

This Opinion is not a
Precedent of the TTAB

Hearing: August 12, 2020

Mailed: October 29, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Friendship Retirement Corporation
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Serial No. 87942568
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Matthew B. Wenzlau of Focus Law Firm PLLC,
for Friendship Retirement Corporation.

Aretha Somerville, Trademark Examining Attorney, Law Office 107,
J. Leslie Bishop, Managing Attorney.

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Before Lykos, Heasley, and Dunn,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Friendship Retirement Corporation (“Applicant”) seeks registration on the Principal Register of the mark CENTER FOR MODERN AGING (in standard characters) for “providing assisted living facilities,” in International Class 43 and “continuing care retirement communities (CCRCs) in the nature of nursing home services” in International Class 44.¹

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¹ Application Serial No. 87942568 was filed on May 31, 2018, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has refused registration of Applicant's mark of the Trademark Act on the grounds that it is merely descriptive under Section 2(e)(1) and has not acquired distinctiveness under Section 2(f), 15 U.S.C. §§ 1052(e)(1), (f).

When the refusal was made final, Applicant appealed and twice requested reconsideration—first on December 18, 2018, when it filed its appeal,² and second on April 12, 2019.³ The Examining Attorney denied both requests,⁴ and the appeal proceeded. Applicant filed a main appeal brief, a supplemental brief, as permitted by the Board, and a reply brief.⁵ The Examining Attorney filed a brief, as well.⁶ The parties then appeared for oral argument before the Board.

Having considered all the arguments, applicable law, and evidence, we affirm the refusal to register as to both classes of services.

I. Mere Descriptiveness

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act precludes registration of a proposed mark on the Principal Register that, when used in connection with an applicant's goods or services, is merely descriptive of them. 15

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

² Applicant's first request for reconsideration, 4 TTABVUE.

³ Applicant's second request for reconsideration, 8 TTABVUE, which the Board treated as a request for remand, and granted. 9 TTABVUE.

⁴ Feb. 4, 2019 Office Action and Aug. 12, 2019 Office Action, 10-11 TTABVUE.

⁵ 6, 17, 20 TTABVUE.

⁶ 19 TTABVUE.

U.S.C. § 1052(e)(1). A term is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought. *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). 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 AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007), 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). By contrast, 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).

Applicant argues that CENTER FOR MODERN AGING is suggestive, not descriptive, of its services. It argues that the Examining Attorney erroneously dissected the proposed mark into its constituent words, each of which has a wide variety of definitions.⁷ “CENTER,” for example, can mean “a place at which an activity or complex of activities is carried on,” but it may have many other meanings, such as “a point equally distant from all points on the circumference of a circle” or “the approximate middle point, place, or part of anything.”⁸ Similarly, “MODERN” can mean “involving recent techniques, methods, or ideas: UP-TO-DATE modern,”

⁷ Applicant’s brief, 6 TTABVUE 6-7.

⁸ Applicant’s brief, 6 TTABVUE 8 (citing www.CollinsDictionary.com, Sept. 26, 2018 Office Action TSDR at 15).

but it can also mean “characteristic of present and recent time; contemporary; not antiquated or obsolete: modern viewpoints,” among other definitions.⁹ And “AGING” can mean the “present participle of age,” i.e., “to grow old; He is aging rapidly,” among other definitions.¹⁰ According to Applicant, “[t]hese definitions are standard dictionary definitions, which show the diverse meanings and usages of the words in the Applicant’s mark, and its resultant distinctiveness, motivating the consumer to seek out a further understanding.”¹¹ Applicant concludes, “[w]hen the mark is read as a whole, it is suggestive and invites the consumer to seek out the products and services for further evaluation,” analogizing to *In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490 (Fed. Cir. 1988) (finding HUCHINSON TECHNOLOGY, taken as a whole, not merely descriptive of the applicant’s identified electronic components).¹²

Based on the evidence of record, we agree with the Examining Attorney, however, that CENTER FOR MODERN AGING is merely descriptive of Applicant’s assisted living and nursing home services. Contrary to Applicant’s contention, “[t]he 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.” *Earnhardt*

⁹ Applicant’s reply brief, 20 TTABVUE 6-7 (citing www.Merriam-Webster.com and www.Dictionary.com).

¹⁰ Applicant’s reply brief, 20 TTABVUE 7-9 (citing www.Merriam-Webster.com and www.Dictionary.com).

¹¹ Applicant’s reply brief, 20 TTABVUE 9.

¹² Applicant’s brief, 6 TTABVUE 9.

v. Earnhardt, Inc., 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017) (citing *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012)).

