the brain by way of the optic nerve.”²⁴

- Bladder is defined as “a membranous sac in humans and other animals, in which urine is collected for excretion.”²⁵
- Urethra is defined as “the canal through which urine is discharged from the bladder in most mammals and through which semen is discharged in the male.”²⁶

When the anatomical terms are combined to form the marks **AdiposeTE**, **BowelTE**, **LiverTE**, **CorneaTE**, **RetinaTE**, **BladderTE** and **UrethraTE** used in connection with “biological tissue grafts; implantable scaffolds comprising living tissue for enhancing therapy; implantable scaffolds comprising living tissue for maintaining tissue contour” and “prosthetic tissues for parietal, visceral and vascular use,” each term retains its individual, descriptive meaning and directly conveys that the composite refers to specific anatomical tissue that is being regenerated. The combined terms do not create an incongruous term or a mark with a non-descriptive

²⁴ Merriam-Webster.com attached to the September 26, 2017 Office Action (Serial No. 86260650) (TSDR 64).

²⁵ OXFORD LIVING DICTIONARIES (oxforddictionaries.com) attached to the March 14, 2017 Office Action (Serial No. 87260658) (TSDR 9); *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com) (“Any of various distensible membranous sacs, such as the urinary bladder or swim bladder, that serve as receptacles for fluid or gas.”) (TSDR 12).

²⁶ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (ahdictionary.com) attached to the March 14, 2017 Office Action (Serial No. 87260683) (TSDR 9); *see also* OXFORD LIVING DICTIONARIES (oxforddictionaries.com) (“the duct by which urine is conveyed out of the body from the bladder, and which in male vertebrates also conveys semen.”) (TSDR 12).

meaning. In other words, there is no imagination or multiple step reasoning necessary for the relevant consumer of such products to understand that [anatomical term] TE describes the characteristic of Applicant's tissue products. Where, as here, the individual components of the marks retain descriptive meaning in relation to the goods, the combination results in a composite mark that is itself descriptive and not registrable, despite the Applicant's arguments. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1341 (TTAB 2009) (holding BATTLECAM merely descriptive of computer game software with a feature that involve battles and provides the player with the option to utilize various views of the battlefield); *In re Cox Enters.*, 82 USPQ2d 1040, 1043 (TTAB 2007) (holding THEATL merely descriptive of publications featuring news and information about Atlanta where THEATL was the equivalent of the nickname THE ATL for the city of Atlanta); *Tower Tech*, 64 USPQ2d 1314, 1317-18 (TTAB 2002) (holding SMARTTOWER merely descriptive of highly automated cooling towers); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1085 (TTAB 2001) (holding AGENTBEANS merely descriptive of computer software for use in developing and deploying application programs on a global computer network).

Applicant argues that the Examining Attorneys improperly dissected the marks and, therefore, failed to consider their overall commercial impressions because the Examining Attorneys merely analyzed the marks' parts.²⁷ In other words, Applicant claims that the marks should be viewed as ADIPOSETE, BOWELTE, LIVERTE,

²⁷ Applicant's Brief, pp. 6-7 (7 TTABVUE 7-8).

CORNEATE, RETINATE, BLADDERTE and URETHRATE, which “take on a distinct meaning” separate and apart from the combination of elements.²⁸ However, this argument is belied by the fact that although Applicant filed for standard character marks, it displayed those marks so as to convey the commercial impression of two distinct terms (i.e., **AdiposeTE**, **BowelTE**, **LiverTE**, **CorneaTE**, **RetinaTE**, **BladderTE** and **UrethraTE**). An applicant may depict standard character marks in any font style, may use bold or italicized letters, and may use both uppercase and lowercase letters, all uppercase letters, or all lowercase letters, because no claim is made to any font style, size, or color. *See In re Vittera Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012) (“the standard character mark XCEED ‘could be depicted in a variety of reasonable variations, including a large capital ‘X’ followed by ‘ceed’ in smaller letters”); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (“If the registrant complies with Section 2.52 of the Rules of Practice in Trademark Cases and obtains a standard character mark without claim to ‘any particular font style, size or color,’ the registrant is entitled to depictions of the standard character mark regardless of font style, size, or color”).

Even assuming that Applicant depicts its marks in a uniform manner (e.g., all uppercase or all lower case letters), however, the relevant consumers, medical professionals or researchers, will recognize the marks as comprising an anatomical term followed by TE directly conveying the nature of the tissue being generated.

²⁸ Applicant’s Brief, p. 8 (7 TTABVUE 9).

Notwithstanding that Applicant “is in the business of working with functionally-polarized tissue” and that Applicant “takes advantage” of tissue engineering, Applicant asserts that TE, in its marks, does not mean “tissue engineering” because the composite marks are coined terms “without a dictionary definition or any meaning in the industry or otherwise.”²⁹ Applicant concludes that “a medical professional must use his/her imagination to ascertain the nature of Applicant’s goods.”³⁰

Such is the case here. Applicant’s Mark does not immediately convey the nature of Applicant’s goods. The term “adipose” can be described as either “fat” or as loose connective composed as adipocytes, or as body fat, all of which are relevant, but each of which is used distinctly; “tissue engineering” can reasonably refer to several things, the most common of which are:

- The engineering of tissue through stem cells.
- The removal of tissue from cadavers to engineer and facilitate surgery on humans.
- The engineering of synthetic tissue for use where organic tissue is used.
- The inducement of cell and tissue polarity.
- The creation of prosthetics using organic tissue.

The breadth of meanings for both elements of the Mark contradicts descriptiveness.³¹

²⁹ Applicant’s Brief, p. 9 (7 TTABVUE 10). Applicant refers to an interview given by its founder in 2017 by citing to a website without submitting a copy of that website. As noted above, we cannot give this website any consideration.

