ESTTA Tracking number: **ESTTA1376334**
Filing date: **08/09/2024**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Ex Parte Appeal - Serial No.	97428106
Appellant	EVOQ Therapeutics
Applied for mark	EVOQ
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Submission	Appeal brief
Attachments	Appeal Brief 97428106.pdf(321885 bytes)
Appealed classes	Class 005. First Use: None First Use In Commerce: None All goods and services in the class are appealed, namely: (Based on Intent to Use) Diagnostic preparations for medical purposes for detecting the presence of autoimmune disorders and conditions; pharmaceutical preparations and products for immunotherapy treatments; pharmaceutical preparations and products for the treatments of cancers and autoimmune diseases Class 042. First Use: May 2016 First Use In Commerce: May 2016 All goods and services in the class are appealed, namely: (Based on Use in Commerce) Medical research in the field of autoimmune diseases and cancers; medical research and development in the field of development of immunother-apy treatments Class 044. First Use: May 2016 First Use In Commerce: May 2016 All goods and services in the class are appealed, namely: (Based on Use in Commerce) Consultancy in the field of the medical treatment of autoimmune dis-eases and cancers; medical treatment of autoimmune disorders and conditions; medical testing and diagnostic services for treatment purposes in the field of autoimmune disorders and conditions; immunotherapy treatments; immunother-apy treatments for cancers and autoimmune disease; medical diagnostic testing, monitoring, and reporting services
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Before the Trademark Trial and Appeal Board

APPLICANT'S APPEAL BRIEF

Applicant: EVOQ Therapeutics

App. Serial No: 97428106

Mark: EVOQ

I. INTRODUCTION

Applicant EVOQ Therapeutics ("Applicant") seeks review of the refusal to register the EVOQ mark (the "Mark" or "Applied-For Mark") in Application Serial No. 97428106 (the "Application") based on likelihood of confusion under Trademark Act Sec. 2(d). For the reasons stated below, Applicant respectfully asks the Board to reverse the refusal and approve the Mark for publication.

II. STATEMENT OF FACTS

Applicant filed its Application for registration of the Mark on May 25, 2022, for use with certain medical goods and services in International Classes 005 and 044. *See* May 25, 2022 Application, TSDR p. 1. Applicant filed under Trademark Act Sec. 1(a), identifying dates of first use anywhere and in commerce of May 2016. *Id.*

The Examining Attorney issued a non-final office action on March 27, 2023, refusing registration under Trademark Act Sec. 2(d), rejecting Applicant's specimens, and requiring clarification of the description of goods and services in the Application. *See* March 27, 2023 Non-Final Office Action, TSDR pp. 1-8. The Section 2(d) refusal was based on the following marks:

Reg. No.	Mark	Goods/Services
4552076	EVOKE PHARMA	Pharmaceutical preparations for the treatment of gastrointestinal diseases, IC 005; Scientific and medical research, scientific analysis and new product development in the field of pharmaceutical drugs, IC 042
6098300	EVOC	Multiple in IC 009, 010, 042, and 044[1]

Id., at pp. 2-6.

Applicant responded to the office action on June 27, 2023. As part of its response, Applicant amended the identification of good and services in the Application to the following:

> Diagnostic preparations for medical purposes for detecting the presence of autoimmune disorders and conditions; pharmaceutical preparations and products for immunotherapy treatments; pharmaceutical preparations and products for the treatments of cancers and autoimmune diseases, IC 005; Medical research in the field of autoimmune diseases and cancers; medical research and development in the field of development of immunotherapy treatments, IC 042; Consultancy in the field of the medical treatment of autoimmune diseases and cancers; medical treatment of autoimmune disorders and conditions; medical testing and diagnostic services for treatment purposes in the field of autoimmune disorders and conditions; immunotherapy treatments; immunotherapy treatments for cancers and autoimmune disease; medical diagnostic testing, monitoring, and reporting services, in IC 044.

See December 2, 2023 Trademark Snap Shot Amendment & Mail Processing Stylesheet.[2]

On the Sec. 2(d) refusal, Applicant argued that "EVOQ" and variations thereof – like "EVOC" and "EVOKE" – were weak due to the proliferation of third-party registrations featuring "EVOKE" or a phonetically similar term and, therefore, that consumer confusion was unlikely given the differences in the subject marks. March 27, 2023 Non-Final Office Action Response

[1] Due to its significant length, the entire listing of goods and services in U.S Registration No. 6098300 is not included here.

