

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 7, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Robert Castro*  
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Serial No. 87435626  
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Mark C. Johnson of Johnson | Dalal  
for Robert Castro.

Christine Martin, Trademark Examining Attorney, Law Office 104,  
Zachary Cromer, Managing Attorney.

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Before Lykos, Larkin and English,  
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Robert Castro (“Applicant”) seeks to register the mark POSITIVE MENTAL  
ATTITUDE in standard characters on the Principal Register for goods and services  
ultimately identified as

“Educational materials, namely, printed books in the field  
of providing sales methods, sales strategies, and sales  
management techniques for increasing the sales of goods  
or services for the sales industry” in International Class 16;

“Consulting for the sales industry, namely, consulting in  
the field of sales methods, sales management, and sales  
improvement for increasing the sales of goods or services  
for the sales industry” in International Class 35; and

“Education and entertainment services, namely, motivational seminars in the field of providing sales methods, sales strategies, and sales management techniques for increasing the sales of goods or services for the sales industry” in International Class 42.<sup>1</sup>

The Trademark Examining Attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the mark is merely descriptive of Applicant’s identified goods and services.<sup>2</sup> The appeal is fully briefed. For the reasons set forth below, we affirm the refusal to register as to all three classes.

### **I. Evidentiary Issues**

Before discussing the merits of this appeal, we address evidentiary issues raised in the briefs. Applicant in his main brief asserts that “the Examining Attorney provides 5 links to internet evidence from websites which she purports demonstrate use of [the phrase] positive mental attitude in connection with sales methods,” and that “only 4 of the 5 links function.”<sup>3</sup> Applicant further criticizes the probative value of “3 of the 4 functional links” to blog posts because “Applicant does not seek to register for creating blogging content.”<sup>4</sup> Applicant urges the Board to find that his proposed mark is not merely descriptive based solely on this one functional hyperlink

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<sup>1</sup> Application Serial No. 87435626, filed May 3, 2017, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

<sup>2</sup> Following Applicant’s deletion of the International Class 25 goods in his April 19, 2019 Request for Reconsideration, the Examining Attorney withdrew a likelihood of confusion refusal under Section 2(d) of the Trademark Act. *See* April 23, 2019 Denial of Applicant’s Request for Reconsideration.

<sup>3</sup> Applicant’s Brief, p. 8; 13 TTABVUE 9. *See also* Applicant’s Reply Brief, pp. 2-3; 16 TTABVUE 3-4.

<sup>4</sup> *Id.*

showing use of the phrase “positive mental attitude” in the sales industry. In response, the Examining Attorney maintains that Applicant misrepresents the content of the evidentiary record which includes printouts from 18 websites.

We agree that Applicant mischaracterizes the nature of the evidence the Examining Attorney submitted to support the refusal. With certain provisos, the Board accepts printouts obtained from Internet websites. *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018) (applying the Board’s decision in *Safer Inc. v. OMS Invs. Inc.*, 94 USPQ2d 1031 (TTAB 2010) to ex parte cases). Providing only a link, however, is insufficient to make Internet materials of record. *In re Change Wind Corp.*, 123 USPQ2d 1453, 1462 n.8 (TTAB 2017). The Examining Attorney did not provide mere links but rather printouts from various different websites, including blog posts.<sup>5</sup> Contrary to Applicant’s belief, the website printouts, not the links, comprise the evidentiary record. It is this evidence that we have considered in making our determination.

In addition, the Board does consider blog postings, taking into account their origin. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1208.03 (2020). Blogs hosted by nationally known enterprises or media outlets will have greater probative value than blogs hosted by individuals insofar as we do not know the extent of the reach to the public for individual postings. See *In re Morrison & Foerster LLP*,

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<sup>5</sup> See August 3, 2017, Office action, pp. 2-27; February 28, 2018, Final Office action, pp. 2-164; April 23, 2019, Denial of Request for Reconsideration, pp. 2-39.

Citations to the prosecution history are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) database.

