In the Office Action having a mailing date of May 21, 2021, the Examining Attorney refused the Class 44 specimen of use submitted with the Statement of use on the basis that the specimen does not show a direct association between mark and the services identified in Class 44. Applicant respectfully disagrees with this refusal, as follows.

The Examining Attorney's refusal to accept the specimen of use for the Applicant's Class 44 services is based upon the Examining Attorney's position that the specimens "show use of the mark as "SimpleDose presorted Rx packages," packages of prescription medicines, not as a source identifier for the providing of information." However, as an initial matter, Applicant notes that there is no prohibition on using a mark to identify both products and services. *See In re La Quinta Worldwide, LLC*, (Serial No. 85420181, TTAB 2015). Here, Applicant's mark "SIMPLEDOSE" identifies the source of Applicant's RX packages and Applicant's applied-for pharmacist services and information services.

Pages 26-31 of Applicant's specimen of use are acceptable as evidence of use of the mark in connection with the Class 44 services as the screenshots show the Class 44 services being rendered and accessed through Applicant's non-downloadable "SIMPLEDOSE" software. The TTAB has held that screenshots of software applications or references to the mark being used in connection with a software program may be accepted as evidence showing use of the mark in the course of rendering services through the software program. See *In re Metriplex Inc.*, 23 USPQ2d 1315, (TTAB 1992); *see also In re Metriplex Inc.*, 23 USPQ2d 1315, (TTAB 1992).

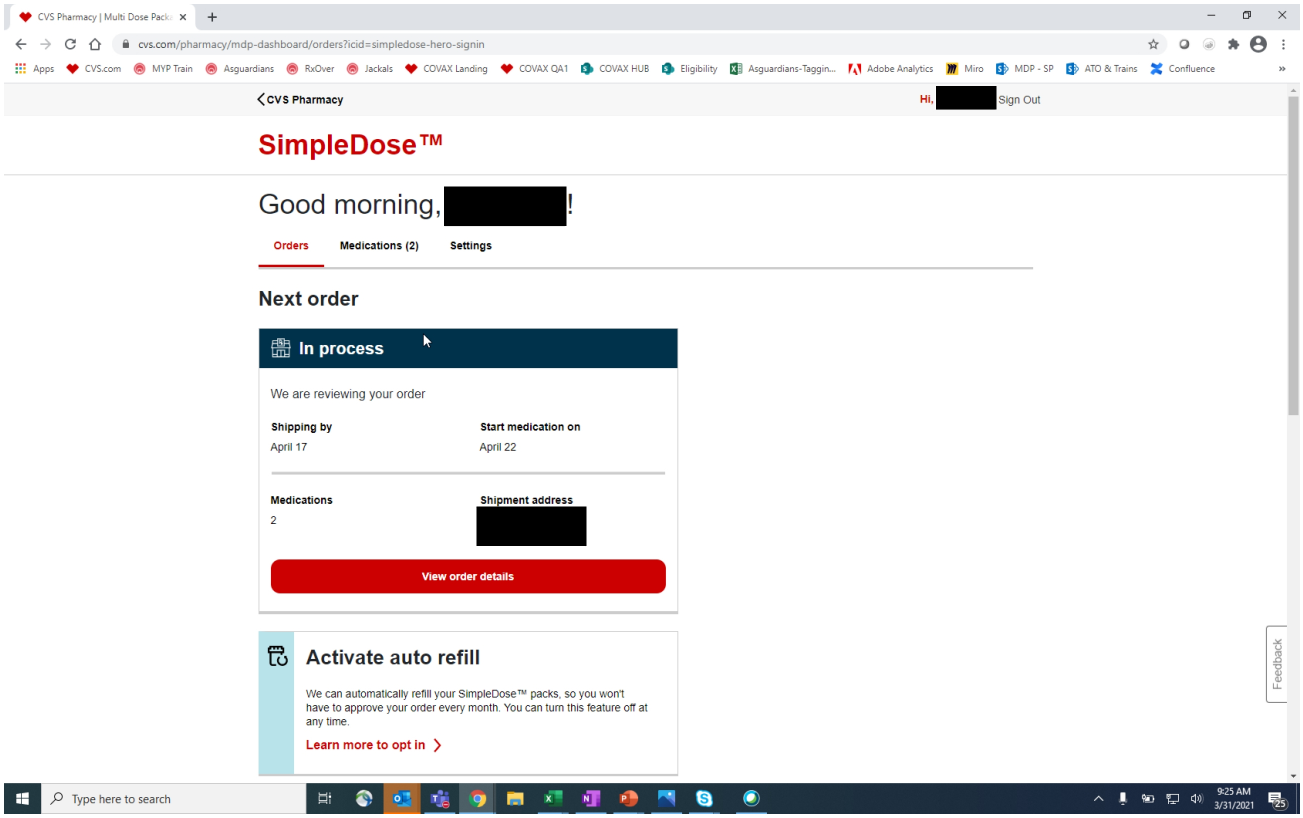
The present case is analogous to in *In re Linguistique et Intelligence Artificielle, dba Lidia S.A.*, (Serial No. 75980776, TTAB 2003), a copy of which is attached for reference, in which the applicant applied for the mark LIDIA RETRIEVER for the services of analyzing communications in Class 35. The applicant submitted a specimen of use for the services comprised of promotional literature which stated, "Only Lidia Retriever™ allows you to work with large qualitative databanks, to access and evaluate all the ideas expressed, and to segment these ideas based on the strength of their relationship to the dynamic/search ideas." Applicant's specimen of use was refused on the basis that the specimen only showed use of the mark in connection with a software program for employing the applicant's LIDIA methodology, and services. *Id.* The TTAB reversed the Examining Attorney's refusal and accepted the specimen of use because the specimen clearly indicated that the applicant's services are rendered through applicant's use of computer programs and noting the following:

> That is, just because applicant's intangible services are rendered through the means of a tangible item, specifically, a computer program, this does not mean that applicant's mark does not also identify the services. It is true that the specimen does not make explicit reference to the services precisely as they are identified in the application, however, the specimen does indicate use of the mark for these services.

Id. (citations omitted). Additionally, in *In re Metriplex Inc.*, 23 USPQ2d 1315, (TTAB 1992), also attached for the Examining Attorney's reference, the TTAB held that the applicant's specimen of use, which showed the mark being used on a display screen, was acceptable for the applied-for data transmission services because the computer display screen showed use of the applied-for mark in the rendering or selling of applicant's services.

Therefore, similar to *In re Linguistique et Intelligence Artificielle, dba Lidia S.A*. and *In re Metriplex Inc.*, Applicant submits that pages 26-31 of Applicant's specimen of use are sufficient to create a direct association between the mark and the services of "providing prescription information for medical treatment; providing medical information regarding medications and medication management; providing medical information, including, information on medications" in Class 44, as the screenshots shown in these pages show use of Applicant's mark on a computer screen in the course of Applicant's rendering of the Class 44 services made available to users through Applicant's software services. In pages 26-31, Applicant's mark "SIMPLEDOSE" appears in large, red text at the top left of the screen and lists the software user's prescription information such as the user's current medications, pending prescription orders and order prescription order history. Accordingly, pages 26-31 of Applicant's Class 44 specimen of use are acceptable because they show use of Applicant's mark as it appears on a computer screen in the course of Applicant's rendering of the Class 44 services.

Therefore, Applicant respectfully requests that the Examining Attorney accept the originally submitted specimen of use which shows use of the mark in connection with the applied-for services in Class 44. It is now believed that the present application is in condition for publication and such action is hereby respectfully requested. Should the Examining Attorney have any questions, please contact the undersigned.


