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TMB-7919 - EXAMINER BRIEF

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 87412185

MARK: OSET ORTHOPAEDIC SUMMIT EVOLVING



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APPLICANT: OSET, INC.

CORRESPONDENT'S REFERENCE/DOCKET NO:

TMB-7919

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EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

Applicant, OSET, INC., has appealed the requirement to amend the disclaimer statement to include a disclaimer of the word "SUMMIT" in the mark consisting of the wording "OSET ORTHOPAEDIC

SUMMIT EVOLVING TECHNIQUES” and design for “educational services, namely, providing national educational conferences and educational meetings in the field of orthopaedics and sports medicine” in International Class 041. Applicant has disclaimed the wording “ORTHOPAEDIC” and “EVOLVING TECHNIQUES”. The examining attorney made the disclaimer requirement under Sections 2(e)(1) and 6 of the Trademark Act on the basis that “SUMMIT” is descriptive in the context of the applicant’s educational services. 15 U.S.C. §§1052(e)(1), 1056(a).

As applicant has failed to comply with the disclaimer requirement, the examining attorney has refused registration of the applicant’s mark under Section 6(a) of the Trademark Act. 15 U.S.C. §1056(a). The examining attorney respectfully requests that this refusal be affirmed.

FACTS

On April 14, 2017, applicant filed an application to register the mark “OSET ORTHOPAEDIC SUMMIT EVOLVING TECHNIQUES” and design for “educational services, namely, providing national conferences and meetings in the field of orthopaedics and sports medicine” in International Class 041.

Pursuant to a conversation with the applicant’s attorney on July 10, 2017, the examining attorney issued a combination priority action and examiner’s amendment wherein: (1) the identification of services was amended to read “Educational services, namely, providing national educational conferences and educational meetings in the field of orthopaedics and sports medicine;” (2) the mark

description was amended; (3) a disclaimer of “ORTHOPAEDIC” and “EVOLVING TECHNIQUES” was entered; and (4) a requirement was issued to amend the disclaimer to include “SUMMIT” so that the disclaimer would read “ORTHOPAEDIC SUMMIT EVOLVING TECHNIQUES”.

The examining attorney made this requirement final in an Office action dated January 29, 2018. Applicant filed the present appeal on July 30, 2018 after denial of the applicant’s request for reconsideration by the examining attorney.

ISSUE ON APPEAL

The sole issue on appeal is whether the word “SUMMIT” in applicant’s mark, “ORTHOPAEDIC SUMMIT EVOLVING TECHNIQUES” is merely descriptive when used in connection with the applicant’s educational services and, therefore, whether it is required that the disclaimer be amended to include a disclaimer of “SUMMIT” under Section 6(a) of the Trademark Act. 15 U.S.C. §1056(a).

ARGUMENT

I. Legal Standard

Section 6(a) of the Trademark Act states that “[t]he Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable.” 15 U.S.C. §1056(a). A disclaimer is a statement in the application record that an applicant does not claim exclusive rights to an unregistrable component of the mark when used apart from the mark. A disclaimer does not affect the appearance of the mark or physically remove the disclaimed matter from the mark. *See Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 978, 144 USPQ 433, 433 (C.C.P.A. 1965); TMEP §1213.

A component of a mark is unregistrable if, when used in connection with the listed goods and/or services of the applicant, it is merely descriptive of them. *See* 15 U.S.C. §1052(e)(1); *see also In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, (Fed. Cir. 2005); TMEP §§1209.03(f), 1213.03 *et seq.* The rationale behind the disclaimer practice is that descriptive components of marks need to be freely available for other businesses to market comparable goods or services and should not become the proprietary domain of any one party. *See Dena Corp. v. Belvedere Int’l, Inc.*, 950 F.2d 1555, 1560, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991). If an applicant does not provide a required disclaimer, the USPTO may refuse to register the entire mark. *See In re Stereotaxis Inc.*, at 1041; TMEP §1213.01(b).

A separable element of a mark is merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of an applicant’s goods and/or services. TMEP §1209.01(b); *see, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). Wording “may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.” *See In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004) (citing *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1346, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001)); TMEP §1209.01(b).

