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Paper No. 9  
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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 **Somnus Medical Technologies, Inc.**

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Serial No. 75/673,724

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Harold C. Hohbach of Flehr Hohbach Test Albritton & Herbert LLP  
for Somnus Medical Technologies, Inc.

Patricia A. Horrall, Trademark Examining Attorney, Law Office 106  
(Mary Sparrow, Managing Attorney).

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Before **Chapman**, Bucher and Holtzman, Administrative Trademark  
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Somnus Medical  
Technologies, Inc. to register SMART RF as a mark for the  
following goods:<sup>1</sup>

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<sup>1</sup> Serial No. 75/673,724; filed April 1, 1999 on the Principal Register alleging a bona fide intention to use the mark in commerce. The application also includes two classes of services as follows: "Educational services teaching physicians a surgical method using low levels of radiofrequency energy for shrinking of redundant tissue" (in Class 41); and "medical services relating to the treatment of sleep disorders and chronic nasal obstruction" (in Class 42). The term "RF" has been disclaimed as to those classes. The refusal to register in this case pertains only to the goods identified in Class 10 of the application.

"Medical devices, namely radiofrequency electrosurgical generators and electrode handpieces for use therewith."  
Class 10

Registration has been finally refused under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark is merely descriptive of applicant's goods.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

The Trademark Examining Attorney argues that SMART RF describes "the main feature" of applicant's medical devices, namely that applicant's goods are highly automated devices using radio frequency ("RF"). In support of her position, the Examining Attorney relies on a definition of "smart" as "a highly automated device" and an acronym dictionary reference to "RF" as radio frequency. In addition, we take judicial notice of the following definitions of "smart" and "radio frequency":

**Smart** - "Equipped with, using, or containing electronic control devices, as, ...microprocessors." *Random House Webster's Unabridged Dictionary* (2<sup>nd</sup> ed. 1998).

**Radio Frequency** - "The frequency in the range within which radio waves may be transmitted, from about 3 kilohertz to about 300,000 megahertz." *The American Heritage Dictionary of The English Language* (4<sup>th</sup> ed. 2000).

The Examining Attorney has also made of record a number of articles obtained from the NEXIS database to show that "smart" is used descriptively "in relation to automated devices" as well as copies of six third-party registrations and applications for

marks in which the word "smart" has been disclaimed. The Examining Attorney argues, based on this evidence, that a medical device which, as described by applicant, is capable of providing temperature controlled radio frequency energy for creating precise volumetric lesions, "would be considered 'smart' by the definition of the term."

Applicant, on the other hand, contends that the word SMART modifies the acronym RF and connotes that the RF has the desired characteristics rather than the medical device itself. Applicant argues that:

"[a]lthough the words 'smart RF' can connote certain characteristics of the medical devices in Class 10, they certainly do not suggest use of the term 'smart RF' for a medical device that is capable of providing temperature controlled radio frequency energy for creating precise volumetric lesions."

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods or services with which it is used. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). On the other hand, a term is suggestive if, in the context of those goods or services, a purchaser must use imagination, thought, or some type of multi-stage reasoning to understand the term's significance. See Plyboo America Inc. v. Smith & Fong co., 51 USPQ2d 1633 (TTAB 1999).

There seems to be no dispute as to the descriptive meaning of the term "RF" in relation to applicant's medical devices which use radio frequency energy or technology. Nor is there any question that medical devices that use radio frequency energy or technology can be "smart." For example, one of the NEXIS articles submitted by the Examining Attorney describes such a device as follows (emphasis added):<sup>2</sup>

"HEADLINE: Microwave Device Used to Cure Snoring and Nasal Congestion.... A **smart** microwave uses **radiofrequency** and a computer controlled thermometer to deliver very specific amounts of heat energy to stiffen the floppy tissues in the nose, mouth and...."

Thus, each word in the mark may individually describe some aspect of applicant's goods. The critical question, however, is whether the mark SMART RF, when considered as a whole, is descriptive of the identified goods. See *In re Medical Disposables Co.*, 25 USPQ2d 1801 (TTAB 1993). Based on the record before us, we cannot conclude that it is. The third-party registrations submitted by the Examining Attorney are not relevant because none of the registrations is for SMART RF.<sup>3</sup> While the registrations may arguably show the descriptive meaning of the word "smart" in relation to certain medical devices or

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<sup>2</sup> The source of this article has not been identified.

<sup>3</sup> Moreover, third-party applications are not evidence of anything.

equipment, the inquiry does not end with a determination that one of the words in the mark is descriptive.

The NEXIS evidence submitted by the Examining Attorney is similarly unpersuasive. The articles refer to "smart" medical devices and even, as shown above, smart medical devices that use radio frequency. However, applicant's mark is SMART RF not SMART DEVICE, and applicant's goods are medical devices not radio frequencies. While a medical device can be "smart," it is unclear, and the evidence fails to show, how a radio frequency can be "smart" or imbued with "smart" capabilities (such as a microprocessor).

Thus, we find, based on this record, that while SMART RF may suggest applicant's goods, it does not directly and immediately describe any particular aspect of the goods.

**Decision:** The refusal to register is reversed.