“Whether a mark is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which the mark is used, and the possible significance the term would have to the average consumer because of the manner of its use or intended use.” *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1102 (TTAB 2018) (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)). *See also In re Omniome, Inc.*, 2020 USPQ2d 3222, *3-4 (TTAB 2019). In this case, the relevant consumers would be senior citizens and/or their families. *See Primrose Ret. Comm’s, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016). We consider CENTER FOR MODERN AGING as a whole, as viewed through their eyes. *Real Foods v. Frito-Lay*, 128 USPQ2d at 1374.

We may not dissect the proposed mark into isolated elements, but we may preliminarily consider the meanings of its constituent words to help determine its overall impression. *Id.*; *see also In re Well Living Lab Inc.*, 122 USPQ2d 1777, 1779 (TTAB 2017). “CENTER” denotes one central place where goods or services are provided. *See, e.g. Ilco Corp. v. Ideal Security Hardware Corp.*, 527 F.2d 1221, 188 USPQ 485, 487 (CCPA 1976) (“HOME PROTECTION CENTER signifies a unitary aggregation of goods related to home protection, the one place in the hardware store to go for home protection needs.”); *In re Gould, M.D.*, 173 USPQ 243, 245 (TTAB 1972) (“...‘CENTER FOR INTERPERSONAL STUDIES’ immediately denotes a place or

center where interpersonal relationships are studied or investigated and that, as applied to applicant's services, it possesses nothing more than a merely descriptive significance."); *In re The BOC Group, Inc.*, 223 USPQ 462, 464 (TTAB 1984) ("we believe that a high degree of descriptiveness inheres in the term applicant has adopted as its mark [COMPUTER LEARNING CENTER]").

This usage is consistent with the dictionary definition of "CENTER" adduced by the Examining Attorney: "a place at which an activity or complex of activities is carried on."¹³ Alternative definitions arising in different contexts, such as the geometric center of a circle, are not controlling. *In re Franklin Co. Historical Soc'y*, 104 USPQ2d 1085, 1087 (TTAB 2012) ("That a term may have other meanings in different contexts is not controlling."). "It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive." *In re Malhotra*, 128 USPQ2d at 1105. Similarly, "MODERN" connotes up-to-date techniques,¹⁴ and "AGING" the process of growing older or maturing.¹⁵ Taken as a whole, then, CENTER FOR MODERN AGING connotes a place using up-to-date techniques to deal with a population that is growing older.¹⁶

One of Applicant's vice presidents, quoted in a *Forbes* article, "A New Approach to Successful Aging in Glendale, Arizona," confirms the Center's modern approach to

¹³ www.CollinsDictionary.com, Sept. 26, 2018 Office Action at 15, Aug. 12, 2019 Office Action at 4.

¹⁴ www.Merriam-Webster.com, Applicant's reply brief, 20 TTABVUE 16.

¹⁵ AHDictionary.com, Examining Attorney's brief, 19 TTABVUE 14, www.Dictionary.com, Applicant's reply brief, 20 TTABVUE 29.

¹⁶ Examining Attorney's brief, 19 TTABVUE 5.

caring for the aging:

Here, up to 900 residents live in a 40-acre lush community setting in Glendale, Arizona, and are helped through the aging process to achieve the greatest level of independence.

...

The Center for Modern Aging is more than a Wellness Center, it is a shift in a mindset. We focus on prioritizing the needs and desires of the residents, emphasizing wellness at every turn.

...

Obviously, we all want to be young again – why not go to college? So we make it fun and both mentally and physically stimulating by implementing a university-like setting within the walls of our wellness center.

...

We want our residents to have a chance to relive their youth or even to go to college for the first time, ever.¹⁷

Seniors and their families, knowing—not guessing—what Applicant’s services are, would immediately understand that Applicant’s mark describes a place to grow older in a modern manner.¹⁸ The combination of words results in a phrase, CENTER FOR MODERN AGING, that is itself merely descriptive of the services’ features and characteristics. *In re Omniome, Inc.*, 2020 USPQ2d 3222 at 10. This case is thus less like *Hutchinson Technology*, on which Applicant relies, and more like *Franklin County Historical Society*, where the Board found “CENTER OF SCIENCE AND INDUSTRY” merely descriptive:

[I]t is clear that a consumer would understand “CENTER OF SCIENCE AND INDUSTRY,” used in connection with applicant’s services, as conveying information about them, namely, a place where services that concern science and industry are provided. ... Therefore we find that the mark is merely descriptive of the recited services.

Franklin Co. Historical Soc’y, 104 USPQ2d at 1089 (internal citations omitted).

¹⁷ “A New Approach to Successful Aging in Glendale, Arizona” Forbes.com Sept. 27, 2018, Dec. 18, 2018 Response to Office Action at 9-19.

¹⁸ Examining Attorney’s brief, 19 TTABVUE 5-6.