As a preliminary matter, applicant argues that “SUMMIT” in its mark is not descriptive of applicant’s services because it “would not be construed by the ordinary consumer as relating to orthopaedics and sports medicine.” Applicant’s appeal brief, pg. 4. However, because applicant has not listed medical services in its application, the question of whether “SUMMIT” describes medical services is not relevant. Rather, orthopedics and sports medicine are the *subject matter* of the applicant’s services, which are educational conferences and educational meetings. Thus, the question is not whether “SUMMIT” describes orthopedic and sports medicine, but whether it describes applicant’s *education services*.

II. Summary of Evidence

The evidence previously submitted by the examining attorney showing the descriptiveness of the term “SUMMIT” in connection with applicant’s educational services comprises:

- A third party, *The Atlantic*, advertising an education summit on its website featuring speakers and discussing emerging topics in the field of education. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 2-7.
- A third party, Brandeis University, advertising a “Global Youth Summit on the Future of Medicine” on its website featuring guest lecturers in the field of medicine. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 8-10.

- A third party, Southern Medical Association, advertising, on its website, its “premier educational event,” a medical summit in the nature of an educational conference. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 11-18.
- A third party, Forbes, advertising on its website for its healthcare summit in the nature of an educational conference focusing on “problems that plague our healthcare system.” Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 19-22.
- A third party, Total Retail, advertising on its website for a Women in Retail Leadership Summit, advertised as an educational event where women can “[l]earn the keys to success” in retail. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 23-26.
- A third party, The American Institute of Architects, advertising on its website for its Women’s Leadership Summit, featuring speakers, workshops, and classes tailored for women architects. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 27-35.
- A print version of a news report from a television station, WAVY, provided on their website, reporting on the “Governor’s Virginia Women’s Summit,” featuring panel discussions on engaging women as leaders. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 36-40.
- A third party, iEarn, advertising a youth summit on its website featuring an educational conference, workshops, and excursions focusing on innovative technologies in education. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 37-43.

- A third party, the Kennedy Krieger Institute advertising on its website for a youth summit with panel discussions and workshops focused on resources for youths with disabilities. Examiner's Amendment/Priority Action, July 10, 2017, pgs. 44-45.
- A third party, Yakima County, Washington, advertising on its website for an environment summit for youth featuring speakers focused on recycling efforts. Examiner's Amendment/Priority Action, July 10, 2017, pgs. 46-47.
- A third party, Rem-TEC, advertising on its website for a summit featuring sessions and presenters in the field of environmental science. Examiner's Amendment/Priority Action, July 10, 2017, pgs. 48-49.
- Applicant's advertising on its own website for the 2017 Orthopaedic Summit showing subspecialty summits being advertised during the same conference. Final Office Action, Jan. 29, 2018, pgs. 2-5.

The evidence previously submitted by the applicant comprises:

- Definitional evidence from various dictionaries showing definitions of "SUMMIT", and including definitional meanings such as summit meeting, summit conference, to take part in a summit meeting, relating to a summit meeting, conference of high-level leaders, and meeting of high officials. Applicant's Response to Office Action, Jan. 10, 2018, pgs. 9-22.

- Definitional evidence that includes among the “related words” to “SUMMIT”: conclave, conference, congress, convention, council, meeting, and session. Applicant’s Response to Office Action, Jan. 10, 2018, pg. 14.

Both parties previously provided copies of U.S. Registrations owned by third parties containing the word “SUMMIT”, which are detailed below. Examiner’s Amendment/Priority Action, July 10, 2017, pgs. 50-113; Applicant’s Response to Office Action, Jan. 10, 2018, pgs. 24-61; Applicant’s Request for Reconsideration, July 30, 2018, pgs. 3-63.

III. Analysis of Evidence

Analyzing the evidence, it is clear that the requirement for a disclaimer of “SUMMIT” should be upheld. First, the definitional evidence clearly establishes that one meaning of the term “SUMMIT” involves meetings or conferences. Because descriptiveness is considered in relation to the relevant services, which are meetings and conferences in this case, it is not reasonable to view the meaning of “SUMMIT” apart from the applicant’s listed services. See *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012).