³⁰ Applicant’s Brief, p. 12 (7 TTABVUE 13).

³¹ Applicant’s Brief, p. 13 (7 TTABVUE 14).

As noted above, descriptiveness is determined in relation to the context with which the mark is used and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use. “The 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 and services are will understand the mark to convey information about them.” *DuoProSS*, 103 USPQ2d at 1757 (quoting *Tower Tech*, 64 UPSQ2d at 1316-1317). When the marks are viewed in the context of Applicant’s products, “biological tissue grafts; implantable scaffolds comprising living tissue for enhancing therapy; implantable scaffolds comprising living tissue for maintaining tissue contour” and “prosthetic tissues for parietal, visceral and vascular use,” relevant consumers will perceive the marks as describing the type of tissue that is being created. Applicant has failed to submit any evidence to support its argument that consumers will have to employ imagination, thought, and perception to determine that the marks refer to a specific type of tissue.

The fact that Applicant “coined” the marks sought to be registered or that Applicant may be the first and only user of those terms does not justify registration if the only significance conveyed by the terms is merely descriptive. *See Fat Boys*, 118 USPQ2d at 1514; *In re Nat’l Shooting Sports Found., Inc.*, 219 USPQ 1018, 1020 (TTAB 1983); *see also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004) (trademark law does not countenance someone obtaining “a complete monopoly on use of a descriptive term simply by grabbing it first”) (citation

omitted). In this regard, the fact that Applicant's marks are not found in a dictionary is not controlling on the question of registrability when, as here, the Examining Attorneys show that the terms have well-understood and recognized meanings. *See In re Orleans Wines, Ltd.*, 196 USPQ 516 (TTAB 1977) (BREADSPRED held merely descriptive of jellies and jams); *see also In re Gen'l Permanent Wave Corp.*, 118 F.2d 1020, 49 USPQ 184, 186 (CCPA 1941) ("Because appellant has combined two common English words, which in combination are not found in the dictionaries, is wholly immaterial.") (citation omitted).

Applicant contends that the composite marks cannot be merely descriptive because the letters TE "encompass too many meanings to make descriptiveness possible."³²

TE has multiple meanings in the medical and clinical fields, including without limitation the following:

Test Equipment (<http://www.atci.com/test-equipment.html>)

Technology and Engineering (<https://scholar.lib.vt.edu/journals/JTE/v26n2/rose.html>)

Thrombolic Events (http://ascopubs.org/doi/abs/10.1200/JCO.2017.35.4_suppl.280)

Therapeutic Equivalence (<https://camargopharma.com/2014/12/therapeutic-equivalence-ratings-under-505b2/>)

Temperature Element (<http://www.eng-tips.com/viewthread.cfm?qid=332851>)

³² Applicant's Brief, p. 9 (7 TTABVue 10).

Time to Echo (<https://radiopaedia.org/articles/echo-time>)

Tracheoesophageal

(<https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=90&ContentID=P02018>)

Expiratory

(<https://www.ncbi.nlm.nih.gov/pubmed/7649930>)

Time

Tellurium

(<http://.rsc.org/periodic-table/element.52/tellurium>)

(<http://.rsc.org/periodic-table/element.52/tellurium>)

Thermal

(<https://www.sciencedirect.com/science/article/pii/S0375960117308356>)

Expansion

Translational Equivalent (<https://linguisticalist.org/askling/message-details2.cfm?asklinguid=200453385>)

Total

(<https://www.ncbi.nlm.nih.gov/pubmed/2011802>)

Estrogen

There are two problems with this argument. First, as indicated above, because Applicant did not submit the websites, there is no evidence to support the various meanings that Applicant attributes to TE. Second, as previously noted, the issue of whether a term is merely descriptive is determined in connection with the goods for which registration is sought. Applicant did not provide support that relevant consumers for “biological tissue grafts; implantable scaffolds comprising living tissue for enhancing therapy; implantable scaffolds comprising living tissue for maintaining tissue contour” or “prosthetic tissues for parietal, visceral and vascular use” would perceive TE to mean any of Applicant’s purported alternatives. “That a term may have other meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)).

Applicant argues that its marks are not merely descriptive because competitors need not use those terms to describe their products. However, the Board has rejected the competitor's need test. *See In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009).

Since this decision issued in 1985, there have been numerous decisions from the Court of Appeals for the Federal Circuit and the Board making clear that the test for descriptiveness is whether a term "immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Bayer Aktiengesellschaft*, 82 USPQ2d at 1831, citing *In re Gyulay*, 820 F.2d 1216, 1217, 3 USPQ2d 1009 (Fed. Cir. 1987). Further, with respect to applicant's statement that "the Examiner has also failed to show that any competitor has used, or will ever have need to use, the terms URBANHOUSING or HOUSING in connection with real estate services," brief, pp. 5-6, the test for descriptiveness is set out in the preceding sentence. There is no requirement that the Office prove actual competitor use or need; it is well established that even if an applicant is the only user of a merely descriptive term, this does not justify registration of that term. *See In re BetaBattInc.*, 89 USPQ2d 1152, 1156 (TTAB 2008); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001); *In re Acuson*, 225 USPQ 790, 792 (TTAB 1985).

In re Carlson, 91 USPQ2d at 1203.

We find that the marks **AdiposeTE**, **BowelTE**, **LiverTE**, **CorneaTE**, **RetinaTE**, **BladderTE** and **UrethraTE** are merely descriptive of "biological tissue grafts; implantable scaffolds comprising living tissue for enhancing therapy; implantable scaffolds comprising living tissue for maintaining tissue contour" and "prosthetic tissues for parietal, visceral and vascular use."

Decision: The refusals to register Applicant's marks are affirmed.