110 USPQ2d 1423, 1424 n.2 (TTAB 2014) (“These blog postings are from what appear to be well-established media sources with national circulation and public exposure as well as more obscure blogs for which we cannot ascertain the degree of exposure. As such, we are aware that many of the blogs may simply reflect the perception of a single author and not that of the general public.”). We have taken this into account in rendering our opinion.<sup>6</sup> *See, e.g., In re Geller*, 751 F.3d 1355, 110 USPQ2d 1867, 1870 (Fed. Cir. 2014) (the Board, in noting that “the probative value of the blog comments ... is less than that of the articles themselves due to the anonymity of the authors,” did not err in concluding that such comments shed light on the meaning of the term “Islamisation”).

## II. Mere Descriptiveness

We turn our attention now to the substantive refusal before us. In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act prohibits registration of a mark on the Principal Register that, when used in connection with an applicant’s goods or services, is merely descriptive of them. 15 U.S.C. § 1052(e)(1).<sup>7</sup> “A term is merely descriptive 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*

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<sup>6</sup> We add that we have not considered evidence obtained from foreign websites or blogs. *See, e.g.,* blog sponsored by Corporate Coach Group based in the United Kingdom (<https://corporatecoachgroup.com/blog/positive-mental-attitude>) submitted with April 23, 2019, Office action, pp. 4-8.

<sup>7</sup> “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive ...”

*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)). See also *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015). The determination of whether a mark is merely descriptive must be made in relation to the goods or services for which registration is sought, not in the abstract. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831. This requires consideration of the context in which the mark is used or intended to be used in connection with those goods or services, and the possible significance that the mark would have to the average purchaser of the goods or services in the marketplace. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Bayer*, 82 USPQ2d at 1831; *In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987). In other words, the question is not whether someone presented only with the mark could guess the goods or services listed in the identification. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them. See *In re TriVita*, 114 USPQ2d at 1575; *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)).

Evidence that a term is merely descriptive to the relevant purchasing public “may be obtained from any competent source, such as dictionaries, newspapers, or surveys,” *In re Bayer*, 82 USPQ2d at 1831, as well as “labels, packages, or in advertising material directed to the goods [or services].” *In re Abcor Dev. Corp.*, 588

F.2d 811, 200 USPQ 215, 218 (CCPA 1978). It may also be obtained from websites and publications, and, in the case of a use-based application, an applicant's own specimen of use and any explanatory text included therein. *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1710 (Fed. Cir. 2017); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1565 (Fed. Cir. 2001). In this particular case, the involved application has been filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), meaning that Applicant has yet to claim use in the United States. Nonetheless, the Examining Attorney is not precluded from introducing excerpts from Applicant's own materials, website, or news articles as evidence of public perception of the mark. *In re Promo Ink*, 78 USPQ2d 1301, 1303 (TTAB 2006) (examining attorney may introduce evidence that applicant's own literature supports descriptiveness of term despite the fact that application based on intent-to-use under Trademark Act Section 1(b)); *cf. In re Omniome, Inc.*, 2020 USPQ2d 3222, \*4 (TTAB 2019) ("Evidence that a term is merely descriptive . . . may come from an applicant's own usage other than that found on its labels, packaging or advertising materials.").

Applicant argues that his proposed mark POSITIVE MENTAL ATTITUDE does not immediately convey any aspect of the identified goods or services and instead should be deemed as an arbitrary designation, or at the very least, suggestive. As Applicant maintains, consumers "cannot readily associate POSITIVE MENTAL ATTITUDE with printed books, consulting, and seminars on the subject matter of sales methods, sales strategies, and sales management techniques" because the

phrase involves “an element of incongruity.”<sup>8</sup> Applicant disagrees with the Examining Attorney’s finding that consumers presented with Applicant’s mark in connection with the identified goods and services would perceive the mark as merely descriptive. As Applicant contends, his proposed mark “does not have a specific or generally accepted meaning in the sales industry.”<sup>9</sup> Rather, Applicant maintains that the mark may refer to employee mental health.<sup>10</sup>

Applicant’s arguments are belied by the evidence of record. An arbitrary mark is “a known word used in an unexpected or uncommon way.” *Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1340, 71 USPQ2d 1173, 1180 (Fed. Cir. 2004). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1209.01(a) (Oct. 2018) (“Arbitrary marks comprise words that are in common linguistic use but, when used to identify particular goods or services, do not suggest or describe a significant ingredient, quality, or characteristic of the goods or services (e.g., APPLE for computers; OLD CROW for whiskey).”). A mark is suggestive if it “requires imagination, thought, and perception to arrive at the qualities or characteristics of the [services].” *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987). The record contains substantial evidence to show that Applicant’s proposed mark is neither arbitrary nor suggestive, but rather merely descriptive, when considered in relation to the goods and services identified in each class.