Applicant argues that *Franklin County Historical Society* is distinguishable from this case because the examining attorney in that case adduced over a dozen examples of third parties using various combinations of “center,” “science,” and “industry” for museum services, whereas the Examining Attorney in this case has adduced “limited evidence” that “Center for Modern Aging” is used in connection with assisted living facilities and continuing care retirement communities.¹⁹ The Examining Attorney’s third-party examples consist of Internet web pages, one from a caregiver like Applicant:

- “Modern Aging” Perspectives on Growing Old” by the Woodland Ridge assisted living community in Georgia;²⁰

Articles using the term “modern aging” to describe care for seniors:

- “Modern Aging: Finding Hope in Hospice” in the September 4, 2011 Danville Register & Bee (Virginia);²¹
- “Modern Aging” in the Nov. 8, 2014 Richmond Times-Dispatch; ²²
- “Words to think about: Modern Aging” in the October 3, 2013 Rialto Record (California);²³

The title of a University course:

- “The Design Sprint: Modern Aging and the Future of Health in China,” A New

¹⁹ Applicant’s Supp. Brief, 17 TTABVUE 8.

²⁰ www.WoodlandRidge.org Sept. 26, 2018 Office Action at 5.

²¹ Sept. 26, 2018 Office Action at 13.

²² Aug. 12, 2019 Office Action at TSDR 9-11.

²³ Sept. 26, 2018 Office Action at 20.

York University course in Shanghai, China;²⁴

And entities offering social media platforms to discuss subjects such as “modern aging,” for instance:

- “ModernAging” “For anyone interested in aging! This group promises to bring industry talks, online classes, in person learning sessions and meetups to build a community focused on helping seniors.”²⁵

In *Franklin County*, the Board based its finding of mere descriptiveness primarily on the dictionary definitions of the key words in CENTER OF SCIENCE AND INDUSTRY, finding that “[I]t would not take any complicated reasoning or cogitation for consumers considering the proposed mark in conjunction with the recital of services to conclude that the proposed mark conveys information about a center where one can learn about science and industry.” *Id.* at 1087. Even though few of the third parties used the exact term “center of science and industry,” the Board held, “We find, nevertheless, that the dictionary evidence shows applicant’s proposed mark to be a descriptive one.” *Id.* at 1088. The third-party evidence illustrated the primary purposes for refusing registration to such a merely descriptive mark:

(1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods; 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.

Id. at 1088-89 (quoting *In re Abcor*, 200 USPQ at 217 and *In re Stereotaxis Inc.*, 429

²⁴ www.Shanghai.nyu.edu 4/26/2019 Aug. 12, 2019 Office Action at TSDR 12-13.

²⁵ www.Meetup.com/Modern-Aging, Aug. 12, 2019 Office Action at TSDR 15.

F.3d 1039, 77 USPQ2d 1087, 1090 (Fed. Cir. 2005)).

Here, in much the same way, competitors such as Woodland Ridge assisted living community have an equal right to use the terms “center” and “modern aging” in various combinations to offer their services to senior citizens and their families. *Id.* As the Board has declared, “The fact that applicant may be the first and possibly the only one to utilize this notation in connection with its services cannot alone alter the basic descriptive significance of the term and bestow trademark rights therein.” *In re Gould, M.D.*, 173 USPQ at 245 (CENTER FOR INTERPERSONAL STUDIES merely descriptive).

Prospective purchasers of Applicant’s services would immediately understand the descriptive significance of the proposed mark CENTER FOR MODERN AGING as conveying information about the services, i.e., a place using up-to-date techniques to deal with a population that is growing older. We therefore find that the proposed mark is merely descriptive of the recited services in both classes.

II. Acquired Distinctiveness

Applicant argues in the alternative that if its applied-for mark is found to be merely descriptive, it has nonetheless acquired distinctiveness.²⁶ “To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself.” *Apollo Med. Extrusion*

²⁶ Since Applicant makes this claim in the alternative, it does not concede that the proposed mark is merely descriptive. See *In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1713 (TTAB 2011).

Techs. Inc., v. Med. Extrusion Techs. Inc., 123 USPQ2d 1844, 1852 (TTAB 2017) (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005) and citing *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1729 (Fed. Cir. 2012)).

Applicant's burden is heavy because it bases its application on intent to use, not actual use of its proposed mark. Section 2(f) of the Trademark Act provides in pertinent part that "nothing in this chapter shall prevent the registration of a mark **used by the applicant** which has become distinctive of the applicant's goods in commerce." 15 U.S.C. § 1052(f) (emphasis added). Consequently, "[a] claim of distinctiveness under Section 2(f) is normally not filed in a Section 1(b) application before the applicant files an amendment to allege use or a statement of use, because a claim of acquired distinctiveness, by definition, requires prior use." *In re Nielsen Bus. Media, Inc.*, 93 USPQ2d 1545, 1547 (TTAB 2010). On the other hand:

[A]n applicant can establish acquired distinctiveness in an intent-to-use application where it can show that 'same mark' acquired distinctiveness for related goods or services, and that this acquired distinctiveness will transfer to the goods or services specified in the application when the mark is used in connection with them.