[2] Applicant amended the filing basis for the Class 005 goods to Trademark Act Sec. 1(b), with Classes 042 (newly added) and 044 proceeding under Trademark Act Sec. 1(a).

("NFOA Response"), TSDR pp. 4-10. In support of its position, Applicant submitted copies of numerous live registrations for "EVOKE" marks and iterations thereof. *Id.*, at pp. 11-130.

A Final Office Action maintaining the Section 2(d) refusal issued on February 14, 2024. The Examining Attorney was not persuaded that "EVOKE"-formative marks are weak, finding Applicant's registration evidence to be of minimal probative value because registrations are "'not evidence that the registered marks are actually in use or that the public is familiar with them.'" Feb. 14, 2024 Final Office Action, TSDR pp. 6-7 (quoting *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1167 n. 5 (TTAB 2013) (citations omitted). The Examining Attorney also rejected Applicant's arguments regarding the differences in the subject marks. *Id.*

On May 2, 2024, Applicant filed its Request for Reconsideration After Final Action ("RFAFA"). Applicant submitted additional arguments and evidence in support of its argument regarding the weakness of, and thus narrowed scope of protection for, "EVOKE"-formative marks. *See* May 2, 2024 RFAFA. This evidence included internet evidence demonstrating actual use in commerce of numerous "EVOKE"-formative marks with medical and health-related goods and services. *Id.*, **Exs. 1** and **2**. Applicant then filed its notice of appeal on May 13, 2024. Based on the pending reconsideration request, the Board suspended the appeal and remanded the matter to the Examining Attorney.

The Examining Attorney denied Applicant's reconsideration request on June 28, 2024, stating the following:

> **Applicant's request for reconsideration is denied**. See 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant's request and determined the request did not: (1) raise a new issue, (2) resolve all the outstanding issue(s), (3) provide any new or compelling evidence with regard to the outstanding issue(s), or (4) present analysis and arguments that were persuasive or shed new light on the outstanding issue(s). TMEP §§715.03(a)(ii)(B), 715.04(a). Accordingly, the following requirement(s) and/or refusal(s) made final in the Office action dated February 14, 2024 are **maintained and continued**:

• Refusal under Trademark Act Section 2(d)

June 28, 2024, Request for Reconsideration After Final Action Denied, at TSDR p. 1.

Following the denial of Applicant's reconsideration request, the Board resumed the appeal on July 1, 2024 and set an August 30, 2024 deadline for Applicant to file its appeal brief.

III. ARGUMENT

"In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the [goods/services]." *In Re Sl&e Training Stable, Inc.*, 88 USPQ2d 1216, at *2 (TTAB 2008). "Conflicting marks are to be compared with respect to the similarity of pronunciation, appearance, and connotation." *McCarthy on Trademarks and Unfair Competition* § 23:21 (5th ed.); *see also In Re Emissive Energy Corp*., 2006 WL 1723558, at *2 (TTAB June 15, 2006) ("First, we consider whether the marks are similar. We compare their similarities in sound, appearance, meaning, and commercial impression."); *In Re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, at *2 (TTAB 2016) ("In comparing the marks, we consider their appearance, sound, meaning, and commercial impression."). "[T]he strength of the cited mark is -- as always -- relevant to assessing the likelihood of confusion under the du Pont framework." *In Re Morinaga* 120 USPQ2d 1738, at *6.

A. The Examining Attorney Did Not Accord Appropriate Weight to Applicant's Registration and Use Evidence.

Applicant submitted substantial evidence demonstrating the weakness of EVOKE-formative marks, both in the form of registrations and internet evidence of actual use. The Examining Attorney gave no apparent weight to any of it in evaluating the subject marks. Applicant respectfully submits that the Examining Attorney failed to accord appropriate weight to

this evidence, resulting in an erroneous conclusion that the subject marks were sufficiently similar to warrant a Section 2(d) refusal.