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<sup>8</sup> Applicant’s Brief, p. 7; 13 TTABVUE 8.

<sup>9</sup> Applicant’s Reply Brief, p. 2; 16 TTABVUE 3.

<sup>10</sup> *Id.* at 6; 16 TTABVUE 7.

According to the record, “positive” is defined as “indicating, relating to, or characterized by affirmation, addition, inclusion, or presence rather than negation, withholding, or absence;” “mental” as “of or relating to the mind;” and “attitude” as “a feeling or emotion toward a fact or state.”<sup>11</sup> From a grammatical standpoint, as used in Applicant’s applied-for mark POSITIVE MENTAL ATTITUDE, “mental” denotes a type of “attitude” and the adjective “positive” modifies “mental attitude.”

The record further shows that “positive mental attitude” is a recognized philosophy with origins dating back to the early twentieth century:

Positive mental attitude (PMA) is a concept first developed and introduced in 1937 by Napoleon Hill in the book *Think and Grow Rich*. The book never actually uses the term but develops the importance of positive thinking as a principle to success. Napoleon, along with W. Clement Stone, founder of *Combined Insurance*, later wrote *Success With Positive Mental Attitude* which defines positive mental attitude as comprising the “plus” characteristics symbolized by such words as faith, integrity, hope, optimism, courage, initiative, generosity, tolerance, tact, kindness and good common sense.

Positive mental attitude is the philosophy that having an optimistic disposition in every situation in one's life attracts positive changes and increases achievement. Adherents employ a state of mind that continues to seek, find and execute ways to win, or find a desirable outcome, regardless of the circumstances.<sup>12</sup>

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<sup>11</sup> See dictionary definitions from [www.merriam-webster.com](http://www.merriam-webster.com) submitted with August 3, 2017, Office action, pp. 28-36.

<sup>12</sup> Entry for “Positive mental attitude” from WIKIPEDIA at [https://en.wikipedia.org/wiki/Positive\\_mental\\_attitude](https://en.wikipedia.org/wiki/Positive_mental_attitude) submitted with August 3, 2017, Office action, p. 11.



Since its inception, the concept of “positive mental attitude” has evolved in the “self-help” lexicon as a recognized tool for achieving personal success as well as mental and physical health. *See, e.g.*, excerpt from article posted on the online version of THE CHICAGO TRIBUNE (“A positive mental attitude benefits health, longevity and quality of life”).<sup>13</sup>

A “positive mental attitude” has also become a well-known tool used by authors and motivational speakers in the field of sales:

[Positive mental attitude] is a main theme in most of the inspirational writings which have influenced the sales industry, in door-to-door sales and direct marketing businesses. Self-help material along with self-talk help employers to shape their employees to be more resilient to failure and become more positive and energetic salespeople.<sup>14</sup>

Consistent therewith, the record shows that it is not uncommon for the phrase “positive mental attitude” to be used by others in the sales and corporate coaching industry to designate a methodology, strategy and technique to help those working in sales to achieve success:

An online article sponsored by BusinessBlogs entitled *7 Steps to A Positive Attitude and Better Sales* states, “It sounds simple, but it is harder to actually do, especially for sales people. Developing and maintaining a positive

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<sup>13</sup> <https://www.chicagotribune.com/real-estate/chi-primetime-pma-022611-story.html> submitted with August 3, 2017, Office action, pp. 23-17.