In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1812 (Fed. Cir. 2001) *quoted in In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1273-74 (TTAB 2016).

This is a fairly onerous burden. "[B]y the very nature of the inquiry, Section 1(b) applicants face a heavy burden in establishing that their mark will acquire distinctiveness when use commences. Accordingly, the required showing for acquired distinctiveness to 'transfer' to new products is a rigorous one." *In re Olin Corp.*, 124

USPQ2d 1327, 1335 (TTAB 2017). Applicant must establish that it has met two requirements:

First, applicant must establish, through the appropriate submission, the acquired distinctiveness of the same mark in connection with specified other goods and/or services in connection with which the mark is in use in commerce.

...

Second, applicant must establish, through submission of relevant evidence rather than mere conjecture, a sufficient relationship between the goods or services in connection with which the mark has acquired distinctiveness and the goods or services recited in the intent-to-use application to warrant the conclusion that the previously created distinctiveness will transfer to the goods or services in the application upon use.

In re Rogers, 53 USPQ2d 1741, 1744 (TTAB 1999). *See generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1212.09(a) (Oct. 2018).

Applicant acknowledges these two requirements, and argues that it has met them.²⁷ Taking the second requirement first, it points out that it owns two Principal Register registrations for



- Reg. No. 5264427, issued August 15, 2017, for “providing assisted living facilities” in International Class 43; and
- Reg. No. 5264426, also issued August 15, 2017, for “continuing care retirement communities (CCRCs) in the nature of nursing home services” in International Class 44.

It also owns a registration for **GLENCROFT AT HOME** (in standard characters):

- Reg. No. 5756626, issued May 21, 2019 for “continuing care retirement communities (CCRCs) in the nature of nursing home services” in International

²⁷ Applicant’s appeal brief, 6 TTABVUE 10.

Class 44.²⁸

These recited services are identical to those recited in the subject Application. The Examining Attorney does not dispute that these are the “same services,”²⁹ and we find accordingly that the second requirement has been met.

The true issue arises under the first requirement: whether Applicant has provided these identical services under the “same mark” as its present applied-for mark. Applicant contends that it has taken steps to promote and protect its “GLENCROFT” formative marks, and to cross-brand them with the intent-to-use mark CENTER FOR MODERN AGING.³⁰ “The Applicant’s mark ‘Center for Modern Aging’ builds on the existing business of the Applicant under the mark of ‘Glencroft Senior Living’ and ‘Glencroft at Home,’” Applicant contends.³¹

Having registered the domain name “Glencroft.com” in 1996 and registered the trade name “Glencroft Senior Living” with the Arizona Secretary of State in 2018,³² Applicant engaged in its cross-branding efforts, such as this advertising in *Phoenix Magazine*:

²⁸ Applicant’s brief, 6 TTABVUE 12; Applicant’s second request for reconsideration, 8 TTABVUE 6; Applicant’s supp. brief, 17 TTABVUE 10.

²⁹ Examining Attorney’s brief, 19 TTABVUE 9.

³⁰ Applicant’s brief, 6 TTABVUE 11; Applicant’s second request for reconsideration, 8 TTABVUE 5.

