

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Conventus Orthopaedics, Inc.

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Serial No. 86534128
Serial No. 86534174

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Abigail Rubinstein of Weiss & Arons, LLP for Conventus Orthopaedics, Inc.

Regina C. Hines, Trademark Examining Attorney, Law Office 114 (K. Margaret Le,
Managing Attorney).

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Before Mermelstein, Kuczma, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Conventus Orthopaedics, Inc. (“Applicant”) filed applications for registration on
the Principal Register of the two standard character marks set forth below:¹

CAGE PH Serial No. 86534128

PH CAGE Serial No. 86534174

Applicant seeks registration of each mark for:

¹ Each application was filed on February 13, 2015 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), on the basis of Applicant’s asserted *bona fide* intent to use the mark in commerce.

Surgical implants comprising artificial materials; Surgical instruments and apparatus; Surgical instruments for use in implantation surgery; Surgical apparatus for use in implantation surgery; Surgical devices for use in implantation surgery, in International Class 10.

In each case, Applicant has disclaimed the exclusive right to use CAGE apart from the mark as shown.

The Examining Attorney refused registration of each mark on the ground that it is merely descriptive of Applicant's goods, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1). When the refusals were made final, Applicant appealed to this Board and requested that the two appeals be consolidated. The Board consolidated the appeals by order of May 2, 2017 (5 TTABVUE).² The case is fully briefed.

A mark is merely descriptive of services within the meaning of Section 2(e)(1) if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods. *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); *see also, In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). Whether a mark is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the mark is used, not in the abstract or on the basis of guesswork. *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978); *In re Remacle*, 66 USPQ2d 1222, 1224 (TTAB 2002). In other words, we evaluate

² Citations to TTABVUE and to the examination record refer to the record in Serial No. 86534128. The evidentiary records of the two cases are virtually identical. (Although the cases were consolidated, the Examining Attorney filed two essentially identical briefs, one for each application.)

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whether someone who knows what the goods are will understand the mark to convey information about them. *DuoProSS Meditech Corp. v. Inviro Med. Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). A mark need not immediately convey an idea of each and every specific feature of the goods in order to be considered merely descriptive; it is enough if it describes one significant attribute, function or property of the goods. *See In re Gyulay*, 3 USPQ2d at 1010; *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973). Further, a mark need not describe every one of the identified goods in an application in order to be considered merely descriptive. A descriptiveness refusal is proper with respect to all of the identified goods in an International Class if the mark is descriptive of any of the goods in that class. *In re Chamber of Commerce*, 102 USPQ2d at 1219; *In re Stereotaxis Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). It is the Examining Attorney's burden to show, *prima facie*, that a mark is merely descriptive of an applicant's goods. *In re Gyulay*, 3 USPQ2d at 1010; *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2052 (TTAB 2012).

Applicant has disclaimed the exclusive right to use CAGE, and does not contend that this term is distinctive with respect to the goods. The record shows that a "cage" is a type of orthopedic implant used to support damaged bone, and Applicant's product has been described as a "fracture cage."³ This case turns on whether the acronym PH is a descriptive term and whether each of the marks CAGE PH and PH CAGE, in its entirety, is merely descriptive of Applicant's goods.

³ Office Action of May 27, 2015 at 4-7 and 10-11.

An acronym is merely descriptive only if it has “become so generally understood as representing descriptive words as to be accepted as substantially synonymous therewith.” *Modern Optics, Inc. v. Univis Lens Co.*, 234 F.2d 504, 110 USPQ 293, 295 (CCPA 1956). To support a finding that an acronym is merely descriptive, the Examining Attorney must show that the acronym is an abbreviation of a term that is merely descriptive of the identified goods; and that a relevant consumer viewing the acronym in connection with Applicant’s goods would recognize it as an abbreviation of that descriptive term. *In re Thomas Nelson Inc.*, 97 USPQ2d 1712, 1716 (TTAB 2011); *In re BetaBatt Inc.*, 89 USPQ2d 1152, 1155 (TTAB 2008); *see also Baroness Small Estates Inc. v. American Wine Trade Inc.*, 104 USPQ2d 1224, 1230 (TTAB 2012).