The Board has, on occasion, noted the marginal probative value of registrations as evidence of actual use of the subject marks in commerce. *See, e.g., In re Midwest Gaming*, 106 USPQ2d at 1167 n. 5. Conversely, the Board has also frequently recognized that "active third-party registrations may be relevant to show that a mark or a portion of a mark is … so commonly used in a particular industry that the public will look to other elements to distinguish the source of the services." *In Re Patch Boys*, 2023 WL 2754397, at *3 (TTAB March 9, 2023); *see also McCarthy* § 11:86 ("If in an industry, a certain term is in common use by several competitors, that indicates that the term is weak and not easily infringed."). With its response to the NFOA, Applicant submitted fifteen active third-party registrations for EVOKE-formative marks for goods and services in the medical and health fields.[3] *SeevFuel Clothing Co. v. Nike, Inc.*, 7 F. Supp. 3d 594, 612 (D.S.C. 2014) (15 registrations in same class of goods indicative of weakness); *see also Jupiter Hosting, Inc. v. Jupitermedia Corp.*, 2004 WL 3543299, at *4 (N.D. Cal. Nov. 9, 2004) (where a "mark resides in a crowded field, hemmed in on all sides by similar marks on similar goods, that mark is weak as a matter of law.") (citation omitted). Under Board precedent, the cited registrations are competent evidence that EVOKE-formative marks are relatively weak in these fields and are thus only narrowly protectible.

Applicant, moreover, did not rely solely on the cited registrations. Rather, Applicant bolstered the record by submitting substantial internet evidence of actual use of EVOKE-formative marks with medical and health-related goods and services, including the following[4]:

[3] *See* Exhibits A, B, C, F, G, H, I, J, K, I, M, N, O, P, and Q to June 27, 2023 NFOA Response.
[4] This internet evidence is compiled in **Exhibits 1** and **2** to Applicant's RFAFA.

Mark	Description of Goods/Services	URL
EVOQUE	Artificial heart tricuspid replacement valve	https://www.fda.gov/medical-devices/recently-approved-devices/edwards-evoque-tricuspid-valve-replacement-system-p230013
EVOK	Hip-femoral stems	https://www.amplitude-ortho.com/en/products/2-evok
EVOKE	Dermatological care	https://minaretsmedicalgroup.com/cosmetic/evoke/
EVOKE	Demineralized bone fibers	https://pinnacletransplant.com/evoke-demineralized-bone-fibers/
EVOKE NEUROSCIENCE	Medical supplies	https://bio-medical.com/evoke
EVOKE MED	Nurse practitioner services	https://www.healthgrades.com/group-directory/ca-california/tarzana/evoke-med-xvywrc
EVOKE MEDICAL CARE	Digital healthcare services	https://evokemedicalcare.com/
EVOKE HEALING SPACE AND SPA	Weight loss products	https://www.evokehealingspacebend.com/weight-loss
EVOKE WELLNESS	Addiction treatment	https://evokewellnessoh.com/
EVOKE	Custom, 3-D printed knee braces	https://www.osskin.com/evoke/
EVOKE HEALTH	Healthcare services	https://evokehealth.co/
EVOKE5 MEDICAL CENTER	Healthcare services	https://evoke5.com/
EVOQ TECHNOLOGIES	Goods for use by ophthalmic and visual science professionals	https://evoqtechnologies.com/
EVOKE	Software for real-time measurement of neural activation	https://www.saludamedical.com/us/evoke/
WIDEX EVOKE	Hearing aids	https://www.widexpro.com/en-us/products/evoke/
EVOKE THERAPY PROGRAMS	Mental health therapy services	https://evoketherapy.com/
EVOKE	Non-surgical devices that utilize radio-frequency technology to heat the deeper layers of the skin, which melts fat cells and causes the skin to contract, becoming tighter and firmer.	https://www.advancedsurgicaltechnology.com/aesthetics/facial-contouring/evoke/
EVOQE AESTHETICS	Facial aesthetic services	https://evoqeaesthetics.com/
EVOQUE LASH AND DAY SPA	Medical aesthetics services	https://www.evoquespa.com/
EVOQUE HEALTH + AESTHETICS	Weight loss centers, family practice services, IV hydration	https://www.yelp.com/biz/evoque-health-aesthetics-lake-city
INIZIO EVOKE	Health marketing, communications, and transformation platform services	https://www.inizioevoke.com/
EVOQ	Skin care products	https://evoqbeauty.com/

EVOQ NANO	Nanotherapeutics	https://evoqnano.com/
EVOQ BIO	Goods for treatment of bacterial infections	https://evoqnano.com/
EVOQ	Medical devices with antimicrobial properties	https://evoqnano.com/

There is no indication in the record that the Examining Attorney according any weight to this use evidence in evaluating Applicant's reconsideration request.