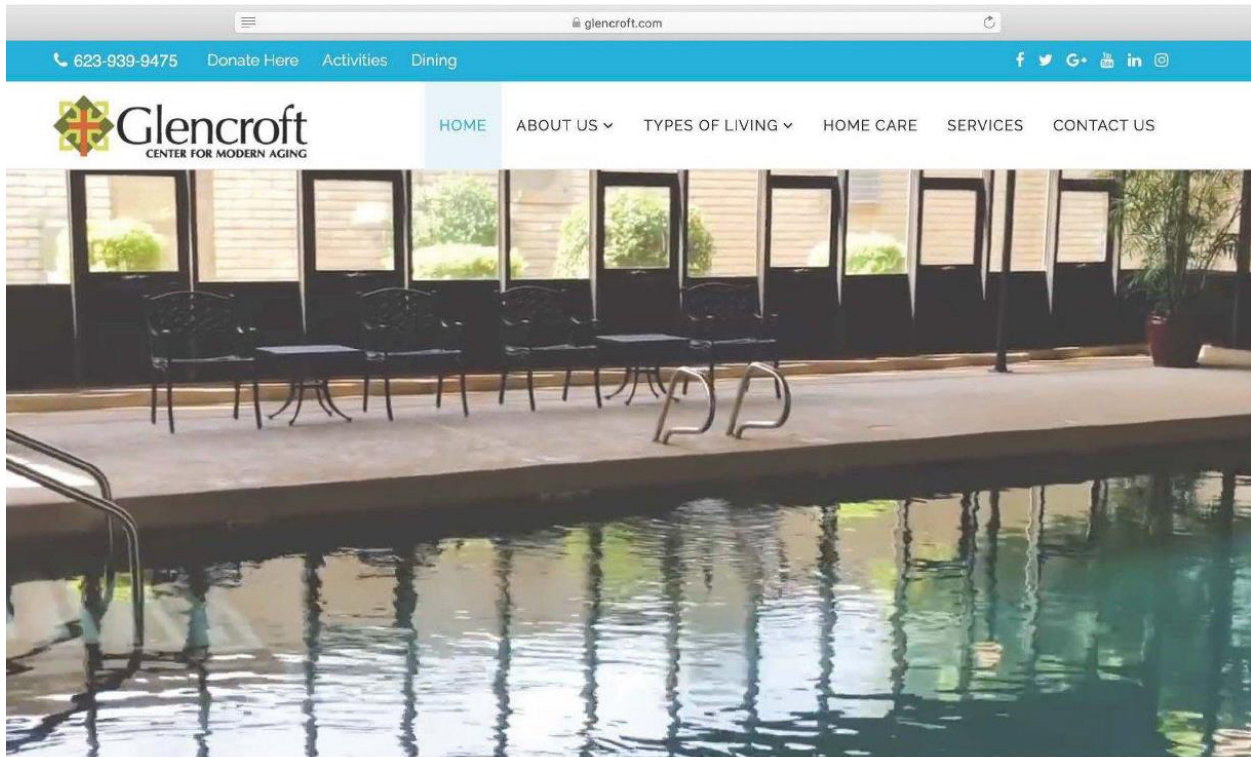
³¹ Applicant’s brief, 6 TTABVUE 13-14.

³² April 12, 2019 Response to Office Action (request for reconsideration) ex. A, domain name registration, at 8 TTABVUE 10, ex. B, Arizona trade name registration, 8 TTABVUE 13.

The advertisement is set against a background of dark red wood grain. At the top center, the word "PHOENIX" is written in a large, bold, black serif font, with "MAGAZINE" in a smaller, spaced-out, black sans-serif font below it, all enclosed in a thin black rectangular border. Below this, a large rectangular area is divided into two vertical panels. The left panel has a dark blue background and contains the text "Yesterday Senior Living ..." in white. The right panel features a photograph of a saguaro cactus in a desert landscape at sunset, with the sun low on the horizon and rays of light. Above the cactus, the text "Independent Living | Assisted Living | Memory Care | Long-term Care" is written in a small, white, sans-serif font. Below the cactus, the text "Today Center For Modern Aging." is written in a larger, white, sans-serif font. Below the main advertisement area, there is a wide horizontal banner with a dark background and a desert landscape image. On the left side of the banner is the Glencroft logo, which consists of a stylized green and yellow cross-like symbol followed by the word "Glencroft" in a white serif font. On the right side of the banner is the "Center for MODERN AGING" logo, where "Center for" is in a small white font and "MODERN AGING" is in a larger, bold, white sans-serif font, with a diamond-shaped graphic element behind the text. Below the logo, the text "For More Information Contact Steve Heller 623-847-3120" and "www.centerformodernaging.net" is written in a small white font. At the bottom center of the banner, there is a smaller, framed version of the "Center for MODERN AGING" logo and contact information.

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And its website at Glencroft.com, which tallied over 36,000 new users in 2018:



The Center for Modern Aging



As seen in [Forbes](#),

At Glencroft Center for Modern Aging, we feel "Successful Aging" can be summed up simply by making sure someone, no matter what their age, has a sense of purpose and direction. If we can provide our seniors with purpose, passion and meaning in their lives then we will put them in the best possible scenario of aging successfully. As an organization we maintain focus on helping our residents achieve a sense of fulfillment in many key areas of their lives: physically, mentally, socially, spiritually and emotionally.