The Examining Attorney contends that PH is substantially synonymous with the term “proximal humerus” and that medical professionals in the field of orthopedics would recognize PH as an abbreviation of that term. Applicant’s advertising materials show that its product is designed for treatment of injuries to the proximal humerus:

... the Conventus PH Cage™, the industry’s first alternative to traditional treatment options for proximal humeral (shoulder) fractures ...

Utilizing the shape memory properties of nitinol, the Conventus Cage™ System expands within the bone creating robust fixation and preventing further collapse of the fracture ...

Prior to the introduction of the Conventus PH Cage™, patients with multipart fractures of the proximal humerus requiring surgical treatment were limited to

traditional fixation technologies or in some cases left to consider shoulder replacement alternatives.⁴

The Examining Attorney appears to argue that Applicant's use, in its advertising, of the expression "PH Cage" in connection with references to the proximal humerus demonstrates that PH is a recognized acronym for "proximal humerus," arguing that such use "shows the applicant's intention to abbreviate the wording 'proximal humerus' with the appropriate letters"⁵ However, we see no use of PH in Applicant's advertisements that is inconsistent with trademark use of this term. Rather, the advertisements use PH CAGE or CONVENTUS PH CAGE in order to identify the goods; and in explanatory text that refers to the proximal humerus, the advertisements use the full words "proximal humerus" rather than an abbreviation thereof. The same is true of the press notices relating to Applicant's product:⁶ they do not use PH as an abbreviation for "proximal humerus," but as part of a phrase for identifying Applicant's goods. A trademark is, by definition, a "device ... used by a person ... to identify and distinguish his or her goods" Trademark Act Section 45, 15 U.S.C. § 1127. The Examining Attorney's suggestion that "the letters PH [are] a logical abbreviation" for the words "proximal humerus"⁷ does not suffice to show that PH is "understood as representing" these words.

The Examining Attorney has submitted a few examples of third-party use of the term PH. One of them is the use of "Targon® PH" to designate an "Intramedullary

⁴ Office Action of January 26, 2016 at 5.

⁵ Examining Attorney's brief, 9 TTABVUE 8.

⁶ Office Action of May 27, 2015 at 4-8.

⁷ Examining Attorney's brief, 9 TTABVUE 7.

nail system for the proximal humerus.”⁸ The advertisement for this product uses PH only in connection with the name of the product, and never as an abbreviation for “proximal humerus,” to which there are many references. This product name indicates that another merchant found PH to be an apt way to indicate that the product is for the proximal humerus. However, it does little to demonstrate that PH is generally understood by others as substantially synonymous with the descriptive term “proximal humerus.” A scholarly article entitled “Angular and sliding stable antegrade nailing (Targon PH) for the treatment of proximal humeral fractures” clearly uses this term in order to identify the specific device that was the subject of the study:

The purpose of this study was to evaluate the functional outcome and the complication rate of an angular and sliding stable antegrade interlocking nail for the treatment of displaced proximal humeral fractures. ...

The treatment of displaced proximal humeral fractures with an angular and sliding stable antegrade nail (Targon-PH) led to good functional results, especially in 2- and 3-part fractures.⁹

In this article, we see no use of PH as a substitute for the expression “proximal humerus.”

The only other third-party use of PH that is of record is the abstract of an article entitled “Nail Fixation of Proximal Humerus Fractures,” which reads, in part:

Proximal humerus (PH) fractures are among the most fracture types [*sic*]. ... The charge-book for surgical management of PH fractures is restoring PH anatomy,

⁸ Office Action of January 26 at 15.

⁹ *Id.* at 11.

obtaining stable osteosynthesis, and conserving PH vascularization. ... Our initial indication for using a nail for PH fractures was displaced fractures of the surgical neck in elderly patients;.... However, nail fixation for PH fracture is not a panacea, and our surgical arsenal also includes bone sutures, percutaneous osteosynthesis, anatomical PH plates, and PH fracture prostheses. ... This technique is technically demanding, but after a learning curve, nail fixation for PH fractures is a very good technique if the indication is well defined.