CVS Pharmacy | Multi Dose Packs
cvs.com/pharmacy/mdp-dashboard/orders?icid=simpledose-hero-signin
Apps
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MYP Train
Asguardians
RxOver
Jackals
COVAX Landing
COVAX QA1
COVAX HUB
Eligibility
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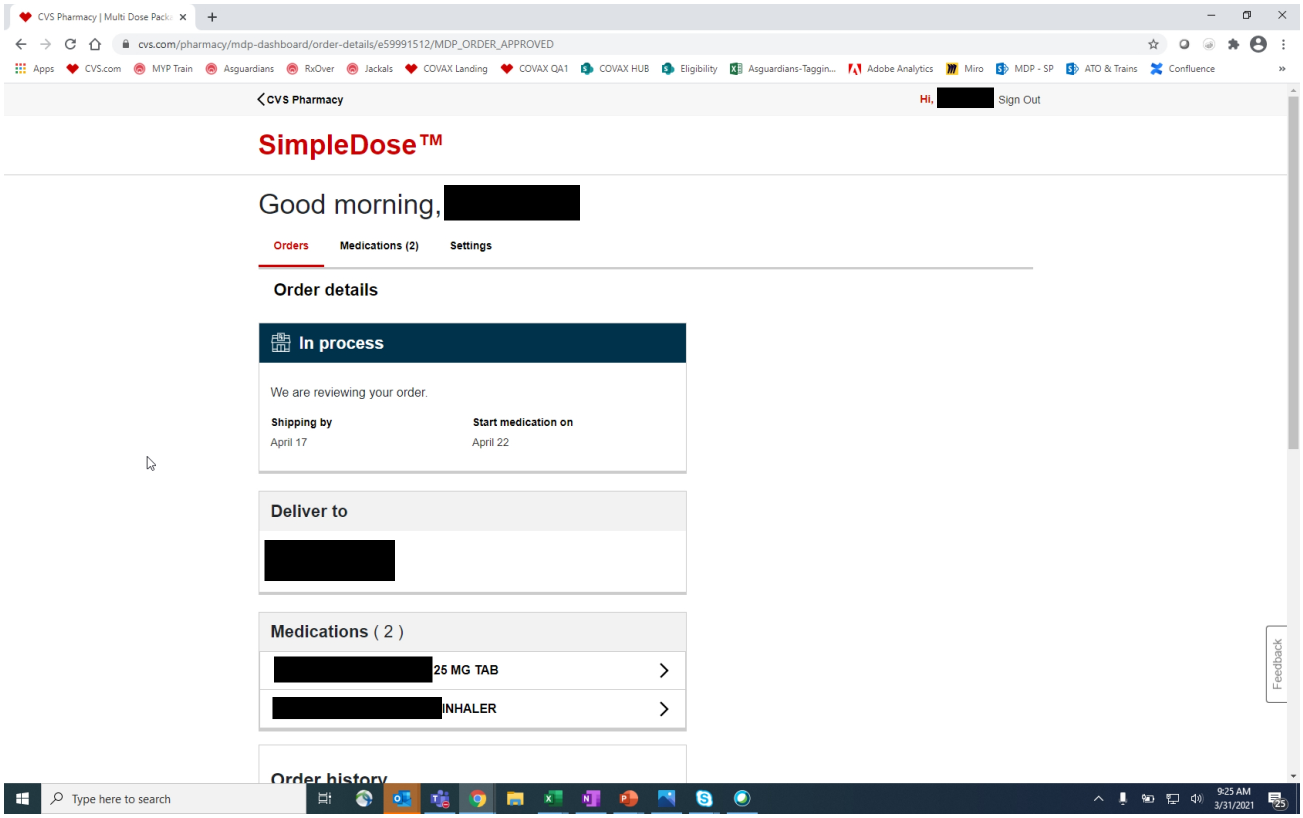
Adobe Analytics
Miro
MDP - SP
ATO & Trains
Confluence
CVS Pharmacy
Hi, [redacted] Sign Out
SimpleDose™
Good morning, [redacted]!
Orders
Medications (2)
Settings
Next order
In process
We are reviewing your order
Shipping by
April 17
Start medication on
April 22
Medications
2
Shipment address
[redacted]
View order details
Activate auto refill
We can automatically refill your SimpleDose™ packs, so you won't have to approve your order every month. You can turn this feature off at any time.
Learn more to opt in
Feedback
Type here to search
9:25 AM
3/31/2021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Asguardians
RxOver
Jackals
COVAX Landing
COVAX QA1
COVAX HUB
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MDP - SP
ATO & Trains
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CVS Pharmacy
Hi, [redacted] Sign Out
SimpleDose™
Good morning, [redacted]
Orders
Medications (2)
Settings
Order details
In process
We are reviewing your order.
Shipping by
April 17
Start medication on
April 22
Deliver to
[redacted]
Medications (2)
[redacted] 25 MG TAB
[redacted] INHALER
Order history
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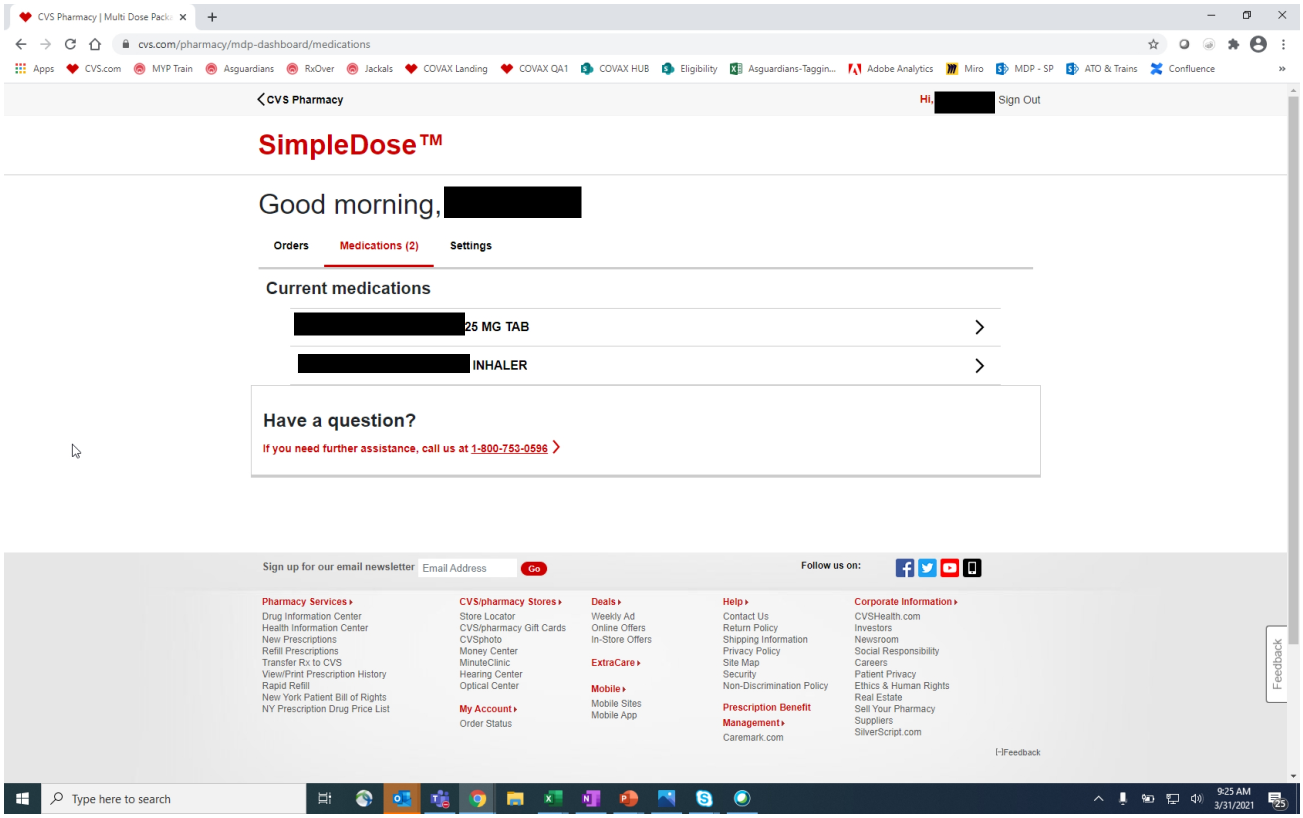
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cvs.com/pharmacy/mdp-dashboard/medications
CVS Pharmacy
Hi, [redacted] Sign Out
SimpleDose™
Good morning, [redacted]
Orders
Medications (2)
Settings
Current medications
[redacted] 25 MG TAB
[redacted] INHALER
Have a question?
If you need further assistance, call us at 1-800-753-0596
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Pharmacy Services
Drug Information Center
Health Information Center
New Prescriptions
Refill Prescriptions
Transfer Rx to CVS
View/Print Prescription History
Rapid Refill
New York Patient Bill of Rights
NY Prescription Drug Price List
CVS/pharmacy Stores
Store Locator
CVS/pharmacy Gift Cards
CVSphoto
Money Center
MinuteClinic
Hearing Center
Optical Center
My Account
Order Status
Deals