Applicant summarizes its expenditures purportedly devoted to cross-branding in this table:

Television Activity	Cost (Spread Out Monthly)
Secured and Performed Television Broadcast advertisements that firmly establish the “Center for Modern Aging” Brand on Broadcast Television and Digital Platforms. (e.g. terrestrial television, digital streaming)(<i>See Attached Your Life Arizona Television Interview; KTVK; September 19, 2018 Air Date</i>).	\$2400
Secured and Performed Television Broadcast advertisements that firmly establish the “Center for Modern Aging” Brand on Broadcast Television and Digital Platforms. (e.g. terrestrial television, digital streaming)(<i>See Attached Your Life Arizona Television Interview, KTVK; November 29, 2018 Air Date</i>).	\$2400
Secured and Performed Television Broadcast advertisements that firmly establish the “Center for Modern Aging” Brand on Broadcast Television and Digital Platforms. (e.g. terrestrial television, digital streaming)(<i>See Attached Your Life Arizona Television Interview, KTVK; TBD Air Date</i>).	\$4800 (Two Spots)
Construction, Advertising, & Other Expenditures	Cost (Monthly)
Building remodeling specifically for Center for Modern Aging (<i>Current Amounts \$148,000 yearly</i>)	\$12,333
Building signage replace and remodel (<i>Monthly Cost</i>)	\$7500
Secured and Released Advertising through Phoenix Magazine in the amount of \$8,000. (<i>See Attached Phoenix Magazine Advertisement</i>).	\$8,000
Hired key staff dedicated to Center for Modern Aging. (VP/Director of Center for Modern Aging at \$90,000 per year, 4 Assistants at \$30,000 per year; 40 contractors/vendors at \$20,000 per year)	\$84,167
Secured and Performed Arizona Billboard advertisements that firmly establish the “Center for Modern Aging” Brand on Physical Advertising Platforms. (e.g. terrestrial television, digital streaming) - in the amount of \$2,500/month per board. (<i>See Attached Images Billboard Advertising</i>)	\$5,000
Cross Branded the “Center for Modern Aging” mark with Applicant’s preexisting mark “Glencroft Senior Living”, which currently reaches 36,965 users, with 36,474 new users. (<i>See Website Traffic and Statistics dated 1/18-12/18</i>).	TBD
	Total = \$117,433 per month

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Applicant emphasizes that this chart indicates expenses on a monthly basis.³⁶

³⁵ Applicant’s brief, 6 TTABVUE 13-14; Applicant’s supp. brief, 17 TTABVUE 12-16; Applicant’s request for reconsideration, 4 TTABVUE 5-6; Applicant’s second request for reconsideration, ex. D, 8 TTABVUE 22.

³⁶ 8 TTABVUE 23.

Based on this evidence, Applicant concludes that “the mark ‘Center for Modern Aging’ builds on the existing business and goodwill of the Applicant under the mark of ‘Glencroft Senior Living’ and its related mark ‘Glencroft at Home’. Through this cross branding, the Applicant has adequately informed and educated the consumers as to the distinctive source of goods it provides....”³⁷

Applicant acknowledges that in order to transfer good will from its marks used in commerce to its intent-to-use mark, it must first establish that they are the “same mark.” That is, they must be “legal equivalents,” creating “the same, continuing commercial impression such that the consumer would consider them the same mark.”³⁸ It contends that it has met this first requirement:

The applicant asserts through its evidence submitted herein that the cross branding efforts of combining “Glencroft” and “Center for Modern Aging” give the same commercial impression to consumers as the marks emanate from the same source, same staff, and same services. Aside from the combination of property, plant and equipment, the marketing efforts expended by the Applicant towards its new/existing consumer base, advertises “Glencroft” and “Center for Modern Aging” as the same provider of goods/services sought by the public.³⁹

The Examining Attorney responds that “An applicant can only claim 2(f) based on prior registration on the Principal Register for the same mark for related goods or services. That is, the prior mark must be exactly the same or virtually identical. TMEP 1212.04(b). Here, the two marks do not share a single word.”⁴⁰

³⁷ Applicant’s reply brief, 20 TTABVUE 11.

³⁸ Applicant’s supp. brief, 17 TTABVUE 9 (citing TMEP § 1212.04(b) and *In re: Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807 (Fed. Cir. 2001)).

³⁹ 17 TTABVUE 9.

⁴⁰ Examining Attorney’s brief, 19 TTABVUE 9.

We agree. As noted, Section 2(f) provides in pertinent part that “nothing in this chapter shall prevent the registration of a mark **used by the applicant** which has become distinctive of the applicant’s goods in commerce.” 15 U.S.C. § 1052(f) (emphasis added). Trademark Rule 2.41 implements the statute by providing, in pertinent part, that:

In appropriate cases, ownership of one or more active prior registrations on the Principal Register or under the Trademark Act of 1905 of **the same mark** may be accepted as prima facie evidence of distinctiveness if the goods or services are sufficiently similar to the goods or services in the application; however, further evidence may be required.”