We agree with Applicant's view that, in this abstract, PH is used as a defined term: that is, PH is a term coined by the writer for the purpose of shortening his text, not a term drawn from the lexicon of recognized abbreviations.

Finally, the Examining Attorney has submitted examples of use of the letters PH to stand for "proximal humerus" (or "proximal humeral") as components of other, lengthier acronyms, as follows:

Polarus Proximal Humeral Plating (PHP) System¹⁰

Twenty-four cadaveric humeri were instrumented with use of either a titanium proximal humeral nail (PHN) or a 3.5-mm locking compression plate for the proximal part of the humerus (LCP-PH).¹¹

These examples show that persons in the relevant industry have incorporated the letters PH into abbreviations for other terms that relate to the proximal humerus; however, they do not show that PH alone is generally understood to represent the phrase "proximal humerus."

¹⁰ Office Action of January 26, 2016 at 13; Office Action of September 8, 2016 at 9-11.

¹¹ "Two-part surgical neck fractures of the proximal part of the humerus. A biomechanical evaluation of two fixation techniques." Office Action of September 8, 2016 at 7

Applicant, for its part, has submitted results of online medical abbreviation searches for the term PH from <medilexicon.com> and <en.wikipedia.org>; as well as a more general search from <abbreviations.com>.¹² Although the searches disclose many terms that may be abbreviated as PH, none of them lists “proximal humerus.”

Applicant has also submitted the declarations of four orthopedic professionals (each of whom provides consultation to Applicant).¹³ Although none of the declarations squarely states that PH is not a recognized acronym for “proximal humerus,” each states that the declarant would require “at least a second or two of thought” in order to determine the significance of PH in the context of Applicant’s marks and goods.

Finally, Applicant has submitted a scholarly article regarding shoulder fractures¹⁴ and a discussion of shoulder fractures from <assh.org>,¹⁵ neither of which makes any reference to the acronym PH.

The Examining Attorney’s evidence of record, considered in its entirety, does not support a finding that the designation PH is “generally understood” by relevant customers to mean “proximal humerus” or “proximal humeral,” much less so generally understood “as to be accepted as substantially synonymous therewith.” *Modern Optics*, 110 USPQ at 295. At best, it demonstrates that one other business

¹² Applicant’s response of November 27, 2015 at 14-38.

¹³ Applicant’s response of July 26, 2016 at 38-88.

¹⁴ “Surgical vs Nonsurgical Treatment of Adults With Displaced Fractures of the Proximal Humerus: The PROFHER Randomized Clinical Trial,” *id.* at 19-32.

¹⁵ *Id.* at 34-36.

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in the orthopedics field has used PH as part of a trademark in order to suggest a product's intended purpose, and that one writer has found PH to be a suitable defined term for indicating "proximal humerus" in order to shorten a lengthy piece of writing. In light of this determination, we agree with Applicant's contention that even sophisticated professionals, when confronted with the marks CAGE PH and PH CAGE, would have to stop and think,¹⁶ and use their perception and imagination in order to reach the conclusion that, in the context of these goods, PH means "proximal humerus." Therefore, on this record we find that Applicant's marks are suggestive rather than merely descriptive with respect to the goods. *See In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017), *quoting DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 103 USPQ2d at 1755 ("a suggestive mark requires imagination, thought and perception to reach a conclusion' about the nature of the goods or services."). For the reasons stated, with respect to both applications we reverse the refusal under Section 2(e)(1).

Note: Although Applicant entered a disclaimer of the exclusive right to use CAGE apart from the mark as shown in each application, this disclaimer does not appear to be reflected in the USPTO database. Prior to publication of the applications for opposition, the database should be corrected to reflect the disclaimer of CAGE in each application.

Decision: The refusal to register in each case is REVERSED.

¹⁶ Applicant's brief at 15, 6 TTABVUE 16.