Applicant argues that other meanings of “SUMMIT” rank higher in dictionaries and resource materials as the primary meanings for the word. Applicant argues further that the meaning attributed to the term “SUMMIT” by the examining attorney is “arbitrary” given that the primary meaning listed in the dictionary evidence is not educational activities. Applicant’s brief, pg. 4. However, other meanings

in other contexts have little bearing on the meaning within the context of applicant's usage, and the ranking by dictionaries has absolutely no bearing on the usage by the applicant. *See In re Franklin Cnty. Historical Soc'y*, at 1087 (TTAB 2012); TMEP §1209.03(e). Within the context of educational services, the evidence clearly establishes a well-understood meaning that will be immediately apparent to consumers.

Determining the descriptiveness of a mark is done with knowledge of the nature of an applicant's goods and/or services, by analyzing the context in which the mark is being used, and employing that knowledge and analysis to determine the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *See In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); TMEP §1209.01(b). Descriptiveness of a mark is not considered in the abstract. *In re Bayer Aktiengesellschaft*, 488 F.3d at 963-64, 82 USPQ2d at 1831. Accordingly, there is nothing arbitrary about the conclusion that "SUMMIT" denotes educational activities. The definitional evidence definitively demonstrates that, within the context of educational conferences and meetings, "SUMMIT" primarily refers to those activities.

Turning to the evidence showing "real world" usage of "SUMMIT", the evidence shows extensive third-party usage of the word "SUMMIT" to indicate educational services, particularly conferences. The evidence also shows use by applicant in a way that mirrors usage by third-parties, specifically, for conferences. This evidence of actual usage shows that consumers would immediately understand "SUMMIT" in applicant's mark to indicate the nature of the applicant's educational services, namely, that applicant is providing conferences and meetings. Such website and advertising evidence is

generally a competent source for determining how the public perceives the mark in connection with applicant’s services. See *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); TMEP §1209.01(b).

Next, an analysis of third-party registrations also strongly supports the disclaimer requirement. Third-party registrations featuring services the same as or similar to applicant’s services are probative evidence on the issue of descriptiveness where the relevant word or term is disclaimed, registered under Trademark Act Section 2(f) based on acquired distinctiveness, or registered on the Supplemental Register. E.g., *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (quoting *Inst. Nat’l des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 1581-82, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992)).

The third-party registrations submitted by both parties are summarized as follows:

Reg. No.	Mark	Relevant Services	How Mark Supports Requirement
4787565	GLOBAL ECONOMIC SUMMIT	Educational services in International Class 041	“SUMMIT” disclaimed; Supplemental Register
4626530	LUXURY REAL ESTATE SUMMIT	Educational services in International Class 041	“SUMMIT” disclaimed; Supplemental Register
4721798	SUMMIT IN AESTHETIC MEDICINE	Educational services in International Class 041	“SUMMIT” disclaimed; Supplemental Register
5098103	THE IBD SUMMIT and design	Educational services in International Class 041	“THE IBD SUMMIT” disclaimed
4787649	GLOBAL SPA & WELLNESS SUMMIT	Educational services in International Class 041	“SUMMIT” disclaimed; Supplemental Register

4961723	RETENTION MARKETING SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed; Supplemental Register
4770714	ROCKY MOUNTAIN HEDGE FUND SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed; Supplemental Register
4792294	WHISTLEBLOWER SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed; Supplemental Register
4857095	EVENT SAFETY SUMMIT	Educational services in International Class 041	Supplemental Register
4903159	CALIFORNIA CRAFT BEER SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed; Supplemental Register
5211766	MARTIAL ARTS BUSINESS SUMMIT and design	Educational services in International Class 041	"MARTIAL ARTS BUSINESS SUMMIT" disclaimed
5000474	DIGITAL CITIZENSHIP SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed; Supplemental Register
5215470	WATERLOO INNOVATION SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed; Supplemental Register
5224350	ASENBIA SPECIALTY PHARMACY SUMMIT	Educational services in International Class 041	"SPECIALTY PHARMACY SUMMIT" disclaimed
5224865	WORLD FUEL OIL SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed; Supplemental Register
5149972	ADULT COMMITTEE LEADERSHIP SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed
5183530	NOVUS SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed
5224958	CHICAGO DESIGN SUMMIT	Educational services in International Class 041	"DESIGN SUMMIT" disclaimed; Supplemental Register
5180934	TXMX BUSINESS SUMMIT and design	Educational services in International Class 041	"BUSINESS SUMMIT" disclaimed
5212534	SUBSCRIPTION SUMMIT 2016 and design	Educational services in International Class 041	"SUBSCRIPTION SUMMIT 2016" disclaimed
5171612	NEW ESTABLISHMENT SUMMIT	Educational services in International Class 041	"SUMMIT" disclaimed