37 C.F.R. § 2.41(a)(1) (emphasis added).

A proposed mark is the “same mark” as a previously-registered mark if it is the “legal equivalent” of that mark; one mark is the legal equivalent of another if it creates the same, continuing commercial impression, such that consumers would consider them both the same mark. *In re Dial-A-Mattress*, 57 USPQ2d at 1812 cited in *In re Highlights for Children*, 118 USPQ2d at 1274. See also *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 113 USPQ2d 1365, 1366 (2015) (holding that original and revised marks may be ‘tacked’ for purposes of priority when they are “legal equivalents’ in that they create the same, continuing commercial impression”) quoted in *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F3d 1363, 116 USPQ2d 1129, 1132 (Fed. Cir. 2015).

The standard for legal equivalence is higher than that used to compare two competitors’ marks. “[E]ven if the two marks are confusingly similar, they still may not be legal equivalents.” *In re Nielsen Bus. Media*, 93 USPQ2d at 1547. A variance of one word can render the previous and proposed marks different. See, e.g., *Ilco v.*

Ideal Security Hardware, 188 USPQ at 487 (holding that HOME PROTECTION HARDWARE and HOME PROTECTION CENTER do not create the same, continuing commercial impression); *In re Binion*, 93 USPQ2d 1531, 1538-39 (TTAB 2009) (finding the previously registered marks JACK BINION and JACK BINION'S were not the same as the intent-to-use marks BINION and BINION'S). A variance of one letter can render them different. See *In re Nielsen Bus. Media*, 93 USPQ2d at 1547-48 ((finding THE BOLLYWOOD REPORTER is not the legal equivalent of the registered marks THE HOLLYWOOD REPORTER and similar marks). Even if the previous and proposed marks have the exact same meaning, they are not legal equivalents if they have differing wording. See *In re Highlights for Children*, 118 USPQ2d at 1273-75 (finding that the applied-for mark, IMÁGENES ESCONDIDAS, and the previously registered English equivalent, HIDDEN PICTURES, are not the "same mark" because they are entirely aurally and visually different).

Here, as the Examining Attorney correctly observes, the GLENCROFT marks do not share even one word with CENTER FOR MODERN AGING. Applicant's argument that its previous and proposed marks emanate from the same source misses the point: even if they do, they do not create the same, continuing commercial impression such that the consumer would consider them both the same mark. *Id.* at 1275. *In re Franklin Co. Historical Soc'y*, 104 USPQ2d at 1093. Thus, they are not the "same mark" for purposes of transferring good will under Trademark Rule 2.41(a)(1).

There is some question as to whether subsections (2) and (3) of Trademark Rule 2.41(a) apply to an application that tries to extend acquired distinctiveness to an

intent-to-use mark. *In re Olin*, 124 USPQ2d at 1340 (Lykos, J. concurring). For the sake of completeness, though, we consider them, as well.

The second subsection is clearly inapplicable here, as it requires proof of substantially exclusive and continuous use of the applied-for mark in commerce for five years. 37 C.F.R. § 2.41(a)(2).

The third subsection, simply entitled “[o]ther evidence,” provides that:

In appropriate cases, where the applicant claims that a mark has become distinctive in commerce of the applicant’s goods or services, the applicant may, in support of registrability, submit with the application, or in response to a request for evidence or to a refusal to register, verified statements, depositions, or other appropriate evidence showing duration, extent, and nature of the use in commerce and advertising expenditures in connection therewith (identifying types of media and attaching typical advertisements), and verified statements, letters or statements from the trade or public, or both, or other appropriate evidence of distinctiveness.

37 C.F.R. § 2.41(a)(3).

Assuming *arguendo* that this subsection is applicable, we find that Applicant’s evidence falls short of proving acquired distinctiveness under its terms. Applicant’s burden of proving acquired distinctiveness increases proportionately with the descriptiveness of its applied-for mark. *In re Franklin Co. Historical Soc’y*, 104 USPQ2d at 1089 (“The higher the level of descriptiveness, the greater the proportionate showing of acquired distinctiveness need be.”). For the reasons discussed above, we find that CENTER FOR MODERN AGING is moderately to highly descriptive, like other applied-for “CENTER” marks. *Id.* (“It is the examining attorney’s position that ‘CENTER OF SCIENCE AND INDUSTRY’ is highly descriptive. For the reasons discussed in the prior section, we agree.”).

It would have been preferable for Applicant to verify its cross-branding claims with declarations or affidavits from its principals. “It is preferable for an applicant to submit information of this nature in a showing of acquired distinctiveness in a declaration or an affidavit.” *In re Highlights for Children*, 118 USPQ2d at 1276. Applicant presents two videos of its principals discussing CENTER FOR MODERN AGING on local television programs,⁴¹ and a magazine article quoting Applicant’s “Vice President and Director of Glencroft’s Center for Modern Aging,”⁴² but its chart of recurring expenditures is supported solely by attorney argument, which “is no substitute for evidence.” *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005). Nonetheless, since the Examining Attorney does not object to Applicant’s evidence on this ground, and addresses its substantive weight, we shall do the same, and consider it for what it is worth. *In re Highlights for Children*, 118 USPQ2d at 1275-76.