Fairly viewing the record as a whole, the evidence of record demonstrates extensive third-party use, and thus relative weakness, of EVOKE-formative marks when used with medical and health-related goods and services. *FIU Board of Trustees v. Florida. Nat. Univ., Inc.*, 830 F.3d 1242, 1257-58 (11th Cir. 2016) (affirming judgment of no likelihood of confusion based on "extensive third party use", noting that "twelve third-party uses can be sufficient to diminish the distinctiveness of a mark."); *Homes & Land Affiliates, LLC v. Homes & Loans Magazine, LLC*, 598 F. Supp. 2d 1248, 1261 (M.D. Fla. 2009) (finding "widespread third-party use" based on 18 users). Giving this evidence appropriate weight, the mark comparison *DuPont* factor tilts against a likelihood of confusion finding.

As the Board stated in *n Re Innovative Aftermarket Sys., L.P.*, 2009 WL 1741906, at *4 (TTAB June 2, 2009) (citation omitted):

> "'Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.'"

Consequently, when the marks at issue are relatively weak, and thus only narrowly protectible, even small difference in the marks are sufficient to render consumer confusion unlikely:

> The weaker a mark, the fewer are the junior uses that will trigger a likelihood of customer confusion. As the Eighth Circuit observed: "Determining that a mark is weak means that consumer confusion has been found unlikely because the mark's components are so widely used that the public can easily distinguish slight differences in the marks, even if the goods are related."

McCarthy § 11:76 (citation omitted); *see also In Re Iberia*, 2001 WL 984581, at *6 (TTAB Aug. 27, 2001) ("Consequently, … terms such as INTERCONTINENTAL are weak and are given only a narrow scope of protection, with even small differences in the marks being sufficient to make confusion not likely.") (internal punctuation omitted). Such is the case here.

Applicant's EVOQ is a unique iteration of the term EVOKE that does not exist in the English language and has no definition in any foreign language. This unique spelling, moreover, renders Applicant's Mark distinguishable from the marks cited against Applicant's Mark – EVOKE PHARMA and EVOC – neither of which encompass the term that comprises Applicant's Mark. While these differences may be relatively small, the authorities cited above support the conclusion that Applicant's Mark and those in the cited registrations are sufficiently distinguishable to weigh against a likelihood of confusion finding given the weakness of EVOKE-formative marks in the relevant field of use.

B. Purchaser Sophistication

Applicant also respectfully submits that purchaser sophistication is a significant factor that was not accorded appropriate weight in the likelihood of confusion analysis.

The fourth *DuPont* factor considers the "'conditions under which and buyers to whom sales are made, i.e. 'impulse' vs careful, sophisticated purchasing[.]' Purchaser sophistication or degree of care may tend to minimize likelihood of confusion." *In Re Paragon 28, Inc.*, 2022 WL 17067399, at *9 (TTAB Oct. 18, 2022) (citations omitted); *see also Electronic Design & Sales v. Electronic Data Systems*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992) ("[W]ith regard to the issue of likelihood of confusion, purchaser 'sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care.'").

The Board has, moreover, repeatedly recognized that purchasers of medical goods and services tend to be highly sophisticated and thus less susceptible to source confusion. *See, e.g., In Re Paragon 28*2022 WL 17067399, at *10 ("The Board has found on multiple occasions, sometimes based solely on the nature of the identified goods, that purchasers of medical equipment are sophisticated buyers who exercise considerable care in the purchase decision.") (citing cases); *In Merck Kgaa*, 2006 WL 1723553, at *6 (TTAB June 13, 2006) ("We find that based on the identification of goods and services potential purchasers would exercise a high degree of care and would necessarily have some sophistication in the fields of biology and genetics. Thus, this factor weighs against a finding of likelihood of confusion.").

Consistent with the above-cited authorities, the target audience for Applicant's goods and services and those of the registrants are sophisticated professionals in the medical field. This is evident from the Accordingly, the consumer sophistication factor further reduces any appreciable risk of consumer confusion.

III. CONCLUSION

For the reasons stated above, Applicant respectfully requests that the Section 2(d) refusal be reversed and that the EVOQ mark in Application Serial No. 97428106 be approved for publication.

Respectfully submitted,

TAFT STETTINIUS & HOLLISTER LLP

Dated: August 9, 2024

/s/ David McDaniel

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