5235764	CHROME DEV SUMMIT	Educational services in International Class 041	"DEV SUMMIT" disclaimed
5352303	STRATEGY SUMMIT	Educational services in International Class 041	"STRATEGY" disclaimed; Supplemental Register
5342586	DELAWARE LIFE SUMMIT 5 FIXED ANNUITY	"Issuance and administration of annuities" in International Class 036	Services unrelated to applicant's services
5334772	NATALE'S SUMMIT BAKERY FAMILY TRADION...SINCE 1938 and design	"Retail bakery shops" in International Class 035	Services unrelated to applicant's services
5328106	SUMMIT STEEL	"Steel warehousing and distribution services" in International Class 039 and "Custom steel processing services for others" in International Class 040	Services unrelated to applicant's services
5327827	SUMMIT STRATEGY GROUP, LLC	Public relations services in International Class 035	Services unrelated to applicant's services
5325480	1 ST SUMMIT BANK'S FRESH START CHECKING ACCOUNT	Banking services in International Class 035	Services unrelated to applicant's services
5324866	SUMMIT FORCE TRAINING	Information, articles, and videos about exercise and fitness in International Class 041	Services unrelated to applicant's services
5310271	SUMMIT MANOR HOUSING INITIATIVE, LLC. And design	Real estate services in International Class 036	Services unrelated to applicant's services
5313371	SUMMIT STUDIOS	"Calendars; Stationery" in International Class 016	Goods unrelated to applicant's services
5313108	SUMMIT RIDGE and design	Bags in International Class 018	Goods unrelated to applicant's services
5298029	THE 80/20 SUMMIT	Educational Services in International Class 041	
5287284	SUMMIT HOCHSTROM FILTER	"Laboratory filters" in International Class 009	Goods unrelated to applicant's services

5250611	ALPINE FILTER	Goods in classes 018, 022, and 025	Goods unrelated to applicant's services
5431973	AGENT SUMMIT	Educational Services in International Class 041	Claim of acquired distinctiveness under Section 2(f)
5382800	HPP SUMMIT	Educational Services in International Class 041	Supplemental Register
5252877	FH GLOBAL SUMMIT	Educational Services in International Class 041	Supplemental Register
5024356	PATIENT-CENTERED CHARCOT-MARIE-TOOTH SUMMIT	Educational Services in International Class 041	Supplemental Register
4816217	GLOBAL ETHICS SUMMIT	Educational Services in International Class 041	Claim of acquired distinctiveness under Section 2(f)
5130660	FOOD WASTE & HUNGER SUMMIT	Educational Services in International Class 041	Supplemental Register
4698778	EVENT MARKETING SUMMIT	Business conference services in International Class 035	Claim of acquired distinctiveness under Section 2(f)
4899656	ASPEN SPORTS SUMMIT	Educational Services in International Class 041	Supplemental Register
4736955	SOUTHEASTERN CYBER SECURITY SUMMIT	Educational Services in International Class 041	Supplemental Register
4595818	GLOBAL LEADERSHIP SUMMIT	Educational Services in International Class 041	Claim of acquired distinctiveness under Section 2(f) as to "LEADERSHIP SUMMIT"
4299997	SUMMIT	Hotel and hospitality services in International Class 043	Services unrelated to applicant's services
4376971	SUMMIT SERVICED RESIDENCES	Real estate services in International Class 036 and Hotel and hospitality services in International Class 043	Services unrelated to applicant's services
4351880	INKJET SUMMIT	Educational Services in International Class 041	Supplemental Register