Weekly Ad
Online Offers
In-Store Offers
ExtraCare
Mobile
Mobile Sites
Mobile App
Help
Contact Us
Return Policy
Shipping Information
Privacy Policy
Site Map
Security
Non-Discrimination Policy
Prescription Benefit Management
Caremark.com
Corporate Information
CVSHealth.com
Investors
Newsroom
Social Responsibility
Careers
Patient Privacy
Ethics & Human Rights
Real Estate
Sell Your Pharmacy
Suppliers
SilverScript.com
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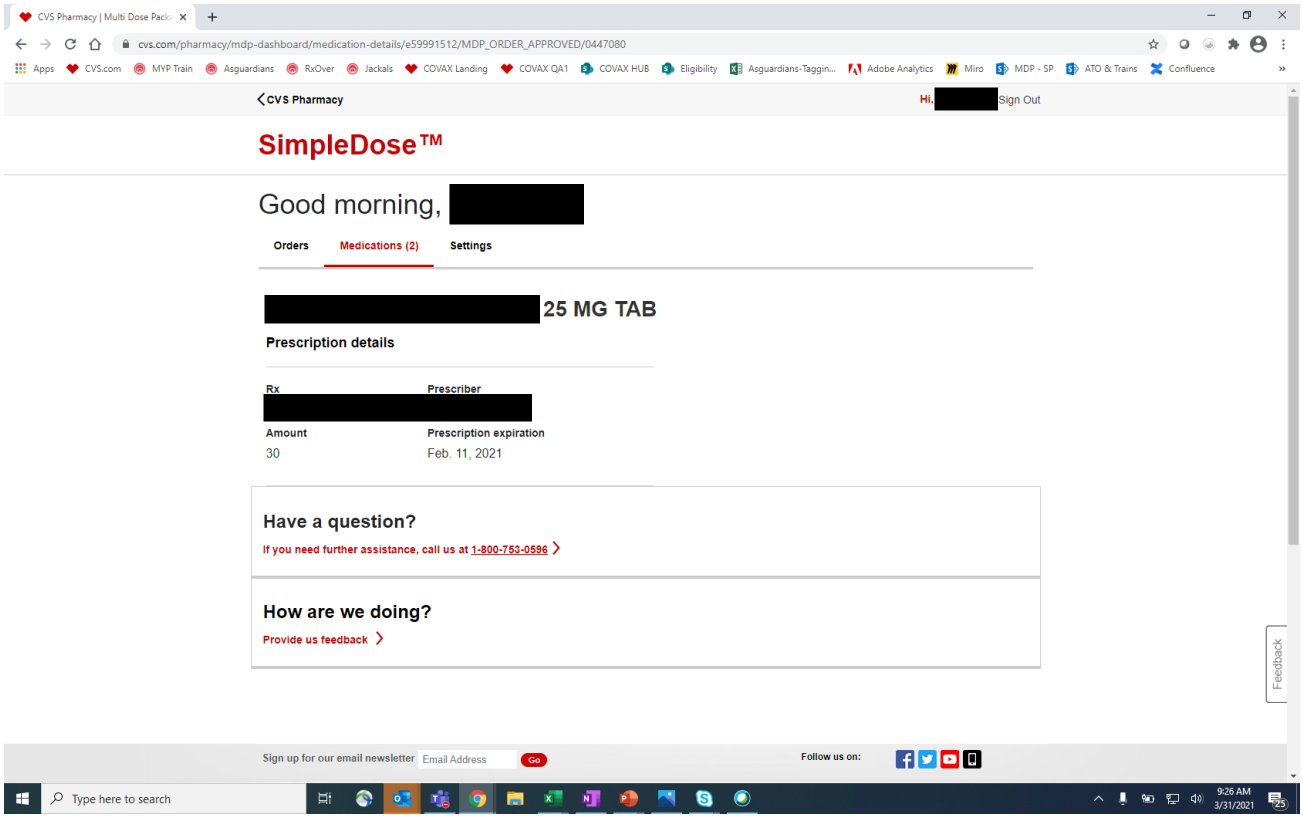
CVS Pharmacy | Multi Dose Packs
cvs.com/pharmacy/mdp-dashboard/medication-details/e59991512/MDP_ORDER_APPROVED/0447080
Apps CVS.com MYP Train Asguardians RxOver Jackals COVAX Landing COVAX QA1 COVAX HUB Eligibility Asguardians-Taggin... Adobe Analytics Miro MDP - SP ATO & Trains Confluence
CVS Pharmacy
Hi, [redacted] Sign Out
SimpleDose™
Good morning, [redacted]
Orders
Medications (2)
Settings
[redacted] 25 MG TAB
Prescription details
Rx
[redacted]
Prescriber
Amount
30
Prescription expiration
Feb. 11, 2021
Have a question?
If you need further assistance, call us at 1-800-753-0596
How are we doing?
Provide us feedback
Feedback
Sign up for our email newsletter
Email Address
Go
Follow us on:
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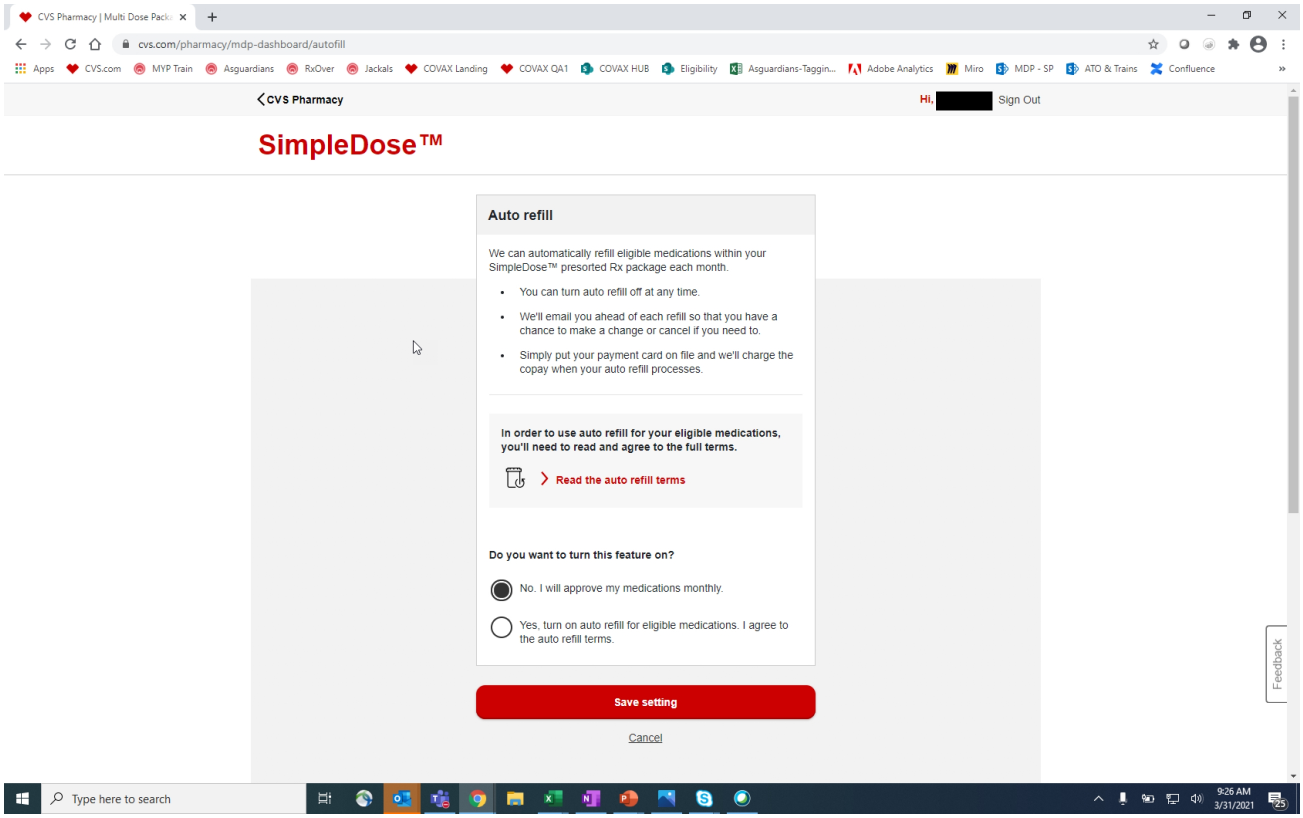
3/31/2021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COVAX HUB
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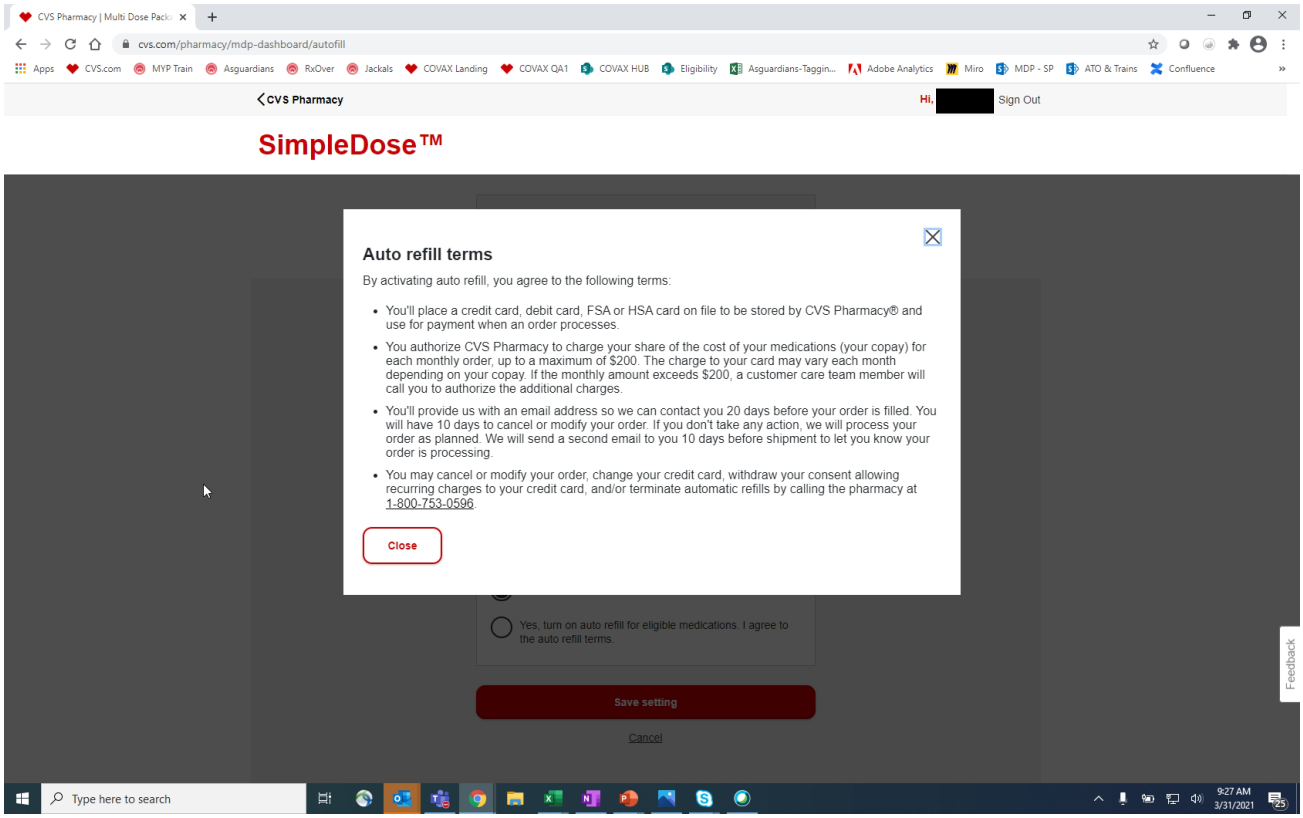
Adobe Analytics
Miro
MDP - SP
ATO & Trains
Confluence
CVS Pharmacy
Hi, [redacted]
Sign Out
SimpleDose™
Auto refill
We can automatically refill eligible medications within your SimpleDose™ presorted Rx package each month.
You can turn auto refill off at any time.
We'll email you ahead of each refill so that you have a chance to make a change or cancel if you need to.
Simply put your payment card on file and we'll charge the copay when your auto refill processes.
In order to use auto refill for your eligible medications, you'll need to read and agree to the full terms.
Read the auto refill terms
Do you want to turn this feature on?
No. I will approve my medications monthly.
Yes, turn on auto refill for eligible medications. I agree to the auto refill terms.
Save setting
Cancel
Feedback
Type here to search
9:26 AM
3/31/2021