<sup>14</sup> Entry for “Positive mental attitude” from WIKIPEDIA at [https://en.wikipedia.org/wiki/Positive\\_mental\\_attitude](https://en.wikipedia.org/wiki/Positive_mental_attitude) submitted with August 3, 2017, Office action, p. 11 (with references to Dale Carnegie and Tony Robbins).

mental attitude requires determining and controlling your thoughts.”<sup>15</sup>

An online article sponsored by New to Sales entitled *7 Easy Positive Mental Attitude Tips To Help You Succeed In Sales* offers advice on how to maintain a “positive mental attitude” in order to excel in sales.<sup>16</sup>

An online article sponsored by Universal Course catalog entitled *The Mindset of a Great Salesperson: A Positive Mental Attitude* stating that “One of the most singular contributors to success is a positive mental attitude” and then offering advice on how to accomplish this.<sup>17</sup>

Thus, while the phrase “positive mental attitude” could, as Applicant contends, apply to employee mental health issues, it also has a recognized meaning in the sales industry as a technique for achieving professional success, and “[i]t is well settled that so long as any of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)).

Mere descriptiveness is analyzed vis-à-vis consumer perception of the applied-for mark as it relates to the identified goods and services. According to the identification in the application, the subject matter of Applicant’s educational books, consulting services and motivational seminars is the same: “sales methods, sales strategies, and

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<sup>15</sup> <https://www.businessblogshub.com/2012/11/7-steps-to-a-positive-attitude-better-sales/> submitted with February 28, 2018, Office Action, pp. 123-128. According to the website, BusinessBlogs is “a popular online Hub for quality business articles. We publish unique articles and share them with our social followers.” The blog therefore falls under the category of professional development blogs directed to sales personnel, meaning that its probative value is relatively strong.

<sup>16</sup> <https://newtosales.org/7-easy-positive-mental-attitude-tips-to-help-you-succeed-in-sales> submitted with February 28, 2018, Office action, pp. 132-145.

<sup>17</sup> <https://www.universalclass.com/articles/business/sales/the-mindset-of-a-great-salesperson.htm> submitted with February 28, 2018, Office action, pp. 151-164.

sales management techniques for increasing the sales of goods or services for the sales industry.” The dictionary definitions coupled with the evidence of third-party use of the phrase “positive mental attitude” demonstrate that Applicant’s mark denotes a sales technique that is the subject matter of Applicant’s printed books in International Class 16, consulting services in International Class 35 and motivational seminars in International Class 42. As such, we find that Applicant’s proposed mark merely describes a feature of the identified goods and services.

Applicant also counters that his proposed mark is incongruous. Only where the combination of descriptive terms creates a unitary mark with a unique, incongruous, or otherwise nondescriptive meaning in relation to the goods and services is the combined mark registrable. *See, e.g., In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) (SUGAR & SPICE held not merely descriptive of bakery products). Given the nature of the goods and services which as identified are targeted to the sales and corporate coaching industries, we are skeptical that prospective consumers would attribute any other meanings to the mark POSITIVE MENTAL ATTITUDE. *Compare In re Tennis in the Round Inc.*, 199 USPQ 496, 498 (TTAB 1978) (TENNIS IN THE ROUND held not merely descriptive for providing tennis facilities, the Board finding that the association of applicant’s marks with the phrase “theater-in-the-round” created an incongruity because applicant’s tennis facilities are not at all analogous to those used in a “theater-in-the-round”) *with In re Mecca Grade Growers, LLC*, 125 USPQ2d 1950, 1955 (TTAB 2018) (MECHANICALLY FLOOR-MALTED merely descriptive of malt for brewing and distilling and processing of

agricultural grain). Again, the question of whether a proposed mark is merely descriptive is not determined by asking whether one can guess, from the mark itself, what the goods or services are, but rather by asking, when the mark is seen on or in connection with the goods or services, whether it immediately conveys information about their nature. *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003); *In re Patent & Trademark Serv. Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). No imagination or thought is required by prospective consumers to discern the purpose of Applicant's goods and services. To the contrary, Applicant's proposed mark immediately conveys, without conjecture or speculation, educational books, consulting services and motivational seminars on the topic of a recognized methodology or technique for increasing sales.

In sum, we find Applicant's standard character mark POSITIVE MENTAL ATTITUDE to be merely descriptive of the identified goods and services and therefore ineligible for registration on the Principal Register in the absence of a showing of acquired distinctiveness. As explained in the seminal case of *In re Abcor Dev. Corp.*, 200 USPQ at 217:

The major reasons for not protecting such marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular [services]; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products.

**Decision:** The mere descriptiveness refusal to register Applicant's mark under Section 2(e)(1) of the Trademark Act is affirmed as to all three classes.