4030114	CORPORATE DIRECTORS SUMMIT	Educational Services in International Class 041	Supplemental Register
4573813	MONEYSUMMIT	Educational Services in International Class 041	Supplemental Register
4222347	REACHING THE SUMMIT	Educational Services in International Class 041	Verb renders mark a unitary phrase
4513638	ISUMMIT	Educational Services in International Class 041	"SUMMIT" in mark physically conjoined with other matter
4480283	CAROLINA GAMES SUMMIT	Educational Services in International Class 041	Claim of acquired distinctiveness under Section 2(f)
4342750	AMERICA'S SMALL BUSINESS SUMMIT	"Arranging and conducting business conferences" in International Class 035	Claim of acquired distinctiveness under Section 2(f)
4412400	GAME MARKETING SUMMIT	Educational Services in International Class 041	Supplemental Register
4402592	ISUMMIT	Educational Services in International Class 041	"SUMMIT" in mark physically conjoined with other matter
4390341	GLOBAL SUMMIT OF WOMEN	"Arranging and conducting business conferences" in International Class 035	Claim of acquired distinctiveness under Section 2(f)
4259412	PRIMARY CARE CARDIOMETABOLIC RISK SUMMIT	Educational Services in International Class 041	Supplemental Register
4171303	EAGLES SUMMIT APOSTOLIC CONFERENCE and design	Educational Services in International Class 041	Phrasing suggests "SUMMIT" refers to "EAGLES" rather than the "CONFERENCE"
4145286	SUMMIT OF AWESOME	Educational Services in International Class 041	Preposition links the wording to create a unitary phrase
5220193	SUMMIT EDUCATION ENTERPRISE	Educational Services in International Class 041	Placement of "SUMMIT" at beginning creates ambiguous meaning

3767539	GLOBAL DEPARTMENT STORE SUMMIT and design	Educational Services in International Class 041	Cancelled registration
3170240	MEDICAL SPA SUMMIT AND MEDICAL SPA BUSINESS SUMMIT	Educational Services in International Class 041	Cancelled registration

As detailed above, only two of 63 cited registrations even arguably support applicant's position that "SUMMIT" is not descriptive (U.S. Registrations Nos. 5298029 and 4171303). The others either affirmatively support the contention that "SUMMIT" is (at best) descriptive of educational services such as applicant's or are neutral on the matter, being registrations for unrelated goods and/or services or being cancelled registrations.

Applicant's contention that there is a pattern to the way the Office has required disclaimers of "SUMMIT" related to the positioning of the term at the end of a word mark rather than at the center of a word mark is simply not born out by an examination of the registrations made of record by the parties. Rather, the clear pattern is that "SUMMIT" is treated as descriptive of educational services not only by disclaimer, but also by registration on the Supplemental Register and via claim of acquired distinctiveness. *See In re Morinaga Nyugyo Kabushiki Kaisha* at 1745; *see also In re Box Solutions Corp.*, at 1955. The third-party Registrations strongly support the disclaimer requirement.

Finally, applicant argues that the examining attorney improperly dissected various elements of the mark rather than viewing the commercial impression of the mark as a whole when requiring the disclaimer. It is true that marks comprising more than one element must be considered as a whole and

should not be dissected; however, a trademark examining attorney may consider the significance of each element separately in the course of evaluating the mark as a whole. *See DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1253, 103 USPQ2d 1753, 1756-57 (Fed. Cir. 2012) (reversing Board’s denial of cancellation for SNAP! with design for medical syringes as not merely descriptive when noting that the Board “to be sure, [could] ascertain the meaning and weight of each of the components that ma[de] up the mark”). Here, the examining attorney discussed various elements of the mark in order to explain how each element contributed to the overall meaning of the mark. Merely discussing one element at a time does not constitute improper dissection. Viewing the mark as a whole, it is clear that certain separable elements are descriptive of features of the services, and these separable elements must be disclaimed, including “SUMMIT”.

CONCLUSION

Any suggestion that the word “SUMMIT” does not immediately convey any particular information about the nature of applicant’s services is clearly belied by the evidence. The evidence establishes that “SUMMIT” immediately conveys information indicating the very nature of the services. *In re N.C. Lottery*, 866 F.3d 1363, 1367, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017); TMEP §1209.01(b).

While it is true that any doubt regarding the mark’s descriptiveness should be resolved on applicant’s behalf, in the present case, the evidence of record leaves no doubt that the wording “SUMMIT” in the mark is merely descriptive. *E.g., In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 1571 4 USPQ2d 1141, 1144 (Fed. Cir. 1987).

For the foregoing reasons, the refusal to register on the basis of Section 6(a) of the Trademark Act, due to applicant's failure to disclaim "SUMMIT" for educational conferences and educational meetings apart from the mark as a whole, should be affirmed.

Respectfully submitted,

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