CVS Pharmacy | Multi Dose Packs
cvs.com/pharmacy/mdp-dashboard/autofill
CVS Pharmacy
HI, [redacted] Sign Out
SimpleDose™
Auto refill terms
By activating auto refill, you agree to the following terms:
You'll place a credit card, debit card, FSA or HSA card on file to be stored by CVS Pharmacy® and use for payment when an order processes.
You authorize CVS Pharmacy to charge your share of the cost of your medications (your copay) for each monthly order, up to a maximum of $200. The charge to your card may vary each month depending on your copay. If the monthly amount exceeds $200, a customer care team member will call you to authorize the additional charges.
You'll provide us with an email address so we can contact you 20 days before your order is filled. You will have 10 days to cancel or modify your order. If you don't take any action, we will process your order as planned. We will send a second email to you 10 days before shipment to let you know your order is processing.
You may cancel or modify your order, change your credit card, withdraw your consent allowing recurring charges to your credit card, and/or terminate automatic refills by calling the pharmacy at 1-800-753-0596
Close
Yes, turn on auto refill for eligible medications. I agree to the auto refill terms.
Save setting
Cancel
Feedback
Type here to search
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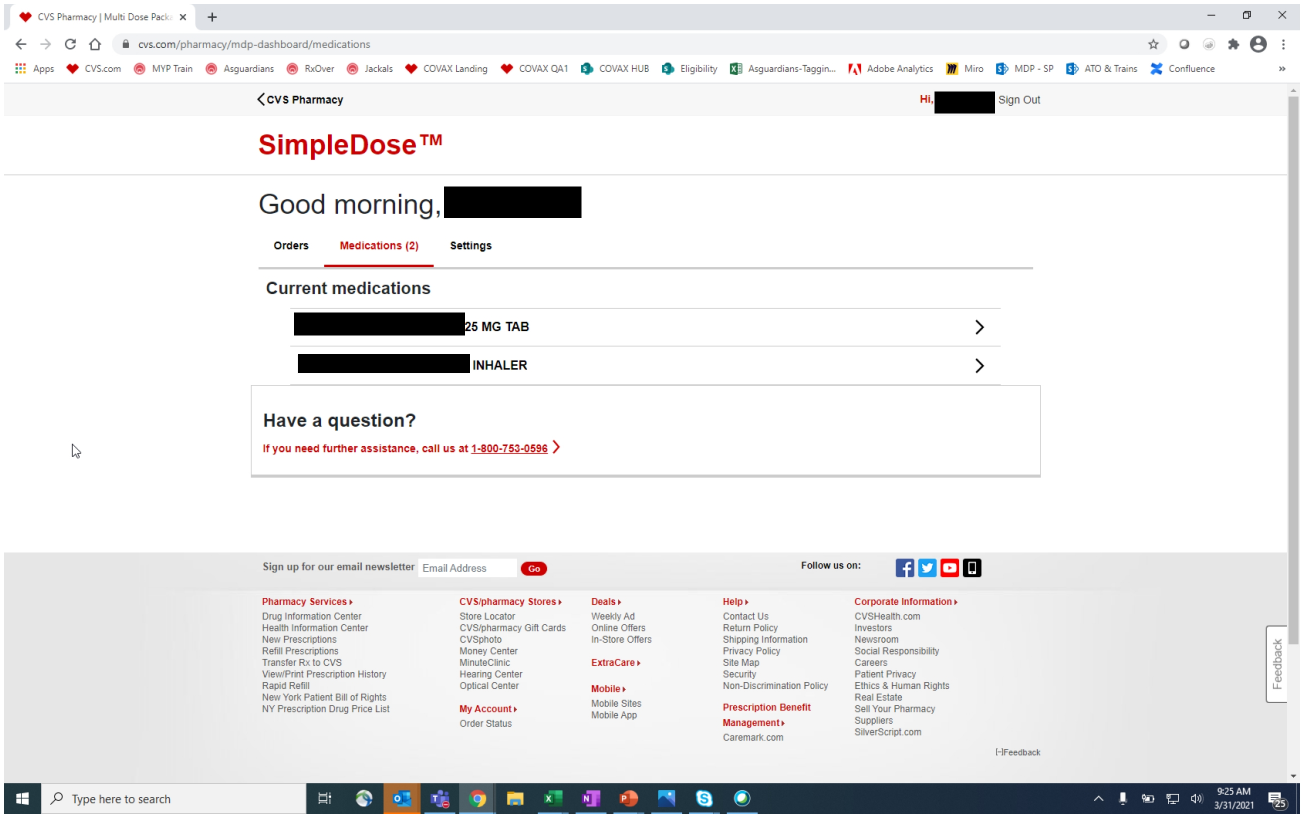
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Good morning, [redacted]