To begin with, we note that the “cross-branding” examples shown above show GLENCROFT in conjunction with CENTER FOR MODERN AGING. Applicant’s website refers to the “Glencroft Center for Modern Aging,”⁴³ and the Forbes article refers to “Glencroft’s Center for Modern Aging.”⁴⁴ As the Examining Attorney correctly notes, evidence that only shows a mark used in conjunction with other

⁴¹ See Dec. 18, 2018 Response to Office Action.

⁴² “A New Approach to Successful Aging in Glendale, Arizona” www.Forbes.com, 4 TTABVUE 9-13.

⁴³ 4 TTABVUE 21, 8 TTABVUE 39.

⁴⁴ 4 TTABVUE 10.

wording may be insufficient to show that the mark has acquired distinctiveness.⁴⁵ See, e.g., *In re La. Fish Fry Prods.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (“all of these data involve uses of LOUISIANA FISH FRY PRODUCTS, and thus do not establish that FISH FRY PRODUCTS has acquired distinctiveness.”); *In re Franklin County Historical Soc’y*, 104 USPQ2d at 1093 (“in none of the examples shown does the mark for which applicant seeks registration, ‘CENTER OF SCIENCE AND INDUSTRY,’ appear without the acronym COSI,”; “there is no indication that any goodwill associated with COSI has somehow been transferred to, or is shared with ‘CENTER OF SCIENCE AND INDUSTRY’”).

Similarly, in this case, where GLENCROFT is the only distinctive term used, we are not convinced that relevant purchasers—seniors and their families—associate the designation CENTER FOR MODERN AGING, without the accompanying GLENCROFT, solely with Applicant. *Apollo Med. Extrusion Techs., v. Med. Extrusion Techs.*, 123 USPQ2d at 1855 (“Simply put, we are not convinced that relevant purchasers associate the designation MEDICAL EXTRUSION TECHNOLOGIES, without the accompanying MET, solely with Applicant.”).

Applicant’s chart of recurring expenses is no more illuminating. As the Examining Attorney also notes:

This information appears grouped in with the establishment and running of the company in general, and does not appear to specifically relate to the promotion of the mark in association with the services. Such things as financial outlay to hire staff and remodel the facility are included. These items are not evidence of efforts to associate the mark with the services. While some funding was used to advertise the mark, there is nothing in

⁴⁵ Aug. 12, 2019 Office Action (response to request for reconsideration), 10 TTABVUE 3.

the record to demonstrate that consumers would associate the mark with the services.⁴⁶

We agree. “The ultimate test in determining whether a designation has acquired distinctiveness is applicant’s success, rather than its efforts, in educating the public to associate the proposed mark with a single source.” *Apollo Med. Extrusion Techs., v. Med. Extrusion Techs.*, 123 USPQ2d at 1856. In this case, given Applicant’s entwined use of the GLENCROFT marks with CENTER FOR MODERN AGING, we cannot conclude, based on all the evidence, that it has succeeded in educating the public to associate its applied-for designation, standing alone, with itself.

In the same vein, Applicant argues that its applied-for mark has acquired distinctiveness as a “new member” of the “Glencroft family of marks.”⁴⁷ To establish acquired distinctiveness by this means, however, an applicant must show (1) that it owns a family of marks with a recognizable, distinctive common characteristic—a characteristic it has used and promoted so that the purchasing public would recognize it as a source indicator for its goods or services, and (2) that the purchasing public would perceive the applied-for mark as part of that family of marks, and thus as a source indicator. *In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1202-04 (TTAB 2016). Here, even if Applicant’s GLENCROFT formative marks could be deemed a family (an assumption that is dubious, at best), the applied-for mark shares no common

⁴⁶ Examining Attorney’s brief, 19 TTABVUE 10.

⁴⁷ Applicant’s supp. brief, 17 TTABVUE 10-12; Applicant’s reply brief, 20 TTABVUE 10-11 (citing TMEP § 1212.06(e)(v)(family of marks)).

characteristic with them.

Consequently, Applicant has failed to satisfy its burden of proving acquired distinctiveness under Section 2(f).

III. Conclusion

“[D]escriptive terms are in the public domain and should be free for use by all who can truthfully employ them to describe their goods.” *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (citing *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543-44 (1920)).

For the foregoing reasons, we find that Applicant’s proposed mark, CENTER FOR MODERN AGING, is merely descriptive under Section 2(e)(1), and has not acquired distinctiveness under Section 2(f). 15 U.S.C. §§ 1052(e)(1), (f).

Decision: The refusal to register Applicant’s proposed mark as to both classes is affirmed.