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Rapid Refill
New York Patient Bill of Rights
NY Prescription Drug Price List
CVS/pharmacy Stores
Store Locator
CVS/pharmacy Gift Cards
CVSphoto
Money Center
MinuteClinic
Hearing Center
Optical Center
My Account
Order Status
Deals
Weekly Ad
Online Offers
In-Store Offers
ExtraCare
Mobile
Mobile Sites
Mobile App
Help
Contact Us
Return Policy
Shipping Information
Privacy Policy
Site Map
Security
Non-Discrimination Policy
Prescription Benefit Management
Caremark.com
Corporate Information
CVSHealth.com
Investors
Newsroom
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Careers
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Ethics & Human Rights
Real Estate
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Suppliers
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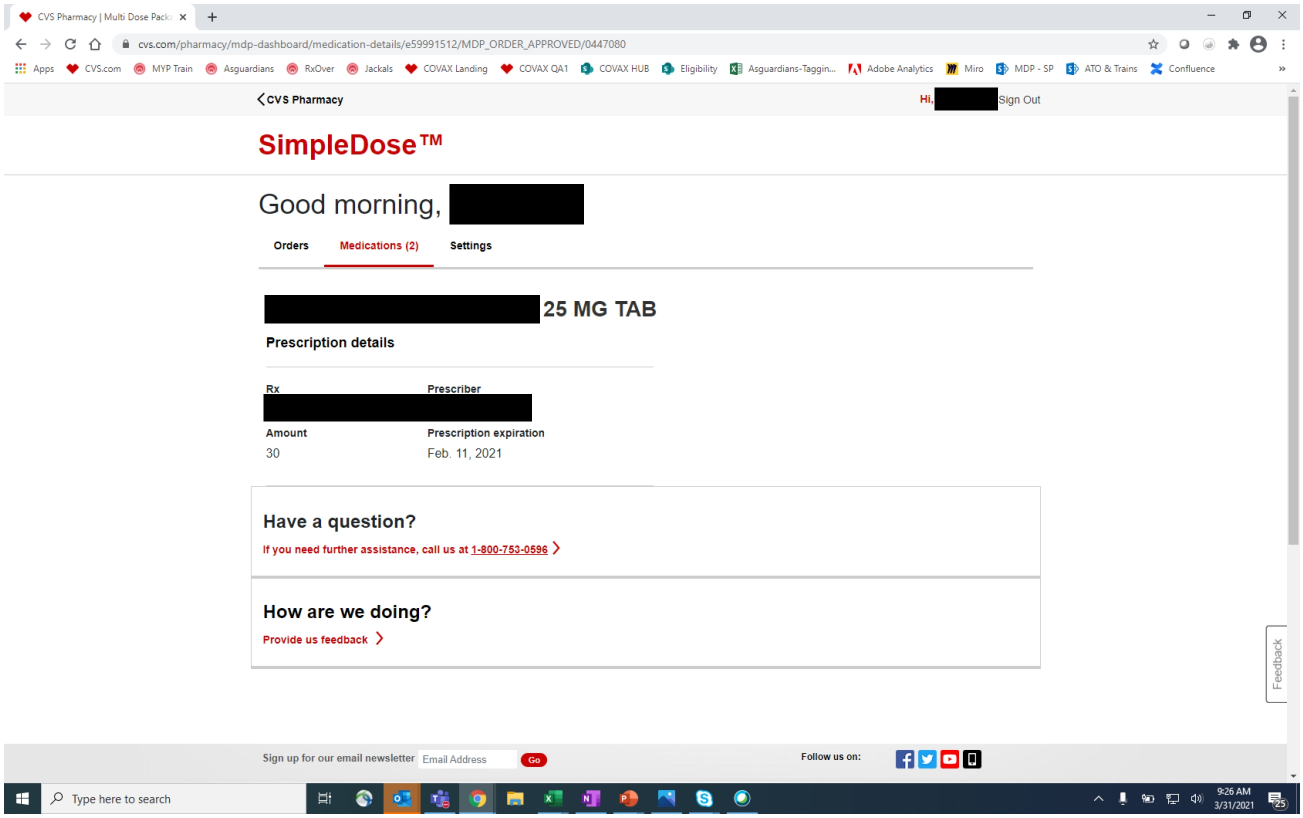
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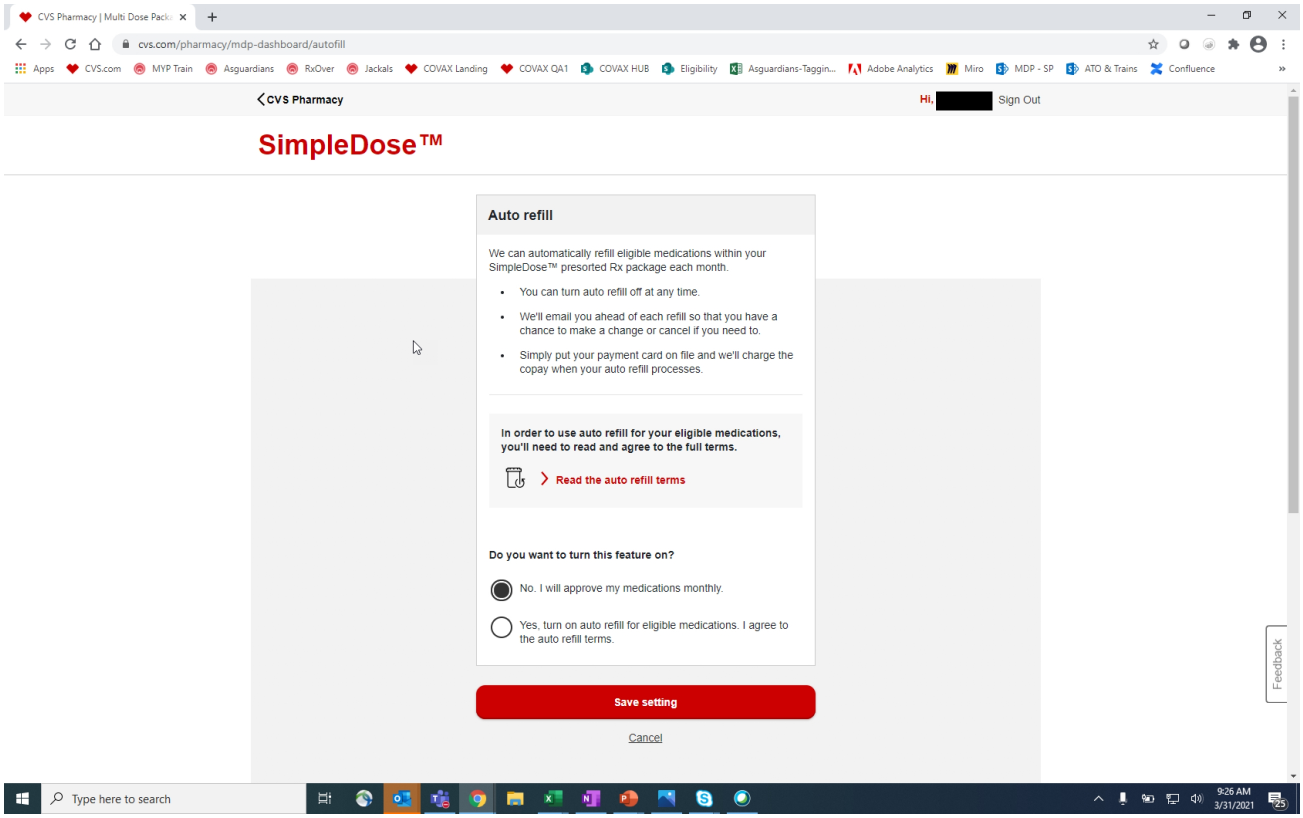
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In order to use auto refill for your eligible medications, you'll need to read and agree to the full terms.
Read the auto refill terms
Do you want to turn this feature on?
No. I will approve my medications monthly.
Yes, turn on auto refill for eligible medications. I agree to the auto refill terms.
Save setting
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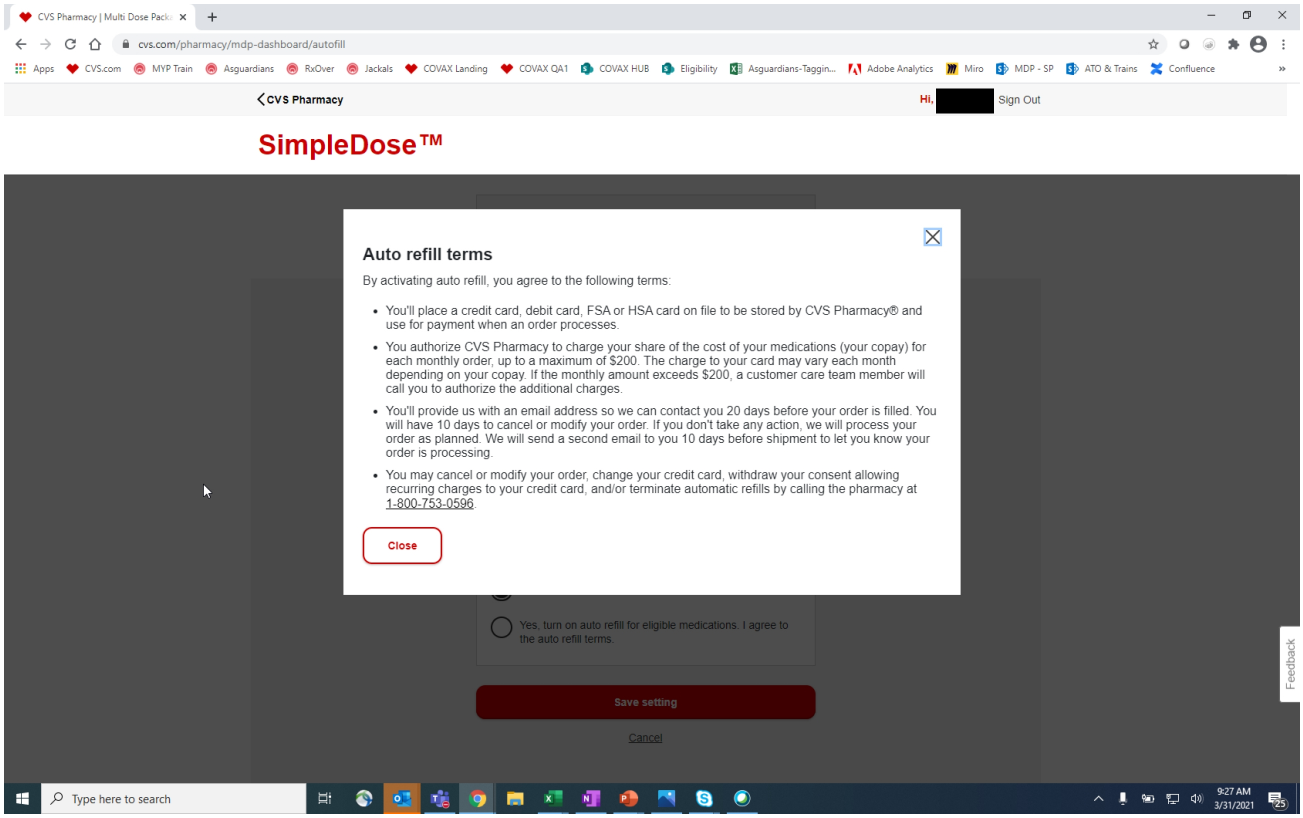
3/31/2021


CVS Pharmacy | Multi Dose Packs
cvs.com/pharmacy/mdp-dashboard/autofill
CVS Pharmacy
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You'll place a credit card, debit card, FSA or HSA card on file to be stored by CVS Pharmacy® and use for payment when an order processes.
You authorize CVS Pharmacy to charge your share of the cost of your medications (your copay) for each monthly order, up to a maximum of $200. The charge to your card may vary each month depending on your copay. If the monthly amount exceeds $200, a customer care team member will call you to authorize the additional charges.
You'll provide us with an email address so we can contact you 20 days before your order is filled. You will have 10 days to cancel or modify your order. If you don't take any action, we will process your order as planned. We will send a second email to you 10 days before shipment to let you know your order is processing.
You may cancel or modify your order, change your credit card, withdraw your consent allowing recurring charges to your credit card, and/or terminate automatic refills by calling the pharmacy at 1-800-753-0596
Close
Yes, turn on auto refill for eligible medications. I agree to the auto refill terms.
Save setting
Cancel
Feedback
Type here to search
9:27 AM
3/31/2021

In re Linguistique et Intelligence Artificielle, dba Lidia S.A., Serial No. 75/980,776, (T.T.A.B. 2003)

THIS DISPOSITION IS
NOT CITABLE AS PRECEDENT
OF THE TTAB

Mailed: April 1, 2003

Paper No. 19
BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Linguistique et Intelligence Artificielle, dba Lidia S.A.

Serial No. 75/980,776

Fritz L. Schweitzer, Jr. of Schweitzer Cornman Gross & Bondell LLP for Linguistique et Intelligence Artificielle, dba Lidia S.A.

David T. Taylor, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Cissel, Seeherman and Chapman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On December 29, 1998 Linguistique et Intelligence Artificielle, dba Lidia S.A. (a French corporation) filed an application to register the mark LIDIA RETRIEVER on the Principal Register, for services identified, as amended, as "business consultation directed to the research and scientific analysis of the syntax of written and verbal **[*2]** communications, with particular regard to discerning the main ideas of such communications and their associated ideas, especially to enable intelligent indexing of such communications" in International Class 35.[1] The application, as originally filed, was based on applicant's assertion of a bona fide intention to use the mark in commerce. The method-of-use clause for the services stated that the mark would be applied to letterhead, brochures and promotional materials.

The application was published for opposition on June 6, 2000, and on August 29, 2000, the USPTO

issued a notice of allowance. Applicant filed a statement of use for the Class 35 services on January 9, 2001, setting forth a date of first use and first use in commerce of February 28, 1997. The method-of-use clause now reads that the mark is applied "to brochures and advertising sheets offering the services."

The Examining Attorney noted the filing of the statement of use, but he required that applicant submit substitute specimens, supported by an affidavit or **[*3]** declaration, showing use of the mark for the identified services. Applicant responded by submitting an "explanatory document," specifically explaining it was not offered as a substitute specimen. (Applicant's paper filed August 2, 2001 — miscaptioned "Statement of Use Under 37 C.F.R. §2.88 ").[2]

Registration has been finally refused on the ground that the specimen submitted by applicant does not show use of the mark for the services identified in the application.[3]

Applicant has appealed, and briefs have been filed, but applicant did not request an oral hearing.

The Examining Attorney's position is essentially that the specimen shows use of the mark for goods, that is, **[*4]** computer programs, but fails to demonstrate use of the mark in association with the identified services, "business consultation directed to the research and scientific analysis of the syntax of written and verbal communications, with particular regard to discerning the main ideas of such communications and their associated ideas, especially to enable intelligent indexing of such communications," as required by Trademark Rule 2.56. Rather, the Examining Attorney asserts that the specimen shows use of the mark LIDIA RETRIEVER as identifying one of three software programs employing the LIDIA methodology, but does not show service mark usage.

Applicant essentially contends that there is a minimal association requirement between the specimens and the services offered; that there is no requirement for an explicit reference to the services, but rather, the specimens for services must merely show use of the mark in association with the services; that its specimen adequately focuses on the relationship between the mark LIDIA RETRIEVER and applicant's service of analyzing communications; that even if the specimen could be viewed as advertising goods as well as services, applicant has explained in the record that "Applicant's services are rendered using computer software" (brief, p. 6), and has **[*5]** explicitly stated (through counsel) that applicant does not sell or license software under the LIDIA RETRIEVER mark; and that the specimen submitted is, in fact, what applicant uses to advertise and offer its services.

Applicant's specimen of record is a two-sided sheet of promotional literature. The mark LIDIA RETRIEVER, followed by the symbol "™," appears by itself at the top of the front page, in large type and in blue ink making it very prominent. It is clear the text which follows the headline (LIDIA RETRIEVER) refers to this mark. It is evident from this material that LIDIA RETRIEVER is being used as a service mark for the identified services. For example, the following statements appear on applicant's promotional literature specimen:

> Only Lidia Retriever™ allows you to work with large qualitative databanks, to access and evaluate all the ideas expressed, and to segment these ideas based on the strength of their relationship to the dynamic/search ideas.
>
> By identifying the ideas that are essential to a respondent's point of view, it prioritizes the ideas that are most important to your customers. It then puts these into context by finding the links between the ideas expressed and by understanding the strength of the associations between

them.

[*6] Applicant's specimen clearly indicates that applicant's services are rendered to its customers through applicant's use of computer programs, and, in fact, applicant has so stated; but that does not mean that the mark does not also identify applicant's services. See *In re Metriplex Inc.*, 23 USPQ2d 1315 (TTAB 1992). That is, just because applicant's intangible services are rendered through the means of a tangible item, specifically, a computer program, this does not mean that applicant's mark does not also identify the services. It is true that the specimen does not make explicit reference to the services precisely as they are identified in the application, however, the specimen does indicate use of the mark for these services.

Moreover, applicant's attorney has stated that the specimen is the promotional literature which is distributed to applicant's prospective customers in the offering of applicant's identified services to its customers; and that applicant "has never sold any goods under any mark" and it "does not sell or license software in connection with the LIDIA RETRIEVER mark" (brief, p. 4).

We find that applicant's specimen shows use of the mark LIDIA RETRIEVER for applicant's identified business consulting services such that customers would perceive the **[*7]** association between the mark and the identified services. See *In re Advertising & Marketing Development, Inc.*, 821 F.2d 614 , 2 USPQ2d 2010 (Fed. Cir. 1987).

Decision: The refusal to register on the basis that the specimen does not show use of the mark in connection with the identified services is reversed.

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fn 1 The original application was Serial No. 75/612,997 and included goods in International Class 9 as well as the International Class 35 services. However, applicant filed a request to divide out the Class 35 services, resulting in this "child" application. (The original "parent" application has subsequently been abandoned.)

fn 2 Both the Examining Attorney and applicant subsequently treated the "explanatory document" as a substitute specimen. To clarify the record, there is only one specimen of record and that is the one submitted with applicant's statement of use on January 9, 2001. The "explanatory document" was not offered by applicant as a specimen and, moreover, was not supported by an affidavit or declaration as required by Trademark Rule 2.59.

fn 3 The Examining Attorney also argued in the Final Office action that a term which merely designates a process, or is used only as the name of a process, is not registrable as a service mark. The Examining Attorney did not make a separate refusal to register on the ground that the mark does not function as a mark, but identifies only a process, and in his brief, the Examining Attorney expressed the issue on appeal as "whether the specimens submitted are unacceptable as evidence of actual service mark use such that the refusal to register is proper." Inasmuch as there is no separate refusal based on the term identifying only a process, that argument will not be further considered herein.

Source: U.S. Patent & Trademark Office.

In re Metriplex Inc., Serial No. 73/836,597, 23 U.S.P.Q.2d 1315, (T.T.A.B. 1992)

Pagination

* U.S.P.Q.2d

23 U.S.P.Q.2d 1315

U.S. Patent and Trademark Office Trademark Trial and Appeal Board

In re Metriplex Inc.

Serial No. 73/836,597

Decided May 5, 1992

Released June 8, 1992

Appeal from refusal of registration (Craig D. Taylor, senior examining attorney; Deborah S. Cohn, managing attorney).

Jerry Cohen, of Perkins, Smith & Cohen, Boston, Mass., for applicant.

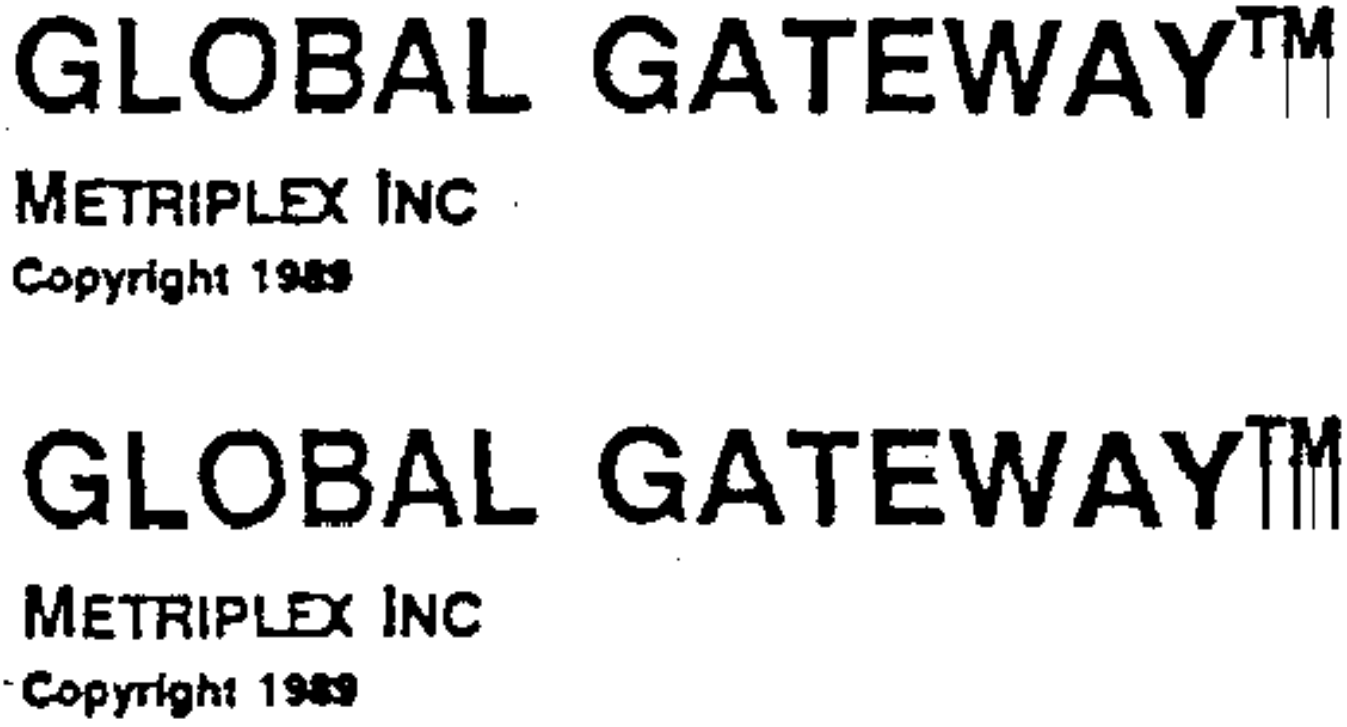
Before Rice, Seeherman, and Hanak, members.

[*1316] [*1316] Seeherman, member.

Metriplex, Inc. has applied to register the mark GLOBAL GATEWAY for the service of "transmission of data in various fields (commercial as well as personal) to subscribers to the service by means of information entry software, radio data transmission and portable terminal interface with such subscribers."[1] Registration has been refused by the Examining Attorney on the basis that the specimens submitted by applicant are unacceptable as evidence of actual service-mark use because they do not refer to the services identified in the application.

Applicant has appealed.

The specimens at issue (reproduced below) are, according to applicant's declaration, an example of a computer screen display that appears on a computer terminal in the course of applicant's rendering of the service. Applicant states that this screen is observed by potential subscribers in the course of demonstrations of applicant's services, and by customers who encounter the screen on the terminal as the service is being rendered.



[1] [1] We reverse the refusal to register. The gravamen of the Examining Attorney's complaint about the specimens is that they do not make reference to the service identified in the application, specifically, they do not indicate that GLOBAL GATEWAY is used in connection with the transmission of data to subscribers. The only authority the Examining Attorney has cited in support of his position is *Intermed Communication, Inc. v. Chaney*, 197 USPQ 501, 507 (TTAB 1977). However, that inter partes proceeding involved the question of whether the applicant had made use of its service mark prior to filing its application, and the Board found that use of the mark in a progress report which, in effect, announced future plans to use a mark, did not constitute service mark use. Thus, we do not view the language in that case "A specimen which shows an alleged mark but which makes no reference to the services offered or performed thereunder is not evidence of service mark use" as requiring that specimens must, in all cases, contain a statement as to the nature of the services in order to be acceptable.

The *Trademark Manual of Examining Procedure, Section* 1301.04 , makes clear that, because by its very

nature a service mark can be used in a wide variety of ways, the types of specimens which may be submitted as evidence of use are varied. Some of the specimens which the Board has found to be acceptable are a photograph of chain-link fences, where the mark sought to be registered consisted of alternately colored strands of wire arranged in the fencing, for the service of renting chain-link fences, *In re Eagle Fence Rentals, Inc.*, 231 USPQ 228 (TTAB 1986); and a photograph of a person wearing a bird costume, where the asserted mark was a design of that bird costume, for entertainment services, namely personal appearances, clowning, antics, dance routines and charity benefits, *In re Red Robin Enterprises, Inc.*, 222 USPQ 911 (TTAB 1984). Although the specimens in these cases did not refer explicitly to the services identified in the respective applications, they were found to show use of the mark in the rendering, i.e., sale, of the services.

[2] [2] In the same way, the specimens herein show use of the mark in the sale of the services. As applicant explained in its declaration, the specimens show the mark as it appears on a computer terminal in the course of applicant's rendering of the service. There is no question that purchasers and users of the service would recognize GLOBAL GATEWAY, as it appears on the computer screen specimens, as a mark identifying the data transmission services which are accessed via the computer terminal. Thus, the printouts constitute specimens of the mark as used in the sale of the services. Trademark Rule 2.58(a).

It appears to us that the Examining Attorney may have been misled by the language in the *Trademark Manual of Examining Procedure* that "letterhead stationery or business cards bearing the mark may be accepted if the services are clearly indicated thereon." Section 1301.04. Normally, because of the intangible nature of services, it is not possible to affix a mark to them, as can be done in the **[*1317] [*1317]** case of goods. As a result, Section 45 of the Trademark Act defines service mark use as occurring when a mark "is used or displayed in the sale or advertising of services and the services are rendered in commerce...." In most cases, the specimens submitted to evidence service mark use are advertising materials. Letterhead stationery and business cards are deemed to fall into the category of advertising matter if they contain a reference to the services.

Here, however, as in the cases noted above, we have a situation where the services are rendered through the means of a tangible item, namely, a computer terminal, so that the mark can appear on the computer screen, and the specimens show such use. Because the specimens show use of the mark in the rendering or selling of applicant's services, not in the advertising thereof, the requirements specific to specimens which are advertising are not applicable.

Decision: The refusal of registration is reversed.

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1 Application Serial No. 73/836,597, filed November 6, 1989 and asserting first use and first use in commerce as early as July 31, 1989. It is noted that, in the Examining Attorney's brief, he has recited the identification of services somewhat differently from the language quoted above. However, since the quoted language is taken from applicant's response filed May 16, 1991, and the Examining Attorney's Office Action

following that response stated that "the amended recitation of services is acceptable," we have treated this as the actual identification.